

# The voice of the child in divorce proceedings

## Divorce is a grown up problem... But not only ....

The decision rendered on October 24, 2012 by the 1<sup>st</sup> Civil Chamber of the *Cour de Cassation* (French Supreme Court) (appeal n° 11-18849) seems to impose to lower courts the obligation to pay particular attention to the requests made by a child during the divorce proceedings between his/her parents.

Indeed, a divorce entails a reorganization of the child's lifestyle. The child will live most of the time with only one of his/her parents in case of a "standard" sole custody or spend 50% of his/her time at the home of one parent and 50% at the home of the other parent in case of a joint custody arrangement.

This marital separation, indisputably painful for the child, can be even more difficult to live when decisions are imposed by a judge (whose duties and functions are unknown by the child) and conflict with the child's own desires, or even worst, when they are contrary to his/her welfare.

It is true that the New York Convention of January 26, 1990 has clearly specified that the child's best interests must be a primary consideration.

The Law n°93-22 of January 3, 1993 thus offered to minors capable of discernment the possibility to be heard by the judge in all proceedings that affect them (Article 388-1§1 of the French Civil Code).

When ruling on the conditions of exercise of the parental authority in the framework of a marital separation, the Family Judge must notably take into consideration "2°- the feelings expressed by the minor child", as per Article 373-2-11 of the French Civil Code.

Yet, relying on the concept of "minors capable of discernment" to consider hearing the child is difficult in practice, due to the absence of minimum age requirement set forth by law. As such, to decide to proceed with a hearing, judges have to assess the degree of maturity of the minor child on a case-by-case basis.

Nonetheless, to avoid leaving too much discretion in the hands of judges, the French legislator has provided that when the minor child requests to be heard, the judge may deny such request only for two reasons (Article 388-4§1 of the French Code of Civil Procedure). The first reason is that the minor child is not sufficiently capable of discernment to be heard by the judge. The second reason is that the pending proceedings do not affect him/her.

It should also be specified that the minor child's request may be made at any stage of the proceedings and

even for the first time on appeal (Article 338-2 of the French Code of Civil Procedure).

Yet, some judges refuse to hear a minor child during the divorce proceedings of his/her parents and fail to state sufficient reasons for their refusal. They do not provide a clear answer to the minor child's request.

Even worst, in a specific case, trial judges have refused to hear a minor child, not because of the reasons provided for by the legislator but because they considered that the minor child's request was "belated" as it had been made during the stage of deliberation. The *Cour de Cassation* later quashed the trial judges' decision (1<sup>st</sup> Civil Chamber of the *Cour de Cassation*, May 18, 2005, appeal n° 02-20613).

In this context, the decision rendered on October 24, 2012 by the *Cour de Cassation* serves as a two-fold reminder: (i) firstly, it recalls that when the request originates from the minor child himself/herself, such request is "as of right", even if it is received by the Court of Appeals on the day following the pleading hearing, and (ii) secondly, it specifies that the fact that the minor child has already been heard by the Family Judge three years prior to the pleading hearing before the Court of Appeals is not a ground for denying the minor child's request to be heard again.

This decision deserves credit on two counts:

- It imposes a strict application of the legal texts relating to the hearing of the child, which ensures that his/her interests are preserved and given primary consideration;
- It is socially fair as it entitles the child, even several years after having already been heard by a judge, to express a different opinion on the lifestyle that would suit him/her best following the separation of his/her parents.

To conclude, minors should always be encouraged to request to be heard by the judge during divorce proceedings so that his/her life choice be taken into account and his/her interests prevail upon the separation of his/her parents.

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