

## Artigos

Recebido: 04.07.2018

Aprovado: 04.07.2018

DOI <http://dx.doi.org/10.18316/REDES.v6i2.4891>

\* University of Maribor, Faculty of Law

Maribor, Eslovênia



## New family code of Slovenia (2017): procedural aspect

Suzana Kraljić\*

Vesna Rijavec\*

**Abstract:** Slovenia went in past years through turbulent time in the field of family law: new definitions or redefinitions of marriage have been presented, topics related to the parenthood have undergone changes, the adoption has been the subject of many discussions, there have been two referendums related to same-sex partnerships... Finally, March 23 April 2017, new Family Code was adopted. One of the important changes, brought by the Family Code, are related to jurisdictions in family matters, which have been transferred from administrative bodies to the courts. The aim of this transfer is raise the procedural protection of children. In doing so, the legislator followed the request, that the jurisdictions for substantively similar issues should not be proceed by the different authorities. Due this, the jurisdiction on adoption, foster care and guardianship is transferred to the courts. But there is also a two-track system, in which the family matters could be handled in civil or non-contentious procedures. Regardless of the procedure (administrative, civil, non-contentious), the best interest of the child shall be a primary consideration. Therefore, the Family Code gives special intention also on child protective measures, which represents the obligation of the state to protect the child's best interests. Child's interest" is a legal standard, which value has to be made concrete by respecting all circumstances of a single case. Therefore, the courts have to provide proper procedural safeguards, despite of the type of procedures.

**Keywords:** New Family Code; Transfer of Jurisdiction; Court of Justice; Children; Safeguards.

### O novo código de família da Eslovênia (2017): aspectos processuais

**Resumo:** O direito de família na Eslovênia vivenciou anos de manifesta ebulição: o casamento recebeu nova definição (ou) redefinição, a parentalidade foi revisitada, a adoção tem sido objeto de muita discussão e houve dois referendos relacionados às parcerias entre pessoas do mesmo sexo ... Finalmente, aos 23 de março de 2017, foi recebido o novo Código de Família. Uma de importantes mudanças mais salientes está relacionada à jurisdição nas questões de família, transferida dos órgãos administrativos para os tribunais de modo a tentar aumentar a proteção processual da criança. Ao fazê-lo, o legislador atendeu ao pedido de que a jurisdição para questões semelhantes seja a mesma e a partir daí adoção, assistência social e tutela passam a interessar aos tribunais. Mas há também um sistema de via dupla, no qual questões familiares podem ser tratadas de não-contenciosa. Independentemente do procedimento (administrativo, civil, não-contencioso), o melhor interesse da criança é consideração primordial. Daí que o Código de

Família direciona especial atenção às medidas de proteção à criança ante a obrigação do Estado de proteger os melhores interesses delas. O interesse da criança “é padrão legal, cujo valor haverá de ser concretizado de modo a respeitar as circunstâncias do único caso. Para isso, os tribunais devem fornecer garantias processuais adequadas, independentemente do procedimento adotado.

**Palavras-chave:** Novo Código de Família; Transferência de Jurisdição; Tribunais; Criança; Garantias.

## Introduction

The legal source regulating family law in Slovenia is Marriage and Family Relations Act<sup>1</sup> (hereinafter: MFRA) that was adopted back in 1976. Although Slovenia became an independent state in 1991, this act that was adopted when Slovenia was part of Yugoslavia, is still in force nowadays. It has been renewed several times (1989, 2001, 2004). The latest novel was adopted made in 2004 with alterations in the field of custody and raising children. Finally, after almost a decade of negotiations and co-operations, and two legislative referendums<sup>2</sup>, on March 23 2017 new Family Code<sup>3</sup> (hereinafter: FC) was adopted. Except some exceptions (see below) FC will be used from April 19 2019. Slovenia also adopted on April 21 2016 the new legislation, which regulates civil union in Slovenia. New Civil unions Act<sup>4</sup> (hereinafter: CUA) has replaced in 2005 adopted Civil Partnership Registration Act (hereinafter: CPRA)<sup>5</sup>. Nowadays, the partners from same-sex civil unions have all the legal rights of marriages, except three exceptions. They cannot enter into marriage, cannot jointly adopt a child and cannot use the system of [in-vitro fertilisation](#) (comp. art. 2(3) and Art. 3(3) CUA). On the one hand, the new FC does not regulate anymore the prolongation of parental care, the proxy marriages and the deprivation of legal capacity, but on the other hand the FC introduces new family law concepts. For example: the conclusion of marriage is possible without witnesses, prenuptial agreements, if spouses do not have a child, they could divorce before the notary, parents may express their anticipated will on child care in the case of their death... The article will focus on the procedural aspects of new Slovenian FC.

<sup>1</sup> **Zakon o zakonski zvezi in družinskih razmerjih** (Marriage and Family Relations Act: MFRA): Uradni list RS (Official Gazette RS) 69/04 – uradno prečiščeno besedilo (official consolidated version (hereinafter: OCV)); 101/07 – odl. US; 90/11 – odl. US; 84/12 – odl. US, 82/15 – odl. US; 15/17 – FC.

<sup>2</sup> Slovenian Constitution does not contain the definition of marriage as a union of a man and a woman. In past years Slovenia had three referendums regarding directly or indirectly the questions related to homosexuality. The first referendum was on June 17 2001. It was related to the amendment of the Infertility treatment and procedures of biomedically assisted procreation act, which was supposed to give the single woman the right to artificial insemination. The voters voted against with 72,36% by turnout of 35,66%. The second referendum was on March 25 2012. It was about the new FC which was rejected with 54,5% of votes on a 30,3% turnout. Rejected was whole FC, which was very modern on many relations. The reason of the rejection was the regulation which was supposed to give to registered same-sex partners the same rights as the heterosexual spouses have, including marriage. The only exemption was the adoption. On December 20 2015 Slovenia had the third referendum, which was dealing on the question on legalizing the marriage also for same-sex couples. The voters voted against with 63,47% by turnout of 36,38% - see more KRALJIĆ S. (2017) Same-sex relationships in Eastern Europe: marriage, registration or no regulation? In: BOELE-WOELKI, K. (ed.), FUCHS, A. (ed.). **Same-sex relationships and beyond: gender matters in the EU**, (European family law series, 42). Fully revised 3. ed. Cambridge; Antwerp; Portland: Intersentia. p. 55-75.

<sup>3</sup> **Družinski zakonik** (Family Code: FC): Uradni list RS 15/17.

<sup>4</sup> **Zakon o partnerski zvezi** (Civil Unions Act: CUA): Uradni list RS [33/16](#).

<sup>5</sup> **Zakon o registraciji istospolne partnerske skupnosti** (Civil Partnerships Registration Act: CPRA): Uradni list RS [65/05](#); [55/09](#) – odl. US; [18/16](#) – odl. US; [33/16](#) – ZPZ; [68/16](#) – ZPND-A.

## Defining the »family matters«

FC does not specify an explicit definition of the »family matter«. Originating from the description of the Art. 1 FC:

This code regulates marriage, cohabitation, relationships between parents and children, forms of state assistance in problems of partnership and family life, measures for protecting the benefit of the child and livelihood, adoption, granting parental care to a relative, foster care and guardianship of children and adults who need special protection.

In the broadest sense, the term »family matter« can be used for all the areas to which FC relates and are regulated by it<sup>6</sup>. The novelty also represents the definition of the family (art. 2 FC):

Family is living community of a child, regardless of his/her age, with both parents or one parent or another adult person, if this person is taking care about the child and has towards child obligations and rights.

The new definition of family extends the concept of the family also to the living community of the child with another adult person, if the adult person is taking care about the child and has certain obligations and rights to the child according to the FC. Therefore, there is no doubt that between family matters we can consider also the child relationships with third parties (for example: foster care, guardianship, granting the parental care to a relative).

## Delimitation between administrative and judicial jurisdiction

The FC concludes a radical reform by transferring the jurisdiction from administrative bodies to the courts<sup>7</sup>. With novels MFRA-B<sup>8</sup> and MFRA-C<sup>9</sup>, first of all, the main jurisdictions for deciding on children were transferred to the courts. In doing so, the legislator followed the request, that it should not arbitrarily select the jurisdictions of the different authorities for substantively similar issues. The transfers of jurisdiction from the SWC as an administrative body to the courts are a consequence of the harmonization of the Slovenian legal system with European Convention on the Exercise of Children's Rights<sup>10</sup> (hereinafter: ECECR). ECECR determines, that in family proceedings, in particular those involving the exercise of parental responsibilities such as residence and access to children, the »*judicial authority*« means a court or an administrative authority having equivalent powers (comp. Art. 1(3) in 2(a) ECECR). Already in

<sup>6</sup> New Slovenian FC is divided into the following chapters: First Chapter – Introductory provisions; Second Chapter – Marriage; Third Chapter – Relationships between Parents and Children; Fourth Chapter - Preliminary counselling and mediation; Fifth Chapter – Adoption; Sixth Chapter – Granting parental care to a relative; Seventh Chapter – Foster Care; Eighth Chapter – Guardianship; Ninth Chapter – Family Support Programs; Tenth Chapter – societies and other organizations in the public interest in the field of family policy; Eleventh Chapter – Data Collections; Twelfth Chapter – Transitional and final provisions.

<sup>7</sup> See more NOVAK, B. (2017). **Družinsko pravo**, 2. sprememnjena in dopolnjena izdaja. Ljubljana: Uradni list Republike Slovenije; str. 261.

<sup>8</sup> **Zakon o spremembah in dopolnitvah zakona o zakonski zvezi in družinskih razmerjih** (ZZZDR-B) (Act Amending the Marriage and Family Relations Act (MFRA-B)): Uradni list RS 64/01.

<sup>9</sup> **Zakon o spremembah in dopolnitvah zakona o zakonski zvezi in družinskih razmerjih** (ZZZDR-C) (Act Amending the Marriage and Family Relations Act (MFRA-C)): Uradni list RS 16/04.

<sup>10</sup> **Zakon o ratifikaciji Evropske konvencije o uresničevanju otrokovih pravic** (Act Ratifying the European Convention on the Exercise of Children's Rights): Uradni list RS – Mednarodne pogodbe, [26/99](#).

year 1999 and then in year 2003, the Constitutional Court of the Republic of Slovenia<sup>11</sup> assessed that due to procedural deficiencies, the SWC could not be regarded as an equivalent body to the court. The non-compliance with the ECECR required the transfer of the jurisdiction in matters relating to the upbringing and care of children in all cases to courts, as the administrative procedure does not provide the same procedural guarantees as the judicial procedure. Therefore, the previous division of the jurisdiction in the same matters<sup>12</sup> between the various bodies was not constitutionally sustainable. The transfer has been made with the novel MFRA-B. The Novel MFRA-C followed the decision of the Constitutional Court of the Republic of Slovenia from the year 2003<sup>13</sup> and has determined the jurisdiction of the court for the decisions on the contacts between the child and the parents in all cases, since the previous regulation was not in accordance with the ECECR, because in some cases the child's parents' contact was decided by the SWC, which did not have the same powers as the courts.

In the FC, the legislator again used the positivist method of determining judicial or administrative jurisdiction in each individual relationship. In addition, the FC from administrative bodies, specifically from the Social Work Centres (hereinafter: SWC) transfers to the courts new jurisdictions, namely:

- a) overlook of the reservation of relation in 4<sup>th</sup> degree at marriage (art. 27(3) FC);
- b) overlook of reservation of minor age at marriage (art. 24(2) FC);
- c) as long as guardianship lasts, a guardian and ward may enter matrimony only by consent of the court of justice (art. 28 FC);
- d) measures for protection of the child's best interests:
  - i. placement of a child in foster care and nomination of the foster parent (Art. 235(1) FC);
  - ii. decision on adoption of a child (art. 229 FC);
  - iii. putting a child in child guardianship and nomination of a guardian (art. 257 FC);
- e) measures for the protection of an adult:
  - i. putting an adult under guardianship for adults and nomination of a guardian (art. 262 FC).

SWC maintained the competence for guardianship for special cases (art. 276(1) FC) and the execution and supervision of guardianship.

FC followed these directives, harmonised and unified the decision-making in the field of guardianship. Thus, after FC the competence in the field of guardianship is totally passed to the courts of justice and the former two-track regulation is abandoned. Up to now, namely, the court of justice established the need for a guardian, who was named by the SWS, then. After FC the court of justice shall decide on custody and the nomination of a guardian as in the case of providing such a sort of protection of a child

<sup>11</sup> **Odločba Ustavnega sodišča RS U-I-273/98** (ECLI:SI:USRS:1999:U.I.273.98), July 1 1999.

<sup>12</sup> On the protection and upbringing of children born in matrimony the court of justice took decisions. On the protection and upbringing of children born out of wedlock, the SWC decided.

<sup>13</sup> **Odločba Ustavnega sodišča RS U-I- 312/00-40** (ECLI:SI:USRS:2003:U.I.312.00), May 9 2003.

(guardianship of children), as well as for adults (guardianship of adults). The sense of transferring the institute of guardianship to the courts of justice is also justified by the fact that the court of justice decides also on the placement of the child under guardianship at the same time as on the taking away of the child and at the same time nominates a guardian, if needed.

In spite of the loss of competence, the importance of the SWC even after the new regulation of FC is not to be overlooked. SWC and its bodies are specialised for matters of children and guardianship. By transfer of competence, namely, their burden of deciding in administrative proceedings fell off and experts of the SWC may dedicate to the following of a status, counselling and supervision of the work and especially the making of proposals and the performing of measures that are decided by the courts of justice. In principle, FC determines due cooperation (art. 16 FC), and therefore SWC shall have further conduction of numerous tasks set by SWC (e.g. production of expertise for courts of justice in matters of decisions on measures for protection of the best interests of a child; production of a support plan for a family and child before decision by the court of justice on a measure for the protection of a child of durable character (art. 170(1) FC); informing maintenance claimants about the alignment of the maintenance (art. 107(3) FC); assistance in concluding agreements on upbringing, care, contacts, maintenance etc.). Besides, SWC may have a status of a claimant in proceedings (for example: in procedure on the deprivation of parental care), representative (SWC is named guardian – art. 244(1) FC) or *intervenienta sui generis*<sup>14</sup>.

### Substantive jurisdiction

In litigation in family matters, already Civil Procedure Act (hereinafter: CPA)<sup>15</sup> determines competence of county courts (art. 32(2) CPA). The dilemma regarding non-contentious proceedings was resolved by the legislator in the first step in a way that by the novel of MFRA-C the county jurisdiction for all matters from MFRA to be resolved in non-contentious proceedings is determined.

FC generally determines jurisdiction of the county court on first level in matters, where FC the courts of justice have jurisdiction, except if an act determines something else (art. 14(1) FC). Courts Act (hereinafter: CA)<sup>16</sup> determines in its art. 99 that for decisions in non-contentious proceedings, jurisdiction is with the district court, but also this provision foresees the option that another act might determine something else. Thus, any doubt that the provision of the later and more specialised FC on the jurisdiction of the county court in family matters prevails and generally sets jurisdiction of the county court without further need for adaptation of CA is avoided.

<sup>14</sup> ARAS, S. (2013). *Uzdržavanje djece - Sudski alimentacijski postupci u domaćem i poredbenom pravu*. Zagreb: Sveučilište u Zagrebu Pravni fakultet. p. 283 and ff.

<sup>15</sup> **Zakon o pravdnem postopku** (Civil Procedure Act: CPA): Uradni list RS 73/07 – OCV; 45/08 – ZArbit, 45/08; 111/08 – odl. US; 57/09 – odl. US; 12/10 – odl. US; 50/10 – odl. US; 107/10 – odl. US; 75/12 – odl. US; 40/13 – odl. US; 92/13 – odl. US; 10/14 – odl. US; 48/15 – odl. US; 6/17 – odl. US; 10/17.

<sup>16</sup> **Zakon o sodiščih** (Courts Act: CA): Uradni list RS 94/07 – OCV; 45/08; 96/09; 86/10 – ZJNepS; 33/11; 75/12 – ZSPDSL-A; 63/13; 17/15; 23/17 – ZSSve.



## Delimitation between civil and non-contentious proceedings

Lacking content definition of non-contentious proceedings, an actual border between civil and non-contentious proceedings even in family matters derives from the prevailing established positivistic principle. Departing from art. 1 CPA conflicts from family relations are resolved mainly after the rules of CPA, except if another act expressively sets jurisdiction of a specialised court of justice. Such provisions are contained by Non-Contentious Civil Procedure Act<sup>17</sup> (hereinafter: NCCPA) that determines immediately in art. 1(1) that also family matters are handled in non-contentious proceedings. Until the full validity of the new FC<sup>18</sup> exclusive jurisdiction of the non-contentious court for following family matters is set:

- a) a procedure for the deprivation and the return of legal capacity (Art. 44-56 NCCPA);
- b) a procedure for the prolongation and the ending of prolongation of parental care (Art. 57-60)
- c) a procedure for the acquisition of the full legal capacity of a minor child who became a parent (Art. 61-63 NCCPA);
- d) a procedure for the withdrawal and return of the parental care (Art. 64-68 NCCPA);
- e) a procedure for limiting parental care rights regarding the management of the child's property (Art. 69 NCCPA).

In the non-contentious procedure are handled the matters for which provides the NCCPA itself. Mainly, we may follow legislative technique, by which FC determined civil proceedings, when it enables decisions on regulations of relations based on a claim. In all other cases, non-contentious proceedings are provided either to order decisions based on a proposal, ex officio or no action for start of proceedings is set.

## Reasons for Choice of Proceedings

The choice of a sort of proceedings has a legal policy character to a great extent<sup>19</sup>. We may establish that no base for the limitation between contentious and non-contentious proceedings is to be found in the framework of the right to access to court neither from art. 6 European Convention on Human Rights and Fundamental Freedoms<sup>20</sup> (hereinafter: ECHR), nor in the constitutional right to protection by the court of justice (art. 22 Constitution of the Republic of Slovenia<sup>21</sup> (hereinafter: CRS)). From art. 6 ECHR

<sup>17</sup> **Zakon o nepravdnem postopku** (Non-Contentious Civil Procedure Act: NCCPA): Uradni list SRS 30/86; [20/88 – popr.](#); Uradni list RS [87/02](#) – SPZ; [131/03](#) – odl. US; [77/08](#) – ZFCdr; [10/17](#) – ZPP-E.

<sup>18</sup> As already mentioned, new FC does not regulate prolongation of parental care and deprivation of legal capacity any more.

<sup>19</sup> JUHART, J. (1961). **Civilno procesno pravo FLRJ**. Ljubljana: Univerzitetna založba; p. 99.

<sup>20</sup> **Zakon o ratifikaciji Konvencije o varstvu človekovih pravic in temeljnih svoboščin, spremenjene s protokoli št. 3, 5 in 8 ter dopolnjene s protokolom št. 2, ter njenih protokolov št. 1, 4, 6, 7, 9, 10 in 11** (Act ratifying the Convention on Human Rights and Fundamental Freedoms as amended by Protocols Nos. 3, 5 and 8 and amended by Protocol No. 2 and its Protocols Nos. 1, 4, 6, 7, 9, 10 and 11: ECHR): Uradni list RS – Mednarodne pogodbe [7/94](#).

<sup>21</sup> **Ustava Republike Slovenije** (Constitution of the Republic of Slovenia: CRS): Uradni list RS [33/91-I](#); [42/97](#) – UZS68; [66/00](#) – UZ80; [24/03](#) – UZ3a, 47, 68; [69/04](#) – UZ14; [69/04](#) – UZ43; [69/04](#) – UZ50; [68/06](#) – UZ121, 140, 143; [47/13](#) – UZ148; [47/13](#) – UZ90, 97, 99; [75/16](#) – UZ70a.

it only derives that the right to protection by the court of justice does not necessarily mean a right to access to the court of justice, but this right may be realised also in another judicial proceeding or through specialised courts (e.g. labour, social). The decision, in which kind of judicial proceedings a certain civil right or obligation shall be decided is left to the legislator of an individual state, who respects the kind of proceedings is the best for the resolving of certain civil matters according to its structure. At setting the proceedings, it has to watch out that contents of matters of the same kind shall not be handled in different proceedings without grounded reasons.

Non-contentious proceedings in family matters is more appropriate, as a rule, than contentious proceedings, as the interests of the participants in non-contentious proceedings are not always diametrically opposite. In numerous cases, the purpose of non-contentious proceedings, there is no solution for a conflict between two parties, but a formation of legal relations that are for a long term by nature and usually step into force between people who still have to »live with one another«. Therefore, at regulating relations one has especially to care for a minimum consent among the participants, at least, which is most probably to be reached in non-contentious proceedings. An essential advantage is this represented by the so-called preventive component, based on which it is possible to conduct further procedural principles, as there are a higher flexibility, milder formal requests, orientation towards aid for a party, joint liability of the court and parties for profound and maybe quick proceedings, etc. Based on the named principles, proceedings may be started (exclusively or also) *ex officio*. A special advantage and adaptability of a concrete development of a handled conflict relation is represented by the abandoning of the strictly formal concept of the claim. In non-contentious proceedings, namely, there is no need for a proposal with an exact claim, in spite of the fact that then the conclusion has to contain a totally clear definition of rights or obligations. In the interest of the public and for the protection of people with special needs the principle of investigation is in the foreground, based on this there is the principle of the courts duty to establish all important circumstances *ex officio*, independent from the proposals by the parties, who nevertheless carry responsibility for a quick and profound establishment of the facts. Procedural formalities shall be as small as possible, as the judge is considered to be a legal guardian, who shall be relatively free in a proceeding. Orientation of proceedings towards support for the parties and acceleration of proceedings shall prevent that mere formalities cause failure of the proceedings. In spite of this, the providing of a right to be heard in proceedings, is inevitable. There are also differences between non-contentious and contentious proceedings in connection with representation and reparation of costs. The decision is a conclusion, and also legal remedies are specific. Revision is allowed only, if the law sets it in an individual non-contentious proceeding.

An advantage of non-contentious procedure, determined as general procedure, is the option of a unified handling of a whole family situation. A connecting of decision-making with realisation of the decision is possible. *De lege ferenda* it may be determined that a judge in a non-contentious procedure, where a child's rights are decided upon is also competent for the complete procedure regarding children. By this, needed specialisation in family matters could be reached and by this all-important questions for the protection of the child's rights may be regulated by a specialised family judge, even on the running of the enforcement that has to be especially adapted. The conclusion on contacts may contain a threat with

penalty. The solution may be adapted to the rules of Claim Enforcement and Security Act<sup>22</sup> (hereinafter: CESA). The possibility is known from German law, where a German court of justice determines also the consequence for a violation of obligations at the same time as the regulation of contacts. A procedure for determination of a threat of penalty (*Zwangsgeldverfahren*) is connected to a procedure for regulation of contacts. The one obliged to contacts has the right to make a statement. Complaint against the decision on the amount is possible<sup>23</sup>.

### Contentious Procedure

In spite of the fact that in the past years the number of family matters within the jurisdiction of non-contentious procedure increased, jurisdiction of contentious procedure remained for many conflicts. There, CPA differs between regular civil procedure and special civil procedure that is foreseen for marriage conflicts and conflicts out of relations between parents and children (e.g. conflicts on establishment and contest of fatherhood and motherhood). Contentious procedure is foreseen also in conflicts of divorce and annulment of marriage, where also connected claims are resolved (custody and upbringing, maintenance of children, contacts, prohibitions due to violent actions after art. 19 Domestic Violence Prevention Act<sup>24</sup> (hereinafter: DVPA), protection of the place of living in case of violence after art. 22 DVPA).

In a regular civil procedure, with the disputes on marriage or cohabitation are resolved also disputes on the:

- a) existence of a marriage;
- b) property relations between spouses and cohabitants, unless otherwise provided by law;
- c) maintenance of spouses, cohabitants and adult children.

Conflicts continued by heirs of a claimant in order to prove the base of divorce or annulment of marriage are allowed by the law only due to property consequences. The verdict in such a case does not set divorce or annulment but establishes whether there was a right to divorce or annulment. Therefore, these claims are handled after the rules of a regular procedure, but not after the rules of a special procedure in matrimonial disputes.

### Non-Contentious Procedures

As already mentioned, some non-contentious procedures in family matters were already determined by NCPA from the beginning. Then, the novels of MFRA-B and MFRA-C added new procedures to the existing ones that were transferred from SWC on non-contentious court. An additional extension to

<sup>22</sup> **Zakon o izvršbi in zavarovanju** (Claim Enforcement and Security Act: CESA): (Uradni list RS, št. [3/07](#) – uradno prečiščeno besedilo, [93/07](#), [37/08](#) – ZST-1, [45/08](#) – ZArbit, [28/09](#), [51/10](#), [26/11](#), [17/13](#) – odl. US, [45/14](#) – odl. US, [53/14](#), [58/14](#) – odl. US, [54/15](#) in [76/15](#) – odl. US).

<sup>23</sup> SEIDL, H. (1999). **Familienrecht**. 5. edition. Munchen: Beck. p. 103.

<sup>24</sup> **Zakon o preprečevanja nasilja v družini** (Domestic Violence Prevention Act: DVPA): Uradni list RS 16/08; [68/16](#); [54/17](#) – ZSV-H.



non-contentious procedures is also brought by new FC. Namely, in the articles of the FC where the word “lawsuit” is not used, the jurisdiction of the non-contentious court is given for decision-making in following matters on:

- a) the acquisition of the full legal capacity of a child who has become a parent;
- b) the overlooking marriage impediments;
- c) on parental care,<sup>25</sup> that will be in decisions making on:
  - i. upbringing and care of children;
  - ii. the maintenance of the child;
  - iii. contacts of the child;
  - iv. the implementation of other aspects of parental care;
- d) the measures to protect the best interests of the child;
- e) the placement of the child in the foster care;
- f) the placement of a child under the guardianship when deciding on protection measures for the best interests of the child;
- g) the withdrawal and return of the parental care;
- h) the adoption and the annulment of a decision on the adoption of a child;
- i) the prohibition of the alienation because of the domestic violence;
- j) the property issues between spouses and cohabitants if the legal act provides this (for example: division of the joint property);
- k) housing issue.

According to the FC, the decision-making in the non-contentious procedure could be classified into three groups:

- a) the first group includes the resolution of disputes between the parents on all questions of parental care and on the validation of their settlements on upbringing, care, maintenance in contacts, when the enforcement title is required;
- b) the second group of matters are state measures that need to be introduced to protect the child’s benefits because either parents do not act in the best interest of the child or there are no parents, or they are hindered by exercising of parental care. This also includes measures in the field of foster care, guardianship and adoption;
- c) the third group are procedures for regulation the property relations between the spouses or cohabitants and housing protection<sup>26</sup>.

<sup>25</sup> The FC replaced the term »parental rights« with the term »parental care«.

<sup>26</sup> RIJAVEC, V. (2017). Postopki v družinskih zadevah ob sprejemu Družinskega zakonika. **Podjetje in delo** 6-7/2017/XLII. p. 1288.

## Protecting the child's best interest in procedures

For the protection of the child's best interest, FC expressively determines some principles to be respected at deciding on measures for the protection of a child's best interests. At all activities in connection to children, either that they are led by the states or by private establishments for social care, the courts, administrative bodies or legislative bodies, the child's best interests shall be the main guideline (art. 3(1) Convention on the rights of the child (hereinafter: CRC))<sup>27</sup>. *The principle of the best interest of the child* is also given in the CRS and determines, that children shall enjoy special protection and care and they shall enjoy human rights and fundamental freedoms consistent with their age and maturity (art. 56(1). CRS). Even FC follows this, as already in introductory provisions the essence of the principle of the child's best interest is defined (art. 7 FC), in the same way in art. 154 FC the obligation of the state to protect the child's interests is additionally determined. There, the legal standard "child's interest" is a term of value that has to be made concrete by respecting all circumstances of the case<sup>28</sup>.

A novelty of FC is represented by the setting of the *principle of the milder measure* within the provisions of the law. After this principle, a measure shall be adopted, by which parents will be less offended, if the child's best interest can be protected by this measure, and the child shall not be taken away, if its best interest can be protected in another way (art. 156 FC). The court of justice, after FC, has a general authority to protect the child's best interest in the most appropriate way. Such a general authorization does not prescribe the sort of a measure taken by the court of justice but enables a proper adaptation to concrete needs (*the principle of proportionality*). Measures are listed as examples and here, FC respects some new measures of durable character, as in practice it showed that they are needed. Besides the measures of durable character, FC regulates urgent measures and contemporary orders in detail. Essential for the protection of the child's best interests are the measure of taking away the child and the measure on medical examination of a child. Also, *the principle of the limited duration of the measures* was adopted with the intention to ensuring the child's best interest. After this principle, at each measure it has to be especially determined, how long it may last, a constant verification of the ground of further enforcement of the measure is to be provided for. SWC is obliged to suggest the ending of the measure, an exchange of a measure with another or suggest an already taken measure when it is of the opinion that it is for the best interest of the child. In the same way, court might decide by official duty.

Authorisation for decision disregarding the set claim is generally given in art. 408 (2) CPA and then made concrete in art. 421(2) CPA so the court decides on custody, upbringing, maintenance of common children and on contact in divorce proceedings, even if there is no request, and if it is made, the court is not bound to it. The same official authorisation is also set in the case of a ruling for establishment of fatherhood for the decision on maintenance for a child (art. 422 CPA). Content of obligatory decision-making by official duty in divorce for common children is set also in art. 98(2) FC in the same range as in CPA. But, as

<sup>27</sup> **Konvencija o otrokovih pravicah** (Convention on the rights of the child: CRC): Uradni list SFRJ 15/90; Uradni list RS 35/92.

<sup>28</sup> RIJAVEC, V. (2009). **Pravdni postopek – zakon s komentarjem**, 3. Knjiga (305.a do 503. člen). V:UDE, L. et al (ed.). Ljubljana: GV Založba, str. 617; tudi *VSL sklep IV Cp 6293/2005* (ECLI:SI:VSLJ:2005:IV.CP. 6293.2005), December 28 2005.

CPA is in subsidiary use also in non-contentious procedures, these starting-points are valid also for non-contentious procedures in family matters.

Especially in CPA it is determined that in procedures in marriage disputes and conflicts in relations between parents and children there is neither an option of a verdict based on recognition, refusal, delay, nor consent by the parties (art. 412(1) CPA). Settlement is very limited, as parties may have a settlement only regarding the protection, upbringing and maintenance of children and regarding contacts, if the court establishes prior to this that it is for the child's best interests (art. 412(2) CPA). Else, settlement on custody, upbringing, maintenance and contacts is possible even outside the court of justice (for example: at the SWC, in mediation), but this settlement has no effect of an enforcement title. Also, a notary may not enable enforcement of a consent on questions of custody, and upbringing, contacts and maintenance, even if it formulates them as a notary act<sup>29</sup>. FC changes the concept and only gives a hint to the parents to obtain an enforcement title to propose entrance into a judicial settlement allowed by the court, if it is for the child's best interest (comp. art. 138(2) and art. 141(4) FC). At entering judicial settlement of custody for a child, the judge watches by official duty.

Judicial matters in connection to relations between parents and children, adoption, conveying parental care to relatives, foster care and guardianship are resolved *by priority* (art. 14(2) FC).

### Child's position in family matters

In civil litigation in modern theory, a clear term of a party is established based on a formal criterion. A party is someone, who claims legal protection of certain content by the court, or the one against who the claimant request for legal protection. Status of a party is recognised also to someone, who claims a material legal title and even to someone, who even does not claim to be legitimated by material law<sup>30</sup>. Nature of family relations frequently requests for an effect of the decision against a wider circle of people in comparison to a simple pattern of one claimant and one defendant. Certain procedural rights are owned also by those, who are not parties in a formal sense. By this, we come closer to the term of a party in theory of material law that was abandoned in procedural law. The parties after this theory are all subjects of the relation of material law. The court decides on rights and interests of these persons, the carriers of these rights and interests have to have the possibility to say their statement and to defend themselves from an intended measure by the court<sup>31</sup>. Therefore, non-contentious procedure is frequently more appropriate than contentious procedure. In non-contentious procedures, in which it is taking part, the child is subject to such a procedure already only due to the fact of a material criterion, in spite of the fact that it is not named as claimant or opposite party. A participant is everybody, regarding whom the procedure is held or everybody, to whom a decision immediately relates, as well as a person, whose legal interest may be affected by the court's decision (art. 19 NCCP). In individual procedures it is especially provided that the child appears also as one of the possible claimants.

<sup>29</sup> VSL sodba IV Cp 4560/2010 (ECLI:SI:VSLJ:2010:IV.CP.4560.2010), December 22 2010.

<sup>30</sup> RIJAVEC, 2017. p. 1294.

<sup>31</sup> JUHART, J. (1970) *Civilno nepravdno pravo*. Ljubljana: Univerzitetna založba; p. 55.

In case of divorce litigation, where it is also decided on custody and upbringing of children and on contacts, the child is a subject to these claims. The status of a subject of the child has to be recognised also after CRC. In spite of the fact that it is named as a party in the head of the claim, it is named in the request set for its right. A parent makes the move on behalf of the child. If the parent does not make the move, it is respected by the court by official duty and the child is named in the verdict as entitled person, whose legal relation is created by this judgement. Between parents, such a decision produces also the obligation to do or omit (hand the child to custody and upbringing, enable contacts). In the same way, the child may also take an active role and claim for custody and upbringing, it may request contacts and has the right to resist contacts<sup>32</sup>. It independently files actions, if the conditions by art. 409(1) CPA are met, in other cases by a legal representative. It may file against one or the other or both parents. If the interests of the child are opposite to the interests of the parents, the child is equipped with a collision guardian. The child is an active party, as maintenance is requested on its behalf and on its account, in spite of the fact that the request usually is formulated in a way that the person obliged to maintenance (for example: a father) has to pay maintenance for a child and not to the child, on the account of the parent, who is the legal representative. FC expressly foresees the child as claimant also in the new non-contentious procedures, as e.g. in procedures for the decision on a measure for the best interests of the child older than 15 years. The addition regarding age of 15 years is no condition for the status of a subject, but for procedural capacity. Capacity to be a party is owned by each natural and legal entity, independent from business capacity. Therefore, one cannot agree with the court in a case, when the court was of the opinion that the child was a party to the procedure only, if it was 15 years old and capable of understanding the meaning and legal consequences of its actions<sup>33</sup>. Else, the establishment is valid that a conflict on custody and upbringing of common children is a conflict of the parents, as a rule, but the relation is regulated with effects also on the child, and the child may not be object of the decision.

If it expressed its opinion in a procedure, the law especially requests from the court to hand the decision to the child, and the child has a right to challenge the decision (art. 410(3) CPA), but that does not mean that younger children are no parties in matters, where their rights are decided about. They are represented by a legal representative and the decision is sent to him. Usually, this is one of the parents, who is in the role of the claimant. In art. 409, CPA does not determine in detail, in which cases the child is a party of the procedure, but regulates the procedural capacity of a minor, who is already 15 years old, in all disputes from relations between parents and children. Procedural capacity is generally bound to business capacity. By the age of 15 years, a child obtains partial business capacity enabling the child to independently enter legal relations, if the law does not determine otherwise. For the validity of these relations, the allowance by the parents is needed, if they are so important that they essentially influence the minor's living, or if they are such that they may influence its living also after maturity (art. 146(1-2) FC).

A child above the age of 15 years is independent at procedural actions after art. 409 CPA, even if it

---

<sup>32</sup> KRALJIĆ, S. (2016). 12. člen KOP – pravica otroka do svobodnega izražanja v sodnih in upravnih postopkih. **Pravosodni bilten**, letn. 37(1). p. 14.

<sup>33</sup> **VSRS sodba II Ips 199/2005** (ECLI:SI:VSRS:2005:II.IPS.199.2005), July 7 2005.

essentially influences its life. Without this important norm, the child would need the allowance of a legal representative for its procedural actions. Independence is recognised to the child by the judge under the condition that it is capable to understand the meaning and the legal consequences of its actions. If the degree of maturity of reason and judgement are given and the child expresses to take over the litigation, the court recognises its expressions and not the ones of the representative. A violation of the provision of art. 409 CPA, because the court did not respect the child and did not enable the child of an age of over 15 years to cooperate in the procedure, jurisdiction defines as absolute violation of art. 339(2)(8) CPA<sup>34</sup>.

In art. 410 CPA does not determine, when a child is party to the procedure, but its *right to a direct hearing* in procedures, where decisions are made on upbringing and protection and contacts of children with parents and other persons. In paternity litigations and in litigations for maintenance, the immediate interview of the child is not foreseen. Nevertheless, in all procedures after CRC the child has to be enabled to make expressions, if this is possible and not too burdening for the child. Also ECERC foresees procedural rights of a child, the right to be informed and to express the views of the child in a procedure, but the child does not have a right to allow or reject a proposed decision, yet. The court respects the child's opinion in line with its age and maturity. In this sense, CPA requests from the court that decides on upbringing and custody of a child and on contacts that it has to inform the child on the start of procedure and its right to express its opinion in a proper way, of course under the condition that the child is capable to understand the meaning of the procedure and the consequences of the decision regarding its degree of maturity<sup>35</sup>. By this, also one segment of the right to an interview of the parties is fulfilled. Neither CPA nor now the new FC does determine any more the limitation of age, under which the child is absolutely not capable of understanding the meaning and consequences of the procedure, but the establishment of the child's capacities are left to the judge in each concrete case. The intention of the law is to enable the child in each case, when it is possible, to express its opinion and to take its wishes and needs serious, if it is capable to understand their meaning and consequences<sup>36</sup>. By this, the child has a safe position of a subject to the procedure.

So, the court has to inform the child on the procedure and its right to express its opinion in a proper way. Naturally, the court evaluates prior to that, whether the child is capable of understanding the meaning of the procedure and the consequences of it. A positive movement is the effort of jurisdiction that the judge has an informal conversation with the child alone, eventually at court or somewhere outside, by interference of other people, e.g. SWC or a school advisory worker. A person to be chosen by the child may be present at the conversation. The court is liberated from the duty to obtain the opinion of the child, only if the attraction of the child would be obviously against the best interest of the child. The judge elaborates minutes of the conversation, but he also might decide to record the conversation on tape. Due to the protection of the child's best interests, the court may rule that the parents are not allowed to insight into the minutes or the hearing of the record (art. 274(2) FC).

SWC may in procedures in connection to the child have the conversation with the child without

<sup>34</sup> VSC sklep Cp 512/2006 (ECLI:SI:VSCE:2006:CP.512.2006), May 11 2006.

<sup>35</sup> KRALJIĆ, 2016. p. 11-30.

<sup>36</sup> VSL sodba IV Cp 2188/2015 (ECLI:SI:VSLJ:2015:IV.CP.2188.2015), September 23 2015.



the consent by the parents, if it estimates that this is for the child's best interest. In the same way, due to the protection of the child's best interests, it may refuse the parents insight into the minutes of the conversation with the child (art. 177 FC). If the child has to be placed e. g. in foster care, SWC or the court of justice might decide on special conditions not to inform one of the parents of both on the place, where the child shall be placed. In this case, the original of the decision with the naming of the person, to whom the child will be placed, and the nomination of the foster parent, another person or institution is sealed, and the copy of the decision is handed over without the naming of the place of the child's stay (art. 178 FC). For the protection of the best interests of the child, it was possible already before FC (i.e. after CPA) to hinder the parents to read the conversation with the child, as the special nature of the procedure commands the extraordinary limitation of information on written materials. The novel CPA-E<sup>37</sup> adds now that the content of the conversation must not be presented even in the judgement (art. 410(2) CPA). Already a prior limitation of information with written materials was criticised as too hard reaching into the parents' right to expression<sup>38</sup>. In spite of the fact that this right is one of the most important elements of the right to fair trial, in the case of children, it has to be challenged by the child's best interest (comp. art. 3 CRC; art. 7 FC).

## Conclusion

Again, the meaning of a harmonisation of the regulation of the way of regulating family relations has to be stressed. The development in Slovenia is going in the right direction. Adaptation of the requests by conventions and other relevant reasons relatively totally supported the transfer of the majority of decisions by SWC to the courts of justice. Such an orientation is given also by comparative legal models. In spite of the fact that decisions by SWC in the past relatively successfully fulfilled their tasks, certain lacks regarding the protection of the participants rights, especially those of children or persons not capable to take care of their own matters, showed. The administrative procedure is meant for the deciding on matters that have a different nature than the regulation of family matters, where the reaching into the most intimate sphere is almost inevitable. Therefore, proper procedural safeguards have to be provided. The double role of social workers of the SWC, who are now liberated from the competences of an authority to decide in fundamental relations of family law, showed to be negative. Judicial decisions reach a different acceptance by people than decisions by any SWC that frequently share even improper reactions. By the transfer of competences from SWC to the courts of justice, the counselling and orientation role of the SWC comes to validity even more. Therefore, it is fitting that this body cooperates in non-contentious procedures in various ways, as a representative, participant or as *intervenient sui generis*, who professionally supports the participants and the courts at choosing evidence or search for consensual solutions.

In jurisdiction the ground for a unified resolving of all family matters before the county courts of justice is set and usually the choice of procedure is already made. For the final harmonisation of the

<sup>37</sup> **Zakon o spremembah in dopolnitvah Zakona o pravnem postopku (ZPP-E)** (Act Amending the Contentious Civil Procedure Act: CPA-E): Uradni list RS, št. [10/17](#).

<sup>38</sup> GALIČ, A. (2017). **Zakon o pravnem postopku, neuradno prečiščeno besedilo, z uvodnimi pojasnili k spremembam zakona in stvarnim kazalom**. 2. dotis. Ljubljana: Uradni list. p. 61-62.

concept, besides FC, procedural legislation is still needed, mainly in the sense of upgrading the rules in individual family matters. In the procedural field, a less legislative concept has to be reached and it has to be more focused on the child. The greatest effort is still ahead, as an organisational reform has to follow.

## References

ARAS, S. (2013). **Uzdržavanje djece - Sudski alimentacijski postupci u domaćem i poredbenom pravu**. Zagreb: Sveučilište u Zagrebu Pravni fakultet.

**Družinski zakonik** (Family Code: FC): Uradni list RS 15/17.

GALIČ, A. (2017). **Zakon o pravdnem postopku, neuradno prečiščeno besedilo, z uvodnimi pojasnili k spremembam zakona in stvarnim kazalom**. 2. dotis. Ljubljana: Uradni list.

JUHART, J. (1961). **Civilno procesno pravo FLRJ**. Ljubljana: Univerzitetna založba.

JUHART, J. (1970) **Civilno nepravdno pravo**. Ljubljana: Univerzitetna založba.

**Konvencija o otrokovih pravicah** (Convention on the rights of the child: CRC): Uradni list SFRJ 15/90; Uradni list RS 35/92.

KRALJIĆ S. (2017) Same-sex relationships in Eastern Europe: marriage, registration or no regulation? In: BOELE-WOELKI, K. (ed.), FUCHS, A. (ed.). **Same-sex relationships and beyond: gender matters in the EU**, (European family law series, 42). Fully revised 3. ed. Cambridge; Antwerp; Portland: Intersentia.

KRALJIĆ, S. (2016). 12. člen KOP – pravica otroka do svobodnega izražanja v sodnih in upravnih postopkih. **Pravosodni bilten**, letn. 37(1).

NOVAK, B. (2017). **Družinsko pravo**, 2. sprememnjena in dopolnjena izdaja. Ljubljana: Uradni list Republike Slovenije; str. 261.

**Odločba Ustavnega sodišča RS U-I- 312/00-40** (ECLI:SI:USRS:2003:U.I.312.00), May 9 2003.

**Odločba Ustavnega sodišča RS U-I-273/98** (ECLI:SI:USRS:1999:U.I.273.98), July 1 1999.

RIJAVEC, V. (2009). **Pravdni postopek – zakon s komentarjem**, 3. Knjiga (305.a do 503. člen). V:UDE, L. et al (ed.). Ljubljana: GV Založba, str. 617; tudi *VSL sklep IV Cp 6293/2005* (ECLI:SI:VSLJ:2005:IV.CP. 6293.2005), December 28 2005.

RIJAVEC, V. (2017). Postopki v družinskih zadevah ob sprejemu Družinskega zakonika. **Podjetje in delo** 6-7/2017/XLII.

SEIDL, H. (1999). **Familienrecht**. 5. edition. Munchen: Beck.