

L.R. Aliyeva*, G.A. Ilyassova

*Karaganda University of the name academician E.A. Buketov, Kazakhstan
(E-mail: aliyevalyuda@inbox.ru, G.Ilyassova@mail.ru, ORCID ID: 0000-0002-6289-8325,
Scopus Author ID: 57197811182, Researcher ID WOS: AAR-6742-2020)*

The concept, conditions and legal consequences of adoption (adrogation) of a child under the Republic of Kazakhstan legislation

This scientific article discusses the legal framework for the adoption of a child in the Republic of Kazakhstan. The authors analyze the definition of adoption at the present stage in the statutory instruments of the domestic and international standing, as well as doctrinal sources. Special attention is drawn to the fact that, at the moment, the institution of adoption of a child is one of the most significant and favourable forms of legal accommodation of children left without a parental care in any civilized state. The legal norms regulating the adoption (adrogation) of a child and the procedure for consideration of cases of adoption in court in the Republic of Kazakhstan were analysed. The comparative legal analysis, regulatory and other cognition methods form the basis of the methodological background of this scientific paper. The article, also, discusses the main conditions of adoption of a child which exist today. The court judgement about establishment of a child adoption is characterized as evidence confirming the fact of the advent of legal consequences of the considered institution. The legal consequences arising on the basis of adoption of a child are also considered. It is important to identify legal consequences, since they are a certain legal result. The conclusion is formulated that the fact of blood relation is the basis for the occurrence of rights and obligations of citizens as in the law of domestic relations, as well as in different spheres of law.

Keywords: adoption (adrogation), child's rights, adoptive person, adoptive child, legislation about adoption, adoption conditions, legal consequences of adoption.

Introduction

Today, the preservation of rights and protection of the law-stipulated interests of children is considered as one of the principal directions of domestic political activity in the Republic of Kazakhstan.

In order to achieve the purpose of the goals delivered in the main international legal documents and that the norms of domestic legislation with the world standards for improving the quality of life of all segments of the population in all directions, including protecting the rights and legitimate interests of children, our state has to make considerable efforts today.

The Constitution of the Republic of Kazakhstan in article 27 enshrines: "Marriage and family, motherhood, paternity and childhood are under the protection of the state" [1].

According to the Agency for Strategic Planning and Reforms of the Republic of Kazakhstan Office Bureau of National Statistics at the beginning of 2020, there are over 6,110,156 children aged from 0 to 17 years old in our country.

With all the measures implemented, the number of legally free children is not enough for quite a long time. The total number of orphans and legally free children today is about 23,000. Of these, about 4,000 children are foster children of orphanages. The state should pursue the goal of reducing the number of organizations for orphans, and of course, the number of orphans themselves. However, with the whole situation, the number of legally free children is not reduced.

Materials and methods

The article uses common and private scientific cognition methods, which allowed to analyze the point of the study objectively. The issue, purpose and objectives of the research, the usage of a dialectical method helped identify the methodological foundations of the study and clarify the essence of the analyzed concepts.

In order to determine and systematize the theoretical foundations regarding the institution of adoption as a priority forms of the legally free children settlement, a method of scientific analysis and generalization is used.

* Corresponding author's e-mail: aliyevalyuda@inbox.ru

The formal legal method was used to determine the structure and relationships of covered ideas, as to also, review of the pertinent regulations of the Republic of Kazakhstan legislation on the concept, conditions and legal consequences of adopting (adrogation) in the Republic of Kazakhstan.

The comprehensive-textural method is used for in-depth study of the regulations of international acts and national state legislation on relations arising within the institution of adoption (adrogation) in the Republic of Kazakhstan.

Results

World states in accordance with international legal acts, recognize that "the child for the complete and harmonious development of his personality needs to grow in a family environment, in the atmosphere of happiness, love and understanding" [2].

Civilized states at the legislative level provide for establishment of child welfare institute of "vulnerable children" category. This is this way to designate children who were devoid of care, affection, and attention from their parents.

By virtue of its physical, mental and moral state of juvenile, children cannot perceive reality on par with adults. That is why, they necessarily need representatives who perform the functions of parents.

"Vulnerable children" more than anyone else needs to be even more protection of their rights, interests they possess, and have the right to implement them. It is clear that the timeliness of the institution of guardianship, custody and adoption in this case is more than appropriate.

The institution of adoption (adrogation) is traditionally considered as one of the most ancient institutions. It always had a legal form and existed in all the law systems as the best and most preferred form of the device of children left without parental care. The main factor affecting the emergence of a complete complex of parental rights and responsibilities for the subjects of the specified institution is adoption.

Adoption is obviously predetermined by the legally provided relations between the adoptive parents (his relatives) and the adopted child (his offspring). They can be both personal and property character. And most importantly, such relationships are similar to those that exist between parents and their blood children.

The primary goal of the institute under consideration is to ensure children who are turned out to be deprived of concerns and caress from parents, living conditions, as well as situation that promotes their development and education in the conditions as close as possible to the native family. Besides, the relationship arising from adoption is certainly favorably affecting adoptive parents. In the process of adoption, the foundation is laid for satisfying their maternal and paternal feelings. In most cases, there are couples that do not have their own children, they are decided to make a responsible step to accept someone else's child into their family.

At the same time, the Kazakhstan legislator does not see the need for prohibiting persons with their own children, become an adopter for another child. Despite the fact that in recent times there are less examples, in practice they are still found. Mostly, this kind of situation arise in families, where one of the spouses adopts a child of another spouse. This definitely has a positive effect on a common family atmosphere. In practice, the priority in this is largely married couples. For harmonious development of children, they need a full family. It is in it that they will grow surrounded by heat, caress and good on the part of both parents.

An incomplete family has the opportunity to receive a child for adoption providing interests of this child.

The decisive meaning and signification of adoption, in our opinion, consists of the maximum implementation of the entire complex of the rights of "vulnerable child". Therefore, the priority of this complex is the right to live and to bring up in the family.

Discussion

In various social sciences, adoption (adrogation) is always seen extraordinary phenomenon. The predetermination of this institution and the outcome, which is achieved by them, carry quite humane promise and are undoubtedly regarded as socially useful. Children, vulnerable due to the deprivation of parental caress and care, precisely through adoption in someone else's family, acquire a chance to grow in a favorable family atmosphere. The readiness to take into someones family "vulnerable child" is always associated with a conscious volvas solution, which was due to certain reasons. Often, this is the impossibility of healthing their children. Also, the prerequisite for occurrence can serve the desire to strengthen the already available family relations with the child and his father or mother.

In the semantic sense, adoption and adrogation coincide. This is predetermined by the fact that, in both cases, the same legal consequences arise. They comply with the general rules. It follows that, in the law, the definition implying "adoption" applies in the family to adoption of children of either sex. Therefore, in the doctrine and legislation, the definition of "adoption" implies also "adrogation".

The nature of adoption as an institution with legal consequences corresponds to the essence of similar family law institutions governing the relations of parents and children. Therefore, the current law regulating this institute provides for the formation of legal relations similar to the relationships that arise between parents and children who are blood relatives.

The definition of "adoption" exists with deep antiquity. Relationships involving adaptation can be observed in ancient Rome. During the entire existence of this category, a different meaning intended in it.

The term "adopting" comes out of the distant Latin "ADOPTARE" (AD: A Y Optare: Desear) "choose", "wish." In the vocabulary of the Russian language, the Latin Meaning of the category "Optare" is reflected in such words as "optimizing" and "optimal". F. Puig, denoting the definition of "adoption", writes: «Declarar los Romanos Adoptio Imagonature, que la adopción es imagen de imitación de la naturaleza, en lo que a la filiación concierne. En la misma línea, la partida IV decía que adopción tanto quiere decir como prohijamiento, que es una manera que establecieron las leyes por la cual pueden los hombres ser hijos de otros, aunque no lo sean natural mente (título XVI ley 1.). En Roma la institución conoció amplísima difusión con el ejemplo de los emperadores, que recurrieron a ella para asegurar sucesores de su afecto y confianza» [3; 460]. "Adoption is a kind of analogue or reproduction of kinship that exists in nature. IV article says that Adoption "adopción" or adoption "prohijamiento" is a special way provided for by law, consider people to children those whose they are not related to children. In Rome, this method was used among emperors, which thus tried to provide themselves with heirs".

In "Lectures and Research ..." V.I. Sergeyevich we can notice the definition: "Adoption is a way to create a certain tandem between parents and children." [4; 498]. Scientist G.F. Shershenevich considered adoption as "reproduction of a family from the absence of future generation." [5; 662].

In doctrine obviously, the most popular is the view that adoption is the cause of family legal relationship. Contentious however, the question was considered: what legal relationships is there a place here? Parental or just similar to it? Or is it just a prerequisite for the occurrence? So, according to A.G.Goyhbarg: "Adoption entails derivatives from family relationships without natural communication." [6; 163]. This definition is intertwined with a similar G.F. Shershenevich, but again does not disclose the essence of arrangements.

In a short while, scientists noted that the law considers adoption as an agreement, which requires the consent of certain persons [7; 31]. This definition is not quite accurate, since in accordance with regulatory acts there is not enough agreement between certain persons. In addition, the state sanction is also required to these actions expressed in a specific act. At the same time, from the definition incompletely clearly, what kind of relationships are formed and take place as a result of this act.

Most of the authors of the Soviet period at construction of definition "adoption" were started from the legal consequences that it is generated. For example, N.A.Ivanov, Yu.A. Korolev, P.I. Sedugin and others noted that adoption makes sense in voluntary making parental duties towards someone else's child [8; 84]. The position of L.A. Kuzmicheva is clearer: "The main background of parental legal arrangements is adopting" [9; 108–110].

There are also points of view that adoption is aimed at guaranteeing proper education for children in the family. They emphasize that it only equalizes relations arising from the institution of adoption and related relations.

There are authors, seeing at the adoption relationship of ancestry between the adoptive person and the adopted child. In accordance with the point of view Ya.R. Vebers: "Blood relationship is possible not only from blood ties, ... it is a bond of not, natural, but of social character", and therefore it can be based and not on common blood [10; 35]. He also suggests that in a social context, adoption is a full blood relationship. Consequently, adoption is regarded as a prerequisite for parental relationship.

Ye.M Vorozheykin shared a fundamentally opposite opinion. He separates the relationship arising from the adoption of parents and children's relationships and defines it as "legal relations associated with education and alimentation." He drew attention to a significant difference between the legal relationship of parents and adoption [11; 21].

V.N. Zabrodina adheres similar point of view: "First, it is difficult to agree with this opinion, since the genesis of one person falls from another. Secondly, at the moment of child's birth parental right immediately

arises at mother. Thirdly, ways of termination of these legal relations are not similar. Fourth, in relationships about adoption, the emergence of some rights and obligations between the adoptive person and adopted depends up the consent of the adopted who has reached the age of 10, which is not available in the relationships of parents and children. Consequently, at adoption parental relations do not arise, but only equivalent to them" [12; 85-92].

Yu.Bespalov is considering adoption as a way of judicial defense of child's rights. Basis of this approach is the appointment of adoption. In his opinion, the purpose of adoption is the realization of the rights of legally free children, first of all, is the right to life and education in the family and the right to defense [13; 39-41].

Taking all the aforesaid into consideration, it can be noted that many scientists offer to see adoption as a variety of legally free children settlement. Some of them represent adoption as juridical act between the adoptive person and his relatives, on the one hand, and the adopted child, on the other hand, benefit and burden develop into exactly in natural family.

Here adoption is understood as a legal fact and as a foundation for occurrence of an original legal bond between these persons. At the same time, the legal connection between the child with his real parents and relatives biologically sourced ceases its effect. So, adoption is a legal act in parallel and the right-conferring and rights-terminating.

The concept «adoption» dictates the procedure for establishing and stopping the adoption, the rights and obligations of participants in this legal relationship.

Concerning legal consolidation of this concept in the internal laws of the Republic of Kazakhstan, became inoperative law of independent Kazakhstan, regulating family-marriage relations, did not provide it. This gap was replenished with the enactment of the current law - Code "On Marriage (Conjugal) and Family" of 12.26.2011. So, in of Article 1 (9) indicated: "Adoption (adrogation) - the legal form of transference of a child (children) for parenting into one family under authority of court judgment, as a result of which personal non-property and property benefit and burden, equivalent to the benefit and burden of alliance of ancestry arise" [14].

Kazakhstan legislation in power "On Marriage (Conjugal) and Family" provides a special order of adoption, which implies its exercise by court in order of special proceedings as part of civil proceedings. In addition, the Code specifies in detail the adoption by foreign citizens as an alternative form of child's settlement if it is impossible to adopt in his homeland. The regulated judicial order of adoption in Kazakhstan and compliance with all necessary conditions contribute to ensuring the guarantee of the rights of children and strength of legal relations arising between the subjects of this institution.

Adoption is possible when compliance with the main conditions. Ye.M.Vorozheykin and G.K. Matveyev adhere to the point of view that the conditions of adoption is nothing more than a totality of legal facts [15; 309-318].

Civilists-scientists in most cases, only list the conditions for adoption. Law enforcement requires a clear differentiation of these conditions to resolve the controversial moments arising in practice.

According to Abylatipova N.A., Forostyan A.S.: "Any condition is a separate legal fact, the corollary of which are legal consequences along with other legal facts. Conditions are interrelated and interdependent among themselves". Based on these features, they educe the following definition: "The facilities of adopting can be recognized as strict legal requirements applied to persons and relations in the adopting process" [16; 186-192].

In order to separate legal facts and the need to allocate the main criteria for adoption, Baturina N.I. divides the conditions for general and special. For general conditions, it refers all those necessary in all cases to make a positive decision in adoption case. For example, the requirements applicable to adopted, candidates for adoptive parents, to the goals of adoption. Special ones are only those conditions, which are necessarily in the cases provided by law [17; 203].

Conditions of adoption are strictly fixed and governed by the family law legislation of the Republic of Kazakhstan.

Adoption is carried out by a court. Exclusively juvenile children come under adoption. It's connected to minors are unable to protect their rights independently.

It will be observed that the law makes the requirements for the adoptive person that are compulsory for all and, of course, provide preliminary security for adopted child. In this vein, Article 91 (1) of the Family Code of the Republic of Kazakhstan consideres that only adults can be adoptive parents and also exception of persons who cannot [14].

Position of law-making body, fixed in Article 91 (3) of the RK Code "On Marriage (Conjugal) and Family", is not entirely understood: "Persons who are not to take place in marriage (conjugal) against each other cannot in collaboration with adopt the same child" [14]. Today, actual marriage relations are quite frequent, but not properly completed in registering state bodies. But this, in our opinion, should not be considered as an obstacle to the adoption of a child, since the actual marriage relationships involve cohabitation and management of the economy as a whole, and the upbringing of a adopted child in such families will not differ from a similar process in families where marriage is registered officially.

Not only healthy children are subject to adoption, but also children suffering from any diseases. In the latter case, future adopters must know this.

The reverse situation stands with the adopter. The law provides for specific diseases, having which a potential adopter will not be able to become in reality [18].

Despite this, the dishonesty of potential adopters, manifested in concealing information about the signs of their diseases, serves as a frequent basis for the adoption annulment in practice.

Obstacles for the adoption by persons of different nationalities with adoptive legislation of the Republic of Kazakhstan are not envisaged.

In the adoption procedure it is important to obtain the consent of such persons as: adoptive parents, adopted, parents of a child or persons replacing them, the adoptive spouse, if he is not a child adopter.

An important condition for the adoption of the child according to the law is to receive endorsement of his parents if they are not terminated parental rights. If the parents of the adopted child did not reach the age of 16, endorsement of their appropriate adults is required, and in the absence of those, the consent of the body that performs the function of custody or trusteeship.

Ensuring the guarantee of the rights and interests of both a child and parents is the consent of the parents of the child. It plays an important role as well adoption process as directly for the adopter.

With the adoption of a child who has reached 10 years, its consent is required. It is believed that at this age the child is already able to think and express their desires. Adoption against the child's desire is unacceptable. In practice, however, there are often cases when pressure from the adopter was rendered to the child and it can negatively affect the expression of consent or disagreement during the trial.

If the appearance of child turned the age of 10 years is impossible due to its health status, (for example, the child has disability and is limited in movement), the court must take into account his interests. In such cases, learn the opinion of child respecting adopting is probably at the place of child's occurrence [19].

If the adoption of the child is one of the spouses and he is not adopted by both spouses, then the consent of another spouse in writing form is required. The exception will make cases where judge reviewing a case will determine that actual family relationships stopped, the spouses do not live together over 1 year and the place of residence of the applicant's spouse is unknown.

Adoption will certainly entail legal consequences. The court judgement on adoption is proof of confirmation of the fact of the occurrence of consequence in law of considered institution. Properly, additional documents that would also confirm this fact are not necessary.

According to the letter of the law, adoptive parents, first of all, become the owners of parental rights and responsibilities, which at the same time are deprived of the parents of the child by origin. If the adopter in his own will agrees to take over the burden of educating the adopted child, the law will oblige him to bring up a given child as his own, as well as take care of his health.

Through a legal pathway legal consequences of adoption are enshrined by Article 100 of Family Code of the Republic of Kazakhstan [14].

In the process of adoption, children forfeit a rights and obligations towards their biological parents. If, the adopter is only stepfather or stepmother, respectively, the relationship is lost with one of the parents.

The fact of blood relation is a basis for the occurrence of rights and obligations also in other areas of law and legislation, respectively, the subjects of adoption relations become owners.

Conclusion

The domestic law of the Republic of Kazakhstan, governing sphere of family legal relations, establishes various forms of adoption of children for education: guardianship and custody, adoption, patronage. But among these forms of the permanent settlement of legally free children, exactly the adoption (adrogation) has own special place. Kazakhstan legislation discusses it precisely as a priority form of settlement of legally free children.

Summarizing all the above, it should be indicated that in the present period, adoption (adrogation) as the institution of "social" motherhood and paternity can be maximally relate to relationships arising between parents and children in a bloodrelated family.

It should also be noted that the adoption realization as at the national level within the state, so at the international level there must be undoubtedly based on specific legal principles. And these principles found their consolidation as in international acts (first of all, in the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, of December 3, 1986), so in national legislation (The Republic of Kazakhstan Law "On the Rights of the Child", the Republic of Kazakhstan Code "On marriage and family"). Disregard of principles is the basis for the annulment of already committed adoption or refusal in implemented one.

It seems that the constant improvement and development of adoption mechanisms for all children, deprived of parental care, as at the national, so at the interstate level, granting ultimate values of child will have a positive impact the overall situation associated with these relevant questions at all times.

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Л.Р. Алиева, Г.А. Илиясова

Қазақстан Республикасының заңнамасы бойынша бала асырап алудың түсінігі, талаптары және құқықтық салдарлары

Мақалада Қазақстан Республикасындағы бала асырап алудың құқықтық негіздері қарастырылған. Авторлар қазіргі кезеңдегі ұлттық және халықаралық деңгейдегі заңнамалық актілердегі, сондай-ақ, доктриналық қайнар көздердегі бала асырап алу дефинициясын талдайды. Бала асырап алу кез келген өркениетті мемлекетте ата-анасының қамқорлығынсыз қалған балаларды отбасына орналастырудың бүгінгі күні ең маңызды нысандарының бірі болып табылатындығына назар аударылған. Қазақстан Республикасында бала асырап алудың тәртібін, бала асырап алу туралы істі сотта қараудың тәртібін реттейтін құқықтық нормаларға талдау жүргізілген. Зерттеулердің әдіснамалық негізін диалектикалық, жүйелік, салыстырмалы-құқықтық, нормативтік және танымның басқа да әдістері құрайды. Мақалада сондай-ақ бүгінгі күні белгіленген бала асырап алудың негізі талқыланған. Бала асырап алуды анықтау туралы соттың шешімі қарастырылып отырған институттың құқықтық салдарының туындау фактісінің дәлелі ретінде сипатталды. Сондай-ақ, бала асырап алу негізінде пайда болатын құқықтық салдарлар қарастырылған. Құқықтық салдарларды айқындау маңызды, өйткені олар белгілі бір құқықтық нәтиже болып саналады. Туысқандық фактісі тек отбасылық құқықта ғана емес, сонымен бірге құқықтың басқа да салаларында азаматтардың құқықтары мен міндеттерінің пайда болуына негіз болып табылады.

Кілт сөздер: бала асырап алу, баланың құқығы, асырап алушы, асырап алынған бала, бала асырап алу туралы заңнама, бала асырап алу талаптары, асырап алудың құқықтық салдарлары.

Л.Р. Алиева, Г.А. Ильясова

Понятие, условия и правовые последствия усыновления (удочерения) ребенка по законодательству Республики Казахстан

В статье рассмотрены правовые основы усыновления (удочерения) ребенка в Республике Казахстан. Авторами проанализирована дефиниция усыновления (удочерения) в современных законодательных актах национального и международного уровня, а также в доктринальных источниках. Обращено внимание на то, усыновление (удочерение) ребенка сегодня является самой лучшей формой устройства детей, оставшихся без попечения родителей, в любом цивилизованном государстве. Проведен анализ правовых норм, регламентирующих порядок усыновления (удочерения) ребенка, порядок рассмотрения дел об усыновлении в суде в Республике Казахстан. Методологическую основу данной научной работы составили диалектический, системный, сравнительно-правовой, нормативный и иные методы познания. Авторы изучили основные условия усыновления (удочерения) ребенка, существующие на сегодняшний день. Решение суда об установлении усыновления ребенка охарактеризовано как доказательство подтверждения факта наступления юридических последствий рассматриваемого института. Изучены правовые последствия, возникающие на основе усыновления (удочерения) ребенка. Важным является выявление правовых последствий, поскольку они есть определенный правовой результат. Сформулирован вывод о том, что факт родства является основанием для возникновения прав и обязанностей граждан не только в семейном праве, но и в других отраслях права.

Ключевые слова: усыновление (удочерение) ребенка, права ребенка, усыновитель, усыновленный, законодательство об усыновлении (удочерении), условия усыновления, правовые последствия усыновления.

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