

SAŽETAK DOKTORSKOG RADA

„ZAKONSKO ZASTUPANJE U PARNIČNOM POSTUPKU“

DOKTORANDICE BRANKE HRKAĆ

Institut zakonskog zastupanje u Bosni i Hercegovini odnosno materiju stranačke sposobnost i pravilnog zastupanja u parničnom postupku pored materijalnih zakona reguliraju četiri procesna zakona: Zakon o parničnom postupku Federacije Bosne i Hercegovine, Zakon o parničnom postupku Republike Srpske, Zakon o parničnom postupku Brčko Distrikta kao i Zakon o parničnom postupku pred Sudom Bosne i Hercegovine.

Kada govorimo o zastupanju u parničnom postupku važno je istaknuti da je to jedan od najznačajnijih instituta građanskog procesnog prava. Pravilna primjena odredaba o zakonskom zastupanju predstavlja procesnu pretpostavku za pokretanje i vođenje postupka te za meritorno odlučivanje u parnici. Ove odredbe su prinudne naravi, sud pazi po službenoj dužnosti tijekom cijelog postupka je li stranka zastupana od strane zakonskog zastupnika ili ako je to potrebno, ima li zakonski zastupnik posebno ovlaštenje za poduzimanje određene procesne radnje.

Zastupanje u postupku provode zastupnici, osobe koje u ime i za račun stranke poduzimaju radnje u postupku. Zastupnik ima ovlast poduzimati sve radnje koje po zakonu može poduzimati i stranka koja se zastupa u parnici. Kada stranka nema zakonskog zastupnika, ili ima zakonskog zastupnika koji nema posebne ovlasti, sud može od nadležnog centra za socijalnu skrb zatražiti da postavi odgovarajućeg skrbnika stranci koja je parnično nesposobna, ili može pozvati zakonskog zastupnika da on pribavi sebi potrebna posebna ovlaštenja ili potrebne mjere kako bi nastavio zastupati parnično nesposobnu stranku.

Zakonski zastupnik je osoba koja parnično nesposobnu stranku ili stranku koja iz drugih razloga nije u stanju brinuti se o svojim pravima i interesima, zastupa u parnici neovisno o njezinoj volji, izvodeći svoje ovlaštenje za zastupanje iz zakona ili odluke nadležnoga organa. Zakonskog zastupnika ne određuje stranka. Zakonski zastupnik može, u pravilu, biti samo fizička osoba. On mora biti stranački i parnično sposoban. Kada zakonski zastupnik nije određen zakonom, postavljaju ga nadležni organi (organ starateljstva ili sud). Zakonskog zastupnika, u pravilu, postavlja organ starateljstva, a sud postavlja privremenog (zakonskog) zastupnika, besplatnog zakonskog zastupnika i zastupnika za prijem pismena. Zakonski zastupnici su: roditelji koji imaju dužnost i pravo zastupati svoju maloljetnu (poslovno i parnično nesposobnu) djecu; usvojitelji koji zastupaju usvojenike, zato što usvojenjem stječu

pravo na roditeljsko staranje; staratelj koji zastupa osobe pod starateljstvom; stečajni upravitelj; privremeni zastupnik i zastupnik za primanje pismena. Zakonski zastupnik poduzima radnje u postupku u ime i za račun zastupane stranke (neposredno zastupanje). Izuzetak od pravila da zastupnik može biti samo fizička osoba imamo u slučaju kada centar za socijalni rad, pokrene i vodi u ime i za račun djeteta, kao zakonski zastupnik, parnicu protiv staratelja za naknadu štete, alimentacijsku parnicu i alimentacijsko izvršenje, odnosno kada u ime djeteta predlaže mjere osiguranja radi uzdržavanja. U tim će slučajevima u ime centra za socijalni rad u postupku pred sudom istupati osoba koju odredi ovlaštena osoba centra.

Kada govorimo o pojmu zastupanja imamo zakonsko i ugovorno zastupanje. Ugovorno zastupanje je ono zastupanje koje se zasniva na ugovoru između zastupanog koji se još može nazvati vlastodavac i zastupnika odnosno punomoćnika, pa bi se prema tome ovlaštenje za zastupanje zove punomoć bez obzira je li ono dano usmeno ili pismeno. U radu su obrađeni i punomoćnici *de lege lata* odvjetnik, odvjetničko društvo ili uposlenik službe za besplatnu pravnu pomoć, kao i pravne osobe, uposlenik te pravne osobe, bračni, odnosno izvanbračni partner stranke po krvi po pravnoj liniji do bilo kojeg stupnja, a u pobočnoj do četvrtog stupnja zaključno, odnosno srodnik po tazbini zaključno do drugog stupnja: odvjetnika i odvjetničko društvo, pružatelja besplatne pravne pomoći, zastupnika pravne pomoći, bračnog i izvanbračnog druga i srodnika stranke.

U ovom radu obradio se institut *Zakonskog zastupanja u parničnome postupku* te kroz iscrpnu analizu domaćih i međunarodnih propisa, literature i sudske prakse primjenom suvremenih metoda postavilo mjesto i uloga zakonskog zastupanja u parničnom postupku i predložili prijedlozi *de lege ferenda*. Također su se obradili izvori i povijesnopravni prikaz razvoja zakonskog zastupanja te odredili pojam stranke kao i međunarodni pravni standardi i kroz komparativnu analizu zakonskog zastupanja i vrsta zakonskih zastupnika postavili *de lege ferenda* prijedlozi unaprjeđenja nacionalne regulative i usklađivanja s europskim standardima.

Ključne riječi: stranka, zakonsko zastupanje, vrste zakonskih zastupnika, punomoćnik.

SUMMARY

LEGAL REPRESENTATION IN CIVIL PROCEDURES

The Institute of Legal Representation in Bosnia and Herzegovina, i.e., the matter of party capacity and proper representation in civil proceedings, is regulated by four procedural laws: the Civil Procedure Code of the Federation of Bosnia and Herzegovina, the Civil Procedure Code of Republika Srpska, the Civil Procedure Code of the District Brčko as well as the Civil Procedure Code before the Court of Bosnia and Herzegovina.

When we talk about representation in a civil procedure, it is important to point out that it is one of the most important institutes of civil procedural law. Proper application of the provisions on legal representation is a procedural precondition for initiating and conducting procedures and for deciding on the merits in litigation. These provisions are coercive in nature, the court monitors *ex officio* throughout the procedures whether the party is represented by a legal representative or, if necessary, whether the legal representative has special authority to take certain procedural action.

Representation in the procedure is carried out by representatives, persons who take actions in the procedure on behalf and for the account of the party. The representative has the authority to take all actions that can be taken by law and the party represented in the litigation. When a party does not have a legal representative, or has a legal representative who does not have special powers, the court may ask the competent social welfare center to appoint a suitable guardian for the incompetent party, or may invite a legal representative to obtain the necessary special powers or measures to continue the representation a legally incompetent party.

A legal representative is a person who represents a legally incompetent party or a party who, for other reasons, is unable to take care of his/her rights and interests. The legal representative acts for the party in litigation regardless of the party's will, exercising his/her power of attorney from the law or decision of the competent authority. The legal representative is not appointed by the party. As a rule, a legal representative can only be a natural person. He must be party and litigation competent. When the legal representative is not determined by law, he/she is appointed by the competent authorities (guardianship authority or court). The legal representative, as a rule, is appointed by the guardianship authority, and the court appoints a temporary (legal) representative, a free legal representative and a representative for receiving

documents. Legal representatives are: parents who have the duty and right to represent their minor (incapable of work and litigation) children; adoptive parents who represent the adopted children, because by adopting they acquire the right to parental care; a guardian representing the persons under guardianship; bankruptcy trustee; temporary representative and representative for receiving documents. The legal representative undertakes actions in the procedure in the name and on behalf of the represented party (direct representation). We have an exception to the rule that a representative can only be a natural person in the case when the Social Welfare Center initiates and manages in the name and on behalf of the child, as a legal representative, a litigation against guardians for damages, an alimony litigation and an alimony execution, and proposes child support measures. In these cases, a person appointed by the authorized person of the center will appear in court on behalf of the Social Welfare Center.

When we talk about the concept of representation, we have legal and contractual representation. Contractual representation is that the representation which is based on a contract between the represented person who may still be called the principal and the representative or proxy, and therefore the representation of authorization would be called a power of attorney regardless of whether it is given orally or in writing. The paper also deals with proxies *de lege lata* lawyers, a law firm or employee of the free legal aid service, as well as legal entities, employee of that legal entity. The paper also mentions natural persons, which can be marital or extramarital partner of the party by blood in legal line to any degree, and in the lateral up to the fourth degree inclusive, i.e. the relative by in-law up to the second degree: lawyers and law firms, free legal aid provider, legal aid representative, spouse and common-law partner and relative of the party.

This paper deals with the Institute of Legal Representation in Civil Procedures through a detailed analysis of domestic and international regulations, literature and case law. Using modern methods, this paper sets the place and role of legal representation in civil procedures and gives proposals *de lege ferenda*. The sources and the historical overview of the development of legal representation were also discussed. The paper gives the definition of a party as well as of the international legal standards. Through a comparative analysis of legal representation and types of legal representatives, the paper gives *de lege ferenda* proposals to improve national regulations and harmonize them with European standards.

Key words: party, legal representation, types of legal representatives, proxy.

