LEGAL ISSUES OF CHILD-CUSTODY DECISIONMAKING: «THE BEST INTERESTS OF THE CHILD» STANDARD VS ALTERNATIVE DISPUTE RESOLUTION

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The paper focuses on the confrontation between "the best interests of the child" standard and the methods of alternative dispute resolution (ADR) in the USA. America is a society with a substantial divorce rate. As a consequence, custody disputes are now the most common reason for a legal filing in the United States. The article reveals the role of the current US legal system in child custody arrangements and explains why the US legal system works that way. The best interests of the child principle as a dominant custody decision rule is explained. Due to the stated inadequacy of the best interest of the child principle proposals on how to encourage alternative dispute resolution are made.

Key words: divorced parents; never married parents; custody determination; "the best interests of the child" standard; alternative dispute resolution; co-parenting; parental agreement.

1. What is child-custody decisionmaking? Basically, child-custody decisionmaking is deciding who will have the right to make important decisions for the child. According to the 28 U.S.C. § 1738A, custody determination means a judgment, decree, or other orders of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications [1]. Special attention should be paid to the explanation of the best interests of the child principle. Article 3 of the UN Convention on the Rights of the Child says that "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" [2]. However, despite the fact that it is dominant in today's child custody, there is no single, straightforward definition for this principle. Such new legal terms as parenting plan / agreement and co-parenting are especially important for us in the light of the main issue of the article. Parenting plan / agreement is a written document that ex-spouses create together to outline how they will handle the care of their children after divorce [3]. Co-parenting is a concept where both parents continue parenting the children in much the same way as when the family lived under one roof [4].

2. The role of the current us legal system in child custody arrangements. America is a society with a substantial divorce rate. Each year, more than 1,000,000 children in the United States are affected by the divorce of

their parents [5]. In such kind of situation child custody rights are at issue. Who knows what is best for children: courts or parents? Generally, child custody arrangements are supposed to be settled through voluntary agreement of the parents. But in reality, the parents of a child are unable or think that they are unable to do that on their own, so the court is used to settle the dispute. In these actions the court will always support "the best interests of the child".

Let us consider the following facts. Today, slightly less than half of all first marriages end within twenty years, and close to half of children are born outside of marriage [7]. Divorced parents (or those who never married) can sue each other and successfully do it. The courts are overburdened with custody disputes. In fact, custody disputes are now the most common reason for a legal filing in the United States. Family-court judges routinely decide where the children of divorced, separated or never-married parents will attend school, worship and receive medical care; judges may even decide whether they play soccer or take piano lessons. So, we could see that the ratio between divorced or never married parents and married is almost 50/50.

And the paradox is that American courts consistently refuse to hear similar disputes on child custody between married parents, even if they argue strongly. In 1936 in People ex rel. Sisson v. Sisson the New York Court of Appeals (2 N.E.2d 660, 661 (N.Y. 1936)) explained the reasoning: "Dispute between parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law. The vast majority of matters concerning the upbringing of children must be left to the conscience, patience, and self-restraint of father and mother". The same ruling was issued later in Kilgrow v. Kilgrow by Alabama court in 1958 (107 So. 2d 885, 888 (Ala. 1958) [7].

3. Why the US legal system works that way. Why does it help only divorced or never married parents and does not want to cooperate with married couples, even if they disagree severely? We can single out three main points:

1. Stereotype that separated parents' interests in their children are not alike is rather powerful.

2. However, this is an outdated idea from the times when divorces were not so common and widespread, when parents have been in a gender war that has played out in courts over custody.

3. Back then one parent won custody, the other became a visitor. But now custody is routinely shared by parents living apart. You no longer win or lose custody. You develop a parenting plan. When judges make decisions, they are guided by the "best interests of the child" – a list of factors like the parents' mental health and the child's wishes. States should add parental agreement to the list, and make it the primary consideration. And some states, for instance Vermont (VT. STAT. ANN. tit. 15, § 666 (2012)), West Virginia (W. VA.

CODE § 48-9-201 (West 2009)) and Oregon (OR. REV. STAT. § 107.169 (2013)) have already done it [7].

Unfortunately, such laws are adopted not everywhere. And sometimes even when unmarried parents agree on a plan, judges can overrule it. This intervention of judges is really confusing, because on the one hand courts are overburdened with custody disputes and itseems natural to encourage independent agreements between parents, but on the other hand courts continue to intervene in the intimate decisions made by parents for about half of all American children. As separation, divorce, cohabitation, and nonmarital birth are routine demographically and broadly accepted socially.

4. The best interests of the child principle. Despite the fact that nowadays courts generally rely on the best interests of the child standard to resolve conflicts, judges face difficulty in applying it in the absence of a legislative definition of "best." Thus, judges have to decide cases in accordance with their own instincts and values [6].

5. Alternative dispute resolution. Due to the inadequacy of the best interests standard, Mnookin advocated for non-judicial resolution of most custody disputes through negotiation or mediation [6]. So far, mediation and other types of ADR like parenting agreements offer one of the most hopeful solutions to the problems produced by indeterminacy of the best-interests standard. Realizing that separated, divorced, and never-married parents can come to an agreement and share co-parenting caused change in legal terminology. The lesson learned from successful and as it turned out possible private dispute resolution is that courts should do the same when treating the separated, divorced, or unmarried parents as they do the married half: staying out of parental disputes. Judges are needed to decide some divorce disputes, but custody disputes ideally should be left for parents.

6. Proposals on how to encourage alternative dispute resolution:

- judicial review of parenting plans should be eliminated for cases in which parents agree;
- contracts between parents, such as ADR or parenting-plan contracts should be honored and enforced;
- access to the courts can and should be limited whether in the context of promoting ADR (such as mandatory mediation) or reducing repeat litigation. California (22. CAL. CIV. CODE § 4607 (West 1981). 23. CAL. FAM. CODE § 3170 (West 2013)) became the first state to mandate that all parents must attempt mediation before a court hearing concerning custody issues. Whereas Wisconsin (WIS. STAT. § 767.451 (2013)) discourages repeat litigation [7].

Conclusion. The answer to the question "Who knows what is best for children?" is their parents, whether married or unmarried. Instead of telling

parents how to bring up their children, the legal system should encourage agreements between parents. Even if the best interests standard will remain the prevailing standard for deciding child custody, let the parenting plan be the primary consideration in the list of factors in the best interests of the child. The US legal system has always seen the wisdom of encouraging married parents to work together. Now it needs to recognize that divorced and never-married parents are not so different. After all, partners with children are tied together forever.

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