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THE INSTITUTE OF GUARDIANSHIP AND CUSTODY IN UKRAINE AND EUROPEAN COUNTRIES

Abstract. Purpose. The study of the legal nature and peculiarities of establishing guardianship and custody for orphans, children deprived of parental care, disabled and legally incapable individuals in Ukraine, as well as the analysis of European legislation governing these social relations, is relevant today.

Guardianship and custody are the most common form of childcare in the world and Ukraine. The emergence of guardianship and care as an institution is due to the fact that children are violated of the rights, freedoms and legitimate interests of parents, families, families who perform improperly or do not perform their duties at all.

Guardianship and custody are an institution not only of civil but also of family, administrative, civil-procedural law, which regulates such categories of relations as incapacitated and partially incapacitated individuals, as well as orphans and children deprived of parental care.

The aim of the article is to analyze the legal regulation of the institution of guardianship and custody in Ukraine and European countries, particularly, France, Germany and Great Britain; provide proposals for improving Ukrainian legislation, borrowing and implementing the experience of these countries.

Undoubtedly, bringing the legislation of Ukraine in line with international law is a positive result, but today, according to statistics, the situation in the field of guardianship is deteriorating every year, and therefore protection and restoration of rights, freedoms and legitimate interests of orphans, children, deprived of parental care, partially able-bodied and incapacitated individuals in Ukraine needs better regulation.

Purpose. Analyzing and comparing legislations and specific characteristics of the European countries mentioned is the aim of the study.

Research methods. The empirical basis of the original study is the modern civil legislation of Ukraine, as well as the legislation of European countries.

Analysis of recent research and publications. The theoretical basis of the study is the work of domestic and foreign experts in the field of Roman private law, civil law, general theory of law, and more. Among them, first of all, it is necessary to name contributions of jurists from Ukraine and Russia: D. Azarevych, S. Alekseeva, C. Azimov, D. Bobrov, V. Borisov, O. Dzera, A. Dowgert, N. Dyachkova, I. Zhilinkova, O. Ioffe, O. Nevzgodina, O. Krasavchikova, H. Kuznetsova, I. Novitsky, Z. Romovska, V. Ryzasantseva, O. Pidoprigora, N. Saniakhmetova, Y. Kharitonova, Y. Chervonnyy, B. Cherepakhina, Y. Shevchenko, I. Shereshevsky, and others.

The empirical basis of the study of the original source is the modern civil legislation of Ukraine, as well as the legislation of European countries.

Results. Following the cases of such European countries like France, the Federative Republic of Germany, and the United Kingdom, the efforts of the article's authors result in highlighting, uncovering, and implementing some of their features into Ukrainian legislation to improve institute of guardianship and custody in our state.

Conclusions. The regulation of the institution of guardianship and care in European countries has many features, original legal rules that give grounds to conclude on the implementation of specific positive developments in France, Germany, Great Britain in civil law for Ukrainian science, as well as improving legislation and application in the Ukrainian legal space.

Key words: guardianship, care, European countries, France, Germany, the United Kingdom.

1. Introduction.

The development of family forms of education is a priority of the state for orphans and children deprived of parental care. At the end of 2020, almost 70,000 children were registered as orphans and children deprived of parental care. Last year, 9,634 children were orphaned. Thus, 10 074 children were arranged in a family of citizens of Ukraine during the year (guardianship - 6929, foster families, an orphanage of family type - 1906, adopted by Ukrainians - 992, foreigners - 247). In general, family forms of education cover about 64 thousand children, which is 92.2% of the total number of such children. As of December 31, 2020, there were 1,235 family-type orphanages and 3,172 foster families in Ukraine. It does not matter that the number of foster families is decreasing (compared to 2019 by 174 families), and orphanages are increasing (compared to 2019 by 82 families). The total number of children raised in these families is growing. At the end of 2020, the total number of children in the FF, orphanage of family type was 14,516, which, compared to 2019, more than 458 children (Kabinet Ministriv Ukrainy, 2021).

2. The legislation of Ukraine

Guardianship and custody are established in order to ensure the personal non-property and property rights and interests of minors, minors, as well as adults who, due to their health status, cannot independently realize their rights and execute their duties (Tsyvilnyi kodeks Ukrainy, 2003).

It should be noted that there is no specific definition of both guardianship and custody in the Civil Code of Ukraine (hereinafter - the CCU), the Family Code of Ukraine etc. However, Article 1 of the Rules of Guardianship and Custody, registered with the Ministry of Justice of Ukraine, states that guardianship (custody) is a special form of state care for minor children deprived of parental care and adults in need of assistance to ensure their rights and interests (Nakaz Derzhavnoho komitetu Ukrainy u spravakh simi ta molodi pro Pravyla opiky ta pikluvannya, 1999).

Comparing the legislation of Ukraine and European countries, we should pay attention to the most important, essential and special rules, that are, undoubtedly, available in each abovementioned Western European country.

Guardianship is established over minors who are orphans or deprived of parental care,

and individuals whose civil capacity is limited. Regarding the appointment of a guardian or trustee, Art. 63 of the CCU defines cases, namely: a guardian or trustee is appointed by the body of guardianship and trusteeship, except in cases where the court establishes guardianship and trusteeship; a guardian or trustee can only be a natural person with full civil capacity; an individual may be appointed a guardian or trustee only upon his / her written application; guardian or trustee is appointed mainly from persons who are in a family relationship with the ward, taking into account the personal relationship between them, the ability of the person to perform the duties of guardian or trustee; when appointing a guardian for a minor and when appointing a guardian for a minor, the wishes of the ward shall be taken into account; an individual may be assigned one or more guardians or trustees.

It is equally important to point out that there are certain categories of individuals who cannot be guardians or trustees. These are individuals who are deprived of parental rights if these rights have not been restored; whose behavior and interests are contrary to the interests of an individual in need of guardianship or custody (Article 64 of the CCU).

If an individual who suits the above standards has decided to become a guardian, a person has certain rights and responsibilities: the obligation to take care of the ward, to create the necessary living conditions, care and treatment; to take care of the upbringing, education and development of a minor; the right to demand the return of a ward from persons holding him without legal grounds; makes transactions on behalf of and in the interests of the ward; take measures to protect the civil rights and interests of the ward (Article 67 of the CCU).

The guardian is not an exception to certain rights and responsibilities: he/she is obliged to take care of the creation of the necessary living conditions, education, training and development of a minor; to take care of treatment, creation of necessary living conditions for an individual whose civil capacity is limited; agrees to the commission of transactions in accordance with Articles 32 and 37 of the CCU; take measures to protect the civil rights and interests of the ward (Article 69 of the CCU).

The legislator has set restrictions on the performance of transactions by guardians and trustees. With regard to guardians, it is prohibited

to enter into contracts with the ward, except for the transfer of property to the ward in the property under the contract of gift or in gratuitous use under the loan agreement; may not make a donation on behalf of the ward, as well as undertake on his behalf a guarantee (Article 68 of the CCU). As for the guardian, it is prohibited to consent to the conclusion of agreements between the ward and his wife (husband) or close relatives, except for the transfer of property to the ward in the property under a gift agreement or free use under a loan agreement (Article 70 of the CCU).

The institute of guardianship and care also includes the relevant or special tutorship and guardianship agency. For example, educational institutions, health care institutions or social protection institutions, etc. If no guardianship or trusteeship has been established over an individual or a guardian or trustee has not been appointed, this institution shall provide guardianship or trusteeship over person.

Particular attention is paid to the issue of property in relation to the person under guardianship, namely: the obligation of the guardian to take care of the preservation and use of the ward's property in his interests; if a minor can independently determine his needs and interests, the guardian, when managing his property, have to take into account his wishes; and it is noted that the guardian independently incurs the costs necessary to meet the needs of the ward, through pensions, alimony, compensation for loss of a breadwinner, care allowance and other social benefits assigned to the ward in accordance with the laws of Ukraine, income from the ward's property, etc. (Article 72 of the CCU); if the person under guardianship or trusteeship has property located in another locality, guardianship over this property shall be established by the body of guardianship and trusteeship at the location of the property; guardianship over property is also established in other cases established by law (Article 74 of the CCU).

Article 76 of the CCU states that guardianship is terminated in such cases as: in the case of transfer of a minor to parents (adoptive parents); if the ward reaches the age of fourteen, i.e., the person who performed the duties of guardian, becomes a guardian without a special decision in this regard; in case of restoration of civil capacity of a natural person who has been declared incapable. Article 77 of the CCU stipulates that guardianship ceases when an individual reaches the age of majority; registration of a minor's marriage; granting a minor full civil capacity; restoration of civil capacity of a natural person whose civil capacity was limited.

3. The legislation of the French Republic

The issue of guardianship and custody in France is regulated by the Civil Code, namely Volume 1, Chapter 2, Title X of the French Civil Code [4]. According to Article 17 of Order № 2015-1288 as of 15 October 2015, the article entered into force on 1 January 2016 states that the legal administrator represents minors in all acts of civil life, except where the law or custom allows minors to act independently.

The French Civil Code (hereinafter - the FCC) distinguishes between acts-orders and administrative actions on the property of a minor. Acts of administrative (managerial) actions do not pose an unjustified risk to the heritage and do not change its nature. One or the other parent or both parents may perform administrative actions without the need for permission from the judge's guardianship authority. The permission of the guardianship court must be obtained in case of disagreement between the parents; for a number of acts of retirement established by law (Article 388-1-1 of the FCC). Among the acts of the provision that requires the permission of the guardianship authority: obtaining a loan on behalf of a minor, waiver of rights or real estate, etc.

Guardianship is established when the father and mother have died or are deprived of parental rights. In addition, it may be established in respect of a child whose origin has not been established. However, the code states that this should not affect specific laws governing the social assistance service for children (Article 390 FCC). If the child comes to be recognized as one of his parents after the establishment of guardianship, the guardianship judge may, at the request of the father, decide to replace the legal administration of guardianship (Article 392 FCC). Guardianship ends with the emancipation of a minor or by age. It also ends in the event of the death of a person (Article 393 of the FCC).

Certain requirements are provided for the person of the guardian and his activities in Articles 395, 396 of the FCC. In Art. 397 states that it is the family council that decides on the removal and replacement of guardians, and the court takes care of the family council itself, the issues that interest them. The judge may, if he deems it necessary, take precautionary measures in the interests of the juvenile.

In accordance with article 398 FCC, even if there is a testamentary guardian, guardianship is established by the family council. The Family Council consists of, at least, four members, including a guardian and a supervisory guardian, but not a judge (Part 2 of Article 399 of the FCC). The members of the family council may be the parents and relatives of the father

and mother of the minor and any person living in France or abroad and showing interest in the child.

The personal right to choose a guardian, from relatives or outsiders, belongs only to the parents who died last, if he exercised legal authority or guardianship before the day of his death. This right can be exercised only in the form of a will or special statement in the presence of a notary. A guardian appointed by the father or mother is not obliged to accept guardianship (Article 403 of the FCC).

Pursuant to Article 411 of the FCC, if guardianship remains vacant, the guardianship court have to apply to the relevant state body for social assistance to children. In this case, the supervisory board has no family or guardian-observer.

4. The legislation of the Federal Republic of Germany.

The civil law of modern Germany continues to differ in completeness and logical sequence of legal requirements. As for guardianship and care, both of these institutions are provided for in a separate part 3 of Book 4 of the Code (hereinafter - GCC) (German civil code, 1896; Aleksandra Matveevna Nechaeva, 2011).

Pursuant to § 1789, a guardian is appointed by the guardianship court with the obligation to execute guardianship honestly and conscientiously. Moreover, the imposition of this duty is confirmed in the form that replaces the oath. At the same time, the GCC draws attention to cases of custody by the court in matters of custody on one's own initiative (§ 1774), for example, when measures taken by the court to resolve family disputes proved ineffective.

Choosing a guardian, the guardianship court must select a person who, by his personal qualities and property, is able to perform the duties of a guardian (§ 1779 (2)). Another duty of the court is to hear the relatives or friends of the ward, "if it is possible without significant delay or inadequate expenses" (§1779 (3)). Every German is obliged to assume the guardianship duties for which he has been chosen by the guardianship court (§ 1786 GCC) if there are no reasons to justify his reluctance. A detailed list of such reasons is contained in § 1786, entitled "The right to refuse". In case of unreasonable refusal to be a guardian, the person is still, but temporarily, obliged to be a guardian. In addition, the guardianship court has the right to the person chosen by the guardian, until the adoption of the duties of guardianship by imposing a fine. "It can be applied at intervals of at least one week. However, no more than three fines may be imposed.

The provisions of the German Civil Code provide for the appointment of several different

guardians for joint guardianship, and in case of disagreement between them, the decision is made by the guardianship court; also gives parents the right to mention it in their will; allows parents to nominate their guardian. Moreover, this candidacy may be replaced without the consent of the person called to guardianship, only in certain cases listed in § 1778.

Another feature of the German Civil Code is the consultation of guardians by the guardianship court (§ 1837 (1)). The court may also compel the guardian and the supervising guardian to comply with court orders by imposing fines, but no fine should be imposed on the youth department or association. These include the duty of the guardian and the supervising guardian at any time, at the request of the guardianship court, to provide him with information "on the exercise of guardianship and on the personal relations of the ward".

The German Civil Code has a fairly comprehensive coverage of issues related to the care of minors. As for caring for them, chap. 3 books 4 as a supplement provides for "special care" (§ 1909), which states: "A person who is subject to parental care or guardianship is appointed a guardian in matters that cause difficulty for the parents or guardian." In particular, a trustee is appointed to manage property that the person acquires in the event of someone's death or that will be provided free of charge by a third party under agreements between the living, if the testator has a testamentary disposition and the third-party property. Special guardianship "should also be established if there are conditions for the appointment of guardianship, but a guardian has not yet been appointed" (§ 1903). Custody is also assigned to a conceived child in order to respect his or her future rights to the extent that those rights require protection (§ 1912 (1)).

It should be noted that there is no similarity between the concepts of "guardianship" and "care" of minors between the German Civil Code and the Family Code of Ukraine.

5. The legislation of the United Kingdom

Guardianship issues are regulated in the United Kingdom by the Guardianship of Minors Act 1971, the Guardianship Act 1973, and the Child Care Act 1980 (Child Care Act, 1980; Guardianship Act, 1973; Guardianship of Minors Act, 1971).

Guardianship is defined in the Guardianship Act 1973 as an established system of measures aimed at protecting the personal and non-property rights of minors (Child Care Act, 1980).

Guardianship is established by a court decision in cases where a minor has lost his parents or they are deprived of parental authority. Upon reaching the age of majority (coming of age

when the child reaches the age of 18), guardianship is terminated, except in cases where an adult is declared incapacitated due to mental illness (Guardianship Act 1973).

The guardian is called to take care of the minor's personality, upbringing and education, manage his property and represent the interests of the ward.

In the UK, custody cases are handled by magistrates, but their decisions are subject to appeal in the Family Division of the High Court.

It should be noted that English law follows the recommendation of the European Court of Human Rights, which has repeatedly pointed out that the care of the child by public authorities should be considered a temporary measure until the family is restored. The United Kingdom is an example of a state that cares for the family, reasonably combining the principle of non-interference in the affairs of the family, and in case of violation of the rights of its members, uses effective means to protect the rights of both children and parents.

6. Conclusions

In addition to adoption, guardianship and custody, the most common legal forms of placement and upbringing of orphans and children deprived of parental care in Ukraine are family-type orphanages and foster families. Their creation and operation are aimed at ensuring the possibility of the child's right to grow up in a family environment are acceptable for the full development of orphans and are closest to raising a child in a biological family.

In accordance with the statistics mentioned above, problems in the field of guardianship and care exist and worsen every year. It is necessary to point out certain significant shortcomings, namely: the conceptual apparatus (for example, the concept of guardianship and care is not in the Civil, Family Codes of Ukraine); the delimitation of the competence of executive bodies and local self-government bodies in the exercise of guardianship and trusteeship in the current legal acts is not clear enough; public participation in solving issues and tasks of guardianship and care is not provided; also, the certainty of the legal status of the wards and the responsibility of guardians and trustees is not thoroughly spelled out, etc.

Specific proposals for improving Ukrainian legislation in the field of guardianship

and custody may be the adoption of a separate law aimed at specifying and expanding the rules, powers and improving the position of guardians and trustees during the establishment, change and termination of these legal relations.

In particular, it will be useful to study the choice of guardian in France. The legislation of this country states that it is the family council that decides on the removal and replacement of guardians, and the court takes care of the family council itself. The judge may, if he deems it necessary, take precautionary measures in the interests of the juvenile. This is a very positive thing, because the family council can probably choose a guardian for the child better than anyone else. After all, members of the family council can be the child's parents and relatives or any other person.

It is worth noting the peculiarities of the establishment of care in Germany. The guardian is appointed in cases that cause difficulties for the parents or guardian. In particular, the trustee is appointed to manage the property that the ward has acquired. Perhaps, such a model of the division of guardianship and care could work well in our state. A guardian would be appointed for the child from birth to 18 years of age, and custody would be considered as an ancillary function to parents or guardians (Ianitska I. A., 2016, pp. 175-182).

In general, the state needs to encourage the creation of foster families, family-type orphanages, as well as the birth of children, borrowing the experience of Germany, by providing tax benefits that could significantly improve the situation in the field of guardianship and care.

The experience of Great Britain in the field of guardianship and care should be considered and applied, namely the regulatory Standards of child rearing in foster families, family-type orphanages, family institutions of children deprived of parental care.

Summarizing the above, the regulation of the institution of guardianship and care in European countries has many features, original legal rules that give grounds to conclude on the implementation of specific positive developments in France, Germany, Great Britain in civil law for Ukrainian science, as well as improving legislation and application in the Ukrainian legal space.

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ІНСТИТУТ ОПИКИ ТА ПІКЛУВАННЯ В УКРАЇНІ ТА ЄВРОПЕЙСЬКИХ КРАЇНАХ

Анотація. Актуальним сьогодні є дослідження правової природи та особливостей встановлення опіки та піклування над дітьми-сиротами, дітьми, позбавленими батьківського піклування, обмежено дієздатними та недієздатними фізичними особами в Україні. Опіка та піклування є найбільш поширеною формою турботи за дітьми як у світі, так і в Україні. Поява опіки та піклування як інституту зумовлена тим, що діти зазнають порушення прав, свобод та законних інтересів з боку батьків, родини, сім'ї, які виконують неналежним чином або зовсім не виконують покладені на них обов'язки. Опіка та піклування є інститутом не тільки цивільного, а й сімейного, адміністративного, цивільно-процесуального права, які регулюють категорію відносин недієздатних та обмежено дієздатних фізичних осіб, а також дітей-сиріт та дітей, позбавлених батьківського піклування. Безперечно, приведення законодавства України у відповідність до міжнародних норм права є позитивним результатом, але сьогодні, з огляду на статистику, ситуація у сфері опіки та піклування погіршується щорічно, а тому захист та відновлення прав, свобод та законних інтересів дітей-сиріт, дітей, позбавлених батьківського піклування, обмежено дієздатних та недієздатних фізичних осіб в Україні потребує кращого щодо нормативного забезпечення. Метою статті є аналіз правового регулювання інституту опіки та піклування в Україні та країнах Європи, зокрема Франції, Німеччини та Великобританії; пропозиції щодо вдосконалення українського законодавства, запозичення та впровадження досвіду цих країн.

Мета. Метою дослідження є аналіз та порівняння законодавства, особливостей зазначених європейських країн.

Аналіз останніх досліджень і публікацій. Теоретичною основою дослідження є праці вітчизняних та зарубіжних фахівців у галузі римського приватного права, цивільного права, загальної теорії права тощо. Серед них, передусім, треба назвати праці правознавців України та Росії: Д.І. Азаревича, С.С. Алексєєва, Ч.Н. Азімова, Д.В. Бобрової, В.І. Борисової, О.В. Дзери, А.С. Довгерта, Н.А. Д'ячкової, І.В. Жилінкової, О.С. Іоффе, О.Л. Невзгодіної, О.О. Красавчикова, Н.С. Кузнецової, І.Б. Новицького, З.В. Ромовської, В.О. Рясенцева, О.А. Підпригори, Н.О. Саніахметової, Є.О. Харитоновна, Ю.С. Червоного, Б.Б. Черепакіна, Я.М. Шевченко, І.В. Шерешевського та ін. Емпіричним підґрунтям дослідження першоджерела є сучасне цивільне законодавство України, а також законодавство європейських країн.

Результати. Прагнення авторів статті на прикладах таких європейських країн, як Французька Республіка, Федеративна Республіка Німеччина, Велика Британія, висвітлити, розкрити та імплем-

ментувати деякі з цих особливостей в українське законодавство з метою вдосконалення інституту опіки та піклування в нашій державі.

Висновки. Регулювання інституту опіки та піклування в європейських країнах має багато особливостей, оригінальних правових норм, які дають підстави зробити висновок про впровадження конкретних позитивних для української науки напрацювань Франції, Німеччини, Великої Британії у цивільне право, а також удосконалення законодавства та застосування в українському правовому просторі.

Ключові слова: опіка, піклування, європейські країни, Франція, Німеччина, Велика Британія.

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