

INSTITUTION OF MATERNAL ASSISTANCE AS A CHILD PROTECTION MEASURE

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Abstract

This study seeks to analyze special measures for the protection of the child in difficulty (placement and placement in an emergency) in the form of a nursing assistant. The institution of maternity care has grown in recent years, surpassing by far the other alternative protection measures. The critical analysis of the legislation, the theoretical and practical characterization of the measure, the formulation of conclusions and proposals in the field were followed. Issues such as place of maternal care in all alternative child protection measures, categories of special measures determining protection through a professional nursing assistant, individual protection plan and priority order of measures related to the child, duration of the measure, authorities with attributions in domain, the child - a qualitatively active subject of the legal protection relationships that concern him/her, categories of children who can benefit from the placement measure, including a nursing assistant, monitoring the application of special protection measures, categories of services for achieving special protection, rights and obligations the professional nursing assistant, aspects of judicial practice and conclusions.

Keywords: protection of the child, special protection measures, professional nursing assistant, family type service, placement, emergency placement.

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1. Introduction: regulation, proximity and specific difference

The maternity assistance is part, according to the Law on the Protection and Promotion of the Rights of the Child no. 272/2004, in the category of alternative protection measures, namely the measure of the placement.

The child has the right to know their parents and be cared for, grown and educated by them. Therefore, the first measure that will be taken by state authorities to protect and promote the rights of the child will be the reintegration into the family. If this is not a desirable task to be achieved, for various reasons, an alternative measure for the protection of the child in difficulty in the meaning of a child who is not protected by at least one of parents.

Any child who is temporarily or permanently deprived of the protection of his or her parents or who, in order to protect his or her interests, can not be left to their care is entitled to alternative protection consisting of: establishment of guardianship, special protection measures² regulated by the Law no. 272/2004³, adoption regulated by Law no. 273/2004. In choosing one of these solutions, the competent authority will duly take into account the need to ensure a certain continuity in the education of the child, as well as its ethnic, religious, cultural and linguistic origin.

The distinction between alternative protection and special protection is that from general to particular.

Alternative protection consists of all three categories (guardianship, special protection and adoption).

The special protection of a child temporarily or permanently deprived of the protection of his or her parents/parent can be defined as the total of measures, services and services intended for the care and development of the child, temporarily or permanently deprived of the protection of his or her parents, it can not be left to their care.

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² For more details on child protection in difficulty see Laura Cetean-Voiculescu, *Dreptul familiei*, Hamangiu Publishing House, Bucharest, 2012, p. 120 et seq.

³ The Law on the Protection and Promotion of the Rights of the Child, republished in the Official Gazette no. 159/5 March 2014, amended and supplemented by a series of normative acts, the last being Law no. 52/2016 published in the Official Gazette no. 253/5 April 2016.

The special protection measures are three: placement, emergency placement and specialized supervision, according to art. 59 of the Law no. 272/2004.

2. Categories of special measures that may give birth to the institution of maternal assistance

Special measures that may give birth to the institution of foster care are placement and placement in an emergency.

Placement can be defined as the special temporary protection measure that may be available:

- to a person or family;
- to a nursing assistant;
- a residential service.

Placement in a person/family is achieved by meeting the following legal requirements:

- the person/family is domiciled in Romania;
- the person/family is declared fit by the General Directorate for Social Assistance and Child Protection (D.G.A.S.P.C.), by fulfilling the moral guarantees and the material conditions;
- for the child who is under 2 years of age, the additional condition is required to be placed in the placement of a person in the extended or substitute family. The law also stipulates that it is forbidden to place children of such a young age as a residential service, but does not stipulate whether they can reach a nursing home;
- placement of the child will be prioritized to the extended/substitute family;
- the brothers will be placed together;
- parents have the right to visit the child and maintain personal ties to them throughout their placement;
- the competence to take the placement measure lies with the Child Protection Commission or the court at the request of DGASPC in certain special situations.

Placement effects:

- the child's domicile will be on the person, family, maternity assistant or residential service;
- as a rule, parental rights and obligations towards the child are maintained throughout the duration of the placement measure (when the placement is ordered by the Child Protection Commission or even by the court, for cases where the court decides parental rights and obligations towards the child pass to the DGASPC Director);
- the parent retains the right to consent to the adoption of his child;
- the parent owes further maintenance to his child, in the amount established by the Child Protection Commission or the court, the sums thus received being income to the budget of the county or of the Bucharest municipality, and in case of impossibility to pay this contribution, by the court's decision, the parent will be obliged to provide 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 territorial administrative area in which he has his domicile or residence.

Emergency placement differs from the actual placement by setting it for the following categories of children:

- abused, neglected or subjected to any form of violence
- find or leave in sanitary units
- whose guardians/sole guardian were detained, arrested, interned, or in the situation in which, for any other reason, they can not exercise their parental rights and obligations with respect to the child.

Legal requirements for emergency placement:

- the measure is set by the director of DGASPC in the administrative-territorial unit where the child or the court is located, in certain situations
- in case of emergency placement by the director of DGASPC, the latter is obliged to file a complaint with the court within 5 days from the date on which he ordered this measure

- revocation of the measure: the Director of DGASPC is ordered, if the circumstances underlying the measure are no longer maintained.

Effects of emergency placement:

- for the entire duration of the emergency placement, the exercise of parental rights shall be suspended by law until such time as the court decides to maintain or replace this measure and the exercise of parental rights;

- during the period of suspension, the parental rights and obligations regarding the child are exercised and fulfilled respectively by the person, the family, the maternal assistant or the head of the residential service that received the child in emergency placement, and the ones regarding the goods of the child are exercised and, respectively, performed by the Director of DGASPC.

3. Individualized protection plan. Priority order of measures concerning the child

The individualized protection plan can be defined as the instrument through which special child protection measures are established and applied.

The competence to draw up this plan lies with DGASPC.

The deadline is 30 days after receipt of the application for a special protection measure or immediately after the DGASPC Director has placed the placement in an emergency.

Priority in this plan is the reintegration of the child into the family, and if this is not possible, the internal adoption procedure will be opened.

In order to reintegrate the child into the family, a mandatory consultation of the parents and members of the extended family could be made.

If the reintegration of the child into the family could not be accomplished, the internal adoption procedure would be opened, in which case it would not be necessary to consult the parents or members of the extended family. However, in the adoption procedure, according to Law no. 273/2004, parents will be summoned by the tribunal to give their consent to the adoption of their child.

The individualized protection plan may provide for the placement of a child in a residential service only if guardianship could not be established or placement could not be made to the extended family, to a foster parent or to another person or family, under the present law.

Thus, the measures that will be ordered for the protection of the child in difficulty are the following:

- first, reintegration of the child into the family;
- secondly, the internal adoption procedure or, alternatively, the international adoption procedure is opened;
- thirdly, guardianship is established or the placement of the child is ordered by a person belonging to the extended family of the child;
- fourthly, the placement of the child to a foster parent or to another person or family will be ordered;
- in the fifth and final row the child will be placed in a residential service.

In conclusion, maternity assistance can be defined as a measure for the protection of the child in difficulty, being temporarily or permanently deprived of the protection of at least one of the parents as a result of the introduction of a special measure of protection of placement or placement under the urgency, regulated by law as an alternative to the institutionalization measure.

4. Duration of maternal assistance

Due to the fact that the measure of maternal assistance is a special measure of child protection, it will benefit from this protection until it has full exercise capacity. The full exercise capacity is usually acquired at the age of 18 years but also in anticipation by a decision of the tutelage court, at the request of the person concerned, who has reached the age of 16, for good reasons, according to the procedure regulated by the Code civil at art. 40, or from the age of 16, for the married minor.

Similar to the statutory maintenance obligation, the age of 18 may be prolonged, continuing to grant the protection measure, at the request of the young person, expressed after gaining full-time exercise if they continue their studies once in each form of day education. In this case, special protection is granted, under the law, for the duration of the studies, but without exceeding the age of 26 years.

Also, the young person who has acquired full exercise capacity and has benefited from a special protection measure but who does not continue his studies and can not return to his own family, being faced with the risk of social exclusion, receives, upon request, an up to 2 years of special protection, in order to facilitate its social integration. This right is lost if it is proved that the young person has been offered a job and/or home at least twice, and he has refused or lost them for reasons attributable to him.

5. Authorities with attributions in the field

The Child Advocate, under the supervision of the People's Advocate, acts to promote and protect the rights of children under the age of 18, supports and encourages the observance and promotion of children's rights under Law no. 35/1997, the Convention on the Rights of the Child and Law no. 272/2004 on the protection and promotion of the rights of the child.

The local government authorities have an obligation to guarantee and promote respect for children's rights in administrative-territorial units by ensuring that the child is not separated from his or her parents, as well as the special protection of the child who is temporarily or permanently deprived of his/her parents' care. They also have the obligation to involve the local community in identifying the needs of the community and addressing social problems affecting children at the local level.

The Commission for Child Protection, which is subordinated to the county council and the local councils of the sectors that represent their specialized body, without legal personality, having the following main attributions in the analyzed field:

- pronounce on the proposals concerning the establishment of a special protection measure for the child;
- solving requests for the issue of a maternity assistant certificate.

The General Directorate of Social Assistance and Child Protection is a public institution with legal personality, established under the jurisdiction of the County Council and of the local councils of the Bucharest municipalities, exercising in the field of the protection of children's rights the duties provided by the regulations in force regarding the protection and promotion of the child's rights.

The public social assistance services organized at the level of the municipalities and towns, as well as the persons with social welfare attributions from the local communal councils, also perform a number of tasks in the field of child protection.

In the area of child protection in difficulty, *the private bodies* may also carry out their activity, provided they are authorized. Regarding foreign legal persons, the requirements of art. 2582 Civil Code, for the recognition of foreign legal persons without patrimonial purpose, which can be recognized in Romania, on the basis of the prior approval of the Government, by a court order, subject to reciprocity, if they are validly constituted in the state of their nationality and the statutory purposes which they pursue do not contradict the social and economic order in Romania.

Private bodies that organize and develop services for the prevention of child separation from their family as well as special services for the child who is temporarily or permanently deprived of the protection of his / her parents are obliged to notify the General Direction of Social Assistance and Child Protection of the date of commencement of operation their effectiveness and to allow directional specialists access to the premises where the services are provided.

Private accredited bodies may conclude collaboration agreements with DGASPC and/or public social assistance services, or may contract services to prevent child separation from their parents, as well as the special protection of the child separately, temporarily or permanently, by its parents, under the terms of the law.

6. The child – an active qualifying subject of the legal protection relations that concern him

The Civil Code, which entered into force on 1 October 2011, establishes a new principle on the protection of children's rights, that of "listening" to it. According to art. In all administrative or judicial proceedings concerning him, the child who has reached the age of 10 years is obligatory. However, the child who has not reached the age of 10 may also be heard if the competent authority considers it necessary to settle the case.

Therefore, listening to the child who is 10 years of age is compulsory, and listening to the child who has not yet reached this age but still has the necessary maturity is optional.

The right to be heard implies the possibility of the child to ask for and receive any information, according to his or her age, to express his/her opinion and to be informed of the consequences this may have if the child is respected, as well as the consequences any decision that concerns him.

The special protection measures of the child aged 14, including the placement of a foster parent, shall be established only with the consent of the child. If the child refuses to give his consent, the protective measures shall be established only by the court which, in duly motivated circumstances, may overcome his refusal to express his/her consent to the proposed measure.

7. Categories of children who can benefit from the placement measure, including a nursing assistant

Of the three categories of special protection measures, we will only analyze the situation of placement and emergency placement, since the measure of specialized supervision is directed towards the child who has committed a criminal offense and is not criminally liable.

The following types of children benefit from the special protection measures, in terms of placement and emergency placement respectively:

- a child whose parents are deceased, unknown, fallen from the exercise of parental rights, or who have been subjected to the ban on parental rights, placed under a ban, declared court or missing, when tutelage could not be established;
- a child who, in order to protect his or her interests, can not be left to the care of his parents for reasons beyond their control;
- the child abused or neglected;
- the child found or the child left in sanitary facilities.

8. Monitoring the application of special protection measures

DGASPC has the power and duty to verify quarterly the circumstances underlying the establishment of special protection measures ordered by the Child Protection Commission or the court. If these circumstances have been modified, the Commission for Child Protection or, as the case may be, the court, shall be notified to amend or, as the case may be, to terminate the measure. This referral may also be made by the child, the parents or the legal representative of the child.

The second competence of the DGASPC and of the authorized private body is to monitor the way in which the special protection, development and care of the child are implemented during the period of application of the measure, through the drawing up of a quarterly report or whenever a situation arises, reports on the development of the child's physical, mental, spiritual, moral or social development, and how it is groomed.

This report may propose the need to change or, as the case may be, to terminate the measure, in which case the DGASPC is obliged to immediately notify the child protection commission or, as the case may be, the court.

The third competence relates to the moment of the cessation of the special protection measure by reintegration of the child into the family, and belongs to the public social assistance service, organized at the level of the municipalities and towns, the persons with social assistance powers from

the mayor's specialized apparatus, and the DGASPC at home or, where appropriate, from the residence of the parents, who have an obligation to follow the development of the child, as well as how parents exercise their rights and fulfill their obligations with regard to the child, by producing monthly reports for a minimum of 6 months .

9. Categories of services for special protection

The special protection of the child is done either for the purpose of preventing separation from his/her parents or for the special protection of the child separately, temporarily or permanently, by the parents.

The law regulates three categories of services:

- day services;
- family type services;
- residential services.

Of the three types of services, priority is given to day care as the priority measure to protect the interests of children in difficulty is the reintegration and maintenance of the child in its biological family. But the service that can give birth to foster care is the family type.

Family-type services are those services that provide for the raising and caring of the child separately, temporarily or permanently, by the parents at the home of a natural person or families, as a result of the determination of the placement measure under the present law.

The general requirements for receiving children in placement are:

- those individuals must be at least 18 years of age;
- those individuals have full exercise capacity;
- the respective individuals should have their domicile in Romania;
- the respective individuals provide moral guarantees and material conditions necessary for the child to grow and care for the child separately, temporarily or permanently, by his/her parents.

In addition, for those who are to receive the maternity assistant certificate, besides these general requirements, the following special conditions are also required:

- they use a home that covers the needs of food, hygiene, education and rest of their users, including those of children to be placed in place or in custody;
- does not carry out paid activities;
- the specialized training courses organized by the specialized public service for the protection of their child have been followed by the authorized private body carrying out the assessment for the issue of a professional maternity assistant certificate;
- submission of a standard request for assessment of their capacity in order to obtain the attestation, and documents of supporting documents;
- the application will necessarily include the number of copies for which the applicant considers that it can simultaneously ensure optimal care conditions, their age group and sex, the availability to care for children with disabilities, HIV infected or AIDS patients;
- the application will include the applicant's curriculum vitae as well as the reasons why she wants to become a professional nursing assistant.

The quality of a professional nursing mother can not hold her:

- the person who has been convicted by a final court judgment for the commission of an offense;
- the parent who has been deprived of the parental rights or whose child has been declared abandoned by a final judgment;
- the person suffering from chronic transmission diseases.

The family-type service is aimed at protecting the minor through a foster parent, only in the alternative, because when establishing the placement measure for families and persons, the General Directorate for Social Assistance and Child Protection will take steps to identify the extended family members with whom the child enjoyed life family members for consultation and involvement in setting/reviewing the objectives of the individualized protection plan.

The activity of the person certified as a nursing mother under the law is based on a special child protection contract concluded with the direction or with an accredited private body which has the following characteristic features:

- a) raising, caring and educating the foster children takes place at home;
- b) work program is required by children's needs;
- c) free time planning is based on the program of the family and of the foster children;
- d) during the period of legal leave, ensures the continuity of the performed activity, unless the separation between the child placed in foster care in his family is authorized by the General Directorate for Social Assistance and Child Protection during this period.

The individual employment contract⁴ ends on the date of issue of the order of the director of the General Directorate for Social Welfare and Child Protection to determine the emergency placement measure or the decision of the Child Protection Committee/court regarding the determination of the placement measure.

10. Rights and obligations of the professional nursing assistant

The rights and obligations of the professional nursing assistant are:

- money entitlements according to the legislation in force;
- the right to advice and support from DGASPC specialists;
- the rights provided by the labor legislation in force;
- the right to training courses organized by DGASPC;
- the obligation to ensure the growth, care and education of children in order to ensure their harmonious physical, mental, intellectual and emotional development;
- the obligation to ensure the integration of children into his/her family by applying equal treatment with other family members;
- the obligation to ensure the integration of children into social life;
- an obligation to contribute to the preparation of the reintegration of children into their natural family or to their integration into the adoptive family, as appropriate;
- the obligation to allow specialists of the specialized public service for the protection of the child or the authorized private body to supervise their professional activity and assess the development of children;
- the obligation to ensure the continuity of the activity performed during the period of legal leave, unless the separation from the children placed or entrusted for this period is authorized by the employer;
- the obligation to keep confidential the information it receives about children.

11. Analysis of judicial practice in the field

The appeal brought by D.E. and E.N. against civil sentence no. 1270/10 July 2009, pronounced by the Iasi Court in contradiction with the intimate DGASPC Iași:

The appellant D.E. asks for the admission of the appeal as formulated, considering that it has conditions to ensure the child's growth, care and education. The appellant claims to have a child care facility and is aware that juveniles are currently in the care of a foster parent, but he was not allowed to see them.

Prosecutor E.F. concludes the rejection of the appeal and the maintenance of the sent. the court of law as being lawful and sincere. He maintains that the court of law has held that the evidence in the case file shows that it is in the best interest of the minor to be in the care of a foster parent, since the appellants do not have a real estate and live in a grandparent's home, is in an advanced

⁴ In connection with the detailed analysis of the individual labor contract of the maternal assistant, see Ada Hurbean, *Legal nature of the individual employment contract*, „Lex et Scientia International Journal. Juridical Series” no. VII, vol 2/2010, p. 41-48.

state of degradation. It is also apparent from the case-file that two of the children resulting from the concubinage relationship of the appellants have died.

The Court of Appeal states that through the application filed with the Iasi Tribunal under No (...), the applicant DGASPC Iasi, by legal representatives, requested the replacement of the placement measure in emergency regime, ordered by civil judgment no. 336/27.02.2009 of the Iasi Tribe of the child D.M.-E. with the measure of foster care and the delegation of parental responsibility for the child, the professional nursing assistant E. N.

By civil sentence no. 1270/10 July 2009 of the Iasi Tribunal, the request made by the applicant DGASPC Iasi, through legal representatives in contradiction with the defendants D.E. and E.N. with domicile in (...) displaced the replacement of the emergency placement ordered by the presidential decree of the child D.M.-E., born on 17.10.2007, the daughter of D.E. and E.N., with the placement of the professional nursing assistant E.N. The parental rights and obligations with respect to the minor will be exercised by the professional nursing assistant E.N.

In so doing, the Court held that the child's parents are not in a position to ensure the child's growth, care and education, showing dissatisfaction with the fulfillment of parental obligations and opposing the authorities that support them in improving the situation. Minor D.M.-E. to benefit from a special protection measure from those provided by Law no. 272/2004 and that it is in the best interest of the child to be protected under the maternity assistance scheme, there being no conditions for reintegration into the family.

Against the civil judgment no. 1270/10 July 2009 brought an appeal by D.E. and E.N. By the appeal, the appellants claim that they have conditions for raising and educating the M.E. Minor, and asks for the possibility of giving them the care of the minor.

The appeal is unfounded. Criteria for assessing the best interests of the child are the age of the child, the parents' ability to ensure good physical, intellectual and moral development, their attachment to the minor and the minor towards each parent, the care taken by parents, the personal involvement of the parents at various stages of evolution of the minor. In assessing the best interest of the child, one of the criteria can not be absent, the court will evaluate them as a whole. The purpose of taking emergency measures was precisely to protect minor M.-E., daughter of D.E. and E.N., born on 17.10.2007.

The social survey conducted in question notes that recurrent parents are known to be over-alcoholic drinkers and show little interest in raising and educating children. From the concubinage relationship of the D.E. with E.N. there were 5 children, two of whom died, the first at the age of 2 months - the cause of death being suffocation and the second at 5 months - the cause of death being acute cardio-respiratory failure.

Currently, the circumstances underlying the taking of the measure of placement in the emergency regime compared to the minor have not changed, which is still lacking in supervision and care, and its physical and mental health is thus in danger.

In relation to all these considerations and the provisions of C. proc. the appeal brought by D.E. and E.N. against civil sentence no. 1270/10.07.2009 of the Iasi Tribunal, which it maintains.

From the point of view of the substantive competence of solving, we find correct the settlement of the case at first instance by the tribunal, and in appeal by the Court of Appeal according to art. 95 and 96 of the Code of Civil Procedure.

Given the poor housing conditions, even if parents have a home, it is not conducive to raising the juvenile, according to a psychosocial inquiry report. The fact that parents can not visit the child is due to alcoholism and their behavior towards the minor. In the best interest of the latter, the right to visit may be suspended or refused.

In conclusion, we believe the decision is correct from the point of view of legality and soundness.

However, it is criticizable how to replace the placement measure in emergency with the measure of "placement to the professional maternal assistant". Special measures for child protection are, according to Law 272/2004: placement, emergency placement and specialized supervision. Emergency placement or placement can be arranged, among other things, with a professional nursing

assistant, but they do not become a new protection measure. The measure of emergency placement can be replaced by the placement measure (to a person or family, first of all, to a foster parent, second or to a residential service, last but not least). The court did not refer to placement in a person or family, extended or substitute family, or to a person or family to whom the child developed attachment relationships, passing directly to foster care. With respect to parental rights, the exercise of parental rights is legally suspended for the duration of the emergency placement until the court decides to maintain or replace this measure and to exercise it. During the period of suspension, the parental rights and obligations regarding the child are exercised and fulfilled respectively by the person, the family, the maternal assistant or the head of the residential service that received the child in emergency placement, and those related to the child's property are exercised and fulfilled respectively by the Director of DGASPC.

12. Conclusions

In conclusion, maternity assistance can be defined as a measure for the protection of the child in difficulty, being temporarily or permanently deprived of the protection of at least one of the parents as a result of the introduction of a special measure of protection of placement or placement under the urgency, regulated by law as an alternative to the institutionalization measure, through the intervention of central or local public bodies.

Bibliography

1. Laura Cetean-Voiculescu, *Dreptul familiei*, Hamangiu Publishing House, Bucharest, 2012
2. Ada Hurbean, *Legal nature of the individual employment contract*, „Lex et Scientia International Journal. Juridical Series” no. VII, vol 2/2010, p. 41-48.
3. Law no. 272/2004 on the Protection and Promotion of the Rights of the Child, republished in the Official Gazette no. 159/5 March 2014, amended and supplemented by a series of normative acts
4. Law no. 273/2004 on the adoption procedure, republished in the Official Gazette, Part I no. 739 of 23 September 2016, as amended.