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LEGISLATIVE REGULATION OF RIGHTS AND OBLIGATIONS OF GUARDIANS (TUTORS)

Taking care of children who have not reached the age of majority is naturally the responsibility of their parents. When kids for some reason are deprived of parental care, the society takes special measures aimed to create appropriate conditions for their children upbringing. One of such measures is placement of children under guardianship [1, p.305].

Guardianship (tutorship) is established for upbringing of minor children who because of various reasons are deprived of parental care, and for protection of personal and property rights and interests of children. Guardianship is set over children who have not reached 14 years of age and tutorship is set over teenagers aged from 14 to 18. Guardianship and tutorship authority is a local government. They deal with issues concerning the interest of children left without parental care – orphans, children whose parents are deprived of parental rights and so on. Persons who become aware of minor children without parental care shall notify the guardianship and tutorship authorities at physical location of such persons.

The study of the subject was done by such scholars as C.N. Asimova, D.N. Bobrova, V.I. Borisova, O.V. Dzera, N.A. Dyachkova, O.O.Krasavchykova, N.S. Kuznetsova, N.O. Saniahmetova, E.O. Kharitonov, Y.S. Chervonyy, B.B. Cherepakhina, J.M. Shevchenko.

The aim of the study is to determine the legal nature, peculiarities and requirements to persons who take under guardianship orphans and children deprived of parental care, and to develop proposals for further improvement of requirements to such persons.

According to the Law of Ukraine dated 26 April 2001 "On Protection of Childhood" function as to ensuring of normal conditions for upbringing and care of children are laid in the first place on the close relatives of the child, educational staff, the Ministry of Internal Affairs of Ukraine, bodies of social protection of people, bodies of family and youth matters, juvenile authorities, register offices, notaries, courts, housing maintenance organizations [2].

Guardianship and tutorship of children can be established by a court or an authority of guardianship. This rule is a novel of the Civil Code

(Articles 60, 61) and the Family Code (Part 3 Art. 243). Before the entry into force of these regulations the decision to establish guardianship was made solely by the guardianship and tutorship authorities [3; 4].

In practice, most guardianship and tutorship are set at the place of residence of the person who needs guardianship and tutorship. Only in some cases of the existence of circumstances that need attention (e.g. when the a person under guardianship is already resident with the family of a person who wishes to become his guardian or trustee), a guardian or a trustee may be appointed at the place of their residence.

In accordance with Part 2 of Art. 63 of the Civil Code a guardian or a tutor may be a natural person only. Guardians and trustees must be able to perform their duties in person. A guardian or a tutor may not be the person who is found incapable by a court is limited in capacity since they require guardianship and tutorship themselves (Articles 58, 59 of the Civil Code) [3].

Creating normal education and accommodation conditions for a ward can be provided only when guardianship or tutorship was imposed voluntarily. Therefore, in accordance with Part 3. Art. 63 of the Civil Code guardians or tutors can be assigned only those individuals who personally in a written statement expressed a desire to perform these duties.

Fulfillment of the rights of the child under guardianship is directly related to the conduct of legal representatives – guardians and tutors. Interests of a child must outline the extent and limits of guardian's or tutor's participation in the fulfillment of a child's rights. Therefore, P. 4. Art. 63 of the Civil Code, Art. 171 of the Family Code and Part 3. Art. 244 of the Family Code provide that at the appointment of a guardian for the minor and a tutor for a teenager the desire of a child is taken into account. This rule also comes from the provisions of the UN Convention on the Rights of a Child of 20 November 1989, according to which States Parties shall ensure that a child capable of forming his or her own views has the right to express those views freely in all matters relating to the child, the views of the child are given due weight in accordance with the age and maturity. The consent of the child is not a mandatory condition for appointment of a guardian (tutor), but his desire is taken into account whenever possible. It is necessary at least take into account the relationships that exist between the prospective guardian (tutor) and the person under guardianship or tutorship [5].

When appointing a guardian or a tutor a court or a guardianship authority must ensure not only the presence of conditions to ensure that the goal of care can be achieved (listed in Art. 63 of the Civil Code), but in the

absence of circumstances that prevent the possibility of establishing normal relations between the guardian (tutor) and child.

A guardian or a tutor can not be a person deprived of parental rights if those rights were not restored. Deprivation of parental rights is a sanction that is applied to parents as a result of their wrongful conduct on the child. The ground of deprivation of parental rights is an offense under Art. 164 of the Family Code. Deprivation of parental rights is not an irrevocable act: in case of changes of parents' attitude towards their child their parental rights can be resumed in the manner prescribed by Art. 169 of the Family Code.

Children whose education and care is done by educational institutions, health care or social welfare institutions, guardians and tutors may not be assigned. Duties of a guardian or a trustee as to such persons are performed by the administration of an institution where a child is staying. Thus, in accordance with Art. 243 of the Family Code if a child resides in a child care facility or health care institution, functions of a guardian and a tutor are relied on the administration of these institutions. Performing by the administration of these institutions the duties of guardians (tutors) shall be subject to rules of civil and family law.

In addition, to protect the property interests of these children (e.g., for managing their property) a guardian of the property may be appointed.

Often, at the request of parents who can not personally exercise their parental duties guardianship and tutorship authorities appoint a guardian or a tutor for their child. In such cases further cohabitation of parents and guardians (tutors), paying attention to the child and joint care of him is possible. However, priority in the implementation of the rights and responsibilities as to a child is given in these cases to a guardian and parental rights are limited.

The purpose of custody of minor children is, firstly, to ensure their education and, secondly, the protection of the moral and economic rights and interests. A guardian must perform functions of a child's tutor without shifting them to other people.

Laying on the bodies of guardianship the task of protecting the rights and interests of children left without parental care, the legislature until recently did not pay enough attention to the problem of the presence in their structure highly-qualified specialists. One manifestation of this omission in the law is ignoring in some subjects of guardianship and tutorship authorities such form of family placement of children left without parental care as patronage or patronage professional support families, the essence of which is giving on the part of guardianship and tutorship

authorities psycho-educational, legal and other assistance both to patronage tutors and children placed under patronage [6, p.134].

State support should not stay aside and is must be made up from a number of integrated tools that include not only financing certain expenditure, but more importantly, the organization of work on the placement of children into care (care).

In this regard to organize and to identify both relationships on the revelation and placement of a person under guardianship, relationships of guardians (tutors) with their wards and all other relationships arising from guardianship (tutorship) is only possible in the framework of law [7, p. 39].

Of course, a great range of responsibilities are entrusted to guardians (tutors) of children. This includes a joint residence and constant communication with the child, continuous care about training and education, providing for not only physical but also spiritual conditions for physical, intellectual and moral development. Proper execution of the above duties (especially since they are performed free of charge) is possible only under the condition of existence of the internal desire, firm belief of a guardian (tutor), the perception out his spiritual and ethical duty to a ward, or, for example, to his dead parents.

Procedure of appointing an individual as a guardian (tutor) must involve testing to determine his ability to perform duties of guardianship (tutorship) and also living conditions, as of a person in need of guardianship (tutorship), and the potential guardian (tutor). Personal ethic qualities of a potential guardian (tutor) should be taken into consideration considered as personal ethics as proposed guardian (trustee), the relationship that exists between him and the person who needs guardianship (tutorship), and (if possible) –the desire of a ward.

The analysis of the current state and trends of the development of proper regulation of guardianship and tutorship confirms the need for further research on the ways and methods of formation of legislation aimed at comprehensive implementation of the moral and material care of children and the protection of personal and property rights of persons who because of various reasons can not exercise these rights themselves. Legislation on guardianship and tutorship requires fundamental changes, there is an urgent need to pass a special law that would define the legal, organizational and financial principles of operation of the guardianship and tutorship in Ukraine, as provisions of Article 56 of the Civil Code of Ukraine provide for the existence of such Act [8, p. 148].

Unfortunately, cases of abuse of guardians (tutors) of their wards, the failure or improper performance of their powers are not rare: they assign

property of their wards, don't bother about upbringing of the minors [9, p.3].

Complex demographic situation in the country, poor conditions of the homeless and neglected children necessitate changes in the system of government in working with minors.

Sources

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