

SPECIAL GUARDIANSHIP - PROTECTION MEASURE FOR ADULTS - IN NATIONAL AND FRENCH REGULATIONS

R. MATEFI¹ I. NICOLAE²

Abstract: *This article proposes an analysis of the special guardianship, a measure of protection of the major, recently introduced in the Civil Code, following the changes made under Law no. 140/2022 regarding some protection measures for persons with intellectual and psychosocial disabilities and the modification and completion of some normative acts. The analysis concerns the internal regulations in the matter, by comparison with the regulation of this institution in the French legislation.*

Key words: special guardianship, protection, major, regulation.

1. Introduction

The institution of special guardianship is recently introduced in the Romanian legislation, and it is meant to protect the adults that are unable to take care of their interests due to the impairment of their mental faculties.

The measure is also to be found in the French Civil Code, where it regards the persons unable to provide for their interests due to an alteration, either of their mental faculties or of their bodily faculties. The present analysis focuses on a comparative presentation of the institution in the two legislations, emphasizing among other aspects, the legal conditions for establishing this measure, the procedure for its establishment or the duration of the measure.

2. Legal regulation of special guardianship in the Romanian Civil Code

Article 106, para. (2) of the Civil Code establishes that "the protection of the minor takes place through the institution of the measure of judicial counselling or special guardianship or curatorship or another measure provided by law", while article 164, par. (1) of the Civil Code, in its new regulation, provides that "the adult who cannot take care of his own interests due to a temporary or permanent, partial or total impairment of his mental faculties, established following the medical and psychosocial assessment, and

¹ *Transilvania* University of Braşov, roxana.matefi@unitbv.ro, corresponding author.

² *Transilvania* University of Brasov.

who needs support in the formation or expression of his will may benefit from judicial counselling or special guardianship, if taking this measure is necessary for the exercise of his civil capacity, under conditions of equality with other persons."

It follows, therefore, from the wording of this legal text that the legislator introduces two measures for the protection of the major – namely judicial counselling, respectively special guardianship, in the hypothesis that, as a result of a medical or psychosocial evaluation, it turns out that his mental faculties are affected, which makes it impossible for him to manage his own interests.

These measures are thus necessary in applying the principle of equality of legal subjects in the exercise of their civil capacity.

As shown in the doctrine, the two measures are necessary for protection equally of the interests of "the person who cannot take care of his interests (...) against the abuses of third parties, as well as against his own inaptitude and that of third parties, who, by the fact that these measures are subject to publicity, can learn about their existence, and thus avoid the conclusion of voidable legal acts, which could prejudice them." (Boroi, Angheliescu, Nicolae, 2022, p. 325).

3. Legal conditions for the establishment of special guardianship

Regarding the conditions that must be met in order to establish measures to protect the natural person, implicitly the ordering of special guardianship, we will initially focus on the provisions of art. 104 of the Civil Code, which regulates the general conditions.

A first condition, stated by the first paragraph of the previously mentioned legal text, is that any measure of protection of the natural person should be established only in his interest. It therefore follows that the interest of the natural person is the one that takes priority in the establishment of such a measure.

The second paragraph provides that "when taking a protective measure, it is to be taken into account the natural person's ability to exercise his/her rights and fulfill his obligations regarding his/her person and assets", while according to another condition established by the Romanian legislator "the measures to protect the adult and the decisions regarding his/her person ensure respect for his/her dignity, rights and freedoms, his/her will, needs and preferences, as well as the safeguarding of his/her autonomy." (para. 3, Civil Code).

As for the duration of these protective measures, para. 4 of the Civil Code provides that "the measures for the protection of the minor are ordered for the shortest possible term, only in case of necessity, and are proportional and individualized depending on the degree of alteration of his/her mental faculties, as well as the needs of the protected person and the circumstances in which he finds himself." It therefore follows that the establishment of these measures is governed by the principles of necessity and proportionality.

To these two principles we should add that of subsidiarity (Boroi, Angheliescu, Nicolae, 2022, p. 327), as it results from the content of the last paragraph of art. 104 of the Civil Code, according to which "*The measures for the protection of the minor are ordered only if the court considers that establishing the measure of assistance for the conclusion of*

legal acts, the application of the legal regulations in the matter of representation, of those regarding the rights and obligations of the spouses or the approval of a protection mandate concluded by the person in question are not sufficient to protect the interests of the protected person."

In addition to these general conditions established by art. 104 of the Civil Code, in order to establish special guardianship, the legislator also stipulates the condition that the deterioration of his mental faculties is total and, as the case may be, permanent and that it is necessary to be continuously represented in the exercise of his rights and freedoms (par. 4, Art. 164 Civil Code).

In addition, the establishment of such a measure will only be done in the event that "an adequate protection of the protected person cannot be ensured by the establishment of assistance for the conclusion of legal acts or of judicial counselling." (art. 164, para. (5) Civil Code).

The measure of special guardianship can be ordered not only in respect of persons with full exercise capacity, but also in the case of minors with restricted exercise capacity. According to paragraph (6) of art. 164 of the Civil Code "*when the court of guardianship assesses that the protection of the person can be achieved by the institution of curatorship or by placing him under judicial counselling, this measure can be ordered one year before the date of reaching the age of 18 and begins to produce effects from this date*".

4. The procedure for the establishment of special guardianship and the duration of the measure

The persons entitled by the legislator to request the establishment of special guardianship are the ones who needs care, his spouse or relatives, the person who lives with him, the persons close to the minor, the administrators and tenants of the house where the minor lives; the civil status records on the occasion of the registration of a person's death, the notary public on the occasion of the opening of an inheritance settlement procedure; the courts on the occasion of a criminal conviction or the termination of parental rights; the prosecutor, the local public administration authorities, the protection institutions, as well as any other person (Art. 111 and 165 Civil Code).

The procedure for establishing the measure of special guardianship is regulated by the Civil Procedure Code, in the content of art. 936 – 942. Without describing in detail the stages necessary for the establishment of this measure, we only mention that the court that has the competence to resolve the request for the establishment of special guardianship is the guardianship court in whose jurisdiction the person is domiciled.

At the same time, we specify that through the decision by which the measure of special guardianship is ordered, the court will also establish the categories of documents for which representation is necessary in relation to the degree of autonomy of the protected person and his needs.

The court can also order that the measure of special guardianship covers only the person or only his assets. (Art. 168, paragraph (4) Civil Code).

As for the duration of the measure of special guardianship, it will be ordered according to the provisions of art. 168, para. (3) of the Civil Code for a period that cannot exceed 5 years.

The legislator also provides for the possibility of extending this measure in the event of a permanent deterioration of a person's mental faculties, however, the duration of this instituted measure must under no circumstances exceed 15 years.

Whenever he finds that there are data or circumstances to justify the re-evaluation of the measure, the representative of the protected person has the duty to notify the guardianship court for the re-evaluation of this measure.

The same obligation is incumbent upon him at least 6 months before the expiration of the period for which the measure was instituted. The court could order the extension, replacement or lifting of the measure of special guardianship.

5. Special guardianship in French civil legislation

According to Art. 440 of the French Civil Code, as it has been modified by Law no 2007-308 of March 5, 2007, "the person who, without being unable to act himself, needs, for one of the reasons provided for in article 425, to be assisted or supervised in a continuous manner in the important acts of civil life, can be placed under curatorship. Curatorship is only ordered if it is established that legal safeguards cannot provide sufficient protection. A person who, for one of the reasons provided for in article 425, must be represented continuously in acts of civil life, may be placed under guardianship. Guardianship is only pronounced if it is established that neither legal safeguards nor curatorship can provide sufficient protection." (https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006427481/2022-12-05).

Article 425 of the French Civil Code stipulates that "any person unable to provide for their interests on their own due to an alteration, medically confirmed, either of their mental faculties or of their bodily faculties which would prevent the expression of their will, may benefit from a measure of legal protection provided for in this chapter. Unless otherwise provided, the measure is intended to protect both the person and the property interests of that person. However, it may be expressly limited to one of these two missions."

As we can notice, the reason for the establishment of a protective measure that can target the person, his goods or both the person and the goods is the medically confirmed impossibility of the person to take care of his interests due to an alteration of his mental or physical faculties.

The duration of this measure is set by the judge and can not exceed five years. Whether the alteration of personal faculties of the person concerned clearly does not appear likely to experience an improvement according to the scientifically acquired data, the judge may set a longer duration, not exceeding ten years (Art. 441 of the French Civil Code). According to Art. 442 of the French Civil Code, the judge may renew the measure for the same duration.

"When the alteration of the personal faculties of the person concerned does not appear manifestly to experience an improvement according to the scientifically acquired

data, the judge may, by specially reasoned decision on the assent of a doctor registered on the list mentioned in Article 431, renew the measure for a longer period that he determines, not exceeding twenty years” (Art. 442 of the French Civil Code).

The measure can be terminated, modified, or replaced with another measure at any time. In the absence of renewal, the measure ends at the expiry of the fixed period, in the event of a judgement of release becoming final or in the event of the death of the person concerned (Art. 443 of the French Civil Code).

Regarding the person that is going to exercise the function of guardian, the French Civile Code stipulates that in case a person appoints one or more persons that will be responsible for exercising guardianship in case he/she will be placed under such a measure, this appointment becomes binding on the judge.

By exception, the judge will decide in case the person refuses the function, she/he can't exercise it or this appointment is contrary to the interest of the individual placed under guardianship (Art. 448 of the French Civil Code).

If a person that is placed under guardianship did not appoint any person for this function, the judge might appoint the spouse as guardian, or the partner with whom he has concluded a civil pact of solidarity, his concubine, a relative, an ally or a person residing with the protected adult or maintaining close and stable ties with him, a legal representative for the protection of adults (art. 449, 450 of the French Civil Code).

6. Acts performed under guardianship

According to Article 473 of the French Civil Code, the person placed under guardianship will be represented by his guardian in all acts of civil life, unless the law authorizes him to act for himself.

It is also provided by law that “the judge may, in the opening judgment or later, list certain acts that the person under guardianship will be able to perform alone or with the assistance of the guardian” (art. 473 of the French Civil Code).

The guardian is also responsible with representing in court the person placed under guardianship.

The guardian may also assist or represent the person under guardianship in making donations, but only if the judge or the family council authorizes it.

7. Conclusions

By comparing the regulations of guardianship as a measure of protection for adults in the Romanian and French civil regulations, we can notice that there are many similarities, as the legislator of the Romanian Civil Code had as source of inspiration the French legislation.

Both in Romania and in France, this measure is meant to protect those adults that are unable to take care of their own interests. While the Romanian Civil Code regulates the temporary or permanent alteration of the mental faculties of a person as the reason for establishing their special guardianship, the French Civil Code refers to the medically confirmed alteration, either of the mental faculties or of the bodily faculties of the

person that will be placed under guardianship.

Regarding the duration of this measure that is to be established, we can notice that in the light of the Romanian Code the special guardianship can be ordered for no more than 5 years, but it can be extended in case of a permanent deterioration of the person's mental faculties. In this case the duration of the measure cannot exceed 15 years.

By comparison, we notice that according to the French Civil Code, the measure can be initially established for maximum 5 years. In case of no improvement of the alteration of personal faculties of the person, the duration of the special guardianship can be ordered for a longer period of time, but no longer than ten years.

The maximum length of this measure is twenty years in case the alteration of the personal faculties of the person does not experience any scientifically proven improvement.

References

Romanian Civil Code

French Civil Code

https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006427481/2022-12-05

Boroi, G., Anghelescu, C.A, Nicolae, I. (2022). *Fişe de drept civil. Partea generală. Persoanele. Familia. Drepturile reale principale* [Civil law sheets. The general part. Persons. The family. The main real rights]. Bucharest: Hamangiu.