

# COMPARATIVE ANALYSIS OF THE REGULATION REGARDING THE SUBSTANTIVE CONDITIONS OF ADOPTION IN ROMANIA AND IN THE REPUBLIC OF MOLDOVA

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## Abstract

*The study examines from a comparative point of view some theoretical issues of the substantive conditions of adoption both in Romania and in the Republic of Moldova as they are regulated by the specific laws. The research consists in the analysis of the legal provisions related to the conditions that must be fulfilled by the adopted and by the adopter both from theoretical and practical perspectives. The authors also intend to carry out an analysis of the relevant case law of the courts of law in this matter.*

**Keywords:** *adopted, adopter, consent, adoption age, interdictions*

## 1. Introduction

This paper intends to carry out an analysis of the substantive conditions of adoption both in the Romanian and in the Moldavian legislations.

The substantive conditions of adoption are regulated by the Romanian Civil Code (Law No. 287/2009, republished)<sup>1</sup> – hereinafter referred to as Civil Code –, by the Law No. 273/2004 regarding the legal regime of adoption, as republished and further amended<sup>2</sup> – hereinafter referred to as Law No. 273/2004 – and by the Moldavian Law No. 99/2010 regarding the legal regime of adoption<sup>3</sup> – hereinafter referred to as Law No. 99/2010 –.

## 2. Content

### 2.1. The individuals who can be adopted

According to the provisions of article 455 paragraph (1) of Civil Code, the child can be adopted until acquiring full exercise capacity. Nonetheless, the provisions of article 455 paragraph (2) of Civil Code stipulate the fact that the individual with full exercise capacity can be adopted also, when raised during minority by the individual who wishes to adopt him or her<sup>4</sup>. As per article 38 of Civil Code, the full exercise

capacity begins when the individual becomes an adult, respectively at the age of 18 years old. Also, it must be taken into consideration the case of the child acquiring full exercise capacity by marriage, as well as the child acquiring full anticipated exercise capacity, under the conditions stipulated by article 40 of Civil Code. As stated in the literature<sup>5</sup>, the growth of the child during minority means not only ensuring the child support, but also the existence of affective relations between the adopted and the adopter, such as those established between the child and the natural parents. Also, the growth must have been continuous and on a long-term. With respect to the application in time of the provisions governing the age of the adopted, article 48 of Law No. 71/2011 on the application in time of the Law No. 287/2009 on the Civil Code<sup>6</sup> stipulates that „the provisions of article 455 of Civil Code are applicable also in case the child acquires anticipated exercise capacity, as per article 40 of Civil Code”.

The provisions of article 10 of Law No. 99/2010 are approximately similar to those in the Romanian legislation, meaning that the individual can be adopted only until the age of 18 years and, by way of derogation from this rule, the individual who has acquired full exercise capacity until the age of 18 years old can be adopted only in case the adopter is the individual or the family who has raised him or her, if he or she has cohabited for no less than 3 years until the application for adoption.

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<sup>1</sup> Published in Official Gazette of Romania No. 505 of July 15, 2011, as further amended.

<sup>2</sup> Published in Official Gazette of Romania No. 739 of September 23, 2016, as further amended.

<sup>3</sup> Published in Official Gazette of Republic of Moldova No. 131-134 of July 30, 2010, as further amended.

<sup>4</sup> Please see Constanța Tribunal, I Civil Division, Civil Sentence No. 99/2012 and Civil Sentence No. 139/2012 (www.juridice.ro), when the court admitted the action and approved the adoption of an adult.

<sup>5</sup> D. Lupașcu, C.M. Crăciunescu, *Family law*, 3rd edition, Universul Juridic Publishing House, Bucharest, 2017, p.481; E. Florian, *Family law. Marriage. Matrimonial regims. Filiation*, ed. a 5-a, C.H. Beck Publishing House, Bucharest, 2016, p.467; C. Mareș, *Family Law*, Second Edition, C.H. Beck Publishing House, Bucharest, 2015, p.288; B.D. Moloman, L.-C. Ureche, *The new Civil Code. 2nd Book. About family. Articles 258-534. Commentaries, explanations and jurisprudence*, Universul Juridic Publishing House, Bucharest, 2016, p. 608-609.

<sup>6</sup> Published in Official Gazette of Romania No. 409 of June 10, 2011, as further amended.

The distinction between the two regulations consists in the following: (i) according to Law No. 99/2010, may be adopted the individual who has not reached the age of 18 years old and, exceptionally, the individual who has acquired full exercise capacity until 18 years of age, (ii) according to Law No. 99/2010, a minimum cohabitation period of 3 years until the application for adoption is regulated, in case of adoption of the individual who has acquired full exercise capacity until the age of 18 years.

The first difference stipulated by article 10 of Law No. 99/2010 consists in the fact that only the child until the age of 18 years old can be adopted and, in case the individual acquires full exercise capacity until the age of 18 years old, the adopter must be the individual or the family who has raised him or her, if the latter has cohabited for no less than 3 years until the application for adoption.

The second difference between the two legislations is that, according to the Romanian law, it is not mandatory a minimum duration for the adopted with full exercise capacity to be raised during minority by the adopter, unlike the Moldovan legislation which stipulates the mandatory minimum cohabitation period of 3 years of the adopted with the adopter individual or the family who has raised him or her, until the application for adoption.

Article 463 paragraph (1) letter b) of Civil Code and article 15 paragraph (2) of Law No. 273/2004 require the consent to adoption of the adopted individual who is 10 years old. Thus, it is mandatory also the consent of the adopted with full exercise capacity. Prior to the consent, the general direction of social assistance and child protection, in whose territorial jurisdiction the child who is 10 years old resides, shall inform and shall advise the latter, especially with respect to the consequences of the adoption and its consent thereof, and shall conclude a report in this regard<sup>7</sup>. The consent to adoption of the child who has reached the age of 10 years old shall be given in front of the custody court, when approving the adoption<sup>8</sup>.

The consent to adoption must cumulatively meet the following conditions:

- a) to be freely expressed, not affected by any vice of consent. According to article 479 paragraph (1) of Civil Code, the vices of consent in the matter of adoption are the following: (i) the error on the adopter's identity, (ii) the misrepresentation or (iii) the violence.

- b) the consent must be unconditional, a consent given in view of the promise or the actual gain of benefits, irrespective of their nature is not considered valid<sup>9</sup>.
- c) the consent must be expressed only after the child who is 10 years old has been duly informed and advised, taking into account his or her age and maturity, especially on the consequences of the adoption and his or her consent thereof.

Article 23 paragraph 1 letter c) of Law No. 99/2010 stipulates the expressing of consent to adoption of the adopted who is 10 years old.

The individuals whose consent to adoption is required shall be duly informed of the consequences of their consent and, in particular, of the termination, following the adoption, of the family ties between the child and his or her biological family<sup>10</sup>. The territorial authorities at the place of residence of the adopted individual are obliged to provide counseling and information to him or her prior to expressing the consent to the adoption and to conclude a report in this respect<sup>11</sup>.

The consent of the adopted is expressed in writing, freely and unconditionally, authenticated according to the provisions of the legislation or confirmed by the territorial authority of their domicile<sup>12</sup>. Consent of the adopted through corruption, deceit, fraud, money, other goods, or any kind of promise before or after obtaining the consent is not valid<sup>13</sup>.

The competent court may request confirmation of the consent when examining the case in front of the court, ensuring the confidentiality of information about the adopters and the biological parents<sup>14</sup>.

The territorial authority shall require the consent of the child, taking into account the age and the degree of maturity, as well as his or her views, desires and feelings in the adoption process<sup>15</sup>.

In the process of matching the adopter, the child who is 10 years old, at the request of the territorial authority at his/her domicile, must express his written consent<sup>16</sup>.

The child must receive counseling from the territorial authority on the consequences of adoption, future adopters, as well as appropriate information on all aspects of adoption<sup>17</sup>.

In order to approve the adoption, the consent of the child who is 10 years old must be expressed in front of the court, when the child has the right to decide on

<sup>7</sup> Article 15 paragraph (3) of Law No. 273/2004.

<sup>8</sup> Article 15 paragraph (1) of Law No. 273/2004.

<sup>9</sup> Article 463 paragraph (2) of Civil Code.

<sup>10</sup> Article 23 paragraph (2) of Law No. 99/2010.

<sup>11</sup> Article 23 paragraph (3) of Law No. 99/2010.

<sup>12</sup> Article 23 paragraph (4) of Law No. 99/2010.

<sup>13</sup> Article 23 paragraph (5) of Law No. 99/2010.

<sup>14</sup> Article 23 paragraph (6) of Law No. 99/2010.

<sup>15</sup> Article 26 paragraph (1) of Law No. 99/2010.

<sup>16</sup> Article 26 paragraph (2) of Law No. 99/2010.

<sup>17</sup> Article 26 paragraph (3) of Law No. 99/2010.

the adoption, to confirm or to withdraw the consent to adoption<sup>18</sup>.

With respect to the consent of the child who is 10 years old, both legislations stipulate the obligation to express it, along with the obligation of the competent authorities to advise the child on the consequences of adoption and his or her consent to adoption, as well as the need to express the consent before the court, in the adoption phase.

Also, in order to approve the adoption, both legislations provide the need for biological parents' consent. Thus, article 463 paragraph (1) letter a) of Civil Code requires the consent of the natural parents or, as the case may be, of the child's guardian whose natural parents are deceased, unknown, declared dead, missing or prohibited. Article 23 paragraph (1) letter a) of Law No. 99/2010 stipulates the need of the biological parents' consent or, as the case may be, of the guardian or curator of a child whose parents are deceased, unknown, declared missing or deceased, subject to judicial protection in the form of custody under the law.

Although custody is also established in case the parents are deprived of their parental rights<sup>19</sup>, in this case the consent to adoption shall be given by both the guardian and the natural parents, based on article 464 paragraph (2) of Civil Code, according to which the parent or parents who has/have been deprived of the parental rights or who has/have been subject to the interdiction of parental rights shall keep their right to consent to the child's adoption, the consent of the child's legal representative being also mandatory. In order to validly conclude the adoption, the consent of both natural parents is mandatory, even if they are separated in fact or divorced and the custody court has decided that the parental authority be exercised only by one of the parents. Consent to adoption can not be expressed in the place of the natural parents or the guardian by the curator, trustee or other individual empowered to do so.

Unlike the Romanian legislation, article 24 paragraph (3) letters b) and c) of Law No. 99/2010 stipulates that the consent of biological parents is not required if they are deprived of their parental rights or in case they are subject to judicial protection in the form of custody.

Another difference between the two legislations resides in the manner in which the minor parent expresses the consent. Thus, according to the Romanian legislation<sup>20</sup>, the minor parent who is 14 years old shall express his or her consent, assisted by his legal guardian. According to the Moldovian legislation<sup>21</sup>, minor parents shall express their consent to the child adoption through their legal representatives, until the age of 16 years old, and individually, after this age.

As regards the revocation of consent and the refusal of natural parents or of the guardian to consent to the adoption, both legislations provide for solutions to be adopted in such situations. Thus, according to article 466 of Civil Code, the consent to adoption of the natural parents or, as the case may be, of the guardian may only be expressed after a period of 60 days as of the child's birth and may be revoked within 30 days of the date of its expression. According to article 24 paragraphs (6) and (7) of Law No. 99/2010, the consent of the biological parents can not be expressed until the child's birth, but only after 45 days after his or her birth, and they can revoke their consent until the court decision on the adoption is pronounced.

In the case of the natural parents' refusal to consent to adoption, article 467 of Civil Code provides that, by way of exception, the custody court may disregard the refusal of the natural parents or, as the case may be, the guardian to consent to adoption if proven by any means of proof that it is abusive and the court considers that the adoption is in the superior interest of the child, taking into account his/her opinion, given according to the legal provisions, with the express reasoning of the decision in this respect.

A similar provision is also regulated by article 24 paragraph (9) of Law No. 99/2010, respectively the exceptional situation in which the court may disregard the refusal of the biological parents or, as the case may be, the guardian's or the curator's consent to the adoption of the child if proven, by any means of proof, that they abusively refuse to give their consent to adoption, and the court considers that the adoption is in the best interest of the child, expressly reasoning it in the court decision.

As stated within the case law<sup>22</sup>, the mere assertion that the consent to adoption is abusive is not sufficient,

<sup>18</sup> Article 26 paragraph (4)-(5) of Law No. 99/2010.

<sup>19</sup> Article 110 of Civil Code.

<sup>20</sup> Article 12 of Law No. 273/2004.

<sup>21</sup> Article 24 paragraph (2) of Law No. 99/2010.

<sup>22</sup> Pitești Court of Appeal, Civil Division I, Decision No. 764/2013, in the Legal Week No. 40/2013, p.11-12. The court held that the court of first instance made a correct assessment of the evidence administered and legally held that it was not necessary to admit the applicant's application for adoption because the conditions laid down by the Law No. 273/2004, respectively, lacking the father's consent, an essential condition stipulated by the law. The child's biological father claimed that he rarely visited the child because of reasons determined by the child's mother's family, who is reluctant to allow him to have contact with the minor. The circumstances shown by the applicant, namely that the natural father of the child manifests disinterest in this, does not contribute to its growth and maintenance, does not visit it, but which is not supported by clear and conclusive evidence, is not such as to determine the refusal of the defendant to consent to adoption as an abuse in the sense of the law. The court held that the father's negligence towards the child was presumed. This negligence is not complemented by a real lack of affection and affiliation from father to child. No deeds or acts committed by the father have been proven to lead to the alienation of the child.

To consider, in view of the peculiarities of the case, that the refusal of the father to the adoption of her daughter constitutes an abuse, it would mean giving rise to conflicts between the mother's family and the natural father of the child, between them and the adopter, between the child and the father. Although the child said that she wanted to be adopted by the plaintiff, the current husband of the mother, when listening to the

in the absence of clear evidence of the contrary nature of the refusal to the child's interest; the court can not approve the adoption in this case because the condition of the natural parent's consent is not fulfilled.

Also, it was decided<sup>23</sup> that the possibility of the court to supplement the consent to adoption of the mother must be analyzed by reference to the exact circumstances of the case, the mother's behavior towards the child who she abandoned and who she has never visited again, as well as the repeated absence before the administrative bodies or the court being considered abusive refusal to adoption consent.

It may also be considered as an abusive refusal to adoption consent the situation when the natural parents or, as the case may be, the guardian, although legally cited, did not repeatedly appear before the court at the hearings set for the expressing of the consent<sup>24</sup>.

According to another decision<sup>25</sup>, the situation in which a parent can not be found given that his/her domicile is unknown may be considered as an abusive consent.

With respect to the conditions of the natural parents' consent or, as the case may be, of the guardian, the natural parents of the child or, as the case may be, the guardian must consent to the adoption freely, unconditionally and only after being properly informed of the consequences of adoption, especially on the termination of the child's relations with his or her family of origin<sup>26</sup>.

The consent to adoption must cumulatively meet the following conditions:

- a) it must be freely expressed, not affected by any vice of consent, meaning: (i) error with respect to the identity of the adopted individual, (ii) misrepresentation, or (iii) violence;
- b) it must be unconditional, a consent given in view of the promise or actual gain of benefits, regardless of their nature, not being valid;
- c) it must be expressed only after the natural parents or guardians have been properly informed of the consequences of the adoption, especially the termination of the child's family ties with his or her family of origin. The general direction for social assistance and child protection in whose territorial jurisdiction the natural parents or, as the case may be, the guardian reside is obliged to ensure their counseling and information before expressing the

consent to adoption and to draw up a report in this respect.

- d) to be given by the natural parents or, as the case may be, by the guardian, only after a period of 60 days after the child's birth. The given consent may be revoked within 30 days as of the date of its expression;
- e) to be given by the natural parents or, as the case may be, by the guardian in front of the court when deciding over the start of the adoption procedure. Along with the request for consent, the court shall ask the general direction for social assistance and child protection the counseling and information report, confirming the fulfillment of the counseling and information obligation<sup>27</sup>.

The Moldovan legislation also provides for the obligation to properly inform the biological parents or, as the case may be, the guardian or curator of the child whose parents are deceased, not known, declared missing or deceased, are subject to judicial protection in the form of custody the conditions of the law, whose consent to adoption is requested, on the consequences of their consent, in particular on the termination of the family relations between the child and his/her biological family as a result of adoption<sup>28</sup>.

Also, as shown for the condition of the adopted's consent, the territorial authorities from the domicile of the biological parents or, as the case may be, of the guardian or the curator of the child are obliged to provide counseling and information to them prior to the consent to the adoption and to draw up a report in this regard<sup>29</sup>.

Moreover, the consent of the biological parents or, as the case may be, of the guardian or curator of the child must be expressed in writing, freely and unconditionally, authenticated according to the legislation or confirmed by the territorial authority of their domicile<sup>30</sup>. The consent of the biological parents or, as the case may be, of the guardian or curator of the child obtained through corruption, deceit, fraud, money, other goods or for any kind of promise before or after obtaining the consent shall not be valid<sup>31</sup>.

## 2.2. The individuals who can adopt

The general rule is that any individual can adopt irrespective of civil status, gender, race, nationality, religion etc. However, the above-mentioned elements

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child in the council room, there were indications that this manifestation of will be impressed by the influence exercised by her mother and husband, of the conflicting attitude maintained about the child's natural father, the desire of the child to be in agreement with his mother. It was found that the child artificially imposed a distance from her father. The defendant sought his child, but in the last few years he did not do so because of preventing the former wife from making contact with the child. The child's mother denies these claims of the father of the child, but at the declarative level.

<sup>23</sup> Bucharest Court of Appeal, 3rd Civil Division, decision No. 857/2013, in Legal Week No. 9/2014, p.23.

<sup>24</sup> Article 8 paragraph 2 of Law No. 273/2004.

<sup>25</sup> Bucharest Court of Appeal, Civil division, decision No. 207A/2013, apud. B.D. Moloman, *Consent – an important actor in the adoption procedure*, in Romanian Review of privat law No. 3/2018, p.250.

<sup>26</sup> Article 465 Civile Code and article 9 of Law No. 273/2004.

<sup>27</sup> Article 14 paragraph (3) of Law No. 273/2004.

<sup>28</sup> Article 23 paragraph (2) of Law No. 99/2010.

<sup>29</sup> Article 23 paragraph (3) of Law No. 99/2010.

<sup>30</sup> Article 23 paragraph (4) of Law No. 99/2010.

<sup>31</sup> Article 23 paragraph (5) of Law No. 99/2010.

shall be duly analyzed when approving an adoption. Also, according to article 452 letter c) of Civil Code the ethnic, linguistic, religious and cultural origins will be taken into account in view of the continuity principle of the child's growth and education.

### 2.2.1. The age of the adopter

With respect to the minimum age, as per article 459 of Civil Code, the individuals who do not have full exercise capacity can not adopt. From the corroboration of these provisions with those of article 40 of Civil Code, according to which the court may give full exercise capacity to an individual who is 16 years old, for justified reasons, thus it can be concluded that the minimum age of the adopter may be 16 years old, when acquired a full anticipated exercise capacity. The Civil Code does not explicitly stipulate the maximum age of the adopter.

However, according to article 460 paragraph (1) of Civil Code, the adopter must be at least 18 years older than the adopter. According to paragraph (2) of the same article, "for good reasons, the custody court may approve adoption even if the difference in age between the adopted and the adopter is less than 18 years, but not less than 16 years". As decided by the Supreme court<sup>32</sup>, the adoption can be refused in exceptional and undeniably proven circumstances, where the advanced age of the adopter is an unavoidable obstacle to the fulfillment of the purpose of adoption, namely the satisfaction of the adopted individual's interests.

The Moldovian legislation provides for a minimum age for the adopter, but also a maximum age difference between the adopted and the adopter<sup>33</sup>. Thus, according to article 12 paragraph (1) of Law No. 99/2010, the adoption is only allowed for individuals who have full exercise capacity, 25 years of age, and are at least 18 years older than the one they wish to adopt, but not by more than 48 years old. With respect to the condition of the minimum age of 25 years old, the law provides a derogation, in the sense that it is sufficient that only one of the spouses to be 25 years old.

Regarding the age difference between the adopted and the adopter, the Moldovian legislation also provides that the court can approve adoption even if the age difference between the child and the adopter is less than 18 years old, but in no case less than 16 years old<sup>34</sup>.

### 2.2.2. The exercise capacity

From the provisions of article 459 of Civil Code, according to which people who do not have full exercise capacity can not adopt, it follows that the adopter must have full exercise capacity.

The same condition of full exercise capacity is expressly stated by the provisions of article 12 paragraph (1) of Law No. 99/2010.

### 2.2.3. The vocation to adopt

In accordance with the principle of the best interests of the child, article 461 paragraph (1) of Civil Code and article 13 paragraph (1) of Law No. 273/2004 on the adoption procedure, republished, stipulate that the adopter or adoptive family must fulfill all moral guarantees and material conditions necessary for the child's harmonious growth, education and development<sup>35</sup>.

We consider, together with other authors<sup>36</sup>, that the fulfillment of the moral guarantees and material conditions is not mandatory in case of adoption of the individual with full exercise capacity, given the express mention on the final thesis of article 461 paragraph (1) of Civil Code, with respect to the child, meaning the individual is not 18 years old or who has not acquired full anticipated exercise capacity, as well as the provisions of article 484 of Civil Code, according to which "the parental authority is exercised until the child acquires full exercise capacity".

The fulfillment of all guarantees and material conditions, as well as the existence of the parental skills shall be assessed by the general direction of social assistance and child protection by issuing a certificate attesting that the individual or family is able to adopt<sup>37</sup>, which shall be attached to the decision of the general / executive director of the direction, when carrying out the evaluation according to Law No. 273/2004<sup>38</sup>.

Nonetheless, according to article 26 of Law No. 273/2004 the certificate shall not be necessary in the following cases: a) for the adoption of the individual who has acquired full exercise capacity; b) for the adoption of the child by the husband of the natural or adoptive parent.

The capacity to adopt is also provided under the Moldovian legislation. According to article 16 of Law No. 99/2010, the territorial authority at the domicile of the adopter shall assess should the moral guarantees and material conditions of the adopter comply with the child's development needs, in accordance with a

<sup>32</sup> Supreme Court of Justice, Civil Division, Decision No. 578/1992, in Dreptul No. 2/1993, p.68.

<sup>33</sup> See B.D. Moloman, L.-C. Ureche, *Law No. 273/2004 on the adoption procedure. Commentaries on articles*, Ed. Universul Juridic, Bucharest, 2016, p.65-66.

<sup>34</sup> Article 12 paragraph (2) of Law No. 99/2010.

<sup>35</sup> See Supreme Tribunal, Civil Division, decision No. 2144/1985, in R.R.D. No. 9/1986, p.65. In this case, the 84-year-old adopter, who died 2 months after the adoption, could not provide the moral conditions of the 6-year-old minor, the only purpose of adoption being to create a succession vocation. Moreover, the adopter, beneficiary of a benefit of 300 lei per month needed assistance himself in ensuring living conditions, so that the court's decision to reject the action on the nullity of adoption is untenable and unlawful.

<sup>36</sup> E. Florian, *op. cit.*, p.476.

<sup>37</sup> See Order No. 552/2012 regarding the approval of the framework model of the certificate of a individual or family able to adopt, as well as the model and content of some forms, instruments and documents used in the adoption procedure (published in Official Gazette of Romania No. 245 of April 11, 2012).

<sup>38</sup> Article 461 paragraph (2) Civil Code along with article 13 paragraph (2) of Law No. 273/2004.

regulation approved by the central authority, and shall conclude an evaluation report.

Based on the results of this assessment, the territorial authority shall decide the issuance or the refusal to issue the certificate. In case of issuance, the territorial authority shall decide the registration of the adopter<sup>39</sup>. The territorial authority that issued the decision shall provide, within 10 days, to the central authority a copy of the decision and of the certificate in order to include all necessary information in the State Register of Adoptions<sup>40</sup>.

Also, as within the Romanian legislation, according to article 18 paragraph (3) of Law No. 99/2010, as an exception, the registration of the adopter is not a condition of adoption in the case of the following: a) the adoption of the child by the husband or wife of the biological parent or adoptive parent of the child; b) the adoption of the child who has acquired full exercise capacity until the age of 18 years old.

#### **2.2.4. The consent of the adopter or, as the case may be, of the adoptive family**

Article 463 paragraph (1) letters c) and d) of Civil Code requires the consent of the adopter or, as the case may be, of the spouses of the adoptive family when they adopt together, as well as the spouse of the adopter, unless the lack of discernment makes it impossible for him to manifest his or her will.

As in the case of the consent of the adopted, as well as of the natural parents or guardian, the consent must be freely expressed, not affected by the vices of consent, and unconditional, the consent given in view of the promise or the actual gain of benefits, regardless of their nature, not considered as being valid. The consent of the adopter or adoptive family shall be given to the custody court when deciding on the adoption application<sup>41</sup>. The consent of the adopting husband is necessary even if, at the date of the adoption, the spouses are separated in fact and without distinction as to whether a child or an individual with full exercise capacity is adopted.

However, the consent of the adopting husband is not necessary in case of impaired judgment but also in the following cases: the husband is considered a mentally incompetent individual, is missing etc. As with the adopter or adoptive family, the consent of the adopter's spouse is given to the custody court when deciding on the adoption application. When the adopter is the adoptive parent's husband, the latter will consent to the adoption as a parent, by the effect of the previous adoption.

According to article 25 of Law No. 99/2010, the adopter shall give the consent to the adoption of the child proposed by the territorial authority from the domicile of the latter and shall confirm that he or she was informed on the child's health. At the adoption by spouses, it is mandatory the consent of both spouses.

The adoption by both spouses shall be permitted only in case their marriage has been lasting for at least 3 years prior to the application for adoption<sup>42</sup>.

### **2.3. The interdictions**

#### **2.3.1. Multiple adoptions - brothers and sisters**

According to article 456 of Civil Code, the brothers, irrespective of their sex, may be adopted by different people or families only if this is in their best interests. The general rule is that the brothers must be adopted together by the same individual or adoptive family, except for the case when their separate adoption is consistent with their superior interest.

The same provision is governed under the Moldovian legislation. Thus, according to article 10 paragraph (3) of Law No. 99/2010, the separation of siblings through adoption and their adoption by different individuals or families is forbidden, except for the case when this requirement is contrary to the best interests of the child.

#### **2.3.2. The adoption between brothers**

The adoption between brothers is forbidden, irrespective of their sex<sup>43</sup>, them being from marriage or from outside marriage, good brothers<sup>44</sup>, consanguineous<sup>45</sup> or uterine<sup>46</sup>.

The Moldovian legislation also stipulates that the adoption between brothers is forbidden<sup>47</sup>.

#### **2.3.3. Adoption of two spouses or ex-spouses by the same adoptive parent or adoptive family as well as adoption between spouses or former spouses<sup>48</sup>**

Adoption of two spouses or ex-spouses by the same adoptive parent or adoptive family, as well as adoption between spouses or ex-spouses is forbidden. Incompatibility arises from the fact that, by adoption, husbands or ex-husbands would become brothers, and the quality of brother is incompatible with the one of husband. Also, it is incompatible the quality of a husband with the parent-child relationships.

This prohibition is not regulated under Law No. 99/2010.

#### **2.3.4. Adoption by the individual with no full exercise capacity<sup>49</sup>**

As mentioned, according to article 38 of Civil Code, the full exercise capacity begins when the

<sup>39</sup> Article 17 paragraph (2) of Law No. 99/2010.

<sup>40</sup> Article 18 paragraph (1) of Law No. 99/2010.

<sup>41</sup> Article 16 of Law No. 273/2004.

<sup>42</sup> Article 12 paragraph (6) of Law No. 99/2010.

<sup>43</sup> Article 457 of Civil Code.

<sup>44</sup> Having the same mother and father.

<sup>45</sup> Only after the father.

<sup>46</sup> Only after the mother.

<sup>47</sup> Article 11 paragraph (1) of Law No. 99/2010.

<sup>48</sup> Article 458 of Civil Code.

<sup>49</sup> Article 459 first thesis of Civil Code.

individual becomes an adult, at the age of 18 years old. It is also necessary to consider the case of the minor who acquires full capacity by marriage, as well as the minor who acquires full anticipated capacity under the conditions stipulated by article 40 of Civil Code.

This prohibition is also regulated under the Moldovian legislation, according to article 12 paragraph (1) of Law No. 99/2010 which stipulates the condition of the full exercise capacity of the adopter.

### 2.3.5. Adoption by the individual with a mental illness or mental disability<sup>50</sup>

This prohibition concerns the mentally ill individual, whether he or she is under a court order or not. Similarly, the interdiction also applies to an individual with a mental disability regardless of whether he or she has been assigned to a category of disabled individuals requiring special protection or not.

A similar prohibition is also regulated by Law No. 99/2010, which, as per article 12 paragraph (4) letter b) prohibits the adoption of individuals whose state of health does not allow the proper fulfillment of obligations and responsibilities regarding the raising and education of children.

### 2.3.6. Simultaneous or successive adoption of the same individual by several adopters

According to article 462 paragraph (1) of Civil Code, two individuals can not adopt together, neither simultaneously, nor successively. This prohibition considers the purpose of the adoption, otherwise the adopted would have more parents at the same time. The exceptions to this rule are the following: a) simultaneous or successive adoption by adopters who are husband and wife<sup>51</sup>; b) the adopter or adoptive spouses has/have died; in this case, the previous adoption is considered to be terminated on the date of the final decision on the new adoption<sup>52</sup>; c) the previous adoption has ended because of any other reason<sup>53</sup>; d) the adopted child has only one parent, unmarried, and he or she is in a stable relationship and is living with an individual of the opposite sex<sup>54</sup>, not married, who is not a relative to the fourth degree and declares, by authentic notarial act, that the new adopter has been directly involved in raising and caring of the child for an uninterrupted period of at least 5 years<sup>55</sup>.

A similar provision is included within the Moldovian legislation. Thus, according to article 11 paragraph (2) of Law No. 99/2010, the adoption of a child by several adopters is prohibited, unless it is done by both spouses at the same time.

However, a new adoption may be granted if:

- a) the adopter or adoptive spouses has or have died,

the previous adoption being considered to be terminated on the date of the final decision with respect to the new adoption;

- b) the previous adoption ceased as a result of it being declared as void.

### 2.3.7. The adoption by same sex individuals

Article 462 paragraph (3) of Civil Code expressly states that “two individuals of the same sex can not adopt together”.

Law No. 99/2010 does not expressly regulate this prohibition, but it is implicitly derived from the legal provisions on the legal status of adoption.

## 3. Conclusions

In conclusion, the Moldovian legislation is almost similar to the Romanian legal provisions with some differences.

The first difference stipulated by article 10 of Law No. 99/2010 consists in the fact that only the child until the age of 18 years old can be adopted and, in case the individual acquires full exercise capacity until the age of 18 years old, the adopter must be the individual or the family who has raised him or her, if the latter has cohabited for no less than 3 years until the application for adoption.

The second difference between the two legislations is that, according to the Romanian law, it is not mandatory a minimum duration for the adopted with full exercise capacity to be raised during minority by the adopter, unlike the Moldovian legislation which stipulates the mandatory minimum cohabitation period of 3 years of the adopted with the adopter individual or the family who has raised him or her, until the application for adoption.

Unlike the Romanian legislation, article 24 paragraph (3) letters b) and c) of Law No. 99/2010 stipulates that the consent of biological parents is not required if they are deprived of their parental rights or in case they are subject to judicial protection in the form of custody.

Another difference between the two legislations resides in the manner in which the minor parent expresses the consent. Thus, according to the Romanian legislation, the minor parent who is 14 years old shall express his or her consent, assisted by his legal guardian. According to the Moldovian legislation, minor parents shall express their consent to the child adoption through their legal representatives, until the age of 16 years old, and individually, after this age.

<sup>50</sup> Article 459 second thesis of Civil Code.

<sup>51</sup> Article 462 paragraph (1) final thesis of Civil Code.

<sup>52</sup> Article 462 paragraph (2) letter a) of Civil Code and article 6 paragraph (2) letter a) of Law No. 273/2004.

<sup>53</sup> Article 462 paragraph (2) letter b) Civil Code and article 6 paragraph (2) letter b) of Law No. 273/2004.

<sup>54</sup> According to article 6 paragraph (5) of the same law, “The condition regarding the existence of a stable relationship and cohabitation shall be verified by the court in charge of the examination of the application for the adoption approval and can be proved by any means of proof.”

<sup>55</sup> Article 6 paragraph (2) letter c) of the same law. In this case, the legal provisions relating to the adoption of the child by the natural or adoptive parent’s spouse, as well as those relating to the name, domicile, rights and obligations between parents and children, the exercise of parental authority, succession rights, identity papers applicable to the child born out of marriage with established affiliation to both parents is properly enforced.

As regards the revocation of consent and the refusal of natural parents or of the guardian to consent to the adoption, both legislations provide for solutions to be adopted in such situations. Thus, according to article 466 of Civil Code, the consent to adoption of the natural parents or, as the case may be, of the guardian may only be expressed after a period of 60 days as of the child's birth and may be revoked within 30 days of the date of its expression. According to article 24 paragraphs (6) and (7) of Law No. 99/2010, the consent of the biological parents can not be expressed until the child's birth, but only after 45 days after his or her birth, and they can revoke their consent until the court decision on the adoption is pronounced.

In relation to the adopter's minimum age, the Moldovian legislation provides for a minimum age for the adopter, but also a maximum age difference between the adopted and the adopter. Thus, according to article 12 paragraph (1) of Law No. 99/2010, the adoption is only allowed for individuals who have full exercise capacity, 25 years old, and are at least 18 years

older than the one they wish to adopt, but not by more than 48 years old. With respect to the condition of the minimum age of 25 years old, the law provides a derogation, in the sense that it is sufficient that only one of the spouses to be 25 years old.

Regarding the age difference between the adopted and the adopter, the Moldovian legislation also provides that the court can approve adoption even if the age difference between the child and the adopter is less than 18 years old, but in no case less than 16 years old.

Referring to interdictions, the differences between the two legislations reside in the fact that the Moldavian legislation does not provide the interdiction of the adoption of two spouses or ex-spouses by the same adoptive parent or adoptive family as well as adoption between spouses or former spouses and also the interdiction of the adoption by same sex individuals. Notwithstanding, even if Law No. 99/2010 does not expressly provide the interdiction of the adoption by same sex individuals, it results from the entire legal regime of adoption.

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