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## **The order of consideration of special proceeding cases in civil process**

This article is devoted to the features of disposal of legal cases of special proceeding in civil procedural law. The basic problems arising by disposal of legal cases of special proceeding are considered. The authors analyze the operating civil legislation on special proceeding as one of kinds of civil legal proceedings. The authors investigate questions of the legal nature of special proceeding, a subject of judicial activity and the list of cases of special proceeding. The various theoretical positions about considered legal relations are exposed to the analysis also in this article.

*Key words:* civil procedural law, special proceeding, civil procedural legislation, civil proceeding, legal facts, evidentiary facts, legal regulation, legal capacity, restoration of violated rights, notarial actions.

The special proceeding is an independent type of civil legal proceedings on the categories of the civil cases protected by the law specially referred to court competence which are characterized by lack of dispute about the right and application of special means and ways of protection in which the court by establishment of the legal facts (actions, events, states) carries out protection of the interests of citizens and organizations.

The legal regulation is possible only on the basis of the legal facts which aren't raising doubts. The realization of the subjective right for pension can take place if age of the interested person, his seniority, disability are established. For receiving inheritance it is necessary to know the facts of the related relations of a certain degree, maintenance, etc.

In the special proceeding the legal and evidentiary facts are established, and the conclusion about legal status of the citizen is sometimes drawn or other legal issues are resolved (on the basis of established facts, for example, the citizen admits it is untraceable or incapacitated or the issue of transfer of property in property of the state is resolved etc. For example, the fact of the birth of the person is the legal fact attracting legal consequences, and the fact of registration of the birth — evidentiary.

There are two orders of establishment (ascertaining) of the required facts: administrative (including notarial) and judicial. The obvious facts — the child's birth, marriage registration, etc., i.e. the facts made just before the person of appropriate authority or confirmed by official documents can make sure in administrative order. For example, the notary certifies the following facts:

- a) Findings of the citizen in the live;
- b) Findings of the citizen in a certain place;
- c) Identity of the personality of the citizen with the person represented in the photo shown by this citizen;
- d) Time of presentation to the notary of documents.

The facts unascertainable, i.e. or not being subject to official registration, or not confirmed by official documents in view of their loss, make sure in a judicial proceeding as demand research of the proofs confirming the corresponding fact. If in claim proceeding establishment of the corresponding legal fact is necessary for protection of the subjective right, in special proceeding the interest of the applicant is limited to ascertaining of the fact. The issue of the subjective rights following from the fact is resolved later, outside special proceeding [1; 144].

Because of the fact that division of vital circumstances on having legal value and legally indifferent is very conditional, the legal importance of the fact established in affairs of special proceeding has to be determined specifically by each case. For determination of the legal importance of the fact it is necessary to find out the purpose of this fact, i.e. those consequences which approach would be wished by the applicant. Therefore the fact admits legal if for achievement of the purpose pursued by the applicant it has the right-conferring value.

Besides, in special proceeding rather big circle of the evidentiary facts, i.e. such from which existence it is possible to draw a conclusion on existence (or absence) the required (legal) facts can be established. So, the fact of the birth of the person is the legal fact attracting legal consequences, and the fact of registration of

this birth — the evidentiary fact. Therefore the essence of special proceeding consists in protection of legal interests by establishment of the legal or evidentiary facts [2; 199].

In the order of special proceeding the existence or lack of the following facts of various characters is established by court:

1) Actions — for example, the facts of registration of adoption (adrogation), marriage and divorce, acceptance of inheritance, notarial actions or on refusal in their commission etc.;

2) Events — for example, the death facts in certain time and under certain circumstances, the births, accident, etc.;

3) States — for example, the facts of finding of the person in maintenance, the related relations, the actual marriage relations, incapacity of the citizen, unknown absence of the citizen etc. [3; 229].

The facts obvious, i.e. made just before the person of appropriate authority or confirmed by official documents, can make sure administratively (the child's birth, death, marriage registration, divorce, etc.).

The facts unevident, i.e. or not being subject to official registration (maintenance, the actual marriage, acknowledgement of paternity, condition of being a missing person, etc.), or not confirmed by official documents in view of their loss (the facts of registration of marriage, accessory of documents of title), make sure in a judicial proceeding as demand research of the proofs confirming the corresponding fact.

Lack of interest in protection of the subjective right causes absence in special proceeding of dispute about the right. The law obliges the court in case of emergence in special proceeding of the dispute on the right subordinated to judicial authorities, to leave the statement without consideration and to suggest interested persons to resolve dispute in the claim order. So, for example, on the case of establishment of the fact of the maintenance necessary for receiving inheritance, in case of initiation of dispute by other successors it is necessary to leave the statement for establishment of the fact without consideration, and to explain to interested persons that they can resolve dispute in the claim order.

The impossibility of permission in special proceeding of dispute about the right doesn't mean «indisputability» of this type of legal proceedings in general. In some cases and in special proceeding the disputes which are, however, not disputes on the right, but disputes on the fact can be resolved [4; 350].

However the concept and essence of special proceeding, and also category of the cases referred to special proceeding in science of civil procedural law is debatable. The questions of the legal nature of special proceeding, the subject of judicial activity and the list of cases of special proceeding belong to theoretical problems of special proceeding.

In chapter 30, in subsection 4 of Civil Procedural Code of the Republic of Kazakhstan general provisions of special proceeding and the considered cases in this type of proceeding are expressed.

Investigating the question of the legal nature and essence of special proceeding scientists of procedural law come to various conclusions [3; 223].

The main emphasis is placed on indisputable nature of the cases referred to special proceeding (A.A.Melnikov).

The main attention is paid to the purpose of the procedural activity of court directed on protection of the interests of citizens and the organizations (R.F.Kalistratova) protected by the law.

Emphasis is placed to the subject of special proceeding, consisting in establishment of the legal fact or state, and also control of legitimacy of actions of bodies of notariate and registration of acts of civil status. (V.P.Volozhanin).

Also in the order of special proceeding the legal and evidentiary facts are established, and the conclusion about legal status of the citizen is sometimes drawn or other legal issues are resolved (on the basis of established facts, for example, the citizen admits as whereabouts unknown or incapacitated or the issue of transfer of property in property of the state. is resolved).

The cases of special proceeding are considered by courts by the general rules of civil legal proceedings with the withdrawals and additions established by the civil procedural legislation [5].

The general principles of civil process — legality, optionality, directness etc. are applied and in special proceeding. The cases of special proceeding take place the same stages of civil process, as a case of claim proceeding. The same rules of proof, maintaining the protocol, pronouncement of judgments etc. extend to cases of special proceeding.

The lack of dispute about the right predetermines peculiar features of procedural forms of special proceeding. There are no parties (the claimant and the respondent). The person initiating proceedings of special proceeding is called as an applicant.

The interested persons are involved in participation in the cases of special proceeding (citizens, organizations, financial bodies, social welfare authority, etc.). The third parties don't participate in cases of special proceeding.

The impossibility of permission in special proceeding of dispute about the right and absence of the claim non-use of typical claim institutes is caused: recognition and refusal of the claim, agreement of lawsuit, security for a claim, counterclaim, etc.

The list of the cases considered as special proceeding is defined by the procedural law. The cases concern to them:

- 1) about establishment of the facts having legal value;
- 2) about recognition of the citizen as whereabouts unknown and about the announcement of the citizen the dead;
- 3) about recognition of the citizen as partially incapacitated or incapacitated;
- 4) about compulsory hospitalization of the citizen in a psychiatric hospital;
- 4-1) about restructuring of the financial organizations and organizations entering into bank conglomerate as the parental organization and not being the financial organizations;
- 5) about bankruptcy of legal entities and individual entrepreneurs;
- 5-1) about rehabilitation of legal entities;
- 5-2) about double-quick rehabilitation of legal entities;
- 6) about recognition of movable thing unpossessed and recognition of the right of municipal property for real estate;
- 7) about establishment of abnormalities of civil registration;
- 8) according to complaints to notarial actions or refusal in their commission;
- 9) about restoration of the rights on the lost securities to bearer and to order securities (procedure to declare lost documents void);
- 10) about adoption of the child;
- 11) about recognition of the organization which is carrying out extremism or terrorist activity on the territory of the Republic of Kazakhstan and (or) other state extremist or terrorist, including about establishment of change of the name by it, and also about recognition of the informational materials imported, made and (or) extended to territories of the Republic of Kazakhstan, extremist or terrorist;
- 11-1) about exclusion of the foreigner or stateless person out of borders of the Republic of Kazakhstan for violation of the Republic of Kazakhstan legislation;
- 12) about recognition of production of foreign mass media extended on territories of the Republic of Kazakhstan containing information contradicting acts of the Republic of Kazakhstan, illegal.

Also consideration and other cases of special proceeding can be provided by the law.

This group of cases is considered by the judge individually. Concerning separate categories of cases of special proceeding the law accurately defines a circle of interested persons according to statement of whom legal proceedings can be excited.

The structure of the persons participating in special proceeding differs from structure of the persons participating in claim proceeding. As in cases of special proceeding there is no dispute about the right, there are no parties also (claimants and respondents), and the third parties. Only applicants and interested persons participate.

The prosecutor is obliged to participate in consideration and disposition of some cases of special proceeding by law.

Having summed up the results it is possible to draw a conclusion that special proceeding is one of types of civil legal proceedings. Already the name indicates existence of the specific signs characterizing special proceeding.

In science of civil process there isn't a lot of the special works of monographic character devoted to research of problematic issues in special proceeding. Essence of special proceeding and differences of special proceeding from other types of civil legal proceedings it is complicated since contains in the civil procedural legislation few norms devoted to general provisions of special proceeding. So far less attention of essence of special proceeding, in comparison with was paid what attention was paid to consideration of categories of special proceeding.

Special proceeding as a type of civil legal proceedings is devoted to consideration of civil cases on which it is necessary to confirm in a judicial proceeding existence or absence of the legal facts or circumstances on which emergence, change or the termination of personal or property rights of citizens depends.

In special proceeding also civil cases on which it is necessary to confirm existence or absence of the indisputable right are considered (establishment of the fact of possession and using of real estate, cases of restoration of the rights on the lost securities to bearer or to order securities, cases of restoration of the lost proceeding). In these cases protection of the right can't be carried out in a claim order as there is no dispute about the right and the interested person to anybody doesn't impose any requirements.

In special proceeding cases on which the court establishes the legal status of the citizen are considered: the citizen admits incapacitated in one case or is limited by the capable; minors appear completely capable (emancipation), and in others — the dead or is unknown the absent [3, 368].

In the cases of special proceeding dispute about the fact which demands judicial confirmation as not always the fact established by court is obvious is possible, and concerning its existence there are inconsistent proofs, opposite judgments.

At considering of the case in order of special proceeding the court has to be convinced of existence or not existence of the facts by check and comparison of the available proofs, identification of contradictions in judgments of interested persons. Thus, dispute about the fact in special proceeding is possible if dispute about the fact didn't turn into dispute about the right [6; 218].

The rules of claim proceeding of an order of judicial proceedings of claim cases in most part are the general rules and are applied at trial of other civil cases. The special proceeding isn't an exception.

The cases of special proceeding are considered in court of the first instance by rules of claim proceeding with the withdrawals and additions established by the civil and procedural legislation. The activities of court of the first instance for consideration and disposition of civil cases, protection of the violated rights and interests protected by the law find the expression in special acts which are called as resolutions of the first instance court.

These resolutions have to meet the requirements of a civil procedural form at which non-compliance lose the legal importance.

The civil procedural law, establishing certain requirements to the form and content of judicial resolutions, creates the general model of the judicial resolution into which then the concrete conclusion of court on a case in point «fits».

The resolution of the first instance court represents the law-enforcement act of judicial authority which is taken out in the course of consideration and disposition by court of the first instance of a civil case structure, the contents and order of removal of which are strictly defined by the civil procedural law.

Thus the law provides the exact list of civil cases which trial has some specifics and, therefore, has a number of differences (insignificant character) from an order of trial of claim cases [3; 91].

The norms of Civil Procedural Code, regulating an order of maintaining protocols of court session, requirements imposed to the judgment (legality and validity), check of legality and validity of judicial resolutions, extend and on the cases of special proceeding [5].

By production of special proceeding the principles of civil procedural law are used by court, they define what have to be judicial proceedings of civil cases to correspond to ideals of legality, justice and truth. The basic principles of civil legal proceedings which are important guarantees of justice on civil cases:

- principle of legality;
- principle of implementation of justice only court;
- principle of independence of judges;
- principle of publicity;
- principle of an oral proceedings;
- principle of equality of participants;
- principle of directness of judicial examination;
- principle of competitiveness; etc.

At the same time due to the absence of the parties and dispute about the right in this type of proceeding action of the principle of competitiveness is shown to a lesser extent, than in the claim proceeding. The principle of the free exercise of material and procedural rights by the parties to legal proceedings works also not fully, as in special proceeding aren't applied such typical for claim proceeding institutes as the settlement agreement, recognition of the claim, refusal of the claim, security for a claim.

In case of dispute subordinated to court about the right, the court takes out ruling about consideration of the case as claim proceeding. In the order of claim proceeding case is considered in a place of its excitement. Need of implementation of requirements of form and content of the statement of claim, in the time estab-

lished by court is explained to the applicant and other interested persons. In case of objections of interested persons the court can submit the case to other court by rules of territorial jurisdiction.

In case of non-execution of ruling of court in due time the statement is left without consideration, and their right for presentation of the claim in accordance with general practice is explained to interested persons.

Due to the absence in similar cases of the party (i.e. the claimant), the person who appealed to court with the statement is called as the applicant. Citizens, the organizations, the trade-union organizations, mental health medical institutions which address for protection of the interests can be applicants. Excitement in court of cases of special proceeding happens not presentation of the claim concerning the specific respondent and submission of the statement of claim, and to confirm with filing of application with a request this or that circumstance having legal value or to confirm the indisputable right.

Persons who are allocated with the right for an appeal to the court can be carried to number of applicants. For example, in article 302 of Civil Procedural Code the right for an appeal to the court with the statement for recognition of the citizen is limited by the capable or incapacitated is provided to family members, close relatives (parents, children, brothers, sisters) irrespective of accommodation, joint with them, to custody and guardianship agencies, to psychiatric and psychoneurological institution [5].

As applicants various groups of citizens and the organizations, the trade-union organizations, psychiatric medical institutions which address for protection of the interests depending on concrete category of cases of special proceeding can also appear in court. Such procedural position in the basic is held by citizens and the organizations, whose rights and interests are directly infringed by the judgment on case.

Such applicants can be, for example, the citizen for whom the established legal fact generates certain rights; members of the family of the citizen recognized restrictedly as the capable; the direct participant of notarial proceedings (the citizen or the organization) to whom it is refused commission of notarial action or which is made incorrectly etc.

Attraction or the admission in process for special proceeding of interested persons happens by ruling of court in which the bases determined by facts of the case are given. The court is obliged to recruit interested persons which list is concretized depending on category of cases of special proceeding, and also facts of the case.

Interested persons in cases of special proceeding — it is the same participants of civil process, limits of validity of the judgment on any concrete case when the judgment can affect the rights and legitimate interests of these persons can potentially have impact on the subjective rights and which duties that as a result can cause a duty of commission of any decisions by them or change their legal status.

Depending on degree of interest it is possible to allocate citizens who have direct material and legal interest. There are, for example, the actual holders of the document in procedure to declare lost documents void; the citizen concerning whom the issue of restriction of capacity or recognition is resolved by the incapacitated; parents (parent) on cases of establishment of adoption (adrogation), etc.

As interested persons the civil registry office which refused to make corrections to the made record, the state notary or the notary who is engaged in private practice, the made notarial actions or refused his commission, savings bank in procedure to declare lost documents void, military registration and enlistment office on cases of establishment of the fact of accessory of the certificate of wound at the front, the holder of the document to bearer for procedure to declare lost documents void, representatives of public authorities, etc. are also attracted by court.

Attraction in process of participants for special proceeding happens at the request of the applicant, at the initiative of court or the interested person. An important guarantee of the correct hearing of cases of special proceeding is participation in them of the prosecutor and state bodies.

The prosecutor as in the form of initiation of proceedings can participate in cases of special proceeding, and going into the begun case for making the conclusion.

The participation of state bodies obligatory in consideration of some cases:

- Cases of recognition of the citizen it is limited capable or about recognition of the citizen by the incapacitated.
- Cases of recognition recovered the capable.

In special proceeding in which there are no parties, the third parties can't take part.

However by hearing of cases of special proceeding it is impossible to confirm at the same time existence of the fact and the right of the interested person which follows from this fact [3; 7].

At the solution of a question of the statement reception or examination of a case on its merits as special proceeding existence of dispute on the right which is subject to settlement in other court will be established, the court has to refuse reception of such statement or stop proceeding.

If the dispute on the right subordinated to general jurisdiction court is established, the court has to take out ruling about leaving of the statement without consideration in which has to explain to the applicant and other interested persons their right to resolve dispute in the order of claim proceeding. It isn't casual that at establishment of uniform (universal) procedural model of administration of justice on civil cases separate withdrawals of rather procedural regulations of consideration and settlement of cases of special proceeding by general jurisdiction court are provided in Civil Procedural Code.

In this regard it is possible to speak, first, about existence in such proceeding of a specific subject of judicial protection, secondly, about possibility of application of special means and ways of its protection. This hypothesis, in particular, can be confirmed with that a procedural security measure in cases of special proceeding is the statement which unlike the claim doesn't contain material legal requirements. Therefore the person appealing to court with the statement for consideration of the case in order of special proceeding is called as the applicant, and all other persons recruited in process — interested persons. There are no third parties, there are no parties — the claimant and the respondent, therefore, isn't present also possibility of application of claim institutes.

As shows the analysis, the disagreements existing in the doctrine on a subject of judicial protection in cases of special proceeding concerned only some categories of the civil cases considered in order of special proceeding.

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### **Азаматтық іс жүргізудегі ерекше сот өндірісі бойынша істерді қарастыру тәртібі**

Мақала азаматтық іс жүргізу құқығындағы ерекше сот өндірісі бойынша істерді қарастырудың ерекшеліктеріне арналған. Ерекше сот өндірісі бойынша істерді қарастыру кезінде туындайтын негізгі мәселелер қарастырылды. Авторлар азаматтық сот ісін жүргізудің бір түрі ретінде ерекше өндіріс туралы қолданыстағы азаматтық заңнамаға талдау жүргізді, сондай-ақ ерекше сот өндірісінің құқықтық табиғаты, сот қызметінің пәні мен ерекше сот өндірісі бойынша істердің тізімі туралы сұрақтарды зерттеді. Сонымен қатар қарастырылатын құқықтық қатынастар туралы доктриналық ілімдер де жан-жақты талданды.

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### **Порядок рассмотрения дел особого производства в гражданском процессе**

Статья посвящена особенностям рассмотрения дел особого производства в гражданском процессуальном праве. Рассматриваются основные проблемы, возникающие при рассмотрении дел особого производства. Авторы анализируют действующее гражданское законодательство об особом производстве как одним из видов гражданского судопроизводства. Исследуются вопросы о правовой природе особого производства, предмете судебной деятельности и перечне дел особого производства. Также в статье подвергаются анализу различные доктринальные положения о рассматриваемых правоотношениях.

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