

PREVENTING AND RESOLVING DISPUTES ON CHILD RELOCATION



Legal instruments

Recommendation CM/Rec(2015)4
and explanatory memorandum

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

PREVENTING AND RESOLVING DISPUTES ON CHILD RELOCATION

Recommendation CM/Rec(2015)4
adopted by the Committee of Ministers
of the Council of Europe
on 11 February 2015
and explanatory memorandum

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Recommendation CM/Rec(2015)4

of the Committee of Ministers to member States on preventing and resolving disputes on child relocation

*(Adopted by the Committee of Ministers on 11 February 2015
at the 1219th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its member States, in particular by promoting the adoption of common rules in legal matters;

Bearing in mind the Convention for the Protection of Human Rights and Fundamental Freedoms, of 4 November 1950 (ETS No. 5), and the relevant case law of the European Court of Human Rights, in particular in relation to Article 8 (right to respect for private and family life);

Taking into account the United Nations Convention on the Rights of the Child, of 20 November 1989, and recognising that the best interests of the child are a primary consideration in all matters concerning children in accordance with Article 3 of this convention, and that the right of the child to maintain contact with both parents shall be respected in accordance with Article 9 of this convention;

Recalling the European Convention on the Exercise of Children's Rights, of 25 January 1996 (ETS No. 160), and in particular its provisions relating to the procedural rights of a child and the role of the judicial authorities, and the Convention on Contact concerning Children, of 15 May 2003 (ETS No. 192);

Recalling the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, adopted by the Hague Conference on Private International Law, on 19 October 1996;

Recalling its Recommendation No. R (84) 4 to member States on parental responsibilities and, in particular, Principle 6 which provides for the allocation of parental responsibilities in the case of dissolution of the parents' marriage or separation;

Recalling its Recommendation No. R (98) 1 to member States on family mediation;

Taking note of the Washington Declaration on International Family Relocation, of 25 March 2010;

Recalling its Guidelines on child-friendly justice of 17 November 2010, and in particular its provisions relating to the right of the child to be heard and to express his or her views;

Wishing to provide guidance to member States on situations concerning child relocation;

Wishing to encourage the prevention and resolution of disputes on child relocation as a means of reducing the incidence of child abduction,

Recommends that member States take or reinforce all measures they consider necessary with a view to implementing the principles contained in the appendix to this recommendation.

Appendix to Recommendation CM/Rec(2015)4

Principles

Definitions

For the purposes of this recommendation and its principles:

- a. “child” means every human being below the age of 18 unless majority is attained earlier under the national law applicable to the child;
- b. “child relocation” refers to a change in the child’s habitual residence;
- c. “competent authority” refers to a judicial or administrative body that is competent to make a legally binding decision affecting the child’s habitual residence;
- d. “contact” refers to stays of limited duration, meetings, communication in any form and the provision of information;
- e. “parents” refers to the persons who are considered to be the parents of the child according to national law;
- f. “other holders of parental responsibilities” refers to persons who enjoy parental responsibilities in addition to or instead of the parents;
- g. “parental responsibilities” refers to the collection of duties, rights and powers, which aim to promote and safeguard the rights and welfare of the child in accordance with the child’s evolving capacities.

Scope

This recommendation applies to situations where there is, or may be, a disagreement on the relocation of a child, either within the jurisdiction of the member State (subject to Principle 7) or abroad.

This recommendation applies in particular to situations where, as a result of his or her relocation, a child would be at risk of losing contact, or of a significant disruption to contact, with his or her parents or with other holders of parental responsibilities.

General principles

1. National law on child relocation should:
 - a. offer sufficient legal certainty to prevent and resolve disputes;
 - b. provide sufficient flexibility to satisfactorily resolve individual disputes;
 - c. encourage the reaching of friendly agreements.

Rights of the child

2. The best interests of the child shall be a primary consideration in securing agreements and resolving disputes in matters of child relocation.
3. The child should have the right to be informed and consulted, and to express his or her views on the proposed relocation. Due weight should be given to the child's views in accordance with his or her age and degree of maturity.

Avoiding disputes

4. Measures aimed at avoiding disputes on child relocation or its consequences should be in place. Such measures might include:
 - provisions that encourage parents or other holders of parental responsibilities to reflect on a possible future relocation of the child by agreeing on relocation issues such as prior notice, duration and geographical limits;
 - rules on notification to the effect that the person proposing to change the child's habitual residence should be required to inform the other parent or other holders of parental responsibilities in writing prior to the proposed relocation and within specific time limits, in order to avoid unilateral relocations;
 - services (public or private) for advice, counselling and mediation to assist parents or other holders of parental responsibilities in reaching an agreement.

Dispute resolution

5. Alternative means of dispute resolution should be promoted in order to reach agreements on child relocation without the need to have recourse to the competent authority, without prejudice to Principle 6.
6. Parents or other holders of parental responsibilities should have the right to bring any unresolved dispute on child relocation to a competent authority for decision.
7. In the absence of agreement, the child's habitual residence should not be changed without a decision of the competent authority, except in circumstances provided for by national law.

8. In resolving disputes on child relocation, the competent authority should ensure that all relevant factors are taken into consideration, giving such weight to each factor as is appropriate in the circumstances of the individual case. The examination shall focus on the best interests of the child.
9. The decision of the competent authority should be made without any presumption for or against changing the child's habitual residence.
10. As time is of the essence in disputes over child relocation, particularly as far as the child is concerned, member States should ensure that disputes are resolved by the competent authority as quickly as possible.
11. Consideration should be given to facilitating direct judicial communications between the authorities of member States on international child relocation cases.

Explanatory memorandum

Introduction

1. In recent decades, parental disputes over child relocation have become common in Europe and worldwide.
2. Various factors account for this phenomenon. To begin with, there is a high incidence of family break-ups. In addition, there is the growing mobility of persons: parents and other holders of parental responsibilities with whom a child is “habitually or usually” residing may be prompted more and more often to relocate (job opportunities, change of lifestyle, family reunion), within their country or abroad. Finally, there is a growing tendency in many countries for parental responsibilities to be jointly exercised after the separation of the parents.
3. The relocation of a parent or other holder of parental responsibilities with a child can have serious implications for the child’s welfare, in particular where, as a result of the relocation, contact between the child and the non-relocating parent or other holder of parental responsibilities is significantly altered.
4. When disputes occur in cases of child relocation, it can be difficult for the competent authority to reach a decision as each parent or other holder of parental responsibilities can have valid arguments purporting to uphold the child’s best interests.
5. Thus, taking into account the strong potential for conflict over child relocations, the need to prevent and to resolve satisfactorily any disputes on child relocation is increasingly felt.

6. This recommendation is intended to guarantee a comprehensive and coherent approach so as to prevent and resolve disputes by deterring, in particular, a parent or other holder of parental responsibilities with whom a child resides from unilaterally relocating with the child, and averting the unlawful relocation of the latter.

7. The recommendation sets out to avoid too formal an approach, so as to acknowledge the differences in national systems with regard to family law. The principles of the recommendation can be applied to all types of cases, whether or not they include an international element; they can also serve as a basis for concluding agreements.

8. The recommendation, in not only addressing procedural issues but also dealing with substantive principles, intends to contribute towards the avoidance of disputes that may arise when the child's "habitual or usual" residence changes.

Definitions

a. "Child"

9. The child is defined in accordance with the United Nations Convention on the Rights of the Child.

b. "Child relocation"

10. The term "child's habitual residence" used in definition *b.* of "child relocation" in the appendix to the recommendation corresponds to the place which reflects a substantial degree of integration by the child in a social and family environment. Either it is for the parents or other holders of parental responsibilities to establish the child's habitual residence or it is for the competent authority to make a decision affecting the habitual residence of the child, taking account of all the circumstances specific to each individual case. Use of the term "habitual residence" reflects the usage set out in Resolution (72) 1 of the Committee of Ministers on the standardisation of the legal concepts of "domicile" and of "residence".¹

1. Rule No. 9 of the Appendix to the resolution: "In determining whether a residence is habitual, account is to be taken of the duration and the continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence."

c. “Competent authority”

11. The definition of “competent authority” is based on the definition of “judicial authority” in the Convention on Contact concerning Children (ETS No. 192). This means a court or an administrative body having equivalent powers. Administrative bodies are included on the same footing as judicial bodies, since the powers held by the latter are also exercised, in some States, by administrative bodies for certain categories of family law proceedings.

d. “Contact”

12. Relocation of the child will primarily affect the child’s personal, direct, or face-to-face, contact. Direct contact will invariably include spending time together inside or outside the home with the other parent or other holder of parental responsibilities, as well as, in most cases, staying over for short periods of time in their home. There are also other forms of less direct contact which are nonetheless important for the child. These include written correspondence, telephone and Internet communications, as well as the provision of information (photographs, school reports, medical reports, etc.).

e. “Parents”

13. Parentage is to be established in accordance with national law. The approaches as regards the definition of the term “parent” can vary between member States. Therefore, the recommendation leaves it to member States to decide whether or not to include other forms of parenthood, such as biological or social parenthood, in accordance with the standards of the European Convention on Human Rights (ETS No. 5) by modifying, if necessary, their national law accordingly.

f. “Other holders of parental responsibilities”

14. While parental responsibilities are normally given to parents, other persons may, in some situations, also be vested with such responsibilities by law or decision of the competent authority.

g. “Parental responsibilities”

15. Parental responsibilities are a collection of duties and powers which aim to ensure the moral and material welfare of the child. These include, but are not limited to, duties, rights and powers relating to:

- health and development,
- care and protection,

- enjoyment and maintenance of personal relationships,
- provision of education,
- legal representation,
- determination of habitual residence,
- administration of property.

16. It is, however, emphasised that not all the holders of parental responsibilities will have the same responsibilities, or the same level of responsibility.

Scope

1st paragraph

17. The purpose of the recommendation is to avoid conflicts over child relocation and, in the event of a conflict, to offer guidance on how to resolve it. The principles of the recommendation do not extend to other child-care issues except to the extent that they arise within the context of a dispute on child relocation (for example, division of parental responsibilities, custody, child's habitual residence, visiting rights of the non-resident parent and transport arrangements).

18. In most cases, parental responsibilities are exercised by the child's parents. The principles of the recommendation apply to parents, whether or not they are living or have lived together and irrespective of their marital status, whether or not they have been married.

19. In some situations, parental responsibilities can also be held by third persons (for example, those who have custody of the child by means of a decision of the competent authority). These persons may be entitled to exercise all or some parental responsibilities, and this can be in addition to or instead of the parents.

20. Member States are free to extend the principles of this recommendation where the person proposing to relocate with the child disagrees with other person(s) not holding parental responsibilities, such as members of the family of the child.

21. The principles of the recommendation are focused on the promotion and protection of the child's best interests. They apply to relocation taking place within the jurisdiction of the member State or abroad. However, in this context, the first paragraph needs to be read in conjunction with Principle 7 concerning the role of the competent authority (see paragraphs 66 and 67).

22. The principles of the recommendation are limited to a lawful change of the child's habitual residence. Therefore, they do not extend to situations of child abduction (wrongful removal or retention), but rather seek to avoid them.

2nd paragraph

23. It is in the best interests of the child to maintain contact with his or her parents or other holders of parental responsibilities.² The second paragraph specifies that the disagreement referred to in the first paragraph should concern a change with significant consequences for the child's contact with the parent or other holder of parental responsibilities. Most relocations leading to a significant change in contact between a child and one of his or her parents or other holders of parental responsibilities occur during relocation abroad or within the country of residence of the child. However, it should be emphasised that a significant change in contact may also occur upon relocation over a short distance, for example if the child resides in a large conurbation.

24. Relevant changes to the child's contact will also include changes in living arrangements. This expression "living arrangements" refers to situations in which the child lives with each of the parents or other holders of parental responsibilities for periods of time. Such periods of time may or may not be split equally between them.

25. The scope of the recommendation has been defined by reference to contact with parents or other holders of parental responsibilities. It would nonetheless be open to a court or a competent authority, in considering the best interests of the child, to also take account, in appropriate cases, of contact with other persons, whether or not they are members of the family.

26. Furthermore, child relocation may lead to disagreements on other issues, which can be understood within the meaning of Article 8 of the European Convention on Human Rights as interferences with the child's right to respect for private and family life, such as a forced change of the language spoken by the child, the practice of religion or a change in the circle of the child's friends and close relations. All these factors may affect the child's physical and psychological welfare.

2. Article 9, paragraph 3, of the United Nations Convention on the Rights of the Child.

General principles

Principle 1

27. Principle 1 encourages member States to make provisions for the prevention and resolution of disputes on child relocation. These provisions should help secure recognition that child relocation has a significant and separate legal connotation and a strong potential for conflict.

28. In the absence of clear provisions, parents and other holders of parental responsibilities may adopt certain behaviour with a view to pre-empting a decision on the child's residence but which may be to his or her detriment. Accordingly, member States should have a clear and precise national law concerning child relocation in order to offer legal certainty and sufficient predictability for these persons.

29. Member States should provide, in particular, measures that will encourage parents and other holders of parental responsibilities to facilitate the conclusion of amicable agreements in child relocation cases without the need to bring the dispute to a competent authority.

30. At the same time, it is in the child's best interests that the legal framework provide sufficient flexibility for the competent authority to allow for the satisfactory individual settlement of specific cases, taking all their particular circumstances into account.

Rights of the child

Principle 2

31. Under Principle 2, the competent authorities have an obligation to assess the best interests of the child. This principle gives effect to the obligations of the member States under Article 3, paragraph 1, of the United Nations Convention on the Rights of the Child.

32. The principle of "best interests of the child" is widely implemented today in the national legislation of the member States. It is considered a primary factor in child custody and relocation disputes.

33. The United Nations Committee on the Rights of the Child, in its General comment No. 14 (2013), gave clarifications on assessing and determining the best interests of the child as a primary consideration. It states that the extent of the child's best interests should be determined by the competent authority

on a case-by-case basis, in light of the specific situation of the particular child, the circumstances, the context and his or her specific needs.

34. Although parents and other holders of parental responsibilities are not explicitly mentioned in Article 3, paragraph 1, of the United Nations Convention on the Rights of the Child, the recommendation also encourages them to be guided before all else by the child's best interests when it comes to reaching agreement and settling disputes over child relocation.³ In this respect, Article 18, paragraph 1, of the United Nations Convention on the Rights of the Child stipulates:

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

35. The best interests of the child, once assessed and determined, might conflict with other interests or rights, in particular those of the parents and other holders of parental responsibilities (free movement, family reunion, etc.). It is crucial, in child relocation cases, that the child's interests are assessed separately from the interests of the person proposing to relocate with the child. In this respect, the Committee on the Rights of the Child also underlines that:

The expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. [...] Authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and [are] not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.⁴

36. Nevertheless, provisions in the recommendation do not prevent member States from introducing or applying higher standards or more favourable measures to protect the child's best interests.

Principle 3

37. In order to assess and determine the child's best interests, the competent authorities should give the child the opportunity to express his or her views

3. See General comment No. 14 (2013) of the United Nations Committee on the Rights of the Child, paragraph 25.

4. Ibid., paragraphs 37 to 39.

freely and give them appropriate weight. This is clearly set out in the General comment No. 12 of the United Nations Committee on the Rights of the Child. The comment also highlights the inextricable links between Article 3, paragraph 1, and Article 12 of the United Nations Convention on the Rights of the Child which stipulates that:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

38. In child relocation cases, it is particularly important that the child should be able to express his or her views, either directly or with the assistance of an appropriate and independent person. Hearing the child should enable the competent authority to have a better understanding of the child's living environment.

39. Principle 3 of the recommendation is based on the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, which stipulates that:

44. Judges should respect the right of children to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question. Means used for this purpose should be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case. Children should be consulted on the manner in which they wish to be heard.

45. Due weight should be given to the child's views and opinion in accordance with his or her age and maturity.

46. The right to be heard is a right of the child, not a duty on the child.

47. A child should not be precluded from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects him or her, the judge should not, unless it is in the child's best interests, refuse to hear the child and should listen to his or her views and opinion on matters concerning him or her in the case.

48. Children should be provided with all necessary information on how effectively to use the right to be heard. However, it should be explained to them that their

right to be heard and to have their views taken into consideration may not necessarily determine the final decision.

49. Judgments and court rulings affecting children should be duly reasoned and explained to them in language that children can understand, particularly those decisions in which the child's views and opinions have not been followed.

40. These guidelines serve as a practical tool for member States to adapt their judicial and non-judicial systems to the specific rights, interests and needs of children.

41. The diversity in capacities and levels of understanding can vary greatly depending on the individual child's development capacities, life experiences and cognitive and other skills. That is why the recommendation does not set an age limit for the child to be heard.

42. When assessing the child's best interests, the competent authority should fully take into account the diversity in capacities and levels of understanding of the child without going so far as to require of the child a full and comprehensive knowledge of all aspects of the proposed relocation. Babies and very young children have the same rights as all children to have their best interests assessed, even if they cannot express their views or represent themselves in the same way as older children.⁵

43. The child who is capable of understanding needs to know precisely what will happen and what the status of his or her opinion will be. It should be made clear to the child that the mere fact of having been heard by the competent authority does not mean it will follow his or her opinion.

44. The child should be entitled to express freely his or her views in a safe environment, respectful of his or her person, regardless of his or her age. The child should feel at ease when he or she talks to the competent authority. While it is true that there is a risk of the child being manipulated when he or she is heard or expresses his or her views (in particular by a parent or other holder of parental responsibilities), all efforts should be made to ensure that such a risk does not undermine this fundamental right to be heard.

45. Member States are also encouraged to formulate provisions for this fundamental principle to be applied to parents and other holders of parental responsibilities, in particular in reaching amicable agreements. The child

5. Ibid., paragraph 44.

should be offered an equivalent level of guarantees in judicial and non-judicial procedures and in particular through mediation.

Avoiding disputes

Principle 4

46. One of the main objectives of the recommendation is to prevent disputes on child relocation. The purpose of Principle 4 is, therefore, to encourage member States to take measures to ensure that the person proposing to relocate with the child seeks an agreement with the other parent and other holders of parental responsibilities as early as possible or, at least, informs them prior to relocation. This would give them the opportunity to express any concern and propose an agreement or to bring the dispute before a competent authority (see paragraph 65). The list of measures in Principle 4 is not exhaustive.

1st indent

47. The first indent in Principle 4 encourages parents and other holders of parental responsibilities to consider the child's possible relocation and the impact which it might have on the child's contacts with them as early as possible. Agreements between them can be helpful later on when the issue of relocation arises by providing a set of agreed "rules", thereby contributing to an amicable agreement on relocation and avoiding a dispute that might harm the child.

48. Thus, parents or other holders of parental responsibilities could agree on:

- temporal limits to a change in the child's habitual residence;
- geographical limits to a change in the child's habitual residence;
- terms for informing the other parent or other holders of parental responsibilities (how, when and in what form);
- use of mediation, when appropriate, or of other services to help reach an amicable agreement.

49. In some legal systems, in order to give amicable agreements on the child's possible future relocation the same legal effect as a court order and thereby facilitate their implementation, parents and other holders of parental responsibilities can request a competent authority to give its approval to these agreements. The latter may decide to approve the agreement, or may refuse

to do so if it finds that consent has not been given freely or that the child's best interests are not adequately protected.

50. In some legal systems, it is possible for the parents and other holders of parental responsibilities to certify their agreement before a notary or a youth welfare office. This confers a certain degree of "faith and credit" to an otherwise merely private agreement, without the certifying authority exercising a decisive control over the content of the agreement.

51. If a dispute later arises on child relocation, the competent authority may have regard to the terms laid down in the amicable agreement without being bound by it, since the best interests of the child are a primary consideration. Nonetheless, the amicable agreement can provide the competent authority with useful indications regarding the intention of the parents or other holders of parental responsibilities.

52. Conflicts following a unilateral child relocation initiative will often be distressing for the child. Mutual respect between parents or other holders of parental responsibilities is a key factor in the prevention of disputes. Each parent or other holder of parental responsibilities should be encouraged to honour the ties and the rights of the other(s), and seek to ease any tension for the child's benefit.

53. In order to avoid distress to the child, member States are encouraged to adopt provisions aimed at encouraging parents and other holders of parental responsibilities to discuss plans to relocate the child and any consequences (contact with the other parent or other holders of parental responsibilities, transport costs, etc.), and take, as far as possible, a joint decision.

2nd indent

54. The second indent in Principle 4 encourages member States to adopt legislative provisions that would require the person proposing to relocate with the child to inform the other parent or other holders of parental responsibilities of his or her intention to relocate. The information should be given in writing and may take the form of a notification. This may contain:

- details of the child's proposed new habitual residence;
- contact details of the child;
- the date of the proposed relocation;
- proposals for arrangements on the child's contact with the other parent or other holders of parental responsibilities.

However, an exception to any such provision of information or notification may be made where the child, the parent or other holder of parental responsibilities might be put at risk, for example in cases of domestic violence or abuse of the child.

55. The fact that the person proposing to relocate with the child is making a serious effort to secure the agreement of the other parent or holders of parental responsibilities may also be an indicator to the competent authority of the intention of this person to maintain a good relationship with them, including contact with the child.

56. Member States are free to impose a minimum time limit for notifying the other parent or other holders of parental responsibilities. Time limits are of great importance. Indeed, imposing a minimum time limit which is too long may prove to be difficult in practice owing to the respective notice periods for leaving and starting new employment. Moreover, this time limit should leave sufficient time for the person proposing to relocate with the child to prepare a suitable relocation plan to submit to the other parent or other holders of parental responsibilities, as this could later prove relevant for the competent authority.

57. In Denmark for instance, the person proposing to relocate with the child is required to inform the other parent and other holders of parental responsibilities of his or her intention to relocate not later than six weeks prior to the impending move.

58. Minimum time limits may also avoid the risk of strategic procedural behaviour. The person proposing to relocate with the child may wait too long before informing the other parent or other holder of parental responsibilities, or not give notification to them at all before relocating, and either the other parent or the other holders of parental responsibilities may object to the child relocation simply because they have not been informed sufficiently in advance.

3rd indent

59. The third indent in Principle 4 suggests that member States should provide access for parents or other holders of parental responsibilities to appropriate services (public or private) to help reach an amicable agreement in child relocation cases. It is essential that recourse to alternative dispute resolution should be delayed as little as possible.

Dispute resolution

60. Parents and other holders of parental responsibilities are best placed to know the needs of the child. Alternative dispute resolution may allow further progress in reaching a more appropriate solution for the child and for them. Moreover, amicable agreements will be financially less expensive and will also provide emotional advantages such as avoiding distress to the child. The child may spend more time during the school holidays with the non-relocating parent or other holder of parental responsibilities for example, or the child's relocation may take place at the end of the school year, etc.

Principle 5

61. To facilitate reaching an amicable agreement between parents or other holders of parental responsibilities on child relocation and related matters (contact, travel arrangements, etc.), Principle 5 encourages member States to adopt legislative provisions encouraging alternative dispute resolution.

62. In this respect, it is appropriate to recall Council of Europe Recommendation No. R (98) 1 on family mediation which recommends that member States "introduce or promote family mediation or, where necessary, strengthen existing family mediation".

63. Alternative dispute resolution should be encouraged whenever this may best serve the child's best interests. However, the preliminary use of such an alternative should not be used as an obstacle to the child's access to justice or to the expression of his or her views.

64. Nonetheless, having recourse to mediation may not suit every case, in particular when relocation takes place in a context of domestic violence. Victims of domestic violence and their abusers are unlikely to enter the alternative dispute resolution process on an equal level, since factors such as fear and the psychological consequences of domination, control and abuse will have an impact. It should be noted that Article 48 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210) stipulates:

Parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention.

Principle 6

65. Principle 6 recalls the obligation of member States, pursuant to Article 6 of the European Convention on Human Rights, to adopt legislative provisions allowing parents or other holders of parental responsibilities the right to bring before a competent authority a request for relocation of the child or an objection to it. The need to use such a legal procedure is outlined in the jurisprudence of the European Court of Human Rights.⁶

Principle 7

66. Principle 7 makes it clear that the child relocation should not be made unilaterally without the approval of the competent authority as determined by national law, unless it provides otherwise.

67. Principle 7 acknowledges that, while a unilateral change of the child's habitual residence would not be wrongful in itself, it could be a serious interference with the child's right to retain contact with both parents or with other holders of parental responsibilities, and could also cause distress to the child.

Principle 8

68. When one parent or other holder of parental responsibilities disagrees with the plan to relocate with the child and the issue is brought before the competent authority, the latter may need to adjudicate between the conflicting legitimate interests of the adults (parents and other holders of parental responsibilities) while remaining focused on the child. Disputes on child relocation raise numerous difficulties for the competent authority, to which, in some States, may be added the further disadvantage of a lack of legislative provisions or practice regarding the factors to consider in such cases.

69. Apart from the child's best interests as a primary consideration, Principle 8 recommends that the decision-making exercise of the competent authority should be guided by all relevant factors, giving such weight to each factor as is appropriate in the circumstances of the individual case. Particular attention should be paid to situations where the relocation takes place within the context of domestic violence and abuse.

70. These factors are partly based on the factors listed in the "Washington Declaration on International Family Relocation" and on Principle 3:21 of the

6. See *Keegan v. Ireland*, 26 May 1994, Series A no. 290.

Principles of European family law on parental responsibilities of the Committee on European Family Law (CEFL).

71. The declaration was adopted at the close of the Washington Conference (March 2010), co-organised by the Hague Conference on Private International Law (HCCH) and the International Centre for Missing and Exploited Children (ICMEC).

72. The order and classification of the factors set out below are no indication of their priority. The weight to be given to any one factor will vary from case to case, in particular when the change of habitual residence occurs outside the jurisdiction.

- i. The right of the child to maintain personal relations and direct contact with the other parent or other holders of parental responsibilities on a regular basis, in a manner consistent with his or her development.
- ii. The views of the child having regard to his or her age, maturity and level of understanding.
- iii. The proposals of the parents or other holders of parental responsibilities for the practical arrangements for changing the child's habitual residence (including accommodation, education, employment, contacts with other family members).
- iv. The reasons of the parents or other holders of parental responsibilities for seeking or opposing the child's habitual residence.
- v. Any history of family violence or abuse, whether physical or psychological.
- vi. The history of the family and particularly the continuity and quality of past and current care and contact arrangements.
- vii. Pre-existing arrangements concerning the child's habitual residence and contact and previous decisions of the competent authorities.
- viii. The impact of the grant or refusal of the application for relocation on the child, in the context of his or her siblings and extended family, education and social life, and on the remaining parent or other holder of parental responsibilities.
- ix. The nature of the relationship between the parent and other holders of parental responsibilities and the commitment of the person proposing to change the child's habitual residence (to support and facilitate the relationship

between the child and the parent or other holders of parental responsibilities after the relocation).

x. Whether the proposals of the parents or other holders of parental responsibilities for contact after the child's change of habitual residence are realistic, having particular regard to the cost to the family and burden on the child.

xi. The enforceability of contact provisions ordered as a condition of the permission to change the child's habitual residence, particularly in the context of a change of jurisdiction.

xii. The issues of mobility for family members or those who have a reasonable interest in having contact with the child.

xiii. The existence of parenting agreements or other similar agreements, including provisions on child relocation.

xiv. The failure to inform the other parent or other holder of parental responsibilities of the proposal to relocate with the child.

73. However, the above-mentioned factors are not exhaustive and all other relevant factors should be duly considered. As the comment on Principle 3:21 (3) of the CEFL Principles of European family law regarding parental responsibilities states:

[The relocation] decision requires that the competent authority tries to find a balance between the right of the child to maintain personal relationships with the non-residential parent and close relatives and persons with whom the child has a close relationship [...] and the right of the residential parent to move in pursuit of a valid purpose, in order to, for example, improve his or her professional situation or to accompany a new partner (free movement rights). Geographical distance and accessibility as well as the personal, particularly the financial, situation of the holders of parental responsibilities are crucial factors.

Principle 9

74. In deciding on a request for or an objection to relocation of the child, the competent authority may need to confirm or, by contrast, modify a pre-existing decision on the custody of the child and his or her personal contact.

75. Principle 9 recommends a neutral and child-centred approach by the competent authority, with no presumption for or against relocation or in favour of either parent or other holders of parental responsibilities. The competent

authority should decide on a case-by-case basis, considering all the new factors and making the child's best interests a primary consideration.

Principle 10

76. In order to prevent unilateral relocations and to avoid the parent or other holder of parental responsibilities relocating with the child before the competent authority gives its decision, Principle 10 of the recommendation encourages member States to impose an obligation on the competent authority to act promptly in any dispute over child relocation. Any needless delay may be detrimental to the child's welfare and therefore contrary to his or her best interests.

77. Concerning the time limit within which the competent authority should make its decision, the European Convention on the exercise of children's rights (ETS No. 160) stresses in its Article 7:

In proceedings affecting a child the judicial authority shall act speedily to avoid any unnecessary delay and procedures shall be available to ensure that its decisions are rapidly enforced. In urgent cases the judicial authority shall have the power, where appropriate, to take decisions which are immediately enforceable.

78. However, the competent authority is not always able to act as promptly as it would wish, for example where it has not received sufficient information to take a final decision in the child's best interests. If so, it may be expedient to take provisional decisions to be monitored for a certain period of time in order to be reviewed later.

79. Recommendation No. R (91) 9 of the Committee of Ministers to member States on emergency measures in family matters contains principles indicating the steps to be taken to ensure that effective measures are available to the competent authorities dealing with family matters to protect children and others who are in need of special protection and assistance and whose interests are in serious danger. This recommendation also provides that where international co-operation between the courts or other competent authorities is required, "[i]n cases where the return of a child is sought, courts and other competent authorities should [...] give a decision whenever possible within six weeks of the receipt of the completed application by the requested authority [...]."

Principle 11

80. Direct judicial communications should facilitate co-operation through the exchange of information between the competent authorities of the member States, informing them as soon as possible of, in particular, decisions taken to resolve a conflict in child relocation cases.

81. Principle 11 encourages member States to introduce judicial networks that would operate in a complementary and co-ordinated way to develop practical co-operation between the competent authorities, in order to share information and provide practical solutions concerning the recognition and enforcement of judicial decisions and relocation agreements.

82. At the conference celebrating the 15th anniversary of the International Hague Network of Judges (Windsor, 17-19 July 2013), the following recommendations were made in relation to direct judicial communications.

Where there is concern in any State as to the proper legal basis for direct judicial communications under domestic law or procedure, the conference invites States to take steps to ensure the necessary legal basis exists.

The conference notes the many different non-legislative bases for the use of direct judicial communications which were reported by Members of the International Hague network of judges and invites other States to consider these practices with a view to utilising them in their own jurisdiction as possible legal bases for direct judicial communications.

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In today's mobile society, relocation is becoming an increasingly common occurrence. For separated parents wishing to relocate with children, this reality has increased the potential for conflict over where and with whom their children will live.

Recommendation CM/Rec(2015)4 on preventing and resolving disputes on child relocation intends to contribute to avoiding disputes that may arise when a proposal to change the child's habitual residence is made.

It applies to situations where there is, or may be, disagreement between parents regarding the relocation of a child, either within the jurisdiction of a member state or abroad, and where, as a result of such relocation, a child would be at risk of losing contact, either completely or to a significant extent, with his or her parents or with other holders of parental responsibilities.

The recommendation encourages member states of the Council of Europe to take or reinforce all measures they consider necessary with a view to implementing the procedural and substantive principles contained in the appendix to the text.

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