PROTECTION ORDER VERSUS (?) PARENTAL AUTHORITY

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Abstract

Parental authority includes in its scope important decisions related to minors, as identified by Article 36 of Law no. 272/2004 (form of education and professional training, complex medical treatments and surgery, residence of the child or administration of property), which are by consequence to be taken only by agreement of both parents. It is an institution which is genuinely based on collaboration of parents.

Apparently a totally distinct institution, protection order is provided for by Law no. 217/2003 as a legal instrument to ensure the protection of victims against domestic violence. It is often used by one parent against the other, in the larger context of juridical disputes generated by divorce, and implies categorical opposition.

Although the two legal institutions are distinguished and the premises on which they act are indeed different, case-law has revealed the existence of significant interferences, which exceed simple terminological differences and arise problematic issues both in substance, as in procedure.

The purpose of this article is to examine these interconnections from a double perspective, both theoretical and practical, starting from a natural question: does the existence of a protection order interfere (and in the affirmative, to what extent) with the exercise of parental authority?

Therefore, the objectives of this study are to examine relevant procedural and substantial matters as they derive from the experience so far and propose solutions, in an attempt to demonstrate that these two institutions may function together.

Keywords: *protection order, parental authority, important decisions, parental disagreement, juridical interferences*.

1. Introduction

The area of family law comprises a large variety of issues, which are inevitably connected to one another from multiple and intricate perspectives, as they all cover the same main subject: family and interconnections among its members.

The present study will only ponder on two of the most significant and actual subjects in family law, respectively parental authority and protection orders.

As these two institutions generally function on different premises (collaboration of parents in case of parental authority/conflict in case of protection orders), but in the common context of issues concerning the same family, the question arises if existence of protection orders affects the exercise of parental authority.

This question presents both substantial and procedural valences and implies great practical and theoretical importance, as it is often the case that procedures concerning parental authority and protection orders are pending at the same time/in short periods of time, and solutions to be pronounced influence one another.

In this context, the purpose of this article is to examine the interconnections between these two institutions, as they derive from the practical experience so far.

To reach this aim, the study will examine the interferences from a double perspective, both substantial and procedural.

Also, solutions are to be proposed, in an attempt to demonstrate that these two institutions, although starting from different premises, may function together.

Doctrinal opinions, where identified, will also be presented, with the necessary note that in Romanian juridical literature the topic has scarcely been discussed.

2. Content

2.1. Parental authority

Parental authority is a notion common to many legal systems (national laws, EU law[1], private international law[2]) and generally features the same characteristics as they are synthetically to be presented in case of Romanian legislation.

In the framework of this article, it will only be pointed out that parental authority is clearly to be differentiated from custody[3].

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[1] The most important EU legal instrument is 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 L 338/1, 23 December 2003 (Article 2).

[2] E.g., Convention on the Rights of the Child, adopted by United Nations General Assembly, signed in New York on November 20, 1989, which entered into force on September 2nd, 1990 (Article 18 Para. 1).

[3] S.P. Gavrilă, *Instituții de dreptul familiei în reglementarea Noului Cod Civil*, Hamangiu Publishing House, 2012, p. 205: „ (…) notion borrowed from other legal systems, which does not overlap identically to exercise of parental authority (…)”. For a comparative perspective

2.1.1. Notion, forms and premises

In Romanian legislation, the general provisions of Romanian Civil Code[4] are to be corroborated to the special provisions comprised in Law no. 272/2004[5].

The definition and main characteristics of the notion of parental authority are to be found in Article 483 of Romanian Civil Code („Parental Authority")[6], whereas Article 487 of the same legislative act („Content of parental authority")[7] details the content of the same concept.

It results from the above-mentioned articles that, in essence, parental authority is a set of rights and obligations concerning both person, and property of the child.

In case of divorce, the general rule is represented by common parental authority (Article 397 of Romanian Civil Code[8]), whereas exclusive/sole parental authority is the exception.

Exceptions referred to are either objective (expressly prescribed by Romanian Civil Code[9]), or subjective (Romanian Civil Code and Law no. 272/2004[10] - courts have the possibility to appreciate upon sole parental authority in subjective situations, given circumstances specific to each case).

As the standard is represented by common parental authority, which imposes consent of both parents in taking (important) decisisons concerning children, it can be concluded that the premise on which parental authority operates is collaboration of parents.

2.1.2. Area of application

At present, Article 36 Para 3 of Law no. 272/2004[11] clearly defines the area of important decisions belonging to the sphere of common parental authority, which must achieve joint consent[12].

These decisions are related *in concreto* to type of education or training, complex medical treatment or surgery, residence of the child or administration of property.

As in these cases common consent is mandatory by law (but nevertheless the law does not offer a solution in case of disagreement between parents), the solution conceived by jurisprudence was substitution of consent of the opposant parent[13].

Generally, important decisions reffered to above are discussed in opposition to routine (day-to-day) decisions. The first must be agreed upon by parents, whereas the latter are to be made individually by the parent who is currently taking care of the child.

2.2. Protection orders

Similar to parental authority, protection order is an institution which appears in different legal systems

between parental authority and custody, 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 Niculae Titulescu, Nicolae Titulescu Publishing House, pp. 43 – 44.

[4] Law no. 287/2009, published in the Official Gazette of Romania no. 511/24.07.2009 and republished per Article 218 from Law no. 711/2011, published in the Official Gazette of Romania no. 409/10.06.2011.

[5] 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.

[6] "(1) *Parental authority is the set of rights and obligations concerning both person and property of the child which belong equally to both parents*. (2) Parents exercise parental authority only in the best interests of the child, with due respect to his person, and associate the child in all decisions affecting him, considering the age and maturity of the child. (3) Both parents are responsible for bringing up their minor children" (our underline).

[7] "Parents have the right and duty to raise the child, taking care of the child's health, physical, mental and intellectual upbringing, and also the child's education and training, according to their own beliefs, characteristics and needs of the child; they are bound to give the child guidance and advice needed in order to properly exercise the rights granted by the law".

[8] "After divorce, parental authority rests jointly to both parents, unless the court decides otherwise".

[9] Article 507 of Romanian Civil Code ("Exclusive parental authority") stipulates an exhaustive list: "If one parent is *deceased*, *declared dead* by judgment, under *interdiction*, *deprived of the exercise of parental rights* or if, for any reason, it is *impossible* for him or her to express his or her will, the other parent exercises parental authority alone" (our underline).

[10] 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). Subsequently, Article 36 Para 7 of Law no. 272/2004 exemplifies in a nonexhaustive list the subjective reasons mentioned by Civil Code in a general manner, as follows: "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).

[11] "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."

[12] The initial form of Law no. 272/2004 did not prescribe either types of important decisions, or at least general criteria upon which to determine them.

[13] In case of disagreement, Article 486 of Romanian Civil Code offers solutions formulated in a very general manner (the court decides according to the best interests of the child), nevertheless without defining *in concreto* the juridical mechanism that courts should take into account.

belonging both to national[14], EU[15] and private international[16] law sphere of application.

2.2.1. Notion, forms and premises

Protection order was conceived as an instrument to provide protection for victims of domestic violence.

According to Law no. 217/2003[17], preventing and combating domestic violence is part of the integrated family care and support policy, considered an important public health issue.

At present, Romanian legislation offers two forms of this legal instrument: protection order (issued by the court) and provisional protection order (issued by police forces).

As it derives from the very reason leading to adoption of this instrument (safeguarding victims of violence), protection order functions on premises of violence and conflict (generally among members of the same family).

2.2.2. Area of application

The law acknowledged for protection orders a larger sphere of application compared to provisional protection orders.

In terms of provisional protection orders, Article 31 Para. 1 opens possibility to take one/more of the following measures: temporary eviction of the abuser from the common dwelling, reintegration into the common dwelling of the victim and the children, obligation for the aggressor to maintain a specified minimum distance, obligation for the abuser to wear an electronic surveillance system at all times, order to the aggressor to hand over the weapons held to the police.

By comparison, Article 38 Para. 1 regulating protection orders prescribes all the measures above mentioned in case of provisional protection orders, and in addition: limitation of the aggressor's right of use of only a part of the common dwelling, accommodation/placement of the victim and children in a support center, prohibition for the abuser to travel to certain specific localities or areas, prohibition of any contact with the victim, including telephone, mail or otherwise, entrusting minor children or establishing their residence.

Indeed, measures available in the framework of protection orders are more diversified in number and nature, and therefore may be better adapted to particular circumstances of each case.

This disctinction may be explained both in relation to the authority taking the measures (courts are given extended competences compared to police forces), but also to the speediness of the procedure (provisional protection orders are issued promptly in case of imminent risk, whereas adoption of protection orders is made in case of a risk only after a trial before a court).

2.3. Interferences between parental authority and protection orders

None of the measures to be taken by provisional protection orders interfere in any way to parental authority.

By contrast, two of the measures provided in the framework of protection orders issued by courts are relevant for the topic in discussion, respectively: "prohibition of any contact, including by telephone, by mail or in any other way, with the victim"[18] and "entrusting minor children or establishing their residence"[19].

Although not in an obvious manner, prohibition of *any* type of contact in case the victim and the aggressor are also acting as parents interferes with the joint exercise of parental authority, as parents have to be in a *minimum* contact (in whatever form) in order to take important decisions.

On the other hand, the measure of entrusting the child ("încredinţare") available in the procedure of protection orders has obvious interconnections with parental authority, as the first implies both domicile of the child, and also the right to make decisions concerning the child's life (and this aspect belongs to the area of parental authority).

In these two cases, the institutions of parental authority and protection orders present more or less obvious interferences, which start from simple terminological differences and develop in problematic issues both in procedure and substance, as it will be further discussed.

2.3.1. Terminological differences

It can easily be noticed that the Civil Code and Law no. 272/2004 operate with the notion of "**parental authority**", whereas Law no. 217/2003 uses the notion of "**încredinţare**".

This terminological difference is of significant importance, as there is a major distinction between the notion of "parental authority" (introduced by Romanian

[14] The "POEMS" project, co-funded by the Daphne program of the European Union, focused on analysing the law on protection orders in 27 EU Member States. This project and its final report are available along with the country fiches at the following link: http://poems-project.com/results/country-data, last accession on 08.03.2021, 18,46.

[15] There are two EU legal instruments, one applying in civil matters (Regulation (EU) no. 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters of the European Parliament and of the Council, published in the Official Journal L 181, 29 June 2013), and the other one in criminal area (Directive 2011/99/EU of the European Parliament and the Council of 13 December 2011 on the European protection order, published in the Official Journal L 338, 21 December 2011).

[16] Council of Europe Convention on preventing and combating violence against women and domestic violence (*Istanbul Convention*), adopted in Istanbul, Turkey on 11 May 2011, into force on 1 August 2014.

[17] Law no. 217/2003 on the prevention and combating of domestic violence, published in the Official Gazzette of Romania no. 367/29.05.2003, republished in the Official Gazzette of Romania no. 365/30.05.2012, no. 205/24.03.2014 and no. 758/19.08.2020.

[18] Article 38 Para. 1 h) of Law. no. 217/2003.

[19] Article 38 Para. 1 j) of Law. no. 217/2003.

Civil Code in 2011) and the notion of "încredinţare" (legiferated by the former Romanian Family Code[20]).

The notion of "încredinţare" implied domicile of the child, and also the right to make unilaterally decisions with respect to all aspects of the child's life, both in favour of the parent who had the domicile of the child.

In opposition, the notion of "parental authority" stipulated in the present legislation encompasses only the right to make decisions (jointly or exclusively), without including the domicile of the child (which is to be decided in favour of one of the parents, based on different criteria from those taken in consideration when deciding the form of parental authority – sole or common).

This difference in terminology (and also substance) was indeed justifiable in the beginning, as at the time of adoption of Law no. 217/2003 the former Family Code was still in force, and therefore it seemed natural to take over its terminology and notions.

Nevertheless, maintenance of this difference can no longer be explained at present, 10 years after entry into force of the Civil Code and successive amendments of Law no. 217/2003 (the last one by Law no. 106/2020[21]).

This "prolongement" of notions which are no longer actual resulted sometimes in conflicting case-law.

Thus, when issuing a protection order under the form stipulated by Article 38 Para. 1 j), some courts decided only on domicile of the child[22], whereas others decided both on domicile and exercise of parental authority (exclusive/common)[23].

This distinction has of course practical implications, as parental authority and domicile are currently different notions and cover different aspects, and it is therefore of importance if both/only one of them can be decided in the framework of protection orders procedure.

On the other hand, it should also be pointed out that, in the same Article 38 Para. 1 j), Law no. 217/2003 uses the notion of "**residence**" of minor children.

In our opinion, the legislator had in mind the "**domicile**" of the child, as reffered to by the Civil Code and Law no. 272/2004, which is a notion distinct from „residence".

Our opinion is supported by the case-law, where the quasimajority of jurisprudence disposed (when adopting protection orders under Article 38 Para. 1 j) of Law no. 272/2004) upon domicile, and not residence of the child[24].

This divided case-law, but also the necessity to adapt terminology to the actual legislation justify in our opinion, *de lege ferenda*, new amendments on Law no. 217/2003, in order to replace the notions of "încredinţare" and "residence" with the notions of "parental authority" and "domicile" of the child.

2.3.2. Procedural interferences

In the broader context created by divorce, it is often common that there are litigations pending at the same time, where practically the same measures are requested, but following different procedural ways.

Exemplifying one of these situations relevant to the subject in discussion, it is a rather frequent case where one parent claims existence of acts of violence against the minor exercised by the other parent.

In this case, the parent asks for single parental authority and establishment of the minor's domicile using the special procedural path of presidential order ("ordonanță președințială").

In parallel, by another special procedure consisting in protection order, the same parent requests entrustment of the child and establishment of the residence of the child.

As the same measures are asked for by two different special procedures, the question arises whether these two procedures may coexist and, if so, which takes precedence[25].

We are of the opinion that procedural coexistence cannot be denied, and therefore concomitent pending of

[20] Law no. 4/1953, published in the Official Gazette of Romania no. 4/04.01.1954, amended by Law no. 4/1956 published in the Official Gazette of Romania no. 11/ 04.04.1956, republished in the Official Gazette of Romania no. 13/18.04.1956, succesively amended, lastly by Law no. 59/1993, published in the Official Gazette of Romania no. 177/26.07.1993.

[21] Law no. 106/2020 on amending and supplementing Law no. 217/2003 for preventing and combating domestic violence, published in the Official Gazette of Romania no. 588/06.07.2020.

[22] Judecătoria Sector 5 București, decision no. 194/16.01.2019, case no. 782/302/2019, definitive on the aspect under discussion by Bucharest Tribunal, Fourth Civil Section, decision no. 670A/25.02.2019, not published (the appeal was approved on aspects different from the one in discussion). The courts decided in this case only on domicile of the child.

[23] Judecătoria Sector 3 București, decision no. 5463/03.05.2018, case no. 9490/301/2018, definitive by Bucharest Tribunal, Fourth Civil Section, decision no. 2321A/11.06.2018, not published. The courts decided in this case both on domicile of the child, and exclusive parental authority in favour of the mother.

[24] E.g., Judecătoria Sector 3 București, decision no. 9014/17.08.2017, case no. 20207/301/2017, definitive by Bucharest Tribunal, Fourth Civil Section, decision no. 2971A/25.09.2017, not published. For an exception, Judecătoria Sector 5 București, decision no. 3454/13.05.2019, case no. 11039/302/2019, not published, which decided establishment of residence of the children.

[25] Protection order was considered a variety of presidential ordinance (O. Ghiță, *Ordinul de protecţie – varietate a ordonanţei preşedinţiale*, available online at the following link: https://www.unbr.ro/ordinul de protecţie – varietate a ordonanţei preşedinţiale - UNBR, last accession on 23.03.2021, 18,51).

the procedures mentioned above cannot result in inadmissibility[26] or suspension[27] of the either of them.

Indeed, both procedures have "equal status": they are special in nature, have urgent character, and the measures adopted have limited function in time (in case of presidential order measures last at most until the litigation on the merits is solved in first instance[28], whereas in case of the protection order measures take effect for a period of maximum 6 months[29]).

At the same time, judgements pronounced by courts of first instance are executory in both procedures and it is not possible to assess which will be solved first.

Given the reasons presented, we argue that nor protection order or presidential order should take *de plano* procedural precedence (by means either of inadmissibility, or suspension).

On the other hand, it is obvious that connection between procedures cannot be ignored, as long as the same measures are at stake on the merits in both cases and the solutions to be pronounced should not be contradictorial.

It is the reason why we opinate that this interference should be regulated not by way of procedural inadmissibility or suspension, but by way of another procedural solution, consisting in the exception of "lack of interest".

In this line of reasoning, as soon as one of the procedures is solved by an executory decision of the first instance, the other procedure *may remain* without interest.

Thus, if measures requested are granted (either by way of presidential order or protection order), the interest in continuing the other procedure (although existing at the time of registering the procedure) no longer subsists.

If measures requested are rejected by the court that first decides on one of the procedures, the interest in maintaining the other procedure still subsists.

2.3.3. Substantial interferences

As already underlined, substantial interconnections appear in case of two of the measures available by way of protection orders, respectively prohibition of any contact between the victim and the aggressor and entrusting minor children or establishing their residence.

Whether "prohibition of any contact" does not raise any problems in case of sole parental authority, further caution is to be taken in case of common parental authority.

Indeed, the juridical difference between exclusive and joint parental authority is (mandatory) collaboration and communication between parents.

Thus, where parents are totally independent in taking all types of decisions concerning children in case of sole parental authority, they must communicate and collaborate on important decisions in case of common parental authority.

Consequently, from a practical point of view, important decisions concerning minors may be agreed upon only in a context of parental discussions, which obviously imply existence of at least a *minimum contact* between parents.

Therefore, we opinate that, in case of joint parental authority, prohibition by the court of *any contact* should be avoided, so that the minimum contact necessary for taking important decision should be preserved.

We argue that Article 38 Para 1 j) of Law no. 217/2003 leaves courts a large margin of appreciation, as it defines prohibition of any contact in a generous manner: including *telephone*, *mail* or *any other way*.

Depending on the circumstances of each individual case, when issuing a protection order in the form of prohibition of contact between parents, courts may allow certain easily controllable forms of contact e.g., exclusively by mail and only when important decisions as prescribed by law must be taken.

This is the case, for example, when parents must decide *in due time* on the school the child is to be enrolled to, or *promptly* on performing a complex medical surgery on the child. In case these decisions are not taken in sometimes a very limited period of time, the child's right to education/health/life might be endangered.

Should these situations appear inside the period the protection order is in force, interdiction of any contact will result in no possibility to take the decision at the time it is needed.

To this respect, it should carefully be considered that compliance with the protection order is mandatory

[26] Which might be argued following the reasoning that relation between protection order or presidential order is to be determined by the principle *lex generalia – lex specialia*.

[27] Which might be taken into consideration as the same measures are asked in both procedures, according to Article 413 Para. 1 of Romanian Procedural Civil Code ("1. The court may suspend the judgment: 1. where solving the case depends, in whole or in part, on the existence or non-existence of a right which is the subject of another judgment").

[28] Corroboration of Article 997 and Article 448 of Romanian Procedural Civil Code. According to Article 997: "The order is provisional and executory. *If the judgment does not include any mention of its duration and the factual circumstances envisaged have not changed, the measures ordered shall take effect until the dispute over the substance has been resolved*." On the other hand, Article 448 Para. 1 provides that: "The judgments of the first court shall be *executory by law* where they concern: 1. establishing the *exercise of parental authority, establishing the residence of the minor*, and how to exercise the right to have personal ties with the minor" (our underline).

[29] According to Article 39 of Law no. 217/2003: "1. The duration of the measures ordered by the protection order shall be determined by the judge, not exceeding 6 months from the date of issue of the order.

2. *If the judgment does not include any mention of the duration of the measures ordered, they shall take effect for a period of 6 months from the date of issue*" (our underline).

by law both for the offeder (Article 47 Para. 1[30]), and also for the person protected by it (Article 44 Para 3[31]).

Prohibition of any contact by way of protection orders might therefore create an impossibility to exercise common parental authority as long as the protection order is in force.

This will ultimately directly affect the child, although the bests interests of the child are at the very heart and protected by all institutions belonging to the area of family law.

Nevertheless, the "collision" between protection orders and parental authority may be avoided by the way courts formulate *in concreto* the interdiction of contact, as the margin of appreciation granted by the legislator allows harmonization of institutions.

As far as the measure of entrusting minor children or establishing their residence is concerned by way of protection order, we consider a special attention should be taken in formulating the measure according to the actual terminology used by Romanian Civil Code and Law no. 272/2004.

Therefore, courts should precise if the measure refers only to exercise of parental authority (joint or exclusive)/establishment of the domicile of the child/both of them, instead of using the imprecise terminology used by Law no. 217/2003.

If not, discrepancies and collisions might appear if different procedures concerning the same family are pending or succeeding, as imprecise previous judgements might create misjudgements for those following.

3. Conclusions

Although a long period of time has elapsed since the adoption of the new Romanian Civil Code which represents the general framework, there are still situations where specific legislation has not been adapted to its new terminology and institutions.

Such is the case of Law no. 217/2003, which should be further amended in order to take over the notions provided for in the Civil Code, as it still operates with the notion of "încredinţare", different both in terminology, as in content, from the notion of "parental authority" introduced by the Civil Code.

This inadequacy has consequences not only from a theoretical point of view, but also practically, as it sometimes resulted in divided case-law concerning measures to be taken in the procedure of protection orders (parental authority/domicile of the child/both).

Apparently, the institutions of parental authority and protection orders are totally distinct, as they function on different premises (collaboration/conflict) and are designed to offer solutions to different situations (adoption of important decisions concerning children/protection and safeguarding from violence).

Nevertheless, there are important interconnections between these institutions from a double perspective, both theoretical and practical, as the existence of a protection order may interfere (in procedure, as well as in substance) with the exercise of common parental authority.

As they serve different goals, it is important that these two institutions may function together, in spite of terminological discrepancies and a process of legislation harmonising still to be done.

Although conceived to solve different problematics, the institutions of parental authority and protection orders may (and must) coexist, and it is the task of the courts to practically ensure their concomitent and proper functioning.

This conclusion represents once more the reason to reiterate an opinion we already expressed that the legislator should seriously consider the idea of a reasonable number of courts in Romania specialised in family law (following the pattern of Braşov Family and Minors Tribunal) by way of ensuring the actual functioning of the so called "instanțe de tutelă".

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[30] "Violation by the person against whom a protection order has been issued for any of the measures referred to in Article 38 (1) shall be (…) punishable by imprisonment from 6 months to 5 years".

[31] According to Article 46 Para 8: "If the person protected by the protection order violates its provisions, he will be obliged to cover the costs arising from the issuance and enforcement of the order".

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