

Children's best interests: a discussion of commonly encountered tensions.

Discussing a report by the Children's Rights Knowledge Centre (KeKi)

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## Introduction

In light of the 'European Conference on the Best Interests of the Child' to celebrate the 25<sup>th</sup> anniversary of the United Nations Convention on the Rights of the Child, the Children's Rights Knowledge Centre (in Dutch Kenniscentrum Kinderrechten, abbreviated as KeKi)<sup>1</sup> conducted an investigation to find common tensions in the translation of the principle of the best interests of the child from theory to practice<sup>2</sup>. The investigation was a study commissioned by the Division for Youth of the Flemish Government.

Through an inventory and content analysis of existing international best interests practices and policy initiatives since 2004<sup>3</sup>, KeKi found four common tensions: workability of the best interests principle in practical situations, conflict of interests, instrumental view on participation, and protecting children's best interests on a policy level. We discovered these tensions through screening of online databases ([www.kekidatabank.be](http://www.kekidatabank.be) and [www.kinderrechtencoaliteit.be](http://www.kinderrechtencoaliteit.be)), as well as Google search by using the keywords: 'Belang van het kind' (Dutch), 'Child best interests', 'children's best interests' and 'best interests of the child'. As the scope of the analysis was limited, we believe that the four tensions are just 'the tip of the iceberg'. In this text, the tensions found and possible solutions to address them are discussed. The solutions inspire further development and promotion of a best interests framework that is applicable to children's daily realities.

## Inspiration 1: Vagueness as strength

First of all, as the content analysis suggests, formulating a substantive interpretation of the best interests of the child principle that is applicable to a broad variety of individual situations is difficult. The principle appears to be inevitably indeterminate, flexible, dynamic, developmentally dependent and context-specific. This has consequences for the workability of the principle in practical situations. In the report, we tried to answer the following question: **what kind of framework can be developed to avoid that the concept becomes hollow and meaningless, or used in a tokenistic way?**

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<sup>1</sup> For more information: <http://www.keki.be/en>.

<sup>2</sup> Hanne Op de Beeck, Katrien Herbots, Sara Lembrechts, Nele Willems & Kathy Vlieghe (2014). *Children's best interests between theory and practice, a discussion of commonly encountered tensions and possible solutions based on international best interests practices and policy strategies since 2004*, KEKI <http://www.keki.be/en/thematic-research/childs-best-interests>.

<sup>3</sup> See the Annex of the report for examples and the complete overview of the screening.

The study found that **it is possible to develop a factual interpretation** of the best interests principle. This can be done with the help of a solid scientific methodology.<sup>4</sup> For an in depth article about the development of a factual interpretation of the best interests principle, we refer to the contribution of M. Klaverboer in this publication.<sup>5</sup>

On the other hand, it might be necessary to simply accept the lack of a generally applicable interpretation of the principle, since every context induces a different concretization of it. One can also focus on procedural elements to come to **an adequate assessment**, which we see as a learning trajectory. Adults together with children learn about what is best for the child. To develop such a learning experience, inspiration can be found in mediation mechanisms and practices that are specifically directed towards learning about each other's perspective.

The findings from the content analysis also suggest that the background, knowledge and communicative skills of the individual who performs the best interests assessment may be more important than the tool that is used for the assessment. **Best interests determinations are not merely a matter of applying a certain instrument or filling out a checklist.** Several initiatives in our content analysis focus on training and education. The professional should learn the necessary competences to perform the assessment as adequately and holistically as possible. Especially in cases in which important decisions are taken by individuals whose main experiences or skills are not necessarily child-specific – such as return decisions taken by immigration judges – training may bring added value. Different educational programs and practical training packages do equally exist. These packages can serve as an inspiration for policy makers or practitioners who wish to start up a child-specific program. Such a program can contain for instance elements of child psychology, development perspective and a child rights perspective. Finally, an ex-post or feedback system allows the professional to learn about the consequences of his/her decision. Monitoring and feedback lead to more varied knowledge and experience. The professional comes to more adapted decisions in the future.

We also suggest **a clear and general decision-making procedure or structure** for best interests assessments. Such a procedure or structure will decrease the influence of underlying assumptions and focus on intuition, by rationalizing the decision-making process. A clear decision-making structure can serve as a general procedural guideline in all best interests assessments.

**So if you want to pursue a best interest assessment, we suggest:**

- address the assessment as a dynamic learning trajectory, not as the unambiguous outcome of a concrete instrument;
- recognize the importance of the individual who performs or leads the assessment:
  - Invest in child specific training programs for professionals whose decisions affect children;
  - Invest in monitoring, feedback and ex-post evaluation to build hands-on knowledge;
- develop a clear decision-making structure to use as a general procedural guideline in all best interests assessments.

## Inspiration 2: What do you wish?

The second theme, the study highlighted, was that assessing children's best interests does not take place in a vacuum. Different contexts do play a role, and consequently, children's interests may at times conflict with interests of other parties involved. In referring to Article 3(1) of the Convention of

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<sup>4</sup> Kalverboer&Zijstra (2006). *Het belang van het kind in het Nederlands recht: Voorwaarden voor ontwikkeling vanuit pedagogisch perspectief*, Uitgeverij SWP.

<sup>5</sup> Contribution of Klaverboer: see the full publication.

the Rights of the Child, Smeyers argues that “[c]learly, this requirement cannot be enforced without regard to the interest of any relevant adult”<sup>6</sup>. As well, Eekelaar criticizes that due to the strong focus on children’s best interests, no proper consideration is paid to the interests of other involved parties<sup>7</sup>. **We found initiatives that describe how the concept of the best interests of the child can in practice be ‘hijacked’ or misused to defend interests of other parties.** Below, we give some inspirations to avoid the misuse of the child best interests.

We found **five clear examples** about conflict in best interests:

1. Child custody in divorce cases
2. Decisions regarding placement in or returning from care
3. Children whose parents are imprisoned
4. Parental authority in child health decisions
5. Decisions in immigration cases

The first example illustrates that even though it is generally assumed that parents will first and foremost defend their child’s interests, the interests of parents and children can conflict. Due to their own wishes or the situation, both parties – and caretakers or other family members – can have differing opinions on what is best for the child. **Therefore we suggest to clearly separate children’s interests from their parents’ or other parties’ interests.**

Also, the child best interests can be misused to defend other parties’ wishes. The last example, decisions in immigrations cases, shows the conflict in interests between society and child. The society decides that the parents should leave the country of immigration, the interests of the child are often understood as an extension of the parents’ interests. Leaving the country, is not always in the best interest of the child. **To avoid this conflict a transparent distinct definition of other parties’ interests should be created, and adequate methodologies to safeguard all interests should be developed.**

**So if you want to avoid to use the child’s best interests principle as a general pretence to defend other parties’ interests, we suggest:**

- clearly separate children’s interests from their parents’ or other parties’ interests;
- create transparency by developing a distinct definition of other parties’ interests and develop adequate methodologies to safeguard them.

### Inspiration 3: let them say what it’s on their mind!

When determining the best interests of the child, it is essential to know what the child himself or herself considers to be in their best interests. In the inventoried projects, **participation is mainly used in an instrumental way**, as a means to acquire understanding of what the child feels, thinks and believes is in his or her best interests. Hearing the child’s voice and taking his or her perspective into consideration are essential in coming to good best interests decisions. In light of a meaningful participation, different authors and practitioners are cautious for tokenism, negative participation and ‘overquerying’ of children. In our analysis we found suggestions to sustain participation and broaden it in individual decisions as well as in collective decisions.

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<sup>6</sup> Smeyers (2010). *Child rearing in the “risk” society: on the discourse of rights and the “best interests of a child”*, Educational Theory, Vol. 60 no. 3, Wiley-Blackwell, p. 277.

<sup>7</sup> Eekelaar (2005). *Deciding for Children*, Australian Journal of Professional and Applied Ethics, Vol. 7 no. 2, p. 66-82.

In order to let children participate, it is important **to adequately inform** them. The information should be in their own language and adapted to their level of understanding. Children can participate in many different ways. An important tension however is that in practice, the capability, age and maturity of the child remain too strongly a point of reference in deciding if and how a child can participate in determining their best interests. Capability and maturity cannot be defined in general terms, a case-by-case assessment is always necessary. **An individual maturity test** can support a professional in determining the best mode of participation and the weight allocated to the child's opinion. Inspirational practices to develop a maturity test can be found in our analysis.

Next, a decision has to be made between direct and indirect participation. **Direct participation** means that the child participates in the decision-making process him- or herself as an equal, next to the other involved stakeholders. We speak of **indirect participation** when the child is represented by a close family member or a trained professional who expresses the child's wishes and needs based on close communications with the child. If the child did not yet acquire the maturity to be directly involved, indirect participation through representation is a possibility. We found two examples to do so.<sup>8</sup>

Hearing children's voices is not important in individual decisions only. In collective decisions, like policy decisions, children's voices are crucial as well. In this case, an important challenge arising from the content analysis is **the assurance of an equal representation**. Socially vulnerable children and youth have a higher risk of being excluded from participatory trajectories. A non-exhaustive number of strategies to address this challenge, such as cooperation with target group specific organizations, the development of adjusted methodologies and representative sampling methods, was suggested based on existing participation and social research practices.

**So if you want to realize meaningful and qualitative participation of children to decisions that affect them:**

- avoid apparent or tokenistic participation;
- avoid to make children responsible for their participation;
- don't forget, participation is a right, not a duty;
- develop a qualitative maturity test to support a professional in determining the best mode of participation and the weight allocated to the child's opinion;
- at collective level realize a process to hear (a representation) of the voices of children, with specific attention to the socially vulnerable children.

## Inspiration 4: Let's walk together

Finally, the study found that in different countries or regions, initiatives have been developed to **protect children's interests at the macro-level**. Examples of this kind of initiatives include by shaping a child-friendly legislative framework through the application of child (rights) impact assessments, child standards, and other instruments that are directed at the maximization of positive and the minimization of negative consequences of new legislation or (policy) decisions for children and youth. Child rights impact assessments are brought forward by General Comment No. 14 by the UN Committee on the Rights of the Child as crucial instruments to shape an optimal frame of reference for individual best interests assessments. They procedurally relate to best interests assessments, as

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<sup>8</sup> National Society for the Prevention of Cruelty to Children (2012). *Returning home from care: what's best for children*, <https://www.crin.org/en/library/publications/returning-home-care-whats-best-children> .

Bilson & White (2005). *Representing children's views and best interests in court: an international comparison*, Child Abuse Review, Vol. 14 no. 4, Wiley-Blackwell.

they both hold an ex-ante reflective process regarding the impact of important decisions on children's lives.

**If you want to use CRIA as an inspiration, we suggest:**

- centralize knowledge and expertise regarding best interests assessments and make it accessible through online modalities and through the support of a network of informed focal points;
- facilitate control of and appeal to policy decisions that directly and indirectly affect children;
- take into account the social context of the child: especially in decisions that only indirectly affect children, balancing the different interests involved may be a precarious exercise;
- not the eventual outcome, but the underlying reflections are capital in the best interests assessment. The process character in determining children's best interests should be underlined.

## Conclusion

In conclusion, the study conducted by KeKi, showed that practitioners worldwide are not discouraged by theoretical difficulties and the vagueness related to the best interests principle. The study found creative ways to effectively use this concept in different professional realities. It is important to invest in child-specific training programs for professionals as well as in monitoring, feedback and ex-post evaluation. Children's interests should be clearly distinguished from other parties' interests, and children's meaningful participation to decisions affecting them should be a priority both for individual and collective decisions. Inspiration for best interests assessments can be sought from child rights impact assessments. The dialogue between theoretical inspiration and practical creativity creates pathways for actual progress and proficiency. Our report is a step on the inspirational road. If you want to know more background about the suggested solutions or extra literature about the best interests principle inspirations, you can find the complete analysis here: <http://www.keki.be/en/thematic-research/childs-best-interests>. Let yourself be inspired!