АДВОКАТТЫҢ ДӘЛЕЛДЕМЕЛЕРДІ ЖИНАУДАҒЫ РӨЛІ: ҚҰҚЫҚТЫҚ РЕГЛАМЕНТАЦИЯ МӘСЕЛЕЛЕРІ

Сөздік

На русском	На казахском	На английском
Адвокат – лицо, профессией которого является оказание квалифицированной юридической помощи физическим лицам (гражданам, лицам без гражданства) и юридическим лицам (организациям).	Адвокат – кәсібі жеке (азаматтарға, азаматтығы жоқ тұлғаларға) және заңды (ұйымдарға) тұлғаларға білікті заң көмегін көрсету болып табылатын тұлға.	lawyer
Предварительное расследование — вторая стадия уголовного процесса, следующая за стадией возбуждения уголовного дела	Алдын ала тергеу – қылмыстық істі қозғау кезеңінен кейін орын алатын қылмыстық іс жүргізудің екінші кезеңі.	preliminary inquiry
Защитник - лицо, осуществляющее защиту гражданина в уголовном процессе.	Қорғаушы – қылмыстық іс жүргізу кезінде азаматты қорғайтын тұлға.	back
Доказывание – это процесс установления объективной истины по уголовному делу, содержанием которого являются собирание, исследование, оценка и использование доказательств	Дәлелдеу – мәні дәлелдемелерді жинау, зерттеу, бағалау және пайдалану болып табылатын қылмыстық іс бойынша объективті шындықты орнату үрдісі.	proof
Достоверность — несомненная верность приводимых сведений для воспринимающего их человека	Дұрыстық – қабылдайтын адам үшін жүргізілетін мәліметтердің дұрыстығы.	reliability
Допустимость доказательств – это один из основных критериев оценки доказательств с точки зрения их пригодности именно в качестве судебных доказательств и возможности их использования в доказывании.	Дәлелдемелердің рұқсат етілуі – дәлелдемелердің сот дәлелдемелері ретінде жарамдылығын және оларды дәлелдеуде қолдану мүмкіндігін бағалаудың негізгі критерийлерінің біреуі.	admissibility of evidence
Достаточность доказательства (или их совокупности) - одно из требований, предъявляемых законом к доказательствам; означает, что они позволяют сделать достоверный вывод о существовании факта, в подтверждение которого они собраны	Дәлелдемелердің жеткіліктілігі (немесе олардың жиынтығы) – заңмен дәлелдемелерге қойылатын талаптардың біреуі; фактінің болуы туралы дұрыс қорытынды жасауға мүмкіндік береді, оны растау үшін жиналады.	Sufficiency of evidence

ство которого находится уголовное дело, то логически нужно делать вывод, что он и собирает эти доказательства.

Но поскольку мы не без оснований пришли к выводу о том, что объекты, собираемые адвокатом-защитником, не могут изначально (т.е. будучи неприобщенными следователем и др. уполномоченным лицом к делу) признаваться доказательствами по делу, то мы считаем, что в контексте ч.3 ст. 125 УПК РК адвокат-защитник собирает и представляет именно сведения, а не доказательства, как это записано в ч. 3 ст. 125 УПК РК.

В связи с этим нужно уяснить, что именно нужно понимать под термином «представление доказательств». Уголовно-процессуальный закон не раскрывает содержание понятия указанного термина. В науке же оно толкуется по-разному. Одни ученые понимают под представлением доказательств передачу следователю предметов и документов, имеющих значение для дела. Другие процессуалисты понимают под «представлением доказательств» не только передачу следователю предметов, но и заявление ходатайств, а также участие в следственных действиях.

Таким образом, существуют широкое и узкое понимание представления доказательств. Мы придерживаемся узкого - представление следователю, лицу производящему дознание, справок, характеристик (документов). Оно соответствует тому смыслу, в котором представление доказательств употребляется в уголовно-процессуальном законе, поскольку и заявление ходатайств, и участие в следственных действиях выделены в ч. 2 ст. 74 УПК РК в качестве самостоятельных прав адвоката-защитника.

Исходя из всего вышеуказанного, во избежание неопределенности при уяснении и применении ч. 3 ст. 125 УПК, предлагаем, изложить эту норму следующим образом: «3. Защитник, допущенный в установленном настоящим Кодексом порядке к участию в деле, вправе собирать и представлять сведения, необходимые для оказания юридической помощи,...» (далее все как в действующей редакции УПК РК).

ТҮЙІНДЕМЕ
Мақалада қылмыстық іс жүргізудегі жарыспалылықты қамтамасыз ету мәселелері туралы жазылған. Адвокаттың дәлелдемелерді жинау құралдары талданады, құқықтық регламентация мәселелері ашылады.

SUMMARY
The article highlights the problem of provision of competition in the criminal proceedings. The means of collecting evidence by a lawyer are analyzed, the legal regulation issues are disclosed.

INTERNATIONAL LEGAL MECHANISM TO PROTECT THE RIGHTS OF CHILDREN WHO ARE VICTIMS AND WITNESSES OF CRIME

ТАСТАНОВА М. М.

ПРЕПОДАВАТЕЛЬ КАФЕДРЫ МЕЖДУНАРОДНОГО ПРАВА И МЕЖДУНАРОДНЫХ ОТНОШЕНИЙ КАЗГЮУ, МАГИСТР ЮРИДИЧЕСКИХ НАУК, ДОКТОРАНТ КАФЕДРЫ

Children are at risk of significant psychological harm when parents separate. For most, that risk does not lead to long-term adverse consequences. Children weather the storm. They adjust to the post-separation circumstances. However, parental separation leaves its imprint, and changes the course of children's lives[1]. Children may feel a profound sense of loss that lasts for years, but 'poor outcomes are far from inevitable'[2].

A minority of children will be deeply affected by their parents' separation and will suffer long-term adverse consequences. The consistent message of research has been that it is the parental conflict—both before and after the separation—that is most harmful to children. When parents are involved in litigation over their children, there is likely to be intense conflict, and the more so, the further the matter progresses in the litigation process. While in jurisdictions around the Western world, the focus of the court is on the best interests of the child, it is frequently the case that parenting disputes are prosecuted through allegation and counter-allegation, with an emphasis on the deficiencies of the other parent. Even if the matter settles without the need for a trial, written evidence may have been prepared, witnesses lined up, and adversarial positions taken. What place is there in this process for the children? Should they be given seats to the boxing match, or invited into the ring? Or rather should they be excluded from the venue? In the past, the most common response to this issue around the world has been that the courts should seek to protect the children from the conflict as far as possible. While practices differ between jurisdictions, it is generally very unusual for children to be called to give evidence in parenting proceedings, in contrast to the situation in criminal trials when the prosecution alleges that the child has been a victim of a crime or a witness to one.This protective stance towards children does not, of course, mean that their voices cannot be heard in the process of decision-making nor that their wishes are unimportant. Children's wishes have typically been one of the factors that courts have been required to consider in many jurisdictions in making determinations about children's welfare. The protective approach does, however, mean that children are shielded as far as possible from being drawn into the conflict [3].

1. Hetherington, M E, 'Should we Stay Together for the Sake of the Children?' in M E Hetherington (ed), Coping with Divorce, Single Parenting and Remarriage: A Risk and Resiliency Perspective (Lawrence Erlbaum, 1999) pp 93–116; Amato, P.
2. Rodgers, B and J Pryor, Divorce and Separation: The Outcomes for Children (Joseph Rowntree Foundation, 1998) pp 4–5; Laumann-Billings, L and R Emery, 'Distress among Young Adults from Divorced Families' (2000) 14 Journal of Family Psychology 671–687.
3. Hetherington, M E and J Kelly, For Better or for Worse: Divorce Reconsidered (W W Norton & Company, 2002).

The development of Family Courts and the involvement of social-science trained professionals in custody evaluation, conciliation and other such roles as part of the process of court-based dispute resolution has made it more possible for children to be shielded from direct involvement. One change that occurred in many jurisdictions, for example, was in relation to the practice of judges interviewing older children in chambers to find out what they wanted in relation to custody disputes. This was an accepted practice in common law countries for many years. [4].While in some jurisdictions, that continues to be a common (p. 3) practice, [5] the accepted view in most modern common law jurisdictions became that it was better to rely on the work of trained experts to interview children and to interpret their wishes and feelings to the court.

The appointment of a separate legal representative for children has been another way in which children's voices can potentially be heard without direct involvement. However, whether they are in fact heard through their lawyer may depend on whether the lawyer sees it as his or her role to talk directly with the child. A protective approach to children is not the only reason why children's voices have either not been heard at all in parenting proceedings, or have been heard indirectly through a custody evaluator or other report writer. Another issue which has prevented children's views being given significant weight in parenting disputes has been a belief that children, especially prior to their adolescence, do not have the capacity to make reasoned choices about important matters. This is, of course, another reason for the protective stance taken towards their involvement. As Pryor and Emery put it: 'The received view is that children are not able to say anything sensible until about the age of twelve'[6].The law has typically treated issues of children's capacity as a matter involving a binary choice. Either the child has the capacity to give sworn evidence or he or she does not. Either the child understood the wrongfulness of his or her criminal conduct with the consequence that he or she should be held criminally responsible for his or her actions, or he or she did not. Either the child has the capacity to make a medical decision or he or she does not. If he or she has the capacity, then it is his or her decision. If he or she does not, then it is the parents' decision. A similar approach was taken in civil law countries. In Denmark, for example, children had a right to be heard in parenting proceedings once they reached the age of 12 years. An age threshold had to be crossed before children attained a status that gave them participation rights. This right has in recent years been extended to younger children[7].

This binary view of children's capacities is at odds with the understanding that developmental psychologists have of how children's capacities develop over time. As theory and research have developed, the earlier age- and stage-related constructs of development and 'incompetence' are now considered to be out of date. As developmental psychologist Lawrence points out, development now needs to be seen in terms of 'the multiple levels of change that is the normal human experience, the multiple functions affected by developmental change, and the multiple contributors to developmental change and their interactions'. Children's development is dynamic, interactional and profoundly affected by their experiences and relationships with those who are significant in their lives, and by their perceptions of and reactions to those experiences and relationships. Children are also now seen to be more competent earlier than previously thought, though adults still tend to underestimate children's capacities. Their capacities are affected by the context and depend on the support they receive in developing that capacity and the extent to which they are allowed to participate in making decisions. As Smith, Taylor and Tapp point out, 'children who are involved in activities before they are fully competent actually acquire more competence in the process'[8].These notions about children in the legal arena have begun to change in the last few years. The new rhetoric is about the importance of children's participation, and family law jurisdictions in different parts of

4. Simons, R L, L B Whitbeck, J Beaman, and R D Conger, 'The Impact of Mother's Parenting, Involvement by Nonresidential Fathers, and Parental Conflict on the Adjustment of Adolescent Children' (1994) 56 Journal of Marriage and Family 356–374.
5. The cautious, protective approach towards the involvement of children in decision-making is illustrated by the Family Law Act 1975 in Australia.Family Law Act 1975, s 60CE.
6. Jones, J C, 'Judicial Questioning of Children in Custody and Visitation Proceedings' (1984) 18 Family Law Quarterly 43–91.
7. Atwood, B, 'The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform' (2003) 45 Arizona Law Review 629–690.

KEYWORDS:
children, participation, child protection, children's rights, response, minority of children, the Voice of a Child, Family Law

ГЛОССАРИЙ:
дети, участие, защита детей, права детей, ответственность, меньшинства детей, голос ребенка, семейное право

ГЛОССАРИЙ:
балалар, қатысу, балаларды қорғау, балалардың құқығы, жауапкершілік, баланың даусы, отбасылық құқық

the world are now exploring how children's voices can better be heard in the legal process. In France, for example, legislation was passed in 2011 which gives children the right to be heard by the judge if they so choose. This is intended to be the normal way in which a child will be heard, with an interview by another professional such as a child psychologist being utilized only if it is in the best interests of the child to be heard this way. The judge must also examine whether a refusal by the child to be heard is well founded [9]. In Britain, a government minister has called for greater participation by children in family law decision-making and two of the country's most senior judges have encouraged the idea that judges should talk directly with children more frequently in determining parenting cases. In Australia, a variety of approaches have been trialed to make decision-making in family law disputes more child-inclusive. In particular, there has been great interest in the practice of child-inclusive mediation, in which the views of the children, interviewed separately, are fed back to the parents. This has shown distinct benefits for both parents and children in comparison with forms of mediation that do not involve hearing from the children [10]. Why has this change occurred now? Debate about the role of children's wishes in making decisions about their custody and access—as it was called at that time is not new. In the 1960s and 1970s, there was a lively debate between those who advocated for children's wishes being determinative and those who took a much more protective stance, arguing that they should not be given too much weight or even any weight at all. In one of the earliest law articles, Foster and Freed argued that: At least where the pertinent factors are evenly balanced, the child's wishes should be decisive unless the person chosen by the child is obviously unfit or the child's choice is the result of coercion or bribery.Citing the American Orthopsychiatric Association's 1967 Position Statement on Child Custody, Jenkins, a professor of child psychiatry in the US, advocated trusting children's preferences in his advice to expert witnesses on children's cases. Respect the preceptiveness of the children in recognizing which parent really cares more about them, and which parent is more dependable. Even in infancy and early childhood it is possible to note the response of confidence and security or fear to the parent persons. While older children often have some apprehension or fear about expressing a preference between their parents, and some insist on walking a tight-rope and expressing no preference, yet in a private interview, after the establishment of some rapport, a few simple questions directed to the child alone usually clarifies this question...Children are less experienced than adults in judging people, but in general, children study their parents more intently and intensively than parents study their children. Similarly, Lempp, a medical practitioner, argued that an attempt should be made to establish the child's wishes or 'inclinations' in every case, believing the child's welfare to be 'at risk whenever the child is reduced to an object and whenever decisions are made against his will for no compelling reason'[11]. On the other hand, some lawyers and child psychologists and psychiatrists argued that the wishes of children under certain ages (variously 10, 12 or 14 years) should be given little weight or that they should not be ascertained or considered .

Despite the vigorous debate that occurred during the 1960s and 1970s, the issues associated with children's competence to be involved in decision-making, especially in family law, received relatively little attention in the literature until the 1990s. There are two related reasons for the more recent interest in children's participation: a shift in developmental views of children and a shift in thinking about children's rights and citizenship. There has been a distinct shift over the last few decades in thinking about children in both psychology and sociology and in the new area of developmental science. Children are no longer seen as the passive recipients of parental influence, the targets of socialization within and outside the family nor as 'objects of concern' in relation to outside intervention. They are now seen

8. Pryor, J and R Emery, 'Children of Divorce' in P Pufall and R Unsworth (eds), Rethinking Childhood (Rutgers University Press, 2004) p 171.
9.King, M and C Piper, How the Law Thinks about Children (Ashgate, 1995).
10. For a review of the traditional position at common law, see Spencer, J R and R H Flin, The Evidence of Children: The Law and the Psychology (Blackstone Press, 1990).
11. At common law, a child over the age of criminal responsibility, but under a certain age, typically 14 years, was presumed to be not capable of understanding the wrongfulness of his actions with the consequence that the prosecution had to prove that understanding in order to succeed in a criminal prosecution. This is known as the presumption of doli incapax. In England, it was abolished by the Crime and Disorder Act 1998. The provisions on capacity vary from one country to another. For a comparison of Sweden and South Africa, see Johansson, K and T Palm, 'Children in Trouble with the Law: Child Justice in Sweden and South Africa' (2003) 17 International Journal of Law, Policy and the Family 308–337.

as social actors who are shaping their own lives, and influencing the lives of those around them, particularly their parents and siblings. This change has occurred as it has become increasingly apparent that children's development is profoundly affected by their interaction with other people and that their learning benefits from their participation.This new paradigm in the emergent sociology of childhood represents a break away from the earlier construction of children and childhood in sociology. At the same time, the construction of children's agency in developmental psychology has also changed (building on the earlier transactional models, bidirectional models of parent-child relationships and the importance of the broader social context in children's development). As Kuczynski pointed out, there is a long tradition within developmental psychology of exploring both behavioral and cognitive aspects of children's agency in socialization, moral development, and parent-child relations'. Earlier assumptions about children's capacities and presumed incompetence are being challenged as it is recognized that children's competence depends not so much on their age as on the context, the support they receive, and the way activities are structured. What children can and cannot do depends on the structure and support—the 'scaffolding'—provided by those with more skills and understanding. The onus is therefore on adults to guide and assist rather than presume that any incompetence is necessarily the child's alone. Kaltenborn put it succinctly: 'the competence of the child is not just the skill of the child but "a way of relating" and requires to be considered in context'. He went on to expand on this: Children's agency is not just an age-related skill but a complex one constituted by personal characteristics of the child on the one hand, and by structural conditions such as family characteristics, the availability of social support and the practice of the family justice system on the other, all of which are embedded and influenced by societal macro-systems, especially the legal, cultural, political and economic system.The way we see children and construe their competence has considerable implications for the way society, the law and other institutions treat them. Along with the increasing recognition of children as social actors, there is now a greater understanding that in resolving disputes about parenting, it is important to work with children in the decision-making process. There seems to be increasing acceptance in some quarters that decisions that people seek to make about children's futures, even those presumed to be made on the basis of 'their best interests', cannot be made without an awareness of how the children themselves will respond to those decisions. That is, the decision-maker needs to weigh up the possible effects of different decisions on the children themselves, for the children are the ones who have to live with those decisions. In addition, children's reactions to the decision may in turn determine whether it was in fact in their best interests. American law professor Mnookin, in a classic article in 1975, explained this feedback problem in the nature of best interests decision-making with respect to the reactions of the parents [12].The best-interests principle requires a prediction of what will happen in the future, which, of course, depends in part on the future behavior of the parties. Because these parties will often interact in the future, this probable interaction must be taken into account in deciding what the outcome is to be. The feedback issue is also very significant in relation to children's reactions to different possible orders. An awareness of the importance of hearing the voice of the child has emerged from a recognition that for a decision to 'work' it needs to be one which children are able to accept, even if it was not their preferred option. Kaltenborn's research supports this. In following up children for whom reports had been written for the courts in Germany some years before, Kaltenborn found that ignoring children's preferences and attachments often led to 'a difficult situation for the child...trajectories of suffering...and/or later changes of the living situation'[13].The need to consider the workability of arrangements from children's viewpoints has become particularly important as shared parenting has become more

ТҮЙІН
Осы мақалада автор қылмыс құрбандары мен куәлары болған балалар құқықтарын қорғау халықаралық құқықтық механизімін қарастырады.

РЕЗЮМЕ
В данной статье автор рассматривает международно-правовой механизм защиты прав детей которые стали жертвами и свидетелями преступления.

12. Gillick v West Norfolk & Wisbech Area Health Authority [1986] AC 112.

commonplace and has been encouraged by legislatures. Shared parenting usually involves more interaction between the parents than is the case in more traditional custody and access arrangements where the non-resident parent is not involved in the day-to-day lives of the children. It also involves more movement for the children between households. Since children respond in quite varied ways to shared parenting arrangements, it can be particularly important to listen to their views about it and to keep on listening as they grow older. The movement towards greater participation by children has also emerged because of a conviction that children ought to be able to participate. Notions of children's rights in general have been combined with a new focus on children's social citizenship. This helps to build a moral case for the inclusion of children's views and perspectives in all aspects of adult decision-making that affect them. In many different areas of life there has been a movement to encourage such participation in democratic processes by children. As other groups in society are consulted on various problems, policy initiatives or their experience of services, so advocates for children have argued that children too should be included in this citizenship. These ideas have been extended to a focus on children's citizenship in relation to parenting disputes, reflecting also the changing status of children and the greater democratization of relationships within the family.Children's right to participate is embedded in the United Nations Convention on the Rights of the Child. Article 12(1) of the Convention provides that states should 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'. Article 12(2) specifically concerns court proceedings. It provides that the 'child shall in particular be provided an opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body'. This has been identified as one of four general principles which underpin the more specific rights provided by the Convention [14]. The notion of children's rights in relation to post-separation parenting arrangements has translated into an acceptance that children must also have rights in relation to the process. The concept that children have a right to be heard is the natural corollary of saying that they have substantive rights in relation to the outcome of parenting disputes, for an awareness of children's perceptions, wishes and beliefs may well be significant in providing an understanding of how a court should give effect to their rights. The possibility that taking children's views into account might lead to better and more informed outcomes that have a greater chance of being acceptable to and workable for children is of course one of the main arguments for doing so [15]. As academic and clinical psychologist Warshak pointed out, 'children have something important to tell us that may change the decisions we make on their behalf and the way in which we make them' [16].

13. Kronborg, A and I L Svendsen, 'Children's Right to be Heard: The Interplay between Human Rights and National Law' in P LØdrup and E Modvar (eds), Family Life and Human Rights (Gyldendal Akademisk, 2004) pp 405–416.

14. Greene, S, 'Child Development: Old Themes, New Directions' in M Woodhead, D Faulkner and K Littleton (eds), Making Sense of Social Development (Routledge and Open University Press, 1999) pp 250–268; Lawrence, J, 'The Developing Child and the Law' in G Monahan and L Young (eds), Children and the Law in Australia (Lexis Nexis, 2008) pp 83–104.

15. Lawrence, n 14 above, p 90.

16. Lawrence, n 14 above, p 90.