

Best Interest of the Child _____

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Abstract

In this paper we aim to discuss the best interest of the child as one of the one of the key principles and priorities to international and domestic law. The purpose of this study is to treat the legal aspect for best interest of the child especially related to adoption institute and on the possibility of children's adoption by homosexuals, identification of the most critic cases that are related with it, and ongoing debates about the composition of the family, because more and more homosexuals aim to adopt a child therefore it is very important to clarify the criteria that have to be considered by courts in order to guaranty the best interest of the child.

Key words: *best interest, child, parent, law, doctrine*

Methodology

This research is combination of a qualitative and a comparative study but mainly focused on a qualitative one. It will concentrate on the analysis of the statutory national rules, international legal instruments and related case law in the field of adoption. On the other hand, it shall deal with the literature dealing with adoption laws, Hague Convention etc. Considering a variety of doctrinal articles related to this study. The research will be focused on several national legal systems.

Best interest of the child

Children are the most delicate and sensitive beings of the planet...it's our duty to decide and act for them properly. They are the future of the country, and the main

attention should be focused on children as the foundation of future. International legal instruments also the Albanian Family Code recognize that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding. According to Convention on the Rights of the Child, "...a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier .." If we refer to Family Code, there is no definition what a child means by law, but we can interpret from article 6,7 and 8 of Civil Code.

The best interest of the child principle, is an old concept that originally appeared as a standard articulated in the American Adoption Law in the mid-1800s (Kohm LM, 2009: 9). Today, this concept is changing and there are new issues to deal with. Domestic legislation sets out strict rules for making decisions about children only on the basis of their best interest. Although in any international convention or instrument for child protection, the best interest is primary, in the national legislation of different countries the context of this interest is viewed in different ways, depending on the country's socio-economic development. Due to the evolution and legal changes of children's rights in Albania, the aim is to create a normative framework and judicial practices in accordance with international standards. This interest has started to be widely recognized by social workers, practitioners and professionals working with children. International legal instruments and national legislations of EU countries, explicitly proclaim the best interest of the child as the most important and necessary condition for the child's future. The Albanian legislation gives importance to whether the person is able to create a suitable family environment to raise and educate a child

Children's adoption by single homo/heterosexual parent should be treated based on the best interest of the child or based on the nondiscrimination of these people for their sexual orientation?

The Declaration of Human Rights of 1959 sets the best interest of the child at the highest consideration and is mentioned in Articles 3, 9, 18, 20, 21, 37, 40; The European Convention on the Adoption and Convention on the Rights of the Child also set the best interest as primary consideration.

The child's well-being is determined by individual characterizing circumstances for the child, such as the age of the child (which is related to the ability of the child to perceive), the child's growing environment and the relationship with the biological parents.

Our legislation, as well as the domestic law of the EU countries, give priority to the growth of the child by the biological parents, determining the validation of all opportunities to keep the child in his or her family, which must be accompanied with the government's supportive policies towards families with severe economic conditions, creating facilities in order to avoid renouncing parental responsibility and giving consent to child adoption. One of the main principles of F. Code is the

best interest of the child. Like the Constitution, other laws have seen the minor involved in the concept of citizen without differentiating it (UNICEF, 2009: 25).

In cases where it is noted that the rights of a child are not respected, the People's Advocate may start addressing this case even on his own initiative, where he considers that the best interest of the child is not taken into account¹.

Best interest of the child is a standard designed to guide judges when making child-related decisions, it is also a determining factor for specific actions, mainly for adoption (CRC, Article 21). In examining the issue of adopting a child to determine what is best for a child, the court must first rely on the child's happiness (on child's will), or on other aspects of religion, race, nationality, or economic status of adoptive parents? Which of these criteria is most important to the well-being, and education of a child?

First of all, we are not dealing with a hierarchical list by AZ, which sets out the criteria, conditions and values that adopting parents must have, but the diversity of values and circumstances that characterize the beginning of a new parent-child relationship leads the court in determining and selecting the primary criteria on a case-by-case basis and that the issue of the best interest of the child does not have strict rules. In interpreting this interest, emphasis is placed on the child as an individual with his / her thoughts and feelings as well as the child as a subject of civil and political rights, as well as special protection (Training Manual, 2012: 16). In many cases, only legislation cannot determine the best interest for each child individually, in any particular situation. Adoption should always be allowed if it serves the child's interest, so the child's interest in wellbeing (Weisberg, Appleton, 2006: 1129). However, the doctrine sets out a general summary list of criteria to be taken into account in determining the child's highest interest in establishing the adoption relationship, such as:

- Adequacy of the child with adoptive parents
- The consent of the child with regard to adoption
- Prospective parents' ability to raise children
- The economic situation of adoptive parents
- Change of race between parents and children (especially in those cases where adoptive and adopted children have different skin color)
- Sexual orientation of adoptive parents
- Religion, language, culture (in those cases where the child is at an age who understands and can suffer such changes)
- Age of adoptive parents and age difference between adoptive parent and adopted child
- Any other aspect that the court considers important

¹ <http://www.avokatipopullit.gov.al/sq/të-drejtat-e-fëmijëve> date of access 31.01.2018

The best interest principle should define all policies and decisions regarding children, not allowing the prevalence of adult interest (UN Supplementary Report, Italy, 2001: 15). The obligation to respect the child's interest does not violate the rights of adults, in our case of biological parents and adoptive parents, but this interest under UNCRC prevails over other rights.

Can a child's decision be made against his will even if it is in his/her best interest?

Under Article 9 of the CRC, in cases involving the separation of the child from one or both parents, if the child disagrees, this action is not undertaken even though it may be in his / her interest. In cases where it is established that the child's wish is expressed under the influence of different forms from other persons, an adverse decision may be taken with his will that at the trial of the court constitutes his best interest.

In the case of *Sommerfeld v. Germany*, judged by the ECtHR, the applicant alleges that the German court did not take into account his request to have contacts with the daughter who was born out of wedlock, so there was a violation of his right to respect for family life and that he was the victim of discriminatory treatment.

It is based on Articles 6, 8 and 14 of the Convention. German courts based on sections 1634 and 1711 of the German Civil Code unjustifiably impose the father of children born out of wedlock in a less favoring position than the father of children who is divorced from the biological mother and in cases of giving custody does not take into account the child's highest interest but the case is judged on the basis of the father's status. Most importantly, the German regional court did not consider allowing contact between the child and the natural father *prima facie* in its best interest since the child repeatedly refused to meet his father. The court had the right to refuse the father's request, as long as this was not in the best interest of the child. According to Article 9, paragraph 2 of the CRC, a child who is separated from one or both parents must maintain personal relations and direct contact with both parents on a regular basis only if this is inconsistent with her best interest.

What about in case of adoption procedures of a child from a couple who has biological children, whose child's interest should prevail? Should the biological child's wish or consent be taken into consideration by the court regarding the adoption of a brother or a sister?

Neither domestic law nor international legal instruments regarding adoption and children's rights are expressed in relation to such situations. Courts are basically based on the principle that in every action taken with regard to a child, consideration should be given to the child's wishes, respecting his/her best interest, but how to decide whether one child's interest is to be met fulfill the interest of the other child? Adoption procedures according to Law 9695 "On Adoption Procedures" do not provide as part of the administrative or judicial procedures for taking the opinion of the biological child that his parents adopt a child.

Another type of adoption, transracial, often opposed by different organizations in different countries and coupled with controversial ongoing debates, is considered to be a violation of the child's interest. Courts in general, in reasoning about their attitude to decisions in relation to this type of adoption, say that such an adoption relationship would be easily evident from others, the child would have easy to understand in their age small non-biological connection with parents and that this new relationship does not mimic the natural family, as is the purpose of adoption. Given that the child's highest interest is in court interpretation, in those cases where adoption of a trans-national adoption is approved, the child is generally colored while the parents are white. This puts discriminating discriminatory positions on colored adoptive applicants, which for the application for transgressive adoption, the courts decide to violate the child's highest interests. Different scholars define trans-racial adoption as the adoption of black children by white families (Turner & Taylor, 1996: 262).

Conclusions

As sanctioned in both international and national legislation, priority should be given to raising the child in the biological family, interfering with financial or social support.

It is important to design effective social programs and policies to sensitize or extract the family from the difficulties that have led to the abandonment of the child

References

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