

PROTECTING NATURAL PERSONS BY MEANS OF CIVIL LAW INSTRUMENTS

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Abstract

As a general rule, it may be argued that law is centred around the protection of humans, whereas civil law, as other branches of law otherwise, has its specific means for the protection of human beings.

Of these means, we have analysed the particularities of protecting minors (parental authority, guardianship, curatorship), the protection of mentally ill persons through restriction on legal capacity and the protection of natural persons by means of curatorship.

Key Words: *minor, parental protection, guardianship, curatorship, restriction on legal capacity.*

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1. Means of protecting natural persons – presentation

Civil law comprises specific means for the protection of natural persons. The civil law institution for the protection of natural persons is not destined to all, as its name would suggest, but only to those categories that cannot administer their goods or protect their interests due to their age, mental health or other special situations.

Our legislation sets protection measures for minors, mentally ill and mentally challenged people, as well as for persons in special situations.

From the legal provisions indicated we may conclude that the civil law instruments for the protection of natural persons are:

- Protection through parents, guardianship and curatorship for minors;
- Restriction of legal capacity for the mentally ill and mentally challenged;
- Curatorship for natural persons having legal capacity that are in special situations¹.

Art. 106 of the Civil Code also refers to placing minors into foster care, measure regulated by Law no. 272/2004 (republished and updated in 2016) on the protection and promotion of the rights of children².

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¹ Chelaru E., *Drept civil. Persoanele*, Editura C. H. Beck, București, 2016, p. 159; *Noul Cod civil. Note. Corelații. Explicații*, colectiv de autori, Editura C.H. Beck, București, 2011.

² Cluj Court of Appeal, Civil decision no. 678/A of September 4, 2014; Cluj Court of Appeal, Civil decision no. 351/A of April 11, 2014.

As a general principle, art. 104 of the Civil Code establishes that any measure for the protection of a natural person is only set in the interest of that person and the possibility of that persons to exercise his/her rights and fulfil his/her obligations in relation to his/her person and assets shall be taken into consideration when a measure is established.

The procedure of establishing any type of protection measure, as well as solving incidents that may occur during protection are within the authority of guardianship and family courts (art. 107 para. 1 of the Civil Code).

2. Parental authority – theoretical and practical aspects

Parental authority – as a means of protecting minors – represents according to art. 483 a series of rights and obligations that concern both the person and the assets of a child and these rights and obligations belong to and are equally exercised by both parents in the superior interest of the child. This concept also exists in the French Civil code, in the Swiss Civil Code and in the German Civil code. The concept of parental authority is present in the Civil Code of the majority of European states and in North-American legislation under the name of *custody* or *parental responsibility*.

The concept used in EU legislation is *parental responsibility*. In its Recommendation no. R (84) 4 on parental responsibilities, the Committee of Ministers of the Council of Europe states that any decision of the competent authority concerning the attribution of parental responsibilities or the way in which these responsibilities are exercised should be based primarily on the interests of the child.

As far as family legislation is concerned, also at community level, the European Commission outlined in its principles adopted, entitled *Principles of European family law regarding divorce and maintenance between former spouses*, a definition of parental authority that includes both personal and patrimonial aspects.

As any complex concept, parental authority is governed by several principles:

1. The superior interest of the child;
2. The equality of parents in exercising parental authority, as far as both duties and powers are concerned;
3. Patrimonial independence in relationships between parents and children;
4. Non-discrimination according to the child's status;
5. The involvement of the child in decisions that concern him.

As for the duration of exercising parental authority, this is born when the child is born for both parents; when the child is recognised by the unmarried father by way of judicial proceedings; through the adoption of a child.

Parental authority ceases at turning 18, when turning 16 through a request addressed to the guardianship authority or in an atypical way when the court attributes the exercise of parental authority exclusively to one of the parents.

The content of parental authority is formed of the totality of parental duties and powers and civil, contraventional or even criminal liability is engaged for non-adequate exercise of parental protection. The specific sanction in this field is the termination of parental rights which is ordered by the guardianship (family) court (art. 508 of the Civil code).

Decisions regarding minors, more precisely decisions that parents take together regarding: changing the minor's residence, medical treatments, issuing a passport for the minor and travels abroad, the execution of court decisions concerning minors and international child abduction are interesting and topical aspects.

In the following we shall present current practical aspect related to these problems.

According to art. 496 para. 2 and 3 of the Civil code, if the parents do not live together, they shall – by common agreement – establish the child's residence and in case of disagreement, the guardianship court shall decide³. In our legislation there are no clearly stated criteria that the court shall take into consideration when taking a decision. Given that such expressly provided for criteria are missing, the Romanian courts may also take into consideration the principles of the European Commission for Family Law. This commission was created in 2001. Its main objective is to develop principles that – although not mandatory – may serve as a source of inspiration for harmonising European family law.

The principles the Commission considers that shall be taken into consideration are: the age and the opinion of the child; the personal situation of the holder of parental responsibilities; geographical distance and accessibility; the ability and wish of the holders of parental responsibilities to collaborate with each other; the free movement of persons, as well as the actual way of exercising parental authority; the way in which changing the exercise of parental authority would affect the child.

The aspects comprised in Recommendation no. CM/2015 (4) of the Committee of Ministers to member states on the prevention of and solving disputes related to child relocation are also noteworthy. This recommendation contains general principles such as:

1. The national law on child relocation shall offer:

³ Cluj Court of Appeal, Civil section I, Decision no. 104/R of January 10, 2014; Cluj Court of Appeal, Civil section I, Decision no. 625/R of March 7, 2014; Cluj Court of Appeal, Civil section I, Decision no. 899/R of May 23, 2014; Cluj Court of Appeal, Civil section I, Decision no. 899/R of May 23, 2014; Cluj Court of Appeal, Civil section I, Decision no. 628/R of March 7, 2014; cited in *Buletinul Jurisprudenței 2014 Curtea de Apel Cluj*, Universul Juridic, București, 2014, p. 43, 45, 47, 48.

- Sufficient predictability in order to prevent and solve disputes;
- To provide sufficient flexibility in order to solve individual disputes in a satisfactory manner;
- To encourage the attainment of amiable agreements on relocation.

There are solutions in which parents may request the temporary modification of their residence, for the time they are seconded or carry out an activity in another locality or country.

In a case⁴, a mother's application who requested the supplementation of the father's consent by means of a judge's order as far as the issuing of a passport for the minor and the child's travel abroad for 6 months were concerned was rejected. The mother's arguments were the following: she was a teacher and she was admitted to teach an English class in Istanbul. She wanted to take her child with her from the beginning, therefore she took the necessary steps for the child to be admitted to an international school from Istanbul where the language of instructions was English and the child was also going to benefit from a sports scholarship that was adequate to his skills.

The defendant requested that the application be rejected and he formulated a counterclaim in which he requested that the child's residence be established at his place until his mother was abroad. He pointed out that leaving to Turkey would be traumatising for the following reasons: he did not speak Turkish or English (the minor was 7 years old), he would be displaced from his familiar environment, the child did not have friends and it would be difficult for him to make friends there, he would be torn apart from the other members of his extended family, and it could take years until the minor was able to adapt to such a different life.

Analysing the case, the court considers that the conditions for a judge's order are not met, namely urgency, provisional character and no prejudice to the merits of the case, as regulated in art. 581 of the Civil procedure code.

The period for which the minor would leave the country is a long one, at the international school the period covered for the child is only three month out of six and only the sports scholarship is mentioned in the proof presented, without any reference to other educational needs of the child.

The court underlines that the parents' agreement regarding the child is very important in this field (which in this case has not been reached) and that his stay in Turkey should take place in similar conditions to his present conditions, which has not been proven through the evidence presented.

In conclusion, the court considered that the mother could have delegated her parental duties to the father for the term of her secondment, which was possible from a legal point of view, that the father's arguments are grounded and taking a decision that would strongly affect his physical, educational and emotional stability would not be in the interest of the child.

⁴ Bacău Court of First Instance, Civil sentence no. 597 of 24.01.2013, available at <http://portal.just.ro>.

As for the issue of medical treatments, according to art. 661 of Law no. 95/2006 on health sector reform⁵, the legal age for expressing informed consent is 18. However, minors may express their consent if their parents or legal representatives are absent in the following cases: in emergency situations when the parents or the legal representative may not be contacted and the minor has enough judgement to understand his medical situation; in medical situations concerning the diagnosis and/or treatment of sexual and reproductive issues, upon the express request of children above 16 years of age.

Recent case-law⁶ sustains the existence of the obligation to be informed of complex diseases, while decisions concerning minor health problems that are within the competence of the paediatrician may be taken by one parent alone.

According to the European Charter of Patients' Rights⁷, a sick child or minor – as far as he is able to have some personal autonomy or a correct judgement – shall be consulted for current medical acts.

At present, although our legislator does not expressly provide it, in practice solutions granting joint custody with alternative residence have started to appear.⁸ From the point of view of comparative law, this solution is laid down in Canadian legislation. The criteria⁹ that might be taken into consideration when establishing an alternative residence would be the following: the child's age, the child's and the parents' opinion, the parents should live close to each other and there should be no communication difficulties, non-separation of siblings.

As a novelty, for the first time in internal legislation, the new Civil Procedure Code (art. 910 of the Civil procedure code) contains special provisions that regulate the execution of court decisions concerning minors. These special provisions are applied when measures concerning minors are provided for in an enforceable title and they are related to establishing the minor's residence, placing the minor in foster care, returning the child by the person who has him without any right, the exercise of the right to maintain personal relationships with the minor, as well as other measures provided for by law.

We would like to mention that the provisions of art. 910 and the following of the Civil Procedure Code are only applicable to statutory law cases regarding minors and family and not to decisions pronounced by means of judge's orders.

And finally, we would like to mention one last aspect regarding international child abduction. This subject matter is not very much addressed and

⁵ Published in the Official Journal of Romania no. 372 of 28.04.2004, republished in the Official Journal of Romania no. 652 of 28.08. 2015.

⁶ The Court of First Instance of the 2nd District of Bucharest, Civil sentence no. 10243/2013.

⁷ <http://dm.eesc.europa.eu/eescdocumentsearch/Pages/opinionsresults>.

⁸ The Court of First Instance of the 2nd District of Bucharest, Civil sentence from 20.04.2012, available online at <http://portal.just.ro/300/SitePages>; Cluj-Napoca Court of First Instance, Civil sentence no. 4524 of 7.05.2015 unpublished.

⁹ Barbur, D. F., *Autoritatea părintească*, Hamangiu, București, 2016, p. 173.

under the conditions of free movement of Romanian citizens within the European Union, children may be moved from one state to the other in a relatively easy way. The subject matter of the European Convention from May 20, 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, ratified by Romania in 1992, is to ensure the immediate return of children illicitly moved or retained in any contracting state and to ensure that the rights related to the exercise of parental authority are effectively complied with in other contracting states. In each signatory state, there is an authority, called Central Authority, competent to implement the provisions of this Convention. In Romania this authority is the Ministry of Justice.

Moving or not returning a child is considered illicit when it takes place through violation of a right concerning custody, granted to a person, institution or other body. When returning the child is ordered, the court shall mandatorily set a term for the fulfilment of this obligation. The court may also order one of the following measures: handing over the child's passport to the plaintiff; obliging the defendant parent to contribute to the issuing of a passport for the child or supplementing his/her consent to this end. The decision of the court may be appealed at the Bucharest Court of Appeal within 10 days from communication, which suspends the execution thereof.

In this kind of lawsuits the burden of proof is incumbent on the person abducting or retaining the child illicitly¹⁰.

3. Guardianship of minors

Another means of protection, regulated in art. 110 of the Civil Code, is represented by guardianship for minors. This is established in cases and under conditions provided for by law, it is exercised exclusively in the interest of the minor, it is also governed by the principle of patrimonial autonomy between guardian and minor, under the supervision of the Family Council. The person designated as guardian shall have full legal capacity, he/she shall have the material conditions and moral guarantees necessary for the harmonious development of the child. A child may have one or more guardians. From the wording of art. 115 of the Civil Code it may be concluded that a parent may also establish an order in which – if he/she has designated several persons as guardians – these persons shall be called to exercise guardianship. This order shall be respected by the guardianship court.

An important provision is the one according to which, should the interests of a child require it, the guardianship court may decide *ex officio* or upon request of the family council that the guardian present tangible or personal securities.

¹⁰ Bucharest Court of Appeal, Civil section III, Civil decision no. 229 of 2.06.2014, document available online at <http://www.jurisprudenta.com/jurisprudenta/speta>.

The content of guardianship is provided by its sides: non-patrimonial and patrimonial. First, a guardian shall supervise the raising, health and education of the child and he/she shall administer the child's assets by concluding legal acts through representation or approval, according to the child's age.

The Civil Code (2009) introduced an institution which did not exist in the previous Civil Code (1864), i.e. the Family Council. The role of this council is to supervise how guardians exercise their rights and fulfil their obligations. It is made up of 3 members and 2 alternate members, out of relatives or in-laws, taking into consideration the degree of kinship and personal relationships with the minor's family. If there are no relatives, other persons who have been friends with the minor's parents and who manifest interest for his situation may also be members of the council.

Family councils give advisory opinions, take decisions upon the request of guardians or guardianship courts in cases provided for by law. Decisions are taken upon hearing minors who have turned 10 years of age.

Should the guardian conclude legal acts without the advisory opinion of the family council, partial voidness shall apply, while concluding such acts by non-complying with the advisory opinion only entails the guardian's liability.

Upon termination of guardianship, as the case may be, guardians shall be liable (civil or even criminal liability) for the non-fulfilment or inadequate fulfilment of their duties.

We consider that the introduction of the institution of Family councils was a beneficial one, substantiated in practice.

Still concerning minors, the Civil Code contains the regulation of another protection measure, absolutely necessary in certain situations, i.e. curatorship. This is a temporary and subsidiary legal means for protecting minors. It is actually an ad-hoc guardianship, which entails the application of the rules governing the guardianship of minors. Similarly to guardianship, curatorship also has a non-patrimonial and a patrimonial side.

4. Curatorship of minors

Curatorship shall be established in the following cases:

- When there are conflicting interests between a minor and his legal representative or legal protector;
- If due to illness or other reasons a guardian is prevented from fulfilling a certain act in the name of the minor he/she represents or whose act he/she approves;
- If curatorship is terminated due to the death of the curator, if he/she does not have heirs or if his/her heirs are minor or cannot take over guardianship duties;
- If the curator has been removed.

As the cases when such a protection measures may be established are expressly indicated, in practice the curatorship of minors supplements very well the need for protecting minors. There are situations when designating a curator is an absolutely necessary and practically useful measure in special situations not covered by other means of protection.

The next legal institution that ensures protection for natural persons we have proposed ourselves to analyse is legal incapacitation. This applies to natural persons whose lack of judgement prevents them from taking care of their own interests, due to mental illness or mental impairment. This measure is ordered by a court of law and it consists of losing the legal capacity to exercise rights and the establishment of guardianship.

5. Legal incapacitation – theoretical and legal aspects

As for legal incapacitation, the provisions of the Civil Code (art. 164-177) are supplemented by those of the Civil Procedure Code (art. 936-943).

Our legislation also regulates the protection of persons with mental disorders¹¹, which is not to be mistaken with legal incapacitation. The regulation laid down for the protection of persons with mental disorders distinguishes between persons with mental disorders and persons with severe mental disorders and it essentially regulates the procedure for voluntary and involuntary hospitalisation of these persons, the procedure for setting up and implementing a therapeutic program, as well as the rights of persons with mental disorders.

The measures that are taken based on Law no. 487/2002, republished, are as follows: setting up a medical treatment and hospitalisation in a psychiatric institution. The rule is that the prior consent of the patient shall be obtained.

Unlike legal incapacitation, which – as also reflected in its name – is only established by courts of law, setting up a treatment and hospitalisation without the consent of the patient are decided through an administrative procedure by the competent medical authority, while the role of the courts of law is only to solve complaints – if any – against the measures ordered.

The effects are different as well: legal incapacitation determines the loss of a person's capacity to exercise his/her rights and the establishment of guardianship, whereas based on Law no. 487/2002 medical treatment does not have any influence on this capacity.

As they are measures different in nature that have different aims, they may be cumulated.

The procedure of legal incapacitation is a judicial one and it takes place by complying with the civil procedure rules set by the Civil Procedure Code. The trial shall take place with the mandatory participation of the Public Ministry, by

¹¹ Law on mental health and the protection of persons with mental disorders no. 487/2002, republished in M. Of. no. 652 of September 13, 2012.

carrying out a psychiatric evaluation and hearing the person (under the form of an interview) to whom this measure is to be applied to, whenever possible.

Incapacitation produces effects from the date on which the court decision is final. A legalised copy of the operative part of the judgement will be communicated ex officio by the court pronouncing it to the civil status registry where the birth of the legally incapacitated person has been registered, to the competent healthcare unit, to the land registry office and to the trade registry. These communications have the role to protect both the interests of the legally incapacitated person and those of third parties. Enforceability against third parties is important from the point of view of the validity of acts they would conclude with the legally incapacitated person.

The measure of legal incapacitation may be lifted when the causes determining its establishment have ceased (art. 177 of the Civil Code). The procedure of lifting legal incapacitation is identical to the one for its establishment. Formalities for enforceability against third parties shall also be performed and the guardian's right of representation will only be enforceable to third parties from the date of their performance.

In the following we shall present a case regarding legal incapacitation and the establishment of a legal entity as guardian¹². This situation is an exceptional one, therefore the solution shall not be completely in line with the provisions of the Civil Code.

The plaintiffs show that at the moment of naming a guardian the provisions of art. 119 of the Civil Code on the procedure of naming a guardian have not been taken into consideration, more precisely, the consent of the guardian has not been requested.

The court acknowledges that in this case we have a special situation in which requesting the consent of the guardian is not mandatory, aspect resulting from the interpretation of art. 25 para. 4 of Law no. 448/2006 which provides that if a disabled person does not have any relatives or other persons to accept guardianship, the court will be able to designate the local public administrative authority or the private legal entity that ensures protection and care for the disabled person as guardian, as the case may be. These provisions derogate from the general norm and they refer to a special situation. Under these conditions, those argued by the plaintiffs are not sustained.

Moreover, they showed the court that the Family type home taking care of the person whose legal incapacitation was requested could have been designated as guardian. The court has dismissed this argument given that from a legal point of view there is no possibility to designate a structure without legal entity as guardian because it cannot have a patrimony and therefore it may neither ensure

¹² Cluj Court of Appeal, Civil section I, Civil decision no. 106/R of January 10, 2014.

the administration of another patrimony. A guardian has to have the ability to exercise civil rights and such a structure does not fulfil this condition.

The plaintiffs also showed that in their opinion the Local Council of Cluj-Napoca – Guardianship Authority Department could not be a guardian because according to the provisions of art. 25 para. 5 of Law no. 448/2006 it had competencies related to compliance with the obligations of guardians of disabled persons.

The court has dismissed these arguments as well, arguing that there is no contradiction between a guardianship authority being a guardian and the body verifying, supervising the activity of the guardian considering that the legislator has not removed the obligations the Local Council would have if no relative of the disabled person or a third person to accept this situation has been identified.

In this case, as representative of the local authority, the plaintiff has the obligation to attend to the exercise of this duty as it is clear that such a person may not be left without a guardian.

When regulating several competencies of the Local Council by the provisions of art. 25 of Law no. 448/2006, the legislator has been aware that certain conflicts may arise, but the implementation procedures of Law no. 448/2006 provide that: “In the meaning of art. 25 of Law no. 448/2006, if the court names the local administrative authority as guardian, this has the obligation to designate a person or a commission from the mayor’s specialty apparatus or from the department with competencies in the field, respectively, to implement the decision of the court.”

6. Curatorship of capable natural persons

The last protection measure we have proposed ourselves to analyse in this paper is the curatorship of capable natural persons. The rules of the mandate also apply to this type of curatorship (art. 183 of the Civil Code).

The Civil Code lists the cases when this kind of curatorship is established:

- If due to illness, old age or physical disability a person – although capable – cannot personally administer his/her goods or defend his/her interests and he/she may not name a representative;
- If due to illness or other reasons a person may neither personally, nor through a representative take the necessary measures in cases which call for immediate solutions;
- If a person has to be absent for a long period from his/her residence and he/she has not named an attorney-in-fact or a general administrator;
- If a person has disappeared, there is no information about him/her and no attorney-in-fact or general administrator has been named;
- Notarial estate curatorship (art. 1117 para. 3 of the Civil code)

A special curator has all the rights and obligations provided for by law for the legal representatives.

The curator is named by the court and always with the consent of the person affected. As a general rule, the relationships between those protected and curators are governed by the rules of mandate.

Curatorship shall cease when the causes determining its establishment no longer exist.

The main scope of everything related to the category of children's rights, either legal regulations in the field, legal acts issued or adopted, the exercise of parental authority, decisions or measures concerning children taken by public authorities or authorised private bodies or solutions pronounced by courts of law, is to promote the superior interest of children, as evaluated and established by the person or persons in charge for their protection, be it their parents or the authorities.¹³

Conclusions

In conclusion, our civil legislation comprises institutions that allow for the protection of natural persons in special situations: minors, legally incapacitated persons and persons in special situations. This protection aims both the personal and patrimonial aspect (manifested in civil law through the conclusion of civil legal acts), with implications for the persons concerned, as well as for the rights and interest of third parties.

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¹³ Roș, Nicolae, *Protecția socială necontributivă înfaptuită de administrația publică în România*, Risoprint, Cluj Napoca, 2013, p. 105.