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## **Strengthening The Right of Children to Express Their Views in Family Law Procedures**

**ABSTRACT:** In recent years, significant progress has been made in Hungary in strengthening the right of children to express their views. The study analyzes what amendments have been made in Hungarian civil law and civil procedure law in this field. The study analyzes how to interpret the right of a child who is capable of forming views in the light of the findings of the general comments issued by the UN Committee on the Rights of the Child. In addition, the article analyzes in detail Article 21 of the Brussels IIb regulation on the expression of the child's views and the related rules for refusal of recognition and refusal of enforcement of decisions in matters of parental responsibility. The study provides a detailed 'practice guide' for Hungarian legal practice on how to apply the provisions that entered into force in August 2022 consistently with EU law and international legal interpretations. The article provides answers to the procedural questions that arose after the entry into force of the amendment of Hungarian Civil Code in 2022. The author takes a stand on the question of which stage of the civil procedure and with what content it is worth issuing the notice for the child.

**KEYWORDS:** right of the child to express views, capability of forming views, matters of parental responsibility, best interest of the child, hearing the child.

### **1. Introduction**

Act CXXX of 2016 on the Code of Civil Procedure, which entered into force on January 1, 2018 (hereinafter referred to as: Civil Procedure Code), codified the protection of the best interests of the child as a primary consideration when defining family law procedures and developing its

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special regulations.<sup>756</sup> The Civil Procedure Code significantly expanded the range of family law court procedures for which special rules were established compared to Act III of 1952 on the Code of Civil Procedure (hereinafter referred to as: Civil Procedure Code of 1952).

Act CXIX of 2020, amending the Civil Procedure Code from January 1, 2021, introduced additional special rules based on judicial practice to speed up these procedures on the one hand and to protect the interests of children on the other. Furthermore, the amendment to Act V of 2013 on the Civil Code (hereinafter referred to as: Civil Code), which entered into force on January 1, 2022, broadened the joint exercise of parental custody and shared physical custody, while ensuring the best interests of the child.<sup>757</sup>

When the Civil Procedure Code was codified and when the Civil Code and the Civil Procedure Code were amended, an important legislative goal was to ensure that the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, were implemented in the new regulations.<sup>758</sup> These special provisions were already included in the Civil Procedure Code of 1952, with the enactment of Act LXII in 2012 to implement child-friendly justice.

As the main element of child-centered justice, the Civil Procedure Code allows the court to *ex officio* exclude the public from the hearing by the protection of minors and establishes special rules of territorial jurisdiction in family law procedures, which enable the above-mentioned lawsuits to be initiated at the domicile or place of residence of the minor. One of the most important innovations of the Civil Procedure Code for strengthening child-friendly justice is that it defines the rules for interviewing a minor child as an interested person<sup>759</sup> (see later for details). These are important progressive changes.

On August 1, 2022, the outstanding innovation of strengthening children's rights came into force, which supplemented Article 4:171 paragraph 4 of the Civil Code, according to which the court is obliged to

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<sup>756</sup> The Civil Procedure Code contains special regulations for the following family law actions: matrimonial actions, actions for the establishment of parentage, actions related to parental custody, actions related to contact with the child, actions related to the termination of adoption and actions brought for the maintenance of a minor child (Arts. 453–492 of the Civil Procedure Code).

<sup>757</sup> See Szeibert, 2022, pp. 10–15; Simon, 2022, pp. 1–10.

<sup>758</sup> Council of Europe, 2010.

<sup>759</sup> Art. 473 of the Civil Procedure Code.

inform the child who is of sound mind the opportunity to express his or her views in actions for settling the exercise of parental custody and for the child's placement with a third party.

In this study, we analyze Hungarian regulations that strengthen the right of the child to express his or her views and international legal and EU legal backgrounds.

## **2. A brief commentary on the civil substantial and procedural rules regarding the hearing and expression of the child's views**

Unusually, in Hungarian private law, provisions regarding participation, hearing, and giving a child an opportunity to express his or her views in judicial proceedings affecting them are found in both the Civil Code and the Civil Procedure Code. Since its entry into force on March 15, 2014, the Civil Code has placed great emphasis on understanding the views of the child, who is of a sound mind. The Civil Code 'Involving the child in the decision-making' provision is of fundamental importance.<sup>760</sup>

It has been a rule for several decades that, in the procedures for settling the exercise of parental custody and for the child's placement with a third party, the court should hear from both parents, except for irremovable obstacles. In justified cases or if requested by the child, either directly or involving an expert, the child should be heard as well. For a child older than 14 years, the consent of the child shall be required for any decision on parental custody and placement unless the child's choice endangers his development.<sup>761</sup>

An important change was made to this regulation: an amendment on August 1, 2022, which clearly strengthened and made the child's right to express his or her views more effectively in family law lawsuits. Act LXII of 2021 on international judicial cooperation concerning parental responsibility (hereinafter referred to as: Parental Responsibility Act) added that the court must inform the child who is of sound mind about the opportunity to express his or her view.

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<sup>760</sup> According to Art. 4:148 of Act V of 2013 on Civil Code 'The parents are obliged to inform the child of any decisions affecting him; they shall ensure that their child who is of sound mind may express his views before the decisions are taken, and in the cases specified by an Act decide jointly with his parents. The parents shall take the child's views into account with appropriate weight, according to his age and maturity.'

<sup>761</sup> Art. 4:171(4) effective before 1st of August 2022. Act IV of 1952 on Family Law also contained similar provisions.

It is important to emphasize that the supplement, which entered into force on August 1, 2022, did not change the previous regulation of the hearing of the child; to make the channeling of the child's views more effective, it requires the court to inform the child who is of sound mind, so that the child knows at all that he or she can express his or her views during the procedure if his or her parents are not informed about this possibility.

Therefore, we must clearly distinguish between the provisions on hearing the child and the court's obligation to inform the child of the sound mind and the opportunity to express his or her views. The court's obligation to notify does not mean that it orders the child to be heard but that the court informs the child who is of a sound mind that if he or she wishes, he can express his or her views in some form during the procedure.<sup>762</sup> The regulation is otherwise flexible because it is up to the court at which stage of the first-instance procedure to inform the child of the possibility of expressing his or her views.

The procedural rules for interviewing a minor child as an interested person can be found in the Civil Procedure Code. If the court decides in the course of the action to interview the minor child as an interested person, in justified cases it shall simultaneously appoint *ex officio guardian ad litem* for the minor.<sup>763</sup> The court may interview a minor child in the absence of the parties (their parents) or their representatives. The interview with the minor shall be conducted in a suitable atmosphere and in a manner that is understandable, taking into account his age and level of maturity. At the beginning of the interview, the minor shall be informed that all statements made during the interview must be in accordance with the truth and that he may refuse to make a statement or answer individual questions. If a minor is interviewed in the absence of a party, the chair will present the minutes of the interview to the party.<sup>764</sup>

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<sup>762</sup> In the notification sent to the child, the court informs the child that he or she can express his/her opinion in different ways. They can do this in writing, in the form of any electronic message, video message or drawing, which they can send to the court electronically with the help of their parents or even independently, i.e., the child does not have to appear in court. The use of electronic communication channels is already natural for children belonging to generation Z. Based on experience so far, children are particularly active, many use the opportunity to express their views electronically, but many of them want to appear in person before the court.

<sup>763</sup> Cf. Gyurkó, 2022, pp. 1–9.

<sup>764</sup> Art. 473 of the Civil Procedure Code.

The new regulation in the Civil Code, which strengthened the right of the child to express his or her views, was implemented by the Parental Responsibility Act, which reflected the legal developments that took place at the international level in the last decade in the fields of taking children's rights seriously, child-centered justice, and the regulation of cases involving parental responsibility.

Many questions arise in connection with the new Hungarian regulations, which include the following: When is a child said to be of sound mind? At which stage of the procedure must the child be notified? What should be the content of the notification? To whom should the notification be sent: directly to the child or his parents? etc. These questions will be answered at the end of the study, however, an analysis of the international legal and European Union legal background and legal practice of the right of the child to express his or her views will be undertaken as the answers to these questions can be found in both international law and EU law.

### **3. The interpretation of a child's right to be heard in the UN Convention on the Rights of the Child**

The amendment of the cited section of the Civil Code is, therefore, fully harmonized with Article 12 of the UN Convention on the Rights of the Child (hereinafter referred to as: Child Convention), which has been part of the Hungarian legal system since 1991.<sup>765</sup>

According to Article 12 of the Child Convention (1) State Parties shall assure the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight, in accordance with the age and maturity of the child. (2) For this purpose, the child shall, in particular, be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

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<sup>765</sup> Act LXIV of 1991 on the promulgation of the Convention on the Rights of the Child, dated 20 November 1989 in New York.

The Committee on the Rights of the Child<sup>766</sup> (Committee) monitors the implementation of the Child Convention and has issued recommendations, implementation handbooks, and general commentaries over the last 30 years for the effective application of the Convention.

In the following section, we summarize the most important statements regarding the child's expression of his or her views on court procedures affecting the child.

The Committee has consistently emphasized that the child must be regarded as an active subject of rights (active participants) and that a key purpose of the Convention is to emphasize that human rights extend to children. The rights of the child set out in the two paragraphs of Article 12 do not provide the right to self-determination but concern involvement in decision-making. The significance of Article 12 of the Child Convention is that it not only requires that children be assured of the right to express their views freely but also that they should be heard and that their views be given "due weight." The Committee has rejected what it termed 'the charity mentality and paternalistic approaches' to children's issues ('the parent knows what is good for the child').<sup>767</sup>

The Committee emphasizes that it is not enough that legislation should establish children's rights to be heard and have their views given due weight; children must be made aware of their rights. The right to information is a prerequisite for participation.<sup>768</sup>

It is important to highlight that Article 12 of Child Convention provides the right to express freely the views for a child who is 'capable of forming his or her own views.'

Article 12 does not set any lower age limit on children's right to express views freely. Some countries reported that they had set a minimum age for the right of the child to be heard, for example, in custody proceedings following the separation or divorce of parents, but the Convention provides no support for this, and states cannot quote the best interests principle to prevent children from having an opportunity to express their views.<sup>769</sup>

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<sup>766</sup> See Online. United Nations Human Rights. Available at: <https://www.ohchr.org/en/treaty-bodies/crc> (Accessed: 10 January 2023).

<sup>767</sup> United Nations Children's Fund, 2007, pp. 149–150.

<sup>768</sup> Ibid, pp. 152, 159.

<sup>769</sup> Ibid, p. 153.

According to General Comment No. 12 (2009), the States parties shall assure the right to be heard to every child ‘capable of forming his or her own views.’ This phrase should not be seen as a limitation but rather as an obligation for state parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that State parties cannot begin with the assumption that a child is incapable of expressing their own views. On the contrary, State parties should presume that a child has the capacity to form his or her own views and recognize that he or she has the right to express them; it is not up to the child to first prove his or her capacity. The Committee emphasizes that Article 12 imposes no age limit on the right of the child to express her or his views and discourages State parties from introducing age limits either in law or in practice, which would restrict the child’s right to be heard in all matters affecting her or him.<sup>770</sup>

Article 12 paragraph 2, specifies that opportunities to be heard have to be provided in particular ‘in any judicial and administrative proceedings affecting the child.’ The Committee emphasizes that this provision applies to all relevant judicial proceedings affecting the child, without limitation, including, for example, separation of parents, custody, care and adoption (...).<sup>771</sup>

The link between the paragraphs of Article 12 indicates that the second paragraph of Article 12 applies to children ‘capable of forming views,’ again emphasizing that very young children should have the formal right to be heard. As previously noted, the Convention provides no support for a set minimum age. For the child to be ‘provided the opportunity’ implies an active obligation on the State to offer the child the opportunity to be heard, although, again, it is important to emphasize that there is no requirement that the child express views.

The Committee on the Rights of the Child in the ‘Concluding observations on the sixth periodic report of Hungary’ recommends among the main areas of concern and recommendations, that Hungary (a) further develop the practice of hearing the views of children under the age of 14 years and ensure that their views are duly taken into account in family law proceedings concerning them, including in custody and guardianship decisions (...).<sup>772</sup>

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<sup>770</sup> UN Committee on the Rights of the Child (CRC), 2009, p. 9.

<sup>771</sup> Ibid, p. 11.

<sup>772</sup> UN Committee on the Rights of the Child (CRC), 2020, p. 5.

Even before the amendment of Article 4:171 paragraph 4 of the Civil Code, the Committee considered developing the practice of hearing the views of children under the age of 14 years.

#### **4. Strengthening the children's right to express their views in the field of judicial cooperation in family matters in EU law**

The direct reason for the amendment of the Civil Code cited above was the entry into force of Council Regulation (EU) 2019/1111 of June 25, 2019, on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and international child abduction (hereinafter referred to as: Brussels IIb regulation).

It is clearly visible that major progress has been made in the Brussels IIb regulation compared to the Brussels IIa regulation,<sup>773</sup> precisely in the area of much stronger consideration of the rights and best interests of children.<sup>774</sup> In the Brussels IIa Regulation, there was no harmonized obligation for the courts of the Member State exercising jurisdiction in parental responsibility matters to provide the child with an opportunity to express his or her own views. Children's hearing is regulated only in child abduction cases.<sup>775</sup>

According to Recital 39 of the Brussels IIb regulation, the proceedings in matters of parental responsibility under the regulation as well as return proceedings under the 1980 Hague Convention should, as a basic principle,

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<sup>773</sup> Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000.

<sup>774</sup> Art. 56(4), (6) of the Brussels IIb regulation are good examples. According to Art. 56(4), (6) in exceptional cases, the authority competent for enforcement or the court may, upon application of the person against whom enforcement is sought or, where applicable under national law, of the child concerned or of any interested party acting in the best interests of the child, suspend the enforcement proceedings if enforcement would expose the child to a grave risk of physical or psychological harm due to temporary impediments which have arisen after the decision was given, or by virtue of any other significant change of circumstances. Where the grave risk referred to in para. 4 is of a lasting nature, the authority competent for enforcement or the court, upon application, may refuse the enforcement of the decision.

<sup>775</sup> See Art. 11(2) of the Brussels IIa Regulation. If hearing the child is an explicit requirement only in child abduction procedures, it is nevertheless an important and general ground for non-recognition of decisions established in Art. 23(b) of Brussels IIa regulation. See Pataut, 2012, pp. 131–133.



provide the child who is subject to those proceedings and who is capable of forming his or her own views, in accordance with the case law of the Court of Justice, with a genuine and effective opportunity to express his or her views. When assessing the best interests of the child, due weight should be given to those views. The opportunity for the child to freely express his or her views in accordance with Article 24 paragraph 1 of the Charter of Fundamental Rights of the European Union and in light of Article 12 of the UN Convention on the Rights of the Child plays an important role in the application of this regulation.

Articles 21 and 26 of the Brussels IIb regulations determine uniform standards for the hearing of the child. According to the Article 21 of Brussels IIb regulation

When exercising their jurisdiction, the courts of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body. Where the court, in accordance with the national law and procedure, gives a child an opportunity to express his or her views in accordance with this article, the court shall give due weight to the views of the child in accordance with his or her age and maturity.

According to Article 26, Article 21 of the regulation also applies to return proceedings under the 1980 Hague Convention.<sup>776</sup>

It can be seen that the Article 21 of Brussels IIb regulation uses exactly the same wording to define the range of children capable of forming their views. Nevertheless, the regulation supplements Article 12 of the Child Convention with two important indicators: The child must be given a genuine and effective opportunity to express his or her own views. This regulation does not explain when the opportunity to hear about a child is genuine or effective.<sup>777</sup> The leading case<sup>778</sup> of the EU's Court of Justice of

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<sup>776</sup> See Wopera, 2023, pp. 163–172.

<sup>777</sup> According to Recital 39 of Brussels IIb regulation whilst, according to the case-law of the Court of Justice, it is not a requirement of Art. 24 of the Charter of Fundamental Rights of European Union and of Regulation (EC) No. 2201/2003 that the court of the Member State of origin obtain the views of the child in every case by means of a hearing, and that

the European Union<sup>779</sup> does not provide much guidance as to when the opportunity can be considered genuine and effective, but it confirms that the court must be given the opportunity to express a child's views.<sup>780</sup> According to the Practice Guide, all appropriate legal tools must be made available to children to freely express their views.<sup>781</sup>

However, the Brussels IIb regulation should leave the question of who will hear the child and how the child is heard to be determined by the national laws and procedures of the Member States. Thus, the Brussels IIb regulation should not determine whether the child should be heard by the judge in person, by a specially trained expert reporting to the court afterwards, or whether the child should be heard in the courtroom, in another place, or through other means. In addition, while retaining the rights of the child, hearing the child should not constitute an absolute obligation, but must be assessed considering the best interests of the child, for example, in cases involving agreements between the parties.<sup>782</sup>

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that court thus retains a degree of discretion, the case-law also provides that, where that court decides to provide the opportunity for the child to be heard, the court is required to take all measures which are appropriate to the arrangement of such a hearing, having regard to the best interests of the child and the circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity to express his or her views. The court of the Member State of origin should, in so far as possible and always taking into consideration the best interests of the child, use all means available to it under national law as well as the specific instruments of international judicial cooperation, including, when appropriate, those provided for by Council Regulation (EC) No. 1206/2001.

<sup>778</sup> In Case C-491/10 PPU in *Joseba Andoni Aguirre Zarraga v Simone Pelz* the CJEU stated, that 'In other words, whilst it is not a requirement of Art. 24 of the Charter of Fundamental Rights and Art. 42(2) point (a) of Regulation No. 2201/2003 that the court of the Member State of origin obtain the views of the child in every case by means of a hearing, and that that court thus retains a degree of discretion, the fact remains that, where that court decides to hear the child, those provisions require the court to take all measures which are appropriate to the arrangement of such a hearing, having regard to the child's best interests and the circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity to express his or her views.' (Recital 66).

<sup>779</sup> See Raffai, 2016, pp. 76–86.

<sup>780</sup> Case C-491/10 PPU in *Joseba Andoni Aguirre Zarraga v Simone Pelz*, 22 December 2010.

<sup>781</sup> Practice guide for the Application of the Brussels IIb regulation, European Commission, Luxembourg 2022, p. 192.

<sup>782</sup> Recital 39 of Brussels IIb regulation.

The right of a child to express his or her own views plays a role in the recognition and enforcement of decisions, authentic instruments, and agreements. The recognition and enforcement of a decision related to parental responsibility may be refused if it is given without the child, who is capable of forming his or her own views, having been given an opportunity to express those views in accordance with Article 21 (see Article 39 paragraph 2).<sup>783</sup>

## **5. Conclusions and a “practice guide” for the Hungarian judiciary to strengthen the right of children to express their views**

Based on international and EU judicial practices, recommendations, and commentaries, it is clear that children’s abilities to form views cannot be linked to age. It must also be ensured that the youngest child can express his or her views on the procedures that affect them.

It is worth paying attention that the ‘child’s capability of forming his or her views’ according to the Child Convention and EU law, in my opinion is not the same as the concept ‘child who is of sound mind’ according to the Hungarian law. It should be noted that Hungarian civil law does not define the concept of ‘child who is of sound mind.’<sup>784</sup> According to Hungarian judicial practice, ‘the court must examine the child who has a sound mind individually in each case, in which age is not a determining factor.’<sup>785</sup>

It should be emphasized that determining the capability of forming views is not a matter of expertise; it must be decided by the court.

In my opinion, it is reasonable to send a notice to the child at the beginning of the preparatory stage of the civil procedure; and if the child requests to be heard, the opportunity must be created as soon as possible within the framework of the preliminary taking of evidence.

It is important to use notices with different content and languages in court proceedings according to age group. It may be necessary to

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<sup>783</sup> Practice guide for the Application of the Brussels IIb regulation, European Commission, Luxembourg 2022, p. 187.

<sup>784</sup> Unlike the 49/1997. (IX. 10.) Government decree on guardianship authorities and the child protection and guardianship procedure, which defines the concept of a child who is of sound mind. According to section 2a) of this Decree, a ‘child who is of sound mind’ is a minor who, in accordance with his age and intellectual and emotional condition, is able – during his hearing – to understand the essential content of the facts and decisions affecting him or her, and to foresee the expected consequences.

<sup>785</sup> Curia Court Decision No.298.2019.

standardize the wording of court notices with the involvement of psychological experts so that they are sufficiently “child-friendly.”

We agree with court practice, where children under 14 years old are informed by their parents, but the notification is addressed to the child. If a child is above the age of 14, the court sends a notification to the child.

What constitutes a child’s interview from a procedural law perspective must be clarified. It is worth considering that the child’s interview is similar to a procedural perspective as a personal interview at the party,<sup>786</sup> even if the child is neither a party nor a witness in the proceeding. It is also important to emphasize that the notification of the child cannot be ignored, even if the parents reach an agreement on the exercise of parental custody. It clearly follows from international and EU legal regulations that there is no difference between whether the court decides with a judgment or a settlement in parental custody disputes.<sup>787</sup>

In summary, it can be said that important changes have occurred regarding the strengthening of children’s expression of their views and their participation in family law procedures, which were given a new push by the regulation that entered into force on August 1, 2022. It is clear that to accept and understand this new concept, a change of attitude is needed, so that it is clear that the child is not the subject of the procedure, but an interested person in the procedure, who has rights and whose opinion matters.

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<sup>786</sup> According to Art. 231(1) of the Civil Procedure Code if doing so is necessary for adjudicating the action or establishing the facts of the case, the court may order ex officio and at any stage of the proceedings the personal interview of a natural person party, his statutory representative and the statutory representative of a party other than a natural person.

<sup>787</sup> This opinion is confirmed by the Art. 39(2) of Brussels IIb regulation according to which ‘The recognition of a decision in matters of parental responsibility may be refused if it was given without the child who is capable of forming his or her own views having been given an opportunity to express his or her views in accordance with Art. 21, except where a) the proceedings only concerned the property of the child and provided that giving such an opportunity was not required in light of the subject matter of the proceedings; or b) there were serious grounds taking into account, in particular, the urgency of the case.’ Consequently, there is no third exception to constitute the settlement.

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