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## Проблемы правового регулирования суррогатного материнства в Республике Казахстан

Данная статья посвящена проблемам правового регулирования суррогатного материнства. Отмечено, что вопрос о суррогатном материнстве законодательно не нашел однозначного разрешения не только в Республике Казахстан, но и в зарубежных государствах. Определена актуальность вопросов: является ли суррогатное материнство решением проблемы бесплодия; каким образом регулировать проблемы, связанные со статусом суррогатной мамы и эмбрионов; и других, которые становятся все более актуальными по мере развития высоких технологий в области медицины. Авторами предпринята попытка исследовать существующие научные изыскания ученых различных отраслей знаний, взгляды религиозных догм по определению места и значения суррогатного материнства в современный период.

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### Development of alternative ways of civil disputes adjustment

This article is devoted to the problems of application of alternative ways of civil disputes adjustment as an effective remedy of settlement of the legal conflicts. The question about concept and types of alternative ways of settlement of civil disputes legislatively didn't find univocal resolving in the Republic of Kazakhstan. The maximum realization of the rights of participants of civil legal proceedings, timely protection and restoration of the violated rights and personal freedoms, it is possible to reach by development of institutes of amicable dispute resolution therefore the legal nature of alternative ways of legal conflicts settlement during the modern period is studied in article.

*Key words*: civil legal proceedings, settlement arrangements, simplification of the legal proceedings, alternative ways of settlement of disputes, mediation.

The constitution of the Republic of Kazakhstan guarantees to each citizen the right for judicial protection of the rights and freedoms. The judicial recourse for protection of the violated subjective right and legitimate interest — wide, originally democratic, constitutional law in which availability of justice is taken shape. Equality of all before the law and court is fixed in the Constitution of the Republic of Kazakhstan (Art. 14), and also the right to the qualified legal aid (Art. 13) [1]. The protection of the rights of citizens is realized in civil and criminal legal proceedings.

In the Republic of Kazakhstan justice functions independent from the legislative and executive authorities and has strictly competence defined in the Constitution of the Republic of Kazakhstan and laws. The special role in modern conditions belongs to justice on civil cases. From total of the cases considered by courts, the prevailing number is made by civil cases. Therefore justice implementation on civil cases as specific state function consists in providing appropriate application of laws by a way of restoration both

the violated right, and the broken balance in civil legal relationship. That is justice is called as the prominent French jurist of the XIX century Alexis de Tokvil noted in the fullness of time, «to replace idea of violence with idea of the law» [2; 6].

Consideration and settlement of civil cases affects the subjective rights and legitimate interests of considerable part of private persons and legal entities. Therefore, it is difficult to overestimate a justice role in protection of the rights and freedoms of citizens, the organizations, the statement of principle of social justice, the prevention of offenses, education of respect for the law, the rights, to honor and the dignity of citizens.

The specified problems of civil legal proceedings can be successfully realized only at the most strict respecting the legitimacy as one of the most important conditions of strengthening of legal basis of the state and public life, functioning of the constitutional state constructed in Kazakhstan.

According to the Concept of legal policy of the Republic of Kazakhstan for the period from 2010 to 2020 the civil procedural law is intended to provide availability of justice, the maximum realization of the rights of participants of civil legal proceedings, timely protection and restoration of the violated rights and personal freedoms, interests of society and the state. Statutory regulations of the existing civil procedural legislation, pursuing these aims, have to consider fully the occurring changes caused by fast development of economy and need of settlement of legal disputes, increase of legal literacy of citizens [3].

One of the factors defining development of process of democratization in the country is providing to everyone availability of justice, and also fair and rather fast settlement of the legal conflicts. Ways of achievement of such prosperity are various, in particular, in the State of the Nation of President of the Republic of Kazakhstan — the Leader of the nation Nursultan Nazarbayev to the people of Kazakhstan «Strategy Kazakhstan – 2050»: the new political policy of the established state» is specified by one of the main directions of Strategy realization by citizens of the right for judicial protection which is guaranteed by the Constitution. For this purpose it is necessary to simplify the process of administration of justice, having relieved it of excessive bureaucratic procedures. At the same time for unloading of courts it is necessary to continue development of institutes of extrajudicial settlement of disputes [4]. It obliges scientists-jurists to revise the existing civil procedural legislation, separate institutes of civil procedural law.

Judicial reform carried out in the Republic of Kazakhstan is aimed at the statement of the self-sufficient and independent judicial authority, capable to protect the rights, freedoms and legitimate interests of citizens and other legal entities. Achievement of this result isn't possible without studying of practice of realization of problems of civil legal proceedings as effective justice assumes achievement by court of the purposes and the tasks fixed by existing civil procedural law (Art. 5 of CPC of the Republic of Kazakhstan).

The existing Civil Procedural Code of the Republic of Kazakhstan is the code, one of the first on the former Soviet Union space unifying civil legal proceedings. With adoption of the Civil Procedural Code of the Republic of Kazakhstan certain steps towards simplification of civil legal proceedings are taken: writ proceedings and trial of claim cases in the defendant's absence (chapters 13 and 24 of Civil Procedural Code of the Republic of Kazakhstan) are entered. However cardinal change of the civil procedural form which is unmanageable and demanding considerable expenses by overwhelming quantity of civil cases considered in court, didn't happen. In this plan it would be desirable to stop on some questions of improvement of the Civil Procedural Code of the Republic of Kazakhstan regulating an order of administration of justice on civil cases.

Here it should be noted two basic moments, from our point of view, complicating procedure of administration of justice on civil cases. First, often continuance of trial is caused by numerous adjournment of trial of case, in consequence of absence any of participants of process, presentation of the counterclaim, and need of representation or disclosure of additional evidences, attraction to participation in case of other persons, need of commission of any other procedural actions.

The listed circumstances testify quite often to low-quality preparation of cases for public hearing. One of the reasons of it is legislative imperfection. Secondly, norms about case preparation practically don't provide measures for achievement of the agreement between disputing subjects, without bringing the begun case to judicial proceedings. In this regard, questions of application of settlement arrangements need to be regulated particularly in the Civil Procedural Code.

Thus the stage of preparation of case to judicial proceedings could combine successfully activities for preparation of case to judicial proceedings and on dispute settlement. Advantages of application of procedures of dispute settlement at a stage of preparation of case to judicial proceedings are seen in the following: first, the judge in parallel with implementation of preparation of case can render assistance to the parties

in dispute settlement that will promote more thorough training of case with detailed clarification of positions of the parties; secondly, it will help to the parties to fast track settlement of the disputable relations, to estimate the possible continuity of development of judicial proceedings and to come to conclusion about its need, and also to keep business relations with the partner [5; 19].

According to M.A. Manabayeva, for optimization of stage of preparation of case to judicial proceedings and legal proceedings simplification, it is necessary to add part 2 of article 166 of CPC of the RK with new task — compromise of the parties. In spite of the fact that compromise of the parties possibly on any piece of judicial activity, at a stage of preparation of case in the court of the first instance its expediency and big effectiveness is obvious [6;16].

In case of unsuccessfulness of attempts of settlement, civil process gains further development, the case is submitted to stage of judicial proceedings where it is subject to settlement according to the general rules.

The general tasks of the stage of preparation of case to judicial proceedings in civil process treat compromise of the parties.

In spite of the fact that separate non-state procedures already practice in the Republic of Kazakhstan, there was the certain legal base providing their application, all potential of these procedures isn't used. The reason for that is existence in our society of factors constraining development of non-state procedures of settlement of civil disputes. Among similar factors it is possible to call, imperfection of the legislation, legal nihilism and uninformedness of entrepreneurs and representatives of a legal profession about opportunities of settlement of disputes by means of non-state procedures, mentality of the population focused on judicial settlement of any legal conflicts, and also an insufficient theoretical readiness of problematic [5; 4].

In this regard legislators, scientists-jurists are faced by a task to develop conceptual approaches to application of non-state procedures of settlement of civil disputes. Including doctrinal conceptual framework, signs, and types of non-state procedures of settlement of civil disputes.

The purpose of the current legislation is aimed at pronouncement of the judgment in a case, instead of at achievement of compromise between the parties of judicial dispute and conflict elimination in the relations. And the usual understanding of the parties to the case which has developed during not of one ten years of the period of the Soviet legal proceedings consists in aspiration to achieve the judgment favorable for themselves. Unlike it, in such countries as the U.S.A. and Great Britain only from 5 to 10–15 percent of the civil cases begun in the court become a subject of judicial proceedings.

Broad practice of application of different types of compromise settlement of legal disputes is characteristic feature of civil legal proceedings of the U.S.A. So, it is possible to specify the following most widespread methods of settlement of disputes about the right: negotiations, mediation procedure, procurement, serving as intermediary, adjudgement of a civil case by mini court or the appointed court arbitration, negotiations on regulations and others.

The invitations to the judge of interested persons only for discussion of possibility of the settlement agreement take place. Other form of reconciliation used in the U.S.A., this reconciliation by agreement of the parties at which, the judge appoints the referee and submits him single or all controversial questions. Conclusion of agreement is a task of the lawyer. Even before claim presentation lawyers of future claimants usually consult to prospective defendants regarding peaceful settlement of legal disagreements.

As G.K.Dmitriyeva specifies, now total about twenty various procedures of settlement of disputes. Division of alternative settlement of disputes into three main types is standard:

1. Negotiations (negotiation) — dispute settlement directly by the parties without participation of other persons.
2. Mediation (mediation) — settlement of dispute with the help of the independent neutral intermediary who promotes achievement by the agreement of parties.
3. Arbitration (arbitration) — settlement of dispute by means of the independent neutral person — the arbitrator who passes the obligatory decision for the parties [7; 68].

To the number of alternative ways of settlement of civil disputes are carried: negotiations (negotiation); negotiations with participation of the intermediary (facilitated negotiation or facilitation); mediation (mediation); mediation — the arbitration court (mediation-arbitration, med-arb); «mini-court» (mini-trial); independent examination on establishment of the actual facts of the case (neutral expert fact-finding); corporate ombudsman (corporate or organizational ombudsman); private judicial system (private court system) or the judge «for rent» (rent-a-judge), and also the other procedures possessing given signs. The arbitration (the arbitration court, the international commercial arbitration) following logic of a similar image, also enters the volume of analyzed concept [5; 12].

Quite often to them refer claim production and the agreement of lawsuit. However, being directed on non-judicial settlement of dispute, extrajudicial production and the agreement of lawsuit nevertheless don't enter the volume of analyzed concept.

Rather the agreement of lawsuit it is emphasized that alternative ways of settlement of civil disputes with the agreement of lawsuit are characterized by that the last is result on which achievement considered procedures, and also means of legal registration and fixing of the termination of the dispute reached during such procedures are directed [8; 44].

As for extrajudicial production, it, as we know, means assertion of right in the form of the requirement of the interested person to the direct contractor about performance of obligations — presentation of complaint and the answer to it that doesn't mean a meeting of the parties and direct settlement of disagreements. Similar actions are characteristic for a preparatory stage of studied procedures, but can't be apprehended as the independent finished procedure. Besides, extrajudicial production is the prerequisite to dynamics of trial, in other words means of pre-judicial legal settlement, instead of non-state procedure of settlement of disputes.

«It is necessary at first, to separate settlement arrangements from the agreement of lawsuit which can be result not only settlement arrangements, but also negotiations, and mediation. Secondly, it is necessary to distinguish compromise and mediation which are closely connected, but nevertheless are various», — M.S. Suleiyenov notes. «The agreement of lawsuit can be concluded as a result of negotiations.

Means, we have such type of alternative procedure of settlement of disputes as negotiations (negotiation). The agreement of lawsuit can be result of settlement arrangements which according to CPC the court will be obliged to carry out. Then we have such type of alternative procedure of settlement of disputes as compromise. The judge or the parties can attract for achievement of the agreement of lawsuit a mediator. Then there will be such type of alternative procedure of settlement of disputes as mediation (mediation)» [9].

Need of elimination of internal problems and introduction of modern methods of consideration of civil cases (application of settlement arrangements, legal proceedings simplification) is the main reason of reforming. For an example, in England the main task of updating was need of ensuring availability of justice, elimination of extraordinary continuance of judicial proceedings, irrational complexity of legal proceedings. In England civil legal proceedings are carried out by means of three procedures — consideration of the small claims, the double quick order of proceeding and universal procedure [10].

Experience of many countries shows to us successful practice of application in settlement of legal disputes of non-state procedures which in Anglo-American practice received the name of alternative ways of settlement of legal disputes. The similar name of procedure received owing to that arose as alternative to civil a legal proceeding which, despite its importance for society as a whole, is long, expensive, and difficult for participants of dispute.

Foreign experience shows that by means of introduction of alternative procedures it is possible not only quickly and effectively to resolve civil disputes, but also to solve many problems of legal proceedings: considerably to reduce number of cases subject to judicial trial, to simplify trial procedure, to lower a legal cost for the parties, to reduce terms of consideration of cases.

Today in the Republic of Kazakhstan alternative ways of settlement of civil disputes weren't widely spread, their further development is possible prospect on the far future, it is a critical need.

As the statistics testifies, today, unfortunately, in practice at administration of justice percent of using of settlement arrangements during settlement of dispute is insignificant small. The standards of the civil procedural legislation promoted to this which don't put possibility of their wide use in an obligation of the parties. Therefore today it is extremely important to popularize mediation among the population, to inform the public representatives about its advantages, positive results of its using, to stimulate application of alternative ways of settlement of disputes at a stage of preparation of civil case to trial.

It should be noted that in the developed countries mediation wasn't simply legalized, it became a part of culture. However competent work with mass consciousness for this purpose was required. If the institute of mediation is entered in activity of law enforcement agencies, the considerable part of the population will be able to get access to use of new possibility of compromise [11].

Summing up the results, it should be noted that it is necessary to develop system of civil legal procedural norms allowing to carry out function of protection of legitimate interests and rights of citizens, organizations fully, proceeding thus from the principle of equality of all before the law, the right for fair and public judicial

proceedings by competent and independent court. The development of system approach in definition of correlation of the principles of optionality and legality, competitiveness and an objective truth, legality and procedural economy is required.

For achievement of efficiency and simplified nature of judicial production on civil cases it is offered to make changes to chapters 16 and 17 of Civil Procedural Code regulating preparation of case to judicial proceedings and trial of case in court of the first instance. In particular, it is necessary to estimate possibility of introduction at the current legislation of modern methods of consideration of civil cases, among which — application of settlement arrangements, legal proceedings simplification, fixing of the principle of assistance to peaceful settlement of dispute. The worthy place in the draft of Civil Procedural Code has to be allocated for the mechanism of realization of alternative ways of settlement of disputes.

Need of introduction at legislative level of settlement arrangements, is dictated also by annual increase of quantity of civil cases in the courts that is caused by development of the market relations and expansion of volume and type of the objects which are in property at individuals. The application of these forms in practice of court at a stage of preparation of case to judicial proceedings, on the one hand, would allow to unload courts, and with another — would guarantee real restoration of the violated right or legitimate interest as compromise judgments developed with participation of the arguing parties would be a subject for execution.

The problems of application of alternative ways of settlement of civil disputes are: protection of the rights and legitimate interests of citizens, organizations and state, legality and law order strengthening, prevention of offenses; elimination of the legal conflict.

The realization of problems of alternative ways of settlement of civil disputes becomes possible only at observance of such principles as legality, optionality, voluntariness, cooperation, independence and disinterestedness of the neutral person, informality, and also confidentiality.

Considering the foreign experience it is offered to fix legislatively other types of alternative ways of regulation of civil disputes. In this connection, there is a need of introduction in the domestic legislation of the following terms: family mediator, property mediator, negotiations (negotiation), the mediator (mediation), the reciprocal concession, mini-process (mini-trial), the expert determination (expert determination), the independent adjudication (adjudication), the simplified jury trial (summary jury trial). Together with it, we suggest to enter for civil cases, in particular, into property and non-property disputes an obligatory pre-judicial order of settlement of dispute with application of procedure of mediation.

Consideration of possibility of introduction in training programs of jurisprudential specialties of higher educational institutions course «Alternatiny ways of settlement of civil disputes». This course promotes increase of legal literacy of society, and also to propagandize value of application of alternative ways of settlement of civil disputes among the population.

Thus, we consider that protection and restoration of the violated or challenged rights and freedoms of individual persons and legitimate interests of legal entities, the state, respecting the rule of law in a civil turn and the public relations, assistance to peaceful settlement of dispute, the prevention of offenses and formation in the society of respect for the law and court has to be a problem of civil legal proceedings.

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### Азаматтық-құқықтық дауларды реттеудің балама тәсілдерінің дамуы

Мақала құқықтық қатынастарды шешудің тиімді құралы ретінде азаматтық-құқықтық дауларды реттеудің балама тәсілдерін қолдану мәселелеріне арналған. Азаматтық-құқықтық дауларды реттеудің балама тәсілдерінің ұғымы мен түрлері туралы мәселе Қазақстан Республикасының заңнамасында бірмағыналы шешімін таппай отырғандығы дәлелденді. Азаматтық сот өндірісіне қатысушылардың құқықтарын барынша іске асыруға, жеке тұлғаның бұзылған құқықтары мен бостандықтарын уақытылы қорғау және қалпына келтіруге дауларды соттан тыс реттеу институттарын дамыту жолымен қол жеткізуге болады, сол себепті қазіргі кезеңдегі құқықтық таластарды шешудің балама тәсілдерінің құқықтық табиғаты айқындалып, зерттелді.

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### Развитие альтернативных способов урегулирования гражданско-правовых споров

Статья посвящена проблемам применения альтернативных способов урегулирования гражданско-правовых споров как эффективного средства разрешения правовых конфликтов. Отмечено, что вопрос о понятии и видах альтернативных способов урегулирования гражданско-правовых споров законодательно не нашел однозначного разрешения в Республике Казахстан. Определено, что максимальную реализацию прав участников гражданского судопроизводства, своевременную защиту и восстановление нарушенных прав и свобод личности возможно достичь путем развития институтов внесудебного урегулирования споров, поэтому в статье изучена правовая природа альтернативных способов разрешения правовых конфликтов в современный период.

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