

BEST INTEREST OF THE CHILD IN ADOPTION CASES, PROBLEMATIC ISSUES OF SURROGATE ADOPTION

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Abstract

The best interest of the child has long been in the center of attention of the legislator in almost every state. It may happen that, for the most varied reasons, a child is deprived of the biological parents. In such a situation, the adoption, as one of the sources of the family relationship, is often considered with interest.

The adoption is a legal transaction, which is based on the mutual wills of the subjects that participate in it, and, as a result, it is constituted a new legal relationship between the adopted child and the adopter parents. So, in adoption cases, we are dealing with civil kinship which replaces the biological relationship between the adoptee and the original family.

Relying on the fact that the adoption is an act of special importance, the legislator requires the respect of legal requirements necessary for a more efficient adoption.

Regarding the administrative and judicial procedure through which the process of adoption passes, we note that the adoption is authorized only by the competent authority, the Albanian Adoption Committee, and it is finalized by the Court.

The whole process is guided by a principle, the best interest of the child. It is expressly provided in Article 240 of the Family Code, according to which the adoption is allowed only if it is in the best interest of the child, and guarantees the respect for his fundamental rights. Therefore, the adoption should be carried out in accordance with the legal requirements and

proceedings that guarantee the rights of child, the rights of the biological parents and the rights of the adoptive parents.

In all the judicial proceedings regarding to the child, an important role is played by the psychologist, as a professional that assess the situation in the case of administrative proceedings, as well as in the court proceedings.

This paper aims to present the Albanian legal framework regarding the institution of adoption, reflecting the conditions that should be accomplished for the realization of the adoption and its efficiency. In the paper we will also focus on some issues that may arise in the case of the surrogate adoption.

Keywords: Adoption, best interest of the child, international adoption, surrogate adoption.

Introduction

Adoption is a source of the family relationship, known as the civil kinship, it is recognized today in almost all the countries of the world. Through the adoption, it is aimed to respect one of the fundamental principles, respectively, the best interests of the child. Cannot be avoided mentioning the fact that, in practice, there are cases where this institute is not realized pursuant the fundamental principles as the best interest of the child or the respect of his fundamental rights expressly sanctioned in the Constitution of each country. There are cases where the institute is used to “trade”, by giving a legal form to the “sale” of the children and speculating in this way with people who live in miserable social and economic conditions. As a result, wealthy persons buy children from the poorer families, generally in underdeveloped countries, turning children into an object of trade.

The problem of the minors is object of a great attention. However, still exists deep gaps between the children care services, the laws into force for their protection and the government and public authorities’ intervention in this sector. The urban migration, the bad conditions of live in the suburbs and the collapse of the supporting systems offered by the traditional wide family, have brought the transformation of the family itself. Due to this situation there is an increase number of minors that might be defined as neglected or abandoned. Through the adoption, the adoptive family might be a solution for the fulfillment of the needs of these children. It does not matter if it is for a short or long term period.

The civil kinship, or the adoption, is based on the mutual wills of the subjects who aim the creation of a kinship relation.

Regarding the institution of the adoption in our country, it has had an evolution of the terminology from “*adoptim*” to “*birësim*” and an improvement of the children’s rights. For the first time the regulation of the adoption, in Albania, was disciplined in the Civil Code of the Albanian Kingdom⁴⁴.

After Second World War, a lot of children remained without a family and as consequence the institution of the adoption received a great importance. The legal protection of the minors’ position was realized with the Act no. 431, dated 15.05.1947 “On tutele and adoption of the minors and orphan children”.

The current forms of protection defined by the law were the *custody – tutelë* (in the terminology of this law), *adoption* and *patronage*.⁴⁵

The law that has disciplined in a more complete manner the institution of adoption was the law no. 602, dated 19.05.1948 “On adoption”, modified with the decret no. 3327, and dated 01.09.1961. This Act has completely disciplined the conditions, procedures and consequences deriving from the adoption (in the terminology of this law). The law recognized only the *revocable adoption* (not complete).

The Family Code of 1965⁴⁶, has signed another important step in the development of the adoption institute by setting, between the adopted person and the adoptive parents the same relations that exist between children and their biological parents. Differently from the previous legislation, the adoption of the adult persons was allowed, with the condition that during the childhood they have been under the care of the adoptive person.

Afterwards, it has come into force the Family Code of 1982, which has not brought any major modifications regarding the discipline of the adoption institute.

⁴⁴ The Civil Code of the Albanian Kingdom has entered into force on April 1, 1929.

⁴⁵ In both the first hypothesis the care of the children was realized by natural persons, in the hypothesis of the patronage, the care of the child was realized by organizations or institutions founded with the aim to contribute to the improvement of their life conditions.

⁴⁶ The Family Code of the Socialist Republic of Albania, was approved with the Law N. 4020, dated 23.06.1965, came into force on 01.01.1966.

Before the transitional period, Albania was considered a country with a low level of abandonment and neglect of children. The economic and social changes of the transition period after the 90's have significantly increased the number of children at risk, by increasing the number of children who were abandoned, neglected or those abused from their parents.

2. Current legal framework for the orphan children and the institute of adoption

The Constitution of the Republic of Albania is the fundamental law that provides for the protection of children's rights in general and those without parental care in particular. It includes a special chapter where it is provided the obligation of the government to provide care and assistance to the children without parental care throughout the process of their growth, development and education⁴⁷.

The institution of adoption in the Albanian law is governed by the Family Code as well as by the Law No. 9695, dated 19.03.2007 "On adoption procedures and the Albanian Committee of Adoption".

The current Family Code, drawn up after the political changes occurred in Albanian society during the 90's, inspired from the legislation of the western countries and the accumulated experience in the jurisprudence of these countries, has reformed most provisions of the previous legislation, especially the discipline of the family relationships among the family members. The adoption is not simply the result of an act of private autonomy, since for its realization it is now needed the fulfilment of some validity criteria governed by the legislation.

The law aims also to improve the procedure of international adoption. It is required the accomplishment of certain conditions⁴⁸. The Governing Council has the duty to verify these conditions, in order to realize these kinds of adoptions.

The law recognizes to the Albanian Committee of Adoption (KSHB) the right to select and license mediating agencies for the realization of adoptions, sets the criteria on the completion of their activities in this area,

⁴⁷ Article 59/e of the Constitution of the Republic of Albania.

⁴⁸ The validity conditions to be fulfilled are: the validity of the documentation of the applicants, the adequacy of the adoptive applicants in accordance with the principles of our legislation and with the legislation of the receiving country.

the rights and obligations that they have in terms of relations with the adoptive applicants, the meetings of the latter with a child, the exchange of information with this authority, etc.

Differently from the previous law, this law has also provided the protection of the personal data in the adoption documentation, taking into consideration the legal framework that applies in this context. In the same time, the law gives to the adoptive parents and the adopted child the right to receive data from the authority on the origin and history of each - other, excluded the cases in which providing this information will have serious consequences.

3. Validity conditions of adoption

The aim of the adoption is to create a parental relationship, similar in its content with the relation derived from the blood ties⁴⁹. The adoption is an act of great importance for the life of the adopted child, the biological parents and the adopter parents. Therefore, at the time of adoption the legislator requires a strict respect of the *legal requirements*, which are necessary for the *validity of adoption*. If any of these conditions is not accomplished, the adoption cannot be performed. These requirements relate to the adoptee, the adopters, with the difference of age between them, and with the consent of the persons contemplated by our Family Code, whose spirit whereby it is in line with that of the international conventions ratified by the Republic of Albania.

The *maximum age* for the adopted person is 18 years⁵⁰. Also there is required a minimum *difference of 18 years* between the adoptee and the adopter⁵¹. The Law “On adoption procedures” which provides it as a condition of removal from the lists of the Albanian Committee of Adoption and hence the inability to adopt a person who is adult⁵², is in the same line with the Family Code. The “*ratio legis*” of this condition is related to the main purpose of adoption, which is to provide a family to a child who does

⁴⁹ Omari, S., “*E Drejta Familjare*”, Botimet Morava, Tiranë, 2010, fq. 439.

⁵⁰ Article 241, paragraph 1 of the Albanian Family Code.

⁵¹ Article 241, paragraph 2 of the Albanian Family Code.

⁵² Article 21/c of the law “On adoption procedures and the Albanian Committee of Adoption”.

not have one and to provide an opportunity to be raised and educated as all other children, too.

On the international plan, the adoption of minors is governed by the UN Convention “On the rights of the child”. This convention provides that the condition of the age difference fits to the nature and purpose of adoption. In order to create between two persons the same relationship established between the parent and the child, there should be at least a difference of age, suitable to the parent-child relationship, whether in the physical and in moral sense.

The *opinion and consent of the child* depending on age, is mandatory⁵³. In the administrative procedure, the adoption is realized when the Committee receives the opinion of the child when he has reached the age of 10 years. Meanwhile, in judicial procedure besides his opinion, it is also required the consent given in front of the court when he has reached the age of 12 years.

The opinion given by the child regarding the adoption must be given free, be documented and notified in written, in the form foreseen from the Committee.

The adoption is a personal project for the life of the child. This project cannot be implemented without realizing a previous *study of the child and his biological parents*. The conclusion that the child’s family of origin is unable to undertake the care of the minor and the evaluation of the ability of the minor to be positively integrate in a family environment, determines the adoptionability. The adoptionability of a child is decided before the adoption process. The state of adoptionability is declared by the *district court* where the minor resides. In order to declare the state of adoptionability is not necessary to explicitly express the will to abandon the child, it is sufficient the fact that the parents have acted in a way that does not comply with the legal obligations. In this way they show an inability to raise and educate children, up to the point that the psycho-physical balance of the children may be disrupted.

⁵³ Article 12 of the European Convention on the Exercise of Children’s Rights of 1996 and the Hague Convention on Protection of children and cooperation in respect of intercountry adoption, of 1993.

Another legal condition is the registration of the minor in the *Adoption Committee's lists*⁵⁴. The children registered in the Committee's lists are those children who are declared abandoned by a judicial decision, and the children whose biological parents has given their consent for the adoption or the consent for adoption is given by the court for the children who are in custody⁵⁵. These children can be removed from the list and therefore cannot be adopted if the consent given, for the adoption, from the biological parents is withdrawn or if the court decides that the child should remain with their biological parents (after that the latter have interfered in the process) as it is a priority that the child should grow up within the biological family.

The adoptive person should accomplish a number of conditions and procedures which often are accompanied by a long waiting period.

There are no defined and irrefutable rules for the evaluation and selection of the family that is able to adopt a child. An adoptive person can be any adult person who has the *capacity to act*, regardless of gender, marital status or whether he has or has not a biological child. In this sense, it is not a condition for the adoption to be realized only in the situations of inability to have biological children.

The adoption represents a point in common between the children with their needs and the adoptive parents with their desire to have children, to raise and educate them. This does not mean that the adoption should respond to the various demands of the eventual adoptive parents, but those parents have to be willing to have a child and may accept the child that is given to them. In any case, the adoption is a right for a child who needs a substitute and permanent parental figure. The ability of the parents to adopt cannot be reduced only to the legal notion. It should consider also the *economical, ethical, social and medical factors*.

After the evaluation of the legal, economic and social requirements, a group of experts of the Albanian Adoption Committee will express an *opinion on the adoptive ability* of the potential adoptive parents. This team will prepare a report, to be presented to the Administrative Board of the Albanian Adoption Committee.

⁵⁴ Article 252, paragraph 1 of the Albanian Family Code.

⁵⁵ Article 246, paragraph 3 of the Albanian Family Code.

The ability to adopt is governed by the Hague Conventions, that do not provide only the fulfillment of the conditions defined by the applicable law of the host state, but it also aims to answer to the socio-psychological requirements, from which depends the realization of the adoption. According to the Family Code provisions *two or more persons cannot jointly adopt* a child, except for the case in which they are spouses⁵⁶.

The cohabitants do not have the right to jointly adopt a child. The same restriction is provided in the European Convention “On the adoption of children”⁵⁷.

Regardless of the fact that the cohabitation is a factual situation of the family relationships, it is considered that it is not a guarantee for the necessary stability for the adopted child, even more in the case of a child with a difficult past. However, our law sets up some restrictions on the ability to adopt a child⁵⁸.

In the case of a child adopted only from one of the spouses, it is required the consent of the other spouse. Such request is natural and necessary, because the failure to give such consent can cause disputes in the family, which would be improper for the prosperity of the child.

The presence of a psychologist and his opinion through a *psycho-social report* is also important for the court.

In cases where the adoptive parent dies after giving his consent and prior to the court decision, the court may proceed normally with the trial procedure for the completion of adoption. The heirs of the adoptive parent (including the spouse) may submit claims to the court to challenge the adoption.

All the adoption and pre-adoption procedures should be guided by the *best interests of the child*. No other interest, of any kind, shall be considered as dominant or equal to the interest of the child.

All protective measures taken in favor of children should be directed towards the research of his best interest and the respect of his fundamental rights.

The child shall be registered immediately after the birth and starting from this moment he has the right to a name, the right to a nationality and if

⁵⁶ Article 242/1 of the Albanian Family Code.

⁵⁷ Article 6/1 of the Convention.

⁵⁸ Article 245 of the Albanian Family Code.

possible to recognize his parents and have their care⁵⁹. In the case when a child is temporarily or permanently deprived of a family environment or is in his interest not to remain in such an environment, he is given the right to a special protection and assistance by the government⁶⁰. Although the child is detached from the environment of his biological family, his parents will be participant subjects in the procedures followed for their child to be adopted. The biological parents must give their consent to get under way the adoption procedures.

The *consent for the adoption* of the child, given by his *biological parents*, may be withdrawn within 3 months. The parents can withdraw their consent even after the expiry of three months, up to the moment of the decision by the competent court. The parents who decide to refuse to give their child for adoption, should be helped to understand all the implications of their act, and to be aware of the fact that in most cases the adoption means cutting all the socio-legal and personal relations with the child; the child can be adopted within the country or abroad, so that the international adoption causes the child to be transferred to live in another country. In some countries the open adoption exists, and this may mean the possibility of a future relation with the child based on the latter's initiative.

4. Surrogate adoption

The content of the law no. 8876, dated 04.04.2002 "On reproductive health" regards what is called the surrogate adoption. The same criteria and procedures provided by the Family Code for the adoption are applied to the surrogate adoption⁶¹. The surrogate adoption may be required after an artificial insemination, in the cases where the child is not genetically related to the commissioning parents or the holder woman⁶². In this case the commissioning spouses must follow the procedure of adoption in order to legally recognize the child born in that way. The criteria provided for the

⁵⁹ Recital of the UN Convention on the rights of children.

⁶⁰ Article 20/1, UN Convention on the rights of children.

⁶¹ Article 261 of the Albanian Family Code.

⁶² Mandro-Balili, A., Meçaj, V., Zaka, T., and Fullani, A., "*E drejta familjare*", First edition, Kristalina KH, Tiranë 2006, pg. 655.

surrogate adoption⁶³ are not sufficient for this type of adoption since there arise many problems in the implementation.

The first problem arises from the stipulation of the contract between the commissioning parents and the surrogate mother. We rely, in reality, on an agreement between two women but there naturally arises the question whether the fetus may constitute the object of a contract.

What will happen after childbirth if the commissioning parents, for various reasons, do not want the child anymore? Is it possible to require the mandatory execution of this contract? What is meant in this case with the best interest of the child?

In our opinion, the mandatory execution of the agreement would not be in the interest of the child. We deal with the fact of the birth of a child. We may say that the best interests of the child is to grow up in a family environment, but on the other hand, it is not in the interest of the child to grow up and be educated in a family where he is not welcomed.

What will happen if the surrogate mother wants to keep the child? We are dealing here with a conflict between two women. Which of them will have the priority? Who will have the right to raise and educate the child?

If we address to the legislation, we believe that because of the biological relationship, the child will be entrusted with the donor mother. She is the child's biological mother.

But, on the other hand, the woman who born him, because she held him for nine months in her body, can have a great connection to the child. In such a situation, it may be that the surrogate woman consider as her own child and refuse to leave him. What will happen in these cases? Which would be the best interest of the child?

We think that it is not possible to find a clear answer in the legislation regarding these issues. They are very delicate matters and trying to fix them we sometimes fail to find appropriate solutions. We consider that the conflicts in these cases cannot be solved only on the basis of the legislation, no matter how complete and accurate it might be. The best solution would be to examine and study case by case and only then to decide remaining faithful, every time, to the best interest of the child. Based on the jurisprudence of other countries, the solution is based not only in the biological relation, but is based especially in the emotional and social

⁶³ The same as for the complete adoption.

affection that exist between the child and the person who has exercised the parental responsibility⁶⁴.

Problems are also encountered in the time of registration of a child in the civil registry, because in this case the surrogate mother results as his mother, but she is not his biological mother.

Moreover, a child born from the genetic material of anonymous donors will not be able to know his origin⁶⁵.

When age and maturity allow, the minor has the right to know his story, and if possible, to have information about his biological parents⁶⁶. In the case of a child born following the above procedures, such thing is not possible and it clearly falls in contradiction with the provisions of the Family Code and the International Conventions that deal with the protection of minors' rights.

5. Final Remarks

The “perfect family”, which solves the problems of a child deprived of a family environment, cannot be precisely described. In the situation when the biological parents do not have the possibility to guarantee the full and harmonious development of the family, the competent authorities for the welfare and protection of children authorities should seek alternative solutions. Choosing an adoptive family for the child through adoption, should have priority over introducing or leaving them in residential institutions.

Based on the data of the Albanian Adoption Committee, is evidenced that in the recent years a large number of children were adopted. In our opinion, the number of adoptions would have been even greater if the legislation governing the adoption issues would have no room for any legal misinterpretation, regarding the continuing parental interest, which prevents or slows down the adoption of a large number of children residing in residential institutions. The family homes accommodate a very small number of children who, currently, are registered in the social care system. This service is an alternative that helps the healthy growth of children, offering

⁶⁴ Omari, S., “*E Drejta Familjare*” Botimet Morava, Tiranë 2010, pg. 276.

⁶⁵ A right recognized by the UN Convention on the Children's Rights and recognized also by the Albanian Family Code.

⁶⁶ Article 262 of the Albanian Family Code.

them a family environment with a mother, brothers and sisters, an individual home and a community that is close to them. In addition to these family homes, the vocational training and support in their employment, helps teens to build an independent future.

The surrogate adoption, in order to be effective and to find a wider application, requires a special procedure and other arrangements in the reproductive health law and in the civil status law. The law should govern the situation when the commissioning parents, for various reasons, do not want the child anymore. In this case, the Civil Code provisions of the mandatory execution of this contract cannot be applied, because it does not fall in the best interest of the child's principle. In our opinion, the legislation should follow the developments of biomedical technology. It is necessary to have a legal discipline for the new situations that arise, especially, when the use of the analogy for the existing legislation is not sufficient and often it leads to further conflicts instead of solving the existing ones.

Even if the main point of this paper is the principle of the best interest of the child, in our opinion a few legal improvements need to be done regarding the age of the adopted person. As it was analyzed during the paper, the Albanian Family Code requires the minor age of the adopted person, as a validity condition. In our opinion, the legislation should allow the adoption of the adults, also. The ratio of this recommendation is that, everyone has the right to have a family and be part of it, independently of his/her age.

Regardless of all, time is running, and for the children is always late. We hear every day verbally or in written that children are the future, and that the future is the debt that we own to them. But before these children become the future, they are the present, and we are all responsible for their present.

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