THE FAMILY COUNCIL – SUPERVISING ORGAN WITHIN THE GUARDIANSHIP

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ABSTRACT
THE FAMILY COUNCIL HAS THE ROLE TO SUPERVISE THE ACTIVITY PERFORMED BY THE GUARDIAN, TAKING CARE THAT THE PROTÉGÉE'S INTERESTS BE CONSTANTLY TAKEN INTO ACCOUNT THROUGHOUT THE GUARDIANSHIP.
THE FAMILY COUNCIL IS AN ENTITY WHICH CAN BE ESTABLISHED AT THE REQUEST OF THE INTERESTED PARTIES BY THE COURT OF GUARDIANSHIP, CONTROLLING THE WAY IN WHICH THE GUARDIAN FULFILS HIS DUTIES DUE TO THE PROTÉGÉE'S PERSON AND GOODS.
WE BELIEVE THAT DUE TO THE CONDITIONS REQUIRED BY THE LAW TO BE PART OF THE FAMILY COUNCIL, CONDITIONS THAT ARE CLOSELY RELATED TO THE PROXIMITY OF THE MEMBERS OF THE COUNCIL TO THE PROTECTED ONES, WHICH HAVE AS THEIR PRIMARY BASIS THE RELATIONS OF KINSHIP, THEY WILL BE SUBJECTIVELY INVOLVED IN THE OVERSIGHT ACTIVITY OF THE GUARDIAN. GIVEN THAT THE MEMBERS OF THE FAMILY COUNCIL ARE PART OF THE RESTRICTED CIRCLE OF THE PROTECTED ONE, IT IS OBVIOUS THAT THEY HAVE KNOWLEDGE OF HIS PERSONALITY AND INCLINATIONS, CREATING THE PREMISES TO EFFECTIVELY PURSUE HIS INTERESTS IN A MANNER IN WHICH THE COURT GUARDIANSHIP CANNOT BE INVOLVED.

KEY WORDS: *FAMILY COUNCIL, GUARDIANSHIP COURT, GUARDIANSHIP, PROTÉGÉE, MINOR, PERSONAL SIDE, PATRIMONIAL SIDE*

Introduction

This chapter of the paper aims to create a picture over the guardianship as means of protection for the natural person, given that these mentions are necessary for the debut of the research having as purpose a monographic approach of the family council. At the end of this chapter, we shall make several general statements over this judicial institution and its role in the functioning of the family council.

Content

The protection of the natural person by civil law means is a legal institution whose purpose is to protect certain categories of persons incapable of managing their own patrimony or

interests due to age, mental health condition or other cases provided by the law[1]. The main means to protect the incapable is the guardianship, while the trusteeship was created for the protection of the capable person, but who is found in one of the conditions for which the appointment of a trusteeship is allowed[2].

Both under the auspices of the old Family Code, as well as under the new Civil Code, the guardianship has played an important role in the protection of certain categories of vulnerable persons – minors and persons placed under judicial interdiction.

Because the Family Code together with other civil laws does not state a clear definition for the guardianship, this role has been given to the doctrine. Thus, the guardianship is defined differently, but a common element would be that the guardianship refers to the protection of the minors provided by persons, other than their parents.

Constantin Stătescu has stated the following definition: "The guardianship is a free of charge and mandatory duty, in the virtue of which a certain person, called the guardian, is summoned to perform the parental rights and obligations for a minor child, whose parents are either deceased or under the permanent impossibility to perform their attributions"[3].

Gheorghe Beleiu sees the guardianship of the minor as the legal institution referring to the ensemble of the norms stating the protection of the minor without parental protection.

The protection of the natural persons found in difficult situations through the guardianship occupies an important role in every legal system aiming to establish efficient means for their protection, proven also by the fact that this legal institution has very old origins, being seen from the Antiquity.

In Roman law, the guardianship was only opened in the case of the extinction of parental power over the minor. In the primitive state of the Roman law, guardianship was an institution similar to the parental power.

The role of guardian was entrusted to the presumed male heir of the child, in order to prevent the child from wasting the fortune, which must be kept within the family. This political purpose to strengthen and insure the prosperity of the families has slowly been changed into the protection of the minor.

The guardianship in the Roman law ended at the age of puberty, but the minor, although he was able to manage his possessions, remained assisted until the age of 25, by a curator whose attributions were limited to patrimony management and to all the acts relating to both the management and the obligations in general that the minors had contracted.

For the Romans, the guardianship had the following features: was established after the disappearance of the parental power, the main attribution of the Roman guardian was to manage the protégée's patrimony and not his person. From the perspective of our research it is important to mention that the Romans did not considered the establishment of an organ with the purpose of controlling the guardian's activity.

[1] Eugen Chelaru, *Drept civil. Persoanele*, 3rd Edition, C.H. Beck Publ.-house, Bucharest, 2012, p. 144; Art 105 new Romanian Civil Code

[2] Art 105 of the new Civil Code lists the persons protected by the law, as following: "There are subjected to special protection measures the minors and those who, even though are capable, due to old age, disease or other reasons stated by the law, cannot manage their own assets or protect their interests under appropriate conditions".

[3] Constantin Stătescu, *Drept civil. Persoana fizică şi persoana juridică*, Didactic and Pedagogical Press, Bucharest, 1970

Beside these features, which differentiated the Roman guardianship from the modern one, we must ascertain that the Roman law, in its long evolution, has reached to see the guardianship as an institution established for the protection of the minor's interests.

This is why many of the guarantees established for the bad management of the guardian were taken by the modern law: bail, inventory, limiting the guardian's power with regard to the acts he can do, and the legal mortgage on his tangible property.

On the other hand, the guardianship of the minors was progressively mistaken with the trusteeship of the minors for 25 years. The trustee evolved into a manager for the incapable person's assets and thus, the protection of the incapables turns out to be, for the Roman law, an almost unitary feature.

In the old Romanian law, the Calimah Code in its chapter "For guardianship and trusteeship" (Art 255-356) and the Caragea Law in its chapter "For guardianship" (Art 1-39) stated important provisions in this matter[1]. From the beginning we shall preserve the idea of the state intervention in the relations for the protection provided by specialized organs: the "Comisia epitropicească" in Moldavia and the "Obștеasca epitropie" in Wallachia. The guardianship was a right and a power entrusted over a free person and for the management of his property, for safety "for as long as the person because of age cannot manage his actions and property" (Art 255 of the Calimah Code).

The law stated the competence of the commission regarding the appointment of the guardian and his oversight: no person could receive the guardianship without "the knowledge and approval of the guardianship commission" (Art 272 of the Calimah Code), and the attributions of the guardian were being established by the letter of appointment (Art 273 of the Calimah Code). The guardianship also had a personal side, regarding the rights and obligations for the guardian related to the child's person, as well as a patrimonial side, with rights and obligations related to the latter one's fortune (Art 277 of the Calimah Code). The guardian was owed "to care for the poor and their house as a parent" (Art 18 of the Caragea Law) and "responsible for his actions, with or without bad intention, to the damage of the protégé" (Art 19 of the Caragea Law)[2].

The Romanian Civil Code of 26 November 1864 stated the guardianship in its chapter, "The guardianship" from the Title "Minority, tutelage and emancipation", Art 343-420. In this system, the guardianship was stated by the law (Art 344-345, in case of the death of a parent; Art 352-354 on the legitimate guardianship of the ascendants) and by will, by "the latter parent who deceases" (Art 349) and by the family council (guardianship by court appointment, Art 355).

[1]*Calimah Code*, edition drafted by the collective for the old Romanian law, coordinated by Andrei Rădulescu, Romanian Academy Publ.-house, Bucharest, 1958, pp. 145-177; Dem. D. Stoenescu, *Legiurea Caragea*, Fane Constantinescu Press, Craiova, 1905, pp. 130-138

[2] According to the Calimah Code, each guardian had to persuade the commission about his most sincere intentions for the protégée, how he shall provide for the minor good training into becoming a social person, how the protégée shall be protected, how his possessions shall be administered in good faith, compelling himself into fulfilling entirely the commission's decisions (Art 273). "The guardian had to administer the possessions of the protected persons like his own goods and to be held responsible for the damages caused by his bad management, and not by faith" (Art 298).

The guardian's obligations mainly referred to the care of the minor and his representation in civil acts (Art 390 Para 1 of the Civil Code)[1], the administration of his possessions and the conclusion of the obligations (Art 415-420).

For the minor's representation in civil acts, are to be distinguished several categories of documents: documents concluded by the guardian alone, documents forbidden for the guardian (Art 390 Para 2) and documents to be concluded with the approval of the family council and the advice of the court (Art 401-404).

Under the auspices of the Decree No 31/1954[2] regarding the natural and legal persons, the guardianship and trusteeship of the minor can be identified as those means for protection offered to the minor.

On the one hand, the minor's guardianship represent the protection established when he is deprived of parental protection, and on the other hand, the minor's trusteeship is another means of protection, with a temporary and subsidiary feature. Practically, the minor's trusteeship is an ad-hoc guardianship[3]. Under a terminological aspect, the wording " minor's guardianship" is used with two meanings: as means of protection and as legal institution, namely the ensemble of norms establishing it, this institution having a mixed feature, in the meaning that it belongs both to the civil law, as well as to the family law[4].

Regarding the minors, Art 9 of the Decree No 31/1954 stated that "The minor who has not turned the age of 14 has a limited capacity of exercise. The legal actions shall be concluded by him with the prior agreement of his parents or guardian". This text shall be corroborated with Art 133 Para 2 of the Family Code: "The minor who has turned the age of 14 shall conclude legal acts with the prior approval of the guardian, and for the cases stated by Art 132 and 152 Let c) "with the prior approval of his trustee".

Prior to the adoption of the new Civil Code, the relevant provisions concerning the trusteeship were stated by the Family Code, mostly taken by the legislator with the new encoding by which it aimed the appropriation of a monist perspective of the private law.

Nowadays, the relevant provisions are stated by the new Civil Code which states the minor's guardianship in Art 110-163, while the Law No 272/2004 on the protection and promotion of the rights of the child states the "child's guardianship" as an alternative means of protection. According to Art 1 f the Convention on the rights of the child, but also to Art 4 Let a) of the Law no 272/2004, the child refers to a human being below the age of 18, who has not acquired full capacity of exercise, according to the law, except the cases in which, based on the law applicable for the child, the majority shall be decided below this age.

The child's guardianship, as legal institution, refers to the ensemble of the legal provisions which state the protection of a minor by a person, other than his parents – a person who has been entrusted with the guardianship – under the supervision, control and permanent guidance of the competent authority. On the other hand, the child's guardianship refers to the legal means of protection for the child deprived of parental protection.

[1] "The guardian shall take care of the minor and represent him in all his civil acts. He shall be the administrator of the minor's possessions like a good parent and shall be responsible for the damages occurring from his bad management"

[2] Decree No 31/30 January 1954, published in the Official Bulletin No 8/30 January 1954, entered into force on 1st of February 1954 and subsequently repealed by the Law No 71/2011

[3] Gabriel Boroi, *Drept civil. Persoanele,* All Beck Publ.-house, Bucharest, 2001

[4] Constantin Stătescu, *Teoria generală a obligațiilor,* All Beck Publ.-house, Bucharest, p. 281

The guardianship is a free of charge and mandatory duty, in the virtue of which a certain person, called the guardian, it is summoned to perform the parental rights and duties for a minor child, whose parents are either deceased or in a permanent impossibility to perform their duties[1]. The cases for which the establishment of the guardianship is mandatory are stated by Art 110 of the Civil Code and aims the situations in which the minor is truly deprived of parental authority[2].

If for the minor deprived of parental authority, the guardianship is seen as means of protection, for the guardian is seen as an assignment[3].

Though the minors[4] are the main category of persons in need of legal protection though the guardianship, because they do not have the necessary discernment as effect of their young age, the guardianship as legal institution may include the persons with judicial interdictions.

For the latter ones, the lack of the capacity of exercise is an effect of his mental debility or alienation of which he suffers from, being affected by diseases of the nervous system[5].

For a better understanding of the functioning of the guardianship, we shall reiterate its legal features: legality, compulsory/optional, free or paid duty, personality, unicity or plurality.

The guardianship has a legal feature in the meaning that its establishment, the cases for which is invoked, the appointment of the guardian, the content of the protection by guardianship and the cessation of the guardianship are mentioned by the law, using imperative norms. Though Art 114 of the Civil Code states the possibility for the parents to appoint the person who shall be the guardian, does not endanger the legality of the guardianship.

Usually, the guardianship has an optional feature, but its compulsoriness occurs for the case in which the guardian is appointed by a proxy, case in which he can refuse the appointment only for the cases clearly mentioned by the law[6]. We must note the fact that the legislator abandoned the old system referring to the compulsoriness of the guardianship, without allowing the guardian to refuse it. The reason of this optional feature of the guardianship is very simple: the person who would be forced to accept it against his will could not be persuasive in his management, thus endangering the protected person's interests[7]. Mainly, the appointment of the

[1] Constantin Stătescu, *op. cit.*, p. 281; M. Tomescu, *Dreptul familiei. Protecţia copilului*, All Beck Publ.-house, Bucharest, 2005, pp. 229

[2] Art 110 of the Civil Code states the cases for establishment: "The minor's guardianship shall be established when both his parents are either deceased, deprived of the exercise of their parental rights or have been penal sanctioned with the deprivation of their parental rights, placed under judicial interdiction, have gone missing or are legally declared dead, as well as for the case in which, at the end of the adoption, the court decides that it in the best interest of the minor to have a guardianship established".

[3] Gheorghe Beleiu, *Introducere in dreptul civil. Subiectele dreptului civil*, 9th Edition, Universul Juridic Publ.-house, Bucharest, pp. 369

[4] The minors are persons without capacity of exercise (from their birth until the age of 14) and those with limited capacity of exercise, for certain persons aged between 14 and 18.

[5] In this meaning, see Art 171 of the Civil Code, according to which the rules applied for the guardianship of a minor under the age of 14, shall also be applied for the guardianship of the person placed under judicial interdiction, if the law does not state otherwise.

[6] In this meaning, Art 120 Para 2 of the Civil Code states that: "May refuse the continuation of the guardianship: a) the person who has turned the age of 60; b) the pregnant woman or the mother of a child under the age of 8; c) the person who grows or educates 2 or more children; d) the person who, because of a disease, infirmity, specificity of activities, distance between his residence and the location of the minor's possessions or for other grounded reasons, could not fulfill this assignment".

[7] O. Ungureanu, C. Munteanu, *Drept civil. Persoanele*, 2nd Edition, Hamangiu Publ.-house, Bucharest, 2013

guardian shall be done with his consent, by the guardianship court, in chamber of council, by a definitive decision[1].

The free of charge or paid assignment refers to the idea that the guardianship is not usually paid. The free of charge is the nature of the guardianship, not its essence[2]. Art 123 of the Civil Code restates Art 121 Para 1 of the Family Code which referred to the guardianship as a free of charge assignment. The guardian may be entitled, during the performance of the guardianship, to receive a remuneration established by the guardianship court, with the consent of the family council, considering the work done for the administration of the minor's possessions and his well-being, with no more than 10% of the incomes generated by the minor's possessions. Also, the guardianship court, with the consent of the family council, shall be able to change or suppress this remuneration, where appropriate. Thus, the remuneration has an exceptional feature, the expenses done with the minor's care, with the management of his possessions or for the preservation of his rights inevitably entails their debit from the minor's account[3].

The *personality*[4] – the rule is that the guardianship shall be personally performed by the guardian (*intuitu personae*). In the Civil Code, unlike the old regulation, there are two

[1] Art 119, Para 1 of the Civil Code

[2] Gh. Beleiu, *op.cit.*, p. 379

[3] Art 153 of the Civil Code: "The guardianship court shall verify the books referring to the minor's incomes and expenses concluded for his maintenance and with the administration of his possessions and, if are correct and in accordance with the real facts, shall order the guardian's payment"; corroborated with Art 838 Para 1 of the Civil Code, the account for incomes shall be debited with the amounts representing the following expenses, in the following order:

a) Taxes and fees paid, according to the administered possessions;
b) Half of the administrator's remuneration and from the reasonable expenses concluded for the common administration of the patrimony and interests;
c) Insurance bonuses, the costs for minor reparations as well as the other usual expenses for the administration;
d) The expenses concluded for the preservation of the of the beneficiary's rights and half of the costs generated by the judicial discharge, to the extent to which the court does not state differently;
e) The costs of the depreciation of the goods, except for those used for personal purposes by the beneficiary.

(2) The administrator shall be able to divide the important expenses for a reasonable period of time, in order to maintain the incomes at a constant level".

[4] According to Art 107 of the Civil Code, "(1) The procedures stated by the present code for the protection of the natural person are the competence of the guardianship court established according to the law. (2) For all the cases, the guardianship court shall solve the requests as soon as possible". Also, it shall be taken into account Art 229 of the law for the application of the Code: "(1) The organization, functioning and attributions of the guardianship court shall be established by the law for the judicial organization. (2) Until the legal regulation of the organization and functioning of the guardianship court:

a) Its attributions, stated by the Civil Code, shall be fulfilled by the courts, sections or panels of judges specialized in minors and family;
b) The report of psychic-social investigation stated by the Civil Code shall be performed by the guardianship court, except the investigation stated by Art 508 Para 2, which shall be conducted by the general department for social security and child protection;
c) The authorities and institutions with attributions in the area of the protection of children's rights, namely of the natural person shall continue to perform these attributions in force at the date of entrance into force of the Civil Code, except those entrusted to the guardianship court.

(3) Until the entrance into force of the statement provided by Para 1, the attributions of the guardianship court regarding the performance of the guardianship in relation to the minor's possessions or those of the person placed

exceptions: according to Art 122 Para 2 of the Civil Code, the guardianship court, with the consent of the family council, considering the size and composition of the minor's patrimony, to decide that the administration of the patrimony or a part of it be entrusted, according to the law, to a trained natural or legal person; the second exception[1] refers to the death of the guardian when, until the appointment of a new guardian, the guardianship shall be entrusted to his heirs[2]. For the cases in which the guardian's heirs are minors, the guardianship court shall appoint a special trustee, who may be the executor, without representing an exception from the principle of the intransmissibility of the guardian's power stemming from the personal nature of the duty, but rather a temporary measure to protect the minor.

The *uniqueness or plurality of the guardianships* – the guardianship is unique in the meaning that the guardian assumes both the guardianship of the minor, as well as over his possessions. Also, the administration of the minor's patrimony or of a part of it may be entrusted to a specialized natural or legal person. If the guardian does not have the necessary training to administer the minor's possessions, the guardianship over the assets may be separated from that over the person, and the assignment divided between multiple guardians, case in which we are in the presence of a multiple guardianship[3].

The principles of the minor's guardianship are: the principle of the generality of the guardianship; the principle of performing the guardianship for the best interest of the minor; the principle of the patrimonial independence between the minor and guardian; the principle of the permanent control performed by the state over the guardianship.

Regarding the *principle of the generality of the guardianship*, it shall be established every time a minor is deprived of parental protection, who cannot be left without legal protection.

According to Art 133 of the Civil Code, *regarding the principle of the performance of the guardianship in the best interest of the minor*, it shall he performed "only" in the best interest of the minor and his possessions[4].

Regarding the *principle of the patrimonial independence between the minor and guardian*, the guardian shall not have any right on the minor's possessions, nor the minor for the guardian's assets. This principle is mentioned by Art 143 of the Civil Code, stating the representation of the minor until the age of 14, as well as by Art 142 which states that the guardian shall act as manager entrusted with the management of another person's possessions. For the representation, the patrimony of the represented shall not be mistaken with the patrimony of the representative, while Art 807 states that the administrator shall be compelled to keep a ledger with his possessions different than the one for the goods taken into administration.

under judicial interdiction or, where appropriate, regarding the supervision of the way in which the guardian manages his possessions shall be entrusted to the guardianship authority".

[1] For the opinion according to which the exception from the guardianship's personality in this case represents only a temporary measure for the protection of the minor, see also O. Ungureanu, C. Munteanu, *op.cit.*, 2011, p. 246

[2] Art 157 Para 2: "Until the appointment of a new guardian, the heirs shall be entrusted with the guardianship. If there are more heirs, they have the option to appoint, by a special proxy, one of them to provisionally perform the duties of guardianship".

[3] Art 490 Para 1: "The minor parent aged 14 has only the parental rights and obligations concerning the person of the child", while Para 2 states that "The rights and obligations referring to the possessions of the child shall be entrusted to the guardian or, where appropriate, to another person, according to the law".

[4] Of the old regulation, Art 114 of the Family Code stated that "The guardianship shall be performed only in the best interest of the minor".

The *principle of the permanent control performed by the state over the guardianship* refers to the fact that the guardianship shall be performed under a permanent and continuous control from the guardianship court. The latter one may ask the collaboration of the public administration authorities, of the public services and institutions specialized in child protection or of the institutions for protection. The control shall be annual, by reports, when the guardian is compelled to present them to the court and by the reports the court has the right to ask ex officio, as well as the solving of the complaints of the minor aged 14, or of another person regarding the actions or facts of the guardian causing prejudice for the minor[1].

In the doctrine, certain authors such as Dan Lupaşcu[2] speak about a fifth principle in the area of guardianship. It is the principle of celerity, according to which the court is invoked to solve immediately the requests entrusted to it, so that the procedures be performed within a reasonable time[3].

The protection through the guardianship assumes, as well as the parental authority, a personal and patrimonial side. Regarding the personal side, the protection of the minor entails from the guardian the obligation to raise the minor, to care for his physical and psychical growth, to educate and train him according to his skills[4]. The patrimonial side refers to the administration of the minor's assets and his representation when he has no capacity of exercise or his capacity of exercise is limited. The law refers to these aspects in Art 134 of the Civil Code, side named "The content of the guardianship".

In the chapter stating the guardianship, the widest section is the one regarding its performance, thus this chapter states provisions both aiming the person and his assets.

The performance of the guardianship regarding the minor considers his education and professional training. The doctrine[5]considers that the appropriate care for the minor's normal physical and psychical development, as well as training in accordance with his skills represents the very essence of the guardianship.

Also, the personal side of the guardianship refers to the minor's domicile, because it is an attribute of identification. Thus, Art 137 of the Civil Code states that the minor under guardianship shall have his domicile at the guardian's address, and if the establishment of a residence is necessary for the education and professional training of the minor it shall be decided with the consent of the guardianship court.

The performance of the guardianship regarding the minor is essential for the achievement of the purpose aimed by the guardianship, namely to protect the interests of the person placed under protection. This is because his appropriate physical and psychical development is for sure a premise for his adult life to enjoy all the features of a good social integration. This is why the

[1] Ovidiu Ungureanu, *op. cit.*, p. 271

[2] Dan Lupașcu, Revista „Pandectele române", No 22/2011

[3] Art 107 Para 2: "For all cases, the court shall solve these requests as soon as possible". Art 263 Para 4: "The procedures regarding children shall be conducted within reasonable time, thus the superior interest of the child and family relations be unharmed".

[4] Art 134 of the Civil Code: "(1)The guardian shall have the duty to care for the minor. (2) The guardian shall have the obligation to ensure the care of the minor, his moral and physical health and development, education and professional training according to his skills".

[5] Mircea N. Costin, *Marile instituții ale dreptului civil roman*, 2nd Volume, *Persoana fizică și persoana juridică*, Dacia Publ.-house, Cluj-Napoca, 1984, p. 223

important measures[1] concerning the minor shall be taken only with the consent of the family council and after hearing the minor who has turned the age of 10. The hearing of the minor is imperative because the legislator considers that he has the necessary discernment to express a convincing point of view regarding the intimate aspects of his personal perspectives.

The performance of the guardianship regarding the minor's possessions is detailed by the norms of the civil law, giving importance to the means in which the guardian is summoned to administrate the patrimony of the protected person, the legal framework being built so that the latter's interest be constantly observed.

Art 142 of the Civil Code, having the side name "The administration of the minor's possessions" makes general remarks regarding this duty of the guardian, on which occasion it requires him to act in good faith and shall grant the statute as administrator for the assets of another person entrusted with a simple administration.

The doctrine[2] shall divide the content of this patrimonial side depending on the duties to which the guardian is compelled to at the opening of the guardianship, throughout its performance and at its cessation.

At the moment of the establishment of the guardianship, the law stated the performance of an inventory of the minor's possessions. According to Art 140 of the Civil Code, a maximum term of 10 days shall be established from the appointment of the guardian for the conclusion of this procedure. The drafting of the inventory is justified by the need to know the extent of the patrimony administered both under the aspect of the active side, as well as under the aspect of the passive side. The importance of the inventory is emphasized by Art 141 of the Civil Code, according to which before its conclusion, the guardian cannot conclude acts of disposal on behalf of the minor, but just acts for preservation and administration. It must be mentioned that the law states for the members of the family council and the guardian to mention all debts towards the person placed under guardianship.

Throughout the guardianship shall be established by the first court the annual amount necessary for the minor's maintenance and administration of his possessions, moment in which shall also be established the destination for the excess. The most important component aims the administration of the patrimony of the protected person under the aspect of the conclusion of legal acts in the name and on behalf of the protégée or the approval of the concluded ones by the person with limited capacity of exercise[3].

The legal acts concluded depending on their importance in relation to the patrimony of the protégée are: acts of disposal, acts of administration and acts for preservation. Given the fact that each type of legal act affects the patrimony in a different way, the legislator has stated different conditions for their valid conclusion by the guardian on behalf of the protected person[4], thus the most restrictive legal regime refers to the acts of disposal by which the goods exit the patrimony of the protégée.

[1] Art 136 of the Civil Code according to which the current measures do not require the consent of the family council.
[2] Carmen Tamara Ungureanu, *Drept civil. Partea generală. Persoanele*. 2nd Edition, Hamangiu Publ.-house, Bucharest, 2013, pp. 356-361
[3] According to Art 143 of the Civil Code, the guardian has the duty to represent the minor in his legal acts, but only until the age of 14.
[4] See Art 144 of the Civil Code, side named "The legal regime of the legal acts of disposal", but also Art 146 which states the approval and authorization of the acts of the minor aged 14.

For the protection of the minor's interests, which could be conflictive with the ones of his guardian, Art 147 Para 1 of the Civil Code states that "it is forbidden under the sanction of the relative nullity the conclusion of legal acts between the guardian or husband, a relative or the brothers or sisters of the guardian, and the minor".

At the cessation of the guardianship, the guardian or his heirs are compelled that within 30 days to be present in front of the guardianship court to present a general report.

The general report shall state the situation of the incomes and costs registered during the guardianship, pointing out the patrimonial active and passive, as well as the procedural status of the cases in which the minor is part. Based on the report, the guardian receives discharge from the guardianship court after verification and approval of the counts, in accordance with the provisions of Art 153 of the Civil Code. In order to prevent any attempt of the guardian to avoid this report, the legislator states that a possible exemption from this obligation is considered to be unwritten[1].

For sure, the purpose of this legal provision is to discourage the guardian from a possible intention to prejudice the protégée.

The role of the family council in the mechanism described by the guardianship

The family council has the role to supervise the activity performed by the guardian ensuring that the interests of the guard are constantly taken into account during the exercise of guardianship.

Notion and prior regulation

The family council is an entity which can be established at the request of the interested persons by the guardianship court, which has the role to control the means in which the guardian fulfils his duties towards the person and the assets of the protected person[2].

The legislator refers to it in Art 108 of the Civil Code as of a consultative organ contributing to the guardianship.

In the old Romanian law, this legal institution was inexistent, being inserted for the first time in Moldavia by a law in 1840 under the influence of the German and French customary law[3]. The object of this law was the guardianship, Art 15 defining the family council as "the ensemble of relatives of the minor person, or of persons known to be friends with his parents, who within the territory of the court house where the deceased has domiciled, commit actions within their competence".

The family council as control organ for the guardianship is stated under the auspices of the former civil code in its initial form from 1864, these provisions being gradually repealed, not being into force at the adoption of the new legislation of private law. Unlike the current regulation of the family council we could say that at the level of the Cuza's Civil Code, this legal institution enjoyed a special attention having much larger attributions. An important argument in

[1] See in this regard Art 154 of the Civil Code: "The exemption from the report granted by the parents or by a person who made a gratuity for the minor is considered as unwritten".

[2] Dan Lupașcu, Cristina-Mihaela Crăciunescu, *op. cit.*, p. 390

[3] Dimitrie Alexandresco, *Explicațiunea teoretică și practică a dreptului civil roman în comparațiune cu legile vechi și cu principalele legislațiuni străine*, 2nd Volume, Leon Alcalay Library Press, Bucharest, 1907, p. 594; Matei B. Cantacuzino, *Elementele dreptului civil*, All Educational Publ.-house, Bucharest, 1998, p. 71

this meaning is related to the fact that the establishment of the family council was mandatory and not optional, as in the vision of the current legislator.

Nowadays, the will of the legislator to state this legal institution is explained by the need to recognize the utility of such mechanism in the current society which again valorizes the moral values of the family. Beside this, an important argument in favor of the family council as different organ of the guardianship is related to the fact that there are other modern legislations which state it. As the main source of inspiration for the new encoding of our civil law was the French Civil Code, as well as the Quebecoise one, the regulations regarding the family council are no exception for the inspiration source.

Regarding the transitory law, it must be said that regarding the norms stating the family council, Art 17 of the Law No 70/2011 for the application of the Law No 287/2009 on the Civil Code states that: "The provisions regarding the family council shall be applied for the guardianship and trusteeship after the entrance into force of the Civil Code".

The above mentioned legal provision is very important because it is the only legal mention related to the possibility of establishing a family council within the trusteeship, representing a means for protection of the capable person, and excludes the minors placed under judicial interdiction.

The particularities of the family council as organ supervising the guardianship

By the modifications brought to the means for protection of the natural person, and especially by establishing the guardianship court, practically the new Civil Code transfers this procedure from the administrative area to the judicial one.

Even if this judicial authority with specialized competences is the main organ invoked to control the means in which the guardian performs his obligations it does not mean that the members of the family council do not have a special place within this control mechanism.

We believe that due to the conditions stated by the law for the members of the family council, conditions closely related to the relation between the members of the family council and the protected person, which have as main ground the relations of kinship they shall be involved in a subjective manner in the supervision of the guardian. Given that the members of the council are in close relation to the person under guardianship it is obvious that they are aware of his personality and skills, thus creating the premises to effectively supervise his interests in a manner in which the guardianship court could not get involved.

Also, Art 151 of the Civil Code, having the side name "The control of the guardianship court" states the fact that the "guardianship court shall perform an effective and continuous control over the means in which the guardian and the family council fulfill the attributions regarding the minor and his possessions". Either from the stating of the law it results that the court constantly relates to the decisions of the family council when it performs control over the guardianship because only the decisions of this body can represent a landmark for the conclusion that the interests of the protégée have been protected by the guardian.

From our perspective, the family council has the opportunity to control the means in which the guardian performs his rights and obligations regarding the protégée's person and assets much closer than the guardianship court, because the latter one has an objective approach being limited to the application of the law.

Moreover, talking about a judicial organ which cannot activate itself ex officio, it is necessary the intervention of the interested parties, who mostly are the members of the family council, while the latter ones have a permanent contact with the guardian and the protected person.

Conclusions

Concluding, we can say that the veritable control body of the guardianship exercise is the family council, because it can exercise effective and direct control over the guardian, and the guardianship court is called to decide only for the matters provided by the law, an opportunity to rule on the work of board members. The legal literature[1] speaks in the same sense, saying that the guardianship court may establish a family council if it considers that more supervision and control is required on how the trustee fulfills his obligations[2].

[1] Alina Rădoi, „*Ocrotirea persoanei fizice*" coordinated by Flavius Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *Noul Cod civil, comentariu pe articole, art. 1- 2664*, C.H. Beck Publ.-house, Bucharest, 2012, p. 131

[2] Ina Raluca Tomescu, Flavius Cristian Mărcău „European Policies and strategies for combating cross-border criminality. Implications for the internal legal system", in *International Conference "New Criminal Legislation - important phase in the development of Romanian law",* Bologna (Italy), Medimond, pp. 291-296

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