PARENTAL AUTONOMY V. CHILD AUTONOMY V. STATE AUTHORITY POWERS

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ABSTRACT

In this paper the author analyzes relations between parental autonomy, child autonomy and State authority powers within the purview of the content of the parental rights, family status of the child (maternity and paternity) as well as in exercise of the parental rights. These issues are presented according to Serbian law and court practice, from a comparative and international perspective.

KEYWORDS

autonomy
parents
child
State authority
powers
rights
duties

1. Introduction

This paper aims to examine legal relations between parental autonomy, child autonomy, and State authority powers in Serbian and comparative law.

During historical periods, the focus in family law was on the rights and obligations of parents with respect to their children. The next step in family law was a theory of the existence of a correlative relationship between the rights and obligations of parents and the rights of the child. In contemporary family law the child holds independent rights and also has a right to participate in the decision-making in important matters concerning him/her. Nonetheless, the State authority powers can limit the parental and child autonomy. It is important to find an appropriate balance between State authority powers and parental/child autonomy to protect the best interests of a child, as a paramount principle in family law.

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In this paper the author examines issues of the content of the parental rights, family status of the child (maternity and paternity) and exercise of parental rights within the purview of relations between parental autonomy, child autonomy, and State authority powers.

2. Content of Parental Rights/Child's Rights

The content of parental rights comprises the rights and obligations of the parents to care for the child, and includes the following: protecting, educating, upbringing, representing, and maintaining the child, and managing and disposing of the child's property.[1] Apart from defining the content of parental rights, the Family Act regulates rights of a child.[2] These rights include: the right to know who his/her parents are, to live with his/her parents, to maintain personal relations with parents and other persons, right to a proper and complete development, to education, to an opinion, as well as the obligations of the child.[3] The rights of the child can be divided into the rights regarding status (right to: family name, domicile – habitual residence, nationality, to know who his or her parents are), rights derived from parent-child relations (right to: living with parents, to maintain personal relations with parents and other persons, development, education) and the rights on child's property and maintenance.

2.1. The Child's Name

The child's name is determined by his/her parents. Parents have the right to select their child's name freely; however, they cannot provide the child a defamatory name, a name that insults morality or a name that is contrary to the customs and opinions of the community.[4] A child's surname is determined by the parents according to the surname of one or both parents. Parents may not provide different surnames to their common children.[5] Parents have the right to enter their child's name in the register of births in the mother tongue and alphabet of one or both parents, apart from the official language. These are provisions that regulate parental autonomy regarding child's personal name with certain legal limitations.

A child who has reached fifteen years of age and is able to reason has the right to change his/her personal name. A child who has reached the age of ten and is able to reason has the right to provide consent for the change of his/her personal name.[6] These are provisions that regulate a child's autonomy regarding his/her name.

1 | Articles 67–74 of Family Act. Family Act, Official Gazette of Serbia No. 18/05 with amendments (hereinafter referred to as FA). Kovaček Stanić, 2010.
2 | Serbia is a party to the United Nations Convention on the Rights of the Child, ratified: Official Journal of Yugoslavia no. 5/90.
3 | Articles 59–66 of FA.
4 | Article 344 of FA.
5 | Article 345 of FA.
6 | Article 346 of FA.

A child's name is determined by the guardianship authority if the parents are not alive, they are unknown, they have not determined the child's name within the time limit set by law, they cannot reach an agreement on the child's name or they gave the child a defamatory name, a name that insults the morality or a name that is contrary to the customs and opinions of the community.[7] These are provisions that regulate State authority powers regarding a child's personal name as a correcting factor.

2.2. The Child's Domicile/Habitual Residence

The child who lives with his/her parents has the domicile of the parents. If parents do not live together, the child has the domicile of the parent with whom he/she lives. If parents conclude an agreement on joint exercise of parental rights, it should include an agreement on what is to be considered as the child's residence.[8]

The important question related to change of the child's domicile is whether changing the domicile by one parent might qualify as child abduction. In the situation the parental rights are exercised jointly, the parents jointly and mutually agree on all issues related to the child. If one of the parents exercises parental rights independently, the other parent is authorized to decide jointly and mutually with the parent who exercises parental rights, issues of significant influence to the child's life. One of the issues of significant influence is the change of the child's domicile.[9] Thus, removal or retention shall be deemed as wrongful under the domestic family law in all situations when there is absence of agreement between the parents regarding change of domicile (habitual residence). It could be said that the regulations in Serbia are strict in this matter. In a situation when both parents are alive, one parent is authorized to make an independent decision regarding change of domicile (habitual residence) only when the other parent is fully or partially deprived of the parental right. Partial deprivation of parental rights can include deprivation of right to decide on issues of significant influence to a child's life.[10]

There exists another means by which, change of the child's domicile would not be considered wrongful despite the lack of parental consent. The Family Act regulates special procedure for protection of child's rights that could be initiated in such cases; a procedure in which a court would have to assess whether a change in child's domicile would be in the best interests of the child.[11]

A child who has reached the age of fifteen and is able to reason has the right to decide which parent he/she is going to live with; therefore, the child can decide on his/her domicile/habitual residence, as well.[12] This is a provision that regulates a child's autonomy regarding his/her domicile.

7 | Article 344/4 of FA.
8 | Article 76/2 of FA.
9 | Article 78/3, 78/4 of FA.
10 | Article 82/4 of FA.
11 | Articles 261–263 of FA; Kovaček Stanić, 2010; Драшкић, 2012; Станивуковић, 2021; Станивуковић, Ђајић 2022.
12 | Article 60/4 of FA.

2.3. The Child's Origin[13]

In the Constitution of the Republic of Serbia, 2006 and in the Family Act, 2005 it is stipulated that every child has a right to know his/her origins.[14]

A child, independent of his/her age, has the right to know who his/her parents are. A child who has reached the age of fifteen and is able to reason has the right to inspect the register of births and other documentation related to his/her origin.[15]

The issue of origin can be related to different situations: natural birth, adoption, and biomedically assisted fertilization. The issue of origin in the situations of natural birth is examined further in the section on maternity and paternity.

State authority has powers concerning the right of an adopted child to know his/her origin. The official of the guardianship authority has an obligation to advise the future adopters to inform the child regarding his/her origin as soon as possible.[16] However, it could be said that, in practice the adopters enjoy the autonomy to inform the adoptee regarding his adoption or keep it as a secret, as there is no legal obligation but only an advice of the guardianship authority. The registrar is under the obligation to refer the child to psychosocial counseling, before allowing the child to view the register of births.[17] Apart from the adopted child, only the adopters have the right to view the register of births for the child.

Concerning the right of a child conceived using biomedically assisted fertilization to know his/her origin, Serbian Law on biomedically assisted fertilization in Article 57 states:

> The child conceived by biomedically assisted fertilization (BMAF) with reproductive cells of the donor has a right to ask for medical reasons to get data on the donor from the Board of Directors for Biomedicine kept in the State Registry. This right the child obtains when reaches 15 years of age if is able to reason. These data are not on personal nature of the donor, but only the data of medical importance for the child, his future spouse or partner, or their future offspring ...

The child's autonomy regarding his/her origin is limited by State power exercised in legal provision which does not allow to reveal the donor`s identity if the child is conceived using biomedically assisted fertilization.

2.4. Upbringing and Education of the Child

A child has the right to live with his/her parents and the right to be taken care of by his/her parents, in preference to all others. The right of a child to live with his/her parents may be limited only by a court decision, when that is in the best interests of the child. A court may decide to separate a child from his/her parent if there are reasons for the parent to be fully or partially deprived of his/her parental rights

13 | Ковачек Станић, 2021.
14 | Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia 98/06, Art. 64/2. Family Act Article 59.
15 | Article 59 of FA.
16 | Article 322/1 of FA.
17 | Article 326 of FA.

or in case of domestic violence.[18] Thus, the State authority has powers regarding separation of the child from his/her parents.

Parental autonomy regarding the upbringing and education of the child is limited by State authority powers. An example of this limitation is a provision that forbids humiliating actions and punishments that insult the child's human dignity. Further, parents have the duty to protect the child from such actions by other persons.[19]

Nowadays, the issue of corporal punishment of the children is in focus in Serbia, owing to the suggestion that corporal punishment has to be explicitly forbidden in family law.

A new practice on 'sharenting' (use of social media by parents to share pictures or information regarding their child) indicates parental autonomy. However, this practice may not be in the best interests of a child, and therefore, the State authority has powers to regulate this practice. For instance, in a particular case if 'sharenting' is not in the best interests of a child, the guardianship authority can perform corrective supervision over the exercise of parental rights by making decisions that warn the parents of deficiencies in the exercise of parental rights or referring them for consultation to a family counseling service or an institution specialized in mediating family relations.[20]

The Family Act directly limits parental autonomy regarding the upbringing of the child forbidding parents to leave a child of pre-school age unsupervised[21] and by forbidding parents to entrust the child, even temporarily, to the care of a person who does not meet the requirements for being a guardian.[22]

A child's autonomy regarding education is exercised explicitly by the right of a child at the age of fifteen, if he/or she is able to reason, to decide which secondary school he/she will attend.[23]

| *2.5. Medical Issues*

The protection of life and health of the child in contemporary conditions has to a large extent become a function of healthcare institutions. However, the role of the parents is no less important. Apart from the direct care about life and health

18 | Article 60 of FA.

19 | Article 69/2 of FA. By way of contrast, the Civil Code of the Kingdom of Serbia (1844) provided that parents had the right to 'punish immoral and insubordinate children with a moderate domestic punishment.' Further, under the criminal law of that period, children could be imprisoned for up to ten days. In ancient Roman law *pater familias* had *ius vitae ac necis* toward his children (and other persons in his *patria potestas*). Nevertheless, *patria potestas* was limited by the rule that states: '*Patria potestas in pietate non in atrocitate consistere debet*' Kovaček Stanić, 2010.

20 | Article 80 of FA.

21 | Article 69/3 of FA.

22 | Article 69/4 of FA. The following persons may not be appointed as a guardian: a person fully or partially deprived of legal capacity or of parental rights, a person whose interests are adverse to the ward's interests, a person who, given his/her personal relations with the ward, the ward's parents or other relatives, cannot be expected to perform properly the activities of a guardian (Article 128 of FA).

23 | Article 63/2 of FA.

of a child, it also includes providing consent to any medical procedures being conducted on the child.

In contemporary law the child's autonomy is exercised, as an older child has the right to independently decide regarding medical procedures. The Family Act of Serbia, 2005 is in accordance with this approach by which a child who has reached the age of fifteen and is able to reason may provide consent for any medical intervention.[24]

The rights of the child to act independently have certain limitations. A question arises whether parents can or should provide consent despite the fact that their child has the right to consent to medical treatment. The Serbian Act on Patient`s Rights 2013 explicitly states that if the child refuses treatment, the doctor has to acquire consent from the legal representative of the child.[25]

In family law the important issue is to explain the relation between a child's refusal to consent to a particular treatment and a child's refusal of all treatment. In the United Kingdom (UK) various authors have expressed their opinion on this matter.

Authors Gilmore & Herring state:

> There is an important difference between a child's refusal to consent to a particular treatment and a child's refusal of all treatment. A child's capacity to consent merely requires an understanding of the proposed treatment, whereas a valid refusal of all treatment requires an understanding of full significance of a total failure to treat. It follows that a child who has capacity to consent does not necessarily have capacity to refuse all treatment; indeed the child may not even address the latter issue. Where the child lacks the capacity to refuse all treatment, the parent has the power to consent, as is usual when the child lacks capacity to resolve the issue.[26]

Author Booth expresses similar opinion:

> Until a child has attained the status of adulthood at 18, although they may consent to treatment on their own behalf, under the Family Law Reform Act 1969, parental consent will still be effective and can therefore override the 16 or 17 year olds refusal to consent.[27]

Another issue concerning the health of a child is a situation where, for religious reasons, parents refuse consent to certain medical treatments, e.g., blood

24 | Article 62/2 of FA.
25 | Article 19/5 of FA. The Law on Patient's Rights, Official Gazette of the Republic of Serbia No. 45/13, 25/19.
26 | Gilmore and Herring, 2011; Cases: Gillick v West Norfolk and Wisbech Area Health Authority 1986; Re R (A Minor) (Wardship: Consent to Treatment) 1992; Re W (A Minor) (Medical Treatment: Court's Jurisdiction), 1993 etc.
27 | Re W (a minor) (medical treatment) (1992) 4 A11 ER 627 in Booth, 2008, p. 275. The United Kingdom the Family Law Reform Act 1969, s 8 (3) states: 'Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted.'

transfusion. In such scenarios, the court should appoint a guardian who will make decisions on behalf of the child, instead of the parents, thus providing the State authority power to limit parental autonomy.

Regarding child's health, there is a bizarre form of child abuse, termed 'Munchausen syndrome by proxy.' In these cases a parent (mother in most cases) has a delusion regarding the child's illnesses with the consequence of unnecessary treatment, which in some cases even results in the child's death.[28] Parental autonomy in these cases should be limited by State authority powers.

2.6. Child's Maintenance

Parental autonomy is exercised by the parents to make an agreement regarding a child's maintenance. The Family Act favors parental agreements regarding parent-child relations. In the situation of divorce by mutual consent, spouses are obliged to provide a written divorce agreement, which governs the exercise of parental rights. The agreement regarding the exercise of parental rights may be joint or independent exercise of parental rights.[29] The agreement on independent exercise of parental rights includes, among others issues, an agreement regarding child's maintenance. In cases of divorce on the grounds of disturbed marriage relations or where cohabitation of the spouses cannot be objectively realized, during the mediation procedure (the settlement phase) the court or institution implementing the mediation procedure endeavors that the spouses reach an agreement regarding the exercise of parental rights.[30]

Regarding a child's maintenance State authority powers are exercised through the provision of a guardianship authority to initiate the proceeding for child's maintenance.[31] The guardianship authority is authorized to initiate the maintenance proceedings to protect the child, per instance in the situation where the parent fails to do so. Additionally, there is a rule which states that the court is not bound by the claim for maintenance, which means the court is authorized to make a decision on child maintenance which is different from the claim.[32]

In contemporary family law an important issue regarding child's maintenance is the maintenance rules in cases of alternating residence of the child. In most countries there are no specific regulations, even there are considerable differences in cost, for example, housing. In situations of alternating residence of the child, housing is more expensive (16% more expensive than in mono-residence). For example, in Sweden there is no maintenance in situations of alternating residence of the child. This means that fathers generally gain from the lack of regulation and consequently select alternating residence as a mechanism to avoid paying maintenance, as majority of parents paying maintenance are fathers, who have higher income than mothers. Singer (2009) proposed to divide the expenses, so that one parent has the responsibility for certain costs that are independent

28 | Williams, 1986.
29 | Article 40 of FA.
30 | Article 241 of FA; Booth, 2008.
31 | Article 278/3 of FA.
32 | Article 281 of FA.

of actual care, such as clothes, fees for leisure activities, whereas the remaining costs, such as those required for daily needs, should be distributed between the parents according to the time spent with the child. In court practice in Serbia, to prevent fathers from opting for joint exercise of the parental rights to avoid paying maintenance, courts order the sum of maintenance in their decision on joint exercise of parental rights.

2.7. Child's Property

Parental autonomy in connection with child's property is exercised by the right and duty of parents to manage and dispose of the child's property.[33] Parents have the right and duty to manage and dispose of the property that the child has not acquired through his/her work.[34] Parents may use the income from a child's property for their own maintenance or for the maintenance of another common minor child.[35]

A child independently manages and disposes of the property that he/she acquires through work;[36] therefore, a child's autonomy is exercised in this situation.

State authority powers regarding child's property are exercised through the necessity of prior or subsequent consent of the guardianship authority to parental disposal of immovable property and movable property of considerable value,[37] to establish whether the disposal of property is in the best interests of a child.

3. Family Status of the Child: Maternity and Paternity

Acknowledgement of paternity depends almost entirely on parental (child) autonomy. If the man acknowledges his paternity and mother consents (and a child older than 16), the man is considered the father. The biological truth is not examined. In addition, the mother exercises her autonomy as she can decide to name (or not name) the man who is considered to be the child's father.

The possibility of anonymous birth, which exists in some European laws, for example, in the laws of France, Luxembourg, Italy, and the Czech Republic,[38] provides the mother autonomy, which is exercised in not establishing maternity (and consequently paternity) of a child.

When a mother is reporting the birth of a child born out-of-wedlock to the registrar, the registrar is under the obligation to instruct the mother regarding her right to name the man she considers to be the child's father. If acknowledgment of paternity fails, the registrar is under the obligation to instruct the mother regarding

33 | Article 74 of FA.
34 | Articles 192/2, 193/2 of FA.
35 | Article 193/5 of FA.
36 | Article 192/1, Article 193/1 of FA.
37 | Article 193/3 of FA.
38 | On Italy and Luxembourg law Rubellin-Devichi, 2000; on Czech law in: Kralickova, 2009, Act on the so-called Secret Childbirths 2004.

her right to establish paternity by a court decision.[39] If the mother and (or) the child, or the child's guardian (if mother or child are not able to provide consent), fail to provide a positive statement or refuse to consent to acknowledgment of paternity, the registrar is under the obligation to instruct the man who acknowledged paternity regarding his right to establish paternity by a court decision.[40] These provisions regulate State authority powers regarding establishing paternity.

According to Serbian law, in situations where paternity is required to be established in court proceedings, parental (father's) autonomy is exercised in a manner that the alleged father could refuse to take a DNA analysis. This in certain (most) cases prevents establishing paternity, because the Court not being willing to issue the judgment without proof of DNA, makes several attempts to obtain the DNA sample.

In the case Jevremović v. Serbia, the European Court of Human Rights was of the opinion:

> A system like the Serbian one, therefore, which has no means of compelling the purported father to comply with a court order for a DNA test to be carried out, can, in principle, be considered to be compatible with the obligations deriving from Article 8, taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking the establishment of paternity must be secured when paternity cannot be established by means of a DNA test. The lack of any procedural measure to compel the supposed father to comply with the court order is only in conformity with the principle of proportionality if it provides alternative means enabling an independent authority to determine the paternity speedily (ibid.). Furthermore, in ruling on an application to have one's paternity established, the courts are required to have special regard to the best interests of the child at issue. The Court finds therefore that the proceedings in the present case did not strike a fair balance between the right of the applicant to have her uncertainty as to her identity eliminated without unnecessary delay (see paragraphs 85 and 102-105 above) and that of her purported father not to undergo a DNA test, and considers that the protection of the interests involved was not proportionate. Accordingly, the length of the impugned paternity proceedings, which ended by 9 May 2007, had left the first applicant in a state of prolonged uncertainty concerning her identity. The Serbian authorities have thus failed to secure to the first applicant the "respect" for her private life to which she was entitled. There has, consequently, been a violation of Article 8 of the Convention.[41]

Child's autonomy concerning maternity and paternity is exercised by child's right to initiate (or not) court proceedings on establishing or contesting maternity and paternity. The child has no time limit to initiate the proceedings to establish and contest maternity and paternity.

39 | Article 308/1, 308/3 of FA.
40 | Article 307 of FA.
41 | Serbia is a party to the European Convention on Human Rights. The case of Jevremovic v. Serbia, No. 3150/05 [Online]. Available at: http://www.echr.coe.int/echr/en/hudoc (Accessed: 12 December 2022). Jović-Prlainović, 2021.

In the purview of provisions regulating maternity and paternity court proceedings, it could be said that parental autonomy concerning maternity and paternity is limited by court obligation (as one of the State authority powers) to respect and establish the truth of the biological origin of the child in court proceedings, which may be achieved using DNA and other biomedical evidence.

In several countries, in comparative law, State authorities have power to initiate the proceedings for establishing paternity (e.g., Sweden, Norway, Denmark), despite the wish of the mother.[42] In Serbia, according to the previous Law on Marriage and Family Relations 1980,[43] the guardianship authority could initiate court proceedings for establishing paternity, where the mother named the father in the registry, however, did not initiate court proceedings. This possibility existed only where there were no justifiable reasons why mother was against initiation of the court proceedings. Therefore, guardianship authority had limited power (or none) to initiate the proceedings, as it was difficult to prove there were no justifiable reasons. This is why the Family Act abandoned this possibility.

Parental autonomy in family status of a child is exercised in a new practice known as 'elective co-parenting,'

> This kind of arrangement, when two people who are not romantically attached decide to raise a child together, is called elective co-parenting. Call it a twist on friends with benefits—the benefits, in this case, being a partner to share in the emotional, physical, psychological and practical gauntlet of raising a child. Many of the individuals who make this decision have been unable to find a suitable romantic partner to help fulfill their wish to form a family. And the social and legal legitimacy of such arrangements is on the rise: Ontario's All Families Are Equal Act, which came into effect in January 2017, allows a birth parent to enter into a pre-conception agreement to establish parental rights for up to four people.[44]

Development of biology and medicine might cause discrepancy in legal and biological maternity and paternity in situations of biomedically assisted conception, where donor genetic material is used. Thus, autonomy of the parents acquires importance, as legal parental relations are based on the will of the parties; therefore, the principle of biological truth loses importance. Legal parents would be persons who participate in the process of biomedically assisted conception to produce a child.

42 | Saldeen, 2000.
43 | Article 99 of the Law on Marriage and Family Relations 1980. The Law on Marriage and Family Relations 1980, Official Gazette l of the Republic of Serbia 22/1980, with amendments 22/1993, 35/1994, 29/2001. The law ceased to be in force in 2005.
44 | Treleaven, 2021.

4. Exercise of Parental Rights

Parental divorce is a challenging situation that causes changes in the parent-child relationship. Exercise of parental rights (child custody or parental responsibility) is one of the most important legal consequences. The best interests of the child, as a paramount criterion in family law, are accorded utmost importance while deciding the joint or independent exercise of parental rights of both parents.

The Family Act provides that when parents (married or unmarried) do not cohabit with each other they may enter into an agreement providing for the joint exercise of parental rights. The agreement must specify that the parents, jointly and with each other`s consent, will exercise their parental rights in the best interests of the child, and it must also specify the child's domicile.[45]

Joint exercise of parental rights is considered to be in the best interests of the child as a statutory presumption in certain countries (e.g., Sweden, Germany, the Netherlands, and Belgium). In these countries there is no need for the court to decide regarding the form of custody after the divorce, as the custody remains the same as it was before the divorce (non-intervention principle). Moreover, in Sweden, for example, there is a provision for the court to decide on joint custody even where one parent makes a request for sole custody.

On the international level, Commission on European Family Law in the Principles of European Family Law Regarding Parental Responsibilities,[46] in Principle 3:10 states: 'Parental responsibilities should neither be affected by the dissolution or annulment of the marriage or other formal relationship nor by the legal or factual separation between the parents.'

Principle 3:11 states: 'Parents having parental responsibilities should have an equal right and duty to exercise such responsibilities and whenever possible they should exercise them jointly.'

In the Primary Court of Novi Sad in 2007, independent exercise of parental rights was the prevailing form of custody in 87%, and joint exercise in 12% of cases. However, as joint exercise was introduced in 2005 this is not surprising. In comparison with data from Switzerland, where joint custody was awarded in 15% of cases in the first year of introducing this form of law, the data in Serbia and Switzerland are similar. Nevertheless, after 10 years of introducing joint exercise in Serbian law, an investigation reveals almost similar results; joint exercise was ordered in 13% of cases in 2016.[47] It is difficult to explain why joint exercise is not widely accepted. The condition of necessity of the parental agreement for having joint exercise, does not appear to be the main obstacle, as parents frequently make agreements regarding the exercise of parental rights, however, they opt for independent exercise (awarding independent custody mostly to mothers: 74%). In contrast to Serbian practice, in Sweden, in 2000-2001, joint custody was awarded

45 | Articles 75/2, 76 of FA.
46 | Boele-Woelki et al., 2007.
47 | Ковачек Станић, Самарџић and Ковачевић, 2017.

in 93% cases, whereas, independent custody in 7% cases (mothers as independent custodians in 75% of cases).[48]

There are two forms of child residence in cases of joint custody: alternating residence (residence with both parents) and mono-residence (with one parent). Alternating residence is considered to be in the best interests of the child as a statutory presumption (e.g., Sweden, Belgium, France); however, in most countries alternating residence is considered to be in the best interests of the child only if there is an agreement between parents. In certain countries alternating residence is considered to be in the best interests of the child even without an agreement between parents (Belgium, France, Sweden, England, Wales, Greece). The agreement has to be allowed by the competent authority (except Norway where there is no public scrutiny). It will be allowed unless it is clearly against the best interests of the child (Sweden, Belgium, France). In certain countries it is allowed as an exception, only if parents can establish it is in the best interests of the child (Spain, the Czech Republic). Nonetheless, alternating residence is not allowed in Bulgaria, Hungary, and Denmark. [49]

Commission on European Family Law in the Principles of European Family Law Regarding Parental Responsibilities, in Principle 3:20 (2) on residence states:

> The child may reside on an alternate basis with the holders of parental responsibility upon either an agreement approved by competent authority or a decision by competent authority. The competent authority should take into consideration factors such as: the age and opinion of the child. the ability and willingness of the holders of parental responsibility to cooperate, the distance between the residence of the holders of parental responsibility and to the child's school.

In a Serbian decision by the Primary Court of Subotica, the Court ordered alternating residence as follows: the child would reside three days with one parent and four days with the other.[50] In Sweden, alternating residence was awarded in 21% of cases, in 2005, and in the Netherlands in 20% of cases currently. In Switzerland, 40% of children after divorce were under joint parental responsibility with or without alternating residence, in 2010.[51]

Another form of living arrangement after divorce is 'bird nesting arrangement.' Under a bird nesting arrangement, the child remains in the marital home, while the parents move in and out of the home for their respective physical custody periods, thus affording the child the stability of 'nesting' in a permanent residence. Flannery (2004) indicates disadvantages of the bird nesting arrangement, simultaneously, acknowledging its advantages.

48 | Singer, 2008.
49 | Ковачек Станић, 2015.
50 | P. 2.461 [Online]. Available at: https://sudskapraksa.sud.rs/sudska-praksa/download/id/52532/file/odluka (Accessed: 12 December 2022).
51 | Singer, 2008; Bergman and Rejmer, 2017.

> The clearest disadvantage is that it is not financially feasible for many, if not most, couples. In a normal post-divorce joint custody arrangement, parents maintain two households – one for each respective parent. However, bird nesting requires that the parties maintain three separate residences – one for the child and one for each parent when they are not living with the child. Therefore, bird nesting is most likely only feasible for upper and upper – middle class families.[52]

In Serbian law, the State authority powers include a duty to examine the parental agreement regarding exercise of parental rights and to decide whether to accept it or not, based on a determination as to whether the agreement is in the best interests of the child. If there is no agreement, State authority powers include making a decision on the exercise of parental rights.

State authority powers considering parental rights include deprivation of parental rights. A parent who abuses his/her rights or grossly neglects duties that comprise a part of his/her parental rights may be fully deprived of parental rights. A parent abuses rights that comprise a part of parental rights: if he/she physically, sexually or emotionally abuses the child; if he/she exploits the child by forcing him/her to excessive labor, or to labor that endangers the moral, health or education of the child, or to labor that is prohibited by law; if he/she instigates the child to commit criminal acts; if he/she accustoms the child to indulge in bad habits; if he/she in any other way abuses rights that comprise a part of parental rights. A parent grossly neglects duties that comprise a part of parental rights: if he/she abandons the child; if he/she does not at all take care of the child he/she lives with; if he/she avoids to maintain the child or to maintain personal relations with the child he/she does not live with, or impedes the maintaining of personal relations of the child with the parent the child does not live with; if he/she intentionally and unduly avoids to create conditions for cohabitation with the child who is living in a social service institution for user accommodation; if he/she in any other way grossly neglects duties that comprise a part of parental rights. A court decision on 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 full deprivation of parental rights may prescribe one or more measures for protecting the child from domestic violence.[53]

A parent who exercises the rights or duties that comprise a part of his/her parental rights unconscionably may be partially deprived of parental rights. A court decision on 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 of the right to decide on issues that significantly influence the child's life. The court decision on partial deprivation of parental

52 | Flannery, 2004.
53 | Article 81 of FA.

rights may prescribe one or more measures for protecting the child from domestic violence.[54]

In addition, State authority powers considering parental rights include corrective supervision over the exercise of parental rights performed by the guardianship authority. In performing corrective supervision the guardianship authority makes decisions that: warn the parents of deficiencies in the exercise of parental rights; refer parents for consultation to a family counseling service or an institution specialized in mediating family relations; request that parents submit an account on managing the child's property.[55]

Considering parental responsibilities, it is in the best interests of a child to have two parents (or persons) to take care of him/her. This potential interest can be examined in different family situations: natural birth, adoption, and conception using assisted reproduction technologies (ART). In situations of natural birth and adoption the child was already born, however, in situations of child's conception using assisted reproduction technologies it can be said the child is potential or future one. Family law considers the interest of a child to have two parents to take care of him/her, not explicitly, but by adopting different solutions which identify and meet this interest. These solutions are per instance: different possibilities for establishing parentage for the child born out of wedlock, priority to spouses or partners as adopters, reqirement that spouses or partners together have access to ART, only exceptionally single woman. If the child was born using ART, the solutions in comparative law are: supportive parenting as a condition that single woman must meet to have access to ART (UK solution),[56] maintenance obligation of the grandparents (some clinics in Germany require the single woman to name a person who will be responsible for the maintenance of the child, in most cases these are woman's parents),[57] right of a child to know the donor`s identity.[58]

5. Conclusion

Autonomy of the parties is broadened in contemporary family law. Apart from private initiative of each family member (parent and child) autonomy of family

54 | Article 82 of FA.
55 | Article 80 of FA.
56 | For implementing this requirement, the guideline in the Code of Practice states that '[w]here the child will have no legal father, the centre should assess the prospective mother's ability to meet the child's/children's needs and the ability of other persons within the family or social circle willing to share responsibility for those needs.' Human Fertilization and Embryology Authority, Code of Practice § 14(2) (b) (8th ed. 2017).
57 | In Germany ART is regulated by federal model of directions on ART, 2006, amended in 2017. Directions state that access to ART have spouses and partners. Access to ART is regulated by directions of medical boards in different provinces, as well (*Landesärztekammern*). However, practice differs from existing rules as certain clinics allow access to single women.
58 | Kovaček Stanić, 2021. For example, the right of a child to know the identity of a donor is introduced in Sweden, the United Kingdom, Austria, the Netherlands, Switzerland, and Croatia.

members to make decisions regarding family matters by mutual agreement and without the interference of the state acquires importance. This is found in exercise of parental rights. Parents have the autonomy to make decisions and arrange their relationship with a minor child not only during the marriage or partnership, but also after divorce or separation. Joint exercise of the parental rights extends parental autonomy, as the prerequisite for awarding joint exercise of parental rights by the court, according to Serbian law, is the existence of the mutual agreement of the parents provided that the court is satisfied that this agreement is in the best interests of the child. Thus, state authority powers are correcting factor in this legal situation.

Child autonomy is broadened in contemporary family law. For example, child has a right to participate in the decision-making in important matters concerning him/her and holds independent rights. In a family which is stable and functioning well, the rights of the child should not cause any conflict between parents and children, but should help parents to understand and bear in mind children's wishes to find the solution which would be in the best interests of their children. However, if the parents are not capable of taking care of their children and act in their best interests, the provision for independent rights of the child would be useful for the court or other institution to make a decision in the best interests of the child. The limitations to parental rights with respect to their children, by broadening child's rights and prohibiting humiliating actions and punishments that insult child's human dignity, promote a modern, democratic, less paternalistic family model. Parental autonomy might be limited by State authority powers particularly by depriving parents of parental rights. However, it is noteworthy that state interference in family life should be limited and exercised in the best interests of a child.

Regarding child status (maternity and paternity) parental autonomy exists in different ways. The situations that depend almost entirely on the will of the parties concerned are the acknowledgment of paternity and the possibility of anonymous birth. Autonomy of the parents acquires importance in situations of biomedically assisted conception if donor genetic material is used, as legal parental relations are based on the will of parties, therefore, the principle of biological truth loses importance. Legal parents would be persons who participate in the process of biomedically assisted conception to produce a child, not necessarily having genetic link with a child. Child's autonomy concerning maternity and paternity is exercised in child's right to initiate (or not) court proceedings for establishing or contesting maternity and paternity. The State authority powers in the court proceedings for establishing and contesting maternity and paternity include court obligation to respect and establish the truth of biological origin of the child, which may be achieved using DNA and other biomedical evidence.

It is noteworthy that new practices such as 'sharenting,' 'elective co-parenting,' and alternating residence of a child, are situations, where parental autonomy is exercised in contemporary family relations.

Bibliography

Bergman, A. S., Rejmer, A. (2017) 'Parents in child custody disputes: Why are they disputing?', *Journal of Child Custody,* 2017(14), pp. 134–150; https://doi.org/10.1080/15379418.2017.1365320.

Boele-Woelki, K., Ferrand, F., González-Beilfuss, C., Jänterä-Jareborg, M., Lowe, N., Martiny, D., Pintens, W. (2007) *Principles of European Family Law Regarding Parental Responsibilities.* Antwerpen-Oxford: Intersentia; https://doi.org/10.1007/s12027-007-0011-x.

Booth, P. (2008) 'Age as an Issue of Consent and Responsibility – too Young or too Old', *Pravni život*, 2008(10), pp. 263–279.

Драшкић, М. (2012) 'Обавезно лишење родитељског права приликом одлучивања суда о вршењу родитељског права: спорно становиште Врховног суда Србије/ Obavezno lišenje roditeljskog prava prilikom odlučivanja suda o vršenju roditeljskog prava: sporno stanovište Vrhovnog suda Srbije', *Анали Правног факултета у Београду/ Anali Pravnog fakulteta u Beogradu,* 60(1), pp. 366–381.

Драшкић, М. (2021) 'Забрана телесног кажњавања деце и Конвенција о правима детета/ Zabrana telesnog kažnjavanja dece i Konvencija o pravima deteta' in Варади, Т., Ковачек Станић, Г (eds.) *30 година примене Конвенције Уједињених нација о правима детета – савремени аспекти/30 godina primene Konvencije Ujedninjenih nacija o pravima deteta – savremeni aspekti.* Београд/Beograd: Српска Академија наука и уметности/ Srpska Akademija nauka i umetnosti, pp. 27–45.

Flannery, M. T. (2004) 'Is Bird Nesting in the Best Interest of Children', *SMU Law Review,* 57(2), pp. 295–352.

Gilmore, S, Herring, J. (2011) ''No' is the Hardest Word: Consent and Children's Autonomy', *Child and Family Law Quarterly*, 23(1), pp. 3–23.

Jović-Prlainović, O. S. (2021) 'Presude Evropskog suda za ljudska prava protiv Republike Srbije o primeni genetskog testiranja u paternitetskim parnicama', *Strani pravni život*, 2021(1), pp. 47–61; https://doi.org/10.5937/spz65-30886.

Kovaček Stanić, G. (2010) 'Autonomy of the Child in Contemporary Family Law', *Зборник радова Правног факултета у Новом Саду/ Zbornik radova Pravnog fakulteta u Novom Sadu*, 44(3), pp. 141–162.

Ковачек Станић, Г. (2011) 'Аутономија версус материјална истина у компаративном праву о породичном статусу детета/ Autonomija versus materijalna istina u komparativnom pravu o porodičnom statusu deteta', *Зборник радова Правног факултета у Новом Саду/ Zbornik radova Pravnog fakulteta u Novom Sadu*, 45(3/I), pp. 195–222.

Ковачек Станић, Г. (2015) 'Најбољи интерес детета: Законска претпоставка за одређивање наизменичног боравишта детета као облика заједничког вршења родитељског права/ Najbolji interes deteta: Zakonska pretpostavka za određivanje naizmeničnog boravišta deteta kao oblika zajedničkog vršenja roditeljskog prava' in *Хармонизација српског и мађарског права са правом Европске уније : тематски зборник* Књ. 3 = A szerb és a magyar jog harmonizációja az Európai Unió jogával : tematikus tanulmánykötet. 3. = Harmonisation of Serbian and Hungarian Law with the European Union Law : thematic collection of papers. Vol. 3. Нови Сад/ Novi Sad, Правни факултет/ Pravni fakultet, pp. 137–156.

Kovaček Stanić, G. (2021) 'The child's right to know their biological origin in comparative European law: consequences for parentage law' in Marrus, E., Laufer-Ukeles, P. (eds.) *Global Reflections on Children's Rights and the Law. 30 Years After the Convention on the Rights of the Child*. London: Routledge, pp. 199–210; https://doi.org/10.4324/9781003131144-24.

Ковачек Станић, Г. (2021) 'Право детета на родитељско старање – савремени аспекти/ Pravo deteta na roditeljsko staranje – savremeni aspekti' in Варади, Т., Ковачек Станић, Г (eds.) *30 година примене Конвенције Уједињених нација о правима детета – савремени аспекти/30 godina primene Konvencije Ujedninjenih nacija o pravima deteta – savremeni aspekti*. Београд/Beograd: Српска Академија наука и уметности/ Srpska Akademija nauka i umetnosti, pp. 9–26.

Ковачек Станић, Г., Самарџић, С., Ковачевић, М. (2017) 'Развод брака и заједничко родитељско старање као последица развода брака у теорији и пракси/ Razvod braka i zajedničko roditeljsko staranje kao posledica razvoda braka u teoriji i praksi', *Зборник радова Правног факултета у Новом Саду/ Zbornik radova Pravnog fakulteta u Novom Sadu*, 51(4), pp. 1285–1303; https://doi.org/10.5937/zrpfns51-16219.

Králíčková, Z. (2009) 'Czech Family Law: The Right Time for Re-codification' in Atkin, B. (ed.) *The International Survey of Family Law*. Bristol: Family Law, pp. 163–165.

Новаковић, У. (2020) *Пресељење детета и родитеља који врши родитељско право – relocation случајеви/Preseljenje deteta i roditelja koji vrši roditeljsko pravo – relocation slučajevi*. Београд/Beograd: Универзитет у Београду – Правни факултет/Univerzitet u Beogradu – Pravni fakultet, pp.1–279.

Rubellin-Devichi, J. (2000) 'How Matters Stand Now in Relation to Family Law Reform' in Bainham, A. (ed.) *The International Survey of Family Law*. Bristol: Family Law, pp. 143–164.

Saldeen, Å. (2000) 'Paternity and Custody' in Bainham, A. (ed.) *International Survey FAM. L.* 54. Bristol: Family Law, pp. 351–353.

Singer, A. (2009) 'Time is money? – Support for children with alternating residence' in Verschragen, B. (ed.) *Family Finances.* Wien: Jan Sramek Verlag, pp. 591–601.

Станивуковић, М. (2021) 'Уобичајено боравиште детета у пракси Суда европске уније/Uobičajeno boravište deteta u praksi Suda evropske unije', *Зборник Правног факултета у Новом Саду/ Zbornik Pravnog fakulteta u Novom Sadu*, 55(3), pp. 709–735; https://doi.org/10.5937/zrpfns55-34676.

Станивуковић, М., Ђајић, С. (2022) 'Право родитеља на повратак у земљу порекла у светлу Хашке конвенције о грађанскоправним аспектима међународне отмице деце и Европске конвенције за заштиту људских права и основних слобода/ Pravo roditelja na povratak u zemlju porekla u svetlu Haške konvencije o građanskopravnim aspektima međunarodne otmice dece i Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda', *Анали Правног факултета у Београду/ Anali Pravnog fakulteta u Beogradu,* 70, pp. 123–158.

Treleaven, S. (2021) 'Why more people are having babies with their platonic friends?' *Today's Parent* [Online]. Available at: https://www.todaysparent.com/family/parenting/platonic-parenting-having-babies-with-friends/ (Accessed: 12 December 2022).

Williams, C. (1986) 'Munchausen Syndrome by Proxy: A Bizarre Form of Child Abuse', *Family Law,* 16, p. 32.