

Consideration of the Best Interest of the Child in Divorce Proceedings under Rwandan Family Law: Case Law Analysis

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Abstract

This paper explores unpredictability and inconsistencies of divorce case laws with regard to the implementation of the child best interest. The best interest of the child is a legal standard which remains unspecified despite the fact that it is recognized in International and domestic laws. Decision-makers including judges are required to give a paramount consideration to the best interest of the child in their decision-making process. Practically, judges use their discretion to determine what is in the child's best interest in the child's custody, support, and visitation right arrangements in divorce cases given that no guidelines were set up to ease their task. This paper outlines international conventions and domestic laws providing the best interest of the child as a legal norm and analyses case law in order to materialize the reality of the issue in relation to courts' practices in interpreting the best interest of the child. Most of case laws explored are characterized by lack of motivation of facts; unfairness in determination of child support, lack of determination of conditions and modalities of visitation right. This explains unpredictability of Courts' decisions with regard to child best interest. Thus, clear and fair guiding factors need to be established in order to promote individual child welfare balanced with interest of others in the family.

Key words: best interest, child, divorce, family law, case law.

1. INTRODUCTION

The family is considered as natural foundation of the Rwandan society and it is protected by the State.¹ The Constitution of Rwanda clearly recognizes only

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¹ Article 18 of the Constitution of the Republic of Rwanda of 2003 revised in 2015, Official Gazette n° Special of 24/12/2015.

The concept of family has gradually grown over time to denote traditionally, a nuclear family linked to a marriage and composed of a father, a mother and their respective children. Today's realities in different societies reflect other nature of families including unmarried couples in *de facto* unions, mono parental father or mother, single father or single mother to mention a few. Thus, the significance of the concept of the family is limited by the wording of article 17 of the Constitution which seems to associate the right to marry with that of founding a family where it states that "The right to marry and to found a family is guaranteed by the law.

A civil and monogamous marriage between a man and a woman is the only recognized marital union (...)" Consequently, other varieties of families are stigmatized.

marital unions resulting from a civil monogamous marriage.² Ordinarily, spouses embark on marriage hoping to find an emotional stability and pleasant life.³ Nowadays' reality shows that sometimes, spouses are found in a conflicting situation which may culminate into the breakdown of their marriage. The dissolution of a marriage by divorce undoubtedly results in the disturbance of the life style of all family members. No one can ignore that a child is the most vulnerable family member to be affected by the marriage breakdown.⁴

Thus, a special attention needs to be paid to the child's welfare during and after divorce proceedings in order to mitigate adverse consequences of divorce on a child. Generally, the principle of best interest of the child is a legal standard which was incorporated in International Conventions⁵ and State members were requested to accord a primary consideration to the best interest of the child in taking any decision or action either by public institutions including executive, judiciary and parliament or private relevant institutions.⁶ Unfortunately this legal norm is criticized for being vague while its interpretation is left to the perception and discretion of decision-makers with regard to what would be in the best interest of the child.⁷ In matters of divorce, judges used to recourse to their discretion and values of the community in order to weigh what should be in

² Article 17 of the Constitution of the Republic of Rwanda, *supra* note 1.

³ William P. Statsky, *Family Law, the Essentials*, second edition, New York, THOMSON DELMAR LEARNING, 2004, at 6.

⁴ Article 18 of the Law n° 001/2020 of 20/02/2020 amending the law 32/2016 of 28/8/2016 governing persons and family, Official Gazette n° 06/17/2/2020 puts emphasis on the best interest of the child with regard to the determination of the child custody, modalities of child visit, and child support. For example: the child who used to live together with both parents is going to live with the custodial parent after the divorce of his/her parents.

⁵ Article 4 of the UN Convention on the rights of the child of 20 November 1989 ratified by the Presidential Order n° 773/16 of 19 September 1991. The best interest of the child is a guiding and leading principle in elaborations of legal texts and policies wherever the interest of the child is concerned; as examples: the Law n° 71/2018 of 31/08/2018 relating to the protection of the child, Official Gazette n° 37 bis of 10/9/2018, article 18 of the Law n° 001/2020 of 20/2/2020 amending the law 32/2016 of 28/8/2016 governing persons and family, Official Gazette n° 06 of 17/02/2020.

Article 4 (b) of the UN Convention on Rights of Persons with Disabilities; article 23 (2) of the Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption of 29/05/1993 ratified by the Presidential Order n° 24/01 of 7/05/2010; article 4 of African Charter on the rights and welfare of the child of 11/06/1990 ratified by the Presidential Order n° 11/01 of 30/05/2001.

⁶ Article 3, 1 of the UN Convention on Protection of Rights of Child, *supra* note 5.

⁷ Nadia D., "Best Interest of the Child Principle in the Context of Parent Separation or Divorce as Conceptualized by the Community", Edith Cowan University, 2014, at 20, <http://ro.ecu.edu.au/theses/1463>, accessed on 28/10/2019.

the best interest of the child.⁸ Consequently, this could result in inconsistencies in case laws and limit predictability, fairness in decision-making due to absence of clear guidelines on this matter. It is in this line that the researcher undertook this research entitled *Consideration of the Best Interest of the Child in Divorce Proceedings under Rwandan Family Law: Case Law Analysis*.

This paper aims to raise the awareness among law-makers and decision-makers about the gaps arising in the laws relating to protection of the child rights and welfare in respect of child best interest. It intends then to explore how judges interpret and apply the best interest of the child as indefinite legal standard. It furthermore aims to elaborate on the impact of absence of guidance in relation to factors to consider when judges apply the principle of the child best interest in their ruling on divorce cases in light of child custody, support and visitation right. In order to meet the aforementioned goals, the research attempts to answer the following questions: what is the legal framework for the application of the best interest of a child in Rwanda? What are guiding factors to consider when applying the principles of the best interest of the child during divorce proceedings in the light of comparative perspective? What are Rwandan courts' practices in determination of best interests of the child in divorce proceedings? What needs to be improved to ensure effective consideration of the child best interest in divorce proceedings in Rwanda?

The focus of this paper is to analyze case laws rendered by Rwandan courts to explore how the principle of best interest of the child is understood and applied by Rwandan judges in divorce cases. However, to get knowledge on the principle of the child best interest, international and national legal instruments in relation to this subject are referred to. In addition, a comparative approach is used to learn good practices from foreign jurisdictions with respect to factors to take into account in divorce cases.

After an introduction, the paper has two main parts. The first part provides an overview on the principle of best interest of the child in the context of divorce. It explains the principle of the best interest of the child, the concept of divorce and its procedure. The second part of the paper discusses factors that are considered

⁸ *Ibidem*.

by judges in determination of child custody, child support and visitation through case law analysis. The paper ends with a conclusion containing findings and recommendations.

2. UNDERSTANDING THE PRINCIPLE OF THE BEST INTEREST OF THE CHILD IN THE CONTEXT OF DIVORCE

This section attempts to clarify the concepts of the child and the best interest of the child. It additionally, discusses the standard of the best interests of the child from the international and Rwandan domestic law perspectives. It further explores the concept of divorce under the Rwandan legal framework.

2.1. DEFINITION OF THE CHILD AND BEST INTEREST OF THE CHILD

The notion of child is referred to under article 19 of the 2003 Constitution of the Republic of Rwanda revised in 2015 where it recognizes general protection of children's rights. This article states that "Every child has right to specific mechanisms of protection by his or her family, other Rwandans and State depending on his/her age and living conditions as provided for by national and international laws." A child is any person under eighteen years of age.⁹ This definition embraces the wording of article 1 of the Convention on the Rights of the Child¹⁰ and that of article 2 of African Charter on Rights and Welfare of the Child. It is worth to note that the Rwandan family law provisions on childhood are not far from the logic of international and regional legal instruments on rights of the child¹¹ where it recognizes *a contrario* the childhood as a state of a child between birth and eighteen years of age, unless a child has been emancipated.¹² A child needs a special protection in the perspective to limit authority of adults including professionals, parents, and teachers over children.¹³ In fact, adults are in a position to take decisions on behalf of children because they lack experience and judgment.¹⁴ Consequently, for the protection of a child, any action or decision

⁹ Article 3, 6^o of the Law n^o 71/2018 of 31/8/2018 relating to the Protection of the Child, *supra* note 5.

¹⁰ Articles 1 of the Convention on the Rights of the Child, 1989, *supra* note 5.

¹¹ Convention on the Rights of the Child and African Charter on Human and People Rights.

¹² Article 113 of the Law n^o 32/2016 of 28/8/2016 governing persons and family, Official Gazette, n^o 37 of 12/9/2016.

¹³ Jean Zermatten, "Best Interest of the Child, Literal Analysis, Function and Implementation, *Working Report*, 2010, at 6." https://www.childsrights.org/documents/publications/wr/wr_best-interest-child2009.pdf

¹⁴ Nadia D./, "Best Interest of the Child Principle in the Context of Parent Separation or Divorce as

to be taken on his/her behalf must be done considering his/her best interest. The Convention on the Rights of the Child refers to the concept of best interest of the child but it does not provide its definition. In her article, Mélanie Chatenoud affirms that there is no precise definition of the concept of best interest of the child. She goes further to specify that the idea behind this concept gives attention to the protection of the child, the safeguard of the child's welfare and the guarantee to the child's physical and mental health in a favorable environment.¹⁵ The focus on child's protection appears also in the wording of article 2, 10° of the law n° 32/2016 of 28/8/2016 governing persons and family which defines the best interest of the child as "factors to be considered to prevent any prejudice to the child rights especially with respect to his/her care, education, culture, property, and others towards the child protection." Due to the fact that those factors are not specified, decision-makers tend to use subjective and discretionary test to assess all surrounding circumstances that may affect the child welfare and interests.¹⁶ This may justify why some scholars consider it as vague and ideal and it differs in time and space.¹⁷ Thus, this legal concept must be clarified in practice. It is evident that under the Rwandan family law, the best interest of the child is a standard that decision-makers are required to refer to in all cases relating to the child alimony, custody, visitation, adoption, guardianship among others¹⁸ in accordance with different international legal instruments which Rwanda ratified.¹⁹ We consider that it cannot be hoped that decision-makers are acting in the best interest of the child while no guidelines were set up in this regard. More importantly, a thorough assessment of interpretation and implementation of this standard is needed for the improvement of the child welfare.

Conceptualized by the Community", Edith Cowan University, 2014, at 20, <http://ro.ecu.edu.au/theses/1463> ¹⁵ Mélanie Chatenoud, "Best Interest of the Child", <https://www.humanium.org/en/the-childs-best-interest/>, accessed on 20/10/2020.

¹⁶ X. "Best Interest of the Child Law and Legal Definition", <https://definitions.uslegal.com/b/best-interest-of-the-child/>, accessed on 23/10/2020

¹⁷ Nadia D./, "Best interest of the child principle in the context of parent separation or divorce as conceptualized by the community", Edith Cowan University, 2014, at 20, <http://ro.ecu.edu.au/theses/1463>. Every child is unique because he/she has grown or grows up in specific circumstances surrounding his/her living environment. The best interests of the child vary from child to another, during a given time and space. Thus it is not easier to provide a definition of the concept.

¹⁸ Article 18 of the law n° 001/2020 of 2/2/2020, *supra* note 4.

See articles 137, 225, 234, 292, 295, 299, 324 of the Law n° 32/2016 of 28/8/2016, *supra* note 12.

¹⁹ See *supra* note 5, *infra* note 21.

2.2. RECOGNITION OF THE PRINCIPLE OF BEST INTEREST OF THE CHILD UNDER INTERNATIONAL AND RWANDAN DOMESTIC LEGAL INSTRUMENTS

The principle of the best interest of the child along with rights of children were recognized as legal norms worldwide and has been incorporated in both international and national legal instruments. Conventions and domestic laws repeatedly provide that decision-makers must give an important consideration to the best interest of the child in their decision-making process.

In this vein, United Nations Convention on the Rights of the Child specifically dedicated on the rights of the child provides, under its article 3, that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative bodies, the best interest of the child shall be a primary consideration.” This Convention obligates State members to consider the child’s best interest in family matters for any decision intending to separate children from one or both parents, parents’ responsibilities, deprivation of family environment and adoption.²⁰ Moreover, the African Charter on Rights and Welfare of a Child has expressly reproduced the wording of the UN Convention on Rights of the Child in relation to the best interest; where it stresses that “in all actions concerning the child undertaken by any person or authority, the best interest of the child shall be a primary consideration.”²¹

Under the Rwandan context, the protection and recognition of child’s rights have been given a great importance. In this respect, the Constitution of the Republic of Rwanda impliedly recognizes principles of international human rights instruments which are meant for protections of children’s rights and to be incorporated in Rwandan laws for better protection of children’s rights even though there is no express provision on the best interest of the child.²²

Despite that the 2018 law relating to the protection of child does not define the

²⁰ Articles 9, 18, 20, 21 of the United Convention on the Rights of the Child, *supra* note 5.

²¹ Articles 2&7 of African Charter on Rights and Welfare of a Child of 11/06/1990 ratified by the Presidential Order n° 11/01 of 30/05/2001.

²² Article 19 of the Constitution of 2003 as revised in 2015, *supra* note 1. “Every child has the right to specific mechanisms of protection by his or her family, other Rwandans and the State, depending on his or her age and living conditions, as provided for by national and international laws.”

concept of best interest of the child, it contains significantly special rights of the child as well as modalities of the child's protection. In addition, it provides offenses against a child and their respective penalties. Thus, this law expresses specifically the consideration of the best interest of the child throughout its provisions.

As pointed out above, the Rwandan family law expressly refers to the best interest of the child in different matters in relation to child custody, guardianship, adoption last but not least.²³

2.3. CONCEPT OF DIVORCE

2.3.1. Notion

Divorce is a judicial process which is meant for ending up marital relationship.²⁴ The Rwandan family law provides a fault-based divorce and non-fault-based divorce. The grounds for fault-based divorce are spelt out under article 218 of the law n° 32/2016 of 28/8/2016. They include: adultery, desertion for a period of at least 12 consecutive months, conviction for an offence severely tainting the honor, refusal to provide for household needs, excess and abuse, serious insults by one towards another, gender-based violence, *de facto* separation for a period of at least 2 years,²⁵ and non-cohabitation for more than 12 consecutive months from the day of celebration of marriage. For the fault-based divorce, the judge considers only grounds provided under this article 218 and the plaintiff should produce convincing evidence. In case of lack of evidence, the courts do not grant divorce as it happened in the case N° RC 00082/TB/NYARGA of 13/11/2015. In this case, Masengo filed a claim before the Primary Court of Nyarugunga, requesting for fault-based divorce against his wife *Munezero*. He alleged that he was a victim of excess and abuse of his wife, and that his wife committed adultery. The court denied divorce to *Masengo* because he did not provide evidence of the specific acts of misconduct to prove the alleged faults of the wife. The court's motivation was based on article 3 of the law n° 15/2004 of 19/7/2004 relating to evidence and its reproduction according to which the plaintiff must demonstrate the truth of

²³ Article 18 of the Law n° 001/2020 of 20/2/2020 amending the law n° 32/2016 of 28/8/2016, *supra* note 4; also see *supra* note 18.

²⁴ William P. Statsky, *Family Law, the Essentials*, *supra* note 3, at 85.

²⁵ *De facto* separation might not be a result of any mistreatment according to article 218 *in fine*. n° 32/2016 of 28/8/2016, *supra* note 4.

what he or she is claiming. *Masengo* failed to provide convincing evidences of the faults of his wife and that made him loose the case of divorce.

As pointed out above, the Rwandan family law recognizes also a non-fault breakdown of marriage where it provides for a divorce by mutual agreement under its article 224. For such a type of divorce, no one can blame the other for the failure to marital obligations, given that spouses are not obliged to reveal the underlying causes of the dissolution of their marriage. Unlike the fault-based divorce, divorce by mutual agreement is not expensive and time consuming.²⁶ It is important to mention that Rwandan case laws developed another type of divorce which should be compared to “Irretrievable breakdown” of the marriage. For such a case, there is no agreement between spouses to divorce nor can each spouse prove the fault of the either spouse as provided under article 218 mentioned above.

However, apparently it is practically impossible for the spouse to live together because of intolerability of spouses. Sometimes, incompatibility of personality of spouses can make it impossible for spouses to live or to continue to live together in normal marital relationship. Nevertheless, pretty quarrels or minor bickering cannot be justifiable ground for the non-fault breakdown of marital relationship.²⁷ The severability of incompatibility and intolerability or discord must be considered.²⁸ To these, Rwandan judges were required to relate this with the fault provided under article 218. This breakdown of marriage is called *divorce remède*.²⁹ The latter does not need to be related to the fault. Otherwise, it would be a fault-based divorce. Still in this context, *Masengo*'s case remains relevant because, being unsatisfied with the decision of the Primary Court of Nyarugunga in the case N° RC 00082/TB/NYARGA of 13/11/2015, he lodged an appeal before the Intermediate Court of Nyarugenge in the case N° RCA O266/15/

²⁶ After the expiry of three months period of conciliation and as far as spouses comply with conditions required for divorce by mutual consent the judge grants divorce.

²⁷ William P. S tatsky, *Family Law, the Essentials*, *supra* note 3, at 91.

²⁸ The non-fault divorce which is considered here should be based on irreconcilable differences and irremediable breakdown. The judge must check if it makes sense for spouses to continue marital relationships. For example if it is established that there is any expectation that reconciliation is possible, the marriage was completely destroyed and there is no reasonable likelihood that the marriage should be preserved because of unsupportability, to mention a few. William P. Statsky, *Family Law, The Essentials*, *supra* note 3, at 92.

²⁹ Conclusions of Rubavu Retreat held at Rubavu, from 30/11/2016 to 3/12/2016.

TGI/NYGE of 22/04/2016. He argued that in the first instance, the Primary Court of Nyarugunga did not examine the evidence he presented to prove the excessand abuse and adultery of his wife.

The appellant Court reaffirmed that allegations of the husband were not founded because of lack of evidence. Nevertheless, as on one hand, the husband firmly affirmed that even though the Court did not accord divorce, he would not live together with his wife because he did not have affection to her “*naramuzinutswe*” to mean he no longer loved her. On the other hand, the husband lived apart for one year. The judge found these grounds enough to justify the decision of granting divorce given that the husband could not be forced to live together with his wife. Alain Duzell affirmed that in granting a *divorce remède* the judge is not required to establish the failure of one of the spouses to marital duties. Rather, he or she must consider that the community of life is practically impossible incase one of the spouses openly affirms that he or she does not have affection to the other spouse.³⁰ No one can ignore that divorce is a source of emotional and unpleasant consequences on welfare of the family even of the society³¹. The major reason is that the family is considered by the Rwandan Constitution asa foundation of the Rwandan society.³² In fact, the breakdown of marriage hasadverse repercussions on the property of the household, couple and children. The welfare of all family members is at risk.³³ Given that the dissolution of marriage constitutes a stress inducing experience for the couple, children are the most victims of the breakdown of the marriage of their parents.³⁴ Most of the time,disputes in relation to child custody, child support, and child visit arise duringdivorce proceedings.

2.3.2. *Divorce process and best interest of the child*

Divorce follows necessarily a judicial procedure which complies with rules governing civil proceedings. Divorce process comprises of contested petitions

³⁰ *Le juge n'est plus amené à rechercher la violation par l'un des époux d'une obligation essentielle du mariage* (Alain Duzell, *Le droit du divorce*, 3eme édition, Paris, 2002, at 349). “*La désunion est irrémédiable dès qu'il apparait que l'un des conjoints a perdu toute affection et qu'il renonce irrévocablement toute communauté de vie.*”

³¹ Mary Welstead & Suzan Edouards, *Family Law*, Oxford, 2007, at 118.

³² Article. 18 of the Constitution of 2003 as revised in 2015, *supra* note 1. The family which is referred to here is that resulting from a lawful marriage composed of father, mother and their legitimate children

³³ Mary Welstead&Suzan Edwards, *Family Law*, *supra* note 31, at 119.

³⁴ *Idem*, at 118.

and non-contested petitions.³⁵ In fault-based divorce and *divorce remède*, the competent court takes decision for divorce³⁶ and judicial proceedings are started by the grateful stage held in camera where the judge attempts to conciliate the couple by showing them legal consequences of divorce on the family, the property and their respective children. Where the outcome is not successful, it is followed by full hearing of the petitioner's claims and arguments of defense of the defender afterwards a judge takes decisions on divorce.³⁷

For divorce by mutual agreement, the stage of conciliation is also required. Spouses are bound to submit required notarized documents in relation to the settlement of all issues relating to liquidation of matrimonial regime, children's custody and support, residence of each spouse etc.³⁸ In case the judge finds that all is in order after both spouses personally present their respective wishes to divorce, he/she accords divorce.³⁹ Petition for divorce by mutual agreement is subject to an appeal on the condition that a petition is lodged jointly by both spouses.⁴⁰

One may wonder the place of the child's voice in divorce process in light of the child best interest. Normally, the rationale behind the consideration of the child's best interest is to safeguard and protect the child's rights and welfare. In this line, divorce entails dissolution of marriage, and children are negatively affected by divorce of their parents with respect to the child custody and other rights provided for by the law.⁴¹ Then it would be to the children's benefit to provide for their views in the decisions that would affect their rights and welfare. Traditionally, children's views and interests used not to be taken into consideration in case of decision-making on the matters concerning them because they were supposed to be seen and not to be heard. These entrenched

³⁵ This refers to fault-based divorce and non-fault-based divorce. For details see discussions, *supra*: 2.3. Concept of divorce.

³⁶ Article 236 of the law n° 32/2016 of 28/8/2016, *supra* note 12. The stage of conciliation binds the judge and spouses for any court's decision concerning the dissolution of marriage.

³⁷ Divorce proceedings follow the rules governing civil procedures as provided for by the Law n° 22/2018 of 29/04/2018 relating to the civil, commercial, labor and administrative procedures, Official Gazette n° Special of 29/04/2018.

³⁸ Article 231 of the law n° 32/2016 of 28/8/2016, *supra* note 12.

³⁹ Articles 233-234 of the Law n° 32/2016 of 28/8/2016, *supra* note 12.

⁴⁰ Article 235 of the law n° 32/2016 of 28/8/2016, *supra* note 12.

⁴¹ Article 242 of the law n° 32/2016 of 28/8/2016, *supra* note 12.

beliefs on the position and the place of the children in our society left them in vulnerable position.⁴²

As mentioned above, the Constitution of 2003 as revised in 2015 recognizes that a child needs special protection.⁴³ Furthermore, article 12 of the United Nations Convention on the Rights of the Child requests member States to provide for the child who is capable the opportunity to form and express freely his/her views in all matters affecting him or her. However, the consideration of the child's views depends on his/her age and maturity. More importantly, the Convention recognizes the right of the child to be heard in administrative and judicial proceedings affecting him/her, either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law".⁴⁴

To align with article 12 of the UN Convention on the Rights of the Child, which recognizes the right of the child to be given the opportunity to provide his/her opinion in all matters affecting him/her, be it judicial or administrative procedure; the 2018 law on protection of the child rights accords to the child the right to attend and give his/her views either directly or through a representative recognized by the law in any proceeding that aims at separating him/her from his/her family or guardian.

However, the consideration of the opinion will take into account the child's age and maturity with respect to the subject which he/she is heard."⁴⁵ Thus the Rwandan law recognizes the right of the child to participate in a decision that affects him/her. Even, a participation of a child in divorce case cannot be left out. However, the child's participation in divorce proceedings depends on the appreciation of the judge.⁴⁶

2.3.3 Provisional measures in favor of the child during divorce proceedings under Rwandan family law

It is evident that divorce entails dissolution of a legal marriage. However, it

⁴² . Yvonne Dausab, "The Best Interest of the Child", http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_h.pdf, accessed on 20/3/2020.

⁴³ The Constitution of Rwanda of 2003 as revised in 2015, *supra* note 1.

⁴⁴ Article 2 of the UN Convention on Rights of Child, *supra* note 5.

⁴⁵ Article 12 of the UN Convention on the Rights of the Child, *supra* notes 5.

⁴⁶ Judges interviewed indicated that when they consider important and necessary they call children to hear them and express their views.

does not end the relationship between parents and their respective legitimate children born of that marriage. Article 245 of the family law states that children continue to enjoy benefits from a marriage of their parents. In this regard, parents are obligated to keep educating their children.⁴⁷ This obligation to contribute to the child welfare and education lasts until below 21 years old as provided under article 322 of the family law. The child's health and welfare means a lot, much consideration is provided not only to the child's financial support to satisfy his/her basic and essential needs, but also the importance is given to the child custody. In this regard, the Rwandan family law provides for provisional measures with respect to child's financial support and custody and visitation right in ongoing divorce process⁴⁸ even after divorce.

2.3.3.1. Child custody and visitation right

The concept of the child's custody is not defined by the Rwandan family law. The child's custody consists of determination of the place where the child under 21 years old will live and the parent or third person who will be responsible for the daily life of the child. In divorce process, the judge may accord exclusive child's custody to one of the spouses principally the parent who wins the divorce or the other parent or the third party in the best interest of the child.⁴⁹

In the case N° RCAA0134/15/HC of 30/6/2016, opposing *Ndizihwe v Mukamwezi* the plaintiff claimed for the custody of the children born of the dissolved marriage. The children's custody was vested with the mother because the decision ensures the stability and continuity of the children in their living environment. The mother had been living together with her children for eleven years, where she kept parental responsibilities of raising, caring, supervising children. Thus, attachments were developed between the mother and the children. In addition, it was not in the best interest of the children to be raised by the stepmother who lived with their father. Furthermore, the nature of the father's job who used to work far from the family home would prevent him from finding required time to spend and stay with the children and cover their daily needs. The High Court fairly

⁴⁷ Articles 203 of the Law n° 32/2016 of 28/8/2016, *supra* note 12.

⁴⁸ Article 225 of the Law n° 32/2016 of 28/8/2016, *supra* note 12.

⁴⁹ Article 225 of the Law n° 32/2016 of 28/8/2016, *supra* note 12. Article 18 of the Law n° 001/2020 of 20/2/2020, *supra* note 4.

considered the principle of best interest of the child while determining the children's custody. This attachment with a parent was taken into account in another case opposing *Nyirabagirinka v Ngerageze*.⁵⁰

Similarly, in the case *MS v NWB*, Case N^o 46820/201, the High Court of South Africa (North Gauteng, Pretoria) accorded the child custody to the mother taking into account the attachments which were developed between the mother and the child during seven years the child had been living with her. We embrace the decisions of the aforementioned courts because a period of time a child spends with a parent contributes to the development of bonds which must be taken into account in order to avoid disrupting the living environment of the child.

However, the non-custodial parent would be vested with visitation right as the child must keep ties with both parents. The non-custodial parent is awarded visitation right and judges while ruling on the divorce case are obligated to specify appropriate modalities for exercise of that right⁵¹ and it may be expected that the judges' ruling would be done in the best interest of the child. In the case of divorce N^o RC 0189/14/TB/NYBYE of 09/02/2014 which opposed *Ndizihwe* and *Mukamwezi* the court ruled that the non-custodial parent who was the father was entitled to visit his five children and to be visited by them. The court did not decide on modalities of exercising the right to child visit.⁵²

To the contrary, in the case N^o RCA 0040/11/TGI/NYGE of 30/06/2011 which opposed *Gashumba* and *Valoi* the Intermediate Court of Nyarugenge ruled in the best interest of the children with respect of children's visit because the judge determined the modalities according to which the father could visit his children. For those who were studying in boarding schools, the father might respect the scheduled period fixed by schools for children's visits. For those who were not in boarding schools, the father had to visit them one weekend over 2. During holidays, children had to spend a half of the holidays with each of their parents.

⁵⁰ In the case N^o 0390/15/TB/MUH of 4/04/2017, *Nyirabagirinka v Ngerageze*, the Primary Court denied the custody of six children to the father because of his misconduct as he used to maintain concubines. In addition, children developed attachments with their mother who lived together with them.

⁵¹ Article 18 of the law n^o 001/2020 of 20/2/2020, *supra* note 4.

⁵² In the case N^o 0390/15/TB/MUH of 4/04/2017, *Nyirabagirinka v Ngerageze*, the judge accorded to the non-custodial parent the right to visit his children and to be visited by them without deciding on modalities of exercise of this right. This may be a source of intolerable disturbances from either the non-custodial parent or his/her children with regard to the custodial parent, children, or the non-custodial parent's new family.

The determination of modalities of child visits would protect them from boring visits, unnecessary disturbances, to mention a few. The aforementioned article 244 goes further where it tackles the issue of child support as obligation of divorcing parents towards their children. In fact, both parents must contribute to the welfare of their children. Irrespective of the parent the child is placed with, both parents have the right to supervise the maintenance of their children.

2.3.3.2. *Child's financial support*

In divorce cases, a crucial issue to be solved is how the children will be financially supported. The Rwandan family law provides this obligation under article 244 mentioned above where it specifies that parents must contribute to the alimony in proportion to their means. The obligation of the child alimony rests on both parents as it sounds from this article. The law specifies that the contribution of non-custodial parent must be done within the means of the provider. The Rwandan family law is silent about determination of the rate of the child support. It is obvious that it is left to the discretion of the judge. In the case of divorce N° RCAA 0002/15/TGI/NYGE of 12/03/2015 which opposed *Nzabamwita* and *Nibaseke*, the appellant claimed the reduction of the alimony of 50,000 Rwandan francs ordered by the Primary Court of Nyamirambo. The appellant earned 2,000 Rwandan francs per day and it is practically impossible to get 50,000 Rfw of alimony for his three children. Simple calculations show that *Nzabamwita* could not afford to pay this amount of 50,000 Rfw given that even his wife was aware that he earned 2,000 Rfw. The Intermediate Court of Nyarugenge reduced the amount of alimony to 30,000 Rfw. The Primary Court ordered alimony of 50,000 considering only the needs of the children. At least the Intermediate Court of Nyarugenge balanced the needs of the children with the earnings of the non-custodial parents. Nevertheless, this is not the only factor to take into account while calculating the amount of alimony to be granted to children. On this, it is worth borrowing from a case in South Africa *Strydom v Strydom*, Case n° AR 598/2018 the South African High Court of KwaZulu Natal, Pietermaritzburg, a non-custodial parent claimed the reduction of the alimony amounting to R 2,500/month/child for the 2 children. The High Court did not give him a cause because it made calculations of alimony considering not only the needs of the children, but also resources of the appellant's incomes and savings and necessary

expenses. Then the High Court maintained the alimony of R 2,500/month/child and other necessary expenses for the two children. Furthermore, the financial resources of the non-custodial parent must be taken into account as the duty of alimony rests on both parents pursuant to article 244 mentioned above. More importantly, the needs of the children must be balanced with other charges of the non-custodial parent. It is understandable that it would be unfair where the payment of child support leaves the non-custodial parent living under notorious poverty or looks like burdensome to him/her.

It is of interest to mention that the right to the child support goes along with the duty of the child education vested within parents. Article 322 of the law n° 32/2016 of 28/08/2016 specifies that parents are bound to perform the duty of education for their children below 21 years of age. However, in the case N°RC/0325/15/TB/GIS of 24/2/2016, *Mushimiyimana v Mbahungirehe*, the judge ordered the non-custodial parent to provide alimony to the child until she reached six years old.

The court order relating to child support can be subject to modification upon the request of either parent under substantial circumstances.⁵³ We consider that the latter must be substantial changes in relation to the cost of children rearing or parents' income. Consequently, the court should modify upwards or downwards a child support for adjustment to adapt it to the actual needs of the child and means of the parents. In the perspective of guaranteeing the child's welfare, a number of factors must be taken into consideration by judges while deciding in divorce case in the best interest of the child.

3. Consideration of the best interest of the child in divorce proceedings: case law analysis

This section critically analyses Rwandan courts' practice with regard to the consideration of the best interest of the child in awarding the child custody, child visit and support.

⁵³ Article 228 para 2 of the law n° 32/2016 of 28/8/2016, *supra* note 12.

3.1. COURTS' PRACTICES AND BEST INTEREST OF THE CHILD IN DIVORCE PROCEEDINGS

The Rwandan family law does not provide any clear guidance in respect of factors to take into account in case judges are deciding on the child custody, support and visitation right; nor were judicial or administrative guidelines established in this regard⁵⁴ even though the best interest of the child is recognized by family law as legal standard in decision-making process.

It is evident that the lack of guidelines on factors determining the best interest in respect to the child custody and support in divorce case may lead to absence of uniformity in decision-making and lack of predictability and fairness of decision on child custody, visitation right and support.⁵⁵

3.1.1. *The child custody and best interest of the child*

The child custody means the determination by the court of the place where the child under twenty-one years of age must live and the person who is entitled to assume the child's day-to-day care during divorce proceedings or after divorce has been granted by the court.⁵⁶

During divorce process, parents fight over the child custody, or one spouse shows sentiment to remain with children without the either spouse's objection.⁵⁷ The child custody may raise little or no disputes if parents come up with an arrangement on the child custody provided that the judge finds that the arrangement is made in the best interest of the child.⁵⁸ More importantly, let us underline that the child custody can be revisited by the competent court in the best interest of the child.

There is no doubt that divorce of parents creates adverse effects to the child. This becomes worse in case of disputed custody.⁵⁹ The judge retains his/her discretion

⁵⁴ All Presidents of Primary Courts interviewed revealed that there are no guidelines in relation to factors to be considered while they decide on the best interest of the child in divorce cases. They use their discretion in ruling considering what should contribute to the child welfare.

⁵⁵ Harry D. Krause, *Family Law*, Illinois, West Publishing, 1995, at 249.

⁵⁶ *Ibidem*.

⁵⁷ *Idem*, at 295

⁵⁸ William P. Statsky, *Family Law, the Essentials*, *supra* note 3, at 176-177.

⁵⁹ Harry De Krause, *Family Law in a Nutshell*, *supra* note 55, at 295.

when taking decision on the child custody but he/she is called to base on factors helping to guarantee to the maximum care and welfare of the child. The judge ruling could be based on facts and impressions that are not captured in a written record because of lack of guidelines while those factors should help to motivate the position of the court.⁶⁰ It is evident that the judge contributes undoubtedly to the safeguard of the child's welfare as long as the best interest of the child is taken into account while deciding on child custody and visitation arrangements in divorce case. It is of interest to recall that no guidelines in this regard are available to judges. In fact, judges affirmed that they use their discretion to decide what would be fit to the child depending on the surrounding circumstances.⁶¹ In this perspective a number of factors should help judges to decide custody arrangement in the best interest of the child for the child of divorcing couples. The child welfare principle must be given a paramount consideration in all issues in relation to the child.⁶²

3.1.1.1. The stability of the child and psychological bonds with the parent

When the court determines the person who must live with the child in a divorce case, it must take into consideration how long the child has been under the control and care of the parent or any other person. It is quite obvious that if it is established that a child has been in care of one parent, the stability of a child would be preserved if that parent is awarded child custody.⁶³

However, the stability of the child must be regarded widely; the judge must avoid whatever would upset the situation in which the child lives in favor of uncertain future of the child. The parent who actually will maintain maximum stability and continuity of child's lifestyle would be preferable.⁶⁴ In the case N^o RCAA 0134/15/HC/NY of 30/6/2016, *Ndizihwe v Mukamwezi* children's custody was given to the mother who has been raising alone children for 11 years while

⁶⁰ Apart from legal motivation where judges used to reproduce family law provisions in relation to the best interest of the child, many case laws explored showed that motivation of facts the judge based on was left out. This is justified by the lack of guidelines.

⁶¹ All judges of Primary courts interviewed affirmed that no guidelines are available to them for the better application of the principle of best interest of the child during divorce proceedings.

⁶² Mary Welstead & Susan Edwards, *Family Law*, *supra* note 31, at 326.

⁶³ *Ibid.*

⁶⁴ William P. Statsky, *Family Law The Essentials*, *supra* note 3, at 185.

the husband deserted the family residence. Thus, the children inevitably would be comfortable to stay with the mother. The stability of the children was ensured because the psychological bonds were developed between the mother and the children during the eleven years they stayed together under the care and supervision of the mother alone. It can be upheld that the court accorded the children's custody to the mother basing on the attachments developed between children and her in the absence of the father.⁶⁵

In intent to preserve the child welfare, the stability or *statu quo* principle must guide the judges where they decide on the custodial parent and child residence. Once it is proved that the child's stability was established because the child has been living with a given parent, the child stability must not be altered. In the case N^o RC 00049/2017/TB/KGO of 11/01/2018 *Ntihabose v. Kuradusenge*, a mother was awarded child custody because not only she won the case but also used to be with the child for long time. Various primary courts ruled in this sense.⁶⁶ The Court can even accord the child custody to the parent who loses the case when it is established that psychological bonds were developed between him/her and the child. For instance, in the case N^o RC 00714/2016/TB/KCY of 21/4/2017 *Murwanashyaka v. Uwera* the child custody was given to the husband even if he had lost for excess and abuse towards his wife. Despite that, the judge found that it was in the best interest of the child to vest with him the child custody because the child had been staying with him.

To safeguard the child's welfare, the judge must ensure the continuity of the child care by granting custody to the one who was providing care to the child.⁶⁷ It would be detrimental to the child if he/she realizes inconsistency between his/her life before and after separation of his/her parents.⁶⁸ The court ruling must always clarify instructions on how the non-custodial parent can visit his/her children or be visited by them and keep a regular communication with them in order to make sure that they will not suffer his/her absence. In a nutshell, the court's order on the child's custody would not impact on the changing of

⁶⁵ N^o RC AA 0134/15/HC/NY of 30/6/2016 para 8, *Ndizihwe v. Mukamwezi*.

⁶⁶ See examples of N^o RC 0373/10/TB/NGOMA of 25/10/2010, *Kayitesi v. Sebagambyi*. N^o RC 0716/11/TB/Nyab of 16/3/2012, *Murebwayire v. Harerimana*.

⁶⁷ Mary Welstead & Susan Edwards, *Family Law*, *supra* note 31, at 335.

⁶⁸ *Ibid.*

the *statu quo* like quality of education, shelter, food, etc. Thus, the continuity in the child's environment must be guaranteed as well as permanence of the child's psychological attachment.

3.1.1.2. *The benefit for children to have a meaningful relationship with both parents*

The Rwandan family law requires both parents to contribute to the care and welfare of their children until the children reach 21 years of age. In this line, any arrangement in relation to child custody and visitation right that promotes cooperation between parents is in the best interest of the child. While determining the custodial parent, the judge must designate the parent showing willingness and ability to respect and appreciate bond between the child and the non-custodial parent, ability to recognize the importance of continuity of relationship between a non-custodial parent and children. In fact, any arrangement for determination of the custodial parent and child's residency must as much as possible preserve contact between parents and a child.⁶⁹ One may wonder how the judge should discover inability to preserve relationship between children and the other parent. The hostility of one spouse to another while disputing over the child custody indicates that the hostile parent will not promote relationship with the other parent.

Furthermore, the parent who constantly provides argument full of disrespect vis-à-vis the other parent could not permit continuity of relationship with the other parent.⁷⁰

3.1.1.3. *The need to protect the child from physical or psychological harm*

Wherever it is established that there is a likelihood of spousal abuse, a child is likely to be exposed to an atmosphere in which the violence. There is no need to award child custody to a parent while surrounding circumstances indicate that there is high possibility for future abuse of a child, or apparent indicators of unfitness for custody.⁷¹ While deciding on child custody, the judge must avoid awarding custody to the parent who infringed any harm to the child be it physical, sexual or mental or neglect. This is the same in case it is likely that

⁶⁹ Mary Welstead & Susan Edwards, *Family Law*, *supra* note 31, at 236.

⁷⁰ *Ibidem*.

⁷¹ *Ibidem*.

the child is at risk of suffering the harm in the future.⁷² In the case n^o RCOO63/ TB/KCY, *Bizimana v. Habiyambere*, the Primary Court of Kacyiru accorded child custody to the father who won the case on the fault of the wife who committed adultery. The court motivated that she could not provide better education and be a model for her children even those under 6 years of age. Other court ruled in this sense⁷³ where the immorality of the custody-seeker renders him or her unfit for custody.

Nevertheless, the judge can decide otherwise considering the age of the child and psychological bonds that have been developed between the child and the parent of proven misconduct. It happened in the case N^o RC00023/2016 of 10/5/2017 which opposed *Simpunga to Kakiyombe*. The age of the children should be carefully considered when it is established that the attachments were developed for a certain reasonable period of time between the mother and the child.

The role of the judge would be to rule on the case considering specific and particular surrounding circumstances the child have been living in. The judge must avoid as much as possible the decision which will disturb the living environment of the child. We consider that to separate a child from his/her mother who has been raising a child for a long time is not in his/her best interests, despite that article 11 of the law n^o 71/2018 of 31/8/2018 relating to the child protection expressly specifies that the child custody may even be vested with the third party in case of domestic violence, mistreatment, and mental disability of a parent and deprivation of parental authority. In any case,

the decision on the child custody would consider surrounding circumstances so that the court's decision contributes to the child's welfare with respect to guaranteeing as much as possible the child's permanent psychological stability.

In short, the age of the child, psychological bond with a parent and protection of the child against physical and psychological harm must be balanced in his/her

⁷² *Idem*, at 388.

⁷³ Primary Court of Kacyiru, N^o RCOO63/TB/KCY, of 22/04/2010, *Bizimana v Habiyambere*; Tribunal de Grand Instance de Gasabo, N^o RCA 00062/17/TGI/GSBO of 08/02/2018 I vs H, the father was awarded child custody not only he won the case but also the wife lost the case because of adultery and it was doubtful that a mother of bad behavior could give good example to the children including girls; N^o RC 0390/15/TB/MUH of 4/04/2017, *Nyirabagirinka v Ngerageze*, the husband was denied to the custody of the child because he used to maintain concubines.

best interest.

3.1.1.4. Parent's ability to provide for the child needs

As stated earlier, the welfare of the child is given priority where the judge awards child custody to a parent. The judge must take into account a standard of care. This will be justified by material advantages that a custodial parent should avail to the child⁷⁴ to preserve the continuity of the child's lifestyle standards. To meet the child's needs, the judge must take into consideration the parent's availability to ensure the day-to-day needs and care of the child. In the case N^o RCA 0040/11/ TGI/NYGE, *Gashumba v. Valoi*, the Intermediate Court of Nyarugenge denied custody to the father because he was jobless and he could not afford expenses required to meet needs of children. In addition, he could not pay school fees for his children for luxury school he wanted them to attend. His wife who was capable to meet needs of her children was the one awarded children's custody. It is obvious that the custodial parent would be the one capable to provide reassurance and comfort to the children during or after divorce proceedings.⁷⁵ In this respect, the custodial parent would preferably be the one who used to meet children's needs, to respond to medical appointment, to help children to do homework, etc.⁷⁶ We appreciate the court's decision because on one hand, article 18 of the law n^o 001/2020 of 2/2//2020 amending the law n^o 32/2016 of 28/8/2016 governing persons and family set out a principle according to which "the custody of the children is awarded to the spouse who obtains divorce. (...)." In this case, the appellant won this case of divorce and she proved that she was able to afford financial expenses incurred by the education of the children. By contrast, the husband was jobless and was accused of failing to contribute to the household expenses. Thus, he could not cover the day-to-day needs of the children.

Practically, the child's best interest prevails over any other considerations. In the case N^o RCA 0074/12/TGI/GSBO of 18/1/2013, *Uwidutije v. Harindimana* a mother was denied custody for her children below 7 years of age because she could not afford their needs. Even in appeal, the court maintained that she was unable to pay 10,000 Rwandan francs for child support ordered by the Primary

⁷⁴ Mary Welstead & Susan Edwards, *Family Law*, *supra* note 31, at 339.

⁷⁵ William P. Statsky, *Family Law The Essentials*, *supra* note 3, at 185.

⁷⁶ *Ibidem*.

Court.⁷⁷ Financial situation of the parent is not the only determining factor to base on in order to decide on the custodial parent. The age of the child would also matter. Even though, article 18 of Law N° 001/2020 of 20/2/2020 amending Law N° 32/2016 of 28/8/2016 removed the principle that was set out in article 243 according to which a child under 6 years of age cannot be separated from her mother unless it is established that it is not in the best interest of the child. No one can doubt that, in Rwanda, mothers used to stay with children for longer periods than the fathers during the time of breastfeeding and babysitting of their children. The World Health Organization recommends mothers to breastfeed their children in order to ensure the child health and survival given that the breast milk contains antibodies which protect children who are fragile against childhood diseases. The exclusive breastfeeding for the first 6 months is important, thereafter, children should be given nutritious complementary foods and continue breastfeeding up to the age of two years or beyond.⁷⁸ Thus from this point of view, it is not in the best interest of the child to separate a child under six years old from his/her mother as far as the determination of the custodial parent is concerned unless it is established otherwise.

More importantly, let us underline that in determining the child custody, the best interest of the child is not always seen in the mirror of the custodial parent's financial situation. In the case of divorce N° RC00023/2016 of 10/5/2017 which opposed *Simpunga* and *Kakiyonde*, the Primary Court of Byumba granted divorce on the fault of the wife. The court granted the children's custody to the mother who lost the case because of excess and abuse against her husband. However, the court took into consideration the age of the two children born of the dissolved marriage. They were below seven years of age. The wife managed to raise her two children. In addition, the court took into account the attachments which were developed between children and their mother. Financial situation of the mother was not a determining factor in the decision of choosing the custodial parent. The divorcing spouses admitted that they did not have any financial challenges. Then the court ordered the non-custodial parent to pay the alimony amounting to 50,000 Rwandan francs and expenses relating to health insurance scheme, a half of children's school fees.

⁷⁷ Tribunal de Grand Instance de Gasabo, N° RCA 0074/12/TGI/GSBO of 18/01/2013, *Uwidutije v Harindimana*.

⁷⁸ WHO, "Breastfeeding", https://www.who.int/health-topics/breastfeeding/#tab-tab_1, accessed on 23/10/2020.

We appreciate the court's decision because the age of the children was a leading factor to determine the children's custody with respect to their best interest rather than the mother's misconduct or lack or insufficiency of financial means. The court took measures to compensate the outstanding possible balance by ordering the husband to pay alimony and other necessary expenses for children.

It should not be ignored that the parent's physical and mental health plays a considerable role in the child health and welfare. Much attention should be paid to impaired children. The court must consider that the custodial parent will be able to meet physical educational and emotional needs for the disabled child. The parent should be with sufficient resources to afford appropriate accommodation, schooling provisions, and housing, to mention a few for disabled child.⁷⁹

3.1.1.5. *Child preferences and wishes*

Article 28 of the United Nations Convention on Rights of the Child guarantees to the children the right to express their views and to be heard in all matters affecting them during judicial and administrative proceedings. However, the weight given to the child's views will depend on the child's age and maturity. This article goes further to specify that the opportunity to be heard must be provided in any judicial and administrative proceedings.⁸⁰ Thus, the child is entitled to participate in decisions affecting him/her.

Nevertheless, it is of importance to note that this participation in decisions affecting children is recognized to the child who has reached a certain reasonable age, level of understanding and development.⁸¹ Even though an infant should express his/her views and feeling about the parents he/she wants to live with, it is evident that he/she is unable to assess what would be in his/her best interests; a young child should validly express his/her wishes and feelings about the parent they want to stay with while being incapable to make choice in complex situation.⁸² We consider that the child wishes and feelings are not decisive for the judge to award custody to the designated parent; rather the judge must

⁷⁹William P. Statsky, *Family Law, the Essentials*, *supra* note 3, at 334.

⁸⁰ Article 12 of UN Convention on the Rights of the Child, *supra* note 5.

⁸¹ Mary Welstead & Suzan Edwards, *Family Law*, *supra* note 31, at 291.

⁸² *Idem*, 292.

balance this with other factors for the best interest of the child.⁸³ The judge must assess if the child truly upholds the expressed wishes, feeling and preferences or was under someone else's influence, to assess the child's capacity to uphold such expressed sentiment. In addition to that, the best interest of the child must be taken into account.⁸⁴ The judge must relate what the child wants with actual needs of the child in order to preserve the child welfare.⁸⁵

3.1.1.6. Parents' religion

In determining the custodial parent, the court must be neutral with respect to parents' religion. The judge must not be fanatic and show what religion is preferable or correct. Instead, he/she must take into account that the practice of the religion might not undermine children's right and best interest.⁸⁶ Furthermore, the child should express his/her wishes and feeling about this issue, however the judge must ensure the continuity of the child cultural development.⁸⁷

The list of this factor is not exhaustive, any other factor or circumstance that the Court thinks is relevant should be taken into consideration.

3.1.2. Child visitation right and best interest of the child

Divorce terminates spousal communal life. The separation of parents produces adverse effects on moral and spiritual growth of the children given that children are deprived of full time affection and guidance from the noncustodial parent.⁸⁸ In fact, the child custody should be awarded to the spouse who won divorce case or to the spouse who lost the case or third party if the court finds this in the

⁸³ In all case laws relating to divorce I explored, I did not find any case where the opinion of the child appears in the court's ruling. The judge would have good reason for not putting the child's opinion in the court's ruling because this could not be well perceived by the parent against whom the child was testifying and who at the end would become the custodial parent. This also is done in the best interest of the child of divorcing parents.

⁸⁴ Mary Welstead & Suzan Edwards, *Family Law*, *supra* note 31, at 292

⁸⁵ From the interviews conducted with Presidents of 8 different Primary Courts, children are not always called to give their views. However, in some cases the judge can invite children for this purpose and they are not bound by the child's views in their decisions.

⁸⁶ William P. Statsky, *Family law, the essential*, *supra* note 3, at 189. For example, the parent religion which does not allow the child to continue other activities, like studying, etc while those activities are decisive for the better future of the child.

⁸⁷ *Idem*, at 207.

⁸⁸ *Idem*, at 185.

best interest of the child.⁸⁹ The non-custodial parent is provided with a visitation right of the child in order to preserve ties between the child and both parents and to keep closeness to the child.⁹⁰ Conditions for enforcement of visitation right are specified in the court order following the discretion of the judge. In the case N° RCA 0040/11/TGI/NYGE, *Gashumba v. Valoi* the judge at least decided on modalities and conditions of exercising visitation right by obliging the father to visit his children at school or at home during the weekend every two weeks and staying with children for a half of holidays. However, in other different case laws consulted in this study, judges used to reproduce the provisions of the law.⁹¹

In some case laws the judge gives the latitude to the non-custodial parent to visit the child whenever he wishes. However, it is the role of the judge to determine those modalities, otherwise this can affect right to privacy of the custodial parent.⁹²

Worse again in other cases, the judge awards the visitation right to the non-custodial parent without specifying conditions and modalities of enforcement of this right.⁹³

Where judges are deciding on conditions of visitation right they must consider also that the child's welfare should not be affected. Sometimes the visitation right should be denied in restricted circumstances such as cases of brutal enforcement of visitation right which can be detrimental to the child when there is apparent conflict and tension between a non-custodial parent and the other parent.⁹⁴ In these circumstances, the visitation right should be suspended until when the atmosphere becomes favorable to the enforcement of that right. It is advisable to encourage voluntary and peaceful compliance with conditions of visitation

⁸⁹ Article 18 of the law n° 001/2020 of 20/2/2020, *supra* note 6.

⁹⁰ Harry D. Krause, *Family Law in a Nutshell*, *supra* note 55, at 219.

⁹¹ Tribunal de Première Instance de Nyarugenge, N° RCA 0040/11/TGI/NYGE of 30/6/2011, G. D. vs V. J.M.

⁹² N° RC 00052/17/TB/KGO of 30/11/2017, *Uwanjye v Ndagijimana*. N° RC 00051/2016/TB/BY of 30/6/2017, *Sediki v. Majyambere*. N° RC 0126/2016 TTB/BY of 30/06/2017, *Karikumutima v. Nkomeje*. N° RC 0716/11/TB/Nyb of 16/3/2012, *Murebwayire v Harerimana*, N° RC 00136/2017/TB/KCY of 24/5/2017, *Kabera v Maima*. The Courts ruled that the non-custodial parent should visit their children whenever they wished.

⁹³ N° RC 0106/2016/TB/BY of 28/2/2017 of the Primary Court of Byumba, *Kuradusenge v. Salehe*. N° RC 00714/2016/TB/KCY of 21/04/2017 *Murwanashyaka v. Uwera*.

RC 27.708/98 of 27/8/1998 of the Tribunal of the first instance of Kigali, *Mukakagenza v. Ndoli*. The courts awarded visit right the fathers without defining conditions and modalities of enforcement such a right ⁹⁴ Harry D. Krause, *Family Laws in a Nutshell*, *supra* note 55, at 219.

right by both parents.⁹⁵ It is in the best interest of the child if the custodial parent encourages children to find time to be with the noncustodial parent so that they can explore and realize the affection of the either parent; this will ease the execution of child support obligation of the noncustodial parent.⁹⁶ In case of disputed child custody, the court order must clearly indicate that a custodial parent has no right to limit or to defeat the non-custodial parent's visitation right⁹⁷ unless this can endanger the child welfare. In fact, regular and consistent visits to the children contribute much more to the stability and security of both children and parents.⁹⁸

Additionally, visitation right should be denied to the non-custodial parent in case it would affect child physical, mental, moral and emotional health.⁹⁹ If it is established that the non-custodial parent's behavior can endanger the child welfare, the visitation right would not be in the best interest of the child. The non-custodial parent should be denied to contact child in exceptional situation like domestic violence, criminality, etc. For example, a husband who has been violent to the wife would be denied to contact children¹⁰⁰ because the violence towards the mother produced emotional and psychological harm to the child.¹⁰¹ Nevertheless, it would be in the best interest of the children to ensure that the non-custodial parent keep ties with his/her children once he/she changes positively his/her behavior. This would surely contribute to the children's psychological development.

3.1.3. Child support and best interest of the child

As mentioned above, the Rwandan family law obligates both parents to support their children. Each parent accomplishes this responsibility within the limits of his/her means and needs of the child.¹⁰² The components of the child support

⁹⁵ *Idem*, 319.

⁹⁶ *Ibid*.

⁹⁷ William P. Statsky, *Family Law, the Essentials*, *supra* note 3, at 179.

⁹⁸ *Idem*, at 180.

⁹⁹ Harry De Krause, *Family Law in a Nutshell*, *supra* note 55, at 319.

¹⁰⁰ *Ibid*.

¹⁰¹ Mary Welstead & Suzan Edwards, *Family Law*, *supra* note 31, at 345.

¹⁰² Art. 204-205 of the law n° 32/2016 of 28/8/2016, *supra* note 12.

In the case N° RCAA0134/15/HC/NYA of 30/6/2016, the High Court of Nyanza ordered the non-custodial parent to pay 67,000 Rwandan francs and the custodial parent to pay 20,000 Rwandan francs as alimony to

include provision of food, clothes, shelter, ensure medical care of the children, school fees, to mention a few.

One may wonder the age of the child who deserves support from his/her parent. It is not ignored that child support obligation is the composite of child education. Article 322 of Family law envisages that parents are bound by the duty of education towards their children below 21 years of age. We consider that the range of age must be considered with some nuances. The child support obligation must continue for the child who was incapacitated by the competent court as long as the legal incapacity lasts. Parents are *a priori* guardian for the incompetent child the time the court decides on that legal incapacity.¹⁰³ The Rwandan law is silent about parents' support obligation towards the emancipated child. Harry D. Krause considers that where a child is emancipated, the support obligation ceases because the child is considered to be like any other adult person responsible for his or her life.¹⁰⁴ It is unfortunate that in the case N^o 0325/15/TB/GIS of 24/2/2016, *Mushimiyimana v. Mbahungirhe*, the judge ordered the father to pay the child's alimony until the child would reach six years of age. We consider that the Court ruling was not in the best interest of the child because as mentioned above alimony is a composite of the duty of education of child which lasts until the child reaches below 21 years of age.

A judge can give a consideration to the arrangement of parents on the children's alimony as far as it does not compromise the child's best interest. In the case N^o RC 00793/2016/TB/KCY of 20/04/2017, *Musirimu v. Umutoni*, in the parents' arrangement of 20/9/2016, parents agreed that the father would pay the child alimony of 1,000,000 Rwandan francs for four years after which the child would be given to the father. They agreed that the father would pay 21,000 Rwandan francs each month. In the best interest of the child, the judge ruling extended this period of four years to the time the child would reach civil majority. However, it is important to recall that the duty of the child education lasts until before 21 years of age, not until civil majority which is 18 years of age. In addition, the judge

provide to the children born of the dissolved marriage. In some other case laws, the judge used to order the payment of alimony to the non-custodial parent and did not motivate why the either parent was exonerated from performing this parental duty. N^o RC0373/10/TB/NGOMA of 25/10/2010, *Kayitesi v. Sebagarambyi*. The father was ordered to pay 50,000 Rwandan francs.

¹⁰³ Article 152 of the law n^o 32/2016 of 28/8/2016, *supra* note 12.

¹⁰⁴ Harry D. Krause, *Family law in a Nutshell*, *supra* note 55, at 256.

did not provide any motivation to justify how the sum of 21,000 Rwandan francs which was proposed in the parents' arrangement was in the best interest of the child with respect to the child support.

The other crucial issue that arises from the range of age below 21 years of age is where the child above 21 years of age hasn't completed his/her higher education. One may wonder if parents are not bound by education past 21 years of age. Is a 21 years of age petition founded where he/she claims for tuition fees, accommodation, etc,

what would be the legal framework? Harry De Krause affirms that parents are bound to pursue education past 21 years old to help those children to accomplish their studies.¹⁰⁵ This must take into account the ability of parents and child learning capacity,¹⁰⁶ even though the law provides that the duty of education ends before 21 of age is reached.

The performance of the obligation of child support must not be burdensome to the non-custodial parent. It would be unfair if the payment of child support leaves the noncustodial parent living in notorious poverty. Furthermore, it would be meaningless if the court orders child support which a non-custodial parent is not able to afford. In the case n^o RCA 0207/15/TGI/NYBE of 13/3/2016, *Nkubito v. Mukamana*, the Intermediate Court of Nyamagabe reduced the child support ordered by the lower courts because the income of the non-custodial parent was not taken into account.¹⁰⁷ Furthermore, the High court of Nyanza determined child support to be paid by a non-custodial parent basing on various circumstances including the salary, and other actual expenses to be covered by the same salary including payment of loan, insurance scheme, home rent, living expenses to mention a few.¹⁰⁸ Also in the case N^o RC 0053/16/TB/KINIH of 23/06/2016 opposing *Uwamariya and Hategekimana*, it started from the mediation Committee where the custodial parent claimed alimony of 50,000 Rwandan francs.

¹⁰⁵ *Idem*, at 256-258.

¹⁰⁶ William P. Statsky, *Family Law the Essentials*, *supra* note 3, at 218.

¹⁰⁷ RCA 0207/15/TGI/NYBE of 13/3/2016, *Nkubito v. Mukamana*.; N^o RCA 002/15/TGI/NYGE, of 12/3/2015 Omar who was ordered to pay 50000 Rwandan francs in the first instance while he could gain 2000 per day. Then, In appeal, the Intermediate Court of Nyarugenge reduced the alimony up to 30000.

¹⁰⁸ High Court of Nyanza, N^o RCAA 0134/15/HC/NY of 30/6/2016, *Ndizihiwe v Mukamwezi*.

The Committee accorded a monthly alimony of 20,000 Rwandan francs. The non-custodial parent lodged an appeal claiming for its reduction as he could not afford to pay 20,000 Rwandan francs every month. He proved that his salary was equal to 99,160 Rwandan francs, he had been reimbursing a loan of 1,000,000 Rwandan francs, had got other 4 children with a wife they were legally married and had responsibility to maintain and educate them. The Primary Court of Kinihira balanced the best interest of the child with not only the earning of the provider of alimony, but also his actual charges and best interest of other children. Then, the Court ordered that the alimony be reduced up to 10,000 Rwandan francs. We consider that the purpose is to avoid that the child support becomes burdensome to the parent who has to pay. These court's decisions are realistic because the judge fixed the amount of the alimony in consideration of the earnings of the providers, their actual charges including loan payment, education of other children, and other expenses of his daily life. The Court balanced the needs of the beneficiary of the alimony with that of other family members of the provider. Nevertheless, resources of the provider¹⁰⁹ must be taken into account as well as the financial situation of the custodial parent.¹¹⁰

However, the judge does not sometimes decide on child support. In case n° N° RC 0277/15/TB/NGOMA opposing *Nyiramuruta v. Ndayambaje* of 18/05/2015 a judge did not decide on the child support while the mother who was granted child custody raised this issue during divorce proceedings, and the judge did not justify why he did not take stand on the issue. In any case in the best interest of the child, nothing would prevent the judge from deciding on the children's alimony in divorce proceedings in accordance with article 244 of the law n° 32/2016 of 28/8/2016, which specifies that "Regardless of which person the children are placed with, parents retain the right to supervise the maintenance and education of their children. They must also contribute to the alimony in proportion with their means." In the case N° RC00011/2017/TB/G of 15/02/2018, *Umufasha v. Kubana*, the Primary Court of Gasaka decided that the child alimony could not be granted because, on the one hand, the non-custodial parent was in

¹⁰⁹ *Strydom v Strydom*, Case n° AR 598/2018 South African High Court of KwaZulu Natal, Pietermaritzburg, a noncustodial parent claimed the reduction of the alimony amounting to 2,500/month/child for 2 children, The High Court denied the reduction taking into consideration of the appellant's incomes and savings. Then the High court maintained the alimony of 2,500/month/child and other necessary expenses relating to medical care for the children

¹¹⁰ Republic of Rwanda, Supreme court, *Leading Cases Arising from Civil Court in Rwanda, Family law, Administrative Law & Labor Law*, Volume 2, November 2017, at 30.

prison and had no salary, and on the other hand, the custodial parent failed to identify other sources of incomes or resources of the non-custodial parent.

Even though, the Rwandan family law is silent on the matter with respect to child support guidelines, the court should consider the relevant facts suggested in literature, including the child's preferences and wishes, relative financial means of parents, the earning ability of parents, the standards of living and circumstances of parents, needs and capacity of the child for education including higher education, age of the child, financial resources and earning ability of the child, responsibilities of parents to support others, the value of services contributed by the custodial parent, among others.¹¹¹ One may wonder what will happen if the court is required to give primary consideration to the best interest and child welfare for two or many children subjects of the same claim, or simply other children while only one is subject of the petition.

In this context, primary consideration does not mean first consideration. Instead, it denotes the most important consideration.¹¹² That is to say that the child best interest and welfare does not prevail over other children's interests and welfare or that of his/her parents and other persons. The interests of two children subject of petition can be balanced with or against each other depending on circumstances.¹¹³ If need be, the court can also diligently take into account interests of the child's parents and others.¹¹⁴

However, as discussed throughout this paper, this blatant lack of child support guidelines with regard to the principle of best interest of the child, leads to inconsistency in decision-making, lack of predictability, fairness in decision making¹¹⁵ to mention a few.

¹¹¹ Harry De Krause, *Family Law in Nutshell*, *supra* note 54., at 246-247.

¹¹² Oxford Advanced Learner's Dictionary, *International Student's* edition, Oxford, 2006.

¹¹³ Jonathan Herring, *Family Law*, 4th edition, London, Pearson Longman, , 2009, at 417-425.-4 In the case *Re T and E*, [1995] 1FLR 581, [1995] 3 FCR 260. For the purpose of medical treatment, conjoined twins were separated to the disadvantage of one because it case there was no separation both twins would die, to the contrary, J would survive and M would die. The best interest of one twin was considered weighty that that of the other. Even the court of appeal authorized the operation in this sense. Also in the case [1994] 2 AC 212., *Birmingham City Council v H (a minor)* a minor who was under 16 years of age had been taken into care with her baby separately. The minor applied to contact her baby. The request was refused because it was considered as unnecessary in the baby's best interest.

¹¹⁴ N° RCA 0207/15/TGI/NYBE of 13/3/2016, *Nkubito v Mukamana*.

¹¹⁵ Harry De Krause, *Family Law in Nutshell*, *supra* note, 55, at 249.

In case the provider of child support dies, does his /her estate continue to be a source of child support? ¹¹⁶ Under community of property regime, the surviving spouse is bound to continue to take care of the children from the dissolved marriage as well as legitimate child of the deceased parent.¹¹⁷ It means that a step-parent is obligated to provide child support to a child of his/her deceased spouse. Furthermore, if it is established that the surviving spouse fails to raise minor children, the law allows the opening of succession and a half of the property is allocated to the children and the guardian is appointed to administer the child's property. Normally the execution of succession occurs upon the death of the surviving spouse or his/her remarriage.¹¹⁸ This article hinders the exercise of inheritance rights by rightful heirs. The entirety of the property falls in the hands of the surviving spouse while no protective measures are envisaged by the law to safeguard the property which is meant to be shared out by all rightful heirs and legatees. In addition, pursuant to article 83 of Law n°27/2016 of 8/7/2016, the inventory of assets and liabilities is carried out at the time of partitioning. Under separation of property regime, the surviving spouse is entitled to manage the inherited property of the minor children until they reach majority age (article 78, 2° of Law n° 27/2016 of 08/07/2016) unless it is established that he/she does not comply with this duty here the law envisages appointment of a guardian for this purpose.

As mentioned earlier, child support should fluctuate depending on the increase of income of either spouse or needs and income of the child. The modification downwards should occur where the provider cannot afford the amount originally awarded by the court provided that the ground is beyond the control of the provider.¹¹⁹ This is to say that the self-imposed poverty is not a ground to reduce child support. The provider must always act in good faith.¹²⁰

The Rwandan family law does not solve the problem of how to determine the child support and its nature. It only provides that the extent of performance

¹¹⁶ William P. Statsky, *Family Law, The Essentials*, *supra* note 3, at 209.

¹¹⁷ Article 76, 1° of the law n°27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions, Official Gazette n°31 of 1/8/2016.

¹¹⁸ Article 52 para 3 of the Law n°27/2016 of 08/07/2016, *supra* note 114.

¹¹⁹ William P. Statsky, *Family Law the Essentials*, *supra* note 3, at 218.

¹²⁰ *Idem*, at 219.

of this obligation depends on the ability of the provider and needs of the child. Nevertheless, a number of factors should help judges to appropriately and fairly decide in the best interest of the child. In this perspective, those factors include the child's living standards, and own income or financial resources, income or other financial resources of the custodial and non-custodial parent, financial need of non-custodial parent, responsibility of non-custodial parent to support others for example members of the second family from second marriage.¹²¹ In the case RC 00075/2017/TB/KGO, *Muhire v. Muhimpundu*, a father was ordered to pay 1/3 of his salary every month without taking into account other responsibilities. As far as the nature of child support is concerned, we consider that it should be performed in money or in kind as the law remains silent on this matter. A judge ruled that a plot of land will constitute child support for the child. In some case laws explored for the purpose of this study, judges mistakenly motivated that the children have right over their parents' property,¹²² which is not right as long as parents are still alive. In this vein, in case of sharing the property of the divorcing spouse, the judges used to give a big portion of 75% of the entire assets to the custodial parent to the detriment of non-custodial parent and in addition to this, judges ordered the child support to be paid by a non-custodial parent. The High Court of Nyanza in case *Ndizihiwe v. Mukamwezi* ruled differently where it decided that divorcing spouse who was married under community of property regime have to share equally their respective property. It is evident that children should benefit from their parents' assets while they are accomplishing their duty of education and catering for children.

As evidenced throughout this paper, Rwandan law contributes to the enforcement of the child support obligation. In case one spouse fails to accomplish the duty of education, the other spouse can request the court to compel him/her to perform this duty including child support.

¹²¹ *Idem*, at 210.

Jill Black, Jane Bridge & Tina Bond, *A Practical Approach to Family Law*, 7th ed. 2004, at 308.

¹²² N° RC00049/2017/TB/KGO OG 11/1/2018, *Ntihakose v Kuradusenge*; N° RC00057/2017/TB/KGO of 08/02/2018, *Mushimiyimana v Ngayaberura*; N° RC00051/2017/TB/KGO of 17/12/2017, *Mukakaberu v Bizimana*.

4. CONCLUSION

The best interest of the child is provided as fundamental legal standard by international conventions and domestic laws to be given a paramount consideration in all decision-making processes that can affect the child. In this perspective, the Rwandan family law obligates judges to consider primarily child's best interest while they determine child custody, child support and visitation right in divorce cases.

Unfortunately, the best interest of the child as legal norm is not defined and it is criticised to be vague and broader. The interpretation and application of this norm depends on the judges' discretion and values of the community they consider to reasonably contribute to the child's welfare. The task of courts becomes complicated because of absence of guidelines in this respect. The end result is the lack of predictability of case laws, inconsistencies and unfairness observed in some case laws. Most of case laws explored for the purpose of this study lack factual motivations which would call legal motivation as far as child support was concerned. Sometimes the alimony ordered by the court seemed burdensome because judges do not balance the child best interest with other basic needs of other members of the family.

Furthermore, no criteria to determine child support were available to judges. Concerning visitation right, most of judges accord visitation right to a non-custodial parent; however, they do not determine conditions and modalities for enforcement of this right. They only reproduce the article of the law providing this right. Surprisingly, some judges take decisions whose execution would infringe the right to privacy of the custodial parent where they allowed the non-custodial parent to visit children whenever they want. From these aforementioned findings, we suggest that guidelines be provided in order to guarantee consistency, fairness and predictability of divorce case laws with regard to the child custody, child support and visitation right. Those guidelines include a number of factors like the capacity of parents, child ultimate safety and well being, family integrity, emotional ties, child age, child preferences and wishes, mental and physical capacity of the child or parent, to mention a few.

Even though the best interest of the child is the first aspect to consider while a

judge is determining child support, it is not the only one to take into account. It must be balanced with interests of other family members in order to avoid that it becomes burdensome for the provider.

Even though the best interest of the child is a legal norm each judge is required to implement while deciding on the case involving the child's interests, the case law analysis shows that the best interest of the child varies from a child to another. The judge must be aware of the fact that every child is unique, is found in a specific situation with particular surrounding circumstances. That is why the judge is required to be careful while he/she is assessing what would be in the best interests for each child. In some cases, the custody was granted to the parent who obtained divorce in the best interest of the child. In other cases, the custody was accorded to the spouse who lost the case because it was in the best interest of the child considering the age of the child, and the attachment which were developed between the losing party and the child.

Thus, we suggest that the administration of courts in Rwanda organize training sessions to the benefit of judges in charge of ruling on divorce cases. They will be provided with factors that should be considered while deciding in the best interest of the child with regards to child's custody, child's visit, and child's support. The critical analysis of divorce related case laws would help to improve courts' practices in the line of safeguarding the children's welfare while judges are deciding on the child custody, child support and visit in divorce cases. Furthermore, judges will be recalled that the courts' decisions must be sufficiently and strongly motivated with regard to facts and laws. The judge is required to justify the reasons that push him/her to take the decision. Proceeding in this way will promote transparency and fairness in the ruling process.

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