

# The Principle of Protecting the Best Interests of the Child in Vietnamese Divorce Law

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*ABSTRACT* Divorce can have adverse effects on children in many ways, which has been extensively studied and demonstrated in scientific literature worldwide. Therefore, policymakers around the world, including Vietnam, have incorporated the principle of protecting the best interests of the child into their approach to addressing issues related to children during the process of their parents' divorce.

*This incorporation aims to reduce the negative impact of divorce on children and create a favorable environment for their comprehensive development. This article approaches the subject from the perspective of children's rights. Its objective is to introduce the application of the principle of safeguarding the best interests of children in the enactment and enforcement of divorce laws in Vietnam. It focuses on aspects such as determining the custodial parent, child visitation, child support, and changing the custodial parent.*

**KEYWORDS** *children's rights, child's support, child's visitation, divorce law, the child's best interest, Vietnam*

## 1. Introduction

Living with both parents can give children a sense of emotional security and support. When surrounded by family members, children feel loved and cared for, which can help them develop a strong sense of self-worth and confidence. Indeed, it is natural for a child to desire a peaceful and accepting atmosphere of affection between their parents, which is crucial for their healthy personality development.<sup>1</sup>

However, living with both parents has become more complicated in recent years due to the increasing divorce rate caused by a multitude of reasons. This has had a significant negative impact on children both in the short and long term, leading to emotional distress, behavioral problems, and poor academic performance, among other issues.<sup>2</sup> Therefore, it is essential for parents and

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<sup>1</sup> Herger Csabáné, and Katonáné Pehr Erika, *Magyar Családjog* (Budapest: Novissima Kiadó, 2021), 65.

<sup>2</sup> See: Hyun Sil Kim, "Consequences of Parental Divorce for Child Development," *American Sociological Review* 76, no. 3 (June 2011): 487–511.; Ängarne-Lindberg T,

authorities to prioritize the welfare of children, particularly during the process of divorce.

In International law, the principle of safeguarding the best interests of the child is established as one of the core principles in all decisions related to children. This principle has been instrumental in protecting children and has yielded positive results.<sup>3</sup> Vietnamese law is not exempt from the global development trend, as it includes regulations to ensure the best interests of children in matters related to children from birth to adulthood. However, in order to highlight the state's concern for this vulnerable group, this article focuses on relevant regulations when parents of children divorce.

This article will elucidate the following research questions: (1) What is the origin of the principle of safeguarding the best interests of children? (2) When was this principle recognized in Vietnamese law? (3) How is this principle understood? (4) How is the application of this principle recognized and enforced in Vietnamese divorce laws?

The article will employ methods such as electronic reasoning, search, collection, and analysis of legal documents on the internet and related databases to understand and evaluate legal information, analyze the content of legal documents to comprehend the principles and regulations related to the research topic.

## **2. Background to the principle of children's best interests in the Vietnamese legal system and Vietnamese divorce law**

### **2. 1 The principle of children's best interests in Vietnamese legal system**

The principle of the best interests of the child has a long history, but it was not until the late 20th century that it was formally recognized and codified in international legal instruments.

Several documents recognize this principle, such as the Geneva Declaration on the Rights of the Child, which was adopted by the League of Nations in 1924. Later on, the Declaration on the Rights of the Child was

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Wadsby M, "Psychiatric and somatic health in relation to experience of parental divorce in childhood," *International Journal of Social Psychiatry* 58 no. 1 (2012): 16–25.; Lansford, J. E, "Parental Divorce and Children's Adjustment," *Perspectives on Psychological Science* 4, no. 2 (2009): 140–152.

<sup>3</sup> See: Leonora Bakarbesy dan Dian Purnama Anugerah, "Implementation of the Best Interests of the Child Principles in Intercountry Adoption in Indonesia," *Yuridika – Fakultas Hukum Universitas Airlangga* 33, no. 1 (January 2018); Vincenzo Lorubbio, *The Best Interests of the Child More than 'a Right, a Principle, a Rule of Procedure of International Law* (Deditoriale Scientifica, 2022), 77–132; Nadjma Yassari and Lena-Maria Möller, and Imen Gallala-Arndt, *Parental Care and the Best Interests of the Child in Muslim Countries* (Asser Press – Springer, 2017), 18–20.

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adopted by the United Nations General Assembly in 1959. The most notable document is the United Nations Convention on the Rights of the Child, which was adopted in 1989. It recognizes the principle of protecting the best interests of the child in Article 3.

Vietnam signed the UNCRC on February 26, 1990. Being a member of the United Nations Convention on the Rights of the Child (UNCRC) means that Vietnam has ratified this international treaty on human rights and is committed to ensuring the protection and promotion of children's rights and interests within the country. One of them is the protection of the best interests of the child in decision-making processes that involve children.

The principle of the child's best interests first appeared in Vietnam's legal system in the Law on Protection, Care, and Education of Children in 1991 and was further developed and incorporated into the current Children Law, which was issued in 2016. According to Article 3, Clause 5 of this law, all parties are responsible for ensuring the best interests of children are considered in decisions relating to them. The principle of the child's best interests is also reflected in other laws related to children, such as the Law on Marriage and Family and the Law on Foster Care.

## **2. 2 Background to Vietnamese divorce law**

In Vietnam, there is no separate law on divorce; instead, the regulations regarding divorce are stipulated in the Law on Marriage and Family. This law was enacted in 2014, and in Chapter IV, it recognizes two forms of terminating marriage: death and divorce. In regards to divorce, the regulations include the right of the parties to request divorce, the rights and obligations of parents and children after divorce, and the division of marital property.

The subsequent analyses of this research study will concentrate on elucidating the application of the best interests of the child principle in issues pertaining to the rights and obligations of parents towards their children in the context of divorce. It encompasses the determination of the custodial parent, visitation rights, child support, and changes in custodial arrangements.

## **3. The concept of the best interest of the child**

Authors Marit Skivenes and Line Marie Sørsdal asserted that: "There are many competing and legitimate ways of bringing up children and as such defining what is good or best for them. Thus, there is not one "best interest value" that can be expected to be valid and accepted as right for all children". Indeed, evaluating whether a decision protects the best interests of children is not a straightforward matter. Therefore, it is crucial for courts and relevant authorities to carefully consider all possible outcomes of a decision and strive to minimize any negative impacts on children and their families.

Upon examining Article 3(1) of the CRC it can be observed that there is no specific explanation of what constitutes the best interests of the child.

Instead, it establishes a principle that “the best interests of the child shall be a primary consideration”.<sup>4</sup> “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Thus, the concept of “best interests of the child” is a legal concept that is not clearly defined in International law. This can be seen as an “open rule” that provides flexibility for countries in the process of applying the law. Therefore, depending on the specific situation of each country in terms of space and time, as well as the context of their legal system, political order, and welfare model, the application of the principle of protecting the best interests of the child is recognized in legislative activities and implemented in practice through different methods and degrees.

#### **4. Protecting the best interests of children in matters related to children according to Vietnam's divorce laws**

After divorce, the legal relationship between the husband and wife will end, however, their relationship with their children will not end, neither emotionally nor legally. Nonetheless, due to the particular circumstances the children will only receive direct care from one parent.

Therefore, the responsibilities of parents towards their children during this period, in addition to basic responsibilities as when their marital relationship still existed, include ensuring the safety of the children, providing care, education for comprehensive physical and mental development. Vietnamese law stipulates additional responsibilities for parents towards their children and towards the other parent to ensure the best interests of the children in the new circumstances. For example, the parent who directly cares for the children, has the right to care for and nurture the children and the obligation to respect the other parent's visitation rights; the parent who does not directly care for the children, has the right to visit the children and the obligation to provide financial support.

This section will examine the issue of ensuring the best interests of children when resolving issues related to children during the process of their parents' divorce, including: (1) deciding who will directly care for the children, (2) visitation rights, (3) providing financial support for the children, and (4) changing the person who directly cares for the children.

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<sup>4</sup> Jean Zermatten, *The Conventuon on the Rights of the Child from The Perspective of the Child's Best Interest and Children's View* (Bellamy & Zermatten, 2017), 36–52.

## **4. 1 Determining the person who will directly care for the children**

Pursuant to the provisions stated in Article 81 of the 2014 Law on Marriage and Family, there are certain criteria that the Court must uphold when deciding on the custodial parent in divorce cases. These criteria encompass the following: (1) respecting the mutual agreement of the spouses, (2) taking into account the opinions of children who are at least seven years old, and (3) giving priority to the wife in the care of children under 36 months of age.

### **4. 1. 1 Respecting the mutual agreement of the spouses**

In divorce cases, the question of who should be granted custody over the children is a crucial matter that has a significant impact on their lives and future. This is because the parent who is awarded custody will be the one who lives with the child under the same roof and has a substantial impact on the child's personality, intellectual, and physical development.<sup>5</sup> Therefore, the court always carefully considers and evaluates the full scope of factors involved in deciding who will directly care for, nurture and educate the child, in order to ensure the best interests of the child are protected.

The Law on Marriage and Family 2014 specifies in Clause 2, Article 81 the regulations for the care, nurturing, and education of children following a divorce as follows: “Husband and wife shall reach agreement on the person who directly raises their children and on their obligations and rights toward their children after divorce. If they fail to reach agreement, the court shall appoint either of them to directly raise the children, taking into account the children’s benefits in all aspects.”

This regulation indicates that the person who will directly care for and nurture the child following a divorce will primarily be determined through agreement between the spouses. This is because they are the ones who understand the situation, as well as their own conditions and abilities to care for, nurture, and educate the child.<sup>6</sup>

In other words, this regulation stems from the Vietnamese lawmakers' belief in the role of parents in making decisions related to their children's lives. Furthermore, this can also help reduce conflicts and promote cooperation among parties, especially in cases where divorce is being disputed.

This rule is widely applied by the courts in Vietnam when resolving divorce cases. For instance, in the divorce case of Mr. Bui Xuan T and Mrs. Nguyen Thi H,<sup>7</sup> the couple has a common child named Bui Thi Thanh T (born

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<sup>5</sup> Lê Thị Hòa, and Nguyễn Thị Lê Hương, “Bảo vệ quyền và lợi ích nhân thân của con trong các vụ án ly hôn,” *Tạp chí Khoa học & Công nghệ*, no. 14 (June 2017): 125–128.

<sup>6</sup> Tô Đạt Chác, “Pháp luật Việt Nam về Bảo vệ quyền lợi của con khi cha, mẹ ly hôn” (Master diss., Tra Vinh University, 2020), 13–14.

<sup>7</sup> “Judgment No. 279/2020/HNGD-ST regarding divorce issued by the People's Court of Tho Xuan District,” Thanh Hoa Province, Thuvienphapluat,

in 2018). After the divorce, due to the need to work far away and the busy nature of her job, Mrs. H was unable to directly care for the child. Therefore, Mrs. H and Mr. T reached an agreement that Mr. T would be the primary caretaker, responsible for the upbringing of the child. Considering the conditions and circumstances of Mrs. H and Mr. T, the court acknowledged their agreement.

However, it is important to note that the law also provides for the court to make decisions about custody and care if the parties are unable to reach an agreement, or if the agreement is not in the best interests of the child. In these cases, the court will consider a range of factors, including the child's age, health, and education needs, as well as the ability of each parent to provide for the child's physical, emotional, and social well-being. Based on that consideration, the court decides to award custody to the spouse who is better able to provide practical care, nurturing, and education for the child.<sup>8</sup>

#### **4. 1. 2 Taking into account the opinions of children who are at least seven years old**

Vietnamese law also stipulates that the wishes of children aged 7 and older must be taken into consideration when reaching an agreement on who the primary caregiver will be. This is because at this age, a child is recognized as having sufficient awareness to express their views on their life after their parents' divorce.<sup>9</sup>

On the other hand, considering children's desires in custody arrangements can have positive impacts on their well-being. Specifically, children's participation in decisions about custody can give them a sense of autonomy and control over their lives, which can be beneficial for their psychological and emotional health. Some studies have also found that when children's wishes are taken into account in custody decisions, they may have more positive relationships with both parents and experience fewer conflicts.<sup>10</sup>

In her study, author, Le Thi Man, concludes that, “This is also a humane mechanism, significant from both theoretical and practical perspectives. When parents divorce, children lose a crucial support system provided by a complete

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<https://thuvienphapluat.vn/banan/ban-an/ban-an-2792020hngdst-ngay-18122020-ve-ly-hon-tranh-chap-nuoi-con-210568>.

<sup>8</sup> Trường Đại học Luật TP. Hồ Chí Minh, *Giáo trình Luật Hôn nhân và gia đình Việt Nam* (Hồng Đức – Hội Luật Gia Việt Nam, 2019), 453.

<sup>9</sup> In the 2000 Law on Marriage and Family, which was the preceding adjacent legislation to the 2014 Law on Marriage and Family, the age at which Vietnamese legislators recognized a child's ability to express their opinions in this matter was 9 years old.

<sup>10</sup> Rachel Birnbaum, and Nicholas Bala, “Child Participation in Custody and Access Issues: A Review of the Literature,” *Journal of divorce & remarriage* 57, no. 5 (2016): 335–356. See also: Irwin N. Sandler, Sharlene A. Wolchik, and Heather L. Storer, “The impact of children's involvement on post-divorce family relationships: A review,” *Journal of divorce* 9, no. 1–2 (1986): 43–66.

family with both a father and a mother. Therefore, creating a mechanism for children to express their thoughts and desires, for the sake of their own interests, is absolutely necessary”.<sup>11</sup>

However, the opinion of a child is not a binding decision that the court must adhere to, but rather serves as a reference when making the final decision.<sup>12</sup> The reason for this is that while the child's wishes and preferences are important, they may not always be in their best interests. In some cases, the child may express a preference based on incomplete or biased information or may be under the influence of one parent or another. The court must carefully weigh the child's wishes against other factors such as their safety, welfare, and best interests, which may require a different custody arrangement.

Furthermore, the ability of the parents to provide care, support, and stability for the child is also an important factor to be considered. It is possible that the parent who the child wishes to live with may not be the one who is best able to provide for their needs.

The practical resolution of cases in Vietnam has shown that the consideration of children's opinions regarding living arrangements with their parents after divorce is taken quite seriously by local courts.<sup>13</sup> For instance, in the divorce case of Mr. Pham Van N and Mrs. Thach Thi Ng, who have a common child named Pham Ngoc M (born in 2009), during the process of resolving the divorce matter, M expressed the desire to live together with Mrs. Ng. After evaluating the relevant factors, the court determined that, “Following the separation of Mr. N and Mrs. Ng, M has been living with Mrs. Ng. During their cohabitation, Mrs. Ng has provided all necessary conditions for M's well-being and development. Additionally, M has expressed the desire to continue living with Mrs. Ng in order to ensure stability in M's life. Therefore, in order to safeguard M's best interests, the court has determined that Mrs. Ng shall continue as the primary caregiver, providing care and nurturing for M until the child reaches adulthood.”

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<sup>11</sup> Lê Thị Mận, “Bàn về việc xét nguyện vọng con khi cha mẹ ly hôn,” *Tạp chí Tòa án*, no. 16 (2017): 33–35.

<sup>12</sup> Trường Đại học Luật TP. Hồ Chí Minh, *Giáo trình Luật Hôn nhân và gia đình Việt Nam* (Hồng Đức – Hội Luật Gia Việt Nam, 2019), 453.

<sup>13</sup> See: “Judgment No 217/2021/HNGD-ST regarding divorce issued by the People's Court of Tam Ky city, Quang Nam Province,” <https://thuvienphapluat.vn/banan/ban-an/ban-an-ve-ly-hon-tranh-chap-con-chung-so-2172021hngdst-233636>; See also: “Judgment No 02/2021/HNGD-ST issued by the People's Court of Đon Duong District, Lam Dong Province, regarding divorce,” <https://thuvienphapluat.vn/banan/ban-an/ban-an-ve-ly-hon-va-tranh-chap-con-chung-so-022021hngdst-217280>.

#### **4. 1. 3 Giving priority to the wife in the care of children under 36 months of age**

Regarding the decision of who will directly take care of the child when parents divorce, Article 81 of the 2014 Law on Marriage and Family has the following provision in paragraph 3: A child under 36 months of age shall be directly raised by the mother, unless the mother cannot afford to directly look after, care for, raise and educate the child or otherwise agreed by the parents in the interests of the child.

This provision demonstrates that Vietnamese law gives precedence to mothers who can care for children under the age of 36 months. This is based on the belief that during this time, the mother is considered the primary caregiver for the child, as she typically assumes the responsibility of caring for the child since birth. Moreover, the practice of assigning young children to their mothers to directly raise them aligns with traditional gender roles and expectations in Vietnamese society, where women are often expected to prioritize their roles as caregivers and homemakers.<sup>14</sup>

However, the law also has exceptions that when the mother is not qualified to take care of the child or when placing the child with the mother is not in the best interests of the child. Some related cases may include: the mother is seriously ill and not physically capable of taking care of the child; the mother's unhealthy lifestyle harms the child's development; the mother is temporarily detained, wanted, punished criminally or prosecuted; the mother's parental rights concerning the child are restricted.

#### **4. 2 The visitation rights of non-custodial individuals**

In order to protect the rights and best interests of the child, Vietnamese law stipulates the right of non-custodial parents to visit their children. This regulation allows children to have contact with both parents, creating an environment of love and care for them, as mentioned. In addition, it also helps to strengthen the responsibility of parents in caring for and nurturing their children.<sup>15</sup>

Clause 3 of Article 82 of the Law on Marriage and Family of 2014 stipulates the right of non-custodial parents to visit their children as follows: “After divorce, the person who does not directly raise a child has the right and obligation to visit and care for this child without being obstructed by any person”.

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<sup>14</sup> T. T. T. Nga, N. T. T. Binh, and N. T. K. Anh, “Gender roles and family dynamics in Vietnam: The case of the Kinh ethnic group,” *Asian Journal of Women's Studies* 25, no. 1 (2019): 58–78.

<sup>15</sup> Nguyen Duc Chinh and Tran Thi Ngoc Thuy, “Child visitation rights of parents in Vietnam: Legal issues and practical experiences,” *Journal of Social Sciences and Humanities* 1, no. 2 (2015): 60–69.



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From this regulation it can be seen that the emphasis on "without being obstructed by any person" when a non-custodial parent exercises their right to visit their child is not only to protect the rights of that parent, but also to protect the interests of the child. Preventing contact between a child and a parent who does not live with them can have many negative impacts on the child's mental and physical health, making them feel unloved, abandoned, and having low self-esteem.<sup>16</sup>

In addition, to ensure that the person directly raising the child fulfils their responsibilities to the best of their ability, the Law on Marriage and Family of 2014 also stipulates in Article 83, paragraph 2,<sup>17</sup> as follows: The parent directly raising a child and family members may not obstruct the person not directly raising the child from visiting, caring for, raising and educating this child.

This is a new provision added to the Law on Marriage and Family in 2014. Practical resolution of marriage and family cases has shown that there are many cases where the person who directly raises the child has obstructed the non-direct custodian's right to visit, care for and educate the child. The verdict regarding the termination of the act of obstructing visitation of the shared child between Mr. Ly Du D and Mr. Nguyen Van D and Ms. Lam Thi T<sup>18</sup> can be considered as one of the empirical evidences for this provision.

In 2013, Mr. D and Mr. Nguyen Van D's daughter, Ms. Lam Thi T, got married to Mr. Nguyen Thi H, and in 2015 Mr. D and Ms. H divorced. The couple has a shared child named Nguyen Lam K (born in 2015). The Court determined that Ms. H would be the custodial parent for K. After the divorce, Mr. D made several attempts to visit his child, but he was consistently obstructed and verbally insulted by Mr. D and Ms. T. Local authorities were present as witnesses to these incidents.

The Court determined that, "According to the provisions of the Law on Marriage and Family, Mr. Ly Du D has the right and obligation to visit, care for, and educate the shared child, and no one is entitled to obstruct these rights." Therefore, Ms. H and her family must facilitate Mr. D's visitation with his child, Nguyen Lam K. However, in reality Ms. H and her family were engaged in actions that obstructed Mr. D. This behavior is violates the law. Therefore, the Court requires Ms. H and her family to cease these actions and create conditions for Mr. D to exercise his visitation rights.

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<sup>16</sup> Amy J. L. Baker, "The Long-Term Effects of Parental Alienation on Adult Children: A Qualitative Research Study," *The American Journal of Family Therapy* 33, no. 4 (2005): 289–302.

<sup>17</sup> This is a legal provision that delineates the obligations and rights of custodial parents towards non-custodial individuals following divorce, concerning the care of the children.

<sup>18</sup> "Judgment No. 09/2019/HNGD-ST regarding divorce rendered by the People's Court of Tho Xuan District," Thanh Hoa Province, Thuvienphapluat, <https://thuvienphapluat.vn/banan/ban-an/ban-an-092019hngdst-ngay-16042019-ve-cham-dut-hanh-vi-ngan-can-viec-tham-nom-con-chung-105925>.

Nevertheless, the reality also shows another aspect in the exercise of the right to visit children, which is that the non-parental person visiting the child has caused many obstacles and difficulties for the person who directly takes care of the child during the visit. For example, they intentionally create inconvenience, pressure, and discord for the person who directly takes care of the child, or intentionally have a negative impact on the emotional relationship between the person who directly takes care of the child and the child. Therefore, to ensure the harmony of the interests of both parents in taking care, nurturing and educating the child, Article 82, Section 3 of the Law on Marriage and Family 2014 provides that: The parent who directly raises a child has the right to request a court to restrict the right of the other parent who does not directly raise this child if the latter takes advantage of his/her visit to and care for the child to obstruct or adversely affect the looking after, care for, raising and education of this child.

The case regarding the restriction of visitation rights between Mr. Le Thanh T and Ms. Bach Thi My N<sup>19</sup> will contribute to further clarifying the application of the aforementioned provision in practice. Mr. Le Thanh T and Ms. Bach Thi My N got married in 2014 and divorced in 2017. Mr. T was determined by the Court to be the custodial parent of their shared child, Le Bach Kha H (born in 2015). After the divorce, Mr. T provided favorable conditions for Ms. N to visit their child. However, according to the evidence provided by Mr. T, “every time Ms. N comes to visit the child, she creates conflicts and disturbances, which disrupt the household activities of Mr. T. The local authorities have also educated her multiple times, but she has not shown any change in behavior.” Therefore, Mr. T requested the Court to restrict Ms. N's visitation rights, specifically allowing her to visit the child only once a year. The Court determined that, “Although Ms. N's behavior has had an impact on Mr. T's child-rearing, Mr. T's request to allow Ms. N to visit the child only once a year is not reasonable. Considering that the child is still young, they also need the care, attention, and education from Ms. N. Therefore, to ensure the rights of the child, the Court agrees to allow Ms. N to visit the child once a month. The specific time and place will be agreed upon by Mr. T and Ms. N.”

#### **4. 3 The obligation to provide child support for the offspring of non-custodial individuals**

“When parents divorce, according to Article 82 Section 2 of the Law on Marriage and Family 2014, whoever does not directly raise the child must provide support for the child. Support means the obligation of the person to

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<sup>19</sup> Judgment No. 06/2018/HNGD-on the Dispute Concerning the Request for Restriction of Custodial Visitation Rights, issued by the People's Court of Chau Thanh District, Đồng Tháp Province, Thuvienphapluat, <https://thuvienphapluat.vn/banan/ban-an/ban-an-ve-tranh-chap-yeu-cau-han-che-quyen-tham-nom-con-so-062018hngdst-38421>.

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contribute money or other assets to meet the essential needs of the person who is not residing with them.”<sup>20</sup>

It is easily discernible that this regulation is designed to safeguard the lawful rights of children following a divorce. Children have the right to receive support from both parents, and thus, when parents divorce, the parent who does not have physical custody of the child must fulfil their obligation to support their child by providing them with financial assistance.

According to Article 116, Clause 1 of the Law on Marriage and Family in Vietnam, the amount of child support is based on the agreement between the obligated party, the recipient, or the legal guardian of the recipient, taking into account the income, actual ability to pay of the obligated party, and the essential needs of the recipient. If no agreement can be reached, the court shall be requested to resolve the matter. Therefore, instead of specifying a fixed amount of money or specific assets that the obligated person must provide to the supported person, the Law on Marriage and Family has opted for a very progressive solution, which is to allow the parties involved to negotiate themselves. This demonstrates flexibility and suitability to actual circumstances, since because the needs of different subjects regarding age, health status, and living conditions cannot be met by a single support amount. Moreover, the amount of support that the obligated person must provide depends heavily on their financial ability.<sup>21</sup>

There are cases where the needs of children remain unchanged after divorce, but due to the decreased financial ability of the non-custodial parent, the initial child support amount may be modified. The dispute over child support between Mr. Nguyen Van T and Mrs. Duong Thi Yen H<sup>22</sup> is an example for this. According to the decision to recognize their mutual divorce in 2018, Mr. T and Mrs. H agreed that Mrs. H would be the custodial parent of their two shared children, Nguyen Nhu Q (born in 2014) and Nguyen Moc K (born in 2017). Mr. T has the obligation to provide a monthly child support payment of 5,200,000 VND<sup>23</sup> for both children. After fulfilling this child support obligation for two years, Mr. T wishes to modify the child support amount to 3,000,000 VND<sup>24</sup>, stating that “currently, his job is not stable, and his income is only about 4,700,000 VND<sup>25</sup> per month, making it impossible for him to continue providing support for both children at the previous level.” After reviewing the documentary evidence provided by Mr. T, the Court accepted the reduction of child support from 5,200,000 VND to 3,000,000 VND.

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<sup>20</sup> Khoản 24 Điều 3 Luật hôn nhân và gia đình năm 2014.

<sup>21</sup> Khoa Luật Đại học Cần Thơ, *Giáo trình Luật hôn nhân và gia đình Việt Nam* (Cần Thơ: Nxb Chính trị quốc gia – Sự thật, 2023), 213.

<sup>22</sup> Thuvienphapluat, “Judgment No. 23/2019/HNGD-ST regarding Dispute Over Child Support issued by the People’s Court of Bac Giang Province,” <https://thuvienphapluat.vn/banan/ban-an/ban-an-232019hngdpt-ngay-25072019-ve-tranh-chap-hon-nhan-va-gia-dinh-99358>.

<sup>23</sup> Equivalent to 75,000 Hungarian Forints.

<sup>24</sup> Equivalent to 43,000 Hungarian Forints.

<sup>25</sup> Equivalent to 68,000 Hungarian Forints.

#### 4. 4 Alteration of the custodial guardian post-divorce

In order to ensure the rights of children and provide them with a healthy, safe environment, Vietnam's laws on marriage and family have regulations regarding changing the person responsible for directly caring for the child. Specifically, Section 2 of Article 84 of the Law on Marriage and Family in 2014 outlines the grounds for changing the person responsible for directly caring for the child, including, “a) The father and mother have an agreement on changing the person responsible for directly caring for the child that is in the best interest of the child; b) The person directly responsible for caring for the child is no longer capable of directly supervising, caring for, nurturing, and educating the child.”

It can be seen that the grounds for changing the person responsible for directly caring for the child are necessary measures to ensure the rights of the child related to the changing of the person responsible. Specifically, the law stipulates that not all agreements between parents regarding changing the person responsible for directly caring for the child are recognized by law. Instead, the parents' agreement must be “in the best interest of the child.” The regulation is concise but clearly reflects the principle of protecting the best interests of children in all decisions related to children.

However, as discussed above, the issue of custodial parent determination after divorce is rarely a matter of agreement between both spouses in Vietnam. One of the few cases in Vietnam that addresses the change of custodial parent through the agreement of the former spouses can only be found in the dispute over visitation rights. Specifically, in the request for visitation rights restriction concerning Ms. Bach Thi My Th and Mr. Le Thanh T, Mr. Le Thanh T stated that when they divorced in 2017, the Court granted custodial rights to Ms. Bach Thi My Th. However, subsequently, Ms. Bach Thi My Th wanted to change the custodial parent and Mr. Le Thanh T agreed to it.<sup>26</sup>

The second ground for changing the child's caregiver is directly related to the caregiver's conditions. Specifically, it must be a person who is not capable of directly supervising, caring for, nurturing, and educating the child. In fact, to assess and determine the caregiver's lack of conditions as stipulated by law is not a simple process. It requires a comprehensive assessment of many factors from financial capacity, health status to the attitude and behavior of the caregiver.

In addition, as changing the person responsible for directly caring for the child also affects the child's life and psychology, Section 3 of Article 84 of the Law on Marriage and Family also stipulates that the wishes of the child from 7 years of age and above must be considered when deciding to change the person responsible for directly caring for the child.

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<sup>26</sup> Thuvienphapluat, “Judgment No. 06/2018/HNGD-PT regarding divorce issued by the People's Court of Đồng Tháp Province,” <https://thuvienphapluat.vn/banan/ban-an/ban-an-ve-tranh-chap-yeu-cau-han-che-quyen-tham-nom-con-so-062018hngdst-3842>.

Compared to the first basis, the practical resolution of the issue of changing the custodial parent in divorce cases in Vietnam demonstrates that the application of the second basis is much more prevalent in reality. A series of disputes regarding the change of custodial parent can be found on the official website of the Supreme People's Court of Vietnam when announcing judgments on marriage and family matters.<sup>27</sup>

## 5. Conclusion

While marriage typically yields positive impacts for both male and female participants, divorce has the potential to affect entities beyond the immediate couple – specifically, the offspring born from their prior union of affection. The parents hold the pivotal authority in determining the birth or non-birth of children, yet paradoxically, they also possess the power to dissolve the existence of a family – the initial and sole point of reference for a child during their formative years. Consequently, to mitigate the adverse repercussions of parental divorce, both psychologically and physically, particularly for vulnerable and susceptible children, Vietnam has implemented a notably humanitarian approach to safeguarding the best interests of minors within its divorce legislation.

Although a universally standardized conception of the “best interests” of children remains absent in international jurisprudence, this vacuum has engendered a framework for the adaptable and efficacious application of the principle safeguarding children's best interests contingent upon the legal systems of individual nations. Fundamentally, Vietnam has proficiently undertaken this endeavor through the enactment and enforcement of divorce legislation. This article endeavors to underscore this principle while dissecting various facets of Vietnam's divorce law, such as determinations of custodial responsibility, childcare arrangements, financial support provisions, and custodial changes. By marshalling legal stipulations and court judgments as evidentiary support, this article demonstrates that Vietnam has essentially taken commendable strides in safeguarding the best interests of children. Nevertheless, in order to sustain and amplify the efficacy of these efforts in the foreseeable future, consistent monitoring and oversight of the judicial application of legislation, coupled with enhanced legal education efforts targeting individuals and families within society, are imperative.

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<sup>27</sup> Using the search keyword “change of custodial guardian,” a total of 14,472 legal cases were identified on June 23, 2023, from the website: <https://thuvienphapluat.vn>.