MATRIMONIAL AGE

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Abstract: *The Civil Code establishes the rule that marriage may be concluded if the future spouses have reached 18 years of age (art. 272 par. 1 Civil Code). Notwithstanding the provisions of art. 272 par. 1 of the Civil Code, para. 2 of the same article provides that, for reasonable grounds, a minor who has reached the age of 16 can marry by virtue of a medical opinion, with the consent of his/her parents or, where appropriate, of the guardian, and with the authorization of the guardianship court in whose constituency the minor is domiciled.*

Keywords: *Civil Code, marriage, matrimonial age*

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The Minimum Age for Marriage

As a rule, the matrimonial ability is gained with the age of majority, 18 years of age, by both men and women (art. 272 par. 1 Civil Code) [1].

The reasons that dictate the establishment of nubile age requirement are multiple. Firstly, biologically and from the standpoint of eugenics, future spouses must be physically fit to marry, meaning that they must have reached at least the age of puberty; but since puberty is a matter of fact, the law sets a minimum age, superior to that of real puberty. Secondly, from a psychical and moral standpoint, the future spouses must have attained the maturity necessary to understand the importance of the legal act of marriage and they must assume the duties involved in their decision with complete awareness. Finally, from a legal standpoint, marriage is a legal act, and as such, it implies the existence of discernment, in support of conscious and free consent [2].

The law does not provide a maximum age until which marriage may be concluded, so it's possible to conclude a marriage in extremis, before death, which typically legalizes a previous cohabitation. For such a marriage to be valid, all legal requirements must be fulfilled, including the expression of conscious consent by both spouses [3].

The law does not impose a maximum age difference between spouses, hence the conclusion of that marriage can take place regardless of the age difference that exists between them [4]. Some authors consider that huge age difference may be an indication, if corroborated with other evidence, that a fictitious marriage might be desired, aiming for purposes other than starting a family. [5]

Marriage of the Minor

By exception from the provisions of art. 272 par. 1 of the Civil Code, which states that marriage may be concluded if the spouses have reached the age of 18 years old, par. 2 of the same article provides that, for good reasons, a minor who has reached the age of 16 can marry by virtue of a medical opinion, with the consent of his/her parents or, where appropriate, of the guardian, and with the authorization of the guardianship court in whose constituency the minor is domiciled.

As such, marriage can be concluded at 16 years of age if the following conditions are met cumulatively:

- there are reasonable grounds;
- there is a medical opinion attesting that the person is biologically fit to marry;
- there is consent of the parents or, where applicable, of the guardian or the person or authority entitled to exercise parental rights;
- there is the authorization of the guardianship court in whose constituency the minor is domiciled.

a) Existence of reasonable grounds. The law does not define these reasonable grounds. Case law has stated that the following can constitute reasonable grounds: pregnancy, childbirth, previous state of concubinage etc. The existence and validity of the reasons which determine the minor to marry are analysed by the guardianship court in whose jurisdiction the minor is domiciled, who will decide by court order if to authorize the conclusion of the marriage or not [6].

b) Existence of a medical opinion. This must attest that the health of the person, the degree of physiological, psychological and intellectual maturity allow him/her to undertake the duties specific to a marriage, as well as all its consequences. Also, the medical approval should certify the existence of reasonable grounds, when applicable (such as the state of pregnancy of the future wife) [7].

The medical approval must precede the consent of the parents or, as the case may be, of the guardian, of the person or of the authority empowered to exercise parental rights.

The medical opinion is relevant most of all for the authority entitled to authorize the conclusion of marriage and for the authority called upon to perform the marriage [8].

c) Existence of the consent of the parents or, *as the case may be, of the guardian, person* or authority entitled *to exercise parental rights.* Given the limited exercise capacity, the minor is under the protection of those who must provide specific care, namely, as reflected in art. 106 par. 1 Civil Code, the minor is under the protection of parents, guardian(s), of the person with whom the child is in foster care or, in the case of special protection measures, of that authority which has taken over guardianship. As no exception is provided from the rule of accepting undearge marriage, the requirement is met including in the case of the minor who has acquired anticipated exercise capacity in terms of art. 40 Civil Code [9].

Whatever the quality of the author of the declaration of acceptance may be, his unilateral act is special, considering the minor's marriage with a particular person [10].

The right of parents to approve the minor's marriage is part of the ensemble of parental rights and duties which, together, form *parental authority*, and is – without a doubt – a right regarding the person of the child [11].

Exercising this right, concretely expressed consent of the parents is a unilateral manifestation of will, *a unilateral legal act*, having the significance of a permissive legal act, of an authorization (auctoritas, augere) [12].

When both parents are alive, when they are not under interdiction and can manifest their true will, and there is no physical or social hindrance, there is no doubt that for the valid conclusion of the minor's marriage both parents must give their consent [13].

By the notion of *parents* employed by the legislator, it must be understood the natural wedded parents, the parents out of wedlock where parentage has been established for both via one of the methods provided by law, as well as adoptive parents. [14]

The joint exercise of parental authority by both parents occurs in case of undivorced parents, but also in case of divorced parents, when the provisions of art. 397 Civil Code apply, according to which the parental authority rests jointly to divorced parents, unless the court decides otherwise, as well as in the case of unwedded parents living together and who exercise parental authority jointly under art. 505 par. 1 Civil Code [15].

According to art. 272 thesis II of the Civil Code, if one of the parents refuses to approve the marriage, the guardianship court decides on this divergence, considering the best interests of the child [16]. In this way the guardianship court guards the best interests of the child, being called upon to determine whether the abusive refusal falls within the parameters of the superior interests [17].

In accordance with art. 272 par. 3 Civil Code, if one parent is deceased or is unable to manifest his/her will, the consent of the other parent is sufficient.

The provisions of art. 507 Civil Code, which governs the exercise of parental authority by a single parent, shows that if one parent is deceased, declared dead by court order, is under interdiction, is deprived of the exercise of parental rights, or if, for any reason, is unable to express his/her will, the other parent exercises parental authority alone.

The correlation between texts is not fully achieved, but the rationale of the regulation is unmistakable, in the sense that in all cases where exercising parental authority is performed by one parent, that parent's consent is sufficient [18].

As such, the solution set out in art. 272 par. 3 Civil Code applies not only when one parent is deceased, but also when he/she is declared dead by court order or under interdiction or deprived of parental rights or is unable to express his/her will [19].

As the text of the law does not make the distinction, in the literature [20] it is stated that "failure to manifest the will" may be of any kind, for example, physical (insanity or mental illness, coma, etc.) or social (long absence, disappearance, execution of a custodial sentence, etc.).

As such, it may be considered that the phrase "unable to express the will" for the purposes of art. 272 par. 3 Civil Code covers all other cases in which, according to art. 507 Civil Code, parental authority is exercised by one of the parents [21].

According to art. 272 par. 4 Civil Code, under art. 398, the consent of the parent who exercises parental authority is sufficient.

Exercising parental authority by a single parent can be ordered by the divorce court for good reasons, considering the best interests of the child (art. 398 par. 1 Civil Code). The other parent retains the right to watch over the way in which the child is cared for and educated, as well as the right to consent to the child's adoption (art. 398 par. 2 Civil Code).

As the solution in the matter of exercising parental authority provided for divorce is also applicable in case of marital nullity, under art. 305 par. 2 Civil Code [22], as well as to the child born out of wedlock, when parents do not live together, according to art. 505 par. 2 Civil Code

[23], it ensues that in these hypotheses, for the same reasons, the solution is that consent of the parent who exercises parental authority is sufficient [24].

The Civil Code provides in art. 110, that guardianship of the minor shall be established when both parents are, as applicable, deceased, unknown, deprived of the exercise of parental rights or the criminal punishment of prohibition of parental rights was enforced, they were placed under judicial interdiction, are missing or declared dead and if, upon termination of adoption, the court decides that it is in interest of the minor to institute guardianship.

If guardianship was instituted, the guardian is the one who must approve the marriage of the minor.

Although in the context of underage marriage the legislator refers to guardianship exercised by a single person, we infer that in the case of guardians husband and wife, who are jointly responsible of exercising the attributions of the guardianship and are subject to the provisions in matter of parental authority (art. 135 par. 1 Civil Code), the permission of each of them is necessary, and the eventual disagreement is settled by the court of guardianship, like in the case of the dispute between the parents, according to the child's best interests (art. 272 par. 2 final thesis Civil Code) [25].

If there is no parent or guardian who can approve the marriage, the "consent" of the person or of the authority entitled to exercise parental rights is required. The hypothesis is considering the minor protected by placement or through another special protection measure provided by law (art. 106 par. 1 Civil Code) [26].

d) *the existence of the approval of the guardianship court*. The guardianship court is meant to ensure the verification of seriousness and thoroughness of the reasons invoked by the minor, as well as ensure other special conditions - the medical opinion, the existence of the guardian's approval [27].

If both future spouses are minors, the guardianship court will consider each case separately [28].

The request for authorization of marriage is settled by the guardianship court (court of law) in whose jurisdiction is the domicile of the minor wishing to marry. The request is made by a minor under 16 years of age, assisted by his/her legal representative, and shall be heard in the council chamber. Hearing the minor is compulsory in compliance with art. 264 Civil Code. The procedure is a non-contentious one and ends with a judgment subject to appeal [29].

References

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[2]. Ibidem.
[3]. C.C. Hageanu, *Dreptul familiei şi actele de stare civilă*, Hamangiu Publishing House, Bucharest, 2012, p. 23. [4]. Idem, p. 23-24.
[5]. M. Avram, *Drept civil. Familia,* Hamangiu Publishing House, Bucharest, 2013, p. 44.
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A, Gherghe, C. Jora, M. G. Berindei, Universul Juridic Publishing House, Bucharest, 2012, p. 642.
[7]. M. Avram, *op. cit.*, p. 46.
[8]. D. Lupaşcu, C. M. Crăciunescu, *Dreptul familiei*, Universul Juridic Publishing House, Bucharest, 2011, p. 60.
[9]. E. Florian, *op. cit*., p. 26. Art. 40 Civil Code – Anticipated exercise capacity: „For good reasons, the guardianship court may recognize to the minor who has reached the age of 16 full legal capacity. For this purpose, the minor's parents or guardian will also be heard, also hearing, where appropriate, the opinion of the family council."
[10]. See E. Florian, *op. cit*., p. 26.
[11]. M. Avram, *op. cit*., p. 47.
[12]. Ibidem
[13]. Idem, p. 49
[14]. Ibidem
[15]. Ibidem. Art. 505 alin. (1) Civil Code: „In the case of a child born out of wedlock, whose parentage has been established simultaneously or, as the case may be, in succession regarding both parents, parental authority is exercised jointly and equally by the parents if they live together."
[16]. The Civil Code states in art. 263 *the principle of the child's superior interest*.
[17]. A. Gherghe, *op. cit*., p. 643.
[18]. M. Avram, *op. cit*., p. 50.
[19]. Ibidem
[20]. Ibidem
[21]. Ibidem
[22]. Art. 305 alin. (2) Civil Code: „As regards the rights between parents and children, the provisions on divorce shall be applied by similarity".
[23]. Art. 505 alin. (2) Civil Code: „If the child's parents live together outside marriage, the way in which parental authority is exercised is determined by the guardianship court, the provisions on divorce being applicable by similarity".
[24]. M. Avram, *op. cit*., p. 50.
[25]. E. Florian, *op. cit.*, p. 27.
[26]. Ibidem
[27]. Idem, p. 26
[28]. L. Irinescu, *Curs de dreptul familiei*, Hamangiu Publishing House, Bucharest, 2015, p. 37.
[29]. Idem, p. 37-38.