
CERTAIN CONSIDERATIONS REGARDING THE ATTRIBUTIONS OF THE ROMANIAN GUARDIANSHIP COURT IN THE PROTECTION OF THE MINORS

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Abstract: The minors' vulnerability led to the adoption of certain special means of protection. Among them, special protection measures and adoption play a special role. This paper analyses the Romanian court attributions, as guardianship court in the matter of these measures which are regulated by the dispositions of the Law no. 272/2004 republished, regarding the protection and promotion of children's rights and of the Law no. 273/2004 on the procedure of adoption, and it is intended to continue the paper on the same topic from the previous issue.

Keywords: protection, court, special protection measures, adoption.

1. The attributions of the Romanian guardianship and family court in the case of a child's special protection measures

The attributions of the Romanian guardianship court are also exercised for the special protection measures instituted regarding the minor through the provisions of Law no. 272/2004 [1] on the protection and promotion of children's rights. The norms of this law also stipulate explicitly that the court at the child's domicile holds the material and territorial competence on ruling such measures, and, when this domicile is not known, the competence belongs to the court in whose territorial district the child was found (art. 133).

The provisions of the analyzed special law also specify the procedural regime [2] of the disputes on the special protection measures imposed regarding the minor. In this regard, we notice that they are solved as a matter of urgency, being summoned the child's legal representative, the Romanian General Directorate for Social Work

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and Child's Protection and, mandatory, with the prosecutor's participation, and also, the child which is at least 10 years old has to be heard as well.

For the principle of celerity to operate, the ruling deadlines must not be longer than 10 days, and the presidential order for placing in an emergency the child at a person, family, foster parent or in a residential-type service, licensed according to the law, has to be issued in the same day. Then, the court is going to rule on the requested measures based on the submitted application and documents, without parties' conclusions. In addition, the rules by which the case matter is solved are usually given on the same day of the debates ending, and the decision of the court of the first instance is enforceable and final, it must be drafted and communicated to the parties within 10 days since it has been sentenced (art. 136 of Law no. 272/2004). It is noted that unlike common law [3], the term of appeal is shorter, respectively of 10 days from the date of communication of the decision.

According to art. 59 of Law no. 272/2004, the special child protection measures are a) placement; b) emergency placement; c) specialized supervision.

As a rule, these measures, if they concern the child who has reached the age of 14, are given only with his/her consent. The judging entity (respectively the court) can adopt them only when the child refuses to give consent, thus, in duly motivated situations, the court may ignore the child's refusal to express the consent to the proposed measure.

According to art. 60 of the analyzed law, there are to benefit from the special protection measures provided by this normative act: the child whose parents are deceased, unknown, deprived of the exercise of parental rights or to whom the punishment of prohibition of parental rights has been applied, placed under interdiction, declared dead or missing, when guardianship could not be instituted, the child who, in order to protect his/ her interests, cannot be left in the care of parents for reasons not attributable to them; abused or neglected child, found child or child abandoned in healthcare facilities; the child who has committed a deed punishable criminal law and who is not criminally liable.

The first of the special protection measures is the placement of the child. This is a special protection measure, of a temporary nature, which may be ordered, as the case may be, to: a) a person or family; b) a foster parent; c) a residential type service, provided in art. 123 par. (2) of Law no. 272 and licensed according to law.

According to art. 65 par. (2) of Law no. 272, the placement measure is established by the court, at the request of the General Directorate for Social Work and Child Protection:

a) in the case of the child whose parents are deceased, unknown, deprived of parental rights or who have been punished, placed under interdiction, declared dead or missing, when guardianship could not be established, but also in the case of

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the abused or neglected child, of the found child or the child abandoned in healthcare facilities, in the event that it is necessary to replace the emergency placement ordered by the General Directorate for Social Work and Child Protection;

b) in the case of the child who, in order to protect his/ her interests, cannot be left in the care of the parents for reasons not attributable to them and of the child who committed a deed punishable by the criminal law and who is not criminally liable, when there is no parental consent or, where applicable, there is no consent from one of the parents, for the establishment of this measure.

The person or family receiving a child in placement has to have the domicile in Romania and to be assessed by the General Directorate for Social Work and Child's Protection on the moral warranties and material conditions to be accomplished in order to receive a child in placement [4].

The court that ordered the placement of the child has the power to establish, if necessary, the amount of the parents' monthly contribution to his/ her support, under the terms provided by the Civil Code. In the event that the payment of the child support contribution is not possible, the court obliges the working parent to deliver between 20 and 40 hours per month for each child actions or works of local interest, during the application of the special protection measure, within the administrative-territorial area in which the respective parent has the domicile or residence.

According to art. 68 par. (1) - (2) of the said law, the emergency placement constitutes a special protection measure, of a temporary nature, which is provided if a child is in the following situations: it is abused, neglected or subject to any form of violence, or is found or abandoned in healthcare facilities. At the same time, this placement may be established with regard to the child whose sole legal guardian or both have been detained, arrested, hospitalized, or in the event that, due to another reason, they cannot exercise their parental rights and obligations regarding the child.

It is noticed that, unlike the placement, in emergency placement, for its entire duration, the exercise of the parental rights is suspended by law, and the competence to decide on maintaining or replacing this measure on the exercise of the parental rights is incumbent to the court.

The adoption of this measure can be carried out by the director of the General Directorate for Social Work and Child's Protection from the administrative-territorial unit, where the child in the situations stipulated by art. 68 par. (1)- (2) of Law no. 272, is or it can be carried out by the legal entity (namely, the court).

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The measure of emergency placement is ruled by the court upon the notification of the General Directorate for Social Work and Child's Protection for issuing a presidential order for child's emergency placement to a person, a family, a foster parent or a residential-like service, licensed according to the law, in the hypothesis where the legal persons' representatives, and also the natural persons who care or ensure the protection of a child refuse or prevent in any way the performance of the verifications by the representatives of the General Directorate for Social Work and Child's Protection, and they decide that there are substantiated reasons to support the existence of imminent danger for the child due to abuse or neglect [art. 69 par. (2) corroborated with art. 100 par. (3) of the Law no. 272].

After the notification from the General Directorate for Social Work and Child's Protection, following the revocation of the measure for emergency placement ordered by the head of this institution, the court is to analyze the reasons for the adopted measure of the mentioned institution and will rule the termination of the emergency placement and, where applicable, the child's reintegration in the family, the replacement of the emergency placement with the guardianship or with the measure of placement. In addition, the court has also to rule on the exercise of parental rights.

In the event when the emergency placement is ruled by the court, as a result of the notification and in 5 days since the execution of the presidential order ruling the emergency placement by the General Directorate for Social Work and Child's Protection, the court has to rule on: replacing the emergency placement with the placement, the forfeiture of the exercise of the parental rights, and also on the exercise of the parental rights. In addition, the court has to rule on the obligation for the child's parents to participate in counseling sessions.

In this context, there also can be emphasized the regulations on the placement in the Spanish civil law [5]. In this law system, the provisions of Section 1 "De la guarda y acogimiento de menores" of Chapter V "De la adopción y otras formas de protección de menores", Title VII of Book I "De las personas" apply to family placement. This placement implies the minor's full participation in the family life and imposes to the person exercising this means of protection the attributions of care, accompanying, food supply, education, and school and professional training in an affective environment [art. 173 point 1 par (1) Civil Code].

The placement requires the consent given by the persons whom this task is assigned (*los acogedores*), and also by the minor whom this form of protection is applied to, if he shows enough maturity and, in all situations, if he is 12 years of age.

If no serious cohabitation issues occur between the minor in placement and the person or persons whom the family placement is entrusted to, the Public Ministry, the parents or guardians who still have parental authority or the prerogatives of guardianship, or

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any interested person, may request the public entity (*a la Entidad Pública*) to revoke the placement measure.

The family placement may be carried out either in the minor's extended family or in another family.

According to art. 173 bis par. (2), depending on its duration and goals, this placement can take one of the following forms:

- emergency family placement, intended especially for minors aged 6 years old, which will last at most six months, until the appropriate protection measure is decided;
- temporary family placement, which will be of a transitory nature, either because the minor's situation provides for his/ her reintegration into his own family, or because a more stable protection measure is adopted, such as family placement or adoption. This family placement will have a maximum term of two years unless the best interests of the child lead to the extension of this measure with a view to immediate family reintegration, or the adoption of another definitive protection measure;
- permanent family placement, which will be established exactly within two years of temporary family placement, for the family reintegration may not be possible, or directly in the case of minors with special needs, or when the circumstances, in which the minor and his family are, recommend so. In this case, the public entity will be able to request the court to grant to the permanent guardians those guardianship attributions that will facilitate the fulfillment of the responsibilities, taking into account, in any case, the superior interest of the minor [6].

According to the provisions of the art. 173 pct. 4 C. civ., the minor's placement is terminated in the following ways:

- by court decision;
- by the decision of the public institution (*of the Entidad Pública*), of the parents, of the guardians, of those who exercise this protection measure or even of the minor, if he/ she is of sufficient maturity when the termination of the placement is considered required for the protection of his/ her interests, the persons to whom the placement of the child, the minor, the parents or the guardian has been assigned will be heard;
- by the death or declaring bankruptcy of the person or persons who have the child in foster care;
- by the minor reaching the age of maturity.

With regard to the child who has committed a criminal act and who is not criminally liable, following the proposal of the General Directorate for Social

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Work and Child Protection in whose administrative-territorial unit the child is located, the placement measure or the specialized supervision measure will be adopted [art. 84 par. (1) in conjunction with art. 59 lett. a) and c)]. The measure is established by the child protection commission, in the event that there is the agreement from the parents or another legal representative of the child, or, where applicable, the court, in case this agreement is missing, noticing that, at the grounds for the choice for one of these measures, certain criteria are taken into account, such as a) the conditions that favored that deed to be done; b) the degree of social danger of the deed; c) the child's environment of origin; d) the risk of committing again an act punished by the criminal law; e) any other elements that may contribute to the characterization of the child's situation.

As shown above, another special protection measure for minors provided by Law no. 272/2004 republished is the specialized supervision. It has the legal nature of a sanction and is ruled against the child who has committed a criminal act and who is not criminally liable. It is noted that the rules of the analyzed special law differentiate the competent authority to adopt this measure in relation to the agreement of the parents or the legal representative; thus, the specialized supervision measure is ordered by the child protection commission, if there is such an agreement, and, in the absence of this agreement, by the court.

Regarding the content of this measure, the provisions of art. 85 par. (1) clarify it, as they stipulate that it involves keeping the child in the family of origin, subject to the child's compliance with certain obligations, such as:

- a) attending school courses;
- b) use of daycare services;
- c) following medical treatments, counseling, or psychotherapy;
- d) the prohibition to frequent certain places or to have connections with certain persons.

It is noted that depending on whether or not there is consent from the parents or the legal representative, either the child protection commission or the court may decide on the solution of child's placement in the extended or substitute family, with the requirement for the child to fulfill the aforementioned obligations if keeping the child in the family is impossible or in the situation in which the child does not fulfill his obligations by applying the measure of specialized supervision.

Under the same context, in the sense of monitoring, the norms of the Law no. 272/2004, republished, provide at art. 72 also the requirement for the Romanian General Directorate of Social Work and Child's Protection to check each trimester the circumstances that led to the adoption of the special measures of protection, ruled by the commission for child's protection or by the ruling entity (namely the court).

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In the hypothesis of changing these circumstances, the Romanian General Directorate for Social Work and Child's Protections incurs the obligation, and the child's parents or another legal representative of the child, and also the child benefits of the right to seize instantly the commission for child's protection or, where applicable, the court for changing or terminating the measure, depending on the situation.

2. The attributions of the Romanian guardianship and family court in case of domestic adoption

Adoption, as a means of protection of minors deprived of an adequate family environment, and against which other means of protection could not be successfully applied, such as guardianship, placement, is governed by the norms of the Romanian Civil Code and those of Law no. 273/2004 regarding the adoption procedure, republished [7].

Depending on the existence of the cross-border implications, adoption can take one of two forms: domestic adoption and international adoption.

Adoption was defined as the legal act by which kinship relations are born, similar to the natural kinship, between the adoptee and his descendants, on the one hand, but also between the adopter and his relatives, on the other hand [8].

The Romanian Civil Code stipulates briefly at art. 454 par. (1) only that: "Adoption is approved by the guardianship court if it is in the best interests of the child and all other conditions provided by law are met", thus foreshadowing the special role that this court has in the adoption procedure. Moreover, in addition to these norms, the same normative act specifies that a special law is dedicated to the regulation of the adoption procedure, in this case, Law no. 273/2004 regarding the adoption procedure, republished [9].

We remind the incidence in the matter of the provisions of art. 76 of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Romanian Civil Procedure Code, as well as for amending and supplementing related normative acts, which specify that they can fulfill the role of guardianship and family courts, until the date of organizing of such guardianship and family courts, the first instance courts or, as the case may be, courts or specialized juvenile and family courts. In addition to these norms, the Romanian Civil Code provides in art. 454 par. (1) that: "The adoption is approved by the guardianship court, ..", or according to the norms of the framework law in the matter, art. 84 par. (3): "The requests provided by this law, as well as those regarding the termination of the adoption, are within the competence of the court...".

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The norms of Chapter VI of the mentioned special Law, norms concerning the trial procedure in the matter, provide the competence of the Romanian courts to judge the adoption requests if at least one of the parties has the habitual residence in Romania. In addition, the Romanian courts have exclusive competence in the ruling of the requests stipulated by the Law no. 273/ 2004 provided that the child to be adopted has the habitual residence in Romania and is a Romanian citizen or stateless person.

The material competence to solve the requests referred to in the Adoption Law belongs, as mentioned above, to the court, this being in the current regulation the common law court regarding the trial in the first instance, as provided by the norms 84 par. (3) of the mentioned special law corroborated with art. 95 par. (4) of the Romanian Civil Procedural Code.

From all the provisions of the mentioned law, it appears that requests such as the request to open the adoption procedure, the request to entrust the child for adoption, the request to approve the adoption [10], but also the requests for nullity [11] and termination of adoption is part of the jurisdiction of the court, as well as other categories of related applications in the matter.

While in material terms, the jurisdiction belongs to the court, in territorial terms the competence belongs to the court in whose territorial district the domicile of the adoptee is located. For example, the domicile of the adoptee may be at the domicile of the adopter/ adoptive family, or at the institution in whose care the child is. In situations where the jurisdiction cannot be established according to the mentioned norms, the jurisdiction belongs to the Court of Bucharest [art. 84 par. (3) of Law no. 273/2004].

A first stage, in which the role of the court is emphasized, is the stage of opening the domestic adoption procedure. At this stage, in order to approve the adoption, the department in whose territorial area the child's domicile resides shall notify the court of the child's domicile within 30 days from the date of registration of the case by the adoption and post-adoption department. Following the notification, the court will approve or not, as the case may be, the request to open the domestic adoption [art. 31 par. (2) Romanian Civil Code].

Although the expression of the consent to the adoption of the natural parents or, as the case may be, of the guardian is a substantive condition of the adoption, the law-maker gives the possibility to the guardianship court that, by virtue of its active role, and as an exceptional situation, it can override the refusal of the natural parents or, as the case may be, of the guardian to consent to the adoption, in the hypothesis of the coexistence of two conditions: it turns out that it is abusive, respectively the court considers that the adoption is in the best interest of the child, also taking under consideration the child's opinion, given according to the legal

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terms, with the substantiated motivation of the ruling on that matter (art. 467 Romanian Civil Code).

In this context, it is noted that the guardianship court has the power to solve, at the request of any of the child's natural parents or of the department that requested the opening of the adoption procedure, the request to review the decision to open the domestic adoption procedure [12]. In the event that the court decides to revoke the measure of custody of the child, it must rule, following the proposal of the General Directorate in whose administrative-territorial area the child's domicile is located, until the resolution of the request for review, a provisional measure for child's protection (art. 33 corroborated with Article 34 of Law No. 273/2004).

It is also necessary to specify that the assessment of the adopter or the adoptive family regarding the obtaining of the certificate, but also the match between the child and the adoptive person or family does not imply attributions from the courts. Another stage, prior to the approval of the adoption, is the stage of entrusting the child for adoption. At this stage, the Romanian guardianship court is invested by the Romanian directorate in whose territorial area the child resides with the solution of the request for entrusting the child for adoption. At the same time, following the notification of the direction from the domicile of the adopter or the adoptive family, the Romanian guardianship court is to rule on revoking or extending the custody measure.

The approval of the adoption, as the last stage in the adoption procedure, is within the competence of the guardianship entity (namely the court), as it appears from art. 454 par. (1), which will admit the application if it considers that the adoption corresponds to the best interests of the child.

Regarding the settlement of the requests from the mentioned law, but also of those of termination of adoption, it is observed that this is given by the special law in the competence of the specialized panels of the court, in the council chamber, the participation of the prosecutor being mandatory [art. 86 of Law no. 273/2004].

There are also significant procedural norms from the art. 87 of the analyzed law which establish that upon the submission of the request, the president of the court adopts measures in order to set, immediately, the first trial term, which may not exceed 15 days since the date of registration of the request, but also to summon and communicate the request.

The Romanian Court of First Instance shall give its judgment in the first instance based on documents or, where appropriate, of other evidence. The issuing of the judgment in the matter may be postponed by at most 48 hours, the drafting of the judgment being made within 7 days since its issuing, and its communication must be made to the parties within 48 hours since the drafting.

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In this context, we can also notice that, on the occasion of solving the adoption requests, there is incumbent to the court the obligation to hear the child who has reached the age of 10, and, also, regarding the applications for approval of the adoption, to receive the consent of the child who reached the mentioned age. At the same time, it is noticed that the child's opinions at the hearing will be taken into account depending on his/her age and degree of maturity. These provisions derive from the application of the norms of art. 264 of the Romanian Civil Code. In case it rules in contradiction with the opinion expressed by the child, the court has the obligation to substantiate the reasons that led to the removal of the child's opinion [art. 92 par. (3) the final thesis from Law no. 273/2004].

The importance of the decision of the court is special, in particular considering that the effects of the adoption occur since the date of the decision for approving the adoption is final.

3. Conclusions

The prerogatives held by the Romanian guardianship court, as regulated by the current Romanian Civil Code, are diverse and confer proper protection for the child missing the family environment or not benefitting from a harmonious family environment.

In this context, considering that these attributions are regulated dispersed in various normative acts, I reiterate the proposition expressed in the previous survey, respectively that they have to be legislated explicitly and in a unitary manner, either by a special law presenting *in extenso* these prerogatives or specifically, in the Law no. 304/2004 on the judicial organization or in the Romanian Civil Procedure Code in the matters regarding the competence of the courts.

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7. Law no. 272/2004 on the protection and promotion of children's rights, republished in the "Official Gazette of Romania", Part I, no. 159 of March 5, 2014, with subsequent amendments.
8. Law no. 273/2004 regarding the adoption procedure, republished in the "Official Gazette of Romania", Part I, no I, nr. 739 of September 23, 2016.

Notes

- [1] Republished in the "Official Gazette of Romania", Part I, no. 159 of March 5, 2014, with subsequent amendments.
- [2] The norms of Law no. 272/2004 on the procedural regime for solving the cases regarding the establishment of special protection measures shall be adequately completed with those of the Civil Procedure Code (art. 138 of Law no. 272/2004).
- [3] S. Spinei, in I. Leș (coord.), *Tratat de drept procesual civil – Treaty of Civil Procedural Law*, Volume II, Universul Juridic Publishing House, Bucharest, 2015, p. 83.
- [4] Al. Bacaci, C.-V. Dumitrache, C. C. Hageanu, *Dreptul familiei –Family Law*, 7th edition, C. H. Beck Publishing House, Bucharest, 2012, p. 345.
- [5] Regarding the placement measure prior to the entry into force of Organic Law no. 8/2015 (de modificación del sistema de protección a la infancia y a la adolescencia), see C. Lasarte, *Family law. Principles of Civil Law*, Volume Six, 7th edition, Marcial Pons Ediciones jurídicas y sociales, Madrid, 2008, p. 384 and following.
- [6] We agree with the opinion expressed in the doctrine that the requirement of the child's higher interest must be analyzed from the perspective of the way in which the subjective rights of the child are protected and promoted within the institution of parental authority or in other forms of alternative protection, and also how they are to be protected through adoption (T. Bodoașcă, *Condiția interesului superior al copilului*, in *Studii de dreptul familiei / The requirement of child's higher interest*, in *Family Law Studies*, C. H. Beck Publishing House, Bucharest, 2007, p. 134).
- [7] Published in the "Official Gazette of Romania", Part I, no. 739 of September 23, 2016.

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[8] , Al. Bacaci, C. V. Dumitrache, C. C. Hageanu, op. cit., p. 225.

[9] Regarding the elements of novelty brought by changing this law, see D.-C. Creț, Novelty elements and changes brought to adoption procedure by Law no. 57/2016, in Journal of Legal Studies, vol. XIX, Issue 33, 2017, pp. 110-121.

[10] In the previous regulation (Romanian Family Code), the approval of the adoption belonged, from the point of view of competence to the guardianship authority, while the termination of the adoption was within the competence of the ruling entity, in this case, the court.

[11] I. Leș, Noul Cod de procedură civilă. Comentarii pe articole, C. H. Beck Publishing House, Bucharest, 2013 - The new Civil Procedure Code. Comments on articles.

[12] It is noted that the submission of the request for review results in the suspension of the resolution of the request to entrust the child for adoption or, as the case may be, to approve the adoption, if any of them is pending.