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The Superior Interest of The Minor Compared to The Superior Interest of The State in Matter of Property Rights.

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Abstract

The purpose of this article consists of performing an investigation on the property rights of minors, analyzing from a comprehensive perspective the rights of which they are holders and the expected treatment for their administration, by doing a comparative study and from the principles of the best interests of the minor and the public interest, with the activities of exploration and extraction of hydrocarbons when these are intended to be carried out in real state where minors hold some right.

Keywords: Superior Interest of the Minor, Public Interest, Minors' Assets, Extraction of Hydrocarbons, Patrimonial Rights.

I. INTRODUCTION

The patrimony is commonly defined as a set of goods, assets, liabilities that are part of the individual legal sphere of a person, likewise some doctrinal currents point to the patrimony as an attribute of the personality, so it is really relevant the analysis of the patrimony belonging to the minors, since they, As they do not enjoy full capacity to exercise, they are protected by those who exercise parental authority or by the authorities to safeguard their rights, including property rights.

Property is a real right to use, enjoy and dispose directly and immediately, perpetually, exclusively and absolutely, of a corporeal and individualized good, being the other persons obliged to respect the exercise of that right (De la Mata and Garzón, 2013: 120), however, property being the real right par excellence, It has different modalities, which arise in other real rights such as co-ownership, usufruct and bare property, real right of condominium, real rights of which minors can be owners.

In this sense, the analysis that concerns us in the first place is to understand how the exercise of these rights in rem works when their holders are children and adolescents, to expose the specific

regulations regarding the disposition of goods and the acts that can be celebrated with it, always safeguarding the best interests of the minor, which leads to the second term, raised as the possible dilemma that would generate the weighting of the best interests of the child in case of affectations to property of minors in any of its modalities, by exploration and extraction of hydrocarbons, taking into account that, in activities related to hydrocarbons, the affected properties may be unusable for certain activities, which leads to the questioning first, if such affectations are allowed to properties held by minors in that any activity to be carried out with property of minors indisputably requires that it be for their benefit and in some cases, prior judicial authorization, do affectations of exploration and extraction of hydrocarbons really safeguard the best interests of the minor?

II. PROPERTY RIGHTS OF CHILDREN AND ADOLESCENTS.

CONCEPT.

In order to express a definition of economic rights it is necessary to go back to their origin, in a reference of genus species, being the species the patrimonial rights and the genus the famous "subjective rights".

Many theories have been put forward around the legal nature of subjective rights, from positivist, naturalistic and neo-constitutionalist currents of law, as authors such as Hans Kelsen, Robert Alexy, Ronald Dworkin have written on the concept of subjective rights and fundamental rights.

Conceptualizing subjective rights is difficult, since we start from an abstract reflection of the holding of rights and the duties they generate, Hans Kelsen is one of the authors who manages to define, from a positivist perspective, subjective rights from the norm, that is, if it is taken into consideration that the structure of the norm in Kelsen consists of linking a sanction to the breach of a duty ... Two legal duties are contemplated: that of the obligated individual and that of the body that must impose the sanction. Hence, he is introduced to... A right with two projections... a right as a mere "reflection" of the obligation, that is, as its correlate, and a subjective right in the "technical sense" (Cruz, 2017: 26-27). However, this notion was overcome, since it was understood that there is not always a correlation between the right and the obligation, on the understanding that there is not necessarily an opposable right against an obligation.

Obligation There is not necessarily an enforceable right.

The conceptualization of subjective law in the Kelsenian notion is reflected in law in the "technical sense", which consists of the legal power of an individual that the legal order grants him on the occasion of the breach of an obligation by another. For Kelsen, this right is different from the legal obligation of the other subject; Therefore, in this case they do not coincide - they are not correlative. The subjective right with the legal duty (Cross 2017: 27).

This theory has been highly criticized for being in the conceptualization very limited, contrary to this and, adopted mostly by the doctrine, the theory of conceiving rights as legal relations between two subjects with respect to an object or state of affairs (Cruz, 2017; 28-30), but without reducing the concept to the categorization of rights and obligations is currently collected by legal systems including the system applied in Mexico, where we classify in a traditional conception the subjective

rights into public and private, in consideration of the relations between State and individuals and between individuals themselves.

After defining what a subjective right is, we can concentrate on exposing the concept of economic rights, being the species of rights that, within the framework of the concept of subjective rights, fall on those that are part of the patrimony of a person, either directly or indirectly, which by their classification are erga omnes rights that consist of the legal possibilities of obtaining a patrimonial benefit, directly from a thing or good or either through the service that a person will perform in favor of his creditor the first classifying as rights in rem and the second as personal rights.

It is important to address in an enunciative way another classification of economic rights, in addition to real and personal rights, which would be intellectual rights, however, for our study we will focus on real rights, which are those that fall on the relationship and direct benefits of the good, of which children and adolescents can be holders and those that can be the object of contracts for the exploration and extraction of hydrocarbons as an activity of public interest.

RIGHTS IN REM.

In the context of subjective patrimonial rights, entering the subject of this article, real rights construct a series of theories, which doctrinally are distinguished into two groups: dualistic and monistic. Dualistic doctrines are those that seek to clearly divide private subjective rights into real and personal, and have two aspects, the so-called classical doctrine and the eclectic; while the monist ones intend to include one of these concepts within the other, indicating that there is only one type of private subjective right; likewise, such doctrines have, in turn, two aspects: the personalist and the realistic (De la Mata and Garzón, 2013: 17-18).

As a way of contextualization, a divisional table of such theories is added.

DUALIST It divides subjective rights into real and personal.	**CLASSICAL DOCTRINE**	It makes a difference in that the real right is erga omnes (it is asserted against everyone) and the personal right is exercised against a single person, there must be a relationship of obligated subject.
	ECLECTIC DOCTRINE	Commonly accepted, it rescues the best of both theories (monist and dualistic).
MONIST It incorporates both rights into one.	**PERSONALIST**	It affirms that the erga omnes attribute of real rights is not viable and that the real right is not the power exercised over the thing, but on the contrary is a lack of prohibition. It incorporates the right in rem in the staff.
	REALISTIC	Incorporates personal law into real law. The right in rem does not imply a right over the person, but over his property.

Derived from the eclectic theory, it can then be defined to the real rights as that group of private subjective rights that allow the realization of the legal and material interest of the owner immediately and directly on a given good, to the exclusion of other subjects that are in the contingent possibility of disturbing it. (De la Mata and Garzón, 2013: 29).

PROPERTY.

Once contextualized the origin of real rights and defined their nature and function, we can enter the study of the real right par excellence that is property, and that together with the person, are the two fundamental institutions of civil law (Pérez and Cantoral, 2014: 99), property is defined as the real right that a person called owner has to use, enjoy and dispose directly and immediately, in a perpetual, exclusive and absolute manner, of a corporeal and individualized good, being the other persons obliged to respect the exercise of that right (De la Mata and Garzón, 2013: 129).

It should be noted that we refer in this section only to private property, not to the original property, held by the State, which we will mention in the section referring to the exploration and extraction of hydrocarbons, which corresponds to the nation, since we cannot forget that, in Mexico, the federal constitution establishes a triangular structure of property: as a basis, the original property of the nation and as derivations of the first, public and private property. (Pérez and Cantoral, 2014: 103)

To be the holder of the real right of ownership, it is enough to have capacity for enjoyment, which is defined as the ability to be the holder of rights and obligations, (Rojina, 2012: 256) Now, speaking of the disposition of the goods acquired in property, a full capacity of exercise is required, so this is where we find the center of the section, referring to the property of minors, since, although they may be holders of this right in rem, they cannot exercise it freely, but through those who exercise parental authority or by a guardian, as the case may be, a disposition procedure that will be addressed later.

Going deeper into the concept of property, this real right contemplates a division in the faculties of the owner: the right to use, the right to enjoy and the right to dispose, however these faculties may be limited by other real rights or legal acts, one of them is the so-called nuda property, a figure that limits the use, enjoyment, enjoyment and disposition of the property, because it is held in another person, generally in the real right of usufruct that will be analyzed later and of which a minor can also be the holder.

Traditionally, whoever holds the ownership of a good and as a general rule is the one who is empowered and legitimized to dispose of it, either alienate it or celebrate any legal act that affects the property, including contracts that are granted for the exploration and extraction of hydrocarbons, call these contracts of surface occupation or contract of voluntary easement of passage, However, in the case of immovable property of minors, the disposition of these is not given directly, but through legal representatives, it is there where they are carried out c| Do decisions such as those who administer the property of minors take into account progressive autonomy? When the administration of children's property does not require judicial authorization, how is the best interests of the child guaranteed?

USUFRUCT.

Children and adolescents, in their capacity to enjoy, may also be holders of the right in rem of usufruct, where the fruits received by this will also be administered by the person exercising parental authority or, failing that, guardianship. Having a special regime the disposition of the fruits received, for example, the income of a real estate on which the usufruct was constituted, depending on the term will require a judicial authorization for its realization.

The usufruct is a real right of very particular characteristics, it is temporary or for life, and that empowers its owner to use and enjoy in the same terms of one owner, the good of another, that is, it limits the property, holding the usufructuary the disposition of the good given in usufruct, as a reflection, despite the usufruct being a limitation to the real right of property, It is a consensual limitation, since the constitution of a usufruct can only be carried out by the owner of the property, because he is the only one authorized to dispose of it.

Its appearance as a legal figure did not have a doctrinal reason, but responded to social reasons in the Roman world, given the need to attend to the sustenance of the widow, especially in marriage sine manu, in which the wife did not participate in the succession of the husband. For this reason, the lifetime enjoyment of all or some assets of the deceased was granted, without reducing the quota of the children or heirs, (Pérez and Cantoral, 2014: 199) likewise the current usufruct retains those social origins, since the usufructs are conformed to give economic security to vulnerable groups such as children and adolescents, Hence the importance of the administration of these rights is in accordance with the best interests of the child.

As mentioned, the usufruct can be constituted temporarily or for life, which means that it can be for a defined time or until the occurrence of the holder of the real right, that in terms of its constitution, but its extinction, can be given by the renunciation of the usufructuary or by the loss of the property on which the usufruct falls.

Conceptualizing, usufruct does not have the same nature in all legal systems, for example, in El Salvador, it is a real right by which a person called usufructuary can enjoy for a period of time the thing that is owned by another, as long as it does not alter its essence, (Velis, 2017: 1) this concept perceives usufruct as what in Mexican doctrine would be known as the "quasiusufructo", that refers to the temporality of perceiving the fruits and using the given good in usufruct and that also falls on fungible and consumable goods, which can be returned by others of the same kind, quantity and quality.

To conclude with the section referring to the economic rights of minors, capacity as an attribute of personality, in children and adolescents is especially limited, although the capacity for enjoyment is the ability that allows them to be holders of the real rights mentioned here, it is also true that the limitation of the capacity to exercise does not allow them to decide on the destination of the assets they own, This, in large part because socially and legally there is still no culture of the exercise of progressive autonomy.

III. MINORS AS HOLDERS OF RIGHTS IN REM. TREATMENT AND RULES FOR ITS ADMINISTRATION.

For this article, it was required the exposition of the real rights that can be exercised over real estate, which in turn may be the subject of contracts for the exploration and extraction of hydrocarbons as an activity of public interest and, most importantly, that they are rights of which children and adolescents can be titled; Therefore, in the context of the real rights of ownership and usufruct, this section will talk about the rules and treatment for the administration of real estate owned by minors.

Being a minor, by law there is a limitation to exercise the rights of which they are holders by themselves, with their exceptions, but as a general rule, this exercise must be carried out through a representation that generally falls on those who exercise parental authority or, failing that, guardianship.

It is necessary to identify who are those people who can exercise parental authority and guardianship, for this we will refer to the Federal Civil Code, which in its article 414, which states:

Article 414.- Parental authority over children is exercised by the parents. When for any reason one of them ceases to exercise it, its exercise will correspond to the other.

In the absence of both parents or for any other circumstance provided for in this order, parental authority over minors shall be exercised by ascendants in the second degree in the order determined by the family judge, taking into account the circumstances of the case.

In case of not being able to consummate parental authority due to the absence of those who can exercise it, the figure of Guardianship is updated and where the Federal Civil Code also indicates to us, this time a contrario sensu, who cannot perform the position of guardian.

In this sense, whoever legally represents the minor, whether in the figure of parental authority or guardianship, also has the administration of the assets of the same, the Federal Civil Code, hereinafter CCF, states it as follows:

Article 425.- Those who exercise parental authority are legitimate representatives of those under it, and have the legal administration of the property belonging to them, in accordance with the prescriptions of this Code.

Knowing then the assumptions that may arise in the person and legal figure that falls on the administration of the assets of minors, we can analyze the rules of operation that are required to exercise actions on the assets.

In the cases of children and adolescents, the assets are divided according to their form of acquisition, that is, those acquired by their work and goods acquired by any other title, given this separation, it is understood that the administration of both types of property is different.

The property acquired by the minor as a result of his work may be administered and enjoyed by him, which in his personal opinion is a legislative recognition of progressive autonomy, since although the civil code is not waived with respect to the age that the minor must have to be able to

administer the goods resulting from his work, It could be understood that if you have sufficient maturity to develop a job you can also have it to manage the product that results from said employment, however, here there would be room for a deeper analysis regarding the administration of the goods product of work of a minor, by way of illustration, newborn minors who have a job in the entertainment industry, are obtaining a fungible good product of that work, which for obvious conditions they could not administer by themselves, on the other hand, there is the case of minors who work by necessity and economic situation of the family to which they belong, there are many questions that arise regarding that administration that minors exercise on the product acquired by their work, Since if the reasoning is that the child disposes of his assets to obtain them with his effort, it is not in the best interests of the child to let him administer an estate without having the necessary tools and maturity.

However, with regard to assets acquired under any other title, the CCF states the following case:

Article 430.- In the property of the second class, the property and half of the usufruct belong to the son; The administration and the other half of the usufruct corresponds to the persons who exercise parental authority. However, if the children acquire property by inheritance, legacy or donation and the testator or donor has arranged that the usufruct belongs to the child or that it is intended for a specific purpose, the provisions shall apply.

In this provision there are several points to analyze, first that as a general rule half of the usufruct of the minor's assets correspond to those who exercise parental authority, unless the person who will carry out the transfer of property in favor of the minor decides that this is not the case; So, here is an important dilemma with respect to the administration in the short and medium term in relation to the issue that concerns us when the assets of minors are affected by the exploration and extraction of hydrocarbons.

When there is a project of exploration and extraction of hydrocarbons, different types of real and social rights are affected, (such as private property, possession, ejido property, among others) and to give legality to the affectation, contracts are entered into with the owners or possessors of said properties, which are part of the project destined to reach a stage of extraction of hydrocarbons that have a validity of between 20 and 30 years (Reyes and Meneses, 2018: 12) so that the disposition of a property is subject to a long period, which leads us to reflect on the autonomy and best interests of the minor, since in the event that a contract of this nature is concluded affecting a property of a minor, which at the time of the celebration this was authorized by the person who administered the child's property, girl or adolescent, when he reaches the age of majority, the contract concluded, because they are hydrocarbon projects would still be in force, and if the owner considers that he could take better advantage of his property, he would be limited and obliged to fulfill the contract in which he was probably not taken into account to sign it, This is where the problem of long-term effects lies; By virtue of the fact that although the circumstances in which the signing of the contract of assignment was favorable and in accordance with the principle of the best interests of the child were arranged, it does not guarantee that it will be in the same way with the passing of the years, nor that the minor himself when he reaches the age of majority considers that this contract is indeed the best use that he can give to his property.

Another red light regarding the administration of the assets of a minor, is presented with the alienation or lease of a real estate, since for both activities judicial authorization is required, in this regard the CCF states:

Article 436.- Those who exercise parental authority may not alienate or encumber in any way the immovable property and precious furniture that correspond to the child, except for reasons of absolute necessity or obvious benefit, and with the prior authorization of the competent judge.

Nor may they enter into leases for more than five years, or receive the advance rent for more than two years; sell commercial and industrial securities, income securities, shares, fruits and livestock, for less than the value quoted in the market on the day of sale; make a donation of the property of the children or voluntary remission of their rights; or give bail on behalf of the children.

Extremely important what this precept indicates, since they have a common point the lease and occupation for projects of exploration and extraction of hydrocarbons and this is to put limits on the property, that the use of the real estate is not held by the owner but in favor of whom the contract is concluded, call it a tenant or contractor, however the Code is limiting by only stating the lease greater than 5 years to require judicial authorization, which leads us to the question of What about surface occupation contracts for exploration and extraction of hydrocarbons? Is judicial authorization required for its granting? If, as already mentioned in previous lines, these contracts are valid for between 20 and 30 years and, like the lease, limit the use of the property to the owner, it is not provided by the civil code or by the Hydrocarbons Law that judicial authorization is required in the event that a hydrocarbon exploration and extraction project affects properties of minors, Is this due to the legal nature of the activity itself?

As of November 2020, there were 399 current assignments of projects for exploration and extraction of hydrocarbons, which implies thousands of surface occupation contracts concluded, however, there is no history of judicial authorization for these activities, which may accommodate the understanding that such authorization is not required.

IV. PRINCIPLE OF THE BEST INTERESTS OF THE CHILD AGAINST THE EXPLORATION AND EXTRACTION OF HYDROCARBONS AS AN ACTIVITY OF PUBLIC INTEREST.

At this point, this section intends to study what is the best interests of the child and its importance in contrast to the public interest, specifically in the activities of exploration and extraction of hydrocarbons, since in the previous subtopics the current situation regarding the administration of the immovable property of minors was already exposed, where there is a gap in the Law on contracting for exploration and extraction of hydrocarbons.

THE BEST INTERESTS OF THE CHILD.

The first normative point of reference must be Article 4 of the Political Constitution of the United Mexican States, which states in its sixth paragraph: "It is the duty of parents to preserve the right of minors to the satisfaction of their needs and to physical and mental health. The law will determine the support for the protection of minors, in charge of public institutions", (González and

Rodríguez, 2011: 20)however, the Supreme Court of Justice of the Nation, hereinafter SCJN pronounces itself in this regard limiting this responsibility to parents, expanding the panorama and always establishing a criterion of weighing rights when the disputed is related to minors.

Children under eighteen years of age. The analysis of a regulation with respect to them must be done according to the best interests and priority of the child. From the interpretation of article 4, sixth paragraph, of the Political Constitution of the United Mexican States, in relation to the Law for the Protection of the Rights of Children and Adolescents, regulating that precept and the Convention on the Rights of the Child, it is noted that the principle of the best interests of the child together with the right of priority, imply that State policies, actions and decision-making relating to persons under 18 years of age must seek the direct benefit of the child and adolescent to whom they are addressed, and that public and private social welfare institutions, courts, administrative authorities and legislative bodies, when acting in their respective spheres, Give priority to issues relating to such minors. Hence, for the analysis of the constitutionality of a regulation with respect to minors under 18 years of age, it is a priority, in a balancing exercise, the recognition of those principles

The determination of the best interests of the child lies in the fact that all matters in which minors intervene must be analyzed with an approach that alerts the vulnerability of minors and guarantees their rights, for this reason the SCJN is given the task of issuing a legal concept that extracts from the interpretation of the Inter-American Court of Human Rights of the best interests of the child that governs throughout the Mexican State.

Best interests of the child. Your concept. In terms of articles 4 of the Political Constitution of the United Mexican States; 3 of the Convention on the Rights of the Child (ratified by Mexico and published in the Official Journal of the Federation on 25 January 1991); and 3rd, 4th, 6th and 7th of the Law for the Protection of the Rights of Children and Adolescents, the courts must attend primarily to the best interests of the child, in all measures taken concerning them, a concept interpreted by the Inter-American Court of Human Rights (whose jurisdiction the Mexican State accepted on December 16, 1998 when ratifying the Inter-American Convention on Human Rights) as follows: "The expression 'best interests of the child' ... implies that the development of the child and the full exercise of his or her rights should be considered as guiding criteria for the development and application of standards in all areas relating to the life of the child.

The outstanding importance of the best interests of the child cannot be left aside in the weighing of rights that affect the public interest, as is the case here, however, it is important to highlight the vital function of hydrocarbon exploration and extraction activities for the Mexican State.

EXPLORATION AND EXTRACTION OF HYDROCARBONS AS AN ACTIVITY OF PUBLIC INTEREST.

The public interest is understood as the justification of the intervention carried out by the State in the private legal sphere of the governed.

It can be considered as a concept of functional order, since it serves to justify various forms of State intervention in the sphere of individuals foreseeing limits of different degrees, either through prohibitions, permits or establishing modes of management, (Huerta, 2007: 132) in the problem that occupies this article would be to justify the occupation of a good for the benefit of society, It is there that the obligatory question is asked: Where is the best interests of the child foreseen or considered?

Carla Huerta Ochoa points out that for García de Enterrería, (García, 1996: 83) these are concepts with which the laws define factual assumptions or areas of interests or perfectly identifiable actions, although they do so in indeterminate terms, which will then have to be specified at the time of their application.

Article 27 of the Political Constitution of the United Mexican States provides for the concept of the public interest and determines that the State may intervene in the private sphere because of it.

Going a little deeper into the exploration and extraction of hydrocarbons, for the development of these activities, it is necessary to intervene in the private sphere for its realization, the problem of this, is that it is not at the will of the individual, but by the fact that it is the public interest the affected has to yield to the realization of the activities, although the right to private property is constitutionally guaranteed, since property is regulated as a human right not to be deprived of property without fair compensation from the State. (Pérez and Cantoral, 2014: 105).

In the case of contracts signed for the exploration and extraction of hydrocarbons, namely surface occupation and voluntary easement of passage, compensation is established after analysis, for the affectation to the property, which would not have major complication because although property is a human right, the public interest is also contemplated in the constitutional text, so much so that the limits of the property are intrinsic to the structure of the domain itself, and thus the general regime of the right of property is formed, due to the restrictions imposed by the general interest, (Pérez and Cantoral, 2014: 107) however when within the panorama of such contracts is found with a real estate owned by a minor, Necessarily the best interests of the child have to be taken into account and that is where we arrive at the central point of the analysis, because the public interest weighed with the best interests of the child create an effect of indeterminacy, by the nature of both principles.

As indicated above, the periods of duration of contracts for exploration and extraction of hydrocarbons are long-term, which remain in force when the minor reaches the age of majority and certainly, is in a situation of vulnerability to dispose of his assets due to the affectation that falls on them, and, although it is a contractual relationship that can end, What the breach of a contract implies economically would result in the same vulnerability to the owner, what we want to reach with this, is to expose the scenarios that are presented and can be presented in the weighting of the best interests of the child and the public interest, in which a comprehensive analysis must necessarily be made and the long-term effects of the situation and that should be mandatory. a judicial authorization to dispose of the property of minors in cases of exploration and extraction of hydrocarbons.

V. CONCLUSIONS

1.- The economic rights of minors and the administration of their assets must at all times be governed by the principle of the best interests of the child, the provision to the contrary or without an analysis of the legal consequences that could produce in the short or long term the administration of the assets outside the best interests of the child would be incurring in a violation of human rights, since property is a human right recognized in the CPEUM.

2.- The principle of the best interests of the child is the legal approach that must be prioritized in contractual relationships that imply affectations to real rights where their holders are children or adolescents, based on this, the judges and those who exercise parental authority or, where appropriate, guardianship, must consider the best use of the minor's assets in the short and long term, which is difficult, considering the legal significance of the public interest.

3.- the public interest in principle is the tool of the State to directly and almost immediately affect the legal sphere of individuals, without exclusions, that is, it also affects the legal sphere of children and adolescents, so that activities of public interest that arise in the property of minors face a dispute that entails a weighing of principles, that without manifesting itself has been gaining the public interest.

4.- A comprehensive analysis of the judicial authority is necessary to determine the viability and guarantee the best interests of the minor in the contractual relations carried out for the activities of exploration and extraction of hydrocarbons, establish the bases that guarantee legal certainty and an exercise of the will and autonomy of the minor to dispose of his assets when he reaches the age of majority.

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