BALANCING INTERESTS AND PURSUING PRIORITIES IN THE FIELD OF ADOPTION ACCORDING TO THE NEW FAMILY ACT IN SERBIA

Olga Cvejic Jancic, University of Novi Sad, Serbia and Montenegro

I

First of all, I would like to briefly present some of the most important changes made in the new Family Act of Serbia regarding the adoption. The new Family Act was promulgated in February 2005 and it has come into effect on July 1, 2005.

Provisions on adoption have undergone significant changes in the new Family Act of Serbia. Thus, simple i.e. breakable adoption is abolished which means that there is only one type of adoption - full i.e. unbreakable (permanent) adoption.

II

CONDITIONS FOR THE VALIDITY OF ADOPTION

1. Adoptive capacity of the child

Different to our former law according to which only a child younger than 5 years of age could have been fully adopted, now it is possible regardless of the child’s age as long as the child is a minor. It is possible to adopt the child without parents (in case they died or are unknown) or the child without parental care (in case parents are deprived of their parental rights or legal capacity or they have left their child and their place of residence is unknown) as well as the child whose parents agree with the adoption. According to the former law, this was established only for simple i.e. breakable adoption, since it was not possible to fully adopt the child who has both live parents, not even in case they were ready to give consent to full adoption of their child.

A child cannot be adopted before it is at least three months old and a parent can give consent to adoption only when the child is two months old. The consent can be withdrawn within 30 days from the day it is given. A child older than 10 years of age who is capable of reasoning should give its consent to adoption. Without its consent the adoption is not valid.

The provision which sets the upper age limit for adoption is also new. The same as it was in the former law, the difference in age between the adopters and the adopted child has to be at least 18 years, but there is a new provision which establishes that this difference cannot be greater than 45 years. The European Convention on the Adoption of
Children (1967) provides, however, something else. Namely, article 7 of the Convention provides the following:

“A child may be adopted only if the adopter has the minimum age prescribed for the purpose, this age being neither less than 21 nor more than 35 years. The law may, however, permit the requirement as to the minimum age to be waived:

a. when the adopter is the child’s father or mother, or
b. by reason of exceptional circumstances.”

Certainly, it is a very interesting question why our legislator did not take care of the needs of harmonization of our law with the European Convention on the Adoption of Children (1967), having in mind the fact that Serbia and Montenegro is a member of the Council of Europe and supposing that the Convention mentioned above is going to be signed sooner or later, since, as it is obvious, the adopter cannot be younger than 21 nor older than 35 years of age which was not respected in our law, because according to our law it is possible that the adopter is e.g. 19 years old if he or she adopts a child younger than 1 year of age, as well as older than 60 years of age if he or she adopts a 17-year-old child, since our law only provides that the difference in age between the adopter and the adopted child is not less than 18 years nor greater than 45 years. The exception to this rule is possible in case the minister of family protection finds that it would protect the best interests of the child.

According to our law the child has the right to know the truth about his origins. If the child is older than 15 years of age, it has the right to take insight into the birth registry as well as other documents that refer to his origins.

2. Adoptive capacity of adopters

According to our new law only the spouses can be the adopters, which was present in the former law for the full unbreakable adoption, but the new provision establishes that now cohabiting heterosexual couples can also adopt, which was not possible before. This possibility is not even provided in the European Convention on the Adoption of Children (1967). The rule still says that a single man or woman cannot adopt a child except if the minister of family protection allows the adoption because of special justified reasons.

Homosexual partners do not have any rights that would derive from their cohabitation, which means that they also do not have the right to adopt. In our country, there are even no such requests or doctrinal discussions about the rights of homosexuals.

The adopter cannot be a person deprived of his legal capacity or parental rights, a person suffering from the illness which can be harmful for the child nor a person sentenced for crime against marriage and family, sexual freedom and life and body.

The Family Act establishes the obligation for future adopters to attend the preparatory program for adoption issued by the minister of family protection. This is not necessary only in case the adopter is a spouse or cohabiting heterosexual partner of the child’s parent.

As a sign of will for our law to be harmonized with the UN Convention on the rights of the child, the Family Act provides that foreign citizens can adopt a child only if it is not possible to find adopters among domestic citizens and if the minister of family
DRAFT PAPER: The author retains full legal copyright and ownership of the intellectual property rights of this draft paper; this paper may not be used or copied without express permission of the author.

protection gives his consent to it. It will be considered impossible to find adopters among domestic citizens in case one year passes from the moment of registration of the child’s data in Unique personal adoption registry. In case the minister of family protection finds it protects the best interests of the child, he can allow foreign citizens to adopt the child even before this period.

3. Other conditions

Close blood relationship is an unavoidable obstacle for adoption, which means that adoption is not allowed between ancestors and descendants and between brothers and sisters as well as stepbrothers and stepsisters. Further blood relationship is not an obstacle for adoption, so aunt and uncle could adopt their nephews and nieces.

Adoption can be done by naming the adopters or it can be blank i.e. incognito when parents previously sign their consent to adoption without naming the adopters and simultaneously renouncing their right to know who the persons who adopted their child are.

The consent of the child’s parents is a condition for validity of adoption except in case the parent is fully deprived of his parental rights, legal capacity or ability to decide about questions which substantially affect the child’s life. In all of these cases when the consent of parents is not necessary, there has to be a judicial decision in which the parent is deprived of the former rights.

4. Legal consequences of adoption

Adoption causes the end of parental rights of the child’s biological parents except when the adopter is a spouse or cohabiting heterosexual partner of the child’s parent. All mutual rights and obligations between the child and his relatives end as well and they are established with his adopters and their relatives, like in a biological parental relationship. This means that the adopted child and his descendants have the same rights and obligations in respect of their adopters and their relatives and vice versa like in relations between biological parents and their children. The exception refers to the personal name of the adopted child since it can keep the personal name used before adoption, so in this case the surname of adopters and the surname of the adopted child can be different, which is not possible with biological children since they must carry their parents’ surname or if the parents’ surnames are different the child must take the surname of at least one parent. A child older than 10 years of age has the right to give consent to the change of his surname.

The right of the adopted child to inherit its adopters and their relatives cannot be restricted or deprived, which was allowed in the former law in case of breakable adoption.

According to the new law the adoption is unbreakable. It can end only in case of absolute or relative invalidity of adoption which is a question to be decided by the court.

Adopters are not obliged to tell the child the truth about his origins, but it is recommended that they do it. The law provides that the clerk who works in the
guardianship organ will recommend the adopters to tell the child the truth as soon as possible, but there are no consequences if they do not do so. At last, it is up to the adopters whether they will obey the advice of the Center for social work or keep the information on adoption as a family secret. It seems that this question deserves a thorough discussion on whether informing the adopted child, especially if adopted in its early age, should remain the right of the adopters or become their obligation and what, in this case, should be the priorities to be followed and the child’s best interest to be protected.

Certainly, the child has the right to know the truth about its origins, our law establishes this explicitly and if the child is older than 15 years of age and capable of reasoning it has the right to take insight into the birth registry, but there is a chance that the child never finds out about its origins during all his life if the adopters do not want it, especially because of the change in data written in registry books (where the data on biological parents are replaced with the data on the adopters). There are cases in practice when the adopters moved to another place after adoption so as to hide the truth about adoption. One of the possible solutions to this is to establish the right of the Center for social work to supervise the performance of the adopter’s obligation to inform the adopted child of its origins, which would mean that this organ could ask for a report on this from the adopters. This is especially important in case the adopted child is very young and is not able to understand what is happening around it, whereas it is rather insignificant if the child is older and is aware of all the circumstances concerning its family status.

However, we should bear in mind that this is one of the most delicate questions in the field of adoption, since it is really not easy for the adopters to tell the child the truth, especially because the child can understand it as a defeat and it can provoke unforeseeable consequences not only concerning the relationship between the adopters and the child but its further life and development as well. There is neither simple and easy way to tell this to a child nor a way for the child to accept it painlessly – e.g. that his parents have deserted and neglected him, that they do not care for him or her at all or that they are mentally ill and incapable of reasoning, that they are in a sanatorium for the medical treatment or that they are deprived of the right to decide on important questions of the child’s development and so on. In some cases telling the truth will not be a big problem if the way and time for it are carefully chosen – e.g. when the child’s parents have died.

Still, it is very important to weigh out whether the child’s best interest is to know the truth about its origins or perhaps it is his right to tranquil childhood, upbringing, education and development, since the truth about its origins can sometimes be very cruel, hard and misbalanced with the interests of the child. Anyway, although the situation concerning every adopted child is often very different, we think that it is better to tell the child the truth than to live all life in deceit and fear that the child will somehow find out the truth in an inadequate and perhaps very painful way.

Having all of these in mind and especially in order to help the child to accept the truth about his origins more easily and to alleviate the child’s possible stress, grief and depression after revealing the information on his biological parents, our new law establishes the obligation of the registrar to send the child to psycho-social counseling or to some other institution specialized for mediation in family matters. Psycho-social
counseling is a whole new item in our law, so in this moment it is very difficult to foresee to what extent it will be successful, because such psycho-social counseling offices do not exist in our country, which means that we do not have experience in this field. Anyhow, we shall hope that these offices will help the child to overcome problems concerning its origins and past more easily and support it adequately in its preparations for the future.

5. Proceeding of adoption

Adoption has remained in the competence of the Center for social work. Before adoption, the Center is obliged to deliver the child to future adopters for a certain period of time, but not more than 6 months, so that they can adapt to each other.

During this period of mutual adaptation the Center is obliged to supervise the process of adaptation and estimate whether these concrete adopters are suitable to adopt the concrete child. Only when it establishes that both future adopters and future adopted child fulfill both the conditions of general and special suitability for adoption i.e. when it estimates that the adaptation process was successful will the Center for social work bring the decision on adoption.

However, this rule on obligatory previous adaptation between future adopters and the child is not applied in case adopters are foreign citizens. Is it then possible to say that equal legal protection is provided for all children without discrimination or children adopted by foreign citizens are children of secondary importance who do not deserve adequate care of our state organs? The question whether the solution in this case should have been sought certainly deserves attention and discussion. Perhaps competent organs of the state whose citizens are future adopters should supervise the process of adaptation or the solution could also have been sought in certain services of our diplomatic and consular offices, but in any case it seems that, regarding this solution, insufficient attention was paid to the interests of the child compared to the attention paid to other interested parties.

A short research done in the Center for social work in Novi Sad, a city with around 300,000 citizens, showed that in the last five years (from 2000 until the end of June 2005) there was only 51 adoption. In most cases the parental relationship was established only with one parent (44 cases), whilst in 7 cases it was established with both parents. Furthermore, in most cases the child’s parent is either illiterate (8 cases) or has only primary school degree or has finished only four years of primary school (6 cases), whereas in 8 cases the parent has a secondary school degree, then in other cases the parent is a secondary school student, a faculty student, a housewife, while in other cases there is no data.

Adopters are mostly persons with higher level of education than the parents’ since only in one case the adopters were persons with only primary school degree, while in 16 cases the adopters have secondary school degree and in 9 cases faculty degree and in other 25 cases there is no data.

There were no cases of adoption within relatives and no cases in which the spouse of the child’s parent (stepfather or stepmother) would adopt his or her stepson or stepdaughter. The data received from the Center show that the records on adoption should be more complete and that introduction of the Unique adoption registry is necessary in
order to unify data on adoption. The Statistical yearbook now does not contain data on adoption, so it is very difficult to say how many adoptions there are in our country and what the reasons for adoption are. Therefore, we can conclude that the expectations of positive results from the new law are quite real.

Short Biography

OLGA CVEJIC JANCIC, Ph. D. is a full professor and Dean at the Faculty of Law, University of Novi Sad, Serbia and Montenegro. She teaches Family Law and Law of Inheritance. In June 2002, she was appointed the official legal expert for family law, inheritance law and comparative law by the Federal Ministry of Science and Development. She is a member of the Editorial Board of the Kopaonik School of Natural Law as the editor of the chair “Right to Personal Freedom”.

Her areas of academic interest are: legal status of a child, protection of the rights of a child, medically assisted conception, marriage (pluralism of different forms of unions and new approaches to their legal protection), divorce, special courts for the settlement of family disputes, alimony and new normative approaches to adoption. Lately, her work has been mainly focused on family law of EU countries and harmonization of our legal system with the systems of EU countries.

She has published several books including Marital Law (Novi Sad, IV ed. 2001), Law related to Parental and Custodial Rights (III ed. 2004.), Divorce in Yugoslav and Foreign Laws (1987) and she is the author of around 100 articles published in national and foreign journals as well as many encyclopaedia entries.

She speaks French and English.

The web site of the Faculty of Law in Novi Sad is the following: http://www.pravni.ns. ac.yu/english/department_of_civil_law.htm