

# Family Law and the Best Interests of the Child Standard Developing: Incorporating the Mental Health, Cultural History and the Voice of the Child in Custody Determinations

ESIRI AROR<sup>1</sup>, MUNASHE NAPHTALI MUPA<sup>2</sup>

<sup>1</sup>University of Minnesota Law School

<sup>2</sup>Hult International Business School

*Abstract- The principle of the child's best interest has become the prevailing doctrine common among all jurisdictions in the realm of custody law. Nevertheless, what constitutes best interests is fluid, controversial and context specific. The conventional definition based on physical safety and parental stability has significantly expanded and incorporated the knowledge of psychology, multiculturalism, and the human rights perspective. The three dimensions that are discussed in this research journal and influence the custody determination today are mental health issues, cultural context, and the voice/desire of the child. This paper employs comparative law analysis of U.S., Canadian, European and international practice to identify reforms in doctrine, evolution of case law and policymaking. It contends that the law on custody is shifting toward a holistic, rights approach, which considers children to be dependents and individuals with identities, emotional needs, and rights to participate. Policy recommendations on operationalizing these changing factors to achieve fairness, cultural sensitivity, and authentic child participation were given at the study's end.*

## I. INTRODUCTION

Child best interest has become the principle of family law applicable to custody and parenting decisions across the globe. The doctrine relies on the equity principle and is stipulated in the UN Convention on the Rights of the Child (UNCRC), providing the interests of children priority over the rights of the parents in Article 3. It is morally and legally powerful as it is defined by the child-oriented orientation that underlines the theme of security, development, and protection. However, the standard has been widely accused of ambiguity and subjectivity. In most cases, judges use their own values or cultural presumptions to determine what constitutes best interests, and in so doing, offer inconsistent and at times unfair judgments in various cases and jurisdictions (Birchley, 2021)

Courts and legislatures have tried to perfect the principle in the last few decades, concerning developments in psychology, human rights, and multicultural policy. Instead of dropping the doctrine, reformers have operationalized the doctrine using particular evidence-based factors. Three dimensions can be singled out: mental health, cultural background and the child's voice. There is an increased emphasis on parental and child psychological stability in custody determinations, cultural heritage and continuity, particularly in Indigenous and minority contexts, and on the perspectives of children themselves (Srinivasan & S, 2024). This paper explores the application of these changing considerations across jurisdictions, pointing out the advantages and limitations of developing a more holistic, nuanced, and child-centered approach to custody.

## History of the Best Interests Doctrine

### 1.1 Early Custody Approaches

Laws of custody in the 19th century were highly influenced by patriarchal values, not so much by actual thoughts of the needs or well-being of children. Fathers were practically assumed to be the proper custodians under the paternal preference rule since they were legally and economically considered the heads of the house. This supposition was a broader societal arrangement that favored male power and dominance and had the custodial role as less of an issue of nurturing and more of an extension of property rights. The doctrine stressed the responsibility of the father to dominate, protect and support the family so that there was maintenance of traditional gender structures (Srinivasan & S, 2024). These determinations did not give much prominence to children's personal needs and voices, to be subordinated to fathers' power and rights.

This situation started to change during the middle of the 19th century with industrialization and changing social attitudes. The doctrine of tender years brought about an assumption that small children, particularly those below seven years, were well in the hands of their mothers. This doctrine, which was based on the principles of maternal care, embodied cultural perceptions of women as moral and emotional providers (Pires & Martins, 2021). However, as in the case of paternal preference, this was again a process that emphasized not the child's interests but their parents' identity. The two frameworks explain how the custody law was conducted historically, with gendered perceptions and not as an individual case.

### 1.2 Shift to the Best Interests Standard

The 20th century saw the hard and unyielding premises that had long prevailed in the law of custody yield slowly to the more flexible yardstick of the child's best interests. This legal and social change was symptomatic of more widespread changes in the way children were thought of not as the extensions of their parents but as developmentally specific individuals. The new standard emphasized that custody decisions were not to be done on the basis of parental entitlement or automatic preference, but on grounds that were directly connected with child welfare and long term well-being. This marked a great milestone in the field of jurisprudence to create more child-centred approach that is currently evident in the court ruling on the family law (Malek et al., 2021).

This was codified in the United States by the Uniform Marriage and Divorce Act (UMDA 1970), which instructed judges to consider a list of factors, such as desires of the parents, desires of the child (in cases), adaptation of the child to home, school, and community and physical and mental well-being of all parties. Similarly, parenting orders in Canada, through the Divorce Act (1985), revised in 2021, stated the child's best interests to be the sole determinant of parenting orders. The amendments made it explicitly binding to consider other considerations, such as family violence and cultural identity, as best interests had a different meaning.

This shift in doctrine was radical in that it represented a breakthrough against problematic and dogmatic assumptions of gender that previously dominated in custody disputes. Courts in the past would default in most instances to favor one parent, usually a mother, according to the norms of the society, instead of

basing their decision on the child's individual needs. The new approach broke these assumptions, thereby highlighting the need for a personalized assessment where the particular facts of a case need to be scrutinized critically. A broad spectrum of factors concerning the child's general welfare became the focus of judges' consideration, and the best interests became the priority over the parental status (Birchley, 2021). This revolution led to fairer and child-focused judgments on custody.

### 1.3 Critiques of Indeterminacy

Although the best interest's standard has been extensively used in cases where a decision must be made on custody, it has been criticized as imprecise. The legal scholar Robert Mnookin (1975) has notoriously argued that the doctrine offers little substantive advice to courts and that decisions are open to inconsistency and the subjective values of individual judges. Although the flexibility of the standard was first viewed as an advantage, the fact that it gives the courts the freedom to implement the standard in various family circumstances created a loophole. Such transparency threatened to conceal biases of the judicial system, individual moral opinions, or even cultural beliefs in the name of discretion (Birchley, 2021). Consequently, what was meant to be child protection may sometimes be the views of those deciding the child's needs.

Legislatures and courts reacted by implementing the best-interest standard operationally by establishing factors to be used in the determination of custody. Originally, these factors were mainly concerned with the basic stability of the child, his or her safety, and physical well-being. But since then the considerations have greatly increased in scope to reflect a wider social and legal development. The mental health and emotional development of the child and his/her cultural identity and the voice of the child himself are also looked at today in the courts (Augustijn, 2023). This growth demonstrates how child studies and psychological research impacted the growth of the law on custody. It also indicates an increasing understanding, with an international law framework, that children are autonomous rights-holders whose viewpoints cannot be disregarded in any issue that impacts their lives.

Thus, the history of the custody law can be called as the gradual but radical modification. During the initial phases of its development, the scope of custody

decisions was dominated by strict rules that defined the importance of parental status where fathers or mothers were preferred according to the demands of the society rather than the real needs of children. However, with time this model changed to less parental privilege and more balanced and child-centred norm. The new standard focused on the best interests of the child both in physical terms but also in emotional, psychological and cultural wellbeing (Markström et al., 2025). This development signifies a wider appreciation that children are not the appendages of parents, but persons with their own rights, whose voices and real-life experiences must be shielded and given great respect in the decisions regarding custody.

## II. THE CHILD'S VOICE AND EVOLVING AGENCY

### 2.1 Children's Rights Movement

The late twentieth century was a time of a paradigm shift in the legal placement of children. The adoption of the United Nations Convention on the Rights of the Child (UNCRC, 1989) also led to the understanding of the child not just as a vulnerable dependent in need of protection but as a person who possesses rights to access and to be included in decisions that impact their lives. Primary to this change is Article 12, where children are given the right to give their opinion within a judicial and administrative process, and that due consideration is given to their views based on the age and maturity of the child (Srinivasan & S, 2024). The principle has transformed custody jurisprudence in numerous jurisdictions, and courts have had to balance protective instincts against respect for the developing autonomy of children.

### 2.2 Methods of Hearing the Child

Article 12 in custody proceedings has been operationalized through different mechanisms. The most frequently used method is judicial interviews, in which judges privately, non-adversarial interview children. This approach enables a sense of authenticity but poses issues of consistency and judicial training in sensitive communication towards children (Alminde, 2024). The other form is the appointment of child representatives or guardians, who will represent the child independently of either of the parents. These advocates frequently act as a shield, so that children are heard but not subjected to the hostile conditions of a lawsuit. The third one

involves social worker/psychologist reports, during which the children's opinions are collected and submitted to the Court by professionals, as well as the analysis of developmental needs by the expert (Malek et al., 2021). Both approaches aim to get children's views while reducing the risk of direct engagement in controversial matters.

### 2.3 Age and Maturity Thresholds

Age and maturity of children are critical in determining how their opinions shape the result of custody. The thresholds differ across jurisdictions. In several states in the United States, children as young as twelve are deemed competent to express meaningful preferences, and courts must take such opinions seriously (Buchanan et al., 2025). In Canada, children's views are usually noted using Views of the Child reports, which can be taken into account since the age of seven or eight, but at the same time, according to maturity. However, the European Court of Human Rights (ECHR) has clarified that younger children should be offered meaningful participation opportunities. Still, accommodations should be given according to their age (Srinivasan & S, 2024). The difference between the universalization of children's voices and the realities of judging maturity in individual situations comes into play through these approaches.

### 2.4 Balancing Preference and Protection

The challenge for courts is determining which preferences are genuine and which are imposed by other factors, including parent influence or conflict forces. Issues of parental alienation indicate the danger of having the voices of children co-opted. This makes judges wary of leaving children with the burdens of the results of custody because this will generate guilt or even psychological pressure. Instead, the idea of courts is to consider children's views as a persuasive but not a decisive factor, which should be incorporated into a broader context of welfare (Birchley, 2021). This equilibrium indicates the shifting paradigm of acknowledging agency without compromising protection.

### 2.5 Benefits of Incorporating Voice

The advantages of getting the opinion of children are immense. With higher levels of equity and legitimacy, and by making children hear their voices and granting them higher levels of equity and legitimacy, as empirical research also demonstrates, the outcome may not be what they desire. The given

development also reflects the works of developmental psychology that have made autonomy and self-determination the central elements of positive growth. Moreover, children's participation will reduce resentment following litigation and improve compliance with custody conditions, as children feel that the process does not affect their dignity (Srinivasan & S, 2024).

Overall, these changes in the best interest's standard, such as the incorporation of the voice of the child in custody proceedings, are evidence of developing the best interest's standard into a more participatory, child-focused approach. Although there are still obstacles to protecting children against manipulation and undue pressure, acknowledging their changing efficacy makes custody legislation consistent with the norms of international rights and developmental science (Choate & Tortorelli, 2022).

### III. COMPARATIVE AND INTERNATIONAL TRENDS

#### 3.1 United States

The law of custody in the United States is much decentralized because the states have developed statutes and judicial practices. In the face of this variance, a general tendency has emerged of statutory enumeration of the best-interest factors, which are intended to minimize indeterminacy and provide greater judicial predictability (Van Es et al., 2020). They tend to be the mental and physical well-being of parents, family history of domestic violence, and children's interests, which are determined by their maturity. This is illustrated by the fact that New York State and California State specifically require courts to take domestic violence as a determining factor due to the increased awareness of the effect of domestic violence on the mental health of children (Augustijn, 2023).

In the U.S., the cultural protection of custody is arguably the most prominent in the Indian Child Welfare Act (ICWA, 1978). It sets a presumption favoring placing Native American children with their extended family or within their tribe to avoid the historical displacement of Indigenous children into non-native households. Even though ICWA has survived constitutional scrutiny, with some recent cases being heard in the Supreme Court, it is still a significant milestone that cultural continuity is part of

children's best interests (Claessens & Mortelmans, 2025).

#### 3.2 Canada

Canada has shifted to a single best interests model in the Divorce Act (amended 2021), codifying a clear set of factors to be considered by a court. These are the safety of a child, the emotional well-being, cultural identity, and the significance of preserving relationships with either parent, where such is necessary (Birchley, 2021). The Act emphasizes the necessity to consider children's opinions and preferences, and domestic law corresponds to what Canada has committed to under the UNCRC.

One of the notable Canadian contributions to this is the statutory acknowledgment of the rights of Indigenous children in situations of custody and child welfare. Provincial laws, like the Child, Youth and Family Services Act of Ontario (2017), mandate that courts consider the cultural heritage and connections to the community of Indigenous children in significant measure (Birchley, 2021). These actions are a direct response to historical wrongs such as the Sixties Scoop and residential schools, where Indigenous identity was systematically eroded. Therefore, children's agency and cultural continuity are explicitly part of the best interests embodied in Canadian jurisprudence.

#### 3.3 Europe

The European Court of Human Rights (ECHR) case law greatly influences European custody jurisprudence. The Court notes that children are to have a voice in the process that directly concerns them, as it is one of the most important checks and balances of fairness and justice. Article 8 of the European Convention on Human Rights guarantees the right to respect private and family life; in that regard, it is not a matter of choice but a necessity (Rocha Beardall, 2025). This responsibility compels member states to develop mechanisms that consider children's opinions so that the decisions made are based on their best interests and their maturity in exercising autonomy.

The issue of cultural identity is becoming a problem in increasingly diverse and multicultural societies in Europe, and it directly impacts European courts. When dealing with custody issues of immigrant families, judges frequently have to give preference to two competing considerations to keep a child in touch

with their cultural background and to make sure that they will successfully assimilate into the host society. Though continuity of culture is widely recognized to be significant in a child's sense of belonging and identity, it is not addressed as an absolute and categorical right (Birchley, 2021). Instead, the prevailing paradigm stresses that child welfare is the most important. The overriding concerns are stability, security and safety; the cultural identity is to be weighed, but eventually it is to be subordinated in case it conflicts with the child's best interests, and the long-term welfare.

### 3.4 International Law

On the international scale, the UN Convention on the Rights of the Child (1989) provides the almost universal standard of custody conflict. Article 3 contains the best interest's principle and is supplemented by Article 12 (right of the child to be heard) and Article 20 (protection of cultural identity in alternative care). In another effort to elucidate the role of best interests, the UN Committee on the Rights of the Child General Comment No. 14 (2013) states that best interests serve as a substantive right, an interpretation principle, and a procedural guarantee (Tunestveit et al., 2023). This triple perception demands that states entrench the welfare of children in substantive laws, that vague standards be interpreted in a child-friendly manner, and that there be just processes to enable children to give voice.

These comparative and international trends point to a strong international intersection in how societies attend to children's well-being. Although there is no denying that legal frameworks will vary in jurisdictions, there is an increasing realization that mental health, cultural identity, and agency of children cannot be isolated from one another. They are considered to make a more holistic view of what is in the child's best interest. This development demonstrates that the safety of children needs more than a legal framework to ensure their safety; it also requires respect for their voices and identities (Birchley, 2021).

## IV. THEORETICAL AND POLICY IMPLICATIONS

### 4.1 Toward a Holistic Child-Centred Standard

The development of the best interests of the child doctrine is a pointer to an ongoing trend in which a

child-centred human rights-grounded paradigm is replacing a parent-centred approach to custody. The original manifestations of the doctrine, as embodied in presumptions such as the paternal preference rule or the tender years doctrine, evaluated the outcomes of custody based on parenthood and not on the requirements that children were residing with (Hus & Segal, 2021). However, in contemporary jurisprudence, the child is central to deciding on custody, and in the method, developmental psychology, cultural tradition, and participatory rights are involved. This redefined concept has helped to break the mentality that children are dependents, but people with voices and values and changing abilities.

This tendency is not new in terms of the principles of the United Nations Convention on the Rights of the Child (UNCRC), which acknowledges that children are vulnerable creatures that require protection and independent rights holders. The full appreciation of the best interests standard then mandates an appreciation of the multi-faceted nature of the welfare of a child, such as mental health, cultural affiliation, and the possibility of meaningful involvement in the activities that concern them. Courts that adopt this paradigm outgrow their consideration of children as passive objects of custody or protection (Birchley, 2021). Instead, they recognize children as active contributors to their future, making legal choices in Court in light of their developing needs and ability to make independent choices and determine their future.

The shift of compartmentalized decision-making is also present in a holistic approach. Instead of framing mental health issues, cultural identity, or the voice of children separately into a set of checklists, this framework integrates them as overlapping dimensions of well-being. As an illustration, preserving cultural heritage impacts a child's psychological stability, and a sense of belonging and autonomy can be strengthened by meaningful involvement (Augustijn, 2023). Such dependence puts an onus on courts to perform a delicate balancing act that is not reductionist.

### 4.2 Risks and Limitations

The doctrine, though progressive, has its shortcomings:

Over-complexity: It has become much longer than the list of applicable factors, encompassing both

psychological stability and cultural continuity, as well as children's involvement, by legislatures and courts. This adds to the framework but also causes an overload of decision-making. The balance between competing considerations can be challenging for judges, and this difficulty poses the risk of selective emphasis or inconsistency (Pires & Martins, 2021). Subjectivity: Discretion in the courts has clearly dominated the adjudication of custody. Statutory directives bind judges, yet they cannot prevent the intrusion of their personal values and cultural assumptions into their verdicts (Pires & Martins, 2021). This poses a risk of cultural bias- especially when the practices of a minority, or the questionable actions of a parent, have to be considered.

**Accessibility:** An in-depth strategy often consists of resource-consuming assessments, psychological testing, cultural professional reports, and special interviews with children. Marginalized or low-income families do not have the resources to they can be disadvantaged against more financially endowed litigants (Pires & Martins, 2021). The child-centred model has the potential to augment inequality unintentionally.

The risk also exists that a general framework is overly ambitious. It may establish theoretically achievable ideals, but it is impossible because of judicial workloads, funding constraints, or the absence of specialized expertise. There is an uneven implementation risk across jurisdictions, which poses a threat to fairness.

#### 4.3 Policy Recommendations

To respond to these dangers and create a truly child-centred standard, a few reforms are essential:

##### Standardized Guidelines

The courts are becoming aware of the necessity of formulated, evidence-based principles to tell how considerations of mental health, cultural identity, and the right to participate in decisions should be compromised during custody. Although the best interests standard is praised as flexible, this flexibility tends to provide loopholes and individualism. One way standardization can reduce these risks is to ensure closely related cases are handled more predictably and fairly. Such guidelines need to be built through a multidisciplinary strategy, which involves incorporating the expertise of psychologists, cultural experts, and children's advocates (Birchley,

2021). Their efforts to cooperate could assist in developing scientifically based structures responsive to various situations of children and contribute to more regular, transparent and child-focused decision-making in the judicial system.

##### Training in Cultural Competence and Child Psychology

Judges, lawyers, and evaluators should receive ongoing training in cultural sensitivity and child development. The training can avoid stereotyping, promote respect for diverse heritages and increase fairness. It prepares the decision-makers to be more aware and therefore be able to critically assess expert evidence, which fosters inclusivity and makes judgments that are culturally aware, objective, and in the best interest of all children concerned (Birchley, 2021).

**Accessible Mental Health and Evaluation Resources** Assessments that are involved in custody should be funded or subsidized by governments. Resources made publicly available would be fair, benefit children and parents alike, and avoid the inequality in representation by wealth (Augustijn, 2023).

##### Child Participation Protocols

They should not overwork children but hear their voices. Authenticity can be preserved, and parent influence can be reduced through standardized age-sensitive procedures, including interviews with trained professionals (Srinivasan & S, 2024). The affective load levied on children is also minimized by framing preferences as one of a variety.

## V. CONCLUSION

The doctrine of the best interests of the child, which used to be criticized because of its ambiguity and absence of practical guidance, has over time become a powerful multidimensional rule. First, the principle was regarded to be too vague with judges having wide discretion and minimal uniformity in rulings regarding custody. With time though, courts and legislatures have given it a meaning after determining definite factors that inform custody decisions. The doctrine today is more holistic and evidence-based, where the welfare of the child cannot be narrowed down to material needs. Rather it is inclusive of psychological health, cultural identity and the right to meaningful participation, so that children are

regarded not as dependent people, but as individuals with voices and rights who should be respected.

Mental health consideration during custody increases safety and stability because the psychological and emotional needs of children form part of the custody decision and formulation, rather than serving as a scapegoat to a legal or parental claim. Combining these aspects, courts admit that the well-being of a child is closely connected with his or her mental stability and general growth. Culturally, sensitivity to the law of custody is also important as it prevents the loss of identity especially in the aspects of Indigenous and minority children whose culture, language of expression, and heritage would otherwise be relegated. The associated continuity and rootedness is strengthened by respecting cultural belonging. Lastly, children being identified as contributors to their own futures through recognition of their voice reinforces dignity, fairness and the democratic legitimacy of custody outcomes.

Even now, considerable challenges are still related to the practical implementation of the best interests standard, especially regarding judicial subjectivity and the difference between resources at their disposal in different jurisdictions. Such difficulties may result in uneven results and the lack of the purpose of justice. However, the general trend is towards a more holistic and rights-based approach to children that acknowledges children as key actors in custody processes. Through fortification and enhancement of the standard, courts are one step closer to meeting their inherent promise: to make custody decisions that reflect children's lived experiences, identities, and voices. This development highlights the concept of protection and empowerment, which is why the judicial practice corresponds to the contemporary interpretations of the rights of children.

#### REFERENCES

- [1]. Alminde, S. (2024). Listening to children: A childist analysis of children's participation in family law cases. *Social Sciences*, 13(3), 133. <https://www.mdpi.com/2076-0760/13/3/133>
- [2]. Augustijn, L. (2023). Joint physical custody, parent-child relationships, and children's psychosomatic problems. *Journal of Public Health*, 31(5), 755-764. <https://link.springer.com/article/10.1007/s10389-021-01583-1>
- [3]. Birchley, G. (2021). The theorization of 'best interests' in bioethical accounts of decision-making. *BMC Medical Ethics*, 22(1), 68. <https://link.springer.com/article/10.1186/s12910-021-00636-0>
- [4]. Buchanan, E., Woods, K., & Shaw, B. (2025). Linking the United Nations on the convention on the rights of the child (1989) to the needs of children affected by parental imprisonment. *Pastoral Care in Education*, 1-17. <https://www.tandfonline.com/doi/full/10.1080/02643944.2025.2482982>
- [5]. Choate, P., & Tortorelli, C. (2022). Attachment theory: A barrier for indigenous children involved with child protection. *International journal of environmental research and public health*, 19(14), 8754. <https://www.mdpi.com/1660-4601/19/14/8754>
- [6]. Claessens, E., & Mortelmans, D. (2025). Joint Physical Custody in Europe: A Comparative Exploration. *European Journal of Population*, 41(1), 1-21. <https://link.springer.com/article/10.1007/s10680-025-09732-y>
- [7]. Hus, Y., & Segal, O. (2021). Challenges surrounding the diagnosis of autism in children. *Neuropsychiatric disease and treatment*, 3509-3529. <https://www.tandfonline.com/doi/full/10.2147/NDT.S282569>
- [8]. Malek, M. E., Nyberg, G., Elinder, L. S., Patterson, E., & Norman, Å. (2021). Children's experiences of participating in a school-based health promotion parental support programme—a qualitative study. *BMC pediatrics*, 21(1), 228. <https://link.springer.com/article/10.1186/s12887-021-02694-0>
- [9]. Markström, A., Andersson, C., Björkhagen Turesson, A., & Plantin, L. (2025). A collaborative process: child participation in interventions provided by Swedish child and family welfare services. *Nordic Social Work Research*, 15(1), 153-166. <https://www.tandfonline.com/doi/full/10.1080/2156857X.2024.2317217>
- [10]. Pires, M., & Martins, M. (2021). Parenting styles, coparenting, and early child adjustment in separated families with child physical custody processes ongoing in family court. *Children*, 8(8), 629. <https://www.mdpi.com/2227-9067/8/8/629>

- [11]. Rocha Beardall, T. Y. (2025). Indigenous Abolition and the Third Space of Indian Child Welfare. *Genealogy*, 9(2), 59. <https://www.mdpi.com/2313-5778/9/2/59>
- [12]. Srinivasan, S. P., & S, S. (2024). A comparative review of UNCRC and Indian legislation from the child mental health perspective. *Indian Journal of Psychological Medicine*, 46(4), 289-297. <https://journals.sagepub.com/doi/full/10.1177/02537176241226714>
- [13]. Tunestveit, M., Njøs, B. M., & Seim, S. (2023). Collective participation of children and young people in child welfare services—opportunities and challenges. *European Journal of Social Work*, 26(2), 285-297. <https://www.tandfonline.com/doi/full/10.1080/13691457.2022.2092073>
- [14]. Van Es, R. M. S., Kunst, M. J. J., & De Keijser, J. W. (2020). Forensic mental health expert testimony and judicial decision-making: A systematic literature review. *Aggression and violent behavior*, 51, 101387. <https://www.sciencedirect.com/science/article/pii/S1359178919302745>