

CHILD’S SPECIAL GUARDIAN – INTERNATIONAL AND EUROPEAN EXPECTATIONS AND CROATIAN REALITY

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Abstract

The aim of this paper is to analyze the institute of the child’s special guardian in Croatian law and to assess its compliance with relevant international and European standards in this legal area. The paper discusses the right of the child to be heard “through a representative” under Article 12 of the Convention on the Rights of the Child, European “child-friendly” legal representation standards and relevant cases in the latest case law of the European Court of Human Rights. The institute of special guardian in Croatian legislation and legal practice is analyzed in detail. Based on the analysis of data collected from the Special Guardianship Center and on the insight into relevant case law, the paper singles out the main problems that currently exist regarding child representation by special guardians in practice and identifies their causes, but also suggests what needs to be done to improve the application of relevant regulations in legal practice.

Key words: child, special guardian, representation, family proceedings, Croatia

1. Introduction¹

The latest reform of the Croatian family legislation, aimed at improving the child’s procedural position in family matters, including the institute of the child’s special guardian, took place over six years ago. This reform was the result of long-term efforts of a number of family law experts, who have repeatedly called for the improvement of child protection standards in judicial proceedings (Rešetar, RupiĆ, 2016, p. 1176). It is necessary to regulate the issue

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of child representation, taking into account international and European standards, in all those cases where there is a conflict of interest of the child and his or her most common legal representatives, parents, or in cases where there is the risk of such a conflict occurring (Aras Kramar, Ljubić, 2017A, p. 24). By the decision of the then Ministry of Social Policy and Youth², based on the relevant provisions of the family legislation, a Special Guardianship Center was established (hereinafter: SGC) as a public institution whose activity is the representation of children, as well as adults, in proceedings before courts and other bodies prescribed by the law governing family matters. Representation in the SGC is carried out by special guardians who have passed the bar exam.

The aim of this paper is to analyze in detail the institute of the child's special guardian in Croatian law and to assess its compliance with relevant international and European standards. In this regard, the paper first discusses the right of the child to be heard "through a representative" under Article 12 of the Convention on the Rights of the Child³ (hereinafter: CRC) and European "child-friendly" legal representation standards. Some recent observations on child representation in the case law of the European Court of Human Rights (hereinafter: ECtHR) are also highlighted. The institute of special guardian in Croatian legislation and legal practice is then analyzed in detail. Based on the analysis of data collected from the SGC for the purposes of this paper and on the insight into relevant case law, considering previous research in this area, the paper will single out the basic problems that currently exist regarding child representation by special guardians in practice, identify their causes, and point out what needs to be done to eliminate them or to better implement the relevant legal framework in legal practice.

2. Child representation in family law proceedings – some international and European legal determinants

2.1. Right to be heard "through a representative" under Article 12 of the CRC

In the debate on child participation in family law proceedings, a pertinent question is whether or not to provide children with representation and if so, how to provide it (Mol, 2019, p. 66). The most important document for the protection of children's rights at the international level, the CRC, guarantees each child the right to be heard in any judicial and administrative proceedings affecting him or her. This right can be exercised either directly, or through a representative. Research studies conducted in the past decade which have sought to ascertain the influence which the CRC has had on national legal

² Decision of the Ministry of Social Policy and Youth, CLASS: UP/I-550-01/14-01/39, NUMBER: 519-06-2/1-14-1 of 14 July 2014

³ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577

systems imply that Article 12 of the CRC is the most incorporated provision, after Article 3, which states that the best interest of the children should be a primary consideration in all action concerning children (Daly & Rap, 2019, p. 300). The full text of Article 12 of the CRC reads:

1. States Parties shall assure to 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.
2. 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.

Among the judicial and administrative proceedings affecting the child there is a large number of family law proceedings, and in contemporary literature there is an active discussion of the ways in which it is best for the child to exercise his or her right to express his or her views in such proceedings (e.g. Daly, 2018, Mol, 2019, Tolonen, 2020). Article 12 of the CRC provides minimum standards for the child's right to express views and to do so, in judicial proceedings, through a representative (Mol, 2019, p. 66). In other words, the CRC places the burden of finding adequate ways to protect the child's right to express his or her views on national legislation. In literature there are contradictions in the interpretation of whether Article 12 requires that the child be provided with the opportunity to express his or her views through a representative, or this is at the disposal of the state. Thus, for example, according to Parkes, having a representative must be available as an option to children in proceedings, while Hodgkin and Newell interpret it differently, indicating that States have the discretion to determine how the child's views should be heard (according to Mol, 2019, p. 70). The UN Committee of the Rights of the Child in General Comment No. 12 (CRC/C/GC/12, 2009) explains that the child alone decides to be heard, and after the child has decided to be heard, he or she will have to decide how to be heard: "either directly, or through a representative or appropriate body". It would be unreasonable to demand that a state ensure that all three options are available to the child in every proceeding affecting the child (Ludy, Tobin, Parkes, 2019, 423). The Committee recommends that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings (General Comment No. 12, paragraph 35). Moreover, there is still a lack of consensus as to which form of participation works most effectively for children, with different models best suiting different children. However, a unifying theme from the research is that children involved in such processes want their views to be included in the decision-making (Ludy, Tobin, Parkes, 2019, p. 423).

Committee also clarifies that the representative can be the parent(s), a lawyer, or another person and emphasizes that in many cases there are risks of a conflict

of interest between the child and their most obvious representative, parent(s). As stated by Ludy, Tobin and Parkes, this does not mean that just anyone can represent a child. Although there are no express requirements under Article 12 of the CRC as to what makes the representative “appropriate”, such qualification must be implied if the child's enjoyment of their right to representation is to be effective (Ludy, Tobin, Parkes, 2019, 427). The Committee specifically warns that if the hearing of the child is undertaken through a representative, it is of utmost importance that the child's views are transmitted correctly to the decision maker by the representative and that the representative must have sufficient knowledge and understanding of the various aspects of the decision-making process as well as experience working with children (General Comment No. 12, paragraph 36). Furthermore, the Committee emphasizes that the representative must be aware that she or he represents exclusively the interests of the child and not the interests of other persons such as the parent(s), institutions or other legal bodies (General Comment No. 12, paragraph 37). The Committee does not comment on the influence of the child on the election and appointment of a representative, but it is certain that the opinion of the child should be considered when making this decision (Korać Graovac, 2012, p. 122).

2.2. European "child-friendly" legal representation standards

Looking at the European context, it is evident that attention is paid to the development of the child-friendly justice system, and within it to the child-friendly representation standards. The European Convention on the Exercise of Children's Rights⁴ (hereinafter: ECECR) provides for measures which aim to promote the rights of the child, in particular in family proceedings before judicial authorities. This Convention prescribes that the child shall have the right to apply, in person or through other persons or bodies, for a special representative in proceedings before a judicial authority affecting the child where internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter (ECECR, Article 4 paragraph 1) and that judicial authority shall have the power to appoint a special representative for the child in those proceedings (ECECR, Article 4 paragraph 1). The ECECR also states that parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular [...] a separate representative [...] a lawyer (ECECR, Article 5). It indicates that the task of the child's representative in family proceedings before a judicial authority affecting a child is according to Article 10 paragraph 1:

- a. provide all relevant information to the child, if the child is considered by internal law as having sufficient understanding;

⁴ Council of Europe, European Convention on the Exercise of Children's Rights, 25 January 1996, ETS 160

- b. provide explanations to the child if the child is considered by internal law as having sufficient understanding, concerning the possible consequences of compliance with his or her views and the possible consequences of any action by the representative;
- c. determine the views of the child and present these views to the judicial authority.

With the adoption of the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010) the concept of child-friendly justice has become part of the European legal and political framework concerning the position of children in the justice system (Lieford, 2016, p. 905). These Guidelines were developed to enhance child's access to and treatment in the justice process and they apply to a range of justice contexts (Stalford, Cairns and Marshall, 2017, p. 208). Regarding legal counsel and representation of children, the Guidelines indicate that children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties (Guideline 37). Taking account of the fact that the efficient protection of child's procedural rights, including the right of the child to express his or her views, often depends on the skills and competencies of those who carry the burden of responsibility for representing the child, the Guidelines shed light on the importance of the possession of those skills and competences, but also on the ability to communicate with children in compliance with their level of understanding (Lucić, 2017, p. 401). Lawyers representing children should be trained in and knowledgeable on children's rights and related issues, receive ongoing and in-depth training and be capable of communicating with children at their level of understanding (Guideline 39) and should provide the child with all necessary information and explanations concerning the possible consequences of the child's views and/or opinions (Guideline 41). In cases where there are conflicting interests between parents and children, the competent authority should appoint either a guardian *ad litem* or another independent representative to represent the views and interests of the child (Guideline 42).⁵

2.3. Recent observations on child representation in the case law of the European Court of Human Rights

⁵ In addition, it should be noted that UNICEF's Europe and Central Asia Regional Office (UNICEF ECARO) developed Guidelines on Child-Friendly Legal Aid (2018). It is emphasized in the explanation for Guideline 3 (Effective participation – Legal practitioners must ensure that a child's views and voice are heard and given due weight throughout the legal process) that legal professionals play a crucial role in enabling a child's right to participate in justice systems.

The ECtHR refers to the importance of the adequate protection of the child's right to express an opinion, and in some cases, to express his or her view "through a representative". Within the framework of certain decisions on the violation of the right to private and family life from Article 8 of the European Convention on Human Rights⁶ (hereinafter: ECHR) refers to some determinants of (in)appropriate representation of children in family proceedings before the court. In the case of *N. Ts. and others v Georgia*⁷ the ECtHR concluded that there had been a violation of Article 8 of the ECHR, because the competent national court granted the father's request for the return of three underage boys who were with the relatives of the deceased mother, even though the children were not adequately represented in the case and none of the three boys was heard in person by either of the judicial instances. The Government claimed that the children had been both involved and heard in the domestic proceedings via the representative assigned to them by the Social Service Agency (SSA), but the ECtHR found the representation of children by the SSA inadequate in this case, essentially stating that:

"75.... In practice, throughout a period of rather more than the two years that the proceedings lasted, the various representatives of the SSA met the boys only a few times, with the sole purpose of drafting several reports on the boys' living conditions and their emotional state of mind. No regular or frequent contact was maintained in order to monitor the boys and to establish a trustworthy relationship with them." Referring to the European Convention on the Exercise of Children's Rights and the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, the ECtHR further states the following: "77. The Court does not see how the SSA's drafting of several reports and attending court hearings without the requisite status could be classified as constituting adequate and meaningful representation, as outlined *inter alia* in the above-mentioned international standards."

In the case of *M. and M. v Croatia*⁸ the ECtHR found a violation of Article 8 of the ECHR due to the lengthy procedure for deciding with which parent the child shall live, in which the child's opinion was not taken into account. The Court, in its decision in this case, points out (paragraph 129) that the first applicant's precarious position "*had been further exacerbated by the fact that it took the domestic authorities more than a year and a half before she had definitely been appointed a special representative in the custody proceedings (...), as required by the European Convention on the Exercise of Children's*

⁶ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950

⁷ European Court of Human Rights, *N. Ts. and others v Georgia*, App. No. 71776/12, 2 February 2016

⁸ European Court of Human Rights, *M. and M. v Croatia*, App. No. 10161/13, 3 September 2015

Rights (...).” In the case of *Paradiso and Campanelli v Italy*⁹, the ECtHR pointed to the importance of considering biological or adoptive links between the child and his or her representative as the basis for representation. The suspicion of a conflict of interest between the child and the mother who was supposed to represent the child prompted the ECtHR to, in one of the recent cases against Croatia before that court, *A. and B. v Croatia*¹⁰, require the appointment of a child's special representative from the Croatian Bar Association.

In the analysis of the Grand Chamber case of *Strand Lobben and others v Norway* 2019 (the backdrop for the Grand Chamber case is the dissenting Chamber judgment of 2017 – *Strand Lobben v Norway*¹¹), Skivens draws attention to the 10-year-old boy's absence in the Grand Chamber judgment. Namely, the boy is not independently represented in the proceedings but is instead seen as the second applicant and thus his interests are to be assumed to align with his biological mother's, the first applicant. The concurring dissenting opinion of Judges Koskelo and Norden discusses the lack of representation and the disadvantages with the boy being combined with the mother in the considerations of their interests: “It is high time for the Court to reconsider its approach and practices regarding the issue of permitting a natural parent to act on behalf of his or her child even where the circumstances of the case indicate an actual or potential conflict of interests between them. If the Court is genuinely to embrace, in line with the Convention on the Rights of the Child, the idea of children as subjects of distinct individual rights and the need to regard the best interests of the child as a primary consideration, it appears necessary to make changes also in the procedural practices. [(para. 17), cited in Skivens, 2019].

In March 2020, the ECtHR delivered further judgment relating to the Norwegian child protection system, *Pedersen et al. v Norway*¹², where again issue of the child's position within the proceedings was questionable. As Luhamaa and Krutzinna summarize in their analysis, X was a party to the proceedings but was not independently represented, rather he was represented by his biological parents. The ECtHR rejected the Government's claim that there was a conflict of interest between X and his biological parents, referring to the argumentation and decision in *Strand Lobben*. The ECtHR has in previous cases requested a separate representative to the child, where there was a potential conflict between the interests of the child and the interests of the parent (*A. and B. v Croatia*). However, it has not found that such conflict of

⁹ European Court of Human Rights, *Paradiso and Campanelli v Italy*, App. No. 25358/12, 24 January 2017

¹⁰ European Court of Human Rights, *A. and B. v Croatia*, App. No. 7144/15, 20 June 2019

¹¹ European Court of Human Rights, *Strand Lobben v Norway*, App. No. 37283/13, 30 November 2017

¹² European Court of Human Rights, *Pedersen et al. v Norway*, App. No. 39710/15, ECtHR 10 March 2020

interests in adoption cases and has not requested that the state appoint a separate legal representative for the child in adoption matters. According to Luhamaa and Krutzinna, because the child is also not involved in the process in any other way, the lack of independent representation effectively means that the ECtHR does not hear the child's perspective separately from that of the biological parents and that therefore the ECtHR failed to shift its practice to allow for a better representation of the child. Instead, it took a step back from *Strand Lobben*, as there was no explanation why the adoptive parents were not a party to the proceedings (Luhamaa, Krutzinna, 2020).

3. Child's special guardian in Croatian legislation and legal practice

3.1. Legislative framework

The Croatian Family Act¹³ (hereinafter: FA) in Article 240, paragraph 1 prescribes that, in order to protect certain personal and property rights and interests of the child, the social welfare center or the court shall appoint a special guardian:

1. to a child in matrimonial disputes and in proceedings for contesting maternity or paternity,
2. to a child in other proceedings in which it is decided on parental care, certain contents of parental care and personal relations with the child when there is a dispute between the parties,
3. to a child in the procedure of imposing measures for the protection of personal rights and welfare of the child within the jurisdiction of the court when it is prescribed by the provisions of FA,
4. to a child in the process of making a decision that replaces the consent to adoption,
5. to a child when there is a conflict of interest between him or her and his or her legal representatives in property proceedings or disputes, or when concluding certain legal transactions,
6. to children in case of a dispute or a legal transaction between them when the same person has parental care over them,
7. to a child of foreign citizenship or a stateless child found on the territory of the Republic of Croatia unaccompanied by a legal representative,
8. in other cases as prescribed by the provisions of FA, i.e. special regulations or if it is necessary for the protection of the rights and interests of the child.

Although, as stated by Aras Kramar and Ljubić, according to the general provision of Article 240, paragraph 1 of the FA, which stipulates that a child's special guardian will be appointed by a social welfare center or a court, it could

¹³ Family Act (Official Gazette No. 103/15, 98/19)

be concluded that there is concurrent competence of these bodies to appoint special guardians, this is not the case (Aras Kramar, Ljubić, 2017B, 16). The decision to appoint a special guardian is made by a social welfare center, unless the FA prescribes that the decision on the appointment of a special guardian be made by a court (Article 242 paragraph 1).

Special guardian is, in accordance with the definition in Article 240, paragraph 3 of the FA, a person who has passed a bar exam, employed at the SGC (and only exception of an employee of a social welfare center). For more than six years since its establishment, the work of the SGC has been regulated exclusively by the provisions of the family legislation and the Statute of the SGC. Considering the importance and specificity of the SGC activities, the legislature assessed that it is more expedient to regulate these activities via a special law. Thus, in April 2020, the Special Guardianship Center Act entered into force¹⁴ (hereinafter: SGCA). The SGCA expanded the activities of the SGC to perform other professional tasks related to representation, introduced the possibility of establishing SGC branches, defined the composition of the management board, the method of appointing or electing its members and electing the president, the term of office of members of the board, conditions for their appointment as well as the reasons for dismissal and the manner of decision-making. There are also provisions on the expert council, its composition, and powers and manner of work. Perhaps the most significant novelty of this Act is that it stipulates that professional workers employed in the SGC, in addition to lawyers who have passed the bar exam, are social workers and psychologists and social pedagogues. However, according to the SGC data, no social worker, psychologist or social pedagogue was employed there at the time of writing this paper.

The special guardian is, in accordance with Article 240, paragraph 2 of the FA, obliged to represent the child in the procedure for which he or she is appointed, to inform the child about the subject, the course and outcome of a dispute in a manner appropriate to the child's age and, if necessary, contact the parent or other persons close to the child. Exceptionally, if a child is fourteen years old and his or her ability to take action in the procedure of proxy authority is recognized in a decision, no special guardian will be appointed, except in the case of a child of foreign citizenship or a stateless child who is found unaccompanied by a legal representative on the territory of Croatia. In that case, a social welfare center will appoint a special guardian outside the SGC (Article 240 paragraphs 5 and 6).

The FA stipulates that the child has the right to learn, in an appropriate manner, the important circumstances concerning his or her rights and interests, to receive advice and express his or her view, and to be informed of the possible consequences of respecting his or her opinion when deciding on his or her right

¹⁴ Special Guardianship Centre Act (Official Gazette No. 47/20)

or interest. In this regard, in matters of representation, the special guardian is obliged to take into account the child's view in accordance with his or her age, maturity and best interests. In matters of representation, the special guardian is obliged to accept the view and wishes of the child, unless it is contrary to his or her welfare (FA Article 243, paragraph 1, and in conjunction with Article 230, Article 257 paragraph 2). The SGCA in Article 3 stipulates that the SGC, in addition to representing the child through an appointed special guardian, also informs the child or adult about the subject matter of the dispute, the course and outcome of the dispute in a manner appropriate to the child's age, if necessary contacts the parent or other persons close to the child, informs the child of the content of the decision and the right to appeal, obtains the opinion of the child or adult and performs other tasks placed under the jurisdiction of the SGC by the law and the statute.

Although the FA does not explicitly prescribe that the special guardian must have previous work experience, prescribing a bar exam as a condition for performing the duties of the special guardian implies that the special guardian can only be a person with previous work experience in the legal profession. In addition, the SGCA prescribes that all workers who perform professional work in SGC must have at least three years of work experience in professional work in the prescribed academic title and academic degree (Article 19 paragraph 1). However, the representation of the child in court proceedings requires that the child's guardian have certain specific competencies for communicating with the child that are not acquired during legal education. Examining the child's views and wishes to steer the representation in the direction in which the child really wants is not easy, especially if the child is young and/or emotionally disturbed by the circumstances that led to the court proceedings, or due to some other circumstances that made the child reserved in expressing his or her view.

The FA does not explicitly oblige special guardians to have interdisciplinary training to communicate with the child. Almost in parallel with the entry into force of the FA, the Ordinance on the Manner of Obtaining the Opinion of a Child¹⁵ also entered into force, which obliges the special guardian to use the help of an expert when obtaining the child's opinion, if he or she does not have the professional knowledge and skills necessary to communicate with the child and determine the child's opinion. When the adoption of the SGCA was announced in the second half of 2019, a detailed regulation of the obligation of special guardians to take part in professional training was expected. However, this act prescribed a general obligation for all professional workers employed in the SGC, not only lawyers, to undertake continuous professional development in the field of social work, law, psychology and other areas important for efficient and quality performance of work (Article 25, paragraphs 1 and 2), with the instruction that the annual program of professional training

¹⁵ Ordinance on the manner of obtaining the opinion of a child (Official Gazette No. 123/15)

of workers (hereinafter: the program) will be adopted by the ministry in charge of the family in cooperation with SGC no later than September of the current year for the next year (Article 25 paragraph 3). For the purposes of this paper, a direct written request was sent to the Ministry of Labor, Pension System, Family and Social Policy (hereinafter: Ministry) to find out whether the program was drafted and whether its text was publicly available, but the Ministry did not respond to that inquiry. Given this, as well as the fact that the program is not available on the websites of the Ministry or the SGC, it can be assumed that the program has not been adopted.

The SGCA in Article 19, paragraph 2 stipulates that a lawyer with a bar exam employed in the SGC must have training in the field of protection of the rights of children and adults in proceedings before courts and other bodies prescribed by the law governing family relations and professional knowledge and skills needed to communicate with children and adults, with the instruction that the education, professional knowledge and skills necessary for communication with a child and an adult, as well as additional professional knowledge, skills and competencies will be prescribed in an ordinance by the minister in charge of family matters. Thus, at the beginning of 2021, the Ordinance¹⁶ came into force, but a more detailed regulation of the types of education was again missing. This Ordinance has only six articles, in essence it only repeats (in Article 2) the obligation from the SGCA that the special guardian employed in the special guardianship center must have: 1) education in the field of protection of the rights of children and adults in proceedings before courts and other bodies prescribed by the law governing family relations, with the specification that it must last for at least 15 hours (specific application of legal regulations relevant to representing children and adults before courts and other bodies in accordance with the law governing family relations), and 2) professional knowledge and skills necessary for communication with the child and adult acquired through education or programs, again with the specification that it must last for at least 15 hours (basic knowledge and communication skills for working with children and adults and targeted knowledge and communication skills for working with people unwilling to cooperate, people with disabilities, as well as team communication skills). However, it is not enough to determine only the number of hours of training in the ordinance, without more detailed instructions on their concept, method and other conditions for their implementation. The Ordinance not only does not determine the basic conditions for conducting training, but it also entrusts its implementation to a very wide range of potential contractors. It stipulates that education and training programs for special guardians may be organized by the ministry in charge of family and social policy, educational

¹⁶ Ordinance on education, professional knowledge and skills necessary for communication with a child and an adult of a lawyer who has passed the bar exam and additional professional knowledge, skills and competencies of a social worker, a psychologist and a social pedagogue employed in the special guardianship center (Official Gazette No. 2/21).

institutions, professional organizations and associations with the support/recommendation of the ministry responsible for family and social policy, or other competent bodies. The question arises why the legislature entrusts the implementation of this highly specialized training and programs to such a wide range of legal entities, especially if we take into account that the SGC currently employs a very small number of special guardians and other professionals, a situation which will be discussed in more detail in the next section.

3.2. Child's special guardianship in legal practice

Since the establishment of the SGC, the biggest problem of the successful work of special guardians has been the excessive number of cases of representation in relation to the number of employed special guardians. The SGC was requested to provide data on the number of cases of representation by special guardians from 2015 to 2020, and the number of employed special guardians in the same period. Considering that the SGC has its headquarters in Zagreb and branches in Rijeka, Osijek and Split, the data was collected for Zagreb and each branch separately.

Table 1 Number of representation cases by years

LOCATION	2015	2016	2017	2018	2019	2020
ZAGREB						
Cases with children	456	1181	1688	2214	2359	2263
Cases with adults	347	615	863	1210	2833	3275
RIJEKA						
Cases with children	155	480	650	682	736	697
Cases with adults	226	288	342	388	749	1048
OSIJEK						
Cases with children	223	656	784	955	954	832
Cases with adults	90	298	329	544	1251	1620
SPLIT						
Cases with children	147	411	634	616	625	701
Cases with adults	172	271	345	479	984	1033
TOTAL						
Cases with children	981	2728	3756	4467	4674	4493
Cases with adults	835	1472	1879	2621	5817	6976

Total cases	1816	4200	5635	7088	10491	11469
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As can be seen in Table 1, the number of representation cases of special guardians has been growing every year, so that their number in 2020 compared to 2015 is six times higher. If we look only at the cases of child representation, we see that the number of cases is almost five times higher in 2020 compared to 2015. It is to be expected that the number of special guardians has increased in proportion to the increase in the number of cases of representation. This, unfortunately, is not the case, as illustrated in Table 2.

Table 2 Number of special guardians employed by year

LOCATION	2015	2016	2017	2018	2019	2020
ZAGREB	3	4	7	8	8	8
RIJEKA	2	3	3	3	3	4
OSIJEK	2	3	4	4	4	4
SPLIT	1	2	3	3	3	3
Total	10	12	17	18	18	19

Therefore, if we correlate the number of cases and the number of employed special guardians in 2015 and 2020, we see that the number of cases has increased six times, and the number of special guardians is not even twice as high. The total number of cases in 2020 was 11,469, and the number of special guardians was 19, which means that each special guardian had an average of over 600 cases that year. If we single out only the child representation cases, in 2020 each special guardian had approximately 240 cases. Often times the special guardian is appointed to represent two or more children in one case. In addition to being overburdened with a large number of cases, special guardians are in charge of representation in different counties, which means that they have an extremely wide territorial jurisdiction, and going to remote places often takes a lot of their working time.

It is clear that such the special guardians' heavy caseload must have an impact on the quality of representation. In each case, the special guardian should directly contact the child, inform him or her of the role of the special guardian, the subject of the court proceedings, his or her right to express an opinion, explain the possible consequences of respecting his or her opinion, or the possible final outcome of the proceedings, as well as talk with both parents and other persons who have a close relationship with the child, if necessary. It needs no further explanation that it is really not possible to achieve this with such a large number of representations and with such a wide territorial jurisdiction.

Insight into the case law also points to the conclusion that the overburdening of special guardians significantly affects the quality of child representation. Moreover, due to the large number of cases assigned to them, the representation of children by special guardians is often reduced to the mere fulfillment of a form prescribed by law. This is evident from the statement of reason for the decision in a large number of cases in which the child's special guardian has been appointed. For example, in the explanation of the decision made in one case which decided on divorce and parental care of a minor with special needs, and where, according to one of the parties, domestic violence occurred, the role and attitude of the special guardian who represented the child in that case is described in a single sentence: "At the suggestion of the court, the G. P. Center has appointed the minor D. H. a special guardian A. H. from the center, who responded to the lawsuit stating that it was in the best interest of the child for the parents to reach an agreement on parental care, and that it be guided by the best interests of the child."¹⁷ It follows that the special guardian in this very sensitive case did not have the opportunity to get personally acquainted with the attitudes and wishes of the child or make such a contact with the child, which should be expected between the child and his or her special guardian. This, unfortunately, is not an isolated case. There are many examples where the special guardian does not personally participate in divorce hearings with minors, but only gives his or her written instructions to the parents to act in accordance with the interests of the child. For example, in the statement of reasons of a judgment of the Municipal Court in Sisak¹⁸ it is stated that the special guardian stated in absentia "that the parties therefore suppress their own emotions and try to reach consensus and an agreement on the content of parental care". The statement of reason of decision in this type of case does not even mention the child's opinion.

In one case, which decided on the proposal of the social welfare center to temporarily entrust child care to another person, the court stated in its decision: "On 14 April 2020, a hearing was held before this court in the absence of the counterparties and the special guardian, for whom the service of the summons was not duly stated..."¹⁹ Thus, the hearing at which the repressive measure to protect the personal interests of the child was discussed was held without the presence of the special guardian. Although the FA in Article 138, paragraph 4 indeed provides for the possibility that the court decide on the proposal of the social welfare center to impose this measure within the prescribed period of ten days from the initiation of the proceedings, regardless of whether the parties were duly served, this is provided as an exception solely for urgent action in order to protect the life and health of the child and should not be the basis for neglecting the role of the special guardian in deciding on this measure. It is not

¹⁷ Judgment of the Municipal Court in Bjelovar P Ob-251/2020-14 of 13 April 2021

¹⁸ Judgment of the Municipal Court in Sisak P Ob-106/2020-29 of 13 April 2021

¹⁹ Decision of the Municipal Court in Slavonski Brod 16 R1 Ob-173/2020-5 of 14 April 2020

clear from the statement of reasons for the decision in this case what led to the fact that the summons to the hearing was not duly delivered to the special guardian, but the fact is simply stated as if it were a normal situation. The statement of reasons of some court decisions only state that the child's special guardian has been appointed in the proceedings, without any reference to the actions or views and opinion of the special guardian in the specific case and/or the child he or she represents.²⁰

In her 2020 Report, the Ombudsperson for Children makes a very worrying statement that in the proceedings concerning children, out of a total of 20,356 scheduled court hearings in 2020, special guardians attended 3,251 (16%), and that, due to overloads, they often find themselves in the situation of assessing which hearing they will attend in person. In the same report, she presented the results of a survey conducted in 2020 in social welfare centers and with family court judges and special guardians, the aim of which was to examine in more detail the role of special guardians in family law protection procedures from the perspective of experts participating in these procedures. The Ombudsperson states in the Report that the majority of social welfare centers and judges do not agree with the statement that the number of contacts that special guardians have with the child on average is sufficient to establish a relationship of trust between the child and the special guardian. When special guardians were asked about stressors in their work, most of them listed broad territorial jurisdiction, court dislocation and related frequent travel and field work as sources of stress. Concerning doubt whether special guardians are trained to communicate with the child at the center of parental conflict and who may be exposed to other developmental risks in the family, many social welfare centers are not convinced that special guardians have such knowledge, experience and competencies, while judges generally believe that special guardians do have such competencies, as do most special guardians.

The views of experts on the role of the special guardian are particularly surprising, specifically on whether his or her fundamental role is to express his or her own view of the best interests of the child or to represent the view and wishes of the child. Research has shown that most special guardians practice what they consider to be the best solution for the child, regardless of the child's opinion, and that they most often refer to the best interests of the child in their work, believing that what they say in court is also the best interests of the child. The majority of social welfare centers and judges agree that special guardians should propose and represent to the court what they consider to be the best solution for the child, regardless of the child's opinion. However, as Mol emphasizes, the representative should represent the child's views and not

²⁰ For example, the Decision of the Municipal Court in Vinkovci 6 R1 Ob-335/20-2 of 23 September 2020 in a case in which the court ordered a measure of temporary entrustment and placement of three minor children in a foster family.

merely his or her own views as to what is in the best interests of said child (Mol, 2019, p. 70). The representative must actually obtain the views of a child and cannot assume or substitute their own views for the views of a child (Ludy, Tobin, Parkes, 2019, 428). It is without question that the special guardian should represent the child in accordance with the best interests of the child, but no special guardian who is not acquainted with the wishes and opinions of the child can represent the child in accordance with child's best interests. The special guardian who thinks that what he or she assesses as best for the child on the basis of the court file, who has never made personal contact with the child to get acquainted with the child's opinion and who has not personally participated in the court hearing, but only made a written statement (which, unfortunately, is very common in Croatia), has not actually fulfilled his or her role of the special guardian. Only the request for the appointment of the child's special guardian has been formally fulfilled, and the purpose and objectives of such representation have remained completely unfulfilled. Any model of representation for children which does not mandate that the representative actually communicates with the child to obtain the child's views, would be incompatible with Article 12 of the CRC (Ludy, Tobin, Parkes, 2019, 428).

As the FA places the appointment of the special guardian, under certain conditions, under the jurisdiction of two bodies, the court and the social welfare center, it is evident from the latest decisions in the same types of cases that it is still unclear not only which body should appoint the child's special guardian, but also at what stage of the procedure the appointment should be made. Thus, for example, in divorce proceedings in which parental care is also decided, the courts sometimes appoint the special guardian for the minor child (for example, the Decision of the Municipal Court in Split²¹ states that "... the court appointed the special guardian T. P. to the minor children of G. R. born .. January ... yr. and I. R. born ... September ... yr., a law graduate who has passed the bar exam, in order to protect their rights and interests in the divorce proceedings."...), and sometimes call on the social welfare center to appoint the special guardian (for example, the Decision of the Municipal Court in Bjelovar²² states: "At the invitation of this court, the G. P. Center appointed M. M., an employee of the center, the special guardian for the minor children, who stated in response to the lawsuit ... "). Although perhaps the issue of competence for the appointment of the special guardian is the least important in relation to all other problems that currently exist regarding the institute of the special guardian in Croatia, consistency in the procedures regarding the appointment of special guardians should certainly be worked on. It even happens that the courts appoint the special guardian by a decision on the subject matter of the dispute, so the question arises when the special guardian could have prepared for proper and effective representation of the child if he or she was appointed by the decision in that case.

²¹ Judgment of the Municipal Court in Split P Ob-306/2020-9 of 9 April 2021

²² Judgment of the Municipal Court in Bjelovar P Ob-100/2020-35 of 13 April 2021

4. Conclusion

From the analysis of relevant legislation and legal practice it can be concluded that Croatia has developed a good legal system of representation of children by special guardians, harmonized with relevant European and international standards, but which, unfortunately, still does not work in practice as envisaged in the legislation. Although there are, of course, examples of good practice, where special guardians represented children exactly as prescribed, and thus significantly contributed to the protection of their rights in family proceedings, due to the insufficient number of special guardians, as well as their extremely wide territorial jurisdiction, in many cases the representation of children by special guardians even today is reduced to the formal fulfillment of that role. Despite the goodwill of the special guardians, they are simply not able to be fully acquainted with the child's opinion and the child's view of what is in his or her best interest and explain to the child the implications of respecting his or her opinion in each case. Sometimes they are not even able to contact the child and/or explain to the child what the role of the special guardian is in protecting his or her rights, or even to attend hearings in the cases in which they are appointed. All this leads to the conclusion that despite all legal standards for the protection of the child's right to express an opinion in proceedings concerning him or her, the child and his or her opinion in many family proceedings still remain invisible.

It is important, of course, to have a clear, precisely defined and legally secure framework for the work of special guardians, but one should be aware of the fact that there is no law that can make a special guardian a successful representative in over six hundred cases a year. Putting the importance of legal reforms in the forefront, the only significant innovation that has taken place in relation to the activities of the SGC since its establishment, is the adoption of the SGCA. However, this law is mostly focused on the regulation of the internal organization of the SGC, the work of administrative bodies and directors, and organizational issues, and far less on improving the conditions for the successful work of special guardians, who bear the burden of representation within the competence of the SGC. Although it envisages the employment of social workers, psychologists and social pedagogues, who should help special guardians in establishing better communication with users, according to the SGC, to date none of the professional workers in these areas have been employed. Their employment can certainly contribute to the more successful operation of the SGC, but one should still be aware of the fact that, given the current state of affairs, the priority is to employ a larger number of special guardians. Special guardians are not able to personally contact with each child for whom they are appointed as representatives, let alone detect in each case their personal weakness in achieving successful communication with the child and seek help from other professionals in obtaining the child's opinion. We have, therefore, made another step forward in legislation, the successful implementation of which is again not realistic to expect.

It can therefore be concluded that, as long as we do not have a sufficient number of special guardians, the representation of children in family proceedings by special guardians aimed at respecting the child's opinion and role and firm protection of other (procedural) rights of the child will, in many cases, remain just a well-intentioned idea.

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²³ The author translated the references into English language.

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