

The Protection of Right of Minors to Express Their Opinions in Family Litigations

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Abstract: *The right of minors to express their opinions in family litigations refers to minors, who have a certain degree of mental capacity and assertiveness, having the right to express their opinions on the arrangements or decisions related to themselves when the courts handle familial litigation cases involving their interests, and to request the courts hear their opinions. In essence, the right of minors to express their opinions in family litigations belongs to the basic procedural rights of minors as well as judicial beneficiary rights. As for the protection of the right of minors to express their opinions in family litigations, recognizing the status of minors as independent subjects of rights is the logical premise, the procedural guarantee for the rights of the substantive parties involved is the direct cause, and ensuring the best interests of children is the fundamental reason. In order to protect the right of minors to express their opinions in family litigations, China should standardize the mechanisms for judges to hear the opinions of minors directly, improve the mechanisms for family investigators, and establish mechanisms for representing the interests of minors.*

Keywords: family litigations ♦ the right of minors to express their opinions ♦ procedural guarantee ♦ ensuring the best interests of minors

The right of minors to express their opinions has been widely recognized by the international community as a human right. The United Nations *Convention on the Rights of the Child* has special provisions on the right of minors to express their opinions.¹ After China's accession to the *Convention on the Rights of the Child*, the right of minors to express their opinions in China has been increasingly valued. The

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1. The *Convention on the Rights of the Child* defines children as individuals under the age of 18, which is what is referred to as minors in this paper. Article 12 of the *Convention on the Rights of the Child* states that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

General Provisions of the Law on the Protection of Minors stipulate that the opinions of minors should be heard in handling matters involving minors. The *Civil Code* also regulates the hearing of the opinions of minors in divorce and other family cases.² Although the *Civil Code* of China has made provisions for respecting the opinions of minors in family litigations, it does not specify the mechanisms for hearing the opinions of minors and protecting their right to expression in family litigations. The provisions of the *Civil Code* on respecting the opinions of minors in family litigation cases need to be implemented through procedural laws and mechanisms. China needs to establish a systematic safeguard mechanism to protect the right to expression of minors in family litigations. The academic and legal practice circles in China have conducted some research on the protection of the rights of minors to express their opinions in family litigations.³ However, there is no consensus on the differences between the right of expression of minors and adult parties in family litigations, the legitimacy basis for protecting minors' right to expression, and special safeguard mechanisms needed for the rights of minors to express their opinions in family litigations. In order to better implement and protect the right of minors to express their opinions in family litigations and achieve justice in family judicial proceedings, it is necessary to conduct in-depth research on these issues.

I. The Right of Minors to Express Their Opinions: A Special Procedural Right

A. The meaning of the right of minors to express their opinions in family litigations

The right of minors to express their opinions was recognized in the *Convention on the Rights of the Child* in 1989. Article 12 of the *Convention on the Rights of the Child* states that "States Parties shall assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall, in particular, be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." The right of minors to express their opin-

2. China's *Civil Code* contains several provisions regarding minors' right to expression in family litigations. For example, Article 31 of the *Civil Code* stipulates that the people's court shall respect the true wishes of the ward and appoint a guardian from among those who have guardianship qualifications in accordance with the principle that is most beneficial to the ward. Article 38 of the *Civil Code* stipulates that if the parents or children of the ward have their guardianship qualifications revoked by the people's court, except for intentional crimes committed against the ward, if they show genuine remorse, they may apply to the people's court to restore their guardianship qualifications based on respecting the true wishes of the ward, and the guardianship relationship between the designated guardian appointed by the people's court and the ward shall be terminated simultaneously. Article 1084 of the *Civil Code* stipulates that after divorce, if the parents fail to reach an agreement on the custody of children who have reached the age of 2, the people's court shall make a judgment based on the circumstances of both parties and the principle that is most beneficial to the minors. For children who have reached the age of 8, their true wishes shall be respected.

3. For example, Ren Fan, "On Procedural Guarantees for Minors in Family Litigations," *Science of Law* 2 (2019); Zhang Liwei, *Research on Minors' Right to Participation in Family Litigations* (Changchun: Jilin University Press, 2021).

ions confirmed by the *Convention on the Rights of the Child* certainly includes the rights of minors to express their opinions in family litigations. In family litigations, some of the parties involved are minors, while in other cases, the parties involved are not minors, but the handling of the case may involve the interests of minors. The right of minors to express their opinions in family litigations naturally applies to family cases where minors are parties. The right of minors to express their opinions in family litigations discussed in this paper focuses on cases where there are disputes among the parties involved in family litigations regarding the arrangements for minors' affairs and other cases involving the interests of minors,⁴ where minors are not parties to the case in procedural terms. The rights of minors to express their opinions in family litigations refers to that minors who have a certain degree of mental capacity and assertiveness have the right to express their opinions on the arrangements or decisions related to themselves when the court handles family litigation cases involving the interests of minors, and to request the court to hear their opinions properly. The right of minors to express their opinions in family litigations includes two aspects: First, minors have the opportunity to express their opinions when a court handles cases involving the arrangements for their affairs and other cases involving their interests; second, the court is required to appropriately listen to the opinions of minors based on their mental capacity and other circumstances.

Compared with adult parties' right to expression, the right of minors to express their opinions in family litigations has the following characteristics.

First, the subject of the right of minors to express their opinions in family litigations is a minor who has a certain level of mental capacity, has their opinions, and is able to express their opinions. When adult parties act as the subject of the right to expression, they are mentally mature individuals with full capacity for civil conduct, while minors who have the right to expression in family litigations are individuals with limited capacity for civil conduct or no capacity for civil conduct, but have a certain level of mental capacity, opinions, and the ability to express their own opinions. As for the minimum age limit for minors, different countries and regions have different regulations. Article 12 of the *Convention on the Rights of the Child*, which involves the right of minors to expression, does not set a minimum age limit, China should also not set a minimum age limit for minors to enjoy the right to expression. But the special nature of the subject of the rights of minors to express their opinions determines that the ways of expressing their opinions and the means of protecting their right to expression are not completely equivalent to those of adults.

Second, there are various ways in which the right of minors to express their opinions is exercised in family litigations. In family litigations, minors can express their opinions directly by themselves or through other mechanisms. Some countries and regions have legally established an independent representative system for the interests

4. The main cases involving disputes over matters concerning minors among the parties include divorce cases involving matters of child custody, cases involving changes in child custody relationships, cases involving visitation rights of minors, cases involving the appointment of guardians for minors, and cases involving changes in guardianship of minors. Other cases involving the interests of minors mainly include cases of deprivation of guardianship rights of guardians.

of minors, through whom the opinions of minors can be expressed. For example, the Australian family justice system has established the Independent Children's Lawyer system to represent the interests of minors. One of the responsibilities of this independent children's lawyer is to ensure that any opinions expressed by the child in the litigation are fully conveyed to the court.⁵ In the practice of China's family litigations, courts have also learned from foreign practices and used representatives for the interests of minors to express the opinions of minors. For example, in February 2022, the People's Court of Luyang District, Hefei City, Anhui Province appointed relevant personnel as representatives for the rights and interests of a minor child in a case involving a dispute over the change of custody. The representative for the rights and interests of the minor child expressed the true wishes of the minor child during the trial.⁶

When minors express their opinions directly in family litigations, they can do so orally or through non-verbal means, such as expressing their opinions through games, drawing, etc. For young minors, playing games with their parents can better determine which parent they prefer to live with after their parents' divorce. In the *General Comment No. 12 (2009) on the Child's Right to be Heard* (CRC/C/GC/12) of the Committee on the Rights of the Child established by the United Nations Convention on the Rights of the Child, it is pointed out that the full implementation of Article 12 of the *Convention on the Rights of the Child* must recognize and respect minors' non-verbal forms of communication, including games, body language, facial expressions and drawings, through which children express their cognitions, choices and preferences.⁷

Third, when minors exercise their right to express opinions in family litigations, they express their opinions on how to arrange and handle their matters. In family litigations, the matters on which minors exercise their right to express opinions are personal matters related to the minors, rather than property relationship matters. When minors exercise their right to express opinions in family litigations, they express opinions on how to arrange and handle their matters, rather than opinions on handling disputes between parties with whom they have no direct relationship. For example, in divorce proceedings, minors have the right to express their opinions on who will directly take care of them and with which parent they would like to live, but they do not have the right to express opinions on whether their parents should divorce.

Fourth, the procedural occasions for the exercise of the right of minors to express their opinions in family litigations are the procedures in which the court handles matters concerning minors. Whether the court makes a judgment or conducts mediation on matters concerning minors, minors have the right to express their opinions. Specifically, whether it is in the first instance, second instance, retrial, non-litigation procedures, or in the court's family mediation procedures, minors have the right to express

5. Article 68LA of the *Australian Family Law*.

6. Pan Qiao, "Let the 'voice' of minors heard in court: Anhui court introduces the system of representatives for the rights and interests of minors for the first time," *Democracy and Rule of Law Times*, February 17, 2022, page 2.

7. United Nations Committee on the Rights of the Child, *General Comment No. 12 (2009) on the Child's Right to be Heard* (CRC/C/GC/12), accessed February 3, 2022, https://tbintemtochr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f12&Lang=zh.

their opinions on matters concerning themselves.

Fifth, the court should appropriately listen to the opinions of minors based on their age and level of mental maturity. Regarding the expression of opinions by adult parties in litigation, the court should fully respect them. If the court does not adopt the opinions of adult parties in the judgment, it needs to provide reasons. Due to the limitations of the age and mental maturity of minors in family litigations, the opinions they express may not necessarily reflect their true thoughts. Even if the opinions expressed by minors are their true intentions, handling the case according to such opinions may not be conducive to realizing their best interests. Therefore, the court is not required to always listen to the opinions expressed by minors in family litigations. When the court handles matters involving minors, it is not completely bound by the intentions of minors, but rather requires the court to appropriately listen to the opinions of minors based on their age and level of mental maturity. When the court makes arrangements regarding matters involving minors, it needs to consider the value goal of ensuring the best interests of the minors. Because, in the value of family litigations, ensuring the best interests of minors is paramount, but the wishes of minors are not supreme. Kate Standley, a British family law scholar, pointed out that in matters involving children, the Children Act 1989 in the UK gives more recognition to children with sufficient understanding, but children do not necessarily have the final say. Based on the need to protect the rights of children, the court always has the right to suppress the wishes of children. It is not the wishes of children but the rights and interests of children that are supreme.⁸

B. The nature of the right of minors to express their opinions in family litigations

In essence, the right of minors to express their opinions in family litigations belongs to the basic procedural rights of minors as well as judicial beneficiary rights.

First, the right of minors to express their opinions in family litigations is the procedural basic right of minors. Procedural basic rights are relative to ordinary civil litigation rights. Ordinary civil litigation rights belong to the rights under *Civil Procedure Law*, which are confirmed by *Civil Procedure Law*, while procedural basic rights belong to constitutional rights. The right of minors to express their opinions in family litigations originates from the right to be heard. The right to be heard refers to the right of a person to present evidence, express opinions, and be respected by the court when the court makes a judgment on the rights, obligations, and responsibilities of that person, or when the court's judgment involves the rights, obligations, and responsibilities of that person. Although minors may not be parties to family cases, the judgments in family cases will involve minors and have a significant impact on their interests. In fact, the judgments in family cases will make decisions concerning the interests of minors, including their personal and property interests. Therefore, minors in family litigations have the right to request to be heard. In other countries, the right to be heard is usually confirmed through the constitution. For example, Article 103(1) of the *Ba-*

8. Kate Standley, *Family Law*, Qu Guangqing trans. (Beijing: China University of Political Science and Law Press, 2004), 229.

sic Law for the Federal Republic of Germany states that everyone has the right to be heard in legal proceedings. Articles 5 and 14 of the Amendment to the Constitution of the United States of America stipulate the right to due process, and the core elements of due process are notification and hearing. The right to be heard is the core content of the right to due process. According to China's legal theory, the parties have the right to request an adjudication. The right to request adjudication refers to the right of anyone to seek a fair trial by the court after a civil dispute occurs. The right to request adjudication belongs to constitutional rights or basic rights, and it is a procedural basic right. The right to request adjudication is divided into the right to resort to judicial proceedings and the right to request a fair trial.⁹ The right to request a fair trial is a composite right, which consists of several sub-rights, including the right to be heard. The right to be heard contains the right to express opinions. Therefore, the right of minors to express their opinions in family litigations belongs to the scope of procedural basic rights. The right of minors to express their opinions in family litigations is a right with constitutional significance and value.

Second, the right of minors to express their opinions in family litigations belongs to the category of judicial beneficiary rights. Beneficiary rights refer to the rights of citizens to request the state to obtain certain benefits for certain actions. Beneficiary rights include social and cultural beneficiary rights, judicial beneficiary rights, etc. The right of minors to express their opinions in family litigations belongs to the category of beneficiary rights, and specifically falls under the category of judicial beneficiary rights. The realization of the right of minors to express their opinions in family litigations requires the state (especially the court) to create conditions, provide convenience, give minors the opportunity to express their opinions, and provide appropriate treatment.

Because the right of minors to express their opinions in family litigations belongs to the basic procedural rights and falls within the scope of judicial beneficiary rights, the state must guarantee the right of minors to express their opinions in family litigations. The state has the obligation to ensure through legislative, judicial, and other channels that minors with certain mental abilities, independent opinions, and the ability to express their own opinions in family litigations can freely express their opinions on matters that affect them, and in accordance with the age and maturity of the minors treat them appropriately.¹⁰

9. Liu Min, *Research on the Right to Request Adjudication: Constitutional Concepts of Civil Litigation* (Beijing: China Renmin University Press, 2003), 25.

10. According to the provisions of the United Nations Committee on the *Rights of the Child's General Comment No.12 (2009) The Child's Right to be Heard (CRC/C/GC/12)*, contracting states should ensure the right of every child who is "capable of forming his or her own views" to express his or her opinions. "Capable of forming his or her own views" should not be regarded as a limiting condition, but contracting states have an obligation to assess the child's capacity to form independent opinions to the fullest extent possible. This means that contracting states cannot presume from the outset that children do not have the ability to express their own opinions. On the contrary, contracting states should assume that children have the ability to form their own opinions, and recognize their right to express their opinions, without requiring children to prove their capacity first. The freedom of expression of minors means that they can express their opinions without pressure, choose whether to exercise their right to express their opinions, and should not be manipulated or constrained by inappropriate influence or pressure.

II. The Legitimacy Basis for Protecting the Right of Minors to Express Their Opinions in Family Litigations

In family litigations, why should the court protect the right of minors to express their opinions when dealing with matters involving their interests? This is the theoretical question that must be answered first when discussing the system for protecting the right of minors to express their opinions. As for the protection of the right of minors to express their opinions in family litigations, recognizing the status of minors as independent subjects of rights is the logical premise, the procedural guarantee for the rights of substantive parties involved is the direct cause, and ensuring the best interests of minors is the fundamental reason.

A. Logical premise: Establishment of the status of minors as independent subjects of rights

In modern families, due to the immaturity of minors' minds, they need the care of their parents or other guardians, and the guardians act as their legal representatives to engage in civil activities on their behalf. However, this does not mean that minors are only objects of care and not independent individuals. In fact, in modern families, minors are not only family members, but also independent individuals in the family, with independent subject status and rights. The concept of minors as independent individuals in the family and the idea of being independent subjects of rights have gradually formed with the improvement of people's understanding of the status of minors. In the era when minors were not considered independent individuals in the family, minors had no right to express their opinions on matters concerning themselves. On the contrary, minors became objects controlled by their parents. In ancient Rome, the father was the sole representative of the family, and the foundation of the family was the absolute paternal authority. In early Roman law, the father had the power of life and death over his children and could sell them into slavery. Under the system of paternal authority, minors had no independent status.¹¹ In traditional Chinese society, the "Three Obediences" and "Five Constants" became the highest ethical standards. In the family, the father was the head of the household, and fathers had complete control over their children, who were required to obey their fathers unconditionally. In modern society, the status of children in the family has been continuously elevated, and the rights of minors are increasingly valued. By the 20th century, the international community had reached an unprecedented level of understanding regarding the status of minors, and the independent status of minors was established. On November 20, 1959, the United Nations General Assembly adopted the *Declaration of the Rights of the Child*, which proposed various rights that children should enjoy and recognized children as subjects of rights. However, the *Declaration of the Rights of the Child* is not legally binding. In the 1960s and 1970s, the West launched a massive children's rights movement, which brought about a significant shift in the discourse of children's rights. The focus of this discourse shifted from protection to autonomy, from nurturing to self-determination,

11. Mi Jian, *Basics of Roman Law* (Beijing: China University of Political Science and Law Press, 1987), 77-80.

and from welfare to fairness.¹² In particular, the children's liberation movement in the 1970s promoted the development of children's rights. The "Children's Liberators" believe that children have the same freedom as adults, especially the right to decide for themselves.¹³ At that time, children were considered truly independent individuals with their own personalities, and they had the right to self-determination and autonomy. In November 20, 1989, the United Nations General Assembly adopted the *Convention on the Rights of the Child*, which elaborates on the rights of children as minors and considers their rights as an integral part of human rights.¹⁴ Article 12 of the *Convention on the Rights of the Child* stipulates the right of minors to express their opinions. The significance of this provision lies in changing the status of minors from passive objects of care to active participants.¹⁵ In fact, the *Convention* treats minors not only as objects of protection but also as independent individuals or subjects. Currently, the *Convention* has 196 contracting states, making it the most widely recognized international convention globally. The concept of minors as independent individuals or independent subjects of rights is universally recognized and accepted worldwide. Article 3 of China's *Law on Protection of Minors* explicitly states that minors have rights such as the right to participation, indicating that China's legislation also treats minors as independent subjects of rights. The minors' status of independent subjects of rights implies that, first, minors are not only the objects protected by adults, but also independent subjects with their own personality and dignity. Second, minors have extensive rights and require adults to respect them. Third, although minors are persons without capacity for civil conduct or persons with limited capacity for civil conduct, minors have certain rights of self-determination regarding their own matters.¹⁶

The establishment of the independent rights subject status of minors is the logical premise for protecting the right of minors to express their opinions in family litigations. If minors do not have independent subject status, then in family litigations, minors cannot enjoy the right to express their opinions at all, and the court does not need to listen to the opinions of minors. Matters concerning minors will be entirely decided by their parents or by the court. The establishment of the independent status of minors as subjects of rights means that minors are not only independent subjects of rights in national and social life, but also independent individuals and subjects of rights in family life, where minors have a certain degree of self-determination and autonomy. The *Outline for the Development of Chinese Children (2021-2030)* issued by the State

12. Zhang Yang, *Research on Western Children's Rights Theories and Their Contemporary Value* (Beijing: China Social Sciences Press, 2016), 44.

13. Kate Standley, *Family Law*, Qu Guangqing trans. (Beijing: China University of Political Science and Law Press, 2004), 226.

14. The Preamble to the *Convention on the Rights of the Child* states that "Bearing in mind that the need to extend particular care to the child has been recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in Articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in Article 10)."

15. Duan Xiaosong, *Research on the United Nations Convention on the Rights of the Child* (Beijing: People's Publishing House, 2017), 76.

16. There are also scholars in China discussing the significance of establishing children as rights subjects. Zhang Yang, *Research on Western Children's Rights Theories and Their Contemporary Value* (Beijing: China Social Sciences Press, 2016), 55-56.

Council explicitly requires respecting the subject status of children and guaranteeing their rights to equal participation in their own and family affairs. Therefore, based on the independent rights subject status of minors, in family litigations related to the upbringing, guardianship, and visitation of minors, minors of a certain age and with a certain level of mental capacity have the right to express their opinions.

B. Direct cause: The procedural guarantee for the rights of the substantive parties involved

Although minors should have the right to express their opinions in family litigations based on their independent status as subjects of rights, minors are often not the parties to the case in family litigations. What are the direct reasons for minors to exercise their right to express their opinions and for the court to listen to the opinions of minors? Some scholars in China attribute the direct cause to the fact that minors are considered third parties in family litigations. For example, some scholars believe that in divorce cases, minors are third parties without independent rights to request, and the judgment is one of the procedural safeguards that extends its binding force to them. Minors participate in the litigations as third parties without independent rights to request.¹⁷ However, it is inappropriate to understand minors as third parties without independent rights to request. According to Article 59 of the *Civil Procedure Law* of China, a third party without the right to make an independent claim refers to a person who participates in the litigation for the subject matter of the litigation between the parties. However, he does not have the right to make an independent claim, but has a legal interest in the outcome of the case. Third parties without independent claims often join the plaintiff or defendant in litigation to protect their legitimate rights and interests. In family cases such as divorce cases, changes in custody relationships, custody cases, and visitation rights cases involving the custody of minors, the minors are obviously not third parties without independent claims. In these cases involving the interests of minors, the minors are actually the substantive parties. In civil litigation theory, there is a distinction between formal parties and substantive parties. Formal parties are individuals who appear in the proceedings and litigate in their name, while substantive parties refer to individuals other than the formal parties who are subject to the effectiveness of the judgment as the entities of legal relationships.¹⁸ Usually, the substantive parties participate in the litigation themselves, being both the formal parties and the substantive parties. In some cases, the substantive parties may not participate in the litigation, and the formal parties represent them. For example, in litigation, the litigant is the formal party, and the person being served is the substantive party. In family cases involving the interests of minors, the minors are not formal parties to the family case, but the court's judgment will involve the interests of the minors. For example, the court may decide which parent will have custody of the minors or change the guardian of the minors. The court's judgment has a significant impact on the future life of the minors. Therefore, in these family cases, the minors are substantive parties.

17. Hu Junhui, *New Exploration of the Issue of Res Judicata in Civil Judgments* (Beijing: Law Press · China, 2018), 66.

18. Xu Shihuan, *Civil Procedure Law (Volume I)* (Taipei: Sharing Publishing Co., Ltd., 2016), 232.

In cases where the substantive parties are not formal parties, whether a substantive party procedural guarantee should be provided depends on the circumstances. In the case of authorization by the substantive party, there is no need to provide a procedural guarantee to the substantive party because the litigation representative, as authorized by the person being represented who is the subject of the substantive rights and obligations, has the right to carry out the litigation. The person being represented should be responsible for their actions. Even if the judgment affects the person being represented, they do not need to be provided with procedural guarantees. In the case of statutory litigation representation, if the representative obtains the right to carry out the litigation without authorization from the person being represented, it is not sufficient to make the results of the representative's litigation legitimate solely based on legal authorization. Therefore, a procedural guarantee should be provided to the person being represented, who is the substantive party.¹⁹ Article 67(1) of the *Civil Procedure Law of Taiwan Province of China* stipulates that if the litigation result has legal interests for a third party, the court may notify the third party in writing of the litigation event and progress before the end of the oral debate in the first or second instance. Based on this, the court should notify the person being represented in the case of statutory litigation representation, and the person being represented can participate in the litigation and thus obtain a pre-litigation procedural guarantee.

In family cases involving the interests of minors, the minors are the substantive parties, and the parents or guardians of the minors may not be able to fully protect the interests of the minors in the litigation. Therefore, the court should provide procedural guarantees for the minors when dealing with matters involving their interests. Only in this way can the judgments involving the interests of minors be legitimate. For example, in Japan, a minor child involved in a family matter case is one of those persons other than the referee who is subject to the judgment in Paragraph 2, Article 42 of the *Japanese Family Matters Procedure Act*, and the outcome of the trial has a direct impact on the minor. This minor child can participate in family court proceedings as an interested party,²⁰ and can perform procedural actions that parties are allowed to do in accordance with the law, unless otherwise provided by law. Of course, if the family court believes that the participation of minors in family court proceedings would harm the interests of the minors, it should reject the application for permission to participate filed by the minors. If minors can directly participate in family court proceedings, they are both substantive parties and formal parties. The parties involved can obtain the right to request a hearing, and of course, the minors can also obtain the right to request a hearing. Even if the minors are not formal parties, according to Article 65 of the *Japanese Family Procedure Act*, in family court proceedings concerning parent-child relationships, parental rights, or guardianship of minors, as well as in family court proceedings where the outcome may affect the minors, the family court should listen to the opinions of the minors through various means. It can be seen that in the Japanese family justice system, minors who are substantive parties can obtain pro-

19. *Ibid.*, 328.

20. According to Article 42 of the Japanese Family Procedure Act, this kind of participation, which corresponds to "participation of parties," is called "participation of interests".

cedural guarantees. In fact, not only in Japan but also in other countries and regions, procedural guarantees are provided to minors in family litigations, and the direct reason is that minors are substantive parties.²¹ Because minors are substantive parties in family justice, based on the requirement of procedural guarantee, including the right to request a hearing,²² minors in family litigations should be given the right to express their opinions, and the court should appropriately consider the opinions of the minors.

C. Fundamental reason: Ensuring the best interests of minors

Although minors have the right to express opinions in family litigations based on the requirements of procedural guarantees for substantive parties in family litigations, the fundamental purpose or reason for granting minors the right to express opinions is to ensure the best interests of minors. The principle of ensuring the best interests of minors requires the state, society, and family to prioritize the best interests of minors when dealing with matters involving their interests. In international documents, the *United Nations Declaration of the Rights of the Child* in 1959 established the principle of ensuring the best interests of minors. Principle 2 of the *Declaration of the Rights of the Child* states that “The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.” The *Convention on the Rights of the Child* in 1989 reaffirmed the principle of ensuring the best interests of the child, and enriched its content. Article 3(1) of the *Convention* states that “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.” Therefore, the principle of ensuring the best interests of minors has become the highest criterion for dealing with matters involving minors. As for the principle of ensuring the best interests of minors, according to the interpretation of the United Nations Committee on the Rights of the Child in its *General Comment No.14 (2013) On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (CRC/C/GC/14)* in 2013, it is both a substantive right and a fundamental interpretative legal principle, as well as a

21. In the United States, some argue that minors in guardianship cases enjoy the due process rights provided by the 14th Amendment to the United States Constitution. They analyze the interests of the minors involved in guardianship case judgments, that is, the interests of liberty and property mentioned in the due process clause. Minors are the subjects of these interests. See Paul K. Milmed, “Due Process for Children: A Right to Counsel in Custody Proceedings,” *N. Y. U. Review of Law & Social Chang*, vol. 4, no. 2 (1974): 180-183.

22. Professor Shen Guanling from Taiwan Province of China believes that procedural guarantees in family non-litigation proceedings are not limited to the applicants and the opposing parties, but also include interested parties who are substantive parties to the case. See Shen Guanling, *The New Changes in Civil Procedure Law* (Taipei: Sharing Publishing Co., Ltd., 2009), 230-236.

rule of conduct.²³

Ensuring the best interests of minors is the primary consideration and fundamental value orientation of family litigations.²⁴ Only by ensuring the best interests of minors can family judicial justice be achieved. The principle of ensuring the best interests of minors requires the court to prioritize the best interests of minors in handling family cases involving custody, guardianship, visitation, and other matters, with the interests of minors taking precedence over those of parents or other individuals. So, who determines the best interests of minors when dealing with matters involving them? Since minors are direct stakeholders and substantial parties, they have the right to participate in the process of determining and judging what is in their best interests. In family litigations, when adults make decisions and judgments in the best interests of minors, they should consider the voices of the minors and listen to the opinions of capable minors.²⁵ The United Nations Committee on the Rights of the Child, in its *General Comment No.14 (2013) On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration*, states that the child's voice must be considered when assessing and determining the child's best interests. Many countries and regions require courts to consider the opinions of minors when determining what their best interests are. For example, according to Section 60CC of the *Australia's Family Law*, when making parenting orders to determine the best interests of the child, the court must primarily consider the views expressed by the child. According to Article 138 of the *Austrian Civil Code*, when determining the well-being of children, full consideration of the child's opinions, ability and ability to form an opinion should be regarded as important criteria. China's *Civil Code* also has corresponding provisions. For example, Article 1084(3) of the *Civil Code* stipulates that "After divorce, children under the age of 2 shall be primarily cared for by the mother directly. For children

23. According to the interpretation of the United Nations Committee on the Rights of the Child in its *General Comment No.14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (CRC/C/GC/14)* in 2013, the principle of ensuring the best interests of minors includes three levels of meaning. First, it is a substantive right. When considering the interests at different levels, children have the right to prioritize their best interests as a primary criterion and consideration. And this right must be guaranteed whenever a decision involves a specific child, a group of specified or unspecified children, or children in general. Second, it is a fundamental interpretative legal principle. If a legal provision can be interpreted in more than one way, the interpretation that can most effectively achieve the best interests of the child should be chosen. Third, it is a rule of conduct. Whenever a decision is made that will affect a specific child, a group of specified and unspecified children, or children in general, the decision-making process must include an assessment of the (positive or negative) impact that this decision may have on the children involved. The procedural guarantee is necessary for the assessment and determination of the best interests of the child. Furthermore, the reasons for the decision must clearly indicate that this right has been taken into account. In this regard, whether it is for broad policy issues or individual cases, States parties should explain how the decision respects this right, what standards are used to determine the best interests of the child, and how the child's interests are balanced with other factors. See the United Nations Committee on the Rights of the Child in its general comment No.14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, accessed March 5, 2023, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRC%2fC%2fGC%2f14&Lang=en.

24. Liu Min, "On Family Judicial Justice: From the Perspective of Family Judicial Substantive Justice," *Jiangsu Social Sciences* 4 (2021).

25. In the United States, it has been pointed out that under the substantive law concerning guardianship, children have the right to make decisions based on their best interests, which further becomes the reason for their opinions to be heard in guardianship proceedings. See Paul K. Milmed, "Due Process for Children: A Right to Counsel in Custody Proceedings," *N. Y. U. Review of Law & Social Chang*, vol. 4, no. 2 (1974): 183.

over the age of two, if the parents cannot reach an agreement on custody, the people's court shall make a judgment based on the specific circumstances of both parties, following the principle that is most beneficial to the underage children. For children over the age of eight, their genuine wishes should be respected.” This provision means that when the court makes a judgment on the custody of minors, it should adhere to the principle of ensuring the best interests of the minors. When determining what constitutes the best interests of the minors, the court should listen to and respect the opinions of minors over the age of eight.²⁶ It can be seen that in family litigations, based on the fundamental value of the best interests of minors, the court should listen to the opinions of minors and they have the right to express their opinions. In other words, listening to the opinions of minors in family litigations is to ensure the best interests of minors. The best interests of minors are the fundamental reason for guaranteeing the right of minors to express their opinions in family litigations.

III. The Implementation for Protecting the Right of Minors to Express Their Opinions in Family Litigations in China

After the legitimacy of protecting the right of minors to express their opinions in family litigations was established in theory, the key lies in how to protect this right. China's *Civil Code* only requires respecting the opinions of minors in family litigations but does not specify how to listen to them in terms of procedures. The important purpose of procedural law is to implement substantive law. How to implement the requirements of the *Civil Code* regarding the protection of the right of minors to express their opinions in family litigations is the task of family procedural law and family litigations. In order to protect the right of minors to express their opinions in family litigations, it is necessary for China to learn from and absorb the advanced legislative experience of foreign countries and regions, and fully draw on the practical experience of China's family litigations, follow the requirements of the *Convention on the Rights of the Child*, and regulate and improve the mechanism for protecting the right of minors to express their opinions in family litigations.

A. Standardizing the mechanism for judges to listen to the opinions of minors directly

Although there is theoretical controversy over whether it is appropriate for judges to hear the opinions of minors in family litigations directly,²⁷ mechanisms for judges to hear the opinions of minors directly still exist in many countries and regions' family litigations. However, the practice of judges directly hearing the opinions of minors in family litigations varies in different countries and regions. For example, in the state of

26. Of course, the content of this paragraph is also unclear. If the opinions of minors over 8 years old conflict with their best interests, must the opinions of minors be respected? Some scholars believe that respecting the opinions of minors over 8 years old does not mean absolute adoption. See Xia Yinlan, Long Yifei, Cao Sijie, Yao Xing and He Xin, *Interpretation of and Comment on the Chinese Civil Code (Book of Marriage and Family)* (Beijing: China Renmin University Press, 2020), 226.

27. Nicholas Bala, Rachel Birnbaum, Francine Cyr and Denise Mccolley, “Children's Voices in Family Court: Guidelines for Judges Meeting Children,” *Family Law Quarterly*, Rachel Birnbaum, Francine Cyr, Denise Mccolley, “Children's Voices in Family Court: Guidelines for Judges Meeting Children,” *Family Law Quarterly*, vol. 47, no. 3 (2013): 381-383.

Texas, United States, according to *Texas Family Code* § 153.009, in a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the attorney ad litem for the child, the court shall interview in chambers a child 12 years of age or older and may interview in chambers a child under 12 years of age to determine the child's wishes as to conservatorship or as to the person who shall have the exclusive right to determine the child's primary residence. The court may also interview a child in chambers on the court's motion for a purpose specified by this subsection. Of course, interviewing a child does not diminish the discretion of the court in determining the best interests of the child. In any trial or hearing, the court may permit the attorney for a party, the amicus attorney, the guardian ad litem for the child, or the attorney ad litem for the child to be present at the interview. On the motion of a party, the amicus attorney, or the attorney ad litem for the child, or on the court's motion, the court shall cause a record of the interview to be made when the child is 12 years of age or older. A record of the interview shall be part of the record in the case. Unlike Texas judges who meet with minors in their chambers, California allows children to address the court directly when the judge hears their opinions. *California Family Code* §3042 states that if a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation. In addition to the requirements of subdivision (b) of Section 765 of the *Evidence Code*, the court shall control the examination of a child witness so as to protect the best interest of the child. If the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child shall be permitted to do so, unless the court determines that doing so is not in the child's best interest, in which case, the court shall state its reasons for that finding on the record. This section does not prevent a child who is less than 14 years of age from addressing the court regarding custody or visitation if the court determines that is appropriate pursuant to the child's best interest. If the court precludes the calling of a child as a witness, the court shall provide alternative means of obtaining input from the child and other information regarding the child's preferences. The practices in the family judiciary of Texas and California, where judges directly meet with minors, pay more attention to protecting the parties' due process rights. In Australia, Section 60CD(2) of the *Family Law Act* 1975 of Australia provides three methods for obtaining the views of minors in family litigations: (a) by having regard to anything contained in a report given to the court under subsection 62G(2); or (b) by making an order under section 68L for the child's interests in the proceedings to be independently represented by a lawyer; or (c) subject to the applicable Rules of Court, by such other means as the court thinks appropriate. The other means, as the court thinks appropriate, include a judicial interview, where the judge can directly meet with the minors to understand their views and best interests. In the Australian family law system, most judges are reluctant to conduct judicial interviews with minors. They are concerned about their lack of skills or training in meeting and explaining the children's views.²⁸ Some judges also wor-

28. Michelle Fernando, "Family Law Proceedings and the Children's Right to Be Heard in Australia, the United Kingdom, New Zealand and Canada," *Family Court Review*, vol. 52, no. 1 (2014): 49.

ry that private interviews with minors may contradict due process.²⁹ Another reason why Australian judges are reluctant to conduct judicial interviews with minors is the existence of the family consultant system. Family consultants typically meet with the children to ascertain their views and submit family reports to the court.

In order to protect the right of minors to express their opinions, China has developed various mechanisms in its family litigation practice for judges to listen to the opinions of minors directly. The main practices of judges directly listening to the opinions of minors are as follows: First, outside the courtroom, judges meet with minors individually or listen to their opinions through phone communication, etc.³⁰ Second, outside the courtroom, judges meet with minors in the presence of both parties to listen to their opinions.³¹ Third, during the court session, the judge inquires and listens to the opinions of the minors through telephone communication in the courtroom.³² Fourth, during the court session, the judge allows the minors to appear in person and inquires and listens to their opinions in the courtroom.³³ In the practice of family liti-

29. Regarding the view of Australian judges on direct access to minors in family litigations, See Patrick Parkinson, Judy Cash- more, "Judicial Conversations with Children in Parenting Disputes: The Views of Australian Judges," *International Journal of Law and Policy and the Family*, vol. 21, no. 2 (2007): 162-164.

30. For example, in 2022, during the trial of a divorce dispute case by the People's Court of the Development Zone of Yongji County, Jilin Province, the parties reached an agreement during the trial process. The daughter would be raised by the female party, Li, and the alimony would be paid by the male party, Zhang. However, considering that the daughter of the plaintiff and defendant is already over 10 years old, her opinion should be heard regarding the issue of custody. Therefore, the presiding judge contacted the school and went to the child's school to have a private conversation with the child and solicit her opinion. During the inquiry process, the child indicated that she was already aware of the parents' decision to divorce and was willing to choose to live with her father, Mr. Zhang. Based on the opinions of the minors, the judge facilitated the parties to reach a mediation agreement again, and the daughter would be raised by Zhang. See Zhang Zhongqin and Ma Jiahui, "Actively Listening to Children's Voices, and Dealing with Divorce Cases with Warm Mediation," accessed August 3, 2023, <https://view.inews.qq.com/a/20221027A03M5E00>.

31. For example, in a case heard by the People's Court of Santai County, Sichuan Province, in which a divorced couple competed for the custody of their child Little Zhou, in view of the fact that Xiao Zhou was over 8 years old and was capable of independent thought, the judge in charge drove to Xiao Zhou's elementary school with a clerk. The judge handling the case used psychological counseling to help Xiao Zhou slowly let go of his mental burdens and gradually open up his heart. Under the witness of both parties, he expressed his preference of which parent he wanted to live with. In the end, the judge respected Xiao Zhou's true wishes and ruled in accordance with Xiao Zhou's wishes. See Xiong Yangyang, "Divorced Couple Compete for Child Custody, and the Judge Respects the Child's Wishes," accessed August 3, 2023, https://view.thepaper.cn/baijiahao_20682956.

32. For example, in 2019, Wang Qiang (pseudonym) and Zhang Li (pseudonym) chose to divorce due to the breakdown of their relationship. However, because no consensus was reached regarding issues such as child custody, they went to court in 2021. Considering that the child was already 11 years old at the time, Judge Li Jianli of Zhongyuan District People's Court of Zhengzhou city, Henan Province, made a phone call to the child's smartwatch during the trial to inquire about the current custody situation. She presented three options to the child. "Option one is to maintain the current custody arrangement (spending weekdays with the mother and weekends with the father, returning to school on Mondays). Option two is to spend six months with the father and six months with the mother. Option three is to live with either the father or the mother". In the end, the child expressed a preference to live with the father. See Sun Ke, "Parents Go to Court to Fight for Child Custody, Judge Calls Child for Opinion on the Spot," *Henan Business Daily*, June 1, 2021.

33. For example, in May 2021, in a divorce case handled by Judge Liu Peili of Chengguan Court, Mengcun Hui Autonomous County People's Court in Hebei Province, the plaintiff, Ms. Li, brought both daughters to the court as requested by the judge. The judge interviewed each child separately, and Xiaojia and Xiaonuo clearly expressed their willingness to live with their mother, Ms. Li. Both girls signed their names on the transcript. Subsequently, with the mediation of the court, the plaintiff and the defendant finally reached a consensus: They voluntarily divorced, and the two daughters would be under the custody (Continued on Next Page)

gations in China, there are different approaches to the direct inquiry of the opinions of minors by judges. Some approaches focus more on allowing minors to freely express their opinions, such as the first approach mentioned above. Some approaches, such as the second and fourth approaches, focus more on procedural guarantees for the parties involved in family cases. Some approaches emphasize both procedural guarantees for the parties involved and the freedom of expression of minors, such as the third approach. In the family litigation practice in China, what kind of mechanism should be adopted for judges to inquire and listen to the opinions of minors directly? When judges directly inquire and listen to the opinions of minors in family litigations, they should handle the relationship between protecting the right of minors to express their opinions and ensuring the basic procedural rights of the parties involved in family cases. In handling family cases involving the interests of minors, judges generally do not hear the opinions of the minors in court. This is because, in the presence of parents, allowing minors to express their opinions in court is not conducive to their freedom of expression, and it may also cause psychological trauma to the minors. The practice in California, U.S., and the fourth practice in China's judicial practice are not worth promoting in China. Judges should meet and talk with minors outside the courtroom to hear their opinions. The location can be in the court or in other suitable places. The court should provide a friendly and warm place for judges to meet with the minors involved in the case, in order to eliminate the tension in the minors. During the meeting between the judge and the minors, the court may, as needed, hire a psychological expert or other relevant individuals to accompany the minors and assist in communication with the judge. When judges talk to minors, they should inform minors with understanding ability about the possible impact of the judgment or mediation results on them, so as to fully listen to the opinions of minors and protect their right to express their opinions. When judges meet with minors, the parties and their lawyers should not be present. This is because if parents and their lawyers are not present, minors will be able to express their opinions more freely. The practice in Texas, U.S., and the second practice in China's family litigations practice are not worth promoting in China, either. Although not allowing parents and their lawyers to be present restricts the procedural rights of parents, it is for the better protection of the rights of minors. After all, the best interests of minors are the primary consideration of family litigations. Although the practices in California and Texas in the United States, as well as the second and fourth practices in China, are not worth promoting in China, the concept of procedural guarantees for parties contained in these practices should be borrowed in China's family litigations. Therefore, in order to provide appropriate procedural guarantees to the parties and prevent judges from acting arbitrarily, it is necessary to record the opinions of minors when judges hear their opinions outside the court, so that the parties can re-

(Continued) of the plaintiff, Ms. Li. The defendant, Mr. Meng, would bear the cost of custody. Mr. Meng would have visitation rights on the second and fourth Sundays of each month, and Ms. Li would provide assistance and cooperation. See Mengcun Hui Autonomous County People's Court, "Husband and Wife Sue for Divorce, Judge Listens to Children's Voices," accessed January 3, 2023, https://m. thepaper. cn/baijia-hao_12882158.

view them and the appellate court can supervise them.³⁴ Courts with conditions should also set up observation rooms with one-way mirrors to allow judges to observe the interaction between minors and their parents and understand the opinions of minors. When using one-way mirrors for observation, judges can hire psychological experts to observe together and help judges understand the opinions of minors. In foreign jurisdictions, in order to regulate the direct hearing of minors' opinions by judges in family litigations, some countries have formulated guidelines for judges to meet with minors. For example, the United Kingdom has formulated *Guidelines for Judges Meeting Children who are Subject to Family Proceedings, Produced by the Family Justice Council and Approved by the President of the Family Division* in April 2010. The formulation and implementation of these rules have played a positive role in regulating judges' direct hearing of the opinions of minors. To improve and standardize the mechanism of judges directly hearing the opinions of minors, China should establish rules for judges to hear the opinions of minors directly.³⁵

B. Improving the mechanism of family investigation and family investigators

Family investigation involving minors refers to the mechanism in which the court, in handling family cases in the family litigations, designates or entrusts personnel with expertise in law science, psychology, education, medicine, and social experience to conduct investigations through visits, exchanges, interviews, etc., to understand the opinions and best interests of the minors involved in the family case, and form investigation reports, providing opinions and suggestions on matters involving minors. Some foreign scholars refer to this type of family investigation as expert evaluation, and the resulting family investigation report is called an evaluation report.³⁶ Among the protection mechanisms for minors's right to express their opinions in family litigations in different countries and regions, family investigation is an important protection mechanism. In order to protect the right of minors to express their opinions in family litigations, different countries, and regions have established distinctive family investigation and investigation report systems. For example, in Australia, to protect minors's right to expression, in some family cases involving the interests of minors, the family court may instruct a family consultant to provide a Family Report. Section 55A of the *Australian Family Law Act* stipulates that where, in proceedings for a divorce order in relation to a marriage, the court doubts whether the arrangements made for the care, welfare, and development of a child of the marriage are proper in all the circumstances, the court may adjourn the proceedings until a report has been obtained

34. How to balance the procedural rights of parties in family litigations with the right of minors to express their opinions is indeed a difficult problem. This involves the balance between the confidentiality of minors' opinions and due process. See Nicholas Bala, Rachel Birnbaum, Francine Cyr, Denise Mccolley, "Children's Voices in Family Court: Guidelines for Judges Meeting Children," *Family Law Quarterly*, vol. 47, no.3 (2013): 391-394.

35. In China, scholars have drafted the Rules of People's Courts Hearing the Opinions of Minors in Family Litigations. See Zhang Liwei, *Research on Minors' Right to Participation in Family Litigations* (Changchun: Jilin University Press, 2021), 320-323.

36. National Judicial Institute and Canadian Research Institute for Law and the Family, Consultation on the Voice of the Child at the 5th World Congress on Family Law and Children's Rights, accessed April 10, 2022, [http://Z/cr/ilf ca/Documents/Consulta-tion%20on%20Voice%20of%20the%20Child%20-%20Dec%202009.pdf](http://Z/cr/ilf%20ca/Documents/Consulta-tion%20on%20Voice%20of%20the%20Child%20-%20Dec%202009.pdf).

from a family consultant regarding those arrangements. Family consultants are social workers or psychologists with skills and experience in dealing with children and families. They are appointed by the court to help parents and judges achieve the best outcomes for children. Family consultants are considered court experts in handling children's affairs. In the later stages of the case, the judge may request a family consultant to interview the parties involved (the father and mother), as well as the children, to make a comprehensive and detailed assessment of the situation in the family and the needs of the children, and to provide recommendations on the care arrangements that they believe are most in the best interests of the child. This written evaluation report is called a family report, which focuses on the best interests of the minors and must include their views. In addition to hearing statements from parents and others, the most common way for the court to hear the views of minors is through a family report prepared by a family consultant, which is required in approximately 60% percent of child-related dispute cases.³⁷

China's *Law on the Protection of Minors* has initially established the system of family investigation. Article 109 of the *Law on the Protection of Minors* stipulates that in cases involving minors, such as divorce, custody, adoption, guardianship, and visitation, the people's court may conduct social investigations on the relevant circumstances of the minors on its own or entrust social organizations to do so. From the perspective of legislative integrity, China's system of family investigation and family investigators has not been fully established and needs to be improved in the law on family judicial procedures. When establishing the system of family investigators in China, a combination of full-time and part-time positions can be adopted. The court can set up full-time family investigators by itself,³⁸ and it can also hire personnel recommended by women's federations, community-level organizations, and others to serve as family investigators. Family investigators have multiple responsibilities, but one of the essential responsibilities is to understand and grasp the opinions of minors when the court handles matters involving minors, analyze and judge, and submit reports to the court, so that the court can consider the opinions of the minors when making judgments or conducting mediations on matters concerning minors.

C. Establishing mechanisms for representing the interests of minors

In the process of family litigations, when there is a conflict of interests between the parents or guardians of minors and the minors, or when the parents or guardians cannot effectively safeguard the interests of the minors, it is necessary to designate a representative for the interests of the minors. The representative for the interests of the minors shall attend the court proceedings on behalf of the minors and express their opinions based on the best interests of the minors. In family litigations in foreign jurisdictions, many countries and regions indirectly express the opinions of minors and protect their best interests through representatives for the interests of minors. For

37. Michelle Fernando, "Family Law Proceedings and the Children's Right to Be Heard in Australia, the United Kingdom, New Zealand and Canada," 48.

38. In China, some courts have recruited full-time family investigators. For example, in 2021, the People's Court of Yuhuatai District in Nanjing has recruited two full-time family investigators.

example, in the state of Maryland, United States, there is a type of representative for the interests of minors called a Best Interest Attorney (BIA)³⁹ appointed by the court to protect the best interests of the minors. As the BIA for children, they actively listen to the voices of the children, independently assesses what is most beneficial for them, and provide feedback to the court. Regarding matters of guardianship for minors, the BIA independently determines what custody arrangement is most beneficial for the child. The BIA must inform the court of what the child wants, but does not require the court to do what the child wants. The BIA can be appointed by one or both parties as parents, or by the court. They act as the “eyes” of the court to ensure the representation of the child’s best interests. In most cases, the costs of the BIA are borne by the litigants.⁴⁰ In China’s family litigation practice, courts have already explored the implementation of mechanisms for representing the interests of minors, achieving certain results. It is necessary for China to establish a system of representatives for the best interests of minors in family litigations based on experience from outside the jurisdiction. When parents or other guardians cannot effectively protect the best interests of minors in family litigations, the court shall appoint a representative for the best interests of minors, who will speak on behalf of the minors in court and protect their legal rights and interests. The representative for the best interests of minors can be selected from competent authorities for the protection of minor interests, women’s federations, legal professionals, and other organizations and individuals. In litigation, the representative for the best interests of minors should understand the true wishes of the minors and present their opinions to the court in the best interests of the minors through court appearances.

D. Summary

Among the three guarantee mechanisms mentioned above, judges can apply one, two, or all three mechanisms. Based on the specific circumstances of family cases, judges can directly hear the opinions of minors through interviews or other means, or they can appoint family investigators to understand the opinions of minors. They can also designate representatives to express their opinions in court in the best interests of minors. There are similarities in the work of family investigators and representatives for the best interests of minors. Therefore, if the court has already applied the mechanism of family investigators for family investigations, it is not necessary to appoint representatives to participate in the litigation in the best interests of minors. If the judge appoints a family investigator and then needs to designate a representative for the best interests of minors based on the case, the representative can directly obtain relevant opinions of minors from the family investigator in order to present them in court. If the judge does not appoint a family investigator and only designates a repre-

39. In family litigations in Maryland, United States, the representative for the best interests of minors includes three forms: Child’s Best Interest Attorney, Child’s Advocate Attorney, and Child’s Privilege Attorney. The *Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access*, which took effect on December 1, 2019, stipulate the responsibilities of the three forms of representatives for the best interests of minors.

40. Introduction to the Best Interest Attorney, Seebest-interest-attorney, accessed April 10, 2023, <http://www.maryland-lawoffice.com/helpful-resources/about-child-custody-and-support/best-interest-attorney/>.

representative for the best interests of the minors, then the representative needs to understand and grasp the true wishes of the minors through communication with them, and present their opinions in court on behalf of the minors's best interests. In the absence of mechanisms such as a family investigator or a representative for the best interests of the minors, the court can directly inquire into the minors to understand and grasp their true wishes, in order to fully protect their right to express their opinions. Even in cases where mechanisms such as the mechanism for family investigators or the mechanism for representing the interests of minors are applicable, the court can still directly inquire about the minors to better understand and grasp their true wishes, in order to fully protect their right to express their opinions.

IV. Conclusion

In order to strengthen procedural guarantees for minors in family litigations and ensure the best interests of minors, it is necessary to ensure the right of minors to express their opinions in family litigations in China. In the specific process of handling family cases, judges can apply the mechanism of directly hearing the opinions of minors, the mechanism for family investigators, and the mechanism for representing the interests of minors separately or simultaneously. Of course, if there is a conflict between the opinions of minors and their best interests, the court should prioritize the best interests of minors as the fundamental value goal. Therefore, when making judgments, the court should consider the opinions of minors and appropriately listen to their opinions based on their age and level of maturity.

(Translated by *CHEN Feng*)