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Some problems of custody and guardianship establishment over minors in the Republic of Kazakhstan

The problem of the organization of minors deprived of parental care historically attracted the attention of states and society. In recent years, this question has gained special relevance. In “Strategy Kazakhstan–2050: a new political course of the established state”, first President of Kazakhstan, N. Nazarbayev emphasized that the protection of the rights of women and children is an important part of the new social policy. On the basis of the analysis of the current family–marriage, civil legislation of the Republic of Kazakhstan and law enforcement practice, topical issues of ensuring the rights and interests of minors under custody and guardianship are considered. The authors have noted that custody or guardianship are among the traditional institutions of ensuring guaranteed by the state constitutional rights, since the fate of a minor citizen in need of social patronage is determined by the most favorable way, on the one hand, close to family living, on the other one — there is a great positive potential, providing control over compliance with its legal rights and interests. The theoretical foundations and aspects of law enforcement provisions on the establishment, functioning and termination of custody and guardianship over minors is in the focus of a local point. By providing the results of their own theoretical research and in order to expand legal preconditions of the definition of custody and guardianship and to ensure the interests of orphaned children and children deprived of parental care the authors offer proposals that are aimed for improving the current domestic legislation in the designated sphere.

Keywords: Convention on the Rights of the Child, minor, child, protection, guard, custody, guardianship, guardian, child rights.

Introduction

The Republic of Kazakhstan, being a State Party to the UN Convention on the Rights of the Child, assumed the obligations provided for by Part 1 of Article 20, in accordance with which: “A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State” [1]. In order to ensure the right to such protection, states parties in accordance with their national laws provide a replacement of the care for such a child. Today in the Republic of Kazakhstan, custody and guardianship are the most widespread family forms of education of children deprived of parental care for the purposes of their alimentation, upbringing and education, as well as to protect their rights and interests. Currently, the total number of orphaned children and children deprived of parental care in our country — 24,239, of which children that were transferred for custody and guardianship to the families of Kazakhstani citizens — 17,360 [2].

The transfer of an orphaned child under custody and guardianship allows to ensure his right to life and education in the family through the creation of favorable conditions for him and for his family education. Accordingly, the legal regulation of relations associated with such a family device of juveniles, taking into account those changes that occurred and occur in our society, acquires particular importance. The notion of the place of family law in the national law system has changed, the use of not typical types of contracts has been frequent, the tendency of expanding the sphere of state participation in civil law relations has been observed. These circumstances are important prerequisites for discussing the possibility of applying civil law mechanisms to relations of custody and guardianship.

The issues related to the legal status of the child and the protection of his legal rights and interests have long been in the focus of scientists. So, in the works of M.F. Vladimirsky-Budanov, A.I. Zagorovsky, I.A. Pokrovsky, G.F. Shershenevich, and others, some questions of protection of the rights of minors have reflected. In the Soviet and modern period, the contribution to the scientific research of custody and guardianship as a civil legal institution was made by N.M. Yershov, O.S. Ioffe, L.Yu. Mikheyev, E.A. Abashin, M.V. Antokolskaya, M.V. Vlasov, E.M. Vorozheikin, S.A. Muratova, V.P. Nikitina,

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L.M. Pchelintseva, E.A. Chefranov, O.A. Khazov, and others who gave exclusive attention to the matter of use of various forms of education of children deprived of parental care.

N.A. Nalitzko, in the dissertation work “Providing and protecting the rights of children in the Russian Federation and in the Republic of Kazakhstan: constitutional and legal analysis”, was engaged in a comprehensive study of the constitutional and legal aspects of ensuring and protecting the rights of the child in Russia and Kazakhstan. M.V. Andriyashko, in the monograph “Custody and guardianship over minors in the Republic of Belarus”, analyzed the current possibilities of the organization of orphaned children and children deprived of parental care. The subject of analysis of Kazakhstani scientists, such as M. Zhaskayrat, D.A. Dzhandarbek, U.K. Ikhsanov, G.A. Ilyassova was mainly the actual problems related to the definition of the legal status of a child in society and the family, the protection of his rights and interests. Published information and analytical reports on the status of children in the Republic of Kazakhstan, in which the analysis of the main aspects of the situation of children, as well as the measures taken aimed for improving the system of protecting the rights and interests of children also testify about the big attention to the indicated problem.

The above factors testify the relevance of the problem and give grounds for the conclusion of studies conducted by many authors in some cases do not fully comply with changes in the socio-economic life of the state and society. In addition, the need to identify general tendencies in the development of legislation on the security and protection of the rights of minors, remaining without care and find themselves, in connection with this, in a socially dangerous position, identifying legislative guarantees for the security and protection of their rights in the current legislation of the Republic of Kazakhstan, insufficient development of institute of custody and guardianship in a wide range of the use of various forms of education of children deprived of parental care forced to refer to the topic of this research.

The purpose of the research, on the assumption of the relevance of the indicated topic, is in a comprehensive, legal study of relations for custody and guardianship over minors; identifying existing problems in the organization of the system of custody and guardianship; scientific substantiation of the prospects for the development of the institution of custody and guardianship. In accordance with the specified purpose, the following tasks were made and resolved: to analyze the current family-marriage and civil legislation of the Republic of Kazakhstan and some foreign countries in the sphere of regulation of relations on custody and guardianship over minors, deprived of parental care; to justify the worthwhileness of the appointment of custody of the orphaned children; to explore the concepts of “security”, “protection”, “protection method” arising within the framework of family legal relations related to minors; to consider the features of the legal status of guardians and fosterling children; to determine the role of custody and guardianship authorities in protecting the rights and interests of the child.

Experimental

During the study, the comparative legal, logical, dialectical methods of the science of family and civil law, family, civil, administrative legislation, as well as the practice of applying custody and guardianship as a family form of minor persons deprived of parental care were used.

Results and Discussion

In accordance with Paragraph 1 of Article 27 of the Constitution of the Republic of Kazakhstan, marriage, family, motherhood, paternity and childhood are protected by the State. There is no norm in the content of the Constitution of the Republic of Kazakhstan, which would directly point to the priority of family education of children. However, this conclusion follows from the being and meaning of the Article of the basic law of our country [3].

According to G.A. Vasilevich, the family is a natural habitat of a child. Therefore, the upbringing of children in the family is protected and encouraged by the State. The child cannot be deprived of the family. The responsibility of both parents is to create conditions for the residence of a child in the family. In the event of dissolution of marriage or for some other reasons, when parents do not live together, he has the right to know both parents [4; 131]. Relying on the family responsibility for the education of children, the legislation recognizes the family by the subject of law that is able to bear such responsibility under the fear of applying family legal sanctions. The responsibility of the family for the upbringing of children is provided for in Article 24 of the Law of the Republic of Kazakhstan “On the Rights of the Child in the Republic of Kazakhstan” [5]. According to Article 70 of the Code of the Republic of Kazakhstan “On Marriage (Matrimo-

ny) and Family”, the parents are responsible for the education and alimentation of children, their protection [6].

At its essence, custody and guardianship over minors pursue the goals of taking care and the realization of the protection of the rights and legitimate interests of children who have no families or children whose families do not fulfill their responsibilities for children. The basis for the establishment of custody (guardianship) over minors has a complex set of facts, which includes:

- age (as well as mental condition) of the child;
- the lack of parents, deprivation of parental rights, restrictions on parental rights, recognition of parents incapable, parental diseases, long lack of parents, avoiding parents from raising children or from protecting their rights and interests including parents’ fails in taking their children from educational organizations, medical organizations, providing social services, or similar organizations, which pose a threat to the life or health of children or interfere their normal education and development;
- the need of a child in protection of interests and in organization in a family or a children’s institution;
- appointment of a guardian or trustee, in other words administrative act [6].

In accordance with Article 120 of Family and Marriage Legislation and Paragraph 6, “On approval of the Rules for the Exercise of the Functions by the State in Custody and Guardianship”, the local executive bodies of the regions, the cities of the regional, republican importance, the capital are custody and guardianship authorities [7]. The establishment of custody and guardianship over minors by local executive bodies testifies to the administrative nature of the procedural aspect of the establishment.

The legislation of foreign countries is familiar with another procedure for establishing custody and guardianship over minors. So, in accordance with the Article 12 of the Law of the Republic of Poland dated July 12, 2001, “On the courts of general jurisdiction”, the establishment of custody and guardianship over minors is included in the competence of the department for family affairs and the juvenile district courts (family court) [8].

The courts consider cases on the establishment of custody or guardianship for minors in accordance with the Code of the Kyrgyz Republic on children. In particular, according to Part 1 of Art. 21 of the Code of the Kyrgyz Republic on children, to the powers of the court in the procedure prescribed by the legislation of the Kyrgyz Republic refers to:

- 1) the consideration of cases of the direction of children in boarding institutions and special schools;
- 2) the consideration of cases of adoption, the establishment of custody and guardianship;
- 3) taking measures to prevent the illegitimate and unsound in principle direction of the child to the group home;
- 4) the direction of children deprived of parental care, in boarding institutions that have passed accreditation;
- 5) the revision of the reasonableness of finding a child in a boarding school, a special school for children distressed in special conditions of education, or a psychiatric hospital [9].

In modern Romania [10; 159] and the USA [11; 37], the establishment of custody and guardianship is also included in the competence of the court.

The current family-marital legislation of the Republic of Kazakhstan provides the identification and accounting of orphaned children and children deprived of parental care made by all individuals and legal entities that have become known about the absence of parental care.

Individual persons and legal entities are obliged to immediately inform the bodies that perform the functions of custody and guardianship, about orphaned children, children deprived of parental care, at their location. An analysis of legislation leads to the conclusion that state bodies and institutions are designed to identify the cases of ill-being of a child and respond to them, incorporating:

- 1) custody and guardianship authorities operating under local executive bodies;
- 2) authorized educational and health authorities;
- 3) commissions for cases of minors;
- 4) juvenile liaison office of bodies of the internal affairs of the Republic of Kazakhstan;
- 5) officials of medical organizations, etc.
- 6) officials of institutions (pre-school educational institutions, general education institutions and other institutions) and other citizens who have information about children [6].

In accordance with Paragraph 2 of Article 122 of the Code of the Republic of Kazakhstan “On Marriage (Matrimony) and Family”, the guardian or a trustee is appointed with their consent or according to their application in writing by the custody and guardianship authority at the place of residence of the person who is

in need in the establishment of guardianship or custody. As V.G. Tikhinya notes, “in practice, such consent is expressed in the relevant statement into the custody and guardianship authority” [12; 407]. The requirement for the consent of the guardian and trustee is mandatory along with the rule of the need to obtain the written consent of the parents for the establishment of guardianship or custody, which, due to the temporary lack of justifiable reasons, cannot personally raise the child [6].

V.G. Tikhinya reasonably highlighted that “the appointment of one of the spouses by a guardian or a trustee without the consent of another spouse can lead to the negative consequences for the person under care” [12; 408]. The indicated factor corresponds to the principle assigned to the norms of the current family-marriage legislation of the Republic of Kazakhstan, according to which all questions of the marriage and family relations of the spouses, they decide together, by mutual agreement and on the basis of equality. We believe that separate accommodation of spouses does not deprive them of the right to be guided by the title principle.

Also, in legal literature at different times, attention was paid repeatedly to the following, according to N.G. Yurkevich: “...If the child turned 10 years old, his opinion, as a rule, should be taken into account” [13; 196]. The mandatory identification of the child's desire who has reached the ten-year-old age is supposed to be in a wide range of family legal relations: for example, in cases where a family-legal relationship, the opinion of which is detected by the child, is the result of legitimate behavior of participants in family legal relations (adoption; change of family name, name, child's patronymic name; the return of the child to parents, if the reasons that served as the foundations for the removal of a child from custody, etc.) are disappeared. In addition, the desire of the child who has reached the ten-year-old age is also detected in cases where the family-legal attitude is the result of the unlawful behavior of some of the participants in family legal relations (cancellation of adoption as a measure of family and legal responsibility for the improper fulfillment of adoptive persons of their duties). Consolidation in the norm of clause 3 of Article 122 Marriage and Family Code rules that when choosing a guardian or a trustee should be taken into account, including the desire of a person who need in custody or guardianship that has reached 10 years, testifies to the desire of the domestic legislator to agree on the norms, to eliminate collisions, to simplify law enforcement practice [6].

It should also be indicated that when choosing a guardian or trustee, his personal qualities and the ability to fulfill the responsibilities of the guardian or trustee should be considered thoroughly. An approach was also formed, according to which only adults are allowed to carry out functions for custody and guardianship. The legislation of neighboring states directly provides for the demands on the age of candidates for guardians and trustees: they can only be persons of majority age. Thus, the Civil Code of the Russian Federation and the norms of the Family Code of the Russian Federation provide that only persons of majority age and capable may be appointed guardians (trustees) of children [14; 340]. The norms of the Family Code of Ukraine establish that the “the trustee, the guardian of the child may be at its consent of an emancipated capacitive person” [15].

The legislator imposes certain requirements for the personality of the guardian and trustee, in addition to the requirements for its age. The establishment of certain criteria and strict compliance with the requirements is aimed to exclude from the range of persons who want to carry out functions to educate minors and the protection of their personal and property rights, such citizens who are not able to fulfill these functions due to the state of health or grounds recognized by socially significant.

So, only persons of majority age can be guardians or trustees, with the exception of:

- persons recognized by the court incapable or limitedly capable;
- persons deprived of parental rights or limited by the court of parental rights;
- suspended from the duties of the guardian or trustee for the improper execution of obligations entrusted to him by the Law of the Republic of Kazakhstan;
- former adoptive parents, if adoption is cancelled by the court by their fault;
- persons who, on medical grounds, cannot carry out the obligations of a guardian or trustee;
- persons who do not have a permanent place of residence;
- persons who have an unreimbursed or unexpended conviction for committing an intentional crime at the time of the establishment of custody (guardianship),
- persons destitute of nationality;
- male people who are not in registered marriage (matrimony), except in cases of actual education of a child at least three years due to the death of a mother or the deprivation of her parental rights;

- persons who at the time of establishing custody or guardianship do not have an income providing the person under care of the subsistence minimum established by the legislation of the Republic of Kazakhstan;
- persons who are registered in narcological or psycho-neurological dispensaries;
- persons who have or had a record of criminal conviction undergoing or undergone to criminal prosecution for criminal infractions: killing, deliberately causing harm to health, against public health and morality, sexual immunity, etc.;
- citizens of the Republic of Kazakhstan, who permanently residing in the territory of the Republic of Kazakhstan who did not undergo psychological training in the procedure prescribed by Paragraph 4 of Article 91 of this Code (with the exception of close relatives of the child).

Historically, the administrative procedure for appointing guardians and trustees for minors appeared later. It was preceded by order, in accordance with which the guardian was determined by the parents of the child.

Parent who properly performs his duties for the upbringing and alimentation of minor children, has a full and priority right to control their future, support them and take care of them. As N.M. Yershova aptly notes, “no way to justify the prohibition of parents in case of death to express his will on the appointment of one or another person by the guardian or trustee over the remaining minor children”. “Defining a guardian or trustee for a minor child in case of his death is a personal non-property right of the parent. It is inalienable and indescribable, belongs to the parent by the law” [16; 64].

The only parent of a minor child is entitled to determine the guardian or trustee for a child in the case of his death. The parent can be made corresponding instruction in a statement filed to the custody and guardianship body at the place of residence of the child. The statement of the parent to determine in the case of his death a guardian or trustee must be signed by the parent with his own hand, indicating the date of the compilation of this statement. The parent's signature should be certified by the Head of the custody and guardianship authority or in cases, where the parent cannot appear in the custody and guardianship authority, under a notarial procedure [17]. The provisions of the Federal Law of the Russian Federation “On custody and guardianship” [18] and the Code of the Kyrgyz Republic on children [9] also provides for the provision of the only parent of the right in case of his death in a statement to indicate a person who will carry out responsibilities for custody and guardianship for a minor [19; 17].

Of course, the custody and guardianship authorities are obliged to check whether the candidacy corresponds to the statement, the general requirements applicable for guardians in administrative procedure. In other circumstances, when the candidate defined by the parent of a child, signification of defects and non-compliance with the requirements, the custody and guardianship authority is entitled to reject such a candidacy and appoint another person according to general rules. We believe that a fully capable parent, who has not deprived of parental rights, properly realizing responsibilities for the upbringing and alimentation of his minor children, has the right to function in the interests of children and to choose those who are able to carry out qualified care for minor children in case of their death.

At the same time, the legislative consolidation of the norm on the right of the only parent in case of his death is to determine the minor child of a guardian or a trustee in a statement filed to the local executive body at the place of residence can be implemented. The worthwhileness of providing the ability to implement by such method inalienable and indescribable parental right in this way if the parent is the only one, if to add Article 122 of the Code of the Republic of Kazakhstan “On Marriage (Matrimony) and Family” by a new item below: “Guardian or trustee can be defined in a statement of the only (one) parent of a minor. The application is given to the custody and guardianship authority at the place of residence of a minor in writing, the parent's signature is subject to a certificate. The statement indicates a person who will fulfill the responsibilities for custody and guardianship regarding a minor in the event of the death of a singular (one) parent. The application may be changed at any time. For the appointment of the person specified in the statement, guardian or trustee, his consent is required”. The proposal complies with the principle enshrined in Article 12 of the Declaration on social and legal principles related to the protection and prosperity of children, especially when the transfer of children to education and their adoption at the national and international levels. In furtherance of implement the right of parents for the definition of a guardian or trustee for a minor child, as well as the rights of children for education in family conditions, it is proposed to be based on the principles relating to the protection and prosperity of children, especially when the transfer of children to education and their adoption at the national and international levels adopted by General Assembly of United Nations organization in 1986. The essence of the principle is that “in solving all the questions about the transfer of a child

for education to another family, future participation should take on future adopting parents and, if possible, the child himself and his own parents” [20; 158].

The custody or guardianship is established for twenty working days from the moment when the corresponding authorities have known about the need to establish for a person a custody or guardianship or custody of property. At the presence of deserving attention circumstances, the guardian or trustee may be appointed by the custody and guardianship authority according to place of residence of the guardian or trustee. If the person, who needs establishing custody or guardianship, is not appointed guardian or trustee, the execution of the responsibilities of the guardian or trustee is temporarily imposed on the custody and guardianship authority at the place of identification of a person who is in need of establishing of guardianship or custody [6]. Guardians or trustees of persons who need in custody or guardianship and those who are in relevant organizations of education, medical organizations, organizations of social protection of the population are the administrations of these organizations. Temporary stay of the person under care in an educational organization, a medical organization, an organization providing social services, or other organizations, including for orphaned children and children deprived of parental care, in order to obtain medical, social, educational, or other services or in order to ensure the temporary accommodation of the person under care for the period when the guardian or the trustee cannot fulfill its responsibilities regarding the person under care, does not terminate the rights and obligations of the guardian or trustee in relation to the person under care [21; 18].

The basis of the occurrence of relations between the guardian or trustee and the person under care is the act of the custody and guardianship authority on the appointment of a guardian or trustee. In the act of custody and guardianship authority about establishment of custody (guardianship), the duration of validity of the custody and guardianship relations may be specified, which is limited to two main ways:

a) indicating a certain period of validity of custody and guardianship;

b) an indication of a certain event that cancels the custody and the guardianship, for instance: before the restoration of the person's under care capacity; until the end of serving the term of deprivation of one of the parents of person under ward ship; before reaching the age of fourteen years of person under ward ship.

The trustee in respect with a minor citizen who has reached the age of fourteen years can be appointed by the custody and guardianship authority at the request of such a minor citizen with an indication of a particular person. The custody and guardianship authority take an act of refusal to appoint a guardian or trustee of the person specified by the parent or parents of a minor citizen or the minor citizen who reached the age of fourteen only if such an appointment is contrary to civil legislation or family legislation or the interests of the child [7].

The research of the peculiarities of the establishment of custody and guardianship over minors in the Republic of Kazakhstan made it possible to divide the causes and circumstances that influenced the need to establish custody or guardianship – to absolute and relative. The relative reasons for the establishment of custody or guardianship are associated with the temporary lack of parents caused by extenuating circumstances (parental treatment due to illness, business trip). In such cases, custody and guardianship can be established under the written statement of parents, indicating the reasons why parents or the only parent cannot do parental duties, the period for which the guardian or trustee should be appointed, as well as the obligation to keep the child during his stay in the family of guardian [22, 14].

The absolute reasons for the establishment of custody or guardianship are caused by the forwardness of circumstances directly provided for in the law as the basis for the establishment of custody and guardianship. Such grounds may be caused as guilty actions (deprivation of parental rights; the removal of children from parental custody without deprivation of parental rights; finding parents for wanted file; finding parents in places of detention in custody; serving the parents of sentences in the form of arrest, restrictions of freedom, deprivation of freedom; leaving children by parents in health care organizations) and innocent (death of parents or the only parent; the recognition of parents as incapable; the recognition of parents as whereabouts unknown; the declaration of parents to be deceased; the disease of the parents, intervenient the fulfillment of parental duties) [23;192].

It is proposed for the establishment of a guardianship of minors and the establishment of a custody over minors to understand the activities of custody and guardianship authorities aimed at the emergence of legal relations between the guardian or trustee and person under ward ship or person under care due to the forwardness of legally significant circumstances. The administrative procedure for the establishment of custody and guardianship over minors consists of a number of interrelated and interdependent consecutive actions, carried out by the custody and guardianship authority aimed for achievement the goals of the custody and

guardianship, formed in the norms of family married legislation, consisting in the education of orphaned children and children deprived of parental care and the protection of personal non-property and property rights and legitimate interests of these children.

The achievement of these goals is mediated by the solution of the custody and guardianship authorities by a number of consecutive tasks, which according to the organizational basis is invited to divide into three groups: aimed at establishing, to monitor and termination of guardianship. At the same time, the solution of each individual task is subordinated to the achievement of the general goals of the custody and guardianship. The lack of a modern classification of the reasons for the establishment of guardianship and the custody, the deadlines to which the custody and guardianship are established, as well as the subjects that perform the functions of guardians and trustees, make it difficult to understand the institution being investigated. We offer to highlight the following classification criteria:

- the nature of the reasons for the establishment;
- the establishment deadline;
- the subject performing the functions of the guardian and trustee.

Taking into account the proposed criteria, we can allocate:

1) by the nature of the reasons for the establishment:

– the reasons for a voluntary nature — the establishment of custody or guardianship at the request of the parents of a minor in their temporary absence, caused by respectful reasons (treatment due to illness, a business trip);

The causes of forced nature — in the loss of parental custody: in connection with innocent circumstances (the death of parents or one of them; the recognition of parents as incapable; recognition of parents is whereabouts unknown; the declaration of parents to be deceased; parental disease that intervenient parental duties); guilty circumstances (deprivation of parental rights; the removal of children from parental custody without deprivation of parental rights; finding parents for wanted file; finding parents in places under guard; serving the parents of sentence in the form of arrest, restrictions on freedom, deprivation of freedom; abandonment of children by parents in health care organizations).

The establishment of custody and guardianship takes precedence over the circumstances and the reasons that caused the need for a minor of guardian or trustee. Such circumstances can be both events (the death of a single parent) and actions (deprivation of the face of parental rights). Depending on the compliance with the norms of action, which caused the need to establish guardianship or custody, may be legitimate (parental disease that impede the implementation of parental rights and the implementation of duties) and illegal (overindulging of parental rights and child abuse);

2) by the term of custody and guardianship:

- long-term establishment — set for a long time (from six months before the age of majority);
- short-term establishment — set for a period of less than six months;

3) on a subject, carried out guardianship or custody:

- custody and guardianship, executed by citizens (guardians and trustees);
- custody and guardianship, executed by legal entities (group home);
- custody and guardianship, executed together both by citizens and legal entities in the distribution of duties.

Carrying out activities aimed at establishing of guardianship or custody, authorities provide information on the procedure for establishing of custody and guardianship over children, lists and forms of documents that necessary for the establishment of guardianship or custody, accept statements of candidates for guardians and trustees, request from the corresponding authorities and organizations information and documents on candidates to guardians and trustees, collect documents with respect to the child, make the conclusion about presence of conditions in his family necessary to educate children and satisfaction of their basic life needs and include it in the act of examination of the living conditions of the candidate in guardians and trustees, conduct preparing a draft decision of the custody and guardianship authority to establishing custody and guardianship over the child and the appointment of a guardian or trustee. When making a decision on the transfer of a minor deprived of parental care, the state-owned software for family forms of the organization is important to indicate in solving an appointment point (cancellation) payments for the alimentation of minor ward. It must be borne in mind that in accordance with the norms of the family-marriage legislation of the Republic of Kazakhstan with the aim of protecting the rights of minors, the presentations of their interests over minors can establish guardianship at the temporary absence of guardianship from parents, the so-called

guardianship without status and payments. Such a guardianship is temporary and can lead to the deprivation of parents, performance of parental duties, parental rights for a long time [22; 195–196].

The authorities, exercising functions on guardianship or trusteeship, at the place of establishing custody or guardianship within the five-day period from the date of the decision to establish custody or guardianship over the child and the appointment of the guardian or trustee, give the last one the latter certificate for the right to represent the interests of a minor who deprived of parental care. The person is considered as a guardian or trustee from the day specified in the decision of the custody and guardianship authority for the establishment of custody or guardianship over the child and the appointment of a guardian or trustee. The issue of a certificate to a guardian or trustee to the right to represent the interests of a minor bears testimony to the termination of relationships on the establishment of custody and guardianship and achievement of the purposes in hand [6].

Conclusions

In this regard, the awareness by the legislator of the importance and significance of the custody and guardianship authorities have led to a significant reforming of the activities of the last ones for the avoidance of conflicts or unregulated moments by the legislation. So, in consequence of the aforementioned reasons, the custody and guardianship authorities are classified as local executive bodies; their powers are refined, the place is emphasized as the main interlink between the party taking in under the guardianship (custody) and persons in need of this.

1. Under the establishment of custody of minors and the establishment of a guardianship over minors, it was proposed to understand the activities of custody and guardianship authorities, aimed at the occurrence of legal relations between the guardian or trustee and person under wardship or person under care according to the forwardness of legally significant circumstances.

2. The absence of the current classification of the reasons for the establishment of custody and guardianship, types of the deadlines to which the custody and guardianship are established, as well as the subjects performing the functions of guardians and trustees, make it difficult to understand the institution under research. It was proposed to allocate the following classification criteria: the nature of the reasons for the establishment; deadline of establishment; the subject performing the functions of the guardian and trustee.

3. For the purposes of improvement the legal regulation of relations related to the establishment of custody and guardianship over minors, it was proposed to complement Paragraph 2 of Article 122 of the Code of the Republic of Kazakhstan “On Marriage (Matrimony) and Family”, which enshrines the possibility of determining the guardian or trustee for minors in a statement of one (the only one) parent in case of his death, submitted to the custody and guardianship authority. The implementation of the proposal will reflect the inalienability of the right of parents to determination of the guardian or trustee for the child in case of his death and will allow to apply the positive experience of other countries.

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Қазақстан Республикасында кәмелетке толмағандарға қорғаншылық және қамқоршылық белгілеудің кейбір мәселелері

Ата-анасының қамқорлығынсыз қалған кәмелетке толмағандарды орналастыру мәселесі тарихи түрде мемлекет пен қоғамның назарында. Соңғы жылдары бұл мәселе ерекше өзектілікке ие. «Қазақстан — 2050» Стратегиясы қалыптасқан мемлекеттің жаңа саяси бағытында жаңа әлеуметтік саясаттың маңызды бөлігі әйелдер мен балалардың құқықтарын қорғау болып табылатындығы ерекше көзделген. Мақалада Қазақстан Республикасының қолданыстағы отбасылық-неке, азаматтық заңнамасын және құқық қолдану тәжірибесін талдау негізінде қорғаншылық пен қамқоршылықтағы кәмелетке толмағандардың құқықтары мен мүдделерін қамтамасыз етудің өзекті мәселелері қаралды. Авторлар қорғаншылық немесе қамқоршылық мемлекет кепілдік берген конституциялық құқықтарды қамтамасыз етудің дәстүрлі институттарының бірі екенін атап өтеді. Өйткені бір жағынан, отбасында тұруға жақын, екінші жағынан, оның заңды құқықтары мен мүдделерінің сақталуын бақылауды қамтамасыз ететін үлкен оң әлеуеті бар әлеуметтік қамқорлыққа мұқтаж кәмелетке толмаған азаматтың тағдыры жақсы жағынан анықталады. Кәмелетке толмағандарға қорғаншылық пен қамқоршылықты белгілеу, олардың қызмет етуі және оларды тоқтату тәртібі туралы ережелердің теориялық негіздері мен құқық қолданудың негізгілері басты назарда болу керек. Авторлар өздерінің теориялық зерттеулерінің нәтижелерін ұсынған және қорғаншылық пен қамқоршылықты белгілеудің құқықтық алғышарттарын кеңейту және жетім балалар мен ата-анасының қамқорлығынсыз қалған балалардың мүдделерін барынша оңтайлы түрде қамтамасыз ету мақсатында анықталған саладағы қолданыстағы отандық заңнаманы жетілдіруге бағытталған ұсыныстар жасаған.

Кілт сөздер: бала құқықтары туралы Конвенция, кәмелетке толмағандар, бала, қорғау, қамқоршылық, қорғаншылық, қамқоршы, бала құқықтары.

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Некоторые проблемы установления опеки и попечительства над несовершеннолетними в Республике Казахстан

Проблема устройства несовершеннолетних, оставшихся без попечения родителей, исторически привлекала внимание государства и общества. В последние годы этот вопрос приобрел особую актуальность. В «Стратегии – 2050: Новый политический курс состоявшегося государства» подчеркивается, что важной частью новой социальной политики является защита прав женщин и детей. В статье, на основе действующего семейно-брачного, гражданского законодательства Республики Казахстан и правоприменительной практики, рассмотрены актуальные вопросы обеспечения прав и интересов несовершеннолетних, находящихся под опекой и попечительством. Авторами отмечено, что опека или попечительство являются одними из традиционных институтов обеспечения гарантированных государством конституционных прав, поскольку наиболее благоприятным образом определяется судьба несовершеннолетнего гражданина, нуждающегося в социальном покровительстве, с одной стороны, близкой к проживанию в семье, с другой — имеется большой положительный потенциал, обеспечивающий контроль за соблюдением его законных прав и интересов. В центре внимания ученых — теоретические основы и аспекты правоприменения положений о порядке установления, функционирования и прекращения опеки и попечительства над несовершеннолетними. Авторами предложены результаты собственных теоретических исследований, и с целью расширения правовых предпосылок определения опеки и попечительства и обеспечения интересов детей-сирот и детей, оставшихся без попечения родителей, наиболее оптимальным образом внесены предложения, которые направлены на дальнейшее совершенствование действующего отечественного законодательства в указанной сфере.

Ключевые слова: Конвенция о правах ребенка, несовершеннолетний, ребенок, защита, охрана, опека, попечительство, опекун, права ребенка, попечительство.

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