

DEPRIVATION OF PARENTAL RIGHTS AND “THE BEST INTEREST OF THE CHILD”


ABSTRACT: In contemporary times, children are recognized as holders of their own rights, which is a departure from past practices. The state delegates authority to participate in and intervene in family matters through designated guardianship bodies and local courts. The deprivation of parental rights carries significant and enduring consequences for both parents and children, with the entire process governed by the legal principle of the best interest of the child. Unfortunately, the “best interest of the child,” while a widely used concept, lacks precise legal definition, potentially leading to adverse effects on the child’s psychological and physical development.

Keywords: *child, exercise of parental rights, state intervention, deprivation of parental rights.*

1. Introduction

“Family today can be defined as the ‘basic unit of society, in which spouses, children, unmarried partners, and other relatives, living in a community of life, create natural and legally established conditions for the development and well-being of all family members, especially children” (Šarkić & Počuča, 2014, p. 60).

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The development of the nuclear family, prevalent today, was initiated by the first family cooperatives. Influenced by economic and social factors, family cooperatives formed the first family communities.

Child upbringing represents the autonomy of parental will. Child rearing is a long-term process that is reflected in the agreement of parents on everyday as well as significant issues of parental rights. The legitimacy of interference and limitation of parental autonomy in decision-making is only drawn by the state regarding significant parental rights issues. Decisions that entail or may have lasting consequences on the psycho-physical development, survival, education, or health of the child imply decisions on matters that significantly affect the child's life. The key balance between these two seemingly opposing sides, with the same goal – the best interest of the child and society, is represented by the family.

“Parenting as the primary basis for exercising parental rights in various legal and life situations is an expression of the idea of the necessity for both parents to care for the child, regardless of their mutual relationship.”¹ The reason for this is the necessity of the influence and participation of both parents for the normal and proper psycho-physical development of the child.

2. The journey from child as “property” to child as holder of rights

“The history of parent-child relationships indicates that, starting from Roman law, they were based on the authority of the father over the children. The paternal power of the head of the family over the household, expressed as *patria potestas*, encompassed unlimited parental authority over the person and property of the child” (Vujović, 2019).

Children did not have the status of rights holders but rather of property, where they could be sold, abused, and even killed during their lifetime.

Under *patriam potestatem*, one obtained authority through birth, adrogation, adoption, and legitimization.

“Throughout much of Roman history, the Roman family was large, consisting of all individuals under the authority of the *pater familias*: sons, daughters, daughters-in-law, grandchildren, great-grandchildren, adopted and

¹ In contemporary societies, there is a tendency towards creating conditions where the marital union can always be dissolved if one or both spouses feel dissatisfaction, mutual intolerance, discomfort, and similar issues within that union. For more detailed insights into this topic, please refer Počuča M. (2011). p. 252.

adrogated individuals" (Malenica, 2007, pp. 86–87). "During the Principate era, rulers sometimes compelled fathers to emancipate sons who were mistreated, and there were cases where fathers were punished with death for killing their sons" (Stanojević, 1989, p. 131). The justification for this method and the relationship between father and child/authority and property was long derived from principles of natural law.

"The institution of paternal authority outlived the slaveholding social order, as it can be encountered, for example, in medieval German customary law under the name *mundium*" (Draškić, 2007, p. 155). With the development of all branches of law and the significant social changes that followed, the first limitations."

"The patriarchal model of organizing family relations has been definitively abandoned, establishing equality between women and men in acquiring and exercising all family rights, and children born outside of marriage are granted all rights guaranteed by the legal system to children born within marriage" (Draškić, 2007, p. 156.).

The family structure and the functions performed by the family as a social unit have changed over time. Such changes have also reflected on the legislative approach and the manner of regulating family relations on paternal powers gradually began to emerge.

"The family is finally understood as a social institution that performs important social tasks – population reproduction, raising and educating children, which has necessarily shifted the focus from paternal authority over the child to the duty of both parents to care for the child and provide protection" (Vujović, 2019, p. 25).

The first documents proclaiming children's rights emerged in the 20th century, but the establishment of a distinct body of law within international human rights law undoubtedly had the most impact with the adoption and almost universal ratification of the Convention on the Rights of the Child.²

According to the Convention, a child is defined as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier" (Article 1 of the Convention on the Rights of the Child).

"The Convention clearly opposes the traditional understanding of the child as a being in development, immature, incompetent, and incomplete future adult" (Vranješević, 2006, p. 4). In all activities concerning children,

² The Law on Ratification of the United Nations Convention on the Rights of the Child, Belgrade, December 18, 1990.

according to the Convention on the Rights of the Child, the guiding principle is the best interests of the child.

“At the core of the Convention lies the idea of the child as a subject, an active participant in their own development process, as opposed to the view of the child as an object, i.e., a passive recipient of care and protection from adults” (Vranješević, 2006, p. 4).

3. The term “parental legal relationship”

“The family is commonly defined as the basic social unit and one of the most complex, oldest, and earliest social groups. The family is a universal community consisting of adult, reproductive-capable partners and their offspring” (Počuča, 2010, p. 49).

The parental relationship differs from other legal relationships due to the specificity of the subjects involved in that relationship. Its establishment and termination fall under the category of family status. The concept of parental rights comprises the liabilities and rights of parents towards their children, as well as the rights and liabilities of children towards their parents. Previously, the term “parental rights” was characterized by a restrictive interpretation referring only to the relationship between parents and children. Nowadays, there is a broader concept adopted known as the “parental legal relationship,” which includes not only the parent-child relationship but also all other legal powers arising from this relationship. Although the term “parental rights” remains unchanged, the legislator has explicitly defined the meaning of parental rights in this context and subsequently imposed sanctions for their non-realization (Vujović, 2019). When parents live together in marital or non-marital cohabitation, parental rights are exercised jointly and by mutual agreement.

Parental rights, in terms of content, encompass all rights and responsibilities belonging to both father and mother jointly, such as child care and upbringing, representation, guardianship, child maintenance, and management of their property, all in accordance with the best interests of the child.

Child rights are defined as personal and independent rights. Unlike them, parental rights and duties towards children have a derivative character, as they arise and are exercised in those cases when necessary for the child’s adequate psycho-physical development and best interests.

In relation to this, the manner and quality of fulfilling the duties of exercising parental rights affect the possibility of losing or continuing to

exercise these rights. According to the Family Law, the guardianship of the child (Article 68) includes: custody, raising, upbringing, education, representation, maintenance, and management and disposal of the child's property.

“When it comes to the status and rights of the child, especially the obligations of parents towards children, whether born within or outside of marriage, the equalization of their status is often explicitly mentioned in constitutions. This can be either through a general and principled constitutional provision or with a specification of the content encompassing the obligations of parents towards children” (Pajvančić, 2012, p. 205).

In addition to parents, certain institutions also have this obligation towards children as rights holders. “This is done to ensure the most complete realization of all child rights and the most efficient protection of the rights for which the child is the titular holder” (Ponjavić & Vlašković, 2019, p. 285).

4. Deprivation of parental rights

In contemporary law, parents who abuse or seriously neglect their duties outlined in parental rights, or who irresponsibly exercise their rights or duties outlined in parental rights, (Article 81–82 of the Family Law) may face measures that involve depriving them of the authority to exercise parental rights.

“The extent of deprivation can vary – a parent may be deprived of the legal capacity to exercise all rights and duties outlined in parental rights, or only of certain rights they have towards the child (partial deprivation of parental rights)” (Vujović, 2019, p. 50).

5. Complete deprivation of parental rights

A parent who abuses rights or grossly neglects duties outlined in parental rights may be completely deprived of parental rights. The second and third paragraphs of the same article provide examples of the abuse of rights and gross neglect of duties from the content of parental rights (Article 81 of the Family Law). In paragraphs 2 and 3 of Article 81 of the Family Law, the legislator has listed examples of gross neglect, such as physical or emotional abuse of the child, forced labour contrary to the child's morals, health, and education, and similar circumstances.

“Child abuse is manifested in the behaviour of an adult, which can be expressed in neglecting the child, both in terms of their physical needs

(providing food, clothing, and hygiene) and emotional well-being (lack of love); it also includes neglecting the child's educational development (preventing the child from attending school). Child abuse can be divided into different types: physical, sexual, and psychological abuse" (Počuča, 2010, p. 52).

According to research conducted in recent years, unfortunately, there is frequent violence against children in our country. The various forms and environments in which violence against children occurs attest to the current relevance and prevalence of the issue itself.

"Children in the Republic of Serbia are daily exposed to various forms of direct, interpersonal violence such as physical, sexual, and emotional abuse, neglect, or less direct but complex forms, such as structural violence manifested in different ways – for example, through various forms of discrimination (child marriage, child labour, or other types of exploitation) or through multiple social exclusions" (The Strategy for the Prevention and Protection of Children from Violence for the period from 2020 to 2023).

The specificity of the first form of deprivation of parental rights – abuse of parental rights – lies in the intentional and conscious actions taken, whereas the second form – gross neglect of duties outlined in parental rights – manifests through neglect and inaction.

6. Partial deprivation of parental rights

Partial deprivation of parental rights is linked to the legal standard of "negligent exercise of rights and duties." "Since there is no precise definition, the court fills the content of this legal standard with its own value judgment" (Vujović, 2019, p. 68).

Article 82 of the same law stipulates that a parent who negligently exercises rights or duties outlined in parental rights may be partially deprived of parental rights. The court decision on partial deprivation of parental rights may deprive the parent of one or more rights and duties outlined in parental rights, except for the duty to provide maintenance for the child. A parent exercising parental rights may be deprived of the right and duty to care for, raise, educate, represent the child, as well as manage and dispose of the child's property. A parent not exercising parental rights may be deprived of the right to maintain personal relationships with the child and the right to make decisions that significantly affect the child's life.

"During partial deprivation, a parent can be deprived of one or more rights, but not the right to child maintenance" (Delibašić, 2006). "The European

Court of Human Rights ("ECtHR") unanimously concluded that there was no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights in the case of *Wunderlich v. Germany*.³

In the specific case of partial deprivation of parental rights, it involves the removal of four children from their family home for a period of three weeks. The decision of the German authorities for partial deprivation of parental rights was based on the endangerment of the best interests of the children due to the persistent refusal of the parents to send their children to school.

"Citing Article 8, the applicants complained about the decision of the German authorities to partially deprive them of parental rights and assign them to the Youth Welfare Office (German: Jugendamt)."⁴

Mandatory school attendance in terms of adequate psychophysical, emotional, and social aspects of children in society is a relevant reason for depriving parental rights, according to the ECtHR decision. Prolonged isolation of children would create the potential for endangering proper development and the best interests of the child.

"The court must at all times ensure that it achieves an optimal balance between, on the one hand, safeguarding the best interests of the child, and on the other hand, ensuring that the parental capacity of the parents is preserved to the greatest extent possible. Depending on the circumstances of the case, the court is authorized to partially deprive a parent who is not exercising parental rights of the right to decide on issues that significantly affect the child's life, if they negligently exercise rights or duties outlined in parental rights" (Draškić, 2012, p. 368)

In its reasoning, the Supreme Court of Serbia stated:⁵ "In the view of the Supreme Court, the court is not authorized to decide on the place of residence of a minor child instead of the parents or to make decisions that replace joint decisions of parents on essential issues related to exercising parental rights – which significantly affect the life of the minor child, such as the child's education, major medical procedures on the child, changing the child's place of residence, or disposal of the child's high-value property. Preventive and

³ Petition no. 18925/15 dated January 10.2019, <https://www.rolplatform.org/delimiticno-lisavanje-roditeljskog-prava-zbog-odbijanja-roditelja-da-njihova-deca-pohadjaju-skolu/>

⁴ Petition no. 18925/15 dated January 10.2019, <https://www.rolplatform.org/delimiticno-lisavanje-roditeljskog-prava-zbog-odbijanja-roditelja-da-njihova-deca-pohadjaju-skolu/>

⁵ Review no. 2557/06 dated March 1, 2007, by which the Supreme Court of Cassation (VKS) annulled the judgment of the District Court in Sremska Mitrovica Gž.1146/06 dated June 14, 2006, and the judgment of the Municipal Court in Sremska Mitrovica P. 914/05 dated March 17, 2006, and remanded the case to the first-instance court for retrial. For more details, refer to Draškić M. (2012).

corrective oversight of the exercise of parental rights is performed by the guardianship authority and not the court.”⁶ “Resorting to partial deprivation of parental rights of a parent who is not exercising parental rights solely because they refuse to consent to a change in the child’s place of residence is certainly problematic” (Palačković & Ćorac, 2022 p. 748).

The most serious question raised in this paper is the concept in which the Law governing enforcement and security issues stipulates that the enforcement of a decision will be entrusted to the guardianship authority by taking the child away, and whether such a method of execution can be in the best interest of the child.

It seems that this provision is contrary to the concept of the judicial enforcement procedure. By using the provisions of the Law on Enforcement and Security, the court delegates one of the most severe family law sanctions, the procedure of taking away a child, from itself.

“For decades, the concept implied that taking a child away, due to its specificity, falls exclusively under the jurisdiction of the court, and that this procedure cannot even be performed by auxiliary court organs (such as court bailiffs or expert associates, court assistants, etc.), but exclusively by a judge.”

“The courts in the Republic of Serbia, as mentioned earlier, almost without exception take the stance that in case of a dispute between parents regarding a change of a child’s residence, the parent who does not exercise parental rights “must” be partially – concerning the right to change residence – deprived of parental rights in order to allow the other parent to independently make a decision about it” (Palačković & Ćorac, 2022 p. 749).

“It is undisputed that by refusing to grant consent for the change of residence, particularly for relocation abroad, by a parent who does not exercise parental rights, a dispute arises from family law relations, which, according to the provisions of the Law on Civil Procedure, falls within the jurisdiction of regular courts. It is also undisputed that both the procedure for protecting the child’s rights and the procedure for exercising parental rights are separate civil procedures. (Palačković & Ćorac, 2022, p. 749 p.749) The procedure for protecting the child’s rights is subsidiary to all other procedures provided for in the Family Law” (Poznić & Rakić Vodinelić, 2015, p. 563).

⁶ Perhaps the most important task of the guardianship authority in the enforcement judicial process is defined in the section of the Enforcement and Security Law that regulates the execution of decisions in family relations. This section is divided into three groups of articles: child custody transfer, enforcement for maintaining personal relations with the child, and enforcement for protection against family violence, protection of the child’s rights, and other decisions related to family relations. More details can be found in Počuča, M., & Šarkić, N. (2020).

7. Procedure for deprivation of parental rights

The procedure for deprivation of parental rights is a judicial procedure regulated by the Civil Procedure Act, which begins with a lawsuit as the initial action. In disputes for the deprivation of parental rights, the competent court is the basic court, while the territorial jurisdiction is determined based on the residence or domicile of the parent. “A child aged 15 and capable of discernment may decide alone with which parent they will live, maintain personal relationships, which high school to attend, and consent to medical procedures” (Article 60 of the Family Law) “Due attention is paid to the child’s opinion when deciding on the manner of exercising parental rights, considering their age and needs, although the child’s opinion is not the sole determining factor in making decisions about the exercise of parental rights.”⁷

“Additionally, a child under the age of 14 can independently undertake minor legal transactions, legally beneficial, and neutral. Finally, a child who has entered into an employment relationship can independently manage and dispose of their earnings, as well as property acquired through work” (Ponjavić & Vlašković, 2019, p. 296).

In proceedings related to family relationships, the principle of urgency of the procedure is prescribed, as well as the investigative principle, and above all, there is a duty of the court to be guided by the best interests of the child in disputes for the protection of the child’s rights and in disputes concerning the exercise or deprivation of parental rights (Article 204–206 of the Family Law).

“The best interests of the child are a legal standard assessed based on a series of objective and subjective circumstances, which, among other things, implies that a loving, trusting, mutually respectful, affectionate, mutually supportive, and personality-and dignity-respecting relationship is developed and nurtured between the minor child and the non-custodial parent. Such a relationship between parents and children also serves the interest of the entire social community, which is why everyone is obliged to be guided by this interest in all activities concerning the child.”⁸

Preserving the relationship between a child and their parents, as well as addressing the reasons and consequences that led to the deprivation of parental rights, is of great importance both for the individual and for society as a whole. The state responds legitimately through adequate measures of preventive and

⁷ The judgment of the Supreme Court of Cassation Rev2340/21 dated June 3, 2021.

⁸ Rev 3712/2022, p. 4 <https://www.vrh.sud.rs/sr-lat/rev-37122022-31411>.

corrective supervision to preserve the family. However, if in a specific case, through the use of evidence during the proceedings, it is determined that depriving parental rights is necessary, its legitimacy is reflected in the legal standard of the best interest of the child.

8. Conclusion

Parents always make all decisions related to the life of their child. The aim of both theory and practice is to ensure a happy childhood for the child with both parents, which is extremely important for their development and progress. However, when there is complete negligence in exercising rights or duties, abuse of rights, or gross neglect of duties by the parents, the solution is deprivation of parental rights. In this regard, the legislator has envisaged a number of institutes regulating and influencing the state's role in this phase of parent-child relationships, which previously enjoyed complete autonomy.

In addition to the circumstances presented by the parents as parties in the proceedings, there are also those determined by the court through the application of the investigative principle. Although the court takes into account all circumstances when making a decision on deprivation of parental rights, the best interest of the child is a legal standard insufficiently defined in our legislation. The very fact of insufficient definition and criteria carries the possibility of incorrect application and interpretation, which in the case of adequate psychophysical and emotional development of the child leaves lasting consequences.

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LIŠENJE RODITELJSKOG PRAVA I STANDARD „NAJBOLJI INTERES DETETA“

APSTRAKT: Od potpune vlasti nad detetom danas je dete titular prava. Država legitimnost učešća i mešanja u porodične odnose delegira i ostvaruje putem organa starateljstva, funkcionalnih i mesno nadležnih sudova. Lišenje roditeljskog prava stvara trajne posledice na roditelje i

decu, gde se ceo postupak sprovodi kroz pravni standard najbolji interes deteta. Nažalost, "najbolji interes deteta" kao jedan zakonski neprecizan pojam stvara mogućnost prouzrokovanja najtežih posledice za dalji psihofizički razvoj deteta.

Ključne reči: dete, vršenje roditeljskog prava, intervencija države, lišenje roditeljskog prava.

References

1. Delibašić, Z. (2006.) Prava deteta u sporu za zaštitu prava deteta i u sporu za vršenje odnosno lišenje roditeljskog prava [Children's Rights in Proceedings for Protection of Children's Rights and in Proceedings for Exercise or Deprivation of Parental Rights]. *Bilten Okružnog suda u Beogradu*, 74, pp. 20–30
2. Draškić, M. (2012). Obavezno lišenje roditeljskog prava prilikom odlučivanja suda o vršenju roditeljskog prava – sporno stanovište Vrhovnog suda Srbije [Mandatory Deprivation of Parental Rights when Deciding on the Exercise of Parental Rights – a Controversial View of the Supreme Court of Serbia]. *Anali Pravnog fakulteta u Beogradu*, 60(1), pp. 366–381
3. Draškić, M. (2020). *Porodično pravo i prava deteta [Family Law and Children's Rights]*. Beograd: Pravni fakultet
4. Golić, D., & Logarušić, D. (2023.) Children's Rights – International Standards and Their Implementation in the Legal System of the Republic of Serbia. *Pravo – teorija i praksa*, 40(2), pp. 34–56
5. Jović, O. (2012). Pravo deteta na kontakt sa roditeljem sa kojim ne živi [Child's Right to Contact with the Parent with whom They Do Not Live]. In: Marković, G. (prir.), *Prava djeteta i ravnopravnost polova – između normativnog i stvarnog – zbornik radova [Children's rights and gender equality – between normative and real – collection of papers]*. (pp. 102–115). Pale – Istočno Sarajevo: Pravni fakultet Univerziteta u Istočnom Sarajevu
6. Malenica, A. (2004). Rimska pravna tradicija u Srpskom pravu [Roman legal tradition in Serbian law]. *Zbornik radova Pravnog fakulteta u Novom Sadu*, 38(2), pp. 117-139
7. Novaković, U. (2020). *Preseljenje deteta i roditelja koji vrši roditeljsko pravo – relocation slučajevi [Child and Parent Relocation Cases]*. Beograd: Pravni fakultet Univerziteta u Beogradu

8. Pajvančić, M. (2012). Posebna prava deteta u komparativnoj ustavnosti [Special Children's Rights in Comparative Constitutional Law] In: Marković, G. (prir.), *Prava djeteta i ravnopravnost polova – između normativnog i stvarnog – zbornik radova [Children's rights and gender equality – between normative and real – collection of papers]*. (pp. 203–212). Pale – Istočno Sarajevo : Pravni fakultet Univerziteta u Istočnom Sarajevu
9. Palačković, D. & Ćorac, S. (2022). Ne saglasnost roditelja o promeni prebivališta deteta, [Parent's disagreement to changing the child's permanent residence: Procedural dilemmas and possible solutions]. *Anali Pravnog Fakulteta u Beogradu*, 70(3), pp. 745–763
10. Počuča, M. & Šarkić, N. (2011). *Porodično pravo i porodičnopravna zaštita [Family law and family law protection]*. Beograd: Pravni fakultet Univerziteta Union i Službeni glasnik
11. Počuča, M. (2010). Nasilje u porodici [Family violence]. *Pravo – teorija i praksa*, 27(9–10), pp. 49–61
12. Počuča, M. (2011). Razvod braka u uporednom pravu [Dissolution of marriage in comparative law]. *Strani pravni život*, (2), pp. 267–283
13. Ponjavić, Z., & Vlašković, V. (2019). *Porodično parvo [Family Law]*. Beograd: Službeni glasnik
14. Porodični zakon [Family Law]. *Službeni glasnik RS*, br. 18/05, 72/11 – dr. zakon i 6/15
15. Poznić, B., & Rakić Vodinelić, V. (2015). *Građansko procesno pravo [Civil Procedure Law]*. Beograd: Pravni fakultet Univerziteta Union i Službeni glasnik
16. Šarkić, N. & Počuča, M. (2020). Ovlašćenja organa starateljstva prema izmenama i dopunama zakona o izvršenju [Authority of Guardianship Authorities According to Amendments and Supplements to the Enforcement Law]. *Pravo – teorija i praksa*, 37(1), pp. 21–33.
17. Stanojević, O. (1989). *Rimsko pravo [Roman Law]*. Beograd: Službeni glasnik
18. Strategija za prevenciju i zaštitu dece od nasilja za period od 2020. do 2023. godine [Strategy for the Prevention and Protection of Children from Violence for the Period 2020–2023]. *Službeni glasnik RS*, br. 80/20
19. Vlašković, V. (2014). *Načelo najboljeg interesa deteta u porodičnom pravu – doktorska disertacija [Best interes of child in Family law – doctoral thesis]*. Kragujevac: Pravni fakultet
20. Vranješević, J. (2008). *Razvojne kompetencije kao osnova prava deteta na participaciju – doktorska disertacija [Developmental competencies as*

the basis of the child's right to participation – doctoral thesis]. Beograd: Univerzitet u Beogradu, Filozofski fakultet

21. Vujović, R. (2019). *Lišenje roditeljskog prava [Deprivation of Parental Rights]*. Beograd: Službeni glasnik
22. Zakon o ratifikaciji Konvencije ujedinjenih nacija o pravima deteta [Law on the Ratification of the United Nations Convention on the Rights of the Child]. *Službeni list SFRJ – Međunarodni ugovori*, br. 15/90 i *Službeni list SRJ – Međunarodni ugovori*, br. 4/96 i 2/97