

ADOPTION, CONDITIONS AND PROCEDURE OF ESTABLISHING THE ADOPTION

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ABSTRACT

This paper will focus on the subjects of adoption based on different perspectives, such as legal, doctrinal, and judicial points of view. The legal institute of adoption is an important institute, especially under the current circumstances of the development of the country. The institute has been in use in various forms since very ancient times. The author by using a combined methodology with the following methods: method of legal analysis, method of comparison analysis, method of teleological analysis, method of systemic analysis, etc., will analyze this very important institute, which is considered as one of the most important issues in the social sciences. The use of these methods explains the importance of the adoption-related to the family law and other effects when it is created. The Paper will have conclusions that are expected to contribute to further academic discussions and for practical use by courts and other institutions.

Keywords: Adoption, family Law, adoptee, adopter

INTRODUCTION

The history of adoption reveals changes within our societies? [1]. One of the most popular theories claims that adoption is a legal act through which the establishment of the relationship of adoption that is made upon parents and adopted children [2] is the same as the one build between natural parents and children [3]. The adoptee becomes the child of adoptive parent and the adoptive parents become the parents of the adopted child [4]. According to this definition, adoption is a legal act - a solemn contract, and the relationship created by this contract is a relationship of adoption or a family by adoption. Adoption can be considered as a legal act, as well, which enables parental right, as the definition says "The act of transferring parental rights and duties to someone other than the adopted person's biological parents [5]. The Kosovo Family Law [6] (hereinafter KFL) under Article 167 foresees that adoption occurred between adopted parents and adopted child establishes the same rights and obligations that already exist between natural parents and their children. According to these definitions, it follows that adoption is a legal institute because it is regulated by legal norms. It is a legal act because it is established before the state body institution. The purpose of the adoption is to ensure whether the child is deprived from the family environment or not, the possibility of being placed permanently in an adoptive family [7]. According to the KFL Article 160, par 1, it is foreseen that the purpose of mediation of adoption is to place the child (adoptee) under the custody of the

person who wants to take the child under his care and responsibility. This definition of mediation regarding the institution of adoption is also in line with the United Nations Convention on the Rights of the Child, based on the principle of the best interest of the child promoting this convention. "All measures taken for children, whether taken by public or private institutions, social care institutions, courts, administrative authorities or by legislative bodies, the best interests of the child should be the overriding goal" [8]. Children without parental care, are considered to be the ones whose parents are not alive, whose parents are unknown or have disappeared, while children without parental care consider to be as well as children whose parents for whatever reason temporarily or permanently do not perform their parental duties or parental care (article 156, par 1&2 of KFL). KFL recognizes only the full adoption that implies that the child is completely adopted by adoptive parents and divorces parental relationships with the biological parents [9]. In ancient rights, adoption was not intended to protect the interests of children. As an institution, moreover, it was developed to protect the inheritance, family and family-friendly adoptions of children. In Roman law adoption was the act of gaining paternal power over a child in a difficult economic situation, that adoption by a family that had no children to ensure continuity. Pater's family with free will by adoption, adopted a minor without the status of *cives raonai*, for his own children [10]. We can conclude that the adoption establishes a permanent, legal parent-child relationship between the child and a person who is not the natural parent of the child [11].

PRINCIPLES OF ADOPTION

The adoption is based on some basic principles which must be respected in the case of establishing the adoption relationship, which relates to both the procedure and the conditions that must be met. The basic principle, in any case, should be the best interest of the minor but implying that this best interest of the minor can be realized in an adoption relationship under which it is expected that between the adoptive parent and the child the relationship will be established Parent child. One of the conditions is that adoption is only allowed for children who do not have parental care or parental care is not the one that requires the child's interest in upbringing and education. In no case can the establishment of the adoption relationship be allowed unless the child's purpose is achieved despite the fact that the child may be without parental care. In cases where the child is without parental care but there is a request for establishing the adoption relationship, the court will not allow adoption unless it is ensured that adoption will serve the child's well-being. In Kosovo there are already organized forms of care for children without parental care. The "SOS Village" is known for children without parental care and other forms that are organized by institutions for placement of children in families who care for children without parental care versus regular payments made by domestic institutions for these families.

CONDITIONS FOR ESTABLISHING ADOPTION

Adoption trends have changed over the years [12]. There must be an indispensable reason for the adoption of an adoptee, which refers to the best interest of the child, for which the interest should always be taken care of by the court. The assessment of the best interest of the child is a very complex issue which requires professional preparation, good knowledge of social and family issues and genuine cooperation with the Custodian Body. KFL with Article 128 par. 4 defines parental responsibility, which includes the rights and duties that are intended to ensure the child's emotional, social and material well-being by taking care of it, by maintaining personal relationships with it, ensuring the well-being, education, legal representation and asset management, for which things parents should consider the abilities, tendencies and desires of their children. The interest of the child is a fundamental element in the parental right, namely the relationship of the children, which must be protected by the parents, but also by the court which conducts the court procedure for the establishment of adoption, and ex officio. For the court and the Custodian Body it is much easier to estimate the best interest of the child in the adoption procedure when the parents are not known, the parents have died or the parents have disappeared because the condition of the child is necessarily predetermined the need for adoption and remains the court to evaluate the other conditions that refer mainly to the adopters, while it is very problematic to assess the best interest of the child when the parents of the child are known. To be adopted a person must meet these conditions: a) be born alive, b) be a minor child [12], c) not be in the bloodstream with the adoptive parent [13]. KFL has determined that there can be no adoption of the child after the death of the child, only a minor child can be adopted (article 189, 174 of KFL). With this provision it is stipulated that only the juvenile child who is in life can be adopted and how a minor is taken as a person who is not 18 years old. This situation is not regulated solely in the KFL but is also covered by Article 1 of the Convention on the Rights of the Child, which states that: "By this Convention, the word child means any person under the age of 18, unless the age Majority is achieved in advance in accordance with the legislation to which it is subject" [8].

Exceptionally by this rule, a child who, before reaching adulthood with emancipation, has acquired the ability to act is not allowed adoption. Here is no dilemma at full emancipation when the court in a non-contentious procedure by a ruling allows the marriage of a person over 16 years. Regarding the condition of the bloodstream, a person in a straight line, not a brother and a sister can be adopted (article 177 par 1 of KFL). In this case, the KFL has ruled out the possibility of being adopted on a straight line at any scale and hence indirectly to the second degree that refers to the adoption between brothers and sisters. KFL has also introduced a deterrent condition for the establishment of adoption, stating that the guardian cannot adopt his or her care until the competent body dismisses him from the duty of the guardian (article 177, par 2 of KFL). The reason why KFL has ruled out the possibility of adoption at any right-hand scale and in the second instance indirectly refers to the obligation stipulated by the KFL, to keep

relatives in need when in need at all levels and in a straight line to the second degree.

CONDITIONS REGARDING THE ADOPTER

The adoptive person must meet the following legal conditions: 1) the adoptive person must have the capacity to act; 2) have the personal qualities necessary for the successful exercise of the parental rights and obligations and be capable of well-being and education of children, 3) not suffer from any contagious disease that would endanger the health of the child, and 4) have reached the age of 21. While spouses are planning to adopt children, one of the spouses must have reached the age of 25, while the other spouse has reached the age of 21 [14]. According to the KFL, it is allowed the possibility of adopting an unmarried person as well, and if they are married only then jointly by both spouses. The court has an obligation to investigate the personality of the adoptive person in a comprehensive manner and despite the investigations made by the guardianship body in order to protect the interests of the child. In the present case, the court is authorized by law (Article 178 KFL) to produce evidence if there are indications that the application for adoption is intended to misuse the adoption institution, eg. Realizing the material benefit, gaining the workforce, etc. KFL did not foresee any other criterion, which should be the age difference between the adopted child and the adoptive parent as a minimum and maximum criterion, which the court remains to evaluate this circumstance. Viewed from this aspect should be limited so that adoption of juveniles should be allowed to spouses affiliated to marriage for at least three years, with an age of not less than 18 years and no more than 40 years in relation to the adoptee would have to pay particular attention to whether the adopted child is a twin, in this case either to stop adopting or to adopt the twins completely but in no case allow their separation because it would conflict with the purpose of adopting and the adoption of that adopted.

CONSENT FOR ADOPTION

It is not possible for an adoption to occur without court order [1]. The court in the adoption procedure will also hear the juvenile child who has reached the age of 14, so that the child can be given the opportunity of his free declaration of adoption. The child shall be notified of the consequences of the adoption, the rights and the duties deriving from the adoption. Consent for disabled children or younger than 14 years may be granted only by his / her legal representative respectively the guardian of the adopted. Hearing of a child on the occasion of giving consent by the court will take place in the presence of the social worker [6]. When listening to a child, the court must use cautious communication methods with the child, thinking about creating and maintaining an appropriate atmospheric hearing during a child's hearing as it is an essential element of the interrogation process. KFL has also defined the situation of replacing the consent of a parent in order to protect the interests of the child and that: 1) when the consent of one of the parents is replaced by the guardian's body at the request of the child, if the parent greatly disrupts the duties, 2) by the court's decision, when the child can no longer be trusted by the parents, 3) when the child is abandoned

by one of the parents for more than six months, and 4) if you are not granted parental rights or you have not been deprived of the ability to act while your parent is unable to provide the necessary care for well-being due to psychological illness or psychological disability, while the child cannot without adopting to grow in the family (Article 171 of the KFL).

PROCEDURE FOR ESTABLISHING THE ADOPTION

Elaborate procedure has been created to protect the interest of child, the natural parents, and the adoptive parents [11]. The adoption services must cover two primary functions: 1) making and participating in arrangement for the adoption of children and 2) making and participating in arrangement for the provision of adoption support services [15]. According to the KFL, the adoption procedure is a non-contentious litigation procedure. Determining the jurisdiction of the court to establish adoption is in line with the Convention on the Rights of the Child. In terms of territorial competence, "Adoption is established before the court by place of residence where applicants have had the last joint residence and before the court according to the habitual residence of the adopted" (Article 181, par 1). Also, with the provision of Article 181.2 of the KFL it is stipulated that hearings are closed to the public, as this protects the rights of the child. The exclusion of the public is also covered by Article 10.2 of the Law on Personal and Family Affairs, with the exception of non-contentious procedure in cases when the person is declared dead.

THE ADOPTION ACT

After the court has the appropriate assessments, after having heard the adoptive parents, the biological parents if possible, the child will be granted the decision for the probationary period of adoption, if conditions are met. The probationary period of adoption is the period before the court decides on the establishment of adoption, which period will be supervised by the guardianship body, to prove the appropriateness and evaluate the circumstances that with the establishment of adoption can the purpose of adoption be achieved [16]. This is a period in which potential adoptive parents and adopted children live together, under the supervision of the guardianship authority. This period is scheduled to last for three months with the possibility that it by a court ruling to be extended for another three months if circumstances warrant the circumstances depending on the case (Article 166 par. 1 of KFL). This period is monitored by the Guardianship Authority or by experts such as psychologists.

CONCLUSIONS

Based on the complete study analysis of this work, I conclude that adoption is a legal act through which the adoption relationship between adoptive parents and adoptive child is established, which relationships are similar to the relationship between natural parents and children and KFL accepts only the full adoption. In formal terms, the KFL contains strict rules referring to the competence to establish the relationship of adoption, the procedure for establishing the adoption relationship, the conditions to be met when the adoption relationship is established

and that of the adopted parent and the adopted child, the interaction of the court, especially with the Custodian Body and other mechanisms. In some courts, respectively branches of basic courts that have substantive and territorial competence to decide on adoption, are still reluctant to develop the adoption procedure. This has affected in some cases the requests are not processed at all and consequently the children have reached the age of majority without having to develop the adoption procedure. In some other courts, there is a lack of professionally qualified capacities to develop the adoption procedure and in few courts, there is a progress in building professional capacities to address the issue of adoption in the right manner and form. The greatest failure of the Custodian Body is the failure to monitor the probationary period in the proper form and manner. There are cases when monitoring reports have been provided to the courts in an unprofessional manner and in some cases affected by the interests of the parties in the proceedings as not always the requests for adoption in our courts are aimed at protecting the child without parental care. It is recommended for courts to have profiled judges who will deal exclusively with family issues, including the procedure for establishing the adoption relationship. Also, Centers for Social Work should have professional staff in various fields such as psychologists, psychiatrists, pedagogues and sociologists so that they can offer the court a professional report that will contain objective data based on Scientific methods.

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