

Reflections on the relevant factors regarding the assessment and determination of the best interests of the child in parental separation or care proceedings

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This document is the result of investigations, meetings and discussions carried out within the framework of the CINGO mechanisms, notably through the Civil Society Committee on the Rights of the Child (CSC-RC). It aims to contribute to the reflections on the clarification of a list of factors that would be used to characterise the best interests of the child. Such a list aims to help family and youth justice professionals (judges, lawyers, mediators, psychologists and social workers) to make decisions that respect the best interests of the child, i.e. a person under 18 years of age.

When considering the factors regarding the determination of the best interests of the child in parental separation and care proceedings, the court shall give primary consideration to the child's physical, emotional, and psychological safety, security and well-being; the court and the parties should bear in mind that each child, i.e. a person under 18 years of age, faces a specific situation and that a case-by-case assessment is essential. In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each parent as is consistent with the best interests of the childⁱ.

The court shall consider all relevant factors, without hierarchy or exclusivityⁱⁱ, including:

a) The child's views

The **views and preferences of the child**, in terms of emotional, educational, and intellectual needs, giving due weight to the child's views according to the child's age, maturity, and capacity of discernment.

There is no age limit on the right of the child or young person to express her or his views freely. Consideration needs to be given to the notion of the evolving capacities of children and young people. **Appropriate weight should be afforded to the voice of adolescents as they acquire understanding and maturity.**ⁱⁱⁱ

b) The child's identity

The protection of the child's experience and history regarding his or her identity as well as his or her **linguistic, cultural and religious heritage**.

Particular attention should be paid to the parents' willingness to cooperate on this issue, bearing in mind that these issues can also be a source of disagreement between non-separated parents. In the context of a protection or placement measure, co-education should be emphasized, based on the mutual recognition of the adults responsible for the child's education. It is important to respect the child's right and interest, in terms of cultural development, to maintain his or her relationship and inclusion in a family history of values, cultures, religion and languages. Placement can, however, allow the emergence of new forms of identity. Sometimes, in order to develop, a child must be allowed to break with a parent. Such a decision is sometimes difficult to take, but there are parents who represent a danger for their child.

c) Preservation of the family environment and maintaining relations^{iv}

a- **The parents' understanding** of what is meant by “the best interests of the child” **and** the benefit to a child of having **direct, regular, frequent and meaningful contacts^v**. **with**

- **each parent and with any other persons** who have been, or are, involved in his or her upbringing and care; taking into account relationships in the extended family and possible in-laws
- **siblings**: taking into account the relationships established in the siblings of blended families.

b- **The willingness and capacity of each parent^{vi}** to care for and meet the needs of the child with regard of each parent's involvement in the child rearing (e.g. balanced distribution of parental leave between parents, involvement with childcare, nursery or school), or the desire to be more involved and depending on the parent's state of health, possible disability or other specific measures ordered by a judge.

c- **The willingness and capacity of a parent to encourage, and allow, a close and continuing relationship between the child and the other parent^{vii}**; to allow the child frequent, meaningful, and continuing contact with the other parent.

d- **Any parental arrangement proposed** by the parents, taking into account the elements listed in a, b and c, with the following additional elements

- The **proximity** of each parent's home to the child's usual activities (school, leisure activities, culture, social relations); this proximity should be considered in terms of its practical (ease of travel) and social aspects (habits of the inhabitants of the place of residence, medium-sized towns, cities or the countryside, for example).
- The **adaptation** of the **home** to accommodate the child; this adaptation should be considered from a practical (availability of a bedroom) and social (habits of the inhabitants of the place of residence, e.g. medium-sized towns, cities or countryside).
- The **willingness** of each parent to **cooperate** with the other to implement the agreed arrangement and to adapt it to the child's needs as he or she develops; taking into account the willingness to review the arrangement periodically, for example when the child changes school grades (from primary to secondary schools).
- The **absence of domestic violence**, physical or psychological, towards the other parent or towards the child; special care should be taken to ensure that each parent avoids the child being physically or psychologically separated from the other parent or their family.
- How and when the arrangement made will **evolve** or **be reviewed** in order to adapt it to the child's needs in the light of his or her development.

d) Care, protection and safety of the child

Any harm that the child has suffered, or is at risk of suffering, as a result of **domestic violence**, taking account of the overriding need to protect the child's physical and mental health and safety as well as their psychological and emotional well-being; domestic violence includes corporal punishment of children as well as causing the child to fear for his or her safety or that of another person.

e) Situation of vulnerability

An important element to consider is the child's situation of **vulnerability**, such as **disability**, belonging to a **minority group**, being a **refugee** or **asylum seeker**, victim of **abuse**. An individualized assessment of each child's history from birth should be carried out, with regular reviews by a **multidisciplinary team** and recommended reasonable accommodation throughout the child's development process.

f) The child's right to health

The needs of the child concerned (including educational, intellectual, physical, psychological, emotional or other special needs) having regard both to his or her age and stage of development and the potential impact of changed circumstances on him or her (including the rupture of the attachment bonds that most infants have formed with both parents, from early months, at the same time and in the same way);

Child with a psycho-social disorder have the right to be treated and cared for in the community in which he or she lives, to the extent possible.

In the event of placement, those in charge of the institutions take measures to reduce the situations of danger - to health and physical and moral integrity, in particular - caused in the institutions themselves by the situation of vulnerability exacerbated by the placement, especially in pre-adolescence and later.

g) The child's right to education

The possibility for the child to have access to quality education, including early childhood education, non-formal or informal education and related activities. Any decision on a measure or arrangement concerning a child should allow the child to be under the responsibility of appropriately educated and trained persons in the various educational settings.

The timing of the decision

The timing of the decision should, as far as possible, correspond to the child's **perception** of the time and how this decision can benefit him or her. The decisions taken **should be reviewed at reasonable intervals** as the child develops and his or her capacity to express his or her views evolves. All decisions on care, treatment, placement and other measures concerning the child must be reviewed **periodically** in terms of his or her perception of time, and as he or she develops and his or her ability with language and other means of expression evolves.^{viii}

Court proceedings and enforcement decisions must be conducted **without unreasonable delay**^{ix} under the principle of **urgency** thus specified^x:

- (1) The **procedures** in which the personal rights of the child are decided are urgent.
- (2) If the court has assessed a **situation of danger**, the first hearing shall take place **as soon as possible**, to be determined according to the legislation of each State, from the day of the commencement of the proceedings.
- (3) If the court has not assessed a situation of danger, the decision must be made and notified within a **reasonable time**, to be determined according to the legislation of each State. A

reasonable extension may be introduced if **mediation** has been set up to provide for the children's post-separation living arrangements and residence.

(4) If the court has assessed a **situation of danger**, the decision on **temporary measures** and enforcement for the purposes of the exercise of parental authority and contact with the child, as well as for the purposes of the surrender of the child, shall be taken and sent within a **short period of time**, to be determined in accordance with the law of each State, from the day of the first hearing

(5) The decision in the procedure should indicate **how and when the measures taken will be reviewed** in order to adapt them to the child's needs in the light of his or her development.

(6) Exceeding the deadline in the procedures referred to in paragraphs 2, 3 and 4 is allowed only for important reasons. The judge is obliged to inform the president of the court about the exceeding of the deadline referred to in paragraph 4 of this Article.

(7) In any proceedings, the court of second instance must render and dispatch the decision within a **short period of time**, to be determined in accordance with the law of each State, from the day of receipt of the **appeal**.

The practical conditions of judicial decision making (views of family judges, responsible for family matters in courts in France)

The decision-making process for children should include:

- **Sufficient means of investigation and evaluation** available to the judge to assess the concrete family situation of the child (verification of certificates provided by the parents; investigative measures by social enquiry; psychological insight; contact with lawyers before the hearing). Having adequate information to take into account the assessment of the best interests of the child is a challenge for both the family court judge and the children's judge, who would need to work in multidisciplinary teams specially trained in family issues, children's needs and their assessment.
- **The time of the child's hearing**, when it is useful. Hearing the child allows the judge to understand the child's feelings in concrete terms, to pass on messages about his or her rights and, if it is carried out properly, to check that he or she is not being "used" by a parent.
- **Appropriate time limits for decision-making**. Excessively long delays can be a risk factor for the child in conflict situations, especially when children are very young and exposed to break-ups with one parent by the other parent. The effects are sometimes irreversible. However, in cases where the child is at risk, the children's judge can always intervene more quickly than the family court judge.
- Possibilities of **mediation** in the time before the hearing, to replace the parents in their parental responsibility. To make them aware, for example, that when we separate, it is not the judge's role to decide, his role is only subsidiary, it is the parents' role to find agreements by making the effort to communicate.
- **Actions to support parents during their separation**, with local associations, child medicine, child psychiatrists and psychologists, to enable them to know the needs of their

children and the solutions that can be put in place. The following are to be considered: the needs of children in the context of parental separation; the consequences of separation on children; what to look out for in order to protect them and avoid making mistakes; the different possible residence arrangements according to the family's concrete situation.

- **Actions to support children and professionals in the event of placement.** The following issues need to be considered: how to anticipate the placement, relationships in the foster family, the place of siblings, contact with the biological mother and father.
- **Professional education and training.** There is a need for updated knowledge, particularly in relation to psychological research and attachment theory, in order to make more appropriate decisions or implement evidence-based parenting support interventions before making a decision on placement or legal custody, parental authority.
- **A sufficient number of available magistrates.** Long absences (e.g. for maternity leave) should always be replaced. Below a certain threshold, the level of professional staff degrades the quality of proceedings.
- More generally, **information and awareness-raising** about the rights and needs of children and adolescents in situations of parental separation or placement should involve society as a whole - children, parents, lawyers, academics, journalists and public authorities.
- **Support for research** in law, psychology, health, sociology and education on issues related to parental separation and placement.

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i Divorce Act / [Canada](#) : The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order. When considering the factors referred to in subsection, the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being. In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.

The Directive on work-life balance for parents and carers, that was adopted by the Council of EU (24 May 2019). This directive is a further step towards promoting equality between women and men across the EU. Currently, men have only limited incentives to take parental or paternity leave or assume caring responsibilities. The directive provides them with new opportunities to do so. This will reduce the amount of unpaid work undertaken by women and allow them more time for paid employment. It will also contribute to closing the gender gap.

The resolution 2079 (2015) of the PACE on the role of fathers in equality and shared parental responsibility. In its Article 4 this resolution states that "developing shared parental responsibility helps to transcend gender stereotypes about the roles supposedly assigned to women and men within the family and is simply a reflection of the sociological changes that have taken place over the past fifty years in terms of how the private and family sphere is organised."

ii General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1).

Balancing the elements in the best-interests assessment

80. It should be emphasized that the basic best-interests assessment is a general assessment of all relevant elements of the child's best interests, the weight of each element depending on the others. Not all the elements will be relevant to every case, and different elements can be used in different ways in different cases. The content of each element will necessarily vary from child to child and from case to case, depending on the type of decision and the concrete circumstances, as will the importance of each element in the overall assessment.

81. The elements in the best-interests assessment may be in conflict when considering a specific case and its circumstances. For example, preservation of the family environment may conflict with the need to protect the child from the risk of violence or abuse by parents. In such situations, the elements will have to be weighted against each other in order to find the solution that is in the best interests of the child or children.

82. In weighing the various elements, one needs to bear in mind that the purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognized in the Convention and its Optional Protocols, and the holistic development of the child

83. There might be situations where "protection" factors affecting a child (e.g. which may imply limitation or restriction of rights) need to be assessed in relation to measures of "empowerment" (which implies full exercise of rights without restriction). In such situations, the age and maturity of the child should guide the balancing of the elements. The physical, emotional, cognitive and social development of the child should be taken into account to assess the level of maturity of the child.

84. In the best-interests assessment, one has to consider that the capacities of the child will evolve. Decision-makers should therefore consider measures that can be revised or adjusted accordingly, instead of making definitive and irreversible decisions. To do this, they should not only assess the physical, emotional, educational and other needs at the specific moment of the decision, but should also consider the possible scenarios of the child's development, and analyse them in the short and long term. In this context, decisions should assess continuity and stability of the child's present and future situation.

iii Committee on the Rights of the Child. General comment No. 20 (2016) on the implementation of the rights of the child during adolescence

22. The right of the child to have his or her best interests taken into account as a primary consideration is a substantive right, an interpretative legal principle and a rule of procedure, and it applies to children both as individuals and as a group.⁹ All measures of implementation of the Convention, including legislation, policies, economic and social planning, decision-making and budgetary decisions, should follow procedures that ensure that the best interests of the child, including adolescents, are taken as a primary consideration in all actions concerning them. In the light of its general comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, the Committee stresses that, when determining best interests, the child's views should be taken into account, consistent with their evolving capacities and taking into consideration the child's characteristics. States parties need to ensure that appropriate weight is afforded to the views of adolescents as they acquire understanding and maturity.

Recommendation CM/Rec(2012)2 of the Committee of Ministers to member States on the participation of children and young people under the age of 18

There is no age limit on the right of the child or young person to express her or his views freely. All children and young people, including those of pre-school age, school age and those who have left full-time education, have a

right to be heard in all matters affecting them, their views being given due weight in accordance with their age and maturity.

The right of children and young people to participate applies without discrimination on any grounds such as race, ethnicity, colour, sex, language, religion, political or other opinion, national or social origin, property, disability, birth, sexual orientation or other status.

Consideration needs to be given to the notion of the evolving capacities of children and young people. As children and young people acquire more capacities, adults should encourage them to enjoy, to an increasing degree, their right to influence matters affecting them.

iv Caroline Siffrein Blanc: This item C contains numerous criteria that could lead to a loss of focus. Also, I think that we should put at the same level:

- The preservation of the family environment, maintenance of relationships and the need for stability in relation to relationships with parents and other relatives, grandparents, siblings; extended family and in-laws; school, friends and social relationships, extra-curricular activities.
- The nature and consistency of the relationship between the parents and the child, the capacity and willingness of each parent to care for and meet the needs of the child.
- The capacity to cooperate and respect each other and the rights of the other parent: fostering relationships with the child, respecting each other, making parenting arrangements.
- The absence of domestic violence: domestic violence and child abuse of any kind.

v General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1).

61. Given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure, as when the child is in danger of experiencing imminent harm or when otherwise necessary; separation should not take place if less intrusive measures could protect the child. Before resorting to separation, the State should provide support to the parents in assuming their parental responsibilities, and restore or enhance the family's capacity to take care of the child, unless separation is necessary to protect the child. Economic reasons cannot be a justification for separating a child from his or her parents.

vi Divorce Act / [Canada](#) (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;

vii Divorce Act / [Canada](#) (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse; (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;

viii UN CRC GC 14: 93. The passing of time is not perceived in the same way by children and adults. **Delays in or prolonged decision-making have particularly adverse effects on children as they evolve.** It is therefore advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible. The timing of the decision should, as far as possible, correspond to the child's perception of how it can benefit him or her, and the decisions taken should be reviewed at reasonable intervals as the child develops and his or her capacity to express his or her views evolves. **All decisions on care, treatment, placement and other measures concerning the child must be reviewed periodically in terms of his or her perception of time, and his or her evolving capacities and development** (art. 25).

ix In proceedings affecting a child the judicial authority shall act speedily to avoid any unnecessary delay (Art. 7, ETS 160 – Exercise of Children's Rights, 25.I.1996)

x The Croatian Family Act regarding the time-limits issue (article 347) clarifies the principle of urgency:

- (1) The procedures in which the personal rights of the child are decided are urgent.
- (2) In the proceedings referred to in paragraph 1 of this Article, the first hearing must be held within fifteen days from the day of initiating the proceedings, unless otherwise provided by this Act.
- (3) If the decision in the procedure referred to in paragraph 1 of this Article is made without holding a hearing, it must be made and dispatched within fifteen days from the day of initiating the procedure, unless otherwise provided by this Act.
- (4) The decision in proceedings on temporary measures and enforcement for the purpose of exercising parental care and personal relations with the child, as well as for the purpose of handing over the child must be made and dispatched within thirty days from the day of initiating the procedure.
- (5) Exceeding the deadline in the procedures referred to in paragraphs 2, 3 and 4 of this Article is allowed only for important reasons. The judge is obliged to inform the president of the court about the exceeding of the deadline referred to in paragraph 4 of this Article.
- (6) In the proceedings referred to in paragraphs 2, 3 and 4 of this Article, the court of second instance must render and dispatch the decision within thirty days from the day of receipt of the appeal, unless otherwise provided

by this Act.