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Practical aspects of adoption cases consideration in juvenile courts of Kazakhstan

The article reveals the specifics and features of the consideration of adoption cases of Kazakh children in the juvenile court in line with the national legislation. Consideration of adoption cases was analyzed, including adoption not only by Kazakhstani citizens, but also by foreign citizens. The practice of application of the legislation following from marriage and family legal relations is considered. The article shows statistical data, the comparative analysis of the previous legislation with the current one. The increase in the number of children adopted entails the protection of the child rights and interests. Since the child interests are understood to mean proper family education, and the protection of the child interests means a lot for his future development, and how each of the parents will be able to provide the child with a favorable development. Adoption cases by juvenile courts follow the Constitution of the Republic of Kazakhstan, the code of the Republic of Kazakhstan «on marriage (matrimony) and the family». Social workers, psychologists, teachers participate in the case hearing. Overall, the current practice of the juvenile court with such cases brings a positive result. This approach shows that the state and society give priority to the family education of children, taking care of their development and well-being.

Keywords: the code, regulatory resolution, the constitution, the declaration, the convention, Juvenile court, Kazakhstan, civil procedure code of the Republic of Kazakhstan.

Introduction

Society often faces life situations, where child fate involved. Disputes over children appear, when a child involuntarily find himself in a difficult confusing life situation.

In other words, the court has to resolve disputes appeared from emergency circumstances, which break a minor life style, involving children emotional stress. Disputes resolution need to radically change the situation for the better. That is why it is necessary to know the law well and to be guided in matters of pedagogical nature and child psychology for the least painful resolving the dispute over children. And this kind of knowledge should always be combined with careful attitude to parental rights, parents' feelings, when they deserve it. It is no coincidence, that disputes over children have always been considered the most difficult [1].

For example, the total number of children brought up without a family and children, who are brought up in single-parent families, due to divorce or lack of marriage of the mother, increases every year.

Methods and Materials

The methodological basis of this research is the methods of scientific knowledge. In the process of research, general, particular, as well as special methods of cognition were used: the method of scientific abstraction, the method of system analysis, specifically historical, comparative legal, formally dogmatic, method of addressing other sciences and others.

Discussion

The family has many functions: specific and non-specific. Specific function, that is, arising from the essence of the family, reflecting its features as a social phenomenon and inherent in all stages of historical development. And non – specific-the implementation of which the family was forced or adapted in certain historical circumstances [2; 46]. V. V. Chikin includes birth (reproductive function), children maintenance (existential function) and children upbringing (socialization function) to be the specific functions of the family. Other functions (recreational, leisure, health and well-being of family members, property accumulation, etc.) are non-specific for the family and depend on the specific historical conditions in which the family operates.

After the introduction of the code «on marriage (matrimony) and family» (hereinafter – the Code) on January 18, 2012, the Supreme Court of the Republic of Kazakhstan developed regulatory resolution (hereinafter – the Regulatory resolution) in the first half of 2012. In accordance with the requirements of the new legislation, the regulatory resolutions of the Supreme Court of the Republic of Kazakhstan «on the applica-

tion of the law by the courts in resolving disputes related to the children upbringing», «on some issues of the application of the law «on marriage and family» in cases of children adoption» were developed.

The Code presents the range of relations regulated by family and marriage legislation [3]. The Code establishes the rights and obligations, property and personal non-property relations between family members: spouses, parents and children, and in cases and within the limits provided for by the marriage and family legislation of the Republic of Kazakhstan, between other relatives and other persons. It establishes the conditions and procedure for marriage (matrimony), termination of marriage (matrimony) and its invalidation, determines the forms and procedure for placing orphans and children left without parental care in the family, regulates the procedure for state registration of acts of civil status, defines the functions of state bodies, carrying out state registration of acts of civil status [3]. Thus, I agree with M. Nechayeva opinion, who notes that «the space covered with the family law can be considered as closed» [4].

In accordance with article 27 of the Constitution of the Republic of Kazakhstan of 30 August 1995 (hereinafter – the Constitution), marriage and the family, motherhood, fatherhood and childhood are protected by the state, which is a fundamental point in the legal regulation of family relations [5].

According to the part 1 of article 84 of the Code, adoption is allowed in respect of minor children whose birth is registered in the manner prescribed by this Code, and only in their interests, taking into account the possibilities of ensuring full physical, mental, spiritual and moral development. Also the age, maturity and consent of the child for adoption are taken into account. Respect for human rights begins with respect for the child rights. The lack of due attention on the part of the state to the problem of children may be qualified as non-observance with certain provisions of the universal Declaration of human rights (hereinafter – the Declaration) and the Convention on the child rights (hereinafter — the Convention) by Kazakhstan. The problem of juvenile justice establishment in Kazakhstan becomes increasingly important. Although the term «justice that protects the rights, freedoms and legitimate interests of minors» is more understandable and accurate [6].

Thus, according to the amendments and additions to some legislative acts on specialized inter-district juvenile courts of 14 July 2008 to disputes on children related to the children upbringing along with other disputes [7; 1], referred to the category of cases of adoption.

In this regard, the specialized inter-district juvenile court of Astana (hereinafter — the Juvenile Court) has started hearing of applications of this category since 2008.

Results

The practice of hearing of cases shows that the number of appeals to the courts on adoption of minors by Kazakhstan citizens has increased significantly. The largest number of applications is cases of adoption by stepfathers and close relatives.

The court, when hearing cases of adoption by citizens of the Republic of Kazakhstan, is governed by legislation based on the Constitution of the Republic of Kazakhstan, the Convention on the child rights, to which the Republic of Kazakhstan acceded in 1994 and in accordance with the Code of the Republic of Kazakhstan «on marriage (matrimony) and the family», in particular Chapter 12, which regulates adoption cases. The juvenile court of Astana received 131 applications for child adoption in 2018.

According to paragraph 3 of article 76 of the law «on marriage and family», which became invalid in 2012 and paragraph 9 «rules of transfer of children who are citizens of the Republic of Kazakhstan for adoption to foreigners», approved by the government of the Republic of Kazakhstan dated 12.11.2002. No. 1197, foreign citizens, applying for adoption of a child, had in direct contact with the child with more than two weeks in the presence of the representative of body of guardianship and guardianship. And a copy of a log of visits to adoptive parents of children in the Specialized baby House of Astana city can be evidenced by the provided by the bodies of guardianship and guardianship.

While, the period of communication increased in the current Code – article 85 part 3 of the Code states that citizens of the Republic of Kazakhstan, who permanently live abroad, foreigners applying for adoption of a child shall submit to the authorized body in the field of protection of the rights of children of the Republic of Kazakhstan a written statement on the desire to adopt a child, as well as certificates of income, marital status, health, including mental health, the absence of drug (toxic), alcohol dependence, the absence of a criminal record, personal moral qualities of potential parents., issued by special authorized foreign state authorities and adoption organizations. After documents submission to the authorized body in the field of protection of the children rights of Kazakhstan and with the consent of the adoptive parent to adopt a child, the adoptive parent must have direct contact with the child for at least four weeks.

Based on the specifics of the cases in this category, first of all, the period of communication between the applicants and the child is established, which according to the current requirements must now meet the four-week period. In court, applications are accepted only on condition of compliance with this requirement, by checking the attendance log of the orphanage, providing tickets, direction of the guardianship authority in the orphanage. In addition, the court in awarding judgment takes into account that at the time of hearing of the case in court, this period reaches a month or more. From the testimony of the applicants to the question, what attracts adoption in Kazakhstan, one of the reasons is the fact that in the process of adoption in Kazakhstan is possible direct contact with the child, which allows the adaptation of not only the applicants, but most importantly the child. A communication applicant in the orphanage with a child is very carefully monitored.

Part 4 of article 84 of the Code provides that children, who are citizens of Kazakhstan, may be transferred for adoption to foreigners only if it is not possible to transfer these children to the education of citizens of Kazakhstan permanently residing in the territory of the Republic of Kazakhstan, or for adoption to relatives of children, regardless of citizenship and place of residence of these relatives. It follows from the meaning of this provision of the law, that a child can be submitted for international adoption only if it was not possible to transfer him not only for adoption to the citizens of Kazakhstan, but also to place under trusteeship and foster care.

Hearing of cases in this category is checked by clarifying the question of the demand for the proposed children by Kazakh families, which follows from the court copies of the directions of Kazakh families for adoption in an Orphanage. In addition, this question is carefully learnt; it appears in the proceedings of the court, by questioning the representative of body of guardianship and guardianship, the representative of the Child Home.

According to article 2 of the Rules of the organization of the centralized registration of the children without parental support approved by the order of the Government of 09.09.1999. The first registration of children is performed by body of guardianship and guardianship, Regional registration of children is performed by bodies of management of education of the region, the city, the capital, the centralized registration of children is performed by the Central Executive body in the field of secondary education. Officials of institutions (pre-school education, general education, medical and other institutions) and other citizens who have information about children left without parental care are obliged to report them to the guardianship authorities at the actual location of children. The guardianship authority shall, within three days from the date of receipt of such information, carry out a survey of the living conditions of the child and, in determining the absence of the care of his parents or his relatives, ensure the protection of the rights and interests of the child until the issue of his or her placement is resolved. According to these Rules, the heads of educational, medical and other institutions in which there are children left without parental care, are obliged within seven days from the date when they became aware that the child can be transferred to the family, to report to the guardianship authority at the location of the institution. Within one month from the date of receipt of the information, the guardianship provide the placement of children in a foster family, under guardianship (patronage). And if it is impossible to transfer him to the care of a family, sends information about that child to the authority of the Department of education of the respective administrative-territorial units to account for and assist in the subsequent device of the child to education in families of citizens of Kazakhstan permanently residing on the territory of Kazakhstan. If after a month after the receipt of the authority of education information about the child, such a child was not transferred to the family, under guardianship (patronage), a copy of the child's questionnaire is transferred to the education authority of the region. In case of impossibility to transfer the child to the citizens of Kazakhstan on adoption, trusteeship and guardianship or patronage contract to transfer the child for upbringing in a family in a two-month period, the education authorities of the region are required to report information about the child to the Central Executive body in the field of secondary education. The body forms a national data bank on children left without parental care [8].

To verify these requirements of the law, the court, upon receipt of materials, checks the availability of data on the registration of the adopted child for first, regional and central registration [8].

In accordance with the Code, the child's parents consent is a prerequisite for the child adoption. Parents consent to the adoption of a child must be expressed in a statement, notarized or certified by the head of the institution in which the child is left without parental care, or the guardianship authority at the place of adoption or at the place of residence of parents, and can also be expressed directly in court during the adoption. The consent to the adoption given by the parent in court must be recorded in the record and signed by him personally.

Also, in accordance with part 2 of article 84 of the Code, children are subject to adoption, whose one or both of the parents:

- 1) died;
- 2) abandoned the baby;
- 3) deprived and not restored in parental rights;
- 4) gave consent to the adoption of the child;
- 5) declared legally incompetent, missing or declared dead;
- 6) unknown.

In cases of adoption, the courts should be equally responsible for the protection of the children rights and interests and the protection of the biological parents' rights and interests [8].

Foreign citizens, who want to adopt children of citizens of the Republic of Kazakhstan, are registered in a separate journal. The journal contains information about adoptive parents, their material and financial condition, address of their residence, date of receipt of materials for adoption in the guardianship and trusteeship, their departure.

They are required to submit to the guardianship authority a certificate of financial solvency, marital status, health status, characteristics of the personal moral qualities of potential parents [8].

When a child is adopted by a stepfather or stepmother in accordance with the Code, the conclusion of the guardianship authority on the validity and compliance of the adoption with the interests of the adopted is not required. If the child is aged 10 years before the submission of the application on adoption lived in the family of the adopter, believed to be his parents, the child's consent to adoption is expected.

If necessary, the court may involve to participate in the case the parents or other legal representatives of the adopted child, his / her relatives and other interested persons, as well as the child himself / herself who has reached the age of ten years [9].

Based on the specifics of the cases in this category, the court verifies the indication in the application of information about the adoptive parents, children they want to adopt, their parents, requests for possible changes in the registration of the birth of adopted children, the circumstances with which the law binds the ability to be an adoptive parent, confirming their evidence, as well as the presence in the annex to the application of the following necessary documents:

- the conclusion of the guardianship authority at the place of residence (location) of the child on the validity and compliance with the interests of the adopted adoption;
- the act of examination of living conditions of adoptive parents;
- the copy of the record and birth certificate of the child;
- medical report of the competent authority on the state of health and mental development of the adopted;
- parental consent to the adoption of a child, if required by the Law;
- consent of the child for adoption, if the child has reached the age of 10 years;
- the evidence confirming that the applicant can be an adoptive parent of the child [8].

In case of impossibility of receipt by the applicant of these documents, they shall be demanded by court at the applicant request from the relevant bodies [8].

In addition, the law provides for an age limit between an adoptive parent and an adopted child. The age difference between the adoptive parent and the adopted child must be at least sixteen years and not more than forty-five years. For reasons recognized by the court as valid, the age difference may be reduced. At adoption of the child by the stepfather (stepmother) existence of the difference in age established by point 1 of this article is not required (Art. 92 of the Code).

In resolving the issue of the admissibility of adoption in each case should be checked and take into account the moral and other personal qualities of the adoptive parent (the circumstances characterizing the applicant's behavior at work, at home, the presence of a criminal record for intentional crimes), his health, age, prevailing in the family understanding, the relationship that arose between these persons and the child, as well as material and living conditions of future adoptive parents [8].

The law stipulates that the adoption of a child by a married person requires the consent of the other spouse. In this case, the law equally protects both the interests of the child and the interests of the spouse of a person wishing to adopt a child. In other words, we are talking about the protection of the real family, for the adoption of one of the spouses against the will of another can affect their relationship and negatively affect the child upbringing. In order to ensure the secret of adoption protected by law, the court, in accordance with

article 19 of the Civil procedure code of the Republic of Kazakhstan (hereinafter — CPC RK), considers the category of cases of adoption of children in closed session.

According to articles 152, 166, 168 of the CPC RK, the judge is obliged within five days from the date of receipt of the application to decide on its adoption for the production of the court and to make a decision on the initiation of civil proceedings. After that, to prepare the case for trial in order to properly resolve it. Civil cases arrangement for trial is a necessary part of the stage of proceedings in the court of first instance. It creates the necessary conditions for a full, comprehensive and objective study of the evidence presented in the court session, the actual rights and obligations of the applicant, subject to the application of substantive law, the legal and substantiated judicial act pronouncement [8].

For this purpose, according to article 166 of the CPC RK, the judge must specify in the determination what actions should be done. Compulsory aims for preparing a case for trial of each case are:

- 1) clarification of circumstances relevant to the correct resolution of the case;
- 2) definition of legal relations between the parties and the followed law;
- 3) resolution of the composition of persons involved in the case and other participants in the process;
- 4) determination of the evidence that each party must provide in support of its claims [9].

It should be noted by the studied cases, that the judge's approach to civil cases related to adoption is fully consistent with the stage of the principles of civil procedural law, which indicates the proper preparation of the case for trial. Before the appointment of the case to the hearing, the judge finds out sufficiently the circumstances of the case, analyzes the presentation of the evidence, checks the justification of the requirements of the law on adoption [8]. According to item 1.2.3 of the article 93 of the Code, adoption is allowed if the family of the adopter has conditions for normal physical, mental, spiritual and moral development and education of the child. Adoptive parents may be adults of both sexes, except for:

- 1) person recognized by the court as incapable or partially capable;
- 2) spouses, one of whom is recognized by the court as incapable or partially capable;
- 3) person deprived by the court of parental rights or restricted by the court in parental rights;
- 4) person suspended from the duties of a legal guardian or trustee for improper performance of the duties assigned to him by the laws of the Republic of Kazakhstan;
- 5) former adoptive parents, if the adoption is canceled by the court through their fault;
- 6) person who, for health reasons, cannot exercise parental rights. The list of diseases when a person cannot adopt a child, take him under guardianship or patronage, is established by the Government of the Republic of Kazakhstan;
- 7) person, who does not have a permanent place of residence;
- 8) person with non-traditional sexual orientation;
- 9) person, who has unexpunged conviction for committing an intentional crime at the time of adoption;
- 10) person without citizenship;
- 11) man without a registered marriage (matrimony), except in cases of the actual upbringing of a child not less than three years in connection with the death of the mother or deprivation of her parental rights;
- 12) person, who at the time of adoption does not have income that provides the adopted child with the subsistence minimum established by the legislation of the Republic of Kazakhstan;
- 13) person, who registered in drug addiction and psycho neurologic clinic [3].

For practicability of the interview an adopted child who has reached the age of 10 in court to find out his or her opinion on the issue, the court must first find out the opinion of the guardianship authority. So that the presence of the child in court does not have an adverse effect on him or her.

The survey finds out whether the child's opinion is the result of the influence of one of the parents or other interested persons, whether he / she is aware of his / her own interests in expressing this opinion and how he / she justifies it.

The law stipulates that the adoption of a child by a married person requires the consent of the other spouse. In this case, the law equally protects both the interests of the child and the interests of the spouse of a person wishing to adopt a child. In other words, we are talking about the protection of the real family, for the adoption of one of the spouses against the will of another can affect their relationship and negatively affect the child upbringing.

The practice of adoption of Kazakh children by foreigners has shown that, for example in the family courts of the United States fix our court decision by its court decision, that is, it is necessary for the acquisition of us citizenship by a child. After that, according to the court decision, the adoption agency monitors families with adopted children. This agency can take the child in case of discrepancy or improper upbringing

of the adopted child, and the child is returned home. Over the past 4 years, no similar cases have occurred in practice.

Conclusions

From the analysis of the cases received for examination, it follows that in most cases the applicants submitted the consent of the parents to the adoption of the child, expressed in a statement certified by a notary or certified by the head of the institution before the application. The parents of the adopted child were involved in the case, in order to take into account the interests of the child and biological parents.

In accordance with the article 96 of the Code, the child adoption by one of the spouses requires the written consent of the other spouse for adoption, if the child is not adopted by both spouses. The court shall involve the minors parents as interested persons. The process of adoption of minors by Kazakh citizens has become more in-depth, which is a full analysis, not beyond the law. The court also practices for consideration of adoption cancellation cases. Adoption cancellation occurs between the plaintiff and the defendant. Even though the defendant agrees with the claim, the fact that the case is considered in the lawsuit. As a result, it should be noted that the approach to civil cases related to adoption is fully consistent with the stage of civil procedural legislation. Specialized inter-district juvenile courts consider cases and disputes arising on the basis of the Constitution, laws, other laws and regulations, international treaties of the Republic. Thus, adoption analysis shows the growth of adopted orphans in Kazakhstan.

We have concluded that the consideration of adoption cases in the juvenile court is compulsory in order to protect the rights and interests of the child. Of course, the interests of the child mean proper family education and beneficial development. Therefore, the current legislation meets modern international standards.

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Д.М. Мутубаева

Қазақстан ювеналдық соттарында бала асырап алу туралы істерді қараудың тәжірибелік қырлары

Мақалада бала асырап алу туралы істерді сотта ұлттық заңнамаға сәйкес қараудың қырлары мен ерекшеліктері қарастырылған. Тек қана Қазақстан азаматтарымен емес, шетелдік азаматтармен де бала (қыз) асырап алу туралы істерге талдау жүргізілген. Неке-отбасылық құқықтық қатынастардан туындайтын заңнаманы қолдану тәжірибесі қарастырылған. Статистикалық көрсеткіштер келтіріліп, бұрынғы қолданыста болған және қазіргі кезде қолданыстағы заңнамаға салыстырмалы-құқықтық талдау жүргізілген. Балаларды асырап алу санының көбеюі баланың құқықтары мен мүдделерін қорғауға алып келеді, себебі баланың мүддесі деген тиісінше отбасылық тәрбие беруді, ал баланың мүддесін қорғау дегеніміз оның болашағы қалай қалыптасады және әрбір ата-ана өз баласына қандай қолайлы даму жағдайын қалыптастырады дегенді білдіреді. Баланы асырап алу туралы істер Қазақстан Республикасының Конституциясына, Қазақстан Республикасының «Неке (ерлі-зайыптылық) және отбасы» кодексіне сәйкес қарастырылады, әлеуметтік қызметкерлерді, психологтарды, педагогтарды қатыстыру қажеттігі зерттелген. Жалпы, кәмелетке толмағандар істері

бойынша соттарда қалыптасқан аталмыш санттағы істерді қарау тәжірибесі оңды нәтиже беруде. Біздің көзқарасымыз бойынша, мұндай қадам мемлекет пен қоғамның баланың отбасылық тәрбиесіне басымдық беріп, оның әл-ауқатының жақсаруын қамқорлығына алып отырғанын куәландырады.

Кілт сөздер: кодекс, нормативтік қаулы, Конституция, Декларация, Конвенция, ювеналдық сот, Қазақстан, ҚР ӨҚК.

Д.М. Мутубаева

Практические аспекты рассмотрения дел об усыновлении в ювенальном суде Казахстана

В статье раскрыты специфика и особенности рассмотрения дел об усыновлении казахстанских детей в суде по делам несовершеннолетних в соответствии с национальным законодательством. Проведен анализ рассмотрения дел об усыновлении (удочерении) детей не только гражданами Казахстана, но и иностранными гражданами. Рассмотрена практика применения законодательства, вытекающего из брачно-семейных правоотношений. Приведены статистические данные, проведен сравнительный анализ ранее действовавшего законодательства с ныне действующим. Увеличение количества усыновления детей влечет за собой защиту прав и интересов ребенка, поскольку под интересами ребенка понимается надлежащее семейное воспитание, а под защитой интересов ребенка подразумевается то, как сложится его будущее и каким образом каждый из родителей сможет предоставить ребенку благоприятное развитие. Дела об усыновлении ювенальными судами рассматриваются в соответствии с Конституцией Республики Казахстан, Кодексом Республики Казахстан «О браке (супружестве) и семье», усматривается необходимость привлечения социальных работников, психологов, педагогов. В целом, сложившаяся в суде по делам несовершеннолетних практика рассмотрения дел указанной категории приносит положительный результат. На наш взгляд, такой подход свидетельствует о том, что государство и общество отдают приоритет семейному воспитанию детей, проявляя заботу об их развитии и благосостоянии.

Ключевые слова: Кодекс, нормативное постановление, Конституция, Декларация, Конвенция, ювенальный суд, Казахстан, ГПК РК.

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