

**THE DEVELOPMENT OF RUSSIAN LEGISLATION RELATING
TO THE PROTECTION OF THE RIGHTS OF SEPARATED PARENTS
AND THEIR CHILDREN**

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The following article deals with the challenges created by legal regulations concerning divorced or separated couples and focuses on the rights of separated parents with children. The article analyzes the problems associated with law enforcement practices in this area, the gaps in existing family law, as well as the disputed aspects of theory concerning parents' legal relations. Suggestions for legislative developments in Russia concerning the protection of family rights within separated families are given. The authors of this paper argue for a rethink of existing approaches to legal regulations in this field of law due to the fact that existing family legislation does not take into consideration many of the challenges and realities of modern parenthood. Furthermore, current legal regulations in Russia do not fully correspond to international legal norms. The authors contend that this will lead to the curtailment of the legal rights of the separated parents. Such status is characterized, on the one hand, by unreasonable restrictions on parental rights. On the other hand, it permits only a limited degree of responsibility for a child's upbringing and financial support on the part of a parent living separately from their child. The authors propose that, in this respect, it is necessary to rethink disputed legal decisions relating to family law and the implementation of family law in practice. By analyzing such implementation, the authors single out a number of interrelated factors that must be overcome in order to effectively protect separated parents' relationships with their children. The aim of the article is to initiate a new approach to parental legal relations after divorce or separation and to propose new legislative regulations concerning the legal status of a parent who lives separately from their child. New developments in family law are proposed in order to ensure a balance between parental responsibilities and rights as well as the rights of the child.

Keywords: parental rights; children's interests; protecting family rights; parental legal regulations; problems of legal regulation; separated parents; visitation rights; establishing a child's residency.

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Introduction

Parent-child relationships are both natural and legal, and reflect the most characteristic traits of family relationships. Therefore, research of such issues is of primary importance for the development of doctrines/concepts of family law. Nevertheless, the concept of parental relationships is underdeveloped and represents a significant problem leading to multiple challenging issues of family law in both theory and practice. In recent years, there has been a growing emphasis on the problematic legislative and procedural issues in family-related cases and court decisions concerning the process and consequences of divorce and termination of parental rights. It should be noted that the most essential legal norms of the Civil Procedure Code are connected with the court's activities dealing with divorce and termination of parental rights.¹ The study of imperfections of the Family Code of the Russian Federation (hereinafter – RF Family Code) of 1995 and the necessity of modifying the code has become an important focus of current legal research.²

¹ See Dmitry Mareshin, *The Russian Style of Civil Procedure*, 21(2) Emory International Law Review 545 (2007) (Apr. 20, 2017), also available at http://papers.ssrn.com/abstract_id=2208488.

² See Nadezhda Tarusina, *European Experience and National Traditions in Russian Family Law*, 2(3) Russian Law Journal 97 (2015).

Modern family legislation is based on disputed ideas relating to the structure and dynamics of parental relationships developed during the Soviet period. Because of this, the application of the law in practice is not only controversial, but also slow, dragging behind the needs of modern society. The area of family law dealing with the legal rights of separated parents is among the most challenging and disputed. These arguments are explained by a conflict of interests of parents, who often use these realities to their own advantage, much to the detriment of the child. For example, having separate residencies is a major manipulative factor in the increase or decrease of parents' influence on a child.³ Parental conflict in intercultural families is particularly strong; it is no wonder that the protection of children's and parent's rights in intercultural marriages is given high priority by the government in the family policy in the Russian Federation.

One of the consequences of the problems of legal regulations relating to separated parents and children are cases of kidnapping. As we have seen time and time again, family disputes can become ugly; indeed, when some of these disputes between parents regarding a child's abode and access escalate, some parents even resort to kidnapping. Since 2011, Russia has participated in the Convention on the Civil Aspects of International Child Abduction (established in The Hague, October 25, 1980).⁴ A number of legal steps were made to strengthen parental responsibilities. While the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children was signed in October 1996, it was not until 2012 that European states began adopting the regulation into the legal jurisdictions of Europe.⁵ Russian family law has not yet adopted these rulings in accordance with the above documents. Unfortunately, Russian family law is not consistent with international family law regulations dealing.

Though the problem of separated parents and protecting their children's rights is given much emphasis by the Russian Government and by legal theorists in Comparative Law,⁶ systematic and integrative research in this area has not yet been undertaken. For instance, there is only one monograph focusing on the development of a more effective legal mechanism of parental legal rights regulation and it was

³ Старосельцева М.М. Осуществление и защита родительских прав по семейному законодательству Российской Федерации: Дис. ... канд. юрид. наук [Marina M. Starosel'tseva, *Implementation and Protection of Parental Rights as Reflected in Family Legislation of the Russian Federation: PhD thesis*] 46 (Moscow, 2009).

⁴ Available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>.

⁵ Available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>.

⁶ Лялина Н.В. Содержание, осуществление и защита прав родителя, проживающего отдельно от ребенка в Российской Федерации, в Соединенных Штатах Америки: Дис. ... канд. юрид. наук [Natalia V. Lyalina, *Contents, Implementation and Protection of the Rights of a Parent Living Separately from the Child in the Russian Federation and in the United States of America: PhD thesis*] (Moscow, 2006).

published back in 2010.⁷ This means that critical theoretical issues relating to the matter in question have not yet been properly researched and some suggestions proposed by researchers as a result of their exploration of general and integrative issues in this area do not provide a strong rationale for updating the legal basis of family law.

Modern family law theory refers to the existence of “classical parental legal relations”⁸ as well as parental legal relationships with the participation of a separated parent. Judging from these definitions, a lack of common residence should be included among the legal facts that would change the essence of the parental relationship itself. Such interpretation of the meaning of a child and a parent living separately is debatable. From our point of view, the idea of a “classical parental relationship” may be a source of a breach of both the rights of a child and the rights of a parent residing separately as the amount of rights of the latter one may reduce even due to his/her being physically apart from a child.

Taking the above into consideration, the goal of this article is to develop a concept meant for the improvement of a protective legal mechanism for separated parents and their children.

The aims of this paper are as follows:

Firstly, it aims to set out the legal status of a separated parent and, for the first time in Russian family law, argue that a separate residence of a parent should not limit parental legal relations. The meaning of this theoretical conclusion is wide-ranging because, at its core, the entire legal practice, which includes the curtailed rights of a separated parent, provides legal limitations for a separated parent’s rights. As a result, it infringes both the interests of the parent and the child.

Secondly, this research works to develop key recommendations for the Russian legal system with regard to cases of a separated parent forgoing their parental obligations concerning the upbringing of, and provision for, a child. Nonetheless, even such cases are not considered reason enough to deny that parent their parental rights. Implementing these recommendations will ensure a balance of interests concerning the legal regulations relating to the rights of separated parents and their children.

Thirdly, the research aims to investigate factors which are not connected with such legal recommendations concerning a separated parent but which still hinder the effectiveness of legal mechanisms aimed at protecting children’s interests upon the dissolution of the family. The researchers propose ways to implement modern family law with a view to increasing its efficacy.

⁷ Громоздина М.В. Осуществление родительских прав при раздельном проживании родителей по законодательству Российской Федерации: Дис. ... канд. юрид. наук [Maria V. Gromozdina, *Implementing Parental Rights of Parents Living in Separation in the Legislation of the Russian Federation: PhD thesis*] (Moscow, 2010).

⁸ *Id.*

1. Methodology

The authors employ qualitative methods, including systemic and structural analysis with the goal of identifying the impact of separate parental residences, paying special attention to the dynamics of parental legal relations. The authors also employed a historical analysis of laws and norms relating to child-parent legal relations. The researchers also use the comparative law method to define the main trends concerning the relevant rights of separated families. Logical methodology, such as deduction and generalization, was used for the theoretical interpretation of empirical facts in an effort to work out new provisions for legislative development in the challenging areas of children's legal relations with non-resident parents within split families.

2. The Challenges for a Separated Parent Exercising Their Parental Rights

In the post-Soviet legal sphere, there has been a broad discussion about an apparent discrimination against fathers concerning their rights to decide the living arrangements of their children following a divorce. Russian courts tend to have a far higher number of female judges than many other countries, and the same can be said for women's employment in legal bodies that deal with child custody. An analysis of court decisions shows that courts tend to favor women when deciding upon the living arrangements of a child and, therefore, the rights of the divorced or separated parent. Although legal entities do not view the protection of fathers' rights as a critical issue, the increasing number of fathers' rights initiatives presently emerging suggests that it is indeed an important legal issue. Respectively, when "considering a child's interests, age, opinion, as well as the personal and moral qualities of the parents, the court is enabled to solve the dispute in favor of the father."⁹ Similar situations with fathers' rights arise in other countries. It is stressed that "the courts are biased against dads."¹⁰ Biased court opinions concerning fathers' rights for custody and access to their children after divorce or separation led to the "Angry Fathers Movement" in the UK.¹¹

The reason for this is that fathers have no rights in the UK. Instead, the law refers to parental responsibilities. Fathers' rights to see their children are not set out in the UK law as such, but include parental responsibility which gives them the right to contribute to decision making regarding the child's future. On the contrary, in Scotland parental responsibilities and rights is a legal status that means that they have a duty to care for and protect the child.

⁹ Архив Ленинского районного суда г. Тюмени. Гражданское дело № 33-6465/2016 [Archive of the Leninsky District Court of the Tyumen City. Civil Case No. 33-6465/2016].

¹⁰ Available at <https://www.dad.info/divorce-and-separation/fathers-rights-and-law/fathers-rights-to-see-their-children-law-in-the-uk>.

¹¹ *Id.*

Nevertheless, a review of recent law enforcement practices shows an imbalance in the exercise of parental rights between separated parents may be explained by the fact that law enforcement regulations are not always in keeping with the RF Family Code. As a result, that leads to the creation of the special legal status for the separated parent. Such a status may be considered “curtailed” because it is characterized, primarily, by fewer rights compared to those of parents living with the child.

In custody cases, judges tend to be more concentrated on determining the place of the child’s accommodation, even asking for the child’s opinion on the matter, than ensuring that the child will be able to communicate with both parents. Here is an example from court practice that demonstrates the imperfect and illogical nature of some court opinions:

a child has established steady social links with the local environment in the location in which he used to live with his father and to sever these links would have a negative impact on the child. This is why his mother filing a suit to establish a place of living for the child in her favor despite her own not having the right to do so means that she rejects the possibility of civilized communication between her child and his father due to either her personal interests or selfish motives.¹²

That is why, considering the mother’s interest “selfish,” the court ruled, “to deny the claim to accommodate the child with his mother.”¹³ In our view, rather than the claim being the result of selfish motives, this is an example of a parent striving to live with her child.

It is not unusual that among the agreements reached and court opinions determined, one can come across several in which the right of one parent to communicate with his/her child is dramatically curtailed and takes place “every Saturday, from 10 a.m. till 7 p.m. either on neutral territory or at the living address of, but not in the presence of, the child’s mother.”¹⁴ If the parental rights of a separated parent are not restricted, one would assume that his/her communication with a child may and should be the same as it used to be. Nevertheless, analysis of law-enforcement practice reveals that this is far from the case. As a rule, even a law-abiding, divorced or separated parent has to stick to a rigid child attendance schedule.

For example, a court of a higher instance revoked a lower court’s decision that gave a separated father the right to see his child on a daily basis. The case was filed for retrial on the grounds that, “the court opinion in question was unenforceable

¹² Архив Калининского районного суда г. Тюмени. Гражданское дело № 2-137-09 [Archive of the Kalininsky District Court of the Tyumen City. Civil Case No. 2-137-09].

¹³ *Id.*

¹⁴ Архив Ленинского районного суда г. Тюмени. Гражданское дело № 2-1025/2017 [Archive of the Leninsky District Court of the Tyumen City. Civil Case No. 2-1025/2017].

since it did not specify the days, holidays, and the vocational periods for meetings or the timing and location thereof.”¹⁵ We do not believe a court decision should oblige a separated parent either to have access to a child only on fixed dates or limit his/her access on other dates for it represents a fundamental limitation of the rights of separated parents. The limitation or termination of parental rights may take place only in keeping with the Arts. 69 and 71 of the RF Family Code.

Even if these meeting details are set out in a legal opinion, the implementation of separated parent rights may be seriously hindered by another parent living together with a child who may continuously undermine the relationship between a child and the separated parent, by instilling a negative attitude towards him/her. Here is a typical example from a statement of claim of March 2015 brought to the Lower Instance Civil Court in Tyumen,

Due to the personal enmity between me and the defendant, she does her best to obstruct my contacts with our daughter, saying that I will never see her again. I have no chance to visit the child at the residential address of the defendant as she never opens the door for me there and becomes abusive.¹⁶

There is no legal basis for negative legal consequences, even in case of breaching the attendance schedule, which was prescribed either by a negotiated agreement or ordered by a court decision (e.g., if the court ordered Thursdays as meeting days but a parent visited the child on another day).

Evidently, such conflicts have a traumatic impact on a child. This analysis of the case materials notes that

the Parties repeatedly breached the conditions ordered by the court on the basis of parental negotiation determining the arrangements for access to the child. That resulted in both the plaintiff and defendant’s approaching bailiff services, child protection services, and the police. As a result, according to the conclusion of the NGO Family Center [Tyumen] the child developed a sense of alarm, non-productive neurosis, and psychological tension due to the constant movement from his mother’s to its father’s residence, as well as due to the changes in their daily schedule. In order to rehabilitate the physical and emotional health of the child, it is critical to enable him to communicate with both the mother and the father.¹⁷

¹⁵ Определение Московского городского суда от 28 ноября 2011 г. по делу № 33-38737 [Decision of the Moscow city court of November 28, 2011 on case No. 33-38737].

¹⁶ Архив Центрального районного суда г. Тюмени. Гражданское дело № 14-8987/ 2015 [Archive of the Central District Court of the Tyumen City. Civil Case No. 14-8987/ 2015].

¹⁷ Архив Калининского районного суда г. Тюмени. Гражданское дело № 2-257-11 [Archive of the Kalininsky District Court of the Tyumen City. Civil Case No. 2-257-11].

The issue of psychological tension of a child and trauma to his mental, emotional and physical health is stressed in a number of articles by foreign authors.¹⁸

The above situation corresponds with the position demonstrated by the practices of the European Court of Human Rights. For example, in the case *Johansen v. Norway*, August 1996, it was pointed out by the European Court of Human Rights that if a child is deprived of the opportunity to communicate with one of his parents, it can lead to irreversible consequences for his or her mental state.¹⁹ Similar issues are referred to in articles on the mental trauma of children, which point out that children's trauma symptoms increase in case of parental divorce or separation.²⁰

We assert that the courts should have legal leeway to not only consider the claims of the parents and their wishes as to the residential rights of a child, but also to make the decision based on the child's welfare, specifically their ability to communicate with both separated parents. In this respect, we suggest including this stipulation in Art. 24 of the RF Family Code. This will strengthen the legal guarantees of those children who were born out of wedlock because current legislation considers that the court is supposed to decide only upon the legal rights of children who were born within legal marriages.

In view of the above, we also consider it reasonable to amend Art. 66 of the RF Family Code in order to include rules that the separation of a parent should not change his or her parental rights and responsibilities. We are of the opinion that this will work to "strengthen the guarantees and rights of good parents to have access to their children, even if one of them is separated."²¹

¹⁸ Alicia Summers et al., *Terminating Parental Rights: The Relationship of Judicial Experience and Expectancy-Related Factors to Risk Perceptions in Child Protection Cases*, 18(1) *Psychology, Crime and Law* 95 (2012); Liz Trinder, *Competing Constructions of Childhood: Children's Rights and Children's Wishes in Divorce*, 19(3) *Journal of Social Welfare and Family Law* 291 (1997).

¹⁹ See *Johansen v. Norway*, App No. 17383/90, Case No. 24/1995/530/616, ECHR1996-111, [1996] ECHR 31, (1997) 23 EHRR 33.

²⁰ See Katelyn Donisch et al., *Child Welfare, Juvenile Justice, Mental Health, and Education Providers' Conceptualizations of Trauma-Informed Practice*, 21(2) *Child Maltreatment* 125 (2016); Penelope Welbourne & John Dixon, *Child Protection and Welfare: Cultures, Policies, and Practices*, 19(6) *European Journal of Social Work* 827 (2016); Laura E. Brumariu & Kathryn A. Kerns, *Mother-Child Emotion Communication and Childhood Anxiety Symptoms*, 29(3) *Cognition & Emotion* 416 (2015); *Development and Implementation of a Child Welfare Workforce Strategy to Build a Trauma-Informed System of Support for Foster Care*, 21(2) *Child Maltreatment* 135 (2016).

²¹ Экспертное заключение по проекту Концепции совершенствования семейного законодательства Российской Федерации и Предложений по совершенствованию семейного законодательства (принято на заседании Совета при Президенте РФ по кодификации и совершенствованию гражданского законодательства 7 июля 2014 г. № 132-1/2014) [Legal Opinion on the Concept of Improving of Family Legislation of the Russian Federation and Improving of Family Legislation Motions of the Presidential Council for Codification and Improvement of the Civil Legislation of July 7, 2014 No. 1321/2014] (Apr. 20, 2017), available at <http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=PRJ;n=129293#1>.

3. Challenges Concerning the Exercise of Guardianship Rights and Responsibilities of a Separated Parent

It is clear that the flaws in modern family law can lead to the curtailment of responsibilities of a separated parent.

Practice shows that a good parent would forego some of his/her own needs for the sake of a child's in extraordinary circumstances.

Retrospective analyses of parental responsibilities concerning child maintenance speak about its unconditional character. Moral responsibilities oblige parents to take care of their children until they come of age.

Pre-revolutionary lawyers stressed the fact that parents are obliged to take care of a child even at the expense of completely ignoring their own needs. This has served as a strong legal foundation for payments to children known as child support.

If one of the parents is forced to pay for a child's financial support, it is always the parent living separately from the child. Courts tend to mandate that parents pay a certain percentage of their income as a mandatory alimony to their child, whereas a fixed sum of financial support payment is less often enforced by the courts and is looked at as a thing of secondary importance.

Art. 81 of the RF Family Code determined the shares of the income or salary of the financial support payer if he/she is a divorced and separated parent (i.e., not living with the child). These shares have been fixed in family legislation since 1936 in order to overcome situations in which the amount of the support was insufficient compared to the income of the payer. The law was aimed at the following: a) preventing a disproportion between the possibly increasing income of the paying parent and a fixed level of financial support, and b) promptly concluding court decisions. Nevertheless, irrespective of the forms of child support payment, in Russia, in practice, the support payer often either fails to disclose his/her income or transfers the rights to his/her property ownership to their close relatives, etc. Similar issues often arise in international practice.²²

Regarding the liability of the parent avoiding alimony payments the practice of avoiding paying alimony by making regular minimum payments is widespread. In such cases, the payer is not liable under the Criminal Code on the ground of gross violation of alimony payment or under Art. 69 of the RF Family Code on the ground of avoiding execution of parental obligations. Such approach is not consistent with the principle of the child's welfare and development. Therefore, such parents manage to avoid criminal punishment and deprivation of parental rights for evading parental responsibilities under the Criminal Code of the Russian Federation or under Art. 69 of the RF Family Code. Such practice does not correspond to the principles of caring for

²² Shelley Morrison, *In Care, Aftercare and Caring for Those in Care: My Successful Care Journey*, 22(2) Child Care in Practice 113 (2016).

a child. Children who have not yet come of age cannot support themselves without their parents, which is why financial support serves as the only source to satisfy their needs. Additionally, the above mentioned alimony-related norms distort the equality of parental rights in which one of the parents takes full care of the child and the other pays only a small part of his income for the child's care and only when the source of his income is legally proven. It is evident that a parent does not stop being a parent even if he separates from a child, which means that he should stick to the principle of parental equality even in caring for a child. Also, much debate about parental responsibilities has arisen in international legal research.²³

Moreover, court practice shows that if one of the separated parents is legally married to another person, the conditions of his/her alimony payment grow more complicated. For example, there are some Russian Constitutional Court decisions that state the priority of current marital status over parental responsibilities for illegitimate child maintenance. To illustrate this fact we can use the example of the court claim filed by the spouse of Mr. X. and adjudicated by the Nevsky District Court, Saint Petersburg, in 2016. The court based its opinion on Art. 35(3) of the RF Family Code, which provided that a consent and a power of attorney of a spouse is obligatory for any kind of transaction made by the other spouse, and concluded that this ruling does not infringe the constitutional rights of the citizens. Beyond that, according to law enforcement practices, if a separated parent gets married, it becomes more complicated for him/her to pay alimony to a child given his/her new family status (primary or secondary caretakers of a new family). Even the opinions of the Russian Constitutional Court concerning childcare prioritize the rights of legally married (even if newly separated) couples over cohabiting couples. For instance, Ms. N.V. Vidman applied to the Constitutional Court of the Russian Federation (Saint Petersburg) expressing her disagreement with Art. 35(3) of the RF Family Code.²⁴ She claimed that it discriminated against the rights of illegitimate children hoping to obtain sufficient provisions based on parental consensus. The reason for this claim rests with the fact that the Nevsky District Court (Saint Petersburg) rejected the agreement relating to the alimony payment for the underage daughter of Ms. Vidman and Mr. X.²⁵

²³ Ruth Weston & Margaret Harrison, "Divorced Parents' Understanding of Their Rights and Responsibilities towards Their Children, Paper delivered at the Third Australian Family Research Conference, hosted by the Australian Institute of Family Studies, held at Ballarat College of Advanced Education, 26–29 November 1989.

²⁴ See the case of *Vidman v. X*. X was cohabited with Ms. Vidman and the couple had an illegitimate child. Ms. Vidman filed a complaint to the Constitutional Court of the Russian Federation claiming that the previous Lower Instance court decision that ruled that the agreement between her and X, who consented to pay alimony for their child had violated the ruling of Art. 35 of the RF Family Code. The reason for such a decision was that the current legal wife of Mr. X forbade him from paying alimony and, as a result, the lower court ruled that their agreement shall be nullified.

²⁵ Определение Конституционного Суда РФ от 9 декабря 2014 г. № 2747-О «Об отказе в принятии к рассмотрению жалобы гражданки Видман Натальи Владимировны на нарушение ее

Later on, monetary payments exceeding the amount of alimony prescribed by law could only usually be enforced if a divorced spouse agreed to such condition. Also, legally, the income of the alimony payer is treated as the common property of the spouses (Art. 34 of the RF Family Code), except in cases of alimony payment from the sources of individual property of one of the spouses (Art. 36 of the RF Family Code).

On the whole, we consider that the statement of the Constitutional Court of the Russian Federation that Art. 35(3) of the RF Family Code does not infringe upon parental rights. However, the fact that this ruling requires the prospective alimony-paying parent to submit his/her agreement to do so and the pending approval of the power of attorney may hinder the voluntary payment of alimony, making it, in some cases, unrealistic, if not impossible. Furthermore, a new spouse of a separated parent who does not want to reduce their common property may not be willing to give his/her current spouse consent to use their common finance to maintain a child from a previous marriage.

We believe it is reasonable to enforce a mechanism to prevent competitive norms concerning the disposition of spouses' common property in cases dealing with alimony issues. Child support obligations, including voluntary ones, are of a personal nature. That is why they cannot be passed over to a legitimate heir. Also, Art. 45 of the RF Family Code differentiates between personal and common obligations of spouses and does not require agreement on personal responsibilities for a previous spouse with the current one.

That means that a negotiated agreement on paying financial child support should not be considered a transaction with the common property of the spouses, and shall not require justification of the power of attorney. For example, mediation and negotiation plays a pivotal role in out of court conflict resolution between separated or divorced parents in foreign countries.²⁶

In the above case of Ms. Vidman, the defendant should have initiated to take the alimony of the obligator from the split of the spouses common property. That would be in keeping with Arts. 38 and 45 of the RF Family Code. It is evident that the provision of stability in marriages should be carefully regulated; however, parental and marital status tend to compete with one other and which one prevails is decided on the basis of family law rules that are in force. That means that the existence of the new family should not abolish the responsibilities of the previous family and

конституционных прав и конституционных прав ее несовершеннолетней дочери пунктом 3 статьи 35 Семейного кодекса Российской Федерации» [Decision of the Constitutional Court of the Russian Federation No. 2747-O of December 9, 2014. On Rejection of Application by Ms. Vidman Regarding the Acceptance of her Complaint against the Violation of her Constitutional Rights and the Rights of her Underage Daughter under Article 35(3) of the Family Code of the Russian Federation] (Apr. 20, 2017), available at <http://www.garant.ru>.

²⁶ Timothy Keller, *The Meaning of Marriage: Facing the Complexities of Commitment with the Wisdom of God* (New York: Dutton, 2011); Jing Hsu, *Marital Therapy for Intercultural Couples in Culture and Psychotherapy: A Guide to Clinical Practice* (W.S. Tseng & J. Streltzer (eds.), Washington, DC: American Psychiatric Press Inc., 2001).

that a legally capable remarrying person with a child from a previous marriage shall be aware of the legal consequences and the choices that need to be made in connection with these. In keeping with the Convention on the Rights of the Child, all legal actions concerning children shall be made in the best interests of the child.²⁷ The UK Children Act serves as the example that prioritizes this issue.²⁸

4. Protecting Children's Interests When Establishing with Which Parent, They Will Live

Though the ensuring "the best interests of a child" has become a broadly accepted priority, the meaning of this term still has different legal interpretations.²⁹

In Russian family legislation, there exists neither a definition of children's interests, nor the criteria for coordinating their interests with the interests of their parents. For instance, Y. Bespalov, a well-known legal scholar, defines "a child's interest" as "the appropriate conditions for a child's upbringing" and as suitable conditions for a child to exercise its rights, stressing that, in the "interests of a child, the maximum possible capacities of parents to raise and maintain such child shall be ensured."³⁰

The author argues that such interests are fundamentally driven by need and suggests that to define the interests of a child as needs ensures the best development and preparation for an independent life in the future.

O. Ilyina suggests the following definition:

The interests of a child is the subjective (individual) need of a child in having proper living conditions objectively manifested via parental rights and responsibilities stipulated in Family Legislation.³¹

In our opinion, these definitions are too general and not practice oriented.

We hold that the term "interest" requires special interdisciplinary research in order to specify its true legal meaning. Even the etymological analysis of this word shows that it is derived from the Latin word "interest," meaning something critical. It has an additional, subsidiary meaning of being "in between" something or somebody

²⁷ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

²⁸ Children Act 1989 (Apr. 20, 2017), available at <http://www.legislation.gov.uk/ukpga/1989/41/contents>; Children Act 2004 (Apr. 20, 2017), available at <http://www.legislation.gov.uk/ukpga/2004/31>.

²⁹ Joseph A. Goldstein et al., *Beyond the Best Interests of the Child* (London: Burnett Books, 1980); Roy Huijsmans, *Reconceptualizing Children's Rights in International Development: Living Rights, Social Justice, Translations*, 13(2) *Children's Geographies* 249 (2015).

³⁰ Беспалов Ю.Ф. Некоторые вопросы реализации семейных прав ребенка (теория и практика) [Yury F. Bespalov, *Some Issues of the Implementation of Family Rights of the Child (Theory and Practice)*] 12 (Vladimir: Vladimir State University, 2001).

³¹ Ильина О.Ю. Проблемы интереса в семейном праве Российской Федерации [Olga Yu. Ilyina, *Problems of Interest in Family Law of the Russian Federation*] 21 (Moscow: Gorodets, 2007).

("inter-"). From our point of view, if we were to focus on such meaning, it would lead us not just to specify the needs of the child, but also to relate them to parental capacities (i.e., their ability to maintain a child). Throughout the history of Russian legislation, the term "parental capacities" has been interpreted as follows:

the law obliges the parents to perform their parental duties only in accordance with their capacities.³²

Therefore, the interests of a child are evaluated via the perspective of the parents' financial capacities, among others. Nowadays, regarding this question in practice, the court's opinion plays the leading role. The court considers the criteria stipulated in Art. 65(3) of the RF Family Code. These include the emotional attachment of a child to both parents, brothers, and sisters; the child's age; the moral and other qualities of the parents; the existing relationship between the child and each parent; and the possibility for creating the best conditions for the upbringing and development of the child (the parents' occupations, work schedule, material possessions, and marital status). In recent years, the civil rights of children in the family and children's rights and wishes in divorce have become an issue of significant interest.³³ Also, in Australia, when a court is making a parenting order, the Family Law Act 1975 (Sec. 61 DA) requires it to regard the best interests of the child as the most important consideration.³⁴

No matter how strange it may seem, parents themselves may serve as the main threat to the interests of a child. When a family is in conflict, a child is often used as an instrument of reciprocal manipulation, first at the stage of selecting his/her place of residence with one of the parents, and then when the question of parental access is decided. Family dispute negotiation via mediation can help overcome unwanted emotional consequences. Also, the advantage of a negotiated decision is that it establishes a balance between the parties in dispute.³⁵

The analyzed disputes show that legal enforcement which is provided by court decisions is much less appealing than a goodwill decision to implement mediated agreements. Mediated decisions are preferable because it is not possible to oblige a child to communicate with another parent. We maintain that one of the main

³² Законы гражданские с разъяснениями Правительствующего Сената и комментариями русских юристов. Кн. 1 [*Civil Laws with Interpretation by the Governing Senate and Commentaries of Russian Lawyers. The First Book*] 221 (I.M. Tyutryumov (comp.), Moscow: Statute, 2004).

³³ Gerison Lansdown, *Civil Rights of Children in the Family*, 4(2) *Child Care in Practice* 138 (1997); Tomas Englund et al., *Education as a Human and a Citizenship Right – Parents' Rights, Children's Rights, or...? The Necessity of Historical Contextualization*, 8(2) *Journal of Human Rights* 133 (2009).

³⁴ Available at <https://www.legislation.gov.au/Details/C2016C01106>.

³⁵ Сюкияйнен Э.Л. Медиация в международных семейных конфликтах: российский аспект, 2 Семейное и жилищное право 27 (2014) [Elga L. Syukiyajnen, *Mediation in International Families Disputes: Russian Law Aspect*, 2 *Family and Housing Law* 27 (2014)]; Hsu 2001; John G. Oetzel, *Managing Communication Tensions and Challenges during the End-of-Life Journey: Perspectives of Māori Kaumātua and Their Whānau*, 30(4) *Health Communication* 350 (2015).

reasons for all the above mentioned examples are insufficiencies in legal regulations. For instance, concerning the issues of out-of-court decisions regarding children of separated parents, one should note the following.

First, each parent within the mediation process pursues his/her own interests, while a mediator is a neutral person in charge of the negotiation procedure. It is logical to assume that there is nobody in this process who is in charge of the interests of the child. Second, a court decision shall be in keeping with current legislation, whereas a negotiated agreement does not hold such requirements. The result of a mediated negotiation can be any agreement. As the practice of mediated agreements shows, the parties (parents) may even reach an agreement specifying that one of the parents will not request contact with his/her child in exchange for the other parent not enforcing an alimony payment. However, legal assessment of any kind of agreement concerning a child's interests can only take place if it is mediated in court. In view of the above, we think it is reasonable to adjudicate the status of a mediated agreement known in law enforcement practice as an "agreement of intent." It is necessary to stress that a mediated agreement may serve as an organizational basis for reconciling family members and enabling them to proceed in a way that secures a fixed conclusion. That will also make it possible to resolve legal problems concerning the competition between rules emerging from different branches of legislation. In so doing, it will be possible to resolve confusions concerning mediated agreements, particularly those dealing with common property, which, in contrast to the requirements in the RF Family Code, are concluded via legislation without obligations to use a power of attorney.

5. The Significance of Separation in the Dynamics of Parental Legal Relations

Looking at separation within the context of the general theory of parental legal relations, it is necessary to focus on some important issues. First, parental separation may take place even without termination of family relationships or marriage and may be due to differing circumstances (illness, long-term business trips, etc.). Admissions that parental rights may be subjected to termination as a result are inconsistent with the concept of legal capacity.

To consider a separately living parent as "lesser" just because he/she severed relations with another parent correlates with the situations concerning the rights and obligations of parents who even have never lived together with their children (due to different life circumstances). Such approach undermines the essence of parental legal relations.

To put it in another way, the rights of "illegitimate" children and their parents differ significantly from the rights of children born within legal marriages. However, this fact contravenes Art. 53 of the RF Family Code, as well as the legal basis of family legislation.

Therefore, in keeping with the letter of law, it is logical to conclude that the status of a “separated parent” should not lead to a change in his/her rights. This is also in the rules of the RF Family Code that stipulate the right of a separated parent to contact a child or his/her right to obtain the information about a child does not mean that he/she had not possessed those rights prior to separation. The norm in question implies that parental rights of a separated parent are preserved.

We consider it legally just that the fact of parents’ separation shall not affect the essence of parents legal relations.

At the same time, organizational relations between parents are getting more complex, and matters of procedure and conditions for exercising parental duties have come to the fore.

Ideally, they can be resolved by agreement on the exercise of the parental rights of a separated parent. We unanimously agree with the scholars arguing that this kind of agreement cannot be considered transactional, for they do not lead to new rights and responsibilities, neither to the child, nor to one another.³⁶

Therefore, it is evident that changes in parental legal status should not be purely connected with the factual separation of parents. The question is, what are the reasons predetermining the change in parental legal status? We can surmise that these reasons may be connected only with the change of the object of parental rights and responsibilities manifested in the change of the mode of parental participation (involvement/contribution) in rearing the child. This fact can only be ascertained by a court of law.

However, at present, there is no provision for a legislative mechanism capable of resolving this matter with the help of the previously mentioned logical sequence of steps. In accordance with the current law, the only grounds for limiting a parent’s rights, as provided for in Art. 69 of the RF Family Code involve child abuse or cases in which leaving a child with a parent can cause danger to the child’s life or health (Art. 71 of the RF Family Code), thereby changing parental legal relations.

We suggest the following legislative decision: to provide for the legal ability to limit parental rights and obligations in cases in which a parent does not show continued interest in a child’s development, avoids his/her parental obligations, or uses his/her parental rights with the intention of taking revenge against the other parent without considering the child’s interests in his/her parental responsibilities. We believe that, in such cases, parental rights cannot be preserved. It is necessary to add a provision to Art. 7(2) of the RF Family Code under which careless performance of parental rights by one of the parents shall permit the other to request a limitation of the former parent’s rights. Such an approach to solving this issue is consistent with

³⁶ Темникова Н.А. Реализация и защита личных неимущественных прав ребенка: Дис. ... канд. юрид. наук. [Natalia A. Temnikova, *Execution and Protection of Personal and Non-Property Rights of the Child: PhD thesis*] 103 (Omsk, 2006).

the new trends and demands of modern family law.³⁷ We strongly believe that, in such cases, it would be reasonable to extend the legal basis for the limitation of parental rights when one of the parents infringes the family rights of the children, even if this infringement does not threaten the children's health or life. Such a stipulation will protect children's rights in cases of parental separation.

Conclusion

The undertaken research makes it possible to propose new legal provisions concerning the protection of family rights of separated parents and their children, stating that the fact of parents living separately shall not terminate or decrease the essence of their parental rights but, rather, that these rights shall be preserved unconditionally within the dynamics of parental legal relations.

The legal status of a parent living separately from a child shall not be changed, including his/her right to participate in the child's upbringing and care. The split of the family relationships as a legal fact should lead only to the change of the organizational mode of parental legal relations which are becoming more complex and require additional regulation via out-of-court negotiations or court orders regarding the procedure for exercising parental rights by separated parents.

Analysis of law enforcement legal precedent shows that the parent living separately usually exercises "reduced" parental rights as compared to the other parent living with the child. From a legal perspective, this can be qualified as an illegal restriction of a separated parent's rights, which infringes both the interests of a parent and of his/her child.

In order to balance the interests of parental legal relations, it is advisable that the court shall be permitted to go beyond the limits of those claims determining the child's place of residence and to make it obligatory for courts to make decisions on equal visitation and access rights for both parents. This proposition could amend Art. 24 of the RF Family Code. Also, we consider it just to stipulate this provision to protect the interests of illegitimate children (children born out of wedlock).

When considering the matter of childcare by a parent living separately, the principal criteria for the court should be the child's requirements for survival and development. While Art. 81 of the RF Family Code suggests that the share of income for alimony payments shall be fixed, we maintain that it should be more flexible, allowing a more malleable allocation should the income of the alimony paying parent increase.

³⁷ This idea is in tune with the idea explicit in the Concept of Improving of Family Legislation concerning the amendment "to foresee special a case when parental rights shall not be equal (primarily if the child lives with one of the parents and if the other parent refuses, for no good reason, to care for and to support the child for a period of more than 6 months)." See for details the Concept of Improving of Family Legislation of the Russian Federation and Improving of Family Legislation Motions, *supra* note 21.

In connection with the above mentioned suggestion, it will be reasonable to supplement the RF Family Code with a mechanism for dealing with competing rules on using common property of separated parents as well as the rules regulating alimony payments. Alimony obligations, even those that are voluntary, are of a personal character. At the same time, signing an agreement for alimony payment cannot be interpreted as a transaction involving the common property of the parents. This is why it should not require the justification of the power of attorney when parents agree upon personal obligations. We suggest adding this provision to Art. 100 of the RF Family Code.

This research has shown that the need to change parental legal relations with a separately living parent may be caused by a number of factors, among them negligence by a separately living parent and a threat to a child's life and health. Nevertheless, these issues are not stipulated in any article of modern family law, though they may serve as a solid ground for limiting parental rights. We suggest extending the reasons for limiting parental rights for such transgressions and adding them to Art. 71 of the RF Family Code.

Our research has enabled us to draw these conclusions in relation to the protection of the rights of children with separated parents and address the mechanisms according to which it may be possible to modernize current family legislation.

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