

THE LEGAL PROTECTION OF THE NATURAL PERSON

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ABSTRACT

The ensemble of legal means used for human protection forms the system of means of protecting the natural person. This system has been characterized in the legal literature as a "unity in diversity".

- unity, because its purpose is the protection of man;
- diversity, because it is made up of legal means of branch protection”, that is to say civil law, commercial law, family law, labor law, constitutional law, financial law, criminal law etc. In the last period the scope of human legal protection was completed by the adoption of normative acts aimed at protecting the natural person. Civil law, like other branches of law, includes numerous institutions and norms that ensure the defense and protection of the subjective rights of natural persons. The norms of the civil law ensure protection by special means to the following categories of persons:
 - to minors, through parental protection, guardianship and trusteeship;
 - to the alienated and the mentally instable, by putting under interdiction and establishing the guardianship and the trusteeship;
 - persons in special situations (old age, illness, physical disability), by establishing the trusteeship.

KEY WORDS: guardianship, trusteeship, forbidden judiciary, physical disability etc.

INTRODUCTION

The protection of the natural person means the assembly of the means of civil law through which the recognition and protection of the subjective civil rights and of their justice interests, as well as the means of protection of the natural person as a participant in the civil circuit are ensured. The group of legal means used for the protection of the human being make up the legal means for the protection of the natural person. This system has been characterized in the legal literature as a "unity in diversity".

- unity, because its purpose is the protection of man;
- diversity, because it is made up of legal means of branch protection”, ie civil law, commercial law, family law, labor law, constitutional law, financial law, criminal law etc. In the last period the sphere of the legal protection of the human being has been completed by the adoption of normative acts that have as purpose the protection of the natural person.

Civil law, like other branches of law, includes numerous institutions and norms that ensure the defense and protection of the subjective rights of natural persons¹. In principle,

¹ See Tărchilă P. *Drept civil, Partea generală și Persoanele*, Ed. Gutenberg, 2016, Arad, p.311.

civil law is a right of protection "of human rights and especially of certain categories of persons. There is almost no institution or norm of civil law that does not reflect and protect the interests of the natural person: relative nullity is a "protection" nullity of a particular interest; the suspension and reinstatement within the limitation period are provided by law in the purpose of protecting the subjective rights of persons in special situations; the anticipated use capacity is a measure of protection of the child conceived but not yet born; capacity constraints are essentially protection measures.

1. CATEGORIES OF NATURAL PERSONS PROTECTED BY MEANS OF THE CIVIL LAW

The norms of civil law ensure the protection of the following categories of persons by special means:

- minors, through parental protection, guardianship and trusteeship;
- to the alienated and the mentally instable, by putting under interdiction and establishing the guardianship and the trusteeship;
- persons in special situations (old age, illness, physical disability), by establishing the trusteeship.

These categories of persons protected by means of civil law also enjoy the attention of legal norms belonging to other branches of law (means of branch protection), criminal law, financial law, constitutional law, administrative law, commercial law, family law, etc.

1.1. Protecting the child through guardianship

Guardianship is a free and compulsory task, by virtue of which a certain person named guardian is called upon to exercise parental rights and duties towards a minor child whose parents are deceased or permanently unable to exercise their attributions.

The guardianship is regulated in Title III, chap. 1, section II of the family C., entitled "Guardianship of the minor" (art. 113-114).

a) Legal characters

The guardianship has a complex legal nature, for the minor without parental protection, it is a means of protection, and for the guardian it appears as a free and obligatory task.

Being first and foremost a reliable, social task (the guardian has a duty to contribute effectively to the child's upbringing), the guardianship has the following characteristics:

The legality of the guardianship. The establishment of the guardianship, the cases in which the guardianship is opened, the procedure for appointing the guardian, the obligation for certain persons to fulfill the task of guardian, as well as the termination of the guardianship are provided by law by mandatory rules.

Obligation of guardianship. Being a mandatory task, the so-called guardian can only refuse in special situations, biologically, socially and morally motivated. These situations are expressly provided in art. 118, paragraph 2, Family Code. Thus he can refuse the guardianship task:

- the person who turned 60 years old;
- the pregnant woman or the mother of a child younger than 8 years old;
- the person who raises or educates two or more children;
- the person exercising another guardianship or trusteeship;

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- the person who, because of the disease, of the infirmity of the kind of work, of the departure of the domicile from the place where the goods of the minor are, or for other good reasons, could not fulfill the task of the guardianship.

Free tutoring. According to article 121, paragraph 1, Family Code, "Guardianship is a free task." The gratuity is of the nature of the guardianship and not of its essence, so that "the guardianship authority, taking into account the work done in the administration of the assets and the material state of the minor and the guardian, will be able to grant the latter a remuneration, which shall not exceed 10% from the income of the minor's goods. The supervisory authority, according to the circumstances, will be able to modify or suppress this remuneration "(art. 121, para. 2).

The personality of the guardianship. The tutorship is strictly personal, being instituted *intuitu personae*, considering the person of the tutor. Therefore, it must be exercised personally by the tutor, who cannot substitute for another person to fulfill his duties. Generality of the guardianship. Guardianship is instituted whenever a minor is deprived of parental protection. Art. 115, of the Family Code establishes the obligation to notify the guardianship authority in all cases when guardianship must be opened for a minor without parental protection.

Opening the guardianship

Guardianship opens in all cases when both parents of the minor find themselves permanently unable to exercise parental protection. In case only one of the parents is unable, the guardianship will not open, the protection of the minor being ensured by the other parent.

The cases in which the minor will be placed under guardianship are listed by art.113 Family Code as follows:

- a) when both parents are dead or declared as dead;
- b) when both parents are deprived of parental rights;
- c) when both parents are unknown;
- d) when both parents are placed under judicial interdiction;
- e) when both parents are missing;
- f) when, after the adoption, the underage child, the court, decides to establish the guardianship.

Content of guardianship protection

As with parental protection, guardianship protection comprises two sides: personal and patrimonial. As far as the personal side is concerned, the guardian has the same rights and obligations towards the minor under his tutelage as a natural parent. Thus, he has an obligation to raise him/her, "taking care of his physical health and development, his education, teaching and professional training according to his qualities."²

The patrimonial side of the protection of the minor through guardianship includes:

- 1.) In the case of the minor under 14 years, the right to administer his assets and to represent him in the civil legal acts.

The legal documents that the tutor concludes in the representation function of the minor can be grouped as follows:

- a.) - acts that the tutor can conclude alone, without the approval of the tutelary authority: acts of conservation and acts of administration of the patrimony;

² Turianu C.,2008, *Drept civil,Partea generală și Persoanele*, Ed Universitară, Bucharest, p.388.

b.) - acts that the tutor can only validly conclude with the prior consent of the guardianship authority: legal documents available, including taking from the CEC (The Romanian Savings Bank) the amounts of money that exceed the maintenance needs of the minor. According to art. 128, Family Code: "It is stopped to conclude legal acts between the guardian, the husband, a relative in a straight line, or the brothers and sisters of the guardian, on the one hand, and the minor on the other." Also, art. 129, para. 1 states: "The guardian cannot, in the name of the minor, make donations or guarantee the obligation of another."³

2.) For the minor over 14 years, the role of the tutor is to approve the acts that he personally concludes. Thus, according to art. 133, Family Code, "The minor who has turned 14 years concludes legal documents with the prior approval of the tutor."

Termination of guardianship

The guardianship of the minor ceases either due to causes that concern the person of the guardian (the termination of the guardian's function is considered), or as a result of some causes that concern the person of the minor (termination of the guardianship). The following are considered to be causes for termination of a tutor's function:

- death of the tutor;
- removal from the guardianship, if one of the circumstances that makes the person incapable of being a guardian occurs (art. 117, Family Code), or if he "commits an abuse, a gross negligence or facts that make him unworthy to be a guardian, as well as if he does not fulfill his task satisfactorily" (art. 138, paragraph 2, Family Code);

Responsibility of the tutor

The tutor's responsibility is committed for the non-fulfillment or inadequate fulfillment of the obligations stipulated by the law, both regarding the person of the minor and in relation to the administration of his or her heritage.

The criminal liability is committed if the act of the guardian meets the constituent elements of an offense, for example, ill treatment applied to the minor (art. 306, Criminal Code), fraudulent management (art. 214, Criminal Code).

The administrative liability intervenes if the guardian does not fulfill his obligations sanctioned by the law, in case of non-observance, with a contravention fine. Whenever the guardian, by not exercising or improper performance of the obligations has caused the minor a prejudice, the civil liability will be committed.

The civil liability may be:

- non-patrimonial, having as a consequence the removal from the guardianship. In this sense, art. 138, paragraph 2 of the Family Code, states: "The tutor will be removed if he commits an abuse, a serious negligence or an act that makes him unworthy to be a guardian, as well as if he does not fulfill his task satisfactorily;"
- patrimonial, which takes the form of criminal liability for own deed (art. 998-999, Criminal Code).

Protecting the child through custody

The custody of the minor is the legal, temporary and subsidiary means, established by the law, through which the protection of the minor is ensured. Along with the parental and guardianship care, the custody is included among the means of protecting the minor. As a legal nature, the custody is an ad-hoc guardianship, being applicable to it, by analogy, the rules of guardianship of the minor.

³ See Tărchilă P. *Drept civil, Partea generală și Persoanele*, Ed. Gutenberg, 2016, Arad, p.311

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Establishment of the custody

The custody of the minor is instituted by the guardianship authority from the minor's domicile. The establishment of the custody takes place ex officio or at the request of one of the persons provided for in art. 115, Family Code.

The juvenile custody can be ordered for one of the following 4 cases:

1.) when there are contradictions of interests between the minor and his legal guardian (parent or guardian). Art. 132, Family Code states: "Whenever there is a conflict between guardian and minor's interests that are among those that must lead to the replacement of the guardian, the guardianship authority will appoint a curator."

2.) When the replacement of one minor's tutor with another is not done concomitantly. Art. 139, Family Code stipulates: "until the new tutor comes into office, the tutelary authority will appoint a curator".

1.) When there is a process regarding the interdiction of the minor. Art. 146, Family Code specifies: "In case of need and until the request for interdiction is resolved, the tutelary authority will be able to appoint a guardian for the care of the person and the representation of the one whose intention was requested, as well as for the administration of the goods".

2.) When the legal guardian of the minor is temporarily prevented from exercising his rights and duties towards the person and his goods. Article 152, letter c, Family Code stipulates that the guardianship authority will be able to institute a court order "if due to illness or other reasons the parent or guardian is prevented from performing a certain act on behalf of the person whom he/she represents or whose acts it approves".

Content of protection by custody

The custody covers two categories of curator attributions:

- 1.) - protecting the person of the minor (the personal side of the content);
- 2.) - the management of the patrimony of the minor (the patrimonial side of the content);

Termination of custody

The custody ceases if the causes that led to its establishment disappeared, based on the decision of the guardianship authority.

1.3. Protecting the mentally ill through the institution of judicial interdiction

The judicial prohibition is a protection measure that is provided under the conditions expressly provided by law for the person without capacity of decision due to alienation or mental weakness and consists in his/her lack of exercise capacity and the establishment of the guardianship.

The prohibition is a measure of judicial protection, which can be ordered only by the court. Therefore, the prohibition is different from the guardianship and custody (also protection measures) that is instituted by the guardianship authority.

This legal institution is regulated in the Family Code, art. 142-151, Decree no. 31/1954, art. 11, Decree no. 32/1954, art. 30-35.

The competent court of law

The jurisdiction to settle the application for interdiction belongs to the court whose territorial area is the domicile of the person for whom the interdiction is requested.

The placing under judicial interdiction can be requested by the tutelary authority as well as by all those provided in art. 115 (art. 143, Family Code). In the legal literature it is appreciated that the person concerned would also be entitled to apply for interdiction.

The effects of banning

The prohibition has the effect of depriving the person of exercise capacity and thus creating the premise for establishing the guardianship.

a.)- lack of interest in exercising one's capacity

As long as an elderly, alienated, or mentally disabled person has not been placed under a ban, she/he is considered to have full exercise capacity. The legal acts he/she concludes are, in principle, valid⁴. They could only be annulled if the alienated or mentally disabled could prove that he or she had completed the legal act at a time when he or she had no discerning in his / her actions. The fact that it would prove that his usual state of alienation or mental disability is not enough to create incapacity, until the court decision to place the interdiction intervenes, because the alienated or the mentally disabled also has moments of lucidity. In order to reach the annulment of the act, proof of the lack of discernment must be provided at the time of the conclusion of the act, otherwise the act is perfectly valid.

Following the interdiction, the alienated or the mentally disabled is completely deprived of the capacity to exercise, and for the annulment of the concluded act the evidence that it is forbidden to judge will be sufficient. In this situation, the legal act will be annulled, even if it were claimed that the forbidden one concluded the act in a moment of lucidity. In the case of ban, the incapacity is permanent, covering the possible moments of lucidity. Being totally devoid of exercise capacity, the one placed under the interdiction will be able to validly conclude legal documents, only through the tutor who is his legal representative.

The declaration of the incapacity of the forbidden by the judicial decision to place the interdiction is followed by the opening of the guardianship.

According to art. 145 Family Code, the decision to place under irrevocable interdiction is communicated by the court to the tutelary authority, which will appoint a guardian, as well as to the county sanitary direction.

Cessation of judicial prohibition

The judicial ban ends with:

- the death of the forbidden, either physically ascertained or declared by court. In the latter case the prohibition ceases on the date established in the declaration of death as the date of death. - lifting the prohibition by judicial decision, if the conditions that determined it ceased⁵.

The lifting of the prohibition is pronounced by the court with the respect of the same procedure as when establishing it, and with the compulsory obedience of the prosecutor's conclusions. The lifting of the ban will take effect from the date on which the decision became final.

The decision will be communicated by the court that pronounced it, to the court of the place where the decision to place the interdiction was transcribed, to be transcribed in the register and to be mentioned about lifting the ban, according to the decision that pronounced the ban.

1.4. Protecting the adult natural person through custody

The custody is the legal, permanent or temporary and subsidiary means of protecting the adult natural person. Two categories of custody can be distinguished:

1.) the actual custody, for the protection of a capable person, who is unable to manage his/her own estate, due to special situations (illness, old age, physical infirmity, etc.)

⁴ Dogaru I., 2010, *Drept civil român, Persoanele*, Ed. Europa, Craiova, p.421.

⁵ See L.Pop, op.cit. p. 345.

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2.) the custody of the incapable, for the temporary protection of a person without exercise capacity or with limited exercise capacity

The distinction between the actual custody and the custody of the incapable has the following aspects:

a.) the premises of the two institutions: the actual court is established for the protection of a person with full exercise capacity, but unable to exercise his/her rights due to special situations; the custody of the incapable considers the protection of a person lacking exercise capacity, or with limited exercise capacity;

b.) different legal regime: the rules of the mandate are applied to the actual custody, and the rules of the guardianship apply to the custody of the incapable.

Cases for establishing the custody

The establishment of the custody of the capable person is regulated in art. 152, Family Code, as well as in other normative acts thus according to art. 152, Family Code, the custody is established in the following situations:

a.) - if due to old age, illness or physical infirmity, a person, although capable, cannot personally manage his assets or defend his interests in satisfactory conditions and, for good reason, cannot name himself a representative (custody of persons with physical disabilities);

b.) - if, due to the disease or for other reasons, a person, although capable, can neither personally nor through a representative take the necessary measures in cases whose resolution does not suffer delay (the custody of the person in case of emergency);

c.) - if, due to the illness or for other reasons, the parent or guardian is prevented from performing a certain act on behalf of the person representing it or of whose acts he/she agrees with (the custody of the parent or guardian);

d.) - if a person misses a long time from home and did not leave a general guardian (the custody of the person missing for a long time from home);

e.) - if a person disappeared without news about him and did not leave a general guardian (the custody of the missing person).

f.) - the notarial succession court is established only if there is no guardian of the succession, the guardian being appointed by the notary (art. 72 of the Law no.36 / 1995 of the public notaries and of the notarial activity and art. 15 para. 1 of Decree no.31 / 1954);

g.) - the custody of the inheritance accepted as inventory benefit by the sole successor. In this case, the sole heir exercises a legal action against the inheritance (art.672 of the Civil Procedure Code);

h.) - the custody of the deaf-and-dumb. According to art.816 of the Civil Code: "the deaf-and-dumb who does not know how to write can accept a donation only with the assistance of a special curator appointed ... according to the rules established for minors."

Procedure for establishing the custody

The custody is instituted upon request or ex officio (art. 154, para. 1, Family Code).

According to art. 154, para. 2 Family Code: "The custody can be instituted only with the consent of the represented one, except in cases where the consent cannot be given (the case of missing person from home)⁶. The jurisdiction of the appointment of the trustee belongs (except in the case of the trustee of a succession) to the tutelary authority; the territorial competence of the tutelary authority differs depending on the case in which the curator is established.

⁶ Dogaru I., 2010, *Drept civil român, Persoanele*, Ed.Europa, Craiova, p.433.

Content of protection

The content of the custody of the capable person is governed by the following rules:

- the content of the curate of the capable person coincides with that of the representation. Thus, art. 155., paragraph 1, Family Code. specifies: "In cases where the custody is established, the rules of the mandate apply." Therefore, representation by the curator is made only under the conditions imposed by the represented one and only within the limits of the powers conferred by the curator. Exceptionally, if the represented person is not able to give instructions to the curator, the tutelary authority is authorized to give instructions to the curator (art. 155, para. 2, Family Code);

- the represented one can revoke the curator or he can also personally terminate the civil legal act. In this sense art. 153, Family Code stipulates: "In the cases provided in art. 152, the establishment of the custody is without prejudice to the capacity of the one the curator represents. ";

- while performing her/his task, the curator must consider the cause, or the reason for the establishment of the custody⁷.

2. Essential points in the logic of the theme

- the totality of the legal means used by the state for the purpose of protecting the individual, designates the system of legal means of protection of the natural person.

- the legal rules of the civil right, in accordance with the provisions of the new civil code, adopted on 01.10.2011, ensures the special means of the following categories of persons:

- to the minors, by protecting these through trusteeship and guardianship;

- to the alienated and mentally disabled by putting them under court prohibition and establishment of the trusteeship and guardianship;

- to natural persons found in special situations due to old age, diseases, physical disabilities and lack of people who can support them, by positioning them under the institution of the custody.

CONCLUSIONS

Civil law, like other branches of law, includes many institutions and norms that ensure the defense and protection of the subjective rights of natural persons. The norms of civil law ensure the protection of the following categories of persons by special means:

- to minors, through parental protection, guardianship and trusteeship;

- to the alienated and the mentally unstable, by putting under interdiction and establishing the guardianship and the custody;

- persons in special situations (old age, illness, physical disability), by establishing the custody.

The cases in which the minor will be placed under guardianship are listed by art.113 Family Code as follows:

a) when both parents are dead or declared as dead;

b) when both parents are deprived of parental rights;

c) when both parents are unknown;

d) when both parents are placed under Court interdiction;

e) when both parents are missing;

⁷ Gh. Beleiu, op.cit., p.337

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f) when, after the adoption, the underage child, the court, decides to establish the guardianship.

The child's custody is the legal, temporary and subsidiary means established by the law, which ensures the protection of the child. Along with the parental and guardianship care, the custody is included among the means of protecting the child. As a legal nature, the custody is an ad-hoc guardianship, being applicable, by analogy, the rules of the guardianship of the minor. The custody of the minor is instituted by the guardianship authority from the minor's domicile. The establishment of the custody takes place ex officio or at the request of one of the persons stipulated in art. 115, Family Code. The juvenile court can be ordered for one of the following cases:

- when there are contradictions of interests between the minor and his legal guardian (parent or guardian). Art. 132, Family Code states: "Whenever there is a conflict between guardians and minor's interests that are among those that must lead to the replacement of the guardian, the guardianship authority will appoint a curator."

- when replacing one juvenile's tutor with another, it is not done concomitantly. Art. 139, Family Code stipulates: "until the new tutor comes into office, the tutelary authority will appoint a curator".

- when there is a process regarding the interdiction of the minor. Art. 146, Family Code specifies: "In case of need and until the request for interdiction is resolved, the tutelary authority will be able to appoint a guardian for the care of the person and the representation of the one whose intention was requested, as well as for the administration of the goods" .

- When the legal guardian of the minor is temporarily prevented from exercising his rights and duties towards the person and his/her goods. Article 152, letter c, Family Code stipulates that the guardianship authority will be able to institute a court order "if due to illness or other reasons the parent or guardian is prevented from performing a certain act on behalf of the person who represents it or whose acts it approves".

The judicial prohibition is a protection measure that is provided under the conditions expressly stipulated by law for the person without capacity of decision due to alienation or mental disability and consists in his lack of exercise capacity and the establishment of the guardianship.

The prohibition is a measure of judicial protection, which can be ordered only by the court. Therefore, the prohibition is different from the custody and guardianship (also protection measures) that are instituted by the guardianship authority.

This legal institution is regulated in the Family Code, art. 142-151, Decree no. 31/1954, art. 11, Decree no. 32/1954, art. 30-35. The competence to solve the application for interdiction belongs to the court whose territorial area is the domicile of the person for whom the interdiction is requested. The placing under judicial interdiction can be certified by the tutelary authority as well as by all those provided in art. 115 (art. 143, Family Code). In the legal literature it is observed that the person concerned would also be entitled to apply for interdiction. The interdiction has the effect of depriving the person of exercise capacity and thus creating the premise for establishing the guardianship.

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