



The Best Interests of the Child

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Abstract: *The best interests of the child is a principle that governs relationships within the family. In judicial practice, this principle is understood, abstractly and theoretically, and applied as a template. The court does not refer to the factual situation, i.e. the situation of each individual child. In these circumstances, the child's superior principle remains a myth. In following this principle, what is more important is the harmonious development of the child or maintaining the relationship with the non-resident parent. In applying the best interests of the child, judges must look at the social and moral profile of the parents, how they exercise their obligations to provide for the growth and raising of their children.*

Keywords: *best interests of the child, judicial practice, obligations, children, relationships*

1. General Considerations

Any regulation adopted in the field of observance and promotion of the rights of the child, as well as any legal act issued or, concluded in this field shall be subordinated with priority to the best interests of the child.

Both the Romanian law, through the provisions provided in the Civil Code (art. 263 paragraph 1, art. 397, and art. 483) and in the law no. 272/2004, as well as the international legislation on the protection of minors, respectively the jurisprudence of the ECHR has as starting point the principle of the superior interest of the child. This implies the obligation of the parents to watch over the upbringing and education of the child effectively. If the parents are separated, the person to whom the minor has not been entrusted must maintain personal ties with him, these ties being able to be limited only in strictly determined situations.

The best interests of the child has to be considered in relation to each child and cannot be defined as a rule for all children. The content also differs from the same child who has several stages of development, but also different

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situational contexts in which he is at a given time. Therefore, measures on children may change over time, risking affecting the stability of those legal relationships¹.

2. The Dynamics of the Principle the Best Interests of the Child

The legislator did not give a clear definition to this dynamic and flexible concept that follows the child's evolution, leaving the judge free to determine its content according to several generic criteria.

The doctrine noted a duality of the content of this principle, seen, on one hand, as aiming at a general social interest, according to which parents must raise and educate the child according to moral norms and public social order. On the other hand, it involves a personal and individual child, meaning parents or other authorized persons are obliged to raise and educate a child according to the qualities and their skills with specific aspects of health, physical development and training matching each child².

According to art. 2 par. 6 of Law no. 272/2004, in determining the superior interest of the child, at least the following are taken into account:

- a) the needs of physical, psychological, education and health development, security and stability and belonging to a family;
- b) the child's opinion, depending on the age and degree of maturity;
- c) the child's history, taking into account in particular the situations of abuse, neglect, exploitation or any other form of violence against the child, as well as the potential risk situations that may occur in the future;
- d) the capacity of the parents or of the persons who are to take care of the upbringing and care of the child to respond to his concrete needs;
- e) maintaining personal relationships with the persons to whom the child has developed attachment relationships.

In judicial practice, we find a series of criteria according to which the best interest of the child can be determined, such as:

- 1) the opinion of the child, to the extent that it can be reasonably determined, in which case the guardianship court should relate to the age and emotional development of the child;
- 2) the age and sex of the child, according to which his physical, emotional and psychological needs can be established;

¹ Aurora Ciuca, "Interesul superior al copilului. Noi sensuri ale unei formule magice". *Universul Juridic Premium* 10 din 2020, sintact.ro.

² CERCEL Sevastian, GHITA Oana, "Interesul superior al copilului", *Universul Juridic Premium* 9 din 2020 sintact.ro.

- 3) history of child care;
- 4) the ability of parents or other persons to care for the child and to respond to his needs;
- 5) the attachment and stability of the relationship between the child and each of his parents;
- 6) the cultural, linguistic, religious and spiritual identity of the child, including belonging to a certain ethnic group.

In summary, there are three categories of criteria according to which decisions must be taken on children: child's needs opinion, age and maturity, and the ability of parents to meet the child's needs.

In order to determine the best interests of the child, the court should take into account the needs of the child who must be provided with harmonious physical, moral and intellectual development, and not the needs of the parents. The needs of parents to exercise their parental rights may mask an open conflict between them.

In these circumstances, the judge's freedom of interpretation in applying the principle of the best interests of the child is fundamental.

The Civil Code provides for the priority application of the best interests of the child in relation to the interests of the parents or any other adult. Given this aspect, we can conclude that the interest of a subject of law under 18 will prevail in relation to the interest of another subject of major law.

In most cases, the principle of the best interests of the child is applied in practice when the guardianship court must rule on the exercise of parental authority, establishing the domicile of minors, establishing the visiting schedule, establishing the maintenance pension.

However, not always exercise parental rights or duties can be performed in harmony by parents together best interest of the child. Thus, for the situations in which the parents do not understand each other, the court decides on the misunderstandings between them. Solving the cases regarding the parental rights and obligations involves listening to the parents, drawing up the psychosocial investigation report and with the obligatory listening of the child, if he has turned 10 years old. In its decision, the court seeks, with priority, the observance of the best interests of the child.¹

¹ Cristiana-Mihaela Craciunescu, "O masura in interesul copiilor?", *Universul Juridic Premium* 8 din 2017, sintact.ro.

The principle of the best interests of the minor also has a sanctioning character; the violation of this principle can lead to the exclusive exercise of parental authority or even to the forfeiture of parental rights.

In this sense, the judicial practice considered that the *disinterest shown by the parent towards the fulfilment of the component rights and obligations of the parental authority regarding the minor, during a long period, corroborated with the establishment of the defendant for an indefinite period abroad. Considerable by the other holder of parental authority in Romania, in the event of the joint exercise of parental authority by both parents would be likely to constitute a risk to the minor, caused by the impossibility of making easy decisions regarding his upbringing and education, which are limited to the scope of the notion of parental authority. The non-resident parent must undertake and maintain continuous and regular personal connections with the minor, not sporadic or almost non-existent. This should happen in order to know and understand him or her as well as possible, in order to have a continuous dialogue with the minor and thus be able to exercise, knowingly, the rights and perform the duties that make up the content of parental authority*¹.

The European Court of Human Rights reinforces the idea that children's interests take precedence over any other consideration, showing that this interest must guarantee children an evolution in a healthy environment. It must also maintain their ties with the family, unless it proves to be the unworthy, due to the fact that the loss of this connection means infringement child to privacy under Article. 8 of the European Convention on Human Rights, in this case the breaking of the child from its roots.

Thus, it was established that only exceptional circumstances could lead to a rupture of the family relationship, while maintaining the child's personal relationships with it, being in the best interest of the child to reconstitute the family at the right time, if possible. Within a family, children are distinct individuals with their own rights and needs, and whenever a break occurs, the interest of the child is in danger, because the first family is the nucleus for the development of its harmonious. The family means the child's first contact with the world around him, but also the first models for the child in the beginning period, when they outline his character².

Parental alienation is, on the one hand, a very dangerous phenomenon that leads to the poisoning of the child's soul and, on the other hand, it can only be an apparent parental alienation.

It is a dangerous phenomenon if the parents manipulate or, worse, instigate their child against the other parent. At the same time, parental alienation can be a trap in the conditions in which the non-resident parent shows disinterest

¹ Jud. Constanța, s. civ., sent. Civ. no. 13665/2017.

² Recommendation 874/1979 of the Parliamentary Assembly of the Council of Europe.

in the child and in these conditions, the child living anchored in a normality notices the differences between his parent's behaviour and the attitude of a father in a one parental family.

Under the above conditions, the child alone is alienated from the parent. Moreover, there have been many cases in which children were subjected to abuse by one parent, in such situations, it is obvious the cause of alienation of the child from the aggressive parent and channelling all feelings of love for the other parent.

In such situations, both the public authorities whose objective is the protection of the child and the court should sanction the guilty parent from the order of the exclusive exercise of parental authority until the revocation of parental rights.

The court applies the principle of the best interests of the child by administering as evidence, in the case of children under 10, documents, witnesses, like the social investigation report. The last one mentions the statements of the child, resident parent, non-resident parent (some may be untrue), maybe also the interrogation of the parents, witnesses, and in the case of the child over 10 years old and his hearing.

3. Conclusions

All this evidence is insufficient to establish concretely what the best interest of the minor is. The court must also consider whether there are attitudes of parents who take forms of parental alienation.

If at a theoretical level, the establishment of the best interests of the child seems to have coherence and clarity, in practice, the principle is an abstract notion that becomes an automatism in favour of both parents, by virtue of which court makes decisions. Often, decisions are made in the name of the best interests of the child that do not benefit (or do not fully benefit) the children, the courts using this principle motivating their decisions¹.

Applied correctly, the principle of the best interests of the child can overturn this automatism encountered in judicial practice, which ultimately leads to the salvation of children's souls.

¹ Aurora Ciuca, *Interesul superior al copilului. Noi sensuri ale unei formule magice*, sintact.ro.

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