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PARENTHOOD AND PARENTAL RESPONSIBILITY OF THE UNDERAGE PARENTS IN THE ERA OF CHILDREN'S RIGHTS

Abstract

Legal status of the underage parent comprises conflicting roles of a parent and a child in the same person. It triggers many legal issues primarily revolved around underage parents' capability to exercise parental responsibility. Using their natural ability to bear the child, the underage parents actually step out of the boundaries of childhood moving into to world of adulthood despite of the fixed age limits accepted by the law in order to separate, somehow artificially, those two domains. Since life usually precedes the law, giving birth to a child by the underage parents creates a legal mess where the rights and interests of the various participants are at stake. However, the lawmakers are torn between two basic ideas to protect the rights of the newborn and to enable natural parents to acquire parental responsibility so they can perform their duties as parents. This has been shown to be quite complicated task involving the consideration of different concepts such as reproductive liberty, legal parenthood, active legal capacity and child's rights. Those issues have been considered by the author having in mind the complex picture of child's rights, comparative law and national substantive family law rules. The attention is also paid to the solutions proposed by the draftmakers of Serbian Civil Code which could be adopted in the near future.

***Key words**: underage parent, reproductive liberty, legal parenthood, active legal capacity, child's rights.*

1. INTRODUCTION

Childhood can hardly have clear and distinctive boundaries with all turbulences and continuous changes that are included in this phase of life. In that sense, the time of being a child involves psychological, biological, sociological, as well as legal aspects. However, it is important to stress that reaching the point of adulthood is highly individual feature of someone's life

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depending upon various elements of child's own characteristics and complex influence of her/his family surrounding, as well as the impact of broader social environment and cultural context. Furthermore, being an adult does not necessarily coincide with the sufficient level of maturity which leads to even more confusion in the efforts to determine the boundaries of childhood.[1] Thus, a general definition of childhood could figuratively speaking remind of the attempts to make the clothes suitable to every person.

Progressing to adulthood is followed by significant and various changes of the child's cognitive and intellectual abilities that should be depicted in law as far as possible. Since the lawmakers cannot address each and every child, they need to ascertain clear but flexible legal framework in order to determine childhood boundaries. Unfortunately, this has proved to be difficult task which has led to different outcomes in separate legal fields, e.g. penal law, tort law or law on contracts.[2] Such development demanded fragmentation of the legal concept of a child into various subcategories, such as infant, minor, adolescent or juvenile. However, since childhood is a precondition for enjoying children's rights, key definition of a child should be sought into the United Nations Convention on the Rights of the Child, as the most significant international legally-binding agreement in this area.[3]

According to the CRC, "…a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".[4] The term "majority" refers to full active legal capacity.[5] Thus, creators of the CRC established legal presumption that a child attained majority at the age of 18 allowing the national legislators to make certain exceptions due to their appreciation.[6] These exceptions actually form the

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[1] See D. Archard, *Children: Rights and Childhood*, Routledge, London – New York, 2004, 44.

[2] For example, in Criminal Code of Serbia, the term „child" refers to a person up to 14 years of life. On the other hand, the expression „minor" involves adolescents between the ages of 14 and 18. The broadest term is „underage person" which encompasses category of persons under the age of 18. See: Par. 112 (8-10) of Criminal Code (CCSRB) (Krivični zakonik), The Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014.

[3] The United Nations Convention on the Rights of the Child (CRC), United Nations, Treaty Series, Vol. 1577, 3. The CRC was adopted by the UN General Assembly resolution 44/25 of 20 November 1989.

[4] Art. 1. of the CRC.

[5] S. Detrick, *A Commentary on the United Nation Convention on the Rights of the Child,* Martinus Nijhoff Publishers, The Hague – Boston – London, 1999, 59.

[6] The main goal was that CRC should apply to as large group of children as possible. Ibid., 58. Some delegations were proposing the other solutions during the drafting process.

grounds for emancipation of minors in national legislations of state parties.[7] In other words, exceptions from general rule that majority is attained at the age of 18 enable space for assessment of individual childhood limit and distinct characteristics of each child if certain requirements are met. Those requirements usually concern underage person's mental or intellectual capacity and physical ability to perform duties that are commonly linked with adulthood, such as obligations that derive from marriage or parental responsibility.

Emancipation should not be mixed with growing autonomous decision-making space to underage persons created particularly by children rights in the personal sphere.[8] This process is sometimes called „progressive autonomy"in legal literature and it is flexible reflection of a child that gradually grows up and matures developing her/his own physical and intellectual abilities.[9] On the other hand, emancipation offers static legal approach where child maturity and capacity to reason is assessed in a single moment deciding in clear-cut fashion if the child is competent enough to acquire full active legal capacity before attaining majority.[10] Furthermore,

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They were of opinion that this age limit is too high and that it does not correspond to the relevant social and cultural conditions in many countries. In that context some were of the opinions that upper age limit for the legal status of a child should be set to 14 years which was the age when compulsory education ends or when marriage capacity is required in certain countries. On the other side, some legal scholars argue that minimum age limit for attaining majority by national law should have been explicitly included in the CRC text in order to prevent uneqal treatment of children. See *ibid*., 58–59.

[7] On the origin and meaning of emancipation in Roman law; see S. Vladetić, *Prijateljske usluge u rimskom porodičnom pravu*, XXI vek – vek usluga i Uslužnog prava (ur. M. Mićović), Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2014, 265–266.

[8] J. Ferrer – Riba, *Parental responsibility in a European Perspective*, European Family Law III: Family Law in a European Perspective (ed. J. M. Scherpe), Edward Elgar Publishing, Cheltenham – Northampton, 2016, 301.

[9] See R. Martins, *Parental responsibilities versus the progressive autonomy of the child and the adolescent,* Perspectives for the Unification and Harmonisation of Family Law in Europe (ed. K. Boele-Woelki), Intersentia, Antwerpen – Oxford – New York, 2003, 371.

[10] This form of emancipation is known as public or court-order emancipation. Some countries also regulate so-called private emacipation of minors which is based on the consent or even decision of parental responsibility holders. See R. Oliphant, N. Ver Steegh, *Family Law,* Aspen Publishers, New York, 2007, 196; V. Vodinelić; *Građansko pravo: Uvod u građansko pravo i opšti deo građanskog prava,* Pravni fakultet Univerziteta Union u Beogradu – JP Službeni glasnik, Beograd, 2014, 367. Furthermore, certain authors argue that emancipation may also relate to fixed age when parental responsibility ceases. In other

after emancipation is done, an emancipated minor will generally be legally treated equally with adults concerning their legal status.[11] Contrary to emancipation, progressive autonomy makes a child more and more legally closer to adult as she/he grows up narrowing the gap between childhood and adulthood until it finally dissapears when a child reaches the age of 18.

However, emancipation sometimes could be a questionable legal exit from the boundaries of childhood. Such situation may occur when the interests of an underage person to attain full active legal capacity before majority are in the shadow of the rights and interests of another party. Those are the cases when minors have become parents using their natural ability to bear the child. On such occasion the best interests of the newborn will be taken as a primary consideration and the underage parents' interests should be assessed through the lens of the rights of their child.[12] The fundamental problem that arises from giving birth to a child by the underage parents is the issue of their parental fitness or their capacity to perform parental responsibility. As biological parents willing to rear the child, the underage persons need to be legally recognised as the child's parents. However, since the adolescents still have the legal status of children, they are not legally competent to exercise parental responsibility. This is a temporary legal vacuum, but it has to be overcome in order to prevent possible bad outcomes for underage parent's children, as well as negative effects on the adolescent parents themselves.

Problem with fulfillment of parental obligations lies at the heart of family law analysis concerning legal position of the underage parents. However, this hardship came as a result of adolescent reproductive liberty and necessity of establishing legal parenthood after the birth of a child. That is why those issues should be addressed first.

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words, they are of opinion that reaching majority at the age of 18 means at the same time that this person is being emancipated. See R. Oliphant, N. Ver Steegh, *op. cit.*, 196.

[11] Exceptions exist particularly in the area of informed consent to certain medical treatments when capacity to reason or sufficient mental capacity must be determined individually in each and every case, regardless of the existence of full active legal capacity at the patient's side. For example, in most of the countries emancipated minor cannot be living organ donor in spite of his intention and desire to help. See V. Vlašković, *Pravni i etički aspekti doniranja organa sa živih i punoletnih lica nesposobnih za rasuđivanje,* Uslužno pravo (ur. M. Mićović), Zbornik radova sa IX majskog savetovanja, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2013, 723.

[12] See Art. 3 (1) of the CRC, as well as para. 6 (a) of the UN Committee on the Rights of the Child, General comment, No. 14 (2013) on the rights of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) (CRC/C/GC/14).

2. REPRODUCTIVE LIBERTY OF MINORS AND ACQUIRING LEGAL PARENTHOOD

2.1. Reproductive liberty of an underage person to bear a child

Early parenthood is usually looked upon as an unwelcome event which does not fit within prevailing social and legal policy.[13] Some social scientists argue that adolescent parenting has harmful effects on underage parents through lost opportunities for education or work, as well as harmful consequences on their children, through an increased risk of their development, health and unstable living environment.[14] However, natural ability to conceive and bear a child does not depend directly on intellectual capacity or psychological maturity of a person. It has been rooted in distinctive biological characteristics of each and every individual which can hardly be shaped by law. Thus, state resources and capacities to impose wanted social and legal model regarding biological parents are highly limited.[15] The right to conceive a child by natural means does not require state interference, like most of other reproductive rights do, such as treatment of infertility, medically assisted reproduction or termination of pregnancy. Therefore, the right to conceive a child naturally is a negative liberty right not to be stopped from doing what one could.[16] It is essentially a negative concept which prevents the state from interfering in people's reproductive choices.[17]

Constitution of Serbia embraced this idea stating that everyone has the right to decide freely on giving birth to a child.[18] The term „everyone" also includes adolescents with natural ability to bear a child which means that

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[13] See K. Scheiwe, *Between autonomy and dependency: minor's rights to decide on matters of sexuality, reproduction, marriage, and parenthood. Problems and the state of debate – an introduction,* International Journal of Law, Policy and the Family, No. 3, 2004, 267–268.

[14] See E. Buss, *The Parental Rights of Minors,* Buffalo Law Review, No. 3, 2000, 789.

[15] See V. Vlašković, *Najbolji interes deteta u kontekstu porodičnopravnog aspekta usluge surogacije,* XXI vek – vek usluga i Uslužnog prava (ur. M. Mićović), knj. 6, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2015, 253–254.

[16] D. Archard, *op. cit.*, 138.

[17] J. Herring, *Medical Law and Ethics,* Oxford University Press, Oxford, 2008, 317. Reproductive liberty is narrower idea than reproductive autonomy which places also positive obligations on the state to provide adequate medical assistance for those couples who cannot have children by natural means. *Ibid.*

[18] Art. 63 (1) of the Constitution of the Republic of Serbia (CSRB) (Ustav Republike Srbije), Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 98/2006.

state cannot interfere with their decisions to conceive and bear a child. Apparently, the right of an adolescent to conceive a child, as an expression of reproductive liberty, cannot be effectively limited since state cannot have control over someone's intimate sphere. However, early pregnancies could be influenced by preventive measures of sex education, social policy and in extreme cases criminal sanctions.[19] On the other hand, an important question may arise if a state should interfere with adolescent right to bear a child in some extreme cases. Such state interference would be highly intrusive and extremely paternalistic and it would concern the possibility to force an underage girl to undergo an abortion on the consent of her parents or with the authorisation of competent court or other state authority. The key dilemma that should be answered here is if the right of an adolescent to give birth to a child may be restricted by her right to life, survival and development, considering the age and capacity to reason of a minor. If the termination of pregnancy was life-saving treatment, then the choice of an adolescent girl to carry up pregnancy to the term could be perhaps overridden through the best interests of the child, determined by the right-based approach.[20] The reason for such drastic measure may be found in positive obligation of the state to protect the right to life of every human being including her right to survival and development.[21] However, there is not an easy answer here, because such practice would be against human dignity and it could violate many underage girls' human rights, such as: right to prohibition from torture, right to liberty and security, right to respect for private and family life, including also principle of non-discrimination.[22] The right to life has the highest rank among all human rights and it is

[19] Access to information about negative effects of the early pregnancies is of crucial importance. For example, in Germany each individual has a personal right to information and advice on sexuality, contraception and family planning regardless of her/his age. See K. Schiewe, *op. cit.*, 274.

[20] The right-based approach on assessment of the best interests of the child is advocated by the CRC/C/GC/14. Thus, the full application of the concept of the child's best interests requires the development of a righ-based approach, engaging all actors, to secure holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity. Para. 5. of the CRC/C/GC/14.

[21] See D. Hodgson, *The child's right to life, survival and development,* The International Journal of Children's Rights, No. 4, 1994, 380–383.

[22] See Art. 3, 5, 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ETS No. 005, Council of Europe, 4 November 1950. In that context see J. Fortin, *Children's Rights and the Developing Law,* Cambridge University Press, Cambridge, 2009, 159–160, 167.

precondition for enjoyment of all other human rights, but we may ask ourselves a question if it is legally possible to allow someone to give up her life or to jeopardize her own living so that another human being could come into existence. Off course, in such case threshold of adolescent competence and capacity to reason should be particularly high depending on her age and maturity.[23]

When a child is born, regardless of her/his parents' age, it is essential to determine who the child's legal parents are. Thus, parents could take the parental responsibility for the child from the moment of her/his birth.[24] Attribution of legal parenthood should include within it parental responsibility at the same time.[25] However, in case of underage parents,

[23] Under English law an adolescent patient needs a higher level of competence to refuse to undergo treatment than to consent it. In other words, the more dangerous the outcome, the higher is the competence required. See *Ibid.,* 153. Professor Fortin considers that the levels of legal competence should not be adjusted in such manner, and that it would be more honest to authorise the courts to override the minors' wishes, irrespective of their legal competence through the interest of society in protecting underage persons. See *Ibid.,* 155. Thus, in Serbian law the underage patients who has reached the age of 15 and with capacity to reason has the right to consent to medical treatment, but not the right to refuse it. Apparently, this is a paternalistic approach based upon interest theory of rights. However, such provision does not respect human dignity of a minor and it could be highly questionable in the context of adolescent reproductive rights and liberties, having in mind particularly the constitutional norm on the right to bear a child. We might say that Serbian legal solution insists upon transparency, while the English law offers flexibility. See Art. 19 (para. 4 – 5) of the Law on the rights of the patients (LRPSRB) (Zakon o pravima pacijenata), Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 45/2013.

[24] Some authors support the idea of procreational responsibility which involves procreational responsibility before and after conception of a child. The latter concept is based on the idea that those parents, who are responsible for the conception of the child, should be responsible for the child during her/his life. M. Vonk, *Children and their parents: a comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law,* Intersentia, Antwerpen – Oxford, 2007, 270.

[25] Distinction between the concepts of parenthood and parental responsibility is very significant in the context of underage parents. Parenthood is an on-going status in relation to the child, while parental responsibility is responsibility for raising a child. See A. Bainham, *Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions,* in: What is a Parent? A Socio – Legal Analysis (eds. A. Bainham, S. Day Sclater, M. Richards), Hart Publishing, Oxford – Portland, 1999, 29. For example, parental responsibility ends with the child's majority, whereas parenthood lasts until death of a parent or a child.

allocating parental responsibility faces difficult problems concerning their legal status as minors. Furthermore, well known disproportion between establishment of maternity and paternity plays also significant role.

2.2. Attribution of legal parenthood to the underage mother

As professor Meulders-Klein vividly puts forward, women are imprisoned in magic circle of maternity which is not easy to break.[26] Therefore, according to ancient *mater semper certa est* principle, mother is the woman who gave birth to the child. The same rule applies to underage mother, irrespective of her age.

Law on parentage is generally based upon principles of procreational responsibility, child's best interests and legal certainty.[27] Procreational responsibility rests upon premise that both biological and intentional parents are responsible for the child they procreate.[28] In most of the countries, woman demonstrates her intention to rear the child by giving birth to her/him.[29] Thus, there is a presumption that woman who gave birth to a child intends to be legal and sociological mother of a child.[30] In this case,

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[26] See M. Meulders-Klein, *The Position of Father in European Legislation,* International Journal of Law and the Family, No. 2, 1990, 135.

[27] See W. Schrama, *Family function over family form in the law on parentage? The legal position of children born in informal relationships,* Debates in Family Law around the Globe at the Dawn of the 21st Century (ed. K. Boele-Woelki), Intersentia, Antwerpen-Oxford-Portland, 2009, 129.

[28] M. Vonk, *op. cit.,* 270.

[29] Exceptions are the countries that support the idea of the right to anonymous birth, such as France where this practice has been existing at least since the French Revolution. See N. Lefaucheur, *The French 'tradition' of anonymous birth: the lines of argument,* International Journal of Law, Policy and the Family, No. 3, 2004, 319. Furthermore, some rare European states, such as Greece, allow and regulate practice of surrogacy. This is also an exception from presumption that woman who gave birth to a child intends to raise her/him. See K. Rokas, *National Reports on Surrogacy: Greece, in: International Surrogacy Arrangements: Legal Regulation at the International Level* (eds. K. Trimmings, P. Beuamont), Hart Publishing, Oxford-Portland, 2013, 144–145.

[30] The intention of a mother to rear the child follows from her decision not to use her right to abortion as a reproductive right. On legal nature of the right to abortion see: V. Vlašković, *Lekarska i farmaceutska usluga prekida trudnoće i načelo najboljeg interesa deteta*, XXI vek – vek usluga i Uslužnog prava (ur. M. Mićović), Zbornik referata sa VII majskog savetovanja, Pravni fakultet u Kragujevcu, Institut za pravne i društvene nauke Pravnog fakulteta u Kragujevcu, Kragujevac, 2011, 735–738. Women achieve autonomy by choosing not to be immersed in their biology, including not to become pregnant, not to

attribution of legal parenthood also includes parental responsibility or capacity to exercise parental obligations. However, this presumption refers to an adult mother with full active legal capacity. In case of legally incompetent or underage mother, the fact of giving birth to a child will generally not be enough for acquiring parental responsibility. On the one hand, principle of legal certainty, the right of the child to know for her/his parents and the interest of birth mother imposes the outcome where the woman who gave birth to a child will be considered as the child's legal parent.[31] Nevertheless, child's right to development expressed as a paternalistic element of the best interests of the child makes an obstacle for awarding parental responsibility to an adolescent parent. Such situation separates the concept of parenthood from the idea of parental responsibility, which will be further discussed later.

As it has been shown, even the teenage mother with mental disability will be recognised as the child's legal mother by operation of law. This is not the case with determination of paternity where the age and capacity to reason of an underage biological father could play important role. Thus, unlike underage mothers, adolescent biological fathers could face the problem not only about awarding parental responsibility, but also on the establishment of paternity itself.

2.3. Establishing legal parenthood in case of underage father

If the underage biological father is married at the time of child's birth, the paternity will be established automatically through the legal presumption. This is, by far, the best situation for the adolescent father, since making of marriage is followed by his emancipation which means that he will acquire parental responsibility simultaneously with the establishment of legal parenthood.[32] However, when unmarried (underage) mother gives birth to

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have children and not to become mothers. J. Marshall, *Giving birth but refusing motherhood: inauthentic choice or self-determining identity?,* International Journal of Law in Context, No. 2, 2008, 176.

[31] See Art. 7 (2) of the CRC.

[32] For example, emancipation may occur by reason of the underage person's marriage in Germany, The Netherlands, Belgium, Russia, Serbia, although some countries, such as Germany, do not allow emancipation when both of the partners are minors. See Art. 1303 (3) of the German Civil Code; Art. 1:253ha (1) of the Dutch Civil Code; Art. 476. of the Belgium Civil Code; Art. 13 (2) of Family Code of the Russian Federation; Art. 11 (2) of Family Law Act of Serbia (FLSRB) (Porodični zakon), Official Gazette of the Republic of Serbia (Sližbeni glasnik RS), No. 18/2005.

the child, determination of paternity could be difficult depending on mother's preference and teenage father's age and competence.

Unlike underage mothers, teenage biological father could face various obstacles in his intention to become child's legal parent depending on the circumstances of the case. Firstly, it should be stressed that national legislations heavily vary regarding their rules on parentage concerning the establishment of unmarried father's parenthood. Generally speaking, unmarried putative father could become legal parent of the child through voluntary acknowledgement, registration on the birth certificate or by the court's order.[33] The first two solutions rest upon mother's consent providing more desirable outcome from the aspect of the child's best interests. Situation is even more complex in case of underage putative fathers when it can eventually lead to legal impossibility to establish paternity voluntarily after the child's birth. Good example of it may be found in Serbian Family Law.

Thus, according to Family Law Act of Serbia, parenthood may be established by voluntary acknowledgement of the underage man who has reached the age of 16 having sufficient mental capacity.[34] The additional requirement is the consent of competent mother of the child.[35] Therefore, Serbian Family Law does not provide the possibility of establishment paternity through acknowledgement if the putative father is under the age of 16 or if he lacks sufficient mental capacity. Actually, there is a non-rebuttable legal presumption in Serbian law that putative father under the age of 16 does not have sufficient mental capacity to make the acknowledgment of paternity. This could lead to violation of the principle of non-discrimination simultaneously preventing the child to have both legal parents after her/his birth.[36] Therefore, Serbian lawmakers avoid enabling biological father under

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[33] In England unmarried father can be registered on the birth certificate with the mother's consent. See J. Herring, *op. cit.*, 311–312.

[34] Art. 46. of FLSRB.

[35] See: Art. 48 (1) of FLSRB.

[36] Legal parenthood of the teenage biological father under the age of 16 could eventually be established by the court's order on the request of his legal representative (competent parent or a guardian). Serbian Family Law is not quite clear on the possibility of judicial determination of paternity when putative father does not have sufficient mental capacity to make the acknowledgement. Thus, according to the FLSRB, the man who claims that he is the father of the child may initiate the proceedings for judicial determination of paternity within one year from the day when he found out that child's mother or guardian did not consent to his acknowledgement. Art. 251 (3) of FLSRB. Literally interpretation of this rule would imply that it is impossible to determine paternity by the court's order if a putative father does not possess sufficient mental capacity to make valid

the age of 16 the opportunity to become child's legal parent by voluntary acknowledgement, as the most practical way to establish paternity, which was unnecessary since he would not be able to acquire parental responsibility anyway. It is also the case when the underage putative father does not have sufficient mental capacity to make the acknowledgement of paternity. More adequate solutions can be found in Greek or Croatian Family Law where such problem may be overcome.[37]

Serbian family legislation treats acknowledgement of paternity as strictly personal statement. However, such concept apparently shows some drawbacks regarding the establishment of paternity in case of adolescent putative fathers. It is important to stress that attribution of legal parenthood to the underage parents does not mean that parental responsibility will be awarded to them at the same time. That is why it was not necessary to bind acknowledgment of paternity solely to the putative fathers' age and mental capacity.

3. OVERCOMING THE LEGAL STATUS OF MINORITY IN CASE OF UNDERAGE PARENTS

In most cases, when legal parenthood is attributed, the child's legal parents automatically acquire parental responsibility necessary for fulfillment of their parental obligations. However, underage parents lack full active legal capacity needed for exercise of parental duties. In other words, one cannot well meet certain obligations unless she/he has the right to perform those obligations at all.[38] Metaphorically speaking, adolescent parents receive the key to the door they are not allowed to open.

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acknowledgement since parentage proceedings may be initiated only after the unsuccessful attempt to establish paternity through acknowledgement. The exception would be the case when the proceedings are initiated upon request of the child since she/he is not bound by time limits.

[37] Under Greek law the acknowledgement of paternity is not strictly personal statement. Thus, if the father lacks active legal capacity, the acknowledgement can be effected by the grandfather or the grandmother on the father's side. I. Androulidakis-Dimitriadis, *Family Law in Greece,* Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2010, 92. According to the Family Law Act of Croatia, the underage person who has not reached the age of 16 may acknowledge paternity with the consent of his legal representative. See Art. 63. of the Croatian Family Law Act from 2015.

[38] See H. Willekens, *Rights and Duties of Underage Parents: A Comparative Approach,* International Journal of Law, Policy and the Family, No. 3, 2004, 356.

Such legal contradiction or anomaly cannot easily be eliminated, since full active legal capacity is precondition for exercise of many parental obligations deriving from parental responsibility, particularly those regarding child's property and representation in legal proceedings.[39] Right-based approach to this problem suggests that national lawmakers must find legal mechanisms to enable underage parents fulfilling parental obligations, or at least to provide some level of inclusion in decision-making process regarding their children.[40] The underlying principle which should be followed here is that the child should not be separated physically from her/his underage parents.[41]

Generally speaking, there are two ways or models of overcoming the absence of full active legal capacity at the side of underage parents. The first approach is based upon the idea of splitting or fragmenting parental responsibility in a way that underage parent is allowed to exercise parental responsibility only with respect to the personal care of the child.[42] Therefore, the adolescent parent retains personal rights to rear and raise the child keeping the child with them in the same household.[43] Such approach is adopted, for example, by German, Russian and Croatian legislators.[44] Under this model, exercise of parental responsibility is suspended with regard to the parental obligations that underage parents cannot fulfill because the absence of active legal capacity. Suspension lasts until underage parents come to full age or conclude marriage.[45] While the suspension of parental responsibility lasts, underage parent cannot act as legal representative of the child, nor can she/he administer child's property. However, underage parent has the right

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[39] *Ibid.*

[40] The child has the right to be cared for by her/his parents which purpose is to ensure the psychological stability of the child. See S. Detrick, '*Family Rights Under the United Nations Convention on the Rights of the Child*', Families Across Frontiers (eds. N. Lowe, G. Douglas), Kluwer Academic Publishers, The Netherlands, 1996, 99. Furthermore, depriving the underage parents of the opportunity to exercise parental responsibility would probably violate their right to private and family life from the ECHR. See H. Willekens, *op. cit.*, 358.

[41] See H. Willekens, *op. cit.*, 358.

[42] *Ibid.*, 363.

[43] *Ibid.*

[44] See Art. 1673 of the German Civil Code; Art. 62 (2-3) of the Family Code of the Russian Federation; Art. 114 of the Family Law Act of the Republic of Croatia.

[45] Under Russian law, underage parents have only strictly personal rights to live with the child and to take part in her/his upbringing up to the age of 16. From that moment they acquire the right to exercise parental responsibility on their own. See Art. 62 (1-2) of the Russian Family Code.

to decide together with the other adult parent, or together with other underage parent and/or child's guardian, on the issues that significantly affect the child.[46] In case of their disagreement, the court will make the order who will act as the child legal representative concerning decisions that highly affects the child's life.[47]

Apparently, such approach offers flexible legal framework which includes protection of underage parents' rights, as well as respect for the best interests of the child. It is an attempt to reconcile the interests of underage parents to take responsibility for the child with the child's right to development. Essentially, the model of splitting parental responsibility offers nuanced and balanced approach allowing the underage parents to exercise parental responsibility in the personal sphere and providing them support or assistance in the domain of property relations. At this point, it is interesting to make comparison between the model of fragmenting underage parents' parental responsibility and the principle of supported decision-making applied to the rights of persons with disabilities. Thus, Convention on the Rights of Persons with disabilities introduced the right to active legal capacity trying to make a paradigm shift in disability policy from the withdrawal of active legal capacity to the right to support for exercising it.[48] The CRPD approach to active legal capacity is therefore inherently different from the guardianship practice where persons with disabilities instead of being empowered to formulate their choices, are deprived of active legal capacity and given a guardian to take decisions on their behalf.[49] Off course, underage parents cannot be considered as persons with disabilities, since their incapacity is generally of temporary nature concerning primarily their psychological immaturity. However, if the persons with mental disabilities should be helped to make their choices, then absence of full active legal capacity could hardly be taken as an argument to deny underage parents exercise of parental responsibility. Although, in that case the principle of

[46] See, for example, Art. 1628 of the German Civil Code or Art. 114 (2, 4) of the Family Law Act of Croatia.

[47] See Art. 1628. of the German Civil Code or Art. 114 (2) of the Family Law Act of Croatia.

[48] See Art. 12 (2-3) of the Convention on the Rights of Persons with Disabilities (CRPD), United Nations, A/RES/61/106. The CRPD was adopted by the UN General Assembly on 24 January 2007. See also A. Nillson *(The Issue Paper published by the Council of Europe, the Office of the Commissioner for Human Rights), Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities,* https://www.coe.int/t/commissioner/source/prems/IP_LegalCapacity_GBR.pdf, accessed 17 August 2016, 17.

[49] *Ibid.*, 22. See also Z. Ponjavić, *Porodično pravo*, JP Službeni glasnik, Beograd, 2014, 347–348.

supported decision-making must be adjusted to the best interests of the underage parents' child. It is apparently done under the model of splitting parental responsibility since the state interference is channeled through the power of the court or other state authority to decide who will be legal representative of the child when differences arise between the underage parents and child's guardian regarding the issues of substantial importance for the child.

Unlike this approach, the second model includes clear-cut solution which keeps full active legal capacity and parental responsibility together.[50] In other words, active legal capacity is considered as necessary precondition for exercise of parental responsibility. Thus, establishment of parenthood should serve as the ground for emancipation of minors enabling them to acquire full active legal capacity before majority. Such approach to problem where parental responsibility of the underage parents is bound to their full active legal capacity has, for example, the Netherlands and Serbia.[51] Comparing to the Dutch legislation, Serbian law has better solution since it enables both of the underage parents to be emancipated if their parental responsibility have been established.[52] Thus, according to Serbian Family Law Act, the court may enable acquiring full active legal capacity to underage person who reached the age of 16 and became parent developing physical and psychological maturity necessary for taking care of herself/himself and her/his own rights and interests.[53] It is a non-contentious proceedings that may be instituted only by the petition of the underage legal parent or underage legal parents if both of them are minors.[54] The competent court will hear their parents or guardians in the proceedings, but they need not to agree with the intention of the teenage legal parents to be emancipated.[55]

The clear-cut approach to the problem of adolescent parental responsibility has some advantages, as well as disadvantages. First of all, tying the parental responsibility to active legal capacity of the underage

[50] See H. Willekens, *op. cit.*, 365.

[51] See ibid.; Art. 11 (3) of the FLSRB.

[52] Dutch law allows only emancipation of the underage mother of the child on the ground that she became child's legal parent. See H. Willekens, *op. cit.*, 366.

[53] Art. 11 (3) of the FLSRB.

[54] See Art. 360 of the FLSRB in connection with the Art. 80 (1) of the Law on Non-contentious procedure of the Republic of Serbia (LNPSRB), Official Gazette of the Republic of Serbia, No. 25/82, 48/88, 46/95, 18/2005, 85/2012, 45/2013, 55/2014, 6/2015 and 106/2015.

[55] See O. Cvejić Jančić, *Porodično pravo,* Pravni fakultet Univerziteta u Novom Sadu, Novi Sad, 2009, 93.

parent corresponds to the principle of legal certainty. Unlike the model of splitting parental responsibility, under this approach there is no need of making distinction between personal care of the child and other aspects of parental responsibility.[56] The clear-cut approach rejects the possibility of intermediate or transitional status of underage parents regarding their ability to fulfill parental obligations. In other words, they can perform it all, or they can do nothing depending on the court's decision in emancipation proceedings. However, underage parents will not be able to take parental responsibility for the child until they obtain adequate decision of the court concerning their emancipation. Therefore, it is necessary to appoint the guardian of their child in accordance with the rule that such form of protection is necessary when natural parents cannot fulfill their parental obligations. The Serbian Family Law Act explicitly enumerates cases when it will be considered that the child is "without parental custody" involving the situation of giving birth to the child by the underage parents.[57] That is why the Serbian legislator should have enabled guardianship authority to initiate the emancipation proceedings, like the Dutch family legislation does.[58] Otherwise there could be significant gap between establishment of legal parenthood and acquiring parental responsibility.

Furthermore, the court's deciding on emancipation of minors involves the assessment of their psychological maturity. In the context of underage legal parents who want to take parental responsibility, such proceedings may be understood as so-called licensing of parents.[59] Explained in simple words, the matter is about power of certain state authority to decide if someone is fit to be a parent. Such practice is not unknown in family law since competent state authorities assess parental fitness of the persons who apply for adoption of the child.[60] However, adoptive family is a subsidiary family form which is

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[56] H. Willekens, *op. cit.*, 368.

[57] See Art. 113 (3) of the FLSRB.

[58] See H. Willekens, *op. cit.*, 366. This drawback is a consequence of analogous applying of the rules concerning emancipation of minors based on marriage to the emancipation of the underage persons who have become parents. Serbian legislators were aware that latter proceedings has its own characteristics, so they predicted that special, separate and distinctive proceedings of the emancipation of the underage parents should be regulated by the rules of Law on non-contentious procedures, which has not happened yet. See Art. 360 of the FLSRB.

[59] Licensing presupposes that the mere fact of procreation is not enough to demonstrate fitness to parent. Therefore, individuals must show that they can rear their own children. D. Archard, *op. cit.*, 185.

[60] *Ibid.*

founded in cases where natural parents cannot perform their parental obligations from legal or factual reasons. Therefore, the child eligible for adoption is generally in more vulnerable state than the children who have natural parents willing to rear them. In that context, the state has positive obligation to interfere with family relations trying to provide the best possible family environment for the child. Furthermore, licensing of the underage parents could violate the principle of non-discrimination since there is a legal presumption that the adult biological parents are eligible to rear the child.

We may come to conclusion that the approach of splitting parental responsibility has more advantages than the clear-cut model of teenage parents' emancipation providing the better legal framework for the child of the underage parents. Solutions on fragmenting parental responsibility are not unknown to Serbian legislation. Good example of such practice is situation when the child under parental responsibility is placed to foster care. On that occasion, the obligations of foster carer are very similar to the obligations that belong to underage parents in the system of splitting parental responsibility.[61] However, there is an interesting difference in terms used by Serbian lawmakers which is not just semantical. Thus, under Serbian Family Law Act the child will be placed to foster care only if it is in the best interests of the child.[62] Thus, the principle of the child's best interests is at the epicenter of foster care service. On the other hand, according to Serbian law, the court's decision on emancipation of the underage parent will be based on assessment of the adolescent physical and psychological maturity, while the principle of the child's best interests is not mentioned.[63]

There were some hints that Serbian Family Law could turn to the model of splitting parental responsibility regarding the attempts to overcome the problem of underage parents' legal status. However, the Working Text of the Serbian Civil Code with Alternative Suggestions Prepared for Public Discussion offers rather unclear and controversial ideas concerning this

[61] In that context see V. Vlašković, *Usluga hraniteljstva u kontekstu principa najboljeg interesa deteta,* Uslužni poslovi (ur. M. Mićović), Zbornik radova sa X majskog savetovanja, Pravni fakultet u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2014, 734; V. Vlašković, *Usluga hraniteljstva i pravni položaj roditelja deteta,* Pravo i usluge (ur. M. Mićović), Zbornik radova sa VIII majskog savetovanja, Pravni fakultet u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2012, 723.

[62] See Art. 111 of the FLSRB.

[63] See Art. 11 (3) of the FLSRB. See fn. 58.

issue.[64] Thus, the draftmakers have left out the child born from the underage parents from the list of children without parental custody which may lead us to conclusion that adolescent parents would acquire their parental responsibility simultaneously with the establishment of legal parenthood.[65] Apparently, draftmakers did not have such solution in mind since the Working Text, in its General Part, preserves the old approach of acquiring parental responsibility through emancipation of underage parents.[66] Thus, two different parts of the Working Text are in contradiction which makes confusion. Furthermore, one of the alternatives suggests that the child of the underage parents should not be placed to foster care without her/his parents' consent.[67] Therefore, the draftmakers included the elements of model of splitting parental responsibility in their approach causing their suggestions to look even more unclear. Apparently, the choice should be made between two distinctive models for overcoming the problem of underage parents' inability to exercise parental responsibility, although the approach of fragmenting parental responsibility corresponds more to the best interests of the underage parent's child.

4. THE BEST INTERESTS OF THE UNDERAGE PARENTS' CHILD

The best interests of the teenage parents' child should be given a primary consideration embodied in the rules on the underage parents' parental responsibility. However, legislations must also create the space for respecting the adolescent parents' right and interests. Both of these values could be incorporated in legal system through the principle of the best interests of the underage parents' child.

The principle of the child's best interests is determined by various elements concerning individual circumstances, the factors regarding family environment, as well as broader social surroundings that the child belongs

[64] Serbian goverment made the decision on the apointment of the special comission for Civil Law codification and making the Civil Code in 2006. See Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 104/06, 110/06 and 85/09. After two texts of Preliminary Drafts of the Serbian Civil Code, the comission has published the Working text of the Serbian Civil Code with Alternative Suggestions in 2015 (the Working Text)

[65] Compare Art. 113 (3) with Art. 2352 (3) of the Working Text.

[66] See Art. 29 (4) of the Working Text.

[67] See Alternative to Art. 2353 (3) of the Working Text.

to.[68] The UN Committee on the Rights of the Child suggests that children's rights should be used as elements for determination of the best interests of the child.[69] On the other hand, the approach based upon the ECHR and the European Court of Human Rights practice in the context of the right to family life, offers more nuanced approach where the fair balance should be struck between the welfare of the child and the rights and interests of her/his underage parents.[70] However, interference with the underage parent's right to family life may be justified by the necessity to protect the child's best interests and distinctive rights of the child.[71]

When it comes to the problem of underage parents' competence to exercise parental responsibility, their interests will in most cases correspond to the rights of their child. Therefore, the child has the right to be cared for by her/his natural parents willing to rear the child, regardless of their age.[72] Simultaneously, the intention of the adolescent parents to rear their child may increase the level of their psychological maturity encouraging their decision-making capacity.[73] Teenage parenthood may have adverse effects on education and economic status of the underage parents, but their intention to take responsibility for the child should be given preference.

The child cannot be separated from her/his parents, unless such separation is in the best interests of the child.[74] However, legal status of adolescent parents can hardly serve as the ground for separation of the child from their natural intentional parents in the light of the child's best interests. Thus, Serbian Family Law Act prescribes that the court may decide to separate the child from her/his parents if there are reasons for fully or partially deprivation of parental responsibility or in the case of domestic violence.[75] Apparently, parents need to be liable for the acts of intentional harm or gross negligence that infringe the child's right to life, survival and

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[68] See V. Vlašković, *Problem određivanja sadržine najboljeg interesa deteta,* Anali Pravnog fakulteta u Beogradu, Beograd, 1/2012, 355–356.

[69] See Para. 51 of CRC/C/GC/14.

[70] In that context see K. O'Donnell, *Parent-Child Relationships within European Convention,* Families Across Frontiers (eds. N. Lowe, G. Douglas), Kluwer Academic Publishers, the Netherlands, 1996, 136.

[71] On balancing children's rights and adults' rights in the context of the right to family life from the ECHR, see S. Choudhry, J. Herring, *European Human Rights and Family Law*, Hart Publishing, Oxford – Portland, 2010, 232–235.

[72] See Art. 7 of the CRC.

[73] See V. Vodinelić, *op. cit.,* 374 – 375.

[74] See Art. 9 (1) of the CRC and Art. 60 (2) of FLSRB.

[75] Art. 60 (3) of FLSRB.

development in order to be separated from their children.[76] If parents lack maturity or capacity to rear the child, they need to be assisted and not to be separated from their child. When parents cannot be held liable for the omissions committed during the exercise of parental responsibility, they should be separated from their children only after all other possibilities are exhausted.[77]

Immaturity and lack of life experience of the underage parents could be particularly problematic in the domain of legal representation of the child and within property relations involving administering child's property. That is the point where the interests of the adolescent parents could depart from the best interests of the child. For example, emancipated underage parent is not under supervision of the state authorities regarding administering the child's property. The acts of administering property could be too complex for the adolescent lacking psychological maturity and experience. Therefore, the child's best interests demands protection of the child's interests from the potentially reckless parental acts. This problem could be solved using the approach of splitting parental responsibility. Under the model of fragmenting parental responsibility the underage parents will be provided with assistance by the child's guardian allowing them to express their own views at the same time. Such solution would be the closest to the ideal of achieving fair balance between the interests of the underage parents and the principle of child's best interests.

REFERENCES

Androulidakis-Dimitriadis, I., *Family Law in Greece,* Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2010.

Archard, D., *Children: Rights and Childhood,* Routledge, London – New York, 2004;

Bainham, A., *Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions,* What is a Parent? A Socio – Legal Analysis (eds. A. Bainham, S. Day Sclater, M. Richards), Hart Publishing, Oxford – Portland, 1999.

[76] For example, the acts of domestic violence in Serbian law involve only intentional harm caused by the perpetrator. See V. Vlašković, *Pravo na zaštitu od nasilja u porodici kao subjektivno građansko pravo,* Anali Pravnog fakulteta u Beogradu, 1/2009, 252–253.

[77] Thus, according to the Federal Constitutional Court of Germany, the separation of a young child from her/his parents on the grounds that they do not guarantee the child's socialisation within a changing system of standards as well as educational and professional demands is incompatible with Basic Law. BVerfGE 60, 79 of 17 February 1982–1 BvR 188/80. Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany, Vol. 5, Family-Related Decisions, Nomos, Karlsruhe, 2013, 201.

Buss, E., *The Parental Rights of Minors,* Buffalo Law Review, No. 3, 2000.

Choudhry, S., Herring, J., *European Human Rights and Family Law,* Hart Publishing, Oxford – Portland, 2010.

Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany, Vol. 5, Family-Related Decisions, Nomos, Karlsruhe, 2013.

Detrick, S., *A Commentary on the United Nation Convention on the Rights of the Child,* Martinus Nijhoff Publishers, The Hague – Boston – London, 1999.

Detrick, S.,'*Family Rights Under the United Nations Convention on the Rights of the Child*', Families Across Frontiers (eds. N. Lowe, G. Douglas), Kluwer Academic Publishers, The Netherlands, 1996.

Ferrer – Riba, J., *Parental responsibility in a European Perspective,* European Family Law III: Family Law in a European Perspective (ed. J. M. Scherpe), Edward Elgar Publishing, Cheltenham – Northampton, 2016.

Fortin, J., *Children's Rights and the Developing Law,* Cambridge University Press, Cambridge, 2009.

Herring, J., *Medical Law and Ethics,* Oxford University Press, Oxford, 2008.

Hodgson, D., *The child's right to life, survival and development,* The International Journal of Children's Rights, No. 4, 1994.

Lefaucheur, N., *The French 'tradition' of anonymous birth: the lines of argument,* International Journal of Law, Policy and the Family, No. 3, 2004.

Marshall, J., *Giving birth but refusing motherhood: inauthentic choice or self-determining identity?,* International Journal of Law in Context, No. 2, 2008.

Martins, R., *Parental responsibilities versus the progressive autonomy of the child and the adolescent,* Perspectives for the Unification and Harmonisation of Family Law in Europe (ed. K. Boele-Woelki), Intersentia, Antwerpen – Oxford – New York, 2003.

Meulders-Klein, M., *The Position of Father in European Legislation,* International Journal of Law and the Family, No. 2, 1990.

O'Donnell, K., *Parent-Child Relationships within European Convention,* Families Across Frontiers (eds. N. Lowe, G. Douglas), Kluwer Academic Publishers, the Netherlands, 1996.

Oliphant, R., N. Ver Steegh, *Family Law,* Aspen Publishers, New York, 2007.

Rokas, K., *National Reports on Surrogacy: Greece,* International Surrogacy Arrangements: Legal Regulation at the International Level (eds. K. Trimmings, P. Beuamont), Hart Publishing, Oxford-Portland, 2013.

Scheiwe, K., *Between autonomy and dependency: minor's rights to decide on matters of sexuality, reproduction, marriage, and parenthood. Problems and the state of debate – an introduction,* International Journal of Law, Policy and the Family, No. 3, 2004.

Schrama, W., *Family function over family form in the law on parentage? The legal position of children born in informal relationships,* Debates in Family Law around the Globe at the Dawn of the 21st Century (ed. K. Boele-Woelki), Intersentia, Antwerpen-Oxford-Portland, 2009.

Vodinelić, V., *Građansko pravo: Uvod u građansko pravo i opšti deo građanskog prava*, Pravni fakultet Univerziteta Union u Beogradu – JP Službeni glasnik, Beograd, 2014.

Vonk, M., *Children and their parents: a comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law*, Intersentia, Antwerpen – Oxford, 2007.

Willekens, H., *Rights and Duties of Underage Parents: A Comparative Approach,* International Journal of Law, Policy and the Family, No. 3, 2004.

Vladetić, C., *Prijateljske usluge u rimskom porodičnom pravu,* XXI vek – vek usluga i Uslužnog prava (ur. M. Mićović), Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2014.

Vlašković, B., *Lekarska i farmaceutska usluga prekida trudnoće i načelo najboljeg interesa deteta,* XXI vek – vek usluga i Uslužnog prava, Zbornik referata sa VII majskog savetovanja (ur. M. Mićović), Pravni fakultet u Kragujevcu, Institut za pravne i društvene nauke Pravnog fakulteta u Kragujevcu, Kragujevac, 2011.

Vlašković, B., *Najbolji interes deteta u kontekstu porodičnopravnog aspekta usluge surogacije,* XXI vek – vek usluga i Uslužnog prava (ur. M. Mićović), knj. 6, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2015.

Vlašković, B., *Pravni i etički aspekti doniranja organa sa živih i punoletnih lica nesposobnih za rasuđivanje,* Uslužno pravo, Zbornik radova sa IX majskog savetovanja (ur. M. Mićović), Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2013.

Vlašković, B., *Pravo na zaštitu od nasilja u porodici kao subjektivno građansko pravo,* Anali Pravnog fakulteta u Beogradu, 1/2009.

Vlašković, B., *Problem određivanja sadržine najboljeg interesa deteta*", Anali Pravnog fakulteta u Beogradu, Beograd, 1/2012.

Vlašković, B., *Usluga hraniteljstva i pravni položaj roditelja deteta,* Pravo i usluge, Zbornik radova sa VIII majskog savetovanja (ur. M. Mićović), Pravni fakultet u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2012.

Vlašković, B., *Usluga hraniteljstva u kontekstu principa najboljeg interesa deteta,* Uslužni poslovi, Zbornik radova sa X majskog savetovanja (ur. M. Mićović), Pravni fakultet u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac, 2014.

Ponjavić, Z., *Porodično pravo,* JP Službeni glasnik, Beograd, 2014.

Cvejić Jančić, O., *Porodično pravo,* Pravni fakultet Univerziteta u Novom Sadu, Novi Sad, 2009.