

Problems and Improvement of The Guardianship Supervision System for Minors in the Civil Code

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Abstract: In recent year, the issue of supervision of minor guardianship has gradually become a hot topic of discussion. To a large extent, it is related to the frequent occurrence of cases of children's injuries due to the negligence of the guardians of minors in fulfilling their guardianship duties. At present, China has established a guardianship system which is mainly based on family guardianship and supplemented by state guardianship. However, this is only the relevant provisions of the juvenile guardianship system, and the system of juvenile guardianship supervision is still scattered in the Law on the Protection of Minors, the Civil Code, and the Law on Combating Domestic Violence, etc., which is most obviously manifested in the generality and limitations of the provisions of the juvenile guardianship supervision system, and the limitations of the scope of the adjustments have led to the passivity of the minors in safeguarding their rights. Modern society advocates "children's rights-based", under this trend, the custody of minor children will not only the family within the matter, but also should be included in the adjustment of society and the state, with the help of their power to safeguard the legitimate rights and interests of minors. In this paper, we will start from the existing system of supervision of minors' guardianship in China, discuss the lack of supervision system of minors' guardianship, and put forward some suggestions for improvement.

Keywords: Minors; guardianship; guardianship supervision.

1. Importance of the System for Monitoring the Guardianship of Minors

Cao and Zhou are of the view that the incorporation of supervision of minors' guardianship into the scope of State supervision is not only a necessity for the implementation of international human rights law, but also a basic requirement for the fulfillment of China's obligations to protect human rights [1]. In this sense, the implementation of the supervision system for the custody of minors not only reflects China's consistent attitude towards the fulfillment of its international obligations, but is also an effective way to solve the problems associated with China's current custody supervision system. Li and Luo believe that the root cause of whether the legitimate rights and interests of minors are violated does not lie in the soundness of China's juvenile guardianship system, but in its failure to effectively implement [2]. Chen analyzes the necessity of establishing a guardianship system for minors due to social changes in China by applying the theory of institutional equilibrium in the new institutional economics, and points out that institutional cost and social justice must be taken into account when establishing a guardianship system for minors [3].

2. Guardianship of Minors in the Civil Code

2.1. Scope of the subject of guardianship

The civil code stipulates that parents are the guardians of minors, in this case biological parents, adoptive parents and step-parents in a nurturing relationship. If the parents are dead or incapable of guardianship, the following persons may act as guardians: (1) grandparents; (2) elder brothers or sisters; (3)

other individuals or organizations willing to act as guardians, but only with the consent of the village committee, neighborhood committee or civil affairs department of the place where the minor is located; at the same time, it should be noted in particular that the above-mentioned persons and organizations are in order in the selection of guardians of the minor. At the same time, special attention must be paid to the fact that the above-mentioned persons and organizations are in order in the selection of the minor's guardian, and that the guardian shall be selected in that order from among those who have the will and ability to do so. On this basis, the Civil Code also contains detailed provisions on the duties of the guardian, requiring him or her to perform his or her guardianship duties in the best interests of the minor, and to take the minor's age and state of mind as important references for the performance of his or her guardianship duties, which fully reflects the importance the Civil Code attaches to the rights of minors, a special category of individuals.

2.2. Types of custody

The types of guardianship for minors in the Civil Code include five categories: parental guardianship, temporary guardianship, institutional guardianship, entrusted guardianship and testamentary guardianship, and it is worth noting that the addition of testamentary guardianship has been hotly debated. The author believes that, for the selection of the guardian, this form is more favorable, more flexible, it can well reflect the civil law of the autonomy of meaning, but also better protection of the rights of the guardian, reflecting the civil code of the civil liberties of the rights of the high degree of care. Another hotly debated form of entrusted guardianship. The specific content of entrusted guardianship is mainly reflected in Article 1189 of the Civil and Article 13 of the Judicial Interpretation of the Guardianship System of the General Part of the Civil Code. As can be seen from these

articles, the right of guardianship exists independently in our country, and is not transferred with the transfer of the guardian's responsibility for guardianship, nor is his or her legal responsibility extinguished as a result.

2.3. Modification and revocation of guardianship

The revocation of the guardian's guardianship by the court is the centralization of the modification and revocation of guardianship in the Civil Code. Specifically, the court, at the request of the person or organization concerned, decides whether or not to forcibly revoke the guardian's guardianship, depending on the seriousness of the case. When the State intervenes in the guardianship of a minor by exercising public power, the guardianship of the minor no longer falls within the scope of internal family affairs, and the State takes over the legal status of the minor's parents as guardians and becomes his or her final custodian.

3. Problems with the System for Monitoring the Custody of Minors

With regard to the guardianship system for minors, although China's Civil Code has added new provisions such as the form of testamentary guardianship and temporary guardianship in emergency situations, which to a certain extent breaks the traditional institutional deadlock, there are still some shortcomings when compared with the relevant civil courtesy laws of some developed countries, as follows.

3.1. Deficiencies in the provisions on parental authority

The term "parental authority" is not explicitly used in our country, and no distinction is made between the guardianship duties of parents and those of other guardians. Article 26 of the Civil Code stipulates the duty of parents to guardianship their minor children, but it is still not specific enough and does not fundamentally cover the full scope of parental authority. The lack of a clear distinction between parental authority and ordinary guardianship can fundamentally blur the distinction between parents and other guardians. It is only when the exercise of parental authority is impeded that the guardianship system gives full play to its important role as an extension and supplement to the parental authority system, thus allowing other guardians to perform their duties of nurturing and protecting the minor. It can be seen that parental authority, which is the basis of the guardianship system, is an important reference for guardianship and the effective protection of the rights and interests of minors, and should be clearly defined.

3.2. Inadequate guardianship monitoring system

Supervision of guardianship in this context refers specifically to the supervision of the guardianship of minors, with the aim of supervising the fulfillment of their guardianship responsibilities in accordance with the law, and plays a pivotal role in safeguarding the legitimate rights and interests of minors. The basic content of guardianship supervision is set forth in article 36 of the Civil Code, but there are still two deficiencies. Firstly, there is a lack of procedures for the selection of guardianship supervisors, which in turn leads to difficulties in judicial practice; secondly, there are no provisions on the duties of guardianship supervisors, including the registration of the property of the

ward at the time of the establishment of the guardianship, and the timely handling of the incapacity of the guardian to exercise guardianship.

3.3. Inadequate provisions for commissioning care

It is not uncommon in life for guardians to be unable to fulfill their custodial duties, for example, in the case of the New Crown Pneumonia epidemic, when parents are isolated from their minor children. At such times, someone is needed to care for and protect the minor. Article 34 of the Civil Code clearly establishes the duty of the relevant organizations to take temporary care measures for minors in specific situations. Unfortunately, however, it does not provide for a system of care for minors whose guardians are unable to carry out their responsibilities for an extended period of time.

3.4. Lack of procedures for initiating temporary guardianship

Temporary guardianship is a system of temporary emergency guardianship initiated by the State for the special protection of minors in the event of the absence of parents or other guardians for any reason. According to article 36 of the Civil Code, the court may revoke the guardianship of the current guardian and arrange temporary guardianship measures for the minor only if three legal circumstances arise and the individual or organization concerned files an application with the people's court. At the same time, article 92 of the Law on the Protection of Minors also stipulates that, in the event of seven statutory circumstances, the civil affairs department shall, in accordance with the law, take measures such as entrusting the minor to relatives for rearing and placement, or contacting children's welfare institutions and other social assistance organizations for the purpose of accepting or rearing him or her, thereby realizing the purpose of temporary guardianship of the minor. However, there is no provision in the existing legal system as to who should initiate this procedure when the need for temporary guardianship arises.

In the author's opinion, minors' mental and physical aspects are still in the developmental stage of their mind is not mature, coupled with the lack of certain social experience, it is very difficult to take the initiative to the court, the civil affairs department to apply for temporary guardianship, and even temporary guardianship have never heard of. At the same time, for the people around the minors, it is also very difficult to ask them to pay attention to and be aware of the situations stipulated in the above two laws in reality, and it is also very difficult to find out these situations especially in the case of emergencies, not to mention that most of the people have the idea of "not caring about their own business", which leads to the initiation of the temporary guardianship becoming This makes the initiation of temporary guardianship difficult. The lack of a procedure for the initiation of temporary guardianship renders the system a mere formality, and the original purpose of its design will be difficult to realize, let alone truly play its role.

3.5. Lack of provisions for educational assistance after the reinstatement of parental authority

Parents in this context refer specifically to parents whose custody has been revoked. The circumstances in which a

parent may be reinstated after revocation of custody are set out in article 38 of the Civil Code. However, in order to safeguard the legitimate rights and interests of minors, and taking into account the fact that such parents have already been convicted of "previous offenses" (committing acts that are seriously detrimental to the physical and mental health of their minor children), or have neglected their duties of guardianship, they should be provided with educational assistance and strengthened with special education and care, which is regrettably not provided for in the Civil Code.

3.6. Absence of prohibition of guardianship

According to article 27 of the Civil Code, it can be shown that our Civil Code has an open and tolerant attitude towards the guardianship qualification of the guardian. However, openness is not the same as liberalization, and regrettably, the Civil Code does not provide for situations in which guardians are prohibited from acting as guardians. Guardians live with minors for long periods of time, and their level of education, personal conduct, moral character, place of living, and work, economic and physical conditions will have a significant impact on the growth and development of minors. It is therefore important to take a precautionary approach and to clarify the circumstances in which guardians are prohibited from acting as guardians.

4. Suggestions for Improving the System for Supervising the Guardianship of Minors

The newly revised Law on the Protection of Minors adds many detailed provisions to the system of guardianship of minors, and effectively links the provisions of the Civil Code relating to the guardianship of minors, but whether it can complement the relevant system of guardianship of minors remains to be seen. The author believes that the improvement of the minor guardianship system should be from a systematic point of view, not simply point to point to improve, improve the general principle should be to safeguard the rights and interests of minors as the core, strengthen the system design. In summary, the specific recommendations for improvement in this paper are as follows:

4.1. Clarifying the content and exercise of parental authority

Parental authority, also known as "obligatory authority", is aimed at the education and protection of minor children, and is characterized by a dual nature of rights and obligations. According to China's traditional civil law theory and the legislation of various countries, the parents of a minor are the subjects of parental authority, which is exercised jointly by both of them. (Grandparents and step-parents are not subjects of parental authority and do not enjoy it; they are merely auxiliaries or agents of the subject exercising parental authority. In the event of divorce, the exercise of parental authority may be determined by agreement between the parents or by means of litigation. If one parent is unable or unfit to exercise parental authority, it may be exercised independently by the other parent; if neither parent is able or unfit to exercise this right, the minor child is placed under the protection of the guardianship system.

4.2. Establishment of a system for monitoring the guardianship of minors

If one of the parents of a minor dies, or if a person or organization other than the parents acts as the minor's guardian, a guardianship supervisor shall be established. The selection of guardianship supervisors can be divided into the following cases: (1) where the guardianship supervisor is a relative of the mother's family, i.e., where the father or a close relative of the father's family serves as the guardian; (2) where the guardianship supervisor is a relative of the father's family, i.e., where the mother or a close relative of the mother's family serves as the guardian; and (3) where another person or organization serves as the guardian, a guardian may be selected from the relatives of the minor, or from a representative of a village committee or neighbourhood committee in the area of the minor's place of residence or a representative of party members. guardianship supervisors.

At the same time, the appointment of a guardianship supervisor may take the form of a letter of appointment, in which the subject of guardianship supervision, the duties of the guardianship supervisor and the legal consequences thereof are clearly defined. The letter of appointment is not only a formal legal confirmation of the guardianship supervisor, but also a legal supervision of the guardianship supervisor's performance of his or her duties, which is conducive to further clarification of the duties of the guardianship supervisor, and to the realization of the purpose of protecting the lawful rights and interests of minors.

4.3. Establishment of a system of entrusted care for minors

In real life, many parents of minors work outside the country, at which point the exercise of their guardianship is limited by time, space and space, so entrusting their children to the care of friends and relatives becomes the best option. Article 22 of the lapsed Civil Rights Opinions stipulates that "a guardian may delegate some or all of his or her guardianship duties to another person". However, by carefully reading this provision, we can easily find that this legislative language is not very accurate. Moreover, it should be noted that guardianship is a personal responsibility, and the guardian's guardianship duties cannot and will not be automatically transferred; the only matters that can be entrusted to others are the care and protection of minors. Therefore, article 22 of the newly revised Law on the Protection of Minors, when stipulating the relevant circumstances of "entrusting care", does not follow the expression "entrusting guardianship" in the Opinions of the People's Republic of China, and this legislative terminology reflects the legislator's correct understanding of the nature of the entrusted care system. This legislative term reflects the legislator's correct understanding of the nature of the entrusted care system. However, this provision is still not perfect.

First, article 22 of the Law on the Protection of Minors stipulates that parents "shall" entrust care to another person if they are "unable to fully perform their guardianship duties within a certain period of time". In the author's view, this provision needs to be further improved in the following two respects. First, to clarify the "a certain period of time". In practice, the period of time is not clear, it is likely that the guardian neglected to entrust or in non-essential circumstances entrusted others to care for minors. Secondly,

the prerequisite for entrusting guardianship has been narrowed from "unable to fully fulfill the duties of guardianship" to "unable to live with the minor child. In reality, both parents are busy working for a long time, and have no choice but to entrust their minor children to their grandparents, etc., and their grandparents will take care of them in their daily life is very common; although these parents need the assistance of other people to take care of their children, they can still fulfill the main responsibility of guardianship, so it should not be mandatory to entrust them with the custody of their children. Secondly, in view of the increasing socialization of China's guardianship system, trustees should not be limited to natural persons, but should be included in the scope of institutions and organizations with the relevant qualifications. Finally, the rights and obligations of the parents of the minor and the appointee in the entrusted care system also need to be further clarified. In particular, it should be noted that guardianship is not transferred as a result of parental entrustment, and that parents are still responsible for the upbringing of their own children; at the same time, the person to whom the care is entrusted should also perform his or her duties within the scope of his or her entrustment and assume the corresponding responsibilities.

With regard to the specific scope of the entrusted care, the author believes that it can be flexibly determined by the entrustor, depending on the specific circumstances of the person under care and the trustee, and that it can be the care of the person under care in terms of his or her life, health, safety, etc., as well as the care of the person under care in accordance with other guardianship matters stipulated in the Law on the Protection of Minors and the Civil Code. Examples include representing the person under care in the execution of civil legal acts, protecting the person's other lawful rights and interests, including property rights, and guiding the person to establish a correct outlook on life, values and the world.

4.4. Clarifying the subject of temporary guardianship initiation and strengthening State intervention

In the course of the guardianship process, in the event of special circumstances that infringe upon the lawful rights and interests of minors, the public powers of the State (civil affairs departments, etc.) should intervene in a timely manner so that they can be protected in a timely and effective manner, and so that the system of temporary guardianship can be put in place. In cases where both parents are mentally ill, or otherwise incapable of full civil behavior, or where parents commit domestic violence against their minor children, in the absence of intervention by the public authorities of the State, the minor's guardianship will be left vacant, and the minor will remain the ultimate victim. The village (neighborhood) committee of the minor's place of residence is in the first line of supervision of the minor's guardianship, and should arrange for the corresponding personnel to pay close attention to the minor's and his or her parents' living conditions, and, in the event of the circumstances stipulated in the law, promptly submit an application for revocation of his or her guardianship qualifications to the court, and, at the same time, designate the minor's guardian in accordance with the relevant provisions of the (village) committee or the civil affairs department to prevent the minor from the emergence of a vacant period of guardianship. At the same time, before the guardian is appointed, if the minor needs a temporary

guardian, the relevant organization provided for in the law shall promptly appear to act as the minor's temporary guardian, in order to prevent infringement of his or her lawful rights and interests.

4.5. Establishment of an education assistance system

In order to prevent parents whose guardianship status has been revoked from resuming matters that jeopardize the lawful rights and interests of their minor children after their guardianship status has been reinstated, the following measures may be taken: (1) providing them with educational assistance and forcing them to undergo parental education; (2) setting up guardianship supervisors to oversee the implementation of the guardians' guardianship duties; (3) setting up a system of regular reports, requiring them to report on time to the village (neighborhood) committee or civil affairs department where the minor resides, with the above organizations regularly evaluating the guardianship situation; and (4) other measures to help parents whose guardianship status has been revoked to conscientiously carry out their guardianship duties once their guardianship status has been reinstated.

4.6. Further limitations on the guardianship qualifications of delegated caregivers, other guardians

Article 22 of the Law on the Protection of Minors clearly stipulates three situations in which a person may not serve as a delegated caregiver: (1) a person who has committed illegal and criminal acts such as sexual abuse, maltreatment, abandonment, abduction, or violence; (2) a person who has been involved in vices such as drug addiction, alcoholism, or gambling; and (3) a person who has refused to fulfill the duty of guardianship or who has long been negligent in fulfilling the duty of guardianship or caregiving. The Civil Code can refer to the above provisions when restricting the qualifications of guardians and entrusted caregivers. It is not difficult to see that the newly amended Law on the Protection of Minors has also set up additional paths for the protection of minors in many aspects, which has also played a good role in supplementing the guardianship system for minors in the Civil Code.

However, as can be seen from the above, the relevant provisions of the Law on the Protection of Minors are still inadequate and need to be further elaborated. At the same time, the Civil Code, as a basic code for regulating private law relations, and the Protection of Minors Law, as a public law, the latter's norms emphasize more on the management and constraints of public power on the social order, and the possibility of using the latter's relevant complementary provisions to substitute for the former's legislative perfection needs to be explored both theoretically and practically. This shows that there is still room for discussion and improvement of the system of guardianship of minors in China's Civil Code.

4.7. Improvement of the property guardianship system for minors

Minors have a certain amount of property is a general trend in current social development, and some minors even have a negligible amount of property, which indicates that the improvement of the property guardianship system for minors is imminent. In the process of improvement, still need to

uphold the core principle of safeguarding the legitimate rights and interests of minors, especially in the guardian of the minor's property management, the use of more always need to follow this principle. On the contrary, when the guardian to implement infringement of the property rights and interests of minors, such as self-use, possession, lending to others, etc., should be strictly prohibited, and bear the corresponding legal responsibility.

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