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The Specific Nature of Representing Children's Interests under Martial Law

Abstract: Russia's armed aggression, and the subsequent imposition of martial law in Ukraine, made it necessary to move children to safer areas of the country and abroad. This concerns both children who move with family members (not always legal guardians) as well as children who have no parental care during the process. Due to this issue, the representation of children is of particular importance, in particular in connection with changing the place of the child's residence, its movement, border crossing, registration of status (such as a child with no parental care, an internally displaced person, a person who received temporary protection, a refugee, etc.), as well as a possible appeal to the court in this regard.

This article defines the term “child” according to Ukrainian legislation. It is noted that the definition is age-based — these are people under the age of 18. The legislative division of children into “minors” and “underage” affects the scope of their rights and responsibilities.

Further on in the article, the powers of various authorities of Ukraine are determined, which stem from the need to protect the rights of children, especially those who are abroad, in particular in relation to interactions with the relevant authorities of the state where the children reside. It is noted who the legal representatives of the child are and what documents confirm the legal representation. Special attention is paid to the legal representation of children without parental care, along with the question of who

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can represent children if they move to areas where they have no legal guardians. It is noted that, under the conditions of martial law, the procedure for taking a child into family forms of placement (guardianship, care, foster family, etc.) has been significantly simplified.

Unlike the situation under usual conditions, representation in times of martial law is often accompanied by the need to take into account certain special rules introduced during the period of that state, and confirmation of authority can be complicated by actual circumstances (such as evacuation), or the specifics of the settlement of relations of a representative office abroad. At the same time, representation should be carried out with the maximum possible consideration of the best interests of the child.

Keywords: representation — legal representative — child — martial law

1. Introduction

Since the beginning of the active phase of Russia's armed aggression and the imposition of martial law in Ukraine, the issue of representing the interests of children has become of particular importance. The reason for this is not only the need for proper representation and protection of the rights and interests of internally displaced children (this has been fully established since 2014), but also the increase in the number of temporarily occupied territories, military (combat) areas. The said circumstances cause mass movement to safer regions of the country, or abroad, by children with no parental care as well as children who moved with their families or other people accompanying them. What constitutes the primary cause of the relocation is the extremely high risks to the life and health of children under martial law, and consequently, the significantly hampered possibility to ensure proper conditions for their living and development.

2. The concept of "child"

Before we touch upon the issue of representation of the child's rights, we will explore this concept from the point of view of Ukrainian law. The main normative acts define the concept in terms of age and this definition is used in all branches of Ukrainian law. In particular, part 1 of Article 6 of the Family Code of Ukraine (hereinafter referred to as: the FC of Ukraine) stipulates that a person before reaching adulthood has

the legal status of a child.¹ The same approach is stipulated in Article 1 of the Ukrainian Law on the Protection of Childhood, namely: “a child is a person under the age of 18 (adulthood), unless, according to the law applicable to him or her, he or she acquires the rights of an adult before that time.”²

There is a further division into “minors” and “underage persons”. Minors are considered to be children from birth to the age of 14. An underage individual is between the ages of 14 and 18. It should be noted here that the legislator sometimes uses the term “minor person”, for example, the Civil Code of Ukraine, though this is identical to the concept of a “minor child”.

This division into minors and underage persons affects the number of rights and obligations of the child in various spheres and, accordingly, to a certain extent, as well as the degree of representation in certain legal relations.

3. Representing the rights and interests of the child: General aspects

Representing the rights and interests of the child is important in relations concerning the change of a child's residence, his or her movement, border crossing, registration of status (such as a child deprived of parental care, internally displaced person, a person enjoying temporary protection, a refugee), etc. Also it is now urgent to be able to ensure that these children are protected against the risk of violence, exploitation, illegal adoption, abduction, sale or child trafficking. For this reason, it is essential to use the instruments that protect the rights of these children.³

It may be necessary to go to court in order to protect the rights of a child, and in the absence of parents due to the circumstances caused by armed aggression, or, for example, due to a conflict of interest with them, the child will need either the assistance of authorised bodies/persons to

¹ Family Code of Ukraine of 10 January 2002 – URL: № 2947-III – URL: <https://zakon.rada.gov.ua/laws/show/2947-14#Text> [accessed: 10.07.2023].

² The Law of Ukraine on Protection of Childhood dated 26 April 2001, № 2402-III – URL: <https://zakon.rada.gov.ua/laws/show/2402-14#Text>[accessed: 10.07.2023].

³ *Children from Ukraine – civil judicial cooperation* – URL: https://e-justice.europa.eu/38593/EN/children_from_ukraine__civil_judicial_cooperation [accessed: 10.07.2023].

represent his or her interests, or he or she would have to appear in court by themselves.

Problems also arise because of the documents concerning representation issued by illegal authorities in the temporarily occupied territories (bodies or persons that are created, elected or appointed in the order not provided for by the laws of Ukraine).

The situation is also difficult when children who have been arranged into family forms of education are moved (evacuated) to a safe area, but their legal representatives, for various reasons, are forced to stay in the temporarily occupied territory, in the areas of military (combat) actions, or even in captivity, etc. In the case of moving abroad together with legal representatives, there may be problems related to clarifying the scope of powers of such representatives, or, for example, with differences in the provisions of the legislation of the country of the child and the legal representative's residence with the relevant provisions of Ukrainian law.

For example, according to the Ministry of Social Policy of Ukraine, in general, the host countries have created all the necessary conditions to meet the needs of orphans, children deprived of parental care and other children from vulnerable categories who have been moved abroad. However, certain cases have been noted where temporary guardians were appointed from among citizens of the states to which children were temporarily moved, in accordance with the decisions of local courts and the separation of children on the basis of such decisions with foster families or other legal representatives appointed in accordance with the legislation of Ukraine, as a result of such decisions. There is also the problem of returning children from vulnerable categories who have been displaced abroad in connection with certain conflicts between the legislation of Ukraine and the legislation of the countries of temporary residence affecting the representation of the interests of such children, as a result of which legal representatives appointed in Ukraine are not able to protect the rights of the children.⁴ According to the Ministry of Foreign Affairs of Ukraine, as of 17 April 2023, foreign authorities made a decision to temporarily remove 215 Ukrainian children from their parents or legal representatives appointed by Ukrainian authorities, in particular, in Poland – 55 children, Germany – 50 children, Spain – 30 children, Italy – 17 children. In turn, 76 children have already returned to their legal representatives.⁵

In this regard, it is important to note certain amendments in the legislation of Ukraine, following the delineation of the indicated problems.

⁴ Source: <https://www.msp.gov.ua/news/22026.html> [accessed: 10.07.2023].

⁵ Ukrainian Parliament Commissioner for Human Rights Dmytro Lubinets, https://www.ombudsman.gov.ua/news_details/prichini-ta-plan-dij-yakshcho-v-yevropejskij-kray-ini-u-vas-viluchili-ditinu-poyasnyuye-ombudsman [accessed: 10.07.2023].

These amendments serve to clarify and determine which bodies and what powers should be implemented in the event of administrative or judicial authorities adopting decisions concerning the state of children's temporary residence, or in case of other circumstances leading to the inability to exercise the functions of protection and ensuring the rights of children by legal representatives who were duly authorised by the relevant authorities of Ukraine. Among these bodies are the Ministry of Foreign Affairs, foreign diplomatic institutions of Ukraine, the Ministry of Social Policy, the Ministry of Justice, as well as bodies directly involved in making decisions about the child, primarily in the matters of returning children to Ukraine (executive bodies of a city,⁶ town, village council, district, district state administration in Kyiv, district/regional military administration or national social service).

For example, foreign diplomatic institutions of Ukraine:

- take measures to protect the rights and representation of children's interests before they return to the legal representatives appointed in accordance with Ukrainian law, or transferring them to a person authorised to return them to Ukraine;
- issue documents certifying the identity and confirming the citizenship of the child, prepare documents and help in organising the return of the children to Ukraine in accordance with the procedure of returning to Ukraine the children deprived of parental care who are citizens of Ukraine;⁷
- report on such actions by the relevant authorities of the state where the children are temporarily residing;
- take measures to obtain full information on the decisions adopted by the administrative or judicial authorities of the state where the children are temporarily residing, in particular the appointment of a temporary guardian in that state. This can prevent the legal representatives, who have properly authorised the relevant authorities of Ukraine, from performing the functions to protect the rights of children;
- submit relevant information to the Ministry of Foreign Affairs, the National Social Service.

⁶ An important role in the protection of children in Ukraine is played by bodies for guardianship and care. In particular, they participate in legal proceedings related to the protection of minor children. Although Ukraine is not a member of the EU, the activity of such bodies fully complies with Article 76 Council Regulation (EU) 2019/1111 of 25 June 2019.

⁷ The procedure for returning to Ukraine the children deprived of parental care who are citizens of Ukraine, approved by the Resolution of the Cabinet of Ministers of Ukraine dated 23 April 2003 № 569 – URL: <https://zakon.rada.gov.ua/laws/show/569-2003-%D0%BF#Text> [accessed: 10.07.2023].

The Ministry of Foreign Affairs of Ukraine provides such actions through the foreign diplomatic institutions of Ukraine.

The Ministry of Social Policy, the Ministry of Justice, the Ministry of Foreign Affairs, the National Social Service of Ukraine, according to their relevant areas of competence, provide cooperation with the relevant authorities of the states where displaced (evacuated) children – citizens of Ukraine – temporarily reside.⁸

Special measures should also be taken concerning the interaction between authorised bodies. Thus, the Cabinet of Ministers of Ukraine established the Coordination Headquarters for the Protection of Children's Rights under Martial Law – a temporary advisory body of the Cabinet of Ministers of Ukraine, established to promote the coordination of the activities of central and local executive authorities, other state bodies, local governmental bodies on the protection of children's rights under a state of martial law. Among other things, it contributes to achieving and protecting the rights and interests of children who are living outside Ukraine, as well as their parents and other legal representatives.⁹

The interaction between the authorised bodies of all the concerned states will be carried out taking into account international acts (in the case of signing such acts, taking into account the applications and preventions), among other things, regarding the application of measures established by the Convention on Jurisdiction, the applicable law, the recognition, enforcement and cooperation on parental responsibility and measures of children's protection. This covers matters like guardianship, care and similar institutions,¹⁰ ensuring the effective observance and legality of the right to guardianship and access,¹¹ on renewing the custody

⁸ The Resolution of the Cabinet of Ministers of Ukraine dated 7 July 2022 № 794 on Certain Issues of Returning of Children Who Are Temporarily Displaced outside (Evacuated from) Ukraine in Order to Receive Temporary Protection During Martial Law in Ukraine – URL: <https://zakon.rada.gov.ua/laws/show/794-2022-%D0%BF#Text> [accessed: 10.07.2023].

⁹ The Resolution of the Cabinet of Ministers of Ukraine dated 17 March 2022 № 302 on the Establishment of the Coordination Staff for the Protection of Children's Rights under Martial Law – URL: <https://zakon.rada.gov.ua/laws/show/302-2022-%D0%BF#Text> [accessed: 10.07.2023].

¹⁰ The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation on Parental Responsibility and Child Protection Measures from 19 October 1996 – URL: https://zakon.rada.gov.ua/laws/show/973_002#Text [accessed: 10.07.2023].

¹¹ The Convention on Civil Law Aspects of International Child Abduction from 25 October 1980 – URL: https://zakon.rada.gov.ua/laws/show/995_188#Text [accessed: 10.07.2023].

of children where applicable and legal cooperation between the relevant bodies of the contracting states.¹²

4. Legal representation

Coverage of issues of legal representation should begin with an overview of the people who are legal representatives under the legislation of Ukraine.

Thus, parents¹³ (adoptive parents) are legal representatives of their children, either minor or underage (part 1 of Article 242 of the Civil Code of Ukraine (hereinafter: the CC of Ukraine)).¹⁴ A child conceived and/or born in a marriage comes (descends) from the spouses (part 1 of Article 122 of the FC of Ukraine). It follows from Article 123 of the FC of Ukraine that the spouses are the parents of a child conceived as a result of using assisted reproductive technologies. The legislator sets out separate conditions for this, for example, written consent from the husband for the use of assisted reproductive technologies. The legislator also stipulates the rules for submitting an application by a couple who are not married, the mother, if the father cannot be established, or other individuals in cases determined by the legislation. According to the provisions of the Civil Code of Ukraine, parentage can also be established or recognised by court.

In Ukraine, the same approach is used as in the European Union, that it is the parents who are the main persons responsible for children, and thus are their representatives. However, in certain cases, parental responsibility for their children can be delegated. According to the HCCH 1996 Child Protection Convention the term “parental responsibility” includes parental authority, or any analogous relationship of authority determining the rights, powers, and responsibilities of parents, guardians

¹² The European Convention on the Recognition and Enforcement of Child Custody Decisions and on the Renewal of Child Custody from 20 May 1980 – URL: https://zakon.rada.gov.ua/laws/show/994_327#Text [accessed: 10.07.2023].

¹³ The legislator uses the term “parents” in plural. Thus, the question arises whether a single parent (mother or father) can represent child's interests. On the basis of analysis of legislation of Ukraine, in particular the FC of Ukraine, the CC of Ukraine and other laws, it is possible to insist that one of the parents can also represent child's interests. And in case of divorce, separate living – the parent with whom the child lives.

¹⁴ Civil Code of Ukraine dated 18 March 2004 № 1618-IV – URL: <https://zakon.rada.gov.ua/laws/show/435-15#Text> [accessed: 10.07.2023].

or other legal representatives in relation to the person or the property of the child¹⁵).

Under part 1 of Article 121 of the FC of Ukraine, the rights and responsibilities of parents toward child are based on the origin of the child from them, which need to be certified by the state registration body that issues acts of civil status in the manner prescribed by Articles 122 and 125 of the FC of Ukraine. As a result of applying to the authorised body to register the birth of a child, an act recording civil status is drafted, which is indisputable proof of the facts, the registration of which is certified, until they are refuted in court (Article 9 of the Law of Ukraine on State Registration of Acts of Civil Status). State registration of the civil status act is documented in a certificate issued by the state registration body of acts of civil status (part 1 of Article 18 of the Law of Ukraine on State Registration of Acts of Civil Status¹⁶).

In the case of changes to the birth certificate (e.g., on the basis of a court decision on the recognition of maternity), a new birth certificate is issued (Article 134 of the FC of Ukraine). In cases when the original birth certificate was stolen, lost, damaged or destroyed, it is issued again (part 1 of Article 19 of the Law of Ukraine on State Registration of Acts of Civil Status). Since adoption is a procedure that is carried out as a part of separate proceedings in courts of general jurisdiction, the procedure of adoption is considered completed from the date of a relevant court decision entering into force. To make changes to the court record on the birth of an adopted child or an adult person, a copy of the court's decision must be sent to the state registration body of acts of civil status at the place where the decision was approved, and in cases where children are adopted by foreigners also to the authorised body of executive power (part 7 of Article 314 of the Civil Procedural Code of Ukraine¹⁷ (hereinafter: the CPC of Ukraine)).

This means that the main document confirming the (legal) capacity of parents (including adoptive parents) as legal representatives of the child is the birth certificate of the child, in addition to the court decision (if available). It should also be taken into account that short/abridged copies

¹⁵ Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children – URL: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70> [accessed: 10.07.2023].

¹⁶ The Law of Ukraine on State Registration of Civil Status Acts dated 1 July 2010 № 2398-VI – URL: <https://zakon.rada.gov.ua/laws/show/2398-17#Text> [accessed: 10.07.2023].

¹⁷ Civil Procedure Code of Ukraine dated 18 March 2004 № 1618-IV – URL: <https://zakon.rada.gov.ua/laws/show/1618-15#Text> [accessed: 10.07.2023].

can be obtained from the State Register of Acts of Civil Status, including information regarding the birth of a child and his or her parents (Article 11 of the Law of Ukraine on State Registration of Acts of Civil Status).

It should be noted that, in connection with the temporary occupation of certain territories of Ukraine, the issue of documents on the birth of a child by illegal authorities may occur. Thus, part 2 of Article 9 of the Law of Ukraine on Ensuring the Rights and Freedoms of Citizens, and the Legal Regime in the Temporarily Occupied Territory of Ukraine¹⁸ states that any bodies, their officials and officers in the temporarily occupied territory and their activities are considered illegal if these bodies or officials are created, elected or appointed in the manner not provided for by the Law of Ukraine.

However, in 2022, the article was amended to enumerate the exceptions to the general rule that any act (decision or document) issued by the occupation (Russian) authorities and/or persons provided for in part 2 of this article is invalid and does not create legal consequences. Exceptions to this rule are documents confirming the fact of birth, death, registration/dissolution of marriage of a person in the temporarily occupied territory, which are attached to the application for state registration of the corresponding act of civil status. Thus, a birth certificate issued by an illegal body will be considered valid, but the interpretation of this provision allows us to conclude that it is not a valid document per se (including confirmation of the legality of the representative office), but it is required to be attached to an application for state registration of the act of civil status and recognised as a proper document by the state registration bodies of acts of civil status to perform the appropriate registration action and issue a birth certificate in accordance with the legislation of Ukraine.

In turn, parents, as legal representatives, can instruct third parties to represent the interests of their children (e.g., according to part 3 of Article 59 of the Civil Procedure Code of Ukraine, legal representatives can entrust the conduct of the case in court to other persons) to accompany them, for example, children under the age of 16 are allowed to be left outside Ukraine if accompanied by individuals authorised by at least one of the parents with a written statement certified by the guardianship agency, without a notarised consent of the second parent and if there are documents on the basis of which the State Border Service of Ukraine will allow the state border to be crossed in accordance with the rules on

¹⁸ The Law of Ukraine on Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine dated 15 April 2014 № 1207-VII – URL: <https://zakon.rada.gov.ua/laws/show/1207-18#Text> [accessed: 10.07.2023].

crossing the state border by the citizens of Ukraine¹⁹ (Article 151 of FC of Ukraine), and to transfer them in order to be educated abroad.

In such cases, in order to determine the scope and content of the powers that the person authorised by legal representatives possesses, it should be familiar with the content of the relevant documents (e.g., a contract for legal assistance with a lawyer, a contract for participation in the upbringing of a child, a power of attorney or a written application). This may prove to be important in practice. For example, Mateusz Pilich indicates that in the situation of a mass influx of war refugees from Ukraine, Polish courts and public administration bodies – especially registry offices and social welfare centres – are currently very often faced with the need to assess who is a child's parent, who is entitled to parental authority and whether the possible custody of the child results in any limitation thereof.²⁰

Among the most common forms of arrangement for children with no parental care are custody and care. Guardians and carers are legal representatives of the children under their care. They are mostly individuals who are in a kinship relationship with the wards. In accordance with paragraph 42 of the Order of conduct by the guardianship institutions and custody of activities related to the protection of the rights of the child, matters like guardianship and care over the child is established by a decision of the local authority, namely, districts in the cities of Kyiv and the Sevastopol State Administration, the executive body of cities, district councils in the city (in case of formation), villages, and the settlement council of the united territorial community, in the presence of documents specified in paragraph 40 of the order,²¹ or the court. Thus, the main documents confirming the legal representation of a guardian or trustee are the decision of the relevant local governmental body or a court decision. In the latter case, the court may decide on the custody of a minor or an underage person if it is established during the case that the child is without parental care (Article 60 of the Civil Code of Ukraine).

¹⁹ The Rules of Crossing the State Border by Citizens of Ukraine, approved by The Resolution of the Cabinet of Ministers of Ukraine dated 27 January 1995 № 57 (in the amended wording of the Resolution of the Cabinet of Ministers of Ukraine dated 25 August 2010 № 724 – URL: <https://zakon.rada.gov.ua/laws/show/164-2022-%D0%BF#Text> [accessed: 10.07.2023]).

²⁰ Mateusz Pilich: *Jurysdykcja i prawo właściwe dla stosunków między rodzicami a dzieckiem w relacjach polsko-ukraińskich*. “Problemy Prawa Prywatnego Międzynarodowego” 2022, Vol. 31, p. 8.

²¹ The Procedure of the implementation of guardianship and custody bodies related to the protection of the child's rights approved by The Resolution of the Cabinet of Ministers of Ukraine dated 24 September 2008, № 866 – URL: <https://zakon.rada.gov.ua/laws/show/866-2008-%D0%BF#Text> [accessed: 10.07.2023].

The legal representatives of children with no parental care can also be foster parents of a family-type children's home. A family-type children's home is a separate family-type unit that is created at the request of a spouse or an individual who is not married, who takes on at least five orphans and children with no parental care to bring them up in his or her household (part 1 of Article 256⁻⁵ of the Family Code of Ukraine). Parents-educators of family-type children's homes are people who substitute for parents, they are legal representatives of their wards, and protect their rights and interests in front of public authorities, including judicial authorities, as guardians or carers without special powers. They cannot use their rights against the interests of the child.²² The relevant provision is also stipulated in part 4 of Article 256⁻⁵ of the Family Code of Ukraine. On the basis of the decision to create a family-type children's home, a contract is concluded between the foster parents and the institution that decides whether it should be established, the features of which, including during a state of emergency or martial law (e.g., the termination of the contract when refusing to evacuate), are determined by the Regulation on the family-type children's homes.²³

Foster parents are the legal representatives of foster children and act without special powers as guardians or carers in accordance with part 4 of Article 256⁻² of the Family Code of Ukraine. A foster family is a family that has voluntarily accepted to bring up from one to four orphans and children with no parental care (part 1 of Article 256⁻¹ of the Family Code of Ukraine) in their household. The procedure for creating a foster family is similar to that of a family-type children's home: the relevant institution makes a decision (e.g., the executive committee of the city council) and a contract for the arrangement of children in a foster family is concluded between the foster parents and the institution that decided that a foster family should be established.²⁴

Special attention should be paid to the legal regulation of relations in terms of representation under the conditions of martial law, in the event that the children are moved (evacuated from some area). Thus, in cases

²² Article 31 of The Law of Ukraine on Ensuring Organisational and Legal Conditions for the Social Protection of Orphans and Children Deprived of Parental Care dated 13 January 2005, № 2342-IV – URL: <https://zakon.rada.gov.ua/laws/show/2342-15#Text> [accessed: 10.07.2023].

²³ The Regulation on family-type orphans approved by the Resolution of the Cabinet of Ministers of Ukraine dated 26 April 2002 № 564 On the approval of (as amended) – URL: <https://zakon.rada.gov.ua/laws/show/564-2002-%D0%BF#Text> [accessed: 10.07.2023].

²⁴ Article 256-4 of the Family Code of Ukraine, the Regulation on the Foster Family, approved by the Resolution of the Cabinet of Ministers of Ukraine dated 26 April 2002, № 565 – URL: <https://zakon.rada.gov.ua/laws/show/565-2002-%D0%BF#Text> [accessed: 10.07.2023].

of temporary movement (evacuation) within Ukraine to a place where there are no hostilities, or outside the borders of Ukraine, of children from round-the-clock stay institutions, then the head of the institution, or an accompanying person authorised by the head for the period of the temporary movement (evacuation from some areas) of children and individuals, is entrusted with the exercise of the powers of legitimate representatives of children and the performance of other duties determined by a special order.²⁵ This procedure sets out a wide range of institutions of various types, forms of ownership and subordination, that are subject to its action, as well as children and persons who can be temporarily moved (evacuated from some areas) and documents that should be issued, for example, an order on the temporary movement (evacuation from some areas) of children.

Special rules regarding the conduct of the heads of relevant institutions acting as legal representatives of the child follow directly from Article 30⁻¹ of the Law of Ukraine on the Protection of Childhood. This article regulates the protection of children who are in the zones of military operations and armed conflicts, as well as children who suffered as a result of armed hostilities and conflicts. Thus, the heads of the relevant institutions, employees who have been authorised by them, or anyone else appointed by the guardianship or custody authority, or the military administration/military-civilian administration at the location of the institution are legal representatives of such children, in particular if the head or the employee authorised by the head is removed from the duties or absent. The legislator limited their powers by excluding from that list the capacity to make actions on behalf and in the interest of the child related to housing and property rights, to consent to the adoption and the change of a child's citizenship. In addition, the legislator set the time limits for such a legal representation – before returning such a child to Ukraine or before their reunification with their family.

The provisions of the said article also apply to a foster parent, who is also the legal representative of the child, taking into account the above requirements and restrictions of Article 30⁻¹ of the Law of Ukraine on the Protection of Childhood.

At the same time, in accordance with the general rule, fostering a child concerns the temporary care, upbringing, and rehabilitation of

²⁵ The Order of temporary movement (evacuation) and provision of conditions for staying on the territory of Ukraine, where there are no hostilities, or outside Ukraine of the children and persons living or enrolled in institutions of different types, forms of ownership and submission to round-the-clock stay, approved by the Resolution of the Cabinet of Ministers of Ukraine dated 27 March 2022 № 385 – URL: <https://zakon.rada.gov.ua/laws/show/385-2022-%D0%BF#Text> [accessed: 10.07.2023].

a child in a foster family until the lapse of time when the child, the parents or other legal representatives overcome difficult life circumstances (part 1 of Article 252 of the FC of Ukraine) and due to the temporary and professional nature of such activities, it does not imply the establishment of a relationship of legal representation of the foster parents. However, for the period of martial law, or before the child's reunification with the family, these provisions of the law on legal representation should be taken into account. On the child joining a foster family, the guardianship and custody authority makes decisions/orders and concludes a contract on fostering a child, and during the introduction of a state of emergency or martial law in Ukraine alternative rules are effective for the decision of the guardianship and custody authority or the order of the head of the village, settlement, city council on the child joining the foster family, the extension of such a contract, etc.²⁶

It should be added that, under the conditions of martial law, the procedure of taking a child into the care/custody by relatives has been significantly simplified. The general procedure for establishing guardianship/custody of a child required a very large set of documents, which were almost impossible to collect under martial law. In addition, the legislation obliged the potential guardian/carer to take an education course at the local centre of social services for family, children and youth on bringing up such children, which further complicated the procedure for registering guardianship/custody. Currently, the list of documents that must be submitted for guardianship and caregiving has been reduced and the requirement for training has been removed.

The above applies only to the guardianship/custody procedure. At the same time, the procedure of adopting a child has not undergone any changes or simplification. It continues to be difficult and is implemented exclusively in court in accordance with the rules of Articles 310–314 of the Civil Procedure Code of Ukraine.²⁷ At the same time, restrictions have been introduced for Ukrainian citizens who temporarily or permanently

²⁶ Paragraphs 35–42 of the procedure order for the establishment and operation of the foster family, arrangement, stay of the child in the foster family, approved by the Resolution of the Cabinet of Ministers of Ukraine dated 20 August 2021 № 893 – URL: <https://zakon.rada.gov.ua/laws/show/893-2021-%D0%BF#Text> [accessed: 10.07.2023].

²⁷ I.V. Davydova holds the same opinion in her article: *Institute of Representation as an instrument of protection of another person interests under martial law*. “Legal Scientific Electronic Journal” 2022, No. 6, p. 509, DOI <https://doi.org/10.32782/2524-0374/2022-6/116>. Also S.S. Zhurilo and V.V. Vladyshevska draw attention to the issues of adoption under martial law and the simplification of the procedure of taking under guardianship/custody in their article *Protection of the rights and interests of the child under martial law*. “Precarpathian Law Journal” 2022, Vol. 43, No. 2, pp. 34–38, DOI <https://doi.org/10.32837/pyuv.v0i2.1013> [accessed: 10.07.2023].

live (reside) outside the borders of Ukraine, as well as foreigners, to participate in the adoption process during martial law and within three months after its termination or cancellation. Exceptions include, for example, when the adoptive father/mother is a relative of the child, or where contact with the child through the National Social Service was established before the introduction of martial law in Ukraine.²⁸

5. Representation in court

According to the general rule, the rights of the child are protected in court by the child's legal representatives. If it is established during the proceedings that a minor or an underage person with no parental care does not have a legal representative, the court will establish a custody or guardianship under the submission of the guardianship and custody authority, appoint a guardian or trustee and involve them in proceedings as legal representatives (part 2 of Article 63 of the Civil Procedure Code of Ukraine). It should be noted that the court may appoint or replace a legal representative at the request of a minor or underage person, if it is in their best interests (part 4 of Article 63 of the Civil Procedural Code of Ukraine).

Paragraph 2 of part 1 of Article 1 of the Law of Ukraine on Free Legal Assistance provides a list of people who can be legal representatives. These are parents, foster parents, parents-caregivers, step-parents, guardians, carers and representatives of institutions that serve as guardians and carers.²⁹

Despite the fact that, according to Article 8 of this law, everyone under the jurisdiction of Ukraine has the right to free primary legal assistance under the Constitution of Ukraine and this law, people who have reached the age of majority still have to apply for free primary legal assistance, and in the case of appeals regarding children, they must be sent or submitted by their legal representatives (parts 1 and 2 of Article 10 of the

²⁸ Paragraph 134 of the Procedure order of providing the activity of adoption and supervision of the adopted children's rights, approved by the Resolution of the Cabinet of Ministers of Ukraine dated 8 October 2008, № 905 – URL: <https://zakon.rada.gov.ua/laws/show/905-2008-%D0%BF#Text> [accessed: 10.07.2023].

²⁹ The Law of Ukraine on Free Legal Assistance dated 2 June 2011 № 3460-VI – URL: <https://zakon.rada.gov.ua/laws/show/3460-17#Text> [accessed: 10.07.2023].

Law of Ukraine on Free Legal Assistance). This means, for example, that a minor cannot apply for such help independently.

However, the definition of a client, as set out in paragraph 7 of part 1 of Article 1 of the Law of Ukraine on the Bar and Legal Practice³⁰ does not contain any restrictions in terms of individuals, which implies that a client may be a minor, taking into account the legal capacity of a minor.

In this sense, it is interesting to look at the position of the Supreme Court and the opinion it formed in a case regarding the issue of a restrictive order. In this case, the court of first instance, referring to the Law of Ukraine on Prevention and Counteraction to Domestic Violence, pointed out a certain number of individuals who have the right to apply to the court with a statement about issuing a restrictive order against an offender in the case of domestic violence against a child, and the child itself is not entitled to apply personally to the court with the appropriate application. The appellate court returned the claim of the minor's lawyer because it had not remedied the shortcomings of the appellate claim on the provision of the contract for legal assistance.

As the appellate court established, which was confirmed by the case file, the original order issued by the lawyer and containing the signature of the lawyer was added as the confirmation of the powers to represent the interests of a minor by the lawyer. In this regard, the Supreme Court stated that the representative of the applicant – the attorney conducting the court case on behalf of a minor – has their authority confirmed by a warrant, which is the appropriate document confirming the authority to represent a person, in particular, to perform such a procedural action as filing and signing an appellate claim on behalf of a minor.

The Supreme Court, in essence, stated:

The court of appeal did not take into account that a minor who has reached the age of 14 may enter into an agreement with a lawyer only with the consent of the parents (adoptive parents) or guardians. However, the absence of such consent does not negate the legal consequences of concluding such a contract and granting the attorney with the authority of representation, except for cases where the contract is declared invalid in court.

In the case of representing a minor in court, the lawyer must provide the court with evidence of parental consent to conclude a contract for legal assistance. During the representation of a person who has reached the age of 14, the lawyer provides the court with documents confirming the authority on representation (a warrant and/or a power of attorney),

³⁰ The Law of Ukraine on Bar and the Legal Practice dated 5 July 2012 № 5076-VI – URL: <https://zakon.rada.gov.ua/laws/show/5076-17#Text> [accessed: 10.07.2023].

without the need to submit the consent of the parents to conclude a contract with such a lawyer. At the same time, the court cannot demand the presentation of a contract for the provision of legal assistance to confirm the authority to represent a person who has reached the age of 14.

With reference to the European Convention on the Exercise of the Children's Rights of 1996, the Supreme Court stated that the European Convention on the Exercise of the Children's Rights regulates legal relations in the given case. The purpose of this convention is to give children procedural rights and to promote the exercise of these rights by ensuring the situation in which children are personally, or through other persons or bodies, informed and admitted to participate in the proceedings by the judicial authority in cases relating to them.

The European Convention on the Exercise of the Children's Rights notes in its Article 4 that, except as provided in Article 9, the child has the right to apply personally or through other individuals or bodies for the appointment of a special representative during the consideration by the judicial body of cases relating to it in situations where the internal legislation deprives the subjects of parental responsibility of the right to represent the child in a result of their conflict of interest with the latter (in the context noted in the international act, a special representative may be, in particular, a lawyer). Article 5 sets out, among other procedural rights, the right to request assistance from a certain person of their choice when expressing their own opinion; the right to request, independently or through other persons or bodies, for the appointment of a separate representative, and in appropriate cases an advocate; the right to appoint their own representative; and the right to implement all or some of the rights of parties in the process.

Therefore, these international acts, as having the highest interests of the child in mind, place the maximum obligation of the state, both at the legislative level and at the level of administrative and judicial protection to provide the child (a person under 18 years of age) to take direct part in cases of protection of their interests, especially in the presence of a conflict with the individuals holding parental responsibility, including the right to appoint/choose their own representative.³¹

The above-mentioned issues become especially important in cross-border issues. Based on the provisions of Article 5 and 6 of the 1996 HCCH on the Protection of Children³² administrative authorities of the Con-

³¹ The Resolution of the Supreme Court as a member of the Third Court Chamber of Judges of the Cassation Civil Court dated 16 June 2021 in case № 369/13467/20 – URL: <https://reyestr.court.gov.ua/Review/98267310> [accessed: 10.07.2023].

³² Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for

tracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person and thereby represent the interests of Ukrainian children in the country of their stay due to armed aggression.³³

6. Conclusions

The protection of children's rights under conditions of martial law includes the representation of their interests before the courts, the state and local bodies, to third parties both in Ukraine and abroad. In contrast to the usual conditions, representation in times of martial law is often accompanied by the need to take into account the special rules introduced during that period, as well as that the confirmation of authority can be complicated by transpiring events (such as evacuation) or the specific nature of regulating representation abroad. That is why the representation of the child's interests becomes even more important.

Legal representatives (parents, adoptive parents, guardians, carers, other individuals appointed in the manner and in the order prescribed by law) can represent the interests of children. The implementation of representation should be exercised with the maximum possible consideration of the child's best interests.

After more than a year from the moment of large-scale invasion, there is a palpable need in Ukraine to find the answers and remedies for resolving a number of questions in the international Law concerning the Ukrainian children's rights defense who were moved to the EU territory. At the same time, the work in this direction must be carried on, and specific attention have to be paid also to the thorny problem of representing and defending the rights of children who were forcibly deported to Russia.

the Protection of Children – URL: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70> [accessed: 10.07.2023].

³³ Protecting the Rights of Ukrainian Children during [war] and in the post-war context – URL: <https://www.coe.int/en/web/kyiv/protecting-the-rights-of-ukrainian-children-during-and-in-post-war-context> [accessed: 10.07.2023].

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