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CRITERIA FOR ASSESSING THE BEST INTERESTS OF THE CHILD IN PROCEEDINGS FOR THE PROTECTION OF CHILDREN'S RIGHTS^{4**}

ABSTRACT: The principle of the best interests of the child is one of the four fundamental guiding principles underlying the system for the protection of children's rights under the auspices of the United Nations and the Convention on the Rights of the Child (CRC). It constitutes a general principle, a flexible concept/term to which legal practitioners attribute specific meaning in each unique case. The Family Law of the Republic of Serbia and the Convention on the Rights of the Child both lack a definition of this principle, leaving ample room for assessing the child's best interests *in concreto*, i.e., in the scope of a specific case. In this regard, legal practitioners find valuable guidance in General Comment No. 14 (2013) by the Committee on the Rights of the Child, which clarifies the concept of the child's best interests. This document establishes objective criteria as guiding principles all decision-makers should adhere to in matters concerning children. In addition to examining the prevalent perspectives within legal theory and regulations concerning criteria for assessing a child's best interests, this paper

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will also explore predominant viewpoints found in the judicial practice within the legal system of the Republic of Serbia in this domain.

Keywords: the principle of the best interests of the child, objective criteria, legal proceeding

INTRODUCTION

The principle of the best interests of the child stands as one of the most significant principles in the field of children's rights. It could be argued that this principle forms the foundation for the entire theory of children's rights, subsequently shaping legislative and judicial practices in this domain. As one of the most significant principles, the principle of the best interests of the child is proclaimed by the provision of Article 3, paragraph 1 of the Convention on the Rights of the Child (in the following text: CRC).⁴⁵ This provision stipulates that in all actions concerning children, whether by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies,

⁴⁵ The Convention on the Rights of the Child, adopted by the United Nations General Assembly through Resolution No. 44/25 on November 20, 1989, stands as an internationally recognized document with the broadest ratification. Today, all countries worldwide, with the exception of the United States – although a signatory to the CRC - have ratified this international legal document. In that sense, it serves as the "constitution" for children's rights. The Convention on the Rights of the Child is available in English at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>; Accessed: 1. 11. 2022. In the following text: CRC. The day the CRC was adopted, November 20, was officially declared as World Children's Day in 1990. Source: <https://www.un.org/en/observances/world-childrens-day>; Accessed: 1. 11. 2022. The CRC is not the first document to develop the principle of the best interests of the child. This principle is enshrined in Principle 2 of the UN Declaration on the Rights of the Child from 1959, while the first international treaty containing this principle is the UN Convention on the Elimination of All Forms of Discrimination Against Women. However, while these documents make reference to this principle, they attribute to it fundamentally different meanings and qualities. The 1959 Declaration mentions the best interests of the child in only two specific contexts. According to the provisions of this document, the best interests of the child should be the paramount consideration in "making laws" that enable the child to "develop physically, mentally, morally, spiritually, and socially" (Principle 2). Moreover, parents and other caretakers responsible for a child's upbringing are mandated to prioritize the child's interests as a guiding principle (Principle 7). The Declaration on the Rights of the Child was adopted by the United Nations General Assembly through Resolution 1386(XIV) on November 20, 1959.

The Declaration on the Rights of the Child is available at: <https://cpd.org.rs/wp-content/uploads/2017/11/1959-Declaration-of-the-Rights-of-the-Child.pdf>; Accessed: 1. 11. 2022.

The UN Convention on the Elimination of All Forms of Discrimination against Women is available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>; Accessed: 1. 11. 2022.

the best interests of the child shall take precedence and be a primary consideration.⁴⁶ It constitutes one of the four fundamental principles upon which the CRC is grounded,⁴⁷ and has a threefold nature⁴⁸ as it, according to the CRC, simultaneously embodies a child's right, the principle of the CRC, and a procedural rule.⁴⁹ This principle is also explicitly included in other individual provisions of the CRC.⁵⁰ One of the crucial features of the principle of the child's best interests, when discussed as a child's right, is its self-executing character,⁵¹ according to the stance articulated by the CRC.⁵² This implies that

⁴⁶ According to the CRC, the "Principle of the best interests of the child" serves as the guiding principle in all legal matters pertaining to children, irrespective of whether these actions are undertaken by parents, guardians, social or state institutions, courts, or administrative authorities. This principle finds its roots in the revised text of the 1979 draft CRC, articulated by the working group responsible for its development and submitted by the government of Poland. Source: Sloth-Nielsen, J., Liefgaard, T. (2016). *The United Nations Convention on the Rights of the Child: Taking Stock After 25 Years and Looking Ahead*. Leiden, 63.

⁴⁷ Alongside the child's right to life, survival, and development (Article 6 of the CRC), the right to non-discrimination (Article 2 of the CRC) and the child's right to express his or her views freely (Article 12 of the CRC).

⁴⁸ For more insights on the threefold nature of the principle of the best interests of the child, refer to Takács, N. (2021). The threefold concept of the best interests of the child in the immigration case law of the ECtHR. *Hungarian Journal of Legal Studies*, 62 (1), pp. 96–114.

⁴⁹ General Comment No. 14 (2013) of the Committee on the Right of the Child, para. 6. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/441/89/PDF/G1344189.pdf?OpenElement>. Accessed on: 3. 10. 2022. године.

⁵⁰ For more insights on this matter, refer to provisions of Article 9, Article 18, Article 20, and Article 21 of the Convention on the Rights of the Child (CRC).

⁵¹ Takács, N. (2021). The threefold concept of the best interests of the child in the immigration case law of the ECtHR. *Hungarian Journal of Legal Studies*, 62 (1), p. 99.

⁵² The Committee on the Rights of the Child, serves as the treaty body established by the provisions of Articles 43–45 of the CRC. Its primary function is to oversee the realization and protection of children's rights guaranteed by this international legal document. Initially composed of ten experts of high moral standing and recognized competence in the field of children's rights (Article 43, item 2 of the CRC), the Committee on the Rights of the Child currently consists of eighteen experts. The membership of this body was expanded through the United Nations General Assembly Resolution No. 50/155 on December 21, 1995. This amendment to Article 43, item 2, of the Convention on the Rights of the Child (CRC) replaced the term "ten" in the aforementioned provision with "eighteen." In this manner, the number of experts comprising the Committee on the Rights of the Child was increased. This decision was warranted by acknowledging the pivotal role of the Committee in overseeing the adherence to the CRC by state parties. At that time, this international treaty had garnered 182 ratifications. The amendment outlined in Resolution No. 50/155, dated December 21, 1995, came into effect on November 18, 2002, having been accepted by two-thirds of the contracting parties (128 out of 191 countries). Available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. Accessed: 29. 12. 2021. United

the principle of the best interests of the child is directly applicable, allowing judges and other participants to invoke it in legal proceedings.⁵³ The principle of the best interests of the child, viewed as a procedural rule, entails an obligation for public authorities making decisions directly or indirectly affecting children to assess the impact of their decisions on the child from the perspective of the child's best interests. In this context, the rationale for any decision concerning children should include an explanation of how the child's rights have been honored, what has been identified as the child's best interests, based on which criteria, and so forth.⁵⁴ The third aspect of the principle assumes the role of a fundamental, interpretative principle, used in instances when a legal provision is open to more than one interpretation and necessitates determining the interpretation that most effectively serves the child's best interests.⁵⁵

Thus, the principle of the best interests of the child serves as an *umbrella* term with the goal of ensuring the well-being of the child. All other provisions of the CRC should be interpreted in harmony with this principle.

Criteria for determining the best interests of the child

The principle of the best interests of the child represents the cornerstone of the CRC⁵⁶ and is a unique concept in International Human Rights Law.⁵⁷ It constitutes a legal standard, a complex concept that is flexible and adaptable, and should be adjusted and defined individually according to the specific situation of the child or children concerned, taking their personal context, situation, and needs into consideration.

Nations General Assembly No. 50/155 from December 21, 1995, is available at: <https://undocs.org/en/A/RES/50/155>, Accessed on: 29. 12. 2021. Information about current and former members of the Committee on the Rights of the Child, along with their professional biographies, is available at: <https://ohchr.org/EN/HRBodies/CRC/Pages/Membership.aspx>, Accessed: 29. 12. 2021.

⁵³ General Comment No. 14 (2013) by the Committee on the Rights of the Child, para. 6a. This standpoint is brought into question in states adhering to the so-called dualistic principle of the relationship between national and international law, which entails the integration of internationally signed and ratified treaties into the national legal framework through the enactment of domestic laws.

⁵⁴ Takács, N. (2021). The threefold concept of the best interests of the child in the immigration case law of the ECtHR. *Hungarian Journal of Legal Studies*, 62 (1), pp. 96–114, 100.

⁵⁵ *Ibid.*

⁵⁶ Sloth-Nielsen, J., Liefgaard, T. (2016). *The United Nations Convention on the Rights of the Child: Taking Stock After 25 Years and Looking Ahead*. Leiden, 63.

⁵⁷ *Ibid.*

This broad definition of the best interests of the child simplifies the position of decision-makers in matters concerning children. It encompasses diverse life situations, providing decision-makers with a wide scope for discretionary judgment. However, at the same time, it also highlights the absence of clear guidelines on what precisely constitutes the child's best interests. While such formulation of the principle was necessary, given the boundless creativity inherent in daily life and the imperative to protect the rights and interests of children universally, it was equally essential to offer guidelines, primarily for judges but also for other individuals working with and for children, to determine the best interests of the child in each specific case and prevent decisions from adopting an arbitrary nature.

In this regard, the CRC, in fulfilling its interpretative role, identified key elements for determining the best interests of the child in individual cases. These elements are outlined within General Comment No. 14 (2013).⁵⁸ According to the stance of the CRC, the criteria for assessing and determining what constitutes the best interests of the child in a specific case are as follows:

“The child's views; the child's identity including characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality; preservation of the family environment and maintaining relations, which implies that the separation should only occur as a last resort measure, as when the child is in danger of experiencing imminent harm or when otherwise necessary, where economic reasons cannot be a justification for separating a child from his or her parents; care, protection and safety of the child; situation of vulnerability, such as disability, belonging to a minority group, being a refugee or asylum seeker, victim of abuse, living in a street situation, etc.; the child's right to health; the child's right to education.”⁵⁹

Given the diverse criteria, balancing each of the abovementioned elements is crucial when determining the child's best interests in a particular case. It should be noted that the fundamental objective in determining the best interests of the child is the full and effective realization of all rights guaranteed by the CRC.⁶⁰ Decision-makers, when determining the child's best interests, should also bear in mind that the child's capabilities will evolve. Decision-makers should, therefore, consider measures that can be periodically revised or adjusted accordingly instead of making definitive and irreversible decisions.⁶¹

⁵⁸ General Comment No. 14 (2013) by the Committee on the Rights of the Child, para. 32. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/441/89/PDF/G1344189.pdf?OpenElement>. Accessed on: 1. 11. 2022.

⁵⁹ General Comment No. 14 (2013) by the Committee on the Rights of the Child, paras. 53–79.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, para. 84.

In addition to the general criteria for assessing the child's best interests, the CRC has also established procedural safeguards for implementing this principle. According to the CRC, these include: the right of the child to express his or her views; establishment of facts (facts and information relevant to a particular case must be obtained by well-trained professionals to draw up all the elements necessary for assessing the child's best interests); time perception (the passing of time is not perceived in the same way by children and adults).

The stance of the CRC is that postponing or protracting decision-making has notably adverse effects on children who are still in development. Therefore, it is advisable that proceedings involving decisions impacting children be prioritized and carried out as expeditiously as possible. Decisions made in these proceedings should be subject to periodic review at reasonable intervals, aligning with the child's development and capacity to form and articulate opinions on matters concerning them. Decisions concerning children should be made by professionals trained in child psychology, child development, and other relevant human and social development fields, with experience in working with children, who will consider the information received objectively. As far as possible, a multidisciplinary team of professionals should be involved in assessing the child's best interests; the child should receive proper legal representation before the court and equivalent legal bodies; legal reasoning (any decision concerning the child or children must be motivated, justified and explained; if the decision differs from the views of the child, the reason for that should be clearly stated; all decisions must be explicitly specified, instead of generalized); established mechanisms to review or revise decisions.⁶²

Given the above, we can conclude that there are diverse criteria for determining the child's best interests in each unique case. Therefore, it is up to the decision-maker to identify, within a particular case, which criteria or set of criteria to consider and attribute decisive significance. In this regard, the prevailing significance of one criterion over another is subject to interpretation, which is inherently subjective. Hence, in addition to the initial challenge of the vague nature of the principle of the best interests of the child as a legal standard, disregarded in establishing objective criteria for assessing the child's best interests, another question arises: From the multiple objectively defined criteria, which one will the decision-maker base their decision on? The crucial matter is, therefore, *how* the decision-maker will choose to apply one or more criteria. Given that there is no formally established hierarchy among the outlined objective criteria for evaluating the child's best interests, we believe that it is the responsibility of the decision-maker, notably the judge, to provide

⁶² General Comment No. 14 (2013) by the Committee on the Rights of the Child, paras. 85–98.

ample, clear, and persuasive justifications in the rationale of their decision, particularly in situations where various criteria compete or conflict, clarifying why a specific criterion is given precedence over others.

In literature, there is often a reference to the potential conflict between the principle of the best interests of the child and the child's right to express his or her views freely and due weight given to said views in all matters affecting the child. It is emphasized that due attention should be given to the child's views in accordance with their age and maturity, a right guaranteed by Article 12 of the CRC.⁶³ Thus, this theory raises the question of whether these two rights or principles are in conflict or complementary to each other.⁶⁴

Furthermore, applying these principles implies that the child's views will be considered even when determining the child's best interests. On the other hand, the child's opinion will be heard, given due attention, and respected to the extent that it is in the best interests of the child.⁶⁵ Archard and Skivenes argue that conflict arises due to the principle of the best interests of the child being based on the assumption that the adults are the ones who should determine what is in the child's best interest in a given situation. On the other hand,

⁶³ The child's right to express his or her views freely and participate, as guaranteed by Article 12 of the CRC, constitutes yet another fundamental principle among the four foundational pillars that underpin the protective framework established by the CRC. In literature, these two rights are recognized as the most significant within the spectrum of children's rights. See: Archard, D., Skivenes, M. (2009). Balancing a Child's Best Interests and a Child's Views. *International Journal of Children's Rights*, 17 (2009), 1–21.

⁶⁴ Zermatten, J. *The best interest of the Child – Literal Analysis, Function and Implementation*, p. 2. Available at: https://www.childsrights.org/documents/publications/wr/wr_best-interest-child2009.pdf

⁶⁵ Indications of this idea can also be found in General Comment No. 14 (2013), para. 44. For further insights into determining the child's best interests based on the child's perspective, refer to the work of Milutinović, Lj. (2018). *Mišljenje deteta kao kriterijum za utvrđivanje najboljeg interesa deteta. Porođični zakon – dvanaest godina posle*. Belgrade: Union University School of Law, 150. In the paper, the author references a legal case where the plaintiff sought to affirm the rights of minor children to freely express their preferences regarding living arrangements, school attendance, and the nature of relationships with a non-custodial parent. The defendants, the social welfare center, and the other parent are obliged to respect these rights. The objective was to demonstrate that the opinion of the social welfare center contradicted the best interests of the minor children, thereby infringing upon their fundamental rights. Additionally, the request aimed to implement a temporary measure to halt the execution of a prior court-ordered temporary measure in another case related to the exercise of parental rights. The court dismissed such a lawsuit through a decision, deeming it inadmissible in accordance with art. 194, para. 1, of the Civil Procedure Law. It concluded that the request was impermissible, as it sought the determination of a factual circumstance, not the existence or non-existence of a legal right or legal relationship. The appellate court affirmed the decision of the basic (first-instance) court. (Basic Court in Smederevo, P2 55/16).

the child's right to respect for their views implies that the child has the right to voice their opinion and, ultimately, decide what is in their best interest.⁶⁶

In this context, Professor Vlašković offers an intriguing viewpoint, arguing that the child's best interests have undergone an *internal transformation*. This transformation is attributed to the infiltration of participatory elements within the concept of the best interests of the child, coupled with the concurrent suppression of paternalistic influences that have historically shaped the content of this principle.⁶⁷ We could largely agree with this assertion, advocating for the subtle precedence to be given to the principle of the best interests of the child, which may not always coincide with the child's perspective and views on what is best for them.

We also consider Professor Petrušić's viewpoint acceptable, emphasizing that the child's perspective is the paramount criterion for determining their best interest. However, in instances where the identified best interest of the child does not align with the child's opinion, the decision on such matters should be distinctly justified.⁶⁸

THE BEST INTERESTS OF THE CHILD IN DOMESTIC COURT PRACTICE

Courts are tasked with the fundamental responsibility of identifying the child's best interests in all proceedings concerning the realization and protection of children's rights. In this regard, domestic courts refer to Article 6 of the Family Law, emphasizing the duty of everyone involved to be guided by the child's best interest in all activities concerning children.⁶⁹ These pertain to particular urgent and time-sensitive proceedings,⁷⁰ where the court can ascertain facts, even those not disputed between the litigating parties. The court is authorized to independently investigate facts neither party has presented (the investigative principle).⁷¹

⁶⁶ Archard, D., Skivenes, M. (2009). Balancing a Child's Best Interests and a Child's Views. *International Journal of Children's Rights*, 17 (2009), 2.

⁶⁷ Vlašković, V. (2017). Pravo deteta na mišljenje i najbolji interes deteta sa težištem na pristupu Komiteta za prava deteta. *Collection of Papers of the Faculty of Law in Niš*, 75(LVI), 197.

⁶⁸ See more at: Petrušić, N. (2006). *Pravo deteta na slobodno izražavanje mišljenja u novom porodičnom pravu Republike Srbije. Novine u porodičnom zakonodavstvu*. Niš: Faculty of Law, University of Niš, 99–118.

⁶⁹ Art. 6, para. 1 of the Family Law of the Republic of Serbia.

⁷⁰ Art. 269 of the Family Law of the Republic of Serbia.

⁷¹ Art. 205 of the Family Law of the Republic of Serbia.

A recognized shortcoming of the existing legal framework in this domain lies in the fact that Family Law fails to explicitly define criteria based on which the court shall determine what constitutes the best interest of the child in each specific case. This observation holds notable weight, given that the specified criteria are not explicitly articulated in the provisions of the CRC, either. Moreover, when deciding on matters concerning children, judges refrain from invoking the views outlined by the CRC in its general comments.

The provision of Article 2, paragraph 1, item 5 of the Draft Law on the Rights of the Child and the Protector of the Rights of the Child institutes, among its objectives, the establishment of unified criteria and standards for realizing the best interests of the child in all areas of a child's life and development and creating conditions for their implementation.⁷² Article 12 of the Draft specifies that in all actions concerning children and decisions made in connection with children, public authorities, legal entities, and natural persons are obligated to act guided by the best interests of the child (para. 1). In determining the best interests of the child, public authorities, legal entities and natural persons are obliged to determine the child's opinion/views and pay due attention to it, taking into account the child's age and maturity (para. 2). Paragraph 3 of the same Article defines the criteria for determining the child's best interest, specifying that the best interests of the child are determined based on: 1. the child's rights as stipulated by this law, the CRC, and other ratified international treaties, along with the practices of international institutions overseeing the implementation of human and children's rights; 2. the child's gender, age, individual characteristics, past experiences, and life circumstances; 3. the need for physical, cognitive, emotional, and social development and protection of the child's life and health; 4. the necessity to ensure the child's safety; 5. the significance of maintaining stability, continuity in relationships with parents, family, and the environment of origin or residence, considering the child's surroundings and way of life; 6. the quality of the child's relationship with a parent or another individual and the immediate and long-term effects of maintaining that relationship; 7. the need to preserve family ties, particularly

⁷² Art. 2, para. 1, item 5 of the draft of the Law on the Rights of the Child and the Protector of the Rights of the Child. Available at: <https://www.paragraf.rs/dnevnevesti/070619/070619-vest15.html>. Accessed: 5. 9. 2021.

Interestingly, some authors are pessimistic regarding the perceived significance of the existing draft of the Law on the Rights of the Child and the Protector of the Rights of the Child. They argue that the legislative solutions it introduces are inadequate and fail to introduce novel protective mechanisms compared to the current Family Law. More information can be found in: Jović-Prlainović, O. (2020). Protection of the Rights of the Child within the Human Rights System and the National Framework. *Thematic Proceeding of X International Scientific Conference "Archibald Reiss Days"*, November 18–19, Vol. 10 No/. Belgrade: University of Criminal Investigation and Police Studies, 35–45.

relationships with siblings; 8. the child's cultural, racial, ethnic, linguistic, and religious affiliations or heritage; 9. respect for the child's perception of time and acknowledgment of the repercussions of unjustified delays in decision-making on the child; 10. other circumstances, individual characteristics, and conditions that may impact the child's well-being. Paragraph 4 specifies that public authorities are obliged to establish unique standards for assessing and determining the child's best interests in their respective areas of competence. Paragraph 5 stipulates that when determining the child's best interests, public authorities, legal entities, and natural persons should, when necessary, seek independent expert opinions. This becomes mandatory when there's a disagreement about what serves the child's best interests.⁷³

In judicial practice and legal proceedings, the question of determining the child's best interests typically arises when deciding on exercising parental rights following the termination of the parents' cohabitation. In these instances, the court decides which parent will be entrusted with the independent exercise of parental rights or whether both parents will jointly share parental responsibilities. Even in situations where parents have reached an agreement on exercising parental rights, the court will examine the agreement from the perspective of fulfilling the child's best interests.⁷⁴ In such instances, the court will assess, on a case-by-case basis, the parent's ability to fulfill their parental responsibilities, identifying which parent is better suited to meet the child's immediate and developmental needs. Simultaneously, the court will consider the child's expressed preference regarding their living arrangement, provided the child is of an age and maturity level, to form an opinion.⁷⁵ In

⁷³ Article 12 of Draft Law on the Rights of the Child and the Protector of the Rights of the Child. Available at: <https://www.paragraf.rs/dnevne-vesti/070619/070619-vest15.html>. Accessed on: 5. 9. 2021.

⁷⁴ An instance from legal precedent where the court determined that the parental agreement regarding the exercise of parental rights wasn't in the child's best interest is evident in the verdict of the Court of Appeal in Novi Sad (case no. Gž2 401/17), issued on August 10, 2017. In this specific case, the parents submitted a written agreement to the court outlining the shared custody of their children to be independently exercised by the father. However, when the father moved abroad and started a new family, having another child, the court concluded that relocating the children, separating them from their mother, and uprooting them from their established environment wouldn't serve the children's best interests. The mother's proven parental capabilities particularly influenced this decision. As a result, the court did not approve the parents' agreement. Instead, relying on the assessments of the custody authorities, the court granted sole custody to the mother, with arrangements made for the children to maintain a relationship with their father.

⁷⁵ An intriguing ruling emerged from the Court of Appeal in Novi Sad (case no. Gž2 285/21), dated July 2, 2021. It involved granting custody of the child to the mother for exercising parental rights despite the child's expressed opinions and preferences throughout the legal proceedings. The plaintiff, in this instance, was the mother of a minor child who,

determining child custody, the Appellate Court in Niš asserts that the court must thoroughly examine the suitability and parental competencies of each parent. This involves assessing their emotional, educational, social, and developmental influence on the children. Consideration should be given to factors such as the child's age, emotional bonds with the parents, and ensuring that custody arrangements align with the child's best interests by addressing their emotional and developmental needs. It is necessary to determine both parents' personality structure, their capacity to recognize and adequately respond to the child's needs, as well as which parent has better-organized living conditions overall and played a more dominant and consistent role in their upbringing.⁷⁶

Moreover, in determining the child's best interests, the court must also consider the so-called compromising factors that may be present in one or both parents. These encompass negative aspects of a parent's behavior and personality, such as, for instance, a predisposition to gambling.⁷⁷ Additionally, in

after the end of the parents' relationship, had been entrusted to the father for the independent exercise of parental rights. Alongside the father, the child resided in a household with the paternal grandparents, forming a close bond with them. Upon the father's passing, the mother initiated legal action seeking parental rights and requested the court to compel the grandparents to relinquish custody of the child. During the proceedings, the child strongly expressed a wish to continue living with the grandparents and rejected any interaction with the mother. Despite the child's clear stance and expression of their views, the court determined it was in their best interest to grant custody to the mother, considering her parental capabilities. The Court of Appeal upheld this decision, noting that parental rights are a highly personal matter. If the parent to whom independent parental rights were granted passes away, the other parent – in this case, the plaintiff – retains the right to assume custody of the child. This outcome arises from the absolute nature of parental rights, prioritizing the assumption that parents hold the primary right to care for their child before any other individual, irrespective of circumstances that might involve the child being under someone else's care. From the obtained findings and expert opinion of the competent guardianship authority, it is evident that the plaintiff is a suitable parent and that it is in the child's best interest to continue residing with her. To facilitate this, additional measures are required to rebuild and strengthen their relationship, for which a comprehensive action plan was formulated. For more context, refer to the decision of the Belgrade Court of Appeal, Case No. Gž2 493/21 dated September 15, 2021.

⁷⁶ This perspective was presented in the rulings of the Court of Appeal in Niš, specifically in Case No. Gž2 432/2018, dated October 30, 2018, and Case No. Gž2 313/17 dated August 30, 2017. Moreover, in the decision of the same court, Case No. 27Gž2.br. 102/17 dated March 29, 2017, the decisive factor for dismissing the lawsuit seeking to change the prior parental rights decision and the sole custody of the children to be granted to the mother was the fact that the children had already adapted to the environment where they lived with their father.

⁷⁷ See the decision of the Court of Appeal in Niš Gž2 444/2016 from October 10, 2016. In the decision of the Court of Appeal in Belgrade Gž2 508/21 from September 23, 2021, the fact which disqualified the father of parental rights was an existence of violent patterns of behavior towards the mother of the child and the child itself.

certain situations, the presence of support from extended family in fulfilling the parental role may be significant. It is crucial that members of the extended family, and even friends, are capable of stepping in to assist the parents in meeting the child's needs when they are temporarily unable to do so.⁷⁸

In judicial practice, the child's opinion is one of the crucial criteria the court takes into account for decision-making.⁷⁹ For instance, in a specific ruling, the court granted the father sole parental rights over a minor child despite the social welfare center's opinion favoring the mother's ability to meet the criteria for fulfilling the child's needs. Given that the child had been residing with the father for over a year, lacked sufficient contact with the mother, experienced estrangement, and has expressed a desire to live with the father, the court determined that it is in the child's best interests and in line with the factual circumstances to entrust the child to the independent exercise of parental rights by the father. Simultaneously, the court arranged the method for maintaining personal relations between the child and the mother. The court had taken the stance that, in a scenario requiring the gradual reintegration of strained relations between the child and the mother following the child's residence with the father, resorting to coercive measures to fulfill the mother's wish for sole parental rights is impractical. The first-instance (basic) court respected the child's opinion in accordance with Article 65 of the Family Law, considering that the child is capable and able to express their opinion authentically. The child's desire to live with the father was deemed authentic, reflecting independence and freely expressed will, rather than being negatively influenced by the father or his household. Hence, deducing from the court's ruling in this case, it becomes apparent that, for a child's perspective to be considered in decision-making, it must genuinely reflect the child's inner sentiments – free from external influences such as coercion, manipulation, intimidation, etc. This criterion is established within the legal proceedings based on the guardianship authority's professional evaluation and expert opinion.⁸⁰

⁷⁸ The decision of the Court of Appeal in Niš, Case No. Gž2. 205/2018, dated May 16, 2018. The same criterion was decisive in the ruling of the Court of Appeal in Belgrade, Case No. Gž2 445/22 dated September 14, 2022.

⁷⁹ See the ruling of the Court of Appeal in Niš, Case No. 28 Gž 2. br. 313/17, dated August 30, 2017, as well as the decisions of the Court of Appeal in Belgrade, Case No. Gž2 382/21, dated July 14, 2021, and Gž2 430/21, dated August 18, 2021.

⁸⁰ Ending a marriage or a domestic partnership is a stressful time for all family members, particularly children. In such situations, the parents' relationship is strained by conflicts which they sometimes inadvertently project onto their children. In such circumstances, children face what's known as a loyalty conflict, making it challenging for them to authentically express their preference regarding which parent they wish to be entrusted to in terms of parental rights. To delve deeper into this matter, you can refer to the ruling of the Belgrade Court of Appeal, Case No. Gž2 204/21, dated April 29, 2021.

In the ruling of the Belgrade Court of Appeal (case: Gž 2 653/21) dated December 8, 2021, addressing the determination of custody post-parental divorce, the court, in justifying its decision to entrust the child to the mother for autonomous exercise of parental rights, stated that although both parents had the capacity and met the necessary psychological, pedagogical, and socio-economic criteria for autonomously exercising parental rights, the minor child of the disputing parties should reside with the mother post-termination of their cohabitation. As per the guardianship authority's assessment, the mother was actively engaged in the child's care and, thus, deemed capable of adequately responding to the minor child's needs. The court acknowledged the mother's ability to provide the child with basic care, security, emotional warmth, and stimulation based on the guardianship authority's assessment, which highlighted the child's stronger emotional attachment to the mother. Moreover, it was less stressful for the child not to be relocated from the household it was fully adapted to. Considering the child's age, the mother's past performance, and her motivation for exercising parental rights, as well as the fact that the child's sister, to whom the child was exceptionally attached, also resided with the mother in the family household, the Court of Appeal concurred with the first-instance court's assessment, finding that it correctly concluded that it was in the child's best interest to be entrusted to the mother.

One crucial factor the court considers when determining the best interests of the child, particularly in deciding which parent will be entrusted with parental rights after the parents' separation, is the presence of violence. A parent who engages in violence is generally deemed unfit to be granted parental rights following the termination of the parents' cohabitation, whether it be the father or the mother acting as the aggressor. This holds for both cases of domestic violence and acts of violence directly perpetrated against the children.⁸¹ In line with this, the prevailing stance in judicial practice is that grounds for revising

⁸¹ Belgrade Court of Appeal, in Case No. Gž2 460/21, dated August 26, 2021, addressed a situation involving parental violence. In this instance, the father's abusive behavior towards the child prompted a reconsideration of the parental rights arrangement, resulting in the child being placed in the custody of the mother instead. During the proceedings, the court found evidence of the child being a victim of paternal violence. While the child's basic needs were met in the father's care, the father's aggressive and excessive psychological outbursts contributed to the child seeking protection and a change in the parental rights arrangements. The child has clearly expressed the desire to live with their mother, which is in their best interest. The childcare authorities considered various aspects, including the child's age, expressed preferences, relationship with both parents, their motivation for parenthood, the violence the child was exposed to while living with the father, the father's lack of accountability, and the positive experiences during the child's previous stays with the mother. In the child's best interest, the authorities recommended entrusting independent parental rights to the mother. However, it was deemed unnecessary to restrict or determine the child's contact with the father; instead, they decided that the minor child should have

decisions on parental rights and child custody also exist in instances when the parent who was previously granted parental rights enters into a new domestic partnership (cohabitation), exposing the child to violence.⁸² Conversely, the parents' financial factors and material circumstances do not play a pivotal role in deciding whether it is in the child's best interest to be placed under the mother's or father's care.⁸³

In legal precedent, a firm standpoint is evident – exercising parental rights serves the child's best interests, with an overriding emphasis on the child's best interests over the needs of all other parties. The preservation of personal relationships, too, must align with and occur within the context of the child's best interests, a guiding principle incumbent upon the court in accordance with Article 266, paragraph 1 of the Family Law, and Article 3 of the CRC.⁸⁴

the autonomy to decide when and how they interact with their father when they feel ready, considering the enduring impact of the experienced violence.

On the other hand, in the decision of the Court of Appeal in Belgrade, case number Gž2 451/21 dated September 2, 2021, the violence perpetrated by the father against the mother, both psychological and physical, stood as a decisive criterion among other factors considered by the court. This led to the decision to entrust the independent exercise of parental rights to the mother.

⁸² This was the reason for altering the decision on parental rights in the ruling of the Court of Appeal in Belgrade, case number Gž2 230/21, dated May 27, 2021. In this particular case, material neglect, exposing the child to pornographic content, compelling the child to sleep in the same bed as the mother and her new partner, the child's exposure to inappropriate sexual behavior, and instances of physical and verbal violence among them were deemed as psychological neglect and child abuse by the court.

⁸³ In this regard, see the rulings of the Court of Appeal in Belgrade, Gž2 338/21, dated September 23, 2021, Gž2 288/21 dated June 10, 2021, and Gž 176/21 dated April 9, 2021, as an example.

⁸⁴ Refer to the ruling by the Court of Appeal in Novi Sad, Case Gzh2 377/17, dated July 25, 2017. In this specific instance, the court deliberated on a plea from close relatives of a child – the maternal grandmother and aunt of the deceased mother – seeking to maintain a personal relationship with the child. The court underscored that this matter pertains to the right to uphold private life, balancing the father's sole exercise of parental rights with the grandmother and aunt's plea for continued ties with the minor grandchild or niece. This request, however, intrudes upon respecting the family life rights of the person in question. The resolution of this conflict hinges solely on assessing the child's best interests, necessitating a thorough evaluation. The court emphasized that children whose mother has passed have the right to visit her grave, honor her memory, and receive due reverence, which should be taken into account. In such scenarios, the irreparable loss of a child demands that all decisions prioritize the child's welfare, irrespective of any underlying conflicts.

CONCLUSION

The principle of the best interests of the child serves as a legal standard, a general norm guiding the interpretation of specific situations. Despite its inherent ambiguity, this principle is not arbitrarily defined. Instead, what constitutes the child's best interests is determined in each unique case by applying the pre-established objective criteria. These criteria were set forth by the CRC within the General Comment No. 14 (2013) framework, emphasizing the child's right to have their best interests prioritized.⁸⁵

The CRC has emphasized that, in determining these objective criteria, the fundamental objective is to ensure the complete and effective enjoyment of the rights guaranteed by the CRC.⁸⁶ Hence, the CRC recommends that, in determining the child's best interests, the following elements need to be taken into consideration: the child's views; the child's identity (including characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, and personality); preservation of the family environment and maintaining relations; care, protection, and safety of the child; situation of vulnerability (disability, belonging to a minority, being a refugee or asylum seeker, victim of abuse, living in a street situation, etc.); the child's right to health; the child's right to education, etc.

In the judicial practice of the Republic of Serbia, these criteria have been acknowledged and upheld despite the absence of a specific definition of the child's best interest and criteria for determining this concept within the Family Law of the Republic of Serbia. In this context, we believe that addressing the current ambiguities in this domain will be achieved through the enactment of the Law on the Rights of the Child and the Protector of the Rights of the Child. The draft of this legislation provides well-defined criteria that would enable decision-makers involved with children to assess what is in their best interest with clarity.

⁸⁵ General Comment No. 14 (2013) on the right of the child to have their best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, Available at: <https://www.refworld.org/docid/51a84b5e4.html>, Accessed: 01.09.2021

⁸⁶ *Ibid*, para. 51.

BIBLIOGRAPHY

- Archard, D., Skivenes, M. (2009). Balancing a Child's Best Interests and a Child's Views. *International Journal of Children's Rights*, 17 (2009).
- Jović-Prlainović, O. (2020). Protection of the Rights of the Child within the Human Rights System and the National Framework. *Thematic Proceeding of X International Scientific Conference "Archibald Reiss Days"*, November 18–19, Vol. 10 No/(2020). Belgrade: University of Criminal Investigation and Police Studies.
- Petrušić, N. (2006). *Pravo deteta na slobodno izražavanje mišljenja u novom porodičnom pravu Republike Srbije. Novine u porodičnom zakonodavstvu*. Niš: Faculty of Law, University of Niš.
- Sloth-Nielsen, J., Liefgaard, T. (2016). *The United Nations Convention on the Rights of the Child: Taking Stock After 25 Years and Looking Ahead*. Leiden.
- Takacs, N. (2021). The threefold concept of the best interests of the child in the immigration case law of the ECtHR. *Hungarian Journal of Legal Studies*, 62 (2021) 1.
- Vlašковиć, V. (2017). Pravo deteta na mišljenje i najbolji interes deteta sa težištem na pristupu Komiteta za prava deteta. *Collection of Papers of the Faculty of Law in Niš*, 75(LVI).
- Zermatten, J. (2009). *The best interest of the Child – Literal Analysis, Function, and Implementation*. Available at: https://www.childsrights.org/documents/publications/wr/wr_best-interest-child2009.pdf;
- Milutinović, Lj. (2018). *Mišljenje deteta kao kriterijum za utvrđivanje najboljeg interesa deteta. Porodični zakon – dvanaest godina posle*. Belgrade: Union University School of Law.

Legal regulations

- United Nations, *Declaration of the Rights of the Child*, 1959. Available at: <https://cpd.org.rs/wp-content/uploads/2017/11/1959-Declaration-of-the-Rights-of-the-Child.pdf>; accessed: 1. 11. 2022.;
- United Nations, *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>; accessed: 1. 11. 2022.
- United Nations, *Convention on the Rights of the Child*, 1989. Available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>; accessed: 1. 11. 2022;
- Draft Law on the Rights of the Child and the Protector of the Rights of the Child. Available at: <https://www.paragraf.rs/dnevne-vesti/070619/070619-vest15.html>, accessed on: 5. 9. 2021;
- Family Law of the Republic of Serbia, *Official Gazette of RS*, No. 18/2005, 72/2011, and 6/2015;
- United Nations, *United Nations General Assembly Resolution No. 50/155 from 21.12.1995*, 1995. Available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>; accessed on: 29. 12. 2021;

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), 29 May 2013. Available at: <https://www.refworld.org/docid/51a84b5e4.html>; accessed on: 1. 9. 2021.;

Judicial practice

The ruling of the Court of Appeal in Novi Sad, Case No. Gž2 377/17, dated July 25, 2017.

The ruling of the Court of Appeal in Novi Sad, Case No. Gž2 401/17, dated August 10, 2017.

The ruling of the Court of Appeal in Novi Sad, Case No. Gž2 285/21, dated July 2, 2021.

The ruling of the Court of Appeal in Belgrade, Case No. Gž2 493/21, dated September 15, 2021.

The ruling of the Court of Appeal in Belgrade, Case No. Gž2 204/21, dated April 24, 2021.

The ruling of the Court of Appeal in Belgrade, Case No. Gž2 653/21, dated December 8, 2021.

The ruling of the Court of Appeal in Belgrade, Case No. Gž2 460/21, dated August 26, 2021.

The ruling of the Court of Appeal in Belgrade, Case No. Gž2 451/21, dated September 2, 2021.

The ruling of the Court of Appeal in Belgrade, Case No. Gž2 230/21, dated May 27, 2021.

The ruling of the Court of Appeal in Belgrade, Case No. Gž2 338/21, dated September 23, 2021.

The ruling of the Court of Appeal in Belgrade, Case No. Gž2 288/21, dated June 10, 2021.

The ruling of the Court of Appeal in Belgrade, Case No. Gž2 176/21, dated April 9, 2021.

The ruling of the Court of Appeal in Niš, Case No. Gž2 444/2016, dated October 20, 2016.

The ruling of the Court of Appeal in Niš, Case No. Gž2. 313/17, dated August 30, 2017.

The ruling of the Court of Appeal in Niš, Case No. Gž2. 205/2018, dated May 16, 2018.

The ruling of the Court of Appeal in Niš, Case No. Gž2 382/21, dated July 14, 2021.

The ruling of the Court of Appeal in Niš, Case No. Gž2 430/21, dated August 18, 2021.