

THE EUROPEAN CONVENTION ON THE EXERCISE OF CHILDREN'S RIGHTS

By

Mia Marie-Louise Reich-Sjögren¹

When examining how different Member States protect children's rights in proceedings, it is natural to start with The European Convention on the exercise of Children's Rights.

The Convention states that the rights and best interests of children should be promoted and that they should have the opportunity to exercise their rights, especially in family proceedings.

It was recognised that children should be given relevant information to enable their rights and best interests. Due weight should be given to children's views. The importance of the parental role in protecting and promoting children's rights and best interests was recognized. Member States should also participate by protecting and promoting these.

It was also considered that in case of a conflict, it is preferable that families try to reach an agreement before initiating court proceedings. This last statement has led to, at least in my home country, Sweden, strong efforts, whereby divorcing parents agree about custody and contact social workers for their assistance. During so-called "cooperation talks," an agreement is discussed and drawn up without representation from lawyers. It often leads to a signed agreement that is enforceable like a court order if it is also signed and approved by the social services. This may contribute to avoid court proceedings, which in itself is probably a positive result for the child. However, it is important to know that the child is not heard during these talks and I am not convinced that the child's views and wishes or the best interests of the child are given the due weight stated in the Convention. Also, a parent not willing to undergo cooperation talks or sign an agreement under these circumstances may be considered not acting in the best interests of the child.

1.1. Brussels II and Brussels II bis

Brussels II Regulation (regulation 1347/2000 EC) came into force on March 1, 2001. The new Brussels II Regulation, referred to as Brussels II bis, Brussels II A or sometimes the new Brussels II, came into force August 1, 2004 and applies from March 1, 2005. The Regulation mostly repeats the old Brussels II, but a major change is that the Regulation now applies to all children, not only children of both spouses, and also provides for new provisions relating to abduction cases. It takes precedence over the 1980 Hague Convention in cases between countries in Europe which have joined the Convention. This change to make the Regulation cover children in all civil matters was a much needed expansion on the law.

¹ Mia Maria-Louise Reich-Sjögren is a family law attorney in Göteborg, Sweden and a Fellow of the International Academy of Matrimonial Lawyers. She may be contacted at: mia@reichsjogren.com.

Brussels II bis also elaborates on Hague (Art 11) in references to the wishes of the child.[1]

2. DIFFERENCES IN PROTECTING CHILDREN IN PROCEEDINGS

2.1. Sweden

Sweden has acknowledged the Convention on the rights of the child. As part of the Convention on the rights of the child, Sweden has made special remarks in a couple of Acts, in order to stress the seriousness and importance in dealing with children's rights.[2]

A child's best interests have been given different interpretations or meanings in the various Acts. It may have to do with the fact that there are different understandings of what is meant by a child's best interests.

The Swedish Children's Committee[3] proposed that the child's best interests should be interpreted partly from an objective perspective (what is known about children after research and experience) and partly from a subjective perspective (listening to the child and including the child's views in the decision making).

The objective perspective should lead to the result that "decision-makers" on different levels look at what would be in the best interest of the child from a scientific and proven point of view, whilst the subjective perspective should mean that the child would be given the possibility to express his/her own point of view and what would be best in the child's own opinion.

2.1.1. A Child's Opinion - How to Find Out

One of the problems observed when trying to find out about the child's own opinion is how and where this can be done. The hearing of the child or rather, a meeting with the child, should preferably be performed in an environment where the child is not too influenced by an adult. This may not be easy to arrange. When an investigation is made by the family section of the social welfare in order to find out what the child's best interests are, the person(s) investigating meet with the child at the father and mother's homes. The child is present and sometimes heard alone but not always, all depending on age and maturity.

The investigator reports about the meeting and elaborates on what the child said and if possible, on the child's own views. This is done in the final report of the investigation. Sometimes, again depending on the child's age and maturity, a child will meet the investigator alone and not at home.

The investigator is expected to express his/her opinion in the final investigation report and also to make a recommendation as to how the court should rule. The basis for the recommendation is the child's own views and an objective judgement of what is in the child's best interests.

It is certainly of importance that the report from the meeting with the child be reproduced in a very careful and sensitive way. In order to ensure that the investigation report is professional and objective, the investigator's knowledge and experience is essential. Investigators' experiences range considerably, and this has a bearing on their reports.

The investigation has a major impact on the court's final decision, especially since the judge almost never sees the child in court. The judge therefore has to rely on the investigation report to a large degree. The decision is based on a report of the child's views and desires which has been filtered and obtained in a surrounding and under circumstances influenced by parents or other adults.

It should also be taken into consideration that Sweden does not have family court judges and family courts. This gives even more importance to the report on the child's hearing. Lately, some of the courts of appeal have allocated judges who have shown interest in hearing family law cases.

In a case from the High Court[4] in Sweden, the court elaborated on a child's views in a Hague Convention case. The child, who was 10 years old, had expressed his will, but even though this child's will should have been considered, the court decided that the child was not mature enough. The same conclusion was found again[5], based on the fact that the child was not mature enough and therefore the child's will was not given major importance. Normally it is said that a child between 12-13 years of age who expresses his will has a major impact on the decision.[6]

A child may be heard in court if there are special reasons for doing so and if it is clear that it will not harm the child to be heard.[7]

2.2. Ireland

In any disputes affecting children brought before Courts in Ireland, the first and paramount concern is the welfare of the children and the children's best interests. Welfare is a wide concept and can be defined in many ways. In Ireland, it includes physical and social welfare but also the religious, moral, and intellectual welfare of a child.

Compared to some of the other Member States, this concept of welfare in Ireland differs from Sweden, for example. I dare say that religion is not a major issue unless it is an obvious and important part of a child's daily life and upbringing.

The Guardianship of Infants Act 1964 allows the court to take account of the child's wishes in any proceedings affecting the child, if it is considered appropriate and practicable, having regard to the age and understanding of the child.

In practice, the voice of the child is heard through his/her parents. It may also be with the assistance of an expert, i.e. child psychologists or other specialists, if possible. This leads to the fact that a child is heard mostly by parents or at least in the presence of parents, and not in an environment where it is not totally uninfluenced by parents. In very limited cases, the child may be interviewed by the Judge.

When it comes to Child Abduction cases, the child is most often interviewed by a Child Specialist.

2.2.1. Brussels II bis

The Regulation has operated in Ireland for a number of years and it seems to have been implemented satisfactorily. The provisions were already at hand when the Regulation came into force.

2.2.2. Representation for the Child

Very rarely, a child is granted his/her own representative in Ireland.

2.2.3. Constitutional Referendum

The Irish Government has recently announced a referendum on children's rights, which proposes to enhance the protection of children in guardianship, custody, and access proceedings, in addition to ensuring their best interests in care and adoption structures and the criminal justice system generally.

There seems to be a need for a better balance between the rights of the child and the rights of the family under the Irish Constitution. Practitioners and experts have advocated an enhanced protection of children's rights for many years. The children need to be ensured that their voice is better heard.

2.3. Scotland

In any proceedings in Scotland involving children, sheriffs or judges are obliged to take into account the children's views, but only if the child wishes to express his/her views. It is not age limited and there are different ways to take and hear the child's views.

The child can meet with the sheriff or the judge directly.

A reporter who is an independent person supposed to be the eyes and the ears of the court goes out to meet with the child and also other relevant people. Then he/she reports back to the Court on the views expressed by the child.

A curator ad litem can be appointed to represent the interests of a vulnerable child and part of their job is to take into account the child's views. Curators do not have to advocate

the child's views – they can make recommendations to the court about what they believe would be in the child's best interest even if that is contrary to the child's stated wish.

A child can become party to legal proceedings. There is no age limit at which a child can instruct a solicitor but there is the presumption that a child of age 12 has the capacity to instruct a solicitor. The issue is the solicitor's decision to decide whether or not the child understands what s/he is to instruct a solicitor. Solicitors have acted for children no older than 8 or 9 and that probably is the lower limit.

Children are given intimation, in a child-friendly form in any proceedings that relate to suzannetake free legal advice from the Scottish Child Law Centre.

As mentioned, in Scotland, sheriffs and judges have an obligation to ascertain whether a child wishes to express a view and the take account of that view. An example of how the Scottish courts have interpreted that obligation is a case from 2002, *Shields v Shields IH* 16 January 2002.

The decision, which was an appeal from the lower courts, focused on whether the case was fundamentally flawed because the sheriff who had heard the case at first instance had “failed to consider giving the child an opportunity to indicate if he wished to express his views....”

It was made clear by the three judges who heard the appeal that it was the court's duty to give the child the opportunity to express his/her views, if practicable. This obligation is not dependent on the age or maturity of the child, although how the child's views are to be ascertained will differ depending on the child's age or maturity.

In a more recent case, *Cv McM Fam LR 36*, the two children involved were eight and six years old. The Sheriff Principal Kerr noted, “I accept without hesitation that it is appropriate to afford children aged six and eight the opportunity to express their views and that there are practicable methods of doing so.”

2.3.1. Brussels II bis

The systems that were in place in Scotland before Brussels II are thought to ensure that all of the provisions within the Regulation have been implemented. It is generally thought that the provisions within the legislation and the procedures are adequate, probably even good.

2.3.2. Challenges

The challenges now may be the practical measures that are available and the extent to which there will be funding made available to ensure that Legal Aid remains available to children. The Scottish Child Law Centre is a charitable organisation and also depending on adequate funding. It provides free legal advice for children and young people.

2.4. Germany

2.4.1. Voice of the Child

In Germany, the way to hear a child in proceedings is regulated.[8] If a child is over 14 years of age, the Court is obliged to hear the child directly, unless the proceedings only deal with economic matters. In that case the Court can abstain from hearing the child.

If the child is not yet 14 years old, the Court shall hear the child if the child's own views are of importance for the outcome of the case, or if it is of importance due to other grounds.

The Court may abstain from hearing the child if there are special and relevant reasons not to do so. If a hearing does not take place only because of a risk for delay, the hearing must take place as soon as it is possible. Younger children are also heard regularly in courts.

Children are to be informed about the proceedings and what they are dealing with in a way adequate to the age and maturity of the child, but only if information would not be of harm to the child.

The older the child, the more importance is given to the child's views and will. This has been clearly said in two decisions from 2007.[9]

In every separate case, the Court has to examine if the child's desire and will are durable and also correspond objectively with the child's best interests. If this is found to be, and the child seems to have grounds for his/her decision, the Court will follow the child's opinion and rule according to that.

Before a court decides and announces the decision, it has to involve the local Family Section of the Social Services, the Jugendamt. A representative normally visits with both parents and also meets with the child in order to ensure that the child's desire also meets with the best interests of the child.

A child can also have its own representative, a "Verfahrensbeistand," who is appointed to support the child if this seems to be necessary in order to ensure that the child's best interests are met.

2.4.2. Brussels II Revised

Due to what has been reported, Brussels II bis works well in Germany and no obvious claims have been heard. The provisions in FamFG were recently changed and it seems that no further changes have to be made at this time.

2.5. England

Under English law, it is mandatory for a court to give regard to the ascertainable wishes and feelings of the child concerned (considered in light of his/her age and understanding).[10] It is established that judges have a power to interview children in private.

The Children Act 1989, which was implemented on October 14, 1991, introduced comprehensive changes to legislation in England and Wales affecting children's welfare. The Children Act states for instance that children's welfare must be a paramount consideration when courts are ruling about them.

The concept of parental responsibility was replaced by that of parental rights, and children were given the ability to be parties, separate from their parents, in legal proceedings.

The Act also states that a checklist of factors must be considered by the court before reaching decisions. When a court determines a question with respect to a child's upbringing, the child's welfare shall be the court's paramount consideration. Two additional points concerning the welfare of such a child need to be considered. First, the courts are required, in public and in private law proceedings, to establish a timetable and give directions for the expeditious handling of each case. The courts observe the general principle that any delay is likely to prejudice the welfare of the child.

Second, courts must have regard in opposed applications in care proceedings to a checklist concerning the child's circumstances.

The list of matters concerns:

- * The ascertainable wishes and feelings of the child (considered in light of age and understanding)
- * The physical, emotional, and educational needs
- * The likely effect on the child of any change in the circumstances
- * The age, sex, background and any characteristics of the child which the court considers relevant
- * Any harm the child has suffered
- * How capable each of the parents is of meeting the child's needs
- * The range of powers available to the court in the proceedings in question.

In 2007, a decision from the High Court[11] concluded that as there was no Children Act application before the High Court, the court would ward the child and make a new order for contact reflecting the wishes of the child as expressed to the reporter and the child's current circumstances, thus putting in place a subsequent enforceable judgment which, pursuant to Article 47, supersedes the earlier order where it is irreconcilable.

2.6. Italy

An Italian Act, L.8. Febbraio, 2006 n. 54 enables judges in divorce and separation proceedings to hear children over the age of 12, if the children are considered to be mature enough.[12]

3. THE RIGHT TO BE HEARD

In each of the legal systems reviewed, the child has a legal right to express his or her preferences in the proceedings. However, the ways in which a child is heard and how a child's voice comes to the knowledge of the court differ. In reality, the right to express their will is not always exercised. For example, in an English study, nearly three quarters of professionals stated that children's views should not be ascertained as a part of a legal process. Despite clear laws favouring children's participation in proceedings, German research also showed that, if sole custody was not sought, 88% of the judges did not involve children in a hearing.[13] In Italy, judges interviewed children directly in as few as 2.5% of cases, and in Sweden "children are not heard to the extent desirable." [14]

Most European legal systems also give children the right to be represented autonomously. However, in reality, children are given a separate representative in not more than 1.6% of German cases.[15] British polls indicate that separate representation for children is ordered in up to 10% of cases.[16]

Legislations in Member States express the right for children to be heard and represented in one way or other, but it is a fact that in reality, the way and how serious and consequent it is performed must be looked upon more carefully. In particular, how courts consider what the child has expressed and the way these facts are investigated and reported must be more thoroughly examined.

Is the Right for a Child to be Heard Right or Wrong?

There is no doubt that a conflict between parents during a divorce affects the welfare of the child in a negative way.[17] Such a conflict culminates when parents fight for their rights, in court, whether it is in a custody case or an abduction or retention case. The aim to keep children out of the middle of their parents' conflict may explain why, in practise, children relatively seldom are asked to express their preferences in European courts. Some children may have very clear preferences about their living arrangements, but most children also do not want to be caught in the middle of a parental dispute.

4. CONCLUSION

This report has looked into a number of Member States in regard to the protection of children's rights in proceedings. Examining the provisions and the instruments that are being used in the different EU Member States, it is obvious that there are significant differences.

These differences are most obvious when it comes to the way a child is heard, at what age a child is to be heard and by whom the child is heard. There are also differences pertaining to the way courts consider the child's views and wishes.

I strongly believe that this is an effect of the fact that each country has its own traditions, religion, and conceptions of a family. The general view is reflected also in legislation and certainly in the way children and their views are respected.

Further action in regard to guidelines and perhaps even legislation in order to ascertain children's rights to be heard and able to express their views and ensure that the expressed views are considered by the court before a decision would be helpful and needed.

Differing Definitions in Member States

When enforcing foreign orders, for example those due to Brussels II Revised, there are a number of issues that may provide significant and potential problems, especially for us practising family lawyers in international contact or custody disputes as well as in abduction cases.

The definition of "custody" versus "parental responsibility" is an example where perhaps a more similar concept in the Member States would be preferable.

Failing that, significant differences for children and families in Member States will continue, further complicating the enforcement of orders given within the EU.

[1] "The views of Children in Child Abduction cases under the Hague Convention," Richard Harrison, Family Law Week June, 2010.

[2] Prop.1997/98:7 Vårdnad, boende och umgänge, Prop 2000/01:80 Ny socialtjänstlag mm, Prop.2002:03:53 Stärkt skydd för barn i utsatta situationer m.m.

[3] SOU 1997:116 p.134, after Eckelar J., "Interests of the Child and the Child's Wishes," Clarendon Press 1994 and Eckelaar J., "Beyond the welfare principle," Child and Family Law Quarterly, Vol. 14 No 3 2002, 237-249

[4] NJA 2008:85

[5] NJA 1981:753

[6] 21 kap 5 § FB (RÅ 2002 ref 1)

[7] Jänträ-Jareborg

[8] §159 FamG 112

[9] Bundeversassungsgerichtsentscheidung FamRZ 2007, 105 and Bundeversassungsgerichtsentscheidung FamRZ 2007, 1078

[10] Children Act, 1989

[11] Article 41 8!) Wardship & the children Act 1989,

Re D (Abduction: Rights of Custody) 12006) UKHL 51 (2007) 1 FLR 961 HL

[12] Patti. 2004

[13] Kotka, 2004

[14] Jänterä-Jareborg

[15] Hanneman & Kunkel, 2004

[16] Lowe & Douglas, 2007

[17] Douglas, Murch, Miles & Scanlan, 2006; Emery 2004