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## ADOPTION OF A CHILD WITHOUT CONSENT OF ITS PARENT WITH A INTELLECTUAL DISABILITY – CASE OF A.K. AND L. *v.* CROATIA

### **Abstract:**

*This paper discusses the matter of parents prior right to provide his/her child with care in situations in which a child's parent is a person with intellectual disabilities. The author analyzes the case of A.K. and L. v. Croatia in which European Court of Human Rights concluded that it come to violation of the right to family life of A.K, a mother with an intellectual disability and her son L., who was adopted without the mother's consent.*

*The paper presents a critical review of Croatian family law in a matter of a parent's consent for an adoption when the parent is a person with intellectual disabilities. By connecting contemporary standpoints of the European Court of Human Rights and the latest scientific knowledge about the ability of persons with intellectual disabilities to take care of their child, the author discusses a possible conflict between the principle of child's best interest and the priority right of a parent to take care of his/her child. Also, the author warns about the danger of a parent with intellectual disabilities being deprived of his/her parental rights and completely excluded from the process of adoption even in situations when the parent could, with adequate professional help and support, maintain a family relationship with the child. From that perspective the author also discusses the latest reforms of the family law concerning protection of parental rights of persons deprived of their capacity for work.*

**Keywords:** *parental responsibility, intellectual disability, adoption, consent*

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## I. INTRODUCTION

In the case of *A.K. and L. v. Croatia*<sup>1</sup> (hereinafter: *A.K. and L. v. C.*), the first applicant was a person with a mild mental disability<sup>2</sup> who applied to the European Court of Human Rights (hereinafter: ECtHR) due to violation of the right to family life between her and her son L. Since A.K. was, following a decision of the competent court, divested of her parental rights in respect of L. and since according to the Croatian family law legislation, no parent's consent for child adoption is required if the parent has been divested of his/her parental rights, L. was adopted without consent of A.K. What is disputable in this case is the reasoning of the competent national court implying that due to her mild mental disability and scoliosis, A.K. should have been provided assistance in the protection her rights and interests because she was not able to protect them herself and she should have been provided professional help and support in the exercise of her parental rights, instead of having been divested thereof. Nonetheless, A.K. had been, based on a decision of the competent court which adjudicated following a request of the Welfare Centre, divested of her parental rights, after which L. was adopted without her consent. Although A.K. had never directly hurt the interests of her child and even though she, within the limits set by her (mild) mental disability, had shown concern for her child and expressed a wish to proceed with maintaining family life with her child, the system did not protect her parental rights and thus, referring to the best interests of the child, irreversibly broke the family bond between A.K. and her son L.

<sup>1</sup> *A. K. and L. v. Croatia*, ECtHR, Application no. 37956/11 [2013]

<sup>2</sup> T. Not explains it in a way that people with mental disabilities should be classified as disabled persons. This author stresses that people with mental disabilities are also known as persons with developmental disabilities or persons with special needs, but the term of persons with intellectual disabilities has lately prevailed in this context. She also warns that the differences in the terminology and definitions, which exist both in professional books and relevant regulations, may affect the consistence of law enforcement and bring to denial of certain privileges and rights. See T. Not, "Mentalna retardacija: definicija, klasifikacija i suvremena podrška osobama s intelektualnim teškoćama, *eng. Mental Disability: Definition, Classification and Contemporary Support to Persons with Intellectual Disabilities*", *Nova prisutnost*, vol. 6, no. 3, 2008, p. 341. A. Došen also observes that the term of mental retardation (disability) has been substituted with the term of intellectual disability which is defined as "a deficiency in psychosocial development (particularly its cognitive segment) with respect to an average person of the same chronological age." She then suggests that "pursuant to international systems of classification of mental disorders (DSM IV and ICD 10), intellectual disabilities are classified according to the following criteria:

- reduced cognitive ability (IQ score in psychometric tests below 70)
- difficulties in adaptive behaviour
- diagnosis before the age of 18 years."

This author emphasizes that intellectual difficulties are not mental but developmental disorders and hence they cannot be treated or cured like some other illnesses but one should focus on stimulation of possible development. See A. Došen, "Poremećaji ponašanja i psihički poremećaji osoba s intelektualnim teškoćama, *eng. Behavioural Disorders and Mental Disorders of Persons with Intellectual Disabilities*", *Socijalna psihijatrija*, vol. 38, no. 2, 2010, p. 109-110.

This paper begins with analysis of the circumstances of the case of *A.K. and L. v. C.*, basic objections of the applicant and conclusions of the ECtHR. All the controversial case-related issues of child adoption without consent of the parent with intellectual and physical disabilities are also taken into consideration. The paper attempts to answer if there is a conflict between the principle of the best interest of the child and the fundamental parental right to provide childcare even in case of a parent's intellectual disability. Since the judgment in the case of *A.K. and L. v. C.* was passed when the Family Act was in force<sup>3</sup> [(hereinafter: FA (2003))], the relevant legal issues are viewed through the prism of this Act. Taking account of the standpoints of the ECtHR in the case of *A.K. and L. v. C.*, the new Family Act<sup>4</sup> [hereinafter: FA (2015)] has brought some novelties relating to the protection of the parental rights of those who are not capable of protecting their own rights and interests, which is also discussed in this paper.

Although the judgment uses the term of 'mental disability', the respective literature has recently replaced it with the notion of 'intellectual disability'<sup>5</sup>, so wherever in the paper reference is not made exclusively to the judgment in the case of *A.K. and L. v. C.*, the term of 'intellectual disability' will be preferred.<sup>6</sup>

## II. CASE OF A.K. AND L. V. C.<sup>7</sup>

### 2. 1. The Circumstances of the Case

The first applicant A.K. was born in 1987. The second applicant L., the biological son of the first applicant was born on 10 December 2008. By a decision of the K. Welfare Centre of 19 December 2008, L. was placed in a foster family in another town, on the ground that the first applicant was unemployed and had no income, was supported by her mother, attended a special needs programme in school and lived with her mother and mentally ill brother in an old and dilapidated house without heating.

The Welfare Centre drew the conclusion that A.K. is mildly mentally retarded and lodged a request with the court proposing that A.K. be divested of parental rights since she lived in poor housing conditions, in untidy and unmaintained premises, since she had

<sup>3</sup> Obiteljski zakon, *eng.* Family Act (Official Gazette 116/03, 17/04, 136/04, 107/07, 57/11, 61/11)

<sup>4</sup> Obiteljski zakon, *eng.* Family Act (Official Gazette no. 103/15)

<sup>5</sup> See footnote no. 2.

<sup>6</sup> Zakon o socijalnoj skrbi, *eng.* Social Welfare Act (Official Gazette no. 157/13, 152/14, 99/15) in its Article 4 item 9 defines a disabled person as "a person with long-term physical, mental, intellectual or sensory impairment which may, in interaction with various drawbacks, prevent such a person from full and efficient participation in the society on an equal footing to a person without disabilities".

<sup>7</sup> Quoted from the judgment in the case of *A. K. and L. v. Croatia*

visited her son only twice in a one-year time and was not interested in him, so she, according to the Centre's opinion, had abandoned her child and had not created appropriate conditions for joint life with her child within a year after the child had been separated from its family. The first applicant contested the request and asked the court to restore her parental rights and give her a chance to care for the child again. For the sake of determining the facts in the case, the competent Municipal Court ordered the first applicant to undergo psychiatric expertise. The expertise resulted in the diagnosis that A.K. was affected by a mild intellectual disability accompanied with severe scoliosis and that due to her mental and physical condition, she was not capable of providing her son with good care.

On 10 May 2010, the K. Municipal Court divested the first applicant of her parental rights in respect of her son L., stating that "this court accepts the opinion of the expert ... and considers that the mother ... is not able to care for L. Owing to her health – advanced scoliosis – she is not able to pick the child up, hold him in her arms, run after him, or prevent him from hurting himself, because the scoliosis prevents her from moving quickly. In addition, at the hearings held before this court, [hereinafter: the Court] established that the mother spoke with difficulty and had a limited vocabulary, which indicated a risk that, if entrusted to his mother's care, the child would not learn to speak or would learn to do so with a delay. It is questionable whether he would be able to start his schooling on time, because he would surely be behind in his development in comparison with other children of the same age; so this Court cannot allow that to happen, because the child has the right to a life of good quality in orderly surroundings with all the necessary care, and, above all, in sanitary conditions, none of which he would have with his mother.

In her reply the respondent stated that she wished to try to care for her son L., but this Court, in order to protect the wellbeing of the child, cannot allow such an experiment."

On 28 October 2010, the first applicant's legal aid lawyer lodged a request with the K. Municipal Court, asking it to restore her parental rights in respect of L. The first applicant alleged that her living conditions had significantly changed after the decision divesting her of her parental rights had been adopted. Thus, her mentally ill brother no longer lived in the same household but had been placed in an institution; the house had been partly renovated and a heating system had been installed. She also argued that a mild intellectual disability should not be a reason for depriving her of her parental rights and that the allegations that she did not know how to prepare meals or care for a child had not been true. Furthermore, no expert opinion had established that she had a speech problem and had limited vocabulary or a limited ability to reason which would create a risk that the child, if entrusted to her care, would not learn how to speak.

On 10 December 2010, the first applicant informed the Welfare Centre that in a telephone conversation with L's guardian, which took place on 7 December 2010, she had learned that L. had been put up for adoption. She asked the Welfare Centre to provide her with all the relevant information concerning the adoption of her son L. On 14 De-

ember 2010, the Welfare Centre replied that L. had been adopted by the final decision of 15 October 2010 and that no consent for adoption was needed from the parent who had been divested of parental rights, and that such a parent could not be a party to adoption proceedings.<sup>8</sup> No further information could be given to her since the data concerning the adoption were confidential.

## 2.2. The Applicant's Objections

The first applicant complained that hers and her son's right to respect for family life protected by the European Convention on Human Rights<sup>9</sup> (hereinafter: ECHR) under Article 8 thereof<sup>10</sup> had been infringed in that she could not effectively participate in the proceedings concerning her parental rights, and that her son was put up for adoption without her knowledge, consent or participation in the adoption proceedings.

The first applicant also complained, under Article 6 of the ECHR, that she had not been a party to the adoption proceedings, that she had not given her consent to the adoption and that she had never been informed that such proceedings had been instituted. In this connection, the first applicant complained that her child's guardian had been an employee of the Welfare Centre that had carried out the adoption proceedings, and claimed that the guardian had influenced the initiation of the adoption proceedings instead of protecting the first applicant's rights.

The first applicant also complained that her child had been taken from her owing to her intellectual disability and physical impairment and that therefore she had been discriminated against on that basis. She relied on Article 14<sup>11</sup> of the ECHR.

## 2.3. Basic Conclusions of the ECtHR

While judging in this case, the ECtHR noted as follows:

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<sup>8</sup> Pursuant to Article 138 paragraph 3 of the FA (2003), parents whose consent for child adoption is not required shall not be deemed a party in adoption proceedings.

<sup>9</sup> The ECHR was adopted by the Council of Europe in 1950, it came into force in 1953 and Croatia ratified it together with its Protocols in 1997.

<sup>10</sup> Article 8 of the ECHR, reads as follows:

*"1. Everyone has the right to respect for his private and family life, his home and his correspondence.  
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

<sup>11</sup> Relevant part of Article 14 of the ECHR reads as follows:

*"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

“The Court considers that the national authorities should have ensured that, in view of the importance of the proceedings at issue for her right to respect for her family life, the first applicant’s interests were adequately protected in the proceedings at issue. That the first applicant could not properly understand the full legal effect of such proceedings and adequately argue her case and thus protect her rights and interests as the biological mother of L., is evidenced by her above-described personal circumstances. ... The Court finds it difficult to accept that a person whose speech impediment and limited vocabulary were taken as grounds to fear that she would not be able to teach her child to speak properly, would be able to argue her case in proceedings before the national courts concerning her parental rights. ... Owing to the decision of 10 May 2010, divesting the first applicant of her parental rights in respect of L., the first applicant was subsequently excluded from the adoption of L. Therefore, in the proceedings preceding a decision of such paramount consequences, the applicants’ rights and interests should have been adequately protected by the first applicant being provided with proper assistance by a lawyer in the interests of affording her the requisite consideration of her views and protection of her interests as well as those of her biological son L. from the standpoint of preserving ties with his biological mother. While those proceedings were pending, the first applicant learned on 7 December 2010 that L. had already been adopted. The proceedings for restoring the first applicant’s parental rights were therefore terminated on 28 January 2011. No further remedy would have served any purpose, since no proceedings concerning the first applicant’s parental rights could be continued owing to the fact that L. had already been adopted. The Court further notes that the first applicant was not informed of the adoption proceedings and was not heard at any time in that connection. Since she was not a party to the adoption proceedings she had no right to use any remedy in the context of those proceedings. While the Court can accept that her consent, owing to the fact that she had been divested of her parental rights, was not necessary in the adoption proceedings, it nevertheless considers that where, as in Croatia, a national system allows for parental rights to be restored, it is indispensable that a parent be given an opportunity to exercise that right before the child is put up for adoption, should such a possibility have any meaning. In the present case, by not informing the first applicant about the adoption proceedings the national authorities deprived her of the opportunity to seek restoration of her parental rights before the ties between the biological parent and child were finally severed by the child’s adoption. She was thus prevented from enjoying her right guaranteed by the Family Act.”

Against this background the ECtHR concluded that it came to violation of Article 8 of the Convention. Having found violation of this provision, the ECtHR concluded that no separate issue arises under Article 6 § 1 of the Convention. The ECtHR also concluded that it is not necessary to examine any further complaint under Article 14 of the Convention.



### III. WHAT IS DISPUTABLE IN THE CASE OF A. K. AND L. V. C IN REGARD TO CHILD ADOPTION WITHOUT CONSENT OF A MOTHER WITH INTELLECTUAL AND PHYSICAL DISABILITIES?

As shown in the circumstances of the case of *A. K. and L. v. C*, the Welfare Centre did not require consent of A. K. for adoption of her son L. Furthermore, despite the resistance to divest her of parental rights and her struggle for the child's return, the child was adopted without her knowledge and consent. The circumstances in this case entail that one should take into consideration the legal frameworks regulating consent of parents with intellectual and physical disabilities.

First of all, it is important to accentuate that parents' intellectual and physical disabilities themselves shall, neither pursuant to the FA (2003) nor in line to the FA (2015)<sup>12</sup>, constitute a ground on which a child could be adopted without consent of its parents.<sup>13</sup> In the judgment *A. K. and L. v. C*, disability is not stated as the reason why the Welfare Centre did not require consent of A.K. for adoption of L., but only deprivation of her parental rights. In fact, in compliance with the FA (2003), a child may be adopted without

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<sup>12</sup> See Chapter V.

<sup>13</sup> *Obiteljski zakon, eng. The Family Act* (Official Gazette 162/98) encompassed a provision, according to which adoption could be carried out against the will or without consent of the non-resident parent if such has grossly neglected their care for the child for over three months (Article 129 paragraph 2). It is hard to assume which circumstances may lead to a failure of the non-resident parent to care for their child for over three months. It is certain that the circumstances due to which a parent might grossly neglect the care for their child do not necessarily have to arise solely from the action of the parent, so this provision hid the danger of adopting the child against the will of the non-resident parent and in case the parent could not provide the child with proper care for objective reasons for over three months. Among other things, a parent's intellect disabilities might be the cause that he/she does not properly care for her/his child, which does not necessarily mean that the parent has no emotional bonds with the child or that he/she does not want to provide proper care for the child, but more likely that the former is not (currently) capable thereof due to his/her intellectual disabilities. It is this issue that appeared in the case of *A.K. and L. v. C*. If this provision had been in force at the time when the Welfare Centre decided on child adoption in the referring case, it would have represented a legal ground for adoption against the will of A.K. even if there had been no judicial decision on the divestment of parental rights. Having observed the dangers emerging from the legal possibility that the Welfare Centre makes a discretionary assessment if it would come to adoption against the will of a parent with parental rights, the legislator, by adopting the FA (2003), withdrew such a legal possibility. It is worth mentioning that the research conducted by D. Hrabar and A. Korać-Graovac has demonstrated that all the possibilities foreseen by the FA (1998) relating to adoption without a parent's consent, in respective cases, the welfare centres applied only the prerequisite that a parent had already been divested of his/her parental rights and they did not exercise their power to determine the circumstances of the case and make an adoption decision against the will of the parent pursuant to Article 129 paragraph 2 of the Family Act (1998). See D. Hrabar and A. Korać-Graovac, *Primjena obiteljskopравnih mjera za zaštitu dobrobiti djece te zasnivanje posvojenja bez pristanka roditelja, eng. Implementation of Family Law Measures for the Protection of the Well-Being of Children and Adoption without Consent of the Parents*, Zagreb, Pravni fakultet Sveučilišta u Zagrebu, 2003, p. 119.



consent of a parent deprived of their parental rights, a parent fully incapacitated for work and a minor parent who cannot comprehend the meaning of adoption.<sup>14</sup> To sum up, since A.K. was divested of her parental rights, she was not invited to provide consent for the adoption of her son.

The European Convention on the Adoption of Children (Revised)<sup>15</sup> stipulates that adoption shall not be granted without consent of the parents, but if the father or mother is not a holder of parental responsibility in respect of the child, or at least of the right to consent to an adoption, the law may provide that it shall not be necessary to obtain his or her consent.<sup>16</sup>

Europe's White Paper on principles concerning the establishment and legal consequences of parentage<sup>17</sup> also sets forth that adoption shall not be granted without consent of the mother and father, but consent of the mother or the father or both of them shall not be required if they are not holders of parental rights.<sup>18</sup>

Indeed, from the aspect of both international and national law, there is nothing controversial in the fact that in the case of *A.K. and L. v. C, L.* was adopted without consent of his mother A.K. who had been previously divested of her parental rights. However, what requires speculations is the ground for divestment of the first applicant's parental rights and their close link with her intellectual disabilities and severe scoliosis. After psychiatric examination, A.K. was diagnosed with a mild mental disability accompanied with severe scoliosis, which makes her incapable of caring for her son. The Welfare Centre had previously ascertained that the mother does not maintain personal hygiene nor cleans her housing premises. It is to be assumed that such conduct has resulted from her intellectual disability, due to which the applicant was not able to understand the dangers of such a way

<sup>14</sup> Article 130 of the FA (2003)

<sup>15</sup> The European Convention on the Adoption of Children was adopted in Strasbourg in 1967. In 2008, the Council of Europe opened the revised European Convention on the Adoption of Children for signing. The revised Convention entered into force on 1 September 2011. Croatia has neither signed the European Convention on the Adoption of Children (1967) nor the revised European Convention on the Adoption of Children (2008). See a comparative view to these Conventions in A. Korać Graovac, "Europska konvencija o posvojenju djece, *eng.* European Convention on the Adoption of Children", *Dijete i društvo*, vol. 11, no. 1/2, 2009, pp. 279-292. See also D. Hrabar, "Posvojenje na razmeđu interesa posvojitelja i posvojenika, *eng.* Adoption at the Crossroads between Adopters and Adopted Children", *Zbornik radova Pravnog fakulteta u Zagrebu*, vol. 58, no. 5, 2008, pp. 1107-1139, D. Jakovac-Lozić, "Ususret novoj Europskoj konvenciji o posvojenju djece, *eng.* Meeting the New European Convention on the Adoption of Children", *Zbornik radova Pravnog fakulteta Sveučilišta u Mostaru*, 2007, pages 91-121.

<sup>16</sup> See Article 5, paragraph 1 item a and paragraph 4 of the European Convention on the Adoption of Children.

<sup>17</sup> Council of Europe's Committee of Experts on Family Law on 15 January 2002 adopted a "White Paper on principles concerning the establishment and legal consequences of parentage". "White Paper" contains 29 principles which are contained in the following 3 parts: principles relating to the establishment of legal parentage; principles relating to legal consequences of parentage; and possible legal consequences where parentage has not been established.

<sup>18</sup> See Principle 15.

of life for her and the child. Therefore, one can conclude that the intellectual disabilities did not set grounds for not requiring the A. K. consent for the adoption. Yet, the intellectual and physical disabilities had resulted in the mother's incapability to provide the child with proper care, which motivated the competent Court to divest her of parental rights. So, it can be implied that in this concrete case, it was the mother's intellectual and physical impairment that brought to adoption of the child without her consent.

In this respect, one can raise the question whether a parent's intellectual and physical disability can constitute a firm ground for divestment of his/her parental rights. Pursuant to the FA (2003), which was in force at the time when the decision on the divestment of the first applicant's parental rights was made, the reasons for divestment of parental rights include abuse and severe infringement of parental responsibilities, duties and rights.<sup>19</sup> In the light of Article 114 paragraph 2 of the FA (2003), a parent shall be considered abusing or severely violating parental responsibilities, duties and rights if he/she:

1. inflicts physical or emotional violence on the child, including exposure to violence among adult family members,
2. abuses the child sexually,
3. exploits the child, forcing it to excessive labour or labour which is not appropriate for its age,
4. permits the child to consume alcoholic beverages, drugs or other narcotics,
5. guides the child to socially unacceptable behaviour,
7. does not provide the child with proper care as its non-resident parent,
8. does not create, without having justified grounds for not doing so, conditions for joint life with the child within a period of three years after becoming its non-resident parent,
9. does not provide for the basic needs of the child as its resident parent or does not adhere to the measures previously passed by a competent body for the sake of protection of the rights and wellbeing of the child,
10. in any other way severely abuses the rights of the child.

As presented above, the FA (2003) does not regard parents' intellectual and physical disabilities as a reason for divestment of his/her parental rights. Only if a parent with intellectual and physical disabilities has abused or severely violated his/her parental responsibilities, duties and rights in one of the ways laid down in Article 114 paragraph 2 of the FA (2003), he/she could be deprived of parental rights like any other parent.

It is rather unusual that the psychophysical condition of A. K. lead to deprivation of her parental rights but not to deprivation of her capacity for work, even though the FA

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<sup>19</sup> Article 114 paragraph 1 of the FA (2003)

(2003) foresaw the possibility of full or partial deprivation of capacity for work. If she had been deprived of capacity for work, a guardian would have been appointed to her in order to protect her fundamental human rights which could not obviously be protected by herself, such as the right to family life with her child.<sup>20</sup> Actually, the purpose of guardianship as an institute from the field of family law is protection of the rights and interest of persons who, due to their condition, might get into an underprivileged position with respect to other persons or groups.<sup>21</sup>

The same authority is competent of conducting adoption proceedings and of care for people who are incapable of defending their rights and interests, so what is even more surprising is the fact that in the case of *A.K. and L. v. C*, the Welfare Centre made an adoption decision referring to the protection of the interests of the child and at the same time completely neglected the rights and interests of the mother with intellectual disabilities. Particularly worrying is the fact that the Welfare Centre did only fail to provide the mother with necessary aid after the divestment of her parental rights but also excluded her from making any decisions relating to her child. Moreover, it did not take so long at all for the Welfare Centre to make a decision on child adoption whereat it fully neglected the mother's appeal to get her son back, try to care for him and create conditions for living with him. One can conclude that the competent bodies made a huge mistake in this case and thus violated the fundament human rights of both the mother and her son.

#### IV. BEST INTERESTS OF THE CHILD AND THE PARENTAL RIGHTS OF PARENTS WITH INTELLECTUAL DISABILITIES

It is quite certain, as pointed out by B. Rešetar, that the institute of parental care will remain immortal in its core and exist as long as the human race. On the other hand, one cannot ignore the fact that the world unstopably goes on and brings what used to be unimaginable.<sup>22</sup> Once it was believed that persons with intellectual disabilities

<sup>20</sup> On the family law regulation of the status of persons deprived of capacity for work see in I. Milas, "Obiteljskopравни status osoba lišenih poslovne sposobnosti, eng. *The Status of Persons Deprived of Capacity for Work in Family Law*", Zagreb, Pravni fakultet Sveučilišta u Zagrebu, 2005. More on the role of a guardian in the protection of persons who are incapable of protecting their rights and liabilities see in I. Milas Klarić, "Pravni status skrbnika kao jamstvo zaštite ljudskih prava odraslih osoba, eng. *The Legal Status of a Guardian as a Guarantee of Protection of Human Rights of Adults*", Zagreb, Pravni fakultet Sveučilišta u Zagrebu, 2010.

<sup>21</sup> Similarly J. Džankić and I. Milas Klarić, "Uloga skrbnika u zaštiti osobnosti osobe lišene poslovne sposobnosti, eng. *The Role of a Guardian in the Protection of the Personality of Persons Deprived of Capacity for Work*", *Pravnik*, vol. 44, no. 88, 2010, p. 89.

<sup>22</sup> B. Rešetar, "Pravna zaštita prava na (zajedničku) roditeljsku skrb – kamo vodi ovaj put kojim smo krenuli, eng. *Legal protection of the Right to (Joint) Parental Care – the Path We Have Taken?*", *Pravna zaštita prava na (zajedničku) roditeljsku skrb*, Osijek, Pravni fakultet Sveučilišta J.J. Strossmayera u Osijeku, 2012, p. 244.

were incapable of providing adequate care for their children and could not benefit from teaching programmes<sup>23</sup>. Consequently, the parental rights of persons with intellectual disabilities used to be fully marginalized. Today the possibility of exercising their parental rights is in the focus of interests of numerous experts.<sup>24</sup> There is much more acknowledgement than before that while many such parents face specific and challenging problems, they remain parents, with the same hopes and fears as others.<sup>25</sup>

Taking into consideration all presented in relation to the case *A. K. and L. v. C.* so far, one faces the question if the principle of the best interests of the child contradicts the prior right and duty of parents to provide their children with care in situations in which a child's parent is a person with intellectual disabilities. In order to answer the question if there is a conflict between the principle of the best interest of the child and the prior right and duty of parents to provide their child with care in situations in which a child's parent is a person with intellectual disabilities, one should first define what the best interest of the child in such situations really is.

The Convention on the Rights of the Child<sup>26</sup> prescribes that "*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*".<sup>27</sup> The preamble of the Convention on the Rights of the Child states that "*child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding*". This Convention prescribes that the child shall have the right to parental

<sup>23</sup> See E. Emerson *et al.*, "Clinical Psychology and People with Intellectual Disabilities", Malden/Oxford/West Sussex, John Wiley & Sons, 2012, p. 296.

<sup>24</sup> See, for instance, C. Andritschke, *Was lässt Eltern mit geistiger Behinderung zu schwierigen Fällen werden?: Befunde, Konflikte, Herausforderungen*, Hamburg, Diplom.de, 2010; H. Cleaver *et al.*, *Children's Needs – Parenting Capacity: Child abuse, Parental mental illness, learning disability, substance misuse, and domestic violence*, London, The Stationery Office, 2011; G. Llewellyn *et al.* (ed.), *Parents with Intellectual Disabilities: Past, Present and Futures*, West Sussex/Oxford/ Malden, John Wiley & Sons, 2010; R. Mildon *et al.*, *Best Practice in Parenting Education: Understanding and Supporting Parents with Learning Difficulties*, Carlton, Victorian Parenting Centre, 2011; K. MacLean and M. Aunos, 'Addressing the Needs of Parents with Intellectual Disabilities: Exploring a Parenting Pilot Project', *Journal on Developmental Disabilities*, vol. 16, no. 1, pp. 18-33.; K. Schiborr, *Zur Lebenssituation von Eltern mit geistiger Behinderung und ihren Kindern*, GRIN Verlag, 2003 etc.

<sup>25</sup> S. McGaw, 'What Works for Parents with Learning Disabilities? – Summary', 2000, available at <http://www.barnardos.org.uk/wwparwld.pdf>, (accessed 2 December 2015.)

<sup>26</sup> The Convention on the Rights of the Child was adopted at the 44<sup>th</sup> session of the General Assembly of the United Nations held on 20 November 1989 (Resolution no. 44/25) and it came into force on 2 September 1990. Pursuant to the Decision on Publishing Multilateral Treaties to which Croatia has been a contracting party based on succession recognitions (Official Gazette – International Treaties no. 12/93), Croatia has been a contracting party to the Convention on the Rights of the Child since 8 October 1991.

<sup>27</sup> Article 7 paragraph 1 of the Convention on the Rights of the Child

care<sup>28</sup> and that it shall not be separated from its parents against their will<sup>29</sup>. If separation is necessary due to protection of the interests of the child, all the persons whose interests are being decided upon shall have the right to participate and be heard in proceedings dealing with their rights and interests.

The Convention on the Rights of Persons with Disabilities<sup>30</sup> prescribes that *"States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents."*<sup>31</sup>

The foreword of the Guidelines for Practice on National and Intercountry Adoption and Foster Family Care<sup>32</sup> governs that *"as a matter of principle, all efforts should be directed to ensuring that children be raised by their own families"* and the basic principles of these Guidelines set forth that *"priority for a child is to be cared for by his/her biologi-*

<sup>28</sup> Article 7 of the Convention on the Rights of the Child:

*'(1) The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. (2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.'*

<sup>29</sup> Article 9 paragraphs 1, 2 and 3 of the Convention on the Rights of the Child:

*'(1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. (2) In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known. (3) States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.'*

<sup>30</sup> Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted on 13 December 2006 at the United Nations Headquarters in New York, entered into force on 3 May 2008. Croatia signed the Convention on the Rights of Persons with Disabilities in 2007.

<sup>31</sup> Art. 23. par. 4. Convention on the Rights of Persons with Disabilities

<sup>32</sup> 'The Child's Right To Grow Up in a Family: Guidelines for Practice on National and Intercountry Adoption and Foster Family Care' (1997). This document provides guidelines for practice on national and intercountry adoption and foster family care, developed under the aegis of the International Council on Social Welfare and incorporating the work of over 200 practitioners, experts, and government officials representing nearly 30 countries. Available at <http://eric.ed.gov/?id=ED423025>, (accessed 1 December 2015.)

*cal parent/s*”<sup>33</sup> and that “governments and societies shall commit themselves to providing families the possibility and encouragement to care for their own children.”<sup>34</sup>

From the legal point of view it is impossible to give a single answer to the question in which situations it is in the best interest of the child that its parent with intellectual disabilities does not provide it with care without an interdisciplinary approach to this vital and legally very delicate issue. Assessment of the type and intensity of the risk for the child when its parent does not provide it with proper care, no matter if the inadequate care results from the parent’s intellectual disabilities or any other reason, is mostly an exceptionally complex task.<sup>35</sup> The answer to the question if support of the family or detachment of the child is the key that resolves this issue in the event of inadequate parental care depends on the circumstances of every single case.<sup>36</sup>

However, it should be noted that the respective literature often highlights that an intellectual disability *per se* is a poor indicator of parental capacity and that there are many other factors that will influence a parent with an intellectual disability’s capacity to provide adequate care to their children, such as poverty, unemployment, social isolation, stress, domestic violence etc.<sup>37</sup> A. Lamont and L. Bromfield stress that the experience

<sup>33</sup> Principle 3.3.

<sup>34</sup> Principle 3.4.

<sup>35</sup> See M. Ajduković (ed.) and T. Radočaj (ed.), ‘Pravo djeteta na život u obitelji: stručna pomoć obiteljima s djecom i nadzor nad izvršavanjem roditeljske skrbi kao proces podrške za uspješno roditeljstvo, eng. The Right of the Child to Live in a Family: Professional Help Provided to Families with Children and Supervision over Providing Childcare as a Process of Support for Successful Parenthood’, UNICEF Office for Croatia, 2008.

<sup>36</sup> Not speaking about the context of the risks exclusively caused by parents’ intellectual disabilities but generally about the risk factors for the child in a family, M. Ajduković claims that most countries have integrated the “family support” model, which concentrates on strengthening of the family in order to enable it to perform its function of bringing up children, with the “saving children” model or with their separation from a risky environment. This author also shares the opinion that both models have their good and bad sides. Hence, putting a primary focus on ‘saving children’ leads to situations in which many children are separated from families who had, with appropriate expert support, a potential to provide these children with good care. On the other hand, preference of the ‘family support’ model brings to short-term and multiple separation and return of children to their families, which additionally jeopardizes their sanity. Therefore it is necessary, from the viewpoint of M. Ajduković, to find the right balance between these two approaches, taking account of the best interest of the child in every single case. M. Ajduković, ‘Rane intervencije i ostale intervencije u zajednici kao podrška roditeljima pod rizicima, eng. Early and Other Interventions within a Community as Support to Parents at Risk’, *Prava djeteta na život u obitelji*, UNICEF Office for Croatia, 2008, p. 74.

<sup>37</sup> See, for example, H. Cleaver *et al.*, ‘Children’s Needs - Parenting Capacity: The Impact of Parental Mental Illness, Problem Alcohol and Drug Use, and Domestic Violence on Children’s Development’, The Stationery Office, London, 1999, A. Lamont i L. Bromfield, ‘Parental intellectual disability and child protection: Key issues’, National Child Protection Clearinghouse, Australian Institute of Family Studies, Melbourne, 2009, available at <https://aifs.gov.au/cfca/publications/parental-intellectual-disability-and-child-protection-key-i>, (accessed 21 December 2015).



of these factors does not mean that parents are at high risk of abusing their children - the problem might increase the risk, but could be counter-balanced by other protective factors. Even where the risk is high, it does not mean that parents definitely will abuse or neglect their children. However, identification of risk factors is valuable as it may help to determine the support needs of parents with intellectual disabilities, or situations where the risk of children's safety and wellbeing is unacceptable high.<sup>38</sup> They also assert that many parents with intellectual disabilities will be able to provide sufficient and supportive care to their children, however others will need additional support and training. The capacity for the service system to accommodate the support needs of such parents is a critical step in trying to reduce the over-representation of parents with intellectual disabilities in the child protection system.<sup>39</sup> "Parents with an intellectual disability are not a homogenous group. Cognitive limitations vary from individual to individual and IQ testing fails to reflect the way in which individuals adapt to their environments or their social functioning. It is important for each case featuring a parent with an intellectual disability be assessed individually with consideration given to the risk and the protective factors. When concerns regarding parental capacity are raised, practitioners making assessments, need to focus on how the parent's intellectual disability or learning difficulty is affecting their parenting and whether they are experiencing other stressors that may increase the risk of children experiencing abuse or neglect."<sup>40</sup>

M. A. Field and V. A. Sanchez also suggest that the ability of a parent to provide adequate childcare cannot be predicted on the basis of intelligence alone and that as with parents without disabilities, the ability to parent successfully depends on a wide range of factors.<sup>41</sup> Some parents with intellectual disabilities may neglect their child, but it is not clear whether children of parents with intellectual disabilities are at greater risk than other children - particularly given the variation in the degree of intellectual disabilities and the impact it may have on children's safety and wellbeing.<sup>42</sup>

A similar standpoint is promoted by A. Tymchuk and M. Feldman who also hold that parents with intellectual disabilities, like any other group, are diverse with regard to their parenting skills so that parent intelligence is a poor predictor of parenting capacity.<sup>43</sup>

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<sup>38</sup> A. Lamont and L. Bromfield (2009)

<sup>39</sup> A. Lamont and L. Bromfield (2009)

<sup>40</sup> A. Lamont and L. Bromfield (2009)

<sup>41</sup> M. A. Field and V. A. Sanchez, *Equal Treatment for People with Mental Retardation: Having and Raising Children*, Cambridge, Harvard University Press, 1999.

<sup>42</sup> A. Lamont and L. Bromfield, 'Parental intellectual disability and child protection: Key issues', available at <https://aifs.gov.au/cfca/publications/parental-intellectual-disability-and-child-protection-key-i>, (accessed 21 December 2015).

<sup>43</sup> A. Tymchuk and M. Feldman, 'Parents with mental retardation and their children: Review of research relevant to professional practice', *Canadian Psychology*, vol. 32, 1991, pp. 486-496.



If the conclusions on the parental rights of persons with disabilities, which can be found in contemporary works belonging to other scientific disciplines, are adjusted to the legal frameworks for the parental rights of persons with disabilities, one has to conclude that parents with disabilities should not experience discrimination based on stereotypes and presumptions about their parenting capacity. Such a stance is held by the ECtHR too. The case of *A. K. and L. v. C.* is not the only case in which the ECtHR has been invited to adjudicate on violation of the right to the private and family life of the child and its disabled parent as a consequence of separation of the child from the family only on the ground of the parent's disability. The case-law of the ECtHR constantly warns us that separation of a child from its family due to a parent's disability may lead to infringement of the right to respect for private and family life under Article 8 of the ECHR.<sup>44</sup>

It is beyond any doubt that welfare centres should be the ones to undertake a measure for the protection of the personal interests of the child or to, if need be, propose pronouncement of one of the repressive measures by the court if they assess that a parent (due to his/her intellectual disabilities) does not provide proper childcare. Although

<sup>44</sup> P. Bartlett points out that ECtHR case 46544/99 *Kutzner v. Germany* [2002] 'is the first family law case to be brought by parents with intellectual disabilities'; P. Bartlett, *Mental Disability and the European Convention on Human Rights*, Leiden/Boston, BRILL, 2006, page 195.

In the *Kutzner v. Germany* case, the applicants were parents with mild intellectual disabilities who lived with their two daughters, who were late developers, and who were receiving educational assistance and support. A court withdrew the applicants' parental rights and ordered their placement with foster parents on the grounds that applicants did not have the intellectual capacity required to bring up their children. The girls were placed in separate, unidentified foster homes. The applicants' visiting rights were sharply restricted. The applicants alleged a breach of Article 8, arguing that the withdrawal of their parental rights over their daughters and their placement with foster parents had infringed the applicants' right to respect for family life under Article 8. Although the authorities may have had legitimate concerns about the late development of the children, the ECtHR considered that both the care order itself and the manner in which it was implemented were unsatisfactory. Bearing in mind the children's age, severing contact and limiting visiting rights could lead only to the children's increased 'alienation' from their parents and from each other. The interference was therefore not proportionate to the legitimate aims pursued. Quoted from J. Fiala et al. (ed.), 'Summaries of Mental Disability Cases Decided by the European Court of Human Rights', Mental Disability Advocacy Center, 2007.

ECtHR case 39948/06 *Saviny v. Ukraine* [2008] concerned the placement of children in public care on the ground that their parents, who have both been blind since childhood, had failed to provide them with adequate care and housing. The domestic authorities based their decision on a finding that the applicants' lack of financial means and personal qualities endangered their children's life, health and moral upbringing. The Court held that there had been violation of Article 8 (right to respect of private and family life) of the Convention, doubting the adequacy of the evidence on which the authorities had based their finding that the children's living conditions had in fact been dangerous to their life and health. It was observed in particular that the judicial authorities had only examined those difficulties which could have been overcome by targeted financial and social assistance and effective counselling and had not apparently analysed in any depth the extent to which the applicants' irremediable incapacity to provide requisite care had been responsible for the inadequacies of their children's upbringing. Downloaded from the ECtHR webpage, available at [http://www.echr.coe.int/Documents/FS\\_Parental\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Parental_ENG.pdf), (accessed 1 December 2015). See also ECtHR case 35731/97 *Venema v. The Netherlands* [2002].

the possible conflict between the best interests of the child and the prior right of a parent with intellectual disabilities may be viewed through all the repressive measures for the protection of the personal interests of the child foreseen by family law legislation<sup>45</sup>, the child can be adopted without consent of its parent only if he/she has been divested of his/her parental rights. Accordingly, against the will of the parent, none of the other repressive measures can result in irreversible termination of the parent-child bond as a result of child adoption.<sup>46</sup>

The moment of the assessment if the child's right to family life needs to be protected by withholding it from adoption is indicative and decisive indeed.<sup>47</sup> It seems that this issue as well as responses thereto are even more complex when a decision on the adoption of a child of parents with intellectual disabilities is to be made. In such situations it is impossible to provide a single answer to the question where to draw a line between the best interest of the child and the prior right of its parents to provide childcare without interdisciplinary analysis of the circumstances of every single case.<sup>48</sup> Still, the importance of providing persons with intellectual disabilities with assistance and support and of protecting the family bond between the child and its parent with intellectual disabilities instead of breaking it, is nowadays growing.<sup>49</sup> As C. Watkins stated, if we are truly concerned about the welfare of children, we should invest more

<sup>45</sup> On repressive measures for the protection of personal rights and wellbeing of the child from the interdisciplinary, comparative and international aspect, see B. Rešetar and S. Aras, *Represivne mjere za zaštitu osobnih prava i dobrobiti djeteta*, eng. *Repressive Measures for the Protection of the Personal Rights and Wellbeing of the Child*, Osijek, Pravni fakultet Sveučilišta J.J.Strossmayera u Osijeku, 2014.

<sup>46</sup> The FA (2015) foresees exceptional cases in which a parent's' consent for child adoption may be substituted by a court decision in non-contentious proceedings. See Chapter V.

<sup>47</sup> Similarly in D. Hrabar, 'Pravo djeteta na obiteljski život', eng. *The Child's Right to Family Life*, *Dijete i društvo*, vol. 7, no. 2, 2005, page 391.

<sup>48</sup> The psychological-sociological aspects of adoption represent an inseparable part of the legal dimension of this institute. D. Jakovac-Lozić, *Posvojenje*, eng. *Adoption*, Split, Pravni fakultet Sveučilišta u Splitu, 2000, p. 169.

<sup>49</sup> There are a large number of projects indicating it. E.g., the European Commission within the Lifelong Learning Programme co-funded project '*PID - Parents with Intellectual Disabilities - EUROPEAN FAMILY SET*'. The overall objective of the project is based on the 2006 Convention on the Rights of Persons with Disabilities, Article 23. The project will meet this convention by supporting people with disabilities in matters of marriage, family, parenthood, and relationship, prevent separation of families, learning from good practice examples from all over the world, developing family competences by intergeneration/family learning, etc. See <http://www.docfoc.com/european-family-set-parents-with-intellectual-disabilities>, (accessed, 1 December 2015).

United Kingdom's Department of Health fund the project '*Inclusive support for parents with a learning disability*'. See report that describes this project available at <https://www.mencap.org.uk/sites/default/files/documents/2011-03/making%20the%20difference.pdf>, (1 December 2015).

The Australian government has funded a capacity-building model known as '*Healthy Start: A national strategy for children of parents with intellectual disabilities*'. See more in D. McConnell et al., 'Healthy Start.' A National Strategy for Parents With Intellectual Disabilities and Their Children', *Journal of Policy and Practice in Intellectual Disabilities*, vol. 5, no.3, 2008, pp. 194-202.

money and energy in preventive services for families rather than in parental rights termination.<sup>50</sup> The success of the family law protection of the family depends primarily on the willingness to ensure, at institutional level, sufficient funds, services and aid for parents providing proper childcare.<sup>51</sup> A society has to demonstrate willingness to embrace people with any mental disability and to apply modern models for providing support to these people.<sup>52</sup>

Concerning all the aforementioned, one can draw the conclusion that divesting parents with intellectual disabilities of parental rights may be justified only in situations in which regardless of all the necessary assistance provided by the system, the parent is in no way capable to provide proper childcare, so the best interest of the child should be protected by entrusting it to another person. Since such a parent is not in position to exercise his/her parental rights, it makes no sense to elaborate the conflict between his/her parental rights and best interest of the child. In case a parent with intellectual disabilities is capable of providing childcare within acceptable level, he/she should not be deprived of his/her parental rights.<sup>53</sup> Divestment of parental rights in regard to a parent who is, though with assistance of the system, capable of providing proper childcare does not facilitate but suppress the child's interests. Therefore, it is to ascertain that there should be no conflict between the best interest of the child and the prior right and duty of parents to provide childcare if a child's parent is a person with intellectual disabilities.

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The United States National Council on Disability (independent federal agency making recommendations to the President, Congress and other federal agencies regarding policies, programs, practices, and procedures that affect people with disabilities, to enhance the quality of life for all Americans with disabilities and their families) 2012 made a report '*Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*', available at [https://www.ncd.gov/rawmedia\\_repository/89591c1f\\_384e\\_4003\\_a7ee\\_0a14ed3e11aa.pdf](https://www.ncd.gov/rawmedia_repository/89591c1f_384e_4003_a7ee_0a14ed3e11aa.pdf), (accessed 1 December 2015.). The goal of *Rocking the Cradle* is to advance understanding and promote the rights of parents with disabilities and their children. The report provides a comprehensive review of the obstacles people with diverse disabilities, experience when exercising their fundamental right to create and maintain families, as well as persistent, systemic, and pervasive discrimination against parents with disabilities.

<sup>50</sup> C. Watkins, 'Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded', *California Law Review*, vol. 83, no. 6, 1995, pp. 1475.

<sup>51</sup> A. Korać Graovac, "Obiteljskoppravna zaštita osobnih interesa djece prije izdvajanja iz obitelji: prava djece – odgovornosti i prava roditelja, *eng.* The Family Law Protection of the Personal Interests of Children Prior to the Separation from Their Families: the Children's Rights – the Parents' Liabilities and Rights)", *Prava djeteta na život u obitelji*, UNICEF Office for Croatia, 2008, pp. 53-54.

<sup>52</sup> T. Not (2008), p. 339.

<sup>53</sup> Certainly, if there is no any other reason for divestment of parental rights.

## V. RESPONSE OF THE NEW FAMILY LAW LEGISLATION TO THE CASE OF *A.K. AND L. V. C.*

Speaking within the sphere of the protection of parental and other rights of persons with intellectual disabilities granted by the new family law legislation<sup>54</sup>, it should be noted that the FA (2015) has abandoned the institute of full deprivation of capacity for work. As highlighted by S. Aras, beside abandoning the institute of full deprivation of capacity for work and enhancing the procedural law position of people subject to proceedings for deprivation of capacity for work, the FA (2015) has raised the quality of the provisions on the guardianship of adults with disabilities, taking into account the autonomy of their will.<sup>55</sup>

Taking into consideration the viewpoints of the ECtHR expressed in the judgment both in the case of *A.K. and L. v. C.* and in the case of *X v. C.*<sup>56</sup>, the FA (2015) has paid great attention to the case-law protection of the interests of parents who are not capable of protecting their rights and interests.<sup>57</sup> Unlike the FA (2003), the FA (2015) does not regard deprivation of capacity for work as the reason why parent's consent for child adoption is not required. Pursuant to Article 188 of the FA (2015), a parent's consent is not required only if the parent has:

1. died, disappeared or is not known or
2. been divested of parental rights.

If consent for child adoption is to be given by a parent deprived of capacity for work, irrespective of his/her partial or full incapacity, the parent shall be able to understand the meaning of consent for the adoption and the competent welfare centre is obliged to inform him/her about the appertaining consequences. If a parent incapacitated for work is not capable of comprehending the meaning of consent for the adoption, his/her consent

<sup>54</sup> Which other significant novelties have been introduced into the family law legislation by the Family Act (Official Gazette no. 75/14), that have been incorporated in the FA (2015) see in S. Ledić, 'Glavne značajke reforme obiteljskog prava i postupka', *eng.* Main Features of the Family Law and Procedure Reform', *Aktualnosti hrvatskog zakonodavstva i pravne prakse*, vol. 21, 2014, pp. 197-233.

<sup>55</sup> See S. Aras, 'Što donosi novi Obiteljski zakon', *eng.* What Brings the New Family Act?', *Pravo i porezi*, Vol. 24, No. 11, 2015, page 25.

<sup>56</sup> XECtHR case 11223/04 *X v. Croatia* [2008]. In this case, the ECtHR found violation of Article 8 of the ECHR since the state had, by not preventing the exclusion of the applicant as a person incapacitated for work from the proceedings having resulted in the adoption of her daughter, failed to secure respect for her private and family life. More on this and other judgments of the ECtHR relating to the Croatia and the area of the protection of people with mental disorders see in I. Milas Klarić, 'Reforma skrbničkog zakonodavstva i europski pravni okvir (Reform of the Guardianship Legislation and European Legal Framework)', *Godišnjak akademije pravnih znanosti Hrvatske*, vol. 5, no. 1, 2014, pp. 103-110.

<sup>57</sup> Although *A.K.* was not deprived of capacity for work, she was mildly mentally retarded, because of which she was capable of protecting her rights and interest in an adequate way.

can be substituted by a court decision<sup>58</sup>, but in compliance with Article 190 paragraph 1 item 3 of the FA (2015), it shall be only possible if the parent is incapable of providing childcare to such an extent that he/she is not capable of providing any segment of childcare on a permanent basis and there is no chance that the child will be raised by the child's close relatives and the child is expected to benefit from the adoption.<sup>59</sup>

As far as the case of *A.K. and L. v. C.* is concerned, the provisions of the FA (2015) regulating adoption proceedings, particularly the protection of the rights and interests of a person incapacitated for work, could not though protect the rights and interests of A.K. since she was not deprived of capacity for work but of parental rights. Yet, the previous lines suggest that according to the circumstances of this concrete case, it should not have come to divestment of parental rights in the first place. If the first applicant had not been divested of her parental rights, it would not have been possible, pursuant to the FA (2015), to substitute her consent for the adoption with a court decision because she was not incapable of providing childcare to such an extent that she could not provide any segment of childcare on a permanent basis. Besides, neither of the other two requirements under Article 190 of the FA (2015) for substitution of parent's consent with a court decision was met. The requirements are as follows:

1. parent has been abusing or severely violating his/her parental responsibilities, duties and right or has been showing a lack of interest in the child for a longer period of time and adoption would be beneficial for the child,<sup>60</sup>

2. parent has been abusing or severely violating his/her parental responsibilities, duties and right for a shorter period of time but to such an extent that he/she will never be eligible for conferring the childcare on him/her on a permanent basis.

The FA (2015) foresees the possibility of divesting a parent with intellectual disabilities of his/her parental rights in the event his/her mental ability is so limited that he/she is not capable of providing any segment of childcare on a permanent basis whereat the wellbeing of the child is put in jeopardy.<sup>61</sup> Otherwise, divestment of parental rights of a parent with intellectual disabilities may be initiated only if such a parent, like any other non-disabled parent:

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<sup>58</sup> A court decision in non-contentious proceedings which is made following a proposal of a welfare centre.

<sup>59</sup> Which other forms of the protection of adults with disabilities is foreseen by the Family Act (2015) see in S. Aras, pp. 28-30.

<sup>60</sup> The court shall reject any proposal for making a decision substituting a parent's consent for child adoption if the welfare centre did not previously notice the parent thereabout or inform him/her about the possibility of being pronounced the measure of intensive professional help or if it has been less than three months since the day of the notice or if it has been less than three months since the first attempt to determine the parent's place of living in case it was not possible to give notice to the parent due to his/her unknown address. See Articles 189 and 190 of the FA (2015).

<sup>61</sup> Article 171 paragraph 1 item 6 of the FA (2015)

1. abuses or severely violates his/her parental responsibilities, duties and rights,<sup>62</sup>
2. has abandoned the child,
3. if the child is exposed to violence among adult family members,
4. if a report of the competent welfare centre implies that the parent does not honour the measures, decisions and instructions previously issued by a welfare centre or court for the purpose of protection of the rights and wellbeing of the child,
5. if a report or assessment of the competent welfare centre suggests that return of the child to its family after an implemented measure for protection of the rights and wellbeing of the child would represent a serious threat to the child's life, health and development, and
6. based on a valid verdict against the parent in cases involving some of the crimes explicitly laid down in the FA (2015), which have been committed against his/her child.<sup>63</sup>

Like the FA (2003), the FA (2015) also requires no consent for child adoption in case a parent has been deprived of his/her parental rights. Nevertheless, the FA (2015) stipulates that the competent welfare centre shall provide a parent divested of parental rights with the possibility to express his/her opinion on possible child adoption. The parent's opinion is not binding, but the welfare centre experts are obliged to take such an opinion into consideration when making assessment if adoption in a concrete case is the most convenient form of permanent child placement.<sup>64</sup>

If a person is deprived of capacity for work in the part referring to the exercise of his/her parental rights, these rights shall, according to the FA (2015), be suspended. During the suspension, daily childcare may be provided individually by the person in question or collectively with the other parent or the child's guardian. Suspension of parental rights due to legal obstacles shall be terminated if the reasons for the suspension cease to exist.<sup>65</sup>

What is particularly important in this context is that the FA (2015) foresees the possibility of providing professional help and support in the exercise of parental rights. The competent welfare centre shall supply parents with professional help and support if it finds that they are not capable of autonomously providing full or partial childcare due to circumstances affecting them or the child whereat the child's development is put in jeopardy but not its life or health.<sup>66</sup> Such a measure shall be pronounced if a child grows

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<sup>62</sup> Article 170 of the FA (2015)

<sup>63</sup> Article 171 paragraph 1 items 1-5 of the FA (2015)

<sup>64</sup> See Article 210 of the FA (2015)

<sup>65</sup> See Article 114 of the FA (2015)

<sup>66</sup> This measure is regulated in Articles 140-144 of the FA (2015)



up in a risky environment and the parents (or other persons who provide childcare on a daily basis) are not capable of providing autonomous and proper childcare due to special circumstances, including parents' intellectual disabilities.

The presented overview and analysis of the relevant provisions of the FA (2015) reveal major improvements in the protection of the parental rights of persons with intellectual disabilities. Still, it should not be forgotten that "no reform can succeed if the perception is not changed, so it is necessary to provide people with intellectual disability with social support at all levels in order to help them preserve and reinforce what they have all in common – their own dignity."<sup>67</sup>

## VI. CONCLUSION

While once it was common to think that parents with intellectual disabilities are not capable of providing proper childcare, today there is a growing number of those who realize that parental intellectual disability affects parenting capacity to the extent that parents with intellectual disability are unable to provide adequate care for their children and that the diagnosis of intellectual disability *per se* is a poor indicator of risk for child abuse and neglect. Here the emphasis is put on assuring aid and support to people with intellectual disabilities in providing childcare in order to protect, where possible, the child-parent bond instead of breaking it.

The case of *A. K. and L. v. C.* makes us consider if Croatian institutions keep track with contemporary world trends when it comes to providing parents with intellectual disabilities with assistance and support in the exercise of their parental rights and protection of the bond between the child and its parent with intellectual disabilities. Judging by the conclusions of the national court in the reasoning of the decision based on which mother A. K. was divested of her parental rights, after which the child was soon adopted without her consent, one can conclude that there is not enough awareness that the right of a parent with intellectual disabilities to family life with his/her children does not differentiate from the same right of any other parent. What is particularly upsetting in this case is that A.K. has never done direct harm to the child and showed, despite her intellectual disabilities, a wish to provide childcare. Apart from contesting the divestment of her parental rights, she did everything to remedy what the Welfare Centre assessed risky for the child. She claimed that she had rehabilitated the housing premises and installed a heating system as well as that she did not live with her mentally brother any more since he had been placed

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<sup>67</sup> A. Korać Graovac i A. Čulo, 'Konvencija o pravima osoba s invaliditetom – novi pristup shvaćanju prava osoba s duševnim smetnjama, *eng.* Convention on the Rights of Persons with Disabilities – a New Approach to Persons with Mental Disorders), *Zbornik radova Pravnog fakulteta u Zagrebu*, vol. 61, no. 1, 2011, p. 106.



in an institution. When doing all those things aimed at demonstrating that she can be a good parent and that she can live with her child, she was not provided, at least that is what the judgment in the case of *A. K. and L. v. C.* discloses, with any assistance by the system. There is a hope that the case of mother A. K. will remain an exception to the rule that Croatia institutions act in accordance with the protection of the parental rights of persons with intellectual disabilities.

Encouraged by the conclusions of the ECtHR in the case of *A. K. and L. v. C.*, the Croatian legislator has made significant improvements in the FA (2015) regarding the protection of the parental rights of those who have no capacity to protect their own rights and interests. Among other things, it is essential to mention that deprivation of capacity for work is no longer a reason why a parent's consent for child adoption is not required. If consent for child adoption is given by a parent deprived of capacity for work, he/she shall be able to understand its meaning and the competent welfare centre is obliged to inform him/her about the legal and factual consequences of the adoption in an appropriate way. If a parent deprived of capacity for work is not able to comprehend the meaning of consent for child adoption, his/her consent can be substituted with a court decision, but only if the parent is incapable of providing childcare to such an extent that he/she is not capable of providing any segment of childcare on a permanent basis and there is no chance that the child will be raised by the child's close relatives and the child is expected to benefit from the adoption. The FA (2015) foresees the possibility of divesting a parent with intellectual disabilities of his/her parental rights in the event his/her mental ability is so limited that he/she is not capable of providing any segment of childcare on a permanent basis whereat the wellbeing of the child is put in jeopardy. Besides, the FA (2015) has introduced the institute of suspension of parental rights, according to which the parental rights of a person incapacitated for work are suspended as long as the circumstances having led to the suspension are present. It is vastly important to highlight the professional help and support in providing childcare, which is foreseen by the FA (2015) and intended for parents who are not capable of providing their children with autonomous and proper care due to special circumstance, including parents' intellectual disabilities.

The case of *A. K. and L. v. C.* has encouraged us to realize that when deciding on the parental rights of persons with intellectual disabilities, one should never forget that "persons with intellectual disabilities are different in abilities but not in the rights"<sup>68</sup> and that parents' intellectual disabilities should not be an incentive to disrespect the instruction in the Guidelines for Practice on National and Intercountry Adoption and Foster Family Care propagating that "primary purpose of adoption is to provide a child with a family and a home to call his/her own and not to provide a child for a family".

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<sup>68</sup> T. Not (2008), page 339.