

Study on the Application of the Clauses of Respecting the True Will of Minors in Custody Disputes

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Abstract. Since the implementation of the Civil Code in 2021, the true will of minors has become the important accordance for courts to verdict the ownership of the child custody of minors. However, the clauses of respecting true will of minors have a weak institutionalization. There is a lack of a procedure to explore true will of minors and a standard to weigh that, causing inconsistent application of clauses in judicial practice. In order to realize the legislative goal of substantive law for respecting true will of minors, a procedural mechanism shall be established for listening and exploring true will of minors, and the applicable standard for measuring shall be specified when there is a conflict between true will of minors and other maintenance conditions. The applicability of the clauses of respecting true will of minors shall be strengthened.

Keywords: Custody Disputes, true will of children, the principle of best interest to minor children, children's subjectivity.

1. Introduction

Based on Article 1084, Paragraph 3 of the Civil Code of the People's Republic of China, the principle of "adhering to minor kids' best interest" was introduced as the fundamental guideline to ascertain parents' custody rights of their minor kids. At the same time, the Civil Code also establishes the provision of "respecting minor kids' true will", which provides a judicial guideline for resolving disputes over custody rights after parental divorce. However, since this provision is overly principled, it encounters numerous disputes in terms of judicial application. What on earth is "true will"? How can we understand minors' true will, ensure its authenticity, and guide them to express their needs appropriately? Since the nature as well as prioritization between respecting minors' true will and the principle of adhering to their best interest lack of clarity, conflicts can arise. When minors' genuine intentions and the approach to maximize their interests clash with other custody conditions that benefit them, whether respecting their true will should be taken as priority remain controversial owing to the lack of clear standards. Therefore, in judicial practice, how to nail down custody arrangements that best serve the interests of minors presents as a major issue [1].

2. Lack of Judicial Procedures to Uncover the True Intentions of Minors

2.1. Non-standard Expression of Intention

At present, China's legal frameworks do not provide an adequate explanation and further guidance on to the provision of "respecting minors' true will". The lack of procedural mechanisms for minors to express their true will leads to inconsistencies and irregularities in how minors' wishes are communicated in practice. In real cases, there are often situations where one parent, who advocates for sole custody, representing their minor kids to convey their intentions to the judge. However, under this circumstance, the parent may be at odds with the kid's best interests, which makes it nearly impossible to genuinely express the minor's needs, or even contradict the kid's true willingness. This largely undermines the authenticity of minors' true wishes. Many judges express their uncertainty about how to ask the minors' true will without causing them mental pressure. In judicial contexts, judges often decide unilaterally on minors' ways of expressing their views, and this action tends to be arbitrary and formalized [2].

2.2. Inadequate Procedures For Ascertaining True Intentions

Confined to causes including insufficient procedural rules, the process of understanding minors' true intentions in terms of parental support is hindered by many factors. Furthermore, minors are susceptible to various external contexts and factors, which adds another layer of difficulty to ascertain minors' true will. Most judges only conduct simple and non-specific inquiries in practice, instead of delving into the reasons and backgrounds behind the minors' wishes. However, there hasn't been any direction on how to find out and pay attention to genuine intents in the pertinent court interpretations. Due to these operational challenges, there is now a large discrepancy between the percentage of situations where little children's intentions were truly consulted and the percentage of cases where their intentions ought to have been taken into account.

This results in various conclusions. In practice, most judges don't perform specific assessments regarding the authenticity of minors' intentions. Instead, most of them draw from their own experiences. Some judges even presume any statement given by a minor is valid, and accept it without considering potential interruptions from parents. While the so-called true will should reflect a minor's authentic intentions, free from external or third-party influences. Thus, how to ensure that a minor expressed wished independently and how to effectively ascertain the authenticity of the wishes pose challenges for the judicial process [3].

3. Conflicts Between Honoring Minors' Genuine Wishes and Maximizing Their Interests in Practice

3.1. Divergence in Honoring Minors' Genuine Wishes

Some judges think that owing to minors' inherent fragility, they are easily influenced by external factors and express immature wishes. Therefore, the judges don't trust in minors' ability to make choices that truly benefit themselves, leading to their tendency to overlook minors' true will. Even if they take minors' expressions into consideration, those wishes only exert limited influence on custody rulings. While some other judges believe that every individual, minors included, is best suited to consider their own interests. Therefore, as long as minors make their own decisions, their views should be respected. From this perspective, minors' wishes should be regarded as the only factor that affects their custody, with "respect" equated to "immediate acceptance." During that process, judges may avoid forming their own conclusions or weighing the authenticity of the minors' wishes against their best interests, they only act as conduits for those expressed desires. Thus, there is a clear division regarding the extent to which minor's genuine wishes are respected in judicial scenarios [4].

3.2. Lack of Substantial Attention to Minors' Genuine Wishes

Speaking of respecting minors' true wishes, it requires not only the ability to "hear" but also to "comprehend." However, judges frequently ignore minors' voices owing to their prevailing bias that prioritizes parental perspectives. Some judges agree that minors' opinions can be easily swayed by current emotions and parental influence. They place greater emphasis on parent's willingness, capability, financial status, considering these factors as more definitive indicators of what is in minors' best interests. These factors often sway judges' discretion, which result in significant presence of "parent-centered" mindset in custody determinations. Consequently, minors' true wishes are not considered as seriously as they should be, and fail to be the primary or critical factor in determining custody rights [5].

3.3. Lack of Measurement Standards

The principle of prioritizing minors' best interests is featured with uncertainty in both its interpretation and application. Custody disputes often involve various factors that collectively influence a minor's biggest interest. When minors' genuine wishes conflict with other criteria aimed at maximizing their benefits, such as the stability of their living conditions or both parents'

willingness and capability to care for them, the lack of an evaluative framework leads to the minors' true wishes being largely subject to the judge's discretion. Consequently, the final judgment come to be heavily reliant on the judge's personal emotions, ethical values, and subjective views, leading to unpredictability and some degree of arbitrariness. This might cause negative impact on law's stability and fails to guarantee minors' best interest. Therefore, how to balance minors' genuine intentions with other custody factors effectively poses a critical challenge in these cases, which underscores the necessity for setting clear criteria to carefully evaluate these elements and reduce the likelihood of arbitrary judgments [6].

4. Theoretical Basis for Respecting Minors' Genuine Wishes

4.1. Realizing Minors' Best Interests

In China, both Civil Code and the Law on the Protection of Minors refine discretionary terms like "consider" and "listen" to more obligatory "respect" when it comes to adopting kids' views in custody disputes. This reflects the fact that the Chinese government increases its emphasis on respecting minors' autonomy. Minors' true intentions are on longer optional factors excluded from the litigation, their wishes have become a critical reference for legal judgements. Generally speaking, minors who have reached certain age and maturity are possessed with cognitive abilities that enable them to propose views that match their best interests. While their true wishes often reflect attachments to one parent, and are contained with affection from their past family life. Minors are the ones who understand themselves most. Therefore, their true wishes are the best reflection of their inner needs. Respecting minors' true wishes is a requirement and application of the principle that earns most benefits for minor children. Furthermore, it is the fundamental factor to assess minors' biggest interests. Therefore, respecting minors' wishes is consistent with bringing them greatest benefits, and the former plays a critical role in safeguarding minors' inner fulfillment as well as mental and physical health [7].

4.2. Fostering the Subjectivity of Minors

Minors possess subjectivity because they are also human beings. They are born with dignity, having their own personalities as well as social status. Minors should not be considered as mere objects protected by adults, and adults should acknowledge minors' dependency. Minors' subjectivity develops consistently. It needs social cultivation, support, and guidance to continuously develop its abilities to think rationally and make scientific decisions. Through ensuring minors' rights to give their opinions regarding critical decisions, they are encouraged to engage in their own affairs and bear consequences for their behaviors. In judicial practices, encouraging minors to develop their own autonomy and decision-making abilities not only enables them to take more control of their lives but also builds their confidence and decision-making skills in the future. Therefore, respecting minors with their true wishes is a significant approach to cultivating their autonomy. It is necessary to promote minors' capabilities in terms of independent thinking, self-decision, self-action, and self-selection, encouraging them to explore their lives.

4.3. The Participation and Expression Rights of Minors

The Convention on the Rights of the Child explicitly states the rights of children to participate and express their opinions. It acknowledges that children are proactive subjects with rights instead of passive objects under control. The right of participation is a basic human right as well as a critical component of children's rights. It also serves as the basis for other significant children's rights. Children's participation rights consist of core factors including the right to information, the right to express views, and the right to have those views taken into consideration. The Convention on the Rights of the Child endows minors with rights to express their views; meanwhile, it also imposes obligations on decision-makers, which ensures that minors' opinions will be listened to and adopted in accordance with their age and maturity [8]. Therefore, in custody disputes, children should be

possessed with opportunities to express themselves, and the judicial system is obliged to allow children to speak for themselves. To cultivate kids into independent and well-rounded individuals, it is necessary to endow them with varying levels of participation and expression rights so as to develop their decision-making skills, engaging with their own affairs consciously.

5. Establishing Procedures to Ascertain the True Intentions of Minors

5.1. Improving the Expression of Intentions

Minors at different ages are possessed with various levels of cognitive abilities and discernment. Therefore, to adapt to minors' developing pace and ensure their mental and physical health, it is necessary to endow minors from different age groups with varying levels of participation rights. For children under eight, courts may appoint family investigators and set up a nicely decorated children's room as the specific venue for observation. Children can be guided to express their genuine ideas in such a comfortable and cozy environment. For minors aged eight to twelve, whose cognitive abilities keep evolving, it is reasonable to anticipate that they can articulate their wishes independently. Judges should communicate with these minors directly in a relaxing environment and initiate individual discussions. Minors at this age should be listened to directly instead of being represented by their parents; however, it will be inappropriate for them to appear in court in person to prevent them from being hurt again. For minors over the age of twelve, who typically exhibit greater cognitive abilities and mental resilience, it is crucial to establish efficient channels for them to express their views. Employing diverse methods that are appropriate for the developmental levels of minors is essential for recognizing and respecting each minor's voice, thereby ensuring that their legal rights are acknowledged and protected [9].

5.2. Strengthening the Inquiry into True Intentions

Respecting little children's actual will in custody battles requires stepping up the investigation into their true intentions. A 'Parent-Child Relationship Observation Program' can be implemented, and psychologists can be hired. It is possible to build a trusting relationship with minors and get insight into their internal problems and emotional inclinations by using a variety of techniques, including sketching, sand play, and organized interviews. Insights into the parent-child connection in actual circumstances may also be gained by seeing how minor children and their parents interact. Meanwhile, to better resolve the conflicts between minors' immaturity and their willingness for custody, and ensure the authenticity of their willingness, it is essential to establish a systematic framework that affirms these desires. Since minors are easily persuaded by their parents to choose either side, and they might compromise their own interests for their family's sake, or make irrational decisions owing to their limited cognitive abilities, it is crucial to delve into the reasons behind their willingness, and judge whether their decisions are genuine, well-considered, most beneficial to themselves and will contribute to their healthy growth [10].

6. Practical Application of Provisions Respecting the True Intentions of Minors

6.1. General Application of Provisions Respecting the True Intentions of Minors

Given that a minor's genuine intentions are confirmed, as long as the intentions do not violate the law or contradict with the minor's best interests. Theoretically, the minor's true wishes should be adopted. This is the necessity for respecting the minor's dignity, as well as the principle that benefits the minor the most. If a minor's true wishes conflict with other priority custody factors, it is necessary to analyze the categories of those factors. If the conflict arises with parent-centered custody factors, such as the parents' economic status, fertility, or whether they have other children, then such parental custody rights should not outweigh kids' own right to choose their future life. While if the minor's true wishes conflict with other "child-centered" custody conditions, such as a stable living

environment, then a comprehensive assessment should be taken with regard to whether the minor's desires are reasonable, and good to their physical and mental health. The aim should be to adopt the minor's true wishes to the greatest extent possible, ensuring that their choices support their healthy development [11].

6.2. Special Application of Provisions Respecting the True Intentions of Minors

Honoring a minor's desires does not mean accepting them unconditionally. If a minor's true wishes conflict with what is best for them or endanger their safety and well-being, those wishes should not be honored. This is especially important in custody battles, which can arise in two main scenarios. Firstly, if one of the spouses snatches or hides a child, the child's preferences must come from a natural situation, free from coercion or wrongful influence. Such actions can severely jeopardize the child's physical and mental health and suggest that the parent does not prioritize the child's best interests. As a result, custody should not be granted to the party who snatched or hid the child [13]. Furthermore, if a child truly desires to stay with an abusive parent due to fear or admiration, it is crucial to recognize that abusers typically lack emotional stability. Being around such individuals for an extended period can be extremely dangerous for the child, as it raises the risk of future violence. Moreover, children may unintentionally mimic aggressive behaviors from their surroundings, which could lead to them becoming abusers later on. To break the cycle of domestic violence and ensure the child's safety and healthy development, custody should not be awarded to the abusive parent. The ethical behavior of parents significantly influences a child's character; thus, issues like gambling, substance abuse, or other detrimental habits must be taken into account, as they may indicate that the child's true wishes do not align with their best interests. In exceptional circumstances, the child's safety and well-being must always take precedence.

7. Conclusion

The provision of respecting minors' true wishes defined in substantive law must be implemented through specific procedural mechanisms. The establishment and utilization of such mechanisms reflect respect for minors' true wishes. This is an inherent requirement of Article 1084, Paragraph 3 of the Civil Code. When the minor's true wishes conflict with parental-centered priorities for custody, their wishes should be respected and adopted. In contrast, when the minor's true wishes conflict with child-centered priorities for custody, a comprehensive judgment with their true wishes as the priority should be made. It is important to clearly outline the circumstances under which the true wishes of minors may not be considered in custody disputes, ensuring that decisions are made in a way that genuinely benefits the children. Furthermore, the legislation should also make it clear under what unusual situations kids' actual will are not taken into account when deciding custody issues.

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