The Best Interests of the Child: A Guiding Principle in Administering Cross-Border Child-Related Matters?

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Abstract

This chapter points out the ways in which the legal standard of the best interests of the child affected the system of cross-border judicial protection of a child. Nowadays best interest of the child operates as a declaratory overriding principle, but boils down to the level of choice-of-law rules, the level of criteria of international jurisdiction, and as a basic interpretive principle in cross-border child-related matters. It is noticeable that this principle is not of equal importance in all child-related matters. Thus some sectors, such as child abduction, have been particularly elaborated in the chapter. The chapter discusses the Hague Conference on Private International Law convention system as well as relevant EU regulations. It is argued that the best interests of the child principle was significantly advanced by the introduction of a new methodology of adjudication in cross-border child-related issues, which entails more flexibility and requires sensitivity to the needs and interests of children in each case. Implementing the best-interests principle allows a more holistic approach to decisions relating to children in cross-border protection and involves the proactive power of interpretation of the adjudicatory authority.

1 Introduction

It is well known that the principle of the best interests of the child was established as a legal standard on the international scene in 1989 by article 3 of the UN Convention on the Rights of the Child (CRC). The creators of the Convention had reasons to believe in its global impact; however, the way in which this legal standard achieved its interdisciplinary effect on child protection systems has certainly surpassed many expectations.

This chapter focuses on the way in which the legal principle of the best interests of the child has infiltrated private international law and international

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1 Trevor B International Child Law (2014) 137 et seq.
procedural law which is applied to solve cross-border (international) disputes regarding the rights and the interests of children. In addition to article 3, the CRC itself stressed specific areas where special attention should be paid to the protection of the best interests of the child. In this respect, a number of provisions are particularly significant for resolving cross-border cases. Despite these guidelines, the effects of the CRC standards relating to the best interests of the child now extend far beyond the CRC itself.

This chapter deals primarily with the ways to implement the principle of the best interests of the child in the conventions adopted by the Hague Conference on Private International Law (HCCH) and the regulations adopted by the EU in the field of judicial cooperation in family matters. As the CRC set a substantive standard with implications for other legal disciplines, the realisation of the principle of the best interests of the child in court proceedings is particularly emphasised, especially those related to parental care and parental child abduction. The most intriguing questions in cross-border cases seem to be those concerning the interpretation of the best interests of the child related to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. Furthermore, it is an interesting fact that nowadays the best interest of the child has a significant role in those legal areas where there is a complete lack of legal regulation at the international level, such as genetically assisted procreation or surrogate motherhood.

Ultimately, the effects of the CRC and its standard on the best interests of the child on interpretation of matters of cross-border child protection are far-reaching. In order to adequately analyse the cross-border position of the best interests of the child we shall follow the tenets of General Comment No. 14 of the UN Committee on the Rights of the Child, which provides this legal standard with a triple function: it is the standard of substantive law, the fundamental interpretive principle of law and the procedural principle. The chapter

3 The following provisions are important in cross-border child protection: articles 9, 10, 12, 18, 20 and 21.
6 UN Committee on the Rights of the Child, 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), 29 May 2013, CRC/C/GC/14, (hereinafter ‘UN Committee on the Rights of the Child General Comment No. 14’) para. 6.