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SOME PROBLEMS OF LEGAL REGULATION OF THE INSTITUTION OF GUARDIANSHIP AND TUTELAGE IN UKRAINE

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For today, the importance of guardianship and tutelage bodies can't be overemphasized. At a time when the country is in an undeclared war, many families have suffered from the effects of hostilities, many children have been left without parental care and need protection. Against the backdrop of a decline in the social security of citizens and economic problems, the drop in the standard of living, the increase in the crime situation, the large number of internally displaced citizens, and the protection of children is of particular importance.

Keywords: guardianship, tutelage, orphans, guardian, trustee, parental care, ward.

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Окремі проблеми правового регулювання інституту опіки та піклування в Україні

Зазначено, що на сьогодні значення органів опіки та піклування важко переоцінити. Наголошено, що в час, коли країна перебуває в умовах неоголошеної війни, чимало сімей постраждало від наслідків бойових дій, багато дітей залишилося без батьківського піклування та потребують захисту. Вказано, що на фоні зниження соціального забезпечення громадян, економічних негараздів, падіння рівня життя, підвищення криміногенної ситуації, величезної кількості внутрішньо переміщених громадян, захист дітей набуває особливого значення.

Ключові слова: опіка, піклування, діти-сироти, опікун, піклувальник, батьківське піклування, підопічний.

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Отдельные проблемы правового регулирования института опеки и попечительства в Украине

Обозначено, что на сегодня значение органов опеки и попечительства трудно переоценить. Подчеркнуто, что во время, когда страна находится в условиях необъявленной войны, многие семьи пострадали от последствий боевых действий, многие дети остались без родительской опеки и нуждаются в защите. Определено, что на фоне снижения социального обеспечения граждан, экономических проблем, падение уровня жизни, повышение криминогенной ситуации, огромного количества внутренне перемещенных граждан, защита детей приобретает особое значение.

Ключевые слова: опека, попечительство, дети-сироты, опекун, попечитель, родительская забота, подопечный.

Formulation of the problem. During its existence, the scientific views on guardianship and tutelage and the legislative regulation of guardianship and tutelage relations have undergone cardinal changes.

In ancient times, when there were strong tribal relations, the care of incapacitated persons was the affair of relatives, and the primary purpose of it was not the care of the ward, but the petition for his property in the interests of the immediate heirs. As a result, the ward had the character of a preliminary protection of the future heritage. This basic idea of ancient tutors is reflected throughout its construction [1, p. 488].

The purpose of the work is to reveal the essence and grounds for the establishment of guardianship and care under the legislation of Ukraine. To achieve this goal, we must accomplish the task:

- to reveal the stages of formation of the law on guardianship and tutelage;
- to investigate the current state of legal regulation of guardianship and tutelage in Ukraine;
- to analyze the concept of guardianship and the basis for its establishment;
- to investigate the grounds for the guardianship of young people who are orphans or deprived of parental care;
- to disclose the essence of the concept of guardianship;
- Determine the grounds for the establishment of guardianship under the legislation of Ukraine.

Presentation of the main research material. It should be noted that the Romans distinguished between guardianship (*tutela*) and tutelage (*cura*). D. D. Grimm noted with regard to the legal status of the trustee that the trustee never used the broad powers that the guardian had. Tutelage didn't give rise to any special rights, but from the very beginning laid the trustee only one more or less complex duties. Over time, the difference between guardianship and tutelage has largely flattened, since the guardianship lost the character of a purely family institution. It was the guardian who had the right to formal participation and solemn approval of transactions that was carried out by the ward. The trustee did not have such a right, but he had to give his consensus that the transaction entered into force. This consent could be given informally, before or after the conclusion of the transaction. Thus, this difference was of no real significance and subsequently disappeared [2, p. 439].

The development of legal regulation of relations in the field of guardianship and tutelage in the territory of Ukraine since the beginning of the first rules of guardianship and tutelage in the systems of customary law, and so far has been several periods of development. However, in the domestic legal literature, the issue of periodization of the history of the development of care and care until recently was considered only in the context of Roman law [3, p. 115, 181].

Conditionally, two stages of the development of the domestic institution of care and guardianship can be distinguished:

1) pre-revolutionary stage, which, in turn, is divided into:

– a period of customary law, when the rules of customary law, having passed the test of time, entered the collection of customs - «*Russkaya Pravda*» by Yaroslav the Wise. «This Russian law, that is, the customary right of pagan Russia, and was the basis of the Truth, was its main source» [4, p.269], as well as to the Lithuanian statutes;

– period of the history of the Russian Empire, when the law gradually displaces customary law and becomes the dominant source of law. And only in some cases, despite the quite natural process of displacement of customary law by the law, the latter continues to play the role of a source of law in the establishment of guardianship and tutelage;

2) post-revolutionary stage, which is divided into:

– the Soviet period, during which the imprint of the leveling of private law also affected the regulation of guardianship and tutelage. During the Soviet period, the application of civil law in the regulation of guardianship and guardianship was virtually minimized, the development of the institution of guardianship and tutelage is associated with the codification of family law;

– the modern period, the period of independence of Ukraine - is characterized by the continuation of the application of Soviet legislation, as well as by the change in the legal regulation of guardianship and tutelage with the entry into force of the Civil Code of Ukraine and the Family Code of Ukraine (January 1, 2004), the simultaneous action of the CC of Ukraine, the FC of Ukraine.

Changes in the legal regulation of guardianship and tutelage during the establishment and development of the institution of guardianship and tutelage concerned, primarily, the purpose, grounds and procedure for the establishment of guardianship and tutelage, subjects of legal relations, their rights and responsibilities.

The reform of the Ukrainian legislation after 1991 also touched upon the rules of guardianship and tutelage. With the adoption on January 10, 2002 of the Family Code of Ukraine and January 16, 2003 of the Civil Code of Ukraine and their entry into force on January 1, 2004, the rules on guardianship and tutelage have undergone fundamental changes. First of all, it should be noted the new approach in the legislative regulation of the institution of guardianship and tutelage, which is to regulate its basic provisions in civil law, and not to the family, as was the case with the 1963 Civil Code of the USSR and the 1969 Code of Marriage and Family Law There was a certain redistribution of «spheres of influence» between civil and family law [5, p. 214].

According to modern civil law, guardianship and tutelage are: 1) a way of ensuring and protecting personal non-property and property rights and interests of juvenile person, minors and adults who, because of health conditions, can not independently exercise their rights and perform duties (Article 55 of the Civil Code of Ukraine); 2) a kind of personal non-property rights (Article 292 of the Civil Code of Ukraine); 3) a means of protecting the property rights of persons recognized as missing, as well as individuals whose place of residence is unknown (Article 44 of the Civil Code of Ukraine); type of representation (Part 2 of Article 242 of the Civil Code of Ukraine).

Guardianship and tutelage under family law are a form of placement of orphans and children deprived of parental care (Chapter 19 Section IV of the Family Code of Ukraine).

The issue of delimitation of the scope of civil and family law, as well as the interaction of civil and family law has a great scientific and practical interest. There are clearly traceable features of guardianship and tutelage as

a way of ensuring, safety and protection civil rights and interests of individuals, on the one hand, and guardianship and tutelage as a legal form for the placement of orphans and children deprived of parental care, on the other.

According to Art. 9 of the Civil Code of Ukraine, the provisions of the Civil Code of Ukraine apply to the regulation of family relations, if they are not regulated by other legislative acts [6].

Article 8 of the Family Code of Ukraine stipulates that if personal non-property and property relations between spouses, parents and children, other family members and relatives are not regulated by the Family Code of Ukraine, they are regulated by the relevant norms of the Civil Code of Ukraine, if this does not contradict the essence of family relations.

Civil and Family Codes are normative legal acts of the same legal force. Proceeding from this, the legal priority in applying the norms of the Civil Code of Ukraine and the Family Code of Ukraine should be determined in accordance with the type of social relations that fall within the scope of legal regulation of these codes. And yet, the general rules on guardianship and tutelage are established in the Civil Code of Ukraine. If the special rule of the Family Code of Ukraine establishes a rule different from the norm of the Civil Code of Ukraine, then its general provisions of the Civil Code of Ukraine are not canceled, but limited. This, for example, concerns the definition of the age of a person who may be appointed as a guardian / guardian to a child.

It should be clearly defined which relationships in the field of guardianship and tutelage are regulated by civil law and which are family law. The general rules on guardianship and tutelage, as well as the rules on guardianship of the property of an individual who is recognized as missing, as well as the individual whose place of residence is unknown, on the trust management of the property of the warder is established in the Civil Code of Ukraine (Articles 44–48, 55–79, 1032). Special rules on guardianship and tutelage of children are specified in Chapter 19 of the Family Code of Ukraine.

Unfortunately, Chapter 19 of the Family Code of Ukraine does not contain any guidance on the application to the relations of guardianship and tutelage of the norms of civil law, except that the tutelage of the child is established by the guardianship and tutelage body, as well as by the court in cases provided for by the Civil Code of Ukraine [7, Part 3 of Art. 243]. And, of course, there is no need to duplicate the norms of the Civil Code of Ukraine on guardianship and tutelage in the Family Code of Ukraine. However, the specified Chapter 19 of the Family Code of Ukraine should contain a reference to the need to take into account the provisions of Chapter 6 of the Civil Code of Ukraine on guardianship and tutelage in establishing guardianship and care of children. This will simplify the application of the law on guardianship and tutelage of the organs of guardianship and tutelage, children's services. As a rule, a whole array of legislation can and should cover a lawyer, lawyer with legal education. However, except for them, the implementation of these acts is carried out by employees of local government and local self-government, who have another education, as well as representatives of public organizations (guardians' councils, children's rights protection committees, etc.), and their own caretakers and trustees. «The legislator says that no one can refer to the ignorance of the law, therefore, it is necessary to make sure that everyone, without any help, could read, understand its meaning and clearly imagine the rights, responsibilities and consequences that follow from the law»[8].

The process of giving the child the status of an orphaned child or a child deprived of parental care, and the establishment of guardianship and guardianship is regulated by the Resolution of the Cabinet of Ministers of Ukraine dated September 24, 2008, No. 866 «Issues of the activities of the child welfare and child welfare bodies», which the Procedure for the conduct of guardianship and tutelage activities related to the protection of the rights of the child and the Model Regulations on the Commission on the Protection of the Rights of the Child have been approved [9].

The Civil Code of Ukraine contains many short stories concerning the legal regulation of guardianship and tutelage. This includes, in particular: determining the grounds for establishing guardianship and care for individuals; establishment of a custody of property; management of property used in entrepreneurial activity, body of guardianship and tutelage; requirements for persons who may be trustees; possibility of appointing one person to several guardians and trustees; payment for the services of guardians and trustees; the rules of the guardians and trustees of property and personal non-property rights of the wards.

In addition to civil, family law, separate guardianship and tutelage relationships are regulated by the norms of administrative law. This concerns, in particular, the definition of the powers and activities of state bodies whose competence includes the establishment and implementation of guardianship and tutelage (Article 34 of the Law of Ukraine «On Local Self-Government in Ukraine»), the responsibility of officials for violating the procedure or terms for submitting information about children- orphans and children left without parental care (Article 184-2 of the Code of Administrative Offences of Ukraine), etc. This also applies to relations with the observance of the

legislation on the protection of children's rights (Laws «On ensuring the legal and organizational conditions for social protection of orphans and children deprived of parental care», «On the Protection of Childhood», «On the bodies and services for children and special institutions for children «).

The legal regulation of the relations that make up the institution of guardianship and tutelage is also carried out by international legal acts such as: the Universal Declaration of Human Rights (December 10, 1948), the Convention on the Protection of Human Rights and Dignity regarding the Use of Biology and Medicine: the Convention on the Rights Human Rights and Biomedicine (Oviedo, April 4, 1997) (signed by Ukraine on March 22, 2002) [10], European Convention for the Recognition and Enforcement of Decisions on Custody and Restoration of Children (Luxembourg, May 20, 1980). p.) [11], the Convention on the Protection of Human Rights and Fundamental Freedoms Human Rights in 1950, First Protocol and Protocols No. 1, 4, 6, 7, 9, 10 and 11 to the Convention (Rome, 4.XI.1950) [12], Convention on the Rights of the Child (Convention ratified by the Verkhovna Rada of Ukraine, No. 789- XII of 27.02.91) [13].

Conclusions. Thus, the structure of the system of legislation in the field of regulating the relations of guardianship and tutelage can be represented in an orderly set of legal norms and legislative acts: the norms of the Constitution of Ukraine; civil and family-legal norms (the Civil Code of Ukraine, the Civil Procedure Code of Ukraine and the Family Code of Ukraine); norms of other branches of legislation (the Criminal Code of Ukraine; the Code of Administrative Offences of Ukraine); judicial practice; legal norms of international acts.

Despite the fact that the Civil and Family Codes are normative legal acts of the same legal force, the legal priority in applying the norms of the Civil Code of Ukraine and the Family Code of Ukraine should be determined in accordance with the type of social relations that fall within the scope of legal regulation of these codes. The norms of the Civil Code of Ukraine are common in regulating relations in the area of establishing, implementing and termination of guardianship and guardianship, norms of the Family Code of Ukraine - special.

The definition of the understanding of guardianship and tutelage should be approached in the light of the existence of two branches of law - civil and family. Guardianship in civil law can be considered as: 1) a component of the institution of legal representation, 2) a component of the capacity of the individual, 3) a way of protecting the property rights of an individual who is recognized as missing absent, as well as an individual whose place of residence is unknown, 4) ensuring the realization, protection and protection of property and personal non-property rights of incapacitated persons and young children of orphans and children deprived of parental care. Tutelage in civil law can be considered as: 1) a component of the capacity of the physical person; 2) a way to ensure the realization, protection and protection of property and personal non-property rights of persons whose civil capacity is limited, as well as minor orphans and children deprived of parental care.

Список використаної літератури

1. Конституція України від 28 червня 1996 р. № 254к/96-ВР // Відомості Верховної Ради України. – 1996. – № 30. – Ст. 141.
2. Цивільний кодекс України від 16 січня 2003 року зі змінами [Електронний ресурс] // Офіційний сайт ВРУ. – Режим доступу : <http://zakon1.rada.gov.ua/laws/show/435-15>.
3. Сімейний кодекс України від 10 січня 2002 року зі змінами [Електронний ресурс] // Офіційний сайт ВРУ. – Режим доступу : <http://zakon2.rada.gov.ua/laws/show/2947-14>.
4. Харитонов Є. О. Історія приватного (цивільного) права Європи. – Ч. I. Витоки. – Одеса : Бахва, 1999. – 292 с.
5. Юркевич Н. Г. Правоспособность гражданина СССР по советскому гражданскому праву : дис... канд. юрид. наук : 12.00.03 / Юркевич Николай Григорьевич. – Минск. – 243 с.
6. Сімейне право України : підруч. / Л. М. Баранова, В. І. Борисова, І. В. Жилінкова [та ін.] ; за заг. ред. В. І. Борисової та І. В. Жилінкової. – К. : Юрінком Інтер, 2004. – 264 с.
7. Покровский И. А. История римского права / И. А. Покровский. – М. : Статут, 2004. – 540 с.
8. Гримм Д. Д. Лекции по догме римского права / Д. Д. Гримм ; под ред. и с предисловием В. А. Томсинова. – М. : Зерцало, 2003. – 496 с.
9. Ушаков А. А. Очерки советской законодательной стилистики. Содержание и форма в праве и проблема законодательной стилистики : учеб. пособ. / Ушаков А. А. – Пермь, . – 206 с. – Ч. 1.
10. Питання діяльності органів опіки та піклування, пов'язаної із захистом прав дитини: Постанова Кабінету Міністрів України № 866 від 24 вересня 2008 р. [Електронний ресурс] // Офіційний сайт ВРУ. – Режим доступу : <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=866-2008-%EF&new=1&p=1304054879692552>.

11. Конвенція про захист прав і гідності людини щодо застосування біології та медицини : Конвенція про права людини та біомедицину (Ов'єдо, 4 квітня 1997 р.) [Електронний ресурс] // Офіційний сайт ВРУ. – Режим доступу : http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=994_334.
12. Європейська конвенція про визнання та виконання рішень стосовно опіки над дітьми та про поновлення опіки над дітьми (Люксембург, 20 травня 1980 р. [Електронний ресурс]. // Офіційний сайт ВРУ. – Режим доступу : http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=994_327.
13. Конвенція про захист прав і основних свобод 1950 року, Перший протокол та протоколи № 1, 4, 6, 7, 9, 10 та 11 до Конвенції (Рим, 4.XI.1950) [Електронний ресурс]. // Офіційний сайт ВРУ. – Режим доступу : http://zakon3.rada.gov.ua/laws/show/995_004.

References

1. *Konstytutsiya Ukrainy [The Constitution of Ukraine]. (1996, June 28). Vidomosti Verkhovnoi Rady Ukrainy – Bulletin of Verkhovna Rada of Ukraine. Kyiv: Parlam. vyd-vo [in Ukrainian].*
2. *Tsyvil'nyy kodeks Ukrainy [The Civil Code of Ukraine]. (2003, January 16). (n.d.). zakon.rada.gov.ua. Retrieved from <http://zakon1.rada.gov.ua/laws/show/435-15> [in Ukrainian].*
3. *Simeynyy kodeks Ukrainy [The Family Code of Ukraine]. (2002, January 10). (n.d.). zakon.rada.gov.ua. Retrieved from <http://zakon2.rada.gov.ua/laws/show/2947-14> [in Ukrainian].*
4. *Kharitonov, Ye.O. (1999) Istoriya pryvatnoho (tsyvil'noho) prava Yevropy. [The history of private (civil) law in Europe]. (Ch.I). Odessa: Bakhov.*
5. *Yurkevich, N. G. Pravospobnost' grazhdanina SSSR po sovetskomu grazhdanskomu pravu [The legal capacity of a citizen of the USSR for Soviet civil law]. Candidate's thesis. Minsk [in Russian].*
6. *Baranova, L. M., Borisova V. I., Zhilinkova I. V. (Eds.). (2004). Simeyne pravo Ukrainy [Family Law of Ukraine]. Kiev: Yurinkom Inter [in Ukrainian].*
7. *Pokrovsky, I. A. (2004) Istoriya rimskogo prava [History of Roman Law]. Moskva: Statute.*
8. *Grimm D. D. (2003)b Lektsii po dogme rimskogo prava [Lectures on dogma of Roman law]. Moskva: Zertsalo [in Russian].*
9. *Ushakov, A. A. Ocherki sovetskoy zakonodatel'noy stilistiki : Soderzhaniye i forma v prave i problema zakonodatel'noy stilistiki [Sketches of Soviet Legislative Stylistics: Content and Form in the Law and the Problem of Legislative Stylistics]. (Ch. I). Perm [in Russian].*
10. *Pytannya diyal'nosti orhaniv opiky ta pikluvannya, pov'yazanoyi iz zakhystom prav dytyny [Issues related to the activities of the guardianship and tutelage bodies related to the protection of the rights of the child]. Postanova Kabinetu Ministriv Ukrainy - Resolution of the Cabinet of Ministers of Ukraine. (2008, September 24) (n.d.). zakon.rada.gov.ua. Retrieved from zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?Nreg=866-2008-%EF&new=1&p=1304054879692552 [in Ukrainian].*
11. *Konventsiya pro zakhyst prav i hidnosti lyudyny shchodo zastosuvannya biolohiyi ta medytsyny : Konventsiya pro prava lyudyny ta biomedytsynu [Convention on the Protection of Human Rights and Dignity regarding the Use of Biology and Medicine: Convention on Human Rights and Biomedicine] (1997, April 4). (Oviedo). (n.d.). zakon.rada.gov.ua. Retrieved from http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=994_334 [in Ukrainian].*
12. *Yevropeys'ka konventsiya pro vyznannya ta vykonannya rishen' stosovno opiky nad dit'my ta pro ponovlennya opiky nad dit'my [European Convention on the Recognition and Enforcement of Decisions concerning the Custody of Children and the Restoration of Custody of Children]. (1980, May 20). (Luxembourg). (n.d.). zakon.rada.gov.ua. Retrieved from http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?Nreg=994_327 [in Ukrainian].*
13. *Konventsiya pro zakhyst prav i osnovnykh svobod 1950 roku, Pershyy protokol ta protokoly № 1, 4, 6, 7, 9, 10 ta 11 do Konventsiyi [Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, First Protocol and Protocols No. 1, 4, 6, 7, 9, 10 and 11 to the Convention]. (1950, November 4). (Rome). (n.d.). zakon.rada.gov.ua. Retrieved from http://zakon3.rada.gov.ua/laws/show/995_004 [in Ukrainian].*

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