

# CROATIA'S NEW FAMILY ACT AND ITS IMPLICATIONS ON MARRIAGE AND OTHER FORMS OF FAMILY LIFE

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## I. A FEW INTRODUCTORY NOTES

After almost fifty years of coexistence with other states in the former Yugoslavia, Croatia gained independence in 1991.<sup>1</sup> Since independence, Croatia has undergone many social and political changes, including enactment of a new constitution<sup>2</sup> and the nullification of pre-1990 communist era laws. Croatian Family Law has also greatly changed since the fall of communism.

*De lege lata*<sup>3</sup> family relations in Croatia are set by the Family Act (New Family Act).<sup>4</sup> Enacted on December 20, 1998 and effective as of July 1, 1999, the New Family Act replaced the previous Marriage and Family Relations Act (Old Act).<sup>5</sup> The New Family Act governs marital rights, relations between parents and children, adoption, guardianship, support, relations regarding property rights, court and administrative procedures, and transitional and concluding provisions.<sup>6</sup>

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1. *See Ustavna odluka o suverenosti I samostalnosti Republike Hrvatske [Constitutional Decision declaring the sovereignty and independence of the Republic of Croatia]*, NARODNE NOVINE, SLUŽBENI LIST REPUBLIKE HRVATSKE [National Gazette, Official Publication of the Republic of Croatia], June 25, 1991, at 849 [hereinafter NATIONAL GAZETTE].

2. *See USTAV REPUBLIKE HRVATSKE [Constitution] [URH]*, NATIONAL GAZETTE, Dec. 22, 1990, at 1237 (Croatia); *see also USTAV REPUBLIKE HRVATSKE (PROČIŠĆENI TEKST) [Amended Constitution] [URHPT]*, NATIONAL GAZETTE, Jan. 26, 1998, at 133 (Croatia).

3. *De lege lata* is defined as "what the law is (as opposed to what the law ought to be, *de lege ferenda*)." Kurt Taylor Gaubatz & Robert Turner, "Beck's Law Dictionary": *A Compendium of International Law Terms and Phrases*, (last updated June 23, 1999) <<http://www.people.virginia.edu/~rjb3v/latin.html>>.

4. *See OBITELJSKI ZAKON [FAMILY ACT]*, NATIONAL GAZETTE, Dec. 22, 1998, at 3915 (Croatia).

5. *See NATIONAL GAZETTE*, Mar. 21, 1978, at 170.

6. Transitional provisions appear in the New Act in matters previously regulated in the Old Act. They serve to inform citizens when to behave in accordance with the New or Old Act. Most transitional provisions are in force for a limited period of time and are meant to clarify any confusion in the application during the transition period between the old and new

The New Family Act makes significant changes to Croatian family law, however, it retains all of the provisions deemed satisfactory and functional of the previous Marriage and Family Relations Act. New provisions reflect a tendency toward more detailed legislation and the modernization of particular legal institutions, as well as harmonization with the provisions of numerous international (global and regional) agreements.<sup>7</sup>

This article introduces, analyzes, and compares the changes of the New Family Act to the Old Act with regard to marriage, adoption, unmarried couples, and familial obligations created through artificially assisted conception.<sup>8</sup>

## II. HOW THE NEW FAMILY ACT AFFECTS MARRIAGE AND NONMARITAL PARTNERSHIPS

### A. Defining "Partnership"

Worldwide, there is an increasing trend toward legalizing same-sex partnerships.<sup>9</sup> Countries such as Denmark,<sup>10</sup> Sweden,<sup>11</sup> Norway,<sup>12</sup> Iceland,<sup>13</sup> and the Netherlands<sup>14</sup> have all enacted detailed regulations permitting same-

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law. As time passes they lose their *raison d'être*. Concluding provisions, unlike transitional provisions, are mandatory, providing citizens with the date the new law comes into force as well as indicating significant changes from the former law.

7. For example, Section 90 of the New Act provides that parents, before anyone else, are responsible for ensuring a child can exercise its rights as a child and parents are to inform their children of their rights in a manner suited to the child's age and maturity. Adoption of such a provision is a result of Croatia's ratification of the UN Convention on the Rights of the Child. Sections 5 and 18 of the Convention delineate the responsibilities, rights, and duties of parents and other persons responsible for a child to direct and guide the child in the exercise of the rights recognized and granted by the Convention. See Convention on the Rights of the Child, *infra*, note 67 §§ 5, 18.

8. See MIRA ALINČIĆ ET AL., *OBITELJSKO PRAVO [FAMILY LAW]* 21-22 (Birotehnika ed., 1994).

9. See generally William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 *MCGEORGE L. REV.* 641 (2000).

10. See Danish Registered Partnership Act, Nos. 363, 372 (June 7, 1989) (Den.) (Act No. 372 established the registered partnership, while Act No. 363 amended various laws to incorporate the Registered Partnership Act). See generally Martin D. Dupuis, *The Impact of Culture, Society, and History on the Legal Process: An Analysis of the Legal Status of Same-Sex Relationships in the United States and Denmark*, 9 *INT'L J. L. & FAM.* 115, n.109 (1995).

11. See Homosexual Cohabitees Act (1988) (Swed.); see also Åke Saldeen, *Family Law, in SWEDISH LAW* 359, 373-74 (Juristförlaget ed., Stockholm 1995).

12. See Registered Partnership for Homosexual Couples, Apr. 30, 1993, no. 40 (1993) (Nor.); see also Peter Lødrup, *Norway: Registered Partnership in Norway*, in 1994 *THE INTERNATIONAL SURVEY OF FAMILY LAW* 387 (Andrew Bainham ed., 1996).

13. See Law on Registered Cohabitation no. 87/1996 (1996) (Ice.); see also David Thór Björgvinsson, *General Principles and Recent Developments in Icelandic Family Law*, in 1995 *THE INTERNATIONAL SURVEY OF FAMILY LAW* 215, 225-26 (Andrew Bainham ed., 1997).

14. See Caroline Forder, *The Netherlands: Re-Thinking Marriage, Parenthood and Adoption*, in 1995 *THE INTERNATIONAL SURVEY OF FAMILY LAW* 359, 360-61 (Andrew Bain-

sex partnerships.<sup>15</sup> These countries generally call such partnerships “registered partnerships”<sup>16</sup> or “homosexual cohabitation.”<sup>17</sup> Some European countries have even granted same-sex partnerships nearly the same legal effect as that of heterosexual partnerships.<sup>18</sup> The most liberal European countries, such as the Netherlands, have in fact granted same-sex partnerships the same legal status as heterosexual marriages.<sup>19</sup> In contrast, Croatia’s Family Acts have failed to follow this liberal trend, providing such partnerships neither *de lege lata* nor *de lege ferenda*.<sup>20</sup>

Under the New Family Act, marriage is defined as “the union of man and wife for life.”<sup>21</sup> This decision therefore presents a traditional standing toward the institution of marriage. Homosexual cohabitation has effectively been rejected in Croatia. The rejection of homosexual cohabitation in Croatian law is an attempt to protect traditional marriage as the foundation of the family and ensure the future of the human race.

Thus far in Croatia there is no evidence of an effort to enact legislation for homosexual partnerships or to change public opinion on the matter. Without doubt, adoption of laws providing for same-sex partnership would lead to great disputes in this deeply traditional country. Nevertheless, the New Family Act does take a small step toward providing for same-sex partnerships in that unmarried partnerships are legally recognized. The current definition of a an unmarried heterosexual partnership is the “union of an unmarried woman and an unmarried man.”<sup>22</sup> While this may provide some hope for proponents of same-sex marriages in Croatia, such hopes are for the

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ham ed., 1997).

15. See Eskridge, *supra* note 9. Some of the changes present in the legislation of countries that are:

adopting [pro-homosexual changes] in [their] law[s]: repealing laws criminalizing consensual sodomy, equalizing the age of consent for same-sex and different-sex intercourse, prohibiting discrimination on the basis of sexual orientation, affording same-sex cohabiting couples the same rights and obligations as different-sex couples, recognizing same-sex unions as ‘registered partnerships’ or the like, and expressly allowing same-sex partners to adopt children on the same terms as married couples.

*Id.* at 647.

16. *Id.* at 663-70.

17. Homosexual Cohabitees Act, *supra* note 11. Other names similar to “registered partnerships,” or “homosexual cohabitation” are also used.

18. See Eskridge, Jr., *supra* note 9, at 668, which states: “[d]ifferent-sex as well as same-sex couples can register as partners and are entitled to all the benefits and duties of marriage, but not the right to adopt children.”

19. See *id.*

20. See Dijana Jakovac-Lozić, *Brak na razmeđi heteroseksualne isključivosti i homoseksualne dopustivosti [Marriage at the Boundary Line Between Heterosexual Exclusiveness and Homosexual Permissibility]*, 35 ZBORNIK RADOVA PRAVNOG FAKULTETA U SPLITU 143-62 (1998). See also note 3.

21. See FAMILY ACT cl. 5.

22. See *id.* cl. 4.

distant future. Additionally, placing such hopes even further into the future has been the recent revival of the religious right. Nevertheless, for now change seems avoidable and unlikely, despite the changes sweeping Western Europe.

### *B. Prerequisites to Marriage*

The conservative trend of the New Family Act toward same-sex marriages is in sharp contrast to its new flexibility toward heterosexual marriages. This flexibility has been greatly increased by the legislature's abandonment of the so-called "marital prohibitions."<sup>23</sup> These marital prohibitions are now considered outdated. Traditional impediments to marriage such as affinity, duress, or fraud have been abandoned by the New Family Act. Persons lacking capacity are even now allowed to marry with court approval. Such marriages are allowed if a court is convinced that the couple is genuinely in love and wants to live together, or that marriage is in their best interests. Under both tests the couple still must be able to comprehend the gravity and legal consequences of marriage.<sup>24</sup>

Notwithstanding the absence of the "marital prohibitions," certain prerequisites for the existence of marriage have been preserved—the parties must (1) be of the opposite sex; (2) provide evidence of consent to marry; (3) initiate the marriage by state-recognized authority (the registrar or a representative of a state-recognized religious community);<sup>25</sup> (4) be of age of majority;<sup>26</sup> (5) not be within a prohibited degree of consanguinity;<sup>27</sup> and (6) be unmarried.<sup>28</sup>

The New Family Act, however, has become significantly stricter than the Old Act with respect to regulating consanguineous marriages. Other imperfections, in both content and form, have also been interjected into this area of law. Under the Old Act, prohibited marriages included marriages between related individuals within a certain collateral degree—the first degree, or directly related (e.g., father and daughter), the second degree (e.g., brothers and sisters and cousins), the third degree (e.g., a child and his or her parents' sibling(s)), and the fourth degree (e.g., children and parental siblings

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23. Marital prohibitions were circumstances that prevented the contracting of a valid marriage. If a marriage, however, occurred despite the presence of one or more of such prohibitions, the marriage was still valid but the registrar of marriages could be sanctioned for allowing the marriage to occur. The registrar could be disciplined if negligent or tried criminally if acting intentionally.

24. For example, a mentally handicapped person who cannot manage their own affairs could be allowed to marry in certain circumstances. Another example is elders in nursing homes.

25. *See* FAMILY ACT cl. 24.

26. *See id.* cl. 26.

27. *See id.* cl. 28. The New Act also prohibits marriage between a parent and an adopted child, regardless of the form of adoption. *Id.* cl. 29.

28. *See id.* cl. 30.

and/or cousins). The fourth collateral degree prohibition could be permitted with court approval so long as the marriage was not contrary to folk tradition or local custom.

In contrast, the New Family Act prohibits marriage between persons up to the sixth collateral degree<sup>29</sup> and persons related in the sixth degree may marry only in exceptional circumstances where valid reasons for exception are stated, and only with permission of the court.<sup>30</sup> Croatia's prohibitions are unique, as no other European nation treats these degrees of consanguinity as an impediment to marriage, including countries of the Roman juridical culture whose laws and legal system derive from Roman law—countries influenced by Catholic incest prohibitions, which are less restrictive than Croatia.

These changes in consanguineous prohibitions have not proven flawless in theory or practice and have created conflicts with other areas of Croatian law. One such conflict is with Croatia's Penal Code.<sup>31</sup> Ironically, the New Family Act is even more restrictive in some aspects than the Penal Code. The Penal Code defines collateral-line incest as sexual intercourse between siblings, which is narrower than the New Family Act.<sup>32</sup> Furthermore, Croatia's Penal Code does not go as far as the New Family Act in delineating relationships that are prohibited from marrying.

In addition, because religious marriages have only recently been recognized in Croatia, the difference between Croatian family law and certain religions' laws are at odds. For example, Roman-Catholic Croatians are prohibited from marrying relatives by the rules of their religion, albeit to a significantly lesser extent than by the New Family Act. The Roman Catholic Code of Canon Law,<sup>33</sup> in force since November 27, 1983, provides that marriage between direct descendants and ancestors is restricted and marriage is prohibited up to the fourth degree in the collateral line of descent. Thus, the marriage of two Roman Catholic Croatian citizens, married by a religious ceremony, will not possess the legal effect of a civil marriage if they are of a degree of consanguinity prohibited by family law but accepted in the Catholic Church. For example, a marriage in the Catholic Church between two individuals related in the sixth collateral degree (e.g., an individual's grandchildren to the individuals' siblings) have an invalid marriage under the New Family Act. In such a case, if an annulment proceeding were to be com-

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29. See *id.* cl. 28. This provision prohibits, for example, marriage between grandchildren and siblings of an individual.

30. An example of exceptional circumstances include a pregnancy or where the parties never met until they were adults so they did not become acquainted in the context of their family relation.

31. See KAZNENI ZAKON [PENAL CODE] cl. 198 (1997) (Croatia).

32. See Mira Alinčić, *Saborski amandmani u Obiteljskom zakonu [Amendments of the Croatian Parliament Concerning the Family Act]*, 3 VLADAVINA PRAVA 141, 143 (1999) [hereinafter Alinčić, *Amendments*].

33. See *Codex Juris Canonici*, 1983 [Code c.1091, §§ 1-2].

menced by a competent person with standing to challenge the marriage—i.e., relatives or parties—the court would have to void the marriage.<sup>34</sup>

### *C. Solemnizing Marriage: A New Choice*

An important addition to the New Family Act concerns the procedure for establishing a valid marriage. In addition to the civil marriage long-recognized by the state, the New Family Act also introduces a previously unrecognized facultative form of marriage solemnized through a religious ceremony. The New Family Act, therefore, provides for two forms of solemnizing marriage: (1) a civil marriage executed before a registrar, and (2) a religious marriage executed before the representative of any religious community legally recognized and regulated by the Republic of Croatia. This provides Croatian couples with a welcome choice.<sup>35</sup>

Constitutional provisions legally recognizing freedom of religion and provisions mandating the separation of church and state are the basis for the changes in the New Family Act.<sup>36</sup> This new amendment also results from an agreement reached between the Holy See of the Roman Catholic Church and the Republic of Croatia.<sup>37</sup>

For a religiously solemnized marriage to be given legal effect, two prerequisites must be met. First, the bride and groom must obtain from the registrar of marriages a certificate documenting that they meet all of the prerequisites in order to marry. This document indicates that the applicants are of the opposite sex, they acknowledge their consent to the union, they have attained the age of 18 and they have the required mental capacity to enter into marriage.<sup>38</sup> The certificate also documents that the applicants are not too closely related by consanguinity, affinity, or adoption. Second, the bride and groom are required to solemnize their marriage within three months from the issuance of the registrar's certificate.<sup>39</sup>

Once a couple has religiously solemnized their marriage, the official who has solemnized the marriage must submit to the registrar of marriages the certificate signed by both husband and wife, their witnesses, and the solemnizing official, to certify that the marriage has been solemnized. This is to occur within five days of the ceremony and then the registrar must enter the marriage into the marriage register within three days of receiving the stated document. Subsequently, the registrar issues a marriage certificate to the

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34. See FAMILY ACT cls. 31, 37.

35. See *id.* cls. 6-8.

36. See HRH arts. 40-41.

37. See FAMILY ACT cl. 13. See also Agreement between the Holy See and the Republic of Croatia on legal matters which was signed in Zagreb, on Dec. 18, 1996, and came into force on Apr. 9, 1997. See NATIONAL GAZETTE—Međunarodni ugovori (International Agreements), Feb. 25, 1997 at. 95-97.

38. Persons over 16 may marry in exceptional circumstances.

39. See FAMILY ACT cl. 20(3).

couple, which affirms that the religiously solemnized marriage has the legal effect of a civil marriage. Therefore, a marriage solemnized, for example, by the Catholic Church is the legal equivalent of a civil marriage from the date of solemnization.<sup>40</sup> Such an option was unavailable prior to the New Family Act.

Not all marriages solemnized in a church in Croatia, however, are recognized by the state. A marriage solemnized by an official of a religious community that is not regulated or recognized by the Republic of Croatia has no legal effect. Such a marriage might be recognized by that church, but not the state.

A comparative analysis with other nations today illustrates a general acceptance of a facultative civil marriage—marriage that can be solemnized by either civil officials (justices of peace, judges, etc.) or religious officials. Such marriages are recognized in Italy,<sup>41</sup> Spain,<sup>42</sup> Sweden,<sup>43</sup> in Anglo-Saxon countries like England<sup>44</sup> and the United States,<sup>45</sup> and in many other countries as well.<sup>46</sup>

#### D. Consent to Marriage

Another change under the New Family Act is that oral consent by either individual is sufficient to create a marriage.<sup>47</sup> This is a drastic change from the Old Act. Under the Old Act, the essential element of a marriage was a written agreement to marry—the signing of the marriage register.

Another related change in the New Family Act is that prospective spouses may not be represented at the formal ceremony by a proxy. The parties are to attend the solemnization in person.<sup>48</sup>

#### E. Divorce

The New Family Act has also made significant changes to divorce proceedings in Croatia. A court will now dissolve a marriage if it is established

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40. See *id.* cl. 23; see also Mira Alinčić, *Građanski brak sklopljen prema državnim propisima i u vjerskom obredu [Civil Marriage Solemnized Under State Statutes and in Religious Ritual]*, 47 ZBORNIK PRAVNOG FAKULTETA U ZAGREBU 647 (1997) [hereinafter Alinčić, *Civil Marriage*].

41. See Nenad Hlača, *Pravno uređenje braka u Republici Italiji [Marriage Related Legal Provisions in the Republic of Italy]*, 19 ZBORNIK PRAVNOG FAKULTETA U RIJECI 175 (1998).

42. See Cantero Gabriel Garcia, *Spain—Marriage Before the Mayor and Other Matters*, in 1994 THE INTERNATIONAL SURVEY OF FAMILY LAW 435 (Andrew Bainham ed., 1996).

43. See Alinčić, *Civil Marriage*, *supra* note 40, at 657-58.

44. See Michael Freeman, *England in the International Year of the Family*, in 1994 THE INTERNATIONAL SURVEY OF FAMILY LAW 199, 203 (Andrew Bainham ed., 1996).

45. See Alinčić, *Civil Marriage*, *supra* note 40, at 657-58.

46. See *id.*

47. See FAMILY ACT cl. 19(1).

48. See *id.*

that (1) marital relations have been seriously and permanently impaired; (2) a year has passed since the marital union ceased to exist; or (3) both spouses consent to a divorce.<sup>49</sup> Further, a husband cannot apply for divorce while his wife is pregnant—he must wait until the child is at least one year old.

Like the United States, Croatia now allows divorce as a legal remedy for broken marital relations.<sup>50</sup> The reason for this change is to simplify divorce and to reduce both time and money spent on divorce proceedings. These changes are a major step toward the humanization of divorce proceedings in Croatia—an intent to pay attention to the needs of individuals involved in the process and how the law impacts them.

Like the Old Act, the New Family Act still encourages couples to attend mediation prior to bringing divorce proceedings. The New Family Act, like the Old Act, places great emphasis upon reconciliation of marriages. The mediation procedure is conducted by a social welfare center. It is compulsory for spouses with minor children and must be completed within six months of applying for divorce by spouses. If a social welfare center does not complete the proceeding within six months, the spouses may institute a divorce trial. Until the divorce is final, decisions regarding children's welfare are to be made by the social welfare center, not by the court.

The drastic rise in the number of divorces worldwide is increasingly disturbing. Some commentators suggest that this phenomenon results from the ease with which people can obtain divorces—legal liberalization.<sup>51</sup> However, the increases in divorce rates can only in part be attributed to the influence of legislation. Often it is legislation that lags behind the social systems that it regulates.<sup>52</sup>

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49. *See id.* cl. 43.

50. Similar to the United States, the current practice allows divorce if the marriage suffers irreconcilable differences.

51. Compare Marie Thérèse Meulders-Klein, *La problématique du divorce dans les législations d'Europe occidentale*, 41 REVUE INTERNATIONALE DE DROIT COMPARÉ (R.I.D.C.) 7 (1989), with Olivier Guillod, *Switzerland: Choosing Its Own Way or Following Others?*, in 1995 THE INTERNATIONAL SURVEY OF FAMILY LAW 487, 488-90 (Andrew Bainham ed., 1997), and Jehanne Sosson, *Belgium—Divorce procedure, children's hearing in courts, joint parental authority: major reforms in Belgium, 1994 and 1995*, in 1995 THE INTERNATIONAL SURVEY OF FAMILY LAW 73 (Andrew Bainham ed., 1997).

52. Such trends are influenced by, for example, the economy and the influence of the modern workforce on marriages, as the harmonization of professional and marital responsibilities requires significant effort on the part of both spouses, especially considering the economic independence it provides to women. Additionally, spouses' family backgrounds are varied—one spouse may come from a family with traditional attitudes regarding the distribution of social and marital tasks of each spouse while the other comes from a less traditional background. We all have individualized attitudes regarding values that provide stability to a marriage, such as faithfulness, respect, etc. All of these factors affect the viability of a marriage. *See generally* BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* (1997); JOHN EEKELAAR, *REGULATING DIVORCE* (1991); JUDITH WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* (1996). The rise in the divorce rate is not just a western cultural phenomenon. Statistical data evidences that Croatia's divorce rate is on the rise as well. As early as 1971, the percentage of marriages ending in divorce in Croatia was 15%, the same as in West Germany. *See* STATISTIČKI



### F. Property Rights

The most significant changes in the New Family Act are found in the regulation of marital property and property accumulated during the marriage. Like the Old Act, the New Family Act distinguishes between jointly owned property acquired by the spouses during the marriage or resulting from such property,<sup>53</sup> and property owned separately by each respective spouse before the marriage or acquired separately during the marriage by gift, bequest, devise, inheritance, or similar fashion.

Upon divorce under the Old Act, property was divided between the spouses based on the individual contribution of each spouse in the acquisition of that property. This system was difficult to implement. Under the New Family Act spouses are joint owners of their joint properties in equal shares.

Spouses may also contract to the contrary. Such a contract is to be made in the form of a notarized deed.<sup>54</sup> The opportunity to contract out of the statutory scheme is an important legislative feature. Under the New Family Act spouses may contractually agree on the ownership of property currently owned as well as property acquired in the future. They may agree to unequal shares in the joint property.

Furthermore, the property a marital agreement can control is not limited to tangible personal property. Such an agreement permits spouses to claim their income as personal property, to reserve the right of preemption regarding specific property, to provide for management or use of property, and to waive the right to demand division of properties for a specified period of time.<sup>55</sup>

One limitation on these agreements concerning joint property is that Croatian citizens may not provide for the application of foreign law or foreign jurisdiction in property matters. However, foreign law may be provided for where one spouse is a foreign citizen.<sup>56</sup>

Under the New Family Act, Croatia's position regarding marital property rights is quite similar to the positions of numerous European states. Like

GODIŠNJAK JUGOSLAVIJE [STATISTICAL ANNUAL OF YUGOSLAVIA] (1971), which states that in 1971, 35,466 civil marriages and 5,474 divorces occurred in Croatia. See also STATISTISCHES BUNDESAMT, WIESBADEN [GERMAN STATISTICAL YEARBOOK] (1971), for German marriage and divorce statistics. Twenty years later, in 1991, 23% of Croatian marriages ended in divorce (4,877 divorces to 21,583 civil marriages). See PETAR ČALIĆ, BRAK U PROCIEPU 98, n.68 (Glas Koncila ed., 1996) [MARRIAGE IN GAP, MARRIAGE IN JEOPARDY]. In 1998, slightly over 16% of Croatian marriages ended in divorce (3,962 divorces to 24,234 civil marriages). See STATISTIČKI LJETOPIŠ 1999, REPUBLIKA HRVATSKA, DRŽAVNI ZAVOD ZA STATISTIKU [STATISTICAL YEARBOOK OF THE REPUBLIC OF CROATIA, CENTRAL BUREAU OF STATISTICS], at 102 (1999).

53. The New Act also identifies gambling winnings as joint property unless a spouse can trace the money used to win to his or her separate property. See FAMILY ACT cl. 258.

54. See *id.* cls. 259-62.

55. See *id.* cl. 259; see also MIRA ALINČIĆ ET AL., KOMENTAR OBITELJSKOG ZAKONA [COMMENTS ON THE FAMILY ACT] 171 (Narodne Novine ed., 1999).

56. See *id.*

Croatia, many European states, such as Germany, Denmark, France and Switzerland, provide for a statutory marital property scheme and a right to contract out of that scheme.<sup>57</sup>

Non-jurists as well as some jurists disagree as to the temporal powers of the New Family Act regarding marital property. Currently, for example, there are objections about the New Family Act's transitional and concluding provisions not being sufficiently clear on whether the Act has retroactive effect.<sup>58</sup> The question is what happens in the case of spouses who acquired property before enactment of the New Family Act, but had not instituted the procedure for establishing their respective shares in such property by that date. Can they now contract out of the marital property scheme?

Most believe the New Family Act does not apply retroactively regarding marital property. Such a conclusion is based on Croatia's Constitution, which states, with few exceptions, that statutes are not to have retroactive effect.<sup>59</sup> Where legislation does not otherwise provide, there is a presumption against retroactive application of a law. If such an effect is deemed necessary, it needs to be provided for by an explicit amendment.

### G. Recognition of Unmarried Cohabitants

Croatia is among a small number of European nations that legally recognize and regulate relations between unmarried couples through family law.<sup>60</sup> The legislation is binding only on relationships between a man and a woman, neither of which is presently married to anyone. The areas affected by this legislation are limited to property acquired during the relationship by both partners' efforts and the obligation to support each other. A relationship between unmarried cohabitants lasting for "a longer period of time" properly creates property rights that rise to the level of the rights of married couples.<sup>61</sup> What defines a "longer period of time" is left to the court's discretion. Thus, Croatian unmarried cohabitants are left without an objective standard. It is for future case law to determine exactly what constitutes a "a longer period of time."

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57. See Dubravka Hrabar, *Režim stjecanja i diobe imovine bračnih drugova u hrvatskom i poredbenom pravu [Regime for the Acquisition and Distribution of Marital Property in Croatian and Comparative Law]*, 44 ZBORNIK PRAVNOG FAKULTETA U ZAGREBU 236 (1994).

58. See Hrvoje Kačer, *Jedna dvojba glede primjene Obiteljskog zakona ili imaju li odredbe Obiteljskog zakona o bračnoj stečevini povratni učinak [A dilemma Regarding Implementation of the Family Act or, Whether the Family Act Provisions Have Retroactive Effect]*, 8 PRAVO I POREZI 26 (1999).

59. See URH sec. 90. Generally, Croatian law is not given retroactive effect but the legislature has discretion to decide otherwise. *Id.*

60. See COHABITEES ACT § 232 (1987) (Sweden). ZAKON O DRUŽINSKIH ZVEZI I DRUŽINSKIH RAZMERJIH [MARRIAGE AND FAMILY RELATIONS ACT] (1976). The amended text of this is published in Slovenia's official gazette, URADNI LIST REPUBLIKE SLOVENIJE, no. 14 (1989).

61. See FAMILY ACT cl. 262.

The New Family Act also affects a father's duty to provide support for the mother of a child born out of wedlock. Under the New Family Act, the father of an illegitimate child is required to provide support to the child's mother for one year following the child's birth. This requirement, however, applies only to mothers without sufficient means of support and who continue to care and provide for the child.<sup>62</sup> Under the Old Act, the father was also required to provide support to the mother during the pregnancy. Regardless of the length of an unmarried partnership, an unmarried partner was, in accordance with his means, to provide support to his illegitimate child's mother beginning three months before and lasting until six months after the child's birth, if the mother had inadequate financial means. The New Family Act places no such obligation on the father, but it has prolonged the period of maintenance following delivery.<sup>63</sup>

A controversy has erupted over the New Family Act's provisions regarding children born out of wedlock to cohabiting partners. Legal experts argue that children born in unmarried partnerships in Croatia are deprived of their rights under the New Family Act.<sup>64</sup> This problem has led some to call for a petition to the Constitutional Court requesting an advisory opinion regarding the validity of the New Family Act.<sup>65</sup> These commentators argue that the current law relegates illegitimate children to "children of lesser rights."<sup>66</sup> In the case of a child whose parents divorce, the argument is that the New Family Act directs a court to ensure, *ex officio*, that the child is taken care of, the non-custodial parent is paying child support, and is staying in touch with the child. In contrast, in the case of a child born of a non-marital relationship, the custodial parent must file for alimony, as opposed to the court taking responsibility, and in most cases, this parent is not sufficiently aware of the child's rights to financial support. Thus, children of divorced couples receive financial support even if neither parent has requested support. In contrast, illegitimate children receive financial aid only if the custodial parent applies for aid. Time will tell if implementation of the law is generally the best indicator of legislative efficacy and adequacy; it is therefore hoped that positive change will soon be made in this particular aspect of Croatian family law in order to benefit the children born out of wedlock, thus ensuring their rights.

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62. See *id.* cl. 230.

63. See ZAKON O BRAKU I PORODIČNIM ODNOSIMA [MARRIAGE AND FAMILY RELATIONS ACT] art. 259 (1978).

64. See, e.g., Gordana Igrec, *Intervju s odvjetnicom Dafinkom Večerinom [An Interview with Attorney-at-Law, Mrs. Dafinka Večerina]*, NEDJELJNA DALMACIJA, Mar. 15, 2000, at 9.

65. See *id.*

66. *Id.*

### III. HOW THE NEW FAMILY ACT AFFECTS PARENT-CHILD RELATIONS

Parent-child relations have undergone great and significant change under the New Family Act. The New Family Act entails new and detailed legislative regulation of children's rights. New legal doctrines have been introduced, all in line with the 1989 UN Convention on the Rights of the Child, such as the responsibility of parents and the best interest of the child.<sup>67</sup> Croatia has accepted this convention and incorporated its guidelines into the New Family Act.

The former approach to the parent-child relationship focused on parental *rights* and the child's obligations. In significant contrast, the current focus is parental *care*, parenting responsibilities, and the interests of the child.

#### A. Children's Rights

##### 1. Violence

The most important rights of a child are the right to the protection of their health and life, the right to a safe upbringing, the right to be raised by his or her parents, the right to education, and the opportunity to choose his or her profession. Children shall be free from humiliation and physical or corporal punishment—they have the right to be free from child abuse and mistreatment. Child abuse prevention benefits from provisions of the New Family Act, which require all citizens directly and indirectly involved in a child's development to report all violations of a child's rights to the social welfare center. Violations that must be reported are physical violence, emotional violence,<sup>68</sup> sexual abuse,<sup>69</sup> neglect or negligent acts by a caretaker, and mistreatment or exploitation of a child.<sup>70</sup> The social welfare center must investigate every reported violation and rectify the conditions under which a child

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67. See Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 44. The Convention was published in the Službeni list SFR Jugoslavije [Yugoslav Official Gazette] (No. 15, of Dec. 21, 1990). It was ratified by the Ratification Act in the Yugoslav Parliament on Dec. 18, 1990. Pursuant to Croatia's Constitutional Decree on Sovereignty and Independence (1991), "international agreements made and entered into by the SFR Yugoslavia, shall be applied in Croatia provided they are not [in contrast] to the Constitution and the legal system of the Republic of Croatia, pursuant to international law stipulations related to succession of states regarding contracts." See generally KREŠIMIR SAJKO, MEĐUNARODNO PRIVATNO PRAVO (OPĆI DIO) [INTERNATIONAL PRIVATE LAW—GENERAL PART], 34 (Informator ed., 1996).

68. See generally Dijana Jakovac-Lozić, *Tjelesno i duševno nasilje nad djetetom kao neki od načina kršenja elementarnih prava djeteta* [Physical and Mental Violence Against Children as Violation of Elementary Children Rights], 36 ZBORNIK RADOVA PRAVNOG FAKULTETA U SPLITU 133 (1999) (discussing physical and mental child abuse).

69. See generally Dijana Jakovac-Lozić, *Spolno iskorištavanje djece kao oblik zlorabe roditeljskih dužnosti i prava i kao kazneno djelo* [Sexual Abuse of Children as a Form of Abuse of Parental Duties and Rights and as a Criminal Offence], 36 ZBORNIK RADOVA PRAVNOG FAKULTETA U SPLITU 527 (1999) (discussing sexual abuse and children in Croatia).

70. See FAMILY ACT cl. 108(2).

lives. Within Croatia's legal system, the social welfare center, which is a governmental entity, is responsible for actually implementing the constitutional principle of the protection of children.<sup>71</sup> Therefore, protecting children's rights is given priority. This is in contrast to the former approach where priority was given to protecting adults' rights, such as family rights, privacy, and respect, and these rights were often manipulated and abused.<sup>72</sup>

Despite the expansion of children's rights and the new focus on children's rights over parent's rights, the New Family Act contains imperfections in the area of domestic violence. Article 118, which prohibits violence in the family, states, "Violent behavior by a spouse or any other family member of the age of majority in the family is forbidden,"<sup>73</sup> and violations committed by a spouse or any other family member of full age shall be punished by thirty days imprisonment.<sup>74</sup> Article 362 delineates punishment for violations of article 118.

Although the presence of a prohibition against domestic violence in the New Family Act is appropriate, its placement in the New Family Act is revolutionary, as it was previously mentioned only in the Penal Code. Therefore, the recognition of the placement of a prohibition against domestic violence in the New Family Act may lead to the erroneous conclusion that such a prohibition did not previously exist. It is placed in the portion of the Act dealing with parental care—specifically, the subchapter covering the rights and welfare of children,<sup>75</sup> yet it does not specifically provide for any protection of children against domestic violence.<sup>76</sup> The placement of the prohibition amongst the parental rights appears to be misplaced and might be better dealt with in the portion of the Act dealing with children's rights. Article 118 provides that violations should be subject to proceedings before a magistrate. It is uncertain, however, who is to institute the magistrate proceedings in the case of child abuse, when the action should be instituted, and how much time can lapse from the time of a violent assault to the time the violator is punished. Like article 118, article 362 does not provide children with any special protection because violence directed toward a child is subject to the same punishment as violence upon a family member of full age—thirty days imprisonment.<sup>77</sup>

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71. See URH arts. 62-64.

72. See Alinčić, *Amendments*, *supra* note 32, at 152; see also URH art. 35.

73. FAMILY ACT cl. 118.

74. See *id.* cl. 362.

75. The portion of the Family Act of Croatia dealing with the protection of children, by its definition, includes persons under eighteen as well as "younger person[s] over the age of eighteen," but the Act does not define the latter category. *Id.* pt. 3, ch. 3, § 3.

76. See *id.* cls. 85-121 (titled "Parental Care").

77. See Alinčić, *Amendments*, *supra* note 32, at 154.

## 2. Protection of Children's Rights

Under the New Family Act, children are now entitled to seek protection of their rights before competent authorities,<sup>78</sup> such as the court system,<sup>79</sup> and governmental agencies, such as social welfare centers.<sup>80</sup> In 1995, the Council of Europe held the Convention on Implementation of Children's Rights. This convention was a new and significant contribution to the promotion of children's rights.<sup>81</sup>

Croatian parents are primarily responsible to advise a child about his or her rights and to enable the child to implement those rights. Thus, the rights of a child are an outgrowth of and dependent upon the obligations of the parent. The New Family Act also establishes obligations a child has toward his or her parent(s), such as the obligation to respect, help, and be considerate towards one's parents.<sup>82</sup>

There are two important legislative changes relating to the rights and obligations of children under the New Family Act. First, parents are obligated to prohibit their children under the age of 16 from going out at night unaccompanied by a parent or adult whom the parents trust. Second, parents may not leave children under the age of seven unobserved by another adult.<sup>83</sup>

As previously stated, the obligation to intervene in parent-child relations is vested in the social welfare centers and courts, all designed to protect the rights and interests of children. Circumstances requiring specific and alternate measures and their classification and duration are regulated in detail by the New Family Act.<sup>84</sup> If omissions and errors in parental care are established, the parents are warned and provided assistance in correcting the omissions and errors. Parents can also be referred to parental counseling centers or schools. If such conduct in childcare is complex and repeated, or if parents require special assistance in raising their children, the social welfare center may order supervision of parental care for at least six months. In cases of major child neglect (e.g. insufficient nutrition, clothing, hygiene, healthcare, irregular school attendance, protection of children from harmful acts of other persons, etc.), the parents may be temporarily deprived of custody. In such cases, the child is placed under guardianship and cared for by another person or institution for up to one year. Removing the child from the custody of parents does not void other parental responsibilities, obligations, or rights

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78. See FAMILY ACT cl. 88. "[A child] may demand protection of its rights before competent authorities, which shall investigate the matter and undertake measures intended to protect the child's rights." *Id.*

79. See *id.* cls. 114, 309-26.

80. See *id.* cl. 108.

81. See European Convention on the Exercise of Children's Rights, Jan. 25, 1996, Europ. T.S. No. 160. Currently, Croatia is not a party to this agreement.

82. See FAMILY ACT cl. 89.

83. See *id.* cls. 93-94.

84. See *id.* cls. 108-20.

regarding the child. Immediately before the guardianship expires, all of the circumstances of the case are to be reviewed and the social welfare center may order the same or another measure in order to protect the child. Through the courts, the state may permanently deprive a parent of custody in cases of severe child abuse or neglect of parental obligations. This is the most severe measure available. A parent permanently deprived of custody is not excused from the obligation of providing for the child.

### *B. Paternity and Artificially Assisted Conception*

The New Family Act delineates circumstances under which it is possible to challenge paternity of an artificially conceived child and circumstances under which it is impossible to establish paternity.<sup>85</sup> All other matters are regulated by medical legislation.

With regard to maternity issues, the legal mother of a child is the woman who gave birth to the child.<sup>86</sup> This eliminates any uncertainty in situations where a child is conceived from a donated egg, which is in contrast to, for example, the Jewish tradition, the United Kingdom,<sup>87</sup> and certain jurisdictions in the United States.<sup>88</sup>

### *C. Families Created By Adoption*

The New Family Act also presented changes to adoption in Croatia. In Croatia, there are two predominant forms of adoption: full adoption and simple adoption. Full adoption creates a legal relationship between the adopting parent and his or her relatives on the one side, and the adopted child and its descendants on the other. This form of adoption creates, in legal terms, a natural parent-child relationship. The child maintains inheritance rights with the natural parent still raising the child.<sup>89</sup> An important addition in the New Family Act is that persons who choose this form of adoption may be entered in the registers of births, deaths, and marriages. If the adopted child is over the age of twelve, however, the child must consent to the adoptive parents being entered in the registers as the child's parents. A very important limitation to full adoption is that only a person who has been married for at least three years can adopt in full, regardless of whether one or both marital partners adopt the child. A full adoption is not voidable under any

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85. See *id.* cls. 83-84.

86. See *id.* cl. 52.

87. See Shlomit Joy Oz, *Genetic Mother vs. Surrogate Mother: Which Mother Does the Law Recognize? A Comparison of Jewish Law, American Law and England's Law*, 6 *TOURO INT'L L. REV.* 438 (1995).

88. See VA. CODE ANN. § 20-158(A) (Mitchie 2000) which states that in Virginia, "the gestational mother of a child is the child's mother;" see also *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410, 1422 (1998) (holding that the egg donor is the legal mother).

89. See *id.* cls. 143, 148(2).

circumstances and must occur by the time the child is ten years old, as opposed to six years old under the Old Act.<sup>90</sup>

A simple adoption creates a legal relationship between the adopting parent and the adopted child and the child's descendants, but does not reach any other relatives of the adopting parent. A simple adoption is voidable in limited circumstances and there is no requirement that the adopting parent be married.

Both types of adoption are limited in that a person may not adopt a child to whom that person is related in the first or second degree. Thus, grandparents cannot adopt a grandchild, a brother cannot adopt a sister, or vice versa, but an aunt or uncle may adopt a nephew or niece. Both types of adoption are also subject to a limitation of no more than forty years difference in age between the adoptive parent and the adopted child.<sup>91</sup> Furthermore, in both simple and full adoption, the child loses inheritance rights related to its natural parents.

Another addition to the New Family Act is the adoptive parents' obligation to tell the child about the adoption, full or simple, before he or she turns seven. If the child is older, the parents are to explain the situation immediately after the adoption. In Croatia, adoption is considered the best and most comprehensive form of protection of children deprived of parental care. Such care requires informing the child of the situation and does not tolerate concealing facts about the child's origin.<sup>92</sup> The New Family Act provides adoptive children with the right to know who their natural parents are when possible, while the UN Convention on the Rights of a Child and other international agreements grant this right unconditionally.<sup>93</sup>

Unlike the Old Act, which did not allow minors to adopt, the New Family Act allows minors to adopt a child if there is no possibility the child can be raised by its natural parents, grandparents, or other close relatives after it is one year old.<sup>94</sup> Finally, foreign citizens may adopt a Croatian child only in exceptional situations—when it is in the best interests of the child and upon consent of the ministry in control of social welfare matters.

## V. CONCLUSION

The provisions of the New Family Act regulating marital partnership and relations between parents and children clearly contain imperfections in both content and form. In particular, consanguineous marriages, the legal status of illegitimate children compared to that of legitimate children, and

90. See FAMILY ACT cls. 131-33.

91. See *id.* cl. 125(2).

92. See Dijana Jakovac-Lozić, *Prijeporni čimbenici "tajnosti" posvojenja [Controversial Factors in the "Confidentiality" of Adoption]*, 33 ZBORNIK RADOVA PRAVNOG FAKULTETA U SPLITU 427 (1996).

93. See Convention on the Rights of the Child, *supra* note 67.

94. See FAMILY ACT cl. 124(4).



the prohibition of domestic violence. These problems illustrate omissions in drafting the Croatian Family Act that could be problematic in the future. Such omissions do not, however, detract from the revolutionary and significant changes and overall quality of the New Family Act's statutory regulations regarding family relations.

The omissions in the New Family Act are not to be neglected but corrected as soon as possible. Only when the necessary corrections are made in Croatia's Family Act will the new regulations bring numerous, affirmative changes that respond to Croatia's present historical and social moment.

