

M.T. Akimzhanova¹, G.A. Ilyassova¹, D. Chankova²

¹*Ye.A. Buketov Karaganda State University, Kazakhstan;*

²*South-West University, Blagoevgrad, Bulgaria*

(E-mail: birmanova81@mail.ru)

Mediation as an alternative method for resolving disputes about children

The article is devoted to the study of the norms of the current legislation on mediation in order to apply the conciliation procedure in resolving family legal disputes affecting the interests of the child. The relevance is due to the fact that the introduction and application of mediation as an alternative method of resolving disputes related to the interests of children is a new, progressive step in the development of the culture of family and marriage relations in the Republic of Kazakhstan. At the same time, the author believes that, despite the great public importance of conciliatory mediation procedures, today it is obvious that there is no mass use of them. The author points to the necessity of applying a mandatory mediation procedure for a number of categories of disputes, the resolution of which is impossible without the participation of a professional conciliator, and this primarily applies to disputes about children. The article analyzes scientific and practical approaches to the definition of family mediation, studies its nature and determines its features. It is noted that the resolution of a dispute about children can not be effective, and the decision made is enforceable, without reaching an agreement by the parents on its merits. The results of the study are new and original, the author's position is justified and is of interest to employees whose activities are related to the interpretation and application of rules related to the settlement of a dispute in pre-trial proceedings.

Keywords: mediation, family law disputes, child, child interests, family mediation, family relations, conflicts, minor, the mediator, mediation agreement.

Introduction

The problems of ensuring and protecting the rights of the child were and remain the most urgent. Foreign experience in the use of conciliation procedures, as well as the increasing number of family disputes considered in courts every year, indicate the need to introduce mediation in the family legal sphere. But, despite the obvious success of the use of family conciliation procedures abroad, there is still no consensus on some controversial aspects of the use of mediation.

At the level of scientific and practical research, the use of mediation in the resolution of so-called «juvenile problems» is considered mainly through the prism of alternative settlement of criminal law conflict, but, in our opinion, not enough attention is paid to other aspects of the use of mediation procedures in resolving conflict situations involving children. In this context, it should be about the possibilities of family mediation.

We analyzed showed that the lack of popularity of the use of mediation procedures in the resolution of disputes with children in the Republic of Kazakhstan, largely due to the unreliability of pre-trial treatment of the disputing parties by the mediator, poorly specific status of the mediation agreement, the impossibility of enforcement, lack of awareness of the disputing parties about the availability of this method of conflict resolution.

Methods and Materials

The methodological basis of the research is presented by systematic approaches to the study of the theory and legal acts concerning the provision and protection of the rights and legitimate interests of the child. In addition, methods of analysis, synthesis, comparison, as well as dogmatic analysis, historical and normative, content and functional methods are used. The normative base of the study is represented by the Code of the Republic of Kazakhstan «On marriage (matrimony) and family», The law of the Republic of Kazakhstan «On mediation» and other normative legal acts. The works of such scientists as Zamriy O.N., Shelepina A.V., Ilyassova G. A. were laid the theoretical foundations of the study.

Results

The integral signs of a democratic, competitive state are a developed civil society, favorable conditions for business development and a high level of legal culture of citizens. It is indisputable that on its way to the

improvement of the legal system, Kazakhstan needs to refer to the experience of developed countries and, after careful study, adopt progressive legal institutions. One of the fastest growing in the world, including in the CIS countries, the institute is mediation — a type of alternative dispute resolution.

The family, being a social institution, objectively presupposes the existence of disagreements and disputes between the participants of the relevant small social group, since the interests of each of them are not always, it is more correct to even say — often they are in conflict with the interests of other participants. Considering again the specifics of the family as a social group that unites participants on the basis of kinship, the presence of a marriage or other social connections, we can agree that many conflicts are resolved in local conditions, figuratively speaking, «they don't stand rubbish» [1; 20–28].

Relations between family members are governed by the norms of various sectoral laws, and the interests of individual family members, in particular minors, are subject to special protection and protection. The state takes care of the family through a number of measures (legal, socio-economic, cultural, demographic and other), among which a special place is occupied by legislative norms aimed at strengthening the family. They are aimed at establishing family relationships that maximize the full satisfaction of an individual's interests, create conditions that ensure a decent life and the free development of each family member, and educate children with harmonious and comprehensively developed members of society. Being the bearer of public authority, the state intervenes in family differences and disputes, establishing the grounds and procedure for their resolution. Among family law disputes addressed by the courts, a significant place is occupied by those that directly or indirectly affect the interests of children, the fate of the child depends on the correct resolution of which. The complexity of such cases is largely due not so much to the content of the family law norms to be applied in this case, as to the specifics of the particular family situation that needs to be assessed by the court.

Mediation as an alternative procedure for the settlement of disputes with the participation of an independent person as an intermediary according to the current legislation can be applied to disputes arising from family relations. For proper understanding, it is necessary to point out that the concept of «mediation» is also used in a different meaning [1; 20–28]. Some scientists argue about the need to use mediation in the so-called «juvenile justice», it is assumed that this form of conflict resolution is focused on «reaching an agreement of the parties, smoothing out harm and healing the victim». In addition, A.V. Davydenko believes not only possible, but also necessary interaction between guardianship and guardianship and the network of mediation services «in relation to compensation for harm to persons in respect of whom the socially dangerous act was committed by minors, including those who have not reached the age of criminal responsibility» [2; 54–58].

Thus, mediate techniques and technologies can be used to resolve disputes arising in various legal relationships that in one way or another affect the interests of minors. If we are talking about the mediation procedure, the grounds and application procedure, the legal consequences of which are provided for by the Law of the Republic of Kazakhstan «On mediation» [3], then we are guided exclusively by the norms of this source. In particular, not all legal relations (administrative, criminal, and others) may involve the mediator.

We agree with many scientists that the procedure of mediation is very effective in resolving the most common category of disputes arising from family relationships, such as divorce disputes: the division of common property of spouses, determination of the procedure for using jointly-owned property, etc [4; 26–30]. In accordance with Article 8 of the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family», family rights are protected by the court, and in cases stipulated by law, state bodies, including bodies performing guardianship and trusteeship functions [5]. Therefore, the activity of the body performing the functions of guardianship and guardianship should be aimed at solving the following tasks: protection and restoration of the violated rights of the child and parents; facilitating the resolution of conflict between family members, reconciliation of the parties; normalization of the psychological climate in the family; creating a psychologically comfortable atmosphere for the life and upbringing of the child; assisting the court in making a legal and fair decision on the merits of the dispute; facilitating the execution of a court decision. The fulfillment of the above tasks is possible only if active and intensive work is carried out with parents, aimed at resolving the conflict and facilitating their achievement of an understanding of all the negative consequences that this conflict may cause to the child.

The specificity of the resolution of disputes related to the upbringing of children is that the settlement in this case is subject to not only legal but also psychological conflict.

In this regard, it is extremely important to maximize the use of the mediation procedure in resolving family disputes.

On the instructions of the First President N.Nazarbayev, in 2010 began the active development of the legal institution — mediation. Legal grounds for the application of mediation as an independent method of settling disputes, including those under consideration by the court created the Law of the Republic of Kazakhstan dated January 28, 2011 No. 401-IV «On Mediation» and the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated November 29, 2018 «On the application by courts of law in resolving disputes relating to the upbringing of children» [6]. This legal institution is aimed at increasing respect for the rights, freedoms of a person, a legal entity, as well as at forming civilized civil relations, strengthening social harmony, resolving conflicts and disputes through constructive dialogue [7; 319–324].

In accordance with the basic principles of family law, the state guarantees the priority protection of the rights and interests of minor family members, parental rights cannot be exercised in contradiction with the interests of children, ensuring the interests of children should be the main concern of their parents. The basis for raising the relevant issue was paragraph 2 of Art. 1 of the Law of the Republic of Kazakhstan «On Mediation» [3] according to which «The mediation procedure does not apply to disputes (conflicts) arising from the relations specified in paragraph 1 of this article, in case such disputes (conflicts) affect or may affect the interests of third parties persons who are not involved in the mediation procedure, and persons recognized by the court as incapable or partially capable».

The analysis of the prescription contained in the above norm allows us to designate at least one fundamental question of theoretical and practical importance — is it possible to apply the mediation procedure to disputes affecting the interests of the child, since the child himself does not participate in the mediation procedure [1; 20–22].

Discussion

Strongly emphasizes the E.A. Shelepin, in the Federal Law «On Mediation» there are no norms obliging the parties to take into account the interests of children when mediating [8; 55–58]. The Law of the Republic of Kazakhstan «On Mediation» determines if during mediation facts are established that expose or may endanger normal growth and child development or cause serious damage to his legitimate interests, the mediator is obliged to apply to the authority exercising the authority to protect the rights of the child. Thus, in accordance with Article 25 of the Law of the Republic of Kazakhstan «On Mediation», when conducting mediation, the mediator must take into account the legitimate interests of the child. For comparison, the law of the Republic of Moldova «On Mediation» of June 14, 2007 stipulates the obligation of the mediator to ensure that the results of mediation do not contradict the best interests of the child and do not interfere with his normal growth and development [9].

It seems that first of all it is necessary to determine a tentative list of disputes arising from family relations and affecting the interests of the child. We agree that this is not only the dissolution of the marriage of the parents of a minor. It can also be independent disputes of parents about the division of common property, including that which a minor has the right to use; this and disputes about the provision of material content (alimony); disputes related to raising a child, and many others. Any dispute arising in a family where there are minor children affects the interests of the latter. It is possible to apply the mediation procedure, both in an out-of-court procedure, and within the framework of the judicial process at any time before the court makes a decision on the case. The mediation procedure is based on the fact that the parties, with the participation of the mediator, must come to a consensus and reach an agreement. This procedure is not in the nature of litigation. The mediator is not an arbitrator, a representative of any party to the dispute or a mediator between the parties, does not have the right to decide on the dispute. It only contributes to the settlement of the dispute, helps the parties to the dispute during the discussion to identify their true interests and needs, find a solution that satisfies all parties to the conflict. This is the main task of the mediator. There are a number of categories of disputes, the resolution of which is impossible without the participation of a professional conciliator, and this, first of all, refers to disputes about children.

When considering disputes about determining a child's place of residence, the procedure for a separate parent to communicate with him and the enforcement of judgments in these categories of cases, it is important that the parent has an intention to resolve the family conflict without harming the child. Unlike the trial, as a result of which one of the disputing parents turns out to be the winner, the mediation procedure makes it possible to make the child the «winner» of the dispute. As a rule, in most family disputes, including those related to determining the child's place of residence, the parents in dispute involve children in the conflict, thereby developing and deepening it. It is in such cases that the best way to settle a dispute can be a mediation procedure, during which, with the help of an impartial third party (mediator), parents can actually

assess the child's situation, needs and feelings when making decisions about his future, taking into account the interests of all stakeholders. The body responsible for guardianship and trusteeship should, if necessary, advise the conflicting parties to help the mediator, explain to them the essence of mediation, the conditions for its implementation, point out the advantages of using mediation in finding a solution to the disputants, recommend the disputant to jointly discuss the possibility of using mediation procedures, require explanations from hand, evading the use of mediation.

Therefore, mediation can be viewed as an informal, confidential process, during which the parties to the conflict with the help of a neutral, impartial third party, able to view the situation from different points of view, develop a solution that would meet the interests of all parties to the dispute. However, in family mediation it is important not only to work out a settlement to the parties as such, but also to make sure that it is in the interests of the child, is effective and safe for him. The goal of family mediation is to avoid a lengthy and, from the point of view of all parties to the dispute, an emotionally painful legal process and the associated application of measures to protect the rights of the child, through peaceful settlement of the conflict. Therefore, mediation in family disputes can be considered not only as an important socio-psychological and legal service, but also as a way to protect the child [10; 114–116].

If you turn to foreign experience in the application of mediation in resolving family disputes, you can see a twofold approach depending on the legal system. Thus, in the countries of the Anglo-American system of law, the use of mediation in some cases is mandatory before going to court in family disputes. Most states in the United States have laws that require family mediation in the custody and care of children after the parents divorce. As a rule, family mediation services are formed during the courts. In the UK, disputes of a family law nature are tentatively resolved without fail by a mediator with state accreditation. In Australia, an appeal to accredited mediators is mandatory on disputes about parenting after parents divorce. The agreement reached by divorcing spouses is submitted for approval by the court leading the divorce proceedings [11; 17–19]. The procedure for the participation of family mediators in resolving family disputes is widely used in the countries of the European Union, being a very popular reconciliation procedure. But, as in the Republic of Kazakhstan, Russia, the conciliation procedure in these countries is not mandatory when going to court [12; 16–19]. Moreover, both mediators engaged in private practice and «state mediators» (civil servants of state bodies and departments) can participate in resolving family law disputes. Moreover, for example, in Germany such a «state mediator» can be a judge in this kind of mediation, like mediation in the course of legal consultation established by the Federal Law «On the development of mediation and other methods of out-of-court settlement of disputes» in 2012 [13; 12–14]. Mediation in the course of legal advice is carried out by a mediating judge in the form of a special procedural procedure in which the judge who is considering the case cannot make a decision. He temporarily obtains the rights and obligations of an extrajudicial mediator and uses mediation methods to resolve a case without a court decision.

In the Republic of Kazakhstan in specialized juvenile courts in the order of mediation, civil cases are also examined, on determining the child's place of residence, on deprivation (restriction) and restoration of parental rights; on the adoption of a child; on disputes arising from custody and guardianship (patronage) over minor children.

These are precisely the categories of cases that require a careful and serious approach, because the fate of the child is being decided, which is sometimes the helpless subject of regulation of the internal conflict relations of parents and relatives. And it is precisely here that the participation of a mediator is necessary, which must sort out a complex, sometimes critical situation. Therefore, when applying to the juvenile court for child disputes, thorough pre-trial preparation is carried out, conversations are held with the parties, if the child is over 10 years old, if possible, with the consent of the psychologist, the child is interviewed, his opinion and attitude to the question regarding his upbringing.

In this regard, the question arises of applying Article 62 of the Code of the Republic of Kazakhstan «On Marriage (matrimony) and the family», according to which the child has the right to express his opinion when solving a family issue of any issue affecting his interests. Moreover, taking into account the opinion of a child who has reached the age of ten years is obligatory, except in cases when this contradicts his interests.

As E.A. Shelepin believes, referring to article 62, mediation does not apply to judicial or administrative proceedings, it is therefore advisable to supplement this article of the Code of the Republic of Kazakhstan «On Marriage (matrimony) and family» with an indication of the mediation procedure [8; 55].

In our opinion, this is not necessary. The child's opinion can be clarified and voiced in various procedural conditions: directly in the courtroom or in the custody and guardianship office, it is possible that the decision made in the case contradicts the opinion expressed by the child.

But in any case, the opinion of a child who has reached the age of ten years must be clarified by the direct prescription of Article 62 of the Code of the Republic of Kazakhstan «On Marriage (matrimony) and the family». Moreover, in full compliance with this article, the child's opinion should be established in the framework of the mediation procedure on family law disputes, most of which, as already stated, in one way or another affect the interests of the child [1; 20–28].

Does this mean that a child who has reached the age of ten may be a participant in the mediation procedure? According to Art. 2 of the Law of the Republic of Kazakhstan «On Mediation», the mediation procedure should be understood as a method of settling disputes with the assistance of a mediator, which is used on the basis of the voluntary consent of the parties in order to reach a mutually acceptable solution [3].

Does this mean that the child can act as an independent party to the dispute and, therefore, as an independent party to the mediation procedure and the concluded mediation agreement?

In our opinion, in most cases — no, since a family and legal dispute arises between the parents of the child and, as a rule, is associated with their marital status, with the implementation of family rights and obligations arising from the status of the spouse. In this connection, disputes arise, as a rule, when resolving the issue of divorce.

As psychologists say, practicing in the reconciliation of spouses intending to dissolve the marriage, «successful resolution of the conflict requires consideration of the interests of all parties to the conflict. In this regard, it is important to keep in mind not only its immediate participants — those between whom the conflict interaction develops, but also other persons whose interests may be affected by this situation and whose position may influence the outcome of the conflict. In essence, they can be considered as indirect participants in the conflict» [14; 82].

However, when examining the legal aspects of the participation of a mediator in resolving a family dispute, it is necessary to strictly follow the legal regulations. Thus, in the dispute over divorce, the parties are spouses intending to dissolve the marriage. Therefore, only they can be parties to the mediation procedure. At the same time, the interests of other subjects of family relations (minor children, their grandparents) should be ensured at the conclusion of a mediation agreement both by the parties and directly by the mediator.

We believe it is possible to declare two types of disputes in which a minor can act as an independent party.

First, these are property disputes related to the exercise of the right of ownership. According to Art. 60 of the IC of the Russian Federation, the child does not have the right of ownership of the property of the parents, the parents do not have the right of ownership of the property of the children. In case of the emergence of the right of common ownership of parents and children, their rights to possession, use and dispose of property are determined by civil law.

Thus, in the event of a dispute arising from the exercise of the right of ownership by both the child and parents, the child acts as an owner of the dispute as an owner (although a legal representative may act in his interests), therefore, he is also an independent party in the mediation procedure [1; 20–23].

Secondly, according to Art. 16 of the Civil Code of the Republic of Kazakhstan, the place of residence of minors under the age of fourteen is recognized as the place of residence of their legal representatives. Consequently, a child over fourteen years old independently determines his place of residence [15]. Thus, if a dispute has arisen between the parents dissolving the marriage about determining the child's place of residence, then a child under the age of fourteen is subject to either parental agreement or a court decision. However, if a dispute arose in relation to a child over fourteen years old, then, by virtue of the requirements of Art. 16 of the Civil Code of the Republic of Kazakhstan, it is already an independent party to this family law dispute. Consequently, if the parents express an intention to apply for the services of an intermediary, the child will act as an independent party in the framework of the procedure and possible later mediation agreement [16, 17].

Perhaps, these are currently the only family-law disputes in which not only the interests of the child are affected, but also he acts as an independent party to the dispute. In turn, this suggests that the child is an independent party in the mediation procedure used in resolving the relevant family law dispute.

According to E.G. Kuropatskaya, «often in cases involving the protection of the rights of the child, is the peak of disagreement between the parties to the dispute at the time of the transfer of the child to one of the parties. In such cases, the possibility of resolving the conflict through mediation should not be underestimated, since this is a real chance to protect the child from serious emotional trauma» [17; 72].

It seems that at the stage of execution of court decisions on disputes over children, the mediation procedure is hardly acceptable. The court, as the carrier of public authority, has already determined, among other legal consequences, its special guarantees for ensuring the rights and interests of children (determining the place of residence of the child, determining the procedure for communicating with the child of the parent living separately from him, etc.). Any mediation agreement aimed at resolving a dispute arising during the execution of a court decision that has entered into legal force calls into question the legality and validity of the latter.

Note that, despite the prevailing public opinion that children left without parental care are orphans or children whose parents are deprived of parental rights, paragraph 2 of Article 117 of the Code of the Republic of Kazakhstan «About marriage (matrimony) and family» provides the creation, by the actions or inaction of the parents, of conditions that threaten the life or health of the children or interfere with their normal upbringing and development. We agree that during mediation a situation may also arise when the parents, choosing the best ways to resolve the conflict, can simultaneously create obstacles for the normal development of the child. In this case, the direct responsibility of the mediator will be to inform the body in charge of custody and guardianship of the violation of the interests of the child and the created threat to its development [16; 19].

At the same time, there are cases when mediation is not always appropriate when protecting the rights and interests of a child. Mediation may not be carried out with deprivation of parental rights [5]. Deprivation of parental rights is an extreme measure of family and legal responsibility; therefore, in such extremely dangerous situations for a child, it is impossible to resolve the conflict through mediation. The same applies to cases where a child is taken from parents on the basis and in accordance with Article 82 of the Code of the Republic of Kazakhstan «On Marriage (matrimony) and family», if the family has a direct threat to his life or health. Disputes in these categories of cases can only be resolved by the court, and it is impossible for them to conclude a settlement agreement. However, in cases of restrictions on parental rights, provided for in Article 79 of the Code of the Republic of Kazakhstan «On Marriage (matrimony) and family», when parents' behavior is not due to alcoholism or drug addiction, mediation is possible, and sometimes even desirable.

Conclusion

Returning to the discussion on the use of mediation as a way to resolve disputes arising from family relationships, we believe it is possible to draw the following conclusions:

– resolution of disputes through conciliation procedures (mediation) has great advantages: it gives the opportunity to keep the child in good relations with both parents, helps parents to formulate certain plans for raising the child in accordance with their capabilities, taking into account the interests of the child. At the same time, the agreements reached during reconciliation procedures are executed more successfully than the requirements of a judicial act.

– we believe that in accordance with the current realities, it is advisable to provide for the possibility of applying obligatory mediation procedure for disputes in the sphere of family relations. To date, disputes arising from family relations fall within the competence of the following bodies: bodies responsible for guardianship and custody, the commission on juvenile affairs, civil registry offices, notary bodies, courts of general jurisdiction. We believe that it is within the framework of the activities of these bodies that it is advisable to conduct family mediation. The use of family mediation, above all, must occur in court. Based on this, it is clear that the parties have taken all measures to resolve the dispute in the framework of pre-trial proceedings, including by contacting a professional mediator. In most cases, when a decision is made, a situation arises in which one of the parties is «won» and the second, respectively, «lost» Such a division is conditional, but fully underlines the fact that there is rivalry between the parties, often hostility, existing in connection with an unresolved dispute regarding the order of communication, upbringing and residence of children. Parents, on the other hand, should try as best as possible to reach agreement in resolving disputes over the upbringing of children, which in the end will also lead to the settlement of existing conflicts between them.

References

15 Замрий О.Н. Интересы несовершеннолетнего как объект охраны при применении процедуры медиации / О.Н. Замрий // Вестн. ТвГУ. Сер. Право. — 2017. — № 1. — С. 20–28.

16 Давыденко А.В. Актуальность применения в российском судопроизводстве института медиации в отношении несовершеннолетних / А.В. Давыденко // Российская юстиция. — 2016. — № 2. — С. 54–58.

- 17 Закон Республики Казахстан от 28 января 2011 года № 401-IV «О медиации» [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/document/?doc_id=30927376
- 18 Матросов Н.А. Медиация на стадии подготовки к судебному разбирательству о расторжении брака / Н.А. Матросов и др. // Российский судья. — 2015. — № 10. — С. 22–24; Трофимец И.А. Роль адвоката и медиатора в бракоразводном процессе / И.А. Трофимец // Семейное и жилищное право. — 2015. — № 1. — С. 26–30.
- 19 Кодекс Республики Казахстан от 26 декабря 2011 года № 518-IV «О браке (супружестве) и семье» [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/Document/?doc_id=31102748
- 20 Нормативное постановление Верховного Суда Республики Казахстан от 29 ноября 2018 года № 15 «О применении судами законодательства при разрешении споров, связанных с воспитанием детей» [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/Document/?doc_id=38111660
- 21 Шайменова А.Б. История развития альтернативного разрешения споров в Казахстане / А.Б. Шайменова, Г.А. Ильясова // Правовая система Казахстана условиях модернизации национального правосознания: сб. материалов Междунар. науч.-практ. конф. — Караганда: Изд-во КарГУ, 2018. — С. 319–324.
- 22 Шелепина А.В. Особенности применения медиации к спорам, возникающим из семейных правоотношений / А.В. Шелепина // Пробелы в российском законодательстве. — 2014. — № 6. — С. 55–58.
- 23 Закон Республики Молдова № 137 «О медиации» [Электронный ресурс]. — Режим доступа: <https://mediation-eurasia.pro/zakonodatelstvo/zakon-respubliki-moldova-137-o-mediaci>
- 24 Елисеева А.А. Медиация как способ урегулирования семейных споров / А.А. Елисеева // Семейное право на рубеже XX–XXI веков: к 20-летию Конвенции ООН о правах ребенка: сб. материалов Междунар. науч.-практ. конф. — Казань: Статут, 2011. — С. 114–116.
- 25 Трофимец И.А. Медиация и расторжение брака / И.А. Трофимец // Российский судья. — 2014. — № 10. — С. 17–19.
- 26 Соловьев А.А. Об актуальных проблемах и некоторых перспективах использования альтернативной процедуры урегулирования споров с участием посредника (процедуры медиации): российский и европейский опыт / А.А. Соловьев, Ю.М. Филиппов // Российский судья. — 2015. — № 1. — С. 16–19.
- 27 Бирюков П.Н. Об институте медиации в Германии / П.Н. Бирюков, А.В. Пронин // Российский судья. — 2015. — № 2. — С. 12–14.
- 28 Ключева Н.В. Медиация в ситуации конфликта между супругами, имеющими несовершеннолетних детей / Н.В. Ключева // Вестн. Удмурт. ун-та. Сер. «Философия, психология, педагогика». — 2016. — Т. 26. — Вып. 2. — С. 82–85.
- 29 Гражданский кодекс Республики Казахстан. (Общая часть), принят Верховным Советом Республики Казахстан 27 декабря 1994 года [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/document/?doc_id=1006061
- 30 Akimzhanova M. Extending legislation of the Republic of Kazakhstan by anchoring international child rights [Электронный ресурс] / M. Akimzhanova, G. Ilyassova, A. Nukusheva, D. Rustembeova // Journal of Legal, Ethical and Regulatory Issues. — 2018. — Vol. 21, Issue 3. — 17 p. — Режим доступа: <https://www.abacademies.org/articles/extending-legislation-of-the-republic-of-kazakhstan-by-anchoring-international-child-rights-7480.html>
- 31 Куропацкая Е.А. Медиация как способ защиты прав ребенка в Российской Федерации / Е.А. Куропацкая // Законы России: опыт, анализ, практика. — 2015. — № 8. — С. 72–76.

М.Т. Әкімжанова, Г.А. Ілиясова, Д.Чанкова

Медиация балалар туралы дауларды шешудің баламалы тәсілі ретінде

Мақала балалардың мүдделерін қорғайтын отбасылық-құқықтық дауларды шешу кезінде бітімгерлік рәсімдерді қолдану мүмкіндігі мақсатында медиация туралы қолданыстағы заңнаманың нормаларын зерттеуге арналған. Тақырыптың өзектілігі медиация рәсімін балалардың мүдделеріне байланысты дауларды шешудің баламалы тәсілі ретінде енгізу және қолдану, Қазақстан Республикасында отбасылық-неке қатынастары мәдениетін дамытудағы жаңа, прогрессивті қадам болып табылатындығымен түсіндіріледі. Сонымен қатар, авторлар татуластыру медиативтік рәсімдерінің қоғамдық маңыздылығына қарамастан, бүгінгі таңда олардың жаппай қолданылмау фактісі бар деп санайды. Авторлар кәсіби татуластырушының қатысуынсыз шешу мүмкін емес бірқатар даулар санаттары бойынша медиацияның міндетті рәсімін қолдану қажеттігін көрсетеді және бұл бірінші кезекте балалар туралы дауларға жатады. Мақалада отбасылық медиацияны анықтаудың ғылыми-тәжірибелік тәсілдері талданды, оның табиғаты зерттелді және оның ерекшеліктері анықталды. Балалар туралы дауды шешу тиімді болмауы мүмкін, алайда, шығарылған шешімнің орындалуына ата-ананың келісімсіз қол жеткізе алмайтыны атап өтілген. Зерттеу нәтижелері жаңа және бірегей, авторлық ұстанымға негізделген және қызметі сотқа дейінгі іс қарау шеңберінде дауды реттеуге байланысты нормаларды түсіндіруге және қолдануға байланысты қызметкерлер үшін қызығушылық білдіреді.

Кілт сөздер: медиация, отбасылық-құқықтық даулар, бала, баланың мүдделері, отбасылық медиация, отбасылық құқықтық қатынастар, жанжалдар, кәмелетке толмаған, медиатор, медиативтік келісім.

М.Т. Акимжанова, Г.А. Ильясова, Д. Чанкова

Медиация как альтернативный способ разрешения споров о детях

Статья посвящена исследованию норм действующего законодательства о медиации с целью возможности применения примирительной процедуры при разрешении семейно-правовых споров, затрагивающих интересы ребенка. Актуальность обусловлена тем, что внедрение и применение процедуры медиации как альтернативного способа разрешения споров, связанных с интересами детей, является новым, прогрессивным шагом в развитии культуры семейно-брачных отношений в Республике Казахстан. Вместе с тем, авторы считают, что, несмотря на большую общественную значимость примирительных медиативных процедур, на сегодняшний день является очевидным факт отсутствия их массового применения. Авторы указывают на необходимость применения обязательной процедуры медиации по ряду категорий споров, разрешение которых невозможно без участия профессионального примирителя, и это, в первую очередь, относится к спорам о детях. В статье проанализированы научно-практические подходы к понятию семейной медиации, изучена ее природа и определены ее особенности. Отмечено, что разрешение спора о детях не может быть эффективным, а вынесенное решение исполнимым, без достижения родителями соглашения по его существу. Результаты исследования являются новыми и оригинальными, авторская позиция обоснована и представляет интерес для работников, деятельность которых связана с толкованием и применением норм, связанных с урегулированием спора в рамках досудебного разбирательства.

Ключевые слова: медиация, семейно-правовые споры, ребенок, интересы ребенка, семейная медиация, семейные правоотношения, конфликты, несовершеннолетний, медиатор, медиативное соглашение.

References

- 1 Zamrij, O.N. (2017). Interesy nesovershennoletnego kak obekt ohrany pri primenenii protsedury mediatsii [Interests of the minor as object of protection at application of procedure of mediation]. *Vestnik Tverskogo gosudarstvennogo universiteta. — Bulletin of Tver state University, 1, 20–28* [in Russian].
- 2 Davydenko, A.V. (2016). Aktual'nost' primeneniia v rossiiskom sudoproizvodstve instituta mediatsii v otnoshenii nesovershennoletnikh [Relevance of the application of the Institute of mediation in relation to minors in Russian legal proceedings] *Rossiiskaia iustitsiia — The Russian justice, 2, 54–58* [in Russian].
- 3 Zakon Respubliki Kazakhstan ot 28 yanvaria 2011 hoda № 401-IV «O mediatsii». [Law of the Republic of Kazakhstan No. 401-IV «on mediation» dated January 28, 2011.] *online.zakon.kz*. Retrieved from https://online.zakon.kz/document/?doc_id=30927376 [in Russian].
- 4 Matrosov, N.A & et. al. (2015). Mediatsiia na stadii podgotovki k sudebnomu razbiratel'stvu o rastorzhennii braka [Mediation at the stage of preparation for the trial of divorce]. *Rossiiskii sudia. — Russian judge, 10, 22–24* [in Russian]; Trofimets, I.A. (2015). Rol' advokata i mediatora v brakorazvodnom protsesse. [The role of a lawyer and mediator in the divorce process] *Semeinoe i zhilishchnoe pravo — Family and housing law, 1, 26–30* [in Russian].
- 5 Kodeks Respubliki Kazakhstan ot 26 dekabria 2011 hoda № 518-IV «O brake (supruzhestve) i seme». [Code of the Republic of Kazakhstan No. 518-IV of December 26, 2011 «On marriage (matrimony) and family»]. *online.zakon.kz*. Retrieved from https://online.zakon.kz/Document/?doc_id=31102748 [in Russian].
- 6 Normativnoe postanovlenie Verhovnogo Suda Respubliki Kazakhstan «O primenenii sudami zakonodatel'stva pri razreshenii sporov, svyazannykh s vospitaniem detei» [Normative Resolution of the Supreme Court of the Republic of Kazakhstan «On the application of legislation by courts in resolving disputes related to the upbringing of children»] *online.zakon.kz*. Retrieved from https://online.zakon.kz/Document/?doc_id=38111660 [in Russian].
- 7 Shaimenova, A.B., & Ilyassova, G.A. (2018). Istorija razvitiia al'ternativnogo razresheniia sporov v Kazahstane. [The history of the development of alternative dispute resolution in Kazakhstan]. *Pravovaia sistema Kazahstana v usloviakh modernizatsii natsionalnogo pravosoznaniia. — The legal system of Kazakhstan in the conditions of modernization of the national legal consciousness — International scientific and practical conference.* (pp. 319–324). Karaganda: Izd-vo KarGU [in Russian].
- 8 Shelepina, A.V. (2014). Osobennosti primeneniia mediatsii k sporam, vznikaiushhim iz semeinykh pravootnoshenii [Features of mediation application to disputes arising from family relations]. *Probely v rossiiskom zakonodatel'stve — The gaps in the Russian legislation, 6, 55–58.* [in Russian].
- 9 Zakon Respubliki Moldova «O mediatsii» [Law of the Republic of Moldova «On mediation»]. Retrieved from [mediation-eurasia.pro https://mediation-eurasia.pro/zakonodatelstvo/zakon-respubliki-moldova-137-o-mediatsii](https://mediation-eurasia.pro/zakonodatelstvo/zakon-respubliki-moldova-137-o-mediatsii) [in Russian].
- 10 Eliseeva, A.A. Mediatsiia kak sposob urehulirovaniia semeinykh sporov (2011). [Mediation as a way to settle family disputes // Family law at the turn of XX-XXI centuries: to the 20th anniversary of the UN Convention on the rights of the child: collection of materials international. science- prakt. conf]. Kazan: Statut [in Russian].
- 11 Trofimec, I.A. (2014). Mediatsiia i rastorzhennii braka [Mediation and divorce]. Moscow: Russkii yazyk [in Russian].
- 12 Solov'ev, A.A., & Filippov, Ju.M. (2015). Ob aktual'nykh problemakh i nekotorykh perspektivakh ispol'zovaniia al'ternativnoi protsedury urehulirovaniia sporov s uchastiem posrednika (protsedury mediatsii): rossiiskii i evropeiskii opyt [On actual problems and some prospects of using an alternative dispute settlement procedure with the participation of a mediator (mediation procedure): Russian and European experience] *Rossiiskii sudia. — Russian judge, 1, 16–19* [in Russian].
- 13 Birjukov, P.N., & Pronin A.V. (2015). Ob institute mediatsii v Hermanii [About the Institute of mediation in Germany] *Rossiiskii sudia. — Russian judge, 2, 12–17* [in Russian].

- 14 Klueva, N.V. (2016). Mediatsiia v situatsii konflikta mezhdu supruhami, imeiushhimi nesovershennoletnikh detei [Mediation in a conflict situation between spouses who have minor children.]. *Vestnik Udmurtskoho universiteta. Seriya filosofii, psikhologia, pedagogika — Bulletin of Udmurt University. Series «Philosophy, psychology, pedagogy»*, 2016, Vol. 2, 82–85. [in Russian].
- 15 Hrazhdanskii kodeks Respubliki Kazakhstan. (Obshchaia chast), priniat Verkhovnym Sovetom Respubliki Kazakhstan 27 dekabria 1994 hoda. [Civil code of the Republic of Kazakhstan (common chest), adopted by the Supreme Council of the Republic of Kazakhstan on December 27, 1994] *online.zakon.kz*. Retrieved from https://online.zakon.kz/document/? doc_id=1006061 [in Russian].
- 16 Akimzhanova, M., & Ilyassova, G., Nukusheva, A., & Rustembeova, D. (2018). Extending legislation of the Republic of Kazakhstan by anchoring international child rights. *Journal of Legal, Ethical and Regulatory Issues, Vol.21, Issue 3. www.abacademies.org* Retrieved from <https://www.abacademies.org/articles/extending-legislation-of-the-republic-of-kazakhstan-by-anchoring-international-child-rights-7480.html> [in English]
- 17 Kuropackaja, E.A. Mediatsiia kak sposob zashchity prav rebenka v Rossiiskoi Federatsii (2015). [Mediation as a way to protect the rights of the child in the Russian Federation] *Zakony Rossii: opyt, analiz, praktika. — Russian laws: experience, analysis, and practice*, 8, 72–76 [in Russian].