CONSIDERATIONS REGARDING THE AMENDMENTS TO LEGISLATION ON CHILD PROTECTION THROUGH THE NEW CIVIL CODE

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Abstract
The new Civil Code came into force on 1st of October 2011, has brought some changes to the two main acts of child protection, namely Law no. 272/2004 on the protection and promotion of children rights and 273/2004 Law on the legal status of adoption.
These changes are not entirely beneficial, in our opinion, the purpose of this paper is to analyze and comment on articles that have been changed.
Will be analyzed in relation to guardianship matters, persons who may be custodians, when the measure of guardianship, who appointed guardian, the substantive adoption, consent to adoption, the date at which effects occur adoption.
Even if we agree that some changes were needed to ensure better protection of child rights, the proposed and introduced by the new Civil Code, which repealed the Family Code and numerous special laws (such as the two which form the subject of this analysis), not as a whole likely to achieve this goal, some of which are wrong in terms of legislative technique, others at odds with practical reality.

Keywords: *The child protection, adoption, interest of the child, guardianship, alternative protection*

Introduction

The field covered by this study is that of child protection as an institution belonging to family law, particularly important in the current context, importance and concern is apparent the legislature to change the main legislation governing the protection, namely the Law on protecting and promoting children's rights and the law on adoption procedure, recently amended by the same law, namely the new Civil Code.

In this paper we propose that objective analysis of the changes introduced in this area in the field covered by the two basic laws belonging package of laws protecting children, adopted in June 2004 and entered into force on 1 January 2005 and last amended by the October 1st, when the last regulatory occurred through a series of acts. Also point out that an important objective is the legal formulation of proposals to improve the civil code of conduct contrary to good legal relations having as subjects children with special about the child custody measure both parents (joint custody).

How to achieve the main objectives is the critical analysis legislative text, reference to the previous regulation and the oldest in the field, the study of comparative law and legal doctrine and analysis of judicial and administrative practice have been experienced.

To date, the date changes mentioned, few authors have expressed opinions on legal doctrine to these changes, with some articles published in professional journals in adjacent materials[1], and few

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[1] For example Emese Florian "Dissolution of marriage in the regulation of the new Civil Code", The Law Magazine no. 10/2011 or Bodoaşcă Theodore, "Some views on the common property of spouses acquired during the marriage, in light of the new Civil Code", The Law Magazine no. 10/2011, Veronica Dobozi "Vision medical assisted human reproduction in new Civil Code," Judicial Review Courier no. 10/2011, Milena Tomescu, "Loss of parental rights under the new Civil Code," Judicial Review Courier no. 10/2011 so on.

courses published after the entry into force of the new Civil Code[2], but special on the field not analyzed.

On the law relating to the protection and promotion of child rights

Of the Law on the protection and promotion of child rights, no. 272/2004 was repealed provisions of 40th articles, first paragraph, 41st and 42nd paragraph.

The 40th article, first paragraph refers to cases where guardianship is established, is repealed because the new Civil Code contains Book I (about people), Title III (Protection of individuals) a chapter on the guardianship of minors, the 110th article provides that "minor guardianship is established when both parents are, where appropriate, deceased, unknown, deprived of the exercise of parental rights or criminal penalty has been applied to prohibit parental rights, placed under judicial interdiction, legally declared dead or missing and if, on termination of adoption, the court decides that the guardianship is in the child interest". Even if nothing has changed in establishing guardianship cases, the legislature has deemed it appropriate to repeal this article. In fact, on several occasions, everything has changed the new Civil Code, the repeal of a law or code of legal rules and legal relationship that brought within its scope. This may justify, if the full repeal a legislative act, but not if some of its articles remain in being, to exist following chapters of laws, consisting of one or several articles, special laws do not define the institution that regulates or conditions that apply, etc.

Also, in the second Chapter of the 272nd Act were repealed both articles which settled the family environment and alternative child care. The first article related to the persons who may be tutors, and the second to the guardian's appointment. So if people can be tutors are, as before, the individual or husband and wife together, not been preserved the condition relating to residence in Romania. Therefore, an individual may be guardian, in the absence of express provisions, even if domiciled in another state. There will probably be called, unless a person established in the manner provided as a priority by the new Civil Code, with priority guardian residing in Romania, applying by analogy the regulation of international adoption as subsidiary to the internal one, but the law does not provide any binding in this sense, therefore remains a recommendation.

Has been also removed, the requirement to assess the moral and material conditions to be met by the guardian to receive a child care, which previously was the responsibility of the General Directorate of Social Assistance and Child Protection.

Given the possibility of appointing a guardian of the child's parents even, indeed, no such verification was necessary, since parents are the ones who know best which is the interest of their child.

The guardian' activity will be, however, checked under the new regulations, on the one hand by the family council, and secondly by the guardianship court on how to tutor exrcise their duties in accordance with the interests of the child. But in the event of his appointment by the court likely would impose such a check.

In the same vein, were repealed provisions of the 42nd article which regulate the appointment of guardians, the appointment by the court is only the exceptional situation, the 118th article, Civil Code expressly providing that "without an appointed guardian, the guardianship court appointed priority as guardian, if not opposed reasons, a relative or a close family friend of the minor' family, able to fulfill this task, taking into account where appropriate, personal relations, the near residences, the material conditions and moral guarantees that we have called the trustee".

Regarding the content changes from in these articles, we emphasize that because of arguments, we agree with the appointment of guardian by parent, first and only alternative to guardianship court. But it would be to inform people about these changes more as we believe that too

[2] Emese Florian, "Family Law", the 4th edition, CH Beck Publishing House, Bucharest, 2011, Dan Lupaşcu, Mihaela Crăciunescu Cristiana, "Family Law", Legal Universe Publishing, 2011, etc.

few parents know what alternative ways to protect their children are and anticipates the possibility of appointing a guardian, in the future.

On the law governing the adoption procedure

Regarding the second reference Act in the areas of child rights protection, no. 273rd Act from 2004 on the legal status of adoption, the new Civil Code also brought a number of changes. Thus, implicitly repealed and modified legal relations referred to the 1st article, 5-13, 16, 18th article, the second paragraph, the first thesis, 56th article, (1) - (4) paragraph, the 57th article, 59-63 and 65, with no given that two years before, this law has been amended once[3]. In addition to criticisms related to legislative instability in a procedure as complex and important as the adoption, the amendments to the Civil Code are largely criticism to.

The first article of the 273rd Act was repealed, although included the adoption definition, which was restored in the same form in the new civil code, without any change. Legislature's intent is clear from all the rules to regulate adoption in general in the Civil Code and procedural matters by the special Act. However, defining the procedure in the special Act governing it was not an aspect that had changed objectionable, in our opinion. It is recommended that a special Act defining the institution that governs, even of his first articles. In every piece of legislation that regulated the adoption, from the Family Code which repealed the provisions relating to adoption of the old Civil Code, this institution has been defined.

Second, the substantive conditions for the adoption validity regulated by the special Act, were repealed (5-13 article), which are currently regulated by the Civil Code, the second section of the chapter on adoption, restructured and reclassified in relation to the former regulation. Perhaps this repeal is made by the legislator desire to dedicate all the substantial aspects to the Civil Code and the procedural aspect to the special Act. A future step of the legislature is probably to settle the adoption procedure in the Code of Civil Procedure and fully repeals the special Act.

If the doctrine hitherto classified these conditions in substantial conditions and obstacles, the Civil Code classifies them now in requirements for persons who may be adopted, the persons who may adopt and consent. But the chapter on the conditions was not completely abolished, leaving the valid provisions of articles about the form of giving consent to adoption, in which case no longer justify maintaining the chapter title (it is actually three remaining articles into force of this chapter: the 14th article, the 15th article and the 17th article).

On the content of the substantive conditions, the new Civil Code has not resumed provided on the child's best interest, but it is recognized as a principle of adoption, which is why we do not believe that it will disrupt the action for revocation of adoption input where it is considered that this is detrimental to the interests of the child. Moreover, the absolute nullity of adoption is drawn so its conclusion in contravention of the form or substance, as well as its fictivity, being that done for a purpose other than the superior interests of the child care. We can say therefore that the best interest of the child in adoption procedure is a background implicitly condition in adoption. The other requirements of adoption remained the same, even if they were reversed and reclassified.

Also as a criticism of legislative technique, the legislature has expressly provided the impediment that two persons of the same sex cannot adopt together, provision unnecessary since the same code provides that two people cannot adopt jointly or simultaneously or successively, unless who are husband and wife, and the same-sex marriages are not allowed in Romania.

Even if the legislature had intended to only cover international adoptions (covered in a separate chapter of the Civil Code) this provision has no utility as on the substance, should be respected national regulations of the adopter and adoptee, and adoption by cohabitants is also prohibited.

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[3]273/2004 Act, republished in the Official Gazette, Part I, no. 788 of 19 November 2009, amended by 102/2008 Ordinance, approved with amendments by 49/2009 Act.

Thus, Law no. 273/2004 regulates in a chapter separate from national adoption procedure, international adoption procedure, supplementing its provisions with those of the law governing the relations of private international law, Law no. 105/1992. However, the provisions of this law, the new Civil Code in force only a few items left, taking most of the rules of private international law, including those relating to international adoption. With regard to determining the law applicable to the substance and form, 2607th article provides that the fund is established by the national law of the adopter, and one to be adopted. In addition, they are to meet the conditions that are required for both, established by each of the two national laws shown. Substantive conditions required for the husbands who adopt together, are those established by law that governs the overall effects of their marriage. The same law also applies if one spouse adopts the child of another.

Third, a substantive change is on the point at which take effect, the judicial decision which was declaration of adoption, this time being, after the entry into force of the new Civil Code, that the final remaining court decision which was declaration of, no longer, expecting when his remains irrevocable.

Fourth, also as a critical legislative technique was maintained chapter of the special law on the effects of adoption, although there is in force only article on the obligation to inform the adopted child of his adoption and a paragraph on the effects of the international adoption.

Fifth, a fundamental change is the possibility of forfeiture from parental rights of the adopter or adopters. While before, the special law provided that the adopter has to adopted child, natural parent's rights and obligations to his child, not provide the possibility of forfeiture from parental rights and the doctrine, the majority view was that the only sanction parents natural, and not adopters. In our opinion, the sanction must be applied equally to natural and adoptive parents, because the situation of the adopted child is the same to the adoptive parents and their relatives, and gives reasons for deprivation of parental rights are distinct from those leading to termination of adoption. On the other hand, the measure of forfeiture of parental rights is a provisional exercise of parental rights the court may restore the natural parents or adopted, while cessation of adoption is a final measure.

Many legal rules contained in the new Civil Code are the reference to the special law. Thus, after the general rule provides that information relating to adoption is confidential, the Civil Code provides in Art. 474 that "the manner in which the adoptee is informed of the adoption and the family of origin and legal status of information on adoption is regulated by special law," sending the whole article only, remained in force in the chapter on the effects adoption of special law.

Sixth, the same question of legislative technique, it is noted on the chapter concerning the termination of adoption, of which remained in force across two articles that cover aspects of procedure (citation, court communication). Defective formulation contained in the special law was removed by repealing the 60th Article, which referred to a declaration of invalidity and not to a nullity determination of the adoption, in an absolute void, the Civil Code correcting these provisions ("Adoption terminated by break-termination or cancellation after finding invalid"). However we disagree with the used terminology, the adoption by the break-termination or cancellation. It should apply by analogy the same terms that define how a marriage ends, since we are in the same branch of law governing the two fundamental institutions: marriage and adoption. Thus, we believe that the termination should be understood that adoption terminates upon death, break-termination for failure in the best interest of the adoptee or culpable acts described, and dissolution for the void, or relative nullity.

On joint custody

If pending the entry into force of the new Civil Code, Family Code provides that the dissolution of marriage or similar situations, the child will be assigned one of the parents, preserving the right for the other parent to have access to the child, as determined by decision court now, in accordance with civil Code (397 article), after divorce, parental authority is shared both parents, except where the guardianship court decides otherwise. From this rule there are exceptions, where

there are reasonable grounds, having regard to the interests of the child, the court may decide that parental authority is exercised only by a parent with the other parent right to supervise the growth and education of the child and to consent to its adoption.

This way of exercising parental authority is a legal novelty in our system, so that already sparked numerous discussions contradictory. In Europe is seen as an arrangement for the benefit of children, reducing tensions between the parents, following separation. It is said[4] that the removal of a parent by establishing unique custody would arise tensions, joint custody involves both parents and trains them in the period after divorce in child care and education of their children, remove emotional conflict, reduce costs, etc.

We could add another argument for joint custody, namely when there are more children - brothers ("couterini" and "cosângeni"), where both parents are able to grow them properly, is removed the possibility to be separated by their custody. The divorce caused enough suffering for children, no longer be added trauma of separation from siblings. Thus, instead of entrusting one child to mother and the other to the father, both children will be entrusted with both parents. Is a possibility that reflected the legislature but in another procedure - the adoption - in which is set that the brothers will be entrusted for adoption together, except where it would be in their best interests to be assign separately.

There are already several judgments in which parents were given joint exercise of parental authority, decisions which went to establish child residence with both parents equally. The practical exercise of joint custody is either the residence establishment, during half a year to one parent and half the year to the other parent, The practical exercise of joint custody is either the residence, during half a year to one parent and half the year to the other parent, but also may be sharing the week or another way. It is recommended that in each situation to determine the best way for children, in determining how to exercise parental authority shall have priority interests of the child and not those of the parents who are divorced. In support of this assertion, we quote the provisions of the 2nd article of the Law on protection of child rights, according to which any regulations adopted in respecting and promoting children's rights, "as well as any legal document issued or, where appropriate, completed in this area is subject to the priority interests of the child". This principle is required including the rights and obligations of the child's parents, other legal guardians and any person whom he has been legally entrusted. Best interests of the child principle shall prevail in all actions and decisions concerning children, whether undertaken by public authorities and private bodies, and in cases decided by courts. The provisions of this Article shall be corroborated with those in the art. 263 Civil Code concerning the protection of interests of the child.

Therefore recommended custody - even both parents, but taking into account in determining how to exercise parental authority of school or kindergarten child relationships of affection and friendship that has developed child with grandparents, other relatives, colleagues, friends, etc.

If the child/children has over 10 years of age, their hearing is also required when deciding which parent to exercise parental authority, but also on how to exercise joint custody despite the fact that new provisions governing mandatory listening child in all administrative or judicial proceedings concerning him.

If listening to children under 10 years is only optional, the child reaches that age is required. The child's right to be heard implies his right to request and receive any information, tailored to age and degree of maturity, the right to express opinion and this opinion be considered as rejected or view child make a different by an authority must be grounded.

[4] For more details see Bogdan Catalin, President of the Romanian Association for joint custody, about Proksch report on the benefits of joint custody and child on www.juridice.ro;

Conclusions

The article carried out an ensemble, not an exhaustive list of provisions of the new Civil Code concerning the protection of children, being analyzed in particular the amendments to the Law on protection of child rights, the law on adoption procedure and some aspects related to the joint exercise by parents of parental authority.

We believe that the subject would meet the relevant administrative and judicial bodies to resolve related proceedings involving family law that it involves minors.

Even if divorce proceedings by agreement between the spouses is not an exclusively judicial, the registrar or notary public keeps the same obligations in their work, namely the protection of interests of the children with information and consideration of their opinion.

The main problem might arise is related to education and civilization of our people, unusual, yet, on friendly terms with post-divorce, absolutely necessary in cases where there is natural or adopted minor children in the family.

Certainly law and administrative practice in the future will provide many topics for analysis, jutting out already the problem of impossibility to crossing national borders with the child / children without consent of the other parent, even during the exercise of parental authority is the parent who wants to travel the child abroad, the parents find an opportunity to tease each other, to the detriment of the child / their children.

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