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The Procedural Practices of Establishing the Child's Residence in the Republic of Moldova

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Abstract

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The children care represents a priority of each state policy. In this context, the legislation of the given field was adjusted to the requirements of the United Nations Convention on the Rights of the Child and other international treaties ratified by the Republic of Moldova.

The substantive law in the procedure of identifying the child's residence establishes the rules of evaluation of the place which will constitute the child's residence. If parents cannot agree amiably whom the child will live, the only possibility of solving the problem is addressing the court.

The procedure of establishing the child's residence is regulated by the provisions of the Code of civil procedure. As far as in this case there is law litigation – the plaintiff interest lays in the fact that the child's residence should be established with him/her and the defendant interest - that the plaintiff pretensions should be rejected.

From the judicial practice of the Republic of Moldova regarding the establishment of child's residence we mention that there are cases of condemning the state to ECHR. The court decided that the competent authorities should take all necessary, reasonable applicable measures for re-establishing the relation between plaintiff and her son as long as the court decides with whom of the parents the child will live.

In the given research we aim to analyze the national procedural peculiarity of establishing the child's residence as well as the concordance with the community normative provisions.

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Keywords: Procedure; child's residence; child care; legislation; public authority.

1. Introduction

Inter-family conflicts according to the delegation of responsibilities for child protection, generates psycho-socio-legal problems affecting the child's welfare. Analyzing the situation that was created at the moment regarding the rights of the child and the work of the courts and public authorities on this section were found a number of uncertainties and violations of mandatory provisions proclaiming the supremacy of the rights and child's interests.

This work aims to be one which supports and promotes the collaboration and cooperation between the family as an institution and the state authorities or institutions of the civil society, in protecting the child's interests in relation to parents' interests, as a so necessary - partnership. From the fact that an analysis of all areas in which those infringements originate would have been too complex and difficult, we tried to elucidate the problematic issues in a narrower field, and namely - in the processes for determining the child's residence. The emphasis in this study is on the role of the public authorities in such categories of litigation and we tried to elucidate all the aspects of the procedural issues of determining the residence of the child.

The goal of the study is to elucidate the role performed by the public authorities in determining the child's residence and to analyze the problematic aspects of the proceedings, in the context of determining a number of uncertainties and violations of the procedural provisions.

The objectives aimed for the goal achievement are:

- The identification of procedural position of the guardianship authority in the process of establishing the child's residence;
- The analysis of legal nature of the of the guardianship authority's approval in the process of establishing the child's residence;
- The analysis of solving cases regarding the establishment of child's residence.

The methodology of research: There is a qualitative and is performed by the analysis of effectual normative acts, primary documents as well as analyze is of the court decisions of the Republic of Moldova. The selection of this methodic lowered: the clarification of the procedural position of the guardianship authority in the course of determining the child's residence; the identification of the legal nature of the guardianship authority's approval, issued in case of determining the child's residence; the determination of the legal precedents for determining the residence.

1.1. *The procedural position of the guardianship authority in civil proceedings regarding the establishment of the child's residence*

According to the law of the Republic of Moldova, the guardianship authorities participate in lawsuits related to the determination of the child's residence (art. 63 par. (3) of Family's Code), deprivation of parental rights (art. 68 par. (3) of Family's Code), the disputes regarding the child's education (art. 73 par. (1) of Family's Code), other situations.

Therefore, the guardianship authority, participating in the administration of justice in cases where it is heard, is called the participant of the lawsuit. Thus, we conducted a broad distinction within the concept of participant in lawsuit, the role of this body depending on the tasks they perform under the law, especially in the process of regarding the child's residence.

After analyzing the theoretical aspects of the procedure subjects, and according to jurisprudence, (Decision from August 26, 2014) the guardianship authorities participate in the lawsuit as an intervener accessory. According to some statistical data, the study conducted by Centre for Human Rights (2013), reflecting the situation for 2012 and the first half of 2013 in 1982 of cases regarding the determination of child's residence, the guardianship authorities participated in the examination of cases as an intervener accessory, a practice that we consider absolutely wrong. In accordance with the art 67 par (1) of Code of Civil Procedure (CCP), the person interested in a process started between other people can intervene with the claimant or defendant until closing a judicial decision rendered in the first instance, if the judgment could affect the rights or obligations to one side. In this sense the law also states that it can intervene in the process at his request, of one of the parties or of the court office (art. 67 par (2), (3) of CCP). So, according to the author Elena Belei (2014: 186) characteristically for the interveners the accessory represents rights:

1. They are not alleged subjects of the disputed material report;
2. They don't submit their claims on the subject of the dispute;
3. They participate in the process of the claimant or defendant's side.

From the mentioned legal concept and the legal characters given to the concept of "intervener accessory", it is clear that the guardianship authorities may not have an intervener accessory in the process, respectively, their attracting practice in the process as an intervener accessory, is wrong.

According to doctrinaires' opinion in the civil procedure, Belei E., (2014: 213) the guardianship authorities within the lawsuit can have only the procedural quality of public authority which participates in the lawsuit to submit conclusions, in accordance with the art 74 of CCP, we consider valid and which represents the ideal solution for this problem. As we have mentioned previously, in accordance with the art 63 par. (3) of Family's Code regarding the determination of child's residence, the court will require also the notice of the guardianship authority on whose territory the residence of each parent is. At the same time, in accordance with art. 74, par. (1) of CCP in cases established by law, the proficient public authorities, on his/her own initiative, at the request of the participants to the process or from the court office, can intervene in the process before the judicial decision in the first instance, as well as at the Appeal court, in order to submit conclusions, in accordance with the function, for the defense of rights, freedoms and legitimate interests of other persons, state and society. Taking into account the art 63, par (3) of Family's Code confirmed with art. 74, par. (1) of CCP shows that the guardianship authority participates in the process just to talk about the living conditions of each parent that are involved in the litigation regarding the establishment of child's residence, so the guardianship authority has only the procedural interest not being affected by the court judgment.

Once the guardianship authority intervened in the process at his request, or by the court office or by the participants at the process, the judge that examines the case will order that the authority elaborates the notice regarding the living conditions of the parents (in accordance with art. 63 of Family's Code), respectively will have to decide the continuity of the process until the presentation of the given notice by the guardianship authority.

In this context, in accordance with art.262, let. d) of CCP, (Code of Civil Procedure, nr. 225/30.05.2003) “The process is suspended: [...] until the presentation in court [...] of the report of the guardianship organ [...] – in cases prescribed by legislation.

Thus, the judge, at the stage of preparing the cause for legal debates will send to defendant, as well as to the responsible guardianship authority the copy of the request for summons, regarding the determination of child’s residence, besides, he/she will warn the guardianship authority about the fact that he/she is obliged in accordance with law to present at the hearing the notice regarding the inspection of the parents’ living conditions – parts of the process, and as we mentioned, the judge may suspend the process until the presentation of the given notice by the guardianship authority.

1.2. The judicial feature and the procedural statute of the notice of the guardianship authority issued in cases of establishing the child’s residence

The doctrinaires classify differently the litigations regarding the child’s rights and interests. The author, Il’ina O.Iu. (2006), the litigations regarding the child’s rights and interests could be classified in the following way: litigations regarding the express violation of the child’s rights and interests (art.53 par (1) of Family’s Code); litigations appeared during the child education: regarding the determination of child’s residence (art. 63 of Family’s Code), regarding the exertion of parental rights in cases when parents are living separately (art. 64 of the Family Code), regarding the remove of impediments of communication with child (art. 65, par (2) of the Family Code), regarding the depriving of parental rights (art. 67 of Family’s Code), etc.; other litigations considering the family relations: the dissolution of marriage (art. 36-37 of Family’s Code), the declaration of marriage nullity (art. 41 of Family’s Code), etc.

It is important to mention that in all the enumerated cases, the guardianship authorities participate obligatory in the trial process regarding the given litigation.

In accordance with the Family Code and other legal acts in force which control the problem of determination the child’s residence we can highlight some peculiarities regarding the notice of the guardianship authority issued in such cases as:

Firstly, the notice related to the living conditions of those who pretend to the determination of child’s residence with him/her can be issued just by the guardianship authorities. Thus, no other organ of public administration has the right to issue the notice that could serve as a base for the judicial decision regarding the determination of the child’s residence, or in case that a certain organ issued the notice and it was considered for the judicial decision, the last will be liable to disposal.

This peculiarity results in accordance with the art. 63 Of Family’s Code. We reiterate the fact that, in the light of amendments to the Family Code regarding the exclusion of Chapter 17 which provided the organs considered as guardianship authorities and their attributions, will be applied, regarding the determination of the guardianship authorities, stipulations of Law regarding the social protection of children in risk situation and children separated from their parents.

Secondly, the notice of the guardianship authority should contain data on living conditions of both parents, whereas the court should evaluate to whom of the parents is more rationally, according to the material conditions and other criteria, to determine the child’s residence. We will mention that within the Supreme Court of Justice there is a right application, (Decision of Supreme Court, November 6,

2013) regarding the lack of cases of assessment by the guardianship authorities of the living conditions of one parent – in such cases the Supreme Court of Justice (on January 22, 2014), quashes available acts of the inferior courts and sends them to retrial, because the assessment of the living conditions of both parents represents important circumstances of the case that should be proved and investigated by the court which examines the substance of case.

Thirdly, if there is a necessity of the guardianship authority to talk about the living conditions of the plaintiff, as well as of the defendant, the notice should be elaborated by the same guardianship authority. This peculiarity, or rather requirement towards the elaboration of the notice by the guardianship authority, is apparent from the fact that the guardianship authorities examine not only the parents' living conditions but also assess the respective conditions and pay attention to the court of the opportunity of determination the child's residence within a certain parent.

The Russian author Anatoliskaia M. V. (Anatoliskaia, et. al., 1996), mentions that doctrine and practice consider that the investigation of the living conditions of parents and elaboration of the notice should be realized by the same guardianship authority even if the parents have the residence in different places or even countries. The legislation of the Republic of Moldova contains a little confused situation, because the stipulations of the art 63 par (3) of Family's Code mention that "in determining the child's residence, the court will request the notice of the guardianship authority in whose territorial area the residence of each parent is". At least, according to the Law, in case that the parents have different residences on territorial area of different guardianship authorities, each of them should speak. We consider that, the position sustained by the authors of the Russian Family Code Commentary is more grounded and closer to the child's interests.

Fourthly, in order to elaborate the notice regarding the living conditions of the parents, the guardianship authorities should assess not only the existence of the given residence and his/her material conditions but also they will take into consideration all circumstances related to the parent: how much does he/she cares for the child, how well does he/she provides for the child, what education the child gets and what kind of relations are established between parent and child.

Fifthly, the guardianship authority act should be signed by the person(s) that examined the living conditions of the parents and obligatory this/these person(s) should be present at the court trial having the seal of the respective guardianship authority.

Sixthly, the notice of the guardianship authority regarding the living conditions of the parents in the examination process on determining the child's residence represents evidence, respectively it should respect certain requirements and it will be evaluated by these qualities. Thus, the guardianship authority notice represents an official writing, because it comes from public authorities, responsible officials and expresses the mandate of authorities or persons that issued them while on duty. At the same time, the guardianship authority notice is writing with an informational content because its content doesn't have expressions of will, limiting to rendering descriptive, confirmative information related to circumstances important for the case settlement – parents' living conditions. Also, we will mention that even if the notice of the guardianship authority represents writing in the legal procedure, it has a special statute because it represents the materialization of the opinion sustained in the procedure by the representative of the guardianship authority.

Regarding the assessment of the guardianship authority notice, we reiterate that its presentation in the process is obligatory. However, it will not be prior in relation with other circumstances or evidences. The family law act (no. 1316 from 26.10.2000), mentions us expressly the criteria which will be taken into consideration by the court, alongside the conclusions exposed by the guardianship authority during the process – the child's affection towards each parent, towards brothers and sisters, child's age, parents' moral qualities, existent relation between each parent and the child, possibilities of the parents to create adequate conditions for child's education and development (occupation and working regime, living conditions, etc.).

The determination of child's residence is not a problem that can be evaluated as being a determination of child in space – where exactly or at which parent the child's residence should be registered, it is rather a solution given to the request with whom of the parents the child will live finally. At the same time, the determination of child's residence with one of the parents doesn't lead to the loss of parental rights and obligations of the other parent with whom the child won't live. Accordance with the art 64 par (1) of Family's Code, the parent who lives with the child, doesn't have the right to impede the contact between the child and the other parent that lives separately, except the cases when the behavior of the last is detrimental to the child interests or presents danger for the child physical and psychic state.

The litigation regarding the determination of child's residence can be examined repeatedly because whenever the circumstances can change, respectively, the repeated request regarding the determination of child's residence may be submitted. Thus, the parent that has improved its conditions of living can afterwards address to the court a repeated demand in order to request the determination of child's residence with him (her) self. So, when we speak about such litigations, the court doesn't have the right to refuse the demand because the given litigation between the parties has been already examined.

From the analysis of the legal nature of the guardianship authority notice, we can conclude that in the national legislation there are not clear aspects related to the content of the notice of the guardianship authority having a summary settlement in the national legislation.

At the moment, in the national procedural legislation there are no stipulations that can allow the courts to elucidate the psychological aspects of the child or parents' personality in the process regarding the determination of child's residence but also at the examination of other litigations related to the child. Thus, a solution in this direction may be the introduction into the Code of Civil Procedure the stipulations which will establish the participation in litigations where are involved the children of the specialists with particular psychological knowledge. Nowadays, the procedural legislation establishes an express list of situations where the specialist can be introduced in the process, and where is missing the stipulation regarding the calling into the process of the specialist-psychologist in the litigations on child rights and interests, fact that will be welcomed in our case.

1.3. The establishment of legal precedents of the residence establishment

Taking into account the fact that the resolution of litigations regarding the child's residence establishment represents one of the main guarantees of defense of children interests, it is necessary to mention the implication of the court in respecting the legislation in force. Examining the litigations, the

court will apply the stipulations of the International Convention of 20.11.1989 regarding the children rights adopted on November, 20, 1989 at New-York, in force for the Republic of Moldova from February, 25, 1993, the Law regarding the child rights nr. 338 of December, 15, 1994, the Constitution of the Republic of Moldova, the Family Code, adopted by the Law nr.1316-XIV of 26.10.2000, in force from April 26, 2001, the Civil Code, the Code of Civil Procedure and other normative acts which regulate this kind of cases.

In accordance with art.39 par (5) of CCP, the action of marriage dissolution may be initiated also in the court from the plaintiff residence if he/she takes care for minor children or if his/her movement to the court of the defendant residence (Decision of April 14, 2013), meets grounded difficulties.(Based on materials of the case results that Stepanenco Silvia addressed to the court Soroca with the demand of invitation to the process against Stepanenco Veaceslav regarding the marriage dissolution and child's residence establishment). Reporting the mentioned normative stipulations on the facts of the case, the civil, commercial and administrative College of the Supreme Court of Justice retains that the plaintiff (in this case – Stepanenco Silvia), exercised her right to address with the present demand in court office from her residence – according to the territorial competence at the plaintiff choice.

A serious problem for the Republic of Moldova is the migration of citizens to find a good job in order to ensure good living conditions for him (her) self and his (her) family members. Related to the court decisions (Decision of November 6, 2014), with which of the parents the child's residence will be established, the legal precedent pointed to the fact that the decision will be taken according with the child superior interest, indifferently if the parent's residence is in the country or abroad. The majority of decisions are taken in favor of the mother (Decision of February 19, 2014), when the child is in his early age and needs maternal care and affection (the case Carabă L.). However, the child's residence can be established at his father's place, if it is identified that he supported the child financially (the case Nuța).

Once the residence with one parent is established, it may be claimed for the other parent to pay the alimony for the minor child maintaining. Often, this is one of the motives invoked in counterclaim demand regarding the child's residence establishment with the defendant (the case Celpan V.) (Decision of November 6, 2014). Here, the civil, commercial and administrative Council of the Supreme Court of Justice mentions that in accordance with the ECHR law, the appeals should be effective, i.e. to be able to offer the redress of the situation presented in the request (the case Purcell against Ireland, April 16, 1991), while in the appeal declared by Celpan V., there are no such aspects.

From the legal practice of the Republic of Moldova regarding the child's residence establishment we will mention that there are cases of conviction of the Republic of Moldova to ECHR (of November 04, 2014), as for example the case Tocarenco V. Citing the art. 8 (the right of respecting the private life and family), the plaintiff denounced a violation of rights of respecting her family life and reproached to the State for the fact that weren't taken adequate measures on restoring the relationship with her child. Citing the art 13 (the right to an effective appeal) combined with the art. 8, she reclaimed the lack of an effective internal appeal which could solve the situation.

The court established, unanimously, the violation of art.8 of the Convention, considering that is not necessary to examine separately the plaintiff complaint cited under the art 13 of the Convention. Thus,

the Court decided that the relevant authorities have to take all necessary measures, reasonably applicable in order to restore the contact between the plaintiff and her son as long as the court is deciding with which parent the child will live.

2. Conclusions

The establishment of child's residence has a double significance: from one side, the child's right to **residence represents one of the elements of fundamental child's right to be grown up and educated by** parents and to live together with them, from the other side, the residence represents an important attribute of person identification, without which this person cannot realize some of his/her rights. The public authorities, exerting their attributions of executive power, have a basic objective in performing these tasks – the protection of child's rights and control of respecting the superior interest of the child in any situation. That is why, the role of public authorities in the processes regarding the establishment of child's residence is expressly indicated by law, respectively, the public authorities should undertake all possible actions for any existent or potential problem in which child suffers or could suffer. The analysis of legal precedent allowed the analysis of problematic aspects of the given procedure. Thus, the goal initially proposed in the beginning of study is achieved.

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