
ДЕЛА, СВЯЗАННЫЕ С УСЫНОВЛЕНИЕМ ДЕТЕЙ ИЗ РОССИИ, В ГРАЖДАНСКОМ ПРОЦЕССЕ США

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Рассмотрена судебная практика судов США по делам, связанным с усыновлением детей из России. Проанализированы проблемы, рассматриваемые в указанных делах. В работе содержатся предложения по решению указанных проблем.

Ключевые слова: усыновление, агентство по содействию усыновлению, гражданский процесс, граждане США, торговля детьми.

Despite the existence of home state adoption priority in Russian family law, the number of foreign adoptions is still high. Foreign citizens adopt more than 7500 Russian children a year - almost as many as Russian citizens do¹. Most of these children are being adopted by the citizens of the USA². Since year 1991 several precedents were created in civil actions involving adoptions of Russian children. The main purpose of this article is to bring attention of the reader to those problems that are resolved in these actions.

Most civil actions involving adoptions of Russian children are actions brought by adoptive parents against adoption agencies alleging that adoption agency misrepresented state of child's health and failed to timely deliver child's medical records³. Moreover, plaintiffs usually allege breach of contract, fraud, intentional nondisclosure, negligent misrepresentation, and intentional infliction of emotional distress. All of these claims usually constitute the tort of wrongful adoption⁴.

Most states recognize the right of adoptive parents to seek a relief in such cases⁵, therefore, adoption agencies tend to include a waiver of negligence claims in the adoption agreements. Consequently, adoptive parents cannot prevail in such cases and have to bear the burden of care and treatment of the child themselves⁶.

Moreover, the District of Columbia Court of Appeals held that the adoptive parent cannot seek a relief if he or she "hastened" the process of adoption aware of the risks the decision involved⁷. Probably, the decision of the court in this case was also driven by the fact that the plaintiff abandoned an opportunity to adopt in the USA, because decided that it would be too difficult for her because of her divorced status⁸. This is one of the common reasons why

American citizens choose to adopt overseas. The complicated procedure of foreign adoption turns out to be easier for US citizens than home state adoption. Maybe, that is a problem of American foster system.

So, if the adoptive parents are precluded from filing a suit against adoptive agency, what is the way of getting relief in such actions? Lawyers try to solve this problem in many different ways. One option is to bring a claim on behalf of the adopted child⁹.

In *Dresser* that was the only claim that survived summary judgment. The reasoning of the court was based on the idea that adopted child was not a party of the agreement and, therefore, could not waive his right to file a claim alleging negligence on the part of adoption agency¹⁰. This was the first case where the court recognized this right of the adopted child¹¹.

At the same time, in *Harshaw* the court followed the same logic and recognized the right of the child to sue¹². However, the court granted summary judgment to the defendants on this claim "for failure to show a genuine issue as to whether Roman in particular was damaged by pre-adoption or post-adoption negligent failure to disclose"¹³. The court explained that the Harshaws have not presented "evidence explaining any *specific* changed or additional testing, counseling, medication, treatment, or other measures which medical professionals could or allegedly would have taken (after the adoption) if they had been given more specific and thorough medical records about Roman, and/or been given the existing records earlier"¹⁴. This is the reasoning for the post-adoption failure to disclose count. As to the pre-adoption failure to disclose count, the court explained that the plaintiff failed to present the evidence that can prove damages from such a tort: "he cannot say that he would have been better off if the BCS had

made the additional or earlier disclosures which their duty of care putatively required before the adoption, because negative medical information disclosed to the Harshaws at that time (on their own view) would have caused them not to pursue Roman's adoption any further"¹⁵. Next, the court points out an argument showing the attitude of US citizens towards the Russian medical and foster systems: "[t]hat, in turn, would have left him in the orphanage in Siberia, with no guarantee of ever being adopted, and likely receiving medical care that was far inferior to that available in the United States"¹⁶.

It is interesting that Russian defendants were involved only in one action. These were the Russian doctors who made a wrong diagnosis of the child.¹⁷ However, they have not been served with the process within the time limits of Rule 4(m) of Federal Rules of Civil Procedure¹⁸, and, therefore, were not before the court in that action¹⁹. There is no any indication of the reason why Russian co-defendants have never been served with the process. Our guess is that summons was "lost" somewhere in the post office, or the defendants simply ignored it. At the same time, the plaintiffs could easily file a claim against these doctors in a Russian court. However, they chose to proceed with American defendants in the US court. The reason is simple - international civil action requires a lot of resources. Plaintiffs would have to hire a Russian lawyer, to translate all the documents, to spend lots of money on transportation to the court and etc., whereas the perspective of such action is obscure.

The real diagnosis was made in all cases only in the USA. In *Ferenc* the court speaks about "ambiguous clinical diagnoses" and "problematic state" of Russian medical education and proficiency²⁰. Such a condition of Russian medical system definitely creates problems for adoptive parents and children. This aspect of Russian adoption system needs to be reformed.

Another interesting case is an action brought by the adoptive father against the adoptive mother in response of her action for support²¹. In *Sell* the adoptive father challenges the validity of Russian adoption decree. He asserts that the child was simply bought²². The court held in this case that the adoptive father was estopped from attacking the validity of foreign adoption decree, if he "fully participated in the adoption process, went to Russia, took possession of the child, brought the child back, treated the child as his own"²³.

This case concerns another serious problem of foreign adoptions of Russian children that is baby selling²⁴. The average cost of Russian adoption is approximately \$25 000²⁵. The fact is that often these money is used for bribes. That is the way how adoption agencies "speed up" the process of adoption or make the adoptions which are contrary to Russian law possible. That is why the procedure of foreign adoption should be even stricter then it is now. In 2008 "[i]n response to the Pavlis murder, amongst other murders in the U.S., the Russian Federation increased the waiting period for foreigners adopting children and mandated that all foreign adoptions proceed through certified adoption agencies"²⁶. The practice shows that these amendments are not enough. The control over the certified adoption agencies should be more exacting.

The art. 165 of the Russian Family Code states that the protection of rights and lawful interests of the children, being citizens of Russia and adopted by foreign citizens or stateless persons, outside of the territory of the Russian Federation is carried out by consular offices of Russian Federation. The children must be registered there until they come to the age of majority²⁷. However, there is no law on the procedure of such protection. Whereas, 14 children adopted by American citizens in Russia were murdered by their adoptive parents²⁸. "There is a much larger group of Russian children adopted into the United States who have been institutionalized, hospitalized, placed into the United States foster care system, or otherwise have failed to adapt to their adoptive placements"²⁹.

Therefore, the analysis of the US civil actions involving adoptions of Russian children allows drawing a conclusion that the Russian legislation on the foreign adoptions needs to be changed in order to protect the rights and interests of the adopted children. In particular, it is indispensably to amend the Russian Family Code by including the provision, imposing the duty of full disclosure of child's medical information to the prospective adoptive parents on the officials bearing responsibility for the adoption process.

It is also necessary:

- to make stricter the state of health assessment procedure;
- to provide the full, relevant and correct translation of medical information;
- to provide explanation of such information;
- to harden the control over the activities of the certified adoption agencies;

- to make provision on the mechanism of control over the conditions of the adopted child within the territory of the foreign State.

¹ *Laura Ashley Martin*. [T]he universal language is not violence. it's love[.] The Pavlis murder and why Russia changed the Russian Family Code and policy on foreign adoptions, 26 Penn St. Int'l L. Rev. 709, 711 (2008).

² *Mary Hora*. A standard of service that all families deserve: the transformation of intercountry adoption between the United States and the Russian Federation, 40 Brandeis L.J. 1017, 1019 (2002).

³ *Dresser v. Cradle of Hope Adoption Center*, 358 F. Supp. 2d 620 (E.D. Mich. 2005); *Harshaw v. Bethany Christian Services*, 714 F. Supp. 2d 771 (W.D. Mich. 2010); *Ferenc v. World Child Inc.*, 977 F. Supp. 56 (D.D.C. 1997); *Sherman v. Adoption Center of Washington, Inc.*, 741 A. 2d 1031 (D.C. App. 1999); *McMullen v. European Adoption Consultants, Inc.*, 129 F. Supp. 2d 805 (W.D. Pa. 2001).

⁴ *Mary Hora*. 40 Brandeis L.J. at 1017.

⁵ *Dresser*, 358 F. Supp. 2d at 639.

⁶ *Dresser*, 358 F. Supp. 2d at 638; *Ferenc*, 977 F. Supp. at 61; *Sherman*, 741 A. 2d at 1037.

⁷ *Sherman*, 741 A. 2d at 1036.

⁸ *Id.* at 1033.

⁹ *Dresser*, 358 F. Supp. 2d; *Harshaw*, 714 F. Supp. 2d.

¹⁰ 358 F. Supp. 2d at 640 - 642.

¹¹ *Id.* at 640.

¹² 714 F. Supp. 2d. at 806.

¹³ *Id.* at 808.

¹⁴ *Id.* at 807 - 808.

¹⁵ *Id.* at 801.

¹⁶ *Id.*

¹⁷ *Ferenc*, 977 F. Supp. at 58 - 59.

¹⁸ Fed.R.Civ.P. 4(m).

¹⁹ *Ferenc*, 977 F. Supp. at 58.

²⁰ *Ferenc*, 977 F. Supp. at 61.

²¹ *Sell v. Sell*, 714 A. 2d. 1057 (Pa. Super. 1998).

²² *Id.* at 1059.

²³ *Id.* at 1061 - 1062.

²⁴ Jonathan G. Stein, *A call to end baby selling: why the Hague Convention on Intercountry Adoption should be modified to include the consent provisions of the Uniform Adoption Act*, 24 T. Jefferson L. Rev. 39 (2001); David M. Smolin, *Child laundering and the Hague Convention on Intercountry Adoption: the future and past of intercountry adoption*, 48 U. Louisville L. Rev. 441 (2010).

²⁵ Jonathan G. Stein, 24 T. Jefferson L. Rev. at 68.

²⁶ Laura Ashley Martin, 26 Penn St. Int'l L. Rev. at 730.

²⁷ Family Code of Russian Federation of December 29, 1995 № 1995-FZ // *Sobranie Zakonodatelstva RF*. 1996. № 1. Art. 16.

²⁸ David M. Smolin, 48 U. Louisville L. Rev. at 474.

²⁹ *Id.*

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