

Best Interests of the Child – the Legal Determination of the Principle

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Abstract: When referring to children, we must admit that they are not just physical existences whose stages of development participate in determining the concept of legal capacity. Children are natural persons who, until the age of majority, are protected by the law, precisely because of their insufficient psychological maturity. In particular, we are referring to legal protection of the child in civil matters, subject to civil law, but also to legal protection of the child in general, which goes beyond the civil support given to the individual, legally called a natural person, within the general legal framework which safeguards the fundamental social values of the individual, by including a special legal protection regime on the child. Therefore, the child is no longer an identity substitute for the parents, but needs to be treated according to what it is and not what it will become, as he is the holder of his or her own rights, having a legal status in his or her own right, while also interacting with the rights and obligations of others (extended nuclear family or third-party relationships), as well as society as a whole, which has structured the status of the child according to its values. This is the ideology of the rights of the child, as a result of its development, centered on the recognition of the child as holder of related rights of indivisibility, interdependence and interrelation, the respect, protection and enforcement of which are bound by the States signatory to the Convention on the Rights of the Child. This legal instrument is a probable consequence of the equalitarian dynamics of human rights, on the one hand, and, on the other, based on the discovery of psychology by highlighting children's ability to understand and feel.

Keywords: *Law, child, child's best interests, legal capacity, Convention on the Rights of the Child.*

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1. Introduction

The special legal protection of the infant refers to the notion of “best interests of the child”, a vector of reference, which is reflected in child-related regulations and which covers measures to be taken if necessary. In this respect, the provisions of Article 2(1) of Law No 272/2004 on the Protection and promotion of the Rights of the Child (Romanian Parliament, 2014) as subsequently amended and supplemented, which provides: ‘this law, any other regulations adopted in the field of respect for and promotion of the rights of the child, as well as any other legal document issued or, where appropriate, concluded in this field, shall be subject to the principle of the best interests of the child as a matter of priority’. The best interests of the child is a principle of major importance which highlights all rights and guarantees set out in the “status of the child” and expresses a double legal support for the infant's psychological needs: On the one hand, the fact that children have their own psychological needs which adults must take into account, and on the other hand, it has been shown that in practice the needs of children may not always match those of the adults in care of them, so children thus acquire a different, yet dependent, status at the same time.

We know, of course, that every infant has the right to personal and social development, and it appears, depending on the specificities of each stage of child's development, the need for membership of a social group. Of course, every stage of development in relation to age involves various processes, stages of preparation, until legal maturity is reached, at least. This explains the reason why the legislator gave legal support to the state of the child's ontogenetic development by regulating the rights of the child whose typology is based on two elements of essence: the principle of the best interests of the child, which filters out all actions regarding him or her, and the principle that parents or any other legal person should guide and protect the exercise of the rights of the child in relation to his or her evolving capacities (Cîrjă, 2016). Family as part of the status of an individual is a form of social relations between people linked to each other by marriage and marriage. Family relationships result from marriage, natural kinhood and adoption and have a dual aspect: Personal aspects and property aspects (Lupascu, 2016).

We believe that the need for the development of the child can be incorporated into the category of rights regarding the development of the child, which covers not only the basic material needs of the child, but also all attitudes, specific requirements laid down as legal rules for parents, the purpose of which is the development of the child's personality. Therefore, each level of age-related development of the child is a range of rights and duties specific to the child's status (Florea, 2017). The legal situation of the child shall refer to *all legal rules relating to the personal non-property and property rights of the child whose affiliation has been legally established*. The Civil Code regulates the legal situation of the child in Articles 448 to 450. These provisions are supplemented by other provisions belonging to family law, such as those of Law No 272/2004 on the Protection and promotion of the Rights of the Child (Papalia et al., 2010), as well as provisions belonging to other branches of law such as those relating to succession (of the Civil Code), those concerning survivor's pension or citizenship, etc. (Luca & Pivniceru, 2016).

2. Structural elements of the best interests of the child as laid down by law

The principle of the best interests of the child shall mean a *guiding aim in matters of the rights of the child and the measures of protection against it, a common denominator of the legal equation established between full and full value of the stage of human development*, on the one hand, and the social and cultural relationship, which is inclusive, on the other. The expression chosen by the legislator, of course, is not limited to a single interest of the child, but a whole range of interests of relevance to children are reported and which target physical, mental, spiritual, social, emotional needs, children's material. By extrapolating the phrase, we see that the same complex content of the preincible (Lupascu, 2016) is being taken into account by the European Court of Human Rights, which refers to the interests of the child taken as a whole.

As a legal rule, "the best interests of the child have a meaning. As a first point, the concept is a substantive right of the infant that can be invoked in court, with the aim of implementing his or her rights in particular

in relation to any other interests in the presence. The second meaning concerns its status as a prevailing interpretative fundamental legal principle on which the respect and guarantee of the rights of the infant is based" (Romanian Parliament, 2014). Moreover, the best interests of the infant are *"a synthetic rule that circumscribes the right of the child to normal physical and moral development, has a socio-emotional balance and family life, elements that relate to the psychology of the development integrated organically into the legal standard, which gives it congruity and substance"*.

Regarded as a fundamental legal principle, we note that the best interests of the infant are the coordinator of the provisions adopted in the field of respect for and promotion of the rights of the child and of any legal document issued or, where appropriate, concluded in this field, and take precedence in all actions and decisions regarding children, undertaken by public authorities and authorized private institutions, and in cases dealt with by the marshal courts, including the rights and obligations of the parents of the infant other legal representatives of the child and of any persons to whom he or she has been legally settled, as stated in Article 2 of Law No 272/2004 (Romanian Parliament, 2014). The obligation to respect and promote the best interests of the infant a priority is provided for in Article 6(a) of Law No 272/2004 as a means of respecting and guaranteeing the rights of the infant alongside other principles which contribute to the achievement of the same end-goal (Romanian Parliament, 2014).

In other words, *the best interests of the infant, it is a procedural rule, a child's right, and represents a major imperative that provides the basis for any measures taken with regard to the infant where appropriate and in the light of the specific circumstances*. In fact, from this point of view, we find in the case-law of the courts various analyzes of the situations actually deducted from the judgment, regardless of the subject matter of the case: Either the establishment of parental authority, the establishment of the infant's home, or the right to maintain personal ties with the child in order to enhance the child's best interests.

The psychology of development highlights the components of the infant's legal concept of best interest. Physical development means 'growth of the organism and brain, including patterns of change in sensory capabilities, motor skills and health specific to each stage of life' (Papalia et

al., 2010), while "moral development is gradually achieved through education in accordance with each stage of child development and aims at the internationalization of the rules that help the child to appreciate what is right and what is wrong, good or bad, and it is expressed through the moral judgment which represents the attitudes of children to the rules, their appreciation for the violation of the rules and their opinions on justice" (Luca & Pivniceru, 2016).

Viewed from another point of view, the socio-emotional balance aims to ensure a normal and peaceful framework for the child's social and emotional development, which also involves "the ability of the child to develop and maintain interactions with adults and other children with a view to adapting to society. Social interactions mediate the way children look at themselves and the world around them. Emotional development focuses in particular on the ability of children to perceive and express their emotions, to understand and respond to the emotions of others, and to develop the concept of self". Knowledge can only be developed in children if there is a modulation of the emotions of social knowledge, with the aim of progressively reducing their dependence and becoming self-sustaining. Similarly, the psychology of development defines family and, implicitly, family life as the relationships and the way in which family members (parents, siblings, grandparents, etc.) live and participate together in their activities (Luca & Pivniceru, 2016).

Looking at the principle from an emotional point of view, we see that the family environment plays a basic role in ensuring the infant's psychological security and balance. We also strengthen characteristics contrary to these values, with multiple intermediate variations represented by family dynamics. Thus, in family life, there are various forms of parental attitude, such as balanced security attitudes, a light attitude and relative independence of each parent from the other, even from the values of marriage and from children. The attitude of each parent may or may not contain higher or lower control methods, requirements and requirements, as well as forms of assistance when required. Parental skills must incorporate rules of command, habits and values in relation to the organization of a normal daily family life. But family life also includes all the material and

spiritual conditions that accompany the child's upbringing and education, and especially by ensuring a climate of freedom, independence, psychological security, affection, intellectual constructivism, appetite for culture and civilization, etc.

The special law on the protection and promotion of the rights of the infant expressly provides for the principle of the best interests of the infant with particular applications in many cases:

- the child's right to have personal relations and direct contacts with parents, relatives and other persons with whom the infant has developed close relationships (Article 17(1) of Law No 272/2004);

- the right to maintain personal relations with him, in so far as this is not contrary to his best interests (Article 17 (2) of Law No 272/2004);

- establishing or limiting the right to keep one-person relationships and direct contacts with both parents, where the infant has been separated from both parents or one of them by a measure ordered stipulated in the law (Article 19 of Law No 272/2004);

- establishing the rights of the infant to maintain personal relations and direct contacts with parents living in different States is also determined by the assessment of the best interests of the child (Article 22 of Law No 272/2004);

- the right of the parent in whom the child resides to make decisions on the choice of professional education or training, complex medical treatment, surgical interventions, the residence of the child, if for any reason the other parent does not express his will regarding these decisions (Article 36 of Law No 272/2004);

- the differences between the parents with regard to the exercise of parental authority shall be decided by the court regarding with the best interests of the child (Article 36(8) of Law No 272/2004);

- only the best interests of the child may require his or her separation from his or her parents, or one of them, against his or her will, except in the express and limitative cases provided for by law, subject to judicial review (Article 38 of Law No 272/2004).

Determining the principle of the best interests of the child shall, in addition to its inherent legal consequences, also address profound

psychological, social, economic, educational, etc. "the rule of the best interests of the child of a general nature is a major determinant imperative in the work of the psychologist being guided as a principle in the conduct of psychological services, thus contributing to the child's mental development process"¹ (Monitorul Oficial, 2013).

3. The legal determination of the best interests of the child

It is clear that in practice, the legislator has difficulty analyzing the term „normal physical and moral development and socio-emotional balance”, even though legislative efforts have been made to this end. The analysis of terms in the absence of knowledge belonging to psychology science *makes it difficult to apply them in practice by a judge in dealing with the cases in which he or she is called upon to decide on the measures requested concerning the child. In practice, the complexity of determining and applying them on a case-by-case basis is left to the judge, thus raising the question of the empirical application of these concepts on a case-by-case basis and thus determining their content, while other social disciplines, the psychology of development, can explain the content scientifically.* By doing so, the content of the words will vary in meaning and practical application.

We therefore deduce that it is very difficult for the judge to consider the best interests of the infant as long as there is no clear definition of the expression ‘normal physical and moral development’ as a composing element of the principle in question. The problem that arises from this point of view is to report to the legislator on a form of normality to which it will have to refer, given the lack of a legal standard of reference. The reality is that there are multiple forms of normality, starting from that specific to a particular family, or family group, normality given by tradition, culture, education, membership of a community, and so on. Thus, in such situations, it is very important and useful to support the court through the expert report by the psychologist, which will clearly evoke the terms necessary to use the principle of the best interests of the infant.

¹ See, Article 10(4) of the Code of Ethics of the profession of psychologist with a right of free practice of 01.11.2013, approved by the judgment of the College of psychologists of Romania No 4CN/2013 (M.O. No 715 of 20 November 2013).

In order to determine the socio-emotional balance of a infant, it is necessary to apply specific instruments aimed at the attachment of the child to each family Member and how the child socializes with the aim of achieving autonomy, which is itself structured according to the age of the child. It is understood that only with specialized support will the court be able to establish the existence of the child's socio-emotional balance, which, together with the other elements, will be able to shape the child's best interests. Family life, as analyzed in the case-law of the European Court of Human Rights, calls for meditation: Whether there are differences in substance and legal methodology in European systems of family law, with regard to subjective rights protected by the Court's case-law, or there are variations in the approach of the expression. We have seen, moreover, recent attempts to redefine the terms family life, family members, mother and father, so we are witnessing a readaptation of the national law of the EU Member States, and not only, but also a rethink of the approach to the principle of the best interests of the infant. The reality is that whatever the organization of family life, at least for the moment in the Court's case-law, it revolves around the best interests of the infant, with family life still being a necessary condition.

In determining the best interests of the child, the legislator has established a number of criteria of a general nature, provided for in Article 2(6) of Law No 272/2004 whose applicability is, in principle, aimed at establishing the parental authority, the child's home, establishing the parent's right to have personal relations with the infant or other persons with whom he or she has developed attachment relations, or to verify the parents' understanding of them, and in any other situation where the court is called upon to order measures relating to the infant.

The criteria are minimal and cover the following aspects:

- a) “the need for physical, psychological development, education and health, security and stability, and membership of a family;
- b) the views of the infant on the basis of age and maturity;
- c) the history of the child's abuse, neglect, exploitation or any other form of violence against him or her and potential future risk situations;

d) the ability of parents or persons to care for the child to meet their specific needs;

e) maintaining personal relations with persons to whom the child has developed attachment relations” (Cîrjă, 2016, p. 24; Luca & Pivniceru, 2016).

We stress that these criteria laid down by law are fluctuating, in the sense that the best interests of the child can also be established by analogy with other additional criteria where appropriate, depending, of course, on the particular situation of the child. Accordingly, depending on each given situation, the legislator can identify and add specific criteria to the general ones in order to adapt the principle of the best interests of the infant to particular cases. In this order of ideas, according to Article 21 of Law No 272/2004, in the case that the child’s home is established with third persons or a special protection service, and where the parents of the child do not understand with regard to the child's home, the court shall consider the determination of his residence with one of them, taking into account the provisions of Article 496(3) C. CIV., the following criteria:

a) the willingness of each parent to involve the other parent in child-related decisions and to respect the parental rights of the child;

b) the willingness of each parent to enable the other to maintain personal relations;

c) the housing situation of each parent over the last three years;

d) history of the violence of parents against the infant or other persons;

e) distance between the home of each parent and the institution providing the child's education² " (Lupascu, 2016, p. 149).

We point out that the analysis of these criteria provides the basis for the case-law of the courts regarding the establishment of the dwelling. Thus, having examined all the known criteria of assessment (the age of the child, the material and moral conditions that each parent can provide for the good physical and intellectual development of the child, the attachment of the parent to the child and the child to the parent, the interest and care shown

² In accordance with Article 3 (1). 496(3)(c) "in the event of a misunderstanding between the parents, the court of guardianship shall decide, taking into account the conclusions of the report of psychosocial inquiry and listening to the parents and the child, if he is 10 years of age The provisions of Article 264 shall remain applicable.

by the parents during their coexistence and after the actual separation), the court determines, in accordance with the principle of the best interests of the child, to which of the parents the child can be entrusted.

4. Conclusions

One of the general principles governing family relations, the best interests of the child is taken over from the special legislation, where it is provided with priority as regards the rights of the child (Article 6(a) of Law No 272/2004), which may be opposed to both parents, and the competent authorities to take the various measures relating to the child. The new rule, in addition to the framework provisions of Article 263 new C. civ, in which, among other things, references are made to the settlement of conflicts or the amicable conduct of proceedings concerning children, or the indication of what is meant by 'child', shall refer consistently to this principle. The Civil Code requires the principle of the best interests of the child to be paramount. Paragraph 1 shall not be proclaims the supremacy of the child's best interests criterion, which is binding and must be respected in taking any measure concerning the child, irrespective of its author; it is the responsibility of the author of the measure to identify the direction of the child's best interests. Pursuant to Article 2(2) of Law No 272/2004, this principle is also imposed in relation to the rights and obligations of the parents of the child, of other legal representatives of the child and of any persons to whom it has been legally placed. The principle of the best interests of the child shall prevail in all actions and decisions concerning children undertaken by public authorities and authorized private bodies, as well as in cases handled by courts.

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