Chapter VI

Serbia: Parent–Child Relationships in Serbian Family Law

Gordana Kovaček Stanić

1. Introduction

In the historical context of Serbia, before World War II, the Civil Code of the Kingdom of Serbia of 1844 regulated family issues. The basic institution concerning parent–child relations was paternal authority (power; "*očinska vlast*"). We consider paternal authority to comprise a set of rights and powers that belong to both parents jointly, but the holder of which is the father, as well as those prerogatives given exclusively to the father. These are the right to represent the child, to give marriage permission, and to manage the child's assets as their legal repersentative. The rule for resolving a disagreement between parents concerning the child's issue states that the father's word prevails.[1]

After World War II, in the former Yugoslavia (nowdays Serbia), parents became equal in parent–child relations. Parental equality was introduced with the Yugoslav Constitution of 1946 based on the general principle of gender equality.

However, in some European countries, the father's role was predominant until the 1980s. For example, in Italy, the father had parental power until 1975.[2] In Greece,

> … until 1983, the only custodial power we had was paternal power exercised by the father, while the mother looked after the child in accordance with the instructions

1 Marković, 1920, p. 194.
2 Foyer, 1974, p. 45.

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and decisions of the father. In other words, the child was under the authority of the father.[3]

The evolution in the relations between parents and children has an impact on the changes in legal terminology. In the legal history of ancient times, specifically Roman law, the term *patria potestas* existed, and paternal authority (power) was used, for example, in the Civil Code of the Kingdom of Serbia of 1844.

In the contemporary family law of European legal systems, the terminology differs. One group of legal systems adopts the term "parental authority" —for example, in the French *Code Civil* ("*autorite parentale*") and the Italian *Codice Civile* ("*potestà dei genitori*"). Some terms have, in their evolution, given priority to the child and to parental responsibility or parental care, as in the United Kingdom's Children Act, which addresses "parental responsibility." In some legal terms, "parental care" is used, such as in the German Civil Code ("*sorgerecht*"), in the Croatian Family Act ("*roditeljska skrb*"), and in the Slovenian Family Code ("*starševska skrb*").

For the harmonization of family law in Europe, of great importance are the Principles of European Family Law Regarding Parental Responsibilities,[4] which use the term "parental responsibility." In international law, in the Hague Convention of October 19, 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility, and Measures for the Protection of Children, the term "parental responsibility" is also used.[5] In the Brisel II and Brisel II *bis* Regulations, the same term is used, but in the plural form—"parental responsibilities."[6]

The Serbian Family Act adopts the term "parental right" ("*roditeljsko pravo*"). This term is redefined as parental rights are derived from the parents' duties and exist only to the extent necessary for the protection of the child's personality, rights, and interests.[7] Term "parental responsibility" is not accepted in the Serbian Family Act as it could be confused with liability for damage as, in the Serbian language, these are same terms ("*odgovornost*").

The research on parental responsibility raises different factual and legal questions in the contemporary family law. One of the most important issues is the exercise of parental responsibility after the divorce (or if the parents do not live together), especially the form of joint exercise of parental responsibility. The *pro et contra* of the child's alternate residence is certainly the most intriguing current issue. In addition, the current factual and legal problem is parental decision-making on issues that significantly influence the child's life.

3 Kotzabassi, 2011, p. 800.

4 Boele-Woelki et al. (2007) Available at http://www.ceflonline.net/ (Reprinted September 21, 2012).

5 Available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=70.

6 Council Regulation (EC) No. 2201/2003 of November 27, 2003 concerning the jurisdiction, recognition, and enforcement of judgments in matrimonial matters and matters of parental responsibility [2003] OJ L 338/1 Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33194.

7 Art. 67.

2. Constitutional foundations for the protection of parental responsibility

The Constitution, as a legal source in family law, defines principles that must be respected in family law in general. In Serbia the Constitution from 2006 is in force.[8] Principles in connection with family law are stipulated in the second part of the Constitution on "Human and minority rights and freedoms."

The gender equality principle is stipulated in the Constitution in Art. 15.[9] A more concrete version of this principle is that of equality between mother and father as parents according to Art. 65/1 and between male and female children. This principle was introduced into the domestic legal system through the Constitution of the Federal People's Republic of Yugoslavia in 1946. The mother and father have the same rights and obligations with respect to their children, and male and female children have the same rights in the family and all other relations. Historically, in domestic law prior to World War II, the mother had an inferior status with respect to the father (pursuant to the institute of paternal authority), while female children had a considerably narrower set of rights than male ones (pursuant to the Civil Code of the Kingdom of Serbia of 1844, female children did not have any inheritance rights). The Constitution especially stipulates under Art. 62/3 the equality between women and men in connection with concluding marriage, its duration, and divorce. Furthermore, a principle explicitly stipulates that all direct or indirect discrimination based on any grounds (including gender) shall be prohibited.[10] On the other hand, affirmative action is not considered discrimination.

The principle of special protection of the family, mother, single parent, and child is stipulated in the Constitution in Art. 66. Mothers shall be given special support and protection before and after childbirth, and this protection shall be provided for children without parental care as well as for those with mental or physical disabilities. Children under 15 years of age may not be employed, nor may children under 18 years of age be employed at jobs detrimental to their health or morals. The protection of the family should include issues of what the best way to protect the family is but also when, namely whether the protection and development of healthy family relationships should be addressed even before the family is formed. In that sense, counseling or conversations with competent persons can be of special importance for spouses or future spouses as well as for non-marital partners. The question is whether the principle of special protection of the family is realized, in practice, in a sufficient manner. It could be said that the protection

8 The Constitution of the Republic of Serbia was adopted in 2006. *Official Gazatte of the Republic of Serbia* 98/2006.

9 In addition to gender, all direct or indirect discrimination on other grounds—particularly on race, national origin, social origin, birth, religion, political or other opinion, economic status, culture, language, age, and mental or physical disability shall also be prohibited (Art. 21/3).

10 Art. 21.

is given mostly to families that cannot satisfy their functions according to the contemporary standards.

The principle of equating children born out of wedlock and those born in marriage is stipulated in the Constitution in Art. 64/4. This principle was introduced into the domestic legal system through the Constitution of the Federal People's Republic of Yugoslavia of 1946. The equality of children born out of wedlock and those born in marriage was not full at first, and a difference existed depending on whether fatherhood was established voluntarily or against the father's will. Thus, a child born out of wedlock entered into a legal relationship with the mother and her relatives, while, if the father acknowledged the child, they also entered into a relationship with him and his relatives. However, if fatherhood was established through court proceedings, the child only entered into a legal relationship with the father and not his relatives. In jurisprudence, there existed a position by which the child acquired rights and obligations with respect to the father's relatives if the father accepted the child following a court decision, and full equality was introduced with the Constitution of the Republic of Yugoslavia of 1974.[11] Today, children born out of wedlock have the same rights and obligations as those born in marriage, and they enter into a legal relationship with the mother and her relatives as well as with the father and his relatives. A difference exists, however, in the manner in which fatherhood is established, which is important since the legal relationship between the father and the child is formed as a consequence of previously established fatherhood. Marital fatherhood is established based on the legal presumption that the mother's husband is the father of the child (*pater is est quem nuptiae demonstrat*), while non-marital fatherhood is established with acknowledgment or through court proceedings. In other words, marital fatherhood is established *ex lege*, while non-marital fatherhood must be established with the acknowledgment of the father or through court proceedings. Historically, non-marital children were discriminated against, and they entered into a legal relationship primarily with the mother.[12]

The principle of equating adoption with parentage is stipulated in the Constitution in Art. 6/5, which provides that an adopted child has equal rights with respect to its adopters as a child does toward its parents, while the adopters have the same legal status as the parents.

The principle of free decision of childbirth is stipulated in the Constitution in Art. 63: "*Everyone shall have the freedom to decide whether they shall procreate or not. The Republic of Serbia shall encourage the parents to decide to have children and assist them in this matter.*"

11 Constitution of the Republic of Yugoslavia, *Official Journal of the Socialist Federal Republic of Yugoslavia* 9/1974.

12 The Civil Code of the Kingdom of Serbia of 1844 contains the following provisions: *"A child born out of wedlock or bastard, the mother is obliged, equally as with a child born in marriage, for its upbringing and to follow down the path of faith and law and happiness"* (Para. 129).

This principle was introduced for the first time by the Constitution of the Republic of Yugoslavia of 1974. Article 191 provides for the free decision on childbirth as a human right that could be restricted only on the ground of health protection.

The principle of free decision on childbirth in the contemporary society is exercised according to the advancement of medicine and technology (artificial reproduction technology). Further, the Serbian Constitution explicitly prohibits the cloning of human beings.[13]

The principle of the child's rights was introduced in the Constitution for the first time in 2006. It is stipulated that a child shall enjoy human rights suitable to their age and mental maturity; that every child shall have the right to a personal name and entry in the registry of births, the right to learn about its ancestry, and the right to preserve their own identity. According to Art. 64 child shall be protected from psychological, physical, economic, and any other form of exploitation or abuse.

The principle of the rights and duties of parents stipulates that they shall have the right and duty to the maintenance, upbringing, and education of their children in which they shall be equal. All or individual rights may be revoked from one or both parents only by the ruling of the court if this is in the best interests of the child, in accordance with the law.[14] The court is a competent organ for these procedures, which means that all other institutions are excluded (e.g., center for social work). This solution is in accordance with international conventions and reflects the extreme legal and factual importance of parental rights; thus, only the court could decide on their full or partial deprivation.

In connection with the children's upbringing and education, the provision on the promotion of respect for diversity is important. In Art. 48, it is stated: "The Republic of Serbia shall promote understanding, recognition and respect of diversity arising from specific ethnic, cultural, linguistic or religious identity of its citizens through measures applied in education, culture and public information."

The principle of the right to education is stipulated in Art. 71:

> Everyone shall have the right to education. Primary education is mandatory and free, whereas secondary education is free. All citizens shall have access under equal conditions to higher education. The Republic of Serbia shall provide for free tertiary education to successful and talented students of lower economic status in accordance with the law.

The Constitutional Court of Serbia was called to assess the constitutionality of the provisions of the Family Act in a period of 9 years (2007–2016) and, in no case, determined their unconstitutionality. One decision involves the content of parental rights; the Constitutional Court confirmed the constitutionality of

13 Art. 24/3.
14 Art. 65.

the provisions of the Family Act on the obligation of parents to maintain their adult children who are incapable of work and do not have sufficient means of subsistence.[15]

One decision of the Constitutional Court is worth mentioning in the context of parental responsibility as it involves a case of so-called "missing babies":

The decision of the Constitutional Court in the Case of G. R. and draws attention on the fact that although the allegations and claims of the applicant in this case are substantially similar to the assessments of the European Court of Human Rights in the Case of Zorica Jovanovic v. Sebia, the facts and circumstances established by the Constitutional Court in the constitutional appeal Case of G. R. are significantly different from the facts established by the European Court in the Case of Zorica Jovanovic v. Serbia… Contrary to the findings of facts by the European Court of Human Rights in the judgment Zorica Jovanovic v. Serbia (it is noted that the body of the applicant's son was never released to the applicant or her family, the cause of death was never determined, the applicant was never provided with an autopsy report or informed of when and where her son had allegedly been buried, and his death was never officially recorded) from the documentation that has been filed with the Constitutional Court follows that the constitutional complainant could not have had any doubts regarding the report on the death of his children or uncertainty about the "crucial factual or legal issues," i.e., credible information as to what really happened to his children. The Constitutional Court also found that all the neatly guided medical protocols with data on the health status of twins, undertaken diagnostic and therapeutic procedures, anamnesis and discharge lists were delivered to the complainant. Unfortunately, despite all the efforts of doctors to save two premature infants, who were born with serious deficits in their basic functions, a fatal outcome was inevitable. The Constitutional Court also found that the facts of birth and death of both children were properly recorded in the Birth and Death Registers, that the parents did not respond to the call of the medical institution to bury their children, and that there is a credible evidence that funeral was carried out in the organization and at the expense of the Institute for neonatology, where children were treated and where a lethal outcome was performed. Therefore, the foregoing considerations were sufficient to enable the Constitutional Court to conclude that allegations of the complainant that he had no credible information about what happened to his children were unfounded in regard to allegations of violation of the right to respect for family life under Art. 8 of the European Convention on Human Rights.[16]

15 Draškić, 2017a, pp. 48–51.
16 Draškić, 2017b, p. 232.

3. Protection of parental responsibility in the system of legal sources

3.1. Domestic legal sources for the protection of parental responsibility

The main legal source concerning family law in Serbia is the Family Act 2005, which regulates parental rights and all legal relations between parents and children. Some acts that regulate other fields of law have provisions protecting the family.[17]

The law on labor of 2005[18] stipulates the right to maternity leave and childcare leave. The former lasts for 3 months after the child is born, and the latter lasts for an additional 9 months. Maternity leave applies mostly to the mothers, while the father can take it only if mother cannot care for the child; on the contrary, childcare leave is available for mothers and fathers in the same way, depending of the parents' agreement. It is also possible for the parents to share childcare leave. The law on labor stimulates the birth of a third and fourth child as maternity leave and childcare leave last for 2 years instead of the 1 year allocated for the first and second child.

The law on biomedical assisted fertilization[19] stipulates different procedures (technologies) available to men and women to help them become parents (not including surrogate motherhood). From 2020, the procedures for stimulation are free of charge and limitless, and three embryo transfers for a woman until she reaches 43 years of age are free of charge as well.[20] For the second child, two stimulation procedures and one embryo transfer are free of charge.

The law on financial support for a family with children[21] stipulates different allowances, such as parental allowance and child allowance. Parental allowance is a sum that every parent receives as financial help when the child is born. This allowance is progressive and depends on the number of the children. The social status of parents does not have any impact on receiving it, which means that every parent is entitled to it. For the first child, parental allowance is 100,000 din as a lump sum; for the second child, it is 240,000 din paid in 24 monthly payments; for the third child, it is 1,440,000 din paid in 120 monthly payments; and for the fourth child, it is 2,160,000 din paid in 120 monthly payments. Thus, this is a birth-rate stimulative measure. Child allowance is a payment for the parents of lower economic status; this law stipulates payments for the maternity leave and childcare leave in accordance with law on labor.

The law on retirement and disability insurance[22] favors the birth of a third child stipulating that an insured's seniority—here, that of a woman who gave birth to her third child—is to be accrued during the 2-year maternal leave as a special type of

17 Family Act, *Official Gazette of Serbia* No. 18/05 with amendments, hereinafter FA.
18 *Official Gazette of Serbia* no. 24/05.
19 *Official Gazette of Serbia* no. 40/17.
20 State Instructions for Conducting Biomedical Assisted Fertilization no. 06/20.
21 *Official Gazette of Serbia* no. 113/17 and 50/18.
22 *Official Gazette of Serbia* no. 34/03, 84/04, 85/05.

seniority.[23] Changes and amendments to this law in 2005 extended the rights of the children without both parents to receive not only one parent's pension but two separate family pensions.[24] This measure does not directly affect family planning but is certainly significant as a measure that protects a child.

The law on preventing domestic violence was enacted in 2016.[25] Domestic violence is broadly defined to include physical, sexual, psychological, or economic violence. Victims of domestic violence have the right to information, the right to free legal aid, and the right to an individual plan of protection and support. The law also regulates data records on cases of domestic violence and data protection, and it prescribes that state authorities and institutions are obliged to act in a timely manner and to provide each victim with legal, psychosocial, and other types of aid for recovery, empowerment, and self-reliance. These institutions are the police, prosecution offices, courts, and centers for social work. In addition, relevant information and help is provided by other institutions dealing with childcare, social protection, education, and health as well as local bodies for gender equality. In addition, a coordination and support body must be established for each of the 58 basic prosecution offices covering a territorial area, with the aim to prepare an individual plan for protection and victim's support. The implementation of the law is monitored by the Council for the Prevention of Domestic Violence.

3.2. International legal sources for the protection of parental responsibility

International law is of great importance at the national level for the protection of parental responsibility. According to the Serbian Constitution, treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly. Ratified international treaties must be in accordance with the Constitution[26]:

For parental responsibility, the most important conventions are as follows: the Convention on the Rights of a Child[27]; the *Convention* on the Civil Aspects of *International* Child *Abduction*[28]; the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children[29]; the Convention for the Protection of Human Rights and Fundamental Freedoms[30]; the Council of Europe *Convention* on Preventing and Combatting Violence against Women and Domestic Violence[31]; the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse[32]; the Worst

23 Art. 60.
24 Art. 73/1.
25 *Official Gazette of Serbia* no. 94/16; https://www.equalitylaw.eu/downloads/4028-serbia-law-on-combatting-domestic-violence-pdf-132-kb
26 Art. 16/2.
27 Ratified: *Official Journal of Yugoslavia* no. 5/90.
28 Ratified: *Official Journal of Yugoslavia* no. 7/91.
29 Ratified: *Official Journal of Yugoslavia* no. 1/01.
30 Ratified: *Official Journal of Serbia and Montenegro* no. 9/03.
31 Ratified: *Official Gazette of Serbia* no. 12/13.
32 Ratified: *Official Gazette of Serbia* no. 1/10.

Forms of Child Labor Convention no. 182[33]; Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption.[34] In 2009, Serbia signed, but did not ratify, the European Convention on the Adoption of 1967, which was revised in 2008.

The Convention on the Rights of a Child regulates, in the first place, a child's rights. The Convention has specific articles that regulate parental care; for instance, in Article 7, it is stated: "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." In Article 9, it is stated: "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 Article 18, is stated: "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child…" The Serbian Family Act is in complete accordance with the Convention.

The Convention on the Civil Aspects of International Child Abduction is very important in contemporary times. The frequency of child abduction cases is a consequence of modern lifestyles, mobility, moving from one state to another, and marriages between persons with different nationalities or habitual residences. On one hand, it could be said that these phenomena are positive consequences of globalization. On the other hand, the increasing divorce rates, including the divorce of marriages between persons of different origins, nationalities, and habitual residences or domiciles, influence the relationships between parents and their children. The increasing divorce rates and child abduction are some of the negative consequences of globalization. Removal or retention shall be deemed as wrongful under domestic family law in all situations when an agreement between the parents on the change of domicile (habitual residence) is absent; thus, this constitutes child abduction.[35] It could be said that the

33 Ratified: *Official Journal of Yugoslavia* no. 1/01.

34 Ratified: *Official Gazette of Serbia* no. 12/13.

35 In one case, (Matejić v. Skinner) British attorneys (of both the mother and the father) approached the Faculty of Law in Novi Sad and myself to give an expert's opinion on the matter of alleged Convention breach. The case was about a minor girl born in 1999 in London in a nonmarital cohabitation of a Serbian citizen—father, Z. M. —and a British citizen—mother, R.D.S. —who both moved to Belgrade after the child's birth. After the breakup of the nonmarital cohabitation, the girl was entrusted to the mother's care by the decree of the guardianship authority in Belgrade. The mother departed to the United Kingdom with her daughter, stayed there and enrolled the daughter into school. The father filed a petition to the court deeming that the mother had taken the child wrongfully to the United Kingdom as he had not consented to the child's change of residence, implying that the Convention on child abduction had been breached. The Court in London applied Serbian law. My view was that the Convention on abduction had been breached since the father, according to the-then applicable law—the Marriage and Family Relations Act (as well as according to now applicable Family Act)—had the right to consensually decide with the mother on issues of significant influence related to the child, and one of such issues is moving abroad. On the basis of the given opinion, the court in London ruled that the Convention had been breached. Kovaček Stanić, 2014b, pp. 283–297.

regulations in Serbia are very strict in this matter. In a situation when both parents are alive, one parent is authorized to make an independent decision on the change of domicile (habitual residence) only when the other parent is fully or partially deprived of their parental right. The partial deprivation of parental right should include the deprivation of the right to decide on issues of significant influence in a child's life (Art. 82/4 Family Act).[36] If the parental right is exercised jointly, the parents jointly and mutually agree on all issues related to the child. If one of the parents exercises their parental rights independently, the other parent is authorized to decide jointly and mutually with the parent who exercises parental rights on the issues of significant influence in the child's life. Issues of significant influence, in line with the Family Act, are considered to be, in particular, the education of the child, conducting major medical procedures on a child, the change of the child's domicile, and the disposal of child's assets of major value (Art. 78/3,4). The available means, which could result in a no wrongful change of the child's domicile in spite of the lack of parental consent, is a special procedure for the protection of the child's rights that could be initiated in such case, a procedure in which a court would have to assess whether the change of a child's domicile would be in the child's best interest (Art. 261-263). The other means is the deprivation of parental right, but this is applicable only if the parent unconscionably exercises his/her parental rights or abuses his/her rights or grossly neglects them.

The most important decisions of the European Court of Human Rights involving Serbia, in connection of the violation of Art 8 (violation of family life), are *V.A. M. v. Serbia* no. 39177/05; 13.3.2007; *Tomić v. Serbia* no. 25959/06 26.6.2007; *Jevremović v. Serbia* no. 3150/05. 17.7.2007; *Damnjanović v. Serbia* no. 5222/07. 18.11.2008; *Felbab v. Serbia* no. 14011/07. 14.4. 2009; *Krivošej v. Serbia* no. 42559/08. 13.10. 2010; *Jovanović v. Serbia* no. 21794/08 26.3.201; *Boljević v. Serbia* no. 47443/14 16.06.2020. In these cases, the issue of court proceedings is the parent–child relationship. In three, it is the right to visitation (*V.A. M. v. Serbia, Felbab v. Serbia, Krivošej v. Serbia*); in two cases, it is entrusting the child to parental care (*Tomić v. Serbia, Damnjanović v. Serbia*); in two, establishing paternity for the father of a child born out of wedlock (*Jevremović v. Serbia, Boljević v. Serbia*); also, in one case, it is the "missing babies" (*Jovanović v. Serbia*).

4. The concept of a parent

The definitions of a parent (mother and father) in jurisprudence and doctrine have a legal ground in the Family Act.

For a long time, in legal history, there has been little question of who was the mother of a child. The ancient Roman law principle of *mater semper certa est etiam*

36 Kovaček Stanić, 2010, pp. 147–161.

si vulgo conceperit was broadly accepted,[37] and the mother was the woman who gave birth to the child. In contemporary family law, statutory provisions often establish or define motherhood, and this is so in Serbian family law. Art. 42 of the Family Act contains a provision explicitly stating that a woman who gave birth to a child is to be considered the child's mother. If the woman who gave birth to a child is not entered in the register of births as the child's mother, her maternity may be established by a final court judgment. Under Art. 43 the child and the woman claiming to be the child's mother have a right to the establishment of maternity.

Maternity can also be contested.[38] The child, the woman entered in the register of births as the child's mother, the woman claiming to be the mother (if she, by the same action, requests the establishment of her maternity) and the man considered to be the father of the child have the right to contest maternity. A child may initiate action to contest maternity regardless of the time limit, and a woman entered in the register of births as the child's mother may initiate action to contest her maternity within 1 year from the day on which she learned that she had not given birth to that child and no later than 10 years from the birth of the child. A woman who claims to be a child's mother may initiate action to contest the maternity of the woman entered in the register of births as the child's mother within 1 year from the day on which she had given birth to that child and no later than 10 years from the birth of the child. A man considered to be the child's father under this Act may initiate action to contest maternity within 1 year from the day on which he learned that the woman entered in the register of births as the child's mother had not given birth to the child and no later than 10 years from the birth of the child.[39] There are restrictions to contesting maternity. Maternity may not be contested if established by a final court judgment, after the adoption of the child, and after the death of the child.[40]

The Family Act regulates the situation of a child conceived through biomedical assistance, stating that their mother is the woman who gave birth to them. According to Art. 57 if a child is conceived through biomedical assistance by a donated ovum, the maternity of the woman who donated the ovum may not be established.

A common rule that regulates who is considered the father of the child born in a marriage states that the husband of the child's mother is to be considered the father.[41] In Serbian law, the husband of the child's mother is to be considered the father

37 *Corpus Juris Civilis,* Dig. 2.4.5 (Theodor Mommsen & Alan Watson, eds., 1985): "*Quia semper certa est, etiam si vulgo conceperit.*"

38 This procedure is necessary in cases when the wrong data of a child's mother have been entered into the register, in case of default or substitution of children, or if somebody else's health identification card has been used in a delivery hospital. In a number of cases, false documents are used in the hospital because the mother does not have medical insurance and is not aware of the fact that giving birth is free, regardless of insurance. Although, in such cases, there is no dispute as to maternity, court proceedings must be initiated so this can be properly established.

39 Art. 250.

40 Art. 44.

41 *Corpus Juris Civilis,* Dig. 2.4.5 (Theodor Mommsen & Alan Watson, eds., 1985): *"Pater vero is est, quem nuptiae demonstrant"*.

if the child was born within 300 days after the termination of marriage, but only if the marriage was terminated owing to the husband's death and if the mother did not end another marriage in the same period. The husband from the new marriage of the child's mother is to be considered the father of a child born during that marriage, regardless of how short a time may have elapsed between the termination of one marriage and the commencement of the other.[42]

Under Art. 45/4 if a child was born out of wedlock, paternity must be established by acknowledgment or by a court judgment. A person who has reached 16 years of age may acknowledge paternity,[43] which may be acknowledged only if the child is alive at the moment of acknowledgment. Acknowledgment of paternity before childbirth is effective, but only if the child is born alive.[44] The acknowledgment takes effect only if the mother and, under some circumstances, the child consent to the father's acknowledgment. A mother and child can consent if they are 16 years of age.[45] If the mother or the child cannot give consent, the consent of either one is sufficient;[46] if neither the mother nor the child can give their consent, the child's guardian can give consent to the acknowledgment of paternity with prior consent of the guardianship authority;[47] thus, the acknowledgment is not a unilateral act. These provisions vividly illustrate the principle of family autonomy as the acknowledgment depends almost entirely on the will of the parties concerned. If the man acknowledges his paternity and the mother consents (and the child is older than 16), this man is considered the father, and the biological truth is not examined. Action to establish paternity by a court judgment may initiate a child regardless of the time limit. A mother may initiate action to establish paternity within 1 year from the day of learning that the man she considers to be the child's father did not acknowledge paternity and no later than 10 years from the birth of the child. A man claiming to be a child's father may initiate action to establish his paternity within 1 year from the day of learning that the mother or the child's guardian did not consent to his acknowledgment of paternity and no later than 10 years from the birth of the child.[48]

In Serbian law, paternity can be contested. In the case of a child born within wedlock, another man can claim to be the father and seek to rebut the presumption of the husband's paternity; indeed, such a challenge can be brought by the mother—or by the child, if over a certain age—and also by the husband himself. A child may initiate action to contest paternity regardless of the time limit. A mother may initiate action to contest paternity of the man considered to be the child's father within 1 year from the day of learning that he is not the father and no later than 10 years from the birth of the child. A mother's husband may initiate action to contest his paternity

42 Art. 45/1-3.
43 Art. 46.
44 Art. 47 FA.
45 Art. 48/1, 49/1.
46 Art. 48/2, 49/2.
47 Art. 50.
48 Art. 251.

within 1 year from the day of learning that he is not the child's father and no later than 10 years from the birth of the child. A man claiming to be a child's father may initiate action to contest paternity of the man considered to be the child's father within 1 year from the day of learning that he is the child's father and no later than 10 years from the birth of the child.[49]

Challenges to paternity can also apply to children born out of wedlock. Only a man claiming to be a child's father may initiate action to contest the paternity of the man considered to be the child's father on the grounds of the acknowledgment. The mother, the father, and the child cannot contest paternity based on acknowledgment as they gave their consent to acknowledgment. Under Art. 56/4 if the paternity of the child born out of wedlock is established by a court decision, it cannot be contested at all. The provisions introduced in the Family Act of 2005, which state that the child has no time limit to initiate the proceedings to establish and contest maternity and paternity, are in favor of the child's right to know their biological origin. In these proceedings, the court is obliged to determine the biological truth, which may be based on DNA and other biomedical evidence. This provision is in favor of the child's right to know their biological origin as well.

The Family Act regulates the situation of the child conceived through biomedical assistance, stating that the mother's husband (or the mother's partner) is to be considered the father or of a child conceived through biomedical assistance, provided that he has granted written consent to the procedure of biomedically assisted fertilization. The paternity of the man considered to be the child's father may not be contested, except if the child was not conceived through the procedure of biomedically assisted fertilization. According to Art. 58 if a child was conceived through biomedical assistance by donated semen, the paternity of the man who donated the semen may not be established.

5. The concept of a child

Serbian family law does not explicitly define the term "child." Thus, in jurisprudence and doctrine, the definition of the UN Convention on the Rights of a Child is accepted. The definition of the child is stipulated in Art. 1 of this Convention: "*For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.*"

In Serbian family law, majority is achieved at the age of 18, whereby the above definition is suitable.[50] With majority, one obtains full legal capacity, which can also be obtained prior to the age of 18 (emancipation) in two ways—both connected to

49 Art. 252.
50 Art. 11 Family Act.

family relations and restricted to the minimum age of 16. The first is to enter into marriage, while the other is parenthood.[51] If the minor obtains full legal capacity through marriage, this capacity remains intact even if, for example, the marriage ends prior to the person turning 18. The Family Act of 2005 introduces the possibility for a minor parent to obtain full legal capacity, which advances their position. By obtaining full legal capacity, the minor parent obtains the right and obligation to independently care for themselves and their child. It is the court that gives permission for marriage to a minor and decides if the minor parent should obtain full legal capacity based on parenthood. The proceeding is non-contentious. The minor who wants to get married is required to have the physical and mental maturity necessary to exercise the rights and obligations of marriage and to independently care for themselves and their rights and interests.[52]

One of the current problems in Serbian legal practice is the issue of "missing babies." The specific act on this issue, namely the "Law on establishing facts on the status of newborn children suspiciously missing from maternity hospitals in the Republic of Serbia," was adopted in 2020. The aim of this Act is to establish facts for finding the truth on the status of newborn children suspiciously missing from maternity hospitals in the Republic of Serbia and to exercise the obligation of the Republic of Serbia arising from the judgment of the European Court for Human Rights in the case Jovanović v. Serbia (application no 21794/09; Art. 2).[53]

6. Principles of parental responsibility

The Family Act stipulates principles on the family, adopting constitutional principles but defining some others. One of the most important principles is that of the child's best interest.[54] This principle was explicitly formulated in the Family Act of 2005 for the first time, where it was stated that "*everyone is under the obligation to act in the best interest of the child in all activities related to the child*." However, statutory texts, including the Family Act of 2005, do not offer a definition of the best interest of the child principle (legal standard), whereby the content is dependent on interpretations in jurisprudence. In Article 3 of the UN Convention on the Rights of the Child, it is provided that the best interests of the child should be of primary importance in all activities having to do with them, regardless of which institutions or organs are undertaking such activities.

51 Art. 11/2,3.
52 Kovaček Stanić, 2009, p. 599.
53 Zakon o utvrđivanju činjenica o statusu novorođene dece za koju se sumnja da su nestala iz porodilišta u Republici Srbiji, *Official Gazette of Serbia* no. 18/20.
54 Art. 6/1.

It is worth mentioning one of the explanations of the best interests of the child principle existing in Swedish law theory: the child, from birth until the age of majority (18 years) should develop from the initial full dependence into a person who is independent, mature, and responsible in a personal, economic, and social sense. Behavior and actions that are in favor of this kind of development are in the best interests of the child, and those that prevent this kind of development are against such best interests.[55]

Another principle is that of the special protection of the family by the state.[56] The principle of protection of the child from neglect and from physical, sexual, and emotional abuse, as well as from every form of exploitation, is also a duty of the state.[57] Protection from domestic violence was, for the first time, governed by the Family Act of 2005.[58]

The principle of equating of children born out of wedlock and those born in marriage is stipulated in Art. 6/4. As explained earlier, children born out of wedlock have the same rights and obligations as those born in marriage in contemporary Serbian family law.

The state is obliged to provide protection for children without parental care in a family environment whenever it is possible to do so.[59]

The principle of equating adoption with parentage is stipulated in Art. 7/4. The Family Act of 2005 fully equates the rights and obligations of children regardless of adoption, providing for only one form of adoption, in contrast to the earlier Law on Marriage and Family Relations of 1980, which recognized two forms of adoption—full and partial.[60] In partial adoption, the adoptee did not have the same rights with respect to its adopters that a child had toward its parents; it was possible to limit their inheritance rights and rights to a surname, and the adoptee did not have any relationship with the adopter's relatives.

The principle of free decision on childbirth is stipulated in Art. 5/1: "*The woman has the right to freely decide on birth*." It should be noted that, in fact, this formulation encompasses only the woman's right as other rights that constitute family planning are not stipulated. Men, as subjects of particular rights, are not mentioned (e.g., the right to medical treatment for cure fertility), and neither are the rights of women and men that they exercise jointly, such as access to artificial reproduction technology. Having in mind the formulation accepted in the Constitution, "*everyone shall have the freedom to decide whether they shall procreate or not*," it is obvious that formulation accepted in Family Act is not sufficient enough. The Serbian Family Act has a provision with regard to one's family life: "*Everyone has a right to have his/her family life respected*".[61] On the

55 Wetter and Appelberg, 1986, p. 484.
56 Art. 2.
57 Art. 6/2, 3.
58 Art. 197–200.
59 Art. 6/6.
60 The Law on Marriage and Family Relations 1980, *Official Gazette of the Republic of Serbia* 22/1980, with amendments 22/1993, 35/1994, 29/2001.
61 Art. 2/2.

contrary, the Serbian Constitution does not contain a similar provision. Historically, in the period of the state of Serbia and Montenegro, a constitutional document with the name of "Constitution Charter" on the state union of Serbia and Montenegro in the Charter on Human and Minorities Rights and Civil Freedoms (which was the part of the Constitution Charter) includes a provision on the respect for private and family life (Art 24).[62] It is not clear why a similar provision was not stipulated in the subsequent Constitution of Serbia of 2006.

According to the Family Act, parental rights are derived from the obligations of the parents and exist only to the extent necessary for the protection of the personality, rights, and interests of the child.[63]

7. The rights and obligations of parents and children resulting from parental responsibility

The content of parental rights comprises the rights and obligations of the parent to care for the child and covers the following: protecting, educating, upbringing, representing, and maintaining the child, as well as managing and disposing of the child's property.[64] The Family Act expressly provides that parents have the right to receive all information about the child from educational and healthcare institutions.[65] This provision is extremely important for the exercise of parental rights. The Family Act directly limits parental autonomy regarding the upbringing of the child, forbidding parents to leave a child of preschool age unsupervised[66] and to entrust the child, even temporarily, to the care of a person who does not meet the requirements for being a guardian.[67]

Parental autonomy regarding the upbringing of the child is limited by a provision that forbids humiliating actions and punishments insulting the child's human dignity.[68] Parents have the duty to protect the child from such actions by other persons;[69] historically, parents were empowered by law to punish their children.[70]

62 *Official Journal of Serbia and Montenegro* no. 1/2003, 6/2003.
63 Art. 67.
64 Arts. 67–74.
65 Art. 68/3.
66 Art. 69/3.
67 Art. 69/4.
68 More on corporal punishment of the child: Draškić, 2021, pp. 27–45.
69 Art. 69/2.
70 Pursuant to the Serbian Civil Code of 1844, the parents had the right to return run-away of lost children and to "…what more, punish corrupted and insubordinate children with a moderate domestic punishment of castigating power." In addition to the application of "domestic punishment," Serbian law also provided for the possibility of imprisoning children for up to 10 days, pursuant to criminal law legislation (Para. 120 of the Serbian Civil Code) for a prison sentence (Para. 350 Penal Code, op. cit. Marković, 1920: 192). The child's obligation to obedience toward the parent and tutor was

In Serbian family law, the rights of the child are expressly regulated in the Family Act of 2005 and, for the first time, under a separate chapter consisting of eight articles.[71] The legal status of the child is governed in accordance with international documents and contemporary standards. The Family Act regulates the following rights of a child: the right to know who their parents are, to live with their parents, to maintain personal relations with their parents and other persons, the right to a proper and full development, the right to education, the right to an opinion, as well as the obligations of the child. The main obligation is to help parents in accordance with their age and maturity. In addition, a child who earns wages or has an income from property has the duty to partially provide for their own maintenance, the maintenance of their parent, and that of their minor brother or sister.[72] In addition to providing a broad scope of children's rights, the Family Act also ensures the exercise of the former. The child can exercise their rights independently at a certain age, and these rights can be divided into rights regarding status (right to family name, domicile/habitual residence, nationality, and to know who one's parents are); rights derived from parent–child relations (right to living with parents, to maintain personal relations with parents and other persons, to development, and to education); and rights on property. A child has the right to express an opinion, and due attention must be given to a child's opinion in all issues concerning them and in all proceedings where their rights are decided on, in accordance with the age and maturity of the child.[73] The Family Act of 2005 has introduced a special procedure for the protection of the child's rights (Art. 263).

The autonomy of the child as one of the European family law principles is formulated in the following way: "*The child's autonomy should be respected in accordance with the developing ability and need for the child to act independently.*"[74] Despite the autonomy of the child as one of the principles in contemporary child law, the need for their protection as a vulnerable individual still exists. The Commission on European Family Law has found the balance between the different concerns by emphasizing the child's age and maturity:

> A younger and less mature child needs more care and protection than an older and more mature child who may enjoy the rights of participation in a decision concerning him or her and who may also, within certain limits, make decisions and act independently on his or her own.[75]

provided for in Hungarian law, which was applied in Vojvodina, while minors could be forced to be obedient with "domestic discipline," which "was to be carried out so as not to affect the child's health" (Para. 10 Tutelage and Guardianship Act). Bogdanfi and Nikolić, 1925, pp. 130–165.

71 The Family Act, *Official Gazette of the Republic of Serbia* 18/2005 of February 24, 2005, entered into force 8 days after publishing and was implemented from July 1, 2005. The Draft of the Family Act was prepared by a draft team, with Professor Marija Draškić as a coordinator and me as one of the members.

72 Arts. 59–66.

73 Art. 65.

74 See Boele-Woelki et al., 2007, p. 39.

75 Boele-Woelki et al., 2007. Chapter II contains the principles regarding the rights of the child.

The rights of a child are graded. A child who is 15 years of age and able to reason has a number of rights in family law; for example, the right to change a personal name is attained by the child at the age of 15 if they are able to reason. This right was introduced into domestic family law for the first time with the Family Act of 2005. A child of the age of 10 and able to reason has the right to give consent to change their personal name (Art. 346), and one who has reached the age of 15 and is able to reason has the right to inspect the birth register and other documentation related to their origin (Art. 59/3). A child who has reached the age of 15 and who is able to reason has the right to decide which parent they are going to live with (Art. 60/4). The Family Act of 2005 has expanded the rights of children with respect to the maintenance of personal relations by providing that a child who is 15 years of age and able to reason can decide on their own about maintaining personal relations with the parent with whom they do not live (Art. 61/4). If the child is 15 and is able to reason, they can decide which secondary school they will attend (Art. 63).

A child who is 16 years of age and able to reason can acknowledge fatherhood or give consent to the acknowledgment of fatherhood (being the underaged mother or a child), and they can also request a marriage license.

The Family Act of Serbia of 2005 explicitly governs the child's right to express an opinion for the first time (Art. 65). The child has the right to freely express their opinion if one condition is met, namely if the child is capable of forming an opinion. A prerequisite for the formation of an opinion is being informed, whereby the Family Act of Serbia of 2005 provides that the child has the right to be duly informed. The child's opinion must be given due consideration in all matters and procedures regarding their rights in accordance with their age and maturity. At the age of 10, the child can freely and directly express their opinion in any judicial or administrative proceedings involving their rights; in addition, the child can independently—or through some other person or institution—address the court or administrative organ and request assistance in the exercise of their right to freely express an opinion.

The Family Act obligates state institutions, the court, and governing institutions to determine the child's opinion in a particular manner appropriate for the child in collaboration with the school psychologist or the guardianship institution, family counseling service, or another institution specialized in family mediation, in the presence of the person chosen by the child themselves. Since, in these procedures, the child and their lawful representative can have opposed interests, the Family Act stipulates that, in those cases, the child is represented by the collision guardian. The appointment of a collision guardian can be required by a child who has turned 10 and is capable of reasoning, by themselves or through another person or institution.[76]

At the age of 10, a child who is able to reason gives consent to adoption,[77] to fostering,[78] and has the right to propose the person who shall be appointed as their

76 Art. 265 Family Act.
77 Art. 8.
78 Art. 116.

guardian.[79] If the child's property was acquired through their employment, the child has the right to manage and dispose of this property if they are 15 years of age or older.[80]

Concerning legal capacity, the legal age of majority is 18, but full legal capacity can be acquired beforehand by entering into marriage with the court's permission. Moreover, a court may allow a person who has reached the age of 16 to acquire full legal capacity if they have become a parent and have the physical and mental maturity to take independent care of their person, rights, and interests (this possibility was introduced in the legal system by the Family Act of 2005). A child who has reached 14 years of age (senior minor) may undertake all legal transactions with the prior (or subsequent) consent of their parents.

The child's rights are stipulated in other branches of law as well. Thus, pursuant to the Inheritance Act 1995,[81] a person who is 15 years old has active testamentary capacity and can put together a will. Pursuant to the Labor Act of 2005, a person aged 15 has the right to enter into employment relations but "*with the written consent of the parents, adopter or guardian, if such employment will not endanger the health, morals or education of the child, or if the employment is not otherwise prohibited by law*" (Arts. 24/1, 25/1).[82] A pregnant woman who is 16 years of age has the right to independently request for an abortion.[83]

The limitations of parental rights with respect to their children by broadening children's rights and by prohibiting humiliating actions and punishments that insult a child's human dignity promote a modern, democratic, and less paternalistic family model.

8. Detailed issues related to parental responsibility

The parents are the child's legal representative. The representation concerning a child's property depends on how this is acquired, which is regulated in the Family Act of 2005. If the property is acquired through the child's employment, the child has the right to manage and dispose of this property independently if they are 15 years of age or older.[84] If the property is acquired, for example, by gift or inheritance, then the

79 Art. 127.
80 Art. 192/1, Art. 193/1, Art. 64/3.
81 Art. 79.
82 Inheritance Act 1995, *Official Gazette of the Republic of Serbia* No. 46/1995; Labor Act 2005, *Official Gazette of the Republic of Serbia* No. 24/2005.
83 Cessation of Pregnancy in a Healthcare Institution Act of 1995, *Official Gazette of the Republic of Serbia* No. 16/1995.
84 Art. 192/1, Art. 193/1, Art. 64/3.

right to manage and dispose of the property belongs to the parents, who have the right to undertake legal affairs through which they manage and dispose of the income that a child under the age of 15 has acquired[85], for example as revenue from engagement in theater shows, film, media, and so on. Since a child under the age of 15 cannot establish employment relations, such cases are governed by adequate contracts.

The child has certain obligations in these situations. If they acquire income or have property revenue, the child is obligated to cover the expenses of their own maintenance, as well as the maintenance of parents or minor siblings under the conditions provided by law.[86] The obligation of the minor child to partially fulfill their maintenance needs from their own income is subsidiary in relation to the same obligation of parents and blood relatives.[87]

Parents are not fully independent in the disposal of the child's property; therefore, the disposal of immovable and movable property of great value can be conducted only with the prior or later consent of the guardianship authority.[88] In deciding whether to approve the disposal of the child's property, the guardianship authority should take the child's best interests into account.[89]

The guardianship authority may decide to appoint a temporary guardian for the child under parental care if it finds that necessary for the temporary protection of the personality, rights, or interests of the child. Thus, a temporary guardian should be appointed in the situation of a child whose interests are averse to the interests of their parents as legal representative (collision guardian). The decision on the appointment of a temporary guardian must also state the legal operations or type of legal operations that the guardian may undertake depending on the circumstances of each specific case.[90]

One of the contemporary issues concerning a child's upbringing is their access to cyberspace tools (social networks, e-mail, and so on). It is stipulated that parents have the right and obligation to develop relations with the child based on love, trust, and mutual respect as well to guide the child in adopting and respecting the values of the emotional, ethical, and national identity of their family and society (Art. 70). One of the significant issues regarding the caring for and raising of children is the statutory regulation of the acceptability of corrective measures toward the child by the parents. Thus, the parents should be informed regarding how and to what extent their child uses cyberspace tools, and they should react if the child uses these tools contrary to their best interests. Denying access to cyberspace tools could be a corrective measure toward the child as well.

The child's education, in contrast to their upbringing—which, in many respects, falls within the scope of the family—is conducted in schools as institutions. The

85 Art. 72/3.
86 Art. 66/2.
87 Art. 154/3.
88 Art. 193/3.
89 Art. 6/1.
90 Art. 132.

Serbian Constitution provides for the obligation to elementary schooling.[91] The Family Act of Serbia of 2005 provides that a child has the right to education in accordance with their abilities, wishes, and inclinations. The child has the right to decide on their education; if the child is aged 15 and able to reason, they can decide which secondary school they will attend[92] —a right that was first introduced with the Serbian Family Act of 2005. The child's education, as a component of parental care, encompasses the parents' obligation to provide schooling for the child, while further education must be provided in accordance with the child's abilities. According to Article 71 the parents also have the right to provide education for the child in accordance with their religious and ethical beliefs.

The parallel existence of private and state-owned schools offers the parents and child a broader choice of schooling.[93] Contrary to secular education, religious education depends on the wishes of the parents and children. In previous times, even state organs could decide on the religious affiliation of children.[94] Religious education in Serbia has been introduced into secular schools again in 2001 as an option for parents and children. The wide scope of possibilities for religious schools to be opened, as well as the fact that religious education is predominantly organized by representatives of the governing religion, whereby other religions are in a less advantageous position, raises the question of whether religion has any place in secular schools.

One of the contemporary issues concerning education is children's sexual education. The ministry for education, science, and technological development of Serbia has provided information on the matter. In Serbia, in public and private schools, no special subject is concerned with sexual education, but this is part of other subjects such as biology or civil education. The Trade Union of Teachers is of the opinion that the sexual education of children ought to be part of other subjects, such as biology, civil education, and physical education, and that it should be introduced in elementary schools. In 2013, in the Autonomus Province of Vojvodina, the pilot project "Education on Reproductive Health" was conducted in secondary schools by the provincial secretariat for sport and youth and the nongovermental organization "Skaska" among 1,200 pupils. As the project became highly popular in 2014, it was introduced in all secondary schools in Vojvodina. In 2015, the program "Sexual Education for Beginners" was introduced in elementary schools in Vojvodina as well.[95]

The protection of life and health of the child in contemporary conditions has, to a great extent, become a function of healthcare institutions. The role of the parents,

91 Art. 71.

92 Art. 63.

93 In Serbia, private schooling has been legalized with the Public Services Act 1991, *Official Gazette of the Republic of Serbia* 42/91.

94 According to Hungarian law, which was applied in Vojvodina, the tutorship organ had the authority to determine the child's religious affiliation prior to their commencement of schooling, if this was not done by the parents themselves.

95 Author Jasminka Petrović has published the manual *Sexual Education for Beginners*. The nongovermental organization Incest Trauma Center has published material on sexual education as well.

however, is no less important. In addition to direct care for the child's life and health, it also covers the provision of consent to any medical procedures being performed on the child. In contemporary law, an older child has the right to independently decide on any medical procedures. The Art. 62/2 of the Family Act of Serbia of 2005 is in line with this approach, by which a child aged 15 and able to reason can give consent to any medical intervention.

According to the Cessation of Pregnancy in a Healthcare Institution Act, a pregnant woman who is 16 years of age has the right to independently request an abortion[96]; thus, the parents make decisions about abortions if the pregnant woman is younger than 16 years, but if she is 16 or older, they do not have any right to influence the decision of their child in this procedure. According to the law on patients' rights if the patient is a child, the parents have the right to inspect health documentation;[97] however, a child aged 15 and able to reason has a right to the confidentiality of the data in their health documentation.[98] In the situation of a child aged 15, this means that the parents cannot get information on contraception or abortion from their child's health documentation. Having in mind that parents have the right and obligation to develop relations with the child based on love, trust, and mutual respect, in most cases, the minor is expected to ask their parents about their opinion on the possibility of abortion and contraception.

9. Parental responsibility in case of divorce

Parental rights in Serbian family law can be exercised in two ways: jointly or independently. Parents exercise parental rights jointly and consensually when they cohabitate, and married parents automatically acquire parental rights when the child is born. If the parents are not married, the mother automatically acquires parental rights in the moment of the child's birth, and the father does when paternity is established (by the father's acknowledgment or by court judgment).

Parents may continue to jointly exercise parental rights even after divorce, provided that they make an agreement on the joint exercise of parental rights and provided that the court is satisfied that this agreement is in the child's best interests.[99] This provision has been introduced in the domestic legal system for the first time by the Serbian Family Act of 2005. This kind of parental agreement enables parents to exercise all the rights and duties comprised within parental rights if they do not

96 Cessation of Pregnancy in a Healthcare Institution Act, *Official Gazette of the Republic of Serbia* No. 16/1995.
97 Art. 20/2.
98 Art 24/1.
99 Art. 75–76.

lead a common life, and it is intended to avoid the hostility and antagonism caused by a court's decision granting the exercise of the parental rights to one of them. Thus, Serbian law affords parents a degree of autonomy in decision-making and in arranging their relationship with a minor child not only during marriage or partnership but also after divorce or separation. Broadening family autonomy should have positive implications for parent–child relationships. If parents can agree on the exercise of parental rights—especially after their divorce or separation—their conflict as partners would not influence their relations with respect to their children, or at least, the influence would be less significant.

The wording of the provision on the joint exercise of parental rights confers great freedom upon the parents as it enables them to agree on the matters related to their child in a manner that is most appropriate for their own particular situation. The only limitation is the parents' duty to reach an agreement on the issue of the child's domicile, which, followed by the child's address, must be established for the sake of legal certainty and especially for the sake of facilitating legal acts (communication of legal documents, notification, and so on). In the opinion of the commission that produced the draft, this limitation does not necessarily mean that the parents cannot agree on so-called "factual joint custody" (shared residence, alternate residence). A court has the power to examine the agreement and to decide to accept it or not based on a determination as to whether the agreement is in the child's best interest. Other countries take different approaches regarding the necessity of parental agreement on joint custody.[100]

Thus, the joint exercise of parental rights is possible after parental divorce but also if the parents separate; if they end their heterosexual, non-marital cohabitation; if the marriage is annulled; or even if the parents never lived together.

The concept of joint exercise of parental rights is the attempt to separate parents–child relations from relations between parents as partners, respecting the fact that the child needs both parents. From a theoretical perspective, it could be said that legal ground for parents–child relationship is moving from relations between parents (who could be married, divorced, separated, or never married) to the biological or legal relations between parents and their children. On the other hand, limitation of family autonomy should also have positive implications in parent–child relationships.

Another form of exercise of the parental right in Serbia is independent exercise. One parent exercises parental rights independently when the child lives with this parent only and the court has not yet made a decision on the exercise of parental

100 For example, in Sweden, courts have the option to award joint custody when the parents have not agreed. According to Åke Saldeen, however, the power to order joint custody in a case where a parent opposes joint custody should be used with great caution and sensitivity. Saldeen (2000) p. 354; Act on the Children and Parents, SFS 1949: 1, amendments SFS 199: 19, from October 10, 199, Ch 6, §5, available at http://www.sweden.gov.se/content1/e6/0 /76/55/1. In France, the judge has the power to order, even if the parents are not in agreement, that the child's residence should alternate between the homes of each parent. Civil Code, Art 7–9; Ferré-André, Gouttenoire-Cornut, and Fulchiron, 2003, p. 176.

rights, or on the basis of a court decision after divorce.[101] As parents could make an agreement on the independent exercise of parental right, this is another way of realizing family autonomy. This agreement must include the parents' agreement on entrusting the common child to one parent, an agreement on the amount of contribution for child maintenance from the other parent, and an agreement on the manner of maintaining the child's personal contact with the other parent.

The Serbian Family Act favors parental agreements on the exercise of parental rights and enables parents to reach the agreement in the mediation conducted mainly in the divorce procedure.[102] This mediation includes the procedure for attempting reconciliation and the procedure for attempting the consensual termination of a dispute (settlement). The purpose of settlement is to resolve the troubled relation between spouses without conflict after annulment or divorce. The court or institution entrusted with mediation proceedings is to endeavor that the spouses reach an agreement on the exercise of parental rights and an agreement on the division of joint property. Mediation proceedings are conducted before an individual judge; however, the judge should recommend spouses to go to psychosocial counseling. Under Art. 232 if the spouses agree, the court may entrust mediation to the competent guardianship authority, a marriage or family counseling service, or another institution that specializes in mediating family relations. A wide range of specialized institutions should provide efficient and high-quality counseling.

Based on the foregoing, it is obvious that under the domestic jurisdiction, the joint and independent exercise of parental rights may be acquired under law and also by a court decision that is preceded by parental agreement whenever it is a matter of the joint exercise of parental rights, while this agreement is a possibility in the matter of the independent exercise of parental rights as well.

In Serbian family law, a specific solution concerns the right of the parents to decide jointly and consensually on issues that significantly influence the child's life, if the parents do not live together. The issues considered to be of significant influence on the child's life, in terms of the Family Act, are the education of the child, larger medical interventions on the child, the change of the child's residence, and the disposal of the child's property of great value.[103]

Both parents have the right to decision-making jointly and consensually regardless of whether they have the joint exercise of parental rights, or one parent independently exercises parental rights. It could be said that Serbian family law is, in a way, theoretically inconsistent as the parents' rights are similar in both situations of joint and independent exercise of parental rights concerning decision-making on issues that significantly influence the child's life. This is due to the assumption that the independent exercise of parental rights would be predominant in practice as joint exercise needs the parents' agreement, which is not easy to reach. Thus, if the

101 Art. 77.
102 Art. 229.
103 Art. 78/4.

parent who does not exercise their parental rights loses their decision-making ability (a right that existed according to the previous the Law on Marriage and Family Relations of 1980), their rights would actually decrease in practice. This is the reason why the Family Act has kept the right to decision-making for the parent who does not exercise their parental rights.

The Serbian Family Act defines that the child has the right to maintain a personal relationship with the parent with whom they do not live; thus, the child is explicitly entitled to this right. A child who has turned 15 and is capable of reasoning can decide about the maintenance of a personal relationship with the parent with they do not live;[104] however, it is also included that the parent who does not exercise the parental right has the right and obligation to maintain a personal relationship with the child,[105] so that not only the child is entitled to this right, but the parent is as well. For the parent, the maintenance of a personal relationship with the child also presents an obligation. To maintain a personal relationship, it is necessary, in many situations for the parent with whom the child lives, to enable its maintenance (for example, if the child is small, the maintenance of a personal relationship is impossible without the active participation of the parent with whom the child lives); thus, this is an obligation to the parent with whom the child lives as well.[106]

The Serbian Family Act determines that only the court has the authority to decide on establishing a personal relationship, in contrast to an earlier law according to which the maintenance of a personal relationship was decided by the guardianship institution (or the court in exceptional circumstances). With the change of jurisdiction in favor of the court, the Serbian Family Act indicates the importance of this question—factual as well as legal.

In the implementation of the decision on the right to contact, the most severe family-legal measure can be determined against the parent who evades the maintenance of a personal relationship with the child or against the parent who impedes the maintenance of a personal relationship between the child and the parent with whom the child does not live—the complete deprivation of parental rights. In that way, the Serbian Family Act has made the parental obligations regarding the maintenance of personal relations with the child much stricter than earlier. The reason for this is that the maintenance of a personal relationship between the child and the parent with whom they do not live is extremely important for the child—especially

104 Art. 61.

105 Art. 78/3.

106 In comparative law, the right of contact with the parents is determined as the right of the child (England and Wales), as the right of the child and the right of the parent who does not live with the child (Russia, Germany, etc.), and as the obligation of the parent who does not live with the child and that of the parent who lives with the child to enable the contact (in the large majority of legislations). In some countries, it is not determined as an obligation of the parent who does not live with the child (Finland, Norway, Greece) but as an expression of the understanding that contacts are useful for the child only if the contact is realized on a voluntary basis. Kovaček Stanić, 2013, pp. 410–411.

for their emotional development. Disabling the execution of the decision on maintaining a personal relationship of the minor with the parent represents a felony regulated by the Criminal Code of Serbia from 2005 (Art. 191/2).[107]

One of the issues considered to be of significant influence to the child's life is the decision on the child's domicile/habitual residence. The parents jointly make this decision in both cases, if they jointly exercise parental rights but also if one of them independently exercises parental rights. One parent is authorized to make an independent decision on the change of domicile/habitual residence only when the other parent is fully or partially deprived of their parental right. Another means that could result in a not wrongful change of the child's domicile despite the lack of parental consent is to use a special procedure for the protection of the child's rights that could be initiated in such case. In these procedures, a court would have to assess whether the change of a child's domicile would be in the child's best interest or not.[108]

The scope of parental rights could be changed as a consequence of the judgment of deprivation of parental rights.

A court decision on the full deprivation of parental rights deprives the parent of all rights and duties that comprise parental rights, except the duty of maintaining the child. A court decision on the full deprivation of parental rights may prescribe one or more measures for protecting the child from domestic violence.[109] A court decision on the partial deprivation of parental rights may deprive the parent of one or more rights and duties that comprise parental rights, except the duty to maintain the child. A parent who exercises parental rights may be deprived of the rights and duties of protecting, raising, upbringing, educating, and representing the child as well as of managing and disposing of the child's property. A parent who does not exercise parental rights may be deprived of the right to maintain personal relations with the child and to decide on issues that significantly influence the child's life. The court decision on the partial deprivation of parental rights may prescribe one or more measures for protecting the child from domestic violence.[110]

The consequence of the decision on the deprivation of parental rights depends on how parents exercise parental rights and if the deprivation is full or partial. If they exercise parental rights jointly and one of them is fully deprived of parental rights, then the other parent would exercise parental rights by themselves if this is in the child's best interest. The same consequence is if one of them exercises parental rights and they are fully deprived of parental rights; if one of the parents is partially deprived of parental rights, the future exercise of parental rights depends of what rights they are deprived of and how the parental rights were exercised in the first place.

107 The Criminal Code (Krivični zakonik) *Official Gazette of the Republic of Serbia* 85/05. The penalty is a fine or prison for maximum 1 year.
108 Art. 261-63.
109 Art. 81.
110 Art. 82.

The court may decide on the deprivation of parental rights in the procedure for the deprivation of parental rights but also in its judgment on a dispute over the protection of a child's rights and in its judgment on a dispute over the exercise of parental rights.[111]

10. The status of a child not subject to parental responsibility

If the child is without parental care adoption,[112] foster care[113] and guardianship[114] may be established. The Family Act defines a child without parental care who may be adopted as a child who has no living parents; a child whose parents are unknown, or their dwelling place is unknown; a child whose parents are fully deprived of parental rights; a child whose parents are fully deprived of legal capacity; and a child whose parents gave their consent to adoption.[115] The scope of care and protection of the adopters are the same as rights and duties between a child and their parents.[116] Adoption terminates the parental rights of parents, unless the child is adopted by the spouse or the cohabitee of the child's parent.

The Family Act defines a child who can be placed in foster care. This is a child who has no living parents, a child whose parents are unknown or their dwelling place is unknown, a child whose parents are fully deprived of parental rights or legal capacity, a child whose parents have not yet acquired legal capacity, a child whose parents are deprived of the right to protect and raise or educate the child, and a child whose parents fail to take care of the child or take care of them in an inappropriate manner.[117] Foster care may also be established if the child is under parental care but has an impediment in psycho-physical development or a behavioral disorder. The scope of care and protection of the foster parent includes the right and duty to protect, raise, and educate the child. A foster parent has the duty to take special care to prepare the child for independent life and work,[118] and the parents of a child given over to foster care have the right and duty to represent the child, to manage and dispose of the child's property, to maintain the child, to maintain personal relations with the child, and to decide on issues significantly influencing the child's life jointly and consensually with the foster parent, unless the parents are fully or partially deprived of parental rights

111 Art. 273.
112 Art. 91.
113 Art. 113.
114 Art. 124.
115 Art. 91.
116 Art. 104.
117 Art. 113/3.
118 Art. 119.

or legal capacity or they fail to take care of the child or to do so in an inappropriate manner.[119] In these situations, a guardian to the child should be appointed, who has the same aforementioned rights and duties as the parents. When foster children are siblings, foster care is generally established with the same foster parent.[120]

A child without parental care (a minor ward) is placed under guardianship. By the decision of placing someone under guardianship, the guardianship authority appoints a guardian and decides on the accommodation of the ward. The guardianship authority will first try to accommodate the ward in a family of their relatives.[121] The guardian is under the obligation to take care of their ward conscientiously, which includes taking care of the ward's personality, representing the ward, acquiring assets to support the ward, and managing and disposing of the ward's property.[122] The guardian is under the obligation to take care that the protecting, raising, upbringing, and educating of a minor ward lead, as soon as possible, to their ability to lead an independent life. The guardian is under the obligation to pay visits to the ward and directly gain information on the conditions under which the ward lives.[123] The guardian is under the obligation to represent their ward, who has legal capacity equal to a child under parental care. The guardian represents their ward in the same way that a parent represents their child. The guardian may—but only with prior consent of the guardianship authority—decide on the education of the ward; decide on medical interventions on the ward; give consent to the undertaking of legal operations by a ward over 14 years of age; and undertake legal operations whereby they manage and dispose of the income acquired by a ward under 15 years of age.[124]

11. *De lege ferenda* conclusions

The Serbian law on parent–child relationships is modern law founded on the principles of equality (regarding sex and children born in wedlock or out of wedlock); children's rights; the protection of the family, mothers, single parents, and the child; and the principle of free decision on childbirth. The concept of the joint exercise of parental right is accepted as a contemporary form of parent–child relationship existing even after divorce.

In the Serbian Family Act, the term "parental right" is used ("*roditeljsko pravo*"). This term is redefined as parental rights derived from the duties of the parents and existomgonly to the extent necessary for the protection of the personality, rights, and

119 Art. 120.
120 Art. 113/4.
121 Art. 124.
122 Art. 135.
123 Art. 136/1,3.
124 Art. 137.

interests of the child. The term "parental responsibility," which is broadly acceptd in European and international law, is not accepted in the Serbian Family Act as it could be confused with liability for damage (in the Serbian language, these are same term—"*odgovornost*"). Apart form the term "parental responsibility," in some European jurisdictions, the term "parental care" is used (e.g., "*sorgerecht*" in Germany, "*roditeljska skrb*" in Croatia, and "*starševska skrb*" in Slovenia). Although the Serbian term emphasizes the personality, rights, and interests of the child, *de lege ferenda* it seems appropriate to change it and replace it with the term "parental care" ("*roditeljska briga*") as a term more in accordance with the contemporary trends in family law.

In Serbia, there is a specific concept in decision-making regarding issues that significantly influence the child's life. Both parents have the right to decision-making jointly and consensually regardless of whether they have the joint exercise of parental rights or one parent independently exercises parental rights. This concept causes a great deal of parental conflict in practice; thus, the need for explicit regulation of possible ways to resolve the conflict would be of practical importance. The solutions suggested for resolving the parental conflict *de lege ferenda* would be as follows. The competent authority should be the court, which can make decisions on the most important issues concerning the child; as they act in family law, the court's judges should be particularly specialized in this field of family law and children's rights. The court should have different options for resolving the conflict. First, to try to conciliate the parents, it should encourage family mediation conducted by competent authorities (court, guardianship authority, a marriage or family counseling service, or another institution specialized in mediating family relations). In addition, the court should have the option to authorize one of the parents to act alone with regard to one or more specific decisions. At the end, the court should be authorized to make decisions by itself and to have discretion to choose option(s) that it finds most appropriate for the current situation in the child's best interest. This will depend on different circumstances—for instance, if the matter is urgent, if the parental conflict is an exception or frequent, and so on.

In Serbia, it is is common to enact domestic acts that contain provisions of the retified conventions; thus, courts and other organs can refer to domestic law in their decisions. This practice would be particularly helpful in connection with the Hague *Convention* on the Civil Aspects of *International* Child *Abduction*. A certain confusion is noted among judges, primarily regarding the procedures for decision-making on child abduction. As a matter of fact, the draft titled "Civil Protection of Children from Wrongful Cross-border Removal and Retention Act" was prepared but never enacted.[125] This law suggests the determination of concentrated jurisdiction, such that only a few courts shall rule on requests under the Convention. The law proposes the following courts as actually competent to rule in abduction cases: Belgrade, Novi Sad, Niš, and Kragujevac—all of them primary courts. *De lege ferenda*, it would be of a great importance to enact the law on child abduction.

125 Kovaček Stanić, 2014a.

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