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## Theory and practice of evidence and proof in civil proceedings

Evidence and proof in civil proceedings. The article deals with theoretical and practical issues of proof and proof in the civil process. The concept of evidence in theory and its practical application in the civil process are disclosed. Emerging in the civil process in the process of proving questions.

**Keywords:** civil process, proof, evidence

## Теория и практика доказательства и доказывания в гражданских процессах

В статье рассмотрены теоретические и практические вопросы доказательства и доказывания в гражданском процессе. Раскрывается понятие доказательств в теории и практическое применение его в гражданском процессе. Возникающие в гражданском процессе при доказывании вопросы.

**Ключевые слова:** гражданский процесс, доказывание, доказательства

## Азаматтық іс жүргізудегі дәлелдемелер және дәлелдеу теориясы және тәжребиесі

Мақалада теория жүзіндегі дәлелдеме түсінігі және оны тәжірибеде қолдану мәселелері зерделенген. Тәжірибе жүзінде дәлелдеу кезінде туындайтын сұрақтарға назар аударылған. Дәлелдемелер және дәлелдеу теория мен тәжрибе арасындағы айырмашылықтар қарастырылған.

**Түйін сөздер:** азаматтық іс жүргізу, дәлелдемелер, дәлелдеу

Questions related to the use of evidence and proof in civil proceedings are governed by chapter 7 of the Civil Procedure Code of the Republic of Kazakhstan. This chapter is specifically dedicated to procedural law of evidence and proof, it opens in Article 64, which contains a number of important provisions of the law of evidence. First of all, it defines the evidence. Then, given a list of procedural means of evidence that could be used in court. The article also contains provisions relating to such procedural categories, as a subject of evidence and other circumstances to be proven in civil cases.[1]

The first part of Article 64 of the Civil Code of the Republic of Kazakhstan determines that the evidence in the case are obtained legal way the evidence on which in accordance with the law the court establishes the presence or absence of circumstances justifying the claims and objections of the parties and other circumstances relevant to the proper resolution of the case.[1]

Evidence - it is just information about the circumstances that the court must establish. This rate of the evidence and facts of the case - equivalent concepts. They could replace each other, and then the evidence would be determined as the information on the circumstances of the case, it establishes the essential things for the evidence on the court. In essence, nothing would have changed.

The evidence about the circumstances of the case may serve as evidence in court only if they were obtained in the manner prescribed by law.

The law defines, firstly, those procedural proof means of which the actual data, and secondly, the procedure for their preparation and investigation can be obtained.

The list of allowed under procedural means of proof contained in Paragraph 2 of Article 64 of the Civil Procedural Code of Kazakhstan - an explanation of the parties and third parties, the testimony of witnesses, material evidence, expert opinions, records of the proceedings, court records, reflecting the progress and results of legal proceedings, and other documents.[2]

Thus, from the content of this provision is clear procedure that provided proof of funds list is not exhaustive. The court has the right to use and any other evidence presented by the parties involved in civil proceedings. In judicial practice, fluctuations were known as to whether it is possible to use as evidence a video - and audio recording. I believe that the procedural law allows it, because their study rules established in Art. 205 Code of Civil Procedure of the Republic of Kazakhstan.

Proofs are divided into personal and material (or subject), depending on whether the source of information, people or things.

For personal evidence include explanations of the parties and third parties, the testimony of witnesses and expert opinions; to material, substantive - written and physical evidence, as carriers of information material objects appear in them.[2]

By way of proof of the formation is divided into initial and derivatives. The initial proof-are the primary sources; derivatives - those which reproduce the content of the other evidence. They are prepared, "second-hand". For example, a copy of a document or testimony of a witness, who himself did not observe any fact, and found out about it from another person.

Evidence may be direct or indirect. Direct evidence allows only one conclusion about the desired actual present. For example, a debtor's receipt of the receipt of the money loaned. Indirect evidence gives rise to a number of assumptions, multiple versions. So, if the plaintiff is in the court of the postal receipt of money to the defendant, it is only indirect evidence of the loan agreement, as there may be other versions - that the plaintiff himself returned previously taken from the defendant borrowed money or that he transferred them to transfer to another person and so on. Therefore, the circumstantial evidence is

necessary to analyze all the versions until a study of all the evidence and circumstances of the case in the aggregate will not allow the court to come to one definite conclusion.

The law allows the use of all types of evidence, establishing at the same time, that no evidence has to court a predetermined force.

The circumstances justifying the claims and objections of the parties, are the subject of the so-called evidence. Law term "item of proof" is not used, but it is widely used in practice and procedure adopted in the theory of law. This range of legal facts, the establishment of which depends on the resolution of the merits. They are all subject to proof in the process, hence the name, the subject of proof. They are called the facts sought, since the court has to establish the facts in order to properly resolve the matter.

Evidence form the subject of the material facts - of a legal nature, ie, the facts stated in the substantive law and rules entailing substantive consequences. The composition of the facts included in the item of evidence for each case is different. It depends on the requirements and objections by parties. The facts that justify their claims and objections, just the subject of proof.

For other circumstances relevant to the proper consideration and resolution of the case, are the legal facts of procedural law and evidentiary facts.[3]

In civil cases there is a need to clarify the circumstances that are not only substantive, but also procedural importance.

For example, the circumstances causing the suspension or termination of the proceedings, or valid reasons of absence of any of the participants in the hearing process. Such circumstances are also installed with the help of evidence.

Evidentiary facts - facts that are not themselves sought legal facts, but help to establish their presence or absence. Evidentiary facts occupy an intermediate position - they first have to prove it, but after that they are evidence of the required facts. Therefore, they are sometimes called intermediate facts. Most often, they are only indirect evidence in the case.

A common example of evidence is the fact the defendant stay the proceedings for damages in the day when the damage was done in the other place (alibi). This fact needs to prove, but if it is set by the court, then he is that the damage was not caused by the defendant.

In accordance with Art. 65 Code of Civil Procedure of the Republic of Kazakhstan, each party must prove the circumstances to which it refers as the basis of their claims and objections.[4]

Thus, the law provides that the burden of proof rests with the party. It is distributed among the parties as follows: the plaintiff must prove the evidence on which it relied in support of its claims, the defendant - the evidence on which it relied in support of its objection against the claim.[5]

This rule expresses and reinforces the main element of a controversial start - each interested party must prove the evidence that justifies his legal position.

For a long time in the theory of procedural law it was believed that more correct to speak not about the responsibilities and the burden of proof, since no sanctions for failure to comply with it has been established. An indication of the

legal duty is a sanction for non-compliance. Incentives for the parties to the proof, is not a sanction, but the interest in obtaining a favorable decision for the party.

In default of a party responsibilities or burden of proving adverse effects may occur in the form of loss process.

The burden of proof is also on a third party, making independent claims. They have to prove the evidence that substantiates their claims. Otherwise, in meeting these requirements may be denied.

Third parties not making independent claims are legally interested in reaching a decision favorable to the party in which they are involved, respectively, they are subject to the burden of proof as evidence that substantiates claims or objections.

I think that to me may not agree, referring, I broadly interpret the norm of Art. 65 Code of Civil Procedure of the Republic of Kazakhstan, according to which only the parties, which are the plaintiff and the defendant has the burden of proof. As a third party, as the independent claims, and not claiming, are full-bodied members of the civil procedure, and have enjoyed procedural rights and bear procedural obligations, they also bear the burden of proof.[6]

The public prosecutor, the public authorities or local governments, and other entities that have gone to court to protect the interests of other persons, must also prove the actual figures, which declared their demands are justified.

Determining the court proof of the subject begins with the adoption of the statement of claim. The Court must determine on what evidence the applicant refers to, what is due to the legal qualification of these relationships and what other evidence may be relevant to the case. It should also take into account the evidence on which the defendant bases its defense against the claim.

The Court's task to determine the subject matter of proving directly stated in the articles relating to the preparation of the case for trial.

In the process, the composition of the actual data included in the evidence object can change, for example due to changes in the base of the claim or cause objects to it, presenting a counterclaim or third party claim.

Proper identification of the subject of proof in each case is very important, as if the court does not examine all the facts relevant to the resolution of the case, this will entail the imposition of unreasonable solutions. In cases when the court, properly defining the desired range of evidence, and will explore such evidence, which are not relevant to the case, it will cause unnecessary waste of time and effort and trial participants in the case, and most importantly, can lead to incorrect permissions on the case substantially.

Incorrect definition of the subject of proof - one of the most common judicial errors.

By virtue of the adversarial process of constructing the presentation of evidence lies with the parties and others involved in the case. They themselves have to take care to confirm the evidence the evidence relied on.

The Court is not empowered to collect or to request evidence on its own initiative. But the well-known activity in the process of providing evidentiary materials, the Court has. Firstly, in case of insufficiency of evidence submitted by the parties, it shall be entitled to offer them additional evidence. In - Second, if the

presentation of evidence by the parties is difficult, at the request of the court should assist them in collecting the necessary evidence and reclamation.

In any category of cases in the event of issues requiring special knowledge, the court may on its own initiative appoint examination.

As a rule, the evidence collected during the preparation of the case for trial. The law defining the task of preparing the case, as one of them called "the definition of evidence that each party should submit in support of his allegations".

Code of Civil Procedure allows the presentation of evidence later in the hearing of the court of first instance. But it may require a deposit business, in particular, on the other hand claim that she needed time to get acquainted with new evidence and prepare a defense against them.

New evidence may be presented in the court of appeal. The cassation instance - only in cases where the party could not present them before.

In cases where the written or physical evidence are not in the most part, but we must get them from the other persons involved or not involved in the case, a party may apply to the court for assistance in obtaining them.

The petition for the taking of evidence can be claimed when filing a claim and during the preparation of the case for trial. Can it be stated in a court session, if identified a need to obtain additional evidence.

The proof is recognized by the court to be relevant if it is evidence that confirms or refutes the findings called into question the existence of the circumstances relevant to the case.[7]

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