

Rights and the Best interests of the Child in Parental Separation and in Care Proceedings

Hearing of relevant stakeholders
4 October 2022, Dublin, Ireland



FINAL REPORT

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REPORT OF THE STAKEHOLDER HEARING

Introduction

1. On 4 October 2022, the Committee of Experts on the Rights and the Best Interests of the Child in Parental Separation and in Care Proceedings (CJ/ENF-ISE) held a hearing of selected stakeholders on its ongoing work on the draft Recommendation(s) and practitioners' needs with respect to possible implementation tool(s) on the rights and the best interests of the child in parental separation and in care proceedings, as laid down in the Terms of reference of the CJ/ENF-ISE. Invited participants shared their views and experiences on selected topics and provided valuable input to the Committee members for the further elaboration of the draft recommendation and its Explanatory Memorandum. The recommendations made by the experts at the hearing, as summarised in this report, will be reflected in the work that lies ahead of the CJ/ENF-ISE.

2. The hearing, which took place in Dublin as part of an event hosted by the Irish Presidency of the Committee of Ministers of the Council of Europe, was opened by Daniele Cangemi, Head of Department of Human Rights, Justice and Legal Co-operation Standard Setting activities of the Council of Europe, who welcomed the participants and underlined the precious contribution of civil society and experts in the work of the CJ/ENF-ISE.

3. The event was moderated by Seamus Carroll (Ireland), and by Thomas Knoll-Biermann (Germany), Chair and respectively Vice-chair of CJ/ENF-ISE. It allowed in-depth exchanges with and between representatives of relevant professional groups, including lawyers, mediators, social workers as well as academics, on issues of particular relevance for this work.

4. The list of participants to the hearing is attached as an appendix to this report.

SESSION 1 – Protection of the best interests of the child and his/her rights in parental separation proceedings

❖ **Consideration of the best interests of the child and his or her rights in cases of parental mediation and amicable separation**

5. Stakeholders agreed that mediation can play an important role in parental separation proceedings and that it can act as a capacity-building exercise, placing the child at the centre of the proceeding and empowering parents to make long and short-term decisions in the best interests of their child.

6. Before initiating a mediation process, stakeholders pointed to several important factors, to be considered, depending on the situation encountered. Prior to any mediation, it was emphasised that each situation needed to be screened as some cases could be assessed unsuitable for mediation, for example, situations where (one of) the parents may be limited in their agency to negotiate their position (domestic violence; sexual abuse etc.).

7. Moreover, stakeholders underlined the need to stabilize the level of tension between parents prior to involve the child in the mediation process in order to safeguard the well-being of the child and reduce the risk of the child of being instrumentalised by his or her parents.

8. Further factors to be considered with respect to professionals involved in this process included the professionals profile involved in mediation, their training and skills needed in the specific situation, including skills in mediating high-conflict situations, the prospects of co-mediation or a cross-disciplinary approach.

9. Stakeholders emphasised the importance of making mediation services accessible to all parties who could benefit from them. In many countries, legal aid schemes did not cover financial aid for mediation proceedings. Another impediment to accessing mediation by parties, even where financial aid was available, was the lack of awareness of the existence of such services. This called for additional measures to be considered to ensure both availability of legal aid for mediation and awareness raising.

❖ **Consideration of the right of the child to be heard in parental separation situation**

10. Stakeholders considered that children were capable of forming views even though they may not always be able to verbally articulate them, and this should be taken into due consideration when hearing the views of very young children who should not be prevented from being heard due to age requirements set out in domestic legislation.

11. Providing age-appropriate or child-friendly information to the child was deemed essential to empower the child at all stages (before, during and after) parental separation and care proceedings. Empowering the child places emphasis on the fact that it is their right, and not their obligation, to express their views and reinforcing trust.

12. Several stakeholders underlined the importance of maintaining the confidentiality of the information disclosed by a child in the course of the proceedings, unless deemed inappropriate or harmful to the child, for example, in a situation of high conflict involving domestic violence that could trigger criminal proceedings. This was considered a delicate issue, although of paramount importance, since it was directly linked to the child's capacity to be able to trust the process and the professionals involved in their case. On the one hand, the rules of fair trial guaranteed under Article 6 of the European Convention on Human Rights, require that parties are provided with all information on the basis of which a decision would be taken. On the other hand, it was acknowledged that a child should have the possibility to withhold information they did not wish to share. As a consequence, information on their right to disclose, should be provided to them before and during proceeding in a manner that makes them aware about the implications of their statements, so as to be able to choose what information they wish to disclose and which one they do not. In such cases, a child representative or comfort person could support the child and elicit any information they deem relevant (or not), in order to represent their perspectives.

13. When involving the perspective of the child, it is well acknowledged that the role of the professionals involved in the proceedings is vital for ensuring that a child's best interests are brought to focus. There is broad consensus that in order to achieve this, professionals must be duly and adequately trained on how to intervene in cases involving children and the ethics

of involving children. In particular, mediators represented at the hearing expressed that they rarely saw and heard children personally in their mediation cases. They called for more training on how to find appropriate ways to hear a child, including with respect to identifying the most suitable time and setting. Specifically, they called for the design of special tools to address how to identify the most appropriate situations for meeting and hearing a child, in order to identify the child's needs and ultimately safeguard their best interests. In this context, the importance of adequate tools and guidance, such as protocols and codes of conduct, both at international and national levels, was emphasised.

14. One other mechanism that was suggested during the hearing was promoting the role of a specialised child advocate or *curator ad litem* for safeguarding the rights and conveying the perspective of children in proceedings. A benefit of an advocate for children is that they will know they have, at all times, an adult who represents them, and whom they can trust and turn to and discuss their views in confidence. Currently, access to such child advocates will often bare a high cost.

❖ **Implementation and enforcement of decisions in high-conflict parental separation**

15. Stakeholders noted that, over time, different methods of enforcement had been explored in the situation of an “implacably hostile” or resistant parent who refused to comply with court orders. Measures such as imposing fines on a parent were considered often to be impractical, belittling and/or disproportionate. In this respect, they considered that one should look outside the scope of family law to find inspiration for more adequate solutions for enforcement. It was agreed that, from the very outset, preventative tools should be promoted, that give an understanding of the importance of compliance with decisions issued and place emphasis on their temporary nature, and that these could or should be subject to updates/reviews.

16. Emphasis was also placed on the need to impose measures with the aim of preventing adverse impact, and for harsher measures to be taken only as a last resort. Measures that could drastically affect the lives of children, such as custodial sentencing, should only be enforced when a parent had implacably refused to comply with a decision, and only after a judge has determined it to be in the child's best interests.

17. The issue of reviewing a decision in a timely manner was another point for enforcement that was highlighted. When an agreement or decision was not upheld by one of the parties, in some cases, it could take a lengthy time to hear a case in court and to review a decision, which could potentially further escalate a conflict and cause more harm to the child. In this respect, stakeholders expressed that there might be a need to look into the possibility of emergency injunctions and orders.

❖ **Consideration of the best interests of the child and his or her rights in case of his/her relocation with one parent, including abroad**

18. Relocation is an increasingly complex issue. A child and a parent may relocate, and a new family may be established, which may involve new parental figures such as partners and step-parents, as well as new siblings and step-siblings. This complexity of suggests the need

for a case-to-case approach that balances the rights of both the original family and the new family through an assessment process. Stakeholders emphasised that all parties involved in relocation cases need to have an understanding of their rights, status and capacity to pursue those rights after relocation.

19. It was further noted that relocation can become increasingly complex in a transnational family dynamic, which can take on multiple dimensions, for example, sometimes one of the parents may not join or see the child because he or she does not the required formalities or documentation to travel or the rights of the child to keep contact with his or her parent imprisoned.

20. In relocation cases, stakeholders underlined the need to foster cross-border networks for all actors that may be involved in relocation proceedings, including for child protection, social services, lawyers and mediators.

SESSION 2 – Protection of the best interests of the child and his/her rights in care proceedings

❖ **Consideration to be given where parental separation situations and childcare proceedings intersect in the context of high conflict parental situations**

21. Stakeholders considered that, in practice, parental separation proceedings only very rarely led to situations which called for child protection measures, such as limitations of parental responsibility or even placement in alternative care.

22. When multiple proceedings occurred in parallel to one another, such as a separation, care and maybe even criminal proceedings, there was a need for a multidisciplinary and interagency approach that enabled close collaboration with the involvement of different actors and professionals.

23. Stakeholders also called for the need to recognise that, in some high-conflict cases such as those involving domestic violence where there are ongoing criminal proceedings, there was a need for professionals to share information, in order to ensure good and informed decision making.

24. High-conflict cases might signal the need for a child protection assessment. In these instances, it is vital that mediators and judges are trained to identify cases involving a high risk for the child, to identify and separate cases where there is a real risk for the child, as well as cases where allegations are made by a parent to strengthen their own position. Stakeholders indicated that there is a need to develop codes of conduct and that they receive support to fully comprehend concepts, such as child protection, parental alienation, and potential coercive control by one parental party. Trainings should also cover international conventions in this area, such as the Istanbul Convention on preventing and combating violence against women and domestic violence (CETS No. 210).

25. Stakeholders reflected on the need to empower parental parties in high-conflict cases where a child protection issue may arise and there is a risk of harm to the child. In such cases,

mediators indicated that often a parent came to them to seek advice on how to act and signal if they perceived a risk for their child. They emphasised the difficulties faced by a parent in such cases, taking into account the fact that the separation itself was sometimes putting a parent in distress, not to mention the feeling of guilt or blame they may be experiencing. Mediators emphasised the importance of their role in providing guidance to empower parents in such situations, by informing them of the services they can reach out to and the alternatives they can seek when acting responsibly and taking a decision in a given circumstance, without feeling guilty or be blamed.

26. High-conflict cases can trigger multiple proceedings and decisions which require exchange and cooperation between all actors involved (civil, administrative and criminal proceedings).

❖ **Best interest determination in care proceedings**

27. Several stakeholders indicated that placement in care should be a measure of last resort and that the objective pursued should be to avoid placing the child in care. When a child is placed in alternative care, there is a need to strike a balance between the temporary care placement, the child's right to maintain contact with their family, family reunification and the child's need for stability.

28. Stakeholders stressed that the best interest determination in care proceedings was also an ongoing process and was not limited merely to binding court decisions. The best interest of the child is related to several decisions that are to be taken, including, but not limited to, placement, access, and the consideration of the needs of the child, which are evolving and/or changing over time.

29. The best interest of the child assessment should determine the upbringing for the child, which includes, where possible, prospects for family reunification and the right to maintain a good relationship with the family, balanced against considerations to ensure the child's safety. To make contact and visitation rights effective, children and parents should be able to fully exercise their rights. This includes ensuring that parents have adequate means for travelling and making use of (public) transport to the childcare location and receive the necessary support to do so. It was stressed that the further away the location from the parent's domicile, the higher the responsibility for the State to give practical support for access and transport. Where appropriate, the notion of "contact" should be interpreted to not only be limited to physical contact but could also include opportunities for non-physical contact such as through digital platforms for messaging.

30. In case of safety concerns, a number of stakeholders indicated their preference for supervised contact, which takes into account considerations such as the cultural dynamics between a child and their parent, including their native language. The child and their parent should be able to communicate in their mother or native tongue, and States should ensure that the burden to speak in a language that is understood by a supervisor should not be placed on the child and parents, but on the authority that must ensure that the supervisor is able to understand the spoken language.

31. Where in the child's best interest, the end goal of placement is to place a child as close as possible to the child's family and network. Stakeholders suggested that kinship care should be preferred. However, stakeholders stressed the importance that services for the support of kinship care are provided in the same way as in other forms of alternative care such as foster care. Moreover, when considering kinship care, stakeholders stressed the importance of taking into account informal kinship care models; arrangements made between family members, with some authority supervision. Stakeholders also emphasised that kinship carers should receive the same kind of support as other foster carers.

Conclusions and final remarks

32. The Chairs warmly thanked the stakeholders for their excellent contributions. The Rapporteur highlighted that interveners confirmed the importance of a number of issues and measures under discussion by the CJ/ENF-ISE. In addition, they also brought to light a number of very enriching new perspectives, and among them the following:

❖ **Protection of the best interests of the child and his/her rights in parental separation proceedings**

33. **Mediation** can be a strong and helpful tool in safeguarding children's best interests in parental separation proceedings. Three requirements were particularly highlighted: firstly, the importance to adequately screen cases for their suitability for mediation, secondly, the importance of appropriate training of all professionals involved, including training on identifying situations where the child's welfare may be in danger, and, thirdly and equally importantly, the importance of making mediation services accessible, where appropriate, through providing financial aid schemes, and adequate information.

34. **Informing** the child throughout the process is key. This should include providing a child with full information, in an age appropriate and child friendly language, on how their statements would be communicated to the court, and notably to the parents, in order to allow them to discern which facts they wish to disclose, and to foster trust. **A child-advocate** (*curator ad litem*) can be a powerful support for the child throughout the proceedings, particularly in difficult conflictual cases between the parents.

35. There is a need to **promoting compliance with decisions**, for example by providing appropriate information about the benefits of compliance and consequences of parental actions in cases of non-compliance, and by promoting preventive tools. Inspiration for innovative solutions may also be found outside the scope of family law.

❖ **Protection of the best interests of the child and his/her rights in care proceedings**

36. Wherever possible, placement in care should be temporary and adequate measures to prepare for family reunification should be taken early in the process. To allow for meaningful contact, **contact and visitation rights have to be practically accessible**. Depending on the situation, this may include the need to support the parent in accessing public transport and providing for a suitable venue. Supervision of contacts should be culturally sensitive, this includes providing the possibility for parents and children to speak their native language.

37. **Kinship care** can be a very valuable option, provided that services for the support of kinship care are offered in the same way as in other forms of alternative care, such as foster care.

APPENDIX
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