



REDEFINING POWER:

**STRENGTHENING THE
RIGHTS OF THE CHILD AS
THE KEY TO
A FUTURE-PROOF EUROPE**

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**STRASBOURG,
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**Report - Workshop 7
The Power of Family
Relations: Respecting the Best
Interests of the Child in
Divorce or Separation**



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Workshop 7: "The Power of Family Relations: respecting the best interests of the child in divorce and separation

Workshop Speakers :

Moderator:

Seamus CARROLL, Member of the European Committee on Legal Cooperation
(*Ireland*)

Participants :

- Youth Delegates: **Andrea** (*Serbia*), **Capucine** and **Lucas**, Members of the High Council for Family, Children and Age (*France*) ;
- **Louise CROWLEY**, Lawyer, Director of the LLM Children's Rights and Family Law at University College Cork Law School (*Ireland*) ;
- **Frédéric MAUCHE**, Judge for Family Affairs, ^{1st} Vice-President at the Tribunal de grande instance de Strasbourg, (*France*) ;
- **Lana PETO KUJUNDŽIĆ**, Judge, President of the Department of Juvenile Justice of Zagreb (*Croatia*).

Introduction

The first contact that children have with the justice system comes too often as a result of disputes relating to divorce and separation, custody or visiting rights; all situations that regularly have devastating results for the children involved. The image and role of the modern family is changing, as is the position of children therein. How can the right balance between the interests of parents and children be struck in such cases? Are the rights of the child adequately upheld by the justice system and are they given a voice? How can cases involving intra-family violence be dealt with in a better way? And how can both parents maintain a positive relationship with their children while in conflict with each other?

This workshop was organised on 14 November in the framework of the Conference "Preparing tomorrow's Europe: strengthening children's rights for a future-proof continent", marking the mid-term evaluation of the Strategy for the Rights of the Child.

It examined the **child's place in the context of high conflict parental separation, which can have significant consequences for the children's daily lives and future.**

Report prepared by Blandine MALLEVAEY, Senior Lecturer at the Faculty of Law of the Catholic University of Lille, Holder of the Research Chair on Children and Families, Scientific Head of Research "Hearing and Discernment of the Child before the Family Court" (*France*).

Purpose of the workshop

The purpose of the discussions was to determine whether and how the **interests of parents and their children** can be **appropriately balanced in the** event of divorce or separation. This implied, in particular, questioning the implementation of children's rights, and more specifically the **right of the child to participate in the legal proceedings aimed at settling the dispute between their parents**. In fact, the interventions and discussions during the workshop focused on children's participation in the legal proceedings following their parents' divorce or separation.

Synthesis of exchanges

In the preamble, the **right of the child to have their best interests as the primary consideration in all decisions affecting them** and **their right to participate in decisions affecting them**, as enshrined in the International Convention on the Rights of the Child (New York, 20 November 1989) and the European Convention on the Exercise of Children's Rights (Strasbourg, 25 January 1996), were recalled. Then, in turn, the **stakeholders provided their observations and concerns** regarding the implementation of these rights, before **making their recommendations** to make them effective. **Three important and interdependent points** emerged from the workshop, rich in reflections and exchanges: it is essential to place the child at the heart of the concerns, which requires major changes in texts and practices, and more particularly requires specialisation of jurisdictions and better training of professionals, as well as improved information for those subject to trial.

I- Placing the child at the heart of the concerns

The workshop speakers were unanimous on the fact that ensuring respect for the best interests and rights of children in the event of divorce or family separation presupposes, as a matter of priority, **(re)thinking the texts and practices in such a way that the child is at the centre of the concerns of each actor**: their parents, judges, the lawyers of each parent, their own lawyer and/or representative, family mediators in the event of recourse to alternative dispute resolution methods, but also the legislator.

Workshop stakeholders considered that:

- A child cannot decide how to organise their life after the divorce or separation of their parents because:
 - the child is subject to parental authority and their parents are presumed to be the best judges of the child's best interests;
 - leaving a child to make the decision alone would be too much of a responsibility to place on them;
 - the wishes and interests of the child may change over time.
- The child must therefore be able to participate in the decision that concerns them, by expressing their needs and opinions, so that their parents or the court can take the best decision in their

interests, and as such a lawyer or interlocutor must explain to them the meaning of the procedure and the final decision.

- Children suffer from their parents' conflictual relationships; this should not be aggravated by silencing the child.

However, they identified that:

- Most often, children are not asked to express their views; they must ask to exercise their right to participate in judicial decisions that affect them, and this right is not always respected.
- When children are heard, their opinions are not necessarily taken into account.
- The amicable settlement of disputes is increasingly favoured by national legislation (family mediation, divorce by mutual consent out of court, etc.). They allow satisfactory solutions to emerge for the parents, but the interests of the child are pushed into the background and the child's word is neglected or even forgotten.
- Children are sometimes victims of their parents' conflicted relationships. However, judges do not have the possibility of automatically dealing with the difficulties that a child may encounter when their parents separate. If a child is at risk, national legislation gives judges the possibility to intervene ex officio in the private sphere to meet the public policy objective of protecting the child, but this possibility may not exist when a child's parents divorce or separate. Indeed, a traditional view is that divorce and separation are private relationships, in which judges are only expected to interfere if asked to do so. However, the dispute between the parents, following their divorce or separation, can be very harmful for the child. It is also to be feared that parents may agree to organize the child's life after separation, opting for arrangements that do not respect the child's interests. However, the child does not have the opportunity to go to court to challenge these agreements.

Therefore they were advocating that:

- all those concerned always put the best interests of the child above the interests of the parents and of each of them;
- children are heard in court before the hearing with their parents, so that judges can talk with parents at the hearing about their child's needs;
- it is up to the court to take the initiative to hear the child;
- judges may intervene ex officio in the private sphere, i.e. in family relations, and/or that the child may act themselves to submit to a judge the agreement concerning them reached between their parents;
- judges who disregard the child's wishes should be required to explain in their decision why they did so.

Placing the child at the centre of concerns, putting the best interests of the child first and ensuring the exercise of his or her rights should be the priority of courts and professionals. However, in practice workshop participants noted significant shortcomings. It is therefore necessary to **specialise the courts and magistrates in family matters** and, more generally, to **better train all professionals involved**.

Specialize jurisdictions in order to:

- encourage a multidisciplinary approach to the child's situation and the difficulties encountered by their family;
- to allow for an adaptation of the premises, so that the child can be heard in a suitable, reassuring environment that facilitates the expression of their words;
- shorten the procedural time limits in order to secure the child's safety and to prevent a de facto situation from developing to the benefit of the parent with whom the child lives.

Train magistrates to...

- respect the right of the child to express their views in proceedings affecting them and make it easier for them to be heard;
- assess the interests and needs of children and to ensure that the best interests of the child take precedence over the demands of their parents;
- appreciate the context in which the child's words are expressed and detect possible instrumentalization of the child;
- communicate with and understand the child and adapt their vocabulary and attitude to the age and maturity of the young person they are talking to.

Train lawyers to...

- explain to their clients the need to put the child's needs ahead of their own wishes (parents' lawyers);
- prepare the child for the meeting with the judge and provide them with the necessary information on the procedure, how the hearing will be conducted, the weight of their word on the judicial decision, etc. (children's lawyers);
- explain the judicial decision and the primacy of the best interests of the child over the demands of each party (parents' lawyers and children's lawyers);
- allow the systematic appointment of specialised lawyers, paid by the State, to assist children in family court proceedings.

Train experts so that magistrates can call on them in the most complex situations to:

- assess the best interests and specific needs of the child;
- detect possible manipulation of the child and possible emotional abuse.

Train family mediators to...

- ensure that parents "in crisis" prioritize their child's best interests over their own interests and conflict;
- integrate the child into family mediation so that they are able to express their views within this framework;
- understand and communicate with the child.

Respect for children's rights in the event of the separation of their parents presupposes that the child is informed of the prerogatives granted to them and the possible consequences of the exercise of their rights. The speakers at the workshop highlighted many shortcomings in this area, despite the recommendations of the European Convention on the Exercise of Children's Rights. In addition to depriving the child of the opportunity to exercise their rights, the lack of accurate and objective information is also a source of misunderstanding and can create a sense of anxiety and injustice in the child. Mistaken beliefs also lead to misunderstandings within families. **Information for children and their families on their participation in family court decisions should therefore be improved and made objective.**

For all, there is a need for information:

- on the right of the child to maintain personal relations with each of their parents;
- on the right of the child to participate in family judicial proceedings affecting them;
- on the right of the child to remain silent and not participate in the proceedings;
- on the legal conditions for the child's participation in family court proceedings (age thresholds, discernment, presumption of discernment from a certain age, etc.);
- on the status and procedural rights of the child, including the possibility of being assisted by a lawyer or represented;
- on the progress of the hearing (place, person to speak to, persons present during the hearing, etc.);
- on the transmission of the child's words to their parents;
- on the influence of the child's words on the judicial decision affecting them, including the fact that the best interests of the child are the primary consideration in any decision affecting them and may take precedence over their expressed wishes.

For the children, there is a need for explanations:

- about the decision made after they have participated in the proceedings;
- where appropriate, on the reasons why the judicial decision is not in accordance with wishes they expressed;
- on the practical implications of the judicial decision on their daily life.

Information and explanations given to the child by a lawyer:

- ↳ This is a neutral third party, who will communicate the information and explanations to the child in an objective manner.
- ↳ They must be specially trained to adapt their vocabulary to be appropriate for the age and maturity of the child.