

## FEATURES OF THE USE OF MEDIATION PROCEDURES IN PROTECTING THE RIGHTS AND INTERESTS OF MINOR CHILDREN IN DIVORCE

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A B S T R A C T	K E Y W O R D S
<p>The current legislation of Uzbekistan has introduced a number of dispute resolution procedures. This is due to the fact that in recent years, in the practice of law enforcement, the parties have been preferring to use the most alternative methods of resolving legal disputes. In our opinion, one of the most acceptable methods of pre-trial resolution of legal disputes is the institution of mediation, which does not bypass family relations.</p>	

### Introduction

Although the peaceful resolution of disputes has been regulated by our ancestors for a very long time, its legal mechanism was created as a result of the adoption of the Law of the Republic of Uzbekistan “On Mediation” on June 12, 2018. Disputes arising from family legal relations were also included in the scope of this law.

Article 33 of the Charter of the United Nations also pays special attention to alternative means of dispute resolution, that is, mediation. In this regard, the Directive of the European Parliament and of the Council of 21 May 2008 on the resolution of disputes at the initiative of the parties is also addressed and considers the resolution of the dispute at the initiative of the parties as a priority.

As is known, the norms related to the rights of the child in family law are of an imperative nature. There are also many dispositive norms that provide the possibility of regulating these relations, the main of which is the achievement of an agreement between the parties to the relationship, including the determination of the place of residence of the child, the conclusion of agreements on the payment of alimony. (Articles 130-134 of the Family Code of the Republic of Uzbekistan).

Family mediation first appeared in the USA in the late 1960s and early 1970s and developed in Western European countries. This area of practice includes divorce and marital disputes arising during divorce, intergenerational disputes in the family, inheritance disputes, family disputes related to social security authorities, problems related to the adoption and adaptation of adopted children, and other disputes.

Mediation (from Latin *mediare* *mediare*) is a method of resolving disputes with the help of a mediator on the basis of voluntary consent in order to reach a mutually acceptable solution.

According to Article 4 of the Law of the Republic of Uzbekistan “On Mediation”, mediation is defined as a method of resolving an arising dispute with the assistance of a mediator on the basis of the parties’ voluntary consent in order to reach a mutually acceptable solution. In this regard, it is important for the parties to take the initiative in resolving the dispute.

The adoption of the Resolution of the President of the Republic of Uzbekistan No. PQ-4754 dated June 17, 2020 “On measures to further improve the mechanisms of alternative dispute resolution” initiated the introduction of the institution of mediation into practice and introduced amendments and additions to the content of legislative acts. This, in turn, allows for effective resolution of the dispute using alternative means.

Although the above Presidential Resolution has implemented a large-scale work on the establishment of mediation centers of the Appeals Councils in some regions, these centers have established rules governing disputes between legal entities engaged in entrepreneurial activities. Rules governing disputes between parties arising in the resolution of family disputes are not provided.

The institution of mediation manifests its legal nature by helping to humanize legal, family-legal relations arising in the field of protecting children's rights in divorce.

So, what is the role of mediation in family disputes? In family disputes, it is beneficial for both parties to achieve a pre-trial resolution of disputes between divorced spouses related to the upbringing and maintenance of children, and to carry out mediation procedures.

Children are considered to be inherently in need of care and protection. They are often called victims of divorce. Today, it is increasingly recognized that children have not only needs, but also rights. If we consider children not only as individuals in need of care and protection, but also as individuals with certain rights, we will approach decisions about their fate differently, and we will begin to think about the need to consult with them, listen to their opinions and seek solutions for them, rather than imposing responsibility on them when making certain decisions. The right of the child to have his or her wishes and feelings taken into account is enshrined in Article 12 of the UN Convention on the Rights of the Child, adopted by the UN General Assembly in 1989. This article states that in resolving any issues related to the implementation of the rules and regulations applicable to the child, his or her views must be given due weight, taking into account his or her age and level of maturity<sup>1</sup>.

The use of family mediation in disputes arising from family legal relations has its own characteristics, unlike civil legal relations. As mentioned above, the use of mediation is justified in various categories of family disputes, including divorce, making decisions about the place of residence of a child when the parents live separately, considering claims for determining the procedure for visiting a child living separately from the parents, dividing jointly acquired property of the spouses, in cases arising from legal relations on the payment of alimony and other cases<sup>2</sup>.

The main goal of introducing the institution of mediation in legal relations related to the protection of the rights and interests of children in family law is to use the fastest and most convenient methods of resolving disputes, which should guarantee the execution of the document at any stage and avoid various costs.

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<sup>1</sup> Паркинсон Л. Семейная медиация. – М., 2010. – С. 230.

<sup>2</sup> Семенова И.Ю. Особенности медиации в семейных отношениях // Экономика и права. №3. 2018. – С. 68.

The above-mentioned process is based on mutual compromise between the disputing parties, which they must achieve through the direct practical activities of the mediator, as a result of which a mutually beneficial result in writing is achieved.

Unfortunately, it is worth saying that today in our practice, the institution of mutual mediation is almost never used in resolving family disputes, in particular, the rights and interests of children in the process of divorce. This indicates that the legal literacy of our population does not yet understand the relationship related to mediation, or that work in this area has not been carried out on a large scale.

However, the role of the mediator in the implementation of the mediation procedure in protecting the rights and interests of children in the divorce process is of great importance, including:

helping the father and mother reach an agreement on the most favorable decision regarding the circumstances that need to be explained to their minor children;

helping the father and mother resolve disputes;

ensures that the father and mother reach an amicable agreement on the distribution of responsibilities related to ensuring the rights of the child;

a fair distribution of tasks is achieved by the father and mother based on their capabilities;

in particular, it helps to eliminate possible future disputes between the father and mother regarding their child and to prevent state fees and other fines that they may have to pay to various law enforcement agencies in the future.

The interests of the child are at the center of family mediation, and these interests are present from beginning to end, as if invisible, throughout the entire process. Some foreign mediators leave one empty chair in the mediation room, symbolically indicating the invisible presence of the child. Nevertheless, for many years there has been a heated debate in the professional community of mediators about the real participation of children in family mediation: there are both supporters who are eager to have children participate in the mediation process, which affects their interests, and those who are categorically against it. The reasons for this by supporters are related to the fact that many children want to be involved in developing the terms of the agreement about their life after the divorce of their parents. Supporters believe that it is important for their parents to listen to them, take their feelings and wishes into account. Opponents of this approach argue that their participation in solving children's painful problems does not harm children and does not cause them psychological harm, but can also create additional incentives for manipulation by the parties to the conflict and turn the child against one of the parents<sup>3</sup>.

Some parents want to involve a mediator in resolving legal issues related to their children, who can explain all the circumstances to their children, while others, on the contrary, do not want many people to know about their family disputes, but the case gradually reaches the stage of court proceedings. However, it is possible to resolve such disputes even before the court with the help of a mediator and avoid various expenses. There are also such parents who, without their participation, try to find a solution to the problems by talking to their children alone with a mediator.

From the point of view of children, sometimes children themselves have a desire to talk to a mediator and tell them all their problems. Because they know that the mediator is aware of the circumstances

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<sup>3</sup> Паркинсон Л. Семейная медиация – М: МЦУПК, 2016. – С. 182–186.

that are happening in their family. As a result, the mediator, being aware of the wishes and desires of the child, will organize an agreement so that his interests are protected and his rights are not violated. Usually, during the mediation procedure for the protection of the rights and interests of the child in a divorce, the most important issues are the joint care of the child's wishes by the parties, the full implementation of his rights, communication with family members, and a joint responsible approach to financial support.

Mediators must become psychologists in the field of child rights protection. This is where they differ from ordinary school psychologists and motivators, namely, they must reach an agreement between the legal parties to ensure that they live a materially and spiritually prosperous lifestyle, based on their rights and interests.

The mediator must begin to exchange information about the children. To do this, he can ask the parents to tell him about their character, professions, and hobbies. Often, the parent who is most involved in the daily care of the child has more information about his child than the other. Focusing on the child allows parents to identify common ideas about the child and the best home for him, thereby creating a basis for constructive dialogue between them. Even if the parties have different opinions on many issues, the discussion of children usually has a positive effect on their mood. Sometimes mediation cannot resolve conflicts between divorcing spouses, including disputes over property or joint decisions about which of them the child will live with in the future. Divorce proceedings in court can take a long time, and in such a situation, the mediator's task may be to ensure the well-being of the child, based on the cooperation of the parents, until the court makes a final decision that protects their interests<sup>4</sup>.

According to Sh. Masadikov, it is precisely in mediation that the principle of dispositive action exists. In this regard, it is embodied in the content of civil and civil procedural legislation. Mediation is a tool that allows for the effective resolution of disputes between the parties. Therefore, mediation can be considered an independent legal institution.

It should be noted that although mediation is used in different areas, places and times, special caution is also necessary when using it in resolving family disputes, in the process of divorce. Because any agreement made for the education and upbringing of a child, and for his healthy growth should serve the interests of the child.

S. Maripova, having conducted research on this issue, notes that there are various types of disputes in this regard, in particular, the division of housing, the recognition of the right to enter or use the house as lost, the application of various contracts, the collection of utility bills, etc. In his opinion, mediation procedures related to housing violations should be mandatory with the participation of state bodies and owners. This process has somewhat diminished its importance today due to the adoption of new laws. In particular, modern approaches to property rights, convergence of legal standards, naturally serve to guarantee property rights.

In our opinion, regardless of the process in which the mediation procedure is used, it is important that it is carried out under the strict control of parents and state bodies, since it affects the rights and interests of minors. After all, the interests of the child are protected by the state and society.

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<sup>4</sup> Гордийчук Н.В. Особенности семейной медиации при разводах // Психология и психотерапия семьи. № 2. – М., 2017. – С. 17.

In her scientific research, Ye.A. Fomina advocates the form of pre-trial resolution of disputes in protecting children's rights and analyzes its effective consequences<sup>5</sup>.

Complementing this opinion, Z.N. Esanova considers it appropriate for the agreement to be drawn up in writing and notarized. She emphasizes that this requirement imposes certain responsibilities on parents, reduces the number of cases of appeal to the court, and increases the efficiency of pre-trial resolution of cases.<sup>6</sup>

In our opinion, the protection of non-property and property rights and interests of children in the process of divorce and reaching a peaceful agreement in their implementation is a beneficial and acceptable solution for both children and parents. In order to resolve family disputes before going to court, it is also necessary to organize the activities of a professional mediator in order to achieve the mediation procedure in disputes between the parties. It is worth noting that the role of family affairs officials organized in mahalla citizen assemblies has almost disappeared.

Also, despite the great organizational work carried out by mahalla activists, no significant positive results have been achieved so far on issues related to family and marriage. Trust in law enforcement agencies, including the court, is certainly higher than in self-government bodies. After all, in the minds of people, the court is represented as a body that solves all problems.

However, the high workload of the courts and the state duty imposed on one of the parties, that is, the defendant, do not always create a satisfactory atmosphere.

In our opinion, the introduction of the practice of courts not initiating family disputes, in particular, disputes arising from divorce and all cases that may lead to the filing of a pre-trial claim, without a mediator's conclusion, and of submitting this conclusion to the court, will have a positive effect on both the parties and the courts.

It is proposed to introduce a norm that the procedure of conciliation and mediation should be applied in disputes concerning the rights and interests of minors in the event of divorce, that these procedures should consist of consideration with the participation of a mediator, proposed to be organized under the MFIs, and that at any stage of consideration of this category of disputes, based on the voluntary consent of the parties, the procedure of resolving the dispute with the assistance of a mediator may be applied to them in order to reach a mutually acceptable solution, and that at any stage of consideration of this category of family disputes in court, until the court adopts a decision, this category may be transferred to a mediator for consideration in accordance with the Law of the Republic of Uzbekistan "On Mediation".

In addition, in order to prevent citizens from sending questions about family disputes to a certain body and to avoid unnecessary hassle during regular receptions organized in courts, it is necessary to sign up for a mediator's reception and organize a conversation with them, and in cases where the mediator manages to reach an agreement between the parties, this will prevent an increase in the workload of the courts in the future, save citizens' time and money, and achieve a number of other positive results.

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<sup>5</sup> Фомина Е.А. Досудебное разрешение конфликтов по семейному воспитанию ребёнка // Право и политика. № 1. 2002. С. 87-89; Фомина Е.А. Досудебное разрешение конфликтов по семейному воспитанию ребёнка // Право и политика. № 12. 2002. С. 83-88.

<sup>6</sup> Esanova Z.N. Bolalar tarbiyasi bilan bog'liq nizolarni fuqarolik sudida ko'rishning protsessual xususiyatlari: Yuridik fanlar doktori ilmiy darajasini olish uchun yozilgan dissertatsiya. – T., 2010. – B. 201.

As we noted above, if councils are established to carry out mediation activities in resolving family disputes in the future, family disputes, especially children's rights and freedoms, will be resolved without obstacles and without censorship.

Research has shown that, although the use of mediation procedures in protecting the rights and interests of minor children in divorce is relatively new, the problems in this regard seem to have not yet matured. The usual, peaceful, negotiation, neighborhood intervention or agreements between relatives are also close to mediation in essence, but they do not always occur in the legal arena. It would be appropriate to provide privileges in this regard during the divorce process, make divorce more accessible, or provide legal solutions in matters affecting the interests of the child. The widespread implementation of mediator activities in resolving family disputes will make it possible to resolve disputes between family members before going to court in the future.