# CIVIL LAW, FAMILY LAW, LAW OF CIVIL PROCEDURE

© T.V. KRASNOVA, L.A. KUCHINSKAYA
*krasnova-tv@yandex.ru, royalbox@yandex.ru*

**UDC 347.921.3(470+571)(063)**

## *THE PROBLEM OF DEFINING FAMILY'S LEGAL RELATIONS IN THE PROCEDURE OF MEDIATION*

*SUMMARY. Limiting the scope of mediation application with individual categories of legal disputes, the legislation overlooked the stage of their classification. A special problem is the definition of the sphere of family relations, that, as a rule, are defined as the relations regulated by family legislation. The family code does not disclose the meaning of the concept of «family members» and does not contain a finished list of subjects of the family relationship. It does not reflect specific features of a legal dispute. The definition of family legal relations only as relations, regulated by the family law, unjustifiably restricts the scope of application of mediation in family conflicts. The mediator is forced to reveal the equality of the subjects of the disputed legal relations and the finished list of entities specified in the family law, with due regard for the specific type of family-legal dispute. At the same time, the correlation of the characteristics of a particular dispute with specificity, reported in article 2 of the Family Code of the Russian Federation, is an important reference point, allowing to correctly identify the substance of the dispute and to create the optimal conditions for its settlement. In this regard, for the determination of family relationships, when deciding on the use of mediation, it is appropriate to establish in the law on mediation the existence of controversial relationships, concerning article 2 of the Family Code, but it does not allow to identify family relations with the relations, regulated by family legislation. To solve this problem it is suggested to use the basis of occurence of family relations, analysed in the article.*

*KEY WORDS. Mediation, legal family relations, subjects of family relations, family conflict, family law.*

One of the most noticeable events in the legal life of Russia was adoption of the Federal law "On the alternative procedure of disputes settlement with participation of a mediator (mediation procedure)" [1] (further — the Law on Mediation). As any statutory act consolidating the basic principles of a new way of communication, this law needs further follow-up and improvement. In spite of the fact that practice of

application of legal norms concerning mediation just starts being formed, it is necessary already now to comprehend ways of their further development. The questions that have to be answered in cases of legal competence lack of a mediator are the questions of present interest: a current version of the Law on Mediation does not contain the means, allowing compensating it. So, for example, restricting the scope of application of mediation with certain categories of legal disputes, a legislator ignores a stage of their legal treatment. Meanwhile it is a mediator priority as this objective criterion directly influences a conclusion about a dispute mediability*. Similarly, a definition of the scope of family legal relationship presents a particular problem taking into account the diversity and anatomic unity with the relations existing out of a legal framework.

In Europe to define the procedure during which an independent third party helps participants of the family conflict, the term "family mediation" is used. The purposes of such procedure are to improve interaction of the conflict parties with each other and to take conscious decisions accepted for both parties on some or all questions connected with parting, divorce, education of children, as well as the questions connected with financial and property issues [3]. L. Parkinson notes that " Family mediation is mostly applied during the parting and divorce of a couple to help them to keep the status of parents and separate joint parenting from bitterness and grief connected with the cut of the relations as partners" [3; 18]. At the same time within family mediation it is possible to consider disputes between the people living together, but officially not married [3; 17]. Besides, family mediation can be used to settle a conflict between a parent and a teenager who has left his home, between spouses and children of the first and second marriages concerning property inheritance [3; 18], etc.

The Russian legislator provides application of "family mediation" concerning the disputes arising of family legal relationship. S.K.Zagaynova, making comments on this provision of Paragraph 2 of Article 1 of the Law on Mediation, defines family legal relationship as the relations regulated by the family legislation, designated in Article 2 of the Family Code of the Russian Federation (further — FC RF ) [2; 15]. Thus, according to Article 2 of FC RF, the family legislation establishes conditions and an order of marriage, marriage dissolution and its invalidity recognition, regulates personal non-property and property relations between family members: spouses, parents and children (adoptive parents and adopted), and in cases and in the limits provided by the family legislation, between other relatives and other persons. It also determines forms and a procedure of placing children without parental support into a family.

The analysis of the specified norm shows its "general character", not allowing qualifying the relations as family-legal in isolation of a systemic analysis of other norms included into the Family Law. The Article does not unveil the meaning of the

* Property of legal dispute owing to which it can be settled in mediation procedure.

concept "family members" and does not contain an exhaustive list of the family legal relationship subjects. It does not reflect specific features of a legal dispute.

To identify a list of subjects of the family relations lawyers traditionally focus on the legal facts which generate these relations: marriage, relationship, child adoption or foster care [4]. Relationship (the blood relations of persons based on an origin from each other or from the general ancestor [5]), certified in the order provided by the law, gives rise to the rights and duties not only between parents and children, but also between such persons as: grandfathers (grandmothers) and grandsons (Articles 67, 94, 95 of FC RF); brothers and sisters, (Articles 67, 93 of FC RF) that is indirectly confirmed by the contents of the Article 14 of FC RF; other relatives, including "close" relatives (Articles 55, 67 of FC RF).

Foster care gives rise to family legal relations between adoptive parents and adopted (Article 137of FC RF), guardians (trustees) and children being under their guardianship (trusteeship) (Article 145 of FC RF); adoptive parents and adopted children, and in cases provided by laws of subjects of the Russian Federation, foster tutors and fostered children (Article 123of FC RF) [6]. It should be noted that the relations of adoption involve in the sphere of family legal relationship such subjects as relatives of adoptive parents and descendants of the adopted (Article 137 of FC RF).

The issue whether the organization for orphan children and children without parental support (Article 155.1of FC RF), and also bodies of guardianship and trusteeship, acting as a guardian (trustee) before the children without parental support are arranged (paragraph 2 of Article 123 of FC RF) should participate in a family legal relationship is a debating point. As it is evident from paragraph 2 of Article 155.2 of FC RF the supervision relation over children and their education in the organizations for orphan children and the children without parental support are not the relations of guardianship (trusteeship) though standards of the legislation on guardianship and the trusteeship, relating to the rights, duties and responsibility of guardians and trustees are applicable to the specified organizations. The guardianship and trusteeship bodies, without being actually guardians (trustees), will also fulfil duties of guardians (trustees) according to the legislation on guardianship and trusteeship. Thereby, these relations will be similar to the relations of guardianship (trusteeship). As A.M.Nechaev points out, entering into the FC RF section VI "The forms of education of children without parental support" where the concrete rights and obligations of bodies of guardianship and trusteeship on identification and registration of such children are provided, suggests the idea that government bodies are among the subjects of family legal relationship in the cases defined by the law [7]. In this regard we share a position of O. S. Ioffe who claimed that «exclusively citizens can be the subjects of family legal relationship" [8]. We believe that legal relationships arising in the cases mentioned above have other legal nature.

Family legal relationship can arise not only at legal registration of the foster care, but also in the result of the parenting de facto and the aliment of minors. Thus, FC RF Article 96 deals with former foster children and their former educators as possible

subjects of family legal relationship. We should note that according to FC RF Article 96 the specified persons are seen as family members after stopping upbringing de facto, but not during its implementation. In this case such legal fact as "foster care " is not enough for coming family legal relationship into existence. That indicates the necessity to broaden the classical list of the grounds to build family legal relationship.

Some scientists reasonably refer kinship-in-law to the legal facts generating family legal relationship [9]. Probably, the position of the scientists who do not point out kinship-in-law among the analyzed legal facts, is based on derivativeness of the relations of kinship-in-law from existence of the registered marriage and relationship which connect one spouse and the relatives of another spouse, and also the relatives of spouses among themselves. Now the kinship-in-law causes exclusively legal relationship concerning payment of the alimony according to which a stepson (stepdaughter) is a person, obliged to pay the alimony to the stepfather (stepmother) (Article 97 of FC RF).

O.Yu.Kosova reasonably includes into the category of the Family Law subject the relations between the former members of one family, mentioning among them the former spouses, the former adoptive parents and the adopted, the former upbringers and their adopted children [10]. There is no doubt that the former spouses can be participants of alimentary legal relationship (Chapter 14 of FC RF). Law-enforcement practice names the former spouses as the independent subjects the property relations who are subordinated to the Civil Code of the Russian Federation but not to FC RF [11].

These points allow assuming that family legal relationship comes into being not only owing to the recent existence of marriage, relationship, kinship-in-law, and child-adoption but also when these relations took place in the past. As it has already been noted, foster care "in the past" links the factual upbringer and the factual adopted child, while the existence of the marriage "in the past" links the former spouses. Emergence of an alimentary obligation of the stepson (stepdaughter) can also occur after the kinship-in-law relations (in particular, in case of divorce - between the father (mother) of the child and his stepmother (stepfather)) stopped. We believe that "in the past" any relationship might exist. Consanguinity acquires the importance of a legal fact only when it is registered. The registry of fatherhood (motherhood) allows to state consanguinity, even in the case when persons have no blood relations and they know it (for example, when a spouse of the child's mother is registered as the father on the basis of a presumption of the child (paragraph 2 of Article 48 of FC RF) or in case of voluntary filiation (paragraph 3 of Article 48 of FC RF), when a substitute (surrogate) mother is registered as a mother of the child (Article 52 of FC RF), etc.). Thereby the registration, instead of the actual relationship leads to legal consequences. Therefore, the relationship can "be stopped", in particular, in the result of fatherhood(motherhood) impingement (Article 52 of FC RF) due to which the corresponding registration record is cancelled. Thus relationship as a legal category

is vested with properties other than biological relationship, including, ability to the termination.

The current family legislation does not protect the violated rights of the persons having been in kinship in the past. According to FC RF Article 96 the person who properly cared for foster children supported them, and was registered as their father for a long period of time (probably, up to their adulthood), after paternity impingement cannot be recognized as a factual upbringer, and has no right to any alimony from the child. The main criterion to determine a person as a factual upbringer is to be found in the fact that such persons have no legal obligations to foster-children. Therefore foster care with the maintenance is called factual because a person carrying it out, "voluntary assigns functions of foster care and child support without being obliged to it under the law" [10; 156]. Thus the lack of the registered paternity won't allow the former father to levy alimony on the basis of Article 87 of FC RF. We assume that in similar disputes "the former parents" and "the former children" can seek a mediation procedure.

Thus, we suggest the following comprehensive list of subjects of the relations settled by the family legislation:

— spouses; parents and children (adoptive parents and adopted children) (in any disputes arising in the sphere of their personal non-property and property right-relations);

— grandfathers (grandmother) and grandsons (in any disputes concerning realization of the right to communicate with underage grandchildren, concerning maintenance of underage and disabled full age grandchildren or charging full age grandchildren );

— consanguine and non consanguine brothers and sisters (in any disputes concerning realization of the right to communicate with underage brothers and sisters, and disputes on the care of underage and disabled full age brothers and sisters);

— other relatives of a child, besides the mentioned above parents, grandfathers and grandmothers, brothers and sisters, but only in the disputes on obstacles to communicate with a child. It means that any person who has consanguine relations with a child, regardless a number of the births connecting them (relationship degree), and also, relationship lines (direct or lateral) can communicate with a child;

— guardians (trustees) of underage children and their wards. It is necessary to rate adoptive parents and children, and also persons who have taken children in a family to bring them up, and children who are under patronage (in any disputes arising in the sphere of their personal non-property and property legal relationship);

— former factual upbringers and children under their care (in disputes concerning the care);

— a stepfather (stepmother) and stepsons (stepdaughters) (in disputes concerning care);

— former adoptive parents and adopted children (in disputes concerning the care);

— ex-spouses (in disputes on the property partition and on the contents). We should note that in disputes on defining a residence of children the ex-spouses acting in the status of parents allows refering them to the first category in this list.

The persons being in the extra-marital cohabitation relations, are not subjects of the Russian family legal relationship but in spite of the fact that they form a family in a sociological sense: "a family is a small social group of a historically formed organization whose members are connected by the marriage or ancestral relations, a community of a life and inter-moral responsibility whose social need is caused by the demand of a society " [12]. Their dispute is to be considered in mediation procedure, but has to be treated as civil.

Thus, the definition of family legal relationship as the relations adjusted by the family legislation, compels to take into consideration cases and limits set by the family legislation. Article 2 of FC RF "warns" about it and thereby, we believe, it is unreasonable to limit scope of mediation in the family conflicts. The specified definition provides the necessity to find out (by a mediator) an identity between the subjects of disputable material legal relationship and the provided exhaustive list of the subjects specified in the family legislation, taking into account a concrete type of a family and legal dispute. At the same time correlation of features of a concrete dispute with the specifics reflected in Article 2 of FC RF, is an important reference point, allowing to specify correctly merits of dispute and to create optimum conditions for its settlement. In this regard, to define family legal relationship while solving a question on a mediability of disputes, it seems advisable to establish in the Law on mediation a field of the disputable relations correlated to Article 2 of FC RF, but not allowing to identify family legal relationship with the relations, settled by the family legislation. To solve this task it is offered to use the analysed grounds of the family relations occurrences. Thus, the following standard can be fixed in Article 1 of the Law on Mediation: "family legal relationship is to be found in the relations arising from marriage, relationship, foster care, and in the former family relations".

## REFERENCES

1. Federal law of 27.07.2010 No. 193-FZ «On the alternative dispute resolution process involving mediation (mediation procedure)». Sobranie zakonodatel'stva Rossijskoj Federacii — Collected Legislation of the Russian Federation. 2 August 2010. No. 31. Art. 4162 (in Russian).

2. Kommentarij k Federal'nomu zakonu «Ob al'ternativnoj procedure uregulirovanija sporov s uchastiem posrednika (procedure mediacii)» [Commentary to the Federal law «On alternative dispute resolution involving mediation (mediation procedure)»]. Ed. S.K. Zagainova, V.V. Yarkov. Moscow: Infotropik Media, 2012. P. 15 (in Russian).

3. U.R. College of Family Mediators, Code of Practice, 1995. Cit.: Parkinson, L. Semejnaja mediacija [Family mediation]. M: Mezhregional'nyj centr upravlencheskogo i politicheskogo konsul'tirovanija, 2010. P. 18 (in Russian).

4. For example: Matveev, G.K. Sovetskoe semejnoe pravo [Soviet family law]. Moscow, 1985. P. 35 (in Russian).

5. Rjasencev, V.A. Semejnoe pravo [Family law]. Moscow: Juridicheskaja literatura, 1967. P. 50 (in Russian).

6. For example: The law of the Tyumen region of 27 April 1998 «On the Protection of Children's Rights». Vestnik Tjumenskoj oblastnoj Dumy — Bulletin of the Tyumen Regional Duma. 1998. No. 5 (in Russian).

7. Nechaeva, A.M. Semejnoe pravo: aktual'nye problemy teorii i praktiki [Family Law: Current Issues of Theory and Practice] Moscow: Jurajt-Izdat, 2007. P. 27 (in Russian).

8. Ioffe, O.S. Sovetskoe grazhdanskoe pravo [Soviet civil law] Vol. 3. L., 1965. P. 194 (in Russian).

9. Voronina, Z.I. Semejnoe pravo. Uchebno-metodicheskij kompleks [Family Law. Educational and methodological complex]. Tyumen: Tjumenskij gosudarstvennyj universitet publ. 2003. P. 15 (in Russian).

10. Kosova, O.Ju. Semejnoe i nasledstvennoe pravo Rossii: Uchebnoe posobie [Family and Inheritance Law in Russia: Textbook] Moscow: Statut, 2001. P. 29 (in Russian).

11. Determination of the Board on Civil Cases of the Supreme Court on January 14, 2005, No. 12-B04-8. SPS Garant (in Russian)

12. Harchev, A.G. Brak i sem'ja v SSSR [Marriage and the family in the USSR]. Moscow, 1964. P. 57 (in Russian).