

Interpretation of the Principle of “Best Interests of the Child” in the Context of Inter-Parental Child Custody Disputes: Case of Estonia

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Abstract

This paper presents the findings of a qualitative small-scale study, documenting and providing an overview of the interpretations of the concept of “best interests of the child” in child custody proceedings by child protection workers and attorneys, including child inclusion in the court practice. The study is based on court records (n = 19, in total 21 children aged 1-10 years) for determining parental rights concerning the child custody disputes in one court house. Results indicate that the best interest of the child is associated more often with child’s physical rather than emotional well-being. Participation of the child into judicial proceedings is little practiced. Furthermore, the best interest of the child is equated to parenting plans, not listening to the child’s voice as part of an individualized determination.

Keywords: “Best Interests of the Child”, Child Custody, Assessment, Well-Being, Child’s Rights, Child Participation

1. Introduction

According to Statistics Estonia (2013a), 3,108 marriages ended officially in divorce in Estonia in 2011 where the number of common under 18-year-old children was 3,099. In 2012 the number of divorces was 3,149 (3,142 common under 18-year-old children, this represents 1.3% of the total population of children in 2012). Child welfare statistics of the Ministry of Social Affairs (2012) indicate that social and child protection workers of local governments solved 291 disputes (15% of all disputes) over child’s place of residence and 534 disputes (27%) over visiting the child and being a part of the raising process (non-custodial parent) by non-judicial proceedings in 2011. Child protection workers participated in judicial proceedings protecting child’s rights 221 and 279 times respectively in the same year.

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The number of child custody disputes has increased in the work of Estonian child protection workers in the last years (Lai, 2009; Toros, 2011). Discussions have been initiated in the area of assessment of the best interests of the child in such cases. Due to the fact that in numerous cases parents are unable to agree on joint custody even with the help of child protection worker, the court system embodies an important role in deciding these issues taking into account the child's best interests (Owen & Rhoades, 2010). Here the child's representative (attorney) and child protection worker, whose opinion the court generally respects in its decision-making in Estonia, have a vital task to fulfil. Therefore, this paper focuses on the interpretation of the best interests of the child, including child's view in the context of inter-parental child custody disputes.

1.2. The Best Interests of the Child as Determination of Child's Rights

Defining child's best interests combines taking into account different factors and circumstances characterising the child, also circumstances and capabilities of child's potential custodian(s) in order to guarantee the most important objective—environment and well-being supporting child's development to the maximum. Zermatten (2010) associates three meanings with the concept of child's best interests. First, determining child's best interests can be seen, one hand, as a procedural matter according to which possible impacts (positive or negative) of decisions involving children have to be taken into account in the decision-making process. Second, the best interest of the child is a basic right that has to be applied all the time. Third, child's best interest is a fundamental, legal principle with the aim of limiting adults' uncontrolled power over children (practitioners work for children and with them, making decisions in children's name). According to Zermatten, no-one knows for sure in reality what is the best interests of a specific child; thus, it needs to be assessed by decision-makers which means a process with fixed procedures, considering the short-, medium- and long-term perspectives of child's life.

It follows, therefore, that for understanding the child's best interests it is important to assess child well-being, taking into account child's rights.

The principle of the best interests of the child includes active involvement of the child in planning the activities and decisions concerning his/her well-being (Committee on the Rights of the Child, 2013)—which enables to understand child's thoughts, wishes and needs and follow not only the opinion of child's parents or other adults (Gladstone et al., 2012; Harris, 2011; Saini, van Wert, & Gofman, 2012; Schoenholtz, 2012). This emphasises the importance of children's views and attitudes consisting of their experiences, ideas and understandings of their lives (Sommer, Pramling Samuelsson, & Hundeide, 2009). Hammarberg and Holmberg (2005) emphasise that in case of emerging disagreements a balance has to be found between child's current interests, parents' competing interests and child's long-term interests. It ensures that children's interests are truly considered (Zug, 2011). Verhellen (2000) indicates that also small children cannot be deprived of the right to express their views and receive information about important decisions concerning them and express an opinion in a situation when their interests differ from that of the adults. Furthermore, Casas (1997, p. 289) points out that for centuries judges and attorneys, social and human scientists have not accepted that children could be right and reliable (competent) to tell the truth, but the actual question is—"weather adults are not competent enough to understand children's expressions and children's perspectives". Seeing the child as someone competent contributes to guaranteeing child's rights, including the focus on the best interests of the child (guaranteeing and protecting participation-related rights).

Looking at attitudes and understandings of child participation in Estonia, it becomes evident that according to the results of monitoring of Estonian children's rights (children in grades 4-12, $n = 999$, Karu et al., 2012a) children see themselves and other children mostly as competent and independent persons—96% of children agreed that children have their own opinions and preferences that need to be taken into account, and most of the children thought that listening to a child is as important as listening to an adult (96% of children who answered agreed partially or totally with that), including taking into account children's opinions and preferences. The study of Estonian population ($n = 1000$) shows that there is, nevertheless, a part of adults who consider children to be incompetent, thinking that children do not know what is beneficial for them (22% agreed totally and 42% agreed partially) (Karu et al., 2012b).

The central principle of the rights of the child is that the best interests of the child should be considered, the child's opinion should be taken into account and the child should be part of any decision-making that affects the child. The involvement of children in decision-making means a dialogue—it gives adults an opportunity to determine the child's needs and preferences, which help to create the best and most suitable conditions for living and development (Laes, Krusell, Reinomägi, & Toros, 2013, 40).

1.3. Determining Child's Best Interests in Custody Disputes: Estonian Practice

Child's custody disputes encompass different but interrelated fields—social work, law, psychology, which means that professional approach to disputes and determining child's best interests require the collaboration of various practitioners. As in other democratic countries, also in Estonia the emphasis on the principles of the UN Convention on the Rights of the Child (1989), on child's rights, and on the need of taking child's rights into account in all proceedings.

The principles of child's visitation and custody rights are determined in general terms in Child Protection Act and Family Law Act. According to Republic of Estonia Child Protection Act (1992), the principle of child protection is always and everywhere to put child's interests first and the objective of child assistance are to ensure the child's safety, development and well-being. Family Law Act (2009) stipulates that the court makes a decision when reviewing cases concerning a child by taking into account firstly the child's best interests, considering all aspects and legitimate interests of concerned parties. According to Code of Civil Procedure (2005), the court hears in a case concerning a child at least a ten-year-old child personally, his/her wishes, but court can also hear a younger child. In custody disputes there is an additional condition that the court has to hear the child if the child's wishes, relations and will bear a meaning for solving the case or when hearing the child seems to be necessary for solving the case. Refusing the child the possibility to be heard can occur only with a reasonable excuse. It is important to mention that there is no family court system in Estonia.

Mardisalu's (2007) study of the practice of separating from family in Estonian court system refers that the approach to guaranteeing the best interests of the child is idealising and does not offer criteria how this could be done.

She states that children younger than seven years are treated as objects since the legislation does not require asking their opinion. At the same time being older does not place the child automatically in the role of a subject, either, because due to the lack of specific criteria it depends on a specific practitioner whether he/she sees the child as subject or object or how he/she understands the child's best interests.

A certain practice has developed in Estonia according to which the court asks the opinion, standpoint, of local government (child protection worker) and child's representative in proceedings concerning the child for determining the best interests of the child. Child protection workers (the local authority in rural municipality and city governments) have a duty to undertake assessments and to provide an opinion to the court—what kind of living arrangement is in the best interests of the child. There is no common regulation or framework for the assessment of child's best interests. Both child protection workers as well as child's representatives form their opinion to the court mostly on the bases of home visit and discussion (parent and/or child). In case of more complex, long-term and conflicting debates repetitive discussions and visits take place, and child protection workers ask additional information from cooperation partners related to the child (e.g., school, psychologist, family therapist) (Toros, 2012). It follows, therefore, that Estonian child protection workers have a considerable responsibility in child custody evaluations, as they are assessing and interpreting child's needs and well-being, parental capability in the best interests of the child, and the court often seeks to base its decision namely on the opinion of child protection workers.

This paper describes empirical results on how the concept of “best interests of the child” is interpreted in inter-parental child custody disputes?”

2. Method

2.1. Sample

The study material consisted of textual data, court records. The sample consisted of applications for determining parental rights concerning the child and regulating visitation reviewed in one court house of Harju County Court (Harjumaa is Estonian largest county, representing 34.2% of the entire population) in 2010.

In total, 92 applications for determining visiting rights were submitted to that court in 2010, and 80 applications concerning child custody disputes. The criterion for choosing the proceedings was the fact that the parent had submitted the application to the court and the child's age was up to ten years. For the purpose of this article, nineteen cases have been analysed in case of which the court appointed a representative for the child in the proceedings and involved a child protection worker, asking also their assessments. These cases were chosen by the head of the civil office of the court on the bases of information in the databases.

Persons who had submitted an application to the court were in thirteen cases the child's farther and in six cases the mother. The appeal made to the court was in six cases for determining visitation rights, in four cases determining place of residence and visitation rights, in three cases changing visitation rights, in four cases transferring custody, in one case determining visitation rights or terminating parental rights, and in one case transferring custody or determining visitation rights. Disputes affected in total 21 children (in one case the parents had three children, in all other cases one child), including fifteen girls and six boys aged 1-10 years. The longest proceeding lasted four years and the shortest one month.

2.2. Procedure

During October and November 2011, the second author reviewed nineteen procedural acts in the court house, the volume of which was 3813 pages and did transcriptions in total on 50 pages (data that was related to practitioners' assessments about child well-being and needs, including judge's opinions that detail the rationales and supporting evidence for judge's decision). The authors of the article find that in the context of the current topic the documents of judicial records form an important source of data reflecting interpretations, justifications, and assessments of the parties. Since judicial records have restrictions on access, conducting the study required explaining research objective and researchers' background and signing a confidentiality agreement.

2.3. Data Analysis

Considering the fact that a qualitative study does not aim to make generalisations, but relies on the principle that what is common is repeated in single cases—single cases are carefully studied and important characteristics of the phenomenon can be found (Hirsjärvi, Remes, & Sajavaara, 2005). The data was analysed using the principles of content analysis, informed primarily by Padgett (2008), consisting of unitising, categorising and pattern search.

As the number of cases was reasonably small, transcripts were manually coded (open-coding). Reliability of the data analysis was enhanced by two researchers conducting the data analysis (first and second author). First the transcripts were read through in order to gain an overall understanding of the words and phrases in the data that were related to the variables of interest served as indicators of the principle of “best interests of the child.” Coding involved repeated readings of the transcripts to discover the patterns in order to code the data into potential meaning units for labels. After transcripts were read independently and initial labels compiled, the first two authors met to discuss the findings to establish list of labels (labels were compared and refined, listed under existing labels or new labels), initial themes were established (themes were continually challenged, checked with the original transcripts, similar labels were grouped for themes/categories). The themes were then reviewed again, and the specifics of each theme further refined, combining labels or developing further within themes/categories. For example, the labels “housing quality and environment” and “material resources” in interpreting the “best interests of the child” principle were grouped under the theme “economic well-being”, as it best characterised the nature of these labels, see Table 1. The transcripts were then read again to extract quotes from the transcripts supporting these common themes (to illustrate the connections between raw data and the conclusions drawn). Consistency in the common labels and themes were achieved by reaching consensus.

As this study explores the understanding of a phenomenon in its context, precise numerical representation of responses is generally not provided (Rubin & Babbie, 2008). Nevertheless, themes and categories are presented in an order that approximates their relative frequency in the data.

3. Results

Based on the materials of judicial records, the best interest of the child is generally described through two larger subject areas: (1) rights (child and parent) and (2) well-being that is connected to the following dimensions: psychological and emotional, physical, social, cognitive and educational, and economic well-being (Thornton, 2001), see Table 1. Words such as children's "rights", "well-being", and "needs" were mentioned throughout evaluations and rationales. Authors consider child's needs as part of the well-being.

Table 1: Interpreting and Applying the Principle of "Best Interests of the Child": Themes, Labels and Examples

Interpretation of the principle "best interests of the child"
Child's rights: communication with his/her parent, taking into account child's wishes, e.g., "The child has to have the opportunity and time to communicate with the parent" (case 3, child protection worker), "Also you need to ask the child about his thoughts and needs" (c5, child protection worker)
Best interest of the child as parental right: child as parental property, child a mother's priority, e.g., "The child should be available for the father at all times" (c14, attorney), "Parents have equal rights and duties, including the duty and right to take care of their child" (c3, court), "As a rule the child is better off with the mother" (c2, attorney)
Economic well-being: housing quality and environment, material resources, e.g., "Father copes better economically" (c5, attorney), "The child has no room of his own" (c3, child protection worker)
Physical well-being: living conditions (including one home), health, appropriate care, risk and safety concerns, e.g., "Living in several places is not good for the child and affects adversely her development and health. This kind of arrangement has increased child's insecurity that has caused learning problems. Travelling between two homes tires the child and is exhaustive both physically and emotionally" (c1, attorney), "Fixed place of residence and living arrangements, stable and safe home is vital for a 6-year-old child" (c9, child protection worker)
Cognitive and educational well-being: schooling, age-appropriate activities and hobbies, e.g., "preparing for school is an important phase of development for the child and it is necessary to create a safe environment that supports development for that period" (c11, child protection worker)
Psychological and emotional well-being: stability (incl. growth environment), attachment, fear, subjective well-being—child-centred principle (child's wishes and opinions), e.g., "Guarantee him/her safe and stable growth environment for versatile development not traumatising the psyche" (case 9, child protection worker), "There

is an extremely strong emotional bond between the child and the mother and separating the child from the mother would devastate the child" (c11, child protection worker), "It is crucial to see whether the parent puts the interests of the child first and whether the parent fulfils his/her duties regarding the child" (c1, attorney)
 Social well-being: parent-child relationship, parenting skills, e.g., "The farther would be unable to care for the child daily due to his work related duties" (c11, attorney), "Because of this kind of living arrangement it is impossible for the child to communicate with class-mates and friends which is very important for a 10-year-oldchild" (c1 child protection worker)

Child inclusion in the court

Child-centred principle: inclusion of the child (n = 1), age-related factor, e.g., "Since in this case the child is 9 years old, then the court will not hear the child" (c14, the court); "The child is a 6-year-old minor whose opinion the court is unable to ask according to the law" (c15, the court), "Older children can state sometimes very clearly what they want, what is in their interest, why do they want it, and why they do not want any differently. The law says that child's wishes has to be taken into account" (c14, child protection worker)

The opinions of child protection workers, representatives and judges contained most often statements and descriptions related to child's rights and parental rights. Child's right to communicate with the parent is child's universal legal right and mostly also in the child's best interests. Theoretically the child is the most important person in custody disputes as the proceedings concern his/her life. In practice, however, parental rights are viewed as superior to child's rights. In court proceedings related to this study, the rights of parent and child are discussed as related and sometimes they are also confused with child's best interests; the focus is more on parental rights than child's rights (especially when female practitioners identify themselves with the mother's situation). Therefore, it can be seen that mother's priority over the child is emphasised that can render the father unimportant but there is a danger that also the child itself, who (whose well-being) is at the heart of the dispute becomes secondary.

Child protection workers and child's representatives interpret the child's best interests mainly in the context of taking into account child's developmental needs, child-parent relations, parent's personal characteristics, relations between parents and stable growth environment, and in case of parental dispute guaranteeing child's best possibilities in a specific situation. The necessity of meeting child's developmental needs is often emphasised but there is not much explanation what is meant.

The same applies to other areas (e.g., parents' personal characteristics and parenting skills have been seldom mentioned, inside the rest of the text as a list of terms, without explaining what is meant). As the Table 1 shows, the concept of "best interests of the child" is associated more often with child's physical than emotional well-being.

Active involvement of the child into judicial proceedings (expressing child's views and opinions about decisions influencing him/her) is little practiced. Since for a child younger than ten years there is no procedure of hearing specified by the law, then guaranteeing child's rights depends more on the competence (work methods and devotion) of practitioners, including the judge. The importance of taking into account child's opinion and wishes is on second place in the court records next to the right to communicate with parents (n = 27). Nevertheless, participation of the child into judicial proceedings is little practiced.

Assessment documents (mostly from child protection workers) show that also younger children can describe the situation and express their opinion. The importance of hearing the child is demonstrated by a six-year-old child's wish to child protection worker who had come to a home visit—the child protection worker communicated first with the father, not the child: "*The father says he has not forbidden communication between mother and child, but that the child him/herself has not wanted this /.../ During the discussion between the child protection worker and the father the child approaches the father with a phone saying that he/she wishes to go to the mother.*" (c13). The child's representatives refer that the meaning of age limit is that child's opinion is informative "in case of a child older than ten years" or just "older". The court does not generally hear a child younger than ten years, neither a nine-year-old child. Among the cases that were analysed the court heard a child only once.

Furthermore, the different interpretation possibilities of the concept of "best interests of the child" are illustrated by the opinions of judges about the enforcement of legal protection during the proceedings. Justifying it with the need to guarantee stability in child's life the judge may see it necessary to determine child's place of residence for the period of proceedings and not determine visitation rights for this period or determine visitation rights only for the period of proceedings.

4. Discussion

Debates about child custody following parental separation have often been framed in terms of a battle between the competing rights of different family members (Rešetar & Emery, 2008). In collaborative practice, specialist's (child protection worker and attorney) role is to provide insight into what may be in the best interests of the child (Pickar & Kahn, 2011, 62). The study shows that the description of child's best interests is based on the principle of child well-being—the general framework of custody disputes is based on laws and on the general principle that the child has certain rights, but the content of these rights consists of child well-being.

Emery, Otto, and O'Donohue (2005) refer that, theoretically, the law guides and controls child custody evaluations, but the concept "best interests of the child" is vague. The current study also indicates that characteristics and concepts describing best interests are often presented as a list of terms, without explaining and justifying the content of these principles for the specific child, and often no facts are included that would allow to understand the full meaning of these statements. Concepts that are undefined result in different interpretations and understandings, including subjectivity. Moreover, one important factor related to child well-being is parenting abilities and skills. The current study indicates that parenting skills were seldom described or only as a list of items. At the same time this is important factor when deciding custody rights.

The subjective viewpoint of child well-being becomes apparent when hearing the child. Although the UN Convention on the Rights of the Child (1989) determines children's rights to be informed, heard and involved in cases related to their lives (Søftestad & Toverud, 2012), the rights of the child appear to be the least contentious human rights in the world (Landgren, 2005). Munro (2011) underscores that everyone involved in working with children pursue child-centred working and recognise children as individuals with rights, including their right to participation in decisions about them in line with their age and maturity. Several authors and studies refer that children's views are absent in decision-making (Holland, 2001; Höjer & Forkby, 2011; Woolfson et al., 2010). It can be said on the bases of the analysed court records in the current study that this requirement was generally fulfilled to some extent by the practitioners who met the child, but not by judges. The child is not deemed competent enough to express his/her opinions, views and understand them.

In the legal system, the child has the legal right to express his or her custody preferences in court. In reality, however, this right is not often exercised. This shows the contradiction between the law and its interpretation. Children's participation may help them to accept decisions made about them and may facilitate their growth towards mature and responsible adulthood (Smith, Taylor, & Tapp, 2003). Authors believe that the expression by a child able to do so of his/her view has independent value as an essential element in the decision-making process.

Holmberg and Himes (2005) state that adults in custody disputes (judges, attorneys, social workers, etc.) tend to associate themselves too easily with the parent, identifying themselves with the problems and attempts of the parents to obtain custody. The judicial records indicated the same tendency that even if an attempt is made to take into account the best interest of the child, practitioners often tend to associate themselves with the needs and interests of the parents. Furthermore, the best interests of the child are equated to parenting plans, not listening to the child's voice as part of an individualized determination. Hinton (2005, p. 1570) refers that by providing children a voice in the custody determination, children will realize their importance to the decision and parents will be reminded of their responsibilities to protect their children's best interests.

Pickar and Kahn (2011) point out that finding effective ways to assist practitioners and judges in child custody disputes in the context of child's best interests remains one of the great challenges in the family law arena. Considering Estonian practice, it is necessary to enact additional criteria with implementing provisions for assessing child's best interests in order for the principle to be more similarly and objectively understood. As Patterson (1983, p. 260) has said years ago, "it is not the child who is vulnerable or invulnerable; it is rather the system in which the child resides". People, including the court and specialists working with children, are a part of the system as are their understandings and ways of implementing the principles in practice.

4.1. Limitations and Directions for Future Research

The merits of this study should be understood in the context of its limitations. First, the findings of data are exclusive to the particular study context and as such there is no intention to seek generalisations. Second, there are also limitations to comparing these findings with similar studies in Estonia.

Another limitation is the use of only court records. Multi-method approach (e.g., inclusion of interviews) would allow the making of more definite conclusions. Despite these limitations, the study's findings still contribute to the extending the knowledge and contributing to deepened understanding of the little researched phenomenon in Estonia. The authors consider it important to study the area further—in order to better understand the phenomenon under study it is important to analyse the decision-making factors of judges (on what are the rulings based on).

5. Conclusions

The best interest of the child can be seen as the sum of child well-being and rights. The study showed that this concept is unclear as it is often used leaving the content of the term unexplained—describing best interests is fragmented, only some factors of child well-being are mentioned, there is a lack of comprehensive and systematic approach that would guarantee an even quality of opinions prepared for the court. Child perspective is mediated generally by adult perspectives. Following and applying the principle of “best interests of the child” starts with a shared understanding of the concept by different practitioners. The findings imply the need to develop a common assessment framework of children in need based on the best interest of the child in general but also specifically for child custody disputes in Estonia.

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