RULES ON THE ESTABLISHMENT OF THE FAMILY COUNCIL IN ROMANIA

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Abstract

If the tutor is the central figure of the tutelage, in order to control and supervise the tutelage function, there is an another mechanism intervenes - the Family Council. The Family Council was governed by the 1864 Romanian Civil Code under the influence of the Napoleon Code and was the supreme body of tutelage. Currently, this legal institution is reintroduced into the New Civil Code and regains its regulation in Article 124-132.

Keywords*: family council, Civil Code, guardianship, minor, capacity of exercise.*

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1. Preliminary considerations

If the guardian is the central character of the guardianship, in order to control and supervise the functioning of the guardianship another mechanism has been created, namely the Family Council.

The Family Council was stated by the Romanian Civil Code of 1864 under the influence of the Napoleon's Code and represented the supreme organ in the matter of guardianship.

Nowadays, this legal institution has been reinserted in the New Civil Code, being stated in Art 124-132.

Up next, we shall analyze the family council in the light of the 1864 regulations. The family council is an assembly of relatives or allies of the minor, having the attribution to supervise the acts of the guardian and the person of the minor.

The Civil Code has given great importance for the family council, by transforming it into one of the superior organs of the guardianship. In our old law, this institution did not existed, being borrowed by the French law and upgraded by the creators of the Napoleon's Code.

2. Rules on the establishment of the Family Council

The family council shall be formed by at least 5 members of which three are relatives from the father's side and two from the mother's. If this number would not be met, namely when the relatives would be missing from one of the bloodlines their absence shall be substituted with relatives from the other bloodline, preferably the relatives with the closest rank. The relatives are preferred instead of allies, and between two relatives with the same rank, shall be preferred the eldest person.

The number 5 is a minimal limit. Thus, the family council may be valid formed by a larger number of persons. Art 358 states that blood brothers (having the same mother and father), as well as the husbands' of the minor's blood sisters shall be members of the family council, regardless of their number. If there are 10 brothers they alone shall represent the family council, but if there are less than 5 persons, the council shall be completed with relatives following the above rules.

If on the territory of the county in which the guardianship has been opened there are no sufficient relatives to complete the family council, then the tribunal shall have the possibility to summon the relatives residing at large distances. If the council shall not be completed with relatives closest to the deceased, the tribunal shall have the possibility to summon other persons, friends of the minor's parents, citizens of the same city, according to Art 359. The wording citizen could

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mean, according to certain authors, that the law does not allow foreigners to be part of a family council.

Considering the establishment of the council, the law has offered the tribunal a certain margin of appreciation in order to create it as it sees fit for the protection of the minor's interests. Thus, Art 360 states that the court shall be able, even in the case in which a relative large number of relatives or allies reside in the administrative-territory, to summon other relatives with a close degree or the same degree residing outside the administrative-territory. Of course that in order to summon all these persons, the court shall have to be sure that the relatives or allies present in the administrative-territory have no compassion nor interest to care for the minor's interests. The law allows it to address other relatives, who cannot have an inferior degree.

The appreciation of the court for the composition of the council is sovereign. The conclusion of the court in this area cannot be subjected to the control of the superior courts, which have as single competence the examination of the appeals against the decisions of the courts ruled upon the deliberations of the family council.

The number of the persons forming the family council may vary, but cannot be under 5. Also, no law states that each meeting of the family council must be held by the same members. If the total number of the members is 10, there is the possibility that 5 of them be present in a meeting, and the other 5 to be present in a future meeting.

Also, it is possible that in the time between the two meetings, certain members might be traveling abroad or be temporarily unavailable. But, as it is possible, it is preferable that the same members be present during the meetings; this is the only way for them get in touch with the minor's interests, who claims for a unit of leadership.

This unit is harder to accomplish if the council's members are constantly changing. The variation of the council's members may very well ease certain frauds aimed by the guardian, easy to be achieved after the removal of certain members of who's over watch he fears.

Art 249 of the Italian Civil Code states that the composition of the family council is permanent throughout the guardianship, excepting the legal causes for vacancy.

The emancipation is a solemn act or a legal benefit, which has as main effect the dissolution of the parental power or of the guardianship, offering the minor the right to manage him in respect of personal acts and to administer his own patrimony within the boundaries of a limited capacity.

In this case the minor shall be considered as emancipated. His capacity shall be limited, thus the emancipation [2] shall represent a transition between the complete incapacity of the non-emancipated minor and the full freedom enjoyed by the major.

The emancipation's aim is to provide a certain freedom before reaching the age of majority. The parents or the guardian, seeing that the minor has the experience necessary to manage his business may emancipate him. In such case, the minor reaching majority shall acquire the complete skills in managing his patrimony.

An important area in which the Law 287/2009 has brought significant changes is represented by the approach of the legal means for the protection of the natural person.

By comparing the actual regulation of the Civil Code with the old Family Code (Law No 4/1953, repealed and the Law No 272/2004 *on the protection and promotion of the rights of the child* – Art 40 Para 1, Art 42-43 repealed), one must note that the means of protection of the natural person are maintained – the guardianship, trusteeship and the placement under interdiction – the means of application for each of them has suffered significant changes.

Also, the family council represents a new institution inserted by the new Civil Code. The council may be set up in order to watch over the means in which the tutor performs his rights and obligations regarding the minor's person and assets.

Because in practice most frequent cases are the ones reclaiming the establishment of the guardianship for the minor without protection, we shall introduce this notion in the light of the new Law 287/2009 on the Civil Code.

[2] Marcel Planiol, *Traite élémentaire de droit civil*, Tome Premier, Librairie Générale de Droit et de jurisprudence, Paris, 1983, p. 649.

Art 110 of the Law No 287/2009 explicitly states the cases in which is possible the establishment of the minor's guardianship: "*when both parents are decease, unknown, deprived of the exercise of their parental rights or have been subjected to a criminal sanction for the prohibition of their parental rights under a judicial ban, missing or declared dead in court, as well as if, at the end of their adoption, the court decides that it is in the interests of the minor to establish a guardianship*" .

Partially reiterating the provisions of Art 115 of the Family Code, the legislator maintained the obligation to inform the competent court (in the old regulation the tutelage, while in the current legislation, the guardianship), which must be fulfilled by the "*persons close to the minor*", together with the "managers *and tenants of the house in which the minor resides*", "*the civil status service*" in case in which a person shall be registered as deceased, "*the public notary*" if the succession procedure has been opened, "*the courts and the local public administration's authorities, the institutions for the protection of the minor, as well as by any other person*" (Art 111 of the Law No 287/2009). We must note that the new regulation has removed the term stated by Art 115 of the Family Code, namely 5 days "*from the date at which the existence of a minor without parental care has been registered*", being replaced by the phrase "*as soon as the existence of a minor without parental care has been registered*".

Going further with the analysis of this institution, we ascertain that for the purpose of protecting the superior interest of the minor, the legislator has expanded the area of the cases for incompatibility with the activity as a guardian. Thus, Art 113 of the Law 287/2009 states that the following persons cannot be appointed as guardians: "*the minor, the person placed under judicial interdiction or the person placed under trusteeship; the person deprived of the exercise of the parental rights or declared incapable of being a trustee; the person having limited exercise of certain civil rights, either based on the law or by a court order, as well as the person with bad conduct registered by a court; the person who, by exercising a trusteeship has been removed from this position according to Art 158; the person under insolvency; the person who because of interests in contradiction with the minor's could not fulfill the role as trustee; the person removed by a legal act or by the will of the parent who at the moment of his death represents the single parenting authority*".

So, basically, any natural person with full capacity of exercise can be a guardian if he is not in one of the other situations mentioned above. If any of these situations arise during the exercise of guardianship, the person concerned will be removed from the custody and a new guardian shall be appointed.

The absolute novelty inserted by Law No 287/2009 refers to the means of appointing the guardian. If the previous regulation (Family Code – Law No 4/1953) attributed this role to the tutelage authority, in the light of the new Civil Code, the appointment of the guardian can be performed by the minor's parent or by the guardianship court. Representing an institution from the Anglo-Saxon law, the statement of the possibility that the parent alive and with full capacity of exercise to appoint a guardian for his child, this strengthens the premises of the fulfillment of the parental rights and obligations being in total agreement with the superior interest of the minor.

According to Art 114 of the Law No 287/2009, the appointment of the guardian by the parent shall be performed by "*a unilateral act or by mandate*" in their authenticated forms. The appointment may also be established by a will. The parent may revoke the appointment of the guardian at any time, being sufficient an act under private signature. Also, it must be mentioned that the person appointed as guardian cannot be removed from this position by a court, only (temporary) if he is found in any of the situations stated by Art 113 of the Law No 287/2009 or if "*by his appointment the minor's interests would be in danger*" (Art 116 Para 1 of the Law No 287/2009).

If there is no guardian appointed by the parent, the guardianship authority shall appoint as guardian "*a relative or an in-law or a friend of the minor's family, capable of fulfilling this role, taking into consideration the personal relations, the proximity of the residences, the material conditions and the moral guarantees presented by the person summoned as guardian*" (Art 118 of the Law No 287/2009).

Regarding the procedure of appointment, we must note that it is mandatory the acceptance of the future guardian (except the case in which the guardian is appointed based on a mandate, in which case the future guardian cannot refuse the guardianship, except for the reasons stated by Art 120 Para 2 of the Law No 287/2009). The hearing of the minor who has turned the age of 10 shall be mandatory. The appointment shall be made in the council chamber of the court by a definitive conclusion which "*shall be communicated in written to the guardian and shall be displayed at the headquarters of the court for tutelage and at the town hall in which the minor resides*" (Art 119 Para 4 of the Law No 287/2009).

Regarding the cases in which a natural person may refuse the appointment as guardian, unlike the former regulation (Art 118 of the Family Code), Art 120 Para 2 of the new Civil Code limits their area, by identifying 4 cases: "*the person who is 60 years old; the pregnant woman or the mother of a child less than 8 years old; the person raising and educating 2 or more children; the person who, because of a disease or infirmity, of the nature of his activities, of the distance between his domicile and the place in which are located the minor's assets or for other grounded reasons, could no longer fulfill this task*".

For the purpose of satisfying the superior interest of the minor, the guardianship has in its essence a personal and gratuitous feature, except the cases stated by Art 122-123 of the Law No 287/2009.

Together with the guardian, the family council[3] may assume attributions in the performance of the guardianship. It shall be created by the tutelage court only at the request of interested parties, and for the cases in which its establishment shall not be required its attributions shall be performed by the tutelage court[4].

For an efficient management of the activity performed by the guardian and in order to have a certain control of the fulfillment of the obligations regarding the person and assets of the minor, the Civil Code has stated the notion of family council, borrowed from the Anglo-Saxon law. The family council shall be appointed by the tutelage court and shall be formed by 3 members "*relatives or in-laws, considering their rank and personal relations to the minor's family*" or, in their absence, "*by other persons who had a friendship relation with the minor's parents or who present a certain interest for his situation*" (Art 125 Para 1 of the Law No 287/2009). The establishment, functioning, attributions and replacement of the family council shall be made under the supervision of the tutelage court.

The family council stated by the new Civil Code is completely different as composition, role and cases for which it shall be established from the institution with the same name stated by the Law No 217/2003 on the prevention and combat of family violence, defined as being "*the association without legal statute and without patrimonial purpose, composed of those family members which have full exercise capacity, according to the law*", having the role to prevent conflicts and mediation between family members.

From the content of the texts referring to the family council it results that its role is consultative (without legal personality), established by the tutelage court, with the role to supervise the means in which the guardian performs his rights and obligations regarding the minor's person and assets. Until the establishment of the tutelage courts, their attributions were carried out by the judges.

Can be part of the family council the relatives or in-laws considering their rank and personal relations to the minor's family. In their absence, other persons who had a friendship relation with the minor's family or who present an interest for his situation can be appointed as members of the family council.

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[3] Art 124 of the Civil Code: "(1) The family council may be establish in order to supervise the means in which the guardian fulfils his rights and obligations regarding the minor's person and assets; (2) For the protection of the minor by his parents, by foster care or, if necessary, by any other means of special protection mentioned by the law, the family council shall not be established".

[4] Art 108 of the Civil Code: "(2) The family council shall be established by the tutelage court only at the request of the interested parties; (3) If the family council shall not be established, its attributions shall be fulfilled by the tutelage court".

The role as member of the family council, as well as in the case of the tutelage, is a personal and gratuitous position. The tutelage court shall not authorize any form of payment. Also, it is optional, because the appointment of its members shall be made based only on their consent according to Art 128 Para 2 of the Civil Code. No modification during the guardianship shall be allowed, except the case in which the minor's interests would require such change or if a completion would be necessary due to the death or disappearance of one of the members[5]. In the meaning of adopting the decisions according to the majority, as well as of the continuity, the tutelage court shall appoint two alternative members[6].

The guardian shall not be part of the family council because the council's role is to supervise the very activity of the guardian, nor the spouses shall be part of the same council. As mentioned by Art 113 Para 1 of the Civil Code[7], shall not be appointed as members of the family council the persons who cannot be appointed as guardians.

Thus, the following persons cannot have the quality as members of the family council: the guardian; the person placed under legal interdiction or under a trusteeship; the person deprived of the exercise of the parental rights or declared incapable of being a guardian; the person who has limited exercise of certain rights, either based on a law or on a court decision or the person having bad behavior registered by a court; the person who, in the performance of a guardianship has been removed from it according to Art 158 of the Civil Code; the person under insolvency; the person who, due to contradictory interests with the minor's, could no longer fulfill the guardianship; the person removed by an authentic act or by will of the parent exercising alone at the time of his death the parental authority.

Can refuse to be member of the family council the person who, because of illness, of infirmity, of the nature of the activities performed, of the distance between his domicile and the place in which are located the minor's assets or for any other grounded reasons, could no longer fulfill this task.

3. Conclusions

The family council shall be established when the minor is in the position of having a guardian appointed. The minor's guardianship shall be established when both his parents are either deceased, unknown, deprived of their parental rights or have received the penalty prohibiting their parental rights, placed under a court interdiction, gone missing or legally declared dead, as well as in the case in which, at the termination of the adoption the court decides that it is for the minor's best interest to have a guardian.

In the case of the protection of the minor by the parents, by placing him in foster care or, as the case may be, by other special protection measures provided by the law, the family council shall not be established.

The family council may be established by the tutelage court only at the request of the interested parties; the persons fulfilling the conditions to be appointed as members of the family council shall be summoned at the minor's domicile by the tutelage court, ex officio or at the minor's request, if the has turned the age of 14, of the appointed guardian, of any other persons aware of the minor's situation.

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[5] Art 127 of the Civil Code: "Beside the situation refered to by Art 131, the composition of the family council cannot be changed during the guardianship, except the case in which the minor's interests require such change or if, by the death or disappearance of one of the members, his replacement would be necessary".

[6] Art 125 Para 3 of the Civil Code: "Under the same conditions, the court shall also appoint two alternative members".

[7] Art 113 Para 1 "Cannot be appointed as guardian: a) the minor, the person placed under judicial interdiction or the person placed under trusteeship; b) the person deprived of the exercise of the parental rights or declared incapable of being a guardian; c) the person who has limited exercise of certain civil rights, either based on the law or on a court decision; d) the person who, in the exercise of a guardianship was removed from it according to Art 158; e) the person under insolvency; f) the person who, due to conflicting interests with the minor, could no longer fulfill the requirements of the guardianship; g) the person who was removed by an authentic act or by the will of the parent who at the moment of his death carried out the parental authority".

The tutelage court shall appoint the 3 members of the family council of the eligible ones, taking into consideration their rank and personal relations to the minor's family. The appointment as members in the family council shall be made with their consent.

Bibliography

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