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SOME ISSUES OF IDENTIFYING AND ENSURING THE "BEST INTEREST OF THE CHILD" IN RA

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The principle of ensuring the protection of the best interests of the child, embedded in international and domestic legal documents, underlies the legal system for child protection. It runs like a red thread in all legal acts regulating relations with the participation of a child; it also guides the competent authorities in almost all actions involving the child and, in the documents, drawn up as a result. The European Court of Human Rights, at the same time regarding the "best interests of the child" both as a substantive right, and as a principle, and as a norm of judicial procedure, thereby shows the comprehensive and fundamental significance of the latter. Therefore, in terms of identifying and reinforcing the evaluative concept of "the best interests of the child," it is important to develop effective training in which the "best interests of the child" will be considered as the fundamental criterion in all matters affecting the child. As a result, in the event of competition between the interests of the child and the rights of others, in all cases, the supremacy of the interests of the child will be affirmed, and even an action determined by a judicial act cannot be carried out in a way that violates the best interests of the child.

Keywords: *best interests of the child, legally protected interest, subjective right, guardianship and guardianship authority, the child's right to express an opinion, child's right to be heard, protection of rights*

The principle of ensuring the best interest of the child is provided by both international and domestic legal acts. The basis of the formation of "The best interest of the child" is the Convention on the Rights of the Child[1] (hereinafter referred to as the Convention) adopted in 1989, where the basic standards for ensuring the well-being of a child are fixed. The principle of ensuring the best interest of the child is the basis of the legal structure of child protection, which exists and operates in the context of direct connection and interaction between the subject, object of protection, and the measures applied by competent authorities in this regard. The object subject to protection is the subjective rights reserved to the child (disputed or violated) and interests protected by law, the boundaries of which are outlined in the 2nd part of the 6th Article of the Family Code[2], with the requirement of non-violation of the rights, freedoms and legal interests of others. There is no clear dividing line between the concepts of "subjective right" and "interest protected by law" in the Family Code. The dominant approach in the professional literature is the distinction between these two concepts. The characteristic distinguishing features of subjective law are clarity, certainty and legal guarantee of the highest degree[3], in another case, the absence of direct duties towards the relevant

[1] Adopted on 20.11.1989, entered into force on 22.07.1993. ՄՊՀՀՊՏ 2008/Special edition.

[2] Adopted on 09.11.2004, entered into force on 19.04.2005. ՀՀՊՏ 2005.01.19/4(376) Art. 60.

[3] See **Малеина Н. М.** Защита личных неимущественных прав советских граждан, М., 1991, Знание, p. 9-10.

persons, not opposed to the interest protected by law[4] S. S. Alekseev defines a subjective right as a means of permissible behavior belonging to a legal person for the purpose of satisfying his interests, which is secured by the legal obligations of other persons.[5] The mediating nature of the "interest protected by law" also follows from the latter approach. Not identifying these two concepts, we believe that they do not exist completely isolated from each other. On the contrary, by outlining the scope of children's rights, becoming the guarantor of their realization, and creating a bridge through harmonious interaction, the basis of the child's rights protection system is formed.

The Arbitration Council operating in the American legal system also adopts the approach of separating the concepts of "right" and "interest". Admitting that the concepts of disputes about rights and interests are not fixed in any provision of the law, he noted: "The dispute of the part of the law refers to the rights stipulated in the law, the agreement or the collective agreement and based on the law council can resolve it... The dispute about the interest has no basis arising from the law, agreement or the collective agreement and the Council resolves it based on the principles of justice".[6]

"Interest" as a legal term, concept, and phenomenon has a special manifestation in the context of relationships involving a child. Various definitions have been voiced in scientific circles. Thus, A. M. Nechaeva, referring to the term "child's interest" several times, considers it not certain and subject to various interpretations, considers the conscious need under interest, and according to the author, the minor is not always able to realize what he needs and why.[7] O. Yu. Ilina considers the child's interest as his need to achieve a certain good, both directly defined by the law and not prohibited by it, recognized by legal norms.[8] M. B. Antokolskaya considers the "interest of the child" from the standpoint of "public interest" and considers that the protection of "child's interests" is at the same time the protection of the public interest.[9] Thus, the author elevates the "interest of the child" to the level of a publicly valued and appreciated phenomenon.

The European Court of Human Rights (hereinafter referred to as the ECtHR) has repeatedly referred to the disclosure and provision of the "best interest of the child" in its precedent decisions, assessing it simultaneously as a material right, a principle, and a rule of procedure.[10] The ECHR has laid down a procedural rule that in all cases where the proceedings are directly related to the rights defined by Article 8 of the European Convention for the Protection of

[4] See Теория государства и права, /Под ред. Н. И. Матузова, А. В. Малько/ - 2. изд., перераб. и доп. - М. : Юристъ, 2004, p. 209-211.

[5] See **Алексеев С. С.** Общая теория права, М.: Проспект, 2009, p. 305.

[6] Available at https://www.arbitrationcouncil.org/right-vs-interests-disputes-whats-the-difference/ as of 24.04.2023.

[7] See **Нечаева Л. М.** Семейно-правовой статус несовершеннолетних, //Проблемы реализации правовых норм в период проведения судебно-правовой реформы, Тюмень, 1994, p. 140.

[8] See **Ильина О. Ю.** Проблемы интереса в семейном праве Российской Федерации, М, Городец, 2007 p. 78.

[9] See **Антокольская М. В.** Семейное право, Учебник, Изд. 2-е, перераб. и доп., Ibid, p. 228.

[10] See European Court of Human Rights, Case of **Olsson v. Sweden (No. 2),** 27.11.1992, app No (s). 13441/87. European Court of Human Rights, Case of **P., C. and S. v. The United Kingdom,** 16/07/2002, App. No(s). 56547/00. European Court of Human Rights, Case of **W. v. The United Kingdom,** 08/07/1987, Application No. 9749/82.

Human Rights and Fundamental Freedoms[11], must be fair and give the beneficiary the opportunity to fully present his arguments in court, emphasizing the child's right to be heard in court.

UN Committee on the Rights of the Child[12] (hereinafter the Committee) interprets the "interest of the child" as a dynamic, complex, comprehensive concept that cannot be defined abstractly and objectively. It must be determined on a case-by-case basis, taking into account the situation, the personal context and the needs of the child.[13] In terms of ideology, the Constitutional Court also expressed the same position, noting that the concept of "child's interest" is subject to evaluation in each specific case based on a combined analysis of all the factual circumstances of the given case.[14]

In the American legal literature, the "best interest of the child" is defined as a vague standard (criterion), which can be problematic, first of all, in connection with the court's determination of the "best interest of the child" in competitive proceedings.[15] In particular, it is mentioned: “In determining the best interest of the child, the court needs the support of the legislature, which is unlikely to be provided by any other entity”[16], and the incomplete disclosure of the meaning and content of "best interest" in legislative acts and the unlimited opportunity given to the court or other competent entities to determine the "best interest of the child" without semantic restrictions, carries the risk of increasing arbitrariness.[17]

In the presented approaches, the enumeration of the exhaustive list of circumstances in the legal acts that will become the revealer of the "best interest of the child" is especially important. According to Andrea Scharlow, some countries have gone as far as enumerating in their legislation a list of circumstances that the competent entity must consider when determining the best interests of the child, while other countries have left the determination of these circumstances to the discretion of the courts. However, no state is clear on what is "the best interests of the child" criterion (standard). It should be applied to create a happy childhood or a well-adjusted adult.[18]

Despite the lack of clear definitions of the concepts of "child's interest", "child's legal interest" and "child's best interest" laid down in the Family Code[19],

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[11] Adopted on 04.11.1950. Entered into force on 26.04.2002.

[12] The UN Committee on the Rights of the Child supervises the implementation by the member states of the UN Convention on the Rights of the Child, ratified by RA in 1993, and of the two protocols attached to the Convention.

[13] **Otto Luchterhandt, Nora Sargsyan,** Regulation of children's rights according to RA 2015 under the editorship of the Constitution, "Bulletin of Yerevan University. Jurisprudence", Yerevan, 2019 N 2 (29), page 31.

[14] See the decision of the RA Constitutional Court SDO-919 of October 5, 2010.

[15] See **Katherine Hunt Federle & Danielle Gadomski,** The Curious Case of the Guardian Ad Litem, available at https://udayton.edu/law/_resources/documents/law_review/curious_case_of_the_guardian.pdf as of 25.04.2023.

[16] See **Katherine Hunt Federle** "Children’s Rights and the Need for Protection", Family Law, Quarterly 34(3), 2000, p. 426-427.

[17] See **Katherine Hunt Federle & Danielle Gadomski,** The Curious Case of the Guardian Ad Litem, Ibid.

[18] See this author's review ibid.

[19] "The best interest of the child" is equivalent to the concept of "the best interest of the child" provided for in Article 3, Part 1 of the Convention on the Rights of the Child, which is one of the 4 general principles of interpretation and implementation of the Convention on the rights of children. About this, see **Otto Luchterhandt, Nora Sargsyan**, Ibid, page 31.

they have a standard role. In the relationship with the child, everyone, the competent body, in their actions, should proceed from ensuring the integrity and protection of that "interest". The peculiarity of "child's interest" is caused by the child's inability to fully realize his demands and interests. Part 8 of Article 1 of the Family Code is aimed at confirming this, according to which if any norm can be applied differently, the best interests of the child shall be taken into account when applying it.

The definition of a non-exhaustive range of characteristics of the concept of "child's interest" or "child's best interest" for individual situations in the Family Code and the obligation of the entities responsible for ensuring this speak of its evaluative nature. However, there are circumstances that are universally considered in determining the "best interests of the child". For example, in the case of parents living separately from each other, when determining the place of residence of the child, for the court as "best interest" revealing circumstances are indicated: the attachment of the child to each of the parents, siblings, the age of the child, other moral and personal characteristics of the parents, existence between each of the parents and the child relationships, the possibility of creating conditions for the upbringing and development of the child (the nature of the parents' activity (work), their property and family situation, etc.). For example, statutes in 22 US states and the District of Columbia include the parent's ability to provide a safe home and adequate food, clothing, and medical care, the child's physical and mental needs, the parent's physical and mental health, the presence of domestic violence in the family.[20]

Guardianship and trusteeship bodies (hereinafter also referred to as Guardianship Bodies) have a key role among the entities obliged to ensure the "best interest of the child".[21] Court disputes regarding child care, upbringing, determining the place of residence and in a number of cases provided for by law shall be carried out exclusively with the mandatory participation of Guardianship Bodies. According to part 2 of Article 67 of the RA Family Code, the Guardianship Authority is obliged to conduct an investigation of the living conditions of the child and the person(s) who claim(s) to organize the care and education of the child and submit the investigation act and it's based on the conclusion about the nature of the dispute. Thus, the Guardianship Body submits to the court the research act and the conclusion about the essence of the dispute.

In the civil case No. SD3/0139/02/15 of December 02, 2016, the RA Court of Cassation (hereinafter referred to as the Court of Cassation) recorded that although the presence of the conclusion of the Guardianship Body is mandatory in cases related to the upbringing of a child and it is of a professional nature, however, the court should not limit itself to repeating the provisions mentioned in the conclusion of the Guardianship body, should ensure their validity and compare it with other evidence obtained in the case. Only after that, taking into account their combination and interrelation, the law should be applied, consider-

[20] Available at https://www.childwelfare.gov/pubPDFs/best_interest.pdf as of 23.04.2023.

[21] The activities of guardianship and trusteeship bodies shall be regulated by "Decision No. 164 of February 24, 2011 of the Government of the Republic of Armenia on Approving the Charter of Guardianship and Trusteeship Bodies" by Decision No. 631-N of June 2 (hereinafter also Decision).

ing the court's internal conviction to decide the issue of rejection or satisfaction of the submitted claims.[22]

Within the framework of another case, the Court of Cassation raised the following legal question: whether the act of research submitted by the Guardianship Body, which was conducted without researching the life of the child and one of the parents claiming to raise him, can be evaluated by the court as proper evidence for the resolution of the dispute. In response, he recorded that the guardianship and trusteeship body is obliged to conduct an investigation of the life of the child and of the person(s) who claim to raise him/her, according to the law.[23] Thus, the Court of Cassation made an attempt to expand the scope of the investigation of the Guardianship Body to include all the persons who claim to raise the child. However, the monitoring of the activities of Guardianship Bodies proves that they are very often limited to researching the life of only one party (often only the plaintiff party). In their conclusions, as a rule, they refer to the right of "the best interest of the child", formally referring to domestic and international norms, without applying the General Comment No. 14 of 2013 of the UN Committee on the Rights of the Child[24] (hereinafter also General Comment No. 14) defined elements by which the scope, presence or absence of the best interest of the child in a given situation should be determined under Article 3 of the Convention. As a result, the conclusions are often declarative in nature, offering traditional solutions, for example, taking into account the interest of the parent of the child rather than the child. The reason for this is the existing legal regulations, to the extent that the implementation of the functions of Guardianship bodies is delegated to the heads of communities, and there is no legal requirement for these officials to have appropriate specialization. As for the guardianship and trusteeship commissions (hereinafter also referred to as the Commission) created under the guardianship bodies, they may include from three to nine persons and these persons may be structural divisions of the staff of regional governorships (Yerevan City Hall in Yerevan), regional social assistance agencies (departments) workers, community employees of the municipal administration staff, medical workers, community educators, psychologists, social work specialists and lawyers, as well as representatives of non-governmental organizations (with consent) (Decision, clauses 11-14)). Under the conditions of such a discretionary requirement, it is possible to form, for example, a Commission that will be composed only of lawyers. Meanwhile, it is obvious that in order to identify the best interests of the child, it is necessary to include not only lawyers, but also psychologists and pedagogues in the Commission, and this should be a mandatory, not a discretionary requirement.

Studies show that Guardianship bodies and Commission members do not have appropriate specialization and experience, do not know referral mechanisms, and do not have methodical literature. Although on January 31, 2017, the Minister of Labor and Social Affairs approved the "Methodological guidance on

[22] See the decision of the RA Court of Cassation dated December 02, 2016 in civil case No. SD3/0139/02/15.

[23] See the decision of the RA Court of Cassation of March 23, 2012 in civil case No. YAKD/0474/02/11.

[24] See UN Committee on the Rights of the Children, General Comment № 14 (2013).

the activities of guardianship and trusteeship commissions attached to the guardianship and trusteeship authorities," which states that when examining or making a decision on any question regarding a child, it is necessary to take into account the best interests of the child it does not provide methodological instructions on how to determine it. Despite the fact that, both at the legislative level and by precedent decisions of the Court of Cassation, it was recorded that the conclusion of the Guardianship body is evidence of a professional advisory nature, the courts generally resolve the dispute based on the said conclusion.

After the systemic changes made in 2018, part 2 of Article 203 of the RA Civil Procedure Code[25] (hereinafter referred to as the Civil Procedure Code) established the possibility for the courts to find out the factual circumstances of the case ex officio when examining family dispute cases. The legislator established that the court is obliged to take the necessary steps based on the need to ensure the best interests of the child, which means that in order to identify the "best interests of the child", the courts are obliged to involve educators, psychologists, appoint various experts and not limit themselves only to the guardianship body on their own initiative often with a one-sided and subjective conclusion. According to the 3rd part of the same article, based on the need to ensure the best interests of the child, the court, on its own initiative or through the mediation of the party, may prohibit or oblige other persons participating in the case or other persons to perform certain actions, even if the applied means of securing the claim apparently leads to the actual fulfillment of the presented claim. It is noteworthy that a separate procedure for disputing the research report and conclusion provided to the court by the Guardianship Body is not provided, the participants of the trial can dispute it exclusively during the trial.

According to Article 6 of the RA Law "On Enforcement of Judicial Acts"[26] representatives of the guardianship and trusteeship authority participate in the implementation of enforcement actions when carrying out enforcement actions related to handing over the child to one of the parties, when carrying out enforcement actions related to the visitation of the child if the need arises. It follows from this that the participation of the representative of the guardianship authority is mandatory when carrying out enforcement actions related to handing over the child to one of the parties, while it is not necessary when carrying out enforcement actions related to visitation.

In all cases, when the decision made by the court is in the best interests of the child but contradicts the child's opinion and wishes, then the enforced execution of the court act must be carried out exclusively with the participation of a psychologist or pedagogue, who must carry out appropriate work with the child, otherwise, the child will be subjected to violence. Placing him in the care of a court-ordered parent against his will or visitation would also be against the child's best interests. We encounter such a situation in one of the precedent decisions of the RA Court of Cassation, where in one case, the Court of Cassation emphasized the importance and necessity of the child's rights to be heard, to express an opinion, and in another case, the parent's right to prefer to educate

[25] Adopted on 09.02.2018. Entered into force on 09.04.2018. HHPT 2018.03.05/16(1374) Art.208.

[26] Adopted on 05.05. 1998. Entered into force on 01.01.1999. HHPT 1998.06.15/12(45).

the child over other people, and as a result, evaluating and combining the said rights from the point of view of the best interests of the child, the rights and interests of the parent are given priority.[27] In order to avoid such problems, in addition to involving a psychologist and/or pedagogue, Article 36 of the RA Law "On Enforced Execution of Judicial Acts" also provides for the possibility of postponing or rescheduling the execution of a judicial act, changing the manner and order of its execution. We can confidently assert that even the action determined by the legal act of the court cannot be carried out in violation of the best interest of the child.

In the current version, the Code of Civil Procedure provides for a number of tools aimed not only at identifying the "best interests of the child", but also at achieving them during the trial. In particular, according to part 3 of Article 203 of the Civil Procedure Code of the Republic of Armenia, based on the need to ensure the best interests of the child, the court, on its own initiative or through the mediation of a party, may prohibit or oblige other persons participating in the case or other persons to perform certain actions, even if the claimed security is applied the remedy shall appear to result in the actual fulfillment of the claim made. For example, during child visitation disputes, it is necessary to ensure periodic contact between the parent and the child, etc., until the final court decision is made. The mentioned legal regulation provides an opportunity to present such motions as necessary to determine the "best interest of the child" such as involving a psychologist or pedagogue in the trial, delaying the execution of the judicial act, providing the conclusion of the guardianship body, etc.

Thus, we can define the "interest of the child" as a concept valued by the law (jurisdiction). In terms of the regulation of relations related to the protection of the child's interests, the definition of "child's interest" is of landmark importance because when regulating these relations, the state follows the path of satisfying the child's needs, serving the child's interests. Through legal norms, the state defines the interests of the child protected by law, the necessary legal measures to prevent their possible violations or to restore the violated right, and the corresponding legal consequences in case of violations. The first step in ensuring the child's interests should be expressed by the persons responsible for their realization or by the state bodies creating certain conditions for his life and upbringing, which first of all implies the determination of the subjective rights of the child and the obligations of other persons and competent authorities in order to ensure their realization, and the rights of the child and establishing the methods and forms of protection of interests is necessary in order to prevent and eliminate possible violations.

Analyzing the approaches expressed in the professional literature regarding the concepts of "best interest of the child" and "subjective right of the child," the interpretations given in the legal practice, and the current trends in the development of legislation, we can state that they are closely related and mutually dependent on each other. We agree with the point of view that "... interest is not included in the content of the subjective right, but is necessary for

[27] See the decision of the RA Court of Cassation of December 27, 2011 in civil case No. ARAD/0264/02/11.

the existence of that right"[28], and we do not consider the definition of the concept of "best interest of the child" and the exhaustive fixation of the circumstances that reveal it in the law to be realistic. When making a decision in each situation, next to the general circumstances revealing the "best interest of the child", the typical circumstances arising from the situation and caused by the person of the given child, the legal representative must be identified and evaluated in a general combination. Therefore, the expansion of the set of circumstances considered revealing the content of the concept is not the fundamental guarantor of the protection of the child's rights and interests. Therefore, we emphasize the formation of such a legal culture in which "the best interest of the child" will be perceived as a fundamental criterion in all matters related to the child (determination of the child's status, organization of care and upbringing, realization of this or that right, limitation, protection), "right" and "interest" " will be considered not in isolation, but in the context of interdependence. In case of competition between the interests of the child and the rights of others, the primacy of the interest of the child will be confirmed. Even the action decided by a judicial act cannot be carried out in violation of the best interest of the child.

ՌՈՒԲԻՆԱ ՊԵՏՐՈՍՅԱՆ – *«Երեխայի լավագույն շահի» բացահայտման և ապահովման որոշ հիմնախնդիրներ ՀՀ-ում* – Միջազգային և ներպետական իրավական փաստաթղթերում ամրագրված՝ «երեխայի լավագույն շահի» ապահովման սկզբունքն ընկած է երեխայի պաշտպանության իրավական կառուցակարգի հիմքում: Այն կարմիր թելի նման անցնում է երեխայի մասնակցությամբ հարաբերությունները կարգավորող բոլոր իրավական ակտերում, իրավասու մարմինների կողմից վկայակոչվում է երեխայի մասնակցությամբ գրեթե բոլոր գործողություններում և դրանց արդյունքում կազմված փաստաթղթերում: Մարդու իրավունքների եվրոպական դատարանը, «երեխայի լավագույն շահը» գնահատելով միաժամանակ թե՛ նյութական իրավունք, թե՛ սկզբունք և թե՛ դատավարության կանոն, այդպիսով ցույց է տալիս դրա ընդգրկուն և հիմնարար նշանակությունը: Հետևաբար, «երեխայի լավագույն շահ» գնահատողական հասկացության բացահայտման և ապահովման առումով կարևոր է այնպիսի իրավական մշակույթի ձևավորումը, որում «երեխայի լավագույն շահը» կընկալվի որպես հիմնարար չափանիշ երեխային առնչվող բոլոր հարցերում: Արդյունքում երեխայի շահերի և այլոց իրավունքների միջև մրցակցության դեպքում կհաստատվի երեխայի շահի գերակայությունը, և անգամ դատական ակտով որոշված գործողությունը չի կարող իրականացվել «երեխայի լավագույն շահի» ոտնահարմամբ:

Բանալի բառեր – *«երեխայի լավագույն շահ», օրենքով պաշտպանվող շահ, սուբյեկտիվ իրավունք, խնամակալության և հոգաբարձության մարմին, երեխայի կարծիք արտահայտելու իրավունք, երեխայի լսված լինելու իրավունք, իրավունքների պաշտպանություն*

[28] See **Алексеев С. С.** Общая теория права, М., Ibid., p. 358.

РУБИНА ПЕТРОСЯН – *Некоторые проблемы выявления и обеспечения «наилучших интересов ребенка» в РА.* – Принцип обеспечения защиты наилучших интересов ребенка, заложенный в международных и внутригосударственных правовых документах, лежит в основе правовой системы защиты ребенка. Он красной нитью проходит во всех правовых актах, регулирующих отношения с участием ребенка, им же руководствуются компетентные органы практически во всех действиях с участием ребенка и в оформляемых в результате документах. Европейский суд по правам человека, одновременно расценивая «наилучшие интересы ребенка» и как материальное право, и как принцип, и как норму судопроизводственной процедуры, тем самым показывает всеобъемлющую и фундаментальную значимость последнего. Следовательно, в плане выявления и закрепления оценочного концепта «наилучшие интересы ребенка», важна разработка такого эффективного обучения, при котором «наилучшие интересы ребенка» будут рассматриваться как основополагающий критерий во всех вопросах, касающихся ребенка. В результате, в случае возникновения конкуренции между интересами ребенка и правами других, во всех случаях, будет утверждено верховенство интересов ребенка, и даже действие, определенное судебным актом, не может быть осуществлено путем нарушения наилучших интересов ребенка.

Ключевые слова: *наилучшие интересы ребенка, охраняемый законом интерес, субъективное право, орган опеки и попечительства, право ребенка на выражение мнения, право ребенка быть услышанным, защита прав*