

Procedural Subject Rights Protection of the Ward as the Defendant in an Infringement Lawsuit

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doi: 10.56397/LE.2022.09.02

Abstract

The theoretical discussion of the wards' litigation status mainly includes five viewpoints. It includes the perspectives that taking the wards as the defendant, the guardian as the defendant, the guardian and the wards as a joint defendant, the guardian as the legal agent and the wards as a third party who does not have the right to make an independent claim. There are diverse defendant selection models in judicial practice, but the most common practice is to list a guardian as a defendant directly. The five viewpoints mainly present the value considerations from three perspectives: utilitarianism, legal receptivism and debatingism. In judicial practice, there are even richer choices. The common practice is to list the guardian as the defendant directly, but this practice is not conducive to protecting the guardian's procedural subject status and litigation rights. Therefore, the system of judge's right of interpretation should be used to bridge the loopholes and risks caused by the lack of litigation ability of the wards. Attentions should be paid to the new problems that may be brought under the principle of interventionism. It is necessary to clarify the scope of the judge's right of interpretation and the system should be different with the differences within the group of wards. It should be matched with the three-level gradient. In this way, the dynamic protection of the rights of the guardian's procedural subject will be realized. The procedural subject authority of the ward shall be consistent with the substantive law and procedural laws and abide by the principle of procedural protection. On the basis of clarifying the qualification of the subject of the guardian ad litem, the risk of the procedural status imbalance caused by the insufficiency of the wards ad litem ability can be healed through the judge interpretation power system. While the attentions need to be paid to the new problems brought from the principle of interventionism. Therefore, it is necessary to further clarify the boundary of the judge's interpretation right in this matter and realize the dynamic guarantee of the procedural rights of the ward while respecting the disposition power of the parties.

Keywords: wards, eligible parties, right of procedural subject

1. Introduction

1.1 Raising of Questions

1.1.1 Selection of Litigation Subject in the Case of Harm Caused by the Ward

The subject status of a ward ad litem is incompatible with the substantive law and the procedural law. Article 1188 of the *Civil Code of the People's Republic of China*: Compared with Article 32 of the *Tort Liability Law of the People's Republic of China*. The content has not changed from the original text of the law. The first paragraph of this article substantially stipulates that the guardian is the sole subject of responsibility in the case of harm caused by the ward. However, the second paragraph also provides that the ward may determine whether he is liable for compensation according to his or her property. There are some logical contradictions that it is provided the ward shall pay the compensation fee by the property, while the subject status of the responsibility is not clarified. The resulting question is that the court has very different choices in judging the subject status of the principal's liability. In Article 57 of the *Civil Procedure Law of the People's Republic of China*, it stipulates that "a person without the capacity for litigation shall have his guardian as his legal representative". The status of the

ward in the case of his injury is neither clear in the stipulation nor unified in judicial practice in the Civil Procedure. In addition, the guardian as the legal representative without legal capacity in the procedure law to participate in litigation is also different from the substantive law. Therefore, a self-consistent dilemma within the civil procedure law exists. Under the provisions of the judicial interpretation, “A person without civil capacity or with limited capacity for civil conduct causes damage to another person, Persons without civil capacity, persons with limited civil capacity and their guardians are co-defendants”, it conflicts with Article 57 of the Civil Procedure Law, which stipulates that “a person without litigation capacity shall have his guardian as the legal representative”. The guardians are always chosen to have the vicarious responsibility in our daily life because the ward usually does not have the responsibility. As for whether the guardian is specifically liable for compensation, it depends on the capacity of the ward’s own estate. The two parties may jointly undertake that and it is also possible that the ward or guardian is liable alone. Therefore, from the perspective of the civil procedure law, the guardian is not a tortfeasor and not necessarily the one liable for compensation. As for the tort legal relationship, there is no reason why the parties must necessarily be co-defendants. Fixed identification as a co-defendant will impact the identification rules of civil action co-defendant in the existing procedure law and not be conducive to the unification of the internal system of civil procedure law.

Therefore, the litigation status of the ward in the case of harm, the most prerequisite problem in the development of civil litigation is the incompatibility between substantive law and procedural law, makes it become a major obstacle for the ward to exercise the right of litigation subject in the case of harm.

1.1.2 The Judge’s Interpretation of the Defendant’s Selection in the Wards’ Infringement Lawsuit

With the implementation and improvement of the “registration system”, the civil litigation threshold is significantly lower than the past, however, the provisions of “clear defendant” cannot match the defendant subject fit requirements and also make the defendant choice for litigation become crucial. It affects the litigation efficiency greatly and requires the judge to interpretate for making up the incoordination between the entity law and procedural law when the litigation object is not suitable.

In addition, the particularity capacity of the ward’s participation in litigation activities also requires the judge to take the initiative to explain it. The ward is a person without legal capacity or with limited capacity for civil conduct, which means the lack of cognitive ability and control ability leads to the lack of awareness and control of many behaviors and consequences in life. The immature mind or confusion often causes damage in social life. Considering the special circumstances of the ward’s participation in the action, stiffly applied to the high demand of litigant ability may lead to a substantial violation of the interests of the ward *ad litem* due to his or her weakness in cognitive and expressive competence. Therefore, the judge should follow the principle of proper intervention, proactively intervene the specific links to make up for the guardian’s ability and litigation skills, which makes a mixed judicial model to reconcile the disadvantages of the authoritarian model and the litigant model.

However, due to the ambiguity of the relevant regulations, the boundary of the judge’s interpretation on the subject right of the guardian *ad litem* is unclear, which leads to a “vacuum” when some judges should explain the appropriate defendant. Some courts even hold that the burden to prove whether the ward needs to be a defendant should bear on the plaintiff, for example, in the Shaoyang Intermediate People’s Court (2019) Xiang 05 Civil Judgment No.2594. “In this case, Liu Xiaoyan and Su Lin did not prove that Liu had property. Therefore, the guardian should bear the tort liability in the direct judgment in accordance with the legal provisions”, such a practice presents the issue of increasing plaintiffs’ burden of proof and also not conducive to the principle of compensation and protection for the victims. The absence of judges’ interpretation power in the judicial process does not conform to the principle of unifying judicial power and responsibility to some extent. Therefore, it is meaningful to clarify the guarantee boundary of the judge’s interpretation right to the litigation activities in the litigation.

1.2 Literature Review

The choice of the eligible defendant in a harm case caused by the ward has always been controversial in theory, and it can be summarized as the main view in five directions overall.

According to the substantive law, some scholars believe that the guardian should be the individual defendant. In addition, Xue Jun (2010) and other scholars pointed out that the property of the ward is also managed by the guardian, which means the final compensation liability must also be realized through the guardian, so this practice is conducive to the efficiency and simplicity of litigation requirements.¹

Some scholars consider that the ward should be the defendant alone, such as Zhu Guangxin (2011) pointed out the guardian shall bear independent responsibility according to the equity thought, only in the previous condition cannot meet will the guardian take the second burden compensation liability unconditionally, in this view the ward is the subject of tort and the guardian just bear a fair responsibility because of the clear provisions of the

law.²

Some scholars claim that both the guardian and the ward should be listed as co-defendants. For example, Liu Xiaoying (1997) believes that the ward has become an adult in litigation activities, they can conduct civil litigation independently.³

A few scholars believe that the guardian should be a third party without the right of independent claim. This view holds that “the original guardian has no right of independent claim for the subject matter of the case, but the handling result of the case has a legal interest with him. Therefore, he is a third party without the right of independent claim”.

In recent years, there are also scholars who consider the ward should be the defendant, the guardian as the legal agent to participate in litigation through comparative law research, such as Wang Xingfei (2021) believe the legal agent should participate directly in the lawsuit according to the provisions of article 57 of the civil procedure law, in addition, Chen Libin (2018) consider the guardian is the plaintiff or the defendant in criminal incidental civil litigation.⁴

Whether the ward’s litigation status is recognized directly related to the realization of the requirements of procedural justice theory. The principal’s right to a fair trial should be reflected by the broad respect of the principal’s subject status.

⁵Gerald J. In the Postema (1997) believes procedural justice is only justified if it facilitates the discovery of the truth. R. Dworkin (1985) stressed that in the process of legal decisions, we should attach great importance to the rights of the judge, especially “the right to obtain a fair trial”. Chen Ruihua (2021) believes that although the traditional theory of procedural justice emphasizes the requirements of formal procedural justice, it ignores the needs of the referee to obtain substantive benefits in the judgment results.⁶

Ou Dan (2018) believes that the subjectivity of the parties requires other subjects to give full respect and guarantee to the subjectivity rights of the parties⁷. Xu Shihuan (2013) summarized the right of the procedural subject as “right of presentation, right of proof, right of refusal to declare, right of procedural disposition and procedural option”⁸. Scholar Huang Juan (2009) pointed out that the litigation rights of the parties mainly include “the right to sue, the right to obtain relevant materials, the right to attack the defense, the cancellation of litigation, the right to appeal and objection”⁹. Tang Li (2003) believes that in the process of serving the parties, the court should create an “affinity” and “easily understandable” litigation space for the parties to engage in litigation.¹⁰

Because the ward has innate disadvantage on cognitive ability and expression ability, stiffly upholding the concept of equality is not conducive to the protection of the principal rights, therefore the judge is required to play their judicial service initiative, using the judge interpretation right to help the defendant let to open the lawsuit, using interpretation to protect the ward from expressing the inner meaning to participate in the litigation.

About the study of the judge interpretation, Cai Hong (2005) believes judge interpretation is different from general litigation command, general litigation command is mainly applicable to the management of proceedings, while the judge interpretation only applies to the parties’ request is not clear, the parties’ request is not appropriate, evidence is insufficient and other specific circumstances.¹¹ Yu Weixuan (2019) believes that the division of the boundary of interpretation power can be mainly developed from five directions: litigation request, procedural matters, the burden of proof, evidence and legal views.¹² Han Hongjun, Xiong Yuemin, Ren Zhong and others believe that if there is a minimum implication of the parties concerned, the court only assists them to clarify its expression, which does not violate the requirements of the principle of judge neutrality. Zhu Haiyang (2021) believes that the court should judge the true intentions of the parties concerned and whether they can Sue again.¹³

2. The Practical Presentation and Value Basis of Subject Selection in Ward Infringement Cases

2.1 Summary of the Practice Mode Based on Statistical Analysis

According to the relevant research results of scholar Zhu Fuyong and scholar Li Chunbo, the two scholars analyzed “the China Judicial documents network according to the ‘ward’, ‘infringement’, ‘Article 32’ as the key word law index, which can search out 1032 relevant cases. 380 civil litigation documents in the past four years from them were randomly selected, found that there are at least seven very different judgments for the judges in the final choice of the subject of responsibility: (1) Only 183 judgments found the guardians to compensate the victims, which accounted for 57.91%; (2) Judge the guardian to compensate the victim, while the ward need to compensate the first paid from estate amounted for 6 items, for 1.90%; (3) In 22 cases where the ward and guardian shall bear the joint and several indemnification for the victim, which accounted for 6.96%; (4) 60 cases that the ward and guardian jointly compensate the victim, for 18.99%; (5) To judge the ward and the guardian to jointly compensate the victim, while the ward pays the compensation from his or her own property, which

amounted for 3 items paid and accounted 0.95%; (6) In 41 cases the ward shall compensate the victim and the guardian compensate the rest, accounting for 12.97%; (7) Only one case of ordering the ward to compensate the victim for 0.32%” (Zhu Fuyong & Li Chunbo, 2021).¹⁴

From article 1188 of the Civil Code, it is obvious that the choice of the responsible subject will not have such diverse answers, so the judgment basis for the judge to make different choices is worth studying.

Besides, retrieving under the keywords “ward” and “infringement” from the “Poly Method Case” database data, the top five relevant substantive laws are Article 32 of Tort Liability Law (2009), Article 6 of Tort Liability Law (2009), Article 16 of Tort Liability Law (2009), Article 26 of Tort Liability Law (2009), and Article 2 of Tort Liability Law (2009). It shows that the most common legal system for most judges in handling the tort cases caused damage from the ward, is the guardian shall be held liable, which led to the judge first recognizing the proper defendant selection should be the guardian in the relevant cases. The top five provisions are Article 144 of Civil Procedure Law (2012), Article 170 of Civil Procedure Law (2012), Article 170 of Civil Procedure Law (2017), Article 64 of Civil Procedure Law (2012), and Article 64 of Civil Procedure Law (2017), which explain that some judges tend to give the option to the plaintiff in the face of ward ad litem status and the default judgment is often applied in the tort cases involving the ward. This reflects the fact that some judges may be negligent in explaining it and rarely give the ward the opportunity to actually participate in the litigation even if the ward is listed as a defendant.

2.2 Procedural Value Presentation Based on Typical Cases

2.2.1 Appropriate Defendant Choice from a Utilitarian Perspective

Utilitarianism is also translated as materialism or consequentialism. As a theoretical type of ethics, it believes that the most correct behavior is to maximize the benefit, and that the result of any behavior is the only criterion for judging right and wrong. The connotation of utilitarianism in its supporters also has differences, such as behavior utilitarianism believes the decision makers should according to the possible results to choose the behavior, while rules utilitarianism believes they should abide by the rules to maximize benefits, and some supporters consider the pursuit of utilitarian maximize overall effect, while some other supporters support the average utility maximization is the goal of utilitarianism.

In the choice about whether the ward should be a fit defendant, the typical starting perspective is based on the utilitarian perspective of convenient connection of litigation activities, which means the judge in order to avoid the execution of the judgment has problems, especially in order to avoid the inconsistency between the subject of the judgment obligation and the fulfillment of the judgment obligation, and to avoid the risk of the resulting waste of judicial resources, guardians are often directly accused in a utilitarian perspective. For example, in the judgment of Yichang Intermediate People’s Court (2020) E 05 Civil No.1508, “the guardian is listed as the defendant, which can avoid the inconsistency between the subject of judgment obligation and the subject of judgment obligation. Therefore, it was not improper to list Zeng Qingyi and Hu Zhenkun’s guardians as the defendants in the first instance.”

With this practice of only naming guardians as defendants from a utilitarian standpoint, the requirements of litigation efficiency and simplicity have been fully reflected, the victim’s relief is also direct and clear. There is exists in interpreting substantive law in this way. However, it does not meet the requirements of “defendant clarity” in the Civil Procedure Law, and even the guardian’s right to request a hearing is greatly ignored. Accounting for the future growth of the ward, the complete exclusion from the subject of litigation will also deprive him of an opportunity to receive education and correction. Out of the interest of the ward, , liability and potential adverse effects will arise directly to the ward once a judgment establishing tort liability is established, which means it may assume compensation and other liabilities. While if a civil subject does not have the status of a civil action, does not have the participation in the litigation and does not enjoy any procedural rights to state opinions, to argue and defend for themselves in the procedure, while need to undertake the result of the procedure, especially the direct adverse effect of the court’s decision. Such practices can hardly be justified, it does not mean that the capacity of the ward ad litem for his rights can be overlooked even if the ward is not yet able to sue. When the estate of the ward is insufficient to sustain the liability, the procedure by which to introduce the guardian as the subject of responsibility becomes a question, misconduct that not allowing additional additions will obviously bring the problem of insufficient protection to the infringed, while it will also increase the burden of the infringed when it is required to add it by filing a separate lawsuit.

Motivated by the utilitarian view, there is also a practice of naming guardians and wards as co-defendants in addition to the option of directly listing the guardian as a defendant. In this view, it can indeed better fit into the practice of judicial practice and expand the extent of defendants’ liability property by taking the guardian and the ward together as potential liabilities. However, it breaks through the existing rules in the civil Procedure law that the ward and the guardian is not a joint tort relationship but the question of vicarious liability. The guardian can

only be called an interested party at most instead of the co-defendants. This practice has problems in the unification of the internal system of the procedure law.

If considering the guardian's interested person in the harm case, taking the guardian as a third person without an independent claim seems to resolve both the issue of the guardian ad litem and avoid the problem of the unification in the internal system of procedural law caused by the guardian as a co-defendant. For example, Hangzhou Intermediate People's Court (2020) Zhejiang 01 Civil 7022 adopted this practice, "The tortfeasor, in this case, was the minor and his parents shall be responsible for his guardianship. The responsibility is that the parents fail to fulfill the guardianship responsibility accordingly, the tort liability of the guardian arises once the minor's infringement occurs." But there is a little overemphasis on "utilitarianism", following this practice, the ward of full age at the time the case was heard may be listed as a defendant for he or she has the ability to act in litigation. List the guardian as a third person with no independent claim directly merely because of the lack of financial strength of the ward and he may be affected by the judgment, such an approach may become whether the ward is an adult, the tort liability of a guardian always exists, which is inevitably suspected of "different treatment". Nor does it conform to the principle of "liability" if the ward subsequently becomes a person with full civil capacity, it ignores the legitimate rights and interests of the guardian to some extent.

2.2.2 Appropriate Defendant's Choice from the Perspective of Legal Acceptance

Legal acceptance mainly reflects the relationship between the receiving subject and its object, which includes the acceptance not only through external behaviors such as cooperation, avoidance or resistance, but also indirectly by means of identification, indifference or silence. As for the relationship between the ward and the guardian, with the popularization of the law, the legal common sense that the guardian is the legal representative of the ward is accepted by the public.

At present, many courts choose to take the wards as the defendants and take the guardian as the legal representative. For example, JianHe County People's Court (2016) Qian 2629 Civil 270 judgment, XinXian People's Court (2019) Lu 1522 Civil 5353 judgment, DongHai County People's Court (2019) Su 0722 Civil 9727 choose the ward as the defendant and the guardian acts as a legal representative to participate in the proceedings. The advantage of this practice is that on one hand the ward's right to participate in the proceedings is protected. On the other hand, it is also in line with the public understanding to list the guardian as a legal representative.

This view is also in line with the determination of the litigation subject status of the ward and the guardian in the litigation legal relationship in many British and American legal countries. But the biggest problem is that the legal agency system stipulates that the consequences of the legal agent shall be borne by the principal. But in ward tort cases, final responsibility is often lied in guardians, it is the conflict that the legal agent to bear the liability when the court ultimately decides the guardian to compensate. While this approach is proper in keeping with the public understanding and facilitates the acceptance of the litigation participants, it does not conform to the advance design in the institutional system that the adverse consequences arising from the legal agent in the process of the agency shall be borne by the principal. Some flaws exist within the procedure and are not promote the cohesion of the proceedings and the execution of the final judgment results.

2.2.3 Appropriate Defendant Choice Under Argumentative Thinking

Debate thinking is a further development to the original "essence"¹⁵ (Zhang Weiping, 1993), compared to the essence theory of the judgment represents the autonomy of will, debate pays more attention to the actual program operation process. When the autonomy of the parties in the litigation activities has not been fully realized, the court for interventional protection is needed, so debate step further to exclude the court interference in this point of view compared to the essence because of the need to fully reflect the autonomy of will.

Under this debate thinking, the ward as a potential liability of tort liability, shall guarantee the whole process to participate in litigation activities and the right to express opinions, such as Chuzhou district people's court in 2005 wu v. Zhu chao, school personal injury compensation dispute case in the judgment, the case takes the ward zhu as the defendant, and in the judgment it mentioned "the defendant zhu argued..." despite Zhu Chaoshang is a person without civil capacity. His education in primary school has given him the ability to distinguish right from wrong, so the judge named him as a defendant and guaranteed his right to defend himself in the proceedings, which can be seen that the ward can also be comprehensively considered according to its age, understanding ability, expression ability and so on even if the ward is a person without civil capacity. Hearing the ward's own statements and excuses is also conducive to the exchange of information between the two parties, which will affect the judge's free heart evidence by giving the judge more chance to discover the "truth" and make a fair verdict.

3. Double Examination: The Dimension of the Procedure and Entity of the Status of the Ward Ad Litem

3.1 Subject of Responsibility: A Systematic Review Centered on Article 1188 of the Civil Code

Firstly, from the first paragraph, the confirmation of civil capacity is mainly based on age and mental health status in China, which can be divided into full civil capacity, limited civil capacity and no civil capacity. Considering the ward lack of civil capacity, the provisions stipulate that the guardian takes the tort liability of the damage caused by the ward and requires the guardian to educate the ward actively and provide appropriate protection when the rights and interests of the ward is violated. If the ward violated the legitimate rights and interests of others, the guardian shall bear alternative responsibility.

For subparagraph 2, This paragraph has always been controversial in theory. Because the existence is not in the form of responsibility but the division of tort liability according to the property status. However, on the one hand, considering that the priority of the ward's property is in line with the principle of responsibility, the situation of the ward have independent property will become more and more with the economy developing, on the other hand, when the guardian is not the parent of the ward, parents often establish an independent property when they appoint a guardian for their ward in order to avoid refusing to act as guardian for considering the risk of avoiding tort liability. Therefore, this regulation is also intended to dispel the guardian's responsibility of guardianship, but whether the "independent property" is enjoyed here should be a dynamic state, which means that in minor infringement cases, a minor has an independent financial capacity should be liable in tort. That is to say that the ward still uses civil tort liability for tort, the guardian of the infringer shall bear unlimited civil tort liability.

But it is worth noting that whether completely without civil capacity, or limited civil capacity, in the provisions of article 1188 of the civil code are treated as wards, which means there is not make any distinction under the tertiary system of civil capacity system, this led to the legislative ideas and standard method of different two types of subject but erased the difference in this system. The way of smoothing the differences is not conducive to maintaining the system consistency and logical self-consistency of China's civil entity norms, nor is it difficult to highlight the guiding and inductive role of the natural person civil capacity division rules stipulated in the general provisions of the Civil Code on the main elements in the separate norms.

Without civil capacity means the natural person does not have capacity and cannot clearly identify and independently control themselves, the main part of the subjects are minors. Considering the principle of "the most beneficial to minors" throughout the civil code, the legislators adopted absolute protection for the group lacking meaning ability and confirmed the conduct act is completely invalid by people without civil capacity and should be implemented by their agent, in this case, the civil code of article 1188 stipulates the tort liability should be taken by the guardian is more reasonable.

A person with limited capacity for civil conduct refers to the gradual maturity of meaning capacity, some civil legal acts may be determined according to their age and specific implementation matters, which means the civil legal act performed is determined to be valid within the scope as permitted by law. Whether the specific act beyond his ability is valid depends on whether his guardian later ratifies or denies it, the effectiveness is not determined in this situation. Such an approach does not have the absolute degree of protection for people like completely without civil capacity, but maintain the balance between the protection of the rights and interests of minors and the trust interests of the counterpart is also achieved to a certain extent.

While the provisions of the Civil Code of the article 1188 ignores the part of self-determination and self-liability enjoyed by people with limited capacity for civil conduct. Since a person with limited capacity for civil conduct can have a certain capacity for meaning, it is unreasonable when he acts against others instead, the meaning ability did not have at all. Such an institutional design makes its meaning and ability suddenly disappear in recognition and the maturing maturity of recognition and control come to an end abruptly. Not only does it not conform to the simple legal feelings of the citizens, it also violates the legal basis and legal logic of the three-level capacity for civil conduct system. Since a person with limited capacity for civil conduct can independently decide their own affairs within a certain limit, it also recognizes the liability for the consequences of the tort of a natural person. When it already included in the autonomy of its own affairs, we should equally recognize that it is equally liable for a part of the tort. Therefore, it is obviously insufficient to replace the guardian only based on the form of responsibility and the status of litigation included in the field of substantive law. In considering the form of ward responsibility and the status of litigation, the internal differences in the group of the ward should also be fully considered and not generalized to people with no capacity for civil conduct, especially for people with limited capacity for civil conduct. There should be a more compromise mean in the specific system design to fit with the three-level civil capacity system, highlight the substantive legal basis for the capacity of civil conduct in the field of tort liability and set the three-level gradient design corresponding to the procedure method.

3.2 Subjects of Litigation: Evidence of the Wards' Right Ad Litem Under the Theory of Procedural Guarantee

The provisions in the substantive law mainly consider the legislative value from the perspective of the victims. It holds the guardian liable to tort liability in paragraph 1 and requires the ward to be liable in tort with the guardian in his own property in paragraph 2. In order to facilitate the relief to the victims, many judges naturally

prioritize the designation of the guardian as a defendant. Therefore, the guardian's litigation right and litigation status in the ward's injury case are often given full recognition and consideration. Even with the consideration of the participation of the ward, it merely considers the ward's opinion as evidence of the action. But looking too much upon the duty of the guardian to classify it as a defendant, this practice ignores the involvement of the guardian ad litem, procedure subject status and right of action against to ward. In other words, this approach only considers the value of the victim receiving relief, ignoring the value of the perspective of "exist for whom". According to Professor Zuo Weimin's view, to "avoid the judicial values of citizens becoming objects", it is essential to respect the autonomy of the parties concerned. Respect for the personal dignity of the person concerned is necessary to protect the rights and freedom of the substantive sense of the parties through procedural subjectivity. The ward, as one of the parties and interested parties in the proceeding, should not be the object of the court (Zuo Weimin, 2002).¹⁶

Respect the ward's right of action is also intended to respect the ward's constitutional rights in fact, to obtain the procedural guarantees of the fundamental constitutional rights of citizens. Then, in the actual litigation process, the subjectivity status of the people should be affirmed. And both parties and interested parties are given the power of procedural subject, which is the procedural subject status. The principle of "procedural subjectivity" not only guides the starting point of legislators engaged in legislative activities, but also the policy that judges should follow when exercising the judicial power to escort the full exercise of the right of action. As Taiwan scholar Qiu Liangong believes, "While the Constitution recognizes the national body, it also guarantees the right of freedom, litigation, property and survival ". Therefore, what the system ought to do is to guarantee the realization of basic rights. The principal position of the citizens is essential. In the specific program participation, the parties and interested parties shall be given the litigation status of the subject of procedure (Qiu Liangong, 1987).¹⁷

But in judicial practice, even if a judge lists the ward as a defendant, litigation is often tried in absentia out of consideration of the special circumstances of the ward. Although such a practice formally affirms the subjectivity of the guardian ad litem. However, the ward has not yet participated in the actual litigation process and gained the true embodiment of the litigation value. It is based on the reciprocal procedural rules to guarantee a thorough debate between the parties. As the Japanese jurist Aigiori Inoue said, "In a chain in which the act of a party affects how the opposing party must act, the distribution of the parties' behavior responsibilities is the key to the procedural guarantee ". Therefore, judges should follow the static litigation view on the premise of law and rights first. Turning to the dynamic litigation view of law and rights formed through the independent action between the parties, which is also the judicial concept that benefits the right of the ward under the third wave theory of procedural guarantee (Inoue Governing Canon, 1987).¹⁸

Therefore, the ward should be regarded as a participant who can quite promote the litigation process (Duan Wenbo, 2015)¹⁹, rather than just exist as an object of the operation of judicial power. Duan Wenbo believes that "the third wave of procedural guarantee takes procedural protection as the purpose of litigation". If the second wave is "litigation for the parties", then the third wave theory takes the parties leading the formation procedure as the universal value pursuit of litigation, that is, "the parties conduct litigation". This wave of procedure guarantees attaches importance to the sharing of the role between the parties, emphasizes the process of argument through litigation itself, and takes this rule of contention as the basic principle of the implementation procedure. It also shows that the participation of the ward should not only be present as the evidence in civil litigation, the ward based on the experience of claims, refute debate type information exchange, is conducive to the judge more deeply grasp the different surface dispute information. Not only can help the judge to determine the effectiveness and adequacy of litigation data, can also help the judge to clarify more clear litigation disputes.

4. The Realization Path of the Procedural Subject Right to the Ward

4.1 Static Qualification of the Principal Status of the Ward Under the Doctrine of Disposition Power

The doctrine of disposition means that the parties enjoy full control over their substantive and procedural rights in the case, and have the right to freely choose to exercise or not to exercise these rights (Millar Robert W., 1923)²⁰. Under the guidance of the principle of private law that autonomy of the will, "no plaintiff, no judge" proverb deeply rooted in the people's mind. The start and termination of the lawsuit should be decided by the parties, while the plaintiff in the process of disciplinary action of the lawsuit is highly valued, but the defendant as the parties enjoy the litigation rights is sometimes easy to be ignored, especially when the ward as the defendant. If the ward cannot freely use their litigation right, the freedom of rights to the wards will be difficult to achieve.

Therefore, we should attach great importance to the litigation rights when the ward is a defendant. At least two dimensions of content should be achieved. First, the ward shall be given due respect, which is the basis of reflecting the procedural subjectivity status of the guardian. The "respect" here means the boundary for the ward to settle the dispute in the litigation process should be recognized. This boundary relationship means the parties

are the boundary between rights and rights, the ward and the court are the boundary between right and power. Such a boundary relationship is clear on the one hand. As one of the participants in litigation activities, they can enjoy the freedom within their own power or rights according to their own will. On the other hand, it is also clear that if it is within the limits of the ward's authority, a true sense of respect means a "restraint" attitude should be maintained. Such respect is not a one-way concession to the ward, it is also a respect for the other subjects themselves. To give the ward the opportunity to participate in an impartial hearing, not only will they give full play to their own procedural role in information exchange and expression of appeals, it can also allow the ward to affect his own interests in fact. Even the feelings of fate encourage the ward to get free of his own lack of capacity for civil conduct and pursue the positive utility of a more complete understanding and control ability. And, more importantly, the victim party and the other members of the society in the case of harm caused by the ward will also express their own respect and affirmation for the fairness and justice of the trial result. Second, the subject status out of the reality of rights will inevitably become meaningless, so give the ward full protection of his or her rights means the surface of the respect is just a bubble should be realized. The embodiment of the parties' right to dispose needs to give the parties a quite wide range of freedom of "independent decision". In the general cases, this freedom protects against violations from "judicial power". However, the lack of the ward's actual litigation ability requires the judicial organs to play their own judicial services to help the ward express their true inner wishes, especially when dealing with the matters related to the ward's own interests. It should be guaranteed that the result is achieved from a series of interactions with the ward and the guarantee of due process. The main way to resolve the dispute outside litigation ought to be the negotiation. In the applicable context of the ward, special attention should be paid to the protection of the ward to help the ward express and discuss with substantial results in the process of negotiation in a disadvantaged position. In order to expect that the results of the solution can restore the ward's true self-resolution requirements to the greatest extent.

Besides, the significant differences between the main objects of China's guardianship system should also be given full consideration. The main object of our guardianship system in the era of General Principles of Civil Law mainly aimed at minors and mental patients. The General Provisions of the Civil Law is clearly revised the mental patients to the adult guardianship. Therefore, the subjects of the ward stipulated in the Civil Code mainly include minors and mental patients and other adult persons with limited civil capacity and persons without civil capacity. Due to the particularity of their own conditions, these three types of subjects have significant differences in their actual exercise of disciplinary power. And the legislative purposes for these three types of subjects are also significantly different, for example, minors are mainly considered in healthy growth and sound personality to protect the legitimate rights and interests of minors; For the mental patients, on the one hand, they need to take care of their daily life and create a positive environment to help them early to restore their ability to live independently due to its lack of understanding ability and control ability. On the other hand, the need to protect the mentally ill themselves and to keep the personal rights and interests of others free from infringement should be highlighted due to the lack of legal capacity in mental patients; The third major group mainly refers to the elderly people with limited awareness and control ability under the influence of objective factors such as Alzheimer's disease. This part of the subject is increasing with the prominent aging problem of China's population becoming more and more serious. While ensuring their daily life, corresponding respect to the subjects who contribute great value to the state must be given. Thus the guarantee methods of litigation subject status adopted should also be different for the internal groups with such a large difference.

Referring to the ladder of participation tool made by foreign scholars, the participation of the ward can be divided into eight steps, and the degree of participation of the ward rises from the first step to the eighth step. The first step: what the ward does and says is completely manipulated by the guardian; the second step: the ornament of the ward as the guardian; the third step: the symbolic participation of the ward but no opportunity to express opinions; the fourth step: the guardian's decision but notifies the ward; the fifth step: the guardian makes the decision with the ward's opinion; the sixth step: the guardian makes a plan and decide it together with the ward; the seventh step: the ward makes a plan and decide it; the eighth step: the ward plans but invites the guardian to discuss the decision together. Participation in the first three steps is not substantial participation but a formal participation. So for the three types of subjects, participation should all be above the fourth ladder and the levels of participation should be applied to different subjects. For a third category of subjects dominated by older adults with limited awareness and control abilities, respect for the independent decisions of adults should be increased, especially for the elderly people who pay more attention to their own ideas and accumulated experience. The participation degree of the sixth ladder or the seventh ladder should be guaranteed; For the mentally ill, the participation degree of the fourth step should be guaranteed; For the minors, it can also be divided into persons with limited civil capacity and persons without civil capacity, considering that children aged 8 have already started to enter primary education. To have a certain degree of understanding of matters related to their own interests, the right and wrong identification in the process of their own behavior can have a certain degree of right and wrong cognition. Therefore, according to the plan proposed by the guardian in the sixth

participation ladder, but making the decision, along with the ward and care for the ward. However, although people without the capacity for civil conduct have a high degree of awareness and control ability. It should also ensure that the fourth or fifth steps should be guaranteed in reality, the judge should make the determination according to the specific age and mental condition of the ward.

Since the promotion of proceedings and the object and scope of the trial have an actual personal or property interest in the defendant. Then the defendant's right to choose in the procedure should be fully guaranteed. Plaintiff makes the withdrawal and the defendant makes the identification. To terminate the litigation activities. Considering the identity particularity of the ward as the subject of the defendant, their cognitive capacity should be fully measured, on the one hand, to determine the extent of judicial protection that is needed under the scope of the free exercise of their disciplinary power. On the other hand, to judge its true meaning, but this should not be part of the state intervention system on the principle of disposition, it should not be in the name of the legitimacy principle under the principle of intervention. To restrict the disciplinary power of the parties concerned, the judge's efforts in communicating with the ward should take the true meaning of the ward clear as the result guide. Otherwise, all the attempts to secure private rights will eventually evolve into the irrationality of judicial procedures and the waste of judicial resources. While it is also not advisable to completely abandon the doctrine of judicial intervention because the ward is not different from the general parties. There is a natural deficiency in the ability to sue the ward. If applies the litigant doctrine stiffly, the ward will suffer substantial inequality in the proceedings. Therefore, to compensate for the risk that the right of ward may be in fact restricted or deprived, judges should provide their own judicial service side.

4.2 The Dynamic Protection of the Judge's Interpretation Power to the Ward's Procedural Rights

In order to adjust the debate doctrine and disciplinary doctrine to promote the realization of procedural justice and substantive justice, the judges in civil litigation have the right of interpretation, which has multiple values such as preventing the surprise judgment and promoting the one-time settlement of disputes (Wang Xingfei, 2014)²¹. The scope of the right of interpretation, namely the boundary of the right of interpretation, from the current system construction in China, the right of interpretation is mainly divided into two categories: the parties' proof and litigation request. In the past research results, some scholars have pointed out that the court has the legitimacy of explaining the form of the parties in the general guarantee liability lawsuit, and the additional co-defendant belongs to the "insufficient interpretation of the litigation claim" in the interpretation of the lawsuit claim (CAI Hong & Wang Ruiqi, 2021).²² In the case of the ward's infringement, the appropriate defendant's interpretation also belongs to the exercise of the case of the interpretation right in the lawsuit request, so as to prevent the parties from failing to realize their due substantive and procedural rights due to the insufficiency and unclear request of the lawsuit. The claim is composed of three parts: legal relationship, type of litigation, right of claim and legal cause, which lays the foundation that the claim is one of the contents that must be clear when the parties file a lawsuit. In China's legal system, in addition to the provisions of Article 35, paragraph 1 of the Provisions on Evidence in Civil Procedure, which is generally regarded as the interpretation of litigation claims, the number of other normative texts on the interpretation is small and difficult to systematization, and the provisions of different regions are also quite different. Unlike the problems that need to be explained caused by the competition of the right to claim, the defendant's choice of defendant in his harm case, compared with it is to make up for the shortcomings of the subject theory of litigation, is a supplement to the theory of the subject of litigation. The ambiguity of the subject will also make the program meaningless, the interpretation of the subject of litigation is mainly reflected in the interpretation of the conditions of the case and the interpretation of the actual prosecution stage. In the case of harm caused by the ward, the judge shall determine whether the appropriate party, the jurisdiction and supervisor of the case, explain the basic facts, reasons and evidence of property preservation and the whole litigation instructions involved. One of the most important means is to notify the parties by inquiry or notification, and at the stage of the lawsuit, the judge may correct the choice of the subject of the procedure to the defendant by rejecting the suit or rejecting the claim. In addition, it can also be placed before the filing of the interpretation, to ensure the ward's participation in the litigation proceedings, considering the provisions in the substantive law, the judge can also ask the guardian's age, understanding ability, the independent property and other basic status, further consider the possibility of vicarious responsibility for a guardian. Ultimately determining whether the guardian needs to be listed as a defendant along with the respondent, if not required, the guardian may use the legal agent of the guardian to participate in the litigation.

Under the protection of the right against the guardian to participate in the lawsuit, unlike traditional Western views where judges should always remain passive and neutral, more and more judges are required to participate in the hearings in a more active manner. The emergence of interpretation is one of the proofs. In the civil proceedings, the choice of their claims as well as the ability to prove parties largely determine the consequences of litigation, to avoid the de facto limitation of statutory rights caused by the inadequacy of the parties, the judge sitting in the center should also guide him appropriately by making the parties aware of their own rights. Finally, the law guarantees that the goal of maintaining fairness and justice will be achieved on the basis of respecting

the autonomy of the parties. Guardian litigation status in the case of the judge to fully exercise the right to guarantee, due to the existence of entity law and procedural law, procedural law and theoretical and practical differences, lead to the plaintiff difficult to determine the choice of the defendant, which may lead to damage to the rights of the guardian ad litem.

The judge shall at least use the power of interpretation to protect the procedural rights of the guardian in the three matters. First, the judge shall ensure that the ward can exercise the response mechanism, in response to the prosecution mechanism of the victim in the case of the guardian's own infringement; Second, the judge shall, in the most effective way of the guardian ad litem in the most convenient way, adjust the exercise mode and scope of the right of interpretation according to the differences of the ward himself. To realize the dynamic protection of litigation rights, ensure that the ward can give full "humanistic care" and reflect the "moderate" side of the judicial service; Third, ensure that the ward can communicate substantially and equally with the plaintiff's parties, maintain full respect for the "dialogue" between the two parties and faithfully take the results of the "dialogue" as the basis of the referee to make up for the lack of ward ad litem ability and litigation skills.

While it is important to note that the judge's right to protect the ward should also be limited. To prevent violations of the ward ad litem rights that may arise under interventionism, the parties determine the scope of the judge's review and the judge should not go beyond the request of the parties. On the choice of the eligible defendants, judges should play a guiding rather than a decisive role. The clarity of this principle is to solve the problem of how to grasp the "degree" on the boundary of judges' interpretation power and how to ensure that neither is unfair because of the absence of the right of interpretation will not affect the judicial public by overexercising the right of interpretation. The answer is that the judge needs to be guided by this in the form of questioning, reminding the inadequate and unclear nature of the eligible defendant's choice and avoiding actions stated in place of the parties. While protecting the procedural rights of the ward, avoid making decisions about the physical rights of the ward solely on the wishes of the judge himself.

5. Conclusion

For a long time, protecting the rights and interests of the ward has been the focus of legal research in all countries in the world, which will not only have a profound impact on their physical and mental development, but also affect the possibility of illegal and criminal acts later directly. The significance of justice, as the last line of defense to protect the rights of the ward and interests, can be seen. Although with the improvement of relevant laws and regulations in recent years, the guardian civil rights judicial protection mechanism has made many achievements, the guardian litigation status is still controversial in theory, the guardian civil litigation special procedures still lack, so need from the guardian litigation status in tort litigation as a breakthrough point, study the relevant rights and interests of the guardian program.

Due to the special of his own ability to participate in litigation, the ward is often treated as an object in case of harm caused by the ward. Even if he or she is allowed to participate in the litigation, it exists only as evidence. While the ward who is the recipient of the adverse effect of the judgment did not enjoy a matching litigation status. On the one hand, it ignores the value orientation of civil litigation to "exist for whom", On the other hand, it also ignores the requirement to protect the ward's "constitutional rights". It leaves a gap in the horizontal information exchange of litigation and does harm to the realization of a just judgment. Therefore, the procedural subjectivity status of the ward should be fully respected.

Considering the particularity of the ward's own ability to bring suit, it also makes the ward's competency disadvantage would evolve into a substantial deprivation of substantive rights if it applies the litigant doctrine rigidly. Therefore, the interventionist principles should be adopted to bridge the loopholes and risks posed by the inadequacy of the ward's capacity ad litem with the help of the judge's right to release. While improper use of judicial interpretation power may also cause the scope of excessive intervention, affecting the guardian's true expression of intention. Therefore, the scope of the boundaries of judges should be clear. In addition, constructing the procedural law matching the design of the three-level gradient system for civil capacity need to take attention to the differences within the ward group. Based on the differences between the three main groups: minors, mental patients, other adults with restricted civil capacity or other adults without civil capacity and on the purpose of the legislation by the ward's age, cognitive ability and mental factors, comprehensively consider the extension scope of the ward's procedural subject rights. Achieve the dynamic guarantee with the help of the judge interpretation power system.

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