EXERCISE OF THE PARENTAL RIGHT:
THE NEW SERBIAN LAW ON FAMILY 2005
IN THE LIGHT OF A CASE BEFORE SUPREME COURT OF SERBIA
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1. Introduction

Exercise of the parental right in a situation when parents do not lead a common life is an important legal and factual issue. The relationship between parents and their minor children inevitably changes in comparison to the situation when parents and children live together. Cases on entrusting children after divorce, if they are contested, are very complicated and difficult, as different interest of parents and children are involved. Finding most appropriate solutions to this issue in general, as well as in court practice - having in mind particular case is, therefore, a legal challenge. It is questionable whether the new legal concepts will be helpful in trying to act in the best interest of the child in such cases.

2. Law on Family 2005

In Serbia the Law on Family is adopted by the Parliament on 17 February 2005, entered into force 8 days after publishing, and implemented from 1 July 2005.\(^1\) In Montenegro the Law on Family was put into effect in 1989.\(^2\)

The Serbian Law on Family 2005 proposes a lot of novelties in the parent-child relationship. One is joint exercise of the parental right in a situation when parents do not lead a common life. There is a new approach on the status of children, as the Law on Family introduces a wide range of rights of the child. In the procedure, very important novelties are: introducing specialization of judges conducting family proceedings, urgency of the proceedings, new concept of mediation proceedings, transferring some powers from the centers for social work to the courts.

2.1. Exercise of the parental right

It might be said that the legal relationship between parents and children, viewing from historical perspective, have depended on the marriage status of parents. It means that married parents had joint custody mostly, but in cases of divorce and child born out of wedlock one parent had sole custody. According to the modern child custody law of number of countries, married, divorced or never married parents can obtain same legal status as married parents. Therefore, marriage status of the parents seems to be losing priority as the basis for custody and the legal relationship between parents and child seems to be gaining in importance.

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The Serbian Law on Family for the first time has introduced the joint exercise of the parental right as a form of shared parenting in a situation when parents do not lead a common life (Article 75/2, Law on Family). The same is applied to married and unmarried parents. The joint exercise of the parental right should be granted only if the parents agree to this type of the parent-child relationship (Article 76 Law on Family). An agreement on the joint exercise of the parental right must include agreement that parents jointly and with each other's consent exercise the parental right in the best interest of the child.

During the legislative process there was a controversy as to whether the Law on Family should introduce the possibility of a child dividing his/her residence between the parents. There were opinions, mostly from psychologists and psychiatrists, that dividing child's residence is contrary to a child's need for stability. Law on Family stated: "Included in agreement on the joint exercise of the parental right, there must be an agreement on what is considered to be the domicile of the child", Article 76/2. It is questionable if this solution exclude the possibility of a child living with both parents or not. While preparing the Draft the legislative committee was of the opinion that the possibility for the child to live with both parents was possible, as the solution to defining the domicile of the child is introduced mostly for formal purposes; for instance, to know the address of the child.

Joint exercise of the parental right is not a legal presumption, but merely one of the options for parents. Courts have the power to examine the agreement and to decide whether to accept it or not. The divorce court will accept it if deems this agreement to be in the best interest of a child. The agreement becomes an integral part of the court judgment (Article 272/1, Law on Family).

After marital separation, or if unmarried parents do not lead a common life, the parents may make an agreement on the joint exercise of the parental right too. The Law on Family has changed competence in these cases, transferring it from the center for social work to the court (Article 75/2). The reason for accepting this solution is the importance of exercising the parental right as a legal issue.

In comparative family law, especially in legal systems where joint parenting has existed longer, the concept differs. For example, in Swedish legislation, courts have the option to award joint custody when parents do not agree concerning this type of custody after divorce or separation (Bill 1998). To quote Åke Saldeen:

"However, according to Bill, the power to order joint custody in a case where a parent opposes joint custody should be used with great caution and sensitivity. If the person opposing joint custody provides substantial reasons for his or her standpoint, it will often be desirable not to go against his or her wishes. If the opposition is based on circumstances such as assault or harassment or other forms of molestation by the other parent, it may, according to the government Bill, be in the best interest of the child that one of the parents is awarded sole custody."

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3 According to Serbian law separation is a de facto situation, as judicial separation as an institution does not exist.
Besides this, in France, the judge has the ability to order, even if the parents are not in agreement, that the child's residence should alternate between the homes of each of the parents.5

Another form of exercise of the parental right is independent (autonomous) exercise.6 A parent exercises the parental right alone when the other parent is unknown, has died, has been declared deceased, or is fully deprived of the parental right or legal capacity. In addition, one parent exercises the parental right alone if only he/she lives with the child, if there is no court decision on that issue. One parent exercises the parental right alone, on the basis of a court decision, when the parents does not lead a common life and has not made an agreement on the exercise of the parental right; when the parents does not lead a common life and have made an agreement on the joint exercise of the parental right, but the court deems that this agreement is not in the best interest of the child; or when the parents do not lead a common life if they have made an agreement on the independent (autonomous) exercise of the parental right and the court deems that this agreement is in the best interest of the child (Article 77, Law on Family).

An agreement on the independent (autonomous) exercise of the parental right must include the parents' agreement on entrusting the common child to one parent, an agreement on the amount of contribution for child support from the other parent, and an agreement on the manner of maintaining the child's personal contact with the other parent. An agreement on the independent (autonomous) exercise of the parental right transfers the exercise of the parental right to the parent to whom the child is entrusted. The parent who does not exercise the parental right has the right and obligation to support the child, to maintain personal contact with the child and to decide, jointly and in consent with the parent exercising the parental right, issues that significantly influence the child's life. Issues considered to be of significant influence are stipulated in the Law on Family, particularly: education, major medical procedures, changing of domicile and disposing of the child's property of considerable value (Article 78). The Law on Family stipulates that parents have a right to get information on the child from educational and health institutions (Article 68/3). This provision would be of great help to the parents enabling them to make decisions on significant issues.

The parent might lose his/her right to decision-making if he/she is deprived of the parental right fully or partially. If the parent is fully deprived of the parental right, he/she loses all rights and only the obligation to support the child remains. If he/she is deprived of the parental right partially, then parent's status depends on a court decision. He/she may be deprived of the right to personal contact with his/her child and (or) the right to make decisions on issues significantly influencing the life of the child. The obligation to support his/her child remains (Article 82/2,4 Law on Family).

2.2. Rights of the child

Influenced by the UN Convention on the Rights of the Child 1989 and other relevant international documents, new family acts in Eastern European countries introduced a new concept to the rights of the child: they are regulated in a separate chapter and have been broadened compared to previous acts.\(^7\)

The Serbian Law on Family in Part III on child-parent relationships, Chapter II on child on parental care contains a section on the rights of the child in eight articles. These rights deal with a child's origin, living with parents, personal contacts, development, education, legal capacity, opinion and obligations.

Concerning living with parents, it is stated that a child has the right to live with his/her parents and to be cared for by them in preference to others. These rights can be restricted only by the law in the best interest of the child, and by court decision.

Regarding parent-child relationships after divorce or separation, the Law on Family introduces the idea that a child who has reached the age of fifteen and who is capable of reasoning has the right to decide with which parent he/she will live and to decide on maintaining personal contact with the parent he/she does not live with (Article 60/4, 61/4). The right of children to maintain personal contact may only be limited by the law, if this is in the best interest of the child, and by court decision. The court may intervene only if there are reasons for a parent to be fully or partially deprived of the parental right or in the case of domestic violence. As a novelty, a child shall have the right to maintain personal contact with relatives and other persons he/she is particularly close to, if it is in his/her best interest (Article 61, Law on Family).

Regarding the development of children, a child has the right to be provided with optimal living and health conditions for his/her proper and full development. A child who has reached fifteen years of age and who is capable of reasoning has the right to give consent to medical procedures (Article 62, Law on Family).

Concerning education, a child has the right to education in accordance with his/her abilities, wishes and inclinations. A child who has reached fifteen years of age and who is capable of reasoning has the right to decide which secondary school he/she will attend (Article 63, Law on Family).

Concerning legal capacity, the legal age of majority is eighteen. In addition, full legal capacity is acquired before eighteen by entering into marriage with court permission (Article 11/1,2 Law on Family). A court may, for justified reasons, allow a minor who has reached the age of sixteen to enter into marriage if he/she has the

physical and mental maturity to perform the rights and obligations of marriage (Article 23, Law on Family). As a novelty court may also allow a person who has reached sixteen years of age to acquire full legal capacity if he/she has become a parent and has the physical and mental maturity to take independent care of his/her person, rights and interests (Article 11/3, Law on Family).

A child who has not reached fourteen years of age (young minor) may undertake legal operations of small significance and legal operations whereby he/she acquires rights. A child who has reached fourteen years of age (senior minor) may undertake all legal operations with the prior (or subsequent) consent of his/her parents. A child who has reached fifteen years of age has the right to undertake legal operations by which he/she manages and disposes of wages and property acquired by his/her own labor (Article 64, Law on Family).

Concerning a child's opinion, a child capable of forming his/her own opinion has the right to freely express it. Also, a child has the right to duly receive all information necessary for forming his/her own opinion. A child's opinion must be given due attention in all issues concerning him/her and in all proceedings whereupon his/her rights are decided on, in accordance with the age and maturity of the child. A child who has reached ten years of age has the right to freely and directly express his/her opinion in every court and administrative proceedings where his/her rights are decided upon. A child who has reached ten years of age has the right to address a court or administrative body, alone or through another person, and request assistance in the realization of his/her right to free expression of opinion. Courts and administrative bodies shall determine the child's opinion in informal conversations taking place in appropriate locations, in co-operation with school psychologists or guardianship authority, family counseling services or other institutions specializing in mediating family relations, in the presence of the person the child chooses (Article 65, Law on Family).

At the end of this section of the Law on Family, it is stated that a child has obligations as well. These are: to help parents in accordance with his/her age and maturity and if a child who earns wages or has income from property is under the obligation to partially finance the needs of his/her support or the support of a parent or minor brother or sister (Article 66, Law on Family).

The Law on Family for the first time stipulates that the state has the obligation to protect child from neglect, physical, sexual or psychological abuse, as well as from all kinds of exploitation (Article 6/2). In addition, a child’s parents may not subject the child to humiliating actions or punishment that insult human dignity of the child and are under the obligation to protect the child from such actions by other persons. Parents must not leave a child of pre-school age unsupervised (Article 69/2,3).

Apart from rights in child-parent relationships, a child has other rights in family law. A child who has reached ten years of age and who is capable of reasoning has to consent to his/her adoption (Article 98, Law on Family), to fostering (Article 116, Law on Family) and has the right to propose the person who shall be appointed his/her guardian (Article 127, Law on Family). A child who has reached fifteen years of age and who is capable of reasoning has the right to change his/her personal name. A child who has reached ten years of age and who is capable of reasoning has the right
to give consent to a change of personal name (Article 346, Law on Family). Paternity may be acknowledged by a man who has reached sixteen years of age and who is capable of reasoning (Article 46, Law on Family). Acknowledgment is not an unilateral act, so in order for acknowledgment to become lawful it is necessary for the mother to give her consent to this acknowledgment. She can consent to acknowledgment of paternity if has reached sixteen years of age and is capable of reasoning. In addition, if when the father acknowledges the child, the child has reached sixteen year of age and is capable of reasoning his/her consent is necessary as well (Article 48/1, 49/1 Law on Family).

The child obtains rights according to the acts in other fields of law, as well. For instance, according to the Law on Labor 2005, a fifteen year-old child can obtain employment, however not without he consent of a parent, adopter or guardian. The restrictions concerning work for the underaged are that it has to be a job which does not jeopardize his/her health, morals or education and is not forbidden by law (Article 24/1, 25/1).8 According to the Law on Inheritance 1995, a fifteen year-old child can write a last will (Article 79).9 A girl who has reached sixteen years of age may seek an abortion without the permission of her parents (Article 2, Law on Abortion).10

1.3. Court proceedings in family relations cases

The main novelties in Law on Family concerning proceedings are: the specialization of judges, urgency of the proceedings, mediation proceedings.

Litigation regarding family relations is in the first instance to be adjudicated by a specialized panel composed of one judge and two lay judges, and in the second instance, by a specialized panel composed of three judges. The judges should have special knowledge in the rights of the child, while lay judges should be selected from qualified persons who have experience in work with children and young persons (Article 203, Law on Family).11

Proceedings regarding family relations are urgent if they concern a child or a parent's exercise of the parental right. The first hearing must be scheduled within fifteen days from the day the action or motion was filed in the court. The court of second instance is under the obligation to make a decision within thirty days from the day the appeal lodged (Article 204, Law on Family).

The Serbian Law on Family introduces a new concept of mediation proceedings. Mediation proceedings includes procedures for attempts at reconciliation and procedures for settlement (Article 229). Mediation shall ordinarily be a part of matrimonial dispute procedure. It shall not be carried out if the spouses do not agree to mediation, if one of the spouses is incapable of reasoning, or if the residence of one spouse is unknown (Article 230).

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11 This provision will be implemented from 1 July 2006.
Mediation proceeding is carried out by the court before an individual judge. However, the judge should recommend spouses to go to psychosocial counseling. If the spouses agree to psychosocial counseling, the court may entrust mediation to the competent guardianship authority, a marriage or family counseling service, or another institution that specializes in mediating family relations. A judge who conducts mediation may not participate in a decision in a subsequent phase of the procedure, if mediation was unsuccessful (Article 232, Law on Family).

The first phase of mediation is reconciliation. The purpose of reconciliation is to resolve the troubled relationship between spouses without contention and without divorce (Article 234, Law on Family). The other phase of mediation is settlement, which is carried out if reconciliation is unsuccessful (Article 240, Law on Family). The purpose of settlement is to resolve the disturbed relationship between the spouses without contention after divorce or marriage annulment. The court or the institution entrusted with the mediation proceedings shall endeavor that the spouses reach an agreement on the exercise of the parental right and an agreement on the division of joint property (Article 241, Law on Family). If settlement is successful or partially successful, the agreement of the spouses shall be included in the judgment decree (Article 243, Law on Family).

The court and/or the institution entrusted with the mediation proceedings shall write a report of the settlement hearing that includes the agreement of the spouses on the exercise of the parental right and the division of joint property, or statements of the spouses that settlement was unsuccessful. The institution entrusted with the mediation proceedings is under the obligation to inform the court of the result of the settlement proceedings and file a report of the proceedings with the court (Article 245, Law on Family). The court and/or institution entrusted with the mediation proceedings is under the obligation to carry out the settlement agreement within two months. If the institution entrusted with the mediation proceedings fails to inform the court on the results of the settlement proceedings within three months from the day of termination of the reconciliation proceedings or from the day of being provided a copy of the court documents, the settlement agreement shall be carried out by the court (Article 246, Law on Family).

Mediation is a phase in divorce proceedings only if a divorce is disputed. In the case of consensual divorce, it is presumed that the parties have already sought professional help to reach an agreement, if they needed it, before starting the divorce proceedings.

3. A Case before Supreme Court of Serbia

Having in mind the overall theme of this Conference, I shall present a case on entrusting the children to care and upbringing after the divorce, as an illustration of different interests in the parent-child relationship.

The case was conducted in Municipal Court of Novi Sad. In 1992 parties were divorced. The wife submitted an action for divorce, with the ground for divorce being unbearable life together. She claimed that after violent actions by her husband she left home and decided to file for divorce. In her action she requested that their two children be entrusted to her care and upbringing (son aged 5, and daughter aged 2).
The husband submitted counteraction asking both children to be entrusted to his care. The court issued an interim order entrusting the children to their mother's care. The father did not comply with this decision, but took the son from the mother by himself. As a consequence of his behavior, he was condemned convicted for a crime.

In the proceedings, the court asked for the professional opinion on entrusting children from the Center for Social Work. The psychological tests showed that both parents were intelligent, stable persons and loving parents, but the mother was found to be more mature and reliable as a parent than father. Their communication as parents was inadequate. At the moment of investigation they were not able to communicate at all. Both parents lived with their parents, grandparents' role was found to be important. The father's parents took day-to-day care of the children when parents were at work during the marriage. The Center for Social Work was of the opinion that the children should be entrusted to their mother's care. The court decided so, but issued another interim order entrusting the son to the father temporarily, in order to move the son to his mother's home gradually. The father appealed to the court judgment, asking the son to be entrusted to his care. The District Court rejected his appeal, finding the Municipal Court judgment to be correct.12

Two months after the District Court rendered judgment, the father installed new court proceedings before the Municipal Court, claiming for the son to be entrusted to his care on the ground of changed circumstances, since the son lived with him at all times. The Municipal Court dismissed his claim. However, this time Center for Social Work and consulted neuropsychiatrist were of the opinion that the son should be entrusted to his father's care, mainly on status quo criterion and having in mind that the son have some health problems (cardiovascular). The court did not accept opinion of Center for Social Work and the neuropsychiatrist, considering them inconsistent, as opinion given this time was the opposite to the opinion given in first court proceedings. The court deemed that they gave too much weight to the factual situation, while not having in mind that father took son away violently, against the mother's will, against the court judgment, and preventing enforcement of the judgment. In the meantime, the mother and son did not have regular contacts, as the consequence of constant conflict between parents.

The father appealed the court judgment. This time District Court accepted his appeal and decided to entrust the son to his father's care. The District Court was of the opinion that the Municipal Court inaccurately applied substantive law. The District Court accepted the opinion of Center for Social Work and medical doctors, considering that Municipal Court rendered judgment based in free judicial evaluation, which was not being objective enough when stated that the circumstances were not altered. Based on this judgment, the mother submitted an application revision to the Supreme Court of Serbia. The Supreme Court accepted her revision and modified the judgment of the District Court, thereby approving the judgment of the Municipal Court. The Supreme Court found that the Municipal Court was right to conclude that circumstances were not altered enough to constitute grounds for the alteration of the judgment. The Supreme Court emphasized interest of children not to be separated from one another, especially due to their young age, and interest of the boy not to be

12 No P. 704/91 Municipal Court of Novi Sad, Gz. 2936/92 District Court of Novi Sad.
separated from his mother.  

Again, two months after the Supreme Court rendered judgment, the father installed new proceedings requesting that the son be entrusted to his care on the ground of altered circumstances, since the son has lived with him constantly, two years after the divorce. In the mean time, the mother took the son to her home after school. It was violent act, against her son's will. The father asked for an interim order, claiming the son to be entrusted to his care. The Municipal Court issued the interim order accepting father's claim. The interim order was enforced by the police and the son was transferred from the mother's apartment to the father's house. In these proceedings, the Municipal Court rendered judgment by which it entrusted the son to the father's care on the grounds of altered circumstances. The Court accepted the opinion of the Center for Social Work. It was found that the boy lived with the father constantly, went to school near the father's house, was attached emotionally to the father, while the father was a caring and loving parent, in his age (7 years), the boy needed to identify with his father. On the other hand, the mother violently took the boy from the school and reacted inadequately on other occasions. The affirmative assessment of the mother, which the Center for Social Work gave during the divorce proceedings, as they now stated, was a professional mistake, as the mother was not able to solve her emotional crisis. She was conducting, as they said "paper war" with her ex-husband for the custody of the boy, but did not have regular contacts with her son, only contacts by chance and by phone. This time mother appealed the court judgment. The District Court rejected her appeal, but mother applied for revision to the Supreme Court of Serbia. The Supreme Court of Serbia accepted her revision and quashed both the judgment of the Municipal and District court and remanded the case to the Municipal Court. The Supreme Court was of the opinion that interests of both children were not investigated thoroughly. The Court raised the question as to whether it is in their interest to be separated one from another, not to have emotional relations and love one another and with both parents. The Court had in mind that the circumstances were not changed due to objective reasons, but, in fact, due to actions of the father. 

After the Supreme Court remanded the case to Municipal Court, Center for Social Work issued another report. The Center found that the parental relationship was disturbed, that the parents were unable to organize personal contacts with the children, as well as contacts between children themselves. The last time they had contact was ten months before the report was issued. The father was willing to make the arrangements on contacts, but the mother was not. Besides this, the Center found that the mother is too hard on the daughter, that she and her mother often punished the girl, that the girl was on sedative therapy from time to time, that the mother spoke about the father and his family in negative connotations and that the mother forbade contact of the daughter with her father. The Center was of the opinion that the daughter should be entrusted to the father's care. As she did not have much contact with her father and brother, since she did know them well, the Center suggested longer period of adaptation to prepare her for moving to the father's house. It is

\[13\] No P. 12296/92 Municipal Court of Novi Sad, Gz. 2828/93 District Court of Novi Sad, Rev. 4325/93 Supreme Court of Serbia.  
\[14\] No P. 2781/94 Municipal Court of Novi Sad, Gz. 1507/95 District Court of Novi Sad, Rev. 5209/95 Supreme Court of Serbia.
suggested that regular contacts with father should precede her transfer. However, the Court ordered that committee of expert witnesses from the Faculty of Medicine, consisting of pediatricians and psychologists should examine the whole family situation once more. Among other facts, they found that the girl had normal intellectual development, that she had sensitive personality, impulsive tendencies, and that her maturity was consistent with her age. The mother's role in her upbringing was strong and caring. The expert witnesses committee found that both families were able to satisfied developmental needs of the children, that the existing situation is stimulating for the children's ongoing development and they suggested that children should have contacts between themselves without parents being present.

Following the expert witnesses committee report the parents made a court settlement. They agreed that the boy would be entrusted to his father's care and the girl to her mother's care and agreed on child support.

The parents reached settlement ten years after the divorce, after ten years of conducting "paper war". Apparently, the "paper war" had huge consequences on real life: the children lost contacts with the parent he and she did not live with and contact between themselves. The mother had a very hard time, changed her behavior significantly, often losing her temper, being too hard on her daughter and trying violently to get her son back.

It could be said that all subjects in these proceedings were led by family interests. However, the disagreement lied in what interests should prevail. The consequence were different court decisions and different expert reports. The most important interests and criterions in the proceedings which could be selected are: interest of children to be entrusted to the "better" parent; interest of children not to be separated from one another; interest of children to have contacts with both parents and each other; criterion status quo; criterion that nobody should benefit from his/her unlawful behavior. Professionals, judges and experts, had different views of what is the best interest of children in this case, especially as time passed and circumstances changed. Both parents wanted to have children in their own care, without being willing to reach a compromise. This is a typical case of parental conflict over children in which nobody wins. Ten years of court proceedings lead to almost tragic consequences, children lost contacts with each other, with the parent with whom they did not live with, the mother changed her behavior, becoming unstable and often reacting inadequately.

Unfortunately, one has to admit that in case such as this one, the law is not powerful enough to resolve family problems and disturbed relationships between parents, often failing to protect children and to act in their best interest.

4. Conclusion

The Serbian Law on Family introduces new institutions and changes existing ones in order to improve legal and factual position of the children. The specialization of judges would probably be helpful in cases similar to the one discussed in previous chapter. The judges should have special knowledge on the rights of the child, while lay judges should be selected from qualified persons who have experience in work with children and young persons, so they could hopefully be more sensitive to the best
interest of the child as a prime principle of family law. The urgency of proceedings regarding family relations will probably prevent long proceedings, as they often occur in cases such as the one in the previous chapter. Settlement proceedings, as a phase within mediation proceedings will help parents to reach the agreement concerning their children.

The rights of the child stipulated in the Law on Family could be of great importance in custody cases. For instance, the right to freely express opinions; the duty of the court to give due attention to the child's opinion in all issues concerning him or her and in all proceedings whereupon his/her rights are decided on; the right of the child to address a court or administrative body and to request assistance in the realization of his/her right to free expression of opinion. These rights could be helpful in trying to avoid long and difficult proceedings, such as the one discussed in the previous chapter.
Curriculum vitae

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