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Illustrations: all kinds of children, children, children...

THE CHILD IN CIVIL COURT PROCEEDINGS

APPLICATION OF THE FAMILY CODE, THE CHILD PROTECTION ACT AND THE PROTECTION AGAINST DOMESTIC VIOLENCE ACT

Participation and procedural capacity, special guarantees, nature of the proceedings, problems in court practice and necessary measures

According to Art. 3, para. 1 of the Convention on the Rights of the Child (adopted by the General Assembly of the United Nations in 1989, ratified by virtue of resolution of the Great Bulgarian National Assembly in 1991), “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

According to the Declaration of the Rights of the Child, “mankind owes to the child the best it has to give”.

Bulgarian legislation has been harmonized with these principles and objectives. The special protection of children has been asserted in Art. 14 and Art. 47 of the Constitution and is provided for in the Civil Procedure Code, the Family Code, the Child Protection Act, the Protection against Domestic Violence Act, etc. We will discuss the most frequently applied provisions of specialized acts in civil court proceedings related to the rights and interests of children.

Proceedings for alimony, parental rights, accommodation of children outside the family, protection against domestic violence, disposal with the property of children, etc. are remarkable for their

intense protection

which is manifested by several aspects jointly or severally: favourable local jurisdiction for lawsuits, review under summary proceeding rules, discharge from the liability for state fees, preliminary enforcement of rulings (Bulgarian Civil Procedure Law, Dr. Zh. Stalev). The protection of children has been additionally guaranteed through the provisions of Art. 15, para. 6 of the Child Protection Act which provides for the participation of a representative of the Social Support Directorate Social Support Directorate in the suits through a social examination and statement. The Social Support Directorate is neither a party to court disputes regarding alimony for children, divorce of families with children and parental rights, nor a representative of the child under the meaning of the Civil Procedure Code. The persons authorized by it are neither witnesses, nor experts. Social reports are not classified as written evidence establishing facts and circumstances. The Social Support Directorate participates in these court actions because of the government’s determination to protect the best interests of children. The purpose is to assist the court with detailed objective information which it cannot collect beyond the evidence presented by the parties (written and oral, collected according to all rules provided for civil proceedings) as well as in the court forming an inner conviction based on the law, the evidence but also on the specific interests of each child.

Divorce in families with children, independent parental right proceedings

In divorce lawsuits of families with children which end in an agreement and mutual consent on the grounds of Art. 99, and Art. 100 of the Family Code – chapter 26 of the Civil Procedure Code, one of the three legal requirements for approval of the agreement is that it is to the best interests of the children (Art. 101, para. 1 of the Family Code, Art. 330, para. 3 of the Civil Procedure Code). In proceedings for divorce due to the profound and irreparable disruption of the matrimony (especially in claim proceedings) the court always considers together with them and makes joinders for the claims pertaining to parental rights, personal relations with and alimony for the children (Art. 322, para. 2 of the Civil Procedure Code). In case such a request has been made, the law provides for the court ruling on provisional measures within short period as well as *ex*

officio ruling of the court on issues pertaining to the children. The parental rights are granted after consideration of all facts with a view to the best interests of the children (Art. 106, para. 1 and 2 of the Family Code). When determining who shall be entitled to use the family home, the court takes into account a number of circumstances where the interests of children have precedence (Art. 107 of the Family Code).

In these claims and in the independent parental right proceedings (litigious court administrations pursuant to Art. 71, para. 2, Art. 72, Art. 106, para. 5 of the Family Code) the child is not a party. The parties are the parents but the rights and interests of the children are directly affected. Minor and underage persons are not witnesses in these suits and no circumstances may be established through them. They are heard (if they are 10 or younger, if the court decides so) in an appropriate environment in the presence of a representative of the social services, without the parents and their representatives. Every child is treated with great care, the conversations include topics from the child's daily routine in which he/she can easily participate. Once induced to take part in these discussions, the child shows with which parent he/she would be feeling more peaceful and protected. It also becomes clear if children have been manipulated.

When the parents have a dispute over their rights but their relations are not strained and their consideration for the best interests of the child is evident, children are more confident and they have a higher self-esteem. On the contrary, in aggravated disputes where the relations between the parents are tense, the children are involved in the conflict as well. Sometimes the parents do not understand or even pay attention to the condition in which the child has been placed by them. Each of them thinks that he/she has higher parental capacity. These relations often continue after issuance of court deeds – the measures ordered by the court are not performed, no mutual compromise is made and a number of claims are filed without there being any actual change in the circumstances. These situations traumatize children.

In court practice, there have been drastic cases of handover and acceptance protocols referring to children.

The child is not an item of property

(Family Code Collection - Court Practice, Mladenov, Bratanova). The child should know where his/her home is and be able to freely communicate with the parent with whom he/she does not live where the connection with this parent should not be severed unless he/she acts in a manner which may pose a hazard for the child. There have been cases of the so-called parent alienation when one of the parents is completely alienated from the child by the other parent.

The court practice on extremely severe parental right disputes, especially in the specified cases, shows that the statutory framework needs modification. Problems are manifested during proceedings, but directions for the parties to make mutual compromises are not always sufficient.

BOX:

It would be good if the court could appoint a specialist *ex officio*, for example a psychologist, who shall be the temporary guardian of the child until the court proceedings are finalized in order to assist and direct the parents, provide therapy to the child and guarantee the protection of the child's interests.

The legal status of such an expert differs from that of the expert under the meaning of chapter 14, section V of the Civil Procedure Code, as well as from the legal status of the special representative (as provided for in Art. 29, para. 4 of the Civil Procedure Code) in the cases of conflict between the interests of the represented and the representative, since parental right disputes are between the parents who do not represent their children in these cases.

Accommodation of children outside the family

In such cases children are accommodated with family members, foster families and institutions as a measure aiming at protection of the child used in the above order of precedence in case of one or more of the circumstances listed in Art. 25 of the Child Protection Act – when the parents are deceased, unknown or deprived of their parental rights, when they persistently fail to take care of the children or are permanently unable to raise them, or when the children are victims of domestic violence and there is a risk that they could be harmed.

These court proceedings are performed when the children have been temporarily accommodated pursuant to administrative proceedings through an emergency protection measure. In the lawsuits which are based on the provisions of Art. 26 et seq. of the Child Protection Act (accommodation), claims may be made by

the Director of the Social Support Directorate, by a public prosecutor or by a parent and in those which are based on the provisions of Art. 30 (accommodation termination) and Art. 30a (modification of the protection measures) of the Child Protection Act – by the respective foster family or the family member with whom they have been accommodated as well.

Usually, these lawsuits are instituted by the respective Social Support Directorate. In terms of the procedure, this institution is a party which may legitimately make claims pertaining to third parties' rights. Under the meaning of the civil procedure code, it is a procedural substituent – a third party which is claimant together with or instead of the entitled person (Bulgarian Civil Procedure Law, Dr. Zh. Stalev).deleted

The above proceedings are not protective because they are not indisputable. In case a protection measure needs to be ordered for the child, the scope of parental rights is affected. Therefore, the parents are defendants in the lawsuit and they may dispute the claim. These are litigious proceedings whereunder measures are ordered which may thereafter, in case of change of circumstances, be modified with a new claim, i.e. litigious administration under the meaning of civil procedure law (Bulgarian Civil Procedure Law, Dr. Zh. Stalev), through which the legislator has allowed for measures for protection of children in the cases provided for by the law. The fact that the proceedings are bilateral and litigious, that the order of precedence of the measures needs to be observed, presupposes that the parents and relatives must be subpoenaed in all cases. The fact that they are often disinterested or difficult to locate slows down the procedure provided for in the Child Protection Act. But such promptness is not absolutely necessary since the emergency protection measures have already been imposed under administrative procedures. It is more important that the court proceedings are elaborate and the court deed guarantees the best interests of the child.

Alimony

Very often, claim proceedings for alimony and its modification pertain to minor and underage persons. Under such proceedings, the child is a party – claimant (entitled party) on whose behalf the claim is made. The claims of minor persons are filed through a legal representative (parent, guardian) and those of underage persons are filed in person with the consent of a parent or guardian (Art. 28, para. 2 and para. 4 of the Civil Procedure Code) in the district of the court according to the defendant's permanent address or in the district of the court according to the claimant's permanent address (Art. 105 and Art. 112 of the Civil Procedure Code). The special local jurisdiction specified second has been established as the usual court practice since it is favourable for those seeking alimony. The parent who has been assigned with the parental rights by the court shall represent the child but if the alimony lawsuit has been instituted against that parent, the child may be represented by the other parent without the need for a special representative under the meaning of Art. 29, para. 4 of the Civil Procedure Code (Bulgarian Civil Procedure Law, Dr. Zh. Stalev). The actual status of the child prevails and the child may not be left without alimony. It is more important with which of the parents the child lives and who takes care of the child (Family Code Collection - Court Practice, Mladenov, Bratanova). Under the meaning of Art. 89 of the Family Code the alimony is monthly and may not be suspended or depend on any temporary change of circumstances. Therefore, a request by the parent not exercising parental rights that he/she should not be paying the alimony which has been ordered for the month (or any shorter or longer period) of the year during which the child is staying with that parent according to the special personal contact regime, would be inadmissible. The provisions of Art. 89 of the Family Code additionally warrant the permanence of the right to alimony.

A minor child has procedural capacity (Art. 27 of the Civil Procedure Code) but not procedural competency to personally undertake procedural actions or for the same to be undertaken against the minor child (Art. 28, para. 4 of the Civil Procedure Code). The representation functions of the child's legal representative (parent, guardian) have been provided for by the law. The parent is not the legal representative of an underage person since the latter has procedural capacity and restricted procedural competency. The parent only consents to the procedural actions of the underage person - Art. 28, para. 2 of the Civil Procedure Code (Bulgarian Civil Procedure Law, Dr. Zh. Stalev). The procedural quality of the child in the alimony procedure guarantees protection of his/her rights: he/she is a party to these lawsuits, its representation has been provided for; favourable local jurisdiction has been provided for as well as a possibility for the lawsuit to be conducted under summary proceeding rules – chapter 25 of the Civil Procedure Code, in conjunction with Art. 79, para. 2 of the Family Code (new text as of 01.03.2008), Art. 310 et seq. of the Civil Procedure Code; the person claiming alimony is not liable for state fees – Art. 83, para. 1, item 2 of the Civil Procedure Code; preliminary enforcement of the ruling is allowed. In these lawsuits, children are usually not heard since the defendants are

the parents who do not exercise parental rights but are entitled to scheduled personal contacts. In order to guarantee their good relations, which children need, for protecting the parental authority and stimulating parental responsibility, it is not appropriate to hear minor and underage persons when this relates to the alimony which shall be paid for them. The interests of children are well protected since the alimony is awarded in the first place with a view to the needs of the child and then according to the financial status of the parents.

BOX:

The statutory thresholds for alimony payable for underage persons are currently too low, out-of-date and are rarely taken into account by courts. They shall be cancelled since in practice greater amounts are ordered especially in the case of parents with considerable income.

Proceedings related to disposition with property of children

According to the provisions of Art. 73, para. 2 of the Family Code, alienation of property and chattels and generally disposition with property of children is allowed with a ruling of the district court at the place of residence only if necessary or if this is evidently to the best interest of the child. As part of protection unlitigious proceedings the court gives permissions or refusals for drawing amounts from deposits of children, usually for petty cash, and for transactions with real estates, motor vehicles and other corporeal rights.

There is no mechanism guaranteeing feedback whether these amounts have been actually utilized for the purpose allowed by the court. For example, the proceeds from the sale of a property of the child could have been used for purchasing a property on behalf of a third party, i.e. the conditional permission of the court sounds as a negligible recommendation. These provisions of the Family Code date back to when the social environment was different from now, when there were no Social Support Directorates with their child protection departments. Namely they could issue permissions for drawing amounts from deposits of children up to a certain annual amount, keeping written files. In case of transactions with real estates of children, the permissions could be issued by the court but with the obligation to provide feedback to the respective Social Support Directorate evidencing the correct execution of the court deed.

Restriction and deprivation of parental rights

These lawsuits are instituted at the request of one of the parents or ex officio by the court or at the request of a public prosecutor in the cases provided for in Art. 75 of the Family Code (deprivation of parental rights). The defendant under such lawsuits is the other parent or the parents respectively. These proceedings are litigious court administration. Usually, in court practice when the parties to these lawsuits are the two parents, one is the claimant and the other is the defendant. A representative of the prosecutor's office participates in all cases, including in the parental right restriction proceedings under Art. 74 of the Family Code, and this should not change since such participation evidences the public interest and priority of the protection of children. The grounds for making such claims are specified in detail in the statutory framework. Such proceedings may be instituted at the initiative of the respective Social Support Directorate as well (Art. 21, item 14 of the Child Protection Act).

Proceedings under the Protection against Domestic Violence Act

Children are the subject of special protection under the said act. The provisions of the Protection against Domestic Violence Act are aimed at providing prompt and effective protection, possibly prevention of graver consequences or crimes, separating the child from the perpetrator. This is secured not only with the summary procedure for issuing the emergency protection order (Art. 18, para. 1 of the Protection against Domestic Violence Act) but by immediate temporary separation of the child's residence with the parent who has not committed violence or who has suffered from it as well (Art. 5, para. 1, item 4 of the Protection against Domestic Violence Act) and by notifying the director of the respective Social Support Directorate if a protection measure is necessary for the child as provided for in the Child Protection Act (Art. 18, para. 3 of the Protection against Domestic Violence Act). The child is not a party to the proceedings under the Protection against Domestic Violence Act. There is a wide scope of persons who are entitled to file claims under this act in terms of the child's rights: a parent but not as a legal representative of a minor or giving consent for an underage person but on the parent's own behalf; grandparents; siblings; a certain scope of family members; the

director of the respective Social Support Directorate. There should be provisions allowing the public prosecutor to file such claims and participate in these proceedings as well.

Box:

The nature of the proceedings described above varies as does the child's procedural quality thereunder. The legal provisions pertaining to the relations specified above guarantee the legislative conditions created for rendering special care for and protecting children. It is possible and imperative that this protection is perfected by amending the Family Code, the Child Protection Act, the Protection against Domestic Violence Act, etc. It is also important that the matter is brought to the attention of non-governmental right protection organizations, the mass communications and the whole society in order to assist the court and guarantee protection for children.

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