**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Article 15 of the Family Code*

*of the Republic of Azerbaijan*

**16 October 2015                                                                        Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova, Sudaba Hasanova (Reporter-Judge), Rovshan Ismaylov, Raphael Gvaladze, Makhir Muradov, Isa Najafov and Kamran Shafiyev;

attended by the Court Clerk Faraid Aliev,

representatives of the interested parties – Ilaha Abbasova, Judge of Yasamal district court of the Baku city, Magomed Bazıgov, Senior Adviser of the Department of Social Legislation of the Apparat of Milli Majlis of the Republic of Azerbaijan,

expert – Makhabbat Damirchiyeva, Department of Civil Law of the Baku State University, Doctor in Law, Professor,

specialists – Asad Mirzaliyev, Judge of the Supreme Court of the Republic of Azerbaijan, Ikram Shirinov, Judge of the Court of Appeal of Baku city,

in accordance with Article 130.6 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case concerning inquiry of Yasamal District Court of the city of Baku on interpretation of provision “within one year after the child's birth” of Article 15 of the Family Code of the Republic of Azerbaijan.

Having heard the report of the Judge S. Gasanova, the reports of the legal representatives of the subjects interested in special constitutional proceedings and specialists, conclusions of expert, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Yasamal District Court of Baku city of, having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asks for interpretation of provision “within one year after the child's birth” of Article 15 of the Family Code of the Republic of Azerbaijan (hereinafter referred to as the Family Code).

It is specified in the address that the claimant O. Aliyev on December 29, 2014 lodged a claim against G. Guseynova with the requirement of dissolution of marriage, however because the defendant was pregnant, a marriage was not dissolved. After that on February 28, 2015 at the defendant the dead child was born, the claimant lodged the claim for dissolution of marriage again. During judicial examination the defendant did not agree with dissolution of marriage, and, having referred to Article 15 of Family Code, declared absence at the husband of the right to demand a dissolution of marriage.

According to the requirement of Article 15 of the Family Code called “restriction of the right of the husband to demand a dissolution of marriage” during pregnancy of the wife or within one year after the child's birth the husband has no right without the consent of the wife to lodge the claim for dissolution of marriage.

However, taking into consideration of lack of exact establishment of whether this restriction cover the cases of the birth of the dead child or his/her death before achievement of one year and existence in judicial practice of various approaches connected with application of article, applicant came to a conclusion about necessity of interpretation of the norms specified in Article 15 of Family Code for clarify a question of whether the husband without the consent of the wife had the right to lodge a claim for dissolution of marriage within one year after the birth of the dead child, or in case of his/her death before achievement of one year.

The Plenum of the Constitutional Court in connection with the inquiry considers necessary to note the following.

In Article 17 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) it is specified that the family as a kernel of society is under special protection of the state.

The institution of the family as one of the main institutes of civil society, historically was considered as the keeper of human values, culture and historical heritage of generations, a basis of stability and growth. The family was estimated as the union making a basis of any civilized society, representing the main, sublime and pure feelings, noble intentions of humanity.

On an equal basis with the fact that on the biological, social and household functions, the family is a cell of society, it also big wealth, ornament, meaning of life of each normal person. The family is the union towering over ethical and moral values.

As result of significance attached by the state to the institution of the family, conditions of the marriage making a basis of creation of family are defined by the Constitution.

According to Article 34 of Constitution called “Right to marriage” everyone has the right to marry upon attaining the age prescribed by law. Marriage consists on the basis of voluntary consent, and nobody can be forced to marriage. Family and marriage are under protection of the state. Maternity, paternity and childhood are protected by law. The state renders support to families with multiple children. Rights of wife and husband are equal. Care and upbringing of children constitute both right and responsibility of parents.

The family legislation, copying the main idea from the Constitution, established the principles of building and strengthening of family relations, their terminations, the rights and duties of participants of the family relations, obligations of public authorities in this sphere and also the norms regulating an order of the state civil registration.

In Article 1.3 of Family Code it is established that the family legislation proceeds from need of strengthening of family, creation of the family relations on feelings of mutual love and respect, inadmissibility of intervention someone in cases of family, mutual assistance and responsibility to family of all her members, ensuring free implementation by members of the family of the rights, possibilities of legal protection of these rights.

According to the family legislation, marriage is the voluntary union of the man and woman registered in relevant organ of the executive authority for the purpose of creation of family (Article 2.3 of Family Code).

Any forms of restriction of the rights of citizens in case of marriage are forbidden and in the family relations on signs of social, racial, national, language or religious affiliation. The rights of citizens in family can be limited only based on the law for the purpose of protection of morality, health, the rights and legitimate interests of other family members and other citizens (Articles 2.4 and 2.5 of Family Code).

Citizens carry out the family rights and also protection of the specified rights independently if the present Code did not provide for other order. At implementation of the rights and fulfillment of the duties the family member should not violate the rights, freedoms and legitimate interests of other family members and other citizens (Article 6 of Family Code).

According to the legal position created by the Plenum of the Constitutional Court in the Decision of November 2, 2010 “On interpretation of Article 307.2.4 of the Civil Procedure Code of the Republic of Azerbaijan” on the basis of the principle of voluntariness and free will of the marriage union of the man and the woman, each man and each woman according to own conclusion voluntarily, without influence of strangers have rights to choose to themselves the husband and the wife. The basic condition of a marriage is the mutual free-will consent of the man and the woman.

Analyzing the above-stated norms of Constitution and family legislation, the Plenum of the Constitutional Court considers that voluntariness of marriage, freedom of will of the persons getting married, need of strengthening of family, ensuring free implementation of the rights of spouses and a possibility of protection for court of these rights, equality of spouses, the solution of intra family questions on the basis of mutual consent and other the principles are cover all stages of marriage (marriage, being married and dissolution of marriage).

The bases and order of dissolution of marriage are regulated by provisions of Chapter 4 of the Family Code, and issues of registration of dissolution of marriage in Chapter 25 of this Code.

In the theory of family law, dissolution of marriage is understood as the termination of the relations of the spouses created from the marriage concluded in the order provided by the law in connection with emergence of certain legal facts.

The family legislation establishes two orders of dissolution of marriage – in a judicial proceeding and in appropriate authority of executive power (administratively). According to Article 16 of Family Code dissolution of marriage is carried out by appropriate authority of executive power, and in the cases provided by Articles 19-21 of the present Code by court.

In these articles the legislator established two main conditions of dissolution of marriage by judicial procedure: when spouses have common minor children; one of the parties does not agree with dissolution of marriage.

By establishing the order of dissolution of marriage, the Family Code, acts in terms of voluntariness of marriage, equality of spouses and also freedom of dissolution of marriage, the principle of ensuring free implementation of the rights of spouses and also in terms of protection of the rights of children.

As it was already noted on the basis, Article 15 of Family Code, during pregnancy of the wife or within one year after the child's birth the husband has no right without the consent of the wife to lodge the claim for dissolution of marriage.

The Plenum of Constitutional Court considers that this limiting indication of law, being the reason of disagreements in judicial practice, serving for family integrity, protection of the rights of mother and child, is not only acceptable for women on a certain interval of time, that is during pregnancy and after the child's birth, but also appreciation of motherhood.

It also follows from tasks of Family Code. So, according to Article 3.0.4 of this Code, the comprehensive protection of the interests of mothers and children's interests and provision of a happy life of every child is established as one of tasks of the present Code.

 According to Article 85.1.1 of the Family Code, a former wife in the period of pregnancy and during 3 years from the birth of common children, has the right after dissolution of marriage via judicial procedure to demand from the former husband, who have a necessary means, the payments of alimony.

From this point of view, restriction for a certain period of the right of the husband to demand dissolution of marriage, cannot be perceived as violation of equality of spouses. So, this right is limited only in the known interval of time that completely conforms to requirements of Article 2.5 of Family Code. Here the purpose consists in creation of softer conditions concerning the woman and the child.

Restriction for a certain term for the rights of the husband to demand dissolution of marriage without the consent of the wife during her pregnancy and after the child's birth is provided in the matrimonial legislation of a number of the states.

So, similar approach is established also in the legislation of the Russian Federation, Kazakhstan, Ukraine, Kyrgyzstan, Moldova, Republic of Belarus.

In the decision of the Plenum of the Supreme Court of the Russian Federation of November 5, 1998 “On application by courts of the legislation for dissolution of marriage”, giving interpretation to Article 17 of the Family Code of the Russian Federation regulating a similar issue, it is specified that the lack of the right of the husband without the consent of the wife to initiate proceedings on dissolution of marriage during pregnancy of the wife or within one year after the child's birth, extends also to cases when the child died before achievement of one year age.

And the legislation of Moldova preconditioned the introduction of year restriction on presentation by the husband of the claim for dissolution of marriage, by the fact that the child is alive within one year after the birth.

As for various approaches connected with application of Article 15 of Family Code, the Plenum of Constitutional Court considers that in point of fact of law the imposition of the restriction on presentation by the husband of the claim for dissolution of marriage without the consent of the wife during pregnancy or within one year after the child's birth, is not stipulated only by the birth fact. Expression “after the birth” norms means the expiration of one year after the birth fact. The child's birth is already considered as the legal fact, the birth of the dead child has no value for elimination of the term established by the law.

In connection with that whether the requirement of Article 15 of Family Code is extends on a case of death of the child before achievement of one year, the Plenum of the Constitutional Court notes that this provision of the law, having imperative character, unambiguously established that the husband has no right without the consent of the wife to make the claim for dissolution of marriage within one year after the child's birth. The restriction set by the law for a period of one year does not coordinate with the fact of death of the child in several months, and his death does not cancel a year. In this context, the year restriction provided in Article 15 of Family Code includes also cases of the birth of the dead child or his/her death before achievement of one year.

In point of fact of specified article, the right of the husband to lodge the claim for dissolution of marriage without the consent of the wife, and in case of the birth of the dead child or the death of the child who did not reach one year, arises only upon termination of a year since the birth of the child.

According to the requirement of the law if the husband without the consent of the wife during pregnancy of the wife lodge the claim for dissolution of marriage, his claim should not be accepted by court, and in case of establishment of pregnancy after acceptance of the claim in proceeding, the proceeding has to be stopped according to requirements of the civil-procedural legislation.

On the basis of the above the Plenum of the Constitutional Court came to such conclusion that provision “during pregnancy of the wife or within one year after the child's birth the husband has no right without the consent of the wife to lodge the claim for dissolution of marriage” of Article 15 of Family Code includes also cases of the birth of the dead child or his/her death within one year after the birth.

Being guided by Part VI of Article 130 of the Constitution of the Republic of Azerbaijan and Articles 60, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. Provision “during pregnancy of the wife or within one year after the child's birth the husband has no right without the consent of the wife to lodge the claim for dissolution of marriage” of Article 15 of Family Code includes also cases of the birth of the dead child or his/her death within one year after the birth.

2. The decision shall come into force from the date of its publication.

3. The decision shall be published in ‘Azerbaijan’, ‘Respublika’, ‘Xalq Qazeti’ and ‘Bakinskiy Rabochiy’ newspapers and ‘Bulletin of the Constitutional Court of the Republic of Azerbaijan’.

4. The decision is final, and cannot be cancelled, changed or officially interpreted by any body or official.