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State Protection of the Family, Motherhood, Paternity, and Childhood: Examining Jurisdictional Challenges in Divorce Cases

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ABSTRACT

The author argues that, currently, courts lack the procedural tools, specialized professional training, and sufficient time to adequately protect the rights of minor children during divorce proceedings. This situation highlights the urgent need for the development of a more effective extrajudicial mechanism to ensure state oversight of parental compliance with the rights and interests of minor children in divorce cases. The proposed procedure is based on the concept that, in addition to courts, other authorities within their respective competencies should oversee the legality of decisions related to divorce proceedings. Specifically, courts should handle legal disputes; registry offices should manage the registration of civil status acts, and guardianship authorities should monitor the protection of the rights and legitimate interests of minors and disabled family members in contentious situations

Keywords: divorce; minor children; legal dispute; jurisdiction; court.

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Защита государством семьи, материнства, отцовства и детства сквозь призму подведомственности дел о расторжении брака

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АННОТАЦИЯ

Автором обосновывается, что в настоящее время суды не располагают ни процессуальными средствами, ни специальной профессиональной подготовкой, ни временем для решения задачи по защите прав несовершеннолетних детей при расторжении брака их родителей. Это свидетельствует о необходимости разработки более действенного внесудебного порядка осуществления реального контроля со стороны государства за соблюдением родителями прав и интересов несовершеннолетних детей в рамках бракоразводного процесса. В основу такого порядка предлагается положить идею о том, что осуществлять контроль за законностью решения вопросов, сопутствующих расторжению брака, следует не только суду, но и другим органам власти в пределах своей компетенции: судам — разрешать споры о праве; органам загс — регистрировать акты гражданского состояния; органам опеки и попечительства — осуществлять проверку соблюдения прав и законных интересов несовершеннолетних и нетрудоспособных членов семьи в конфликтных ситуациях.

Ключевые слова: расторжение брака; несовершеннолетние дети; спор о праве; подведомственность; суд.

Как цитировать

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ЭКО•ВЕКТОР

INTRODUCTION

The essence and purpose of the modern social state are made manifest in its functions and tasks. The functions of the state are commonly understood as "the main directions of its activity, arising from its essence and role in public life. Unlike the tasks of the state, which may be temporary and local, the functions of the state have a permanent character and a general social orientation, although in various historical epochs, they could also be aimed at narrow corporate goals."[1] The nature and content of the functions of the state are influenced by many social, economic, political, and environmental factors, and the international context, etc.

Along with other external and internal functions of the state, the social function occupies its place firmly in the developed states of the modern type, but its specific content may change over time in different historical conditions.

Currently, in addition to the other important social functions of the state, considerable attention is rightly paid to supporting the family, motherhood, fatherhood, and childhood, which has found expression in the latest amendments to the Constitution of the Russian Federation. Thus, leaving unaltered Part 1 of Article 38 of the Constitution of the Russian Federation, according to which "motherhood and childhood, the family are under the protection of the state," the legislator supplemented Article 72 of the Constitutional Law with paragraph g.1), according to which it provides for "protection of the family, motherhood, fatherhood and childhood; protection of the institution of marriage as a union of men and women; creating conditions for the decent upbringing of children in the family, as well as for adult children to fulfill the duty of caring for their parents."[2]

At the same time, the legislator is not limited to declarations only.

In the legislation on social security, for a long time, we have been observing the systematic introduction of many and various measures aimed at stimulating the birth rate, providing material support for families with children, etc.

Amendments to the Constitution of the Russian Federation in 2020 were followed by salient changes in family legislation. Articles 89 and 90 of the Family Code of the Russian Federation, in the wording of the Federal Law of 31.07.2023 № 403 1 provides the right to demand from the spouse alimony for their support during the care of a common child under the age of three years and not only the wife or ex-wife but also the husband or ex-husband. This eliminated, perhaps, the last remaining contradiction of the family legislation with Part 3, Article 19 of the Constitution of the Russian Federation, which provides men and women with equal rights and freedoms and equal opportunities for their realization.

However, unlike the legislation on social security, no further measures aimed at protecting the rights of women and children, strengthening the family, and protecting vulnerable family members have since appeared in family legislation. One of the reasons for this was the fact that Article 1 of the Family Code of the Russian Federation, among other important principles of family law, stipulates the principles of inadmissibility of arbitrary interference by anyone in family affairs, the voluntary nature of the marriage union of a man and a woman, and the resolution of intra-family issues by mutual consent. Indeed, arguably, the best thing the state can do for a normal family is not to interfere with it.

Another scenario is when the rights of some family members who are in a difficult life situation, who have become dependent on other family members, and who are unable to protect their rights temporarily or permanently on their own, are then violated by more prosperous participants in terms of family legal relations. In this situation, the state, represented by the competent authorities, can and must intervene, which is declared in Article 1 of the Family Code of the Russian Federation, which enshrines the principles of ensuring family members the unhindered exercise of their rights, the possibility of judicial protection of these rights, and priority protection of the rights and interests of minors and disabled family members. Accordingly, this approach has been reflected for many years in many provisions of Russian and earlier Soviet family legislation, which contain guarantees for the implementation of these principles and the exercise of the state's social functions in the field of protecting and strengthening the family, motherhood, fatherhood, and childhood.

At the same time, given the significant changes that have occurred in various spheres of life during the term of domestic family legislation, this is an occasion to think about how modern are the means by which these functions of the state are implemented—in particular, the example of the jurisdiction in divorce cases.

MAIN PART

Current legislation of the Russian Federation provides for the possibility of divorce in two ways, namely, by the registry office—with the mutual consent of both spouses who do not have minor children in common (Article 19 of the Family Code of the Russian Federation), and in court—in the absence of the consent of one of the spouses, including if one of the spouses, despite their absence of objections, evades the dissolution of marriage

[1] Abdulaev M.I. Theory of State and Law: Textbook for higher education institutions. Moscow: Magister-Press, 2004. p. 32.

[2] The Law of the Russian Federation on the Amendment to the Constitution of the Russian Federation dated 03/14/2020 No. 1-FKZ "On improving the regulation of certain issues of the organization and functioning of public power" // Collection of Legislation of the Russian Federation. 2020. No. 11. Article 1416.

in the registry office. Additionally, the case of divorce is subject to consideration by the court if the spouses have common minor children, regardless of whether there is a dispute between the spouses about the children (Article 21 of the Family Code of the Russian Federation). Moreover, in each of these cases, the case for divorce is considered by the court in the order of claim proceedings.

The situation that has existed for a long time is unusual. The fact is that according to the classical view, claim proceedings are characterized by the mandatory presence of a *dispute about the law* [1]. The concept of a dispute about the law in itself is debatable and multidimensional, which allows it to be filled with various contents and to assert its presence or absence, depending on the goals that are pursued in a particular situation [2, pp. 238–320; 3, pp. 98–102; 4, p. 58]. However, concerning divorce cases, the legislator points out directly that if there are common minor children, the marriage is subject to dissolution only in court, even to reiterate, "If there is no dispute between the spouses about the children" and even if there is spousal mutual consent to dissolving the marriage.

This legislative decision has been criticized in the pages of legal literature for many years. Many scholars, primarily representatives of the science of civil procedure law, often write about the expediency of transferring all indisputable cases of divorce to the competence of the registry office [5, p. 84; 6, p. 49; 7, p. 15; 8, pp. 42–43; 9].

Meanwhile, the provisions of Art. 21 of the Family Code of the Russian Federation and its predecessors Art. 32, 33, 38, and 39 of the Code on Marriage and Family of the RSFSR of 1968[3] and Art. 220 of the Civil Procedure Code of the RSFSR of 1923,[4] containing the same criteria for the delimitation of jurisdiction in consideration of cases of dissolution of marriage between the court and the registry office, have remained more or less unchanged for more than a hundred years.

Sharing the "procedural" approach outlined above, to the jurisdiction of divorce cases, according to which the court should only consider them in the event of a real dispute between the spouses on this issue, one must admit that when adopting the Civil Procedure Code of the RSFSR of 1923, the Code on Marriage and Family of the RSFSR in 1968 and the current Family Code of the Russian Federation, their developers pursued a significant goal. It was assumed that in circumstances of acute family conflict, it was the job of the court to monitor the observance of the rights of minor children as the most poorly protected members of a disintegrating family. Accordingly, the court was mainly entrusted with fulfilling the function of the state to protect motherhood, family, and any children.

To this end, according to Article 224 of the Civil Procedure Code of the RSFSR of 1923, Article 34 of the Code on Marriage and Family of the RSFSR of 1968, and today—Article 24 of the Family Code of the Russian Federation, the court is obliged on its own initiative to resolve two issues, provided that the divorcing spouses/parents have not reached an agreement on these issues or this agreement violates the interests of the children—to determine which of the parents will subsequently live with minor children after the divorce; and to determine from which of the parents, and in what amounts, the alimony for their children will be recovered.

It can be assumed that, at the time of the appearance of the analyzed norm in the Soviet period, the legislator had reason to believe that the court could cope with the extremely important task of monitoring the observance of children's rights during the dissolution of a marriage. Such grounds were provided by the Soviet civil procedure legislation, which was based on the central principle of the active role of the court. During this period, the court was "... obliged, not limited to the submitted materials and explanations, to take all measures provided for by law for a comprehensive, complete and objective clarification of the actual circumstances of the case, the rights and obligations of the parties" (Article 14 of the Civil Procedure Code of the RSFSR 1964[5]).

Today, the situation is fundamentally different. The current civil procedure legislation does not provide judges with such powers. Accordingly, they also do not have the opportunity to action the function of protecting the family effectively [10, pp. 28–38]. Modern judges no longer collect evidence independently in civil cases. When considering a case on the dissolution of a marriage, they are left to take the word of the plaintiffs, simply indicating in the statements of claim, drawn up according to the model that "...an agreement on the residence, upbringing, and support of the child between the parties has been reached." Judges often simply do not have other information or other ways to make sure that there is an agreement on the upbringing and support of minor children. Moreover, this is impossible if the defendant does not appear at the court session and/or submits a petition for consideration of the case in their absence. The judge cannot place the duty to verify that the spouses have reached an agreement on the children or the custody guardianship authorities either. According to Article 78 of the Family Code of the Russian Federation,

[3] Code on Marriage and Family of the RSFSR (approved by the Supreme Soviet of the RSFSR on 30.07.1969) // Vedomosti VS RSFSR. 1969. № 32. Art. 1397 (no longer in force).

[4] Resolution of the All-Russian Central Executive Committee of 10.07.1923 "On enactment of the Civil Procedural Code of the R.S.F.S.R." (together with the "Civil Procedural Code of the R.S.F.S.R." // Sobranie uzakonenii of RSFSR. 1923. № 46-47. Article 478 (expired).

[5] Civil Procedure Code of the RSFSR (approved by the Supreme Soviet of the RSFSR on 11.06.1964) // Vedomosti VS RSFSR. 1964. № 24. Article 407 (expired).

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this body is involved in the case to survey the living conditions of the child and the person(s) claiming to bring up the child and to submit to the court the survey report and the conclusion based on it when the court considers any disputes related to the upbringing of children.

In addition, the judge can rely mainly on their own intuition and worldly experience; as a rule, they are a justice of the peace who is loaded with a huge number of criminal cases and matters related to bringing to administrative responsibility, in determining whether the rights of minor children in the divorce process are not violated.

These considerations lead to the disappointing conclusion that the courts today are objectively unable to cope with the task of protecting the rights of minor children during the dissolution of marriage and, consequently, with the fulfillment of an important social function of the modern state. They simply do not have any procedural means for this, no special professional training, or time in a busy schedule among other criminal and administrative cases.

It could, perhaps be assumed that the assignment of divorce cases to judicial jurisdiction may contribute to solving another task—reconciliation of spouses and family preservation, which is also in the interest of society and the state today. Unfortunately, this is also not entirely true, and for the same reasons that prevent judges from protecting the rights of minor children effectively in divorce proceedings. First, it is a huge workload with a lack of time. Second, there is a lack of special professional training in the paradigm of family psychology and skills in the organization and conduct of conciliation procedures. In addition, it has long been noted that combining the functions of a conciliator and a judge in one person and one case is fundamentally unacceptable. It is also impossible, as the parties cannot conduct open and constructive negotiations mediated overall by a person who, in the event of failure to reach an agreement, will make an authoritative decision on their dispute [11, pp. 5–57]. Third, there is a lack of effective procedural means to reconcile the spouses. The judge only has the right to postpone the proceedings for a period for their reconciliation within three months, if one of them does not consent to dissolve the marriage, after which he is obliged to decide on its dissolution if the spouses or one of them insists on it (Art. 22 of the Family Code of the Russian Federation). As noted by the Supreme Court of the Russian Federation, "In the case of a decision to dissolve the marriage of spouses who have common minor children, the court, based on paragraph 2 of Art. 24 of the Family Code of the Russian Federation, shall take measures to protect the interests of minor children and explain to the parties that a parent living separately has the right and obligation to take part in the upbringing of the child, and the parent with whom the minor lives, has no right to prevent it."[6] That is, all that the courts do in this situation is to explain to parents their rights and obligations, even though the norms of Article 24 of the Family Code of the Russian Federation do not serve as a guarantee of the indispensable protection of the rights of the child [12, pp. 46–55].

Is higher legal education, work experience in a legal specialty, and passing a qualification exam required to perform the actions specified in Art. 22 and Art. 24 of the Family Code of the Russian Federation? No. This work may well be done by a novice employee of the registry office, who also, incidentally, has a higher legal education and has successfully passed the test of the personnel commission.

The above considerations, which are mainly practical, are given to support the previously expressed theoretical theses of many scholars that in the absence of a dispute (that is, if there is mutual consent of the spouses to divorce), it is incorrect to refer the consideration of these cases to judicial jurisdiction, even though the spouses have minor children in common.

The point here is not even that, in considering such cases, the courts are not doing their job from the perspective of the theory of civil procedure law. The problem today is that neither the courts nor anyone else monitors the observance of the rights of minor children adequately and does NOT fulfill the state function of protecting the family, motherhood, fatherhood, and childhood.

The current situation indicates the need to develop more effective mechanisms aimed at fulfilling this function within the framework of the divorce process, and first of all, to exercise real control over the observance by parents of the rights and interests of their minor children.

Moreover, it is unlikely that all disengaging married couples should be suspected of wishing to seek directly or indirectly to infringe on their children in some way. At the stage of divorce, "the interference of the court in their relations related to the family upbringing of children is an unjustified encroachment on their personal life" [13, pp. 15–18]. Therefore, the decision on the issue of children, as suggested by part 1 of Article 24(1) of the Family Code of the Russian Federation should then be left to their parents. The only difference is that to exercise real control, both parents should confirm that an agreement has been reached on the place of residence of the children and the nature of their support, and this preferably in writing and preferably with appropriate evidence attached that the parent with whom the child will live has the necessary living space.

[6] Resolution of the Plenum of the Supreme Court of the Russian Federation dated 02/06/2007 No. 6 "On Amendments and Additions to Certain Resolutions of the Plenum of the Supreme Court of the Russian Federation in civil cases" // Bulletin of the Supreme Court of the Russian Federation. 2007. No. 5.

This agreement can be submitted to the supervisory authority before the dissolution of the marriage, if the spouses agree to its dissolution and, accordingly, have discussed issues related to the residence and maintenance of their children, and within a reasonable time frame (for example, one month) after the marriage is dissolved. We emphasize that both the preliminary and subsequent control over the resolution of these issues by parents does not have to be judicial, since the custody and guardianship authority can cope with this no less successfully.

However, failure to submit the agreement in question or failure to report the reasons for its non-presentation may then be sufficient grounds for verification by the state, which, again, can be carried out most effectively by the custody and guardianship authorities. The ideal result of such a check would be a complete loss of interest in this family on the part of the guardianship authorities because the issues of residence and support of the child (children) have been resolved. Otherwise, the guardianship authority will come to a conclusion about the need for further control over the resolution of these issues by parents, and perhaps, on the expediency of taking any of the many measures available to protect the rights of the child—from explanatory conversations to filing a lawsuit for deprivation of parental rights.

CONCLUSION

The traditional values of Russian society and the state, wherein family values are significant, should be protected by modern methods and use all the means available to the modern Russian state. Within the framework of such protection, everyone should follow their own interests: parents take care of their minor children; courts resolve disputes about the law; registry offices register acts of civil status; and custody and guardianship authorities verify compliance with the rights and legitimate interests of minors and disabled family members in any conflict situations.

The mechanism for monitoring the observance of children's rights during the dissolution of their parents' marriage, involving a change in the jurisdiction of divorce cases, the foundations of which were proposed in the framework of this paper, seems to be more effective than the one that pertains today. It will provide the state, represented by the court and the custody and guardianship authorities, with clearer criteria for identifying unresolved issues related to the place of residence of children and their support, and will also allow for more individual approaches to better protect their rights and legitimate interests.

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