

Study on the Guardianship Supervision System of Minors in the Civil Code

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Abstract

The guardianship system is crucial to the protection of minors. After the introduction of Chinese Civil Code, the guardianship system has incorporated the concept of socialization of minors' protection, which has enhanced the operability of the guardianship system and provided a strong institutional guarantee for minors' rights and interests. However, against the guardianship supervision system for minors, detailed provisions on parental authority and guardianship supervision have not been made, the connection between real-time supervision and post-facto supervision system is missing, and the cooperation on the part of the public authority for the intervention of the protection of minors has not been adequate. Although the Law on the Protection of Minors amended in 2020 supplements the guardianship system for minors in the Civil Code. Due to the difference in the legal nature between the Civil Code and the Law on the Protection of Minors, and the relevant provisions still need to be improved, there is still room for discussion and improvement of the guardianship supervision system for minors in the Civil Code.

Keywords

Minors, Guardianship Supervision, Custody, Parental Rights

1. Introduction

In recent years, issues related to guardianship of minors have become increasingly important. Some cases of guardianship of minors have highlighted some of the tangles and challenges in concept and practice, which have triggered extensive attention and continuous discussions in both academic and practical circles in China. The timely introduction, revision and implementation of important laws such as the Civil Code, the Law on the Protection of Minors and the

Law on the Promotion of Family Education have provided the background for the discussion and improvement of the current guardianship system for minors. The daily guardianship behavior of guardians must be carried out under the premise of restraint and control, especially the guardianship behavior involving the personal and property matters of minor wards, which requires the intervention of a neutral third party to manage and supervise and authorize the guardianship behavior of guardians in order to regulate their guardianship behavior. This paper is divided into three main parts: firstly, comparing the basic theories of the guardianship system of minors through comparative law studies, then analyzing the main problems and dilemmas of the guardianship supervision system of minors in China, and finally analyzing these problems and propose corresponding improvement measures.

2. Theoretical Foundations of the Supervisory Guardianship System for Minors in a Comparative Law Perspective

The system of supervision of guardianship of minors is based on the theory of the parental authority of the state. The Declaration of the Rights of the Child in 1959 was the first international document to explicitly state the best interests of the child, and the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the United Nations General Assembly in 1999, reinforces the concept of the best interests of the child. The Convention on the Elimination of All Forms of Discrimination against Women, adopted by the UN General Assembly in 1999, reinforces the concept of the best interests of the child. The UN Convention on the Rights of the Child declares that every child has the right to be protected from violence, abuse, neglect and exploitation. Following the principle of the best interests of the minor requires the protection of the legitimate rights and interests of minors in all respects, including the application of this principle to the design of the system of supervision of guardianship of minors so that it becomes the highest guideline for handling disputes over the guardianship of minors in China (Lin, 2017).

The guardianship supervision system of the German Civil Code embodies the theory of state parental authority in the sense that the state can go beyond parental authority and intervene and protect minor wards with state coercive power. This is mainly done through two types of subjects, the courts and the juvenile bureau (Schwab, 2010). The Family Court and the Court of Guardianship act as judicial authorities for the supervision of guardianship of minors, while the Youth Bureau acts as an administrative authority for the supervision of guardianship of minors, forming a unique German dual guardianship supervision mechanism. In order to supplement the work of the guardianship judicial authorities, Germany has also established a guardianship supervisor system. Article 1799 of the German Civil Code provides that if guardianship is related to the administration of property, a guardianship supervisor shall be appointed to assist the guardianship court, who may request the guardian to inform him or her

of his or her guardianship duties and may access information related to guardianship and report to the guardianship court on the execution of guardianship matters in specific cases.

The Japanese Civil Code provides that the subject of guardianship supervision of minors is the guardianship supervisor, and that if the guardian of a minor is created by appointment of guardianship, the guardianship supervisor of a minor may likewise be created by appointment by will.

The state child welfare bureaus in the U.S. are specialized administrative bodies for the supervision of minors. Their duties are primarily to act in the best interests of the child or to bring court action to investigate and evaluate the guardianship of a guardian when the child is in danger or being improperly treated or neglected (Zhang & Xu, 2009), or even to strip the guardian of his or her guardianship.

On the basis of comparative law research, guardianship matters are both complex and highly specialized, and it is difficult to provide effective and timely relief for minors who are infringed and threatened if the relief supervision mechanism is only through the court making decisions. Taking into account the actual situation in China, the civil affairs department and the community should be chosen as the subject of supervision of guardianship of minors. According to Chinese Civil Code, the village (neighborhood) committee has the right to appoint guardians for minors under special circumstances, act as guardians for minors or apply to the court to revoke the guardianship. Therefore, it is reasonable for the village (neighborhood) committee to act as the subject of community guardianship supervision. The grassroots mass self-governance system can directly reflect the direct interests of the broadest masses of people, and China has now basically realized the national community grid management model, so the community can directly understand and grasp the actual situation of the guardianship of minor wards.

3. The Dilemma of the Guardianship Supervision System for Minors

First of all, the design of the guardianship system for minors in Chinese Civil Code has been greatly modified and improved compared to the previous ones, but there are still some shortcomings when comparing the civil-related legislation of developed countries. For example, Article 32 of the Civil Code, which was officially implemented on January 1, 2021, provides that “If there is no person qualified for guardianship according to law, the guardian shall be the civil affairs department, or the residents’ committee or villagers’ committee of the place of residence of the ward who is qualified to perform guardianship duties.” Although this provision provides a legal basis for depriving parents who do not have the capacity and qualification for guardianship of their guardianship rights, and stipulates that the main body to undertake this guardianship duty is the civil affairs department, the resident committee or village committee, and other or-

ganizational bodies, this is difficult to operate in practice. Another example is Article 36 of the Civil Code, which stipulates that relevant persons and organizations may apply to the people's court for revocation of guardianship in cases where the guardian has committed acts seriously damaging the physical and mental health of the ward or neglected to perform his or her duties causing the ward to be in a critical state. However, in practice, no one is willing to take up guardianship duties, so that no one is willing to sue. Even if a subject files a lawsuit to revoke guardianship, the court will have difficulty in making a decision because it cannot identify the subject of guardianship. This dilemma exists in practice in large numbers, resulting in the rights and interests of minors caused by custody difficulties cannot be effectively protected in a timely manner, and many children are in a state of loss of love, control and family. The main reason is that, on the one hand, there is no procedure for the selection of guardianship supervisor, and therefore faces operational difficulties in practice; on the other hand, the important duty of guardianship supervisor is to pay attention to the guardianship on a daily basis, including the registration of the ward's property when the guardianship is established, the confirmation of the guardian's disposal of the ward's property, and also the timely handling of the guardian's incapacity, but the Civil Code does not provide for this.

Secondly, there is a lack of provisions on parental authority. The term "parental authority" is not explicitly used in Chinese Civil Code, nor is there a clear distinction between parents and other guardians in terms of the content of guardianship. Only Article 26 of the Civil Code stipulates that parents have the obligation to raise, educate and protect their minor children, which fails to cover the content of parental authority comprehensively and is not specific enough. The practice of not clearly distinguishing between parental authority and ordinary guardianship dissolves the fundamental difference between parents and other guardians, and is not conducive to the transmission of our fine family culture and ethics. Guardianship is supposed to be an extension and supplement of the parental authority system, and it is only when the exercise of parental authority is hindered that the guardian will fulfill the duty of raising, educating and protecting the minor. Therefore, parental authority is not only the institutional basis of guardianship, but also an important reference for guardianship, which is particularly important for the effective protection of the interests of minors and should be clarified.

Thirdly, there is a need to link the real-time supervision mechanism with the post-facto supervision mechanism. Since minors are in a long-term process of gradual physical and psychological growth, their guardianship should be continuous, which means that the supervision system for the smooth operation of the guardianship of minors must also be continuous. Real-time supervision focuses on the daily supervision of the guardianship of minors throughout the entire process, and is mainly applicable to the absence or failure of guardianship. Real-time supervision is dynamic in nature and, because of its synchronization,

can be corrected in a timely manner. Post-event supervision is generally led by the judiciary and is mainly applicable to situations of guardianship violations. Post-facto supervision is remedial in nature and focuses more on the finality of revocation of guardianship. A cross-search on the Chinese Judicial Documents website using the keywords “petition for revocation of guardianship” and “minor” showed that there were 258 related cases, of which four were dismissed by the court and the others were revoked by the court. The other cases were revoked by the court. The revocation of guardianship is based on the situation that the minor under guardianship has fallen into “physical and mental health” and “legal rights and interests” have been seriously damaged and other “critical state”, and is treated as the last resort.

Finally, there is a lack of public authority to intervene in custody. The legal responsibilities of the government’s public authorities are not clearly defined. Article 43 of the Law on the Protection of Minors only provides that “orphans, minors whose parents or other guardians cannot be identified, or minors who have no means of subsistence” may be taken in and raised by children’s welfare institutions established by civil affairs departments. There is no mention of “minors whose parents’ guardianship has been revoked”, nor is there a detailed description of “minors who have no place to live”. At the practical level, since there is no relevant procedural legislation in our current law, it is only declarative to provide state public authority to protect minors without guardians or uncertain guardians to fulfill the obligation to rescue them, and it is quite difficult to implement it (Zhang, 2011). Although in practice there is a small amount of public power intervention, as mentioned above, which makes post-facto supervision stronger and more rigid than real time supervision. However, because post-facto supervision occurs when the damage to the minor has been caused or the minor is in a critical state, it has a certain lag. Chinese current mechanism for revocation of guardianship has to a certain extent played a strong role in intervening in cases of custody violations against minors, but the mechanism is still only “one revocation to the end” or “no revocation” (Zhu, 2021).

4. Improvements in the Supervision and Monitoring of Minors

Chinese guardianship supervision system for minors is still in the preliminary stage of exploration. At present, its supporting realization mechanism is not yet sound and lacks practicality. Urgent real-life dilemmas still exist, so there is a need to improve the legislation and perfect the guardianship supervision system, bridging the real-time supervision mechanism and the post-facto supervision mechanism, and effectively covering the whole process of minors’ guardianship as soon as possible.

First, there is no special guardianship law for minors at the legislative level, which leads to a judicial dilemma on how to apply the law to punish guardians when they are specifically involved in the abuse of minors. It is recommended that a guardianship law for minors should be established as soon as possible to

change the overly principled and generalized provisions. Clarify the qualifications of guardians and balance the rights and obligations of guardians. Only when rights and obligations are unified can guardians be given certain rights while regulating the performance of their duties, and only when rights and obligations are balanced can the motivation to perform their duties be promoted. Improve the procedures for changing and revoking guardians. In the event that the guardian is unable to perform the guardianship duties, the supervisory department can take the initiative to revoke or change it on application or authority, refine the evaluation criteria and clarify the procedures so that there is a law to follow.

Establish a guardianship supervision system for minors. In cases where one parent dies or where someone other than the parent is the guardian, a guardianship supervisor shall be established. Specifically, if the father or a close relative of the father's family is the guardian, the guardianship supervisor shall be a relative of the mother's family; if the mother or a close relative of the mother's family is the guardian, the guardianship supervisor shall be a relative of the father's family; if another person or organization is the guardian, the guardianship supervisor shall be selected from among the minor's relatives or the village (neighborhood) committee, party representatives, and village representatives of the place of residence. The duties of the guardianship supervisor mainly include: supervising and reporting to the guardianship authority, submitting opinions or applications on the guardian's performance of guardianship duties and whether the guardian has infringed on the interests of the minor or is otherwise unfit to act as guardian, and whether the guardian has lost his or her guardianship status; confirming or acknowledging changes in the minor's property.

Second, the content and exercise of parental rights are clarified. The purpose of parental rights points to the education and protection of children, and its nature is both a right and a duty. Generally speaking, the scope of parental rights includes the right to decide the name of the child, the right to designate the residence, the right to visit the child, the right to request the return of the child, the right to discipline, the right to be informed of the child's affairs, the right to represent the child, and the right to manage the property of the child. Chapter 2 of the Law on the Protection of Minors, entitled "Family Protection", contains detailed provisions on the guardian's responsibility for the protection of minors, which can be appropriately incorporated and transformed into the Civil Code. Regarding the exercise of parental authority, according to traditional civil law theory and national legislation, the subject of parental authority shall be the parents of the minor and shall be exercised jointly by the parents. When the parents are divorced, the exercise of parental authority may be determined by mutual agreement or court decision. If one parent is unable or unfit to exercise parental authority, the other parent shall exercise it alone; if both parents are unable or unfit to exercise parental authority, the child shall come under the protection of the guardianship system. In addition, from the theory of parental

authority and the legislation of various countries, grandparents, grandmothers and step-parents do not have parental authority over the minor, but only assist or exercise parental authority on behalf of the minor's parents.

Third, the dynamic real-time supervision and the remedial post-facto supervision should be applied to make up for the limitations of each, so as to realize the smooth operation of the guardianship system for minors. First, a localized and specialized implementation supervision body can be established, which is composed of the procuratorate, relevant personnel from the civil affairs department, the neighborhood committee village committee and other natural persons qualified for guardianship. Second, specific responsibilities for guardianship supervision should be clarified. Considering the dynamic and synchronous nature of real-time supervision, a regular stage daily reporting and evaluation mechanism can be set up with corresponding responsibilities. Investigate and visit the daily dynamics of the minor under guardianship, form a written report, and submit it to a special supervisory body for inspection and evaluation. At the same time, the guardians of minors are very different in the process of performing their duties, so a mechanism can be set up to assess the level of harm in the supervision of guardians and to specify the corresponding supervisory duties. The guardians can be rated according to the degree of harm to minors in different situations, such as incompetent guardianship, improper guardianship, lack of guardianship or absence of guardianship, or even guardianship violation, and the special supervisory body should confirm and review the rating results. Finally, considering the interconnection between real-time supervision and post-facto supervision, a mechanism of guardianship supervision docking can be set up, and the docking responsibilities with the court can be clarified. When a full-time supervisor finds that a guardian has seriously violated the rights and interests of a minor in the course of real-time supervision, if the report submitted to the specialized supervisory body rates the violation as the highest level of harm and requires revocation of guardianship, the court, which is in charge of post-facto supervision, should be promptly contacted. This docking responsibility is performed by the supervisory body and the supervisor, including sharing information on guardianship supervision and assisting in the implementation of court decisions.

Fourth, strengthen the intervention of public power in the guardianship system of minors. In addition to the supervision of the guardianship of minors in private law, public law should also actively cooperate with the public power organs to actively perform their duties in the protection of the rights and interests of minors with custody deficiencies and crime prevention work, and also to do a good job of integrating resources and interdepartmental work, not only to maximize the use of existing resources, but also to obtain the participation and support of more social forces through financial support. For example, the existing system of the procuratorial organs can include those minors with bad behavior who are without guardianship into the scope of guardianship and behavior correction, and also seek some more professional training institutions or em-

ployment guidance agencies to carry out skills training and employment guidance for minors under guardianship and their guardians; rely on the social guardianship system for minors to carry out assistance in guardianship and establish a perfect accountability mechanism. It is recommended that special administrative departments and judicial bodies be established to impose severe penalties and sanctions for non-fulfillment of guardianship duties, with corresponding civil, administrative and even criminal responsibilities (Zhou, 2008).

5. Conclusion

For families and society, the healthy growth of minors is the foundation of social harmony and stability. The current situation of infringement of minors' rights and interests highlights various problems in the guardianship duties of guardians. We need to make it clear that guardianship is not just a responsibility within a family or a unilateral responsibility of a legally established guardianship agency, but should be a shared responsibility of society as a whole. Therefore, it is necessary to fill in the gaps in our legislation, and to make it more detailed and clear, and to establish a sound legal code and regulations with operability to ensure the rights and interests of minors to the maximum extent.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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