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THE INSTITUTION OF GUARDIANSHIP

Roxana MATEFI[1]

Abstract: *The present paper contains an analysis of the institution of guardianship, one of great importance in the context of the legal ways of protecting the minor's interest both form the personal and patrimonial point of view. In comparison with the parental authority, which represents the general rule of protecting the minor's interest, guardianship is seen as a measure of exception. There are certain situations when the parental authority cannot be exercised due to objective situations like: parents being deceased, unknown; terminated parental rights; placed under legal interdiction; missing; declared dead by way of court of law. In order to replace the parental authority in such hypothesis, the legislator created the institution of guardianship, one of great importance in this context.*

Key words: *minor, protection, guardianship, court, guardianship supervisory agency.*

1. The Institution of Guardianship – a Way of Protecting the Minor's Interests

While parental authority is the usual way by which the minor's interests are protected, both on a personal and patrimonial level, guardianship is a measure of exception, seen as „a second degree in the series of measures of protection taken by the law in the interest of the minor (....) meant to replace parental power" (Hamangiu et al., 2002, p.381).

Guardianship is an institution with deep roots, which we encounter as early as the Roman law from which it had been initially taken from. For Romans, guardianship would apply only if parental power over the minor did not exist anymore. In the state of primitive Roman law, the guardianship was an institution similar to parental power; the guardianship of the child was attributed to the presumptive male heir to prevent the child from spending the fortune, which needed to be kept in the family (Hamangiu et al., 2002, p.382).

Guardianship has had various names throughout time. In the Calimach Code, it was called guardianship; the Caragea Code calls it mandate. The guardian is either a vequil in the Caragea Code or steward in the Matei Basarab Codex. The Calimach Code states that guardianship will be applied to the minor who "based on the fact that he is not of age, can't decide for himself or for his fortune" (Hamangiu et al., 2002, p.382).

According to doctrine, "guardianship is the judicial means of protecting the minor who lacks parental protection and is placed under guardianship in cases and conditions stated by law" (Chelaru, 2012, p.150).

As for the cases when guardianship is necessary, article 110 of the Civil Code describes those cases, namely when the parents are: deceased; unknown; whose parental rights have been terminated; placed under legal interdiction; missing; declared dead by way of court

[1] Transilvania University of Braşov, roxana.matefi@gmail.com

of law. To these hypotheses, we must add the situation in which both parents were criminally sanctioned by removal of all parental rights, as well as the situation in which, when adoption ceases, the court appreciates that the supreme interest of the minor is better protected by placing him under guardianship, according to Article 110 of the Civil Code.

2. The Specificity of Guardianship

One of the essential characteristics of guardianship is lawfulness, as all aspects regarding the cases in which a person is placed under guardianship, the people who must notify the guardianship supervisory agency, the conditions for choosing a guardian, the procedure for naming him and so on, are all expressly regulated by the lawmaker.

Guardianship is characterized by its personal character, stated by article 122 of the Civil Code, which qualifies guardianship as a personal task. As an exception from this character, the lawmaker grants the guardianship supervisory agency the possibility to decide, by considering the dimension and formation of patrimony of the minor, to entrust the administration of the patrimony or a certain part of it to another person or a specialized company, according to Article 122 alignment 2 of the Civil Code.

Gratuity of the guardianship is another characteristic listed by the lawmaker in article 123 of the Civil Code. However, there is one exception. The Civil Code states the possibility of paying the guardian for his work, depending on his material status and the possibilities of the minor. The amount of the payment will be established by the guardianship supervisory agency; also, the notification of the family council is needed. The maximum limit is 10% of the income resulted from the minor's assets, according to article 123 alignment 2 of the Civil Code. According to doctrine, „granting payment to the guardian of the minor is not mandatory, as it depends on a number of factors, but its maximum amount is stated by law with the possibility to decrease or increase it if needed; with all these changes which can only occur in exceptional circumstances, guardianship is mainly a free task" (Lupan & Sabău-Pop, 2012, p.209-210).

3. The People who must Notify the Guardianship Supervisory Agency

According to the provisions of article 111 of the Civil Code, the categories of people who are entitled to notify the guardianship supervisory agency in regard to a minor with no parental care, are the following: any person who is close to the minor; managers and residents of the house where the minor lives; the local public community service for population records, when registering the death of a person; the public notary when starting an inheritance procedure; the courts of law, when criminally sanctioning people by terminating parental rights; institutions of public local authority; protection institutions.

To all these, we can add any person who knows the circumstances whereby a minor is without parental care.

4. The Appointment of the Guardian

The guardian can be appointed by the parent, based on a unilateral act or a contract of mandate, which will have to be concluded in authentic form *ad validitatem*. The parent's will in appointing a guardian can be revoked at any time; the document by which this is

accomplished must not be concluded in authentic form, as it is enough to be signed by the rightful person.

The lawmaker also regulates the case in which, at the time of his death, the parent who had appointed a guardian in any of the two regulated ways was placed under judicial interdiction. In this case, as it is normal and logical, the appointment will be without effects, according to Article 114 alignment 2 of the Civil Code.

Specialty literature also stated that, by allowing the possibility of appointing the guardian by the parents „the lawmaker reinstates the principle according to which family comes first in regard to the minor. As a result, in the future, the parents, mother or father, can appoint the person who would become guardian of their minor children at the time of their death. Surely, in case one of the parents dies, the surviving parent becomes the sole holder of parental authority" (Ungureanu & Munteanu, 2013, p.249).

If the parent makes no such appointment of guardian, the guardianship supervisory agency is the institution able to do so, as this institution „appoints a guardian if there are no justified reasons against it, a relative or a friend of the family of the minor, able to fulfil this task, keeping in mind the personal relations, the closeness of domiciles, material conditions and moral guarantees which the guardian presents", according to article 118 of the Civil Code.

Under Article 120 of the Civil Code, a person appointed guardian may refuse the continuation of this status on the following grounds:

- If the person is aged 60 years old;
- In the case of a pregnant woman or mother of a child younger than 8 years;
- In the event that the person nominated raises or educates two or more children;
- In the event that, due to illness, infirmity, activities, remoteness of residence from where the minor's assets are or for other reasons, he would not be able to complete this task.

5. The People who can't be Appointed Guardians

The lawmaker regulates a series of interdictions in regard to the people who can't be appointed guardians, as a result of the fact that they are incapacitated, or have contrary interests to those of the child that they should become guardian of, or as a consequence of the sanctions which were applied to them, thus becoming a guardian would not be possible.

Thus, this interdiction refers to: minors; people against whom an adjudication of incapacity has been issued; people placed under curatorship; people whose parental rights have been terminated; people who are declared unfit to become guardians; people who do not have the full exercise of their civil rights, by law or by court decisions; also people with an inappropriate conduct, as stated by the court; people who, while being guardians, were disqualified under the conditions of article 158 [According to article 158 of the Civil Code „except for other cases stated by law, the guardian is removed if he commits an abuse, serious neglect or other deeds which make him unworthy of being a guardian, as well as if he fails to fulfil his task"]; people who are not creditworthy; people who have contrary interests to those of the minor and thus would not be able to act as a guardian; those who are disqualified by authentic documents or by will by the parent who had been exercising parental authority on his won at the time of death, according to Article 113 of the Civil Code.

6. The Exercise of Guardianship

The phrasing exercise of supervision designates "all acts, activities and operations that the guardian can and must undertake to fulfil the mission entrusted by the court, or by the parent, through mandate contract or by will, when appropriate" (Prescure & Matefi, 2012, p.315).

The protection of minors by establishing guardianship requires both a personal side as well as a patrimonial one. The personal side presupposes that the guardian, with the consent of the family council, is the one who is going to apply measures that regard the minor's person. The domicile of the minor shall be at the guardian's residence.

With regard to the patrimonial aspect, the guardian is the administrator of the minor's assets, "entrusted with a simple administration, as they have the duty to value the minor's assets to preserve their substance and to exploit them in good faith and in the sole interest of the minor. In this capacity, the guardian performs independent and unrestricted actions towards the conservation and administration of the minor's patrimony, the disposition acts being allowed only under certain conditions, and some that are considered injurious are even banned" (Mirea, 2012, p.111).

7. Court cases

I. By the petition registered under no. .... / 200/2014 of 05/05/2014, the petitioner M. filed for the authorization of the guardianship authority of the sale of real estate located in the village ...., Buzau county, property owned by her husband D. The claimant pointed out that her husband was severely disabled thus having been appointed a personal caretaker and by the disposition no. ... / 27.06.2008 issued by the Mayor of Buzau was appointed a special guardian to collect and administer her husband's pension and to act as trustee in civil documents.

The petitioner stated that her husband suffers from Parkinson's disease and is mentally competent; he may agree but cannot sign documents because of the disease. Thus, the petitioner filed for a ruling in favour of signing the documents on behalf of her husband, with his consent. She invoked art. 145-146 of the Civil Code. In support of her claim, she submitted documents. After analyzing the documents in the case file, under the provisions of art. 245-248 of Civil Procedure Code, the Court will rule on the exception invoked:

According to art.106 of the Civil Code, the measures of protection of individuals are divided into protective measures for minors and protection measures for adults.

The measures for the protection of minors are incumbent upon parents, by establishing guardianship, by placing them into foster care or, where appropriate, other measures of special protection specifically provided by law can be applied, whereas the protective measures for adults presuppose placing them under judicial interdiction or by setting up a curatorship.

Analyzing the legal provisions in force, the court found that, in the case of adults, the authorization of the guardianship authority can enter into force, according to art. 171 Civil Code , only in the case of the guardianship of the person with and adjudication of incapacity issued against them, if the law does not provide otherwise, the tutor being appointed by decision to impose the ban.

According to art. 144 of the Civil Code, the tutor may not, without the consent of the family council and the authorization of the guardianship authority to conclude acts of

alienation, division, mortgage or encumbrance with other real burdens on the minor's assets, to give up property rights thereof, and to validly terminate any other contracts that exceed the right of administration.

However, a court interdiction was not issued against the respondent. Moreover, as shown in the claimant's request (Tab 3 on file) from the hearing of the respondent by the court (tab 27 to file) and the psychosocial investigation report issued (tab 32 file) it resulted clearly that the respondent was mentally competent.

Therefore, the intervention of the guardianship authority in the manner prescribed by Art. 171 in correlation to Art. 144 of the Civil Code is not incidental in the present case. In other words, the claimant's request would be admissible only if the respondent were placed under court interdiction.

On the other hand, even if the claimant has the quality of special curator (pages 7 and 14 of the file), according to art. 181 of the Civil Code, the trusteeship is not detrimental to the one that the curator represents so that the sale of the buildings can be authorized by the claimant only based on a special mandate from the respondent.

For those reasons, the court ruled in favour of the plea of inadmissibility invoked by default and against the claim filed by M. as inadmissible (Jurisprudenta).

II. By the petition no. ../267/2012, registered with the court on ... January 2012 ... the applicant brought an action against the respondent .. contradictory with the Board of Guardians of the City Council .., asking the court that the respondent be appointed guardian for the minor ... aged 11 with the obligation of raising and educating the minor, to support her education and training.

In the motives of the application, de facto, the applicant showed that the minor ... resulted from her marriage with ... and after the divorce she was given custody of the child. She also showed that he had signed an employment contract in Italy and during her absence in the event of working abroad; she wanted the child to be cared for and educated by her mother. She based her request on the provisions of Article 110 and the following of the Civil Code.

Analyzing the documents of the case file, the court ruled that:

In her petition, the claimant, who was given custody of the minor ... after the divorce, requests that her mother, the respondent, be appointed guardian of the child, motivated by the fact that the claimant was leaving to work abroad, thus leaving the child in the care of the respondent.

The court ruled that, according to the provisions of art. 110 of the new Civil Code, the guardianship of the minor is established in the following circumstances: when both parents are deceased, with terminated parental rights or their parental rights had been terminated on the grounds of being convicted or, issued an adjucation of incapacity against them, missing or declared dead, at the termination of adoption, the court decides whether the guardianship is in the minor's best interest. However, in this case, it appears that the child is not to be found in any of these cases.

Indeed, the Civil Code stipulates in art. 114, the parent's possibility to appoint a guardian for his minor child, but that designation is not achieved via the guardianship authorities but, according to the provisions of this legal text, by one of the ways specified above, by a unilateral act, by an authenticated contract of mandate or, when appropriate, by will.

The provisions of art. 118 of the Civil Code., invoked in her written observations, refer to the appointment of the guardian by the court trustee, whose intervention, as was noted above, is only needed in one of the limited circumstances provided by art. 110 of the Civil Code, so they cannot be applied in the present case. In relation to those who are detained, the court ruled that a further analysis of the conditions that need to be met by the person to be appointed guardian is superfluous.

Therefore, for all the reasons above, the court would rule against the claim (Legeaz).

8. Conclusions

The present work in divided into seven sections, namely: The institution of guardianship – a way of protecting the minor's interests; The specificity of guardianship; The people who must notify the guardianship supervisory agency; The appointment of the guardian; The people who can't be appointed guardians; The exercise of guardianship; Court cases.

The aim of this article is to emphasize the main aspects of the guardianship institution, one of great importance for the protection of the minor's interests.

The approach is both theoretical and practical. The first part of the paper is mainly theoretical, while the last part is dedicated to some court cases related to the institution of guardianship.

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