


# The voice of the child and the implementation of the child's right to be heard in parental responsibility matters and cases

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### ABSTRACT

The article deals with a very up-to-date issue, the 'voice of the child', i.e. the implementation of the child's right to be heard in parental responsibility matters and cases. My aim is to find an answer to the question of how the Hungarian codification, judiciary and academic legal literature have changed over the last decade and how they have adapted to the modern child-focused standards. The significance of the topic emerges from the fact that both the exercise and the rendering of parental responsibilities is somehow problematic in many families and this difficulty is burdened by the requirements of child-friendly justice. The issues dealt with in this paper concern the significance of the child's right to be heard, the necessity of the child's hearing, the connection between the child's protection and child's hearing, the difficulty of determination whether the child is capable of forming his or her own views, the direct and indirect hearing of the child and the difference between the child's hearing and the child's voice.

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### KEYWORDS

voice of the child, child's right to be heard, participation, parental responsibility, child-friendly justice, judiciary, academic literature

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## 1. INTRODUCTION<sup>1</sup>

The voice of the child and the child's right to be heard are of utmost important elements of the UN Convention on the Rights of the Child adopted in New York on 20th November 1989 (CRC).<sup>2</sup> The participation of the child is one of the pillars of the CRC. According to Art 12(1) CRC, State Parties have to 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child', and according to Art(2) the child has to be 'provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.' No children's right should be interpreted without taking into account the other rights included in the CRC. All children's rights are interconnected to each other, and other articles of the CRC cannot be fully implemented if the child's right to be heard is not respected.<sup>3</sup> The child has a right to be involved in a decision-making process and there is a need to respect the child's developing capacity for decision-making.<sup>4</sup> This right has several aspects, one of which is the requirement that children have to be effectively provided with an opportunity to express their views.<sup>5</sup> Although I deal with the child's right to be heard and its realization in Hungary, and there is no place to discuss further pillars of the CRC, such as that the child's best interests are to be taken as the primary consideration according to Art 3, the complementary role of Art 3 and Art 12 is significant.<sup>6</sup> If the child's views are not taken into account the child has no possibility to influence the determination of his or her best interests.<sup>7</sup>

From the viewpoint of the legal proceedings the child's right to participate in the judicial and administrative proceedings affecting him or her has to be emphasized and the child's right to be heard is one basic principle and element of child-friendly justice. According to the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted in 2010, this means a system which 'guarantee[s] the respect and the effective implementation of all children's rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child's level of maturity and understanding and the circumstances of the case', and child-friendly justice focuses, among others, on the needs and rights of

<sup>1</sup>This paper is a part of a complex overview of the connections between the child's right to be heard and the child's best interests and parental responsibility matters and cases. Therefore, the focal point of the paper is the Hungarian case law, judiciary and scientific literature.

<sup>2</sup>My starting point of the child's rights' perspectives in an international context is the CRC. In addition to this, many international documents and soft law instruments might be mentioned and reviewed. I refer to these documents and instruments only through a few – albeit important – examples due to length's constraints and the need to keep the paper concise.

<sup>3</sup>General Comment No. 12 (2009) on the right of the child to be heard 17.

<sup>4</sup>UNICEF (2007) 112.

<sup>5</sup>Lundy, Tobin and Parkes (2019) 407.

<sup>6</sup>General Comment No. 12 (2009) on the right of the child to be heard 18.

<sup>7</sup>General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) 13.



the child, respecting the rights of the child, including the rights to due process, and to participate in and to understand the proceedings.<sup>8</sup>

This concept has been mentioned as one of the fields where there are still many tasks for states, as although successes have been achieved, child-friendly justice has not yet been realized. The new Strategy for the Rights of the Child of the Council of Europe (2022–2027) names ‘child-friendly justice for all children’ as one of the priority areas, with the reasoning that justice systems are often a world made for adults.<sup>9</sup> Another priority area is ‘giving a voice to every child’ as ‘children have the right to be heard, participate and have their views given due weight in accordance with their age and maturity in all decisions affecting them’. Actually, two fields among the six in which there is a gap between the requirements of the international and European standards of the child-friendly approach and their realization affect the children’s rights to participation and having his or her voice heard. The EU strategy on the rights of the child has some thematic areas, one of which is child-friendly justice. The aim is to support justice systems that uphold the rights and needs of children, as children are not provided a proper area to exercise their rights to participate in judicial and administrative proceedings.

The above-mentioned documents prove the importance of the voice of the child in general, and the recognition of the principle that children should be active agents in the legal proceedings affecting them. This huge issue has several dimensions and layers. I am restricting the scope of my paper to a segment which is essential both from the children’s right’s perspective and from the viewpoint of family law. In the following the study focuses on parental custody cases and parental responsibilities matters and envisages how the child’s right to be heard is regulated in the legal sources which provide substantial and procedural rules for this legal field<sup>10</sup>. In addition, the judiciary of the Hungarian Curia (Supreme Court) in the years 2016–2020 is analysed, as are those papers in Hungarian academic periodicals which discuss the need for and possible methods applied in the child’s hearing. Lastly, I draw some consequences concerning the tendencies of the child’s hearing in parental responsibility cases in Hungary with regard to the most debated issues.

## 2. THE REGULATIONS OF THE CHILD PROTECTION ACT CONCERNING THE HEARING OF THE CHILD LIVING IN HIS OR HER OWN FAMILY

Act No. XXXI. 1997 on the protection of children and guardianship administration (‘Child Protection Act’ or ‘CPA’) was directly and clearly influenced by the CRC, which was promulgated in Hungary in 1991.<sup>11</sup> The CPA provides several children’s rights mirroring the requirements of the CRC. According to the child’s right to participation and articulation of his or her voice, the child has the right to freely express his or her opinion and to receive information about his and her rights and the possibilities of enforcing those rights, as well as to be heard directly or in another way in all matters concerning his or her person and property, and to have

<sup>8</sup>Council of Europe (2011) 17.

<sup>9</sup>Council of Europe (2022) 33.

<sup>10</sup>See its historical context in Szeibert (2020b) 198–202.

<sup>11</sup>The CRC was promulgated by the Act No. LXIV. 1991.



his or her opinion taken into account with regard to age, state of health and level of development.<sup>12</sup> A further linked right is provided for the child, as he or she has a right to complain in issues affecting him or her before the forum determined in law. The child has also a right to initiate a process because of the breach of his or her rights before a court or other authority determined in law.<sup>13</sup>

The right of the child to be heard is articulated on the side of the parents as a parental obligation. Among other parental obligations, the parent is entitled and obliged to represent his or her child in the child's personal and property issues.<sup>14</sup> The parent is obliged to cooperate with his or her child and to respect the child's dignity, inform the child about the issues affecting the child and to take his or her opinion into account to give guidance, advice and help to the child when exercising his or her own rights, to take the necessary measures in order to assert the rights of the child and to cooperate with the authorities.<sup>15</sup>

The Child Protection Act is a remarkable law as it provides basic and special rights for children. Unfortunately, these rights are not mirrored and even referred to in the judiciary, even if some of them are really modern from the child's rights' perspective, such as the child's right to complain. The title and the main content of the CPA is 'misleading' as it focuses on child protection. Although the basis of this Act is child protection in a broad sense, including the protection of all children, both those living in families and those without their families, the Act is held to be an instrument regulating child protection in a narrow sense, providing regulation only for children living with foster parents or in children's homes. That is why general children's rights have practically never been referred to in judicial decisions.

### 3. THE HEARING OF THE CHILD IN THE HUNGARIAN CIVIL CODE IN PARENTAL RESPONSIBILITIES MATTERS AND CASES

#### 3.1. The effective rules of the HCC concerning the child's involvement in decision-making regarding the child's personal and property issues

The child's involvement in her or his family life and the decision-making process within the family in connection with the child's life and parental rights and obligations is guaranteed in several Articles of the Hungarian Civil Code, specifically in Act V of 2013 (HCC). The regulations differ in terms of the possible situations they relate to, which may vary.

An absolutely general rule is that the child has to be involved in parental decision-making as the parents are obliged to inform the child of any decisions affecting him or her and they shall ensure that their child who is of sound mind may express his or her views before the decisions are taken, and in the cases specified by an Act decide jointly with his parents. The parents shall take the child's views into account with appropriate weight, according to his or her age and maturity.<sup>16</sup>

<sup>12</sup>Art 8(1) of CPA.

<sup>13</sup>Art 8(2)-(3) of CPA.

<sup>14</sup>Art 12(3) of CPA.

<sup>15</sup>Art 8(4) *a)-d)* of CPA.

<sup>16</sup>Art 4:148 of HCC.



This rule is one of the so-called general rules of parental custody<sup>17</sup> in the HCC which introduces the special rules on parental responsibilities. The importance of the child's voice and the child's right to participate in the decision-making of the family is emphasized. It is the right of the child and an obligation of the parents, but the parents' failure to hear the child does not result in any direct legal consequence. It might be sanctioned, but only indirectly, and no such legal case has yet been published.

This requirement is in harmony with some rules concerning the juridical acts that affect the child or the child's property and have to be taken into account by the statutory representative(s) (parents or guardians) of the child. If the child has no capacity to act the statutory representative(s) has to take all decisions concerning the child's personal and property issues as a main rule. In such cases the statutory representative shall take the views of a child with no capacity to act but capable of forming his or her own views into account, in accordance with the age and maturity of the child.<sup>18</sup> If a child has limited capacity to act, statutory representatives may themselves make juridical acts on his or her behalf,<sup>19</sup> and the HCC obliges the statutory representatives – when making juridical acts that affect the child himself or herself or his/her property – to take the views of a child with limited capacity to act into account. These are also obligations on the statutory representatives where there is no direct legal consequence if they are not carried out.

According to Hungarian law, parental custody includes the right and obligation to determine the minor child's name, to care for and bring the child up, to determine the place of residence and manage the child's assets, as well as the right to appoint a guardian and to exclude someone from being a guardian. Although there is a general rule aiming at involving the child in the decisions affecting him or her, the HCC provides some further rules on the child's involvement. A child who has reached the age of 16 may initiate to leave the parent's place of domicile or the place of residence appointed by the parents and the child and his or her parents have to decide jointly what career path the child should prepare for and on the child's education and choice of school.<sup>20</sup> If there is no agreement between the child and his or her parents, the public guardianship authority has the competence to decide. Although the main rules are inserted in the HCC, the more detailed ones can be found in the Order of Government No. 149/1997 on public guardianship authority and proceedings in child protection and guardianship cases (Order of Guardianship).

The involvement of the child in the decision-making of the family or either parent is guaranteed by the HCC, which underlines this right of the child in several provisions. However, we do not know too much about the realization of this requirement.

<sup>17</sup>I use both the phrase 'parental custody' and 'parental responsibilities'. The relevant Hungarian legal institution is 'parental custody', while the international literature and the text of the HCC operate with 'parental responsibilities'.

<sup>18</sup>Art 2:14(1)-(2) of HCC.

<sup>19</sup>Art 2:12(4) of HCC.

<sup>20</sup>Art 4:152(4) and 4:153(2) of HCC.



### 3.2. The effective rules of the HCC concerning the child's involvement in the decision-making on the rendering of the parental responsibilities if there is an agreement between the parents

There are two ways in which parental responsibilities may be rendered if the parents do not live together anymore. The autonomy of the parents has been maintained and is protected by the HCC so they can agree on the exercise of parental responsibilities. They may choose the most appropriate from several solutions. This may be advantageous for the family as they can find a way to exercise parental responsibilities that suits them best. However, it is a question whether the agreement of the parents always serves the child's interests. Parental autonomy and the child's interests may collide.

They may opt for joint parental responsibilities or may split the rights and obligations pertaining to parental custody between each other. Alternatively, they can agree that all rights and obligations pertaining to parental custody will be exercised by one of them and the other parent will exercise only those rights concerning substantial matters affecting the future of the child.<sup>21</sup> Determining and changing the name of the minor child, determining his or her place of residence if it is different from the place of domicile shared with the parent or the place of residence abroad for an extended period of time or for the purpose of settlement, changing the nationality of the child, and choosing the school and career path of the child, shall be considered substantial matters affecting the future of the child.

If the parents agree on joint parental custody, they may choose between joint parental custody without alternating residence which has the consequence that the child lives permanently with one parent, and alternating residence. In this case the parents provide alternating residence for the same periods of time for the child and they are entitled and obliged to take care of the child in turns. In the course of exercising joint parental custody, separated parents shall ensure that their child's life be balanced.<sup>22</sup> At the joint request of the parents the court may approve the parents' agreement or decide on a judgment on the joint parental custody and the domicile of the child, on dividing between each other the rights and obligations pertaining to parental custody or that all rights and obligations pertaining to parental custody will be exercised by one of them and the other parent will exercise only those rights concerning substantial matters affecting the future of the child. The court has to consider the interests of the child.

Most of the possibilities listed were introduced in the HCC when it entered into force in March 2014. However, the alternating residence was introduced in January of 2022. It is thus difficult to conduct any research on agreements between the parents at this moment.

The HCC contains a rule concerning the hearing of the parents and the child. Until the end of July of 2022 this rule prescribed that the court shall hear both parents during the procedure, unless there are irremovable obstacles, and also the child shall be heard in justified cases or if this is requested by the child, either directly or with the involvement of an expert; and for a child older than 14, the consent of the child shall be required for any decision on parental authority unless the child's choice endangers his development. These requirements, which had been traditional ones in Hungarian parental custody cases, were modified and the new ruling entered

<sup>21</sup>Art 4:164(1) and 4:165(1) of HCC.

<sup>22</sup>Art 4:164(1) of HCC.



into force in August 2022. I will go into details later as it is a debated issue in itself whether the child has to be heard if there is an agreement between the parents on the rendering of parental custody. The legal rule, which was in force before the HCC, namely the earlier family law rules, prescribed that the court could also obtain information on the child's opinion on the settling of parental authority through the parents' pronouncement. The HCC has not maintained this rule, so the judiciary has been divided right from the start of the application of the HCC on whether the child has to be heard in such cases. The parents are obliged to involve the child in a decision affecting him or her, but it cannot be easily proved that the parents have performed their obligation.

Actually, the HCC has attached great importance, traditionally, to the parents' agreement. The involvement of the child is presumed and even if the child has not been informed and heard by his or her parents, it seems to be a common opinion that parents know best what is good for their child. However, some challenges to this assumption may be detected over the last five years.

### **3.3. The effective rules of the HCC concerning the child's involvement in the decision-making on the rendering of the parental responsibilities if there is no agreement between the parents**

If there is no agreement between the parents on the exercise of the parental responsibilities, the court has to decide, either upon request or *ex officio*. There have been several possibilities available since 1st January 2022. The court may decide which parent will exercise all rights and obligations pertaining to parental custody. In such cases the other parent will exercise only the rights concerning substantial matters affecting the future of the child.<sup>23</sup> According to the newly introduced rules of the HCC, the court may order joint parental custody even upon one parent's request if it is in the child's interest.<sup>24</sup> The joint parental custody may be exercised with or without the child's alternating residence. The court may order, within the framework of joint parental custody, that the child should have alternating residence with both parents for the same periods of time by turns, with attention to the child's interest. In this case the court decides on the periods of time and the maintenance of the child if there is such need. If the court orders joint parental custody without alternating residence, it decides on the contact, child maintenance and the child's residence.<sup>25</sup>

The court shall hear both parents during the procedure, unless there are irremovable obstacles, and the child shall be heard, too. As was mentioned, the regulation of the HCC concerning the child's hearing in parental responsibility cases has been changed with the aim of being in harmony with the Brussels IIb regulation. The new rule entered into force on 1st August 2022. While the earlier rules stated that in justified cases or if so requested by the child, either directly or with the involvement of an expert, the child shall be heard, according to the rule now in force, the court has to notify the child who is able to form his or her own view about the opportunity to make a declaration and if the child requests his or her own hearing or the court holds it well-reasoned even without a request, the court will hear the child either directly or with the

<sup>23</sup>Art 4:167(1) of HCC.

<sup>24</sup>Art 4:167(1) of HCC.

<sup>25</sup>Art 4:167/A of HCC.



involvement of an expert. The provision that for a child older than 14, the consent of the child shall be required for any decision on parental custody regarding him or her, unless the child's choice endangers his development, has been maintained.

The reasoning of the Act referred to the importance of the child's hearing as the Brussels IIB regulation holds the child's hearing to be an essential element of the court proceedings and its aim is to provide a genuine and real opportunity for a child who is able to form his or her views to be heard. The issue of whether a child is able to form his or her own views has to be resolved in the course of the court proceeding and the court can convince itself in this regard after the child's hearing.

The Brussels IIB regulation has an independent article concerning the child's hearing, which echoes the wording of the CRC. According to Article 21 on the right of the child to express his or her views when exercising their jurisdiction in parental responsibility matters the courts of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body. Besides, where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views in accordance with this Article, the court shall give due weight to the views of the child in accordance with his or her age and maturity. Actually, these requirements shall also apply in return proceedings under the 1980 Hague Convention.

Several further explanations of the method of the child's hearing and a person who hears the child are detailed in the preamble of the Brussels IIB regulation. The Regulation leaves the question of who will hear the child and how the child is heard as it is determined by the national law and procedure of the Member States. According to Recital 39, the regulation does not contain any requirement on whether the child should be heard by the judge in person or by a specially trained expert reporting to the court afterwards, or whether the child should be heard in the courtroom or in another place or through other means. Recital 59 declares that the case-law provides that, where a court decides to provide the opportunity for the child to be heard, the court is required to take all measures which are appropriate for the arrangement of such a hearing, having regard to the best interests of the child and the circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer the child a genuine and effective opportunity to express his or her views.

The hearing of the child in parental custody cases has always been a complex issue but new questions emerged in January of 2022 with the introduction of the rule on joint parental custody and alternating residence upon one parent's request, and in August of 2022 with the obligatory notification of the child. Although the rules on joint parental custody and alternating residence have been in force for some months, no judicial practice has yet taken shape. The hearing of the child can be a crucial issue, especially in cases in which the court exercises its discretionary power on ordering alternating residence upon the request of one parent in the child's interest. In contrast to this, the notification of the child has become a hotly debated issue since its entering into force. No unified practice has yet taken shape.

#### **4. THE HEARING OF THE CHILD IN THE HUNGARIAN CODE OF CIVIL PROCEDURE IN PARENTAL RESPONSIBILITY CASES**

The rules on the hearing of the child are included among the common rules of the procedures on the rendering of parental responsibilities and contact in the Hungarian Code of Civil





Procedure, namely Act CXXX of 2016 (HCCP). If the court decides on the hearing of the child as an interested person in the legal suit a *guardian ad litem* is ordered for the child *ex officio*, if it is needed. The court summons a child under 14 through his or her legal representative. If the court summons a child over 14 to the hearing directly, the child's legal representative is also notified.<sup>26</sup>

The child will be heard by the president of the court's council. The rules concerning the hearing are rather strict and only some special rules have been incorporated concerning child-friendly justice. The child has to be heard in an appropriate atmosphere, with regard to the age and the maturity of the child and in a manner which is understandable for them. The court has to inform the child that he or she has to tell the truth. The child has to be heard by the president of the court's council and both the parents and the guardian ad litem may initiate questions to the child. The statement of the child has to be read aloud in the presence of the child at the end of the hearing and the child may correct or complete his or her statement. The record may be corrected or completed also following the observations of the guardian ad litem and the parents. If the child is not heard in the presence of the parents, the president informs the parents about the record.<sup>27</sup>

## 5. THE RULES ON THE RENDERING OF PARENTAL RESPONSIBILITIES AND THE EXERCISING OF RIGHTS CONCERNING SUBSTANTIAL MATTERS AND THE HEARING OF THE CHILD IN THE ORDER ON GUARDIANSHIP IN PARENTAL RESPONSIBILITY CASES

The Order of Guardianship contains some complementary rules on the rendering of parental custody if the parents agree on the division of rights and obligations between each other or that all rights and obligations pertaining to parental custody will be exercised by one of them and the other parent will exercise only those rights concerning substantial matters affecting the future of the child. The public guardianship authority records this agreement at the request of the parents.<sup>28</sup>

The guardianship authority shall decide if, in the course of exercising joint parental custody, the parents are unable to reach an agreement on an issue, other than on issues within the sphere of freedom of conscience and religion. In such cases the public guardianship authority strives to promote the cooperation of the parties and to assert the child's interests. It has to hear the parents and other legal representatives of a child with limited capacity to act and a child who has no capacity to act but who is of sound mind and, if necessary, other close relatives of the child, personally. The hearing may be waived if the delay due to the hearing would result in irreparable harm or danger.<sup>29</sup>

<sup>26</sup>Art 473(1)-(2) of HCCP.

<sup>27</sup>Art 473(3)-(5) of HCCP.

<sup>28</sup>Art. 18 of Order of Guardianship.

<sup>29</sup>Art. 20(1)-(3) of Order of Guardianship.



The public guardianship authority hears the child in issues affecting him or her either directly or indirectly, especially from the family and child welfare service or other body or person specified in the CPA such as an educational consultant, expert committee, family protection agency or expert. The direct hearing of the child cannot be waived if a child who is capable of forming his or her own view requests it himself or herself, in relation to property or personal issues of a child with limited capacity to act or one who has no capacity to act but who is capable of forming his or her own view, and if it is ordered by a legal rule. A child may be heard without the presence of the child's legal representative or other interested person if it is in the child's interest and a child may be heard outside the official premises of the public guardianship authority if it is necessary.<sup>30</sup>

Several legal sources refer to a child's capability to form his or her own views, but the Order of Guardianship is the only source which provides a definition. According to this interpretational rule, a child is capable forming his or her own view if the minor is able, according to his or her age and intellectual and emotional maturity, to understand the essential context of facts and decisions affecting him or her and to see the expected consequences.<sup>31</sup> This rule is applied by the public guardianship authority when the child is to be heard but its application is not obligatory for the courts. However, judicial decisions often refer to this definition as a possible starting point. The issue of when the child is capable of forming his or her own view is an extremely significant one.

The procedural requirements relating to a child's hearing in court differ from the provisions regulating it in the proceedings before the guardianship authorities. This practice of the guardianship authorities is not widely discussed, even if children, especially those over the age of 14, are regularly heard in different cases affecting the exercise of parental responsibilities, or if the parents debate the issue. The hearing of the child occurs more often as they usually do not assign a forensic psychologist.<sup>32</sup>

## 6. THE HEARING OF THE CHILD IN THE HUNGARIAN JUDICIARY (2016–2020)

In the research I have conducted concerning the cases on the rendering or re-rendering of parental responsibilities decided in the revisional procedure of the Hungarian Curia (Supreme Court) I envisaged and analysed<sup>33</sup> cases<sup>34</sup> where the hearing of the child was mentioned. These cases were decided between 2016 and January 2020. In half of the analysed cases there was no mention of any informing of the child, nor of his or her opinion or hearing.

<sup>30</sup>Art. 11(1)-(4) of Order of Guardianship.

<sup>31</sup>Art. 2 a) of Order of Guardianship.

<sup>32</sup>The causes of the non-assignment of forensic psychology experts are complex ones.

<sup>33</sup>Szeibert (2020a) 8–13.

<sup>34</sup>Pfv. II. 20.253/2016/8; Pfv. II. 21.224/2016/5; Pfv. II. 22.004/2016/5; Pfv. II. 21.509/2017/4; Pfv. II. 22.244/2017/6; Pfv. II. 22.578/2017/8; Pfv. II. 20.031/2018/4; Pfv. II. 20.088/2018/5; Pfv. II. 20.722/2018/6; Pfv. II. 21.029/2018/7; Pfv. II. 21.555/2018/4; Pfv. II. 21.670/2018/11; Pfv. II. 21.898/2018/12; Pfv. II. 20.210/2019/4; Pfv. II. 20.283/2019/14; Pfv. II. 20.287/2019/14; Pfv. II. 20.451/2019/10; Pfv. II. 20.463/2019/8; Pfv. II. 20.572/2019/9; Pfv. II. 20.609/2019/8; Pfv. II. 20.728/2019/5; Pfv. II. 21.206/2019/4.



## 6.1. Overview (2016–2020)

In cases in which the child was heard, the hearing of the child was conducted primarily by a forensic psychologist in the framework of a psychological examination. All decisions of the Hungarian Curia include the claim of the plaintiff, the counterclaim of the defendant, the reasoning and decision of the court of first instance, the appeal and counterappeal, the decision and the reasoning of the second instance court, the claim for revision and the counterclaim, as well as the reasoning of the Curia's decision. I envisaged how the courts have thoroughly dealt with the issue of the child's hearing and how the child's voice – if it was heard – was taken into account with due weight. In only three cases was the fact that the child declared that she or he wanted to be taken care of by the plaintiff or the defendant, respectively, included in the background material compiled by the Curia.

## 6.2. The child's opinion

In two of the three cases siblings were affected and both of them declared – in one case 'several times' – that they wanted to be taken care of by the nominated parent.<sup>35</sup> The exact date of the hearing is not given in the compiled materials but in one case the children were born in 2005 and 2008 and the decisions of the three different instances of court were made between 2014 and 2016; in another case the children were born in 2004 and 2008 and the decisions were made between 2015 and 2017; in the third case the children were born in 2006 and 2006 and the decisions were made between 2015 and 2016.

In a case in which children born in 2004 and 2005 had lived within peculiar familiar circumstances, they declared in the course of the examination conducted by the forensic psychologist that the circumstances were appropriate for them, and they wanted to be brought up together with their half-sibling.<sup>36</sup> In a further case the court of first instance made the decision concerning parental custody affecting children born in 2002 and 2005 in 2015. The children preferred to be placed with their mother, and later the Hungarian Curia referred to the fact that the older child who was 12 years old at that time was heard by the court of first instance twice, once directly and once by the forensic psychologist.<sup>37</sup> In another case the court of second instance held that the hearing of the child who was 9 at that time was unnecessary, also with regard to the fact that the child had been heard earlier. The Hungarian Curia was of the opinion that as the child was under 14 his direct or indirect hearing was only a possibility provided for by the law, so the non-hearing of the child did not constitute a breach of the law.<sup>38</sup> In the last case in which the voice of the child was mentioned, the child, who was 11 at that time, was heard by the court of first instance and the child declared that she wanted to spend equal time with both parents.<sup>39</sup>

<sup>35</sup>Pfv. II. 20.253/2016/8; Pfv. II. 21.224/2016/5; Pfv. II. 22.004/2016/5.

<sup>36</sup>Pfv. II. 21.509/2017/4.

<sup>37</sup>Pfv. II. 22.244/2017/6.

<sup>38</sup>Pfv. II. 22.578/2017/8.

<sup>39</sup>Pfv. II. 20.031/2018/4.



### 6.3. The significance of the child's hearing

The Hungarian Curia summarized its opinion on the child's hearing and its importance in two decisions in the above-mentioned research period. In a decision made in 2019<sup>40</sup> the Hungarian Curia investigated the failure of the lower courts to hear the child upon the basis of the then-effective legal rules (which contained basically the same rules as the HCC and the HPC do today). The Hungarian Curia referred to the fact that the HCC regulates the child's hearing and if the child is under the age of 14 there is only a possibility and not an obligation for the court to hear the child directly or indirectly.<sup>41</sup> The Hungarian Curia noted that it is essential to provide children's rights and protect their interests when parental custody is rendered, so the declaration of a child who is capable of forming his or her own views concerning his or her care has to be taken into account. A child has to be considered as being capable of forming his or her own views if she or he is able to form his or her opinion independently and without influence due to his or her age and situation.<sup>42</sup> The court has a discretionary power to determine whether the child is able to form his or her own views independently and without influence, but this power can only be exercised if the court has obtained knowledge of the child's declaration.

The Hungarian Curia emphasized that there would have been enough time to hear the child before the court of second instance and there would have been an opportunity to evaluate whether the child was capable of forming his or her own views upon his or her declaration. A key sentence of this judgment is that obtaining knowledge about the child's opinion is in harmony with the CRC, but the omission of this legal opportunity is not contrary to the Hungarian CRC. The reasoning of this judgment referred to an earlier decision in which the Hungarian Curia argued that the child's declaration has to be evaluated in connection with the case's other elements and the court has to investigate whether the child is able to form his or her own views.<sup>43</sup>

The same train of thought can be discovered in a judgment from 2020,<sup>44</sup> in which the issue of how a child's opinion may have to be given due weight appears. The child, who was 11 at the time of the decision of the court of first instance, was heard, and the girl told the court that she wished to stay at the concerned parent as she could play alone there. The first instance court attached great importance to this opinion of the child but later, the court of second instance exercised its discretionary power upon the appeal and concluded that this opinion of the child was not enough on which to establish that parent's parental custody. The Hungarian Curia repeated that even if the child had a definite, unambiguous declaration it has to be taken into account by the court if the child is over 14.

### 6.4. The limitations of the child's hearing

The HCC provides an opportunity for the court to modify the exercise of parental custody if the circumstances upon which the parents' decision or the court's decision was based have

<sup>40</sup>Pfv. II. 21.898/2018/12.

<sup>41</sup>Pfv. II. 21.898/2018/12. [88]

<sup>42</sup>Pfv. II. 21.898/2018/12. [87]

<sup>43</sup>Legf. Bír. Pfv. II. 22.440/1995. sz. BH1996. 480

<sup>44</sup>Kúria Pfv.20733/2020/4. [Nyiró Kiss \(2022\)](#)



subsequently changed significantly, and consequently, the modification serves the interests of the child. The child's hearing may be an issue in these cases, as well. In a decision in 2019<sup>45</sup> the child's opinion was interpreted in a particular way. The Hungarian Curia noted that the CCR and the HCC attribute extreme importance to a child's wishes and if these clearly mirror the child's thoughtful, considered and well-reasoned opinion, they must be evaluated.<sup>46</sup> However, there is a restriction. If the consequence may be drawn from the child's age, maturity and manifestations that he or she is not able to have his or her independent and uninfluenced opinion, he or she is held to be unable to form his or her own views.

In a further case the court of first instance took into account the children's opinion declared before the forensic psychologist, but the court of second instance took the view that the younger child had been only 7 years old at the time of the examination and, as in the expert's opinion she might be influenced, she cannot be held to be able to form her own view by her age and maturity. The Hungarian Curia stated that the judgment of the second instance court breached the child's right to have her own view. A constitutional complaint was submitted to the Constitutional Court against this decision of the Hungarian Curia as the claimant argued that the decision was contrary to several provisions of the Hungarian Fundamental Law. The claimant argued that the views of the concerned children had not been taken into account. The Constitutional Court underlined that the provision of children's rights and the protection of children's interests were important objectives of the Hungarian Curia. The exact sentences of the Curia were echoed by the Constitutional Court concerning the child's ability to form his or her own views.<sup>47</sup> The Constitutional Court agreed with the Hungarian Curia that if there is a debate between the parents on the child's ability to have his or her own views, the court may exercise its discretionary power. The Constitutional Court mentioned an aspect of the child's hearing which the courts hearing family law cases have traditionally been aware of, namely that the psychological burden of the decision cannot be laid upon the children.<sup>48</sup>

## 7. THE CHILD'S HEARING IN PARENTAL RESPONSIBILITY MATTERS IN THE HUNGARIAN LEGAL LITERATURE

### 7.1. Should the child be heard in parental responsibility matters?

It seemed to be ambiguous in 2011 that a child had to be heard in a court proceeding on parental responsibility matters, as the advantages and disadvantages of the hearing and many viewpoints, among others psychological ones, had to be initially taken into account.<sup>49</sup> This study mentioned that the judicial hearing of the younger child was usually not supported by many judges and

<sup>45</sup>Pfv. II. 20.609/2019/8.

<sup>46</sup>Pfv. II. 21.898/2018/12. [37]

<sup>47</sup>Pfv. II. 21.898/2018/12. [26]

<sup>48</sup>Pfv. II. 21.898/2018/12. [27]

<sup>49</sup>Kozák (2011) 23.



courts because it was held that this could traumatize these children. Younger child meant a child of the age of 12–14 at that time.<sup>50</sup>

The HCC entered into force in March 2014 and the issue of the child's hearing very soon became a debated issue. The first issue discussed was whether the child had to be heard if there was an agreement between the parents on the exercise of the parental responsibilities. The judiciary of the Budapest Environs Regional Court were of the opinion that a child over 14 had to be heard in such cases and they had positive experiences.<sup>51</sup> In contrast to this practice, the Budapest Metropolitan Court held that if there is a clear agreement between the parents the child should be protected, as this served the child's interests.<sup>52</sup>

## 7.2. Is the child heard in judicial proceedings?

The first Hungarian research study on the child's hearing in parental responsibilities matters was conducted concerning the court of a Hungarian city with county status (Dunaújváros), with 50,000 inhabitants, in 2007. According to the available data, if the parents agreed on the parental custody of the child as an accessory issue in a divorce upon the parents' consent or in the framework of a proceeding on parental custody, there was almost no data about the opinion of a child below 14 and if so, the court became aware of this opinion through the parents' declarations.<sup>53</sup> The court had to decide on parental responsibilities in sixteen cases. In six cases the child was over 14; in three cases the court heard the child directly, while in three cases via a forensic psychologist. In ten cases the child was below 14; the children were heard indirectly, through a forensic psychologist in six cases, while in four cases the children were not heard at all.<sup>54</sup>

## 7.3. Should the child be heard directly by the court?

The study which published the results of the research conducted on the cases before the court of Dunaújváros in 2007 drew the conclusion that the direct hearing of the child occurred only rarely in the judiciary as the judges tended to avoid it.<sup>55</sup> Another publication summarizing the experiences of the child's hearing in court stated that children are not heard directly by the judge in most family law cases and the reasons for this could be the lack of material prerequisites and the insufficient psychological preparation of the judges.<sup>56</sup> The same conclusion was confirmed some years later by referring to the fact that although the national regulations and international conventions emphasized the importance of the child's hearing, it seldom occurred, primarily because the child's opinion is discovered through the parents' statements and also with the aim of avoiding the child's unnecessary traumatization.<sup>57</sup>

<sup>50</sup>Kozák (2011) 25.

<sup>51</sup>Gaal-Fehér (2016) 14.

<sup>52</sup>Darnót (2017) 23; Szeibert (2019) 2.

<sup>53</sup>Bucsi (2011a) 21.

<sup>54</sup>Bucsi (2011a) 23–26.

<sup>55</sup>Bucsi (2011b) 12.

<sup>56</sup>Kozák (2011) 23.

<sup>57</sup>Visontai-Szabó (2015) 33.



One of the most discussed issues has featured in the Hungarian academic legal literature from its first mentioned publication in 2011, i.e. whether a direct or an indirect hearing of the child better serves the child's interests. A forensic psychologist has almost always been requested to examine the family, including the child, in parental custody cases, but this was not – or not always – referred to as a 'hearing'. This is why the direct hearing before the court has become a highly debated topic with divergent viewpoints. According to one opinion, the child has to be heard directly by the judge and the study proposes some techniques for this process.<sup>58</sup> Another author is convinced that what has to be avoided is any confusion of the roles of the judge and that of the forensic psychologist, so both the judge and the expert should stick to their own profession.<sup>59</sup> Forensic psychologists who are frequently requested by the court in parental custody cases were interviewed in 2016 and they were of the opinion that children should be heard by an expert, and if the court heard a child who is under the age of 14, this should happen in the presence of a forensic psychologist. The psychologist could support the protection of the child and help the judge to ask the proper questions at the same time.<sup>60</sup>

Some opinions aim to determine an age limit under which they propose the child's hearing by a forensic psychologist, as they consider that traumatization should be avoided at younger ages. As was discussed above, opinions on what 'younger' means diverge. One study which supports the child's involvement in the court proceeding proposes the age of ten.<sup>61</sup>

## 8. CONCLUSIONS

It is to be welcomed that the child's right to be heard and the child's hearing in parental responsibility matters and cases has become the subject of discussion in the last 10–12 years. Several causes for this development can be identified in 2011–2014, including the modification of the HCC with some new regulations concerning the child's involvement in family life, the different interpretations of the relevant provisions of the HCC and the appearance of the concept of child-friendly justice (2012 was the year of child-friendly justice in the courts, and at that time all courts were equipped with specially designed rooms for the hearing of the child.<sup>62</sup>) In the following years – since 2015 – the concept of child-friendly justice has become better-known but the approaches to the hearing of the child are diverging.

As regards the connection between the child's right to be protected and the child's right to be heard, it is usually held that there is a ranking order between these two rights, but this is contrary to the spirit of the CRC that all children's rights are interconnected to each other. The 'protection' of the child and its primacy often leads to the traditional paternalistic approach towards children. Both the majority of the judiciary and the interpretational analyses try to establish a concrete age under which the hearing of the child can be presumed to be traumatizing. This is

<sup>58</sup>Kozák (2011) 29.

<sup>59</sup>Visontai-Szabó (2015) 32.

<sup>60</sup>Ádámkó (2015) 12.

<sup>61</sup>Gaál-Fehér (2016) 9.

<sup>62</sup>On child-focused justice in Hungary, see Lux (2013); on the first steps, see Gyurkó (2012) 114; on the tasks of the Working Group for Child-focused Justice of the Administration of Justice, see Barna (2019) 122–23.



totally contrary to the proper interpretation of the CRC, as the CRC Committee requested states to avoid age limits.<sup>63</sup> The possibility of the child's presumed traumatization and the child's capability to have his or her own views are very close to each other. Although the HCC and the HCCP do not define the notion of capability to form one's own views, the definition of the Order of Guardianship is applied not only in the proceedings before the public guardianship authorities, but is also referred to by the court. This definition is a very restricting one which demands too much of a child. In fact, it would demand too much even of an adult.

The legal literature discussed focuses on a real problem, i.e. whether a direct or an indirect hearing better fits children. As far as I see, the forensic psychologist examines the family including the child or children living in that family, while the court may hear the child. The point is that in Hungary and in the context of child-friendly justice, especially in the proceedings concerning parental custody, what is always mentioned is the hearing of the child and not the child's voice. Both may serve several purposes, but the phrase 'child's voice' seems to focus on the child's right to participate in the proceeding, while the 'child's hearing' might better include not only the child's rights but also the support of the court in finding the most appropriate solution for the child and the family. Of course, it is not excluded that the 'child's voice' can assist the child's participation and provide useful information for the decision-maker.

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<sup>63</sup>Schmahl (2021) 202.





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