

BEST CHILD CARE ARRANGEMENTS AFTER SEPARATION OF PARENTS

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The child's right to contact is a strictly personal, non-inheritable, and non-transferable right that is tied to the child's closest family relationship. No one can be forced to carry out contact if they do not want to. Parents have the right and responsibility to maintain, educate, and raise their children. This right may be taken away or limited from the parents only for reasons established by law to protect the child's interests. The performance of parental duties must therefore be in the child's best interests. Where it is not in the best interests of a child to maintain unsupervised contact with one of their parents the child does not live with, the possibility of supervised personal contact or other forms of contact with this parent shall be considered. Joint parenting is possible only in cases where both parents are unencumbered by their past parental relationship and are able to agree.

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NAJBOLJŠE UREDITVE VARSTVA OTROK PO LOČITVI STARŠEV

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Pravica otroka do stikov je strogo osebna, neoporečna in nezamenljiva pravica, ki je povezana z otrokovim najtesnejšim družinskim odnosom. Nikogar ni mogoče prisiliti, da izvaja stike, če tega ne želi. Starši imajo pravico in odgovornost vzdrževati, izobraževati in vzgajati svoje otroke. Ta pravica se lahko staršem odvzame ali omeji samo iz razlogov, določenih z zakonom, in če je v korist otroka. Izvajanje starševskih skrbi mora zato biti v največjem interesu otroka. Kjer vzdrževanje nenadzorovanih stikov z enim od staršev ni v interesu otroka, se upošteva možnost nadzorovanih osebnih stikov ali drugih oblik stikov s tem staršem.



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1 Introduction

Children experience divorce deeply and personally, and the potential for negative short- and long-term different kinds of consequences is considerably higher for children whose parents divorce than for those from non-divorced families. While parental divorce poses significant risks for children that warrant concern, research shows that these outcomes are not the same for all children, nor are they inevitable (Pedro-Carroll, 2020). In this relation, the law must provide clear and compelling rules to minimize all these factors, among other means of help.

In the Convention on contact concerning children, a special article 7¹ is devoted to resolving disputes concerning contact, saying that the judicial authorities shall take all appropriate measures to ensure that both parents are informed of the importance for their child and for both of them of establishing and maintaining regular contact with their child. The primary purpose of protection is to encourage parents and other persons having family ties with the child to reach amicable agreements with respect to contact, particularly through family mediation and other processes for resolving disputes. Before making a decision, ensure that they have sufficient information at their disposal, particularly from the holders of parental responsibilities, to decide in the child's best interests and, where necessary, obtain further information from other relevant bodies or persons.

Today, the principle of the best interests of the child is a fundamental principle of children's law – an area where law is intertwined with the child's life. It is covered in article 3 of the 1989 UN Convention on the Rights of the Child² (hereinafter: UNCRC, 1989):

1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
2. *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

¹ Convention on contact concerning children of The Council of Europe, available: <https://rm.coe.int/convention-on-contact-concerning-children/1680a40f71>

² Convention on the rights of the Child, Uradni list SFRJ – Mednarodne pogodbe, no. 15/90, Akt o notifikaciji nasledstva glede konvencij Organizacije združenih narodov in konvencij, sprejetih v mednarodni agenciji za atomsko energijo objavljen v Uradnem listu RS – Mednarodne pogodbe, no. 9/92.

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

The foundation of the child's right to contact with both parents is also stipulated in article 8 of the European Convention on Human Rights (hereinafter: ECHR)³, which is devoted to the right to respect for private and family life.

Parents have the right and duty to maintain, educate and raise their children. This right may be taken away or limited from the parents only for reasons established by law to protect the child's interests. The stated provision of the first paragraph of article 54 of the Constitution of the Republic of Slovenia⁴ lays down the basis of parental care, which belongs to both parents, who have the same rights and obligations towards their children (Kraljić, 2019, p. 455).

In the first paragraph of article 141 of the Family Code (hereinafter: FC)⁵, there is a legal presumption that contacts ensure the child's benefits since the child has the right to contact both parents, and both parents have the right to contact the child. When decisions are made about the child's contact with the parent with whom the child will not live, it is not necessary to prove that the contact is in their favour, as this is assumed (Kraljić, 2019, p. 455).

However, when the procedure for the withdrawal or restriction of contacts, for the reassignment of the child or the change of contacts due to the occurrence of changed circumstances, as follows from paragraphs 7 and 8 of article 141 of the FC, this legal presumption will have to be challenged and according to the court's decision it will have to be assured that the changed contacts of the child after following the changed circumstances are in the child's best interests (Kraljić, 2019, p. 455).

³ The European Convention on Human Rights (ECHR; formally the Convention for the Protection of Human Rights and Fundamental Freedoms) is an international convention to protect human rights and political freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity.

⁴ Constitution of the Republic of Slovenia (Slovene *Ustava Republike Slovenije*) (CRS): Uradni list RS/I, št. 33/91, Uradni list RS, št. 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, 47/13, 75/16 - UZ70a, 92/21 - UZ62a.

⁵ Family Code (Slovene *Družinski zakonik*) (FC): Uradni list RS, no. 15/17, 21/18 - ZNOrg, 16/19 - ZNP-1, 22/19, 67/19, 200/20 - ZOOMTVI, 94/22 - odl. US, 94/22 - odl. US, 5/23.

The importance of the child with both parents who are separated is stated in article 9(3) of the CRC where it is stipulated that the State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents regularly, except if it is contrary to the child's best interests.

The child's right to contact is a strictly personal, non-inheritable, and non-transferable right that is tied to the child's closest family relationship. Waiver of the right to contact has no legal effect, and in the event of its non-execution, there is no termination. However, no one can be forced to carry out contact if they do not want to. The right to contact is also protected against interference by third parties (Kraljić, 2019, p. 456).

2 The performance of parental duties

2.1 Assessing best interests of the child in specific cases

The performance of parental duties must therefore be in the child's best interests. However, parents work for the benefit of the child if they meet his material, emotional and psychosocial needs by appropriate behaviour.

In the decision of the Higher Court in Ljubljana IV Cp 453/2016⁶, the court assessed whether the mother is the one who prevents contact with the child's father. The court's decision is based on the previously valid article 106 of the Marriage and Family Relations Act⁷ (hereafter: MFRA). The fact that one of the parents prevents the child from having contact with the other parent is a circumstance that, given that it is in the child's interest to have regular personal contact with the parent with whom they do not live can also influence the decision on the assignment of a child. The mother must provide more convincing evidence that the boy's contact with his father would be harmful. The parent with whom the child lives is the one who must provide convincing evidence that the child's contact with the other parent is not in the child's best interest (Novak, 2017, p. 222). Namely, the defendant failed to prove either that the contact between the child and the father would harm the child or that

⁶ *VSL sklep IV Cp 453/2016*, 21 June 2016.

⁷ Marriage and Family Relations Act (Slovene *Zakon o zakonski zvezi in družinskih razmerjih*) (MFRA): Uradni list RS, no. 69/04 - uradno prečiščeno besedilo, 101/07 - odl. US, 90/11 - odl. US, 84/12 - odl. US, 82/15 - odl. US, 15/17 - DZ, 94/22 - odl. US, 94/22 - odl. US.

the father would not be able to care for the child. The defendant claimed at the appeal hearing that she was ready to make contact. Now he has the last and ultimate chance to prove it. The court will monitor her conduct if it turns out that the defendant is not ready to exercise contact and the child's interests and possibly protect her; otherwise, the father will become the child's primary guardian.

Article 7 of the Slovenian FC states:

- (1) *Parents shall take care of the best interests of the child in all activities related to the child. Children are brought up with respect for their person, individuality, and dignity.*
- (2) *Parents have priority over all others in the care and responsibility for the benefit of the child.*
- (3) *Parents work for the benefit of the child if, in particular, taking into account the child's personality, age and developmental level and desires, they adequately meet his material, emotional and psychosocial needs by acting to indicate their care and responsibility towards the child, appropriate educational leadership and encourage it in its development.*
- (4) *State bodies, public service providers, holders of public authority, local community bodies and other natural and legal persons must take care of the best interests of the child in all activities and procedures related to the child.*
- (5) *The state shall provide conditions for the operation of non-governmental organizations and professional institutions for the development of positive parenting.*

The principle of the best interests of the child thus represents a fundamental starting point in all vertical relations or activities related to the child carried out by state bodies (e.g., court, social work center, police ...). However, the best interests of the child must also be a fundamental guide in horizontal relations, i.e., in the relations between parents and children.

Our positive legislation does not define the notion of "child benefit," which must be the basic guideline in all matters concerning the child (i.e., general authority). It is a legal standard, the content of which must be sought in each case separately (e.g., judiciary, education, health care). The only starting point is that parents are considered to be working for the benefit of the child if, in particular, taking into account the child's personality, age and developmental level and desires, they adequately meet their material, emotional and psychosocial needs, responsibility to the child and provide him with appropriate educational guidance and encourage him in his development.

According to article 106 of the MFRA, a parent who does not live with the child has the right to personal contact with the child unless the Social Work Center decides otherwise based on the interests of the child, the parent with whom the child lives is obliged to enable contact. In the following case of the Supreme Court of the Republic of Slovenia⁸, the defendant complied with the provisions of the United Nations Declaration on the Rights of the Child⁹ and the CRC, thereby taking into account the child's rights to love, affection, and happy childhood and education for the arrangements of the child whose parents are separated.

After the separation of the parents, the child has his ultimate right derived from the legislation providing him that both of his parents are entitled to realize his emotional needs, that by seeing and communicating with the child, he learns about his physical and mental state and development, and above all, that the child maintains a sense of emotional attachment, connection with him, and a sense of mutual belonging. Contacts should, therefore, build relationships between parents and children when they live together.¹⁰

Effective parenting encompassing warmth and discipline, developing positive parent-child relationships and managing conflict are the three most important factors in protecting children. Developing the ability to listen for children's hidden emotions and help them articulate their feelings underlie parents' ability to parent effectively and develop strong relationships (Pedro-Carroll, 2020).

It is crucial to understand that contacts with both parents are essential so that the child can develop family relationships also with the parents with whom he does not live. As for the decision of contacts, the legal standard of the child's best interests must be considered in each case.

In article 2 of the Convention on Contact concerning children, "contact" means the child staying for a limited period of time with or meeting a person with whom they are not usually living and also means any form of communication between the child and such person, as well the provision of information to such a person about the child or the child about such a person.

⁸ *VSRŠ sodba U 984/94-10*, 6 March 1996.

⁹ Adopted by the General Assembly of United Nations on 20 November 1959.

¹⁰ *VSL sodba IV Cp 2027/2013*, 7 August 2013.

A child and their parents shall have the right to obtain and maintain regular contact with each other. Such contact may be restricted or excluded only where necessary in the child's best interests. Where it is not in the best interests of a child to maintain unsupervised contact with one of their parents, the possibility of supervised personal contact or other forms of contact with this parent shall be considered. It is stated in the article 4 of the Convention on Contact concerning children that it is important that the child has regular contact after separation of parents with both of his parents and that it is advised when necessary to supervise contact of the child with one of his parents. In all cases, parents should act in the child's best interests.

The legal standard of the child's best interests is individually adaptable and traceable to the needs of each child. To give the most optimal content to this legal standard in any case, it is necessary to take into account all the circumstances of the individual case, as it is a value concept that is subjective in nature and adapted to each user. As a rule, the Slovenian court has a wide discretion in defining the content of this legal standard, as in practice it can use a number of subjective and objective reasons that have developed over the years in case law. However, it should not be overlooked that the court must also follow the principle of proportionality, as the exercise of parental care and the obligations and rights arising from it primarily belong to the parents, who exercise them in accordance with the principle of autonomy. Parents, therefore have priority over all others in the exercise of parental care. The basic premise is that parents act in the child's best interests.

As stipulated in article 5 of the above-mentioned convention, subject to their best interests, contact may be established between the child and persons other than their parents who have family ties with the child.

Anyone who disagrees (either a natural person (e.g., a second parent) or a legal person (e.g., a public authority) must challenge this legal presumption (legal standard of the child's best interests) and prove it to the contrary with an appropriate standard of proof.

Contacts are primarily intended for the child because, in the case of parents living separately, it is precisely the contact with both parents that enable him to maintain a connection and attachment to both, even to the one with whom the child does not live. It is important, however, that the parents communicate with each other and

make appropriate arrangements regarding contact without hindering or complicating them (Kraljić, 2019, p. 456, 457).

2.1.1 Decisions about child care arrangements after separation of parents

As it is stated in the first paragraph of article 138 of the FC:

"If the parents do not live or will no longer live together, they must agree on the care and upbringing of joint children by their interests. They can decide on joint care and education of children, that all children are in care and education with one of them or that some children are with one of them, others with the other of them. If they disagree on this, the Social Work Center helps them reach an agreement, and at their request, mediators also help them."

When the parents agree on the care and education of the children, they can propose to the court the conclusion of a judicial settlement, whereby the court will check the content of the proposal for a judicial settlement *ex officio*. Here, the principle of officialdom is followed, as the court cannot leave such decisions to the mutual disposal of the parents because it is in the interests of the children, and the investigative maxim is enforced, which requires the court to determine whether the children are taken care of by the agreement (Kraljić, 2019, p. 442).

The main guide for the decision to establish contact is the child's best interests. The child's benefit is shown through his interest in growing up with both parents. They must take care of the child together even if they live separately. Considering the child's benefit, both parents are therefore obliged to behave mutually loyally when exercising the right to contact. The parent with whom the child is in care and education must abandon everything that makes contact difficult for the other parent, including influencing the child (consciously or unconsciously) that causes him to resist contact. He is also obliged to act actively: as part of his educational task, he must try to eliminate the child's possible psychological resistance to contact or to establish an appropriate positive attitude towards contact with the child. It should be emphasized here that the purpose of the contacts is to ensure the healthy and holistic development of the child, i.e., development into a healthy and independent adult. It is, therefore, necessary to follow the child's long-term benefit, even at the expense of sacrificing his short-term benefit.¹¹

¹¹ *VSL, sklep IV Cp 1932/2017*, 12 October 2017.

According to the opinion of the Social Work Center and the opinion of the expert, in the case under the above consideration, the children's resistance to the father is not artificially aroused by the mother, which would otherwise represent a form of abuse of children's emotions. However, the unconscious alienation of girls from their father, which results in no contact, poses a serious risk to children's normal mental and emotional development which is important for each child. This means that the resulting situation is not for both girls' benefit. However, her solution is not reducing the girls' contact with their father. Reducing the amount of contact poses a risk that the girls and her father will not be able to establish a proper relationship, which can lead to their complete alienation, which is not favourable for their development. The participant in the procedure should be aware of the resulting situation and act with the greatest benefit of the children in mind while, as the court expert found, showing readiness for professional help, which can only be successful under the condition that both parents sincerely want to reach a constructive solution. Therefore, the girls' parents will have to take responsibility for their past decisions and actions and find a solution as soon as possible to end the emotional distress in both of their children.

If the child refuses contact, the court must first determine whether this reflects his resistance or a reflection of the influence of the other parent with whom the child lives (see also Kraljić, 2019, p. 458). It also engaged an expert in the above case, who provided relevant findings for these purposes.

The Higher Court in Ljubljana also dealt with the case in question where the fact that the child is sometimes bored with the father does not provide a basis for reducing contact but rather requires the plaintiff to behave in a supportive and encouraging manner towards contact with the other parent and to accept the fact that the child must learn to adapt even to periods of discomfort; and for the father, encouraging and strengthening the mutual relationship with the child through various activities adapted to the child's developmental needs.¹²

As the Higher Court in Ljubljana was judging the facts in the following case: From the factual basis of the disputed decision comes the indisputable finding that both children refuse contact with the opposing participant. The children's resistance to

¹²*VSL sklep IV/ Cp 256/2014*, 26 February 2014.

contact with their father results from the applicant's conduct, namely the systematic, harmful influence on the children's perception of their father.¹³ The proposer is, therefore, the one who, with her behaviour, causes the children to resist contact. This comes from the opinion of the Social Work Center, the clinical psychologist experts appointed in the non-trial procedure, and the experts who gave their expert opinion in the criminal procedure.

The United Nations Convention on the Rights of the Child and the European Convention on the Exercise of Children's Rights¹⁴ obliges the signatory countries to ensure freedom of expression for a child who is capable of forming his own opinion in all matters related to him. Still, the weight of the expressed opinions is judged per age and the maturity of the child, or that a child who has a sufficient level of reason, among other things, is recognized as having the right to express his opinion and that the expressed opinion is duly taken into account.

In the case under consideration, the court concluded with the help of experts that the expressed will of both children to refuse contact with the opposite participant was not genuine. Regarding the older child, the expert concluded that, given his age and emotional maturity, he is not yet able to make up his mind about issues that are essential for him. Conversely, the younger girl follows her brother's feelings and verbal and non-verbal communication, as they are mutually connected. The court's conclusion of the first instance regarding disregarding the children's opinion is, therefore, correct, as their will is not genuine but is manipulated by the mother.

The aforementioned expert concluded that in the case in question, the contact involves a psychological burden on the children, which is incomparable to the hard-to-repair damage that occurs and could occur to the children, which means that it is a situation where long-term benefits must be identified and pursued of both children.

¹³ *VSL sklep IV Cp 2332/2016*, 8 December 2016.

¹⁴ European convention on the exercise of children's rights, of 25 January 1996 (ETS No. 160, entered into force on 1st July 2000), Strasbourg, Council of Europe).

One of the child's fundamental rights is also the child's right to express an opinion, which is covered by article 12 of the UNCRC, 1989. States Parties shall ensure that a child who is able to form his or her own views has the right to express them freely in all matters relating to him or her.

The weight of the opinions expressed is judged according to the child's age and maturity. In particular, the child must be able to be heard in any judicial or administrative proceedings concerning him, either directly or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.

Therefore, the child's right to be heard in all judicial proceedings has its limits. In the before mentioned case, the court of the second instance could not consider the child's opinion because the court found that the child's opinion was manipulated and, therefore, not genuine.

Article 6 of the European Convention on the Exercise of Children's Rights states that in proceedings affecting a child, the judicial authority, before taking a decision, shall consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities.

3 Children's views are taken into account

In the cases where the child is considered by internal law as having sufficient understanding: – ensure that the child has received all relevant information and consult the child in person in appropriate cases, if necessary, privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child. It will allow the child to express his or her views and give due weight to the views expressed by the child in cases where the court considers the child mature enough to express his views.

It is important that in all relations concerning children, especially after the separation of parents, children are listened to, children are supported in expressing their views, children's views are taken into account, children are involved in decision-making

processes, and children share power and responsibility for decision-making. These are so-called five stages of the participation model.¹⁵ But the decision-making process and child's participation have to be carefully recognized and considered, but "not at any cost".

The child has the right to contact both parents. Both parents have the right to contact the child. Contact primarily ensures the child's benefits (article 106 of the MFRA¹⁶). In accordance with the fifth paragraph of the same article, the court can take away or limit the right to contacts only if this is necessary to protect the child's interests, and the contacts are not in the child's best interest, if they cause mental stress for the child, or if they otherwise endanger his physical or mental development.

In the first instance in the following case, the court determined that the 9-month-old girl should have contact with her father once a week, every Sunday from 11 a.m. to 12 p.m. Such a decision was also based on the opinion of the Social Work Center, which follows that it is in the girl's interest to maintain contact with her father once a week for at least an hour. This is also as much as the court of first instance determined with a temporary order. The contact the girl has with her father once a week is not excessive, as the complaint states—rather the other way around. The court limited the contacts to a small extent. The contacts are short-lived, as they last one hour and are carried out on the terrace of the mother's home. It is controlled contact, which is acceptable considering that it is a child who is not yet one year old.¹⁷

In the next decision of the Higher Court in Ljubljana¹⁸, the court of second instance stated, that the first-instance court based its decision to reject the petitioner's proposal to establish contact between him and his two daughters on the expressed will of the children regarding contact with their father, which they gave at the Social Work Center and the court during an informal interview. It assessed that the girls are old enough and capable of understanding the will expressed and the consequences, and it is in their best interest that they have no contact with their

¹⁵Shier based the Pathways to Participation model on his experience working on child participation in the United Kingdom in the 1990s. He developed the model to align with article 12(1) of the UNCRC, 1989 (Shier, 2001).

¹⁶ Now article 141(1) of the FC.

¹⁷ *VSL sklep IV Cp 2128/2013*, 10 June 2015.

¹⁸ *VSL sklep IV Cp 2631/2016*, 23 November 2016.

father. The Court of Appeal accepts the decision and all the Court of First Instance arguments.

The first-instance court also found that both girls do not refuse contact with their father due to indoctrination by their mother or the so-called syndrome of alienation from their parents—from their mother, which the petitioner claims during all the proceedings as well as in the appeal. In the current situation, taking into account all the circumstances of the case, according to the assessment of the Court of Appeal, this is no longer important since the child's right to contact does not only include the right of the child to maintain contact with both parents but also the right to resist contact for justified reasons. In a collision between the child's entitlement and the parent's right to contact, only the child's benefit is decisive. A similar but even more rigorous position from the point of view of the child's benefits was taken by the European Court of Human Rights in the decision of 23rd September 1994 in the case of *Hokkanen v. Finland*.¹⁹

In deciding on matters of custody and access the competent court must consider the wishes and interests of the child in accordance with the following considerations: primary emphasis must be placed on the interests of the child and particular regard should be had to the most effective means of implementing custody and access rights in the future. The child's views and wishes must, if possible and depending on its age and maturity, be obtained if the parents are unable to agree on the matter or if the child is being cared for by a person other than its custodian or if it is otherwise deemed necessary in the latter's interests. The consultation must be carried out in a tactful manner, taking into account the child's maturity and without causing harm to its relations with the parents (*Hokkanen v. Finland*, p. 10-11).

Conciliation may not be ordered if it is evident from previous attempts that it would be unsuccessful or, in the case of a custody decision if immediate enforcement is in the child's interests and dictated by strong reasons (*Hokkanen v. Finland*, p. 12).

Although there may be plausible reasons for a parent to have custody and access rights, it does not necessarily follow that these should be enforced, especially if it would be incompatible with the interests and welfare of the child. The decision of

¹⁹ *Hokkanen v. Finland*, app. no. 19823/92, 23 September 1994.

the European Court of Human Rights viewed a parent's custody of a child as a right first and foremost in the interest of the wellbeing and balanced development of the child and not primarily for the benefit of the parent (*Hokkanen v. Finland*, p. 15-16).

In the following decision of the Higher Court in Maribor²⁰ the court of appeal explained that the court of first instance has adequate reasons why it did not follow the expert report and the wishes of the children so that the contacts would be under the wishes of the children since it is a high conflict situation between the parents. Therefore, a precise determination of the implementation of the contacts was necessary. However, the parents can still agree on implementing the contacts differently, which the court of first instance repeatedly emphasized and explained to the parents that the contacts are primarily for the benefit of the children, which the participants in the procedure have not seen until now. Caring for the child must be the parents' main guide, following article 141 of the FC and article 54 of the CRS.

3.1 Deciding about the child's care and upbringing can be devoted to experts

The courts must define which contacts are in the child's best interests in each case. Not every situation can be judged according to the views and wishes of the child because it is not always the optimal choice, as we spoke before, the child's decision can sometimes be optimal for the time being, but not an optimal decision for long term agreements between the separated parents. In some circumstances that indicate such a high level of endangerment, the court can decide to stop any contact with the child with one of his parents.

The established factual circumstances in the following case of Higher Court in Ljubljana²¹ do not indicate such a level of endangerment of the child, which would dictate such an exceptional measure as the prohibition of any personal contact of the child with him.

The opposite participant was not all the time under the influence of alcohol and, therefore all the time a threat to the child, so a supervised contact order is offered as a possible solution that would allow the child to have personal contact with the

²⁰ *VSM sklep III Čp 414/2023*, 6 June 2023.

²¹ *VSL sklep IV Čp 702/2023*, 9 May 2023.

father, to whom he is attached and without being endangered. Or in the presence of a Social Work Center expert.

Also, the court may entrust the care and upbringing of the child to both parents as in the case which follows:

Since the expert found that both parents have very similar parental capacities, the possibility of entrusting the care and upbringing of the child to both is indicated. The expert should therefore provide an expert assessment of the complainant's proposal regarding the regime of contact or spending time with the child, as well as her proposal on how (probably gradually) the scope of contact between the child and the father should increase when would it be based on the primary attachment to the mother, which is conditioned with the age of the daughter, to her greatest benefit, that spending time with each parent is (more) balanced and what should be the long-term way of spending time with each parent.²²

Due to the conflicting relationship between the parents, they needed help to reach an agreement on the implementation of contact at the Social Work Center. The father understands contact with his son primarily as a right but not an obligation. At the same time, the mother expects the boy's father to follow what seems right to the mother, leading to repeated conflict situations, as both parents prioritize their needs and interests rather than their son's needs.²³

The idea of arranging contacts has a primary consideration, and that is the child's best interests; the child's care and upbringing must never be a result of the interests of the parents.

The child's best interest is the primary substantive legal guideline for the contact decision. Decision-making should be based on the principle that having good and close contact with both parents is to the child's advantage. If necessary, the court can limit the right to contact to protect the child's interests. Contacts are not in the child's best interest if they cause psychological stress or otherwise endanger their physical or mental development.²⁴

²² *VSL sklep IV Cp 387/2023*, 19 April 2023.

²³ *VSL sklep IV Cp 518/2023*, 23 March 2023.

²⁴ *VSL sklep IV Cp 1962/2022*, 8 December 2022.

The above is the main guideline to all the decisions on contacts as in the above conclusion of the Higher Court in Ljubljana; any contacts, except indirect ones, through written messages, are out of the question because they would not benefit the girl and could mean too much psychological stress for her and harm her mental development.

It follows from the third paragraph of article 138 of the FC that in cases where the parents disagree on the care and education of children, the court decides on this, which means that in this case, the court decides without a claim or without a mutual agreement on care and education (*ultra petitum*). The court, *ex officio*, in accordance with the provisions of the FC, decides on all measures for the protection of the interests of children beyond the claims of the parties (*extra petitum*), all with the aim of satisfying the principle of the child's best interests. In custody and education, the court always decides on joint child support and contact with parents (Kraljić, 2019, p. 442).

After the divorce, the parents can decide to have joint custody and upbringing of the children, that all the children will be in the custody and upbringing of one of them, the right and duty of contact will be determined for the other parent, but they can decide that they will be one child with one, the other with the other of them. This decision to separate children can have a negative impact on the mental development of the children, who, until the moment of separation, grew up together and are attached to each other, but this is not the general impact in all cases, namely in every case it is necessary to judge what is in the best interest of the children (Kraljić, 2019, p. 442).

The parents, who have agreed on which of them will be entrusted with the care and education of the child, have judged in any case what is best for their child. Still, when the parents do not reach an agreement, it is up to the court, after a careful assessment of all the facts and evidence, to decide that the common children will remain in the care and education of one of the parents, which is the decision in most cases. Still, this decision must not be based on giving priority to one of the parents since, in accordance with the provisions of article 6 of the FC, parental care belongs to both parents. Above all, the court must determine which of the parents has the best conditions for the child's further physical and mental development. The court can rely on the Social Work Center's opinion or ask for a court expert's help. In judicial

practice (earlier), the influence of the so-called doctrine of tender years can be traced, where the court's position was mostly formed that a younger child (preschool) should only be entrusted to the care of the father in exceptional cases since the mother is the one who can provide him with the strongest support in the early years, the mother can provide optimal benefits to the child during these years (Kraljić, 2019, p. 443). However, the mother is the one with whom the child is most connected and attached from birth.

4 Best interests of the child as the only criterion?

The fundamental guideline for conduct and decision-making in connection with the assignment of a child is dictated by the legal standard of the child's benefit, which the court completely bypassed with the challenged decision.²⁵ The court decided to assign the child to the mother simply so that the expected big problems would not be caused to him if he was now withdrawn from his familiar environment.

The court thus ruled in complete contradiction to the findings of the expert opinion, which the defendant justly points out in the appeal. The expert concluded that the mother is indecisive, independent, unenterprising, submissive, loses her attitude to reality, and is symbiotically dependent on her parents, which is why she believed that the child should not be raised by her but by her parents, who have a very bad influence on him. Such upbringing can have two pathologically negative outcomes: the child may develop into a neurotic personality disorder, or behavioural disorders may occur. The mother would only take care of the child's physical needs and care; otherwise, given her current functioning, she is incapable of raising the child independently and properly.

The expert drew exactly the opposite conclusions regarding the defendant, who, in terms of his functioning and external conditions, is able to take care of the boy's upbringing and care adequately. He is extremely devoted to and means a lot to him; he is non-aggressive, adequately organized, and has a normal functioning personality. From his side, the child would receive positive emotional affection and active engagement in activities and jobs.

²⁵ *VSL sklep IV Cp 419/2009*, 15 April 2009.

Already in her written opinion, the expert predicted that the mother's upbringing would lead to the child's alienation from the father, which began to be confirmed even before the court's judgment of first instance. Completely contrary to the expert opinion, the court's conclusion is that it is in the boy's favour to assign him to his mother in order not to cause problems when the environment changes. During the oral presentation of the expert opinion, the expert pointed out that assigning the child to the father would be a burden for him in the first phase, but he would get used to it later. It should be considered that the boy was very attached to his father in the past.²⁶

The decision of the court about assigning the care and upbringing of the child is influenced by many factors, among others, it is important the child's sex, age, perceptions of the family environment, and character. Namely, it is also important to consider the child's opinion. As stated in article 12 of the UNCRC, 1989, States Parties shall assure the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall, in particular, be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

According to the Slovenian FC, the right of the child to express his views is stated in article 143, that the court also considers the child's opinion when deciding on the care, upbringing, and maintenance of the child, on contacts, the exercise of parental care, and the granting of parental care to a relative. The child expresses the opinion through a person he trusts and has chosen himself if he is capable of understanding its meaning and implications.

It is primarily the parents who are entrusted with upbringing and care after the divorce, or one of the parents or, in the case of such an agreement, both parents together. In the event that the court determines that neither parent is suitable for the child's future development, the child may also be assigned to a third party, a close

²⁶ Also stated in the decision of the Higher Court in Ljubljana, *VSL sklep IV Cp 419/2009*, 15 April 2009.

relative, or a person to whom the child feels a special attachment. The court may decide that the child is placed in an institution (Kraljić, 2019, p. 445).

The child's benefit is the only criterion that legitimizes the decision to raise and care for the child. The court making the choice must choose the option for which there are several reasons. These are both objective and subjective. To make such a decision, the court must know not only the circumstances on the part of the specific child, his needs and wishes but also the personality and educational abilities of both parents. It must find out what the conditions are for asserting the benefits of the children for each of the parents, what are the characteristics of their personalities, what is the ability of both parents to raise and have an intimate emotional connection with the child, which must be the basis for a guarantee for the successful implementation of care and upbringing of the children, and what are the conditions for the development possibilities of the child with each of the parents.²⁷

When the parents divorce, the court always decides on the relationship between the children and the divorced parents based on the facts and circumstances known to it at the time. The relationship between the parents and the child continues, despite the changed way of life (each of the parents on their own); in the future, such a changed way of life may lead to changed circumstances that demand the issuance of a new decision on the care and upbringing of the child, which occurs if they request it changed circumstances and benefits of the child (article 138(4) of the FC).

The court settlement or the court's decision on joint custody and upbringing of the child must contain a decision on the child's permanent residence, which of the parents the child's parcels are served, and child support (article 139 of the FC).

Otherwise, joint custody is always an option. Still, because it takes a lot of coordination and understanding between the parents, it is difficult to agree on joint custody if the parents have communication issues with each other and are having problems deciding anything.

²⁷ *VSL, sodba IV Cp 1454/2010*, 6 May 2010.

Through a court settlement, the girl was entrusted with joint parenting, which is no longer in the girl's favour due to the tension and hostile relationship between the two parents.²⁸

Both experts concluded that the characteristics of both parents are such that they both have adequate parental capacities, and neither of them is unsuitable as a parent due to their personal characteristics.

However, both experts believed it would be better if the girl had her mother's domicile in the future and had precisely defined contacts with her father. According to the expert opinion, assigning the girl to her mother would have a positive effect on the girl in terms of greater psychological stability and relief, while assigning her to her father would be an emotional burden, causing even greater depression or additional emotional stabilization.

It is also important that the girl expresses her wish, and reassignment to the father would mean that the girl's wish is not considered and that her opinion is not worth it. When evaluating the evidence of the expert's opinion, the court also considered it essential that the expert concluded that the girl confided in her mother about her emotions, feelings, and hardships, but she did not dare to do so to her father. In addition, the girl does not feel accepted in his father's family and does not feel like a part of the family, but the expert expressed optimism that this could be corrected with regular contact.

5 Joint parenting

In any case, the parents must agree on joint custody because if one of the parents opposes the joint custody, they do not reach an agreement.²⁹

Joint parenting is possible only in cases where both parents are unencumbered by their past parental relationship and are capable of completely unencumbered communication regarding the care and upbringing of the child.³⁰ It follows from the expert opinion of the clinical psychologist that she herself would have proposed

²⁸ *VSL sodba IV Cp 1324/2018*, 9 August 2018.

²⁹ Judicial practise also emphasises the importance of the agreement in the cases of joint custody.

³⁰ *VSL sodba IV Cp 1652/2017*, 28 September 2017.

joint parenting if there had not been such a large gap in communication between the parents and if there had not been the plaintiff's obvious opposition to joint parenting. It is, therefore, a circumstance that is essential for the decision on joint parentage. Otherwise, according to the provisions of article 105 of the MFRA, the decision that both parents retain custody and upbringing of the child can only be the result of an agreement between them and not a court decision when the parent, even with the help of the Social Work Center they fail to agree on the care and education of the child (article 105(1 and 3) of the MFRA.

The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors that vary according to the age of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and is again not the same as those relevant to an infant.³¹

As a general rule, a young child's environment is essentially a family environment, determined by the reference person(s) with whom the child lives by whom the child is looked after and taken care of.

That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where the infant is looked after by her mother, it is necessary to assess the mother's integration into her social and family environment.

It follows from all of the foregoing that the answer to the first question is that the concept of 'habitual residence,' for the purposes of article 8 and article 10 of the Regulation³², must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors that must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's

³¹ *Barbara Mercredi v Richard Chaffe*, C-497/10, 22 December 2010.

³² Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast).

move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national Court to establish the child's habitual residence, taking account of all the circumstances of fact specific to each case.

In joint custody cases, it is important to determine the child's permanent residence. It is crucial to define the child's habitual residence, as the Court of the European Union was determining in the above case, to be able to determine the child's permanent residence.

6 Instead of conclusion

Many views need to be taken into account. Still, the essential factor to be considered in the childcare arrangements after the separation of parents is the principle of a child's best interests that has to be considered in any case and any court decision whatsoever.

It is crucial to understand that contacts with both parents are essential so that the child can develop family relationships also with the parents with whom he does not live. As for the decision of contacts, the legal standard of the child's best interests must be considered in each case.

Parents, therefore have priority over all others in the exercise of parental care. The basic premise is that parents act in the child's best interests.

Considering the child's benefit, both parents are therefore obliged to behave mutually loyally when exercising the right to contact.

The idea of arranging contacts has a primary consideration, and that is the child's best interests; the child's care and upbringing must never be a result of the interests of the parents.

The child's best interest is the main substantive legal guideline for the contact decision. Decision-making should be based on the principle that having good and close contact with both parents is to the child's advantage. If necessary, the court can limit the right to contact to protect the child's interests.

The parents, who have agreed on which of them will be entrusted with the care and education of the child, have judged in any case what is best for their child.

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