

Improvement of the guardianship system for minors in the light of the current situation of " De Facto Orphans"

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Abstract. Nowadays, there are a large number of " De Facto Orphans" in our country, who are facing the dilemma of controversial identification, difficulty discovered by the outside world, and the lack of parental responsibility, which reflects that there are still some deficiencies in the current juvenile guardianship system. This paper will seek to improve the guardianship system for minors from three angles: clarifying the definition of "De Facto Orphans", establishing a parental authority system, and improving the guardianship supervision system.

Keywords: de facto orphans, guardianship system, parental authority and guardianship, guardianship supervision system.

1. Introduction

As children are physically and psychologically immature, their legitimate rights and interests are very vulnerable to unlawful infringement. In China, there exists a large number of De Facto Orphans, who lack effective guardianship, and whose legitimate rights and interests are difficult to safeguard in a timely and effective manner under the law, and who are therefore referred to as "De Facto Orphans". At present, China has a series of laws and regulations such as the Civil Code, the Law on the Protection of Minors, and the Law on the Protection of the Rights and Interests of Women and Children, which constitute a legal protection system for the rights and interests of children. ") issued jointly by 12 departments including the Ministry of Civil Affairs, the Ministry of Public Security, and the Ministry of Finance in 2019, and the "Circular on Further Improving the Work of Guaranteeing De Facto Orphans" (hereinafter referred to as the "Circular") issued jointly by the Ministry of Civil Affairs, the Ministry of Public Security and the Ministry of Finance in 2021, which clarifies the concept of "de facto orphans". The concept of "De Facto Orphans" was clarified. At present, even though China has been updating the relevant laws and regulations, there are still difficulties in implementing the system of guardianship for minors and in protecting De Facto Orphans.

2. Status of " De Facto Orphans"

2.1. Disputes over the identification of " De Facto Orphans"

In practice, De Facto Orphans usually refer to minors whose parents are still alive but who, for various reasons, are unable or unwilling to fulfill their responsibility for their upbringing and guardianship. However, the scope of "De Facto Orphans" under the current law is still relatively narrow, and is mainly limited to a few situations stipulated in the "notice". For example, in Xuzhou City in 2019, six minor children of four compulsory medical patients were not included in the scope of De Facto Orphans due to the failure of the Notice to list the circumstances of compulsory medical treatment. Parents are unable to fulfill their guardianship duties due to compulsory medical treatment, and their children objectively meet the status of De Facto Orphans, but the "Notice" does not include this situation in the identification of De Facto Orphans, which leads to a conflict between the criteria for identifying De Facto Orphans and the facts, reflecting the fact that there is a conflict between the criteria for identifying De Facto Orphans and the facts. This leads to the conflict between the criteria for determining "De Facto Orphans" and the facts, reflecting that the determination of "De Facto Orphans" still exists on the level of the lack of regulations, but also shows that the enumeration of

regulations is difficult to cover all the situations in reality. In addition, most of the existing theses and normative documents do not clarify the relationship between children in difficulty and De Facto Orphans, which has led to problems such as incorrect application of laws and regulations and confusion about who should be assisted in the implementation of the relevant laws and regulations by government departments around the country.

2.2. Disadvantages of the family custody model

The idea of the "blood family" is widespread in China, and in the family guardianship system, all the rights and obligations of minors are strictly controlled by their parents or other close relatives. Even though, out of a desire to pay special attention to and care for minors, China is placing increasing emphasis on effective guardianship of minors at both the social and State levels, China's current guardianship system is still based on family guardianship, with State guardianship supplementing family guardianship where it is lacking. However, under the traditional family guardianship model, it is difficult for "De Facto Orphans" to receive outside attention and timely relief for their legitimate rights and interests. For example, in the case of "Nanjing girls starved to death", two young girls were trapped in their home for two months until the community police came to visit them and found that they had already died [1]. In this case, the community's regular subsidies and the police's regular visits show that public power has already intervened, but due to the closed nature of family guardianship, it failed to prevent the tragedy from occurring. Under the premise of high dependence on the parents as the main family guardianship, family guardianship problems, the legitimate rights and interests of minors will be more difficult to ensure.

3. The Dilemma Of The Guardianship System For Minors From The Perspective Of "De Facto Orphans"

3.1. Lack of separation of parental authority and guardianship

Parental authority, as a right of identity, is a natural right and obligation of parents based on their status and is not explicitly provided for in our current laws. Custody, as a legal right, currently exists in the world in two legislative models: "large custody" and "small custody". Under the "small guardianship" model, the parental authority system is used for minors whose parents can exercise guardianship, while minors whose parents are unable to exercise guardianship or adults who do not have full capacity for civil behavior are protected by the guardianship system, with the parental authority and guardianship systems being separate and complementary to each other. China's current civil law system adopts the concept of "large guardianship", which is a broadly defined guardianship system that supervises and protects the personal and property rights and interests of all minors, as well as incapacitated and limited-capacity persons, and which does not emphasize parental guardianship separately or make a specific distinction between parents and other guardians. As a result, parental authority is confused with guardianship [2].

3.2. Inadequate guardianship supervision system

As wards, "De Facto Orphans" often do not have the appropriate civil behavioral capacity, and in the absence of effective guardianship, they are unable to independently apply to the court to revoke the guardian's guardianship qualifications, and therefore require a guardianship supervision system to protect them. However, the existing relevant laws and regulations are too vague, often making it difficult to implement the guardianship supervision system. For example, Article 36 of the Civil Code provides for three circumstances in which a person's guardianship may be revoked, which constitutes the basic content of the guardianship supervision system. However, this provision only addresses the circumstances in which a guardian should be deprived of his/her guardianship qualification and lacks provisions on the suitability of the guardian's qualification and the specific selection procedure [3]. At the same time, due to the imperfection of the guardianship supervision system, the state guardian

also exists in name only. For example, in practice, due to not having the ability to personally perform guardianship duties, the civil affairs department is often the guardian to the children's welfare institutions to care for the guardian, and then no longer concerned, not personally involved in the process of guardianship, and therefore seldom be held accountable, presenting a kind of "lack of" state [4], reflecting the relevant legal system in the civil affairs department of the relevant organizations and their negligence of supervision mechanism. This reflects that the relevant legal system in the civil affairs department of the supervision mechanism of the relevant organizations as well as their negligence in the supervision of accountability and other aspects are missing, making it difficult for the state guardianship to comprehensively protect the legitimate rights and interests of the wards.

4. Proposals To Improve The System of Guardianship of Minors

4.1. Defining the concept of " De Facto Orphan"

"De Facto Orphans", i.e. de facto unsupported children, is centred on the inability or refusal of both parents to fulfil their obligations of support and guardianship, resulting in de facto unsupported minors. However, in conjunction with the definitions given in the Opinions and Circulars, the subjective failure of a guardian to fulfil his or her guardianship obligations is usually only included in the case of "lost contact", while other possible circumstances are not considered in detail. Other possible scenarios are not considered in detail. Nanjing girls starvation case" as an example, music as a mother does not meet the legal definition of "lost contact", but its failure to fulfil the guardianship responsibility of the two young daughters has resulted in the actual situation of no one to support, which once again illustrates the "notice" given circumstances do not meet the legal definition of "lost contact", but the guardian's subjective failure to fulfil the duty of guardianship. This again demonstrates that the circumstances given in the "Notice" are not comprehensive. The determination of "De Facto Orphans" should still focus on whether the guardian fulfils the core characteristics of the guardianship obligations, and to this end, the relevant departments can formulate regulations to further improve and supplement the concept of "De Facto Orphans" scope, based on the original. To this end, the relevant authorities may enact regulations to further improve and supplement the scope of the concept of "De Facto Orphans", adding to the original list the circumstances in which other guardians fail to fulfil their guardianship obligations, or changing the regulations from enumerative to general, to be supplemented by normative documents issued by the local governments at the level of concrete practice.

4.2. Establishment of the legal regime of parental authority

In China's traditional view, parents usually have a special guardianship status. Article 26 of China's Civil Code stipulates that "parents must raise, educate and protect their minor children", and the revised Law on the Protection of Minors also emphasizes parental guardianship in the chapters of General Provisions, Family Protection, and Legal Liability, which shows that China has already had a parental authority system, but it has not explicitly stated it and set up a complete supporting legal system. It is evident that China has a parental authority system in substance, but it has not been clearly stated and a complete supporting legal system has been set up. To emphasize the first guardianship responsibility of parents, and to visualize the "invisible" parental authority system, China's legislation can refer to the "small guardianship" model implemented by civil law countries, and introduce the concept of parental authority into the relevant parts of the Civil Code, to establish a parental authority system in line with China's national conditions, thus achieving the goal of protecting the parental authority system in China. The concept of parental authority should be introduced into the relevant parts of the Civil Code to establish a parental authority system that is in line with China's national conditions.

5. Conclusion

The author believes that a comprehensive supervision system should be established. Traditionally, the discussion on the supervision system of minors' guardianship mainly focuses on the supervision of the guardian's performance of guardianship duties, but with the process of the "public law of private law", the academics' concern for the supervision system of minors' guardianship gradually expands from single supervision in the course of the incident to the three phases of the incident: beforehand, in the course of the incident, and after the incident. To strengthen the feasibility of the guardianship supervision system, it is necessary to improve the existing legal system from these three perspectives.

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