

Some Conceptions on Minor Custody Revocation and Transfer System

CHEN Huan^{[a],*}; XU Qianquan^[b]

^[a]Lecturer, School of Law, Yangtze University, Jingzhou, China.

^[b]Professor, School of Law, Yangtze University, Jingzhou, China.

*Corresponding author.

Supported by the Ministry-Level Project of China Law Society in 2013 “A Study on the System of Social Security for Vagrant Minors” (CLS (2013) D211).

Received 28 November 2014; accepted 4 March 2015

Published online 26 March 2015

Abstract

Reasonable exercise of minor’s custody is of vital significant to mental and physical health of the minors. In reality, due to failure of some guardians to fulfill the guardianship responsibility and the decision made by the Ministry of Civil Affairs on social pilot program of protection of the minors, revocation and transfer system of minor custody is turned into implementation of systems from practical needs. Therefore, it accords with the practical need of protection of minors and juridical practice to build a revocation and transfer system of minor’s custody on the basis of special procedures of the civil procedural law.

Key words: Custody; Revocation; Transfer; Minors’ social protection center

Chen, H., & Xu, Q. Q. (2015). Some Conceptions on Minor Custody Revocation and Transfer System. *Frontiers of Legal Research*, 3(1), 33-40. Available from <http://www.cscanada.net/index.php/flr/article/view/10.3968/6825> DOI: 10.3968/6825

INTRODUCTION

The *General Principles of the Civil Law* and *Law of Protection of Minors* of China provides some regulations on revocation and transfer of the custody of the parents

or other guardians but no relevant procedural rules concerning civil action, which leads to the situation where the revocation system of parents' custody is built but cases with application to the court for revocation system of parents' custody by prosecution are rarely seen (Zhang, 2010), and it is difficult to realize the rights granted by the substantive law provisions in reality. Therefore, it is extremely urgent to solve the poor guardianship of the minors by establishing of the transfer system of minor custody.

Chinese government and civil affairs departments have been establishing minors' rescue places, where the minors who are vagrants and beggars or run away from home are provided with care of temporary guardianship. In May 2013, the Ministry of Civil Affairs published the *Circular on Implementation of the Pilot Program for Social Protection of Minors* (hereinafter referred to as *Pilot Circular on Minor Protection*) to carry out the pilot program of social protection of the minors. Social protection centers for the minors (minors' protection center) were established in the pilot program based on the principle of effective protection of lawful rights and interests of minors. Besides, functions of the minors rescue management stations were expanded into assistance, guardianship service, supervision and protection of the minors under harm and salvation and help minors in trouble. The pilot program launched by the Ministry of Civil Affairs brought a good opportunity for the establishment of an operable revocation and transfer system of minor custody. The minor protection center in J city is one of the experimental units, where various measures and approaches for coping with and solving poor guardianship of minors are collected in practical work, which provide feasible ideas for establishment of the revocation and transfer system of minor custody.

1. ANALYSIS OF FOUNDATION FOR ESTABLISHMENT OF REVOCATION AND TRANSFER SYSTEM OF MINOR CUSTODY

1.1 Nature of the Minor Custody

Delimitation of custody is directly related to nature of the guardianship. Guardianship is generally regarded as the legal system on supervision and protection of body property and other lawful rights and interests of minors and mental patients in accordance with legal provisions (Tong, 1990, p.75). Opinions on the nature of guardianship vary a lot from people to people. But in Article 18 of China's *General Rules of Civil Law*, it is stipulated that "the guardian shall fulfill guardianship responsibility" and guardianship by nature, is the responsibility of the guardian (Wang, 2001, pp.150-151). "Guardianship is not a right but a responsibility and the essence of guardianship lies in protection of the body and property of the person

under guardianship rather than the right of dominating.” (Liang, 1989, pp.84). Hence, it can be seen that, in nature, minor custody is the responsibility undertaken by the guardian for protection and supervision of the person under guardianship other than the “right” literally indicated by the word “power”. For the person under guardianship, the custody means to care, guardianship, education and protection and other responsibilities of the guardian to the minor.

1.2 Theories on National Guardianship Responsibility Is the Guarantee for Transfer of Minor Custody

The guardianship of minors has now stepped into the category of nationalism after going through familism and individualism. National guardianship responsibility means that “the country, like the parents of the minors, shall seek for benefits of the minors who are in lack of supervision and hopes, and support them to some degree.” (Gan & He, 1984, p.577). The Germany pushed national guardianship theories to a new high and advocated that the court and adolescent bureau, which fulfill guardianship responsibility on behalf of the state, shall exercise whole-course intervention and mechanism guarantee (Cao, 2004, pp.193-195). With the urbanization in china and family planning policy, the traditional “acquaintance society” is gradually moving towards defamiliarization for people have less relatives and become estranged; but the prosperity of market economy impels the transformation from traditionally “affiliation” relationship to contractual labor relationship between the unit and the individual, and the personal dependence is reduced. The traditional emotion home is gone and people start to pay attention to the role of the country in protection of the body and emotion of individuals, thus, relay in minor custody of the country is becoming more and more obvious.

In China, emergence of national liability of guardianship can be seen from the Law of Protection of Minors to the pilot program launched by the Ministry of Civil Affairs. In case, the conventionally close relative guardians are unwilling or unable to perform the guardianship responsibility, the minors protection center or child welfare institution — executing agencies of the civil affairs department under the support of the country can apply for initiating the revocation procedures of custody of the original guardian and succeed to become the guardianship body of the minors.

1.3 Principles of Revocation and Transfer System of Minor Custody

According to the large amount of practice accumulated in minors protection center in J city, following principles shall be followed in establishment of revocation and transfer system of minor custody:

1.3.1 Maximization Principle of Protection of Minor’ Rights

A person can take proper care of oneself only after a long period of adolescence after birth. “In other species, the cubs can generally look after itself soon after

birth or incubation but human babies do not have such ability, and need continuous care and protection provided by others for several years after birth. Such period of dependence is much longer than that of other animals.” (Robertson, 1994, p.455). During the adolescence, the individual can barely effectively control its behaviors nor protect its vital interest including personal rights, thus custody is necessary. The revocation and transfer system of minor custody is directly related to survival and growth of the minors, hence, it shall be provided with the maximum protection of the rights of the minors. The maximization principle is mainly centered on the minors, to respect the reasonable needs for the survival, growth and development of them and provide maximum protection of their legitimate rights so as to promote healthy growth of minors.

Under the traditional concept of family of “Blood is thicker than water”, parents, grandparents and other close relatives are deemed as the best guardians for minors. But in case of inappropriate performance of the guardianship responsibility of parents where the minors shall be provided with the same right to receive guardianship, the country shall then become the guardianship body. The national liability of guardianship shall be realized through a series of systems and procedures, of which, the design shall be laid the basis of healthy growth of the minors with due respect of the will of the guardian otherwise assigned and thorough review of the qualification of the assigned guardian to undertake custody and true will of the minors themselves.

1.3.2 Litigation Efficiency Principle

For a long time, fairness has been regarded as the synonym for the law. Along with social progress, efficiency has received increasing attention in social life. Richard A. Posner, the epitome of jurisprudence of economic analysis in the U.S. contributed to the establishment of efficient value in the field of law.

Efficiency is the universal standard to judge whether any legal system is appropriate or not and the legal systems including judicial systems shall be in favor of the realization of efficiency. The only purpose of the law is improvement of economic efficiency. (Posner, 1992, pp.853-855)

Hence we can see that, in addition to fairness, which is the basic value of law, efficiency is another value pursuit during the judicial process.

In the course of revocation and reconfirmation of the minor custody, more importance shall be attached to the litigation efficiency principle for the care and supervision of minors cannot be suspended, once it is, the lawful rights and interests of the minors could be harmed. It is undoubtedly that both efficiency and justice shall be considered and balanced during establishment of revocation and transfer system of minor custody. In practical work, laying too much emphasis on efficiency may undermine the maximization principle of protection of the rights of minors. Therefore, during design of procedures, parents who failed to provide

good guardianship of the minors shall be given adequate opportunities to repent so as to spur them to actively perform guardianship responsibility. Second, because the revocation and transfer system of custody is continuous and the basic facts are coincident, the revocation and transfer procedures of custody can be combined during the process of hearing to design the revocation and transfer procedures of minor custody. By thus doing, the issue of custody of the same minor is addressed in a timely manner and the efficiency value of legalization is realized as well.

2. DESIGN OF REVOCATION AND TRANSFER PROCEDURES OF MINOR CUSTODY IN CHINA

Revocation of custody and reassignment of the guardian is supposed to be carried out in two different legal procedures and both of them are indispensable for protection of minors. It is in conformity with the maximization principle in protection of interests of the minors to combine the two procedures revocation of custody and reassignment of guardian (referred to as custody transfer in this paper) and the design of the combined procedure shall be carried out with reference to the special procedures in basic process of civil actions in China.

2.1 Applicant

The applicant refers to the personnel or organization able to institute revocation and transfer of custody to the court. Because revocation and transfer of minor custody is provided with combined hearing procedures, the applicant is the main body undertaking the guardianship responsibility after transfer of the custody, thus, the two can be the same. Therefore, applicant includes the following types:

- a) Other relatives and friends with qualification of guardianship under the second clause of Article 16 of General Principles of Civil Law;
- b) The organization the father or mother of the minor works in;
- c) The residents' committee and villagers' committee in the place of residence of the minor;
- d) The rescue and protection centers for the minors or child welfare institutions affiliated with the civil affairs departments. The rescue and protection centers for minors mainly include social protection centers for the minors in 20 pilot areas established by the Ministry of Civil Affairs and minors rescue management places in non-pilot areas.

2.2 Application Requirements

According to Article 119 of Civil Procedural Law of China, litigation shall meet certain conditions. Application for revocation and transfer of custody shall be in line with legal provisions.

a) The Applicant. It includes all the foresaid relevant personnel and organizations.

b) The Respondent. It is the object of revocation of the custody, mainly refers to parents or other guardians whose custody shall be revoked as per above rules.

c) Clear and specific appeal. It refers to the applicant's request to the court to revoke the custody of the parents or other guardians of the minor and assign another guardian.

d) Facts and causes in line with legal provisions.

According to the practical condition in China, the applicant can apply for revocation and transfer of custody to the court in case of any of the following behaviors of the parents or other guardians during performance of guardianship responsibility:

- The guardian commits domestic violence or maltreatment, desertion and sexual assault and other crimes in infringement of personal rights and interests or legal property rights of the minors;
- Serious social deviant behaviors such as drug taking and criminal acts or serious disease of the guardian so that it cannot perform the guardianship responsibility;
- The guardian indulge the minor with crime, drug taking or begging and other behaviors or puts the minority in a situation with no supervision, under which the minor may face the risk of death or serious injury;
- The guardian conducts any other behaviors of inappropriate in fulfillment of the guardianship responsibility.

e) Competent court: under jurisdiction of the appellate court.

2.3 Application

Special procedures of revocation and transfer of custody can be carried out in accordance with relevant procedures and conditions of general procedure of first instance in civil cases.

a) Time of application: Generally starts from acquisition of relevant facts and causes for transfer and revocation of custody to perfect capacity for act of the minor;

b) Parties in action: Include the applicant and the respondent.

c) Appeal: Revocation of custody possessed by the guardian who fails to fulfill guardianship responsibility or infringe lawful rights and interest of the minors and reassigning of another guardian of the minor.

d) Facts and causes: Parents or other guardians meet the requirements of foresaid facts and causes for revocation of minor custody.

e) Competent court: The people's court where the respondent is located; if the place of domicile of the respondent differs from the habitual residence, the competent court is the people's court in the habitual residence.

2.4 Acceptance and Hearing Procedures

a) Acceptance. The litigation over revocation and transfer of custody is instituted in order to help the minors out of crisis situation where no guardianship is received or infringement of lawful rights and interests and is an urgent process. Therefore, the court shall shorten the period of time consumed from acceptance to hear so as to urge active hearing of the cases.

Time limit: the competent court shall accept the case within five days after receiving the application; send the service within three days; and meanwhile, advises the candidate guardians of submission of the opinions on the willingness to undertake guardianship responsibility. Those who are willing to fulfill the responsibility shall be told to participate in the hearing and listed as the third person; the candidate guardians shall be advised of opening of the court session fifteen days later while the service is sent. The answer brief shall be submitted within ten days.

b) Hearing procedures: applicable to special procedures of civil action.

c) Arbitration tribunal: collegiate bench composed of three judicial officers.

d) Procedures for opening of the court session: reference to ordinary procedures of first instance. In addition, a debate over candidate guardians shall be added during the court hearing. If there is only one candidate guardian who is willing to undertake the guardianship responsibility, the party shall provide corresponding causes and evidence; if two or more people among the candidates who are willing to undertake the responsibility, each candidate shall provide some evidence and enter into a court debate.

e) Observation period lasting for one month: applicable to guardians who are willing to repent and undertake the guardianship responsibility.

f) Asking for opinions of the person under guardianship. Although the minors do not have civil capacity, they are capable of judging and can express their own will. The procedure is set up to better safeguard the rights and interests of the person under guardianship, for which, opinions of the minors under guardianship are of vital reference significance to judgment of the court.

g) Panel discussion: reference to ordinary procedures of the first instance.

h) Judgment: the court shall pronounce the judgment results of judgment within ten days after the court session is opened. If the parents or other guardians are willing to repent their errors and undertake the guardianship responsibility, the court shall provide an observation period lasting for one month; in case of impenitency of the guardians, the court shall revoke the custody of the original guardians and determine another appropriate guardian. If none of the candidate guardians is willing to undertake the guardianship responsibility, a child welfare institution can be assigned as the guardian according to Article 43 of the Law on Protection of Minors. Before judgment of the court after the application is submitted, the social protection center for minors shall undertake the guardianship responsibility temporarily.

i) Revocation and transfer of custody cases shall be subject to one-final trial.

2.5 Procedures of Revocation of the Original Judgment

The people who are deprived of the custody are oftentimes parents or close relatives of the minors, who are in blood ties with the minors and enjoy natural parental power. They are supposed to be the best guardians of the minors but are deprived of custody because of their poor guardianship or infringement of rights and interests of minors by their subjective faults. If the guardians who are deprived of custody are genuinely repentant and willing to resume to undertake the obligation of guardianship of the minor, procedures of revocation of the original judgment may be established to help them.

a) Applicant: the person who is deprived of custody as per the original judgment.

b) Respondent: current guardian.

c) Requirements on appeal for revocation of the original judgment: the person who is deprived of custody as per the original judgment is genuinely repentant and willing to undertake the obligation of guardianship of the minor.

d) The hearing can be carried out in light of the revocation procedures of custody.

CONCLUSION

For implementation of the conceptions on revocation and transfer of minor custody, the active role of minors protection centers shall be fully played and corresponding pilot programs shall be launched in courts accepting and hearing revocation and transfer cases. Meanwhile, cooperation with the civil affairs and public security departments shall be strengthened to realize effective connection of evidence so as to safeguard lawful rights and interests of the minors.

REFERENCES

- Cao, S. Q. (2004). *A study on supervision system of minors* (pp.193-195). China University of Political Science and Law Press.
- Gan, Y. P., & He, P. (1989). *Criminal law of foreign countries (volume I)* (p.577). China: Peking University Press.
- Liang, H. C. (1989). *Civil law* (p.84). China: Sichuan Renmin Press.
- Posner, R. A. (1992). *Economic analysis of law* (pp.853-855). In Z. K. Jiang (Trans.). Encyclopedia of China Publishing House.
- Robertson, I. (1994). *Sociology*. In Y. F. Huang (Trans.). Commercial Press.
- Tong, R. (1990). *Chinese civil law* (p.75). China: Law Press.
- Wang, L. M. (2001). *Study of civil and commercial law* (revised edition, volume 1, pp.150-151). China: Law Press.
- Zhang, J. L. (2010). A study on revocation system of parents' custody. *Academic Forum*, (5).