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Committee of Experts on the Rights and the Best Interests of the Child in Parental Separation and in Care Proceedings (CJ/ENF-ISE)

Draft Recommendation CM/Rec(2024)x of the Committee of Ministers to member States on the protection of the best interests of the child and his or her rights in parental separation proceedings

enf-ise@coe.int
www.coe.int/enf-ise

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PREAMBLE

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe;

A. ¹*Considering* that the aim of the Council of Europe is to achieve greater unity between its members for the purpose of safeguarding and promoting the ideals and principles which are their common heritage, *inter alia*, by promoting the adoption of common standards and policies and harmonising legislation on matters of common interest;

B. *Reaffirming* the principle of the inherent and equal dignity of all human beings, and underlining the importance of guaranteeing all children within the jurisdiction of a Council of Europe member State, the full exercise, respect, protection and promotion of their human rights and fundamental freedoms, without discrimination on any ground;

C. *Bearing in mind* the Council of Europe Strategy for the Rights of the Child (2022-2027) which includes the strategic objectives of “child-friendly justice for all children” and “giving a voice to every child”;

D. *Reaffirming* the obligations and commitments towards children as set out in relevant international and European Conventions, notably the United Nations Convention on the Rights of the Child, the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) and their respective additional protocols;

E. *Recalling* the relevant case law of the European Court of Human Rights, the standards and guidance from the Committee of Ministers in the area of family law and relevant judicial proceedings, notably the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice;

F. *Acknowledging* the views and opinions of consulted children from member States of the Council of Europe;

G. *Recognising* the important role of civil society, including non-governmental organisations, in supporting children, parents and families in co-operation with state actors, under a common framework;

H. *Having regard* to the fact that the best interests of the child should be a primary consideration and, in some circumstances, a paramount consideration, in all actions concerning the child and concerned that the child’s best interests may not always be given due consideration in parental separation situations;

I. *Convinced* that the status of the child as rights holder should be accorded appropriate legislative, procedural and substantive recognition and that he or she should benefit from appropriate support in exercising their rights in all matters affecting them;

¹ Lettering only for purposes of facilitating examination of the preamble. To be removed once approved by CDCJ and CDENF.

J. *Wishing* to guide member States in improving their legislation, policies, and practice regarding parental separation proceedings and to support them in providing guidance for officials and professionals as well as parents involved in such proceedings;

K. *Emphasising* that this Recommendation aims at establishing a common framework for the assessment of the best interests of the child while acknowledging the diversity of legal systems of the member States;

Recommends that governments of member States:

1. In parental separation proceedings:

- ensure that the best interests of the child are a primary consideration or, where required by law, the paramount consideration;
- ensure that the rights of the child are respected and safeguarded throughout the proceedings;
- ensure that decisions concerning the child are implemented or enforced in an effective and timely manner, in accordance with the best interests of the child;

2. Develop and promote alternative dispute resolution processes which take account of the rights and best interests of the child in parental separation proceedings;

3. Take or reinforce all measures they consider necessary with a view to implementing the principles set out in the appendix to this Recommendation in relevant national law, policy, and practice;

4. Ensure that this Recommendation and its explanatory memorandum are translated and disseminated as widely as possible and, specifically, to relevant competent authorities, professionals and other stakeholders working with children in parental separation proceedings.

APPENDIX TO RECOMMENDATION CM/REC

I. Definitions and scope

Scope

The present Recommendation applies to administrative or judicial proceedings as well as alternative dispute resolution processes in which parental responsibility for, custody or upbringing of, or access to, or contact with a child, is under consideration where the parents of a child are not living together or no longer wish to do so.

Definitions

a. “*Alternative dispute resolution (ADR)*” refers to processes whereby parties negotiate to reach an agreement, with the assistance of one or more professionals; these may take place before, during or after legal proceedings, as provided for by national law.

- b. *“Child”* means any person under the age of 18 years.
- c. *“Contact”* refers to stays of limited duration, meetings and communication in any form with the child by a person when the child is not living with that person.
- d. *“Competent authority”* refers to a judicial or administrative body that is competent to make a legally binding decision about the arrangements concerning a child involved in parental separation proceedings.
- e. *“High conflict case”* means a case in which one or both parents are unable or unwilling to put aside their sharp differences and to focus on the best interests of the child for the purpose of reaching a separation settlement or agreement; such cases are generally characterised by one or more of the following:
 - high level of hostility, antagonism and distrust between the parents,
 - continuous communication difficulties and repeated litigation,
 - non-cooperation between parents, in particular in the implementation of a settlement or agreement reached or a decision made concerning parental responsibility for, custody or upbringing of, or access to or contact with the child.
- f. *“Parents”* refers to the persons who are considered to be the parents of the child under national law.
- g. *“Parental responsibility”* refers to the set of duties and rights which aim to promote and safeguard the rights and welfare of the child in accordance with the child’s evolving capacities, as provided for by national law.
- h. *“Other holder of parental responsibility”* refers to the person(s), institution or other body having parental responsibility in addition to or instead of the parent of the child.
- i. *“Siblings”* includes half-siblings and stepsiblings.

II. Overarching principles

Best interests of the child

A. The best interests of the child should be a primary consideration, or where required by law, the paramount consideration, when securing agreement and resolving disputes in parental separation proceedings and alternative dispute resolution processes.

Right to be heard/to participate

B. The child should have the right to be informed and consulted, and to express his or her views. Due weight should be given to the child's views in accordance with his or her age and maturity.

Rule of law

C. Due process standards should apply to the child in the same way as to adults; these standards should be applied in a child-sensitive and age-appropriate way and not be denied or diluted under the pretext of the child's best interests.

Dignity

D. Every child should be treated with sensitivity and respect at all times; special attention should be given to the child's level of maturity, personal situation and specific needs.

Timeliness

E. Proceedings in which a child is involved should be initiated, concluded and followed-up in a timely manner and should be treated with exceptional diligence. Delays in proceedings are generally not in the best interests of the child and may indeed be prejudicial to the child.

Non-discrimination

F. The rights of the child should be secured, and the child's needs should be met without discrimination on any grounds.

Right to respect for private and family life

G. States should ensure the right to respect for the private and family life of children, parents and other holders of parental responsibility, as well as other family members.

III. Child's best interests' assessment

1. The best interests of the child should be regarded as a primary consideration, or where required by law, as the paramount consideration.

2. To assess the best interests of a child, consideration should be given to the circumstances of the case and all factors relevant to securing the rights of the child and meeting his or her needs. These may include, but are not limited to:

- a) the child's age, level of maturity and evolving capacities;
- b) the child's views where he or she has chosen to express them or, for a child who is unable to form or express her or his own views, the child's perspective;
- c) the appropriate preservation of the child's family and social environment,

- d) the willingness and ability of each parent, without discrimination on any ground, to care for and meet the needs of the child, including a parent's willingness to allow meaningful personal relations of the child with the other parent or other persons who are significant to the child;
- e) the history of the child's upbringing and care;
- f) the protection of the child from physical or psychological harm, or from being subject to, or exposed to abuse, neglect or violence as a direct victim or witness;
- g) any situation of vulnerability or risk as well as sources of protection and support;
- h) the child's developmental, health and education needs;
- i) the child's culture and identity;
- j) the child's usual day-to-day activities and hobbies.

3. The content and weight of each factor varies in each specific case and circumstances. If the assessment of the factors taken into account in a case leads to conflicting conclusions, they should be balanced against each other, with due consideration also of any possible short term, medium- and long-term consequences for the child.

4. The young age of a child should not be a decisive factor depriving the child of the rights to establish and maintain contact with his or her parent.

5. In parental separation proceedings involving a parent or a child with a disability, appropriate arrangements should be in place to enable a meaningful participation of the parent or the child.

6. In awarding custody and contact rights, the competent authority should give effect to the child's right and the principle that a child should have as much direct contact with each parent as is consistent with his or her best interests. Sufficient time should be allocated to enable the child to maintain and develop a meaningful relationship with each parent, in accordance with the best interests of the child.

7. Where unrestricted contact is not in the best interests of the child, the possibility of supervised contact or other forms of contact with the parent concerned should be considered. The possibility that, in some cases, no contact might be in the best interests of the child, should also be recognised.

8. In proceedings in which more than one child is affected, or likely to be affected, the best interests of each child should be assessed individually.

9. Competent authorities, where justified in the circumstances of the case, should have the possibility of activating relevant services and expertise to assess the needs of the child as well as the level of conflict between the parents, using a multidisciplinary approach.

IV. **Right to be heard**

10. The child should be provided with a genuine and effective opportunity to express his or her views, either directly or otherwise, and be supported in doing so through a range of child-friendly mechanisms or procedures. The child's level of understanding and ability to communicate, as well as the circumstances of the case should be taken into account.

11. It should be presumed that a child is capable of forming his or her views. Where age limits below which a child is not considered to have sufficient level of understanding to express his or her views exist in legislation, such age limits should be subject to periodic review.

12. Where a child needs assistance or is unable to express his or her views due to age or capability, the child's perspective on relevant matters should, where relevant, be ascertained and conveyed by a specially appointed and skilled representative or professional.

13. Due weight should be given to the child's views or, where appropriate, perspectives in accordance with his or her age and level of maturity.

14. It should be made clear to the child that his or her opinion will be an important factor in the decision-making process but that it will not necessarily determine the decision of the competent authority; the competent authority will take the opinion into account, together with other relevant factors, for the purpose of determining his or her best interests. The child cannot be considered responsible for the competent authority's decision.

15. Where proceedings concern more than one child, each of them should be provided with the opportunity to express his or her views separately.

16. The child's views may be ascertained in various ways, such as:

- a) Through the child being interviewed by the judge subject to appropriate safeguards;
- b) Through an interview report prepared by a trained professional (social worker or psychologist) appointed by a competent authority.

17. The mechanism or procedure to be used in any particular case should take account of the circumstances of the case, the child's age and level of understanding, as well as his or her ability to communicate; where considered appropriate, the child should be consulted on the manner in which he or she wishes to be heard. In cases involving older children, it may be appropriate to hear the child directly.

18. In order to avoid undue stress and discomfort, the hearing of a child's views should take place in a child-friendly environment.

19. Adequate safeguards should be in place to ensure as far as possible that the child is able to express himself or herself freely and that any expressed views are not the result of undue influence or duress.

20. A child should never be subject to cross examination on the content of his or her views.
21. Repeated hearing of the child should be avoided wherever possible, except where it is in the child's best interests.
22. For reasons of procedural fairness, a summary report of any views expressed by the child should be brought to the attention of the parties.

V. **Right to information and assistance**

Right to information

23. States should ensure that child-friendly information services are in place to inform the child in particular on:
 - a) the reasons of the proceedings;
 - b) his or her role in the proceedings;
 - c) the stages and the likely duration of the proceedings;
 - d) the mechanisms or institutions as well as procedural adjustments available to support the child during and after the proceedings
 - e) where relevant, access to appeals, including any applicable time limits, and independent complaints mechanisms.

Right to assistance and to legal counsel and representation

24. States should ensure that the child has the right to receive independent support and legal advice and, where appropriate, to have access to legal representation separate from the parties throughout the proceedings, in accordance with the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice.
25. The child should have the right to be assisted by a person who is able to advise and support the child, to facilitate his or her comprehension of the legal process, to provide reliable and relevant information, to ascertain the child's wish to exercise his or her right to be heard, to accompany him or her, during the hearing and, where relevant, during the appeal proceedings. The child should be able to contact this person at any time for information and advice.
26. Where the protection of the best interests of the child requires it, a special guardian *ad litem* or a separate legal representative should be appointed as early as possible to represent the child.
27. Access to an effective, sustainable and reliable legal aid scheme should be available for the child and parents. Where relevant, access to a free legal aid scheme should be available for the child involved under more lenient conditions than those applicable to adults.

Complaints mechanism

28. An independent and effective non-judicial complaints mechanism should be accessible to the child regarding the way in which his or her rights, including the right to be heard, have been applied in the proceedings.

VI. Course of parental separation proceedings and alternative dispute resolution processes

Before proceedings

29. Specialised services should be in place to inform and support parents in exercising their responsibilities towards the child before, during and after parental separation proceedings and help them to reach an amicable agreement in the best interests of the child. Competent authorities should be empowered to require parental use of such services as a term of the separation agreement.

In proceedings

30. Competent authorities, where justified in the circumstances of the case, should have the possibility of activating relevant services and expertise to assess the best interests of the child, and identify the most appropriate intervention with families.

31. States should put in place effective mechanisms and case management measures to enable timely identification of high conflict cases in order to allow for the earliest and most appropriate intervention with families, with a view to securing the rights and best interests of the child. Such measures may include early screening, supervised contacts, mediation or other alternative dispute resolution processes, parental education programmes and parental coordination.

32. In high conflict cases and in other cases where necessary to protect the best interests of the child, competent authorities should assess the necessity to activate any care protective procedures and/or measures. Where protective measures or services are considered to be necessary, the competent authorities, where separate, should cooperate closely with each other.

Emergency and interim measures

33. In situations of imminent risk to the health or safety of the child, especially in high conflict cases, national law should provide the availability of urgent referral and accelerated procedures in order to obtain an emergency decision or interim protective measures. In accordance with the child's best interests, emergency measures may be adopted without prior hearing of the child, provided that the child has the possibility to be heard before the final decision on the merits is made.

34. Where, due to the circumstances of the case, or the nature of the proceedings, a final decision is likely to be delayed, especially when the case needs some special investigation, appropriate interim measures should be provided in order to safeguard the rights and best interests of the child.

35. In cases where a child is at risk of abuse or harm by a parent, measures in place should enable competent authorities to promptly suspend direct contact on an interim basis or to order indirect contact, supervised or supported contact or any other measure.

36. In cases of parental obstruction of contact or persistent refusal of a child to have contact, interim measures should be provided with regard to contact until a final decision is adopted.

37. Emergency and interim measures should be immediately enforceable, in principle of short duration and be followed by further decisions taken with full procedural safeguards for the rights of the child and all relevant parties.

Decision

38. A decision should explain how the views of the child or, where appropriate, the child's perspective, have been heard and how they have been given due weight; where a child has not been heard, the reasons should be explained.

39. A decision should contain a clear and transparent reasoning, explaining how the relevant factors have been assessed, verified and assigned weight and how the best interests of the child and the interests of the parties have been given due consideration.

40. The decision should be communicated promptly to the child and explained having regard to his or her age and maturity.

Review of the decision

41. States should ensure that the decision concerning the child is subject to effective administrative or judicial oversight or review.

Preventive and alternative dispute resolution processes

42. States are encouraged to develop and promote mediation or other alternative dispute resolution processes to support parents in reaching an agreement or settlement which takes account of the best interests of the child.

43. Mediation or other alternative dispute resolution processes may not be appropriate where domestic violence or violence against the child has been established or there are well-founded risks of violence or abuse.

44. Domestic violence can impair the capacity of parents to reach a mutual agreement about childcare matters freely. Parents should not be required to participate in joint counselling, mediation, amicable settlement or similar mutual activities to seek agreement unless the competent authority has established both parents' capacity is not impaired.

45. Information explaining the benefits of mediation or other alternative dispute resolution processes should be provided prior to the commencement of any legal proceedings; it may be appropriate under national law to require the parents to attend an information meeting on such processes.

46. The commencement of legal proceedings should not prevent a competent authority from encouraging parents to engage in mediation or other alternative dispute resolution processes at any time.

47. The best interests of the child should be a primary consideration for the mediator or other professionals involved in such processes. They should encourage parents to focus on the best interests of the child at all times and remind them of their primary responsibility for the welfare of their child and the need for them to inform and consult their child.

48. Where, during alternative dispute resolution processes, there are indications that a child is at risk of harm or neglect, the mediator or other professional should report such indications to the competent authorities in accordance with national law.

49. Provision should be made for the registration of mediation or other alternative dispute resolution agreements or their approval by a competent authority where that authority is satisfied that the agreement gives due consideration to the best interests of the child and is fair to all participants.

50. Communications, including statements and records, relating to the mediation should be regarded as confidential and not be disclosed in any proceedings or otherwise; disclosure should be permitted only where required by law or where there are safeguarding or child protection concerns.

Implementation and enforcement

51. In order for enforcement procedures to be as effective and efficient as possible, national law should provide for a range of measures in the event of non-compliance.

52. Orders relating to the enforcement of contact should always promote and protect the best interests of the child and should be determined on a case-by-case basis.

53. In cases where a decision is not being respected by a party, the competent authorities should firstly promote voluntary compliance accompanied, if needed, with a mediation or negotiation phase concerning its implementation.

54. Decisions and measures involving and affecting children should always be implemented or enforced in a timely and child-friendly manner that respects the dignity and the situation of vulnerability of the child.

55. In cases of persistent non-compliance, mechanisms should be in place to enforce the decision or to review it and to make any necessary adjustments.

VII. Relocation

56. Relocation of a child should be decided by the holders of parental responsibility jointly, or by a competent authority in case of disagreement.

57. A parent intending to relocate with or without the child should give timely prior notice to the other parent. Notice about a relocation of the child should be given to other family members of the child having an enforceable contact right.

58. Where a competent authority decides about relocation of a child, there should be no general presumption in favour of or against relocation. Decisions in relocation cases should seek to balance parents' freedom of movement rights with the best interest of the child and right to respect for family life of both parents and the child.

59. All relevant factors should be considered during the best interests' assessment process, with specific attention given to maintaining meaningful relationships with each parent, siblings, other family members and with other people who are significant to the child.

60. Where regular physical contact between the relocated child and the other parent is no longer feasible or possible, agreed relocation arrangements should include provision for regular remote contact and for the receipt of correspondence and gifts to mark significant dates and events in the child's life.

61. The reasonableness of the proposed relocation and, where appropriate, the reasons advanced by the parent seeking to relocate should be subject to an objective assessment in order to ensure that the relocating parent has taken into account the best interests of the child.

62. The practicality of any proposed contact arrangements, having regard to the costs and levels of disruption involved, should also be subject to an objective assessment.

VIII. Miscellaneous provisions

Data protection

63. Any proceedings involving a child should, to the extent possible, be held other than in public in order to protect the privacy of the child.

64. The personal data of the child and other persons involved in the parental separation proceedings should be collected, used, shared, and stored in accordance with law.

65. Where it is in the best interests of the child, the sharing of his or her personal data between relevant competent authorities, professionals and service providers should be ensured in practice.

66. The child and, where applicable, his or her parents or other holders of parental responsibility, guardian *ad litem* or legal representative, should be informed about the procedures for exercising the child's data protection rights, including the right to apply for rectification of incorrect or incomplete personal data in relevant records.

67. States should protect children involved in parental separation proceedings from being identified or identifiable in media coverage.

Training and Professional standards

68. States should ensure that competent authorities and professionals involved in parental separation proceedings, including judges, lawyers, mediators, psychologists, and social workers, receive appropriate support, practical guidance, and training in order to have the necessary levels of expertise on the needs and the rights of the child in parental separation proceedings and on child hearing techniques.

69. Codes of good practice for mediation or other alternative dispute resolution processes should be put in place to ensure high professional standards at all times.

Monitoring and research

70. All legislative, policy and budgetary decisions concerning parental separation should be based on independent monitoring and scientific research findings.

71. States should ensure that the development and review of parental separation related services for children, parents and families are based on periodic consultations of children, parents, and professional service providers from relevant disciplines.

International co-operation

72. States should strengthen their cooperation in order to effectively secure and promote the best interests of the child in cases of parental separation with a cross border dimension.

73. States should promote cross-border exchange of experience, research, and service models, as well as cross-border training of competent authorities and professionals.