



GUARDIANSHIP - PROTECTIVE MEASURE

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Abstract

The way in which personal protection measures are regulated by civil law reflects in all legal systems the degree of concern of the state power to provide the necessary legal framework so that persons who are vulnerable for various reasons can take part in the civil circuit without being prejudiced. Therefore, we believe that guardianship and curatorship together with the protective measures regulated by special laws are part of a broader normative framework, through which the legislator aims to protect the person as the subject of legal relations of any kind. We can say, therefore, that this desire to protect the persons under its jurisdiction is the main purpose of the legislative function for the democratic state organization.

Keywords: guardianship, protection, guardian, institution, minor

1 Introduction

By making these clarifications, we wanted to emphasize the particularly important role played by the guardianship as a legal institution, if we refer to the purpose pursued by the legislator by regulating it.

2 Protection of the natural person through guardianship

Civil-law guardianship of the individual is a legal institution whose purpose is to protect certain categories of persons who are incapable of managing their property or interests by themselves because of their age, mental state of health or other circumstances prescribed by law¹. Guardianship is the main means of protecting the incapable person, while curatorship is intended to protect a person who is capable but is in one of the situations that allow the appointment of a curator².

The protection measures and their subjects are regulated by the legislator in the general provisions on this mechanism for the protection of the individual specific to civil law.

Thus, Art 105 of the Civil Code defines the concept of “protected persons” as follows: “Minors and those who, although capable, because of old age, illness or other reasons provided by law, are subject to special measures of protection, are unable to administer their property or to defend their interests in appropriate conditions”.

It is also important to note that Art 106 of the Civil Code contains *in abstracto* provisions on protective measures. This legal text has a structure composed of two paragraphs relating to the categories of persons who may be placed under guardianship, the first of which concerns the measures applicable to minors, and the second of which provides for the means of guardianship of a person of full age³.

¹ Eugen Chelaru, *Drept civil. Persoanele*, 3rd Edition (Bucharest: C.H. Beck, 2012), 144

² The common-law cases in which the legislator allows the opening of a curacy are set out in Art 178 of the Civil Code, which reads as follows: “Apart from the cases provided for by law, the guardianship court may institute guardianship: a) if, by reason of old age, infirmity or physical infirmity, a person, although capable, is unable to administer his property or defend his interests personally under proper conditions and, for good reason, is unable to appoint a representative or administrator; b) if, owing to illness or for other reasons, a person, although capable, is unable, either in person or through a representative, to take the necessary steps in cases which cannot be postponed; c) where a person, being obliged to be absent for a long period of time from his home, has not left a trustee or a managing trustee; d) where a person has disappeared without any information about him and has not left a trustee or a managing trustee”.

³ The means of protection are classified as part of the special right of suitable persons according to M. Nicolae, *Drept civil. Teoria generală*, 1st Volume, *Teoria dreptului civil* (Bucharest: Solomon, 2017), 371

The legislator provides in the Civil Code, as common law in matters of legal relationships specific to private law, that the protection of minors is not only provided by parents and guardian, but also by other means provided for in special laws, as in the case of fostering a minor in disadvantaged situations.

The fact that such a provision is found in the Civil Code reflects the legislator's increased concern for the protection of minors by the most varied means possible, in order to ensure that their interests will be safeguarded, and that their physical and psychological development will not be left to chance regardless of the concrete circumstances in which they find themselves.

The first chapter of the third title, which deals with the general provisions applicable to the protection of the natural person, begins with an article whose marginal title is: "The interests of the protected person". This legal text establishes, as a guiding principle of the entire system of protection of the natural person, by private law provisions that such measures will be established each time only in the interests of the protected person. Therefore, in order not to prejudice the inherent rights of the person, the law establishes that the least intrusive of all the protective measures provided by law shall be chosen, having regard to the person's ability to exercise his or her rights and fulfill his or her obligations arising in connection with his or her person or property⁴.

In order to understand the functioning mechanism of guardianship, we will recall the characteristics of this legal institution: the legality of guardianship, the mandatory or optional nature of guardianship, its nature of being a free or remunerated task, the personality of guardianship, the uniqueness or plurality of guardianships⁵.

Guardianship is legal in the sense that: the establishment of guardianship, the circumstances in which guardianship may be opened, the appointment of the guardian, the content of guardianship and the termination of guardianship are provided for by law, using mandatory rules. Although Art 114 of the Civil Code gives parents the possibility of appointing the person to be appointed guardian of their children, the legality of guardianship is not affected⁶.

As a rule, guardianship is optional, but it is compulsory if the guardian is appointed by a contract of mandate, in which case he or she may refuse the appointment only for reasons expressly provided by law⁷. It should be noted that the legislator has abandoned the old system which made the guardianship compulsory and did not allow the guardian to refuse the task. The reason for this optional nature of guardianship is very simple: the person on whom such a guardianship would be imposed against his or her will might not be very zealous in the management of the guardianship and, as a result, might harm the interests of the minor under his or her care⁸. In principle, the guardian is appointed with his agreement by the guardianship court in chambers, by a final judgment⁹.

Generally, the guardianship is not remunerated. Gratuity is the nature of guardianship, not its essence¹⁰. Art 123 of the Civil Code reproduces Art 121 Para 1 of the Family Code, which established that guardianship is a "gratuitous task". The guardian during the exercise of the guardianship task may be entitled to be remunerated. The amount of this remuneration shall be determined by the guardianship court, with the opinion of the family council, by reference to the work done in the administration of the minor's assets on the one hand, and to the material situation of the guardian and the guardian on the other hand, but not exceeding 10% of the income produced by the assets of the person under guardianship. Also, the guardianship court, after consulting the family council, may, depending on the circumstances, modify or even order the termination of the payment of this remuneration. The remuneration is therefore exceptional in nature and depends mainly on the degree of solvency

⁴ For an overview of the principles governing children's rights, see also A. R. Motica, *Dreptul civil al familiei. Raporturile nepatrimoniale. Curs teoretic și practic*, 2nd Edition (Bucharest: Universul Juridic, 2018), 326-327

⁵ Eugen Chelaru, *Drept civil. Persoanele*, 150-151

⁶ A. G. Gavrilesu, *Ocotirea minorului prin tutelă. Drepturile și obligațiile tutorelui și drepturile și obligațiile părintești. Aspecte comparative*, in "Annals of the Constantin Brancusi Târgu-Jiu University", Legal Sciences, no. 2/2010, 158

⁷ In this regard, Art 120 Para 2 of the Civil Code provides that: "The continuation of guardianship may be refused: a) by a person who has reached the age of 60; b) by a pregnant woman or the mother of a child under 8 years of age; c) by a person who is raising and educating two or more children; d) by a person who, due to illness, infirmity, the nature of the activities performed, the distance of the domicile from the place where the minor's property is located or for other valid reasons, could not fulfill this task".

⁸ O. Ungureanu, C. MUNTEANU, *Drept civil. Persoanele*, 2nd Edition (Bucharest: Hamangiu, 2013), 245

⁹ Art 119 Para 1 of the Civil Code

¹⁰ Gh. Beleiu, *Introducere in dreptul civil. Subiectele dreptului civil*, 11th Edition (Bucharest: Universul Juridic, 2007), 379

of the minor, since the expenses incurred for the maintenance of the minor, the administration of the minor's property or the preservation of the minor's rights inevitably entail debiting them from the minor's account¹¹.

Personality¹²

The rule is that the guardianship must be exercised personally by the guardian (*intuitu personae*). In the Civil Code, there are two exceptions to the previous regulation: according to Art 122 Para 2 of the Civil Code, the guardianship court, with the advice of the family council, depending on the size and structure of the minor's assets, may decide to grant permission for the administration of all or only part of the assets by a specialized natural or legal person, subject to the applicable legal provisions; the second exception¹³ occurs in the event of the death of the guardian, when, until the appointment of a new guardian, the duties of guardianship will be taken over by his heirs¹⁴.

If the guardian's heirs are minors, the guardianship court will appoint a special curator, who may be the executor of the will, which is not an exception to the principle of non-transferability of the guardian's power of guardianship arising from the personal nature of the task, but rather a temporary measure to protect the minor. The rule is, however, that the guardian cannot be replaced by another person in the exercise of his or her guardianship duties, and any mandate to a third party can only relate to a specific legal transaction and is therefore a special mandate¹⁵.

Uniqueness or plurality of guardianships

The guardianship is unique in the sense that the same guardian assumes both guardianship of the person of the minor and guardianship of the minor's property¹⁶. The administration of the minor's property or part of it may also be entrusted to a natural person or a specialized legal person. If the guardian is not qualified to administer the

¹¹ Art 153 of the Civil Code states that: The guardianship court shall verify the accounts regarding the minor's income and the expenses incurred for the minor's maintenance and the administration of his property and, if they are correctly drawn up and correspond to the reality, shall discharge the guardian"; in conjunction with Art 838 Para 1 of the Civil Code, the income account shall be debited with the amounts representing the following expenses and other expenses of a similar nature, in the following order: a) the taxes and duties paid in respect of the assets administered; b) half of the manager's remuneration and reasonable expenses incurred by the manager for the common management of the capital and interest; c) insurance premiums, costs of minor repairs and other usual administrative expenses; (d) costs incurred for the preservation of the rights of the beneficiary of the fruits and half of the costs of judicial discharge, unless otherwise ordered by the court; e) the depreciation costs of goods, except those used for personal purposes by the beneficiary. (2) The administrator will be able to spread significant expenditure over a reasonable period of time in order to maintain income at a constant level".

¹² Art 107 of the Civil Code states that: "(1) The proceedings provided for by this Code relating to the protection of the natural person shall be within the competence of the guardianship and family court established by law, hereinafter referred to as the guardianship court; (2) In all cases, the court of guardianship shall deal with these applications immediately". One must also take into consideration Art 229 of the application law, stating that: "(1) The organization, functioning and powers of the guardianship and family court are determined by the law on judicial organization; (2) Until the organization and functioning of the guardianship court is regulated by law: a) its tasks, as laid down in the Civil Code, are carried out by the courts, sections or, where appropriate, specialized juvenile and family panels; b) the psycho-social investigation report provided for in the Civil Code is carried out by the guardianship authority, with the exception of the investigation provided for in Art 508 Para 2, which is carried out by the Directorate-General for Social Assistance and Child Protection; c) the authorities and institutions with attributions in the field of the protection of the rights of the child, respectively of the natural person, shall continue to exercise the attributions provided for by the regulations in force at the date of entry into force of the Civil Code, except for those given to the guardianship court; (3) Until the date of entry into force of the regulation referred to in Para 1, the powers of the guardianship court in relation to the exercise of guardianship over the property of the minor or of the court-ordered person or, where appropriate, in relation to the supervision of the guardian's management of the minor's property shall be vested in the guardianship authority".

¹³ For the view that the exception from the personality of guardianship in this case is a temporary measure of protection of the minor; O. Ungureanu, C. Munteanu, *Drept civil. Persoanele*, 2nd Edition (Bucharest: Hamangiu, 2013), 246

¹⁴ Art 157 Para 2 states that: "Until a new guardian is appointed, the heirs will take over the duties of the guardianship. If there are several heirs, they may designate, by special power of attorney, one of them to carry out the duties of the guardianship on a provisional basis".

¹⁵ V. Bîcu *Ocrotirea persoanei fizice prin mijloace de drept civil* in Marian Nicolae (coord.), V. Bîcu, G.-A. Ilie, Radu Rizoiu; *Drept civil. Persoanele* (Bucharest: Universul Juridic, 2016), 218

¹⁶ By way of exception, Art 490 Para 1 provides that: "A minor parent who has reached the age of 14 years has only parental rights and duties with regard to the person of the child", and Para 2: "The rights and duties with regard to the child's property shall be vested in the guardian or, where appropriate, in another person, in accordance with the law.

minor's property, the guardianship over the property may be detached from the guardianship over the person, and the task may be divided among several guardians, in which case, according to the doctrine, we would be in the presence of a plurality of guardianships¹⁷. However, in our view, a real plurality of guardianships arises only when tasks relating to personal and property matters are assigned to different persons.

Conclusion

Both under the auspices of the old Family Code and under the New Civil Code, the guardianship has played and continues to play a very important role, being the main means of protection of these categories of vulnerable persons because, in the case of minors, the establishment of guardianship is certainly preferable to foster care if we take into account the attachment of the protected person to the extended family¹⁸.

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¹⁷ V. Bîcu *Ocrotirea persoanei fizice prin mijloace de drept civil*, 219

¹⁸ D. Lupașcu, C. M. Crăciunescu, *Dreptul familiei*, 3rd Edition (Bucharest: Universul Juridic, 2017), 594-595; E. Lupean, S. Sztranyiszki, *Persoanele în concepția noului Cod Civil* (Bucharest: C. H. Beck, 2012), 202.