

Some aspects on parental protection in the current Romanian Civil Code

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Abstract

The new Civil Code has come to meet the diversification and complexity of social relationships, the growing interference between economic and social life in Romania and the one in Europe and in the world and not least the connection in a greater extent of the Romanian law to the European law. The issues which could occur, given precisely such interconnection with the European law, are those which give rise to issues of civil law enforcement in space, especially when the question would be the application of the Romanian civil law or the foreign civil law, and one of the typical situations in this respect is the law governing parental authority when spouses have different nationalities and misunderstandings arise between them regarding parental authority. Our analysis starts from a hypothetical case, but which may occur in fact, namely the intention of the parent in whose favour was handed down the custody ruling concerning the child, to move in another state together with the child, without having the agreement of the other parent in this respect.

Keywords: *new Civil Code, international law, European family law, parental authority.*

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Introduction

In the new framework, the family relationships in general – marriage, lineage, matrimonial regime – are mentioned, as distinct regulations, in the Code Civil. It goes back to the previous idea of inexistence, in fact, of a distinct branch of law – the family law – separated from the civil law. Even the special regulation of family relationships in a different code was the basic argument - thoroughly the only valid argument – of the empowerment of family law as a distinct branch, different from the civil law. In fact, the sustainment of the existence of a distinct branch of law – the family law - outside the pecuniary and didactical interests for the supporters of this idea, has other reasons, namely the attempt of the totalitarian state to delineate itself from a civil law based on a civil code adopted under a democratic regime, civil code which, in spite of repeated attempts, the same totalitarian state could not replace it, but only to amend it in aspects regarded as essentially capitalist and not consistent with ideological guidance of the regime.

Therefore, the current Civil Code², in addition to the fact that it fully regulates family relationships, it brings significant changes, a fundamentally

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² The current Civil Code has come in effect on October 1st, 2011

different orientation on the matrimonial regime. Thus, in Book II "About family" are covered in Title II - marriage, kinship in Title III, parental authority in Title IV, and support obligations in Title V.

I. The current framework of parental protection

As regards the parental support regulated in Title IV of the Civil Code, it should be mentioned that in Romania, throughout the period when the minor lacks physical and intellectual maturity, he/she receives support from the part of persons of age and capable to decide on the minor and on the goods thereof. The above is valid for the child born during matrimony, as well as for the child born out of wedlock.

In light of Romanian law, Law no. 272 of 2004 regarding child protection and rights³ (hereinafter referred to as "*Law 272/2004*"), mentions that child has the meaning of a person younger than eighteen years of age and has not gained full legal capacity in accordance with the law.

We have to mention that Romanian law concerning child protection, namely Law 272/2004, as well as the corresponding regulations in the Civil Code, observe the Convention regarding competency, applicable law, recognition, execution and cooperation regarding parental responsibility and the measures on child protection, adopted at Hague on 19 October 1996, and ratified by Romania in 2007⁴ (hereinafter referred to as the "*Convention of Hague*" or the "*Convention*") and the Principles of European law regarding parental authority as established by the Commission on European Family Law (hereinafter referred to as "*CEFL*")⁵ as recommendation on family law for all European states.

II. Applying CEFL Principles

Considering these CEFL Principles and referring to the present topic, we notice that in case of disputes between parents, as regards the residence of the minor when they are living separately, Principle 3:20 mentions that they must reach an agreement on the person the minor is going to live with.

³ Published in Official Gazette of Romania no. 557/2004

⁴ The Convention was ratified by Law no. 361/2007, published in Official Gazette of Romania no. 895/2007. With regard to parental responsibility and measures to protect children see Alin-Gheorghe Gavrilă, *Drepturile și obligațiile părintești*, Universul Juridic Publishing House, Bucharest, 2011.

⁵ CEFL was established in 2001 and has as objective the development and the implementation of certain principles – which are not necessarily mandatory – but which are meant to serve as model for national laws in this field, in order to accomplish a harmonization thereof. This objective should be regarded in light of the increasing convergence of national laws regarding family law, and of the need of crucial steps regarding the contribution to the establishment of common European values in the field of child rights and well-being aimed, amongst others, to ease the free movement of people in Europe. See also Christina G. Jeppesen de Boer, *Relocarea parentală, dreptul la liberă circulație și custodia comună asupra copiilor*, <http://www.juridice.ro/221830/relocarea-parentala-dreptul-la-libera-circulatie-si-custodia-comuna-asupra-copiilor.html>

Nevertheless, should the parents fail to reach an agreement, the relevant authority shall decide, in accordance with Principle 3:14. This Principle considers two alternatives, in case of disagreements, namely either the relevant authority will share the parent responsibility, or they will rule in favour of one of the parents. Thus these principles allow the national law to choose one of the two solutions. Therefore, the law may decide on a shared parental responsibility, but usually the domicile of the minor is established with one of the parents.

III. Applying the provisions of Law 272/2004

Child protection by parents implies that the parents have certain rights and obligations regarding the minor and the goods thereof.

Parental protection is deemed as a child protection institution, springing from the very lineage between the parents and the minor. It is composed of a collection of rights and obligations of the parents, all to the best interest of the minor, for his/her protection and the goods thereof.

In case the parents of the minor have divorced and the child was entrusted to the mother who is not citizen of the state they live in, while the father is citizen of the respective state, issues are raised in the situation the mother, after the divorce, for various reasons, wishes to return to her country but together with the child.

According to Romanian law, as per art. 5 of Law 272, children are entitled to protection and assistance in full implementation and fulfilment of the rights thereof. The responsibility for raising and assuring the development of the child belongs firstly to the parents, and subsidiarily to the local community the child and his/her family are part of, as well to the State, with complementary intervention – through the public institutions and authorities with specific attributions in the field.

Art. 6 of Law 272 stipulates the principles substantiating the observance and guarantee of the child rights, namely:

- observance of and priority in promoting the best interest of the child;
- equal chances and non-discrimination;
- raising awareness of parents regarding the implementation of rights and fulfilment of parental obligations;
- prioritising the parents responsibility regarding the observance and securing the child's rights;
- decentralisation of child protection services, multi-sector intervention and partnership between public institutions and authorised private bodies;
- ensuring individual and personalised care for each child;
- observing the dignity of the child;
- listening to the opinion of the child and taking into account this opinion, considering the age and maturity of the child;
- ensuring stability and continuity in attending, raising and educating the child, considering the ethnic, religious, cultural and linguistic origin thereof, in case of taking any protection measure;

- swiftness in making any decision regarding the child;
- ensuring protection against child abuse and exploitation;
- interpretation of each legal directive regarding the rights of the child read together with the comprehensive regulations in the field.

Moreover, the rights stipulated by law are guaranteed to all children, without any discrimination, regardless of race, colour of the skin, gender, language, religion, politic opinion or any other opinion, nationality, ethnic affiliation or social origin, wealth, deficiency extent or type, the status at birth or the status gained, formation or development difficulties or any other difficulties of the child, of the parents or of other legal representatives or any other discrimination⁶.

Among other rights of the child, art. 14 of Law 272 also stipulates the right thereof to maintain personal relationships and direct contacts with the parents, relatives, as well as with other persons with which the child developed personal relationships, the right to get acquainted with the relatives and to have personal relationships with them, as well as with other persons together with which the child has enjoyed family life, insofar as this does not contravene to the child's best interest.

The parents or other legal representative of the child are not allowed to deter his/her personal relationships with grandparents, brothers and sisters or with other persons together with which the child has enjoyed family life, save for the situations when the court assesses that there are solid reasons aimed to jeopardise physical, psychical, intellectual or moral development of the child.

Romanian law⁷ stipulates that the minor that was disunited from both parents or from only one of the parents based on a decision ruled in accordance with the law, is entitled to maintain personal relationships and direct contacts with both parents, save for the situation when it may contravene to the child's higher interest.

The court of law, giving priority to the best interest of the child, may therefore limit the implementation of such right, should there be any solid reasons that may compromise the physical, mental, spiritual, moral or social development of the child.

Moreover, the same legal provisions establish that the minor with parents living in different states is entitled to maintain personal relationships and direct contacts with the parents save for the situation when such thing contravenes to the higher interest of the child.

Children unaccompanied by their parents or by a legal representative or children under no legal supervision are entitled to be granted, in the shortest time possible, the return to his/her legal representatives.

Children movement inside or outside the country shall be substantiated on the acknowledgement and consent of both parents and any litigations between parents regarding the consent shall be solved by the relevant court of law.

⁶ Art. 7 of Law 272/2004

⁷ Art. 16 of Law 272/2004

Also, should a child disappear from his/her domicile, the parents or the legal representatives shall inform the police department within maximum 24 hours from the occurrence.

IV. Applying the provisions of the new Romanian Civil Code and the incidence of Convention of Hague

Art. 486 of the Romanian Civil Code, regarding the topic herein, stipulates that “whenever any disagreement occurs between the parents in relation with the implementation of the parental rights or the fulfilment of parental duties, the guardianship court, after hearing the parents and takes into account the conclusions of the report concerning the psychological and social investigation, rules depending on the higher interest of the child”.

The Romanian Civil Code also establishes that the relevant rule shall be that the change of the dwelling of the child, together with the parent he/she lives with, shall bear the previous consent of the other parent. In case of misunderstandings between the parents, the court of law shall rule in accordance with the higher interest of the minor, taking into account the conclusions of the report on the psychological and social investigation and the declarations submitted by the parents. When the minor is over ten years of age, his/her hearing is mandatory.

It should be noted that in Romanian law, in accordance with art. 2.611 of the new Romanian Civil Code, the law applicable to parental authority is established as per the Convention of Hague.

The Convention applies to minors from birth to the age of eighteen, and concerns the establishing of the state whose authorities have the competency to take measures for protection of the child, applicable law, ensuring of recognition and execution of such protection measures in all signing states and establishment of cooperation among the states in order to fulfil the objectives of the Convention.

According to the Convention, protection measures for the minor refer, amongst others, to attributing, exercising and limiting the parental responsibility, the custody right, especially the right to decide on the residency of the child, as well as visiting rights, including the right to move the child, for a limited period, to another place than the everyday residency.

In accordance with art. 5 para. 1 of the Convention, the protection measures for the minor or his/her goods may be ruled by judicial or administrative authorities in the states of child’s regular residence.

In accordance with art. 7 para. 1 of the Convention, the authorities of the state where the child has residence maintains the competency also in case of illegal movement or failure to return the child, until the following: (i) the child receives a regular residency in another state and every person, institution or another body with custody rights approved the movement or return of the child, respectively, or (ii) in case the minor lived in another state for a one-year period at least after that the person, institution or body with custody rights had or should have had information on the location of the child, but no return claim submitted during such

period had not been yet examined and the child has integrated in the new environment.

Various situations may occur, such as the mother intends to return to her country together with the child, who is brought up in the same country whose citizen the child and the former spouse are, for reasons regarding the lack or scarcity of livelihood means, or for personal reasons.

It is obvious that in such case, leaving together with the minor child in the country of origin of the mother implies altering the rules established and stipulated in the custody ruling concerning the minor, mainly concerning the visit terms for the other parent.

For such purposes, we exclude from the beginning the removal of the minor and the relocation to the other state with the expectation that within one year the return request is not examined. The viable solution remains an agreement with the former spouse to establish, by mutual agreement, the terms for exercising the parental rights taking into account the change of the child's residence.

Should the two former spouses fail to reach an agreement, the only legal possibility is to approach the relevant court of law in the country of birth of the child, so that the court, based on the investigated evidence regarding the causes and the terms on the intention of the mother to return to the country of origin, in order to protect the rights of the minor, to compel the former spouse, the bodies invested with attributions to approve the relocation respectively, to approve such relocation.

Therefore, in lack of an agreement between the parents on the relocation of the minor, in order to legally perform this action, the mother shall appear before the court of law. The court of law of the country of birth of the child, where the child was initially assigned to be raised and educated by the mother, is entitled to rule on this matter.

The submission of the claim filed to the court by the mother does not necessarily entail the winning of the case. The role of the court in such case is very high in assessing, based on the investigated evidence, the higher interest of the minor.

Thus, the relevant Romanian court of law shall also consider the higher interest of the minor, in terms of the following: (i) ensuring his/her physical, psychological, intellectual and moral development, (ii) the rights of the child to maintain personal relationships and direct relationships with parents, relatives or other persons the minor is strongly fond of, to know his/her relatives and to have personal relationships with them.

None of the reasons submitted by the mother in such situation is in essence a reason to substantiate *per se* the final ruling. These reasons may not be decisive reasons unless the court of law considers them in light of the child's interest, regardless whether such reasons concern the health situation of the mother, the existence or the non-existence of alimony granted by the court of law or the intention to return to the country of origin as well as the intention to begin a relationship with a foreign in his country.

In lack of an agreement between the parents, the court shall consider, for any of the invoked and stipulated reasons, a range of factors, such as the relations of the minor with parents, relatives, the involvement of the parents in raising and

educating the minor until that moment, their material possibilities and their determination to be involved in raising and educating the minor, the physical possibilities to maintain the relation with the minor by both parents in case of relocation of the minor, the persons the child is fond of and several other criteria, all in light of the minor's interest.

V. Decisions of jurisprudence

Through a ruling regarding the case⁸, the court of law ruled that “a visiting program only at the domicile of the child in Romania and exclusively in the presence of the mother, may be accepted solely as premise to re-establish the parent-child relationship (...) Nevertheless, on the long term, the court may not accept that such program aims to secure the maintenance of parental relationship within the meaning stipulated by law, but on the contrary, it may result in a distant relationship, with possible negative effects for the physical, moral and social development of the child, because this program is not sufficient for the development of normal relationship between the father and the child”.

Moreover, the court ruled that, considering the seven-year age of the minor and the moral and wealth conditions offered by the father, the child is not exposed to any trauma related to the relocation to Italy, and the fact that the father might be homosexual – as per the declaration of the mother – may not substantiate, per se, any limitation in exercising the right to have personal relationships with the child, in lack of any solid element to prove the negative impact on the education and health of the child.

In this case, the trial court ruled to establish the domicile of the minor with the mother in Romania, entitling the father, an Italian citizen, to maintain a relationship with the child, upon dates and for periods determined by the court, upon the domicile of the mother and exclusively in the presence of the mother.

The appeal of the father, the provisions ruled by the trial court on the domicile of the minor were maintained, but the court partially admitted the appeal of the father and ruled that, for the periods established by the court, the minor be located with the father in Romania, and during holidays – and also for limited periods – in Italy, without the presence of the mother.

In another case⁹, the Romanian court of law ruled in the case of a minor child taken by the mother from Netherlands without the consent of the father, who was a Dutch citizen, and brought to Romania. The father filed before the Romanian court of law a request for the return of the child.

The court decided that the state should grant protection to the higher interest of the minors, to their physical and psychical development and under such circumstances, to the family life, deemed as biological relationship and also as legal relation, which shall have actual character, including as crucial element for

⁸ The Court of Appeal of Bucharest, Civil Section III and Ruling 2216 dated 15 November 2006 for cases involving minors and family matters

⁹ The Court of Appeal of Bucharest, Civil Section III and Ruling 2151 dated 18 December 2007 for cases involving minors and family matters

the parent and the child, the bond between them as protected by art. 8 of the European Convention on Human Rights.

If the case concerns parents and children no longer living together in the same state, the state has the obligation not only to guarantee this right but also it has positive obligations regarding the actual protection of family life. Such positive obligations are ruled by art. 8 of the European Convention on Human Rights mentioned above and shall be interpreted in light of the Convention of Hague on the civil matters on international kidnapping of children and the Convention of the United Nations Organisation on the rights of the child.

In this case, the mother moved the child born in Netherland, meaning from his residence country, without the consent of the father and brought the child to Romania. Consequently, the father approached the Romanian court for the return of his kidnapped child.

Therefore, the Romanian court ruled to admit the request of the plaintiff and to compel the mother to return the minor to the father, stipulating that until a relevant court of law or authority rules on the custody fund, the minor shall return to his everyday residence, as there are no legal grounds substantiating the fact that the father should be declined the parental rights. The disputes between spouses shall not limit the right of the plaintiff to have personal relationships with the child or to supervise his up-bringing.

Conclusion

Consequently, we are of the opinion that the Romanian legal provisions on this topic, including the new Romanian Civil Code are in compliance with the guidance lines at European level, offering to the Romanian judge the possibility to use an extensive array of legal provisions and jurisprudence, in order to take the proper decision in any case-law. Moreover, considering the above, we may conclude that the solution and the ruling of the Romanian judge in cases concerning the custody of the minor in general, mainly depend on the complexity of the issues in fact, all rulings regarding the custody being based on the principle of the higher interest of the minor.

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