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THE LEGAL NATURE OF THE REMUNERATION TO THE GUARDIAN OF THE ADULT INCAPACITATED CITIZENS

The main purposes of present article are the research of regulatory framework of establishment of repayment for tutors of emancipated incapable persons and legal practice of settlement of disputes in abovementioned sphere. Accumulation of methods of scientific cognition is a methodological outline of present research, the main methods are system-defined, technic and comparative ones.

Based on deep analysis of federal and regional provisions of legislation maintained terms and conditions of payments of repayment for tutors of emancipated incapable persons the social and interim nature of aforementioned payments is concluded. Current state law actually allows to conclude that the state care for the socially vulnerable categories of the citizens, including the elderly and disabled citizens, with limited material resources, encourages the legislator to seek new alternative ways of its implementation. To those should be referred "social outsourcing", that is, privatization of "unprofitable" social services in order to optimize the budgetary resources. Meanwhile, the reduction of costs for the implementation of the social functions of the state should not take place to the detriment of the content component.

In the scientific literature there is no unanimity of views on the legal nature of the payments made by the trustees for the performance of such duties. Comparison of remuneration of trustees with a monthly payment for child care until the age of 1.5 years to achieve it possible to identify common objectives of establishing these payments, as well as the identity of their social and interim nature. Confirmation designated theses is to analyze the provisions of the legislation of the Russian Federation, in which the caregiver award is regarded as one of the ways to sequence the elimination of in-patient care and social services at home, which also contribute to the strengthening of social protection of this category of citizens.

However, the practice of implementation of the provisions in the legislation found a number of fundamental problems. In particular, the regulation of these relations norms different industry sector is the cause of the ambiguity of their interpretation. Judicial authorities misinterpreted the purpose of the above payments, ignoring their legal entity. The current judicial practice does not allow to achieve the objectives the legislator and has a negative impact on the social security of citizens.

Key words: social support, compensatory custody, social outsourcing, civil constraction.

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Law has a functional character. The rule of law is focused on the impact on existing social relations, or on stimulating the creation of the new ones. However, as long as the rule of law is not enforced we can not conclude about its effectiveness. Unfortunately, there are cases when the purpose of law is not obvious and provokes ambiguous interpretation of legal norms. As a consequence, there is a considerable amount of controversy and contradictory judgments on them.

Thus, taking care of elderly and disabled citizens has always been proclaimed as one of the most important goals of the state social policy. But with limited material resources, the achievement of this goal began to expand at the expense of other alternative methods, acquired features of the so-called "social outsourcing". Substantially this means the transfer of "unprofitable" social services into private hands in order to save budgetary funds. In conditions of economic crisis, this might be justified if it had not been carried out as a straight line, only to cut costs, which leads to a distortion of the essence and content of the social functions of the state. The above mentioned theses can be illustrated by the situation in the sphere of regulation of relations on a reimbursable care.

In 2008 the Federal Law "On guardianship and custody" has been adopted. The law provided a number of legislative developments regarding the procedures for appointing incapacitated citizens or guardians. One of them is the possibility of establishing appropriate legal ties through the conclusion of a contract on guardianship (p.1 Art. 14 of the Act). There is no doubt that the purpose of introducing this provision was to increase the number of people wishing to become guardians or trustees [2, p. 2]. This innovation has received a controversial assessment among scholars. Positive characterizes are made by I.A., Mikhailov. He indicates that the obligation to establish the concept of custodial relationships had been previously supported by a number of scientists, which include D.I. Meyer, K.P. Pobedonostsev, V.A. Ryasentsev [6, p. 394; 11, p. 198; 15, p. 211]. The author notes that this attitude has the advantage of establishing a clear mechanism of accountability guardians and trustees for non-performance or improper performance of their duties [7, p. 23]. An illustration of the opposite point of view is the position AM Nechaeva [9, p. 86].

However, the most controversial point is the provision of the Law on the possibility of execution of custodial duties on a reimbursable basis. In exceptional cases the guardianship authorities have the right to conclude a contract with a guardian or a trustee which provides remuneration payment to such persons. Historically Russian guardians contained wards "of their own free will" [18, p. 12]. Considering guardianship as "a form of the state protection of the individual" [1, p. 142], the Soviet and post-Soviet family law established a presumption of gratuitousness of these relations. It is preserved in modern Russian legislation. Thus, in accordance with paragraph 2 of Art. 14 of the Act, it is assumed that trustee's duties are free of charge. Establishment of the reimbursable guardianship or custody is possible only in exceptional cases.

The Act reflects and financial sources of these payments. In accordance with the provisions of paragraph 2 of Art. 16 the reward may be paid from the income from the property of the ward, third party funds, and funds of the budget of the Russian Federation. The list of cases and the procedure for payment of remuneration is established by regional legislation.

In 2014, the Code of the Omsk region on social protection of certain categories of citizens was supplemented with Article 42.1 which provided the conditions and procedure of executing of obligations under the custody of the incapacitated adult citizens on a reimbursable basis. For caregivers who have concluded an agreement on the implementation of the guardianship of adults incapable citizens the law provided a measure of social support in the form of payment of the monthly remuneration for exercise of care in the amount of 5 554 rubles for each ward. The standards are also provided a set of conditions, satisfaction of which is necessary for the recognition of the guardians of the right to this kind of social support:

- the guardian is not a person who is obliged to finance the ward by virtue of a court decision;
- the guardian is not a recipient of payments established by the regional legislation for carers for the ward;

- the guardian has not reached the age of 65 years;
- the guardian is not in an employee;
- the guardian and the ward live together;
- the guardian does not receive a fee from the income from the property of the ward, and (or) means of third parties;
- the guardian does not enjoy the free property of a ward in their own interests;
- wards are not registered in the executive authority of the Omsk region authorized in the field of social protection of the population.

The latter condition is remarkable in terms of understanding the goals pursued by the regional legislator when establishing the measures of social support. Can we consider these payments as analogue of wages? Or is it a payment of the social-oriented support of the family? Answers to these questions are not so obvious.

If we draw an analogy with the monthly payment for child care until the age of 1.5 years, we can see a significant similarity of these payments in a circle of subjects (family members), the terms of her appointment and payment (the subject is not working or working part-time). Similar, in our opinion, is the main objective in relation to which the payments have been established called, and namely, transfer of public duties to family level. The situation is different with regard to the remuneration of trustees.

On October 15, 2013 the Government of the Omsk region adopted the State program "Social support of the population". Describing the current state of affairs in the field of social services, the developers emphasized the preservation of citizens' dissatisfaction with the demand for social care services. As of August 1, 2013 the queue for inpatient care consisted of 667 people. Moreover, due to the change of certain provisions of the legislation in the field of hygienic requirements for the placement, device, equipment, maintenance of facilities of health and social service organizations growth in the order of 2.5 times, and, accordingly, increase of the waiting period for admission of citizens to the state had been projected. In this context, the program provided the opportunity to use new mechanisms of improving of the level, quality and effectiveness of social support, including the development and application of hospital technology.

In the same year "roadmap" of the social service sector had been adopted in other regions. The Government of the Yamalo-Nenets autonomous region approved the state program "Social support of citizens and labor protection for 2014-2020." One of the main activities is the development of the social institution of the family for the elderly and disabled. The program states the existing problems of the district in the area of social protection of certain categories of citizens, such as the growth of disability and the unresolved problems of poor people. In addition, due to the nature of the transport infrastructure in the region, there is the problem of the availability of social services for senior citizens and people with disabilities who live in remote inaccessible locations.

One of the reasons of liquidation of queuing for hospital care and social services at home was the successful introduction of alternative forms of social assistance to such persons. Since 2012 adult caregivers of disabled citizens receive remuneration for the performance of their duties. The Institute for Social family for lonely senior citizens has also been formed. The program emphasizes the beneficial effects of innovation leading to the socialization of these individuals. Similar alternative forms of social support through the establishment of a monetary payment of caregivers of adult disabled people have been established in Vologda, Arkhangelsk, Vladimir, Kaluga regions, as well as in the Jewish Autonomous region, Kamchatka and Khabarovsk krae.

Thus, the development of federal and regional legislation in the field of the social services testifies that the authorities at all levels fully support all kinds of initiative in the creation of hospital technology to eliminate queuing people for social care and maintenance of their social

protection. In fact, the regional authorities 'delegated' state functions for charity and care for adult disabled citizens to private persons by entering into an agreement with them on the establishment of a paid care. Unfortunately, this method is accompanied by giving the private-legal nature of benefits provided by adult guardians of incapacitated citizens.

The relation to the remuneration of trustees as a measure of social support has been consistently traced in scientific studies [21, p. 75] and in law enforcement. Courts defended the position according to which that the implementation of the incapacitated adult citizens for a fee on the basis of the concluded contract can not be considered to take up paid work.

However, in 2016 the vector of law enforcement has significantly changed. In July 2016 the Supreme Court formulated the legal position, according to which the agreements on the establishment of a paid care are covered by the provisions of the civil legislation regulating relations in the area of paid services. The guardian, being party of such an agreement, carry out paid work, and their remuneration is taxable income.

A literal interpretation of the provisions of paragraphs 1 and 2 of Art. 152 of the Family Code, according to which the relations arising from the contract of a foster family can be subsidiarily regulated by civil law rules on paid services, unless it does not contradict the essence of such relations, allowed the Supreme Court of the Russian Federation to determine the legal nature of the guardian's remuneration as the income received for the services performed by the guardians. This position of the Supreme Court has been formulated with regard to the remuneration paid to adoptive parents. Meanwhile, the lower courts actively use it in resolution of disputes concerning the definition of the legal nature of the tutelary remuneration under the contract on the implementation of the guardianship of adult incapable citizens, as well as recognize the possibility of applying of the rules of civil law on paid services. We can hardly recognize this position of law enforcers as a corresponding to rule of law. Custodial charges are not identical with labor relations (Art. 15 of the Labour Code), as appropriate remuneration does not correspond to the legal nature of wages (Art. 129 of the Labour Code). Article 16 of the Labor Code established an exhaustive list of the grounds of the employment relationship, among which there is no indication of the performance of guardian's duties under the contract on the implementation of the guardianship.

One cannot identify remuneration of guardians and fees for paid services in the respective civil law contract. Some experts in the field of family law expressed the view of the mixed nature of the agreement under consideration [10, p. 44], which incorporates elements of a service agreement [3, p. 38; 4, p. 339; 8, p. 99]. However, it is obvious that such a relationship is not a contractual one.

The fact entailing the emergence of rights and responsibilities among the guardians is an act of guardianship authority [19, p. 1306]. We agree with the position of T.S. Urumova, that the agreement is reduced only to the establishment of one of the legal facts necessary for the emergence of relations on a reimbursable care [17, p. 19-20]. N.A. Temnikova notes that such an agreement is the basis for an award for the ongoing care. [16, p. 106, 108].

AM Rabets points out that despite the fact that this agreement is mutually compensated any other duties in addition to ensuring payment of remuneration, are not imposed on the guardianship authorities. All the guardian's actions fall within the definition of services. However, such actions are not legally significant. Quantitative accumulation of such actions creates a qualitatively new state of care of the Trust which involves the implementation of set of actions to protect the rights and interests of the ward [14, p. 43, 45].

Thus, the courts must proceed not only from the literal content of the provisions of the law, but also should take into account the teleological interpretation of law. There is no doubt that the

realization of the guardian's duties requires a significant investment not of only material, but also of physical and psychological nature, which radically changes his way of life. In fact, the establishment of such a payment is not more than an additional form of social protection of such categories of citizens [12, p. 412; 5, p. 471].

Perception of the abovementioned position of the courts has significant legal consequences. Recognition of trustee's compensation as income by the service contract means that this sum of money is taxable. Accordingly, it will certainly require additional budget funding. However, due to the difficult economic situation not all regions can afford this

This situation is an example of improper borrowing of private law constructions to another area of law which demonstrates unwillingness of law enforcement agencies to solve complex cases. Scholars are concerned [20, p. 73] and suppose that law enforcers shouldn't be the only one who decides rationally [13, p. 156]. The only correct way to solve the identified problem is to make relevant amendments in the legislation of the subjects of the Russian Federation recognizing such payments as an individual kind of public benefit.

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