

CONSENT OF PARENTS OR PERSON WHO IS ENTITLED TO CONSENT IN THEIR PLACE AS ONE OF THE MAIN CONDITIONS OF ADOPTION

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DOI 10.32782/NP.2023.3.19

The article explores the consent of the parents of the persons replacing them as one of the main conditions for adoption. The author, based on the analysis and generalization of the current family legislation, legal literature, and the practice of regulatory regulation in the field of adoption in foreign countries, defines the concept of adoption conditions and notes their importance. The article also puts forward reasonable proposals for improving Art. 32 of the Law of the Republic of Azerbaijan "On the Rights of the Child".

Keywords: adoption, conditions, conditions of adoption, consent of parents, consent of guardianship authorities.

A condition is a separate legal fact that together with other legal facts, gives rise to a legal result.

According to I.V. Levushkin, the concept of "condition" includes the following features:

- conditions are requirements established by law;
- it is not allowed to deviate from the legal norms in which these requirements are established;
- demands are made against a certain group of people [7, p. 71-75].

T.V. Erkil defines the adoption conditions as follows: "Adoption conditions are the requirements defined by the adoption law and applicable to a strictly defined group of persons". The author states that all the conditions of adoption are related to each other, but their unity is determined by one condition that acts as a factual condition - this is consent to adoption. The complex legal relations on adoption begin to develop from

the moment of the expression of will of the person who wants to adopt. This reasoning partly coincides with the traditional ideas put forward in the doctrine of family law. Some authors under the conditions of adoption mean certain legal facts [5, p. 580-582]. Some of these facts express the actions of a person, while others belong to the category of events.

The authors, E.M. Vorobjev and G.K. Matveyev consider the conditions of adoption as a set of legal facts. However, there was no consistent position on the concept of "condition" in the civil law doctrine. Civil law theory researchers were satisfied only with their enumeration and determination of the conditions necessary for adoption. At that time, the content of the concept of adoption was neglected. Experience shows that there is a serious need to define thoroughly this concept, to study the legal nature of adoption conditions, and this allows solving many controversial issues. The main features of the conditions of adoption are as follows [2, p. 188]:

- 1) requirements conditioned by law and practice;
- 2) the nature of the norms is imperative and these norms define strict rules of conduct, do not allow violations and contain preventive instructions;
- 3) the relevant provisions apply to a strictly defined group of persons.

Full compliance with the rights of the persons participating in the adoption process is closely related to compliance with a number of conditions. Those conditions are determined by the family legislation that regulates legal relations on adop-

tion. Family law clearly and strictly defines the conditions of adoption. By reason that adoption is not carried out in accordance with certain norms, it can violate the legal interests of a wide range of people.

To determine the main criteria of adoption, its conditions are divided into two groups:

1. general conditions;
2. special conditions.

General conditions refer to the conditions necessary for a positive adoption decision in all cases. Special conditions include conditions that are important only in cases provided by law. General conditions are the conditions imposed on the adopted child, the adopter, and the purposes of adoption. Legislation against adopters imposes a number of requirements. Those requirements are mandatory and allow to ensure the safety of the adopted child in advance. The following are specified as special conditions for adoption: the consent of the adopter; consent of the parents, the consent of any person or body who is entitled to consent in their place; the consent of the child under ten years of age [4]. Adoption conditions defined in the current legislation not only allow determining the compliance of all participants of the adoption with the criteria necessary for creating a valuable family, but also determine the general direction of development of family legislation in terms of ensuring children's rights. The division of adoption conditions into general and special conditions, in turn, is important for the theory of family law [2, p. 190]. In practice, each condition of adoption has equal importance in relation to each other.

All types of legal requirements that must be followed during adoption (consent of certain persons, state of health of the adopter, financial situation, etc.) act as conditions of adoption. [8].

One of the main conditions for adoption is the consent of the parents to the adoption. Obtaining this consent is essential. Because after the adoption is formalized, the legal relationship between the child and his/her parents based on blood kinship is canceled.

According to Article 122.1 of the Family Code of the Republic of Azerbaijan, a child with parents can be adopted only with the consent of the parents. However, the legislation provides for a number of exceptions in this matter. Thus, according to the content of Article 123 of the Family Code

of the Republic of Azerbaijan, the consent of the parents is not required for adoption in the following cases, and the act of adoption can be carried out without their consent:

1. If the parents have been deprived of their parental rights and 1 year has passed;
2. If the parents have been considered legally incapacitated;
3. If the parents were considered missing without notice;
4. If the parents do not live with the child for more than 6 months, if they refuse to upbringing or maintenance despite the warning of the custody and guardianship bodies, if the parents do not show parental attention and care to the child.

The act of adoption can be carried out without the consent parents also in the following cases:

- when the child is abandoned;
- when a child is found during a natural disaster, as well as in another emergency situation, and there is an act compiled by internal affairs bodies or custody and guardianship bodies in a prescribed form.

In the above-mentioned cases, despite all efforts, the parents of the children should not be known, that is, it should be impossible to identify them.

In the case of adoption of children of minor parents, the consent of the guardians and parents of the minor parents is required, and in the absence of parents, guardians, the opinion of the relevant executive authority is required.

The parents' written consent to the adoption of their children must be notarized. Consent can also be given orally during court adoption proceedings. In the Decision of the Plenum of the Supreme Court of the Republic of Azerbaijan dated October 29, 2009, "On the experience of applying the legislation by the courts when considering civil cases related to adoption and annulment of adoption", it is noted that "the parents' consent to the adoption of the child at the court session should be recorded in the protocol of the court session and confirmed by the signature of the persons who gave it. That consent should also be expressed in the court decision" [1].

Parents shall have the right to withdraw their consent to adopt their children until the court decision on adoption is approved.

Parents can agree to give their children for adoption to a specific person or without specifying a specific person.

As can be seen, family law provides for two types of parental consent to the adoption of their children: concrete and abstract. The first type - expresses the consent of the parents to give their children for adoption to a certain person, while the second type - implies the consent for the child to be adopted by any adopter who meets the requirements. Abstract consent means that the parents give up the right to choose the adopter and give this right to the state in the person of the custody and guardianship agencies. However, giving up the right to choose the adopter does not mean that abstract consent is unconditional and final [6, p. 292].

The consent of the parents to the adoption of their children by another person(s) can be characterized as a unilateral expression of will. There is no question of a contract between the adopter and the parent. Because the parents' consent to the adoption of their children does not imply the determination of any conditions.

The analysis of the relevant provisions of the legislation shows that the main aspects of the consent of the parent(s) to the adoption of the child are as follows:

- this consent can be given only after the child is born and registered according to the law;
- this consent can be given both in relation to a specific person and without specifying a specific person, i.e. in general;
- this consent is determined by the guardianship authority;
- this consent must be expressed directly during the consideration of the child's adoption case;
- if the parent renounced the child after the birth and expressed his/her consent to the adoption, and he/she has a notarized application to this effect, it is not necessary to obtain this consent again;
- it must be checked whether the parent has withdrawn this consent pending the adoption proceedings;
- the fact that a parent is considered by the court to have limited capacity for action does not constitute a basis for the adoption of his child without his consent.

The characteristics of giving consent to the adoption of children deprived of parental care are defined in Article 124 of the Family Code of the Republic of Azerbaijan:

a) Children under guardianship must have written consent for adoption;

b) during the adoption of children placed in social service agencies, the opinion of the heads of the agencies regarding those children is obtained;

c) for the adoption of children under the care of a foster family the opinion of their foster parents regarding these children is examined.

d) taking into account the interests of the child, the court may adopt a resolution on the adoption of the child on the basis of the opinion of the relevant executive authority without taking into account the consent or opinion of the above persons.

e) When a child who has reached the age of 10 is adopted, his/her consent is necessary. When a child who has reached the age of 7 is adopted, his/her opinion is studied and taken into account by the courts with the participation of an educational worker or a psychologist;

f) If the child lived in the family of the applicant and considers the applicant his/her parent before the application for adoption was submitted, the adoption may be carried out without the consent of the adopted child.

Unlike the consent of biological parents, the consent of guardianship authorities, social service agencies, and foster families does not have the nature of parental rights. Because the legal status of the mentioned persons is close to the legal status of the parents to a certain extent, but it does not completely coincide. Although these persons take care of and educate children, they do not have all the rights and duties that biological parents have. On the other hand, as can be seen from Article 124 of the Family Code, their consent is conditional rather than definitive. So, the court may not give legal importance to this consent, that is, take it into account, guided by the interests of the child.

The Decision of the Plenum of the Supreme Court of the Republic of Azerbaijan dated October 29, 2009 "On the experience of applying the legislation by the courts when considering civil cases related to adoption and annulment of adoption" states that, "courts should focus on the main idea that in order to ensure the rights and best interests of children in each specific case, they should receive the necessary information about the case, have the opportunity to exercise their rights in the court process on family relations issues affecting their interests, their opinions should be taken into account and the rights of children and the

highest interest must be ensured. When resolving the issue of summoning a ten-year-old child to court, the court should be guided by Article 52 of the Family Code. According to that article, the child has the right to express his opinion during the resolution of any issue affecting his interests in the family, as well as to be heard in the course of investigations. The opinion of children under the age of 10 must be taken into account, except in cases where it is against their interests. Courts must make decisions only with the consent of a child who has reached the age of 10 in the cases provided for in the Family Code” [1]. Consideration of the consent of a child who has reached the age of ten regarding adoption is mandatory in the following cases:

- when the child is adopted;
- when the child’s surname, patronymic, as well as own name are changed;
- when the adopters are written in the birth record book as the parents of the adopted;
- when the child’s name and surname are changed due to the cancellation of adoption.

According to most authors, it is only after the age of ten that a child is able to express his/her will fully consciously and correctly assess the importance of adoption. Some authors believe that each child develops individually, according to his physical and mental abilities. Conducted psychological studies show that it is not difficult for children in modern time to fully express their will at an earlier age. Therefore, it would be more appropriate to reduce the legal age limit from ten years to seven years [7, p. 71-75].

It should be noted that it is important to consider the exception in the family legislation regarding obtaining the consent of a child who lives in the family of the person who wants to adopt and considers the family his/her parent until the application for adoption is submitted (that is, in this case, the possibility of adoption without the consent of the adopted child).

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СОГЛАСИЕ РОДИТЕЛЕЙ ИЛИ ЗАМЕНЯЮЩИХ ИХ ЛИЦ КАК ОДИН ИЗ ОСНОВНЫХ УСЛОВИЙ УСЫНОВЛЕНИЯ

В статье указывается, что согласие родителей или заменяющих их лиц является один из основных условий усыновления. Автор на основе анализа и обобщения действующего семейного законодательства, правовой литературы и практики нормативно-правового регулирования в сфере усыновления в зарубежных странах определяет понятие условий усыновления и отмечает их важность. Также в статье выдвигаются обоснованные предложения по усовершенствованию ст. 32 Закона Азербайджанской Республики «О правах ребенка».

Ключевые слова: усыновление, условия, условия усыновления, согласие родителей, согласие органов опеки.