

# Exercising And Protection of the Child's Right to Personal Relationships With Parents

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## Abstract

*The child's right to contact with parents is recognized as one of the basic rights in international and national legislation. According to the Convention on the Rights of the Child, children have the right to maintain regular contact with their parents, except when this is not in their best interest. The issue of contact becomes particularly important in situations of divorce, guardianship, adoption, but also in situations where the parent is far away, such as work migration.*

*New technologies, such as the Internet, mobile phones, video calls (Zoom, Skype, WhatsApp), social media and messaging applications, play a key role in preserving and promoting this right. They enable children and parents, regardless of geographical distances, to stay connected and maintain quality communication. The challenges of such communications concern the protection of the child's privacy and safety.*

*Despite everything, sometimes the child, willingly or under the influence of others, and sometimes the parent who is obliged to do so, expressly refuses the possibility of any communication, which seriously endangers the best interest of the child.*

*After a brief review and critical assessment of the existing mechanisms for exercising and protection of the right to personal relationships in Serbian, comparative and international law and practice, this paper will address newer theoretical approaches to the aforementioned legal institute and its legal protection, which could lead to further improving the normative framework in this delicate matter.*

**Keywords:** *child, parents, family life, close family ties, right to personal relationships, contact concerning children, court, litigation, enforcement*

## I. The child's right to personal relationships in Serbian, comparative and international law

The child's right to personal relations with the parent with whom they do not live is recognized by a large number of modern national legislations, since the relationship between the child and the parents is one of the essential conditions for healthy emotional development of the child. Modern family law attaches great importance to

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the child's personal relationships with close relatives and other persons who, due to the nature of the relationship with the child, have an important role in the child's life and/or who participate in their growth and development in the earliest and most sensitive age of life, especially when there is a lack of responsible and supportive parenting.

In Serbian family legislation, a child is recognized as having the right to live with his parents and the right to be taken care of by his parents before anyone else. It is the right of the parents to decide how to take care of the child, which includes the right to decide how to maintain personal relationships. If the joint life of a child and a parent is interrupted for various reasons, the child has the right to maintain personal relations with the parent with whom he or she does not live. The right to personal relationships can only be limited by a court decision, when it is in the best interest of the child. The court is also authorized to decide on the separation of the child from the parents if there are reasons to completely or partially deprive the parent of parental rights or in the case of domestic violence. A child has the right to maintain personal relationships with relatives and other persons with whom he or she has a special closeness, if this right is not limited by a court decision. At the end of the fifteenth year of life, if he or she is capable of reasoning, the child acquires the right to decide with which parent he or she will live, as well as the right to independently decide on maintaining personal relations with the parent he or she does not live with.

Since personal relationships are of inestimable importance for the proper emotional development of a child, parents have a legal duty, which is also their right, to take care of the child before all others, by personally taking care of his or her life and health. The Family Law of the Republic of Serbia<sup>1</sup> stipulates that it is the right and duty of parents to develop a relationship with their child based on love, trust and mutual respect, to direct the child towards the adoption of universal values, and that in order to fulfill these duties and rights, they receive all information about the child from educational and health institutions (PZ RS Art. 68-70). A parent who does not exercise parental rights has the right and duty to maintain a personal relationship with the child and to decide on issues that significantly affect the child's life jointly and by agreement with the parent who exercises parental rights, and if the child is cared for in another family, with the child's guardian (PZ RS Art. 78, par. 3 and Art. 120).

Since the rights and duties of children and parents are correlated, the correlate of the child's right to personal relationships with the parent and other persons close to the child is the parents' duty to enable the child to exercise the right to maintain personal relationships. This duty belongs to the parent exercising parental rights, regardless of who the participants in the specific relationship are. A parent who does not exercise parental rights, in addition to the duty to maintain personal relationships, has an independent right to contact with the child, which derives from the *right to family life*. On the other hand, the child's right to personal relations with the parent is not the child's duty, nor does it depend on whether the parent exercises parental rights or is deprived of parental rights. The only criterion is the best interest of the child.

Although the parent is legally obliged to maintain personal relations with the child (PZ RS Art. 78, par. 3), it is not possible to force him or her to do so, if he or she does

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<sup>1</sup> Porodični zakon [Family law ], Službeni glasnik RS, br. 18/05, 72/11, 6/15 (PZ RS).

not want it him/herself. Coercion is not allowed, it is simply transcendent to personal, family relationships. On the other hand, any interference or preventing the child or parents to maintain personal relationships is subject to civil and criminal sanctions. Thus, a parent who avoids maintaining personal relations with his or her child with whom he or she does not live or prevents the maintenance of personal relations between the child and the other parent, risks being deprived of parental rights, because not maintaining personal relations with the child, as well as preventing the child from maintaining personal relations with a parent with whom he or she does not live, is defined by law as gross neglect of parental duties (PZ RS Art. 81, par. 3, item 3). At the same time, behavior that prevents the execution of the decision of the competent authority, which determines the way of maintaining the personal relations of the child with the parent or another person close to him or her, can be qualified as a criminal offense<sup>2</sup> (CC RS, Art. 191, par. 3). In the court enforcement procedure for obstructing the execution of the decision on personal relations, a parent can be fined (from RSD 10,000 to RSD 200,000) and this penalty can be imposed repeatedly, if necessary. In addition to a fine, the court can impose a prison sentence on the parent who obstructs the execution, which lasts until the child is handed over to the person with whom he or she should have personal relations, and up to 60 days at most<sup>3</sup> (LES RS, Art. 373 and 374).

The solutions contained in the *Convention on the Rights of the Child*<sup>4</sup> (CRC, 1989) were conceived in a similar way, from which it follows that the signatory states will respect the right of a child separated from one or both parents to regularly maintain personal relationships and direct contact with parents on a permanent basis, unless it is contrary to the child's interests. In cases where the separation is the result of a measure taken by a Member State, such as, for example, detention, imprisonment, exile or deportation of one or both parents or the child, the Member State shall, upon request, provide the parents, the child or, as the case may be, another family member with basic information about the whereabouts of the absent family member if the provision of such information does not harm the well-being of the child (CRC, Art. 9).

In an era of increasingly pronounced population migrations, the Council of Europe, at the very beginning of this millennium, with the aim of harmonizing on the European level the fundamental principles of substantive law in the area of legal protection of the child's right to personal relationships and mechanisms for resolving cross-border disputes related to the exercise of that right, as well as their additional improvement, bearing in mind that the mechanisms created in the *Hague Convention on the civil aspects of international Child abduction*<sup>5</sup> (CAC, 1980) i *European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children* (ECR, 1980), had not given the expected results in that matter, adopted the *Convention on Contact concerning Children*<sup>6</sup> (CoCC, 2003). That convention has confirmed the right of the child and his or her parents to establish and maintain

<sup>2</sup> Krivični zakonik [Criminal Code], Službeni glasnik RS, br. 85/05, 88/05, 107/05, 72/09, 111/09 (CC RS).

<sup>3</sup> Zakon o izvršenju i obezbeđenju [Law on Enforcement and Security], Službeni glasnik RS, br. 106/15, 106/16, 113/17, 54/19, 9/20 (LES RS).

<sup>4</sup> Convention on the Rights of the Child, 20 November 1989, UNTS 1577, I-27531 (CRC).

<sup>5</sup> Convention on the civil aspects of international Child abduction, Hague, 25 October 1980 (CAC).

<sup>6</sup> Convention on Contact concerning Children, Strasbourg, 15. May 2003, CETS no. 192 (CoCC).

regular mutual contacts, which can be limited or excluded only if it is necessary to protect the child's well-being. If it is not in the best interest of the child for contact with the parent to take place without supervision, it is the duty of the competent authorities to consider the possibility of personal contact under supervision or some other way of achieving personal relations between the child and the parent with whom he or she does not live. The signatory states are allowed to, respecting the best interests of the child, extend the right of the child to personal relationships also to other persons who have family, kinship or other close ties with the child (CoCC, Art. 4 and 5). Among other things, the importance of this convention is reflected in the fact that the English term: *access to children*, which until then had been used in international family law, was replaced by a new, more modern expression: *contact concerning children*, which to a greater extent reflects the essence of this legal institute, i.e. the fact that the right to personal relationships primarily belongs to the child. According to the Explanatory Report accompanying the Convention, the expression *contact concerning children* corresponds to a greater extent with the modern concept of children's rights and the modern concept of the legal relationship between children and parents, which shifts the focus from "parental rights" to "parental responsibility". Another important reason for its introduction is the frequent use of the term "contact" in the case law of the European Court of Human Rights, which subsumed under the autonomous term "family life" from Art. 8 of the *European Convention on Human Rights*<sup>7</sup> (ECHR, 1950) the rights of children and parents to maintain "contacts", as well as cases when the child has the right to contact with other persons with whom he or she does not usually live but has *close family ties*<sup>8</sup> (Explanatory Report – ETS 192 – Contact concerning Children, par. 6).

In comparative law, there are different understandings of this legal institute. Thus, in contrast to Serbian, and in general, European family law, in the United States of America, the child's right to personal relationships is not recognized as an independent right. The right to contact is the right of the parent who does not live with the child (*parenting time*), while the child only has an interest, i.e. the need to maintain continuous contacts with both parents<sup>9</sup>. Unlike European continental law, in which the parent is obliged to maintain personal relations with the child, in American law the parent is not obliged to exercise his or her right to contacts with the child, if he or she does not wish to do so<sup>10</sup>. However, if the court has ordered a certain visitation schedule or parenting time, parents are obliged to respect it. A parent who has been granted parenting time is not legally obliged to use all the time allocated to him or her, but his or her eventual lack of interest will be taken into account during future changes related to the visitation plan and, in general, the exercise of parental rights<sup>11</sup>. This solution is based on the belief that coercion in personal relationships is not effective and that any

<sup>7</sup> Convention on Human Rights, 4 November 1950, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16 (ECHR).

<sup>8</sup> Explanatory Report – ETS 192 – Contact concerning Children <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d380d>, accessed 12 November 2024.

<sup>9</sup> J.G. Dwyer, *The Relationship Rights of Children*, Cambridge University Press, New York, 2006, pp. 40-41.

<sup>10</sup> *Idem*, p. 50.

<sup>11</sup> K. Kuehle, L. Drozd, (ed.), *Parenting Plan Evaluations: Applied Research for the Family Court*, Oxford University Press, 2012.

punishment imposed will not guarantee the establishment and maintenance of parent-child contact if the parent does not really want that contact.

## II. Determining the manner of maintaining personal relationships – between family autonomy and state interventionism.

The Convention on contacts related to children stipulates three basic ways of establishing personal relationships:

- (1) direct stay of the child with the parents or in the household of another person close to the child, with whom he or she does not usually live, or meetings and seeing each other in a public or other place for limited time intervals;
- (2) communication with the child via telephone, Skype, letters, fax, e-mail and other available means of communication;
- (3) providing information about the child to the parent or other person who is entitled to it, i.e. providing information to the child about the person with whom the child has the right to have personal relations, which includes the delivery of the latest photos, medical findings, various reports, school diplomas, certificates etc.

When determining how to maintain personal relationships, according to the CoCC, contact decisions made by a court and contact agreements accepted by a competent court have the same effect. The CoCC pays special attention to the agreements of the parties in the proceedings, so Art. 7 stipulates the obligation of Member States to take appropriate measures to ensure that both parents are informed about the importance of establishing and maintaining contact with their child, both for the child and for themselves, to encourage parents and other persons who are in a family relationship with the child to reach an agreement regarding contacts (through family or other mediation and other forms of alternative dispute resolution), as well as to ensure that, before making a decision, the competent authorities have the necessary information about the child from the parent exercising parental rights and/or the person taking care of the child and, if necessary, obtain additional information from other authorities and other persons or institutions, and all with the aim of making a decision in the best interest of the child. In enforcement proceedings in cross-border disputes as well, when preparing for the enforcement of a foreign decision, in addition to possibly changed circumstances, the agreements reached by the parties to the dispute in the meantime must be taken into account, with the fact that under no circumstances can the foreign decision be reviewed in terms of its merits<sup>12</sup> (CoCC, Art. 15).

In Serbian family law, the rule applies that when parents do not live together, they can agree on how to maintain the child's personal relationship with the parent with whom the child does not live. An agreement that formally regulates the way of maintaining personal relationships (model of seeing) parents can conclude independently or with the participation of a mediator, before or during divorce proceedings or other court proceedings related to family relations in which contact with the child is also discussed. The agreement must be made in writing and accepted by the court. If it finds that such an agreement is not in the best interest of the child, the court will modify it, respecting the principle of the best interest of the child. In general, the court

<sup>12</sup> Convention on Contact concerning Children, Strasbourg, 15. May 2003, CETS no. 192 (CoCC).

has significant official powers in the matter of family relations. The court is *ex lege* authorized to decide on the maintenance of personal relations between the child and the parent with whom the child does not live, even when there is no separate claim for regulating such contact. If the court, performing its activity in the procedure concerning family relations, finds that it is necessary to provide judicial protection of the child's right to personal relations, it will initiate an *ex officio* adhesion procedure in which it will make an appropriate decision on contacts. The court can also, following the principle of the welfare of the child, limit or prohibit the parents from having personal relations with the child (PZRS, Art. 75-78 and Art. 243, par. 4).

A child has the right to judicial protection of the right to personal relationships, regardless of age (PZRS, Art. 263, par. 1). In addition to the child and the parents, the guardianship authority and the public prosecutor also have the right to sue for the purpose of regulating or changing the manner of maintaining personal relationships, restrictions or prohibitions (PZRS, Art. 263 and 264). Regardless of who, in the capacity of the authorized initiator of the proceedings, has demanded judicial protection of the right to personal relationships, the court, before making a decision, is obliged to determine the opinion of the child, if the child is capable of forming that opinion, as well as to pay due attention to the opinion of the child. In addition, it is obliged to request a finding and expert opinion (which generally includes a proposal for a model of contact) from the guardianship authority<sup>13</sup>, family counseling center or other institution specialized in mediation in family relations, in order to ensure that the court decision is in accordance with the best interests of the child (PZRS, Art. 65, Paragraph 3 and Articles 266 and 270). As a rule, the child is represented in the proceedings by the parent who exercises parental rights, but the court is obliged to appoint a temporary representative for the child in the event that it assesses that there is a collision between the interests of the child and the parent or that the child is not represented in an appropriate manner (PZRS, Art. 266 Paragraph 1). A temporary representative (temporary guardian in court proceedings or collision guardian, if the interests of the child and parents are in conflict) can also be appointed by the guardianship authority, on their own initiative or at the request of the child who has reached 10 years of age (PZRS, Art. 265). The model of contact determined by the court decision is subject to change, since the child grows up, so his or her needs change, and so do the circumstances in which he or she lives<sup>14</sup>. Following the principle of family autonomy, the case law has taken the position that in every case when the parents live separately, and there is no dispute between them about the way of seeing the child, it is not necessary to initiate and conduct court proceedings in order to regulate personal relations: "when the manner of maintaining

<sup>13</sup> In Serbian law, the duties of the guardianship authority are performed by the local center for social work.

<sup>14</sup> Changed circumstances are a universal reason for seeking a change in a court decision. The very fact that a child grows up implies that, with age, his or her needs also change, which is a circumstance of importance for determining/changing the model of contact. Time plays a very important role in a child's life and is perceived differently than time in an adult's life. The passage of time, under certain conditions, justifies the change, i.e. an extension of the previously determined model of maintaining personal relationships. Thus, for example, in one court decision, it was stated that it is in the interest of the child who had contact with the father according to a certain model that implied the obligatory presence of the mother and "who has built an emotional relationship with the father, whom he perceives positively, and has overcome separation difficulties [...] that his contacts with the father intensify, which cannot be achieved in the future in the situation of seeing the child in the presence of the mother" (Ruling of the Supreme Court of Cassation, Rev. 1436/17 of 5 July 2017).

personal relations between a parent and a child is not regulated by a court decision, the maintenance of personal relations between a parent and a minor child can also be regulated by the agreement of the parents, because not every agreement that is in the interest of the child have to result from a court decision" (Ruling of the Appellate Court in Novi Sad, Gž2 108/16 of 22 February 2016).

Similar rules exist in other legal systems belonging to European continental law. In this place, the material and procedural solutions contained in the German and Swedish family legislation will be briefly presented. Firstly, because the Serbian law is traditionally modeled after it, and it has recently been reformed, and secondly – because according to the level of achieved social rights and freedoms, it is considered one of the most advanced. In addition, given the peculiarities of Anglo-American law, the solutions applied in the field of personal relations in the United States of America will be briefly presented.

In German law, as a rule, the parents decide on the way of maintaining personal relationship between the child and the parents (*Umgangsrecht*) by an agreement, and only exceptionally, if there is a dispute between the parents on this issue or if the child's well-being is at risk for other reasons, the decision is made by the court. As a rule, parents' agreements are not subject to checks and they do not need to be certified, except when the parents themselves request a court certification or a court decision in accordance with the agreement, in order to have an enforceable document. The court itself is obliged to advocate for a peaceful resolution of the conflict between the parents, except in the case of domestic violence, to encourage them to conclude a court settlement or to refer them to a specially appointed judge – mediator in order to try to conclude an amicable agreement<sup>15</sup> (FamFG, Art. 36). Also, the court can order them to undergo mandatory professional counseling (FamFG, Art. 151. par. 1), and is also authorized to issue an order to the expert, if it deems appropriate, to advocate for an agreement between the parents during the expert examination (FamFG, Art. 163. par. 2). The court is assisted in making a decision by the State Youth Office (*Jugendamt*). The parents' agreement is drawn up in writing and must contain clearly defined duties, both of the parent who shall take over the child in order to maintain personal relationships, and of the parent with whom the child lives – to prepare him or her to go to the other parent. The same rule applies to court decisions. The court is required to precisely determine the day, place and time, i.e. the exact date of the beginning and end of the contact, as well as the place of pick-up and return of the child and possibly, the need for the presence of the other parent or a third person, up to the setting of the number of letters and the number of telephone conversations that can be conducted with the child. Although in German legal theory this way of regulating contact with the child is criticized as extremely inappropriate and inflexible<sup>16</sup>, only a precisely defined dictum of the court decision can be suitable for execution. Also, only a precisely defined parental agreement can be court certified (approved) and thus become enforceable (FamFG, Art. 156. par. 2). The court can limit personal relationships, to the extent that deviates from the usual models of visitation, it can determine that contacts are maintained only under the supervision of an official, and it can also prohibit the maintenance of personal relationships between a child and a parent, for a certain period, and only exceptionally

<sup>15</sup> Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit [Law on the Procedure in Family Matters and in Matters of Voluntary Jurisdiction] (FamFG).

<sup>16</sup> D. Schwab, *Familienrecht*, 12. Aufl age, Verlag C.H.Beck, Munchen, 2003, p. 326.

for an indefinite period, if it is necessary to protect the well-being of the child<sup>17</sup> (BGB, Art. 1684). According to the German constitution, the right of parents to independently decide on raising a child is proclaimed as a natural right<sup>18</sup> (BRD, Art. 6 par. 2), thus any interference of the court in regulating that right without a justified reason is a violation of the Constitution<sup>19</sup>. Since it is a matter of natural law, it is not possible to completely and permanently prohibit parents' contact with the child, even when they do not have parental rights, nor can the parents waive that right (BGB, Art. 134 and 138). In connection with this, there is also a rule according to which in the court proceedings, in which it is decided to deny or significantly limit the right to personal relations with the child, the child him/herself must have an independent legal representative. This is one of the situations in which the court is obliged to appoint a special person for the child to provide legal support in the procedure (*Verfahrensbeistand*), unless the child already has a lawyer or some other representative in the procedure (Fam FG, Art. 158). A parent, in any case and regardless of his or her legal position when it comes to exercising parental rights and the right to contact, has the right to information about the child. This right can be limited to the parent, if contact with the child is limited or temporarily denied and if it is required in the best interests, i.e. welfare of the child (BGB, Art. 1686).

In Swedish law, there is also a rule that the way of maintaining personal relations between the child and the parent with whom the child does not live is primarily agreed upon by the parents. Formal agreements are not required, nor are court decisions. Given that the joint exercise of parental rights is a principle and that even after the end of the partnership, the parents continue to take care of the child together, it is often the case that the child alternately (usually for one week) stays with one and the other parent. Indirect contacts (via phone and other means of communication) are maintained only in exceptional circumstances, when the parent is e.g. in long-term hospitalization, in prison or living in a remote location. Parents can decide to enter into a written agreement, in which case it only becomes legally binding when it is approved by the National Health and Welfare Service (*Socialstyrelsen*) after it has been assessed as being in the best interests of the child. If the parents do not reach an agreement on personal contacts, then the decision on this must be made by the court, with a previously attached report from the aforementioned social service or, as necessary, some other office or authority. The report must be submitted to the court within the time limit and according to the guidelines determined by the court for each specific case. The court is competent to decide on the restriction or prohibition of contacts only in exceptional cases, such as the absence of any contact between the child and the parents for a long period of time or cases of violence against the child, various forms of abuse, serious conflicts between parents that prevent reaching an agreement on contacts, cases of illegal detention or abduction of children, and the existence of a risk of violation of other rights of the child<sup>20</sup>. When making a decision, the court must take into account only what is in the best interest of the child. The Family Law stipulates

<sup>17</sup> Bürgerliches Gesetzbuch [Civil Code] (BGB).

<sup>18</sup> Grundgesetz für die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany] (GBD) 23 May 1949, Bundesgesetzblatt 1949 I.

<sup>19</sup> *Idem*, p. 324.

<sup>20</sup> Family Law, Information on the rules, Justitiedepartementet, SE-103 33 Stockholm, 2013, pp. 37-38, <https://www.government.se/4a767e/contentassets/1e0263a0318e47b4b8515b535925941b/family-law.pdf>, accessed 9 November 2024.



that the child must not be exposed to any risk, that good and close contact with both parents is important and that the child's own will should be taken into account, depending on the child's age and maturity. The court must also consider the parent's ability to cooperate in decisions concerning the child. Other adults who are important to the child, in addition to the parents, for example, grandparents or step-parents, do not have the right to initiate legal proceedings (right to sue) and must contact the social services, which can submit a request for contact if they establish that it is in the best interest of the child. The right to sue rests only with the parents<sup>21</sup>.

In the US case law, the tradition of protecting the autonomy of parents in deciding the best interests of the child is firmly rooted, so the right to determine the model of contact primarily belongs to the parents. The right to sue for the protection of the right to contact with the child is the right of the parent who does not live with the child. In some federal states, the right to file a lawsuit is also recognized for the child's closest relatives, such as grandparents, with the fact that third parties who claim contact with the child are required to prove that there are particularly justified reasons for the lawsuit and that contact with the child is in the best interest of the child (the so-called *best interests test*). Otherwise, such a claim could be assessed as a violation of the constitutional rights of parents. Only if the parents are not capable of making a decision on maintaining personal relationships that is in the best interest of the child, the decision will be made by the court, applying the principle of *parens patriae*. The said principle ensures the intervention of the state in family relations when it is necessary to protect the health and best interests of the child<sup>22</sup>.

Already from this brief presentation of the convention, domestic and comparative legal rules, it is quite clear that the principles of family autonomy and joint and consensual decision-making by parents regarding the exercise of parental rights, which includes the duty and right to maintain personal relations with the child, are represented in all systems and represent primary principles. Family autonomy, as one of the basic principles, and family integrity, as a protected asset, mean that the state's intervention in family relations should be strictly limited and based on strictly defined legal assumptions. Considering the position of the child in the family and his or her rights, as well as the special protection of the child and family proclaimed by the Constitution, the intervention of the state in family relations must be limited and conditioned by the best interest of the child<sup>23</sup>. When determining the type and extent of interference that is necessary, states have a certain leeway known as the "field of discretion." The width of that field of discretion varies according to the circumstances. The state bears the burden of proving *proportionality*, which means that the court is always obliged to consider whether the presented reasons for state interference in the personal relationships of children and parents are relevant and sufficient in terms of the nature of the interference and the case as a whole, i.e. whether in each specific case there was an alternative measure that would have led to less interference (*Olsson v. Sweden*, App. No 13441/87). Thus, for example "when parents have reached an agreement on how to maintain personal relationships between parents and children [...], the

<sup>21</sup> Swedish Children and Parents Code, Chapter 6.

<sup>22</sup> J.G. Dwyer, cited, p. 197.

<sup>23</sup> R. Vujović, *Uticaj promene položaja deteta u porodici na njegov položaj i prava u sudskim postupcima u vezi sa porodičnim odnosima* [The impact of a change in a child's position in the family on his or her position and rights in court proceedings related to family relations], *Pravni život*, pp. 55-61, Udruženje pravnika Srbije, Beograd, 2012, p. 56.

judgments of the lower courts in that part should be in accordance with the agreement reached by the parents<sup>24</sup>.

Despite the guarantees provided by international conventions and national legal regulations, due to parental misunderstandings, a considerable number of children after the end of the parents' partnership fail to exercise their right to regular contact with the parent with whom they do not live or with other close persons. According to the data of the Republic Institute for Social Protection, in the Republic of Serbia, an average of about 4,000 procedures initiated to regulate the personal relationships of children and parents are registered annually. Parents' consensual proposals on the way of exercising parental rights make up a fifth of the total number of proceedings, measured by the number of findings and opinions submitted by the centers for social work at the request of the courts in the proceedings in which the exercise of parental rights was decided (without further differentiation of the subject of the proceedings), while in the total number of children whose rights from the relationship with their parents required court protection, the share of children from families in which an agreement on the exercise of parental rights was reached is only 10.7%<sup>25</sup>. These indicators do not deviate significantly from the statistics given for the previous ten years, with the fact that in the last five years there has been a gradual decrease in the number of court proceedings for regulating the personal relationships of children and parents (in 2019 it was lower by 23.2% compared to 2015). There is no special research on the relationship between the number of models of visitation regulated by a court decision according to the accepted agreement of parents and the models of visitation established by the court itself, but the above data indicates that the percentage of models of visitation determined by the court is high. In contrast, research conducted in recent years in several European and American countries has shown that only in 10% of cases the courts decide on the way of maintaining personal relationships between children and parents<sup>26</sup>. In all other cases, these issues are regulated by the parents' agreement.

It should also be borne in mind that, according to the established practice in the application of the ECHR, any *ex officio* judicial decision on the relationship between children and parents when there is no special need for judicial protection of the rights and interests of the child is a violation of the right of parents to freely and independently decide on the exercise of parental rights and it is considered an impermissible interference of the state in family life.

### III. Legal consequences of not exercising the right to personal relationships between the child and the parents

In recent decades, the focus of family law relations has been on the child, so this approach also affects changes in the understanding of which persons should be considered the holders of the right to personal contacts. Maintaining personal

<sup>24</sup> Ruling of the Supreme Court of Cassation, Rev. 4897/2019 of 5 December 2019.

<sup>25</sup> The Republic Institute for Social Protection, 2020, pp. 51-57.

<sup>26</sup> See M. M. Casals, *Divorce Mediation in Europe: An Introductory Outline*, Electronic Journal of Comparative Law, Vol. 9.2, 7/2005, p. 8; J. Wallbank, *Getting tough on mothers: regulating contact and residence*, Feminist Legal Studies, vol. 15, 2007, p. 191.

relationships has traditionally been considered the right of the parent with whom the child does not live, and that approach, as stated above, is still valid, especially in Anglo-American law. After the adoption of the CRC, the right to personal relationships is primarily considered a child's right. The Convention on Contact concerning Children confirms both the right of parents and the right of the child to establish and maintain regular contact. (In addition, it allows the signatory states to, respecting the best interests of the child, extend the right of the child to personal relationships also to other persons who have family, kinship or other close ties with the child.)

Why is it important who the formal legal holder of the right to contact is?

When exercising subjective civil rights, the rule applies that the right to exercise the right also includes the right not to exercise the right. In other words, the holder of a subjective civil right may not exercise that right, if he or she does not want to, without consequences. This is not the case with the right to personal relations between the child and the parents. Although family rights belong to the corpus of subjective civil rights, failure to exercise the rights arising from the relationship between a child and a parent reflects on the best interests of the child. At the same time, the legal consequences of not realizing the right to personal relationships affect the child and the parents differently.

When it comes to the child, one of the fundamental convention principles is the principle of the best interests of the child, which, in the light of the right to personal relationships, we will consider separately. Both conventions (CRC, CoCC) bind the child's right to personal relationships to respect for the principle of the child's best interests. The best interest of the child is at the core of the right to personal relationships: personal relations with the parent are of inestimable importance for the proper full development of the child. Apart from the fact that the child's right to personal relationships is constituted in his or her best interest – the exercising and protection of that right must be ensured in a way that is in accordance with the best interests of the child. Therefore, the principle of the best interest of the child, in addition to the substantive one, also has its procedural dimension. The main problem in the application of the principle of the best interest of the child is that the derivation of specific legal rules from that principle is left to case law, more precisely, the ability of the court to recognize the factors on which the decision on what the best interest of the child is in a specific case depends. And when in a legal system there is a prescribed list of factors that determine the best interest of the child, that list is usually never final. In addition, the relevance of the factors varies from case to case. This gives the court a complex task of selecting relevant factors, which, again, implies the court's prior knowledge of family circumstances, relationships, emotional ties and other relevant factors, which the court generally does not have, or does not have enough of them<sup>27</sup>. Therefore, in most legal systems, there is a duty of the court to obtain the findings and expert opinion of the appropriate social service in the decision-making process.

Another type of problem arises when it is necessary to simultaneously ensure the realization of several different, mutually opposing rights of the child (which is a very

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<sup>27</sup> D. Palačković, *Istražno načelo u porodičnim sporovima kao izraz najboljeg interesa djeteta, in Dani porodičnog prava – najbolji interes djeteta u zakonodavstvu i praksi [The investigative principle in family disputes as an expression of the best interest of the child, in Days of Family Law – the best interest of the child in legislation and practice]*, Zbornik radova, Pravni fakultet „Džemal Bijedić“, Mostar, 2014, pp. 143-156.

common case when the assessed best interest of the child and his or her participatory rights are in conflict) – how to determine the right that has priority in exercising and protection. This applies equally to court proceedings (in which the contact itself is decided on the merit) and to proceedings for the execution of court decisions (when those decisions cannot be voluntarily enforced).

A particularly delicate issue in exercising a child's right to contact with a parent is the parent's refusal. What are the legal consequences of a parent's lack of desire or express refusal to have personal relations with a child with whom he or she does not live? How to protect the best interests of the child in that case? Comparative law and practice provide different answers. Some European legislation, such as the German one, protecting the right to personal relationships and the best interest of the child, try to force the parent to contact with fines<sup>28</sup>. Others, such as the Serbian one, try to use special measures of preventive and corrective supervision over the exercise of parental right to influence a change in the attitude and behavior of the parents, and in extreme cases of failure, the court deprives such a parent of parental rights, since the refusal and avoidance of the parent to maintain personal relations with a child in Serbian law is considered gross neglect of parental duties<sup>29</sup>. Punishing parents for not having personal relations with the child is a consequence of the fact that in German, as well as in Serbian law, the right to personal relations is not considered the exclusive right of the parents, but at the same time it is the duty of the parents (constituted with the aim of protecting the best interests of the child), and non-performance of duty has serious consequences for the child. And yet, it cannot be asserted that fines or prison sentences or deprivation of parental rights ensure effective protection of the child's right to contact, and even less that the best interests of the child are thus protected. Simply put, coercion in family relationships, due to their nature, and especially in the realization of personal contacts, is not effective, and is often harmful, which to the conclusion that the duty of parents to maintain personal relationships with the child in European law practically exists *in abstracto*.

From the child's point of view, the right to contact with a parent who does not want that contact is in reality *nudum ius*<sup>30</sup>.

There may also be a lack of will to contact on the side of the child. Unlike the parents, the child can refuse contact with the parent, without any legal consequences, because the exercising of personal relations is the child's exclusive right, not duty. Although the refusal to have personal relations with a parent is usually against the best interests of the child, any forced contact of the child with the parent is fundamentally also against the best interests of the child, since the use of force is always at the expense of the child's well-being.

In comparative case law, this problem is overcome by applying two diametrically opposed approaches. One is the unconditional respect of the will of the child, and this approach is mostly characteristic of European continental law, while the other is – the deprivation of the primacy of the principle of the best interests of the child, a feature of Anglo-American law. Thus, in German and Swedish case law, and the same applies

<sup>28</sup> D. Schwab, *Familienrecht*, 12. Aufl age, Verlag C.H.Bech, Munchen, 2003, p. 324.

<sup>29</sup> R. Vujović, *Lišenje roditeljskog prava [Deprivation of parental rights]*, Belgrade, Official Gazette, 2019, p. 67.

<sup>30</sup> B. Rešetar, *Pravna zaštita prava djeteta na susrete i druženje [Legal protection of the child's right to meet and socialize]*, Pravni fakultet u Osijeku, Sveučilište Josipa Jurja Strossmayera, Osijek, 2011, p. 245.

to the case law of Serbian courts, the child's refusing will is respected almost unconditionally. Contrary to this, in precedent legal systems, the primary principle is the respect and unconditional implementation of legally binding court decisions, because they are of paramount importance for the functioning of the entire legal system. In American law, a child who refuses contact with a parent (and that contact is determined by a court decision) can be forced to do so by terminating child support, and even by physical coercion (although, in practice, physical coercion is rarely used). It is similar in England and Wales, where after the legislative reforms of 2006, the principle of the best interests of the child is no longer the most important element that must be taken into account in enforcement procedures, but it has equal importance as other elements, so the enforcement of the decision on contacts with the child will not be carried out only if there is a risk to the child's psychological and physical health<sup>31</sup>.

Just as the best interest of the child is one of the basic principles of the CRC, the same applies to the right of the child to express his or her opinion in all proceedings concerning him or her (CRC, Art. 12). Participatory rights of the child are the focus of legislation, and even more of case law, since the issues of determining and respecting the child's opinion are both delicate and far-reaching, especially due to the responsiveness of the child's will to external influences. Since, unlike parents, a child cannot be punished for refusing contact with a parent with whom he or she does not live, parents who intend to prevent contact of the child with the other parent, instead of directly interfering with or preventing the maintenance of the child's personal relationship with the other parent (which is also punishable) resort to various techniques of influencing the will of the child him/herself to refuse contact. What the experts warn about is that interruptions and delays in the execution of the decision on contact between the child and the parents, when the indoctrinated or instrumentalized child expressly refuses contact, never reduce the "pressure" on the child, but only increase it, and complicate the entire relationship in the future<sup>32</sup>.

Child's will can be influenced in many ways. Apart from the instrumentalization and indoctrination of the child, there is also the "buying of time". The passage of time actually has a significant impact on a child's attitudes and thinking. It is known that the perception of time and the time factor in the life of a child and in the life of an adult do not have the same effect. The changes in a child's life that growing up inevitably brings are very big, and they happen in very short periods of time. A child grows and develops very quickly, especially at a low calendar age, changes significantly both physically, mentally and emotionally, and with developmental changes, his or her developmental needs also change. All this must be taken into account when making (and enforcing) decisions concerning his family life<sup>33</sup>. Long periods of time in which the child's contact with the parent is absent or cannot be maintained, for any reason, as a rule, results in later authentic rejection of contact by the child him/herself, which

<sup>31</sup> B. Rešetar, *cited*, p. 109.

<sup>32</sup> D. Vulević, *Uloga organa starateljstva u postupcima izvršenja odluka iz oblasti porodičnog prava – predaja i oduzimanje maloletnog deteta* [The role of the guardianship authority in the procedures for the execution of decisions in the field of family law – surrender and confiscation of a minor child], Beogradski centar za ljudska prava, 2009, <http://www.bgcentar.org.rs/uloga-organa-starateljstva-u-postupcima-izvršenja-odluka-iz-oblasti-porodicnog-prava-predaja-i-oduzimanje-maloletnog-deteta/>, accessed 10 November 2024.

<sup>33</sup> R. Vujović, *Lišenje roditeljskog prava* [Deprivation of parental rights], Belgrade, Official Gazette, 2019, p. 104.

can significantly threaten the best interests of the child and cause irreparable damage to his/her development.

#### IV. Conclusion

Contemporary legislation has not found a suitable solution when it comes to responsibility for failure of the child to exercise his or her right to personal relationships when the court decision determined the way to maintain personal relationships between the child and the parents, and the child's negative attitude towards contact was projected within his/her family. Such a harmful influence on the will of the child also requires an answer to the question of what the duties of the state are in relation to the proclaimed principle of special protection of the child and his or her rights. The positive convention obligation of states, arising from Article 8 of the ECHR, consists in the implementation of measures to remove existing obstacles and requires "creativity in finding a solution that would be just"<sup>34</sup>. Otherwise, the established practice could lead to the conclusion that the primacy of the participatory rights of the child can be an eliminative factor for the application of the principle of the best interest of the child, and thus practically collapse both leading convention principles.

It is clear that in the area of family relationships, which are characterized by privacy and are largely conditioned and colored by emotions, the law as a regulator is quite powerless. And yet, neither law nor theory must give up the search for solutions that will enable children to exercise their right to personal relationships with parents they do not live with, despite all the difficulties. One of the measures should certainly be aimed at additional training and an interdisciplinary approach and preparation of officials of guardianship authorities, family counseling centers and other experts who participate in expert evaluation when making court decisions on the realization of personal relationships between children and parents, as well as during their implementation. Working with the family, educating the parents, preparing the child and adapting the methods and models of contact to specific circumstances are of inestimable importance. New technologies, such as the internet, mobile phones, video calls, social media and messaging applications, can be of great help to them in this, which, despite the distances, provide greater opportunities for both children and parents to stay connected and maintain quality communication. Many countries have begun to recognize the right to contact through new technologies, so courts and social services increasingly consider the possibility of virtual contact, not only when physical contact is not possible, but also when in specific circumstances it is not in the best interest of the child.

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<sup>34</sup> B. Rešetar, *cited*, p. 136.

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