

# SUBSTITUTION OF PARENTAL CONSENT WHEN MINORS TRAVEL ABROAD: SANCTION OR REMEDY?

Anca Magda VOICULESCU\*

## Abstract

*Decisions on establishment of minors' place of residence fall within the sphere of application of joint parental authority, along with decisions concerning the form of education and professional training, complex medical treatments and surgical interventions, respectively administration of minors' property.*

*As a consequence, the principle is that common parental consent is necessary when minors leave national territory in order to travel abroad. In case of parental disagreement, the case-law established a specific line to be followed in courts: substitution of parental consent.*

*The scope of the present article is to analyze from a double perspective (theoretical and practical) the main issues to be considered in solving cases of this type, as well as the implications of judgements pronounced in this area on other interconnected aspects concerning both parents and the child.*

*The objectives of this study are to examine relevant procedural and substantial matters as they derive from the experience so far and propose solutions based on the vector principle of best interests of minors (e.g., the urgent procedure in Romanian Procedural Civil Code called "ordonanță președințială" is admissible, or the procedural path to follow should be the general procedure on the merits of the case; substitution of parental consent should be specific, or also accepted in a general manner, with no reference to the period and location of the minor abroad, etc.).*

*At the same time, the study will ponder on implications of judgements substituting parental consent related to other institutions in the sphere of national law (e.g., common or exclusive parental authority) or international law (incidence of 1980 Hague Convention on the Civil aspects of international child abduction).*

**Keywords:** *common parental authority, joint parental decisions, parental disagreement, substitution of parental consent, international child abduction*

## 1. Introduction

The sphere of joint parental authority applies to important decisions regarding children (including decisions on establishment of minors' place of residence) which request consent of both parents.

Exercise of the right to free movement in the European Union and, more broadly, the possibility to move freely throughout the world has led to the emergence of a new type of litigations in the field of family law, in case parents disagree on establishment of minors' place of residence, either for temporary periods (going abroad for tourism purposes) or definitive (relocation to another country).

The present study aims to analyze in both procedural and substantive terms the remedy offered by jurisprudence for this situation, namely substitution of parental consent (more precisely, substitution of consent of only one of the parents, namely the oppozant parent).

The theme under consideration is important both from theoretical and, above all, practical point of view, since case-law is not always unanimous, and practical situations raising this issue are very frequent. On the

other hand, legal literature in this particular field is practically non-existent.

In this context, the study will concentrate on identifying the procedural means available in domestic law, the main substantive issues raised by this type of litigations, as well as the implications of judgments pronounced in this matter on other institutions of domestic law (parental authority) or international law (international abduction of minors).

## 2. Content

### 2.1. The framework

Article 483 of Romanian Civil Code ("Parental Authority") defines parental authority in terms of general provisions as follows: "(1) Parental authority is the set of *rights* and *obligations* concerning both *person* and *property* of the child which belong equally to both parents." (our underline)

Law no. 272/2004<sup>1</sup> entails special prescriptions, to be corroborated to the general provisions abovementioned.

With relevance for the subject in discussion, Article 36 of Law no. 272/2004 provides: "(1) Both parents are responsible for raising their children. (2)

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\* PhD, Judge at Bucharest Tribunal, trainer in family law at Romanian National Institute of Magistracy, trainer in EU law and judicial cooperation in civil matters at Romanian National School of Clerks, Romanian designated judge in International Network of Hague Judges for 1980 Hague Convention on the Civil Aspects of International Child Abduction (email: ancamagda.voiculescu@gmail.com).

<sup>1</sup> Law no. 272/2004 concerning protection and promotion of children's rights, published in the Official Gazette of Romania no. 557/23.06.2004, successively modified and lastly republished in the Official Gazette of Romania no. 159/05.03.2014.

*Exercise of parental rights and obligations must be in the best interests of the child* and ensure material and spiritual welfare for the child, especially by providing care, maintaining personal relationships and providing growth, education and maintenance, as well as legal representation and administration of patrimony”. (our underline)

The general rule in case of divorce is that parental authority is jointly exercised, according to Article 397 of Romanian Civil Code: “After divorce, parental authority rests jointly to both parents, unless the court decides otherwise”<sup>2</sup>.

It can be concluded from legal provisions presented that parental authority is generally jointly exercised and includes rights and obligations of both parents, concerning the person and also the property of the child. In all cases, exercising parental authority must respect the vector principle of the best interests of the child<sup>3</sup>.

In this context, it is of significant importance to identify decisions on which parental agreement is necessary (substitution parental consent intervenes but in case an agreement of both parents is necessary and it cannot be reached).

To this respect, Article 36 Para 3 of Law no. 272/2004 (actual form)<sup>4</sup> provides that: “If both parents exercise parental authority, but do not live together, *important decisions, such as type of education or training, complex medical treatment or surgery, residence of the child or administration of property* shall be taken only with the consent of both parents.” (our underline)

Juridical literature explained that major decisions are to be distinguished from day-to-day decisions<sup>5</sup> (routine decisions) taking into account their importance and their nonrepetitive nature<sup>6</sup>; also, major decisions are to be considered those which “exceed daily needs of the child”<sup>7</sup>.

Decisions on establishing minors' place of residence (which encompass the situations when

minors travel abroad) are therefore important decisions requesting common parental consent.

For this particular situation, Article 31 Para 3 of Law no. 248/2005<sup>8</sup> provides that: “If there are disagreements between parents regarding the expression of agreement or it is impossible for one of the parents to express his or her will, the departure of minors from Romania shall be allowed only after the disputes have been resolved by the court in accordance with the law, except for situations provided in Article 30 Paras (2) and (3)”<sup>9</sup>.

The aforementioned legal prescription is in fact a particular application in a specific matter (departure of minors abroad) of Article 486 of the Romanian Civil Code, which provides in general terms that in case of disagreement of parents on decisions concerning the child and belonging to the sphere of parental authority: “(...) the guardianship court, after hearing their parents and taking into account the conclusions of the report on the psychosocial inquiry, decides according to the best interests of the child.”

Nevertheless, Article 486 offers only a solution in principle (the court decides according to the best interests of the child), without explaining *in concreto* the juridical mechanism.

It was therefore left for the case-law to conceive this mechanism, which was construed as „parental consent substitution”<sup>10</sup> and explained as follows: “The mechanism of consent is regulated precisely to ensure that a decision is made when parents cannot reach an agreement, but also to prevent an abusive refusal by one of the parents, all in order to ensure that the minor's best interests are respected.”<sup>11</sup>

## 2.2. Specific situations when (common) parental consent is not necessary

Even in case of joint parental authority, there are situations when coparental consent is not necessary so that minors should travel abroad accompanied by a single parent or another major person.

<sup>2</sup> Exclusive parental authority is conceived by Romanian legislator as an exception. Nevertheless, the case-law tends to seriously analyse each particular case and grant exclusive authority either for objective situations (stipulated by Article 507 of Romanian Civil Code) or subjective situations (provided by Article 398 of Romanian Civil Code and Article 36 Para 7 of Law no. 272/2004).

<sup>3</sup> Per Article 2 Para 6 of Law no. 272/2004: “In determining the best interests of the child, at least the following shall be considered: a) the needs of physical, psychological, educational and health development, security, stability and belonging to a family; b) the child's opinion, depending on the age and degree of maturity; (c) the child's history, particularly with regard to situations of abuse, neglect, exploitation or any other form of violence against the child, as well as the potential risk situations that may occur in the future; d) the capacity of parents or persons to care for the child's growth and care to meet his or her specific needs; e) maintaining personal relationships with persons to whom the child has developed attachment relationships.”

<sup>4</sup> The initial form of Law no. 272/2004 prescribed neither which types of decisions were important, nor at least general criteria for evaluation.

<sup>5</sup> For a detailed comparison, A.-M. Voiculescu, *Parental authority versus common custody*, Lex et Scientia International Journal, no. XXV, vol. 1/2018, published by Nicolae Titulescu University and Foundation of Law and International Relations Nicolae Titulescu, Nicolae Titulescu Publishing House, pp. 43 – 44.

<sup>6</sup> J.S. Ehrlich, *Family Law for Paralegals*, 7<sup>th</sup> Edition, Wolters Kluwer Publishing House, New York, 2017, p. 202.

<sup>7</sup> D. Lupaşcu, C.M. Crăciunescu, *Dreptul Familiei*, 3<sup>rd</sup> Edition amended and actualized, Universul Juridic Publishing House, 2017, p. 557.

<sup>8</sup> Law no. 248/2005 on the regime of the free movement of Romanian citizens abroad, published in the Official Gazette of Romania no. 682/29.07.2005.

<sup>9</sup> These exceptions will be discussed further on.

<sup>10</sup> „Therefore, substitution of parental consent when making a decision concerning the minor can be interpreted as an exceptional measure, to be taken in the best interests of the child, when parents cannot agree (...) Another interpretation would deprive of effects legal provisions (...) seriously and irremediably affecting the superior interest of the child, thus paving the way for abusive attitudes of one of the parents on the background of the tensions that arose after the divorce.” (Bucharest Tribunal - IV<sup>th</sup> Civil Section, case no. 14285/302/2018, decision no. 4131A pronounced on 05.11.2018, not published).

<sup>11</sup> Bucharest Tribunal - IV<sup>th</sup> Civil Section, case no. 14285/302/2018, decision no. 4131A pronounced on 05.11.2018, not published, precited.

Subsequent to numerous practical cases which have appeared, when the superior interest of the child was seriously affected by impossibility to make judicial decisions on substitution of parental consent in due time, Romanian legislator decided to modify Law no. 248/2005 and prescribed specific cases when coparental consent/consent of the minor's legal representative is not necessary for minors travelling abroad.

According to Article 30 of Law no. 248/2005:

“(2) In situations provided in paragraph (1) b-d (when the minor travels with a single parent or another major person) it is not necessary the declaration of the *parent deprived parental rights* or, as the case may be, *declared missing* according to the law, if the accompanying person proves to this effect, unless both parents are in this situation and the declaration of the minor's legal representative is mandatory”.

Also, according to Para 3 of the same Article, the border police bodies allow accompanied minors to travel from Romania abroad:

- a) if the attendant justifies the necessity to travel abroad by the fact that the minor needs *medical treatment* which is not possible on the territory of Romania and in absence of which his or her life or health are seriously threatened, on the condition of presentation of documentary proofs issued or endorsed by Romanian medical authorities, indicating the period and the state or states in which the respective medical treatment is to be granted, even if there is no agreement of both parents, the other parent, the surviving parent or the legal representative;
- b) if the attendant demonstrates that the minor is travelling for *official studies or competitions* by presenting appropriate documents showing the period and state or States in which these studies or competitions are to be conducted, even if there is consent of a single parent.

The situations provided by the law when coparental consent/consent of the minor's legal representative is not necessary can be systematized in two categories, namely related to the parents (deprived of parental rights or declared missing), respectively to the child (medical treatment or official studies or competitions).

For the last situation (concerning the child), it should be noted that decisions on complex medical

treatment and education are important decisions, to be taken in consent by both parents.

It is therefore necessary to make a distinction between major decisions on medical treatment and education on the one hand, and major decisions for minors traveling abroad on the other hand (the legislator excluded coparental consent only for the last one)<sup>12</sup>.

Moreover, the law clearly indicates that, in case of medical treatment (as detailed in substantial terms by Article 30 Para 3 a), there is no need for parental consent at all for the child to go abroad (the minor can leave the country without the consent of both parents, accompanied, for example, by a relative).

### 2.3. Substitution of parental consent – procedural aspects

The most argued procedural aspect relates to admissibility of the urgent procedure regulated in Romanian Procedural Civil Code<sup>13</sup> as “*ordonanță președințială*”<sup>14</sup>.

The case-law largely oriented towards acceptance of urgent procedures in cases of parental consent substitution<sup>15</sup>; there were nevertheless situations when these procedures were denied, and parties were instructed to follow the general procedure on the merits of the case.

For reasons to be explained below, we agree to the first opinion.

Article 997 Para 1 of the Romanian Procedural Civil Code enshrines the situations when urgent procedures may be used: “The court, establishing that there is the appearance of law in favor of the plaintiff, will be able to decide provisional measures in urgent cases, in order to maintain a right which would be prejudiced by delay, to prevent imminent and irreparable damage, as well as to remove the obstacles that would arise in the course of execution.”

Starting from this legal basis, juridical literature<sup>16</sup> systematised conditions to be met in cases of “*ordonanță președințială*”: urgency, transitoriness, appearance of law in favor of the plaintiff (no analyse on the merits).

We are of the opinion that all these conditions are satisfied in case of substitution of parental consent for minors traveling abroad, and therefore urgent procedures are admissible in this matter.

The *urgency* relates to the right of the child to free movement<sup>17</sup>, which could not be exercised in case of

<sup>12</sup> By decision of first instance (Judecătoria Sectorului 5 București, case no. 8875/302/2017, decision no. 9150 pronounced on 19.12.2017, not published), the court decided substitution of mother's consent so that minors could travel in Germany for medical treatment accompanied by their father. No reference was made to the fact that the mother did not agree on the medical treatment itself. Bucharest Tribunal - IV<sup>th</sup> Civil Section changed this judgement by decision no. 4486A pronounced on 28.11.2018, not published, substituting the consent for medical treatment also.

<sup>13</sup> Law no. 134/2010, published in the Official Gazette of Romania no. 606/23.08.2012 and republished in the Official Gazette of Romania no. 247/10.04.2015.

<sup>14</sup> Articles 997 and subsequent of Romanian Procedural Civil Code.

<sup>15</sup> Judecătoria Sectorului 4 București, case no. 31918/4/2017, decision no. 15855 pronounced on 21.12.2017, not published.

<sup>16</sup> For an overview of Romanian doctrine on this aspect, V.M. Ciobanu, M. Nicolae (coordinators), *Noul Cod de Procedură civilă comentat și adnotat*, vol. II, Universul Juridic Publishing House, Bucharest, 2016, p. 1389.

<sup>17</sup> Article 25 of Romanian Constitution (amended and completed by Law on the Revision of the Romanian Constitution no. 429/2003, published in the Official Gazette of Romania no. 758/29.10.2003; republished in the Official Gazette of Romania no. 767/31.10.2003); Article 3 Para 2 of the Treaty on European Union (consolidated version published in the Official Journal C 326, 26 October 2012, pp. 13 - 46) and

delay, taking into account the specific circumstances to be detailed further on.

Thus, as a premise situation and in the majority of cases, substitutions of parental consent are requested for limited periods of time and touristic purposes.

On the one hand, a vacation is generally planned for up to 2-3 months before the expected departure date.

On the other hand, a case following the general procedure on the merits cannot be expected to be solved by a definitive judgement apt to be executed eventually by forced execution (first instance and appeal) in the short period of 2-3 months.

In tis context, the only pratical solution which allows the child to exercise the right of free movement is an urgent procedure.

The *temporary nature* of the measure results from the very limitation in time (substitution of parental consent is generally granted for individual periods during scholar vacations).

Finally, the *appearance of law* in favour of the plaintiff (which is the most problematic of the conditions, considered sometimes to imply judgement on the merits) has been argued in the sense that the plaintiff, associated to common parental authority, has the right to take decisions concerning the child and ask for the intervention of the court in case of disagreements<sup>18</sup>.

Having argued the admissibility of urgent procedures, we further consider that it is not even necessary that an application by means of the urgent procedure should be doubled by an application on the merits.

To this respect, it is obvious that a procedure on the merits cannot be decided by a definitive judgement before the established date of departure and therefore it is often the case that such applications on the merits will finally be rejected as remained without object.

In this context, we consider necessary to make a short refference to Article 920 of Romanian Procedural Civil Code, in correlation to a recent judgement of the European Court for Human Rights (although this case concerns a programme of personal ties, the reasoning of the Court is relevant and should also apply to substitution of parental consent).

Article 920 of Romanian Procedural Civil Code has a specific application limited to the period of divorce trial, and some courts considered it was derogatory from Article 997 of the same Code (although situated in the same Book of the Code, the articles mentioned reside in different Titles<sup>19</sup>).

As a consequence, it was argued that, in case a divorce was pending, only measures expressly and

limitedly mentioned in Article 920 of Romanian Procedural Civil Code were allowed, if formulated by using of urgent procedures.

In the recent case *Cristian Cătălin Ungureanu*<sup>20</sup>, the Strasbourg Court held violation of Article 8 of the Convention<sup>21</sup> in view of the fact that the applicant was unable to visit his son during the divorce proceedings (for 3 years and 5 months).

The national court rejected the emergency ordinance by which the applicant requested the establishment of the right of access until the divorce proceedings had been completed.

The denial was argued in the line of reasoning already mentioned, according to which national law did not provide for the right of access during divorce proceedings. Thus, during the divorce trial, courts were allowed to make decisions only in matters strictly indicated by Article 920 (domicile of the child, maintenance allowance, state child allowance and use of the family home), and not other measures falling under Article 997 (even if they were urgent).

Noting that other national courts have admitted similar requests by way of emergency ordinance, the Court essentially sanctioned the insufficient clarity of domestic legislation on this issue and concluded that, as regards the granting of visiting rights during divorce proceedings, Romanian authorities failed to meet their positive obligations arising from Article 8 of the Convention.

#### 2.4. Substitution of parental consent – substantial aspects

Analysis of case-law revealed the existence of some problematic aspects, which will be presented and discussed in the following.

A very frequent situation is represented by applications requiring substitution of parental consent for an indefinite period and non-individualized locations (for example, supplementing *sine die* the consent for travels in the European Union).

It was decided<sup>22</sup> that “consent of the defender could not be supplemented except for one trip abroad, a journey in respect of which both the date of departure and the date of return were established, the country of destination, the route followed to the State of destination (...) however, the applicant's request does not include the travel data, and the court cannot substitute the consent of the defender for any journey

Article 21 Treaty on the Functioning of the European Union (consolidated version published in the Official Journal C 326, 26 October 2012, pp. 47 - 200).

<sup>18</sup> Bucharest Tribunal - IV<sup>th</sup> Civil Section, case no. 14285/302/2018, decision no. 4131A pronounced on 05.11.2018, not published, precited.

<sup>19</sup> Article 920 is situated in Title I, the VII<sup>th</sup> Book of Romanian Procedural Civil Code (“Divorce Procedure”), and Article 997 is situated in Title VI, the VII<sup>th</sup> Book of Romanian Procedural Civil Code (“Emergency Ordinance Procedure”).

<sup>20</sup> ECtHR, Decision adopted on 04.09.2018, Application no. 6221/14, case *Cristian Cătălin Ungureanu v. România*.

<sup>21</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04.11.1950, ratified by Romania by Law no. 30/18.05.1994, published in the Official Gazette of Romania no. 135/31.05.1994.

<sup>22</sup> Bucharest Tribunal - IV<sup>th</sup> Civil Section, case no. 5401/300/2016, decision no. 4989A pronounced on 16.12.2016, not published.

to be made (...) this consent must be requested for each individual journey.”<sup>23</sup>

Another common situation concerns relocations of one parent together with the child in another country, generally refused by the other parent and therefore resulting in applications in courts for substitution of parental consent.

Some courts analysed this type of applications according to Article 36 Para 3 of Law no. 272/2004 (important decision requiring parental agreement, doubled by the sanction of substitution in case of abusive refusal).

Other courts<sup>24</sup> took into account Article 497 of Romanian Civil Code (“Change of the child’s domicile”), which states: “(1) If it affects the exercise of parental authority or parental rights, the change of the child’s domicile, along with the parent with whom he or she resides can only take place with the prior consent of the other parent. (2) In the event of a misunderstanding between parents, the court shall decide the best interests of the child (...).”

It seems that Article 497 of Romanian Civil Code institutes an exception from Article 36 Para 3 of Law no. 272/2004, which qualifies the decision on establishment of minors’ place of residence as major and asks for parental agreement *in all cases*.

Article 497 brings extra nuances, namely that agreement is not always necessary, but “if it affects the exercise of parental authority or parental rights”.

Without choosing an excessive formalism with regard to formulation of the judgement (e.g., “disposes substitution of parental consent for change of domicile” versus “admits the request for change of domicile”), we consider that incidence of Article 497 has clearly the consequence of non-admissibility of the urgent procedure.

We argue that analyse of conditions imposed by Article 497 (“if it affects the exercise of parental

authority or parental rights”) exceeds the “appearance of law” specific to provisional measures and involves analysis of the merits of the case.

Finally, another situation which often appears in practice is a double request substitution: for issuing the passport of the minor<sup>25</sup> and for traveling abroad with the child.

In this case, the focus transcends from juridical to practical aspects: issuance of minor’s passport requires the presence of the child in front of the Service for passports for taking the child’s picture.

In practice, there were cases when the child’s personal ties programme did not overlap with the programme of the Service for passports, and therefore, after having gained in court the substitution case, the petitioner could not put in practice the judgement (practical inconveniences already mentioned and the refusal of the other parent to allow personal ties outside the framework of the programme).

We consider that, in such cases, the application should also ask for supplementing the personal relationship programme with one day, necessary for the presence of the child at the Service for passports.

## 2.5. Implications of judgements substituting parental consent

Decisions for substitution of parental consent for departure of minors from the country may produce multiplied effects, which overcome the sphere of the dispute in which the decision of substitution has been pronounced.

These effects can arise both in connection with domestic law institutions (for example, exercise of joint or exclusive parental authority) and international law<sup>26</sup> (international abduction of children<sup>27</sup>).

### 2.5.1. Institutions of national law

Repeated decisions on substitution of parental consent<sup>28</sup> denote a pattern of an abusive way of

<sup>23</sup> A similar line of reasoning was adopted by Judecătoria Sectorului 4 București, case no. 30372/4/2017, decision no. 15399 pronounced on 13.12.2017: “(...) the opposition of the defendant regarding the displacement of the minor abroad, at any time and for a period not determined in concrete terms, cannot be presumed to be a manifestation of the abuse of rights (...) substitution of the defendant’s consent to the movement of the minor outside the country, anytime and anywhere, equates to deprivation of the parent (...) of parental rights (...).”

<sup>24</sup> Judecătoria Sectorului 1 București, case no. 71299/301/2014, decision no. 7127 pronounced on 21.05.2015, not published; Bucharest Tribunal - IV<sup>th</sup> Civil Section, case no. 34377/301/2016, decision no. 2683A pronounced on 03.07.2018, not published.

<sup>25</sup> Matters concerning issuing of the passport for a minor are considered to fall in the area of application of the concept of “parental authority” (CJEU, Decision adopted on 21.10.2015, C-215/15, case *Gogova v. Iliiev*). In this case, the child was a Bulgarian national who lived in Italy (where both parents lived separately). When the mother sought to renew the child’s Bulgarian passport, the father refused to grant his consent, which was required under Bulgarian law. The Bulgarian Supreme Court made a reference for a preliminary ruling to the CJEU on the issue whether the passport renewal fell within the meaning of “matters of parental responsibility” for the purposes of Article 8 of the Regulation no. 2201/2003 (Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, published in the Official Journal L338/1, 23 December 2003). The CJEU ruled that the concept of parental responsibility was given a broad definition in the Regulation and that the action in this case was clearly within that definition.

<sup>26</sup> For an over view of parental authority in connection to international law, A.-M. Voiculescu, *Autoritatea părintească în contextul litigiilor privind răpirile internaționale de minori*, in M. Avram (coordinator) *Autoritatea părintească – între măreție și decădere*, Solomon Publishing House, Bucharest, 2018, pp. 178 – 208.

<sup>27</sup> For a detailed presentation of procedural and substantial interconnections between 1980 Hague Convention on the civil aspects of international child abduction and domestic litigations, A.-M. Voiculescu, *Interaction between Hague Convention on the civil aspects of international child abduction and domestic litigations concerning domicile of the child and parental authority*, published in *Journal of International Scientific Session organised by Nicolae Titulescu University and Foundation of Law and International Relations Nicolae Titulescu, The 12th International Conference “Challenges of the Knowledge Society”*, Nicolae Titulescu Publishing House, Bucharest, 2018, pp. 347 – 355.

<sup>28</sup> They may concern not only the situation when minors travel abroad, but also other important decisions which come into the sphere of common parental authority.

exercising parental authority on behalf of the parent whose consent was substituted.

In this situation, the case-law considered deciding upon exclusive parental authority on the basis of Article 398 of Romanian Civil Code and Article 36 Para 7 of Law no. 272/2004<sup>29</sup> (which gives the courts possibility to appreciate in subjective situations, depending on circumstances specific to each individual case).

We consider that the situation mentioned is a “serious reason” in the meaning of Article 398 of Romanian Civil Code, related to “risks for the child that would derive from the exercise by that parent of parental authority”.

To this effect, it cannot be ignored that judicial substitution of consent on every important decision obviously implies postponing the timing of the decision making until a final judgement is taken, with the inevitable consequence of affecting the best interests of the child by mere lack of decision in due time.

According to juridical literature<sup>30</sup>, Article 1628 of German Civil Code prescribes an interesting solution in such situations, namely the court may transfer authority to take that type of decisions to one of the parents.

Romanian juridical system does not have such a legislative solution, and therefore the solution of exclusive parental authority offered by the case-law should be pondered on in situations of repetitive substitution of parental consent.

### 2.5.2. International institutions

The Hague Convention on the Civil Aspects of International Child Abduction<sup>31</sup> (the 1980 Hague Convention) is an intergovernmental agreement which aims „to secure the prompt return of children wrongfully removed to or retained in any Contracting State (...)”<sup>32</sup>.

The principle is that the court in the state where that child has been removed/retained will order the immediate return of the minor, except for a few situations provided in Article 12 of the Convention (integration of the child into the new environment), Article 13 of the Convention (serious psychological or physical risk to the child in the case of return) and Article 20 of the Convention (the return is not allowed by the fundamental principles of the requested state

with regard to the safeguarding of human rights and fundamental freedoms).

For the matter under discussion in this study, Article 12 of the Convention presents significant relevance in the light of the provisions of two paragraphs, according to which: „(1) When a child has been illegally removed or retained (...) and *a period of less than one year has elapsed from the moment of removal or retaining (...)* the requested authority shall arrange for its immediate return. (2) The judicial or administrative authority, having been notified even after the expiration of the one-year period provided for in the previous paragraph, shall also order the return of the child, *unless it is established that the child has integrated into his/her new environment*” (our underline)

The period of 1 year to which the Convention makes reference is of high importance as to juridical consequences: if less than 1 year has elapsed from the moment of removal or retaining of the child in another state, the court shall decide immediate return of the child; on the contrary, if more than 1 year has elapsed, the court may appreciate upon integration of the child in the new environment and reject the return in the state of origin.

Taking into account the aspects presented above, we consider that substitution of parental consent so that minors should travel abroad *for periods that exceed 1 year* might lead to an interpretation of integration of the minor into the new environment and thus indirectly open the possibility to change the child's domicile in another country by a rather simple procedure<sup>33</sup>.

This is another reason why we consider important to make the distinction between substitution of parental consent for touristic travels outside the country and the change of domicile of the child abroad.

It is also the reason why we do not agree to some (few) situations when the case-law decided to substitution of parental consent for periods of even 3 years<sup>34</sup>.

This type of judgements was probably pronounced starting from a provision of national law

<sup>29</sup> Article 398 of Romanian Civil Code („Exclusive parental authority”): “For serious reasons, given the interests of the child, the court decides that parental authority is exercised exclusively by a parent. (2) The other parent retains the right to watch over the child's care and education and the right to consent to adoption” (our underline). Article 36 Para 7 of Law no. 272/2004 exemplifies the subjective reasons mentioned by Civil Code in a general manner: “There are considered serious grounds for the court to decide that parental authority is exercised by a single parent alcoholism, mental illness, drug addiction of the other parent, violence against children or against the other parent, convictions for human trafficking, drug trafficking, crimes concerning sexual life, crimes of violence, as well as any other reason related to risks for the child that would derive from the exercise by that parent of parental authority.” (our underline)

<sup>30</sup> B.D. Moloman, L.-C. Ureche, Noul Cod Civil. Cartea a II-a. Despre familie. Art. 258-534. Comentarii, explicații și jurisprudență, Universul Juridic Publishing House, Bucharest, 2017, p. 671.

<sup>31</sup> Concluded at The Hague on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, which entered into force on 01 December, 1983.

<sup>32</sup> Article 1 of 1980 Hague Convention.

<sup>33</sup> If formulated by way of an emergency ordinance, the merits of the case will not be analysed, and the application will be judged taking into account the mere appearance of law.

<sup>34</sup> E.g., Judecătoria Sectorului 5 București, case no. 8875/302/2017, decision no. 9150 pronounced on 19.12.2017, not published, precited, decided on substitution of consent to travel abroad for a period of 3 years “considering that this is a reasonable period both for completing the medical treatment and traveling for recreational purposes”.

relatively recently introduced in Law no. 248/2005 by Law no. 169/2016<sup>35</sup>.

Article 30 Para 1 b of Law no. 248/2005 (actual form) stipulates that minors can leave the country accompanied by a single parent „if the accompanying parent shall submit a declaration of the other parent showing his or her agreement to travel abroad for a *period not exceeding three years* from the date of the declaration”. (our underline)

In the larger context presented so far, we consider that a clear distinction should be made between situations when parents *agree* on minors traveling abroad, respectively there is a *judiciary judgement* on parental substitution consent.

In a logical interpretation of Article 30 Para 1 b previously cited, only the first situation (parents agree) falls within its sphere of application (period of three years), as the text automatically implies an agreement of the parent who accepts to offer the declaration for the minor to travel abroad (and therefore judicial substitution is not necessary).

The literary interpretation leads to the same conclusion, as the text associates the period of three years to the declaration of the parent (not a judgement of parental consent substitution).

Finally, if an agreement intervenes and parents decide to make an agreement declaration for 3 years on the basis of mutual trust, it signifies that the parents voluntarily take the risk of a potential application of Article 12 Para 2 of the Convention (non-return of the child for integration in the new environment).

Such possibility should nevertheless not be opened in an indirect way by the court itself in a situation of substitution, when it is clear that parents disagree and do not trust each other (and therefore the risk of non-return is higher).

Moreover, there are situations when parents justify their refusal invoking exactly the fear that the other parent will not bring back the child, which should carefully be analysed depending on particular aspects of the case<sup>36</sup>.

### 3. Conclusions

According to Romanian national legislation, the important decisions enshrined in the sphere of application of joint parental authority are decisions on establishment of minors' place of residence, form of education and professional training, complex medical treatments and surgical interventions, respectively administration of minors' property.

The principle is that the abovementioned decisions cannot be taken but with the consent of both parents.

The law prescribes nevertheless situations when coparental consent is not necessary in case of decisions on establishment of minors' place of residence (more precisely, for traveling abroad during limited periods of time).

These situations are related either to parents (deprived of parental rights or declares missing), or the child (medical treatment or official studies or competitions).

On the other hand, if co-agreement is necessary and parents cannot reach it, the remedy conceived by case-law for safeguard of the principle of the best interests of the child is substitution of parental consent by national courts (judicial limitations of common parental authority).

This remedy in favour of the child is at the same time a sanction for the parent who acts in an abusive manner and out of the scope of common parental authority.

The courts seized with applications for substitution of parental consent should therefore carefully consider the balance between the interest of the child and the reasons invoked by the oppozant parent, according to the individualities of each case.

From a procedural point of view, both urgent procedures of provisional measures, and procedures on the merits of the case should be available (although only urgent procedures can be efficient, as urgency is of the outmost importance in such cases).

Decision on substitution of parental consent should be seriously pondered on, as the effects overcome the sphere of the dispute in which the decision of substitution has been pronounced.

In terms of national law, repetitive decisions of substitution of parental consent may have the final outcome of exclusive parental authority, as they profile the pattern of an abusive parent.

In terms of international law, an unclear decision on substitution of parental consent may indirectly lead to a change of domicile of the child in another country in consideration of Article 12 Para 2 of 1980 Hague Convention (integration of the minor into the new environment if the period elapsed from departure/non-return exceeds 1 year).

For reasons presented, decisions on parental substitution for minors traveling abroad should always clearly indicate the precise location and the period during which the child may remain abroad without the consent of the other parent, which should not exceed 1 year.

<sup>35</sup> Law no. 169/2016 for amending and completing Law no. 248/2005 on the regime of the free movement of Romanian citizens abroad, published in the Official Gazette of Romania no. 772/03.10.2016.

<sup>36</sup> “The refusal of the defendant can be considered abusive since she has not argued her reluctance in terms of the superior interest of the minor, not explaining *in concreto* why the travel is not appropriate, expressing only the concern that the applicant would not return the child to her home, without any substantiated arguments” (Judecătoria Sectorului 4 București, case no. 31918/4/2017, decision no. 15855 pronounced on 21.12.2017, precited).

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