
АЗАМАТТЫҚ ҚҰҚЫҚ ЖӘНЕ АЗАМАТТЫҚ ПРОЦЕСС ГРАЖДАНСКОЕ ПРАВО И ГРАЖДАНСКИЙ ПРОЦЕСС CIVIL LAW AND CIVIL PROCEDURE

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The protection of housing rights of minors under the Republic of Kazakhstan legislation

This article is dedicated to the content and peculiarities of legal regulation of the rights on minors' housing according to the Republic of Kazakhstan legal system. Author, analyzing law-enforcement practice according to the protection of minors' housing rights, has defined conclusion and suggestions according to the functional family and housing law, which are directed to the improvement of effectiveness of the protection mechanism minors' housing rights.

Key words: minor, minors' housing rights, Republic of Kazakhstan legal system, protection of minors' rights, court practice.

Housing problem is the most major social problem of the government. One of the basis of the state politics of the Republic of Kazakhstan is creation of the conditions for the providing citizens with the housing, their safety and qualitative living in the house. At that The state legislatively regulates the rights and duties of citizens and legal entities in the emergence and termination of property rights for housing and to use them.

Currently the issues of observance of *minors' housing rights* are relevant, since it is not always protected the interests of the child in transactions with housing.

According to the Ministry of education and science, in need of housing more than 14 thousand children-orphan and children left without parental care. At the time of inspection the Prosecutor General's office of the Republic of Kazakhstan for various reasons have not been queued for housing more than 4 thousand children. For example, in Aktobe region 156 of 360 children from needy were not queued for housing. Similar facts took place in Astana, Karaganda, Kyzylorda, Pavlodar and Almaty regions [1].

The Constitution of the Republic of Kazakhstan proclaimed in the fundamental rights and freedoms of man and citizen the right to housing (article 25) [2]. The right to housing is one of the most important socio-economic rights of citizens of the Republic of Kazakhstan, as it affects the most fundamental concepts of people's lives. Housing, like other things, refers to basic material conditions of human life.

In accordance to «the universal Declaration of human rights» everyone has the right to a level of living, including food, clothing, shelter, medical care and necessary social services, necessary for the maintenance of health and well-being of himself and of his family (article 25) [3].

National legislation also protects the child's right to housing, remain in effect norms of family, civil and housing rights.

«Every child has the right to housing in accordance with housing legislation of the Republic of Kazakhstan» (article 14) [4]. Thus, the state guarantees the protection of minors' housing rights.

National legislation protects the right of ownership to housing or the right to use housing juvenile members of the family, orphan, child without parental care in educational institutions, medical and other organizations, including providing temporary isolation from society, under guardianship or trusteeship, in foster care.

«Child-orphan, child without parental care in educational institutions, medical and other organizations, including providing temporary isolation from society, under guardianship or trusteeship, in foster care, retain the right of ownership to housing or the right to use housing, and in his absence are entitled to receive housing in accordance with housing legislation of the Republic of Kazakhstan.

Children left without parental care, including orphans, can not be evicted from their housing without providing other dwellings» (paragraph 2–3 of the Act on the rights of the child in the Republic of Kazakhstan).

According to the Law of the Republic of Kazakhstan «On amendments and additions to some legislative acts of the Republic of Kazakhstan on housing relations» of 22 July 2011 children-orphans and children left without parental care, in accordance with the established procedure needing dwelling from the state housing Fund and registered in the 29 years of age, not subject to removal from the register to obtain the home.

Facts of violations of housing rights of orphans and children left without parental care, become the subject of litigation. So, for the last three years on claims of the bodies of guardianship and guardianship was returned 51 apartment (in Akmola oblast — 8 apartments, Karaganda — 14, Kostanay — 5, Kyzylorda — 10, Mangistau — 2, etc.).

Bodies of trusteeship and guardianship were filed 149 lawsuits in court for the return of housing minors without parental care (of which only the Aktobe region — 60 claims, Karaganda — 17, Kyzylorda — 9, Akmola — 9, Aktobe — 3).

In the Republic for the graduates of educational institutions from among orphans and children left without parental care, opened 29 of youth homes, where there are about 1360 graduates aged 17 to 23 years. From 2006 to 2010, we allocated 327 apartments for children in this category returned to their guaranteed housing 599 children [5].

Government also protected the rights of children under the care of parents. For example, the tenant of the housing from the state housing Fund, with the consent of adult family members and taking into account the rights of minors have the right to privatize housing on the residual value. If the exclusion of this home affects the interests of minors who are owners of the home, requires the consent of body of guardianship and guardianship (paragraph 3 of article 13 of the Law on housing relations). The violation of this provision identified by the Commissioner for human rights in the Republic of Kazakhstan. To the Commissioner for human rights was addressed by a citizen caught up in a difficult situation B.M.

The applicant's parents divorced in 1996, with two years of age M. B. lived with her grandmother.

The parents of B. M., appellant, her brother and sister by right of ownership belonged to the apartment, which after the death of his parents and brother by the decision of the Tekeli city court of Almaty region from 01.06.2001 was recognized ownerless and transferred to communal ownership of the akimat of Tekeli.

However, the share in the apartment still belonged to the B. M. on right of ownership, but the issue duly the right of succession to the apartment it didn't work.

In violation of paragraph 3 of article 13 of Law of RK «On housing relations» Tekeli city court when considering the case about recognition of the specified immovable property ownerless were not representatives of body of guardianship and guardianship. Thus, the court violated the requirements of article 316 of the Civil procedure code of the Republic of Kazakhstan, according to which a statement of recognition of the right of municipal property on real property shall be considered by the court with participation of the applicant and all interested in the case of individuals [6].

Local Executive authorities: are responsible for the registration and control over the safety of children-orphans, children left without parental care; ensure the safety of children-orphans, children left without parental care, until their device under the trusteeship or guardianship, foster care, the organization of education, health and other organizations; establish custody housing orphans, children left without parental care (article 14–1 of the Law on the rights of the child in the Republic of Kazakhstan). Under article 115 of the code of RK on marriage (matrimony) and family «the protection of the rights and interests of children-orphans, children left without parental care, entrusted to the authorized body in the field of protection of children's rights of the Republic of Kazakhstan and other state bodies within their competence, as well as on the legal representatives of these children. Organization of accounting of orphan children, children left without parental care, based on the specific circumstances of loss of parental care, the choice of the form of placement of children, also the subsequent control over conditions of maintenance, upbringing and training is entrusted to local Executive bodies».

The court in the civil case found that local authorities do not always perform their duties, which subsequently lead to the violation of the right to housing of children deprived of parental care. For example, in the claim of the minor orphans of challenge of the committed contracts with respect to apartments, the Supreme Court refused to initiate Supervisory review proceedings, stating that «the allocation of plaintiffs to the orphanage the relevant authorities were not taken actions to preserve their rights to housing, housing as a result of civil transactions lost, so now the applicants can be protected by asserting claims to these bodies» [7].

Law enforcement officials believe that the violation of children's right to housing is the fault of parents, in cases where parents:

- did not care about the future of the child during the period of cohabitation;
- privatize the apartment without the child;
- perform real estate transactions without regard to the fact that the apartment (house) is home to a minor;
- prevent the child's use of fixed premises;
- removed from the register together with the child and write «to nowhere»;
- put at unnecessary risk their property without considering the interests of the child [8].

In the Convention on the rights of the child States: «no child may be subjected to arbitrary or unlawful interference in the exercise of his rights to privacy, family life, the inviolability of the home... the Child is entitled to the protection of the law against such interference or attacks» (article 16) [9]. So, the Collegium for civil cases of the Karaganda regional court of 11 February 2009 No. 3A-416 it was determined that the disputed apartment in order 04.08.1962 year, was provided to Ignatievich family of five. All family members except L.A.Ignatyeva died.

The decision of the court of the region of the name Kazybek bi of Karaganda city dated 17.04.2002 of the year for L.A.Ignatyeva had established ownership of the disputed apartment, December 21, 2006 cancelled in the order of supervision.

The decree of the head of Soviet district administration of 23 June 1995 of the disputed apartment had been reserved for the children Ignatyeva Ludmila Alexeevna — Ignatievna Maxim and ignatevoj Xenia, 14.02.1988 year of birth, Litvinovsky was in boarding school.

Isabekova A. acting by proxy on behalf of the p. L.A. according to the contract of sale dated 09.09.2003 of the year disputed the apartment sold Vacinas S. (Dadykina), which then sold it to Lee T.N. according to the contract of sale dated 23.01.2004.

Given the established, the trial court correctly came to the conclusion about recognition invalid contracts of purchase and sale of apartments 25 located at the address: Karaganda, ul. Gazaliyeva, building 7 on 09.09.2003, (hereinafter — the disputed apartment), No. 14–9447 entered into between L. A. and Ignatiev Vacinas S. (Dadykina), from 23.01.2004, No. 1–295, between Vecinos S. (Dadykina) and Lee T. N. and bringing the parties to their original condition, on invalidation of the power of attorney of L.A.Ignatiev and A.A.Isabekova from 04.09.2003 years with the right of sale of the disputable apartment, in connection with the cancellation of a judgment dated 17.04.2002.

In accordance with part 1 of article 157 of the civil code of RK for violation of the requirements for the form, content and parties to the transaction, as well as to the freedom of their will expression, the transaction may be declared invalid at the suit of the interested persons, appropriate state body or the Prosecutor.

The court properly denied the claim of Lee T. N., since, the bona fide purchaser is not entitled to court with the claim about a recognition its diligent purchaser. By virtue of article 261 of the civil code of the Republic of Kazakhstan bona fide purchaser may be an extremely indicationsa the defendant in the suit. Consequently, the claim for the recognition Lee, T. N. a bona fide purchaser is not subject to satisfaction in connection with the use by the Respondent of a remedy not provided for by the legislative acts [10].

Under article 261 of the civil code of Kazakhstan, if the property purchased for value from a person who had no right to alienate it and the acquirer did not know and could not know (bona fide purchaser), the owner may reclaim the property from the acquirer only in the case where the property lost by the owner or the person to whom the property was transferred by the owner into possession, or stolen from one or the other, either dropped out of their ownership of other way besides their will.

In the legal literature there are opinions on the definition of the place of residence of a minor child after divorce of parents. O.A.Egorov notes that «Giving parents the right to decide about who will remain to live minor, by agreement between themselves, the Family code of the Russian Federation does not contain any special requirements to the procedure for the conclusion and the form of such agreement» [11]. According to

L.M.Pchelintseva, «to this agreement require a written form, with reference to article 66 of the family code» [12; 102]. F.Y.Bespalov proposes to provide in the legislation notarization of this agreement and its registration in the agencies of tutorship and guardianship agencies [13]. Believe, important to pay attention to the conclusion of an agreement between parents during the divorce about who of them will be living minor children, because it is directly linked to housing and the right of the minor child. It should take into account the interests of the child: the child's attachment to each of parents, brothers and sisters, the child's age, moral and other personal qualities of parents, the relationship existing between each parent and child, the ability to create the conditions for child development and education (article 73) [14]. The rest of the criterion «the type of activity, the behavior of parents, parents financial situation, and other similar conditions» should not be the basis for determining the place of residence of the child when the parents live apart. Since these material conditions are not fully satisfy the personal interests of the child, separation from a parent can lead to frustration of the child's mind, to litigation between spouses. In this case, the court «must explain that living apart from children a parent is required to participate in the education of children and has the right to communicate with them, and the other parent has no right to prevent» [15].

Often violated housing rights of minors in cases of separation of one parent with the child, in cases of sales of homes. Also, there are problems of protection of the rights of the child to housing in case of eviction from the dwelling owned by the other spouse. After the termination of family relations, if the dwelling is transferred into the ownership of one spouse, the other spouse is on housing law would be ex-family member of the owner of the dwelling, and minor children will not be treated as former members of the family. They retain ownership as a member of the owner's family home and equally has the right to use the dwelling (article 22 of the Law on housing relations). Although, after moving to another home (in another city, country) of the parent with whom the child will live, the right to use the minor housing of the other parent is actually terminated.

On the basis of article 22 of the Code on marriage (matrimony) and family, the court must «at the request of the spouses to divide the property under their joint ownership, taking into account interests of minor children and (or) interests of the spouses themselves» [14]. Also according to paragraph 9 of the Regulatory resolution of the Supreme Court of the Republic of Kazakhstan «On some issues of application of legislation on the property right to housing» dated 9 July 1999 No. 10 «In the section of the dwelling of the spouses, the court may depart from the beginning of equality of shares of spouses, the interests of minor children.» [15]. If the spouses have no common residence, and the parent with whom the child will live with, owns home, does not provide a right of minors to housing. Also the child's right to housing is violated in the case of an agreement on alimony payment between spouses, where the agreement provides for the transfer of the ownership of the home in payment of alimony. Because the law provides that alimony might be payable «by the transfer of property or otherwise, with respect to which agreement has been reached» (part 2 of article 162 of the Code on marriage (matrimony) and family). Thus, the law directly prohibits to transfer the provision of premises for accommodation of the minor child after divorce of parents in the payment of child support for him. The provision of premises, which is located in common property of spouses, can not be regarded as a way of alimony payment under agreement on alimony payment. Only, in that case, if the person obliged to pay alimony, provided more living space as a way to pay alimony by agreement, then it does not violate the right to housing minors. Yet it should be remembered that the «duty of owner of premises to provide with other premises of the former spouse and other family members for whom he performs maintenance obligations (at their request) may be imposed only when alimony exacted by a court decision» [11].

Thus, today, despite a regulatory mechanism to protect the housing rights of minors in Kazakhstan, there are problems related to the protection of the housing rights of children without parental care and children under the care of parents. From materials of the law enforcement practice revealed the facts of violation of the right to housing juveniles in transactions with housing. Therefore, this issue requires further investigation of facts of violation of children's rights to housing and improvement of legal mechanism to protect the housing rights of minors in our country [16; 20].

During the termination of marriage (matrimony) of parents in court in order to protect the housing rights of the minor child, provided part 2 of article 22 of the Code «On marriage (matrimony) and family» to add with subparagraph 5 to read as follows: «to determine housing law minor children».

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Қазақстан Республикасының заңнамасы бойынша кәмелетке толмағандардың тұрғын үй құқықтарын қорғау

Мақалада Қазақстан Республикасының заңнамасы бойынша кәмелетке толмағандардың тұрғын үй құқықтарының мазмұны мен құқықтық реттеудің ерекшеліктері қарастырылды. Автор кәмелетке толмағандардың тұрғын үй құқықтарын қорғау бойынша құқық қолдану тәжірибесіне талдау жүргізе отырып, кәмелетке толмағандардың тұрғын үй құқықтарын қорғау тетігінің тиімділігін арттыруға бағытталған қолданыстағы отбасы және тұрғын үй заңнамаларын жетілдіру бойынша қорытындылар мен ұсыныстар жасайды.

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Защита жилищных прав несовершеннолетних по законодательству Республики Казахстан

В статье рассматриваются содержание и особенности правового регулирования жилищных прав несовершеннолетних по законодательству Республики Казахстан. Автор, анализируя правоприменительную практику по защите жилищных прав несовершеннолетних, сформулировал выводы и предложения по совершенствованию действующего семейного и жилищного законодательства, направленные на повышение эффективности механизма защиты жилищных прав несовершеннолетних.