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ABUSE OF PARENTAL RIGHTS

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SUMMARY

The article is devoted to the study of the concept of abuse of parental rights. An argumentative issue is brough tupas regards there a soning for abuse of parental rights. It is determined that the scientific literature of the Soviet period poses numerous and authoritative objections to the general rule of inadmissibility of the right abuse. The author considers the issues of abuse in the Roman law. The author offer sherown definition of the "abuse of parental rights".

Attention is drawn to the fact that the exercise of rights contrary to its should not be qualified as abusive. It is noted that the legislator establish hes safeguards against abuse by a guardian, ignoring the abuse of parental rights. The consequences of poor definition of the concept of abuse of parental rights by the Family Code of Ukraine are investigated.

Key words: parental rights, parental responsibility, abuse, abuse of parental rights, parents, children, minors, safeguard against abuse.

ЗЛОУПОТРЕБЛЕНИЕ РОДИТЕЛЬСКИМИ ПРАВАМИ

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АННОТАЦИЯ

Статья посвящена исследованию понятия злоупотребления родительскими правами. Рассмотрен дискуссионный вопрос относительно правомерности злоупотребления родительскими правами. Установлено, что в научной литературе советского периода отмечено много авторитетных противников общего правила о недопустимости злоупотребления правом. Рассмотрены проблемы злоупотребления правом в римском праве. Предложено авторское определение категории «злоупотребление родительскими правами».

В статье обращается внимание на то, что осуществление права вопреки его назначению не следует квалифицировать как злоупотребление правом. Отмечается, что законодатель предусмотрел защиту от злоупотреблений правом со стороны опекуна или попечителя, оставив без внимания злоупотребление именно родительскими правами. Исследованы последствия отсутствия определения в Семейном кодексе Украины понятия «злоупотребление родительскими правами».

Ключевые слова: родительские права, исполнение родительских обязанностей, злоупотребление, злоупотребление родительскими правами, родители, дети, несовершеннолетние, защита от злоупотребления.

Problem statement. The need to distinguish the institution of abuse of parental rights as an element of the unlawful behavior of parents has always been a debating point in the domestic legal science. It is obvious that the discussion refers not only to the family law domain, since categories such as "parents" and "children" fall within the legal regulation of the family law that governs the family's personal non-property and property relations between spouses, between parents and children, adopters and adopted, between the mother and father of a child regarding his/her education, development and maintenance, and within the civil law domain, as the civil law regulates personal non-property and property relations (civil relations) based on the legal equality, free will and property independence of participants involved.

Research rationale. Currently, the abuse of parental rights is a topical subject, which is discussed not only by the scientific community, since abuse of parental rights has reached enormous proportions. In this regard, the legal nature of the abuse of parental rights in the family law of Ukraine requires a comprehensive theoretical understanding, both for the further development of the family law science and for improvement of the family law.

Analysis of recent research and publications. Issues related to abuse of rights are not new to the scientific community. Various aspects of abuse of rights were considered by such scholars as M.M. Agarkov, S.N. Bratus, V.P. Gribanov, O.S. Ioffe, O.I. Muranov, V.O. Ryasentsev, O.Ya. Rohach, O.F. Skakun and others. Some aspects of the abuse of parental rights in the family law of Ukraine were investigated by such domestic scientists as T.V. Bondar, B.K. Levkovsky, G.O. Reznik, Z.V. Romovska, M.V. Logvinova, Ya.M. Shevchenko and others. However, specific features of abuse of parental rights still remain the subject of lively scientific discussions, which also actualizes the topic under consideration.

Purpose and objectives of the research paper. Explore the concept of abuse of parental rights. Make their own conclusions regarding the legality of abuse of parental rights.

Statement of basic materials. Abuse of right is an extremely complicated category that still provokes an interest of researches, since, as A.I. Muranov rightly points out, the simple words "abuse of right" cover a large number of complicated and controversial legal issues, many of which reflects the essence of right [1, p. 21].

V.O. Ryasentsev interprets the abuse of right as the exercise of subjective right as opposed to its purpose [2, p. 8].

Alternatively, the abuse of right is evident when the authorized subject allows the unauthorized use of his or her right, but "always pretends to rely on the legal

right and formally does not contradict the objective right" [3, p. 118].

However, the most comprehensive definition, which is taken as a reference point by modern scholars, is one suggested by V.P. Gribanov, who noted that abuse of right is a special type of civil offense committed by the authorized person in the exercise of his or her right and associated with the use of unauthorized specific forms within the framework of the general type of permitted behavior [4, p. 63].

In addition, let us note that the category of "abuse of right" is not new to the modern science and dates back to the Roman law. Thus, O.Ya. Rohach, when considering the issue of abuse of right in the Roman law, makes the following generalizations:

1) analysis of sources of the Roman law indicates a negative attitude to abuse of a person's right; establishing liability for a person who abuses his or her rights and creating remedies for victims;

2) it cannot be argued that the problem of abuse of right become widespread in the Roman law – however, it fell within the focus of Roman lawyers: it was the Romans who formulated the category of *aemulatio* as one of the forms of abuse of right, the absolute nature of the *qui jure suo utitur, do not mention laedit* principle was rejected, and based on which the appropriate restrictions were imposed on the exercise of subjective rights;

3) the prohibition of abuse of right in the Roman law cannot be considered as a general legal principle, since, as noted above, Roman law had;

4) despite the fact that the Roman lawyers had failed to elaborate the phenomenon in full details, and the term "abuse of right" is absent in the sources, however, the Roman law should be considered as the primary source of formation of the principle of the inadmissibility of abuse of right [5, p. 38].

However, it is believed that the notion of "abuse of civil rights" had been first introduced in the civil law of Switzerland. The legislation of Switzerland, which imposed a ban on the exercise of a right that was intended to harm another person, was the Civil Code of the Zurich Canton and the Swiss Civil Code. However, the Civil Code of the Zurich Canton did not contain a general provision on the prohibition of abuse of right, but only defined a number of specific provisions, which mainly regulated neighborly relations and prohibited *aemulatio*, and not the abuse of right as a whole. The authors of the Swiss Civil Code had given a general notion only [5, p. 113].

It should be noted that the scientific literature of the Soviet period had repeatedly drawn attention to the fact that the theory of civil law the rule of thumb of inadmissibility of abuse of rights had numerous and authoritative opponents, with the main motives of such a negative were: the possible negative effect on the strength of subjective rights, confusability of the right and morality in the course of discussing a specific case, the probability of greater damage to the law than benefit [6, p. 115].

O.F. Skakun, in his work on abuse of right, draws attention to the fact that the unlawfulness of behavior as a legal feature of an offense is not clearly expressed in the abuse of right, which is why some scholars do not qualify the abuse of right as an offense. At that, the abuse of right cannot be treated as legitimate behavior, since the latter is socially beneficial. Therefore, according to the author, the abuse of right is a phenomenon of a legal behavior (here letter of the law is the evaluation criterion), or the wrongful behavior (here spirit of the law is the evaluation criterion). Unlawful nature of behavior in case of abuse of right is the contraction not only to the law, as to the rights and interests of the offender [7, p. 429].

M.M. Agarkov used to note that the exercise of rights cannot be unlawful, since actions being referred to the abuses of right, are actually carried out outside of the law domain [8, p. 427].

In this context, we should mention the famous scientist S.M. Bratus, who in his work pointed out that execution of one's right contrary to its purpose should not be qualified as the abuse of right [9, p. 82].

That is, as O.Ya. Rogach rightly points out, the abuse of right can only occur when an authorized person acts within the limits of his / her subjective right, but uses such forms of its implementation that go beyond the legal limits of the right [5, p. 73].

Taking into account the general theory of the abuse of right, the study of the abuse of parental rights looks promising.

Proceeding from the fact that parental rights are defined as a set of all rights belonging to citizens by virtue of origination of children being certified under the established procedure [10, p. 186].

When considering the issue of abuse of parental rights, one should note the following.

First, consideration of the issue of abuse of parental rights should begin with the civil law. Namely, it is about the limits of civil rights, which a person exercises within the limits provided to him or her by an agreement or acts of the civil law.

Thus, when exercising one's rights, a person should refrain from acts that could infringe the rights of others, or cause any harm to the environment or the cultural heritage. At that, actions of a person committed with the intent to harm another person, as well as abuse the right in other forms shall not be allowed.

Instead, the Family Code of Ukraine lacks the concept of abuse of parental rights; moreover, such a word combination is not used in any article of the Family Code of Ukraine.

However, Article 155 of the Family Code of Ukraine referring to the execution of parental rights and parental responsibilities points out that the parents when executing their rights and responsibilities should respect the rights of a child and his/her human dignity. The key provision within the said Article 155 of the Family Code of Ukraine is that parental rights cannot be exercised contrary to the interests of a child.

In addition, according to paragraph 2 of Article 152 of the FC of Ukraine, which defines the right of the child to a proper parenting education, states that a child has the right to object the improper performance by parents of their duties towards him / her.

Thus, a child has the right to apply for protection of his/her rights and interests to the tutorship and guardianship authority, other bodies of state power, bodies of local self-government and public organizations. In addition, a child has the right to apply for protection of his/her rights and interests directly to a court if he / she has reached the age of fourteen.

At the same time, it is impossible to ignore Article 247 of the Family Code of Ukraine, which refers to the fights of a child under the guardianship or tutorship, namely the right to get protection against abuse by a guardian or a caregiver.

Obviously, in this case, the legislator has provided protection against abuse by the guardian or caregiver, ignoring abuse of parental rights.

In this context, M.V. Logvinova notes that the abuse of parental rights as a social harmful behavior, carried out within the limits of legal norms, falls beyond the scope of the family law. Perhaps the grounds for depriving parental rights, as enshrined in Article 164 of the Family Code of Ukraine, are nothing but abuse of parental rights, which, in turn, is recognized as unlawful behavior of parents. The national legislator recognizes such category as an abuse of right (paragraph 3 of Article 13 of the Family Code of Ukraine). In addition, The Guardianship and Tutorship Regulation of 1999 use such a category as "abuse of parental rights". According to Clause 1.7 of the Regulation, the tutorship and guardianship authorities shall consider appeals of children about the improper fulfillment of parental care by both parents (or any one of them) or the abuse of parental rights [11, p. 82; 12].

At the same time, the essence of abuse of parental rights as a form of unlawful activity is to use the existing parental right to harm the child, his/her education and development. Moreover, one may act contrary to the interests of a minor child until a parent has the right to care. In other words, the parents act until they have such an opportunity (subjective right), the limits of which are not clearly outlined by the law. That is why it is difficult to determine when actions of the parents concerning the upbringing of a child went beyond the scope afforded by the law. According to the author, it is expedient to "restore" the norm of the Family Code, which would provide for the introduction of a legal category of the abuse of parental rights [13; 14].

Abuse of parental rights has various manifestations, in particular:

1) in the form of obstructing the improvement of living conditions, the upbringing of a child, his/her education, participation in the public life;

2) in the form of coercion for committing asocial deeds;

3) in the form of imposition of anti-pedagogical punishments;

4) in the form of conscious formation of a child negative attitude towards socially significant values [15, p. 68].

Today, a child may be protected from the abuse of the parental right be taking away from the parents or from one of them by a court decision, if leaving the child with them is dangerous for his/her life, health and moral education (Article 170 FC). A relevant claim may be filed by the tutorship and guardianship authority, being authorized by the Resolution of the Cabinet of Ministers of Ukraine dated September 24, 2008 On some issues of activities of the tutorship and guardianship authorities associated with the protection of a child's rights, in particular, to consider the appeals of children on abuse by their parents of their rights. Therefore, the author's proposal concerning the possibility of introducing a provision into the Family Code of Ukraine that would set a basis for the deprivation of parental rights in case of abusing thereof, as was stipulated by the Family and Marriage Code, since such form of liability, being an ultimate measure taken against the parents, who commit such violations, in some cases may be the only and most effective remedy to protect the rights of a child [16, p. 74; 17].

The above allows us to formulate the following **conclusions.**

Since the law fails to define the notion of "abuse of parental rights", it seems expedient to understand the abuse of parental rights as execution by parents or guardians of the statutory subjective rights within the limits of the law, but contrary to their purpose and interests of a child, and thus to the detriment of a child. Abuse of parental rights is a comprehensive category, which is an act or negligence characterized by a violation of a child's rights.

It should be remembered that the lack of legal definition of the concept of abuse of parental rights in the Family Code of Ukraine causes the absence of a clear system of protection of children from unlawful actions or negligence of parents or guardians in the process of execution of their statutory obligation to raise a child.

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АДВОКАТ В ПРОЦЕДУРЕ МЕДИАЦИИ В КОММЕРЧЕСКИХ СПОРАХ

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АННОТАЦИЯ

В статье проводится теоретическое исследование особенностей участия адвоката в процедуре медиации в коммерческих спорах. Осуществляется анализ состояния законодательства Украины в проведении процедуры медиации и существующей практики использования медиации как основного альтернативного способа решения коммерческих споров. Раскрываются основные принципы международного опыта в коммерческих делах, направленные на предотвращение и разрешение конфликтов, тактика поведения и роль адвоката в переговорном процессе процедуры медиации, оказание правовой помощи клиенту в процедуре медиации при разрешении коммерческого спора. Обоснована необходимость законодательного закрепления процесса медиации в Украине с учетом международной практики.

Ключевые слова: медиация, адвокат, коммерческий спор.

ATTORNEY IN PROCEDURE OF MEDIATION IN COMMERCIAL DISPUTES

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SUMMARY

The analysis of the Ukrainian legislation as to the mediation procedure and the current practice of using mediation as the main alternative way to resolve commercial disputes is carried out. The main principles of international experience in commercial affairs for preventing and resolving conflicts, tactics of behavior and the role of attorney in the negotiation process of the mediation procedure, legal assistance to the client in the mediation procedure while resolving a commercial dispute are described. The necessity of legislative consolidation of the mediation process in Ukraine, using international practice, is grounded.

Key words: mediation, attorney, commercial dispute.

Постановка проблемы. В условиях евроинтеграционных процессов, которые происходят в Украине, все более актуальными для урегулирования существующих конфликтов становятся способы альтернативного разрешения споров (далее – АРС), одним из которых является медиация. На сегодня, к сожалению, в Украине на уровне закона данная процедура не урегулирована, однако на практике субъекты хозяйствования все чаще к ней обращаются.

Актуальность темы исследования подтверждается тем, что медиация как альтернативный способ урегулирования споров является относительно новым правовым инструментом и не урегулирована в законодательстве Украины.

Состояние исследования. Анализом проблем медиации с точки зрения права занимались такие юристы, как М. Пель, Т. Сурдин, А. Яновская, А. Бицай и другие. Однако вопросы участия адвоката в процедуре медиации в коммерческих спорах не только с научной точки зрения, но и с практической, на сегодня являются недостаточно раскрытыми.

Целью и задачей статьи является проведении системного исследования международных правовых норм для определения необходимости их имплементации в национальное законодательство и особенностей участия адвоката в процедуре примирения сторон для определения различий в тактике поведения и роли адвоката в судебном процессе