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ПРАВОВЕ РЕГУЛЮВАННЯ ПАТРОНАТУ НАД ДІТЬМИ В УКРАЇНІ: ПРОГАЛИНИ ТА КОЛІЗІЇ

Анотація. *Питання патронату над дітьми уже неодноразово ставали предметом наукових розвідок. Проте і в теорії, і на практиці залишилося багато проблемних аспектів, що впливають із влаштування дітей у сім'ю патронатного вихователя та потребують свого загального вирішення. Тому, вбачається, є необхідним дослідити, чи привели зміни у правовому регулюванні відносин із патронату до покращення у забезпеченні якнайкращих інтересів дітей, їх особливого захисту і надання допомоги. Метою цієї статті було виявлення прогалін і колізій у правовому регулюванні патронату над дитиною в Україні, визначення шляхів оптимізації національного законодавства у відповідному контексті. З урахуванням поставленої мети, методологія дослідження охоплює загальнонаукові та спеціальні методи пізнання правових явищ. У результаті проведеного дослідження аргументовано, що слід, ураховуючи інтереси дітей, які (батьки чи законні представники яких) опинилися в складних життєвих обставинах, передбачити спрощений варіант тимчасового їх влаштування у сім'ї не лише патронатних вихователів, а й близьких до них (їх сімей) осіб. Крім того, доречно не обмежувати термін перебування дитини в сім'ї патронатного вихователя трьома (в окремих випадках – шістьма) місяцями. Він має визначатися органом опіки та піклування залежно від конкретних обставин, що зумовили необхідність подібного влаштування дитини. Встановлюючи межі повноважень патронатного вихователя щодо представництва інтересів дитини, яка йому передана на виховання, слід зважати на те, що відповідна діяльність не є видом законного представництва, а здійснюється за договором. Для забезпечення однозначного тлумачення положень інституту патронату та їх правозастосування на практиці доцільно усунути суперечності між окремими нормами права, заповнити прогалини у законодавчому регулюванні патронатних правовідносин.*

Ключові слова: соціальний захист дітей, домашнє насильство, орган опіки, прийомні батьки, патронатний вихователь.

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LEGAL REGULATION OF FOSTER CARE OF CHILDREN IN UKRAINE: GAPS AND CONFLICTS

Abstract. *Issues of foster care over children have repeatedly been the subject of scientific research. However, both in theory and in practice, there are still many urgent issues that arise from the placement of children in the family of a foster parent. Therefore, it seems necessary to investigate whether changes in the legal regulation of foster care relations have led to improvements in the best interests of children, their special protection and aid. The purpose of this paper was to identify gaps and conflicts in the legal regulation of foster care over children in Ukraine, to identify ways to optimize national legislation in the respective context. Considering the purpose, the research methodology involves general scientific and special methods of cognition of legal phenomena. As a result of the study, it was argued that the legislation, It should, considering the interests of children (parents or their legal representatives) who found themselves in difficult life circumstances, provide for a simplified version of their temporary placement in families not only of foster carers, but also of persons close to them (their families). Furthermore, it is appropriate not to limit the period of stay of the child in the family of a foster parent to three (in some cases – six) months. It should be determined by the guardianship authority depending on the specific circumstances that necessitated such placement of the child. When setting the limits of the foster parent's authority to represent the interests of the child transferred to them, it should be borne in mind that the relevant activity is not a type of legal representation, but is carried out under an agreement. To ensure a unambiguous interpretation of the provisions of the institution of foster care and their application in practice, it is advisable to eliminate contradictions between individual rules of law, to fill gaps in the legislative regulation of foster care relations.*

Keywords: social protection of children, domestic violence, guardianship authority, foster parents, foster carer.

INTRODUCTION

At the level of the Universal Declaration of Human Rights¹ (Part 2 of Article 25), it is proclaimed that childhood, along with motherhood, gives the right to special care and assistance. With that, all children should enjoy the same social protection. If a child is temporarily or permanently deprived of a family environment or is unable to remain in such an environment in his or her best interests, he or she shall be entitled to special protection and aid provided by the state. In this regard, states, in accordance with their

¹ Universal Declaration of Human Rights. (1948). Retrieved from https://zakon.rada.gov.ua/laws/show/995_015.

national laws, envisage a change in childcare, which may include, inter alia, foster care (Article 20 of the Convention on the Rights of the Child¹). Incidentally, in addressing the protection of the rights and interests of children and parents, the European Court of Human Rights notes that there must be a fair balance between the interests of the child and the interests of parents and, in maintaining such balance, particular attention must be paid to the most important interests of the child, which by their nature and importance must prevail over the interests of parents (paragraph 54 of the Decision of the European Court of Human Rights in the case “Hunt v. Ukraine” of 7 December 2006²). To ensure the rights, freedoms, and interests of these children, Section IV of the Family Code of Ukraine³ stipulates forms and rules of placement of orphans and children deprived of parental care, to which the legislator included: adoption, guardianship and custody of children, foster care over children, foster family, family-type orphanage.

Without dwelling on the question of whether this list can be considered exhaustive and such that covers all forms of fostering of the relevant category of children, we support the idea that "legislation on protection of the rights and interests of the child continues to evolve, adapting to social realities" [1]. The institution of foster care over children was not left out of the optimization process: after the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on Strengthening Social Protection of Children and Supporting Families with Children”⁴ came into force in 2016, the legislative approach to regulating such legal relations in our country was transformed in its entirety. With that, the Decree of the President of Ukraine No. 5/2018 dated January 12, 2018⁵ proclaimed the creation of foster families in accordance with the real needs for the temporary care, upbringing and rehabilitation of children who, due to difficult life circumstances, are temporarily unable to live with their parents or other legal representatives to be one of the top-priority measures to protect the rights of orphans, children deprived of parental care and persons from among them.

At the same time, the Cabinet of Ministers of Ukraine is tasked to develop and approve within six months an action plan to create a developed system of family forms of raising orphans, children deprived of parental care, dissemination of foster care and mentoring, and regional and Kyiv city state administrations were tasked, with the participation of local self-government authorities according to the competence, to provide funding for training, retraining, including foster carers (subclause 3 of clause 1, paragraph r of subclause 1 of clause 2 of the Decree of the President of Ukraine No. 721/2019 "On some issues of ensuring the rights and legitimate interests of orphans, children deprived of

¹ Convention on the Rights of the Child. (1989). Retrieved from https://zakon.rada.gov.ua/laws/show/995_021.

² Decision of the European Court of Human Rights in the case “Hunt v. Ukraine” (Application No. 31111/04). (2006, December). Retrieved from https://court.gov.ua/userfiles/file/court_gov_ua_sud5010/Konvenciya_z_prav/st_8/Hant.pdf.

³ Family Code of Ukraine. (2002). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14>.

⁴ Law of Ukraine No. 936-VIII “On Amendments to Some Legislative Acts of Ukraine on Strengthening Social Protection of Children and Supporting Families with Children”. (2016, January). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/T160936.html.

⁵ Presidential Decree No. 5/2018 “On Priority Measures to Protect the Rights of Orphans, Children Deprived of Parental Care and Their People”. (2018, January). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/U005_18.html.

parental care, development and support of family forms of child upbringing" dated September 30, 2019¹). Issues of foster care over children have repeatedly been the subject of scientific research. Thus, scientists studied the reasons for the emergence of foster care, their subject matter, the tasks of foster care [2], compared it with other statutory forms of fostering orphans and children deprived of parental care [3], determined the specific features of foster care [4; 5], the subject and conditions of the agreement on foster care, the grounds for its termination and cancellation [3; 6; 7] etc. However, both in theory and in practice, there are still many urgent issues arising from fostering children in the family of a foster parent. Therefore, it seems necessary to investigate whether changes in the legal regulation of foster care relations have led to improvements in the best interests of children, their special protection and assistance. Moreover, many aspects of foster care currently remain unresolved.

In view of the above, the purpose of writing this article is to identify gaps and conflicts in the legal regulation of child custody in Ukraine, to identify ways to optimize national legislation in the respective context.

1. MATERIALS AND METHODS

Considering the purpose, the research methodology involved general scientific and special methods of cognition of legal phenomena. The basis of our study includes the following methods:

1. Comparative law method. This method is the main method in the system of methodology of comparative law research and acts as a set of methods and techniques of identification of origin, development, functioning of different legal systems based on a comparative study of general and specific patterns. This method is described by comparison of single-order legal concepts, phenomena, processes and determination of similarities and differences between them. This method was useful in the analysis of scientific views and experience of foreign countries within the specified problematics.

2. Formal-dogmatic method. Formal-dogmatic approach is used in jurisprudence upon the study of statutory legal material. This method lies in determination of the content and significance of the rule of law, based on its own content. It is formal-dogmatic because it aims to reveal the dogma of law. This method allows to define legal concepts, identify their features, classify, interpret the content of legal requirements, etc. Its specific feature is a distraction from the essential aspects of law. The task, which is set, lies in clarification and explanation of the current legislation, in its systematic presentation and interpretation for the purposes of law-making and law enforcement practice. The formal-dogmatic method facilitated the interpretation of legal categories, such as "foster care over a child", "difficult life circumstances", "foster carer", etc.

3. Aristotelian method. The application of this method contributes to the reliability of gathering, generalization, and evaluation of information that forms the system of knowledge, as a result of studying the subject of comparative law. In this method, attention is paid to legal language, which reflects the legal style inherent in various legal systems.

¹ Presidential Decree No. 721/2019 "On Certain Issues of Ensuring the Rights and Legal Interests of Orphans, Children Deprived of Parental Care, Development and Support of Family Forms of Parenting". (2019, September). Retrieved from http://search.ligazakon.ua/1_doc2.nsf/link1/U721_19.html.

The application of the Aristotelian method is important, and in the classification of legal systems, it brings to the system of criteria that allow to objectively classify them. This method also plays a significant role in studying the structure of law and legal sources within different legal systems. In our study, the Aristotelian method is taken as a basis for argumentation and justification of scientific conclusions and proposals.

2. RESULTS AND DISCUSSION

In the national family legislation, foster care as a form of upbringing orphans and children deprived of parental care was regulated in 2002 by the adoption of the Family Code of Ukraine¹. However, the specified institution has already been known in our country before. Although the opinions of scientists, who conducted special studies on the time of its occurrence, differ [5; 8; 9]. But we will not delve into the historical digression given the purpose of this study. As already mentioned, since 2016, a completely new view on foster care has been declared: firstly, previously a foster child or a child deprived of parental care was placed in the family of a foster parent, now – any child (parents or their legal representatives) who is in difficult life circumstances; secondly, according to the previous wording, the child was transferred for fostering until adulthood, after the amendment – for the period of overcoming difficult life circumstances by the child, its parents, or other legal representatives, but not more than three months (in some cases the term may be extended to six months). This approach is in line with the purpose of the respective institution in the legislation of European countries: those children are assigned to be fostered who need temporary fostering in the family that would replace their own, or those who require special conditions of aid and support in the family [10].

However, the introduced changes caused a few problems in the interpretation of regulations and their enforcement. Thus, first of all, it is now illogical to place Chapter 20 "Foster care over children" in Chapter IV of the Family Code of Ukraine, which covers fostering of orphans and children deprived of parental care. According to Part 1 of Art. 252 of the Family Code of Ukraine², foster care of a child is a temporary care, upbringing and rehabilitation of a child in the family of a foster parent for the period of overcoming difficult life circumstances by the child, its parents, or other legal representatives. Based on the above legal definition, children who are not orphans and who are not deprived of parental care can also be assigned to a family of a foster parent.

This conclusion is confirmed by the content of the definitions "orphan" and "children deprived of parental care" (they are regulated in Article 1 of the Law of Ukraine "On ensuring legal conditions of social protection of orphans and children deprived of parental care"³), their comparison with the purpose of foster care and statutory definitions of difficult life circumstances (these will be discussed below). Art. 1 of the mentioned Law also lists the forms of assignment of orphans and children deprived of parental care, which do not include foster care for children.

¹ Family Code of Ukraine. (2002). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14>.

² *Ibidem*, 2002.

³ Law of Ukraine No. 2342-IV "On Ensuring the Organizational and Legal Conditions of Social Protection of Orphans and Children Deprived of Parental Care". (2005, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/2342-15>.

Family forms of upbringing and foster care are also distinguished in the Law of Ukraine "On Childhood Protection"¹ (Part 5 of Article 5), decrees of the President of Ukraine No. 5/2018 "On priority measures to protect the rights of orphans, children deprived of parental care, and persons from among them" dated January 12, 2018 (paragraph a, 6 of subclause 1 of clause 2)² and No. 721/2019 "On some issues of ensuring the rights and legitimate interests of orphans, children deprived of parental care, development and support for family forms of child upbringing" dated September 30, 2019 (subclause 3 of clause 1)³.

It follows from the above that there is a contradiction between the content of ch. 20 and the intended purpose of Section IV of the Family Code of Ukraine. The provisions of regulations, wherein foster care is not mentioned among the forms of assignment of orphans and children deprived of parental care, are also inconsistent with the requirements of Section IV of the Family Code of Ukraine⁴, which, among the rules on such forms of assignment, does contain the rules governing foster care.

Some researchers rightfully argue that foster care is not a form of assignment of orphans and children deprived of parental care, but a social service [11], a form of education or a contractual form of care [12]. In our opinion, foster care is both an assignment of children, because they are, albeit temporarily, assigned to a family, and a social service provided by foster carers, who, according to a foster care agreement, take care of the child, including their upbringing, and therefore it cannot be denied that foster care is also a form of upbringing and care.

In view of the above, in particular, the fact that any child (whose parents or other legal representatives are) in difficult life circumstances can be assigned to foster care, it is necessary to introduce changes to the Family Code of Ukraine, providing it with the new wording of the title of Section IV: "Fostering orphans, children deprived of parental care, and other children in difficult life circumstances"⁵.

Next, it is not entirely clear who would be the initiator of identifying the child in need, because it, its parents or other legal representatives found themselves in difficult life circumstances. After all, it is easier to find a child who has been left without parental care than (without, for example, teachers, neighbours, relevant services and authorities) a family that is in difficult life circumstances. The answer to this question is specified neither in the Family Code of Ukraine nor in other regulations.

Thus, the Law of Ukraine "On Prevention and Counteraction to Domestic Violence"⁶ vests guardianship and custody bodies, services for children in matters of prevention and

¹ Law of Ukraine No. 2402-III "On Childhood Protection". (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2402-14>.

² Presidential Decree No. 5/2018 "On Priority Measures to Protect the Rights of Orphans, Children Deprived of Parental Care and Their People". (2018, January). Retrieved from http://search.ligazakon.ua/1_doc2.nsf/link1/U005_18.html.

³ Presidential Decree No. 721/2019 "On Certain Issues of Ensuring the Rights and Legal Interests of Orphans, Children Deprived of Parental Care, Development and Support of Family Forms of Parenting". (2019, September). Retrieved from http://search.ligazakon.ua/1_doc2.nsf/link1/U721_19.html.

⁴ Family Code of Ukraine. (2002). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14>.

⁵ *Ibidem*, 2002.

⁶ Law of Ukraine No. 2229-VIII "On Prevention and Countering Domestic Violence". (2017, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/2229-19>.

counteraction to domestic violence with powers of assigning a child to the family of a foster parent in case of child's inability to live with its parents or other legal representatives due to domestic violence against this child or with its participation, including the termination of the foster care agreement on the same grounds (paragraphs 4, 7 of part 1 of Article 9).

The responsibilities of the State Social Service of Ukraine include ensuring control over the protection of the rights of children in difficult life circumstances, orphans and children deprived of parental care, assigned to foster care families, and monitoring, within the competence, the exercise of control over the activities of the families of foster carers (paragraph 4 of the Regulation on the State Social Service of Ukraine, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1053 dated December 18, 2019¹).

The state promotes labour collectives, public and charitable organizations, other associations of citizens and individuals in their activities aimed, inter alia, at ensuring the implementation of measures to create a developed system of care for children in difficult life circumstances, encourages the development of child care by providing tax, investment, customs, credit and tariff benefits in accordance with the procedure established by the laws of Ukraine (parts 5, 6 of the Law of Ukraine "On Childhood Protection"²). The Centre for Social Services for Families, Children and Youth (paragraphs 7, 8 of the General Regulations on the Centre for Social Services for Families, Children and Youth, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 573³) dated August 1, 2013) is responsible for the training of candidates for foster carers, their development of competence, as well as the introduction of the latest social technologies aimed at preventing, minimizing, or overcoming difficult life circumstances (including foster care over a child).

The Resolution of the Cabinet of Ministers of Ukraine No. 148 "Some issues of child custody" dated March 16, 2017⁴ approved the Procedure for creation and activities of the foster carer family, assignment, and stay of the child in the foster carer family, the Model Agreement on foster care of a child and the Procedure payment for the foster carer services and payment of social aid for child support in the foster carer family. Thus, without diminishing the role and importance of the adoption of these acts and the activities of these bodies, we can see that most of these provisions, unfortunately, will remain unfulfilled in practice without providing real state support to various social services, NGOs, associations of citizens, separate individuals, etc., proper promotion of aiding children (their parents or other legal representatives) in difficult life circumstances, and creation of state and non-state institutions that would handle the identification of relevant children. As rightfully noted in the legal literature, the further development of foster care depends to some extent

¹ Cabinet of Ministers of Ukraine Resolution No. 1053 "Some Issues of the State Social Service of Ukraine". (2019, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1053-2019-п>.

² Law of Ukraine No. 2402-III "On Childhood Protection". (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2402-14>.

³ Cabinet of Ministers of Ukraine Resolution No. 573 "On Approval of the General Regulation on the Center of Social Services for Family, Children and Youth". (2013, August). Retrieved from <https://zakon.rada.gov.ua/laws/show/573-2013-п>.

⁴ Cabinet of Ministers of Ukraine Resolution No. 148 "Some Issues of Patronage of a Child". (2017, March). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KP170148.html.

"on economic factors, in particular, on how the state and society can mitigate the impact of instability and economic crisis on foster families, help them perform educational functions"; and "effective operation of state bodies", which should "consistently monitor the implementation of innovative forms of child care", refine procedures and rules "to fully protect the rights of children, strengthen the control functions of the Children's Services" [13]. In other countries, various non-profit organizations contribute to the implementation of similar regulations. For example, in France, the Retis association helps oversee the families, which can be attributed to risk groups. It provides aids families, monitors the development and upbringing of the child and, in crisis situations, organizes its temporary assignment either to relatives or to specialized organizations or professional educators – foster carers [10].

It appears that the family legislation of Ukraine would benefit from the introduction of such a positive experience, in particular, concerning the possibility of assigning the children in need, not only to the family of foster parents, but also to relatives close to the family (for example, friends of parents, neighbours, so-called "godparents") [14]. Currently, only a child left without parental care, including a child separated from the family, can be assigned to the family of relatives, neighbours, acquaintances, and only temporarily until a decision is made on its further assignment (paragraph 31 of the Procedure for the implementation of guardianship and custody activities related to the protection of the rights of the child, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 866 dated September 24, 2008¹).

Although, it should be noted that in Part 3 of Art. 231 of the Law of Ukraine "On Childhood Protection"² the relevant provision is partially formally established: if due to difficult life circumstances the child temporarily does not reside or cannot reside with its parents or other legal representatives, its support and upbringing can also be performed by relatives. However, the procedure for assigning a child to them outside the application of the forms of assignment stipulated in Section IV of the Family Code of Ukraine³ has not been established. We believe that a simplified procedure for assigning children in difficult life circumstances to relatives and other close people should be enshrined at the legislative level. Apart from the definition of "foster care over a child" (Part 1 of Article 252 of the Family Code of Ukraine), the legislation also defines the respective agreement: the guardianship and custody authority assigns a child in difficult life circumstances to the family of a foster parent (Part 2 of Article 253 of the Family Code of Ukraine⁴). When interpreting these provisions, their inconsistency immediately transpires, as the concept of "foster care over the child" is revealed through the wording "difficult life circumstances of the child, its parents or other legal representatives". In the definition of the respective agreement, the legislator indicates the difficult life circumstances of only the child. There is no doubt that the analysed provisions must be harmonised. But to determine in which

¹ Decree of the Cabinet of Ministers of Ukraine No. 866 "Issues of the activity of guardianship and custody bodies related to the protection of the rights of the child". (2008, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/866-2008-п>.

² Law of Ukraine No. 2402-III "On Childhood Protection". (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2402-14>.

³ Family Code of Ukraine. (2002). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14>.

⁴ *Ibidem*, 2002.

direction to move when making changes to them, we must first understand what does the concept of "difficult life circumstances" include.

According to Art. 1 of the Law of Ukraine "On Childhood Protection"¹ a child who is in difficult life circumstances is a child who is in conditions that adversely affect its life, health and development due to disability, serious illness, homelessness, conflict with the law, involvement in the worst forms of child labour, addiction to psychotropic substances and other addictions, ill-treatment, including domestic violence, evasion of parents or guardians from their duties, natural disasters, man-made accidents, cataclysms, hostilities or armed conflicts, etc., which were established after the evaluation of the child's needs. Art. 1 of the Law of Ukraine "On Social Services"² defines difficult life circumstances (regardless of the specific subject, including the child) as circumstances that adversely affect the life, health and development of the person, the functioning of the family, which the person/family cannot overcome on its own. With that, the factors that can cause difficult life circumstances are: old age; partial or complete loss of motor activity, memory; incurable diseases, diseases that require long-term treatment; mental and behavioural disorders, including due to the use of psychoactive substances; invalidity; homelessness; unemployment; poverty; behavioural disorders in children due to parental divorce; evasion of parental responsibilities by parents or guardians; loss of social ties, including while in prison; child abuse; gender-based violence; domestic violence; getting into a situation of human trafficking; damage caused by fire, natural disaster, catastrophe, hostilities, terrorist act, armed conflict, temporary occupation. Thus, upon determining the difficult life circumstances in general, and not only those in which the child found itself, the legislator provided that such circumstances have a negative impact not only on life, health and development, but also on the functioning of the family. An additional qualifying feature of these circumstances is also the fact that a person cannot overcome them on their own.

Having compared the factors enshrined in these regulations, which can form the basis for a person to get into difficult life circumstances, we can conclude that their list differs significantly. Indeed, some factors may not be related to the term "child" (e.g., old age, unemployment). However, some of them are essentially identical, although differently formulated in the cited legislative provisions: for example, "serious illness" and "military action" stipulated in Art. 1 of the Law of Ukraine "On Childhood Protection"³, and "incurable diseases, diseases that require long-term treatment" and "hostilities" – in Art. 1 of the Law of Ukraine "On Social Services". Without arguing on the need to use unified legal terminology and the completeness of these lists, we shall note: even a superficial analysis of both regulations shows that the child will also require additional protection and support in difficult life circumstances of its parents or other legal representatives. In this regard, changes should be introduced to the definition of the agreement on foster care over a child, adding in Part 1 of Art. 253 of the Family Code of Ukraine⁴ after the word "child" the phrase "if it and (or) its parents or other legal representatives are in difficult life

¹ Law of Ukraine No. 2402-III "On Childhood Protection". (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2402-14>.

² Law of Ukraine No. 2671-VIII "On Social Services". (2019, January). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/T192671.html.

³ Law of Ukraine No. 2402-III "On Childhood Protection", 2001.

⁴ Family Code of Ukraine. (2002). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14>.

circumstances". Furthermore, the new wording of ch. 20 of the Family Code of Ukraine stipulates other periods of stay of a child in the family of a foster parent: currently the child is fostered for the period of overcoming the difficult life circumstances by the child, its parents or other legal representatives. The specific term for which a child is assigned to a foster parent is set by the guardianship and custody authority, but it may not exceed three months. However, in the presence of circumstances justifying the necessity and expediency of the child's stay in the family of a foster parent beyond the specified period, the guardianship and custody authority may extend it. In any case, the total period of stay of the child in the family of a foster parent may not exceed six months (Part 6 of Article 252 of the Family Code of Ukraine¹).

Returning to the factors that cause difficult life circumstances, we can see that in some cases, the relevant circumstances cannot be eliminated at all (e.g., old age, disability), or overcoming some of them takes more than three to six months, for which the child is assigned to the family of a foster parent. Therefore, a logical question arises: would not the child suffer even greater harm, considering, above all, the psycho-emotional aspects, by taking it away (even after a maximum period of six months) from the family of the foster carer and assigning it to the next similar family or by applying other forms of assignment to it, stipulated by Part 2 of Article 253 of the Family Code of Ukraine²? Of course, it is difficult to disagree that all forms of assignment of orphans and children deprived of parental care (and in our case – other children (their parents or other legal representatives) can only mitigate the negative impact of the situation in which the child finds itself, and not fully compensate for the absence of the family [15]. In this regard, if possible, such a negative impact should not be exacerbated by the constant movement of the child from one place of residence to another [14]. Proceeding from the foregoing, we believe it is appropriate not to limit the period of stay of a child in the family of a foster parent to three or six months. It should be determined by the guardianship and custody authority depending on the specific circumstances that necessitated the respective assignment of the child. But to implement this, one must first change the provisions set out in Part 6 of Art. 252 of the Family Code of Ukraine³.

Within the framework of this study, we consider it necessary to also address the issue of representation of the child upon assigning it to foster care. Since we have repeatedly emphasized that a child who is not an orphan and who is not deprived of parental care can also be assigned to foster care, its parents (other legal representatives) are not deprived of the relevant powers [16; 17]. This conclusion is confirmed by the provisions of Art. 255 of the Family Code of Ukraine, which set the duties of a foster parent (in particular, in paragraphs 3, 5 of this article it is emphasized that parents and other persons specified by the law are legal representatives). However, the powers of parents and other interested parties regarding legal representation are limited: they cannot return a child without the appropriate decision of the guardianship and custody authority, as follows from Part 2 of Art. 253 of the Family Code of Ukraine⁴. And then – who are the foster carers: legal or contractual representatives? It is especially important to get an answer to this question

¹ Family Code of Ukraine. (2002). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14>.

² *Ibidem*, 2002.

³ *Ibidem*, 2002.

⁴ *Ibidem*, 2002.

when it is impossible to determine the whereabouts of the parents (other legal representatives) of the child or when the child is assigned to the family of a foster parent against their will [18]. Of interest in this aspect is the provision enshrined in paragraph 12 of the Procedure for interaction of state bodies and local governments in identifying separated children who are not citizens of Ukraine, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 832 dated November 16, 2016¹, according to which the foster parent is recognized as the legal representative of the child separated from the family. Some researchers, without arguing their position, claim that foster parent is a procedural representative [7].

As for the procedural representation of the interests of the child by the foster parent, it, indeed, can represent the interests of the child in court based on the concluded foster care agreement: according to subclause 3 of clause 2 of the Model Agreement on Foster Care over a Child, approved by the Resolution of the Cabinet of Ministers of Ukraine No. dated March 16, 2017², the guardian undertakes to represent the interests of the child in the relevant institutions and organizations. However, we cannot agree that the foster carer is the legal representative, given the following considerations:

1) according to Art. 242 of the Civil Code of Ukraine³ the legal representatives are parents, adoptive parents, and guardians. Other persons may be legal representatives only in cases established by law. Special provisions enshrine the status of legal representatives, in particular, of foster parents (Part 4 of Article 256-1 of the Family Code of Ukraine) and foster parents (Part 4 of Article 256-6 of the Family Code of Ukraine⁴). The law does not provide for such a status for foster carers;

2) the assignment of a child to foster care is performed based on the corresponding agreement, the conclusion of the agreement, except cases expressly stipulated in the regulations, according to the generally accepted definition of legal representation, does not belong to its features;

3) assignment of a child to the family of a foster parent, as a general rule, is performed upon the written consent of the child's parents or other legal representatives (parts 2, 3 of Article 254 of the Family Code of Ukraine⁵). In this case, they even assume certain obligations and are granted additional rights under the agreement on foster care of a child (paragraphs 6, 7 of the Model Agreement on Foster Care over a Child, approved by the Resolution of Cabinet of Ministers of Ukraine No. 148 dated March 16, 2017⁶);

4) in any case, the party to the agreement on the custody of the child is the body of guardianship and custody, which, in fact, transfers the scope of powers determined by the legislator to the foster parent.

Therefore, in view of the above, it can be concluded that the foster parent is the

¹ Decree of the Cabinet of Ministers of Ukraine No. 832 "On the features of social protection of divorced children who are not citizens of Ukraine". (2016, November). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KP160832.html.

² Cabinet of Ministers of Ukraine Resolution No. 148 "Some Issues of Patronage of a Child". (2017, March). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KP170148.html.

³ The Civil Code of Ukraine. (2003). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15>.

⁴ Family Code of Ukraine. (2002). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14>.

⁵ *Ibidem*, 2002.

⁶ Cabinet of Ministers of Ukraine Resolution No. 148 "Some Issues of Patronage of a Child". (2017, March). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KP170148.html.

child's representative under the agreement. We shall once again emphasize that a unambiguous solution to this issue is of great practical importance in the representation of the interests of the child assigned to the family of a foster parent, determining the limits of the right to take appropriate action by a foster parent in legal relations concerning this child [19-21]. Although the problems of implementing the analysed legislative provisions are not limited to the above. One can also pay attention to the rule on the need to obtain the consent of the child to assign it to the family of a foster parent, if it has reached such an age and level of development that can express it [22]. After all, the legislator does not determine the form for obtaining (the written consent of the child is mentioned only in the sub-legislative act – paragraph 14 of the Procedure for creation and activities of the foster carer family, assignment, and stay of the child in the foster carer family, approved by the Resolution of the Cabinet of Ministers No. 148 dated March 16 2017¹) and fixing such consent, does not envisage the consequences of the child's unwillingness to live in the family of the foster carer.

Furthermore, it is illogical to establish a rule in paragraph 9 of the specified Procedure concerning the mandatory training of an adult family member who will take part in the provision of child care, a candidate for foster carer according to the program approved by the Ministry of Social Policy, at the request of the social institution and with the consent of this family member (*emphasized by us.* – S.B.). Firstly, "obligation" is inconsistent with the terms "request" and "consent." Secondly, when undergoing the same training, for some reason, the candidate for foster carer may later become such, and a member of its family retains its original status. And thirdly, it remains unclear whether it is possible to conclude an agreement with a candidate for foster carer, if adult family members are against taking part in the provision of foster care, or even not against it, but refuse to undergo this training [23; 24]. The legal literature states that it is "appropriate to extend the foster care agreement to both spouses if the foster carer is married, since truly appropriate living conditions for the child should be created by all adult family members who must undertake to contribute to the performance of the agreement" [2]. We fully agree with the opinion that a foster parent who is married must obtain the consent of the other spouse in order to enter into an agreement of foster care over the child [2]. However, in our opinion, the consent should be obtained from other adult family members of the foster parent, as the child will reside together with them.

Although it is fair to note that even the consent of family members of the foster parent to foster a particular child does not in any way oblige them to comply with the terms of the foster care agreement [11; 25]. However, upon writing this article we did not aim at in-depth investigation of the outlined and other similar aspects, and therefore they can be a promising direction in further research to optimize the institution of child care in our country and develop conceptual foundations for its application in practice.

CONCLUSIONS

In consideration of the foregoing, it can be stated that the legal regulation of the institution of foster care over children requires further improvement. In particular, we believe that,

¹ Cabinet of Ministers of Ukraine Resolution No. 148 "Some Issues of Patronage of a Child". (2017, March). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KP170148.html.

considering the interests of children (their parents or other legal representatives) in difficult life circumstances, a simplified version of their temporary assignment to the family should be provided not only for foster parents but also for their relatives. Furthermore, it is prudent not to limit the period of stay of the child in the family of a foster parent. Such period should be determined by the guardianship and custody authority depending on the specific circumstances that necessitated such assignment of the child.

Upon setting the limits of the foster parent's powers to represent the interests of the child assigned to him/her, it should be borne in mind that the respective activity is not a type of legal representation, but is carried out under according to an agreement. And, of course, the state must not only formally declare the support of foster care for children at legislative level, but also provide real guarantee and support measures for the interests of children in need of foster care and persons and organizations that provide assistance in implementing and development of foster care in Ukraine. The study will be useful in the interpretation and application of family legislation of Ukraine, which are part of the institution of foster care; upon mastering the subject of assignment of orphans and children deprived of parental care by applicants for higher education; as well as upon further research and development of the issues concerning foster care.

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