

NON-ADVERSARIAL CASES – THE FEATURES OF THE CHILD ADOPTION PROCEEDINGS

Ketevan Kukhianidze, PhD student
Grigol Robakidze University, Georgia

Abstract

The presented work is about one of the important issues of the Civil Procedure Law – the non-adversarial cases and the problems regarding the legal proceedings of child adoption in the court. Theoretical investigation of the mentioned article outlines quite clearly the legal proceedings of child adoption, the nature of the statement, also statistical analyses of the court and the legal gaps in Georgian law that need to be overcome.

Keywords: Adoption, Child, Non- adversarial proceedings

Introduction:

After gaining the independence, Georgia achieved considerable success, including the judicial field. Numerous contemporary legal acts including the Civil Procedure Code of Georgia occupying the leading position among other legislative acts have already been adopted. Specifically this Code, in particular its XXXV Chapter regulates some peculiarities of the non-adversarial cases with precisely determined category of cases distinguished for certain specificities, characterized by absence of a dispute about the right. The blunders made while deciding the issue of adoption with administrative rules stipulated the urgency of settlement of this very significant issue under the court.

Adoption in a judicial manner aims at extending legal guarantees for protection of a child as well as other persons participating in the proceedings. The urgency of this issue is mainly caused by the simplification of the rules on adoption in Georgia, which – in its turn - is caused by the amendments to the Civil Procedure Code, the subject of proper assessment and analysis.

Indisputable or the so called voluntary legal proceedings rules (jurisdiction volunteer) have its roots in Roman law where the defendant's request was not the subject of a dispute. It should be noted that the characteristics contested proceedings have long been attracting attention of the specialists of procedural sphere. Such interest was conditioned by the fact that these issues raised not only theoretical interest, but had always had great practical significance.

According to Professor T. Liluashvili, the non-adversarial proceedings, referred to as special proceedings as well, are one of the types of court proceedings differing from the action (adversary) proceedings and from simplified proceedings. Practitioner lawyers fix almost the same position while interpreting the non-adversarial proceedings; in their opinion the non-adversarial proceedings, frequently referred to as special proceedings are one of the types of a court proceedings where the court confirms and approves the presence or absence of the facts with legal significance or the circumstances on which the origination, change or elimination of civilians' personal or proprietary rights and interests depend.

In everyday life, there are the occasions when a person has certain rights, but he/she does not ensure implementation of these rights, because the facts playing the role of the basis for their origination are not frequently presented clearly and relevantly require some identification and approval. As the name suggests, there is no dispute concerning the right of

one person against another regarding material-legal request. The non- adversarial proceedings establish the facts and not the legal consequences of these facts.

The name itself – “non-adversarial proceedings” - does not say anything about their characterizing procedural feature by which they differ from the action proceedings.

For a long time the civil law specialists paid less attention to the non-adversarial proceedings rules; the concepts to explain the non-adversarial proceedings and separate it from the action one were developed only in XIX century.

In Anton Menger`s opinion “The goal of the non-adversarial proceedings is to avoid the offence while the action proceedings aims at its elimination”.

According to Adolf Vakh, “The goal of the non- adversarial proceedings is to establish the human right while the action proceedings aim at restoration of the violated rights”. This opinion is agreed by E. A. Nefedyev.

The concepts mentioned above could not manage to make clear distinction between the non- adversarial proceedings and action proceedings.

The opinion that there are no objective criteria for separation of civil proceedings but assignment of civil cases to an action or non-adversarial proceedings is conditioned by the legislative approaches and reasonability was disseminated only in the beginning of XX century.

A. A. Melnikov in his interpretation of the non-adversarial proceedings indicates specifically to its goal as specific characteristics of the uncontested proceedings. The interpretation says that the civil cases are processed by the persons interested in the non-adversarial proceedings in the case of creation of the preconditions for implementation of their personal or property rights.

Modern scientists have different approach to the mentioned proceedings.

Professor Z. Dzlierishvili mentions that the non-adversarial proceedings are the objective mandatory procedural form of the court activity with procedural features differentiating them from the action proceedings; these features express their essence. Davit Imnadze, the Doctor of Law explains in his monograph the difference between the non-adversarial proceedings and the action proceedings by the fact that in the first case the dispute over the right does not exist and in the second - there are no disputing parties having opposite interests.

We think the non-adversarial proceedings are different from the action proceeding because its main basis is the dispute over material-legal right; this major difference is the fundament for the number of procedural features characterizing the non-adversarial proceedings.

Taking into consideration that the moment of non-adversarial proceedings does not include the dispute concerning the right, cases of this category are not participated by the parties (plaintiff and defendant). This fact indicates the specific feature of the non-adversarial proceedings, i.e. the non-adversarial proceedings are the unilateral proceedings; this kind of proceedings does not have any third party.

The non-adversarial proceedings envisage the special mechanism for protection of the rights awarded by the law. Such mechanism may be the application. A person lodging the complaint in the legal proceedings order will be referred to as an “Applicant”; relevantly, initiating cases of such category will be performed in the manner of applying by the applicant for confirmation of the undisputed right or for identification and establishing this or that circumstance.

According to the Article 310, within the scopes of non-adversarial proceedings the adoption is the independent case. While reviewing the issue, it is necessary to protect an applicant`s interests not because that it is urgent to defend his/her interests, but because the subjective rights should be obtained and implemented.

Adoption is distinguished for its complicated nature where the adopting and adoptive are interrelated with each other as well as with the third persons. The adoption means the legal fact which is arisen between the adopting and adoptive subjects; this is the means to establish the same legal relationship (personal or proprietary) between the adoptive and adopting subjects that might be established in the families of blood relationship.

According to the above mentioned, it should be concluded that the adoption means the following legal outcomes:

- a) Establishment of a legal relationship between the adoptive (foster parents) and the adopted, also between the relatives of the foster parents` relatives and the adopted child;
- b) Termination of any legal relationship between the adopted child and his/her parents, also with his/her biological relatives.

Thus, the issue of adoption is the legal fact for origination of right as well as for termination of legal rights.

According to the article 349 of the Civil Procedural Code of Georgia, the application for adoption should be applied by the adopting to the court according to his/her residence place or the child to be adopted. The mentioned article emphasizes the issue of alternative discussion.

As per the article 350 of the Civil Procedure Code, the application for adoption should indicate the data about the subject of adoption and his/her adopting parents, also the circumstances confirming that such adoption takes place for wellbeing and interests of the child.

The application above should be attached with:

- a) Consent of a spouse when a child is adopted by one of the spouses;
- b) Consent of a child's parent if any.

Besides the above mentioned, in our opinion, consents should be individual and independent without any condition or stipulation even in case when the both parents want to adopt a child.

According to the Georgian legislation "On Adoption and Foster Care", it is forbidden to adopt a child without participation of the adopting/foster parent at a court trial. In such a case, the court proceedings should be necessarily participated by the body of guardianship and custody; in case of any excusable reason the court session may be held with participation of one of the adopting parent.

The legislation admits some exclusion as well when the consent of the parent(s) is not necessary; this is the case when the parents of the child to be adopted are recognized by the court as missing or incapable; besides, the mentioned adoption of a child without the consent of the parent who is deprived of the parent's right will be allowed after one year from the day of such deprivation. Certainly, in such a case, no consent of the parent will be taken into consideration.

Taking into consideration that in reviewing the cases under the non-adversarial proceedings the principle of competitiveness is too restricted, filling up this gap becomes the burden of the court in some cases as only the court can inquire the case by its initiative or under an applicant's request if it is considered to be reasonable in order to decide the significant evidences correctly and make the decision on review the case at a closed court session.

Review of the issue of adoption at a closed court session is stipulated by the fact that the law intends to keep the confidentiality of adoption and envisages taking the additional measures to keep the confidentiality because the information regarding adoption is secret and its disclosure is deemed as a crime, relevantly is punishable under the criminal legislation. In our opinion, in case the adoptive parent decides to tell the child about the mentioned, it will be only his/her good will and nothing more.

Making essential and substantial review of the case, the court will make a decision on full or partial satisfaction of the application, or it may partially refuse the adoptive parents to satisfy their request for adoption of a child, for registering them in the act records/files as the parents of the child, on change of the date and place of birth of the child. In case the adoptive parent, the person adopting the child or the child under 10 refuses to make such deal before the decision of the court, the court will not make the decision on adoption.

The court will make the decision on adoption in the case if the case materials give the basis to the court to consider that such adoption complies with the interest of the subject of adoption (child) and serves his/her wellbeing.

The court decision will not be publicized in case of the request by the applicant; the indication of a lawmaker is also interesting; in particular, if the adoptive parent or the child to be adopted is 10 years old or more, the court session may be open under their request and the information will be public.

The lawmakers in connection with simplification of the adoption procedures accelerated the court decision registration periods in some manner; if there was one month period earlier, currently the term for registration is only 5 days. The mentioned period will be commenced from the day of effectiveness of the court decision; this decision will be transferred to the civil acts registration organ according to the place of such decision. Registration of the decision is mandatory as the act of adoption originates the obligation of the rights and obligations in case of registration, though such rights and obligations will be arisen not from the moment of registration but after the day of effectiveness. In our opinion, the obligation of registration is stipulated with the necessity of registration of demographic data throughout Georgia.

The statistics of the cases reviewed by Kutaisi City Court in 2010-2012 showed that the number of applications for adoption in 2010 amounted to 22, from which 21 applications were satisfied and 1 civil case was left without review.

It should be also emphasized that from the number of the applications for adoption received by the Kutaisi Court of Appeal – 5 in total – only 2 appellations were satisfied, 3 appellations were not satisfied and 2 cases were appealed under the cassation order. In I quarter of 2012, the Civil Cases Chamber of the Kutaisi Court of Appeal reviewed no case regarding the adoption.

In our opinion, the above mentioned statistics is represented in too few numbers; if taking into consideration the joint registry of the adoptive/foster parents throughout Georgia until 2000 till now, there are currently registered 2729 adoptive parents while the number of the children to be adopted is approximately 178.

The Georgian legislation "On Adoption and Foster Care" says nothing about the further control over the child adopted in Georgia.

We think it is necessary to make some amendments to the law with this respect in order to ensure that the adopted child is being grown up really in a healthy environment and the adoption meets its initial purpose.

In our opinion any governmental agency or a court should have the special mechanism to conduct control over the situation of the child after some period from the day of his/her adoption. Such practice has already been well introduced, for example, in Latvia. The Civil Code of this state contains the norm according to which the court is not limited with the decision making only but it established 6 months period during which the attention will be paid to the issue of adaptation of the child to the family; after expiration of this period the orphans' court finally approves the fact of adoption, though it reserves the right to inspect the new family at any time during 2 years from the day of adoption of a child and make sure whether the child adapts to the family well or not.

In our opinion, taking into consideration the mentioned practice will be effective approach from the government to control the environment and conditions the adopted child is

in his/her new family, as we think the adoption is the only chance for orphan children to share the happiness of growing up in a warm, safe and healthy environment.

The basis for termination of legal relations regarding the adoption is also very significant. The basis is as follows: death of the adoptive/foster parent(s) or the adopted child, recognition of death of the adoptive/foster parent(s) or the adopted child and cancelation/abolition of the adoption. Special attention will be paid to the issues of revoke and making the adoption as null and void.

Annulations of adoption will be admitted under I sub clause of the Article 27 of the Georgian legislation "On Adoption and Foster Care" if:

- a) Adoption is performed in violation of the requirements of Georgian legislation;
- b) It is demanded by the organ of tutorship and guardianship relying upon the interest of the adopted child;
- c) Court decision on the adoption is based on the false documents;
- d) Adoption is fictional.

In such cases engagement of the body of guardianship and custody in the review of the case will be mandatory.

In our opinion this requirement of the law is not focusing on the responsibility of the body of guardianship and custody but it is the recognition of its quite large and significant rights in this sphere. When the issue of cancellation of the adoption occurs due to its fictitious character, we think the court decision in such a case should not be revoked but be recognized as null and void.

There are frequent cases when the aged grandparents (grandmother and grandfather) adopt their minor grandchildren in order these grandchildren to have social allowance (pension) after the death of them (breadwinners); in our opinion, if taking into consideration the fictitious character of the issue the case of adoption should be not only revoked but it should be recognized null and void. Invalidating means that the fact had never been deemed real and no powers and rights between the adoptive/foster parents and adopted children had been arisen.

The sixth clause of the Article 27 of the same law indicates that the court decision on adoption may be deemed as invalid in compliance with the rules envisaged by the legislation of Georgia for such invalidation.

The Georgian legislation "On Adoption and Foster Care" does not separate the basis for revocation and invalidation of the adoption; the latter is regulated by the general norms of the Georgian legislation.

In our opinion, as the issue of adoption is very specific, it is necessary to specify and make clear the basis of revocation and invalidation and we should not apply the general norms mentioned above.

Besides the above mentioned, it should be emphasized that in case the adopted child is 10 years old or more, the court decision on the adoption will be revoked only upon the consent of the adopted child. Here the lawmaker gives the priority to the child's interests and his/her legal interests; it considers that the trust and love of the adopted child to his/her adoptive family is one of the dominant factors at making the decision on revocation of the adoption by the court.

It is forbidden to revoke the court decision on the adoption after achievement of the adopted child to his/her full age except the cases when such revocation is agreed by the adoptive/foster family, the adopted person and his/her biological parents.

The adoption will be null and void from the moment of the court decision; specifically, from the mentioned moment all rights and obligations will be restored to the adopted person and his/her native parents, also to his/her blood relatives.

Thus, the logic consequence from the above mentioned is delivery of the child to his/her native persons, also to restore the real name and last name of this child, though in the

last case, if the child is 10 years old or more, the issue will be decided by the court – taking into consideration the will of the child.

In our opinion, in such a case delivery of the child to his/her native parents may not be always reasonable, for example: if the parents discharge their obligations and powers improperly or if they are deprived of their parenting rights not only because the adoption of the child was officially executed; certainly, return of the child to such parents may be incompliant with the interest of the child; in such a case the law envisages delivery of the child to the body of tutorship and guardianship on the basis of the court decision; specifically the body of tutorship and guardianship will decide the issue of tutorship and guardianship of the child; though in such a case, if the adoption of the child is revoked due to improper fulfillment of the obligations by the adoptive/foster parent, the child reserves the right to receive the alimony from his/her adoptive/foster parent.

The court making the decision on revocation or invalidation of the adoption will be obliged to transfer this decision to the Civil Registry Agency within 5 days from the day of its (decision) effectiveness according to the registration of the adoption.

Conclusion:

As a conclusion it may be said that the legal analysis provided in the present article proves that the amendments to the Civil Procedural Code and the Georgian legislation "On Adoption and Foster Care" simplified the process of adoption, but the problem stays the same; only simplification and the prescription of the adoption regulating norms does not mean that everything is fulfilled ideally in the life and the issue of adoption has become easy for the individuals going to adopt the child.

References:

- Liluashvili T., Khrustal V. Comments to the Civil Procedural Code, (II edition). Tbilisi: Law, 2007.
- Kurdadze Sh. Review of a Civil Case at I Instance Court. Tbilisi: GCI, 2005.
- Kobakhidze A. Civil Procedural Law. Tbilisi: Georgian Bulletin, 2003.
- Liluashvili T. Civil Proceedings at Court. (Practical manual). Tbilisi, 1999.
- Practical recommendation to the Magistrate Judges for Civil Procedural Law Issues. Tbilisi Supreme Court, 2008.
- Dzlierishvili Z. Difference between the non-adversarial Proceedings and Action Proceedings. Tbilisi: GCI.
- Ambroladze K. Review of Undisputable and Simplified Proceedings according to the Civil Procedural Code of Georgia. Tbilisi: "Temida", scientific-practical journal, 2(4), 2009.
- Imnadze D. Legal Regulation of the Cases under the non-adversarial Proceedings. Tbilisi: I. Javakishvili Tbilisi State University Press, 2002.
- N# 50/n Oder of February 26, 2010 by the Minister of Labour, Health and Social Affairs of Georgia on "Approval of the Procedures and Forms of Adoption".
- Parliament of Georgia. Law "On Adoption and Foster Care" (N 2381 – II, 2009).
- Kustova V.V. Adoption in the Legislation of the Countries of West Europe and Russia in the XIX Century/Russian Law, the journal. № 9. 2001.