

## THE PRINCIPLE OF PRIMARY CONSIDERATION OF THE BEST INTERESTS OF THE CHILD IN CIVIL PROCEDURE IN UKRAINE

FURSA SVITLANA YAROSLAVIVNA,<sup>1</sup>

BORDIUH TETIANA OLEKSANDRIVNA,<sup>2</sup>

FURSA YEVHEN YEVHENOVYCH<sup>3</sup>

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<sup>1</sup> Institute of Law of the Taras Shevchenko National University of Kyiv, Department of Notary, Enforcement Process and Advocacy, Prosecution, Judiciary, Kyiv, Ukraine

fursa\_2003@ukr.net

<sup>2</sup> Ukraine Supreme Court, Department of Analytical and Legal Work of the Supreme Court, Kyiv, Ukraine

tatiana.bordiuh@gmail.com

<sup>3</sup> Ukraine Republic, Ministry of Foreign Affairs, Department General for Consular Service, Kyiv, Ukraine.

fursamfa@gmail.com

CORRESPONDING AUTHOR

fursa\_2003@ukr.net

**Abstract** The article examines approaches to understanding the terms "children's interests" and "the best interests of children" in scientific theory and law enforcement practice in Ukraine. The authors summarise the experience of Ukrainian judicial practice in observing the principle of primary consideration and ensuring the best interests of the child. This experience is being studied on the example of resolving civil cases on determining the place of residence of a child for the most part. The authors make suggestions concerning the application of Article 3 of the UN Convention on the Rights of the Child. The authors propose to understand the principle of primary consideration and ensuring the best interests of children as the use of the best possible ways and means of resolving cases with the participation of children, which would meet their contemporary interests, consider their existing needs along with the perspectives for the future to the greatest extent possible.

### Keywords

child,  
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opinion

## 1 Introduction

Children require special attention from adults, additional care, and guardianship due to their age and psychological characteristics. Therefore, national and international law determines the protection of children's rights as a priority. Children are the future of every nation, and therefore efforts made to create the right conditions for developing children and ensuring their rights and interests directly affect the future we build.

Recent sociological and psychological studies indicate a higher level of mental development in modern children (Burnsand and Gottschalk, 2019). Accordingly, this tendency also affects the range of their needs and interests – increase and expand them. Therefore, taking into account these factors and processes, as well as realising the importance of the challenges that society faces today in the field of legal regulation of the protection of children's rights and ensuring their best interests, we decided to focus on the research on the interests of children.

The primary consideration and ensuring the best interests of the child is recognised as the main principle of the protection of children, established by Article 3 of the UN Convention on the Rights of the Child, which states,

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (UNGA, 1989).*

Although scientists are studying the interests of children on the national (Olkhovyk, 2006; Onishchenko, Lvova, Sunegin, 2013; Petrochko, 2014) and international (Van Bueren, 2006; Kruk, 2015; Martinson, 2016; Leloup, 2019: 50–68; Krutzinna, 2022: 120-145) levels nowadays, there is still uncertainty as to what should be considered the best form of interest of the child? Consequently, the next question arises, "What should be understood as a primary consideration and ensuring the best interests of the child?" It is uncertain. Therefore, we will try to answer these questions in this article in the context of civil procedure and the adoption of court decisions in civil cases in Ukraine in compliance with the principle of primary consideration of the best interests of children.

To begin, we will try establishing the specific interests of children in the context of solving civil cases on determining the place of residence of a child in particular. Then we will analyse what the principle of primary consideration of the best interests of children means in civil cases. To achieve these goals, we will turn to the judicial practice in Ukraine, and then we will summarise the researched material. In conclusion, we will try to derive a universal rule that would help determine the best interests of children in every civil case.

The novelty of this research is in highlighting the key features of the Ukrainian experience and problems concerning the interests of children, as the Ukrainian approach is an under-researched area in European studies. The novelty of the study also includes coverage of some problems of international legal regulation in relation to the cases about determining the child's place of residence. Besides, we propose a new approach to understanding the principle of the primary consideration of the best interests of children, which will help to identify and protect the interests of children in practice in a better way.

## **2 What Are the Interests of Children?**

If we consider the general approaches in legal doctrine in Ukraine to understand the concept of a legally guarded interest, we can find various definitions proposed by scholars. Thus, the scientists from the Kharkiv Civilistic School believe that the legally protected interest in civil law should be understood as the conscious subject of the right to obtain certain tangible (intangible) benefits or change their legal status, which encourages the subjects of law to take specific actions or, conversely, to refrain from them, which are in the legal field, provided in the implementation of state support, which is implemented in the form of a permit, which is presented in a specific legal relationship (Spasybo-Fateeva, 2014).

O. I. Chepys understands the interest protected by law as the aims of the subject to meet socio-economic needs that are realised in civil law and subject to civil protection, but not mediated by legal norms, although those that do not contradict the general principles of civil law (Chepys, 2010).

Z. V. Romovska emphasises that the inclusion of interest in the group of interests protected by law allows its bearer to act in a certain way, to claim certain behaviour of another person, and in case of dissatisfaction with this interest, to seek his protection (Romovska, 1983).

Summarising the existing approaches in legal science to the definition of the concept under study, R. A. Maidanyk argues that most often, the doctrine of civil law understands the term "interest" in two senses: as a prerequisite or mandatory element of a particular subjective law and as a possibility to satisfy their claims through subjective law. In this regard, a distinction should be made between the notion of interest as a precondition or basis of any subjective right and action in the so-called self-interest. The first of them means the sense of the existence of the subjective right, the main purpose for which it exists, and the second – is the ability of persons to meet their needs by any action, which exists, in particular, in cases of use of one's own or another's property for its intended purpose, because there is no such subjective right, in which its owner would not be interested (Maidanyk, 2012).

The connection between interest and subjective law is interesting. I. V. Venediktova argues that the civil interest is the driving force that ensures the free expression of the will of the parties in the exercise of their rights, which implies a diversity of behaviour of the subject of legal relations when the subject decides on possible actions in these relations (Venediktova, 2014).

As N. S. Kuznetsova rightly points out, civil law itself allows an individual and any association of individuals to implement an initiative based on legal equality and free expression of will, an initiative aimed primarily at pursuing primarily private interests (Kuznetsova, 2008).

Thus, the concepts of interest and subjective law in the doctrine of Ukrainian jurisprudence differ in content but are considered to be very interrelated concepts. Interest is recognised as a prerequisite for the emergence of law, which, in this context, can be defined as a legally established opportunity to realise the interest supported by means of state coercion. Therefore, subjective law, in turn, is a means of realising the private interests of the individual. It is through the right that a person acquires the ability to demand from other people conduct that meets the interests of the authorised person and ensures their implementation.

It should be noted that the interests of the child remain insufficiently studied in Ukraine, although they were the subject of research by some Ukrainian scientists. For example, L. A. Olkhovyk defined the interests of the child as a legal value "characterised by the proper material, moral, physical, mental state of the minor, provided by parents and which the minor is able to assess after reaching a certain age" (Olkhovyk, 2006). Although the interests of the child are indeed a legal value, in our opinion, this definition does not provide an explanation of the concept under study in essence.

N. O. Onishchenko, O. L. Lvova and S. O. Sunegin argue that "under the existing legal doctrine, the logic of legal development and legal practice, the legitimate interest of the child means the interest protected by the state and society" (Onishchenko, Lvova, Sunegin, 2013), in which they can be unquestionably agreed.

J.V. Petrochko believes that "ensuring the best interests of the child means the meeting of the individual needs of the child according to his age, sex, health, development, life experience, family, cultural and ethnicity, taking into account the views of the child" (Petrochko, 2014). This statement seems reasonable; however, it also seems that it does not fully characterise the best interests of the child.

In the United Nations High Commissioner for Refugees (UNHCR) Guidelines on Determining the Best Interests of the Child, it is indicated that the term "best interests" "broadly describes the well-being of the child. Such well-being is determined by various individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the environment and experience of the child" (UNHCR, 2008, p.14). Thus, the well-being of the child is associated with various individual circumstances and ensuring the needs of the child, but not directly in his or her best interests.

In other words, these circumstances are factors that determine the needs of the child, not his or her interests. Therefore, the question arises about the correlation between the interests of the child and his or her needs. It is obvious that these two categories are closely related but not identical. The legally protected interest is defined as not prohibited by law aspiration to have a certain good (benefit) in Ukrainian jurisprudence. Such aspirations can go beyond the framework of what only is

necessary, what only is needed. Therefore, the category of children's interests is broader than their urgent needs at a particular moment in time.

However, the interests of children are designed to meet their needs as well, of course. In this regard, psychologist E. Kruk noted that adults should not only take care of the urgent needs of children but also help children grow and develop and make the most of their opportunities (Kruk, 2015). Thus, psychologist considers such support from adults an important part of ensuring the best interests of children. Besides, such an approach should provide an opportunity to move away from the urgent needs of the child that exist today and also to look to the future of the child, if we take into account the concept of "development" of the child, for example, five or more years ahead.

Investigating the interests of the child, G. Van Bueren points out that 'there is no agreement on the question of what the interests of the child are, not to mention his or her best interests' (Van Bueren, 2006, p. 68). She also rightly notes that the answer to this question is given by the adults themselves, who have the authority to substitute their decisions for the child's decisions, provided that these decisions are made in the best interests of the latter. Thus, determining the interests of children becomes a matter of adult intuition. Nevertheless, G. Van Bueren rightly points out that 'the notion of the best interests of the child has to be more than the crude intuition of judges,' as it must be based on the law to ensure objectivity and observance of the principle of predictability (Van Bueren, 2006: 70).

However, in this aspect, our positions do not quite coincide because taking into account the concept of "law", we come to a stereotypical way of regulating legal relations, and this is understandable if we take into account a group of children, say, a certain age, for example, when conducting a survey of this group of children. If we take the interests of a particular child as a basis, they can be completely different from the interests common among children of a certain age. Therefore, we need an individual approach to each child if we want to establish his or her best interests.

The scholar G. Van Bueren also believes that the Convention on the Rights of the Child is based on the assumption that the observance of all established rights of the child will ensure their best interests. However, she recognises that interests are a broader concept than rights and that they are a prerequisite for rights (Van Bueren, 2006).

As a result of her research, G. Van Bueren proposes to be guided by other principles, namely the principle of less harm and the principle of the dynamics of the development of the child's abilities to determine and observe the best interests of the child. However, she recognises that this may be uneasy in practice (Van Bueren, 2006).

We absolutely agree with this opinion of the scientist because, in her position given earlier, adults often have to proceed not only from the wishes and dreams of the child but from the principle of possible realisation of such dreams. For example, in Part 3 of Article 24 of the Constitution of Ukraine, the state has undertaken obligations for legal protection and material and moral support of motherhood and childhood (Constitution of Ukraine, 1996), but the minimum wage in Ukraine from 1 January 2021 to 30 November 2021 is 6,000 Ukrainian hryvnias (UAH) per month (about 220 USD), and from 1 December 2021 the minimum wage is 6,500 UAH (about 240 USD) (Minfin Media, 2021). Therefore, the opportunities for parents to realise the dreams of a child are on the verge of possible and impossible because the realisation of a child's dream depends on their income.

When the courts order alimony from one of the spouses, it is not based on the interests of the child but on the size of the subsistence minimum per child. Thus, in Ukraine, children under the age of 6 years in 2021 must be financially provided at the level of not less than 2,100 UAH (about 78 USD), and the next age category from 6 to 18 years old must be financially provided at the level of not less than 2,618 UAH (about 99 USD) (Minfin Media, 2021). It follows from this provision that children aged 6 to 18 have the same interests, development costs and material needs, *etc.*, which is difficult to agree with due to the difference in prices for at least clothes for the children.

Indeed, in such cases, much depends on the lawyers, who should ask the court about the provision that will meet the best interests of the child rather than their minimum material support. But the state must also set guidelines to be followed by the courts in determining the best interests of the child in certain circumstances. In the vast majority of Ukrainian families, parents try to give their children the best, often forgetting even their own interests, but in the case of emotionally strained divorces and alimony, some parents, for various reasons, go to the principle and try to determine the smallest amount of alimony. At the same time, alimony should be recognised as one of the important means of ensuring the best interests of the child, who already finds him or herself in a difficult life and emotional conditions when the child's parents divorce.

In 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), it is stated that the concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognised in the Convention and the holistic development of the child (UN Committee on the Rights of the Children, 2013).

Donna J. Martinson points out that the best interests of a child require a rights-based approach that covers all rights and involves the holistic development of the child (Martinson, 2016).

Analysing the case law of the European Court of Human Rights, M. Leloup outlines that "in practice, the child's interests are usually dealt with very briefly. From the case law, it appears that the Court evaluates the children's interests based on three factors: their age, their ties to both the receiving and the host country, and their effective family bonds" (Leloup, 2019: 50–68).

Krutzinna J., in her research, suggests a three-step approach based on a theoretical model of the child to understand his/her needs,

*At least three such perspectives are conceivable: a) the universal child, b) the categorical child, and c) the individual child. While sphere a) characterises children based on their status as a child and assumes sufficient similarity in terms of needs between all children, sphere b) groups children together based on relevant characteristics, which may vary depending on socio-cultural context. Examples include familiar vulnerability-based categories: very young age,*

*female gender, ethnic minority background, poverty, and disability. In contrast, sphere c) takes into account these vulnerabilities as far as they are relevant for the specific child but goes further in considering the child as she is with any additional characteristics, conceptualising the child in her entirety as a unique individual (Krutzinna, 2022: 120-145).*

This approach seems to be interesting and has the potential to help understand a child better and, therefore, his/her needs, but still, it focuses only on this part of the "needs" of the child, not taking into account the rights of a child as it was outlined in the Comment of UN Committee on the Rights of the Children.

## **2.1 Analysis of Relevant National Legislation in Ukraine**

Article 7 of the Family Code of Ukraine establishes, 'The regulation of family relations should be conducted with the greatest possible consideration of the interests of the child' (Family Code of Ukraine, 2002). Therefore, the interests of children are almost the main criterion, based on which all family disputes should be resolved in civil procedure. It is known that the principles enshrined in the rules of law acquire the meaning of the most general rules of conduct for litigants. Therefore, such a general and universal nature of this rule of conduct concerning children gives ground to recognise it as a legal principle.

An example of the application of the principle of the best interests of children by the courts can be found, in particular, in the decision of the European Court of Human Rights of 11 July 2017, *M. S. v. Ukraine*. In this decision, the ECtHR emphasised that it is of paramount importance to resolve the issue of what is in the best interests of the child in cases of determining the child's place of residence. In doing so, the Court noted that the best interests of children should be a primary consideration (ECtHR, 2017).

The Supreme Court referred to this decision of the ECtHR when considering the case on determining the place of residence of children. The Supreme Court indicates in its decision that there are two aspects which must be taken into account when determining the best interests of a child in each case. At first, it is in the best interests of the child to maintain his or her ties with the family unless the family is dysfunctional. Secondly, ensuring a child's development in a safe, calm, reliable and

stable environment is in the best interests of the child. Moreover, the best interests of the child may override those of the parents depending on their nature and seriousness (The Resolution of the Supreme Court, 2018: Case No. 343/1500/15-й).

Simultaneously, we believe that the interests of children should be consistent with the interests of the family because the well-being of children and the realisation of their interests directly depend on ensuring the interests of the family. Therefore, judges should investigate the interests of children comprehensively with the interests of the family as a whole and of other family members separately to achieve the common good. And if the welfare of the family is ensured in this way, then the children will receive all the necessary and appropriate conditions for normal development.

Based on this, we can assume that the principle of proportionality should also be applied in cases concerning the best interests of the child. In our vision, it means that the intervention of the state in the rights of a child, parents and other family members (*i.e.* in cases of adoption, deprivation of parental rights *etc.*) must be limited to the help the child needs under certain circumstances and thus the measures applied must improve the state of the child just enough and not more than it is reasonably necessary. In other words, the less restrictive measures must be applied if they are enough to help a child and provide for his/her best interest.

However, Part 2 of Article 1 of the Family Code of Ukraine establishes other criteria for assessing the conditions that affect both parents and children, namely: the establishment of a sense of duty to parents, children and other family members; building family relationships on a parity basis, on feelings of mutual love and respect, mutual assistance and support; providing each child with family upbringing, opportunities for spiritual and physical development. It is difficult to disagree with these provisions, but it would be appropriate to swap paragraphs of this rule on duty and love and replace the word "parity" with the word "equal".

Let's single out the concept of "love" from the given terminology, which cannot be considered legal, as its content in the Family Code of Ukraine is not disclosed, and its criteria are not given. Despite this, such a term is used in Part 1 of Article 55 and Article 150 of the Family Code of Ukraine, but the complexity of this term, along with others, such as respect, friendship, *etc.*, complicates the task of qualifying the

best interests of the child, if parents are obliged to: raise the child in the spirit of respect for other people's rights and freedoms, love for family, their nation, their homeland, to take care of the child's health, his or her physical, spiritual and moral development.

So, if the Family Code of Ukraine does not formulate the concepts of "love", "respect", *etc.*, then can they not be applied? We believe that in such cases, we must turn to Ukrainian traditions, literature, *etc.*, where we can find examples of perception and application of these concepts in specific relationships and, thus, we will be able to fill these concepts with specific content, taking into account certain legal circumstances.

Returning to the issue of resolving cases concerning the child's place of residence in Ukraine, it should be noted that under the current Ukrainian legislation, a child of fourteen years old is free to choose a place of residence under certain restrictions. The formula for determining the place of residence of a child aged ten to fourteen is more complicated and is one of the most difficult. Article 29 of the Civil Code of Ukraine states,

*The place of residence of an individual aged ten to fourteen is the place of residence of his or her parents (adoptive parents) or one of them with whom the child lives, the place of residence of the guardian or the location of an educational or healthcare institution, etc., in which the child resides unless another place of residence is established by an agreement between the child and parents (adoptive parents, guardian) or an organisation that acts as a guardian. In the event of a dispute, the place of residence of an individual between the ages of ten and fourteen shall be determined by the guardianship authority or the court (Civil Code of Ukraine, 2003).*

Accordingly, the place of residence of a natural person under the age of ten is the place of residence of his or her parents (adoptive parents), or one of them, with whom he or she lives, the place of residence of the guardian or the location of the educational institution or healthcare institution, in which the child resides. The will of a 14-year-old child is brought to the absolute because a such will is recognised as independent of the will of the parents, their marital status, solvency, *etc.*

For a child between the ages of 10 and 14 years old, Ukrainian law allows an agreement between a child and his or her parents, an organisation that acts as the guardian of a child. However, that provision of law on ascertaining the will of a child should also be taken into account when determining the place of residence of a child in the form of a contract. Therefore, the will of a child should be considered when resolving cases in court and out of court, and such will is brought to the absolute quite often, regardless of objective factors.

At the same time, there are several circumstances taken into account in the first place when resolving a dispute over the place of residence of a minor under the age of 10 years old. Such circumstances are the attitude of the parents to the performance of their parental duties, the child's attachment and affection to each of them, the child's age and health and after these – other circumstances of significant importance (part 1 of Article 161 of the Family Code of Ukraine). Thus, the emphasis is not on the will and interests of a child, who may be nine years and eleven months old, but on the parents' performance of their duties, so this is no more about the best interests of the child, both in the present time and in the long term.

Therefore, we believe that the court should not overestimate one of the components to maintain at least parity between the will of the child and his or her best interests but consider them all and decide the fate of the child taking into account all the available evidence in each civil case. In our opinion, the help of psychologists may also be needed in such matters, since some children may be influenced by the promise of one of the parents to give him or her a present in exchange for the child's agreement to stay with that parent, but then the child may end up with the grandparents, while the father or mother will live off the child support.

There are often cases when the parent with whom the child is left to live instils in the child disrespect for the other, forbids the child to see the other parent, *etc.*, so the provisions of the law remain unused in practice, but these cases could potentially be warned or corrected if psychologists were involved in such cases.

## **2.2 Certain Issues of the Regulation of the Protection of the Children's Interests at the International Level**

International treaties ratified by the Verkhovna Rada are part of national legislation in Ukraine. So, it is also worth noting that certain issues concerning the rights and interests of children have received varying degrees of regulation and settlement in international treaties. If we consider other aspects of the protection of the rights and interests of children in the international context in more detail regarding, for example, the adoption of children, we will see many international acts devoted to these issues, such as the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (or Hague Adoption Convention) (UN, HCCH, 1993), European Convention on the Adoption of Children (done at Strasbourg on 27 November 2008) (Council of Europe, 2008) and other international acts.

However, the question of determining the child's place of residence may also be related to a foreign element when one of the parents is legally residing in a foreign country or is a foreign citizen. However, this issue is not regulated in such detail in international treaties, as is adoption, and sometimes it is difficult to find an appropriate judicial practice (relevant case law) in some countries, as it is in Ukraine, for example.

Since this issue will become more relevant because of the development of population migration, it needs detailed regulation in international treaties as well. Thus, if a Ukrainian child from the age of 14 years old has the right to determine the place of residence without restrictions by its borders, then such right can also have a transnational character. Furthermore, in our opinion, similar norms about adoption that are in the international law and national legislation of various countries, where the best interest of the child is proclaimed and put first, may also be applied to cases on determining a child's place of residence.

### 2.3 Sum-Up on Children's Interests

Based on the analysis above, we can conclude that the sphere of interest of children is wide enough and covers all issues related to the well-being of children. Therefore, it is challenging to give a clear and specific list of the interests of children, and there cannot be an exhaustive list at all. Simultaneously, it is difficult to object that children have such interests as follows:

- To grow up in a healthy family atmosphere;
- Not to receive psychological trauma due to strife between adults in the family – *i.e.*, to have and to maintain mental and spiritual health in addition to physical;
- To have good relationships with parents and to receive appropriate help from adults in building correct relationships with peers, *i.e.* to learn friendship and make good friends;
- To develop physically, mentally, morally, spiritually and socially;
- To receive help in discovering and developing their talents;
- To receive from adults decisions that best meet the needs and wishes of the child, *i.e.* children have an interest in the adults' decisions they need and want for themselves;
- To have love and understanding from adults of the child's needs, desires, views, choices, *etc.*

And this list could be extended. We have mentioned only some of the interests of children, which are not directly expressed in law, but which every minor seeks to possess consciously or unconsciously.

## 3 Defining the Best Interests of Children

### 3.1 Determination of the Best Interests of Children in Practice of the Supreme Court

The decisions made by the Supreme Court in cases involving children tend to focus on the best interests of children. The Court assesses the circumstances of the case and decides what will better defend and provide for the interests of children in each specific case.

In cases of determining the place of residence of a child, the Supreme Court has formulated many legal positions regarding what will be in the interests of children, which should be adhered to by all courts of lower instances and state bodies. We will focus on some of them. To begin with, the Supreme Court notes that in determining the child's place of residence, it is necessary to proceed first of all from the interests of the child, taking into account his or her social ties, place of study, psychological state, *etc.*, as well as maintain a balance between the interests of the child, the right of the parents to raising a child and the obligation of the parents to act in the best interests of the child (The Resolution of the Supreme Court, 2020: Case No. 587/2134/17). However, in our opinion, these issues can be perceived as urgent current interests of the child, but they do not take into account the future of the child.

The Supreme Court also concluded that the equality of the rights of parents in relation to the child is a derivative of the rights and interests of the child for harmonious development and proper upbringing, and first of all, the interests of the child should be determined and taken into account, proceeding from the objective circumstances of the dispute, and only then the rights of the parents (The Resolution of the Supreme Court, 2019: Case No. 333/7436/17). That is, the child's opinion should be taken into account in this regard.

According to the position of the Supreme Court, it is in the interests of the child to grow up in a complete family. Therefore, the fact of creating a new family by the mother, in the absence of evidence to the contrary, cannot be assessed as a negative circumstance, which makes it impossible to determine the place of residence of the child with the mother. Such a fact also does not give preference to the father, who did not create a new family in the defined place of residence of the child with him (The Resolution of the Supreme Court, 2019: Case No. 645/4582/16-11). In this regard, the authors share the position of the Supreme Court but suggest not to perceive the definition of the child's place of residence as stably fixed until the child reaches adulthood.

Thus, if the child does not have a good relationship with the mother and her new husband, the Supreme Court concludes that in such cases, determining the place of residence of a minor child with the mother will not meet the best interests of the child, as the child will have to adapt to the new social environment, which can

adversely affect the child's psychological state (The Resolution of the Supreme Court, 2020: Case No. 574/886/18).

In the practice of the authors, there was a situation caused by the fact that the mother of the child, an athlete, had to join a foreign club, and this situation was perceived as a negative phenomenon. But in the court case, the negative assessments were refuted, as the child must get used to adapting to the new team and learning foreign languages along with the natives and, not surprisingly, in the foreign city, there was a school with the child's native language. Therefore, the position of the Supreme Court cannot be considered absolute but should be based on a specific life situation, taking into account the highest interests of the child, which was considered within the arguments of lawyers in this particular case.

According to the practice of the Supreme Court, the separation of children from their parents and the determination of the children's place of residence in the social centre will be in the best interests of children if it is necessary to provide them with adequate living conditions, education and medical care and to prevent children suffering from the absence of care (The Resolution of the Supreme Court, 2020: Case No. 645/731/18).

In the event that a party claims to change the child's place of residence, the Supreme Court concludes that the change of the child's place of residence will not correspond to the best interests of the child as it will entail a violation of the child's stable, established ties with others and their usual environment (The Resolution of the Supreme Court, 2019: Case No. 552/4608/18).

However, it cannot be assumed that a child should live his whole life in a certain place or under certain conditions. In this situation, it is important to take into account how the parental responsibilities were performed, and in case of improper performance, the other parent should be given a chance to raise and develop the child. Of course, if there is relevant evidence in a particular case and the child does not object.

Until recently, forensic statistics testified to the absolute majority of cases when children were left by the court to be raised by their mothers. This situation was caused by the fact that everyone perceives Ukrainian culture as a source of reliable information, where the term "mother's love" has been praised since ancient times. However, how many cases have been recorded when a child is turned against the father and thus refuses to communicate with him? Are all mothers in Ukraine equally worried about their children? Therefore, taking into account the development of society and contemporary processes, the Supreme Court, starting in 2018, departed from the previous legal position, according to which, in order to leave a child with their father, it was necessary to prove the existence of exceptional circumstances that prevent the abandonment of a child by their mother. Accordingly, today's studies of judicial practice indicate a significant increase in court decisions in which the court, based on the equality of the rights of parents concerning the child, leaves children to live with the father. And we consider these tendencies in judicial practice to be correct since there is a significant number of fathers who love their children and who are able not only to provide for the child financially but also to educate them spiritually.

So, according to the practice of the Supreme Court, the assessment of the best interests of the child includes finding a balance between all the elements necessary for making a decision based on the objective circumstances of the dispute, and this balance must not violate the interests of the child, but protect them.

In our opinion, the maintenance and upbringing of the child should be perceived not only through the prism of legislation but also under Ukrainian traditions, where love for a child is one of the highest family values, and a child's love for their parents is a natural property of children and not only Ukrainian ones. In this case, we are reaching the level of those indicators that cannot be measured in modern conditions, but they exist and should be taken into account when determining which parent the child should stay with in the event of a divorce.

So, quite often, in families, one of the parents shows condescension toward the actions of the child, and the other – exactness, checks homework, monitors visits to sports activities and brings up the child in the spirit of respecting their grandfather and grandmother. The question will be simple; who has a more positive role in raising a child and, at the same time, to whom will the child go in the event of a

divorce? However, which parent will give the child greater prospects in independent life and achieving positive results? How to distinguish a demanding father from a despot in family relationships, condescending behaviour from indifference, or narcissism? Is a judge able to determine the best interests of a particular child during a court hearing if he or she does not have objective information but has the positions of the two parties in the dispute? It is just as difficult to understand real relationships based only on the child's position if we want to know about the child's best interests and not the child's assessment of his prospects for the future or his or her perception of the concept of "love" for one parent.

Therefore, determining the limit of state intervention in relations related to the upbringing and maintenance of the child, it should be done not in a hurry and not in a standard way, according to which the child should stay with the mother because so the vast majority of cases in Ukrainian courts; but it should be done by taking into account the positions of the child, both of his or her parents, the arguments of their lawyers, as well as the conclusion of the psychologist, which together must ensure the objectivity of the final court decision.

### **3.2 What can be the best form of interest?**

Now, considering the given examples of children's interests, we can proceed directly to the analysis of the concept of the "best interests" of the child used in the Convention on the Rights of the Child. In this context, the question arises, what can be the best form of interest? For example, what can be the best form of interest to grow in a healthy family atmosphere? What is the best way to stay healthy? What is the best way to seek out and develop talents?

If these questions can be answered, they will be ambiguous, not specific and not applicable to every child and every life event unless we take some starting point to determine better and the best interests. In our opinion, the answers to these questions are more philosophical than practical legal ones. However, following logic, it is necessary to have a proper understanding of the best interests of children to decide their cases in accordance with such best interests. And here, we see that the solution to this question is rather problematic.

Besides, it should be noted that we are not talking, for example, about the best health because, firstly, it is difficult to characterise what kind of health it is, and secondly, the achievement and preservation of absolute and perfect health does not seem possible under the current environmental conditions. Therefore, it seems to us that the principle of primary consideration and ensuring the best interests of children means not so much the best form and the highest degree of the interest itself but the search for the best possible option, the best way to resolve cases involving children, which would satisfy their interests to the greatest extent possible, take into account their needs and fit their wishes.

In other words, in our vision, the primary consideration and ensuring the best interests of children mean that obligated persons have to make every effort to create the best possible conditions for the development of children and give them the best possible care. Thus, the best degree requires the obligated persons to take maximum care of the interests of the children. And this is justified from the point of view that children can often not be aware of their interests, and this means that adults should take care of them. The responsibility of the obligated persons arises to provide the child with the care he or she needs based on the inability of children to take care of themselves.

Therefore, we suggest the principle of primary consideration of the best interests of children by obligated persons (state bodies, parents, guardians, trustees) is to understand, search for and apply the best ways and means out of all the available ones to solve cases involving children, which would to the greatest extent possible satisfy the interests of children, take into account their needs and meet their wishes. The application of such a theoretical approach will make the determination of the best interests of children in practice more clear and will allow judges to decide on cases concerning children in a better way to give the best possible protection to the children's interests with maximum compliance with Article 3 of the UN Convention on the Rights of the Child.

At the same time, it should be stated that the best interests of the child are an indicator that should be determined in comparison with the existing interests of the child when it comes to changing his place of residence, persons who should carry out education, maintenance, as well as take into account the child's development, spiritual education and other values. Obviously, in the legal context, the child's best

interests are determined by the authorised state bodies in a given situation, but with the obligatory consideration of the child's abilities and the state of his or her health and wishes. If we ask a child about this, we will receive his or her dreams and wishes for the future, but not objective information about the perspective that can await him or her in the near or long term. And the point here is not only in the material component of maintenance but in those human qualities of parents who can and are able to make dreams come true in the life of a particular child. Therefore, the authors propose to involve psychologists as widely as possible in such cases, who will be able to understand the psychology of the child, his or her mental state and present the negative influence of one of the parents on the child.

#### **4 Conclusions and Recommendations**

Summarising the above arguments, we should recognise that the interests of the child are a complex multi-vector matter in which both the will of the child and adults are intertwined. Moreover, the will of the child is associated with greater attachment of the child to one of the parents and other persons, while the will of the adults is objectified as they must take responsibility for the future fate of the child and see it both, in the present, and until the time the child comes of age, taking into account the degree of his or her development, desires, aspirations and the like.

To reproduce this conclusion, we propose to amend the relevant national legislation, particularly in Ukraine. We suggest amending Article 6 of the Family Code of Ukraine to move away from duplication of norms of the Civil Code and complement it with the basic principles of international law.

The interests of children should also be consistent with the interests of the family because the well-being of children and the realisation of their interests directly depend on ensuring the interests of the family. Therefore, judges should investigate the interests of children comprehensively with the interests of the family as a whole and of other members of the family separately to achieve the common good. And if the welfare of the family is ensured in this way, then the children will receive all the necessary and appropriate conditions for normal development.

The issue of determining the child's place of residence is not regulated in such detail in international treaties, like adoption, so it requires detailed regulation in international treaties since this issue will become more relevant with the development of population migration.

The principle of primary consideration of the best interests of children is the use of the best possible ways and means of resolving cases with the participation of children, which would meet their contemporary interests, and consider their existing needs along with the perspectives for the future to the greatest extent possible.

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### About the authors

**Fursa Svitlana Yaroslavivna**, Doctor of Juridical Science (Dr.hab.), Professor at the Department of Notary, Enforcement Process and Advocacy, Prosecution, Judiciary, Institute of Law of the Taras Shevchenko National University of Kyiv, ORCID ID: <https://orcid.org/0000-0002-3023-5287> fursa\_2003@ukr.net, +380663172786.

**Bordiuh Tetiana Oleksandrivna**, Ph.D., Chief Specialist at the Department of Analytical and Legal Work of the Supreme Court.

ORCID: <https://orcid.org/0000-0002-3300-8653>

tatiana.bordiug@gmail.com, +380664456711.

**Fursa Yevhen Yevhenovych**, Candidate of Science in Law (Ph.D.), First Secretary at the analysis, planning and information division of the Department General for Consular Service of the Ministry of Foreign Affairs of Ukraine.

ORCID ID: <https://orcid.org/0000-0002-2931-1393>

fursamfa@gmail.com, +380663172786

