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Source / Izvornik: **Procedural Aspects of EU Law, 2017, 391 - 423**

Conference paper / Rad u zborniku

Publication status / Verzija rada: **Published version / Objavljena verzija rada (izdavačev PDF)**

Permanent link / Trajna poveznica: <https://urn.nsk.hr/urn:nbn:hr:132:947745>

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Download date / Datum preuzimanja: **2025-02-10**



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## **PROTECTION OF THE RIGHT OF THE CHILD TO BE HEARD IN DIVORCE PROCEEDINGS – HARMONIZATION OF CROATIAN LAW WITH EUROPEAN LEGAL STANDARDS**

### **ABSTRACT**

*Contemporary developments in European procedural law reveal a growing interest in the protection and promotion of children's (procedural) rights. The right of the child to be heard in proceedings resulting in decisions which directly or indirectly affect its rights and interests, is a procedural right of the child, granted by numerous European documents. One of such proceedings is certainly divorce proceedings involving children. This paper is aimed at demonstrating and analysing the ways in which the right of the child to be heard is protected in European law as well as at examining whether the protection of the right of the child to be heard in divorce proceedings in Croatian law is harmonized with the standards of European law in this legal area. Considering that the latest reform of Croatian family legislation (2015) has proposed some new solutions relating to the expression of child's views in divorce proceedings, the author has conducted empirical research to examine the experiences of application of those solutions in legal practice.*

**Keywords:** *child, right to be heard, divorce, European law, Croatian law*

### **1. INTRODUCTION**

Making the justice systems across Europe more child-friendly is a key action under the EU Agenda for the Rights of the Child<sup>1</sup>. Pursuant to European child-friendly justice standards, the Member States are obliged to undertake measures which should enable the child, in accordance with its age and degree of maturity, to participate in proceedings dealing with its rights and interests. Those measures should also ensure that such proceedings are child appropriate. As asserted by Vandekerckhove and O'Brien "in circumstances where children's rights are at stake in a

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<sup>1</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An EU Agenda for the Rights of the Child /\* COM/2011/0060 final \*/, available at: URL=<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011DC0060>. Accessed 12 January 2017.

(court) case, it is important not only to look at the merits of the case, or the (legal) characteristics of the given situation, but also to consider the manner in which the court system actually deals with and relates to children throughout the course of the proceedings themselves.”<sup>2</sup> The protection of the right of the child to be heard in proceedings directly or indirectly affecting its rights and interests are vital for the implementation of child-friendly justice standards.<sup>3</sup> In terms of civil proceedings, children’s rights in Europe are most often affected by parental divorce and relating proceedings.<sup>4</sup> Children, as “principal victims of divorce”<sup>5</sup>, should enjoy a special form of protection of their (procedural) rights in this type of proceedings.

Croatian family legislation obliges parents and other childcare providers to respect child’s views in accordance with its age and level of maturity. Likewise, in all proceedings resulting in decisions affecting a child’s right or interest, the child has the right to be appropriately informed about relevant circumstances of the case, to get advice and express its views, and find out about possible consequences of taking its opinion into consideration. The child as well needs to know that its opinion is taken in compliance with its age and level of maturity.<sup>6</sup> This paper elaborates in detail how the right of the child to be heard is protected concrete in divorce cases by Croatian family legislation. First, it shows and analyses the protection of the right of the child to express its views in the context of European law. Then it examines the protection of the right of the child to express its views in divorce proceedings within Croatian family legislation. The paper also includes analysis and comparison between non-contentious divorce and contentious divorce proceedings in the light of the legal protection of the right of the child to express its views. For that purpose, the author has conducted empirical research of the expression of child’s views in the mandatory counselling procedure, which precedes judicial divorce proceedings involving minor children.<sup>7</sup> The paper concludes with

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<sup>2</sup> Vandekerckhove, A.; O’Brien, K., *Child-Friendly Justice: turning law into reality*, ERA Forum, Vol. 14, No. 4, 2013, pp. 524/525.

<sup>3</sup> See the overview of EU activities on child-friendly justice in Tuite, M., *The way forward: the implementation of the EU Agenda for the Rights of the Child*, ERA Forum, Vol. 14, No. 4, 2013, pp. 543-556.

<sup>4</sup> See the *Summary of contextual overviews on children’s involvement in civil and administrative judicial proceedings in the 28 Member States of the European Union*, Luxembourg, Publications Office of the European Union, 2015, available at URL=[https://bookshop.europa.eu/en/summary-of-contextual-overviews-on-children-s-involvement-in-civil-and-administrative-judicial-proceedings-in-the-28-member-states-of-the-european-union-pbDS0115277/?CatalogCategoryID=z4mep2Ow4uMAAAFOy-2gi8\\_Ki](https://bookshop.europa.eu/en/summary-of-contextual-overviews-on-children-s-involvement-in-civil-and-administrative-judicial-proceedings-in-the-28-member-states-of-the-european-union-pbDS0115277/?CatalogCategoryID=z4mep2Ow4uMAAAFOy-2gi8_Ki). Accessed 14 January 2017.

<sup>5</sup> Freeman, M., according to Parkes, A., *Children and International Human Rights Law: the Right of the Child to be Heard*, Routledge, Abingdon/New York, 2013, p 90.

<sup>6</sup> See Article 86.

<sup>7</sup> The research was conducted in the form of an on-line questionnaire forwarded to social welfare centres. The questionnaire included 17 questions related to the implementation of the mandatory counselling

an assessment of the compliance of the Croatian solutions with European legal standards in this legal area.

## 2. PROTECTION OF THE RIGHT OF THE CHILD TO EXPRESS ITS VIEWS IN THE CONTEXT OF EUROPEAN LAW

The right to be heard is a right of the child, granted by numerous European documents.<sup>8</sup> The importance of the protection of the right of the child to express its view in proceedings resulting in decisions which directly or indirectly affect its rights and interests has been recognized in the case-law of European courts too.<sup>9</sup>

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procedure. The following 21 social welfare centre took part in the research: Zagreb-subsidary Gornji grad (Uptown), Zagreb-subsidary Trnje, Zagreb-subsidary Novi Zagreb (New Zagreb), Split, Osijek, Zadar, Slavonski Brod, Gospić, Križevci, Pazin, Valpovo, Beli Manastir, Đakovo, Dugo Selo, Bjelovar, Pakrac, Ludbreg, Našice, Koprivnica, Zaprëšić and Novi Marof.

<sup>8</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Council of Europe, 4 November 1950, ETS 5 (hereinafter: ECHR), under Article 10, proscribes that everyone has the right to freedom of expression. As Van Bueren explains, the law is clear that all children are included in term “everyone”. However, Article 10 is principally focused on the necessity to protect against negative “interference” from the state, and for children negative protection may be inadequate, as children also frequently require a positive obligation placed on the state to create and protect accessibility. Van Bueren, G., *Child Rights in Europe: Convergence and Divergence in Judicial Protection*, Council of Europe, 2007, p. 83.

The right of the child to express its views in proceedings is also granted by the Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016 (art. 24. p. 1: *Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*); European Convention on the Adoption of Children (Revised), CETS No.202, 27. 11. 2008 (see art. 5. and 6.); Recommendation No R (84) 4 of the Committee of Ministers of the Council of Europe on parental responsibilities (see Principle 3); Recommendation No R (87) 6 on foster families (see Principle 7) etc. Considering that divorce proceedings involving minor children deal with the issue of contact with the child, one should not forget to mention the protection of the right of the child to express its views, enshrined in the Convention on Contact concerning Children, ETS No.192, 15.5.2003 (art. 6.: *A child considered by internal law as having sufficient understanding shall have this right, unless this would be manifestly contrary to his or her best interests:*

–to receive all relevant information;

–to be consulted;

–to express his or her views.

<sup>9</sup> The right of the child to be heard in civil proceedings is not expressly contained within the ECHR, nor has such a right been explicitly determined by the European Court of Human Right. Considering the principles of evolutive interpretation, the positive obligations inherent within Articles 6 and 8 as well as the case-law on hearing children to date, is to be argued that such a right can be derived under the ECHR. Daly, A., *The right of children to be heard in civil proceedings and the emerging law of the European Court of Human Rights*, The International Journal of Human Rights, Vol. 15, No. 3, 2011, pp. 441.

For the case-law of the European Court of Human Rights relating to the right of the child to express its views see, e.g.: *T. v United Kingdom* (1999) 30 EHRR 121; *Kutzner v Germany* (2002) Appl. No. 46544/99, *Sahin v Germany* (2003) 36 EHRR 765; *Sommerfeld v Germany* (2003), Appl. No.

Considering that the contents of particular European documents protecting the right of the child to be heard overlap, this chapter deals only with some of them, i.e. sheds light only on the most relevant ones for this study. The analysis of those European documents with respect to the protection of this children's right starts with their foundation, i.e. United Nations Convention on the Rights of the Child<sup>10</sup> (hereinafter: UN CRC).

### **2.1. United Nations Convention on the Rights of the Child as the basis of regional European documents regulating the right of the child to be heard**

The UN CRC appears in the preamble of many regional European documents which regulate children's (procedural) rights. The European Court of Justice has recognized that all EU actions must respect fundamental rights and in this regard has noted that due account should be given to the UN CRC.<sup>11</sup> As rightly highlighted by Couzens, the UN CRC "has confirmed that children are regarded as subjects of human rights and not just as subjects of protections" and that "this position creates a direct link between the state and children, without parents or other adults playing a role as intermediaries."<sup>12</sup>

The right of the child to express its views is set forth in Article 12 of the UN CRC:

*States Parties shall assure to 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.*

*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.<sup>13</sup>*

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31871/96, etc.

For the case-law of the European Court of Justice relating to the right of the child to express its views see, e.g.: Case C-491/10 *Aguirre Zarraga v Pelza* [2010] ECR I-14247; Case C-400/10 *McB v L.E.*, [2010] ECR I-8965, etc.

<sup>10</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

<sup>11</sup> O'Donnell, R., *The role of the EU legal and policy framework in strengthening child friendly justice*, ERA Forum, Vol. 14, No. 4, 2013, p. 512.

<sup>12</sup> Couzens, M, *Autonomy rights versus parental autonomy*, The UN Children's Rights Convention: theory meets practice, Alen, A. et al. (eds.), Intersentia, Antwerpen/Oxford, 2007, p. 407.

<sup>13</sup> Article 12 of the UN CRC

It may be argued that recognition of the child's best interests in the sense of Article 3 underpins all the other provisions in the UN CRC<sup>14</sup>. The right of the child to have its best interest assessed and taken as a primary consideration along with the right of the child to be heard are compulsory passages for all those who have the crucial task of deciding on the child's future in a different official (judicial and administrative) context.<sup>15</sup> Article 3 of the UN CRC provides:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

*States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

*States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.*<sup>16</sup>

In Zermatten's opinion, we can give two significations to the expression "*the best interest of the child shall be a primary consideration*". First, the best interest principle is the fundament for a substantive right: the right of the child that its best interests will be assessed and determined and that it will be taken as a primary consideration whenever a decision concerning it is to be made. Second, it is a rule of procedure: whenever a decision affecting a specific child or a group of children is to be made, the decision-making process must be carried out through the consideration of a possible impact on the child concerned and this impact must be accompanied with a primary consideration in the appreciation of different interests in play.<sup>17</sup> The importance of the principle of priority protection of the best interests and well-being of the child as a starting point for any family proceedings which might affect its rights and interests is undoubted and divorce proceedings are no exception in this view. Not only that this principle should underpin all the national legislation provisions regulating divorce proceedings involving minor

<sup>14</sup> Freeman, M., *Article 3: The Best Interests of the Child*, Martinus Nijhoff Publishers, Leiden/Boston, 2007, p. 1.

<sup>15</sup> Zermatten, J., *Best interests of the child*, Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child, Mahmoudi, S. *et al.* (ed.), Brill Nijhoff, Leiden/Boston, 2015, p. 42.

<sup>16</sup> Article 3 of the UN CRC

<sup>17</sup> Zermatten, J., *op. cit.* note 15, p. 31/32.

children but application and proper interpretation of this principle may fill legal lacunae, if any, pertaining to the protection of children's rights in such proceedings.

On the other hand, one of the recurrent critiques to the best interest is that this principle is too vague and that it is difficult to implement it without guidelines that are more precise.<sup>18</sup> Within the conflicting scenario of defining and enforcing the best interest principle, probably the most important right when dealing with the rights of children in marital breakdown relates to listening what children have to say.<sup>19</sup>

There are opposing opinions about whether the right of the child to express its views in divorce proceedings (granted by Article 12 of the UN CRC) and the best interests of the child (in the sense of Article 3 of the UN CRC) are complementary or conflicting. Sometimes the best interests of the child argument is used to encourage participation of the child in the proceedings and on some occasions hearing the child in divorce proceedings is deemed contrary to its best interests.<sup>20</sup> The Recommendations of the UN Committee on the Rights of the Child suggest that all the State parties should facilitate the exercise of the right of the child to express its views either in judicial divorce proceedings or within the framework of family mediation or in any other similar procedure envisaged for the regulation of divorce and post-divorce parental responsibility. This right depends neither on the age of the child nor on the parents' consent to its exercise. The Recommendations promote an individual approach to this issue or precisely, that it is advisable to assess the ability of the child to express its views.<sup>21</sup> One should also bear in mind that the expression of child's views is a child's right and not its liability. The child has the right to decide whether it will express its opinion or not and whether it will express its views directly or through a representative or an appropriate body.

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<sup>18</sup> *Ibid*, p. 36.

<sup>19</sup> Farrugia, R., *Children's rights in family court proceedings*, The UN Children's Rights Convention: theory meets practice, Alen, A. *et al.* (eds.), Intersentia, Antwerpen/Oxford, 2007, p. 407.

<sup>20</sup> Hemrica, J., Heyting, F., *Tacit Notions of Childhood: An Analysis of Discourse about Child Participation in Decision-Making Regarding Arrangements in Case of Parental Divorce*, *Childhoods*, Vol. 11. No. 4, 2004, pp. 449-468.

<sup>21</sup> "In cases of separation and divorce, the children of the relationship are unequivocally affected by decisions of the courts. (...) For this reason, all legislation on separation and divorce has to include the right of the child to be heard by decision makers and in mediation processes. Some jurisdictions, either as a matter of policy or legislation, prefer to state an age at which the child is regarded as capable of expressing her or his own views. The Convention, however, anticipates that this matter be determined on a case-by-case basis, since it refers to age and maturity, and for this reason requires an individual assessment of the capacity of the child." UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, pp 12.



A parent, guardian, lawyer or another person can appear in the role of a child's representative. As proposed in the Recommendations, it must be stressed that in many cases, there are risks of a conflict of interest between the child and their most obvious representative parent. Certainly, such a conflict of interest may, but does not have to characterize divorce proceedings. Therefore, the author holds that the role of parents as primary representatives of the child, who convey child's views to the court, should not be necessarily played by another person. Unless there is another firm ground, this role should be played by someone else only if it is clear that parents do not protect the best interest of the child or that they do not respect its opinion or when there is no agreement between parents on who has the right to represent the child with respect to issues relating to the protection of its rights and interests.<sup>22</sup>

## 2.2. European Convention on the Exercise of Children's Rights

The European Convention on the Exercise of Children's Rights<sup>23</sup> (hereinafter: EC ECR) aims to protect the best interests of children, providing a number of procedural measures to ensure them exercise of their rights. The intention of the EC ECR was to supplement the UN CRC by assisting children to exercise their substantive rights set out in the Convention. It recognises that the most practical means for children to claim and enforce their rights is through legal proceedings.<sup>24</sup> Its application is exclusively related to family matters resolved before courts and competent administrative bodies. One of its most important features is that its provisions are always employed whenever proceedings affect a right of the child, regardless of whether the case revolves around the child or the child appears in the case collaterally. The former situation refers to cases where the child is the petitioner and the latter to cases in which a right of the child is interfered with, which is typical for divorce proceedings.<sup>25</sup>

The right of the child to be informed and to express its views in proceedings is regulated by Article 3 of the EC ECR:

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<sup>22</sup> In this light also see Rešetar, B., *Novi razvod braka u Republici Hrvatskoj pod utjecajem psihologije, sociologije i međunarodnog prava (New Divorce in the Republic of Croatia under the Influence of Psychology, Sociology and International Law)*, *Suvremeno obiteljsko pravo i postupak (Contemporary Family Law and Procedure)*, Rešetar, B. *et al.*, Faculty of Law Osijek, 2017 (in print), p. 52.

<sup>23</sup> European Convention on the Exercise of Children's Rights, Council of Europe, 25 January 1996, ETS 160

<sup>24</sup> Fortin, J., *Children's Rights and the Developing Law*, Third edition, Cambridge University Press, 2009, p 73

<sup>25</sup> Tako i Hrabar, D., *Nova procesna prava djeteta - europski pogled (Children's New Procedural Rights – European View)*, Yearbook of the Croatian Academy of Legal Sciences, Vol. 4, No.1, 2013, p. 71.



*A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:*

- *to receive all relevant information;*
- *to be consulted and express his or her views;*
- *to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.*<sup>26</sup>

As reasoned in the Explanatory Report to the EC ECR<sup>27</sup>, Article 3 has not given the child the right to consent to or to veto a planned decision as it covers many different types of cases and it would not always be in the best interests of a child to be given such a right in the case of certain decisions. As far as the child's capacity to express its views is concerned, it is left to states to define the criteria enabling them to evaluate whether or not children are capable of forming and expressing their own views and states are naturally free to make the age of children one of those criteria.

Hrabar stresses that apart from shedding light on special rights of the child in court proceedings, the EC ECR highlights the importance of amending the court's role. According to the EC ECR, the court should be protective towards the child. The court deals with a case and the child, regardless of not being a party thereto, remains being in the spotlight, so the court should pay special attention to the child's subjectivity, who is in principle unguarded due to its age and immaturity.<sup>28</sup> In this view, Article 9 of the EC ECR foresees the power of the judicial authority to appoint a special representative for the child, irrespective of its capacity for understanding, in proceedings affecting the child where the holders of parental responsibilities are precluded from representing the child as a result of a conflict of interest between them and the child. Furthermore, the Parties to the EC ECR must examine the possibility of giving the judicial authorities a power to appoint, for the proceedings, a separate representative for the child, even when there is no conflict of interest between the child and the holders of parental responsibilities. In any case, a representative shall, according to Article 10 of the EC, provide all relevant information to the child if the child is considered by internal law as having sufficient understanding, provide explanations to the child if the child is considered by internal law as having sufficient understanding concerning the possible

<sup>26</sup> Art 3. EC ECR

<sup>27</sup> Explanatory Report to the European Convention on the Exercise of Children's Rights, Council of Europe, European Treaty Series - No. 160

<sup>28</sup> Hrabar, D., *op. cit.* note 25, p. 78.

consequences of compliance with its views and the possible consequences of any action by the representative, determine the views of the child and present these views to the judicial authority. The necessary requirement for fulfilling these obligations is that none of them is contrary to the best interests of the child. "Determining the views of the child does not necessarily only mean speaking to the child and asking the child to express views verbally but also includes "observations" of the child by a representative or by, for example, an expert medical practitioner."<sup>29</sup> It should be noted that the EC ECR also regards the right of the child to express its views as a right of the child and not as its liability. In any case, the child may refuse to express its views, regardless of whether it is to be heard in person or through a special representative.

### **2.3. Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice**

With the adoption of the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice<sup>30</sup> (hereinafter: Guidelines), the concept of child-friendly justice has become part of the European legal and political framework concerning the position of children in justice systems.<sup>31</sup> Child-friendly justice aims to make justice systems more focused on children's rights, more sensitive to children's interests and more responsive to children's participation in formal and informal decision-making concerning them.<sup>32</sup> As accentuated in the foreword to the Guidelines, the Council of Europe adopted the Guidelines on child-friendly justice specifically "to ensure that justice is always friendly towards children, no matter who they are or what they have done. Considering that a friend is someone who treats you well, who trusts you and whom you can trust, who listens to what you say and to whom you listen, who understands you and whom you understand. A true friend also has the courage to tell you when you are in the wrong and stands by you to help you work out a solution. A child-friendly justice system should endeavour to replicate these ideals."<sup>33</sup>

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<sup>29</sup> *Op. cit.* note 27

<sup>30</sup> 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

<sup>31</sup> Lieford, T., *Child-friendly justice: protection and participation of children in the justice system*, Temple Law Review, Vol. 88, No. 4, 2016, p. 905.

<sup>32</sup> *Ibid.*

<sup>33</sup> 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 and explanatory memorandum, Council of Europe Publishing, 2011, p. 7.

When defining their scope and purposes, it was proclaimed that the Guidelines should ensure that in every proceedings, children's rights, including the right to information, representation, participation and protection, are fully respected with due consideration to the child's level of maturity and understanding and to the circumstances of the case. The Guidelines should apply to all ways in which children are likely to be, for whatever reason and in whatever capacity, brought into contact with all competent bodies and services involved in implementing criminal, civil or administrative law.<sup>34</sup> The foreword to the Guidelines and the Explanatory Memorandum indicate the situations in which the child may come into contact with judicial and non-judicial proceedings and divorce appears as the first example thereof.

The Guidelines makes reference to the right of the child to express its views in Chapter III – Fundamental principles and Chapter IV – Child-friendly justice, before, during and after judicial proceedings. The Fundamental principles suggest that the right of all children to be informed about their rights and be consulted and heard in proceedings involving or affecting them should be respected, bearing in mind their maturity and any communication difficulties they may have or their ability to shape their own viewpoints. It is also denoted that when assessing the best interests of the child, due weight should be given to their views and opinions.

The part of the Guidelines elaborating child-friendly justice before judicial proceedings lays down that children should be thoroughly informed and consulted on the opportunity to have recourse to either court proceedings or alternatives outside court settings.

In terms of child-friendly justice during judicial proceedings, the Guidelines dedicate a special subchapter to the right to be heard and to express views:

*Judges should respect the right of children to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question. Means used for this purpose should be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case. Children should be consulted on the manner in which they wish to be heard.*

*Due weight should be given to the child's views and opinion in accordance with his or her age and maturity.*

*The right to be heard is a right of the child, not a duty of the child.*

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<sup>34</sup> Considering their content, it might be asserted that the Guidelines are mostly concerned with criminal proceedings, but the part referring to their scope and purpose reveals that they should apply to civil and administrative proceedings too.

*A child should not be precluded from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects him or her, the judge should not, unless it is in the child's best interests, refuse to hear the child and should listen to his or her views and opinion on matters concerning him or her in the case.*

*Children should be provided with all necessary information on how effectively to use the right to be heard. However, it should be explained to them that their right to be heard and to have their views taken into consideration may not necessarily determine the final decision.*

*Judgments and court rulings affecting children should be duly reasoned and explained to them in language that children can understand, particularly those decisions in which the child's views and opinions have not been followed.<sup>35</sup>*

Taking account of the fact that efficient protection of children's procedural rights, including the right of the child to express its views, often depends on the skills and competences of those who carry the burden of the responsibility for representing the child, the Guidelines shed light on the importance of the possession of those skills and competences, but also on the ability to communicate with children in compliance with their level of understanding.

The Guidelines encourage the Member States to enhance their interdisciplinary approach in working with children. Cederborg justly concludes that "when children are involved in legal matters, there is a need for collaboration between professionals from behavioural sciences and the legal system" and that "such interdisciplinary collaboration can clarify the knowledge necessary to increase the chance that children are understood from their unique perspectives and conditions."<sup>36</sup> Guideline 14 sets forth that all professionals working with children (police, lawyers, judges, mediators, social workers and other experts) need to complete training in communication skills, in using child-friendly language and in developing knowledge on child psychology. As outlined in the Explanatory Memorandum, judges often lack qualifications to communicate with children and they rarely seek professional assistance in performing that task. In accordance with the data of the European Commission<sup>37</sup> a legal obligation to provide multidisciplinary training to all professionals working for and with children on the rights and needs of children

<sup>35</sup> Guidelines 44 do 49

<sup>36</sup> Cederborg, A., *Children's right to be heard from their unique perspectives*, Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child, Mahmoudi, S. *et al.* (ed.), Brill Nijhoff, Leiden/Boston, 2015, pp. 80/81.

<sup>37</sup> See the *Summary of contextual overviews on children's involvement in civil and administrative judicial proceedings in the 28 Member States of the European Union*, Luxembourg, Publications Office of the European Union, 2015, pp 27/28.

and on proceedings adapted to them exists in 13 jurisdictions<sup>38</sup> The legal obligation to provide mandatory training relating to communication with children in civil and judicial proceedings at all ages and stages of their development exists in 10 jurisdictions.<sup>39</sup> Non-mandatory training opportunities for professionals on communicating with children involved in civil and administrative proceedings exist in 17 jurisdictions.<sup>40</sup>

The discussion on the protection of the right of the child to express its views, laid down in the Guidelines, which truly represent one of the most significant contributions to the contemporary, exceptionally important doctrine of children's procedural rights<sup>41</sup>, concludes with a formulation from the foreword thereto: justice is child-friendly only if "listens to children, takes their views seriously and makes sure that the interests of those who cannot express themselves (such as babies) are also protected."<sup>42</sup>

#### 2.4. Council Regulation (EC) No 2201/2003

The importance of the protection of the right of the child to express its views in family proceedings resulting in decisions affecting its rights and interests has been recognized in some documents relating to the area of private international law. As far as the protection of the right of the child to express its views in divorce proceedings with an international element is concerned, the major role is played by Council Regulation (EC) No 2201/2003<sup>43</sup> (hereinafter: Regulation) which con-

<sup>38</sup> Estonia, Greece, Spain, France, Italy, Lithuania, Luxembourg, Latvia, Poland, Sweden, Slovenia, UK-England and Wales and UK-Northern Ireland.

<sup>39</sup> Austria (mandatory only for social workers) Belgium, France, Greece, Spain (mandatory only for judges of special family courts) Luxembourg, Sweden, Slovenia, UK-England and Wales and UK-Northern Ireland (In UK- England and Wales and UK-Northern Ireland, general training in the form of Continuing Professional Development (CPD) is a mandatory requirement for all professions working with children, including the judiciary, solicitors, social workers and Children's Guardians/Guardians Ad Litem).

<sup>40</sup> Austria, Cyprus (training is mandatory for the officers of the Social Services who come into contact with children), Czech Republic, Estonia (some of the courses for judges are in fact mandatory), Greece, Finland, Croatia, Ireland, Lithuania, Latvia, the Netherlands, Portugal, Sweden, Slovenia, Slovakia, UK- England and Wales and UK-Northern Ireland.

<sup>41</sup> See also Korać Graovac, *Smjernice Odbora ministara Vijeća Europe o pravosuđu naklonjenom djeci (Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice)*, *Dijete i društvo (Child and Society)*, Vol. 13, No. 1/2, 2011, pp. 274.

<sup>42</sup> 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 and explanatory memorandum, Council of Europe Publishing, 2011, pp. 8.

<sup>43</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 responsi-

tains uniform rules for jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility.<sup>44</sup> Bearing in mind that in the EU, as disclosed by Župan, about 250,000 international divorce proceedings are initiated on an annual basis<sup>45</sup>, it is clear how proper and harmonized application of the Regulation contributes to legal security with respect to conducting that kind of divorce proceedings in the Member States.<sup>46</sup>

The Regulation points out that children should be given an opportunity to express their views in proceedings affecting them.<sup>47</sup> The Regulation refers to the right of the child to be heard in various articles.<sup>48</sup> In the sense of the Regulation, the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to its age or degree of maturity. However, an exception to this principle, i.e. not hearing the child due to its age and degree of maturity, should be interpreted very restrictively and one should particularly take into consideration that children's rights are very important in proceedings relating to children and that generally, decisions on the future of the child and the relationship with its parents and others are of vital importance in regard to its interests.<sup>49</sup>

The Regulation provides that the violation of the child's right to be heard is one of the grounds for non-recognition of a judicial statement. Namely, Article 23 of the Regulation explicitly stipulates that a judgment relating to parental responsibility shall not be recognized if it is passed, except in case of urgency, without the child having been given an opportunity to be heard, thus violating the fundamental principles of procedure of the Member State in which recognition is sought.

Pursuant to Article 41 of the Regulation, the right to contact with the child granted in an enforceable judgment given in a Member State shall be recognized and enforceable in another Member State without the need for a declaration of

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bility, repealing Regulation (EC) No 1347/2000

<sup>44</sup> Scope of the Regulation is determined in its Article 1:

*Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:*

*(a) divorce, legal separation or marriage annulment;*

*(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.*

<sup>45</sup> Župan, M., *Europski prekogranični obiteljski postupci (European Cross-Border Family Proceedings)*, Procesno – pravni aspekti prava EU (Procedural – Legal Aspects of EU Law), Petrašević, T. (ed.); Vuletić, I. (ed.), Faculty of Law of the Josip Juraj Strossmayer University of Osijek, Osijek, 2016, pp. 126.

<sup>46</sup> On the application of the Regulation in the Member States see in Boele-Woelki, K. (ed.), Gonzalez Beilfuss, C. (ed.), *Brussels II bis: Its Impact and Application in the Member States*, Intersentia, 2007.

<sup>47</sup> See Recital 19 of the Regulation.

<sup>48</sup> See Article 11 paragraph 2, Article 23 b), Article 41 paragraph 2 c) and Article 42 paragraph 2 a)

<sup>49</sup> Practice Guide for the application of the Brussels IIa Regulation, pp 77. An electronic version available at [http://ec.europa.eu/justice/civil/files/brussels\\_ii\\_practice\\_guide\\_en.pdf](http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf). Accessed 20 February 2017.

enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin. However, the same Article prescribes that the judge of origin shall issue the certificate only if the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to its age or degree of maturity.

The Regulation does not modify the applicable national procedures for taking the views of a child. Techniques and strategies for taking the views of children are in the hands of national courts.<sup>50</sup> After analyzing the protection of the right of the child to express its views, laid down in the Regulation, Zoetewij-Turhan drew the conclusion that it is misleading to declare that the Regulation confers an absolute right to be heard at court to children in proceedings that fall within its scope. The conclusion is accompanied with the explanation that even though the aim of the Regulation is to uniform the procedural law with regard to the matters falling within the scope of the Regulation, the regulation of child consultation continues to be a matter of national law.<sup>51</sup> A similar view has been brought up by Shannon, asserting that this is regrettable and can result in dependence of the child's right to be heard on the Member State in which it is habitually resident.<sup>52</sup> This problem has also been detected by Kruger and Samin and they link it to Article 23 of the Regulation, according to which a judgment relating to parental responsibility shall not be recognized if it is passed without the child having been given an opportunity to be heard, thus violating the fundamental principles of procedure of the Member State in which recognition is sought. They back their assertion with the following explanation: "This test seems overly prudent in the protection of national procedural autonomy. The test should rather be whether there was a violation of the Children's Rights Convention. Such reference would confirm what should be the case already: the same standards of children's rights apply all over the EU. Moreover, it would assist in converging the laws of Member States. This does

<sup>50</sup> The Practice Guide for the application of the Brussels IIa Regulation underlines that regardless of who hears the child, a judge, an expert, social worker or other official, it is of the essence that that person receives adequate training, for instance how to best communicate with children. Similarly, the Practice Guide propagates that whoever takes the views needs to be aware of the risk that parents seek to influence and put pressure on the child and that the hearing shall be carried out properly and with appropriate discretion. See Practice Guide for the application of the Brussels IIa Regulation, pp 77. An electronic version available at [http://ec.europa.eu/justice/civil/files/brussels\\_ii\\_practice\\_guide\\_en.pdf](http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf). Accessed 20 February 2017.

<sup>51</sup> Zoetewij-Turhan, M., *Brussels ii bis: The right of the Child to be Heard in International Proceedings*, *Pravnik*, Vol. 70 (132), No. 11-12, 2015, p. 873.

<sup>52</sup> Shannon, G., *The Internationalisation of Irish Family Law*, *Judicial Studies Institute Journal*, Vol. 5, No. 1, 2005, p. 80.



not mean that national procedural rules on how, and by whom the child is heard must be changed, merely that the standard should be set straight.”<sup>53</sup>

### 3. THE RIGHT OF THE CHILD TO EXPRESS ITS VIEWS IN DIVORCE PROCEEDINGS IN CROATIAN LAW

In 2015, Croatia saw adoption of a new Family Act<sup>54</sup> (hereinafter: 2015 Family Act) which has reformed Croatian family legislation to a great extent. When preparing the latest reform in the field of divorce involving minor children, the Croatian legislator put the emphasis on children.<sup>55</sup> The reform was aimed at improving the child’s procedural position in divorce proceedings and at shaping a legal framework for making judicial decisions on divorce, which are expected to serve as a source of protection of the rights and interests of the child after proceedings completion. This chapter offers a detailed analysis of the provisions protecting the right of the child to express its views within the new Croatian family legislation<sup>56</sup> and provides an assessment of their harmonization with the European standards of legal protection of the right of the child to express its views, which are discussed in the previous chapter.

#### 3.1. Fundamental principles

What can be derived from the analysis of the provisions regulating divorce involving minor children in Croatia is that the child-friendly approach relies on three fundamental principles. The first one is the principle of priority protection and well-being of the child:

<sup>53</sup> Kruger, T.; Samyn, L., *Brussels II bis: successes and suggested improvements*, Journal of Private International Law, Vol. 12, No. 1, 2016, p. 157.

<sup>54</sup> Family Act (Official Gazette no. 103/15)

<sup>55</sup> The 2015 family legislation reform pays great attention to the child’s procedural position in all family matters and not only in divorce proceedings. Croatian legal theory has often warned about the need for improvement of the child’s procedural position in family proceedings. See, e.g., Uzelac, A.; Rešetar, B., *Procesni položaj i zastupanje djeteta u sudskom postupku prema hrvatskom i komparativnom pravu – neka otvorena pitanja (Procedural Position of the Child before Judicial and Administrative Bodies in Family Matters – Some Open Issues)*, *Dijete i pravo (Child and Law)*, Rešetar, B. (ed.), Faculty of Law Osijek, 2009, pp. 163-194.; Hrabar, D., *Zastupanje djece i postupovna prava djeteta pred sudskim i upravnim tijelima u obiteljskopравnim stvarima (Representation of the Child and Its Procedural Rights before Judicial and Administrative Bodies in Family Matters)*, Croatian Legal Journal, Vol. 2, No. 10, 2002., pp. 46-53.

<sup>56</sup> What turned out to be an incentive to reforms in this field was the results of a study of the case-law, revealing an embarrassingly small number of divorce proceedings in which the child was given an opportunity to express its views. See Rešetar, B., *Pravna zaštita prava na susrete i druženja (Legal Protection of the Right to Contact with the Child)*, Faculty of Law Osijek, Osijek, 2011.

*Courts and public bodies adjudicating in cases indirectly or directly affecting children's rights have to protect the rights of the child and its well-being before all.*

*The child is entitled to contact with both of its parents unless this is contrary to its well-being.*<sup>57</sup>

The second one is the principle of amicable resolution of family matters:

*Encouraging amicable resolution of family matters is a task of all who provide the family with professional aid or decide on family relations.*<sup>58</sup>

The third principle refers to proportional and the weakest interference with family life.

*Measures which interfere with family life are eligible if they are necessary and if their purpose cannot be efficiently realized by undertaking more lenient measures, including precautionary assistance or support provided to a family.*<sup>59</sup>

Taking account of all of the three principles, the protection of the best interest of the child in divorce proceedings is the primary task of all the participants in divorce involving minor children. One should also have regard to the fact that the protection of the best interest of the child needs to arise, if possible, from amicable resolution of family matters and without unnecessary interference with the family life of parents and their child. In this light, the Croatian legislator has opted for a divorce concept in which the exercise of children's (procedural) rights foreseen in international documents is facilitated and in which the child is protected from unnecessary exposure to (judicial) examination of its views relating to the parents' agreement where there is no doubt that such an agreement is justified and in compliance with the best interests of the child during and after the divorce.

### **3.2. Mandatory counselling and a parenting plan**

Spouses having a minor child together are obliged to attend mandatory counselling at the competent social welfare centre prior to the initiation of judicial divorce proceedings.<sup>60</sup> In line with the legal definition thereof, mandatory counselling is a form of aid provided to family members to reach an agreement on family matters,

<sup>57</sup> Article 5 of the 2015 Family Act

<sup>58</sup> Article 9 of the 2015 Family Act

<sup>59</sup> Article 7 of the 2015 Family Act

<sup>60</sup> Except prior to the initiation of divorce proceedings involving minor children, mandatory counselling shall be attended before the initiation of other judicial proceedings relating to the exercise of parental responsibility and the maintenance of contact with the child.

within the framework of which the counsellors show great concern for the protection of family relations affecting the child and present the legal consequences of a failure to reach such an agreement and initiation of judicial proceedings regulating children's rights.<sup>61</sup> The mandatory counselling procedure has substituted the mediation procedure envisaged by the former Family Act<sup>62</sup> (hereinafter: 2003 Family Act). The mandatory counselling procedure focuses on an attempt of divorcing parents to reach an agreement on the exercise of their post-divorce parental responsibility and not on an attempt to reconcile, which was the case with the mediation procedure.<sup>63</sup> In fact, if spouses wish to divorce based on an agreement, they shall draw up a parental responsibility agreement (hereinafter: PRA). A PRA is a written agreement of parents on the manner of the exercise of shared parental responsibility in the circumstances of separate life. In compliance of Article 106 of the 2015 Family Act and pursuant to Article 2 of the Regulation on the Required Form of a Parenting Plan<sup>64</sup> (hereinafter: Parenting Plan Regulation), a PRA shall govern as follows: child's residence, child's contact with both of its parents, information exchange and giving consent in relation to making decisions relevant for the child, exchange of child-relevant information, child maintenance as a liability of the non-resident parent and the manner of resolving possible controversial issues. A parenting plan may regulate other issues relating to the exercise of parental responsibility if the parents deem them relevant for the child or if they require an agreement between the parents.

What is posed here is the question how Croatian family legislation protects the right of the child to express its views about the content of the PRA, which sets grounds for making a decision on non-contentious divorce considering that the entire PRA affects the rights and interests of the child. The 2015 Family Act explicitly regulates that parents are obliged to introduce their child to the content of the PRA and provide it with the possibility to express its opinion in compliance with its age and degree of maturity. They shall also respect their child's opinion in

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<sup>61</sup> Mandatory counselling is conducted by an expert team at the social welfare centre situated in the place of the child's residence or in the place of the parents' last common residence. See art. 321. p. 1. and 2. of the 2015 FA.

<sup>62</sup> Family Act (Official Gazette no. 116/03, 17/04, 136/04, 107/07, 57/11, 61/11, 25/13)

<sup>63</sup> Examination of the data on the successfulness of the mediation procedure has shown that the number of cases in which reconciliation or mediation activities resulted in dropping the intention to get divorced by one or both spouses is statistically negligible, so it can be asserted that 'saved marriages' and 'reconciliation' are very, very rare. Uzelac, A., *Novo uređenje obiteljskih sudskih postupaka - glavni pravci reforme obiteljskih parničnih postupaka u trećem Obiteljskom zakonu (New Regulation of Family Matters – Main Reform Courses of Contentious Family Proceedings in the Third Family Act)*, *Novo uređenje obiteljskih sudskih postupaka (New Regulation of Family Matters)*, Barbić, J. (ed.), Croatian Academy of Sciences and Arts, Zagreb, 2014, p. 26

<sup>64</sup> Regulation on the Mandatory Content of a Parenting Plan (Official Gazette no. 123/15)

accordance with the well-being of the child standard.<sup>65</sup> Article 2 of the Parenting Plan Regulation prescribes what a proper parenting plan shall include, but it does not say anything about the expression of child's views in accordance with its age and degree of maturity. Still, a PRA template, which is an integral part of the Parenting Plan Regulation, contains a field in which parents should indicate if they have given their child an opportunity to express its views about the content of the PRA. In case they have failed to do so, they shall state the appertaining reasons. The template also involves a field in which parents should display whether they have taken the child's opinion into consideration or not. If they have not done that, they shall disclose their reasons. Concerning that pursuant to the Parenting plan Regulation, the required form of a PRA does not encompass expression of child's views and that the fields referring thereto provide the parents with the possibility to indicate that they have not taken into consideration their child's opinion about the content of the PRA, allowing them to state any ground for failing to do so<sup>66</sup>, the Parenting Plan Regulation implies that expression of child's views in compliance with its age and degree of maturity does not have a binding character. Yet, since the parents' duty to introduce their child to the content of the PRA and allow it to express its views in compliance with its age and degree of maturity is set forth in the 2015 Family Act, which has superior legal force with respect to the Parenting Plan Regulation, the author believes that parents shall fulfil this duty of theirs regardless of the content of the Parenting Plan Regulation.

The survey has demonstrated that there are some ambiguities in the interpretation of the regulations referring to the (lack of) liability of incorporation of child's views into a PRA. Precisely, more than  $\frac{1}{4}$  of the centres which participated in the questionnaire relating to the mandatory counselling procedure<sup>67</sup> have revealed that in the context of mandatory counselling, PRAs lacking a field intended for describing the child's views can be concluded too (see Graph 1). Therefore, the author points to the need for amendment of the Parenting Plan Regulation in a way that incorporation of child's views into PRAs shall become a liability of the parents.

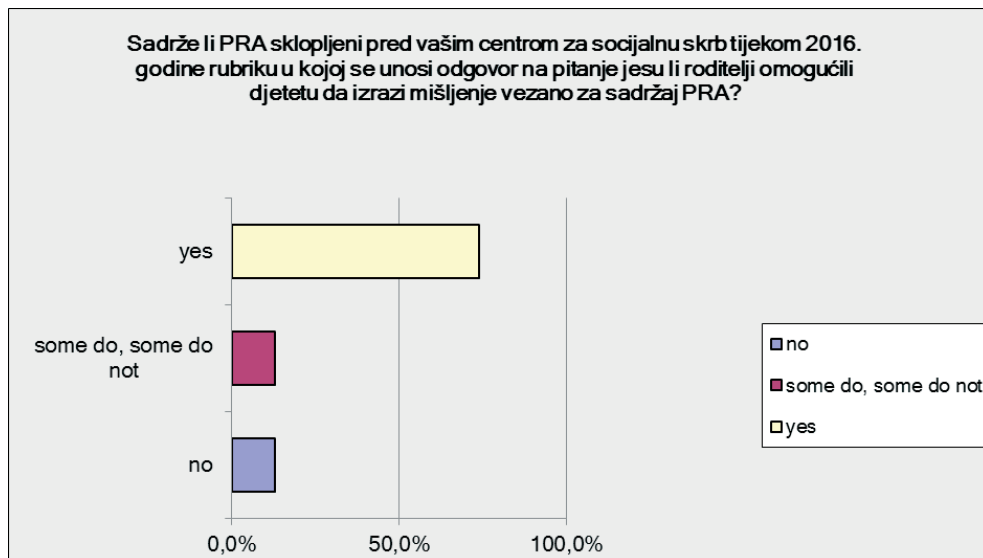
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<sup>65</sup> Article 106 paragraph 4 of the 2015 Family Act.

<sup>66</sup> The reason can be, for instance, their own assessment that the child's opinion is not relevant.

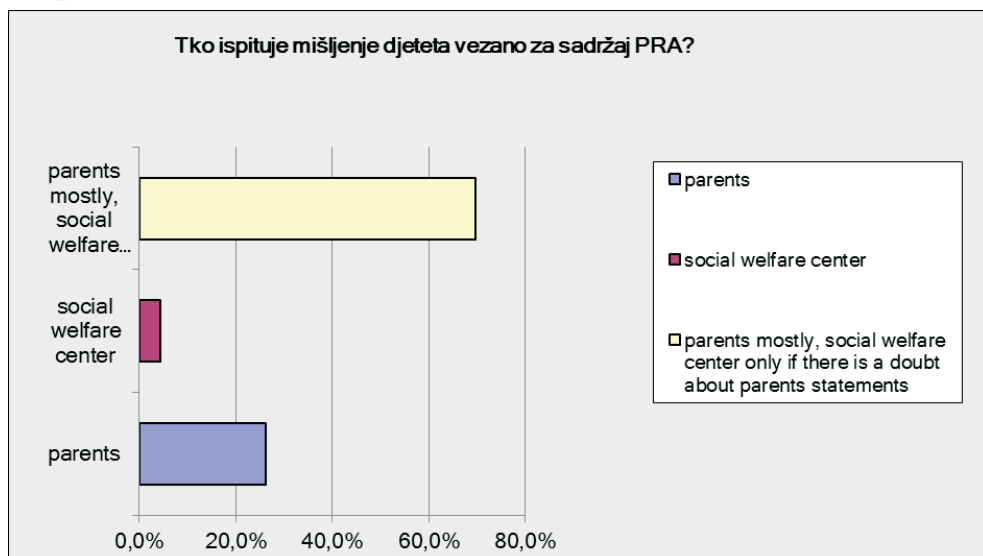
<sup>67</sup> See footnote 7.

### Graph 1



Child's views about the content of the PRA are mostly examined by its parents and the competent social welfare centre substitutes parents in interviewing the child only when there is a doubt that parents have not conveyed the child's opinion correctly (see Graph 2).

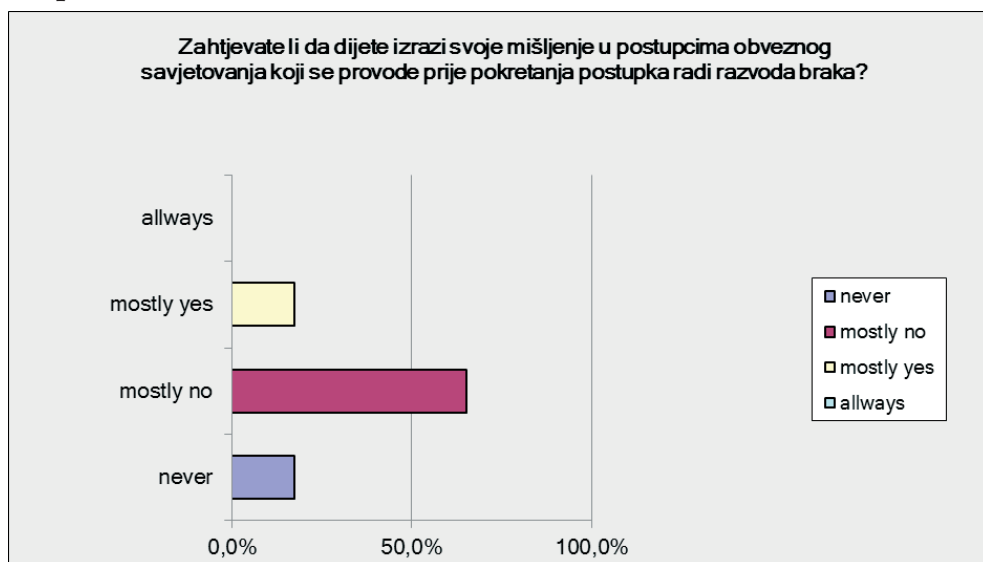
### Graph 2



Regarding the possibility of the child to express its views (not only about the content of the PRA but also about any other issues) at the competent welfare centre within the mandatory counselling procedure which spouses shall attend before initiating divorce proceedings, the 2015 Family Act binds it to a parents' consent thereto.<sup>68</sup> Accordingly, there is the question how often children are heard within the mandatory counselling procedure which shall be implemented prior to the initiation of divorce proceedings. Then, are parents reluctant to give their consent to the child to express its views or they encourage it to do that? The survey has shown as follows:

1. The majority of the social welfare centres that responded to the questionnaire never or hardly ever require from the child to express its views within the mandatory counselling procedure which shall be implemented prior to the initiation of divorce proceedings (see Graph 3). Only 17.39% of the investigated centres require from the child to express its views in most cases and none of the centres asks the child to express its views in every case.

**Graph 3**

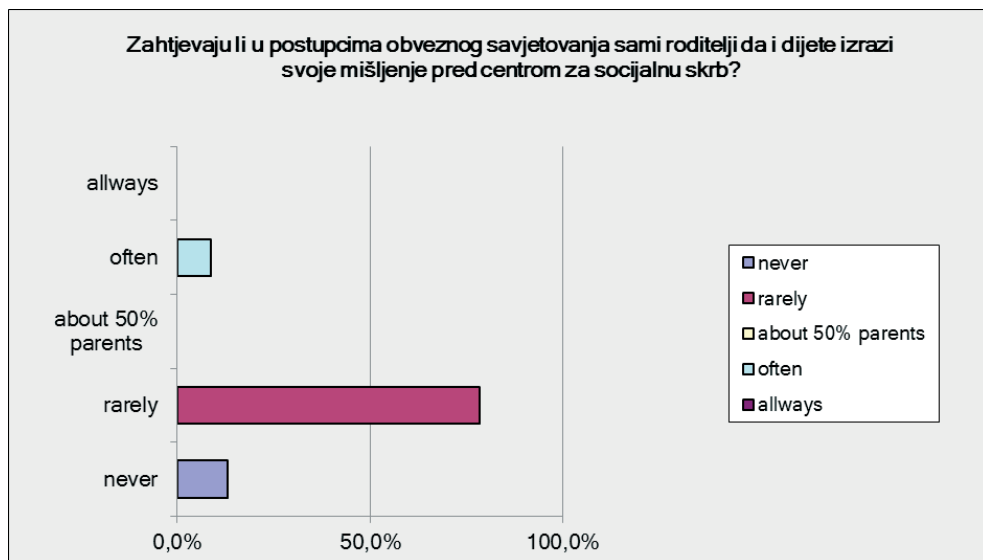


<sup>68</sup> During mandatory counselling, the child can be invited to express its views, but this requires consent of its parents. See Article 325 paragraph 3. The same applies to expression of child's views during the mandatory counselling procedure which shall be implemented prior to the initiation of other judicial proceedings dealing with the exercise of parental responsibility and contact with the child. See Article 329 paragraph 2.

2. When social welfare centres require from the child to express its views within the mandatory counselling procedure which shall be implemented prior to the initiation of divorce proceedings, parents do not usually have any objections thereto. Indeed, most respondents have confirmed that parents never oppose this possibility.<sup>69</sup>

3. Parents rarely invite their child to express its views within the mandatory counselling procedure which shall be implemented prior to the initiation of divorce proceedings (see Graph 4).

**Graph 4**



If the Recommendations of the UN Committee on the Rights of the Child for Article 12 of the UN CRC<sup>70</sup> are taken into consideration, Aras Kramar's assertion seems to be right in principle. She claims that it does not make sense to bind the expression of child's views within the mandatory counselling procedure to the

<sup>69</sup> Zagreb Social Welfare Centre – subsidiary Trnje, Našice Social Welfare Centre and Zaprešić Social Welfare Centre have revealed that about 10% of parents are against the possibility of their child to be heard and thus express its views while Zagreb Social Welfare Centre – subsidiary Novi Zagreb (New Zagreb), Zadar Social Welfare Centre and Dugo Selo Social Welfare Centre have disclosed that about 5% of parents oppose this possibility. In Valpovo, only 2% of parents argued that their child should be given such a possibility. Other social welfare centres have brought forth that parents never prevent their child to express its views within the mandatory counselling procedure.

<sup>70</sup> As promoted in the Recommendations, the right of the child to express its view should not be subject to a parents' consent thereto. See Chapter 2.1.



consent of its parents.<sup>71</sup> Nevertheless, the Croatian solutions are still compliant with the international standards applying to the right of the child to be heard in divorce proceeding. Namely, non-contentious divorce involving minor children can be implemented only if spouses draw up a PRA. The required form of a parenting plan encompasses expression of child's views and hence, the child will be given an opportunity to express its views about divorce-related issues affecting its rights and interests. If parents do not prepare a PRA, their marriage will be dissolved in contentious proceedings in which child's views will be examined in an appropriate way.<sup>72</sup> The Croatian legislator uses such an approach to provide the child with a safeguard with respect to its right to be heard, protecting it from unnecessary participation in judicial proceedings. Indeed, when it comes to the protection of children's procedural rights in divorce proceedings, one should not forget what Diduck and others have to say in this light: "children may neither want complete autonomy nor to be treated as objects".<sup>73</sup>

A PRA may be regarded as a binding document upon spouses if the parties submit it to court for verification and approval through a decree.<sup>74</sup> As pointed out herein-above, the 2015 Family Act assumes that a PRA is in principle better for the child than imposition of certain judicial solutions since parents know their children better than anyone else does.<sup>75</sup> As accentuated by Farrugia, "parents may stop their spousal relationship but where they have children in common they will invariably continue to meet and share interaction at least until the children attain the age of majority (...)". Considering the importance of an agreement on post-divorce parental responsibility both for the child and its parents, the Croatian legislator has set out that in case spouses do not conclude a PRA until mandatory counselling completion, spouses shall attend the first meeting with a family mediator.<sup>76</sup> What

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<sup>71</sup> Aras Kramar, S., *Novi pristup uredenju postupka radi razvoda braka u Hrvatskoj (New Approach to the Regulation of Divorce Proceedings in Croatia)*, Collection of Contemporary Developments in Civil Procedure – achievements in national and comparative legal theory, Faculty of Law of the University of Split, Split, 2015, p. 246.

<sup>72</sup> See Chapter 3.4.

<sup>73</sup> Diduck, A. (2003), according to Fortin, *op. cit.* note 24, p. 242.

<sup>74</sup> See Article 107 paragraph 1 and Articles 461-467 of the 2015 FA

<sup>75</sup> If it comes to a dispute between parents about the representation of the child on the occasion of verification and approval of the parenting plan or particular clauses thereof, this would suggest that an agreement on parental responsibility has not been reached and the court would be forced to reject the non-contentious divorce request and refer the spouses to the possibility of submitting a divorce petition. Aras Kramar, S. *op. cit.* note 71, p. 252.

<sup>76</sup> Except in cases envisaged by Article 332 of the Family Act when family mediation is not carried out:  
1. if based an assessment of an expert team in a social welfare centre or of a family mediator, equal participation of spouses in the family mediation procedure is not possible due to domestic violence,  
2. if one or both spouses are deprived of the capacity to work and they cannot, despite professional

is also possible in this context is to draw up a parenting plan within the framework of family mediation.

### 3.3. Family mediation

Family mediation is a procedure in which the parties, assisted by one or more family mediators, try to amicably resolve family matters<sup>77</sup>. Licensed family mediators are impartial and specially trained persons registered in the family mediator register. The benefits of family mediation are numerous. Before all, they refer to family members who are expected to independently make decisions for the benefit of the whole family. Moreover, family members are taught to efficiently communicate and negotiate in order to get fitter for the resolution of family disputes, irrespective of the changes and reorganization of family life.<sup>78</sup> In terms of divorce involving minor children, the main purpose of family mediation in Croatian law is adoption of a parenting plan or an agreement on shared parental responsibility.

A family mediator is obliged to inform the participants of family mediation on the need for attainment of the well-being of the child and is entitled to enable the child to express its views within the family mediation procedure if approved by its parents.<sup>79</sup> This means that like in the mandatory counselling procedure, the expression of child's views within family mediation is also subject to a parents' consent thereto.

If the parties do not reach an agreement on shared parental responsibility, the family mediator shall prepare a report on the termination of family mediation and state therein whether the parties have actively participated in the respective procedure or not.<sup>80</sup>

### 3.4. The right of the child to express its views in judicial divorce proceedings

If having minor children together, only spouses who have concluded an agreement on shared parental responsibility (parenting plan) within mandatory counselling or family mediation are entitled to opt for non-contentious divorce. The parties to

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assistance, comprehend the meaning and legal consequences of the procedure,  
3. if one or both spouses are incapable of making judgements and reasoning and  
4. if a spouse's residence or temporary residence is not known.

<sup>77</sup> Article 331 paragraph 1 of the 2015 Family Act

<sup>78</sup> Breber, M., Sladović Franz, B., *Uvođenje obiteljske medijacije u sustav socijalne skrbi – perspektiva stručnjaka (Introducing Family Mediation to the Social Welfare System – Experts' View)*, Ljetopis socijalnog rada (Social Work Yearbook), Vol. 14, No. 1, 2014, p. 122

<sup>79</sup> Article 339 of the 2015 Family Act

<sup>80</sup> Article 337 paragraph 1 of the 2015 Family Act

non-contentious divorce are spouses whereas the child is considered a party only in the part of the procedure relating to the approval of the parenting plan.<sup>81</sup> Prior to the acceptance of a non-contentious divorce request, the court shall check if spouses and their child agree with the parenting plan and if it is compliant with the well-being of the child. If there is a suspicion that particular clauses of the parenting plan are contrary to the well-being of the child, the court might obtain further evidence by hearing the parents and the child, and require from the social welfare centre findings and opinion about the clauses concerned.<sup>82</sup> To sum up, the existence of a parents' agreement does not prevent a court from hearing the child in the event of a doubt about the compliance of the agreement with the best interests of the child. In author's opinion, a good reason for hearing the child can be the court's suspicion that the parents have deprived their child of the right to express its views about the parenting plan, without having a reasonable justification in the child's age and degree of maturity.

The child is a party to their parents' parenting plan as well as to the non-contentious divorce procedure, so a decree on the approval of a parenting plan occurs to be prejudicial to the child.<sup>83</sup>

If spouses do not draw up a parenting plan involving an agreement on the child's residence, manner of the exercise of parental responsibility, maintenance of the contact between the child and its non-resident parent and the amount of child maintenance, the court shall *ex officio* regulate these issues in contentious divorce proceedings. One should keep in mind that the parties in contentious divorce proceedings are spouses whereas the child is a party to the part of the proceedings dealing with the above issues<sup>84</sup> and it is represented by a special guardian.<sup>85</sup>

Concerning that divorce proceedings deal with many issues affecting children's rights and interests, Article 360 of the 2015 Family Act imposes the liability on the court to provide the child with the possibility, unless the child does not want that, to express its opinion regarding issues affecting its personal and property rights and interests. Unless there are firm grounds not to do so, which requires detailed clarification in the court's decisions, the court is obliged to hear the child. The same Article governs that the court shall enable the child to express its views in an appropriate place and attended by a professional if it deems it necessary due to the circumstances of the case. It is highly important that the child is informed

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<sup>81</sup> Aras Kramar, *S. op. cit.* note 71, p. 250.

<sup>82</sup> *Ibid*, p. 253.

<sup>83</sup> *Ibid*, p. 251.

<sup>84</sup> *Ibid*, p. 258

<sup>85</sup> See Chapter 3.5.

about possible consequences of respecting its opinion.<sup>86</sup> Because of its age, the child can have a narrow perception of things and be deprived of analytical thinking. Therefore, the right of the child to be informed about possible consequences of honouring its opinion is a certain compensation for these deficiencies and an attempt to balance its position with respect to other participants in the proceedings.<sup>87</sup>

If divorcing parents do not conclude a PRA, the competent social welfare centre shall warn them that the court, after *ex officio* initiating divorce proceedings based on a divorce petition filed by one of the spouses, is going to make a decision on issues relevant for the child<sup>88</sup>, enable the child to be heard and appoint a child's special guardian.<sup>89</sup> The right to a child's special guardian is granted by Article 240 paragraph 1 of the 2015 Family Act. The role of a special guardian is to represent the child and protect its rights and interests in divorce proceedings as well as to respect its opinion and wishes, which is elaborated in detail in the subsequent chapter.

### 3.5. The role of a child's special guardian

The aforementioned demonstrates that a child's special guardian is utterly important for the development of child-friendly justice systems, which is promoted in relevant European documents. In order to avoid situations in which children get, as depicted by Vandekerckhove and O'Brien "the shortest end of the stick, when their rights are "balanced" against rights of opposing adults"<sup>90</sup>, the Croatian legislator has significantly enhanced the role of a child's special guardian. Referring to recent case-law research with respect to the appointment and tasks of a child's special guardian, laid down in the 2003 Family Act, Rešetar and Rupić single out the reasons behind the 2015 reform of the Croatian family legislation in this sub-field. Those two authors claim that until the entry into force of the new law, the child had no special guardian in decision-making and child arrangement enforce-

<sup>86</sup> This liability has been derived from international treaties (see Chapter II) and Article 86 of the 2015 Family Act.

<sup>87</sup> Hrabar, D., *Europska konvencija o ostvaranju dječjih prava – nov prilog promicanju dječjih prava (European Convention on the Exercise of Children's Rights – a New Contribution to the Promotion of Children's Rights)*, Collection of Works of the Faculty of Law in Zagreb, Vol. 46, No. 4, 1996, pp. 398/399.

<sup>88</sup> Following a divorce petition, spouses may themselves propose a child's residence, manner of the exercise of their parental responsibility, maintenance of the contact between the child and its non-resident parent and amount of child maintenance, but the court is not bound to act in accordance with these proposals. Article 56 paragraphs 1 and 2 of the 2015 Family Act.

<sup>89</sup> Parents shall be warned by the court that it may rule that they shall bear the costs of a child's special guardian. See Article 327 of the 2015 Family Act.

<sup>90</sup> Vandekerckhove, A., *op cit.* note 2, p. 524.

ment processes even though it was clear that it had come to a conflict of interest between the child and its parents and the child needed more protection itself since enforcement orders represent the most delicate form of protection of the right to contact with the child. The same authors assert that the passivity and indifference to the protection of children's rights shown by special guardians in cases involving separation of the child from its family, i.e. situations affecting the fundamental human right to family life, were no exception before.<sup>91</sup> Encouraged by the poor state of the judicial practice and respecting the European guidelines for the protection of children's procedural rights, the Croatian legislator reformed the position and tasks of a child's special guardian.

Taking account of all the above things clarifying the importance assigned by the Croatian legislator to parents' agreements which are obviously contrary to the interests of the child, one can assume that in divorce proceedings a child's special guardian should defend the child from situations in which it is likely to get "the shortest end of the stick" only where there is no such agreement.<sup>92</sup> The interests of the child in proceedings dealing with the exercise of parental responsibility, contact with the child and child maintenance are represented by a special guardian appointed for the purpose of that proceeding<sup>93</sup> while the parents are not entitled to undertake any action on behalf of the child within the same proceeding.<sup>94</sup> A child's special guardian is a person who has passed the bar exam and works in the Centre for Special Guardianship. The duties of a child's special guardian are as follows<sup>95</sup>:

- represent the child in proceedings for which he/she is appointed,
- inform the child about the case, its course and outcome in an appropriate way corresponding to the child's age and degree of maturity,
- if need be, contact with the child's parents and other persons who have a close relationship with the child,

<sup>91</sup> See Rešetar, B.; Rupičić, D., *Posebni skrbnik za dijete u hrvatskom i njemačkom obiteljskopravnom sustavu (Child Special Guardian in Croatian and German Family Law)*, Collection of Works of the Faculty of Law of the University of Rijeka, Vol. 37, No. 3, 2016, pp. 1176/1177. See also Rešetar, B., Emery, E. R., *Children's Rights in European Legal Proceedings: Why are Family Practices so Different from Legal Theories?*, Family Court Review, Vol. 46, No. 1, 2008, pp. 65-77.

<sup>92</sup> Of course, if they are not compliant with the best interests of the child, which shall be assessed by the court prior to their approval.

<sup>93</sup> Exceptionally, the child may not be provided with a special guardian if it has turned 14 and has been recognized, by means of a decree, the capacity to undertake action in proceedings. See Article 240 paragraph 4 of the 2015 Family Act

<sup>94</sup> Article 414 of the 2015 Family Act

<sup>95</sup> Pursuant to Articles 240 and 360 of the 2015 Family Act

- investigate the opinion of children under 14 years of age, respecting the standards defined in the Ordinance on the Manner of Obtaining the Child's Views<sup>96</sup> (hereinafter: Ordinance).

When prescribing the protection of the right of the child to express its views, the Croatian legislator took account of the child's age, degree of maturity, and its mental and physical condition. In regard therewith, a child who has turned 14 can personally express its views and if the court deems it necessary considering the circumstances of the case, the child can be accompanied with a professional. A child under 14 years of age may, if allowed by the court, express its views in a convenient place<sup>97</sup> and through a person other than a child's special guardian, such as psychologists and other persons possessing adequate qualifications, skills and competences needed for determination of child's views.<sup>98</sup> Respecting non-discriminatory policies, the legislator intended to provide every child with the possibility to express its views. It is clear that the circumstance of a concrete case may require possession of special skills and competences by those who hear the child, particularly if children with deteriorated mental and emotional health are taken into consideration.

#### 4. CONCLUSION

The analysis of the legal protection of the right of the child to express its views in civil and administrative proceedings in European law implies several basic conclusions:

1. the child has the right to express its views in all proceedings directly or indirectly affecting the protection of its rights and interests,
2. the child has the right to freely decide whether it wishes to be heard or not,
3. the child has the right to freely decide whether it wishes to express its views directly or through a representative,
4. the child needs to express its views in a convenient environment where it feels safe,

<sup>96</sup> Ordinance on the Manner of Obtaining the Child's Views (Official Gazette no. 123/2015)

<sup>97</sup> A convenient place is, according to Article 5 of the Ordinance, a place beyond the courtroom, which is fitted and adapted to working with children and which ensures privacy, child safety and undisturbed work, specially equipped court premises, a special room in a social welfare centre, the Centre for Special Guardianship and other premises specified by the court.

Expression of child's views may take place in the family home (if permitted by the parents), in a foster home or in the home of a natural or a legal person where the child resides.

<sup>98</sup> See Article 2 of the Ordinance.

5. in particularly delicate cases, relevant authorities should adopt a multidisciplinary approach to ensure the child the exercise of its right to be heard,
6. when the child expresses its views, its best interests and its private and family life should be fully respected.

Respecting the standards of European law in this legal area, the Croatian legislator gave due weight to the right of the child to express its views when undertaking the family legislation reform in 2015. Precisely, the right of the child to express its views in divorce proceedings is protected in Croatia in two ways, depending on whether there is an agreement on post-divorce parental responsibility or not. If there is such an agreement, it should be prepared in the form of a parenting plan which shall be supported by the child. If parents do not reach an agreement in the form of a parenting plan or if there is a doubt that its content is not compliant with the best interests of the child or if there is a conflict of interests between parents and their child, the child shall be given an opportunity to be heard in court proceedings. Moreover, the child shall be provided with a special guardian for the protection of its (procedural) rights and interest in contentious divorce proceedings. That way, the Croatian legislator ensures protection of children's procedural rights in proceedings resulting in decisions which directly or indirectly affect their rights and interests. Divorce proceedings definitely belong to such proceedings where the child shall be protected from exposure to judicial examination without reasonable justification in the protection of its best interests.

The author shares the opinion that if parents have agreed on all the issues relating to the exercise of their post-divorce parental responsibility and if the child has been given an opportunity to express its views about its parents' agreement, there is no need to examine the child's views additionally before competent bodies. Otherwise, the child may be unnecessarily exposed to possibly unpleasant situations. When parents live in a family union, the state does not interfere with their family life and the life of their children unless there is a reasonable doubt that parents' agreements on the manner of the exercise of their parental responsibility are not compliant with the best interests of their child or unless there is a suspicion that they do not respect their child's views in making decisions which affect its rights and interests. Indeed, there is no reason for the law to make a difference between situations in which parents live together and those in which they lead a separate life.

Certainly, due attention should be paid to the fact that the possibility of parents to examine their child's views and incorporate it into a PRA should not be interpreted as a possibility but as a liability of parents. Of course, this can be said under



the condition that the child's age and degree of maturity are not regarded as an obstacle to examination of its opinion, which should be transparently presented in the PRA. The author holds that when parents state in the parenting plan template that their child has not expressed its views about the parenting plan and when parents indicate that they have not accepted their child's opinion, without supporting it with the child's age and maturity, the court should not approve such a plan or agreement without hearing the child. Otherwise, the right of the child to be heard, which is granted by numerous international documents, will be violated and a PRA as such could be qualified as a controversial legal ground in the event of cross-border movement of the child. In this light, the author points to the need for amendment of the Regulation on the Required Form of a Parenting Plan in a way that examination of child's views shall be mandatory in terms of the content of a PRA. Such a need has been confirmed by a survey conducted in social welfare centres, which has disclosed that some social welfare centres permit conclusion of PRAs that do not contain a field designated for describing child's views. With this exception, the legislator's idea to protect the right of the child to express its views within the mandatory counselling procedure which shall be implemented prior to the initiation of divorce proceedings seems to work successfully in practice.

Hereby the light is shed on the need to conduct additional research of recent case-law relating to the exercise of the right of the child to express its views in divorce proceedings in Croatia, particularly studies of judicial practice regarding:

- court's approval of PRAs, depending on whether they include child's views or not,
- court's approval of PRAs, depending on whether the parents have taken into consideration child's views about the PRA content or not, and
- protection of the right of the child to express its views in contentious divorce proceedings.

To conclude with, an affirmative answer can be given to the question of the compliance of Croatian legislation with European standards in this legal area. Croatian legislation contains clearly elaborated mechanisms intended for efficient exercise of the right of the child to express its views in divorce proceedings without jeopardizing any element constituting its best interests. Final assessment of the successfulness of new legal solutions in practice requires performance of additional research.

In the end, one needs to stress that expression of views in divorce proceedings and other family matters hides a danger when children are involved therein. This danger can hinder efficient exercise of the right of the child to express its views if

persons who communicate with the child do not possess skills and competences needed for proper and appropriate communication with children. It should also be considered if there are reasonable grounds to introduce, like some other comparative European legislations, mandatory multidisciplinary training for Croatian experts who carry the burden of the responsibility for communicating with children in justice.

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