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Australia

Australian Capital Territory

Children and Young People Act 2008¹

Part 10.3 Principles and considerations—care and protection chapters

349 What is in best interests of child or young person?

- (1) For the care and protection chapters, in deciding what is in the best interests of a child or young person, a decision-maker must consider each of the following matters that are relevant to the child or young person:
 - (a) the need to ensure that the child or young person is not at risk of abuse or neglect;
 - (b) any views or wishes expressed by the child or young person;
 - (c) the nature of the child’s or young person’s relationship with each parent and anyone else;

¹ Law accessed from The Parliamentary Counsel website ACT legislation register:
<http://www.legislation.act.gov.au/a/2008-19/current/pdf/2008-19.pdf> (14.06.2016).

- (d) the likely effect on the child or young person of changes to the child's or young person's circumstances, including separation from a parent or anyone else with whom the child has been living;
 - (e) the practicalities of the child or young person maintaining contact with each parent and anyone else with whom the child or young person has been living or with whom the child or young person has been having substantial contact;
 - (f) the capacity of the child's or young person's parents, or anyone else, to provide for the child's or young person's needs including emotional and intellectual needs;
 - (g) for an Aboriginal or Torres Strait Islander child or young person—that it is a high priority to protect and promote the child's or young person's cultural and spiritual identity and development by, wherever possible, maintaining and building the child's or young person's connections to family, community and culture;
 - (h) that it is important for the child or young person to have settled, stable and permanent living arrangements;
 - (i) for decisions about placement of a child or young person—the need to ensure that the earliest possible decisions are made about a safe, supportive and stable placement;
 - (j) the attitude to the child or young person, and to parental responsibilities, demonstrated by each of the child's or young person's parents or anyone else;
 - (k) any abuse or neglect of the child or young person, or a family member of the child or young person;
 - (l) any court order that applies to the child or young person, or a family member of the child or young person.
- (2) For the care and protection chapters, in deciding what is in the best interests of a child or young person, a decision-maker may also consider any other fact or circumstance the decision-maker considers relevant.

Austria

Austrian Civil Code (ABGB)²

Child's wellbeing

Section 138. The wellbeing of the child should serve as the guiding principle and be guaranteed insofar as possible in all matters concerning the minor child, particularly parental custody and personal contact. Important criteria in the assessment of a child's wellbeing include in particular

1. suitable provisions, in particular of food, medical care, sanitation, living space and a thorough education for the child;
2. care, security and the protection of the child's physical and mental integrity;
3. the parents' appreciation and acceptance of the child;
4. the encouragement of the child's talents, skills, interests and opportunities to grow;
5. the consideration of the child's opinion in accordance with his/her understanding and ability to form an opinion;
6. the prevention of an adverse effect on the child due to the taking of action against his or her will;
7. removal of the risk that the child may suffer violence or assault or see such happen to important caregivers;
8. removal of the risk that the child may be illegally removed or retained or otherwise come to any harm;
9. reliable contact between the child and both parents and important caregivers and secure relationships between the child and these people;
10. the prevention of conflicts of loyalties and guilty feelings on the part of the child;
11. the protection of the child's rights, needs and interests and
12. the living conditions of the child, his or her parents and environment.

² Law accessed from the website of the Austrian Federal Chancellery:
<https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR40146725>.
(01.06.2016)

Translation by Amesto Translations: <http://www.amesto.no/>. (06.06.2016)

Canada

Child and Family Services Act, R.S.O. 1990, c. C.11³

Best interests of child

(3) Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall take into consideration those of the following circumstances of the case that he or she considers relevant:

1. The child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs.
2. The child's physical, mental and emotional level of development.
3. The child's cultural background.
4. The religious faith, if any, in which the child is being raised.
5. The importance for the child's development of a positive relationship with a parent and a secure place as a member of a family.
6. The child's relationships and emotional ties to a parent, sibling, relative, other member of the child's extended family or member of the child's community.
7. The importance of continuity in the child's care and the possible effect on the child of disruption of that continuity.
8. The merits of a plan for the child's care proposed by a society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with or returning to a parent.
9. The child's views and wishes, if they can be reasonably ascertained.
10. The effects on the child of delay in the disposition of the case.
11. The risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent.
12. The degree of risk, if any, that justified the finding that the child is in need of protection.

³ Law accessed from the website of the Government of Ontario:
https://www.ontario.ca/laws/statute/90c11?_ga=1.16889017.1635595470.1466670145#BK2 (23.06.2016).

13. Any other relevant circumstance. R.S.O. 1990, c. C.11, s. 37 (3); 2006, c. 5, s. 6 (3).

Denmark

Consolidation Act on Social Services⁴

Part 11

Special support for children and young persons

Purpose

46. The purpose of assisting children and young persons with special needs is to provide such children and young persons with the same opportunities for personal development, health and an independent adult life as other children and young persons. The support shall be provided to secure the best interests of the child or young person and shall be designed to

- 1) ensure continuity in childhood and youth and a safe environment of care offering close and stable relations to adults, for instance by supporting the child's or young person's family relations and other network;
- 2) secure the child's or young person's opportunities for personal development and acquisition of skills to build social relations and networks;
- 3) support the child's or young person's schooling and chances of completing an education;
- 4) promote the health and welfare of the child or young person; and
- 5) prepare the child or young person for an independent adult life.

(2) The support shall be provided at an early stage and on a continuous basis so that any problems encountered may as far as possible be remedied in the home or the immediate environment. On the basis of a case by case assessment the support must be adapted to the specific situation of the individual child or young person and his/her family.

⁴ Translated law accessed from: <http://english.sim.dk/media/963363/consolidation-act-on-social-services.pdf> (23.06.2016. Numbering changed to be in accordance to the original Danish law).

(3) The support shall be based on the child's or young person's own resources, and the views of the child or young person shall always be taken into account, and proper importance shall be attributed to such views in accordance with the age and maturity of the child or young person in question. Where possible, the difficulties of the child or young person shall be resolved in consultation and cooperation with his/her family. Where this is not possible, the background, purpose and constituent features of the specific measure taken shall be explained to the custodial parent as well as to the child or young person.

England

Children Act 1989⁵

1 Welfare of the child

(1) When a court determines any question with respect to—

- (a) the upbringing of a child; or
- (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;

⁵ Law accessed from the website [legislation.gov.uk](http://www.legislation.gov.uk) managed by the National Archives on behalf of HM Government: <http://www.legislation.gov.uk/ukpga/1989/41/section/1/enacted> (23.06.2016). The version is as it was originally enacted, there has later been changes to the legislation. The only textual change was in 4 (b): the court is considering whether to make, vary or discharge **a special guardianship order or** an order under Part IV. See annotations: <http://www.legislation.gov.uk/ukpga/1989/41/section/1> (23.06.2016).

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question.

(4) The circumstances are that—

(a) the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or

(b) the court is considering whether to make, vary or discharge an order under Part IV.

(5) Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

Estonia

Child Protection Act⁶

Chapter 5 Principles of Treatment of Children

§ 21. Setting best interests of child as primary consideration

(1) Upon the adoption of or deciding not to adopt decisions affecting a child and choosing between different options upon planning a decision (hereinafter deciding together), the best interests of the child shall be ascertained and they shall be based on as the primary consideration upon the making of decisions.

(2) In order to ascertain the best interests of the child, it is necessary:

1) to ascertain all the relevant circumstances concerning the situation and person of the child and other information which is necessary to evaluate the effect of the decision on the child's rights and well-being;

2) to explain the content and reasons of the planned decision to the child, to hear the child in a manner taking account of his or her age and development and to

⁶ Law accessed from Riigi Teataja, the translation is an unofficial text, as the legislation only has legal force in Estonian: <https://www.riigiteataja.ee/en/eli/506052015001/consolide> (23.06.2016).

- account for his or her opinion based on the child's age and development as one of the circumstances upon ascertaining the best interests of the child;
- 3) assessing all the relevant circumstances in aggregate, to form a reasoned opinion concerning the best interests of the child with regard to the planned decision.
- (2) If the best interests of a child differ from the child's opinion or if a decision which does not coincide with the child's opinion is made on other grounds, the reasons for not taking the child's opinion into account must be explained to the child.

Finland

Child Welfare Act⁷

Section 4 – *Main principles of child welfare*

- (1) Child welfare must promote the favourable development and wellbeing of the child. Child welfare must provide support in child upbringing and care for parents, custodians and other persons responsible for child care and upbringing. Child welfare must be aimed at preventing child and family problems and intervening sufficiently early if problems are found. When assessing the need for child welfare and in the provision of child welfare, it is first and foremost the interests of the child that must be taken into account.
- (2) When assessing the interests of the child, consideration must be given to the extent to which the alternative measures and solutions safeguard the following for the child:
- 1) balanced development and wellbeing, and close and continuing human relationships;
 - 2) the opportunity to be given understanding and affection, as well as supervision and care that accord with the child's age and level of development;
 - 3) an education consistent with the child's abilities and wishes;
 - 4) a safe environment in which to grow up, and physical and emotional freedom;
 - 5) a sense of responsibility in becoming independent and growing up;
 - 6) the opportunity to become involved in matters affecting the child and to influence them; and

⁷ Law accessed from Finlex, an online database owned by Finland's Ministry of Justice: <http://www.finlex.fi/en/laki/kaannokset/2007/en20070417?search%5Btype%5D=pika&search%5Bpika%5D=Child> (23.06.2016).

It is emphasised that the text is legally valid only in Finnish and Swedish.

- 7) the need to take account of the child's linguistic, cultural and religious background.
- (3) In child welfare, action must be taken with as much sensitivity as possible, and assistance in open care must be given precedence, unless the interests of the child demand otherwise. If substitute care is needed in view of the interests of the child, this must be arranged without delay. When providing substitute care, the aim of reuniting the family must be taken into account in a manner that accords with the child's interests.

Ireland

Child Care Act, 1991⁸

PART V

Welfare of child to be paramount.

24.—In any proceedings before a court under this Act in relation to the care and protection of a child, the court, having regard to the rights and duties of parents, whether under the Constitution or otherwise, shall—

- (a) regard the welfare of the child as the first and paramount consideration, and
- (b) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child.

Germany

German Civil Code (BGB)⁹

Parental Custody

Section 1697a Principle of best interests of child

To the extent not provided otherwise, the court, in proceedings on the matters provided for in this title, makes the decision that, taking into account the actual circumstances and

⁸ Law accessed from the electronic Irish Statute Book (eISB):
<http://www.irishstatutebook.ie/eli/1991/act/17/enacted/en/html> (23.06.2016).

⁹ Law accessed from the website of the German Federal Ministry of Justice and Consumer Protection:
http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5900 (30.05.2016).

possibilities and the justified interests of those involved, is most conducive to the best interests of the child.

Social Code (SGB) - Eighth Book (VIII) - Child and Youth Welfare - (Article 1 of the Code of 26 June 1990, BGBl. I p. 1163)¹⁰

Section 1 Right to education, parental responsibility, youth welfare

(1) All young people have the right to be supported in their development and the right to education to help them become responsible persons in society.

(2) The care and upbringing of children are the natural right of parents and their primary duty. The state monitors the exercise thereof.

(3) Youth care serves to implement the right pursuant to (1), in particular to

1. support young people in their individual and social development and help them to avoid or overcome disadvantages,
2. advise and support parents and other guardians in the upbringing of children,
3. protect children and youths from dangers for their wellbeing,
4. help to preserve or create positive living conditions for young people and their families and a child and family-friendly environment.

Norway

The Child Welfare Act¹¹

Act of 17 July 1992 No.100 relating to Child Welfare Services

Section 4-1. Consideration of the child's best interests.

When applying the provisions of this chapter, decisive importance shall be attached to finding measures which are in the child's best interests. This includes attaching importance to giving the child stable and good contact with adults and continuity in the care provided.

The child shall be given the opportunity to participate and steps shall be taken to facilitate interviews with the child. Children who have been taken into care by the child welfare service may be given the opportunity to be accompanied by a person whom the child particularly trusts. The Ministry may make further regulations regarding participation and regarding the duties and function of persons of trust.

¹⁰ Translation by Amesto Translations: <http://www.amesto.no/>. (06.06.2016).

¹¹ Law accessed from the website of Norwegian Government: <https://www.regjeringen.no/en/dokumenter/the-child-welfare-act/id448398/> (23.06.2016).

Spain

Organic Law 1/1996, of 15 January, on protection of minors, modification to the Civil Code and the Civil Procedure Act.¹²

CHAPTER ONE

Scope and best interest of the minor

Article 2 Best interests of the child

1. All minors have a right to their best interest being assessed and considered key in all actions and decisions concerning them, in both the public and private sphere. Pursuant to this law and other rules that affect it, as well as in measures concerning minors adopted by public or private institutions, courts or primary legislative bodies, the best interest of the child shall prevail over any legitimate interest that may apply.

Limitations on the capacity to act of minors shall be interpreted restrictively and, in any event, always in the best interest of the minor.

2. For the purposes of the interpretation and application in each case of the best interests of the child, the following general criteria shall be taken into account, without prejudice to those established in specific applicable legislation, as well as any others that may be deemed appropriate in accordance with the specific circumstances of the case:

a) Protection of the right to life, survival and development of the child and their basic needs, material, physical and educational as well as emotional and affective.

b) Consideration of the desires, feelings and opinions of the child, as well as their right to progressively participate, according to their age, development and personal development, in the process of determining their best interests.

c) The fitness of their life and development taking place in a family environment. Priority will be given to keeping them in the original family, and their family relationships shall be maintained, whenever possible and in the best interests of the child. If a protection measure is agreed, fostering will be prioritised over residential care. When the minor has been separated from his family nucleus, the possibility and appropriateness of their return shall be assessed, taking into account changes to their family since the adoption of the protective measure, and the needs and interest of the minor always prevailing over those of the family.

¹² Law accessed from: http://noticias.juridicas.com/base_datos/Privado/lo1-1996.html (30.05.2016).

Translation by Amesto Translations: <http://www.amesto.no/>. (06.06.2016).

d) Preservation of the identity, culture, religion, convictions, sexual orientation and identity of the minor, as well as non-discrimination against same for these reasons or any other conditions, including disability, guaranteeing the harmonious development of their personality.

3. These criteria shall be weighted taking into account the following general elements:

a) The age and maturity of the minor.

b) The need to guarantee their equality and no-discrimination for reasons of their particular vulnerability, whether due to the lack of a family environment, suffering, maltreatment, their disability, their status as refugee, seeker of asylum or subsidiary protection, their membership of an ethnic minority, or any other relevant characteristic or circumstance.

c) The irreversible effect of the passage of time on their development.

d) The need for stability of the solutions adopted to promote the effective integration and development of the minor into society, as well as to minimise the risks that any change in material or emotional situation may cause to their personality and future development.

e) Preparation for transition to adulthood and independence, in accordance with their personal capacities and circumstances.

f) Those other weighting elements that, in the specific case, are considered relevant and respect the rights of minors.

The above elements must be assessed jointly in accordance with the principles of necessity and proportionality, such that the measure adopted in the best interests of the minor does not restrict or limits than those that it covers.

4. In the event of any other legitimate interest applying alongside the best interest of the child, priority must be given to measures that, responding to this interest, also respect the other legitimate interests present.

If not all the legitimate interests applicable cannot be respected, priority must be given to the best interests of the minor over any other legitimate interest that may apply.

Decisions and measures adopted in the best interests of the child must in all circumstances assess the fundamental rights of other persons that may be affected.

5. Any measure in the best interest of the minor must be adopted while respecting the due procedural guarantees, and in particular:

- a) The rights of the minor to be informed, heard and participate in the process in accordance with current regulations.
- b) Intervention in the procedure of qualified professionals or experts. If necessary, these professionals must have sufficient training to determine the specific needs of disabled children. In particularly relevant decisions that affect the minor, the collegiate report by a technical and multi-disciplinary group specialising in the appropriate areas will be supplied.
- c) The participation of progenitors, tutors or legal representatives of the minor or a court-ordered defender if there is any conflict or discrepancy between them and the Public Prosecutor in the process of defending their interests.
- d) The adoption of a decision that includes in its reasoning the criteria used, the elements applied when weighting the criteria between them and other present and future interests, and the procedural guarantees respected.
- e) The existence of resources that make it possible to review the decision adopted that has not considered the best interests of the child as a priority, or where the very development of the minor or significant changes to the circumstances behind said decision require its revision. Minors shall enjoy the right to free legal assistance in the cases legally provided for.

Article 2 drafted by section two of article one of the L.O. 8/2015, of 22 July on changes to the child and adolescent protection system ("B.O.E." 23 July). Validity: 12 August 2015

Sweden

Swedish Social Services Act (2001:453)¹³

2 In the event of measures affecting children, particular attention should be given to the best interests of the child.

Decisions or other measures relating to the care or treatment of children should be based on what is best for the child.

All individuals under the age of 18 are regarded as children. Act (2012:776).

Swedish Children and Parents Code (1949: 381)¹⁴

¹³ Law accessed from the website of the Sveriges Riksdag: http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/socialtjanstlag-2001453_sfs-2001-453 (23.06.2016).

Translation by Amesto Translations: <http://www.amesto.no/>. (04.07.2016).

¹⁴ Law accessed from the website of the Sveriges Riksdag: http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/foraldrabalk-1949381_sfs-1949-381 (23.06.2016).

Translation by Amesto Translations: <http://www.amesto.no/>. (04.07.2016).

Ch. 6 Custody and contact

2 a All decisions on custody and contact should be based on the best interests of the child. In the assessment of what is best for the child, particular focus must be placed on

- the risk of the child or other family member being subjected to abuse or the child being illegally removed or retained or otherwise treated badly, and
- the child's need for close and good contact with both parents.

Consideration must be taken to the child's preference, taking into account the child's age and maturity. Act (2006:458).

Switzerland

Support and Welfare Act for Children and Youths¹⁵ (Children and Young Persons Act, KJG)

The Grand Council of the Canton of the City of Basel,

II. Principles

Section 3. Child's wellbeing

1. The wellbeing of children and youths should be considered a matter of priority in all government action concerning such persons.

United States (Massachusetts)

Massachusetts, General law

Chapter 119 Protection and care of children, and proceedings against them¹⁶

Section 1. It is hereby declared to be the policy of this commonwealth to direct its efforts, first, to the strengthening and encouragement of family life for the care and protection of children; to assist and encourage the use by any family of all available resources to this

¹⁵ Law accessed from the website of Kanton Basel-Stadt:
<http://www.gesetzsammlung.bs.ch/frontend/versions/3254> (14.05.2016).

Translation by Amesto Translations: <http://www.amesto.no/>. (06.06.2016).

¹⁶ Law accessed from the website of the 189th General Court of the Commonwealth of Massachusetts:
<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXVII/Chapter119/Section1> (14.06.2016).

See also information from the U.S. Department of Health and Human Services, Children's Bureau, in "Determining the best interests of the child" by the Child Welfare Information Gateway (2013):
<https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/best-interest/> (14.06.2016).

end; and to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development.

The purpose of this chapter is to insure that the children of the commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes, and to assure good substitute parental care in the event of the absence, temporary or permanent inability or unfitness of parents to provide care and protection for their children.

The health and safety of the child shall be of paramount concern and shall include the long-term well-being of the child.

In all matters and decisions by the department of children and families, the policy of the department, as applied to children in its care and protection or children who receive its services, shall be to define best interests of the child as that which shall include, but not be limited to, considerations of precipitating factors and previous conditions leading to any decisions made in proceedings related to the past, current and future status of the child, the current state of the factors and conditions together with an assessment of the likelihood of their amelioration or elimination; the child's fitness, readiness, abilities and developmental levels; the particulars of the service plan designed to meet the needs of the child within the child's current placement whether with the child's family or in a substitute care placement and whether such service plan is used by the department or presented to the courts with written documentation; and the effectiveness, suitability and adequacy of the services provided and of placement decisions, including the progress of the child or children therein. The department's considerations of appropriate services and placement decisions shall be made in a timely manner in order to facilitate permanency planning for the child.

In all department proceedings that affect the child's past, current and future placements and status, when determining the best interests of the child, there shall be a presumption of competency that a child who has attained the age of 12 is able to offer statements on the child's own behalf and shall be provided with timely opportunities and access to offer such statements, which shall be considered by the department if the child is capable and willing. In all matters relative to the care and protection of a child, the ability, fitness and capacity of the child shall be considered in all department proceedings.

For purposes of this section, the words "all department proceedings" shall include departmental hearings and proceedings but shall not include a court proceeding even when the department is a party.