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Violation of Constitutional Rights Due to Non-Compliance of Obligations in the Special Curatorship

Vulneración De Los Derechos Constitucionales Por El Incumplimiento De Las Obligaciones En La Curaduría Especial

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Abstract

This study originates from the non-compliance with the obligations of special curators towards their represented individuals. The appointment of a curator for future marriages is of significant importance because their designation serves to ensure that the rights of minors or incapacitated individuals, including their assets if they have any, are represented at the time of marriage. With regard to the problem, the primary objective is to request that the judicial authorities carry out monthly monitoring to ensure the proper fulfillment of the responsibilities of special curators, thus effectively safeguarding the rights of minors or incapacitated individuals. The methodology used is a mixed approach, combining qualitative and quantitative methods, which will help obtain statistics and analyze the factors behind this non-compliance. This will lead to proper action regarding the obligations within the appointment of special curatorship to ensure the rights of minors are not violated. Therefore, this study will investigate, from a legal and doctrinal perspective, special curatorship for future marriages, the procedure, and execution, and examine why fulfilling the responsibilities and obligations of the special curator is crucial.

Keywords: special curatorship, rights, minors, incapacitated persons, nuptials.

Resumen

El presente estudio se origina por el incumplimiento de las obligaciones de los curadores especiales para con sus representados, la designación de un curador para ulteriores nupcias es de gran importancia ya que su nombramiento sirve para que en el acto de matrimonio los derechos del menor de edad o incapaz se encuentren representados incluido sus bienes en caso de poseerlos. En función del problema se plantea como objetivo primordial, solicitar a las autoridades judiciales que se realice un control mensual para asegurar el cumplimiento adecuado de las responsabilidades de los curadores especial y que así se tutele efectivamente los derechos de los infantes o de los incapaces, teniendo como metodología un enfoque mixto es decir cualitativo y cuantitativo, que ayudará a obtener la estadística y analizar los factores de por qué se produce este incumplimiento, para que de esta manera se proceda a actuar correctamente con las obligaciones dentro de la designación de la curaduría

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especial y no se vulneren los derechos de los menores, es por esto que en este estudio se va Indagar de manera jurídica y doctrinaria acerca de la curaduría especial para ulteriores nupcias, procedimiento y ejecución y examinar porque es importante el cumplimiento de las responsabilidades y obligaciones del curador especial.

Palabras Clave: *curaduría especial, derechos, menores, incapaces, nupcias.*

Introduction

Special curatorships are directly derived from the general classification of curatorships. This term holds significant importance and relevance. It is essential to understand that the curator has the responsibility of managing the assets of the individual under curatorship and ensuring the effective fulfillment of the best interests of the minor or incapacitated person, should the need arise.

According to Larrea, a curator is “*the person who exercises the respective custody or curatorship of the incapable or of the assets in case they cannot be managed by their owners*” (Holguin, 2006). Curatorship, according to Cabanellas, is “*the position and role of the curator for a minor or adult, broadly, an authority established by law to oversee the affairs and persons of those who, for any reason, are unable to manage their own matters*” (Cabanellas, 2006, p.105).

(Code of Childhood and Adolescence, 2014) The best interest of the child is a fundamental principle in Ecuador that is aimed at ensuring the effective exercise of the full range of rights of children and adolescents. This principle places an obligation on all administrative and judicial authorities, as well as public and private institutions, to align their actions and decision-making with the fulfillment of the effective enjoyment of the rights of children (p.3).

Currently, cases involving special curators are quite common, especially for individuals interested in entering into second marriages when they have minor children or incapacitated individuals under their care. In such situations, they must file a petition for special curatorship for subsequent marriages. During this process, the legal representative of the minors will request the appointment of a person as the curator through a motion before the judge, and the judge will make this designation under a motivated sentence when the circumstances warrant it.

It has been observed that in many cases where a special curator is appointed to enter into new marriages, the rights of the minors or incapacitated individuals being represented are violated. This is because it can be demonstrated that the appointed individuals do not fulfill their obligations and leave the minors or incapacitated individuals solely under the responsibility of the one who has parental authority and their new spouse.

Some of the cases in which this obligation is not met occur due to a lack of awareness of the obligations and responsibilities of the person appointed to the ward, as well as for the sole reason that such a curator is designated to fulfill a requirement for entering into a new marriage.

When the curator fails to fulfill their responsibilities and obligations, it leads to the violation of children's rights due to several factors. One of these factors is the creation of a new marriage. In many cases, the new spouse may not want a child who is not their own, which can lead to the child being excluded and subjected to physical and psychological abuse, thereby violating their right to live in a safe and healthy environment for their growth. This situation can also affect the child's performance in education and their ability to live harmoniously in society.

The right to health is another right that is violated due to the irresponsibility of the parent who has parental authority, in plain view of the designated curator who fails to assume their responsibilities. After the creation of the new marital relationship, severe cases of child malnutrition can occur due to poor nutrition caused by the lack of interest of the parents in their children, influenced by their new romantic partner. It is important to note that Article 32 of the constitution establishes that "Health is a right guaranteed by the State, whose realization is linked to the exercise of other rights, including the right to water, food, education, physical culture, work, social security, healthy environments, and others that support a good life" (Constitution, 2008).

Constitution of the Republic of Ecuador

The State, and society in general, including the family, must promote as a priority the complete integral development of minors, in which they must ensure the full exercise of their rights; as well as the principle of their best interest and their rights prevailing over other people. (National Assembly, 2008)

Girls, boys, and adolescents must enjoy the rights that are common to human beings, and at the same time those specific to their age. The State as such will recognize and guarantee life, including care and protection from the very moment of conception. (National Assembly, 2008)

Considering that the rights of children are the responsibility of both parents, this is why when a new marriage occurs, the appointment of a special curator for the minor or incapacitated child is completely necessary.

Section six, Habitat and Housing, "*people have the right to a safe and healthy habitat, and to adequate and decent housing, regardless of their social and economic situation*" (Constitution, 2008).

National Court of Justice. Resolution N°10-2016

The National Court of Justice in its resolution No. 10-2016 resolved in article 1 that in cases where the law requires the obligation to present a special curator or ad litem to protect the interests of the child that are in conflict in trial, the judicial authority will order that once the summons has been fulfilled, the minor is heard and gives an opinion on the guardian who represents him, taking into account that the intervention of minors or incapable persons will be strictly assessed by the judge considering the degree of development of the person who issues it. (Justice, 2016)

Articles 2 and 3 states that in cases where the child or adolescent does not have the capacity to express their intention, the proper designation will be made by the judge after a hearing with competent individuals and relatives, specifying the date and time for this purpose. Once the choice is made, the judge, through an order, will designate the curator and request their presence for taking the position. (Justice, 2016).

Ecuadorian Code of Childhood and Adolescence

To properly appreciate the best interests of the child, it is necessary to maintain a fair and efficient balance between the rights and all the duties of children and adolescents in the way that best serves the realization of their rights and guarantees. (National A., Code of childhood and adolescence, 2014)

In case of a violation of these rights of girls, boys, and adolescents, the supreme law establishes that all individuals, including the authorities of justice and the administration, have a legal duty

to report it as long as they know that a violation of one or more of the rights of minors has occurred, within a period of no more than 48 hours. It is essential to consider that these reports will lead to providing redress for the minor victim of rights violation and, in turn, the punishment of those responsible.

Ecuadorian Civil Code

Title IV of the Ecuadorian Civil Code in article 131 states about second and subsequent marriages in which it is considered that:

The single parent, widower, or divorced individual who has children under their parental authority or guardianship and wishes to get married or remarry must carry out the solemn inventory of the assets they are administering, which belong to these children either as heirs of their deceased spouse or through any other title. To form this inventory, a special curator will be appointed for these children. (National A., Civil Code, 2005).

Article 132 of the same legal body states that there will be room for the appointment of a curator, even if the children do not own or have assets in their name or under the care of their parents; if so, the nominated curator must testify to it.

It should be noted that the competent judicial authority will not, under any circumstances, allow a single parent, widower, or divorced individual who has children under their parental authority to get married or remarry without first presenting the certificate appointing the special curator. If, due to their negligence, the inventory was not carried out promptly, they will lose all rights to inherit as a legitimate heir or as an intestate heir of any child whose assets they have administered.

Articles 367 and 369, those who must exercise these positions are known guardians or curators, and generally guardians, guardianship, and curatorships are positions imposed on certain people, in favor of those who cannot represent themselves, or manage their businesses competently and they are not under the power of their parents, who can give them due protection. Curatorship and general guardianship extend, not only to the assets but also to the people who are subject to them. In addition to understanding that minors are subject to curatorship (National A., Civil Code, 2005).

Every guardianship or curatorship, except for the ad-litem curatorship or litigation, must be discerned. In this case, the judge's decree and the acceptance of the position serve as discernment. Discernment is known as the judicial decree that authorizes the guardian or curator to perform their duties. To carry out the discernment, it will be necessary for the appointment of the bond or guarantee that the guardian or curator is obliged to provide to precede the curatorship or guardianship.

The acts of the tutor or curator that have not yet been authorized by the discernment will be considered null. But the decree, once obtained, will validate the acts, the delay of which could have resulted in harm to the ward. It is up to the tutor or curator to represent or authorize the ward in all judicial or extrajudicial acts that require his intervention and may undermine his rights or impose obligations.

Article 416 and 418, The guardian or curator manages the ward's assets and is obligated to preserve, repair, and cultivate these assets. Their responsibility extends up to, and including, slight fault. The guardian or curator shall not be allowed, without a prior judicial decision, to alienate the ward's real estate, encumber it with a mortgage or servitude, or alienate or pawn

precious furniture or those with sentimental value. Nor can the judge authorize these acts, except for reasons of obvious benefit or necessity.

There are individuals whom the law prohibits from being guardians or curators, and also individuals whom it allows to excuse themselves from serving as guardians or curators. Incapacities can be related to physical and moral defects.

Taking into account that they are incapable of any curatorship or guardianship, the blind, the mute, the insane, even if they are not under interdiction, the bankrupt, as long as they have not been rehabilitated, those who are deprived of managing their own property, due to dissipation, the who do not have a domicile in the Republic, those who do not know how to read or write, those of notorious misconduct, those judicially sentenced, even if they have been pardoned from it, the spouse who has given cause for divorce, the one who has been deprived of exercising parental authority, those who, due to crooked or careless administration, have been removed from previous custody, or in the trial after this have been sentenced, due to fraud or serious negligence, to compensate the ward. (National A., Civil Code, 2005).

There are also rules related to professions, jobs, and public positions. It is understood that individuals of the Armed Forces who are currently in service, including commissioners, doctors, surgeons, and other individuals affiliated with the regular military units or state vessels, as well as those who have to hold a public office or commission for a long time or indefinitely outside the territory of Ecuador, are incapable of any guardianship or curatorship.

Rules related to age dictate that individuals who have not reached the age of majority cannot be guardians or curators. However, if an ascendant or descendant who has not yet reached the age of eighteen is called to guardianship or curatorship, they will be required to reach that age before assuming the role and an interim appointment will be made for the intervening period. The same applies to a testamentary guardian or curator who has not reached the age of majority. However, appointing a minor as a guardian or curator will be considered invalid, and they would only have to fulfill the guardianship or curatorship for less than two years.

Comparative Law

Based on all the research and in accordance with the current civil code in Ecuador regarding special curatorship, a comparative legal analysis is conducted. This involves a detailed examination of the civil regulations in other countries, specifically the civil codes of Chile and Colombia. The aim is to assess how special curatorship for subsequent marriages is applied in these countries.

Chilean Civil Code

Article 124: Anyone who, having children under their parental authority or their respective guardianship or curatorship, wishes to remarry must proceed to carry out the solemn inventory of every property they are administering, which belongs to them as heirs of their deceased spouse or through any other title. For the creation of this inventory, a special curator will be appointed for the children. (Chile, 2000)

Article 125, The assignment of the special curator will take place, even if the children do not have assets of any kind in their name, whether they are inherited or in the possession of the father or mother. When this is the case, the special curator must testify. (Chile, 2000)

Article 126, The Civil Registry Officer has the obligation not to allow the marriage of the person trying to remarry, without the latter presenting the respective authentic certificate of

the appointment of special curator for whoever is under his parental authority, or without prior summary information that he has no children from a previous marriage. (Chile, 2000)

Colombian Civil Code

Regarding second marriages, Article 169 states that "a person who, under their parental authority or guardianship, has children and wishes to remarry must proceed to create a solemn inventory of the properties they are administering, appointing a special curator for the children" (National C., 1887).

Article 170 of the same law states that the appointment of a curator will take place, even if the children who are under the parental authority of the person wishing to remarry do not have any properties. If a curator is being appointed, it must be testified. (National C., 1887)

Article 171 states that in case of non-compliance with the appointment of a curator and a violation of the provisions, the person will be penalized with the loss of legal usufruct over their children's properties. Additionally, an official will be fined. The judge must refrain from authorizing a marriage when they have not been informed of the proper appointment of a curator for the children, the act that discerned the position, and the inventory of the properties.

It can be observed that both the Chilean Civil Code and the Colombian Civil Code bear great similarity to the Ecuadorian Civil Code regarding the appointment of special curatorship for subsequent marriages. In no case can a marriage be celebrated when the appointment of such curatorship for minors has not been resolved.

Methodology

The chosen study is characterized by being developed with a mixed approach, with deductive, analytical, and comparative methods, with an interview technique aimed at legal professionals to know their legal opinion about requesting judicial authorities to carry out monthly monitoring to ensure adequate compliance of the special curators and thus effectively protect the rights of infants or the incapacitated.

Mixed Approach

This study is focused and supported within a quantitative and qualitative paradigm, that is, a mixed approach, since, within this, quantitative and qualitative data are collected, analyzed, and linked within the same study.

Mixed methods represent a set of systematic, empirical, and critical research processes and involve the collection and analysis of quantitative and qualitative data, as well as their integration and joint discussion, to make inferences resulting from all the information collected (...) and achieve a greater understanding of the phenomenon under study (Hernández, 2008, p.546).

Deductive Method

This method will be suitable for deducing why it is important to appoint a special curator to safeguard the rights of minors or incapacitated individuals and their assets. Through structured interviews with legal professionals to gather their legal opinions regarding the request to judicial authorities for monthly monitoring to ensure the proper fulfillment of special curators' responsibilities and thereby effectively protect the rights of infants or incapacitated individuals.

Analytical Method

This method will serve to analyze each of the determinations regarding special curatorship for second marriages so that in this way an effective study is developed based on doctrinal and legal concepts viable for this analysis.

Comparative Method

This method will be carried out because a comparison will be made with Chilean and Colombian legislation concerning special curatorship and second marriages. In addition to the existing legal principles in the compared laws, the input of professionals who are familiar with the issue and have dealt with similar cases to the proposed study has been considered.

Results

In the present study, it was confirmed that with the appointment of a special curator, the duties are not strictly fulfilled. Often, these curators are designated but do not adequately represent the rights of minors or provide constant care for their assets, thus significantly violating the best interests of the child due to the lack of concern for this responsibility assigned by the court.

Considering that some curators are not properly trained and do not assume the role that has been assigned to them. Consequently, it is considered that talks and training should be carried out by the department of social and psychological well-being of the judicial unit and in addition must propose a monitoring program for special curators.

Discussion

By understanding that the duties of a curator are strictly of intangible responsibility because they are entrusted with a fundamental mission in life, which is to watch over and safeguard the principle of the best interests of the child, encompassing all of their rights as enshrined in the Constitution, international treaties on the protection of rights, and other related laws, it becomes clear that curators must be capable and adequately trained to fulfill this mission.

The criteria of professionals in the legal, social, and psychological fields indicate that the factors contributing to non-compliance with the designated obligations are the lack of training and the absence of follow-up and control, which should be in place to ensure effective work in special curatorship.

Conclusions

- ❖ This case study significantly highlights the importance of fulfilling the obligations of special curators appointed to represent the rights of minors or incapacitated individuals in the creation of a new marital union and the proper representation of their assets, if they have any.
- ❖ The case study concludes that the process for appointing a special curator due to entering a new marriage involves filing a lawsuit with the Family, Women, Children, and Adolescents Court. This court will take cognizance of the case and decide in accordance with the law, with the resolution then being sent to a notary for formalization as ordered by the court.
- ❖ The study found that there is a lack of training for special curators and a lack of oversight by judicial authorities to ensure that they fulfill their responsibilities correctly.

Contributions

- ❖ Request that judicial authorities implement appropriate measures to assign the Department of Social and Psychological Welfare of the courts the responsibility of monthly monitoring and control. This will ensure the effective compliance of special curators with their obligations and safeguard the rights of minors or incapacitated individuals, including the control of their assets if applicable.
- ❖ Thoroughly review the legal framework to uphold the principle of the best interests of the child, as enshrined in the Constitution and other legal statutes. This will prevent unnecessary delays in judicial processes related to the appointment of special curators for second and subsequent marriages, ensuring that these curators fulfill their obligations.
- ❖ Organize training sessions for special curators to equip them with the necessary knowledge regarding their responsibilities upon appointment.

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