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# **THE BEST INTERESTS OF THE CHILD. ANALYSIS OF THE CONCEPT IN THE CASE OF PARENTAL DIVORCE**

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## ***Abstract***

*The child, a vulnerable being, represents our hope for the future. Respect for the best interests of the child is respect for humanity, and the child's place in society is undeniable. The legal recognition of this principle at the international level has been necessary, given cultural, educational, and family structure differences worldwide. The legal regulation of the principle, initially as the child's well-being and later as the child's best interests, is relatively recent, and the concept remains evolutionary, requiring a forward-looking perspective on the child's future.*

*In any decision or evaluation concerning a child, they must be respected and heard. When balancing the child's interests with those of others, if a fair balance cannot be achieved, the child's best interests must be given priority. Procedural safeguards, such as the child's right to be heard, reasonable deadlines in decisions affecting them, specialized training for those involved, and justification of decisions, are necessary to uphold this principle.*

*This study focuses on analysing the fundamental concept from the perspective of the child's situation following parental divorce, when they become more fragile, emotionally affected, saddened, and sometimes even hopeless. In such cases, they require additional protection that parents in conflict may no longer be able to provide, making the intervention of notaries, judges, psychologists, and child protection specialists crucial.*

**Key words:** *best interests of the child, parental authority, child's residence, right to personal relationships.*

## INTRODUCTION

It is impossible to approach the best interests of the child without taking a holistic perspective on all aspects of the child's physical, psychological, moral and spiritual well-being.

This principle must prevail in any decision concerning the child, as it is a complex, fundamental, dynamic, and flexible concept. International bodies, EU institutions, national governments, legislatures, administrative authorities, social services, courts, psychologists, doctors, teachers, and parents all bear the responsibility of protecting children and prioritizing their stability and security in difficult situations.

The current status of the child has not always been recognized and respected. Infanticide, child trafficking, paternal subordination, viewing children as mere tools for their parents<sup>1</sup>, all these practices that marked long periods of history ended when children's rights were placed at the forefront (*Mihăilă, 2023, pp. 101-104; Floare, 2021, p. 97; Gidro, Gidro, 2014, p. 94*).

The best interests of the child are enshrined in various legal frameworks: the 1924 Geneva Declaration on the Rights of the Child, the 1959 Declaration of the Rights of the Child, the 1989 Convention on the Rights of the Child<sup>2</sup>, the 1950 European Convention on Human Rights and Fundamental Freedoms, the 1996 revised European Social Charter, and the 2000 Charter of Fundamental Rights of the European Union (which recognizes children as "independent and autonomous rights holders" in Article 24) (*Mihăilă, 2021, p. 33*). The 2009 Lisbon Treaty further establishes the protection of children's rights as a general objective of the

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<sup>1</sup> 'Children must no longer be considered as parents' property, but must be recognised as individuals with their own rights and needs' - Parliamentary Assembly Recommendation 874 (1979).

<sup>2</sup> The UN Convention on the Rights of the Child which establishes the fundamental rights of children was adopted on November 20, 1989, and ratified by a record number of states. The core principles of the convention include non-discrimination, devotion to the best interests of the child, the right to life, survival and development, and respect for the child's views.

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ANALYSIS OF THE CONCEPT IN THE CASE OF PARENTAL DIVORCE EU<sup>3</sup>. The institutions of the European Union have developed a strong commitment to this principle, which is why specific regulations can be found in both primary and secondary sources of EU law, including EU Regulations as well as numerous Directives and Decisions. (*Borlianu, 2021, p. 25*). At the national level, the best interests of the child are recognized in the Romanian Constitution: Article 48(3) and Article 4, the Civil Code: Article 262(2), Article 263 explicitly named the "Principle of the Best Interests of the Child", Article 396(1), Article 452(a), Article 483(2), Law No. 272/2004 on the Protection and Promotion of Children's Rights: Articles 6(a), 8, 17(1) and (2), 19, 22, 36(2) and (8), and Law No. 273/2004 on Adoption Procedures: Articles 1 and 8(1). (*Ghiță, Cercel, 2018, pp. 131-134; Motica, 2014, p. 134; Ardeleanu, 2020, pp. 158-178*).

The child's best interests may be invoked independently, even in the absence of explicit legal provisions. This concept constitutes both a material right of the child, taking precedence over the rights of others and a fundamental legal principle ensuring the respect and protection of children's rights (*Pivniceru, Luca, 2026, p. 16*).

The primacy of the child's best interests in all decisions affecting them is reinforced by the European Parliament Resolution of April 28, 2016: "The best interests of the child must be paramount in all decisions concerning children at all levels."<sup>4</sup> Consequently, this principle must override any national or international legal provision.<sup>5</sup>

General Comment No. 14 (2013) of the UN Committee on the Rights of the Child, concerning Article 3(1) of the Convention on the Rights of the Child<sup>6</sup>, defines the concept through three key elements. First, it is a child's right to have their best interests evaluated and given priority in all decisions, whether public or private. Second, any decision-making process that may affect a child must include an assessment of the potential impact, considering both positive and negative effects. Finally, the best interests of the child must be seen as a fundamental legal interpretative principle; as a result, when different legal interpretations exist, priority must be given to the one that best serves the child's interests.

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<sup>3</sup> Other Relevant Documents: European Convention on the Legal Status of Children Born out wedlock, 1975, Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, Convention on Contact Concerning Children, 2003, Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 2007 (Lanzarote Convention), European Convention on the Adoption of Children, revised, 2008.

<sup>4</sup> European Parliament Resolution of 28 April 2016 on Safeguarding the best interests of the child across the EU on the basis of petitions addressed to the European Parliament (2016/2575(RSP)) (2018/C 066/01), OJEU C66/2, 21.02.2012.

<sup>5</sup> Opinion of the European Economic and Social Committee on 'The protection of unaccompanied minors in Europe' (own-initiative opinion) (2020/C 429/04). JO C 429, 11.12.2020, 24-29.

<sup>6</sup> UNCHR, GENERAL COMMENT NO. 14 (2013) ON THE RIGHT OF THE CHILD TO HAVE HIS OR HER BEST INTERESTS TAKEN AS A PRIMARY CONSIDERATION (ART. 3, PARA. 1) CRC/C/GC/14, 29 MAY 2013.

The best interests of the child will take precedence over those of any other individual. For this reason, courts may override a parental agreement regarding the child's place of residence or even the child's own preference to live with a more lenient parent if it is determined that the child's best interests lie elsewhere (*Ghiță, Cercel, 2018, p. 136*).

When making decisions that will impact a child, the court must consider factors such as the child's age, safety, well-being, continuity of care, understanding level, and personal wishes (*Goldan, Stanciu, 2023, p. 187*). Relevant elements include the child's opinion, identity, family environment, care and protection, health, education, and vulnerability (e.g., disability, victim status, or group affiliation).

The complexity of this principle makes its application mandatory not only in judicial or administrative proceedings but also in public policies, budget planning, and social programs. Unlike adults, children are fragile beings who cannot adequately protect their interests, making it imperative that society collectively prioritizes their well-being.

Moreover, the notion must be assessed individually for each child, considering their personal context and needs. A child "should neither be seen as incomplete nor reduced to the adulthood they carry within them; they must be understood according to the unique structure of their age, which has its own logic and world" (*Youf, 2002, p. 24*).

From a judicial perspective, the child's best interests require both an abstract evaluation (prioritizing the child's interests in all cases) and a concrete one (analysing the specific circumstances of each case). Due to its complexity, this principle must not be misused or invoked abusively. In *General Comment No. 14* it is stated that "the concept of the child's best interests has been abused by Governments and other State authorities to justify racist policies, for example; by parents to defend their own interests in custody disputes; by professionals who could not be bothered, and who dismiss the assessment of the child's best interests as irrelevant or unimportant." To avoid the stereotyping and excessive invocation of this concept, it is essential to view the child as an entity as complex as they are distinct from others. (*Moloman, 2024, pp. 92-93*).

The flexibility of the concept is closely tied to its dynamic nature, evolving with political and legislative changes as well as advancements in child development research.

Although not explicitly recognized in the European Convention on Human Rights, the European Court of Human Rights (ECHR) consistently applies the principle in cases involving children, particularly concerning private and family life (Article 8). The Court of Justice of the European Union has similarly upheld the best interests of the child in cases related to returning a child to their country of origin or determining the competent court.

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This paper focuses on the best interests of the child in the context of parental divorce, particularly concerning child residence and maintaining relationships with both parents. Recent discussions have also expanded the concept to include bioethics and the rights of same-sex couples, adding new dimensions and interpretations to the principle.

### I. THE BEST INTERESTS OF THE CHILD IN THE CASE OF PARENTAL DIVORCE

Parental divorce inevitably creates trauma for children, with profound psychological, emotional, and social effects. The entire process is stressful, even in the absence of conflict involving the child and regardless of how much care parents take to protect them. A child must have the freedom to maintain relationships with both parents without living in a constant battle<sup>7</sup>.

In cases of divorce, the best interests of the child remain in the hands of judges and psychologists, who, despite their fairness and good intentions are ultimately strangers compared to the parents who should be the ones making the best decisions for their child (*Irinescu, 2021, p. 174*). However, parental agreements must be overseen by the court because the effects of divorce may influence the parents' judgment, potentially leading to their own interests overshadowing those of the child. As a result, the court has the difficult task of ensuring that the child never becomes a tool in parental conflicts (*Motica, 2018, p. 320*). At the same time, courts do not have years to fully understand the needs and interests of the child and social investigations are sometimes conducted hastily. One might wonder why the legislator has not established specific regulations addressing this issue, with clear procedural rules to ensure that children are not subjected to judicial proceedings that affect them more than the divorce itself (*Lugănașu, 2021, p. 160*).

Additionally, how broad is the court's discretion when determining the child's best interests? Does the judge have discretionary power under the pretext of acting in the child's best interests? Does the judge have the power to make discretionary decisions under the pretext of serving the child's best interests? If a court establishes a personal relationship schedule beyond the limits set in the petition, it may conflict with procedural provisions regarding the right of disposition of the parties (*Neamț, 2021, p. 227*).

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<sup>7</sup> Children are and must be the primary beneficiaries when their parents' interests are in conflict, and if they themselves are sufficiently mature to clearly express their own preferences. ECHR, *case of Ignaccolo-Zenide v. Romania*, Application no. 31679/96, 25 January 2000.

In another case, the Court ruled that forcing the minor to see her father would severely disrupt her emotional and psychological balance (despite the fact that no psychological report had been conducted in the case regarding the possibility of establishing contact between the child and the applicant, but only a statement presented by a psychologist was submitted). ECHR, *case of Sommerfeld v. Germany*, Application no. 31871/96, 8 July 2003.

Undoubtedly, changes in family models have led judges to rethink the entire concept of the child's best interests. The fact that the notion is not clearly defined is both an advantage and a disadvantage. On the one hand, it is beneficial because every child is unique and should be treated accordingly; a uniform standard would prevent judges from making case-by-case decisions. On the other hand, the lack of a clear definition may lead to inconsistent decisions based on the individual perspective of each judge, which can create uncertainty and be perceived as arbitrary.

## II. Parental Authority After Divorce

Regarding parental authority after divorce, both parents are responsible for ensuring the child's harmonious growth and development, free from conflicts that may negatively impact them. As such, parental authority is exercised jointly and equally by both parents, as it is in the child's best interests to be raised and educated by both parents, even after their divorce (*Avram, 2022, p. 424*). The provisions of Article 488 of the Civil Code reinforce these statements.

However, there are exceptions to the general rule of joint parental authority. In certain cases, parental authority may be exercised by only one parent or even by other individuals in exceptional situations, as stipulated in Articles 398 and 399 of the Civil Code. The best interests of the child dictate whether the court will resort to these exceptions (Article 36 (7) of Law 272/2004), particularly in cases involving abusive (Article 94 (1) and (2) of Law 272/2004) or alienating behaviour by one or both parents, lack of parental involvement<sup>8</sup>, or serious parental disagreements. In legal literature and court practice, it has been established that physical distance alone is not a sufficient reason to grant sole parental authority, as modern technology facilitates communication (*Frențiu, 2018, p. 52; Barbur, 2021, p. 64*).

Another possible situation in which parental authority is exercised by only one parent is when both parents agree to such an arrangement, but only if the court determines it to be in the child's best interests. However, this does not equate to renouncing parental authority, as legal provisions prohibit such a renunciation (Article 36 (6) of Law 272/2004).

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<sup>8</sup> In this case the court ruled that parental authority should be exercised solely by the mother stating that "when parents do not live together joint exercise of parental authority consists of consulting each other when making important decisions regarding the upbringing and education of the children, while routine acts related to their upbringing and education are carried out by the parent with whom the children reside." The court further noted that "the father's limited interest in the child's upbringing and education, his violence towards the mother, as well as his convictions for violent crimes (robbery), constitute exceptional circumstances justifying his exclusion from the exercise of parental authority." Bacău Court, Civil Judgment no. 1851/21.03.2017, available online at <http://rolii.ro>, accessed on 21.10.2024.

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### III. The Best Interests of the Child in Cases of Parental Cohabitation

The legal status of a child born from cohabitation does not differ from that of a child born within marriage. The same principles apply to parental authority, requiring shared responsibilities and always prioritizing the child's best interests (*Goldan, Stanciu, 2023, p. 93*)<sup>9</sup>.

What happens if cohabiting partners separate, and one of them is not the child's biological parent?

In 2005, the French Court of Cassation<sup>10</sup> granted visitation rights to a transgender stepfather, invoking the best interests of the child. The child was initially recognized by the mother and later by the transgender man (originally female). After their separation, the mother contested the paternity recognition, and the court annulled it, ruling that it was contrary to biological truth. However, since French law allows visitation rights for persons other than parents and grandparents, the court considered this case exceptional.

On the other hand, in another case French courts have denied visitation rights to a former partner concerning a child born through assisted reproduction in Belgium, even though the claimant had raised the child in their early years. The two women had entered into a civil solidarity pact. The Paris Court of Appeal (June 5, 2014) ruled that interactions between the claimant and the child were too traumatizing and that granting visitation rights would not be in the child's best interests.

Before the European Court of Human Rights<sup>11</sup>, the claimant argued that the French courts had violated their positive obligation to ensure effective respect for family life. However, the request was denied, as French law permits a person who has developed a *de facto* family relationship with a child to obtain measures to maintain that relationship, provided it aligns with the child's best interests. The court found that the fragile child was already in a distressing and guilt-inducing situation, caught in a conflict between the claimant and the biological mother, who could not communicate without hostility.

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<sup>9</sup> Despite leaving the shared home after ten years of cohabitation, the defendant may still exercise parental authority if he has shown interest and maintained a personal relationship with the minor, with a strong bond of affection existing between them. The court ruled that it is in the child's best interests for parental authority to continue to be exercised jointly. Arad Tribunal, Decision No. 861/12.08.2016.

<sup>10</sup> COUR DE CASSATION, CHAMBRE CIVILE 1, DU 18 MAI 2005, 02-16.336, PUBLIÉ AU BULLETIN, AVAILABLE ONLINE AT [HTTPS://WWW.LEGIFRANCE.GOUV.FR/JURI/ID/JURITEXT000007051050](https://www.legifrance.gouv.fr/juri/id/JURITEXT000007051050), ACCESSED ON 29.10.2024.

<sup>11</sup> ECHR, *Honner v. France*, Application no. 19511/16, 12 November 2020.

In another case<sup>12</sup>, the court ruled that a mother's former cohabiting partner had no right to maintain a relationship with the child. The claimant sought to establish visitation rights for a child they had recognized during cohabitation. The Rennes Court of Appeal rejected the claim, prompting the claimant to question the constitutionality of the issue: If the law does not require an intentional parent to maintain ties with the child they helped raise, nor grant them visitation rights, does it violate the constitutional obligation to protect the child's best interests?

The court ruled that denying this right would sever relationships irreversibly, infringing on both the child's and the parent's right to family life. However, the request was ultimately dismissed, as French law bases personal relationship decisions solely on the child's best interests.

It is evident that both national and international courts, including the ECHR, make no distinction between children born within marriage, adopted, or born during cohabitation. Their decisions are consistently guided by the best interests of the child.

#### **IV. Parental Authority and the Child's Residence After Divorce**

Parental authority is closely linked to the child's residence after divorce. The court determines the child's residence, although parental agreements are possible under Article 400 of the Civil Code. However, according to Article 919 (2) of the Civil Procedure Code, the court must rule on the child's residence even if it was not explicitly requested in the divorce petition. Parents cannot agree for the child to reside with the non-custodial parent (*Florian, Floare, 2024, p. 376*). If the court grants sole parental authority to one parent, the child's residence will automatically be established with that parent (*Moloman, 2024, p. 232*). Even when parents agree on the child's residence, the court may decide otherwise based on evidence and the child's best interests.

Legal literature (*Neamț, 2018, p. 303*) emphasizes that determining the child's residence is not a "bonus" for one parent and it does not place the non-residential parent in an "inferior or insignificant role," (*Ionescu, 2018, p. 23*) as they remain involved in all major decisions concerning the minor.). If the reasons that led to the initial decision change, considering the child's best interests, the original measure of establishing the child's residence with that parent may be altered.

The criteria that the court considers in determining the child's residence are set out in Article 2 (6) and Article 21 (1) of Law No. 272/2004, with the paramount criterion being the child's best interests. (*Romițan, 2021, p. 240*). Besides several criteria related to the parents or other individuals, those that center

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<sup>12</sup> Cour de cassation, civile, Chambre civile 1, 6 novembre 2019, 19-15.198, Publié au bulletin, available online at <https://www.legifrance.gouv.fr/juri/id/JURITEXT000039389097>, accessed on 23.10.2024.



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on the minor are likely the most important: physical, psychological, educational, and health development needs; security and stability; the need to belong to a family; the child's opinion based on age and maturity level; the child's history, particularly cases of abuse, neglect, exploitation, parental alienation, or any other form of violence against the child, as well as potential risk situations that may arise in the future [Article 2 (6) of Law No. 272/2004].

The minor's residence may also be established at the domicile of other persons (grandparents, relatives, care institutions). In relation to this possibility, the specialized literature (*Neamț, 2021, pp. 231-233*) has analysed the way in which a third party becomes part of the process when they are not summoned from the beginning. The court cannot, on its own initiative, order the introduction of that person into the case. However, based on its active role and in the best interest of the child, the third party may be introduced in the case as a witness and may submit a principal intervention request to establish the minor's residence at their domicile. Additionally, it is noted that the court could order a psychosocial investigation to identify the most suitable person with whom to establish the minor's residence.

### **V. The Right of the Non-Residential Parent and the Child to Maintain Personal Relationships**

Another aspect closely related to the best interests of the child is the right of the non-resident parent, as well as the child's right - in fact, a single right (*Moloman, 2022, p. 37*) - to maintain personal relationships with the minor [Art. 17 (1) and (2) of Law no. 272/2004] (for the opinion that *the right to maintain personal relationships is a right of the child*, see *Filote-Iovu, 2024, p. 78*).

We might call this a 'natural' right. If the parents do not agree on how this right should be exercised the court will determine a visitation schedule according to Art. 401 (2) of the Civil Code. In recent years this right has evolved beyond a mere visitation schedule to include the non-residential parent's involvement in the child's life, including correspondence, video calls, and more. Maintaining personal relationships may also be formalized through a notarized agreement between the parents during the notarial divorce process.

Although we will not dwell on this issue, we cannot avoid highlighting a few problems.

First, what happens when *the minor does not wish to maintain personal contact with the non-resident parent* [Art. 913 (1) Code of Civil Procedure] and maintains this position even after receiving counselling from specialists in public social assistance services or other authorized bodies, as per Art. 18 (4) of Law 272/2004 and Art. 913 (1) of the Code of Civil Procedure? This assumes there is no parental alienation and no opposition from the non-residential parent.

Can the child's refusal to maintain personal relationships with the parent lead to a restriction of this right? Should the child's best interests be sacrificed to enforce the non-residential parent's right? Although this right is closely tied to both the child and the non-residential parent, its interpretation and application must prioritize the child's best interests.

Although this right is closely linked to both the child and the non-resident parent, its application must prioritize the child's best interests. Interpreting Art. 8 of the European Convention on Human Rights, we deduce that national authorities must establish a fair balance between the interests of the child and those of the parents, and in this balancing process, particular importance must be given to the child's best interests. Depending on the nature and severity of the situation, the child's interests may take precedence over those of the parents. Naturally, the child's level of maturity and development must be considered.

Let us recall what Constitutional Court Decision 82/2003<sup>13</sup> stated:

*"Even if the minor refuses to maintain personal relationships with the parent, as long as the investigations in the case do not indicate that such relationships would endanger the child's physical, moral, or intellectual development, the court may grant the request of the divorced parent who was not entrusted with the child, considering that the minor's psychological and physical development is not yet sufficient to enable them to discern what is and what is not in their best interest."*

According to Art. 19 (2) of Law 272/2004, the court, prioritizing the child's best interests, may limit the exercise of this right if there are well-founded reasons that would endanger the child's physical, mental, spiritual, moral, or social development.

Under the new provisions of Law 272/2004 on the protection and promotion of children's rights, if one parent hinders or negatively affects the child's personal relationships with the other parent, the court may order the monitoring of the child's personal relationships. This implies that, after completing this procedure, the minor may even be subjected to a forensic psychiatric evaluation (what would be the purpose of such an assessment?), and various measures may be taken to improve the personal relationship between the child and the non-resident parent - Art. 18 (7). Additionally, the possibility of instituting a child protection measure exists.

*The enforcement of the right to maintain personal relationships (Neamț, 2019, pp. 377-426)* [see Art. 645 (1), Art. 910-914 Code of Civil Procedure] only intervenes when the debtor fails to act. However, if the obligation cannot be fulfilled due to a third party's actions or the creditor's fault, forced execution

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<sup>13</sup> Decision of the Constitutional Court no. 82/25 February 2003 on the exception of unconstitutionality of the provisions of Article 43(3) of the Family Code, M. of. no. 189 of March 26, 2003.

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cannot be justified (*Trișcă-Zăgreanu, 2021*)<sup>14</sup>. In the analysed case, the minor's refusal was proved by the minutes of the hearing of the minor in the Council Chamber, and by the transcripts of the telephone messages between the minor and her mother - the non-resident parent. Meanwhile, the father demonstrated that he had never opposed the child's handover to the mother's residence.

Thus, in the problematic scenario outlined above, where the minor refuses contact with the non-resident parent, without any evidence of parental alienation by the resident parent forced execution of the court ruling cannot proceed. It is crucial to analyse whether the child's refusal is linked to potential abuse by the non-resident parent or other circumstances, such as the parent's remarriage, the birth of other children, or the parent's severity (*Mihăilă, 2023, p. 120*). In one case, inappropriate behaviour by the mother, the non-resident parent, was established, leading the court to annul the enforcement decision.

Typically, to prevent the child's refusal to maintain personal contact with the non-resident parent, enforcement should be accompanied by psychological counselling to improve the relationship with the non-resident parent. Would resuming enforcement not sacrifice the minor's best interests? (*Leș, 2013, p. 1181*). A viable solution would be to terminate enforcement if a psychologist's report concludes that continuing or resuming enforcement is not in the child's best interest.

Despite the fact that the minor is the one refusing, even after psychological counselling, the debtor parent may still be required to pay penalties. The minor does not hold the status of a debtor in the special enforcement procedure; therefore, their right to refuse contact should not be used against the other parent's right to maintain a relationship with the child (*Neamț, 2019, p. 389*). Nonetheless, the amount of penalties imposed should not compromise the minor's best interests by depriving them of significant financial resources. The regulations in the Code of Civil Procedure must be aligned with Art. 20 of Law 272/2004, which stipulates that courts may impose measures, guarantees, or penalties to ensure the maintenance of the child's personal relationships with their parents. If compliance with provisions regarding the child's residence or personal contact schedule is refused [Art. 20 (2) Law 272/2004], penalties may be imposed. The enforcement procedure for this right raises numerous interpretative questions, which we will not address here.

Under no circumstances, however, should coercive measures be taken against the child in the event of failed enforcement of the right to personal relationships (*Ghiță, 2019, pp. 156-157*)<sup>15</sup>.

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<sup>14</sup> Bihor Tribunal, Civil Section, Civil Decision no. 64 of 1 February 2022.

<sup>15</sup> The obligation of national authorities to take measures to facilitate contact between the non-resident parent and the minor after divorce is not absolute. Although national authorities must make every effort to facilitate such cooperation, any obligation to apply coercion in this area must be limited, as it is necessary to consider both the interests and the rights and freedoms of all those

The right to maintain personal relationships with the minor falls under the protection of Article 8 of the European Convention, with parent-child relationships representing a fundamental aspect of family life (*Irinescu, 2024, p. 457*). The Court has condemned states on multiple occasions for violating this right.

In the case of *Boștină v. Romania*<sup>16</sup>, the Court found that the national authorities' decision-making process was not flawed, as the claimant was not prevented from exercising his right. The enforcement proceedings (although the order was enforceable, it was also provisional and subject to appeal) were suspended because the mother had filed an appeal. The Court noted that the General Directorate of Social Assistance and Child Protection assessed the situation, met with the parties, visited the child's home, and proposed solutions to the identified issues. Both the claimant and the mother received psychological counselling, and the mother was particularly advised about the risks of parental alienation syndrome.

In the case of *Sbârnea v. Romania*<sup>17</sup> the Court rejected the claimant's request regarding the alleged violation of Article 8. In this case, the minor refused to meet alone with her parent. The claimant filed a criminal complaint against the mother only three months after the ruling that established his visitation rights. The Court observed that the prosecutor's office and domestic courts never found the mother guilty of the difficulties in ensuring the exercise of visitation rights. It was ruled that the positive actions of the authorities to protect one parent's right to family life must not infringe on the child's right to family life, always considering the child's best interests.

In the case of *Monory v. Romania and Hungary*<sup>18</sup> the Court reiterated that the child's interests are paramount "in matters concerning the reunification of children with their parents," and that "the adequacy of a measure must also be assessed in terms of the speed of its implementation, as such cases require urgent resolution, given that the passage of time can have irreversible consequences on the relationship between children and the non-resident parent."

In the case of *Vlad v. Romania*<sup>19</sup>, after the enforcement proceedings for the father's visitation rights failed due to the daughter's refusal to see him, the court

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involved, and above all, the best interests of the child and their rights under Article 8 of the Convention - ECHR, case *Zawadka v. Poland*, Application no. 48542/99, 23 June 2005, para. 67. Additionally, in ECHR, case *Pascal v. Romania*, Application no. 805/09, 17 April 2012, para. 70, the Court stated that "the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the children live even though coercive measures against the children are not desirable in this sensitive area, although coercive measures against children in this sensitive area are not desirable".

<sup>16</sup> ECHR, case *Boștină v. Romania*, Application no. 612/2013, 22 March 2016, paras. 63-73.

<sup>17</sup> ECHR, case *Sbârnea v. Romania*, Application no. 2040/06, 21 June 2011, paras. 117, 118.

<sup>18</sup> ECHR, case *Monory v. Romania and Hungary*, Application no. 71.099/01, 5 April 2005.

<sup>19</sup> ECHR, case *Vlad v. Romania*, Application no. 1020/20, 5 July 2022, paras. 16-22.

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ordered three months of psychological counselling for the minor. After the resumption of enforcement proceedings and the proposal of sanctions for non-compliance with the court ruling, the court, upon the mother's request for suspension, found that she had not opposed the re-establishment of ties between the father and daughter. However, the Court found a violation of Article 8 of the Convention because no measures were taken to identify the reasons for the minor's refusal to meet her father, counselling was not resumed, and progressive measures regulated by Articles 910-913 of the Code of Civil Procedure were not adopted.

## **VI. Reconfiguration of Legal Relationships Due to a Parent's Gender Identity Change**

When faced with analysing the reconfiguration of certain legal relationships due to a parent's gender identity change, judges face another difficult task: Will the transgender parent continue to be part of the child's life? Is this in the child's best interest? Can the right to personal relationships be restricted due to the parent's transgender status?

In the case of *P.V. v. Spain*<sup>20</sup>, the claimant argued that transgenderism was the reason their former spouse initiated a procedure to modify the custody arrangements made at the time of their separation. Upon divorce, they had agreed that the child's residence would be with the mother, with shared parental responsibility. After the father's transition process began, the mother requested the termination of his parental rights and the cessation of all communication between father and child. The court decided to limit visitation rather than suspend it. The Constitutional Court ruled that the reason for restricting visitation was not the father's transgender identity but his lack of emotional stability (as found in a psychological expert report), which posed a real and significant risk to the child's emotional well-being and personality development, considering the child's age (6 years) and developmental stage at the time. The Court found that the judicial authorities had considered the child's best interests and that there was no violation of Article 8 of the Convention.

In such new circumstances, judges must be prudent and balanced, without being influenced by prejudice (*Nicolescu, 2018, p. 103*) and the child's best interests must remain paramount.

The *total suppression of visitation rights* was sanctioned by the Court in the case of *Vojnity v. Hungary*<sup>21</sup>. The prohibition of personal relationships was based on the father's religious beliefs, which were deemed detrimental to the child's education. The Hungarian courts, considering the child's best interests, ruled that the father's allegedly irrational worldview and proselytizing posed a

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<sup>20</sup> ECHR, case *P.V. v. Spain*, Application no. 35159/09, 30 November 2010.

<sup>21</sup> ECHR, case *Vojnity v. Hungary*, Application no. 29617/07, 12 February 2013.

threat to his son's development. However, the Court found that the Hungarian courts had not demonstrated that severing ties with the father was in the child's best interest.

The child's interest in maintaining personal relationships with individuals other than their parents after a divorce (*Filote-Iovu*, 2020, pp. 79-84) was analysed by the ECHR in *Mustafa and Armağan Akin v. Turkey*,<sup>22</sup> where a child in the father's custody was unable to maintain contact with his sister, who was placed with the mother. The Court ruled that the decision to separate the siblings constituted an interference with the claimants' right to family life, preventing the siblings from seeing each other and the claimant from enjoying the company of both children simultaneously. The Court emphasized that maintaining sibling relationships is too important to be left to the discretion and whims of the parents.

In the case of *N.T.S. v. Georgia*,<sup>23</sup> the Court ruled that the best interests of the children were not respected when the national courts ordered the return of three siblings to their father. The father, convicted of drug abuse and diagnosed with psychiatric and behavioural disorders, requested custody after the mother's death. The children, who had been living with their paternal aunt and grandmother, were only examined by a psychologist in the father's presence. Later, in a hospital setting, psychological assessments revealed that all three children suffered from separation anxiety and displayed negative attitudes toward their father. Moreover, none of the three boys were personally heard by the court.

The Court also noted that the reunification of a parent with a child who has lived with other caregivers for a period cannot happen immediately and requires preparatory measures.

Under the principle of the child's best interests, the child has the right to maintain personal relationships with relatives or other individuals with whom they have enjoyed family life (Article 17 of Law 272/2004). Both Romanian legal doctrine and case law, as well as ECHR jurisprudence, have acknowledged in various cases that relationships between grandparents and grandchildren fall within the notion of family life, and that the emotional bond between them necessitates maintaining close ties even after the parents' divorce (*Costina*, 2021, pp. 104-105).

In the same context, could an egalitarian hosting arrangement in the form of alternating residence be in the best interest of the minor? Is sharing a residence the same as sharing a child? (Lugănașu, 2021, p. 161).

Regarding alternating residence, the Romanian court cannot establish, similarly to foreign legislation (e.g., French system), an alternating residence at both parents' homes. However, if the parents reach an agreement in this regard, it may be authorized by a notary, albeit with caution, in the case of a notarial

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<sup>22</sup> ECHR, case *Mustafa and Armağan Akin v. Turkey*, Application no. 4694/03, 6 April 2010, para. 21.

<sup>23</sup> ECHR, case *N.T.S. v. Georgia*, Application no. 71766/12, 2 February 2016, para. 83.

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divorce (*Irinescu, 2021, pp. 45-60; Motica, Buzincu, 2021, p. 172*). The study indicates that parents cannot establish a child's residence with other individuals through a notarial agreement, as the application of Article 400 (3) of the Civil Code falls exclusively within the court's jurisdiction). In judicial and notarial practice, the right to maintain personal ties with the minor is sometimes framed through an egalitarian hosting arrangement, for example, alternating weekly or biweekly stays. It is presumed that courts have drawn inspiration from foreign legislation and jurisprudence when adopting this approach to determining alternating residence for the child.

As a legislative novelty introduced by Law 123/2024 regarding the exercise of the right to personal relationships, Article 18 (31)(b) provides that "the personal relationship schedule for a child enrolled in an educational institution shall allow for a period of up to seven consecutive days within a 14-day interval during all periods of the year when the child is not on school vacation." Could this provision finally settle the dilemmas and heated debates surrounding the notion of alternating residence, providing a legal basis for the court to establish an egalitarian hosting schedule?

The French courts have justified alternating residence by emphasizing that the focus should be on the child's best interest, maintaining relationships with both parents rather than prioritizing the bond with only one. Thus, there are no reasons why the alternating residence system should not be explored. This system aims to balance the time spent with each parent<sup>24</sup>.

In Romanian jurisprudence the court has ruled that "establishing an alternating domicile for the minor, as long as it does not disrupt the minor's usual routine, does not create a sense of displacement or insecurity, provided the child is equally attached to both parents." The court<sup>25</sup> has chosen alternating residence as a way to counteract the alienating behaviour of the resident parent, which tends to be more pronounced when the non-resident parent's contact is limited.

Egalitarian or alternating hosting could reduce the guilt felt by former spouses and fulfil the expectations of children who experience strong loyalty conflicts toward both parents (*Marquet, 2005, pp. 51-53*).

In another case<sup>26</sup>, although the court acknowledged that, under Romanian law, a minor's residence is a stabilizing factor that, in the event of separation, should be established with only one parent and that alternating residence is prohibited by positive law, it noted that this option is available under several legal

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<sup>24</sup>Cour d'appel de Chambéry, 23 janvier 2017, 16/01313, available online at

<https://www.legifrance.gouv.fr/juri/id/JURITEXT000034963914/>,  
24.10.2024.

ACCESSED ON

<sup>25</sup>Bucharest Court, Sect. 2, Judgment no. 11804/2024 of 26.07.2024, available online at  
<https://www.rejust.ro/juris/de2866ee2>, accessed on 23.10.2024.

<sup>26</sup>Bucharest, Court Sect. 1, Judgment no. 6073/2024 of 29.07.2024, available online at  
<https://www.rejust.ro/juris/59e373g22>, accessed on 23.10.2024.

systems (France, Québec, Portugal, Belgium, Sweden). In that particular case, the court determined that "frequent relocation from one home to another is not in the child's best interest, as it would weaken the minor's social relationships". "Alternating residence would heighten the child's instability amid the parents' separation". Given the child's best interest, the court prioritized stability to minimize the impact of post-divorce changes and to preserve, as much as possible, the child's previous lifestyle. However, after reviewing the evidence, the court decided on a "provisional establishment of alternating residence for the minor children," justified by both the children's best interest and Article 8 of the European Convention on Human Rights to prevent discriminatory treatment between the mother and father concerning time spent with their children.

According to the court, alternating residence can only be ordered "if the parents share the same parenting style and collaborate effectively in enforcing a consistent set of rules for the minors."<sup>27</sup> The court held that minors should have a place they perceive as home and a visitation schedule with the other parent. Given their young age they require stability and predictability. Consequently, the plaintiff's request for alternating residence was denied.

Establishing a personal relationship schedule in the form of egalitarian hosting could be a viable solution that aligns with the child's best interest (*Daghie, 2021, p. 85*). The court would only reject such a request if it conflicts with the child's best interest. Additionally, judges must evaluate not only the parents' physical, psychological, and financial capacity to implement such an arrangement but also whether it truly serves the child's best interest, as each case is unique.

Equal/shared residence has both *advantages* and *disadvantages*: it serves as a way to prevent the abuse of power by the parent with whom the child's residence is established and avoids the child's alienation from the other parent; children have a higher level of satisfaction regarding the time spent with both parents and both parents can be actively involved, allowing them to generate more income; it also presents challenges, such as difficulty maintaining social contacts for children or teenagers moving between two homes, carrying many belongings when switching residences if the parents are not financially well-off, and the existence of "the mother's house" and "the father's house" but not "the child's house." (*Mihăilă, 2020, p. 94*).

As noted in French legal doctrine (*Pascal, 2013, p. 19*), a judge's authority in this domain must be exercised *in concreto*. The court must conduct a realistic assessment of the child's living conditions, including factors such as religious practices or the separated parent's sexual orientation. However, neither religious

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<sup>27</sup>Oradea Court, Judgment no. 3922/2024 of 25.07.2024, available online at <https://www.rejust.ro/juris/3982d933g>, accessed on 24.10.2024.



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practice nor sexual orientation alone provides an abstract basis for determining a child's residence or personal relationship rights.

It is in the child's best interest to maintain relationships with loved ones and with both parents who brought them into the world. Even if parents fail to sustain their love for each other, they must continue to love their child above any personal grievances. Stability, self-confidence, and self-esteem can only be nurtured if the upheaval caused by divorce is reconstructed into a new, secure environment for the child, prioritizing their best interest.

The best interest of the child allows courts to expand the scope of legally regulated rights beyond the strict letter of the law. This principle is sometimes used as a mediation tool (Cîrmaciu, 2021, p. 375) between two opposing claims or conflicting rights, while in other cases, it serves as a legal basis for restricting a right through administrative authority, subject to judicial oversight (Dumortier, 2013, p. 14).

Determining the child's best interest requires considering factors such as the child's age, opinions, personal history, the caregivers' background, and aspects related to gender, sexual orientation, religion, culture, education, needs, and potential medical issues (Pivniceru, Luca, 2016, p. 90).

### CONCLUSION

*As highlighted, the principle of the best interests of the child is based on stability and security in the child's environment, with the child being consulted on decisions affecting their needs. However, these decisions have long-term implications, necessitating emotional balance as another crucial factor. The comprehensive analysis of the child's best interest underscores the need to make optimal decisions for their development, both at the micro level (family) and macro level (state policies and public strategies for child protection and care). These decisions however, have long-term impacts making emotional stability another crucial factor to fulfil. All these analyses regarding the supremacy of the best interests of the child ultimately emphasize the importance of ensuring the child's well-being and making the best decisions for their development - both on a micro (family) level and a macro (state) level through public protection and care policies.*

### BIBLIOGRAFIE:

1. Nadia C. Aniței, *Dreptul familiei*, București: Universul Juridic, 2024;
2. Anca M. Ardeleanu, *Principiul interesului superior al copilului. Abordare europeană*, Revista Dreptul 3, 2020;
3. Marieta Avram, *Drept civil. Familia*, București, Hamangiu, 2022;
4. Diana F. Barbur, *Evoluția relațiilor personale dintre copil și părintele separat în practica judecătorească*, Pandectele Române 1, 2021;

5. Alina E. Borlianu, *Interesul superior al copilului în Dreptul Uniunii Europene*, Revista de Dreptul familiei Supliment, 2021;
6. Diana Cîrmaciu, *Short consideration regarding the mediation in Romania*, International Journal of legal and social order 1, 2021, (1). DOI:<https://doi.org/10.55516/ijlso.v1i1.16>
7. Iulia Costina, *Considerații despre dreptul bunicilor de a avea legături personale cu nepoții minori. Cadrul legal aplicabil. Limitări*, Revista de Dreptul familiei 2, 2021;
8. Nora A. Daghie, *Despre reședința alternantă în România - aspecte teoretice și practice*, Pandectele Române 2, 2021;
9. Thomas Dumortier, *L'intérêt de l'enfant: les ambivalences d'une notion «protectrice»*, Journal du droit des jeunes 329, 2013;
10. Ioana A. Filote-Iovu, *Restrângerea programului de relații personale cu minorul în vederea protecției vieții private a părintelui nerezident*, Dreptul 5, 2024;
11. Ioana A. Filote-Iovu, *Dreptul copilului de a avea legături personale cu părinții sau cu alte persoane, în lumina jurisprudenței Curții Europene a Drepturilor Omului și a celei naționale*, Revista de Dreptul familiei 2, 2020;
12. Marius Floare, *Figura juridică a copilului în istoria dreptului privat european*, Revista de Dreptul familiei Supliment, 2021;
13. Emese Florian, Marius I. Floare, *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația*, Ediția 9, București: C.H. Beck, 2024;
14. Gabriela C. Frentiu, *Aspecte teoretice și practice vizând exercițiul autorității părintești* in M. Avram (coord), *Autoritatea părintească. Între măreție și decădere*, București: Solomon, 2018;
15. Oana Ghiță, Cercel Sevastian, *Interesul superior al copilului*, Revista română de drept privat 3, 2018;
16. Oana Ghiță, *Opinia copilului și alte probleme de drept, cu privire specială asupra cazului Sorina*, Revista de Dreptul familiei 1-2, 2019;
17. Romulus Gidro, Aurelia Gidro, *Drept privat roman*, București: Universul Juridic, 2014;
18. Ana-Maria Goldan, Crina M. Stanciu, *Principiul interesului superior al copilului - un panaceu al dreptului european*, Analele Științifice ale Universității „Alexandru Ioan Cuza” din Iași, TOM LXIX/2, 2023, DOI: 10.47743/jss-2023-69-2-5
19. Bogdan Ionescu, *Găzduirea egalitară. O perspectivă personală*, București: Universul Juridic, 2018;
20. Lucia Irinescu, *Dreptul familiei*, București: Hamangiu, 2024;
21. Lucia Irinescu, *Birdnesting - O nouă abordare a divorțului și despre cum putem adapta prevederile articolului 400 din Codul civil*, Revista de Dreptul Familiei 1, 2021;

## THE BEST INTERESTS OF THE CHILD.

### ANALYSIS OF THE CONCEPT IN THE CASE OF PARENTAL DIVORCE

22. Lucia Irinescu, *O lume minunată cu multe jucării și două locuințe pentru copii*, Analele Științifice ale Universității „Alexandru Ioan Cuza” din Iași. Științe Juridice 2, 2021, DOI: 10.47743/jss-2022-68-1-3
23. Ioan Leș, *Noul Cod de procedură civilă*. Comentariu pe articole (art. 1-1.333), București: C.H. Beck, 2013;
24. Cătălin Lungănașu, *Interesul superior...al cui?*, Revista de Dreptul familiei Supliment, 2021;
25. Jacques Marquet, *L'évolution contemporaine de la parentalité*, Academia Press, 2005;
26. Carmen O. Mihăilă, *Drepturile copilului. Dreptul la religie. Provocări și inegalități*, Revista Facultății de Drept din Oradea 2, 2021;
27. Carmen O. Mihăilă, *Familia post-divorț. Relația părinte-copil. Perturbări, ajustări, adaptări*, Revista de Dreptul familiei 2, 2023;
28. Carmen O. Mihăilă, *Este locuința alternativă în interesul superior al minorului după divorțul părinților săi?*, Revista Facultății de Drept Oradea 1, 2020;
29. Bogdan D. Moloman, *Autoritatea părintească exclusivă*, București: Universul Juridic, 2024;
30. Bogdan D. Moloman, *Menținerea legăturilor personale minor-tată. Ordonanță președințială. Violență verbal (I). Ascultarea minorului (II)*, Jurisprudența rezumată, Revista de Dreptul familiei 2, 2022;
31. Adina R. Motica, *Considerații privind aplicarea principiului ocrotirii „interesului superior al copilului” în caz de divorț al părinților săi*, Analele Universității de Vest din Timișoara, Seria Drept 2, 2014;
32. Adina R. Motica, *Alienarea parentală sau cum să crești un copil nefericit*, in Marieta Avram (coord.), *Autoritatea părintească. Între măreție și decădere*, București: Solomon, 2018;
33. Adina R. Motica, Oana E. Buzincu, *Reflexia interesului superior al minorului*, Revista de Dreptul Familiei Supliment 2021;
34. Ioan I. Neamț, *Interesul superior al copilului versus rolul activ al judecătorului*, Revista de Dreptul familiei Supliment, 2021;
35. Ioan I. Neamț, Laura C. Neamț, *Stabilirea locuinței minorului în cazul în care părinții nu conviețuiesc. O analiză juridico-psihologică*, Revista Română de Drept Privat 3, 2018;
36. Ioan I. Neamț, *Executarea silită a dreptului de a avea legături personale cu minorul. Iluzie sau realitate?*, Revista de Dreptul familiei 1-2, 2019;
37. Cristina Nicolescu, *Dreptul de a avea legături personale cu minorul în cazul părintelui transsexual*, in Marieta Avram (coord.), *Autoritatea părintească. Între măreție și decădere*, București: Solomon, 2018;
38. Julie Pascal, *Les perspectives d'évolution du droit de la filiation en considération de l'intérêt supérieur de l'enfant*, Memoires Droit civil, p. 19,

disponibil online la adresa <https://www.lepetitjuriste.fr/wp-content/uploads/2013/07/MEMOIRE2.pdf>;

39. Mona M. Pivniceru, Luca Cătălin, *Interesul superior al copilului. Expertiza psihologică în caz de separarea/divorțul părinților*, București: Hamangiu, 2016;

40. Ciprian R. Romițan, *Parents' right and duty to care for the child*, Challenges of the Knowledge Society, 2021;

41. Mihaela Trișcă-Zăgreanu, Tribunalul Bihor, secția civ., dec. civ. nr. 64 din 1 februarie 2022, *Executarea hotărârii judecătorești prin care s-a stabilit locuința minorului. Refuzul minorului de a se întoarce la domiciliul care i-a fost stabilit prin hotărâre judecătorească*, Revista Română de Executare Silită 3, 2021.

YOUF Dominique, *Penser les droits de l'Enfant*, Paris: PUF, 2002.



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