

Decision-making and enforcement of children's rights to contact in Croatia – law and research

Branka Rešetar¹

1. Introduction

The child's right to contact with the non-resident parent and *vice versa* is an integral part every contemporary law system and also in Croatia.

International legal instruments which regulate child's right to contact and which are applied in the Republic of Croatia are: the United Nations Convention on the Rights of the Child 1989 (UN Convention), the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR), the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention).

Besides the above mentioned instruments, the Family Law Act 2003 contains provisions on contacts concerning children. It includes substantial law and process law. The latter is divided into decision making and process of enforcement.

In a few years Croatia will be a full member of the EU. Decisions of courts in Croatia concerning parental responsibility and children's right to contact will be recognized and enforced in EU member states and *vice versa*, pursuant to Council Regulation (EC) No 2201/2003 of 27 November 2003. Besides, Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction has been applied in Croatia.

Therefore, the aim of this paper is to introduce the role of legislation as well as the role of courts in decision making and enforcement of children's right to contact in Croatia.

The first part gives an overview of legal aspects of contacts concerning children according to the Family Law Act 2003, whereas in the second part decisions of the Municipal Court in Zagreb of 2003 are analysed. Enforcement of orders for the same period of time are analysed as well.

The key question of the final part is: in what way can the law facilitate maintaining and improvement of contacts between children and parents?

The subject of this paper refers to contacts between children and parents only. Contacts including domestic violence are not considered in this paper.

2. Children's rights to contact in the Family Law Act 2003

The Family Law Act 2003 contains substantial provisions and also process provisions which are applied in both decision making and enforcement processes concerning child's right to contact.

2.1. Child's right to contact

Contacts concerning children are defined as personal relationships between a child and a parent who doesn't live with him with the aim to compensate not living together. Contacts include planned visits, spending time together on particular days, weeks or over a longer period of time (Hrabar, 2004).

Decision on contacts is made if a child doesn't live with a parent; in most cases it happens after divorces or termination of a long term relationship between child's parents. Contacts concerning children are regulated by the Family Law Act 2003; according to Art. 87 a child has a right to contact with a parent if they live separately.²

¹ Branka Rešetar LL.M., teaching assistant, Faculty of Law Osijek, S. Radića 13, CROATIA (bresetar@pravos.hr)

Family Law Act regulates contacts in terms that they can be *restricted or prohibited* as follows:

1. Restriction referring to time,
2. Restriction referring to location where contacts take place or
3. Supervision by the authorized person.³

Supervision of contacts means appointing a person who will be present during parent's contact with a child. The court orders a social welfare office to appoint the supervisor. He has to meet the requirements for the foster; he mustn't be related by blood or affinity (siblings, step-brother or step-sister). If the contacts have negative effects on a child then a parent can be deprived of them (Hrabar, 2003).

2.2. Procedural issues – decision making

Until January 1, 2006 decision making as well as enforcement of orders in Croatia were under jurisdiction of both municipal courts and social welfare centres. Since January 1, 2006 family law courts have had sole jurisdiction over those issues.

Family law courts in Croatia were established on January 1, 2006 and since then they have been dealing with all issues concerning parental responsibility. The judges are available 24 hours a day in order to act in urgent cases (Hrabar, 2003).

All proceedings at family law courts are based on the following guiding principles under the Family Law Act 2003. Once in court, when processing contacts concerning children these principles are applied:

- *The Principle of No Delay* is applied in both decision making and enforcement of order. Namely, the principle of no delay is a general principle according to which the court is obliged to begin with the proceedings within 15 days since the proceedings have been initiated. In the period of 30 days the second instance decision has to be made.⁴ In most cases the appeal is not suspense.

- *The Principle of Obligatory Mediation*. This principle refers to divorce process only. Spouses are obliged to take part in the mediation process. Since January 1, 2006, as a part of an obligatory mediation process before divorce, mediators (trained psychologist and a social worker) have been obliged to inform spouses about all psycho-social consequences of a divorce which affect children⁵ (Hrabar, 2004). When it comes to children, the mediator has to submit his report to the social welfare centre, which undertakes necessary measures, if needed. However, in most case, the centre itself acts as a mediator.⁶

- *The child's right to be informed, consulted and to express his or her opinion*. This principle is part of both substantial and process provisions⁷. It is applied having regard to the child's age and maturity.

- *The obligatory role of social welfare centres*. Social welfare centres have to participate in all proceedings concerning children. They are authorised and obliged to cater for child's welfare.⁸ The centres are also of assistance to the judge through their expert opinion and reports on all issues concerning children.

- *Supporting parents' agreement*. The mediator and the court encourage the parents to agree upon issues concerning children. Their agreement becomes a court decision if it is in child's best interest.⁹

2.3. Enforcement of contact orders

² Child's right to contact with grandparents and siblings are regulated under Article 107 Family Law Act 2003.

³ Article 100 Family Law Act 2003

⁴ Articles 263 and 265 Family Law Act 2003

⁵ Article 48 Family Law Act 2003

⁶ Article 50 Family Law Act 2003

⁷ Articles 89 and 269 Family Law Act 2003

⁸ Article 275 Family Law Act 2003

⁹ Article 298 Family Law Act 2003

All the above principles are applied in the enforcement process. The Family Law Act 2003 regulates the enforcement process as well.

The provisions on enforcement residence orders are applied in enforcement of contact orders. The enforcement is performed to enable occasional and temporary maintenance of contacts between child and non-resident parent (Dika, 2003).

The enforcement proceedings can be initiated by the court *ex offio*, social welfare centres, the non-resident parent but also the child if he/she is mature enough (Dika, 2003).¹⁰

The resident parent is forced to enable contacts between the child and the non-resident parent by the threat of fine or imprisonment. However, the enforcement order refers to any person with whom the child is at the moment of enforcement.¹¹ The appropriate action has to be taken without delay. There are following ways of enforcement: fine or imprisonment for the person (in most cases the resident parent) who refuses to deliver the child, or prevent contacts (e.g. by hiding the child).¹²

3. Research of decision - making and enforcement of contact decisions - the Municipal Court in Zagreb

Before January 1, 2006, when family courts were established, decisions on contacts in the process of divorce or in procedures for determining paternity had been made by municipal courts *ex offio*. Under the Family Law Act 1998 there was a parallel jurisdiction over contacts of both courts and social welfare centres. Simultaneously they had jurisdiction over the enforcement process. Thus, the process of enforcement was on courts and welfare centres depending on the decision maker. Since January 1, 2006 family law courts have had a sole jurisdiction over all processes regarding issues of child's rights. The roles of the welfare centres are, among others, to be of assistance to courts, to determine the child's will and to give expertise.

In the following there is a presentation of the research results. The research dealt with decision making and enforcement of contact orders. The court decisions made in 2003 by the Municipal Court in Zagreb as well as the processes of enforcement of contact orders were analysed.

3.1. Decision making

At the Municipal Court in Zagreb¹³, according to the data in the court register of 2003 there were 589 divorce decisions made. These decisions refer to marriages with minor children. Generally, each decision also included decisions on child's residence, contacts between the child and the non-resident parent, and on maintenance. Such "package" of decisions has been made *ex offio* after the divorce process has been initiated.

Out of the above mentioned 589 decisions, 113¹⁴ were analysed in the research. In all decisions, the parents had residence in Croatia. Three of them do not give data on the age of children. Some decisions refer to more than one child (siblings) in a way that one decision regulates contact between the non-resident parent and more than one child.

The analysed decisions regulate contacts between, altogether, 146 children and their non-resident parent.

¹⁰ Article 269 Family Law Act 2003

¹¹ Article 342 Family Law Act 2003

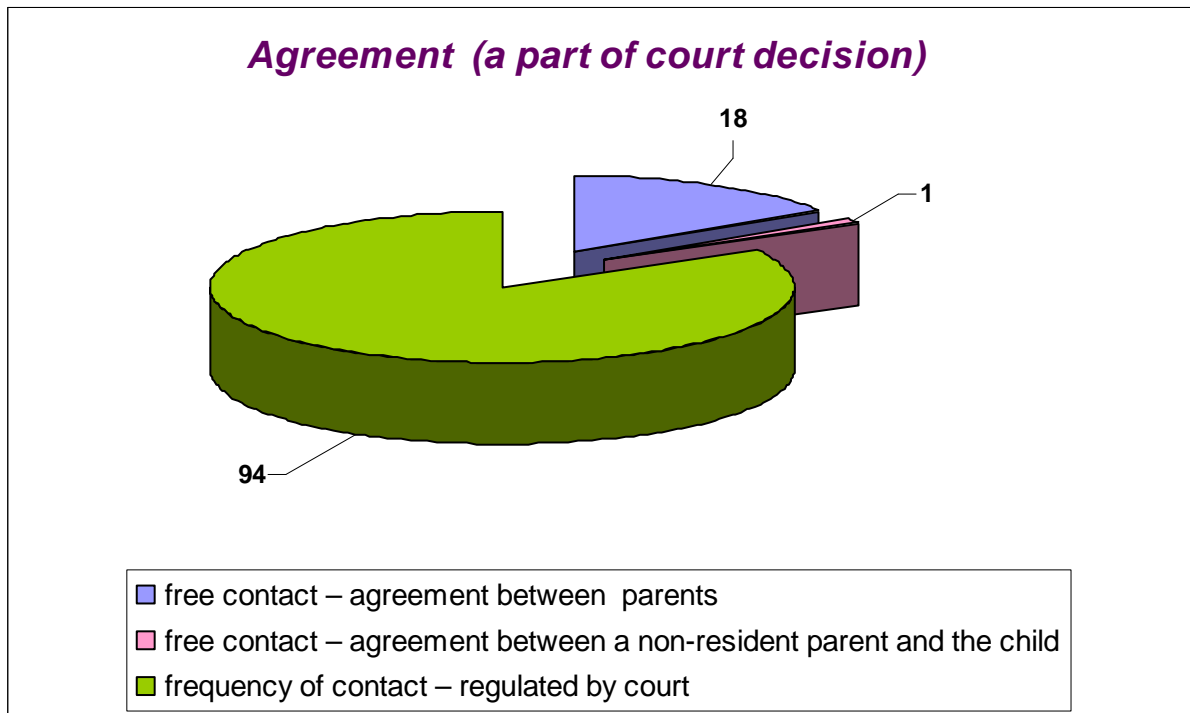
¹² Article 345 Family Law Act 2003

¹³ Zagreb is the capital of Croatia and there are 568.550 inhabitants in the area of its jurisdiction

¹⁴ In 104 cases the children stayed with the mother, in 7 cases the court decided that the children should live with the father, in 2 cases siblings were separated – one child to live with the mother and the other with the father.

All decisions with international element, and there are only 10 of them made in 2003 by the Municipal Court in Zagreb, are analysed separately.

A Agreement (a part of court decision)

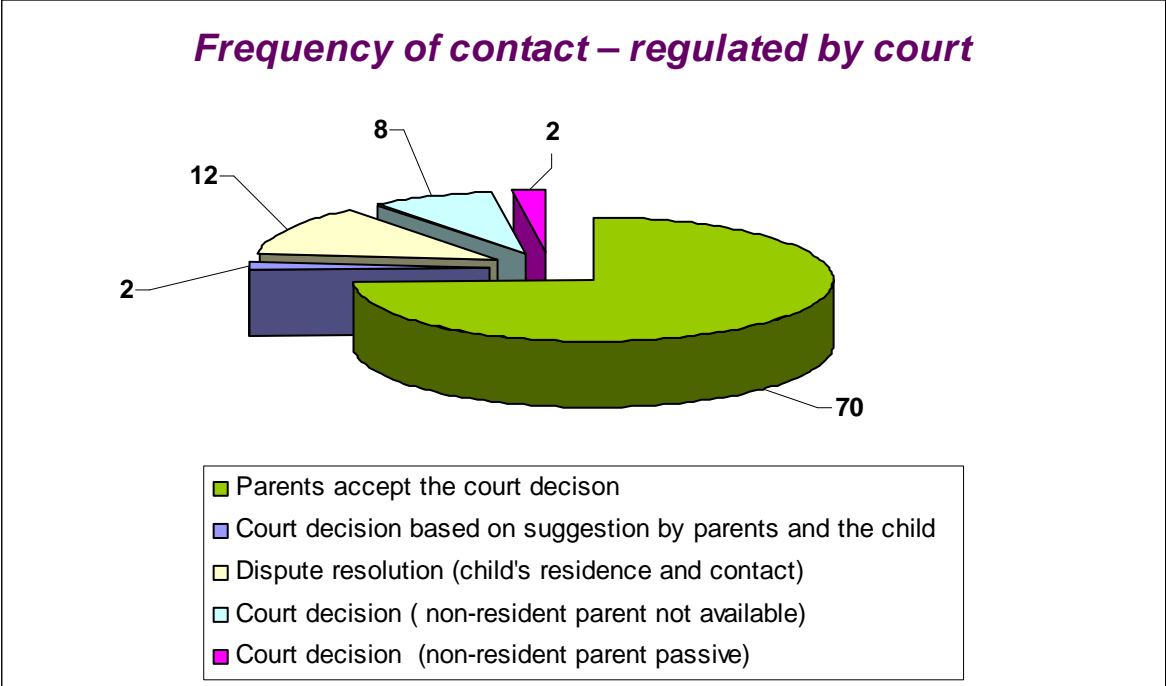


Out of 113 decisions, which had been analysed, 18 of them left the contact between a non-resident parent and a child free depending on the parent's *ad hoc* agreement. In 7 cases children were 1 - 7 years old, in 4 cases children were 7-13 years old and in 7 cases children were 14-18 years old.

According only one decision contact between a non-resident parent and seventeen years old child going to occur free, based on their *ad hoc* agreement.

The rest of 94 decisions included arrangement of contacts clearly regulated by the court. This group of decisions will be analysed in the next graph.

B Frequency of contact – regulated by court (94 decisions)



Out of 94 court decisions, 70 decisions were made without parents' opposition. On one hand it could not be accepted that there was an agreement between parents concerning all of these decisions. One of the reasons is that all these contact arrangements were more or less of the same kind – contact arrangements were alike. On the other hand, it does not mean that in all 94 cases parents were parts of "legal battle", just that they left to the court to make decisions on their contact arrangement. That could happen because of various reasons e.g. indifference, wish that divorce proceedings finish as fast as possible or perception of a contact decision as a formality.

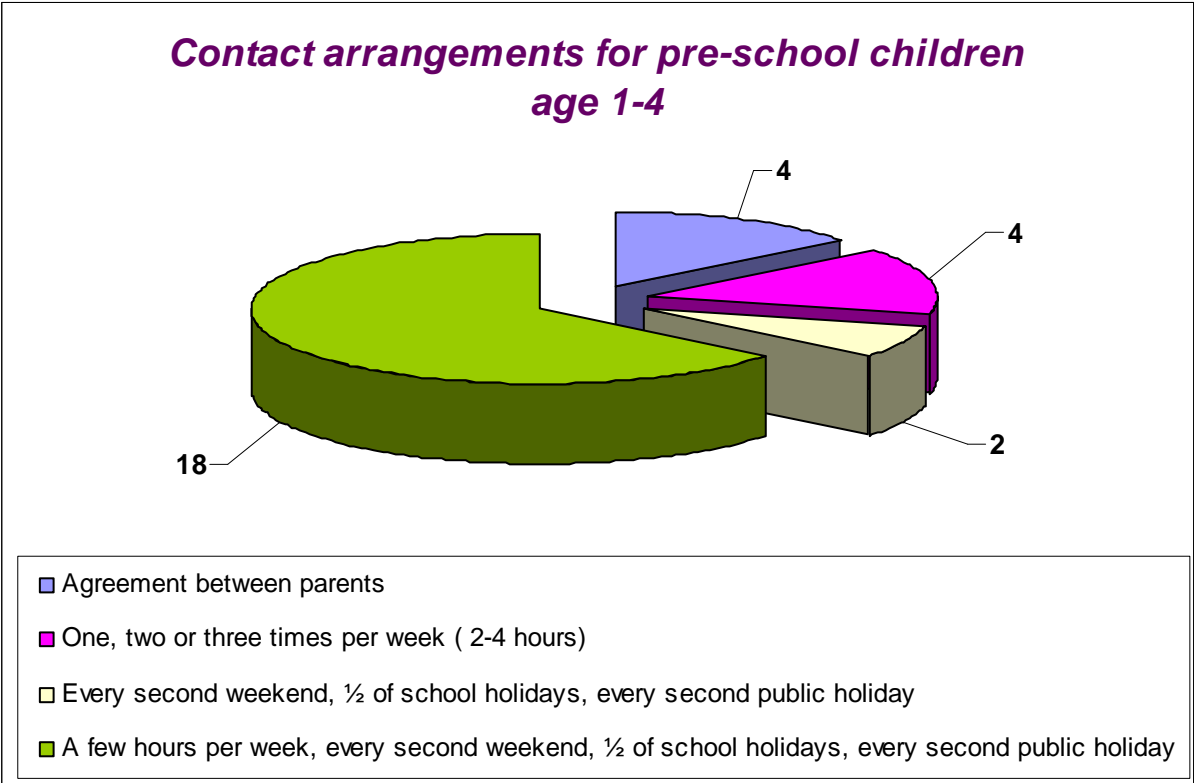
Only 2 decisions stated that contact arrangements were made based on suggestions by parents and the child. These contacts are strictly regulated

In 12 cases court decisions resolved disputes. Disputes were about child's residence and thereby about contacts between a child and its non-resident parent. These proceedings lasted longer than others.

Non-resident parents were not available in 8 cases, whereas in 2 cases non-resident parent were passive. In these cases the court made contact arrangements on its own motion.

C Contact arrangements

Pre-school children; age 1-7 (altogether 48 decisions)



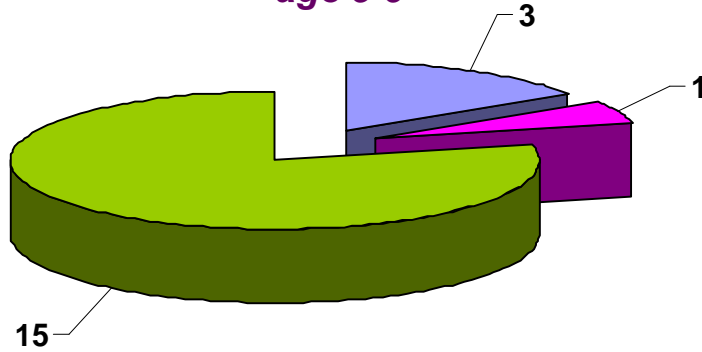
Out of 48 court decisions which contained contact arrangement for children 1-7 years old, 28 of them refer to infants and toddler hood children.

One important point to note is that the contact arrangements were made similarly as contact arrangements for older – school children. Therefore under the court decision, contact have to occur few hours per week, every second weekend, ½ school holidays, every second public holiday. Second group of decisions are the same, except for that these were without contacts during the week. It means that, under the decision, a child will see its non-resident parent every 15 days. There were altogether 20 of this type of decisions. In two decisions contacts were arranged just one, two or three times per week (2-4 hours), without including overnight stay, weekends or holidays.

Regulations of contacts between a child and its non-resident parent based on agreement between parents were found in 4 decisions.

The importance of contacts between a non-resident parent and an infant or a toddlerhood is taken into the consideration in the last part of this paper.

Contact arrangements for pre-school children age 5-6



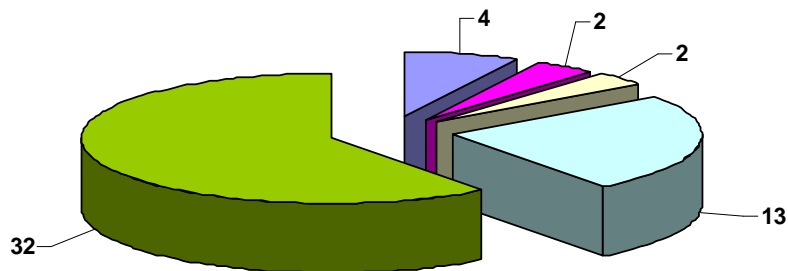
- Agreement between parents
- Every second weekend, ½ of school holidays, every second public holiday
- A few hours per week, every second weekend, ½ of school holidays, every second public holiday

This small group of decisions which refer to the pre-school (5-6 years old) is created, because, on one hand the children of this age are not infants or toddler-hood, but on the other hand they are school children neither, at least in Croatian school system. Expressing their will, might not be considered as mature enough, which is the case with school children (7 and above). However, the child's age does not reflect of child' maturity. An individual approach principle is and should be the leading principle in all family court proceedings.

Three contact arrangements were based on agreement between parents, whereas in 16 decisions contact arrangements included weekly contact, children's staying with non-resident parent during the weekend, during the half of school holidays and every second holiday.

Age 7-13 (primary school) – 58 decisions

Contact arrangements for Primary-school children age 7-13



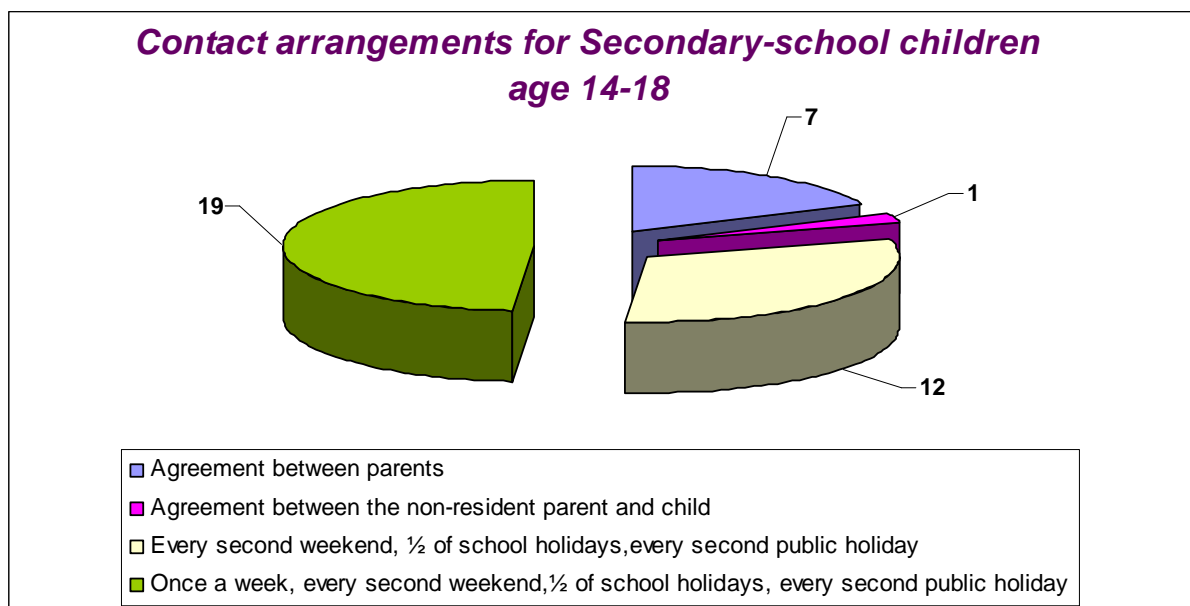
- Agreement between parents
- Agreement between the non-resident parent and child
- A few hours a week
- Every second weekend, ½ of school holidays, every second public holiday
- A few hours per week, every second weekend, ½ of school holidays, every second public holiday

The data concerning the expressing of child's will mentioned above for children of 5 and 6 can be applied to this group of children, too. In 6 cases arranging of contacts was based on agreement, in 4 cases it was an agreement between parents and in 2 cases between a non-resident parent and a child.

The usual way of court's arranging of contacts (weekly contact, children's staying with non-resident parent during the weekend, school holidays and every second holiday) was found out, altogether, in 45 decisions.

It was not clear why the court in 2 cases imposed the contacts between parent and child only for a few hours a week.

Age 14-18 (secondary school) – 40 decisions



Court decisions referring to this group of children are the most arguable. It was necessary to put several questions here. Why only one decision was based on the agreement between the non resident parent and the child? What was the role of teenager or adolescent in 7 cases where the agreement between his/her parents concerning contacts was made? The answer was not found out in these decisions.

However, a specific feature of contacts between parents and teenagers or adolescents is taken into the consideration in the concluding part of this paper.

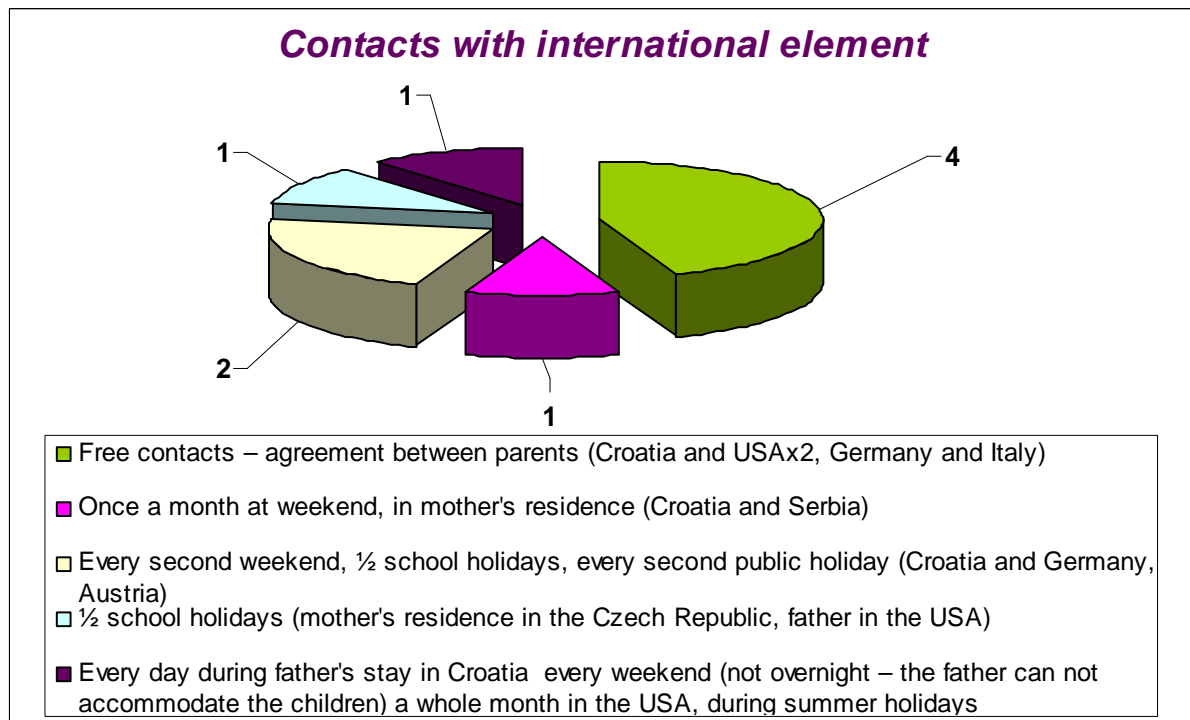
Usual types of contact of a non-resident parent with a child (weekly contact, children's staying with non-resident parent during the weekend, school holidays and every second holiday), were found in 32 out of 39 court decisions altogether. Without decision on contact (age 17) was 1 court decision.

D Child's will

In 4 decisions only can be find out about the children's will. Children's will was expressed in terms of his/her residence and arrangements of contacts. In all 4 cases the children expressed their will in the presence of the social welfare worker. It doesn't mean that in all other cases children's will wasn't taken into consideration when making decision, but it wasn't explicitly stated in those decisions.

E Contacts with international element

In 2003 there were made 10 decisions with international element. Nine decisions contained contact arrangements whereas one didn't regulate contacts because the father was not available.



3.2. Enforcement of contact decisions

In 2003, at the Municipal Court in Zagreb 6 processes of enforcement were initiated. In 4 cases the father initiated the enforcement process whereas in 2 cases the mother requested from the father to deliver the child after the contact. At the time of divorce the children were at the age of 2-6 except for the one who was 13. Time period from the finality of the divorce decision until initiation of enforcement was 5, 6 and 9 months – in 3 cases, 5 years in 2 cases and 9 years in one case.

In 4 cases there was a dispute between parents concerning residence and contacts in time of divorce process.

Out of 5 initiated cases, just 2 of them were successfully finalised. The following is an overview of enforcement processes outcomes:

- The outcome of one case was temporary prohibition of contacts between the father and a ten-year-old child who refused contact. Based on the opinion of the team of experts forcing a child to contact with the father can have a negative effect on the child's mental stability. The father was obliged to be treated by a psychiatrist whereas the mother and the child had to be given a supportive treatment.

- In other 2 cases the enforcement was unsuccessful – the fathers abandoned the enforcement. In both cases the mothers with children changed residence moving to a town 500 or 600 km away respectively.

- One of cases was not finalised for procedural reasons.

Cases which were successfully finalised:

- The process of child delivery was successful, but not without certain problems.

- In the other case the enforcement was successfully performed. The parents reported, separately, that after the court had intervened on several occasions, the contacts between two daughters (age 12 and 14) and the father were even more frequent than as decided by the court. Mother was not participating in agreement between father and children. They also reported of a good relationship between those two girls and their 3 step-brothers.

4. Instead of the conclusion – "the importance of being law"

Contacts based on agreement between parents are not disputable. However, all the other contacts which are problematic have to be considered.

As this is a legal relation who involves three parties: the resident parent, the non-resident parent and the child, the problems may arise from several directions. On the one hand the resident parent could prevent contacts, the non-resident could be passive and on the other hand the child could refuse contacts.

What the law can do – especially when it comes to divorce or termination of a long term relationship?

The next question is: what does the law can offer to a child who grew up without having contact with a parent in relation to a parent who was being prevented from contacts with his child?

The following attitudes are aimed at giving the answer.

4. 1. Well-know principle of no delay

Besides the principle of the child's best interest, the principle of no delay plays very important part, (Cretney, Masson, Bailey-Harris, 2003, Motzer, 2003). Moreover it could be an integral part of the principle of the child's best interest. Every delay when making a decision could have severe consequences. It can also result in child's alienation from the non-resident parent as well as in a negative influence by the resident parent during the period of delay. If it is true that there is a controversial PAS (Parental Alienation Syndrome) when a child refuses contacts with a parent (Lowenstein, 2005 and Bruch, 2001), it could be expected that such a negative influence can not be created among infants or "overnight."

The principle of no delay should be of a great importance when parents start living separately. At that time the tension in their relationship is the highest and therefore they fail to cooperate in issues concerning contacts between the non-resident parent and the child. In such circumstances the law has to act without delay and arrange contacts taking into consideration the child's best interest. Who will be in charge of contacts arrangements depends on the specific nature of the relationship between family members. It can be a mediator, a judge or both of them. However, as we try to achieve the best solution the time goes by and the relationship between the child and the non-resident parent suffers the most.

4.2. Child's age

The child's age is very important at the moment of decision making. Contact arrangements should not be the same for a e.g. child who is 4 or the one who is 16, not only in judicial practice but also in legislation.

The following elements may be of influence:

Infants and toddler – hood children

"The issue of custody (except where a parent has been determined to be unfit) is less important, it would seem, than the nature of the contacts a young child has with each parent particularly when viewed against the array of developmental tasks and attainments expected of children during infancy and toddler-hood " (Horner and Guyer, 1993). Attachment of a child

to the mother and the father is of significant importance for the child's development (Horner and Guyer 1993, Crockenberg, Lyons-Ruth and Dickstein, 1993). It also lays foundations for a future relationship between a child and its parents.

If there is no delay when deciding on contacts, they should be as frequent as possible, despite the attitude that a child has to preserve its daily routine and stay with its primary care, in most cases it is a mother. In a modern world, when mothers go to work and children stay in kindergarten or with nannies nobody raises the question of the child's daily routine, change of environment and absence of mother (Horner and Guyer, 1993).

Primary school children

At this age children can express their will, unlike younger children, but they do not always have to be mature. Therefore an expert's role is very important when determining child's maturity, will and its best interest concerning contacts. Parents' role in child's life before deciding on contacts (when the family was together) has a great influence on child's will. That should not be overlooked.

The experts should not be "judges" but only reporters, advisors and suggest several possible arrangements, between which the judge should choose the best, with reference to all facts (Bruch , 2001 and Horner and Guyer, 1993).

Adolescents

At this age the basic relationship between parents and the children have already been created. In case of divorce, forcing children to contact does not help. An adolescent needs to be advised on how to prevail the consequences of a divorce which all family members suffer from.

However, the law grants for every child (younger than 18) contact with the non-resident parent according to Article 9 (3) UN Convention. On the other hand, a parent is entitled to a family life according to Art 8 ECHR (Bainham, 2003).

In the Croatian family law a child at the age of 16 can enter into marriage, a child at the age of 12 give its consent to being adopted, a child is entitled to initiate process at court in some cases, according to labour law a child at the age of 15 can sign a working contract, and finally a child is responsible for its actions according to criminal and tort law

The situation is similar in all other contemporary legal systems. Beside all granted rights, a child is entitled to ability to act in some cases. Taking that into account the question is: why does not it have certain legal obligations?

In the context of contacts that would be: why, e.g. a sixteen-year-old child does not have an obligation to contact with its parent (Bainham, 2005)?

Finally, right to contact generally is not just about being together, but it is any form of communication between a child and the non-resident parent.

Why not a child should be obliged to inform the non-resident parent, who anyway supports him financially, about its progress in school?

In Croatian law system children have some kind of duty e.g. under the Article 90 Family Law Act 2003 children have a duty of respect for parents.

4.3. Compensation

On the one hand, a parent who has been deprived of his/her right to a family life, under Art 8 ECHR is entitled to compensation. It also applies when he/she is deprived of his/her rights to contact with a child. A child has right to live with both parents under the Articles 7 UN Convention. This right becomes right to contact with the non-resident parent after divorce or other forms of separate living under the Article 9 UN Convention (Bainham, 2003).

The law can not do a lot when a parent does not want to have contact with a child in spite of his/her legal obligation. Enforcement of possible order of contact does not make sense. In this way a child's right to contact becomes a specific *nudum ius*.

What the law can do is to offer a child the right to compensation for violation of its right to contact. The non-resident parent should bear the costs of the compensation. For the future of a child it means that it will have more than inheritance, especially in cases when there are other children with whom the father lived.

References

- Alinčić M, Bakarić Abramović A, Belajec V, Hrabar D, Hrvatin B, Jakovac-Lozić D, and Korać A (2004). Family Law Act, Zagreb: Narodne novine 120-121.
- Alinčić M, Dika M, Hrabar D, Jelavić M and Korać A (2003), Family Law Act – News, Doubts and Perspectives. Zagreb: Narodne novine.
- Bainham, Andrew (2005) Children. The Modern Law. Family Law, Jordan Publishing Limited, Bristol.
- Bainham A (2003). 'Children as a Right and Obligation'. In Bainham A, Lindley B, Richards M and Trinder L (Eds.) Children and Their Families – Contact, Rights and Welfare. Oxford: Hart Publishing.
- Bruch C S (2001-2002) Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases. 35 Fam.L.Q. 527 2001-2002: 527-552.
- Cretney SM, Masson JM, Bailey-Harris R (2003). Principles of Family Law London: Sweet&Maxwell.
- Crockenberg S, Lyons-Ruth K and Dickstein S (1993). The Family Context of Infant Mental Health: II. Infant Development in Multiple Family Relationships, Handbook of Infant Mental Health. The Guilford Press, New York/London 38-55.
- Horner, TM and Guyer, MJ (1993). 'Infant Placement and Custody' in Zeanah, CH, (Eds.) Handbook of Infant Mental Health. New York/London: The Guilford Press 462-479.
- Lowenstein LF Parental Alienation (2005). www.parental-alienation.info available on 10.2.2006.
- Motzer S (2003). Gesetzgebung und Rechtsprechung zur elterlichen Sorge und zum Umgangsrecht seit dem Jahr 2001. *Zeitschrift für das gesamte Familienrecht* 12/2003.

Numbers of decisions:

P2-7/03,P2-9/03,P2-13/03,P2-15/03,P2-19/03,P2-22/03,P2-23/03,P2-27/03,P2-29/03,
P2-32/03,P2-34/03,P2-39/03,P2-43/03,P2-45/03,P2-49/03,P2-54/03,P2-58/03,P2-61/03,
P2-68/03,P2-74/03,P2-76/03,P2-79/03,P2-83/03,P2-88/03,P2-90/03,P2-93/03,P2-99/03,
P-101/03,P2-104/03,P2-505/03,P2-506/03,P2-509/03,P2-510/03,P2-513/03,P2-514/03,
P2-517/03,P2-521/03,P2-522/03,P2-526/03,P2-528/03,P2-530/03,P2-533/03,P2-534/03,
P2-537/03,P2-542/03,P2-543/03,P2-545/03,P2-546/03,P2-548/03,P2-549/03,P2-556/03,
P2-557/03,P2-559/03,P2-561/03,P2-564/03,P2-566/03,P2-571/03,P2-576/03,P2-578/03,
P2-580/03,P2-584/03,P2-593/03,P2-595/03,P2-596/03,P2-599/03,P2-600/03,P2-601/03,
P2-602/03,P2-605/03,P2-606/03,P2-612/03,P2-613/03,P2-622/03,P2-623/03,
P2-1716/03,P2-1733/03,P2-1737/03,P2-1743/03,P2-1755/03,P2-1757/03,P2-1758/03,
P2-1759/03,P2-1761/03,P2-1764/03,P2-1765/03,P2-1775/03,P2-1777/03,P2-1789/03,
P2-1793/03,P2-1796/03,P2-1803/03,P2-1806/03,P2-1811,P2-1812/03,P2-1815/03,
P2-1818/03,P2-1823/03,P2-1827/03,P2-1829/03,P2-1830/03,P2-1835/03,P2-1842/03,
P2-1844/03,P2-1846/03,P2-1849/03,P2-1850/03,P2-1853/03,P2-1854/03,P2-1858/03,
P2-1863/03,P2-18/03,P2-60/03,P2-78/03,P2-394/03,P2-568/03,P2-604/03,P2-814/03,P2-
963/03,P21096/03
Ovr-671/03,Ovr-1148/03,Ovr-1442/03,Ovr-2308/03,Ovr-1529/03,Ovr-1614/03

