

The Minor in the Civil Procedure

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Abstract

The thesis deals with the topic of the minor in civil procedure. This topic has not been yet properly compiled in Czech legal literature although the issues of participation of minors within civil proceedings are still actual and their importance is increasing.

The basic legal source covering the chosen topic is Act No. 99/1963 Coll., Civil Procedure Code, which had to be amended more than 120 times.

Procedural law in family law matters, which form substantial part of the content of this thesis topic, is firmly connected with substantive law. Substantive legislation is nowadays represented by Civil Code and Family Law, which are supposed to be replaced on 1 January 2014 with new code of civil law, Civil Code (Act No. 89/2012 Coll.). This is the reason why the thesis pays attention to the existing legislation as well as to novelties brought by the new code. Where needed, an analysis of new legislation in terms of proper procedural protection of the rights of minors is provided.

New legislation of civil law brings the question of preparation of appropriate procedural code. On spring 2012 the draft of law of non contentious procedure which includes main principles and outline of this brand new procedural regulation was published. Where appropriate, notes of suggested regulation are made.

New law on mediation (Act No. 202/2012 Coll.) was introduced in the thesis as well.

The thesis also deals with related international and EU legislation.

The thesis does not ignore available judicature. Excluding given exceptions, it is not permitted appeal to the High Court, hence there is lack of unifying judicature. The role of „judicature unifier“ is then transferred to Constitutional Court which permanently refuses such a role.

The thesis aims to examine thoroughly the legislation concerning the role of minors in civil proceedings to find out its compliance with modern principles which govern such proceedings – right to fair trial or principle of minor's best interest protection in particular. Examined legislation is under critical evaluation in terms of its coherence, logic and clearness and also in terms of its compliance with other Czech legal regulations including international and EU legislation. Where useful, solution de lege ferenda is suggested.

The issues are described globally. All institutes and proceedings was not given the same space though: special attention is particularly devoted to issues that seem to be difficult, questionable, on whom legal discourse is lead in professional literature.

In the beginning, basic terms are explained. Plurality of terms for minor in different legal regulations is mentioned. While defining term of civil procedure, its inner differentiation is referred and contentious and non contentious proceedings are presented as distinctive parts.

The thesis presents situations when minor takes part in civil proceedings according to Civil Procedure Code:

- as claimant (plaintiff) or defendant in contentious proceedings
- as applicant and/or participant in interim measure proceedings or non contentious proceedings,
- as a witness as well.

A child younger than fifteen years that committed a quasi criminal act has a particular position. His act will be processed using Civil Procedure Code regulations.

Within commentary on participation of minor the thesis deals with minor's procedural subjectivity and procedural capacity (also with comparative aspects), all kinds of representation and group of participants. Attention is focused on the person of guardian and performance of guardianship.

Minor's right to be informed and to express his views in all proceedings affecting him or her and to all measures to be taken in favor of him or her is considered definitely essential. This is connected with interrogation of a minor that is examined in detail including psychological aspects.

In the thesis are described especially all non contentious proceedings with minor as a participant. They are several interim measures, non contentious proceedings regulated in part three chapter five of Civil Procedure Code and enforcement proceedings in matters of custody and maintenance. Of contentious proceedings the thesis deals only with those whose contentious nature is considered inconvenient just for participation of a minor.

Within interim measures that can be taken in favor of a minor, the thesis highlights problems which may arise when applying interim measure under § 76a with regard to applicant and placing a child in interim foster care, or uncertain application of § 76b regarding protection of a minor against domestic violence. The commentary of all interim measures includes their enforcement, because it forms their integral part.

Proceedings of determination and denial of paternity are not particularly regulated by Civil Procedure Code and are heard in contentious proceedings (with the exception of proceeding of determining paternity declaration of consent of parents), but they are particularly regulated by Family Law and a minor is or should be always a participant. Therefore these proceedings were included in the thesis, were subjected to examination and criticism. As a kind of *obiter dictum* proceedings of determination and denial of maternity is mentioned, which has not been yet legislated.

Within legal custody of minors are described general principles and characteristics of this proceeding as typically non contentious. Separately is mentioned judicial supervision over the care of minors and approvals for acts of minors.

Proceedings of adoptability and adoption are discussed together due to their nature of incidental and substantive procedure. Principles of adoption according to new Civil Code are described in detail, particularly with regard to the consent to the adoption of the child.

Proceeding of permission to marry is discussed particularly regarding consequences of failure to fulfill legal conditions for underage marriage, again with reflection in new Civil Code regulation.

Relatively new legislation, proceeding of return of a minor child in matters of international child abduction, is composed of elements of contentious and non contentious procedure, while Convention on the civil aspects of international child abduction (Hague, 1980) and Regulation No. 2201/2003 shall be applied to it. The thesis offers detailed analysis and critical evaluation of legislation of this procedure including enforcement of the decision and brings proposals *de lege ferenda*, which could specify the nature of the procedure for provide more intensive protection of minor's rights.

Proceeding of quasi criminal acts of children younger than fifteen years is due to its specific nature discussed separately, although the regulation of Civil Procedure Code of legal custody of minors applies to it. Legislation of Act No. 218/2003 Coll. of Juvenile Justice is described here in detail.

Enforcement of decision has been recently amended several times. Amendments are within the commentary to enforcement in matters of custody and maintenance described and critically evaluated.