

## The Relations of the Minor with the Parents and Extended Family. Assessing the Best Interest of the Child. Criteria of Assessment

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**Abstract.** Without any doubt, the most important principle which governing the child protection is the principle of best interests of the child. Besides, the protection of this interest is the stated purpose of all the international conventions and the domestic legislation. Despite this, of his importance, the principle is only observed, without content or to enjoy some conceptualization, the criteria assessing being left to the discretion of the court and the competent authorities. It was supported in the literature that the establishment of an invariable content for all issues incident to the child protection might not be possible through the light of variety situations can find each child. In this way, the present study identifies a priority order of those assessing criteria in the matter of the child relations with parents and extended family. As the exertion of the parental rights and obligations must be governed by the same principle, the identification of those criteria is realized analyzing the internal case law in this field and ECHR jurisprudence. The papers originality consist in the fact that the research tries to establish the content of this principle, without straightening the action area of the competent decisional authorities (public authorities, judges), the conclusion of this study being addressed also to the doctrinaires, also to the practicants.

**Keywords:** right visit; right to privacy and family; custody; parental rights

### 1. Introduction

The best interest of the child represents the criterion which must guide any decision or action taken by individuals or authorized institutions, either public or private, having a direct impact upon the child. Although all the regulations in the field of child protection make a direct reference to this principle, creating the impression that all their decisions must gravitate around it, to this day there is no legal act establishing its content.

We are certainly not dealing with a legal gap, but with a voluntary omission from the part of the legislator, who, unable to envisage the entire range of complex and various situations a child can be in, chooses to pass the responsibility to the competent institutions (legal courts, administrative structures), which are supposed to evaluate the specific circumstances and to decide with accuracy which is the best interest of the child. We are therefore talking about a concept of *lege lata*, a legal notion with variable content, which must be decided upon by a judge or a competent authority. The legal practice

gathers several criteria of assessing the best interest of the child, which refer both to the child (age, personality, sex, maturity level, institutionalized education) and the person / persons to whom he / she relates to personally and who have an impact on education, growth or professional formation of the child (morality issues, criminal record, financial criteria, etc.)

Having in view that, during the last century, the field of human rights, and, implicitly, the rights of children extended substantially, we consider that a re-conceptualization of the utmost principle governing child protection is needed. We do not state that, by establishing a legal matrix, the problem of the legal content of this principle could be solved entirely. This would be impossible, because of the situations in which a child can be found and also because of the specific issues subjected to it. Still, one can objectively establish a priority order as to the criteria of assessing the best interest of the child, depending on the field this interest is manifested in, such as: exertion of the children rights, applying an alternative protection measure, executing an educational act, entrusting a child after the divorce, etc. In other words, it is not the general definition of this principle that prevents us from stating the best interest of the child; it is rather the fact that the decision-maker does not enjoy steady landmarks established by the law in order to assess the best interest of the child. As these landmarks vary from one situation to another, they should be identified function of the table of contents, so that the evaluation and assessment of the best interest of the child is easier and more objective.

As the problems of interpretation and application of this principle are generated by the fact that it has an evasive regulation, the only certain thing that can be stated is the fact that it prevails in front of other principles governing child protection.

## **2. The Right of the Child to Maintain Personal Relations with the Parents, Relatives and other Persons. Practical Ways to Exert the Right**

As for the relationship of the minor with his/her parents and extended family, assessing the best interest of the child is also a sensitive matter, extremely important as the legal court must maintain a balance between the necessity to ensure that the child enjoys a harmonious growth and development and the respect for the private and family life of a human being, as it is stated in article 8 from the European Convention for Human Rights (either the right of the child or the right of any of the two parents).

The right of the child to maintain personal relations with the parents, relatives and other persons he/she became attached to is guaranteed by the provision of the Family Code<sup>1</sup> and by the articles 14 and 15 from Law no.272/2004 (Filipescu, 6/1984, pg. 41-43). The law also stipulates naturally the exception from the exertion of the respective right, which is the situation where the relations are not in the best interest of the child. The legislator has considered the acknowledgement of this right as a natural result of the fact that losing the quality of spouse does not mean losing the quality of parent. In other words, the non-custodial parent will be allowed to continue to exert his/her lawful parental rights (the right to participate in bringing up and educating the child and the right to provide him/her with all types of guidance). We must also stress the fact the non-custodial parent is not assimilated to the parent whose parental rights have been terminated. The law acknowledges the fact that, in the former case, the person has a series of rights as opposed to the child, which practically represents the

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<sup>1</sup> Article 43, 3rd paragraph from the Family Code.

guarantee of this person's right to private and family life. And how could these rights could be exerted if the law denied him the right to have personal relations with the child?

To sum it up, the non-custodial parent has the right to maintain personal relations with the child and to be involved in his/her upbringing, education, elementary training and professional formation. In case he/she is prevented from exerting his right by the other parent, he/she can appeal cu a legal court, which will decide upon the practical ways of exerting that right, which will become compulsory for the parent who has the child.

In conformity with the article 15 from Law no. 272/2004, exerting the right to maintain personal relation with the child can take various forms: meetings between the parent and the child, visiting the child at his/her residence, keeping the child at the parent's residence for a limited period of time, correspondence or other form of communicating with the child, sending information related to the child, including recent photos, medical or academic evaluations to the parent or to other persons having the right to maintain personal relations with the child. The two parents can establish in good faith the practical ways to exert the right to have personal relations with the child, as well as the visitation program and only in the situation when they cannot reach a compromise, the legal court can step in and subsidiary take a decision. We consider that, in order to avoid possible misunderstandings between parents regarding the exertion of the right to have personal relation with the child, once the child is entrusted after the divorce, the legal court should also decide on the specific forms of exerting this right, even more so since the best interest of the child is being assessed for the first time and, moreover, the children must be the main beneficiaries of the legal sentence. Another argument in favor of rejecting any compromise between parents concerning visitation rights could be the fact that, once in divorce, the relations between parents are irremediably damaged and the agreement of any of the parties involved on a common problem, even if it is the problem of entrusting the child or of establishing a visitation schedule in order to maintain a personal relation is unlikely to last. We should take into account the legal decision pronounced by the section for minors and family from Alba Iulia, which shows that allowing the father to establish the visitation schedule, on grounds that he has only been aggressive towards the mother, not towards the child, represents a wrong application of the legal proceedings in the field, as long as it has been proved that the best interest of the child is not to maintain the relation with the father for the time being<sup>1</sup>. Also, the request formulated by the parent not entrusted with the child to establish the visitation schedule, filed at the same time as the divorce was pronounced admissible and could not be rejected for the mere reason of being prematurely formulated<sup>2</sup>.

The right of the non-custodial parent to maintain personal relations with the child is correlated to the obligation of the other parent to respect the right, so it can reach its purpose. Thus, it has been shown that „this kind of cooperative behavior is imposed by the fact that the above-mentioned rights are in reality instruments to fulfill the obligations any parent has toward his/her child, which exist as long as the parental rights are not terminated”<sup>3</sup>. The cooperative behavior must be manifested not only by the non-custodial parent, but also by the parent permanently and effectively exerting parental rights and obligations, which can be obstructed in the process. For instance, the legal practice has shown that the final expatriation does not make impossible the personal relations with the non-custodial parent or with the members of the extended family. This is the reason for which the bearers of this right to maintain personal relations cannot object to the child's leaving the country and settling abroad (Tițian,

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<sup>1</sup> Alba Iulia C.A., Department for Minors and Family, Decision No. 32 of March 3, 2006 unpublished.

<sup>2</sup> Alba Iulia C.A., Department for Minors and Family, Decision No.5 of January17, 2006.

<sup>3</sup> Decision no.82 of February 25, 2003, published in Official Gazette no.189/26.03.2003, in the Judicial Courier no. 4/2003.

2006, p. 71)<sup>1</sup>. As far as we are concerned, we consider, in accordance to the legal practice, that settling the child's residence abroad does not affect the exertion of the right to maintain personal relations with him/her, just because the distance would prevent the other parent from contributing to the upbringing and the education of the child. In this situation, personal relations can continue by using different methods which allow the co-participation to the upbringing and education of the child as effectively as possible. In this case, the intervention of the legal court is vital for the decision concerning the specific forms of exerting the right, as, in our opinion, any parental pre-arrangement regarding this aspect should be ruled out.

According to legal practice, the right of the parent to have personal relations with his/her child cannot be limited unless it has been exerted abusively. If such a circumstance is not proven, the practical exertion of the parental right should not be obstructed by the compulsory presence of the other parent; thus, the communication between the parent and the child should follow a natural, unrestricted course<sup>2</sup>. As a result, the legal court can deny visitation rights only in special cases, when it has been established that the exertion of this right by the parent not entrusted with the child is not in the best interest of the child. For example, this right can be terminated on severe grounds which can deeply affect the child (alcoholism, inappropriate behavior towards the child) (Garder, 1980, p. 244).

The French doctrine sustains that the parent bearing the child visitation right is also the beneficiary of a correspondence right, involving, although not regulated, on the one hand, the child's right to receive correspondence from the parent not entrusted with his/her care, and on the other had, the right of the parent to send and receive correspondence from the child. These rules also apply to phone conversations (Garder, 1980, p. 244).

The refusal to execute the legal sentences concerning visitation rights and entrusting can raise a series of problems in the application of article 8 from the Convention, as it is proved by the sentence pronounced in the case *Ignaccolo-Zenide against Romania*<sup>3</sup>. The criterion is to know if the authorities have taken all the necessary measures which could be reasonably adopted in the specific circumstances to put the legal sentences into practice. Emphasizing the fact that, generally, coercitive measures are not desirable in cases involving children entrusting, the Court accepted the fact that resorting to sanctions cannot be avoided if the parent entrusted with the child breaks the laws.

### **3. The Right of the Parent to Solicit the Child Re-Entrustion. ECHR Jurisprudence and Internal Case-Law. The Superior Interest of the Child**

The law also acknowledges the right of the parent to solicit that the child is re-entrusted either to him/her, or to a specialized public service or even to other persons, as well as the right to consent at the child's adoption<sup>4</sup>. This right can be justified by proving that the initial circumstances which led to the child's entrusting to the other parent changed and that the child does not enjoy the same treatment which provides him/her an appropriate upbringing or education. It is obvious that the re-entrusting

<sup>1</sup> C.A. Department of children and family, Decision no. 59 of 2<sup>nd</sup> May 2006 unpublished.

<sup>2</sup> Civil Department III, Decision no. 560/8.04.1994.

<sup>3</sup> ECHR Decision, January 25, 2000 in Case *Ignaccolo-Zenide against Romania*.

<sup>4</sup> ECHR case law has shown that when it comes to a child to be adopted and his natural parents can not increase unreasonably oppose adoption, which judgment consent replaces them, although it is an interference with their right privacy is justified because it pursues a legitimate aim, namely health and child development. ECHR, May 15, 1986, no.11588/1985, *GF v. U et Allemagne*, DR. no.47, p. 259 ff.

decision must be solidly justified, so that the stability and continuity in the upbringing and education of the child are not jeopardized<sup>1</sup>. In case of re-entrusting the child to the other parent, the aim of the legal regulation of the right to maintain personal relations with the child is once again highlighted, this time reflecting even more profoundly the principle of the best interest of the child. In this way, the parent not entrusted with the custody of the child can be easily and objectively informed on the evolution of his child, so he/she can determine the cause of a certain regress in his/her education, a cause which can stem from the parent taking care of the child. Even more so, maintaining personal relations strengthens the family ties, in accordance with the International Convention of Children Rights and of the European Convention for Human Rights.

Relevant for this situation is the ECHR's decision in the case of *Gorgulu against Germany*<sup>2</sup> in which we are dealing with the relation between a father and his child born outside marriage and then given by his mother in foster care for adoption. The Court considered a violation of the laws the fact that the national courts of law did not decide to examine the possibility for the father and the child to be reunited in circumstances that could diminish the pressure upon the child. The plaintiff, the father, tried to adopt the child and started a procedure to obtain custody and visitation rights. The persons taking care of the child wanted to adopt him and Gorgulu refused to give his consent, which determined the respective persons to file an official solicitation and obtain a legal sentence. The ECHR considered that article 8 was violated and that, even if a sudden and complete separation between the child and his caretakers risked having a negative impact on the child, the German authorities did not take into account the possibility of re-uniting father and son, in order to minimize the negative effects of this measure upon the child. The German authorities did not have in view the long-term effects of separating the child from his biological father. The judges from Strasbourg considered that the suspension of the visits of the father to his son, by a national law court, made impossible any meeting of the involved parties as well as the consolidation of family ties, which can only be severed in extreme circumstances which could not be found in this case. The ECHR concluded that: despite the assessment margin provided by the national authorities, the imixtion was not proportional with the legitimate goals<sup>3</sup>. In Romania, in the situation of entrusting the child to a specialized institution or to another person, one would observe article 33 from the Law no.272/2004. This measure is applicable whenever the upbringing and education of the child alongside his/her parents is no longer possible. This situation has stirred a lot of debate in the ECHR's jurisprudence. Although it has been shown several times that for a child, the fact of living together with his/her parent/parents represents „a fundamental component of family life” and his/her entrusting to an institution of social protection stand for an imixtion in the family life of the parties involved, this measure is always based on a good reason. Thus, it must have in view the best interest of the child and also it has to be temporary. Granting child custody to another person does not necessarily mean the parental rights are terminated, which supposes that both parents will have the right to maintain personal relations with the child, thus being able to express his/her opinion concerning his/her education or other decisions made by the caretakers. Also, any of the parents can solicit the custody of the child, when the circumstances determining custody granting to another person are gone.

We must mention that the right of the child to maintain personal relations with the non-custodial parent cannot be opposed to the refusal of the biological parent to develop such relations. As a matter of fact, the positive obligations stated by article 8 from the Convention do not include, up to now, the

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<sup>1</sup> Supreme Court, Civil Section, Decision no.2396 of July 10, 1997, in Bulletin of Jurisprudence.

<sup>2</sup> ECHR decision in Case *Gorgulu against Germany*, February 26, 2004.

<sup>3</sup> *Ibidem*, paragraph 50.

right to impose contacts between the child and the biological father, against the will of the latter. While examining the ways of applying article 7 from the United States Convention for Children Rights and article 8 from the European Convention for Human Rights, the Dutch Supreme Court considered unlikely that the states involved in this instrument wanted to establish a right that goes up to that point as to provide the child with the right to force his/her biological father to have contacts with him/her, when he has not recognized him/her and rejects any personal contact<sup>1</sup>.

The right to maintain personal relations with the child is also correlated with the obligation of the custodial parent to contribute to his/her care by establishing in the law court of alimony in the amount and conditions imposed by the laws.

The right to maintain personal relations with the child is recognized by the doctrine (Bacaci, Dumitrache, & Hageanu, 2009, p. 312) and by the legal practice also in the case of grandparents and other close relatives (the extended family)<sup>2</sup>. The European law courts include in the notion of „family life” the relations between close relatives „which might play a considerable role in the field, such as the relations between grandparents and grandsons...”. Generally-speaking, the grandparents have the right to keep personal relations with their underage grandson even if there is no legal sentence for it. This right needs to be established in a law court only in the situation where their own child and parent of the minor is missing, deceased, in prison, etc and the grandparents are prevented by the other parent to keep in touch with their grandson still, the actual exertion of the grandparents’ rights to maintain personal relations with their grandchildren cannot take the form of an abuse or affect the best interest of the child<sup>3</sup>. Assessing the various forms of child visitation by his/her grandparents is made by fixing a parental program within reasonable limits. Deciding upon a restrictive visitation program would be a violation of the right to private and family life. This right is also maintained both in case of divorce and dissolution of marriage.

#### **4. The Actual Consultation of the Child Concerning Custody, Changing of Custody or Exerting the Right to Personal Relations**

A very important issue in assessing the best interest of the child in this matter is represented by the actual consultation of the child concerning custody, changing of custody or exerting the right to personal relations. The article 24 from the Law no.272/2004 stipulates that „ the child with the power of judgment has the right to express freely his/her opinion on any problem affecting him/her”. Therefore, starting from the age of 10, the child has the right, according to the law, to be taken into account in any matter concerning him/her and, in the case he/she has not reached this age yet, he/she still can be accounted for if the competent authority considers his/her testimony is necessary for solving the case.

The right to be taken into account offers the child the possibility to ask and receive any relevant information, to be consulted, to express his/her opinion and to be informed on any decision

<sup>1</sup> Première division, 22 decembrie 1995, 8643 *rechtspraak van de Week*, 1996, 10, english summary at: [www.codices.coe.int](http://www.codices.coe.int)  
Van Beuren, G (2008) *Les droits des enfants en Europe*, Edition du Conseil de l’Europe (p. 87).

<sup>2</sup> The extended family is understood, under the Law no. 272/2004, parents, children and relatives to the fourth degree inclusive.

<sup>3</sup> Supreme Court, Civil Section, Decision no. 28 of January 9, 1992.

concerning him/her , as well as on the consequences his/her opinion might have if respected. The child's opinions will be taken into consideration while having in view his/her age and maturity level.

It is a generally accepted fact that the law courts must take into account the children's wishes in these procedures of custody granting or of establishing the visitation program for the non-custodial parent. Practically, at a certain level of stage, it can become useless, even counterproductive forcing a child to comply with a situation he/she rejects (no matter the reasons of the rejection).

The French doctrine has shown that the right to expression of the child in family litigations affecting him/her, as well as the right to inform a judge in this respect signify, at the same time, the emergence of the minor's legal capacity and the restriction of the parental authority's prerogatives (Dekeuwer-Défossez, 1991, p. 75).

The right of the child to know his/her parents and grow alongside them, if the equal exertion of parental rights by both parents becomes impossible, means establishing personal relations between the child and the non-custodial parent. The best interest of the child must hereby be assessed in both ways. First, the law court must decide if the best interest of the child imposes the recognition of such a right or it is necessary to ban the development of such personal relations, on grounds that there are solid and obvious reasons which might put the child's life and physical or mental health to risk, because of irresponsible parental behavior. Second, the law court must decide not only on child custody, but also on practical aspects related to the exertion of this right, thus having to find the most appropriate ways to maintain these relations. In deciding upon the best interest of the child, one should take into account criteria such as: the child's residence (which is to be settled by the custodial parent), the physical distance between them, the educational schedule of the child, the child's relations with the grandparents (the parents of the non-custodial parent), the place of visitation, the age of the child, his/her maturity level, but also criteria depending exclusively on the parent. We consider that establishing these methods and the visitation program must not be the object of a parental pre-arrangement, even if in reality, after the pronouncement of the sentence by the law court, the parents can close further convention, in parallel with the legal decision.

As both parents need to continue contributing to the education of the child, but the non-custodial parent is objectively not around the child all the time, we consider that, in order to provide relevant guidance on issues important to the child, the custodial parent must have, among other obligations, the mission to provide relevant information about the child to the non-custodial parent, such as: information about the health state, education, professional choices, changing the legal residence, academic situation, the child's relations with other persons and their influence on the child's formation, journeys abroad, etc.

## **5. The Consideration of the Superior Interest of the Child by the Courts Concerning Custody or Exerting the Right to Personal Relations**

An interesting issue really affecting the future of the child's education and upbringing in case of divorce is the problem of custody granting to one or the other parent. In this case, the law court must also take into account the best interest of the child. A closer look at this problem shows that there is no fixed recipe to be taken into account by the law court. The criteria for custody granting must refer to

the moral conduct, the financial situation of parents<sup>1</sup>, the child's wishes etc. If until a century ago, the child used to be entrusted, in most divorce cases, to the father, this situation being part of a tradition which helped retrace the origin and inheritance on the paternal line (in this tradition, the wife was the property of her husband, without any rights on the child), 100 years later, the importance and role of the mother in the mental development of the child are significantly higher. Nowadays, taking into account the female emancipation and the reconsideration of her legal status, one cannot speak of the invariable custody granting to the father anymore, in case of a divorce. Starting from the principle of full equality between men and women, we are dealing with the custody granting to the mother or to the father, as the law court must decide in this respect, according to the best interest of the child.

It is obvious that, after the divorce, the child cannot live with both parents, so the law grants the custody to one parent. This represents, as it has been stated, „an indispensable solution without any doubt, in order to prevent the child from becoming a stake between parents. The law must find a balance between the parents' desire for freedom and the exertion of parental rights. Still, all the laws, all the legal sentences stay without effect, thus it deprives the child of parental love” (Fulchiron, 1985, p. 31).

As for the legal jurisdiction, we must say that the law courts in Romania have the material jurisdiction to decide on cases involving minors with Romanian citizenship, as it is stipulated by the article 150 from the Law no.105/1992. In the situation where in other countries, the exertion of parental rights of a Romanian citizen was limited, the Romanian law court must comply. Similarly, if in Romania there is a case for child custody; one cannot ignore the foreign legal sentence granting the custody to one of the parents, as the provisions of article 168 paragraph 1 from the Law no.105/1992 are optional. (Tițian, 2006)

According to the ECHR, the legal sentences concerning child custody must take into account the equality issues. Granting custody depending on the sexual orientation or religion contradicts the Convention. Thus, in the case *Salguiero Da Silva Mouta against Portugal*, the plaintiff showed the appeal court from Lisbon funded its decision to grant custody of his daughter to his former wife solely based on his sexual orientation<sup>2</sup>. The European court from Strasbourg after examining the sentence of the Portuguese law court, noted that the homosexuality of the plaintiff was one of the factors taken into account by national law courts and, consequently decided that there is no reasonable ratio of proportion between the means and the goal. The judges from Strasbourg considered that there is a violation of article 8 corroborated with article 14. Similarly, the Hungarian Supreme Court considered the sentence of an inferior law court not in the best interest of the children, as it separated two brothers based on the religious orientation of the mother (a Jehova's Witness)<sup>3</sup>. The sentence did not take into account the qualities of the mother. The Hungarian Supreme Court invoked article 8 and then article 14 from the Convention, funding its decision on the case *Hoffman against Austria* in order to estimate that the religious convictions of a parent cannot play a decisive part in the custody granting, not the in the favor, or to the disadvantage of the person in cause.

Either in custody in the divorce case, assessing the best interests of the child does not benefit legal criteria; the courts are those which must rule on this issue. We believe that the judicial decision of custody should be established also the child's right to maintain personal relationships with the other

<sup>1</sup> The court may pass over the criterion of financial resources, as long as both parents are required to contribute to the maintenance of their child, resulting consequence that this criterion is not decisive in juvenile custody. In this regard, Supreme Court, Civil Section, Decision no. 2396 of July 10, 1997, in *Bulletin of Jurisprudence*.

<sup>2</sup> ECHR Decision of December 21, 1999 in *Case Salguiero Mout Da Silva against Portugal*.

<sup>3</sup> *Bokor-Szego et Weller, „Hungary”, in Blackburn et Polakiewicz, worked cited (p. 388).*

parent, as well as the visiting program and specific procedures for the exercise of this right. National case law and ECHR jurisprudence establish criteria for assessing the child's best interests in child custody matters, removing as shown in the previous presentation of assessment criteria depending on which the domestic courts could be sanctioned by the Strasbourg Court as discriminatory (a parent's sexual orientation or religious beliefs). However, we consider that in certain situations such criteria might be relevant to assessing best interests of the child, even though the priority they should occupy a final place.

In the matter under review, namely: maintaining personal relationships with parents and extended family, as well as regarding his custody to one parent or another person or a specialized public service, the principle of best interests of the child may help to balance the conventional rights fundamental and to establish a balance between them when they come into collision, because no right is more important than another. Maintaining a balance between them keep the skills of judges, which examining the circumstances in which the child is must determine what is in the best interests of the child.

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