The authors identify characteristic features of how certain children’s rights are exercised under the family law of Russia and the legislation of the Commonwealth of Independent States (CIS). The norms of the CIS family law on children’s rights are specific; they adhere to national cultural traditions and customs that have an impact on the implementation and protection of children’s personal non-property rights. The authors point out that a child, under certain circumstances, can be a carrier not only of the rights and obligations provided for by the family codes of independent States, but also by family law of the CIS. The article points out to the need to define the law applicable to regulating relations where the participants have different or dual citizenship, or legal facts occurred on the territory of one State that is a member of the CIS. The authors describe a defect in Russian legislation regulating the status of a child with dual citizenship. The problem of legislative consolidation of the concept of proper upbringing of a child is addressed, as are ways that children may undertake self-protection of their rights granted in CIS member States. One peculiarity of the family codes of CIS member States is the norms regulating a child’s participation in personal non-proprietary and proprietary relations. Special attention is paid to alimony payments. Moreover, the authors consider the laws that regulate dissolution of a marriage, as well as how such dissolution affects the legal status of the child. The article focuses on deprivation of parental rights as a radical method of breaking the bond between a child and parents, distinguishing the deprivation of parental rights from their restriction. The authors consider adoption procedures, as well as the legal status of the adopted and adoptive parents. Each problem is considered by using the comparative legal research method.
The radical changes that took place in Russia at the turn of the 1990s led to the collapse of a unified State, the USSR, and resulted in the formation of the Commonwealth of Independent States (CIS). According to the current Charter of the CIS, the founding States are those States which, at the time of adoption of the Charter, had signed and ratified the Agreement of 8 December 1991 establishing the CIS and the Protocol Thereto of 21 December 1991. The member States of the CIS are those founding States that accepted obligations under the Charter within one year of its adoption by the Council of the Heads of States.1

These States are Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Uzbekistan. As a result of the dissolution of the Soviet Union, each as an independent State has adopted its own domestic legislation different in specific details. In other words, after the collapse of the Soviet Union, unified legislation ceased to operate.


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Theoretical research to identify the specific features of certain children's rights would be one-sided if it did not characterize similar norms in CIS legislation. A child under certain circumstances may be the bearer of not only the rights and responsibilities under the norms of the Family Code of the Russian Federation, but also norms of the CIS family law. The norms constituting the institution of parental legal relations, personal non-property rights of a child (such as the right to a name, patronymic and surname, the right to nationality, the right to express their opinions), as well as the procedure and methods of such protection of rights make it possible to identify the peculiarities of their implementation depending on which State the child or his parents belong to, and their place of residence or citizenship.

Such family relations involving a child will differ in their ambiguous legal nature and in certain complexities. The latter are caused by difficulties in exercising the rights and duties of the participants as these have to match those in the Family Code of the Russian Federation and the family legislation of another CIS member. Thus,


the solution to a certain question, for example, concerning the changing of a child’s personal data, the protection of his or her rights and interests cannot be determined only by domestic material norms. The general principles of interaction of the CIS member states are regulated by the Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Cases, according to which “the legal relations of parents and children shall be determined by the legislation of the Contracting Party on whose territory the children reside” (Art. 32).\(^1\)

In other words, in such cases the law applicable to regulating relations where the participants have different or dual citizenship or the legal fact occurred in the territory of one of the CIS member states must be determined. These relations can occur in the territory of one State and develop in the territory of another.\(^2\) Moreover, the issues relating to such relationship may be resolved by agencies of a third State.\(^3\) Such interaction between different States means that one State cannot independently and fully regulate these relations, especially relations with the participation of a child.

This state of affairs arises because a child is a bearer of the rights and duties provided not only by Russian, but also international law, which have a significant impact on the formation and content of a child’s legal status.\(^4\) Furthermore, family law relations with the participation of a child are diverse in their legal nature and, at the same time, complex in their structure because they can be complicated by a foreign element. Such relations are referred to as conflict-of-laws in the theory of international private law. Some authors rightly point out that

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\text{[i]t is the conflict-of-laws rule resolving a certain issue that cannot be replaced by domestic material norms.}^{15}\]

The peculiarity of implementing conflict-of-laws rules in practice is as follows: according to their functional purpose, unlike other rules conflict-of-laws rules are not aimed at protecting the rights and interests of individuals, and their application is not aimed at regulating private issues with the individual’s participation. Their general purpose is to determine the law that is to be applied to regulate the relations

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\(^{13}\) Брун М.И. Введение в международное частное право [Mikhail I. Brun, Introduction to Private International Law] 63 (St. Petersburg: Tip. V.F. Kirshbauma, 1915).


complicated by a foreign element. These features of conflict-of-laws legal relations indicate their group integrity and allow qualifying them as an independent type of civil relations. To a certain extent, one can suppose that conflict-of-laws rules are a link between international private relations and material norms. Such interaction determines the peculiarity of the conflict-of-laws method to legally regulate the relevant legal relations, including family relations with the participation of children.

Legal regulation of the relevant relations is exercised not only by the norms of international law (international treaties, customs), but also by legislation of the Russian Federation. In this sense, family relations are no exception and just as any other legal relations can be complicated by a foreign element. The Family Code of the Russian Federation contains a special chapter regulating relations with foreign citizens and stateless persons (Ch. 7). An example of such relations is when a child has dual citizenship (for example, Russian citizenship and citizenship of another State), or when his parents have different citizenship, or when their joint property is in the territory of a foreign state, or when a legal fact occurs in the territory of another State, such as marriage, birth of a child, divorce, and the like.

The above-mentioned cases require the application of foreign law. At the same time, the fact of different citizenship of the subjects in the relevant relations (in particular parents and children who live in the territories of different States) requires not only resolving conflict-of-laws issues, but also such procedural issues as, for example, the execution of a foreign court decision for the recovery of alimony abroad.

One way or another, the application of international norms has an impact on the formation of a child’s legal status: the legal status of the Russian child and the status of the child with dual citizenship differ from one another. As is pointed out by certain authors, the solution of a general theoretical problem is required; namely,

the inconsistency between the norms of the Russian legislation and the generally-recognized principles and norms of international law defines this fact as a defect.  

The systematic analysis of CIS family legislation allows us to come to a general conclusion that the norms regulating family relations contain national cultural customs and traditions of a State. The influence of the latter is more evident in such legal institutions as the institution of adoption, the institute of children’s rights and duties, the institute of parental rights and duties in relation to children, and others.

The principle of equality of parental rights and responsibilities in relation to children is connected with the regulation of parental relations; however, the definition of certain rules of family codes of CIS members is characterized by certain terminological

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peculiarities. For instance, Chapter 2 of the Family Code of Georgia devoted to parental rights and duties with regard to children in the title of Article 1197 refers to “equal rights of parents with respect to children,” and in the norm itself establishes a general principle: “parents shall have equal rights and duties with respect to children.”

The title of an Article using the term “equal rights” instead of the most common term “equality” merits attention. A purely theoretical question arises about the interdependence of the concepts “equal rights” and “equality” in terms of their scope and content; whether they are identical or not, what is the degree of their impact on other norms regulating relations with children. If one turns to the etymology of “equal rights,” the following explanation is given in the dictionaries:

> Equal rights of citizens are a legally ensured principle of the legal status of an individual, meaning equality of rights, duties, and responsibilities of citizens before society, State, law, court.

In the special legal dictionary the term “equal rights” appears to encompass the term “equality”; equality is impossible without equal rights and obligations of participants in legal relations. However, one cannot say these concepts are synonymous because “equal rights” is, in fact, a broader concept, the structural elements of which are the equality of rights, duties and responsibilities of citizens. It seems to us that “equal rights” and “equality” differ in meaning, equal rights means having the same rights with someone, and equality is the position of people in a society, the sameness of their political and civil rights.

Following the logic of a legislator, in Article 1197 of the Family Code of Georgia “equal rights” indicates the existence of the same rights of one subject in relation to another, in particular, parents have the same rights in relation to their child. At the same time, “equality” is interpreted in a broad sense indicating the equal position of citizens in the sphere of public relations, in particular, family. Within the framework of such relations, it is difficult to distinguish between these categories; because one is impossible without the other, they can be considered to be generic relations. Equal rights between subjects cannot exist without such an essential feature as equality of rights and duties of participants of legal relations that, in turn, provides implementation of the dispositive principle to regulate family relations. The practical implementation of this principle is manifested in the fact that the subjects are in a legally equal position in relation to each other, that is, the parents of the child have the same and equal rights and duties not only in relation to the child, but also in relation to each other. In other words, in family relations, as well as in civil relations, there is no principle of power and subordination of one subject to another, that is, relations according to family law are built horizontally, not vertically.

Parents, as the legal representatives of children, have a duty to create conditions for their proper family upbringing, for the family is the natural environment where
children receive necessary education. Because the Russian Family Code lacks a General Part containing definitions contributing to the development of effective mechanisms to regulate family relations, Belarus legislation proposing a definition of “improper upbringing of a child” is of interest. Thus, according to Article 67,

> education shall be considered inadequate if the legitimate rights and interests of children are not ensured, and children do not form a stable immunity to antisocial behavior, to violation of State laws and the rights and interests of other children.

This understanding of “improper upbringing” of children is general and devoid of purely legal criteria; it reflects the child's behavior in a society and demonstrates his or her ability to adapt therein. Moreover, the concept of “improper upbringing” indicates the presence of a public element such as a violation of State laws that is more indicative of the duty of any citizen to comply with the laws of the State in whose territory he or she resides.

This concept of “improper upbringing” does not fully reflect the interests of the family characterized primarily by private law. Apparently education in a broad sense involves the education of a child as a fully-fledged citizen of his or her country who must comply with the laws and be a patriot of his or her country. However, the effort of the legislator to provide a definition of “proper upbringing” deserves approbation from the standpoint of enriching the theory of family law because this promotes the effective implementation of family norms. In any case, the law proposes certain criteria to assess the extent to which the child’s upbringing is appropriate.

Responsibilities for children's upbringing are assigned to their parents as their legal representatives; they are obliged by law to fulfill certain duties towards their children, and parental rights cannot be exercised contrary to the interests of children (Art. 65 of the Russian Family Code). Article 1198(1) of the Family Code of Georgia is of interest in this regard:

> Parents shall have the right and the duty to raise their children, to care for their physical, mental, spiritual, and social development, and to raise them as worthy members of a society, taking into account the interests of the children.

At first glance, the approach of the legislator to defining the principal duties of the child’s parent does not fundamentally differ from the family legislation of other CIS countries. However, a detailed interpretation of this norm makes it possible to identify fundamental differences in comparison with other norms. In our opinion, the words “taking into account children's interests” in the Article not only differ in their semantic meaning, they also demonstrate various legal consequences when implementing the norms. The interpretation of these provisions suggests that the
category of “children's interests” is perceived by the legislator differently; in Article 65 of the Russian Family Code, parents are unable to exercise their rights and perform their duties “contrary to their children's interests”; that is, the parents when making various decisions concerning children first and foremost have to consider their interests. In the second case, the phrase “in the best interest of the child” implies that the decision on the question is made by taking into account all the circumstances of the case, which include the opinion of the child.

A noteworthy feature of some CIS family legislation is that the rights of minors are set out in separate chapters devoted to the rights of children. For example, Chapter 12 of the Family Code of the Kyrgyz Republic describes the basic rights of minors and identifies the basic rights of children; the latter are divided traditionally into personal non-property and property rights.

Personal rights of a child include the right to live and be raised in a family (Art. 59); the right of a child to communicate with parents and other relatives (Art. 60); the right to legal protection (Art. 61); the right to express an opinion (Art. 62); the right to a name, patronymic and surname, and the change thereof (Arts. 63 and 64). Only Article 65 is devoted to children's property rights. Apparently, basic children's rights traditionally include rights of a personal nature that override children's property rights. A similar approach is evident in Chapter 11 of the Russian Family Code, being devoted only to the rights of minors.

In the Family Code of Uzbekistan, some children's rights, on the contrary, are formulated in separate norms. The children's right to express their opinions is formulated, in contrast to the Russian Family Code, in general terms because no age of a child is specified upon reaching which the child's opinion has legal significance. Thus, Article 68 of the Family Code of Uzbekistan provides that

[a] child has the right to express his or her opinion on any family matter affecting his or her interests, as well as to be heard in any judicial or administrative proceedings.

Nor is the minimum age specified for a child upon reaching which his or her opinion is legally significant for other participants of family relations. The Russian Family Code indicates when the specific age of a child entails certain legal consequences for the child. Thus, according to Article 57 of the Russian Family Code,

[a] child has the right to express his or her opinion on any family matter affecting his or her interests, as well as to be heard in any judicial or administrative proceedings. To take into account the opinion of children aged 10 is required except when it is contrary to their interests. In instances provided by law, the guardianship authorities or the court may issue a decision only with the consent of a child who has reached the age of 10 years.
Russian law specifies the age of a child upon reaching which not only his or her opinion is taken into account by the legislator, but also in certain cases without the child’s will a certain decision cannot be made, in particular, to change the child’s name and surname, to restore parental rights when adopting a child, and others.

Among the important rights and duties of parents as legal representatives of a child is the right to protect their children’s rights and interests (Art. 1198(2) of the Family Code of Georgia, Art. 64 of the Russian Family Code). Such a parental right is traditional for family legislation. However, this right is ensured in a separate norm of the Russian Family Code, along with such rights and duties of parents as the right to education or upbringing, whereas such parental rights and duties are summarized in a single norm in the Family Code of Georgia. However, the Family Code of the Kyrgyz Republic contains particular provisions to protect children’s rights and interests. According to Article 61(1),

[a] child has the right to protect his or her rights and legitimate interests; at the same time, the law specifies that a minor recognized in accordance with the law as fully capable until the age of majority has the right to exercise his or her rights and duties, including the right to protection.

The law does not specify the minimum age at which a child can defend his or her rights and duties in court.

Thus, based on these norms, children have the right to defend their rights independently provided they are recognized as having full legal capacity in accordance with the procedure established by law. In other words, a judicial decision which entails the recognition of a child as legally capable is the basis for the minors’ right to protect themselves independently. Recognition of a minor as legally capable allows him or her to defend his or her rights in court despite the fact that formally he or she has not reached the age of 18. In this case, the legal status of a minor is transformed into a legal status of a person having full legal capacity. The reason for the latter is not the child’s reaching the legal age which entails the onset of full legal capacity (18 years), but the adoption of a judicial decision on declaring a minor to have full legal capacity.

The general legal status of a child consists of the personal property and non-property rights and duties. The wording of certain personal non-property rights of a child, in particular the child’s right to a name, patronymic and surname, differs in the Russian and other CIS family codes because such norms reflect the national and cultural traditions of a State. According to Article 63(3) of the Family Code of the Kyrgyz Republic,

[at] the request of parents, the surname of children can be assigned according to the name of the father or grandfather or in compliance with Kyrgyz national traditions. The names of persons of other nationalities shall, at their request, be assigned in accordance with their traditions.
Or in accordance with Article 69 of the Family Code of Uzbekistan,

[a]t the request of parents, a child may be assigned a surname derived from the name of his grandfather, both paternal and maternal, according to national traditions.

In addition, the law defines the age of children at which they have the right to change their names and surnames in Article 70(21), namely:

At the joint request of the parents until the child reaches the age of sixteen, the civil registry office based on the interests of the child shall have the right to change the name of the child as well as change the name assigned to him or her to the name of the other parent. At the same time in the same norm it is specified that change of a name or a surname of the child who has reached the age of ten years can be made only with his or her consent.

The Family Code of Kazakhstan not only contains Chapter 9 on the children's rights, such as the children's right to life and be brought up in the family, the right to communicate with parents and relatives, the right to express their opinion, the right to a name, patronymic and surname, but also highlights such an independent right of children as their right to nationality (Art. 57). According to this provision (Art. 57(2)),

[t]he children's nationality is determined by the nationality of their parents; if the nationality of children and their parents is different, it is determined at the request of the child in accordance with the nationality of the father or mother when the children receive identity cards or passports.

The law provides that in the future the children's nationality upon their application may be changed to the nationality of the other parent.

The legislator allows children to choose their nationality. This norm is unusual because the right of the child to have a nationality is indicated in the Family Code of Kazakhstan, whereas the family legislation of all other CIS members abandoned this position. The reasoning was that these norms somehow illuminated a certain “ideological background”: the attitude to the individual in certain historical periods of the development of the Russian State was determined on the basis of belonging to a particular nationality and this expressed discrimination against a person depending on a particular nationality.

The family codes of the CIS countries traditionally regulate relations with the participation of a child in terms of personal non-property and property rights. For example, Chapter 11 of the Belarus Family Code characterizes property relations between parents and children. Parental property rights and duties are defined as
follows: rights and duties to manage the affairs and property of minors, disabled adult children who are in need of assistance, providing them with the financial support in the form of alimony or other payments according to and on the conditions ensured by this Code and other acts of the legislation of the Republic (Art. 88). Such property rights are characteristic of any family law, but in this provision the legislator attempts to name specific types of property rights and duties of parents with regard to children of a certain legal status (minors, disabled adults). The norms governing financial support of a child in the form of alimony are among traditional children's property rights. All the family codes protect children's property interests and make provision for the reasons and procedure to impose alimony for the child's support.

The basic principle is that children due to their age need assistance and support from their parents or relatives under certain conditions. Payment of alimony may be voluntary, that is, by agreement of the parties, and coercive, that is, by court decision. In the first case, the amount of alimony is determined by the parties on the basis of their financial situation. In the second case, the law uses various criteria that allow the court to determine alimony.

According to Article 65(2) of the Family Code of the Kyrgyz Republic, the court may transfer no more than 50% of the assigned alimony to bank accounts opened in the name of minor children at the request of a parent obliged to pay the alimony. Some norms prescribe the procedure to fix alimony payments based on an agreement between parents on payment for the child's support. For example, Article 1214 of the Family Code of Georgia states:

> If the parents do not reach an agreement on the amount of alimony, the dispute shall be resolved in court. The court shall determine the amount of alimony on the basis of a reasonable, fair assessment within the necessary requirements for normal financial support and upbringing of the child. When determining the amount of alimony, the court shall take into account the real financial situation of both parents and the child.

The legislator in this provision uses vague wording and criteria to determine the amount of alimony: “reasonable,” “fair” assessment within the necessary requirements for the normal development of the child. Obviously, such criteria as “reasonableness” and “fairness” are evaluative and serve as approximate guidelines to determine the alimony in favor of the child. In addition, the practical implementation of such legal provisions, in our view, does not safeguard a universal approach to determine the amount of child's support. Moreover, each child has his or her own “requirements” for normal development, his or her own needs, so one cannot ignore this fact. However, a universal approach to the issue of alimony is difficult due to the individual approach to each child, his or her situation in the family. But the criteria to determine the alimony should be the same for all children without exception.
Nevertheless, when determining the amount of alimony, one should not only utilize the general approach, that is, set the amount of alimony according to general norms for the development of the child, but also take into account the status of the child in whose favor alimony is collected. If the child’s parents are deprived of parental rights and the child has no relatives who could help him or her, this fact should be taken into account and reflected in the court’s decision when determining the amount of alimony. When the child has one parent or other relatives who can actually help, the alimony can be fixed but should be sufficient to meet the basic needs of the child.

When the parents of the child have divorced, the legal status of the child should not change, and the parents may likewise agree on the payment of alimony. In other words, depending on the current situation in the family, the legal status of the child, the number of persons obliged to pay alimony, all these circumstances together, have an impact on the decision, and all these factors should be taken into account when determining the alimony. In this case, we are talking about the “situational” method of legal regulation in the sphere of family relations, including assigning the alimony. The material capabilities of the person obliged to pay the alimony should be taken into account among the determining factors in the process of setting the alimony. The specific aspects of the legal status of the child in whose favor the alimony is collected are ensured to some extent in certain norms. For example, if a child is in institutional care, then the expenses may be collected from the parents in favor of such an institution (Art. 1216 of the Family Code of Georgia). If the legal status of the child is clearly defined including when paternity is established and before considering the merits of the case, the court may set the amount of the child’s financial support (Art. 1217 of the Family Code of Georgia). The legal status of a child raised in a family differs from that of a child fostered in a family. To a certain extent, a different approach is utilized to determine the alimony payments in respect of a child fostered in a family. A person who has assumed obligations to foster a child but subsequently renounced these duties is obliged to financially support a disabled adult ward (Art. 1228 of the Georgian Family Code).

Thus, the legislator does not derogate from children’s property rights in cases when the child is fostered in the family; however, the alimony is based on the specific aspects of the legal fact that causes the relationship, namely, the adoption of the child. At the same time, the alimony is based primarily on the fact that the child is a minor and needs financial support and guidance of a foster parent despite the lack of blood ties. In other words, a legal fact such as the adoption of a child as the reason to set the alimony is not blood ties (alimony duties of parents and children), but the legal fact of the child’s acceptance into a family for upbringing.

There is the possibility to reduce the amount of alimony paid by a parent in favor of a child. A parent who pays alimony has the right to file an application to reduce the payment established by the court (Art. 1221(1) of the Family Code of Georgia). The Russian Family Code (Art. 119) contains a similar provision if the financial or family status of the alimony payer changes, as does the Family Code of Georgia (Art. 1222).
However, the Family Code of Georgia differentiates the procedure and reasons for reducing the alimony collected from parents when the court changes the amount of alimony. The legislator believes this “differentiation” in the law is justified and makes it possible to effectively address property issues in relation to minors. Despite this difference, the principle to collect alimony, both under Georgian and Russian law, remains common, namely, when setting the alimony in favor of minors, the court takes into account not only the needs of the alimony recipient, but also the real capabilities of the payer. Thus, the interests of the latter are also protected along with the interests of the alimony recipient. The protection of a child’s property interests does not mean diminishing the interests of the other party in these relations. The legislator utilizes the principle of fairness and reasonableness determine the alimony. When the financial or family situation of the obligated person is such that he or she is unable to pay the alimony in the amount determined by the court, the latter upon presentation of the payer’s relevant application must take into account this circumstance and make a fair, reasonable, and valid decision. Such a decision does not mean that the child’s property interests are violated. In this case, the court takes the so-called “transformative decision” which takes into account both the interests of the child and the alimony payer. This means the latter cannot be placed in conditions under which they are unable to fulfill effectively their alimony duties. Indeed, such decision allows a balance of interests to be achieved of the alimony recipient and payer.

The purpose of the alimony is to support the recipient, but the payment thereof cannot be contrary to the interests of the obligated person. The principle to set and collect the alimony is based on fair and reasonable assessment of the situation of both parties and remains unchanged regardless of the content and the wording of the alimony norms in legislation of the CIS countries.

Parental legal relations form the basis for relations with children (Ch. 12 of the Russian Family Code). Therefore, considerable attention is paid to legal regulation of these relations in the CIS family codes. Several provisions governing parental legal relations exhibit some peculiarities. For example, Article 1198(4) of the Georgian Family Code provides that “parental rights may not be used in opposition to the interests of the child.” In our view, use of the term “in opposition” implies a certain conflict of parental and children’s interests, a certain opposition to each other. At least this wording does not allow the conclusion that the rights and duties of the subjects in these legal relations are legally equal, which is not typical of the family law of the Russian Federation, according to which “parents shall have equal rights and equal duties with respect to their children (parental rights)” (Art. 61(1) of the Russian Family Code). Dictionaries say that the phrase “in opposition” means something that counteracts, opposes something else. One can assume that the use of such wording involves a certain “resistance” to or suppression of children’s interests in relation to their parents. The legislator is unlikely to have meant such an interpretation, but in practice there may be difficulties in implementing this norm, especially in the case of a conflict between the parents and the child.
Because a registered marriage between the spouses is the basis for a matrimonial relationship and, as a consequence, for the parental relationship, the presence or absence of a registered marriage between the spouses directly affects the legal status of a child. A child’s family status is complete when he or she is brought up in a nuclear family where there is a mother and father. A child who is raised in a family where the parents are divorced, or in one way or another a child is brought up by one parent, even though the parents have a good relationship has a legal status which can be called incomplete, truncated. Therefore, each CIS family code defines the legal consequences of parental divorce for the child. In the vast majority of cases, a divorce should not affect the relationship of the spouses with regard to the child born in a marriage. For example, Article 1199 of the Georgian Family Code states that “in respect of children, parents have equal rights and duties in cases when they have divorced.”

The logic of this provision in general does not cause any objections; indeed, a divorce is reason to terminate marital, but not parental, relations. This fact should not affect the relationship between each of the parents and the child. However, after the divorce, problems arise with the execution of the court decision concerning the participation of a parent living separately in the process of raising a child. It is often difficult for parents after divorce to be on good terms, to step back from the conflict, and to think about the children and their interests. The children’s fate, their psychological health, their social and family status depend on whether a compromise between the parents is reached. The extent to which the divorce influences the psychological state of children depends on their age: a small child, as a rule, does not fully realize the meaning of what is happening, but a teenager can react in a variety of ways, including inadequate ones. In any case, the divorce “leaves a mark” on the psyche of the child which further affects his or her whole life, position in a society, and the ability to adapt to the social environment and other circumstances.

In this case, we refer to the moral aspect (reproach of the society, peers, friends), and the legal when the family and social status of the child is “transformed,” modified (as a rule, a mother brings up the child after divorce). For this reason, in order to minimize the negative consequences of the divorce for spouses and children, the legislation of the majority of the States resolves such issues on a voluntary basis, namely, the issues of raising children are decided by parents based on mutual consent (Art. 1200(1) of the Family Code of Georgia), and only in the absence of such consent, is the issue resolved by a court with the participation of parents (Art. 1200(2) of the Family Code of Georgia). Only the court can deal with this category of cases; no other body can participate in the consideration of such cases.

In contrast to the law of Georgia, Russian legislation provides the child’s parents with a choice of the authority, that is, an alternative exists for either the court to

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consider the case or the guardianship and trusteeship agency to do so. Article 65(2) of the Russian Family Code says:

All questions relating to the upbringing and education of children shall be resolved by the parents by mutual consent on the basis of children's interests and taking into account the views of children. Parents (or one of them) in the event of disagreement between them shall have the right to apply for the resolution of such disagreement to the guardianship and trusteeship agency or to the court.

Moreover, first, the legislator refers to the guardianship and trusteeship agency, thereby indicating the possibility of resolving the conflict between the parents in a pre-trial procedure. But this provision does not prohibit parents from going directly to court, bypassing the guardianship and trusteeship agency; however, the presence of such an alternative, in our opinion, contributes to a more effective solution of the issue related to the upbringing of the child. The professionalism of the judges allows the judicial process to carefully understand the causes and motives of the spouses' conflict, to determine the child's place of residence, and the procedure for the participation of each parent in the process of raising a child after divorce:

In the event of divorce, the minor’s place of residence is determined by an agreement between the parent; if the spouses do not reach such, this issue shall be resolved by the court, taking into account the interests of the child (Art. 1201 of the Family Code of Georgia).

A parent living separately from the child retains the right to communicate with the child and is obliged to participate in his or her upbringing. Interestingly,

[t]he court has the right to deprive a spouse of the right to communicate with a child for a certain period of time if this communication interferes with the normal upbringing of the child and adversely affects him or her (Art. 1202 of the Family Code of Georgia).

We believe that this norm is more logical than Article 66(1) of the Russian Family Code, according to which

[t]he parent with whom the child lives should not interfere with the child's communication with the other parent, if such communication does not cause harm to the physical and mental health of the child, his or her moral development.

The wording of Article 66 of the Russian Family Code allows us to conclude that the “level” of the relationship between the child and a parent living separately from the
child is essentially determined by the former wife (less often the former husband) with whom the child stays to live. According to Article 160(2) of the Family Code of Ukraine, the place of residence of the child who has reached ten years shall be determined by mutual agreement of the parents and the child. If the parents live separately, the place of residence of the child who has reached 14 years is determined by him or her (Art. 160(3)). This norm implies that the decision on the child’s place of residence when the parents live separately is determined by the child independently upon reaching the age of 14 years. The issue of the child’s place of residence is resolved jointly by his parents, but the opinion of the child who has reached 10 years of age is taken into account. In the first case, the consent of the child has an independent legal value, whereas in the second case, the consent of the child is identified, taken into account by law, but has no independent value. In general, in all CIS countries, the opinion of a child is considered legally significant when he or she reaches the age of 10.

As a rule, the child’s mother begins to “speculate, blackmail,” using the child while building a relationship with her ex-husband and deploying as a formal argument the wording of Article 66 of the Russian Family Code. The parent with whom the child lives should not interfere with the child’s communication with the other parent, if such communication does not cause harm to the physical and mental health of the child, his or her moral development. The second parent (usually the child’s mother) should determine whether the communication between the father and the child is dangerous for the latter, but the legislator does not establish any criteria for such communication and behavior. Taking into account that the relationship of former spouses after divorce is rarely benevolent, the child often becomes a “hostage” to the situation between the spouses, the conflict between them which caused the divorce. The ex-spouse is unlikely to be objective about the communication between the child and the ex-spouse living separately. Moreover, how she will determine the degree of harm which the second parent causes the child as a result of their communication remains open.

The practical implementation of this norm demonstrates that a parent living separately may apply to the court only when a former spouse living together with the child repeatedly fails to comply with the court decision on his or her right to participate in the child’s upbringing. In other words, when a parent who lives separately is accused of the harm the communication between a child and such parent causes, this parent does not have grounds to apply to court. His right to communicate with the child directly depends on the will and desire of the child’s mother, as far as she is objectively able to assess the behavior of the father in relation to the child.

Practice shows that the right of a child to communicate with his or her parents after the divorce is threatened because often it is not exercised as a result of unfair actions on the part of the parent living together with the child. In this regard, the Family Code of Ukraine ensures legal consequences for the illegal behavior of one parent when determining the minor’s place of residence. According to Article 162 of the Family Code of Ukraine,
If one of the parents or another person arbitrarily without the consent of the other parent or other persons with whom under the law or a court decision a minor lived changes the place of residence involving the child’s abduction, the court, based on the application of the person concerned, shall have the right to immediately issue a decision to return the child to the one with whom he or she lived. […] A person who voluntarily changed the minor’s place of residence shall be obliged to compensate material and moral damage caused to the person with whom the child lived.

Thus, the Code contains civil law provisions concerning negative consequences of a material nature occurring as the result of the implementation of unlawful behavior on the part of those who abuse their right of a parent in relation to another parent who lives separately from the child. Such norms enable justice to be rendered to those who do not execute or who impede the execution of a court decision.

Parental rights and duties towards a child are absolute, including their right to raise their child. It is necessary, however, to distinguish their right to raise a child from the right of the child to communicate with parents. Divorce is the basis for terminating marital relations, so this fact should in no way affect the relationship of the child and each of the parents, as well as other relatives. The child has the right to communicate with parents, grandparents, brothers, sisters, and other relatives. The parents’ divorce, invalidation of the marriage, or separation do not affect the rights of the child (Art. 55(1) of the Russian Family Code). In addition to the child’s parents, other relatives (grandparents) have the right to communicate with their grandchildren; they retain this right after a divorce between the child’s parents. And this right, in some cases, is not limited and is not conditioned by the fact of their participation in the upbringing of their grandchildren, as provided in Article 1203 of the Family Code of Georgia:

The grandfather and grandmother shall have the right to have relations with their minor grandchildren even if they do not directly participate in their upbringing.

Where the parents of a child refuse grandparents to communicate with the children, the court may order the parents to enable such communication between them and their grandchildren in the manner prescribed by the court. The court may determine the procedure for of such communication provided that communication between the children and their relatives will not interfere with children’s normal upbringing and will not have a bad impact on them (Art. 1203 of the Georgian Civil Code).

The absolute nature of parental rights and duties towards the child is expressed in their absolute protection against infringement by other persons. In accordance with Article 68 of the Russian Family Code,
Parents shall have the right to demand that their child is returned from any person holding him or her in the absence of legal grounds. In the event of a dispute, the parents may apply to the court for protection of their rights in respect of the child being held.

In practice, this means that the court may deny the parents their request if it comes to the conclusion that the return of the child to the parents is contrary to the child’s interests (Art. 1204 of the Georgian Family Code, Art. 68 of the Russian Family Code). These norms implement the principle of priority to protect the child’s rights and interests in comparison with other participants in family relations. The legislator gives preference to the opinion of the child in deciding such an important right as the right to live and be raised in the family. The deprivation of parental rights may be the reason why the court refuses parents the return of their child.

Deprivation of parental rights is not only a sanction for the improper conduct of parents towards a child, but also an important legal fact. The deprivation of parental rights affects not only the legal status of the child’s parents, but also the legal status of the child whose parents are deprived of parental rights; such status is differs significantly from the status of the child in the care of parents.

The general legal consequence of the deprivation of parental rights is that a parent loses all rights based on kinship with respect to the child (Art. 1207 of the Family Code of Georgia, Art. 71(1) of the Russian Family Code). In other words, the parent loses legal connection with the child when his or her parental rights with respect to the child are terminated, except for the duty to pay alimony (Art. 71(2) of the Russian Family Code). The child whose parent is deprived of parental rights, on the contrary, retains property rights based on kinship, including the right to inheritance (Art. 71(4) of the Russian Family Code). In our opinion, the legal consequences of the deprivation of parental rights specified in Article 71 of the Russian Family Code in comparison with the Family Code of Georgia are defined more clearly. The legal consequences of parental rights deprivation are concentrated in the Russian Family Code in a single norm, whereas in the Georgian Family Code the legal consequences of parental rights deprivation are scattered in several norms. For example, a separate norm is devoted to alimony in favor of a child, providing that simultaneously with the decision to deprive parents of their parental rights the court resolves the question of alimony (Art. 1207 of the Family Code of Georgia).

Another fundamental difference in the consequences of parental rights deprivation is that according to the logic of Article 71 of the Russian Family Code, children whose parents are deprived of parental rights are transferred to guardianship and trusteeship agencies lose their personal relationships with the parents, including the right to communicate. In contrast to this norm, Georgian legislation allows a parent who is deprived of parental rights to visit a child. For example, Article 1208 of the Family Code of Georgia provides that
[t]he guardianship and trusteeship agencies may allow a person deprived of parental rights to see a child, if this does not have a bad impact on the child.

Under the Georgian law, a parent deprived of parental rights does not lose the full rights and duties towards the child, in particular, the right to communicate with the child. A similar provision is found in the Family Code of Belarus; Article 83 ensures the opportunity for parents derived of their parental rights to meet with children:

At the request of parents deprived of parental rights, the guardianship and trusteeship agencies may allow them to meet with children unless communication with the parents has a harmful effect on children. Such permission is based on the decision of the guardianship and trusteeship agency; the time, place, and duration of the meeting shall be specified. Such a decision may be appealed in a judicial proceeding.

This opportunity is provided to the parent with the permission of the guardianship and trusteeship agencies; however, the right of the parent to communicate with the child is not automatically lost after the deprivation of parental rights. In our opinion, this is a fundamental difference between the Georgian Code and Article 71 of the Russian Family Code, which contains the imperative provision that a parent deprived of parental rights loses all rights based on kinship with the child in respect of whom they were deprived of parental rights. The reasons for depriving of parental rights under both the Georgian Code (Art. 1205) and the Russian Code (Art. 69) are the same, except for two reasons specified in the Russian Family Code (parents have committed an intentional crime against the life or health of their children and or they refuse to take the child from a medical institution). Under conditions specified in the law, parents deprived of parental rights may be restored in their rights if the parents change their behavior, lifestyle, or attitude to the children's upbringing (Art. 72 of the Russian Family Code); a similar provision is found in the family legislation of other CIS countries. In accordance with Article 72(2) of the Russian Family Code, a parent deprived of parental rights may file such an application. In contrast to the Russian Family Code, however, according to the law of Georgia not only the parent, but the guardianship and trusteeship agency, as well as the child, can file an application to restore parental rights (Art. 1209). Because of his or her age, the child is capable of expressing his or her views on the restoration of the rights of his or her parent. The legislator merely clarifies that if a child is 10 years old, the court takes into account his or her wish (Art. 1209(3) of the Georgian Family Code). Nevertheless, following the logic of the legislator, a child can file such an application at an earlier age, but most likely by his or her legal representatives at his or her request.

In our opinion, such norms have a direct impact on the legal status of the child. Restoration of parental rights in respect of a child who has reached the age of 10
years is possible only with his or her consent (Art. 72(4) of the Russian Family Code). The Russian legislator, unlike the legislator in Georgia, connects the restoration of parental rights with the consent of a child who has reached the age of 10 years.

The Family Code of Georgia (Art. 1209(3)) applies a different formulation: if the child is 10 years old, then his or her opinion is taken into account. This means that the opinion of a 10-year-old child is taken into account only together with other facts relevant to the restoration of parental rights. In addition, the child has the right to apply to the court for restoration of the rights of his or her parents. Thus, the legislator extends the legal capacity of the child, in particular the procedural capacity, by giving the child the right to sue for the restoration of the parental rights of his or her parents. This legal provision ensures additional opportunities granted to the child by the law of Georgia. The decision to restore parental rights is important not only for the parent, but also for the children who must fully understand and realize the consequences of such a decision for themselves. The decision to restore parental rights affects the legal status of the child, so it is unreasonable to focus only on the formal premises for a decision in favor of parents, such as changing their behavior.

In this regard, the right of the child to apply to the court to restore his or her parent to their parental rights is fairly granted. The children must decide for themselves how much they need to restore legal communication with their parents. Eventually, this decision affects the lives of children in general, in particular their legal status: whether it shall be the status of a child who will be brought up in a nuclear family, or the status of a child who lives in an institution and has lost contact with the parents because of the deprivation of their parental rights.

The norm devoted to the rights of parents deprived of parental rights (Art. 1211 of the Family Code of Georgia) is of great practical interest:

A parent (s) whose rights are limited by the removal of a child may be allowed to communicate with the child, unless this has a bad effect on the child.

In this form the norm is controversial because the title refers to the rights of parents deprived of parental rights, and the content refers to the restriction of parental rights on the basis of the child’s removal. Within one norm several different grounds for the termination or change of the parental legal relationship (deprivation, restriction of parental rights, or removal of the child) are identified; there is no difference between these legal facts and their consequences in the norm. In this case an editorial mistake was made because Article 1210 of the Georgian Family Code states that the removal of a child is effectuated without deprivation of parental rights of his or her parents.

The measures of responsibility that may be applied to the parents of the child all differ both in their implementation and the legal consequences generated by each measure. In addition, the legal status of the child depends to a certain extent
on the sanction applied to his or her parents. A child whose parents are deprived of parental rights has a different legal status than a child whose parents have limited parental rights. In instances when removal of the child from his or her parents is immediate, the status of such a child is significantly different from that of children whose parents are deprived of or restricted in their rights. In the event of deprivation of parental rights, there is no legal connection between parents and child except for the obligation to financially support the child.

The legal status of a child whose parents are restricted in their rights is truncated: such parents retain all the rights with respect to the child except for the right to personal communication for the duration of the restriction. The legal status of the child who is removed from the parents is “not regulated” in the sense that it depends on what measures will be taken in the future with respect to his or her parents. The legal status of such a child may be complete, that is, the child may be returned to the parents, or truncated, if they are limited in rights, or incomplete, in the case of a decision to the deprive of parental rights. Given the various legal consequences arising from these measures, they must be clearly delineated. Moreover, the lack of criteria in the law to distinguish between these measures may contribute to their improper implementation in practice and lead to a violation of the rights and legal interests of the child.

The restoration of parental rights is not always possible, for example, if the child is adopted by other persons (Art. 1209(4) of the Family Code of Georgia). A similar rule is provided in Article 72(4) of the Russian Family Code, reflecting the fact that as a result of adoption, adoptive parents have the rights and duties that parents have in relation to the child. In other words, as a result of adoption, the child acquires new parents in the form of adoptive parents; therefore, the restoration of parental rights of his or her biological parents is impossible because of the status stability of the child and adoptive parents.

Adoption of a child affects not only the legal status of the child, but also his or her fate. In legal consequences, adoption is equated to consanguinity, but the relationship between the adoptive parent and the adopted is only identical to the relationship between the biological parents and the child.

Article 124(1) of the Russian Family Code specifies adoption as a priority placement form of a child left without parental care. The Russian Family Code does not contain a definition of adoption, and Chapter 19 of the Code merely indicates certain requirements for candidates for adoptive parents. In this regard, Chapter 6 of the Georgian Family Code (Art. 1239 of the “The Concept of Adoption”) is of interest. Adoption is allowed only in respect of minors for the sake of their well-being and in their interests, if it can be assumed that between the adopter and the adopted there will be the same relationship as between parents and children (Art. 1239(1)). Even though the Article is entitled the “Concept of Adoption,” it does not define the concept of adoption; rather, it set out certain conditions under which the
adoption of a child is allowed, namely, only in respect of minors in their interests, and it generates a relationship between parents and children.

In essence, the concept of adoption includes the conditions necessary for the implementation of the adoption procedure, as well as the consequences arising from such a legal fact. In our view, the use of conditional language in the text of the law, such as “if it can be assumed” that the relationship between the adopter and the adopted person will be the same as between the parents and the children, is evaluative. The legal consequences of such a legal fact as adoption must be determined absolutely clearly without allowing any approximate wording.

The family codes of other independent States also contain a definition of adoption. For example, Article 18 of the Family Code of Ukraine is devoted to the characteristics of the main forms to create suitable living conditions for the child left without parental support; adoption is one. Article 207(1) provides that

[a]doption is the process of acceptance of a person into a family with the rights of a daughter or a son by an adoptive parent; the process is carried out on the basis of a court decision.

Moreover, the adoption of the child is in the best interests of the child in order to ensure a stable and harmonious living environment. It is not clear what the legislator ultimately means by “adoption.” As a matter of fact, we are referring only to the fact that a child is accepted into the adoptive family, but it is not clear what is meant by “adoption,” its legal nature, or whether it is a form to create suitable living conditions for the child, or is a legal fact, or something else. A distinctive feature of the Family Code of Ukraine is the presence of a norm regulating relations regarding adoption, namely, the criteria to determine how the decision on adoption meets the interests of the child and provides him or her with normal living conditions in the adoptive family. According to Article 207(3), (4), and (6) of the Family Code of Ukraine, the court decision on adoption must indicate the motives for which the person wishes to adopt the child, and also the “mutual compliance” of the person wishing to adopt the child and the child himself or herself, and also period during which this person is to take care of the child and the child's attitude to the person wishing to adopt him or her. Thus, the legislator defines the criteria that are important in the adoption procedure because in the absence of psychological compatibility of the adoptive person and the child it is impossible to build a normal, close relationship between them. The latter is characteristic of family relations. An interesting wording is used by the legislator – “mutual compliance” of the adoptive person and the child. Indeed, in order for the adoption to take place and be successful, it is essential that the participants of these relations are psychologically compatible with one another, meant for each other.

Chapter 18 of the Family Code of Moldova considers the adoption of a child as a form to create suitable living conditions for children left without parental care.
According to Article 121(1) of the Family Code of Moldova, adoptive parents can be persons of both sexes who have reached the age of 25 years; the maximum age of adoptive parents is also set; namely, adoptive parents cannot be older than 50 years, unless the adoptive parents are spouses and one has not reached the age of 50 years, or when the spouse adopts the other spouse's child, or when the child has lived in the family of future adoptive parents before they reached the age of 50 years. The presence of such an age limit in the law deserves special attention because the adoptive parents must have time to raise a child, “bring him or her up.” There is another traditional condition: the age difference between the adoptive parent and the adopted should be at least 15 years (Art. 123 of the Family Code of Moldova). However, this difference can be reduced up to five years, but no more than five years. The presence or absence of such a condition depends on the specific children’s situation: whether they were brought up in the family of the adoptive parent; other relevant circumstances are also taken into account.

According to the Family Code of Uzbekistan, the age difference between the adoptive parents and the adopted should be no less than 15 years, except for adoption by a stepfather and stepmother (Art. 152). The persons having priority in the process of adoption include: relatives of the adopted person, regardless of their place of residence; the person in whose family the adopted person lives; a stepfather and stepmother; citizens of the Republic of Uzbekistan; persons who lost children due to illness or accident. The relatives of the child, under all other equal conditions, enjoy advantages in the adoption of a child as is reflected in the Russian Family Code (Art. 127(3)). The Family Code of Uzbekistan contains a traditional list of conditions necessary for legal adoption: the consent of a child who has reached the age of 10 years, the consent of the spouse, the consent of the child’s parents (Arts. 155 to 159).

According to Article 125 of the Russian Family Code, adoption comes into force as of the date when the court decision enters into force. However, some family codes of the CIS countries determine the moment of the legal consequences of adoption differently. For example, under Article 167 of the Family Code of Uzbekistan, the legal consequences of adoption arise as of the date when necessary changes are made in the birth registry of the adopted. Thus, the Family Code of Uzbekistan links the emergence of legal consequences arising from the child’s adoption with the moment when the act of adoption is registered in the registry book of civil status acts.

The Russian Family Code has preserved the only reason to terminate the adoption relationship: in the instances specified by law (Art. 140). The family codes of some CIS countries retain norms to deem an adoption invalid. For example, the reasons to invalidate an adoption are set out in Article 168 of the Family Code of Uzbekistan: cases when the adoption was registered using false documents, the adoption was fictitious, an adult was adopted, the adoptive parent is a person who does not have the right to be an adoptive parent by law.

The Family Code of Uzbekistan contains a provision not typical in other States. Article 162 deals with the re-adoption of a child, which is possible only after the court
cancels the original decision on adoption. In other words, adoption in respect of the same child can be performed repeatedly. Although this provision is not present in Russian legislation, the law does not impose restrictions on the subsequent adoption of a child in the event the first adoption did not take place for any reason. The Family Code of Uzbekistan is progressive in this respect as it protects the rights and interests of the children to be adopted and ensures the stability of their legal status.

Among the provisions of the Family Code of Kazakhstan on adoption, we would single out the provision that persons wishing to adopt a child must have direct contact with him or her at least for two weeks, that is, the future adoptive parents must establish a certain personal contact with the adopted child (Art. 76). The consent of the child to be adopted is among typical conditions for legal adoption. However, the regulations specifying the procedure for obtaining the required consent for adoption say that if children lived in the family of the adoptive father and considered him their parent before filing the application on adoption, the child’s consent to adoption is implied (Art. 84(2)). Thus, the legislator has established a certain presumption to identify the consent of the child necessary for the adoption as there is a provision that in this case the consent of the child is not required in other versions of the same norm (Art. 132 of the Russian Family Code).

We have noted that the legal status of a child differs depending on the legal facts that constitute his or her rights and duties. The characteristics of some provisions of the CIS family codes in comparison with the Russian Family Code in general demonstrate a unified approach of the legislator, namely, to ensure first the protection of children’s rights and interests. The personal rights of the child are formulated in CIS family codes and uphold cultural and national customs and traditions of each State; this demonstrates not only the specific nature of the rights of the child, but also indicates the independence of each State of the Commonwealth. A study of the most important children’s rights, such as the right to a name, the right to express their opinions, to protect their rights and interests differ in the family codes of the Russian Federation and of the CIS.

This analysis of CIS family legislation is the basis for formulating and enriching a holistic view of the rights of a child. When they are studied by way of comparison and with an assessment of the advantages of preserving cultural and national characteristics in norms devoted to children, such legal norms protect children’s rights in real life.

References


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