

Theoretical and Practical Considerations Regarding the Child's Right to a Family Environment and to Alternative Care

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1 Preliminary considerations

Child protection represents the set of rights and duties acknowledged in the child's interest, to his/her natural or foster parents, whose exercise, and fulfilment, respectively, has as purpose the insurance of the child's raising, education and formation for life¹.

The legal framework with respect to the protection of the minor, observance, promotion and granting of the child's rights is established by the Family Code and by Law no. 272/2004 related to the protection and promotion of the child's rights².

The underage child's protection is mainly and habitually done by the parents. The exercise of rights and the fulfilment of the parental duties must have in mind the superior interest of the child and ensure the child's material and spiritual well being, especially by taking care of him/her, by maintaining personal relations with him/her, by ensuring his/her raising, education and maintenance, as well as by his/her legal representation and by the management of his/her patrimony. In this sense, art. 5 paragraph (2) of Law no. 272/2004 stipulates that the responsibility for the bringing up and insurance of the child development devolves mainly upon the parents, who must exert their rights and fulfil their obligations towards the child, taking into account, first of all, his/her highest interest.

In the child's rights matter, the dominant principle is that of complying with and promoting with priority the superior interest of the child. This principle is imposed including in relation with the rights and obligations of the child's parents, of his/her other legal representatives, and to any persons to whom he/she was legally entrusted³. The judicial practice and the specialized literature have emphasized the prevalence of the principle of the child's superior interest in all steps and decisions regarding the children, taken by public authorities and authorized private bodies, as well as in the cases solved by courts of law.

The defence system around the child is concentric: the natural and legal core is the family, formed of parents and their children; the extended family, composed of the child, parents and their relatives⁴

¹ In this sense, see: A. Ionaşcu, M.N. Costin, M. Mureşan, V. Ursa „*Filiaţia şi ocrotirea minorilor*”, Dacia Publishing House, Cluj-Napoca, 1980, p. 172.

² Published in the Official Gazette, Part I, no. 557 of the 23rd of June 2004. This law came into force on the 1st of January 2005, except for the provisions of art. 17 paragraph (2), art. 19 paragraph (3), art. 84 paragraph (2), art. 104 paragraph (2), art. 105 paragraph (5), art. 107 paragraph (2) and art. 117- which came into force 3 days after the publishing of this law in the Official Gazette, Part I.

³ Thus, it was decided that the protection of a child who claims to have been the victim of a physical and/or emotional abuse, especially when he/she comes from a family with social problems, i.e. the separation of parents, after one of them decided to work abroad, must be realized promptly, with the identification of the members of the extended family, capable of exerting „de facto” the parental rights and also by listening to what the underage child's statement, to the extent allowed by his/her situation and age. (Bucharest Court of Law, 5th Civil Section, civil judgment no. 888 from August 1st 2006, irrevocable by lack of appeal, unpublished.

removed, including; substitutive family, reuniting the persons, others than those belonging to the extended family, who ensure, according to the law, the raising and caring of the child. In the 2nd section of the 2nd Chapter „Child’s Rights” from the Law regarding the protection and promotion of the child’s rights, the child’s rights to grow up next to his/her parents are regulated (art. 30-38) and the child’s right of receiving alternative protection, as temporarily or definitively deprived of the protection of his/her parents, or who, in the purpose of protecting his/her interest, cannot be left in their care (art. 39-42).

2 Child’s right of growing up next to his/her parents.

The family is the natural and most beneficial micro-climate for a child to manifest his/her rights, and the child has the right to grow up next to his/her parents. For the first time in our legislation, this right of the child is expressly stipulated in art. 30, paragraph (1) from Law no. 272/2004.

According to art. 8, paragraph (2), this right is acknowledged upon the child’s birth⁴. The establishment and preservation of the child’s identity, if applicable, with the support of public institutions and authorities, has as finality the defining of his/her family belonging, as a premise of the exercising of the right to grow up next to his/her parents, be they „natural” or foster parents⁵.

The same right grants to the „lost” child the duty to receive the support from public institutions and authorities, to receive, within the shortest extent possible, his/her return to his/her parents; his/her parents or, if applicable, the child’s legal representative, must announce to the Police the child’s disappearance from the domicile, within at most 24 hours since the disappearance was ascertained.

The child cannot be separated from his/her parents or from one of them, against their will, except for the cases expressly and limiting provided by the law, under the reserve of judiciary reviewing and only if this thing is imposed by the child’s superior interest. On the grounds of art. 103 from the Family Code, parents have the right to ask for the returning of the child from whoever is holding him/her without being entitled to.

Any separation of the child from his/her parents, as well as any limitation of the exercise of parental rights must be preceded by the systematic supply of the services and performances provided by the law, with a special emphasis on the corresponding informing of parents, on their counselling, therapy or mediation, granted based on a service plan.

The child’s right to grow up next to his/her parents means that the child remains daily next to his/her parents, that he/she is cared of, educated by them and has as correspondence the correlative obligation of the parents to raise him/her. Thus, both parents are responsible for raising their children, in full equality, both in the relations between them, as parents, and in the relation between the parents and their children, without making differences if the children were born during their marriage, from other marriages, with legally established affiliation or adopted.

For realizing the child’s right to grow up in conditions which allow his/her physical, mental, spiritual, moral and social development, art. 32 from Law no. 272/2004 expressly establishes the following obligations for parents: the obligation to supervise the child; the obligation to collaborate with him/her and to respect his/her intimate and private life, and his/her dignity; the obligation to inform the child about all the acts and facts which could affect him/her and to consider his/her opinion; the obligation to take all necessary measures to realize the rights of their child; the obligation to collaborate with

⁴ According to the constant case law of the European Court of Human Rights, the relations between parents and children constitute one of the essential components of the family life, protected by art. 8 of the Convention. Starting from birth and by the mere fact of birth, between a child and his/her parents there is a constitutive relation of the family life, understood as a biological and/or juridical connection, above which a real, affective, personal relation, is over imposing. See C. Bărsan , *“Protecția dreptului la viață privată și familială, la corespondență și la domiciliu în Convenția Europeană a Drepturilor Omului”*, P.R., supplement to issue 1/2003, p. 54 and subs.

⁵ In this sense, see R. Chiriță *„Convenția europeană a drepturilor omului”*, Comentarii și explicații, 2nd Edition, Beck Publishing House, Bucharest, 2008, p. 503 and subs.

natural persons and legal entities which exert activities in the domain of caring, educating and forming their child .

The child's right to grow up next to his/her parents is accompanied by the right to met his/her relatives and to have personal relations with them, and other persons next to whom he/she enjoyed a family life, without his/her parents or another legal representative impair the child's personal relations with his/her grand parents, brothers or sisters or with other persons for whom he/she developed feelings of attachment. Only a court of law can make such decision if it deems that the maintenance of the relation with a certain person could endanger the physical, psychical, intellectual or moral development of the child (art. 14 from Law no. 272/2004).

3 The right of a child separated by both of his/her parents or by one of them, to maintain personal relations and direct contacts with both parents.

The Family Code accustomed us to report the right to have personal relations to the child's parent as sole holder of such right⁶.

But now, the Law regarding the protection and promotion of the child's rights makes reference to the child's right of having personal relations and direct contacts with both parents. Based on art. 16, paragraph (1) and (2) from the Law, the child who was separated from both parents or from one of them, pursuant to a measure ordered according to the law – either the child was entrusted for raising and educating in the context of the dissolution of marriage (art. 42 from the Family Code), by the establishment of a measure concerning the special protection of the child, or by any other hypothesis involving the cleavage of parental care – has the right to maintain personal relations and direct contacts with both parents, including in the case of a child whose parents live in different States (art. 17), except for the case when this is contrary to his/her superior interest; the court of law can delimit the exercising of this right if it deems that otherwise, it would endanger the physical, mental, spiritual, moral or social development of the child.

The fact that Law no. 272/2004 comes with a shaded approach as opposed to the Family Code, talks about the child's right of having personal relations and direct contacts with his/her parents, and not about the parent's right to have personal relations with the child, risks an excessive, unilateral interpretation, this time, in the child's favour. We believe that this right, in this primary and essential format, i.e. child-parents, belongs both to the child and to the parents – better said, to each one of the parents – but only the superior interest of the child may justify restrictions in its exercising, without the parent to be able to void them, by invoking a private right to keep personal relations with his/her child. For example, the decision was made that, when the conflict between parents had affected the child's health status, this aspect cannot be neglected, or minimized, so that, considering the child's superior interest, his/her staying at his/her father's domicile for longer periods of time is not opportune, at least until the relations between parents become normal again⁷.

The child's right of having personal relations is not limited only to parents, but, as an innovation, the law expressly stipulates the underage child's right to have personal relations and direct contact with his/her relatives and with other persons, with whom he/she had a family life [art. 14 paragraph (1) and (2)], a right opposable to the parents, as long as they are not entitled to prevent the personal relations between their child and his/her grand parents, brothers and sisters, or with other persons with whom he/she had a family life. Only the court of law can decide in this sense, if it acknowledges that there are good grounds which may indicate that the personal relations, direct contacts with a certain person or with certain persons, may endanger the physical, psychical, intellectual or moral development of the child [art. 14, paragraph (3)].

⁶ In this sense, see, art. 43, 3rd paragraph, art. 111 from the Family Code.

⁷ Bucharest Court of Appeal, 3rd Civil Section and for cases involving underage children and family, see judgment no. 652/2005, in the Bucharest Court of Appeal, "*Culegere de practică judiciară în materie civilă*", 2005, U.J., Bucharest, 2006, p. 477.

The forms by which personal relations can be realized are the following, according to the examples enumerated in art. 15, paragraph (1): meetings between the child and his/her parent or another person who has this legal right (this is a legal provision, in which the analyzed right is not attached exclusively to the child); visiting the child at his/her domicile;⁸ housing the child over a determined period, by his/her parent or by a person where the child does not live habitually; the transmission of information to the child, about his/her parent or other persons having the right of holding personal relations with the child; transmission of information about the child, including recent photos, medical or school evaluations, to the parent or person entitled.

For the case when children and parents, or the other persons having family connections with the children, live in different States, the Strasbourg Convention regarding the personal relations with children, ratified in our country by Law no. 87/2007⁹, establishes ensuring measures and adequate guarantees for the exercise of personal relations and the immediate return of children upon the end of the visit period, having in mind, at the same time, the instituting of the cooperation between central authorities, judiciary authorities and other bodies, having as purpose the promotion and improvement of the personal relations between children and their parents, and with the other persons with whom they have family relations.

According to art. 4 from the Convention, a child and his/her parents have the right to obtain and maintain constant personal relations – by personal relations understanding, according to art. 2 letter a), the child's housing, limited in time, by a person with whom the child does not usually live, the meeting between the child and that person, any type of communication between the child and that person, as well as the supply of any type of information about the child and that person or vice versa – and these cannot be restrained or excluded except when this is necessary in the child's superior interest; when the child's superior interest does not include having unsupervised personal relations with one or both of his/her parents, the possibility of supervised personal relations is considered, and of other forms of personal relations with that parent. Under the reserve of the child's personal interest, the same right is acknowledged as well, in relation with other persons different from parents (art. 5).

4 The right of the child, temporarily or definitively deprived of the care of his/her parents, to alternative protection.

According to art. 39 paragraph (1) from Law no. 272/2004, any child who is temporarily or definitively deprived of the protection of his/her parents, or who, for having his/her interests protected, cannot be left in their care, has the right to alternative protection.

In detail, art. 56 enumerates the children found in any of the following situations: a child whose parents are deceased, unknown, who lost their parental rights, or who were forbidden from exerting their parental rights, placed under interdiction, declared death or disappeared, by way of justice; a child who, for having his/her interests protected, cannot be left in the care of his/her parents, for reasons not imputable to them; an abused or neglected child; a found child or a child abandoned by his/her mother in sanitary units; a child who committed a fact provided by the criminal law, but who does not have criminal responsibility. We mention that the invoked text is placed in the context of special protective measures – one of the forms of alternative protection, together with the tutelage or adoption – but the enumeration is complete for the cases when the intervention by alternative assistance is obligatory.

The same article 39, in paragraph (2), enumerates the following forms of alternative protection: tutelage, special protective measures – in this category, according to art. 55, we have placement, emergency placement, specialized supervision – and adoption. As a common trait, the court of law is the only authority competent for making decisions regarding the total or partial defeasance of parental rights and the return of the exercise of parental rights, to the person exercising them, and fulfils the

⁸ The limitation of the father's visiting right to only a few hours, at the mother's domicile, and in her presence, does not ensure either the realization of an affective father-daughter relation, or the daughter's emotional stability – Bucharest Court of Appeal, 2nd Civil Section, judgment no. 440/2006, P.R. no. 5/2006, p. 93.

⁹ Official Gazette no. 257 from April 17th2007.

parental obligations in relation to the child temporarily or definitively deprived of parental care, the means in which the rights and exerted and the parental obligations are fulfilled (art. 38).

The order of enumeration in art. 39 paragraph (2) also indicates a reference order between the three types of measures¹⁰, which is relevant, of course, only if the situation in discussion leaves open all possible options. The tutelage solution is explicitly preferred in the case of a child whose parents are deceased, unknown, lost their parental rights, or who were forbidden to exert their parental rights, placed under interdiction, declared death or disappeared, by way of justice, child in relation to whom the special protective measure represented by placement will be taken only if the tutelage could not have been instituted [art. 56 letter a)]. The approval of opening the procedure of the internal adoption of a child in one of the situations which justify the instituting of tutelage presupposes, among other conditions, that the steps taken for reintegrating the child in the family, or, if applicable, for placing the child within the extended or substitute family had failed, the proof of performing these steps being shown before the court of law, by the General Directorate for Social Assistance and Child Protection, from his/her domicile (art. 22 and art. 23 from the Law regarding the juridical regime of adoption). Of course, when the alternative protective measure will be decided about a child who committed a criminal fact, but does not have criminal responsibility, only the special protective measures remain under discussion, namely placement and specialized supervising (art. 80).

We are wondering which are the reasons for which the law giver grants preference to tutelage as opposed to special protective measures, and adoption. We think that tutelage is preferred in the competition with the special protective measure represented by placement (or emergency placement) even though there are no significant differences from the point of view of selection criteria of the person or family which will ensure alternative protection - in essence, in both cases, the members of the extended family have priority [art. 41 paragraph (2), art. 42 paragraph (1) regarding tutelage, art. 60 paragraph (3) letter a) regarding placement] who hold the corresponding offer of moral guarantees and material conditions to be granted a child for care [art. 41 paragraph (2), respectively art. 58 paragraph (2)] and are able to ensure a certain continuity in the child's education, also considering his/her ethnical, religious, cultural and linguistic origin [art. 39 paragraph (2) – or from the point of view of the estimated duration of the measure – in both cases, the alternative protective measure accompanies the child throughout the period of crisis caused by the lack of parental protection, with the observation that in the case of placement, the protection may be extended after the coming of age (art. 51)¹¹ - because only in the tutelage case there is an almost complete transfer of the parental rights and duties from parents, to the tutor, only the maintenance obligation between parents and children missing, which is not conveyed onto the tutor.

The parental rights and obligations will be taken over by the tutor in their entirety, including the prerogative to consent to the adoption of the child under tutelage [art. 11 letter a) from Law no. 273/2004]; comparatively, in the case of special protective measures, the parental rights and obligations, if they are suspended or withdrawn [they can be maintained - art. 62 paragraph (1)], they will be exerted, respectively fulfilled, not only by one person, but “in collaboration”, in the sense that the family which received the child, will exert the rights, and will fulfil the parental duties regarding the child, and the president of the County Council (or, if applicable, the Mayor of Bucharest Municipality) those regarding the child's goods [art. 62, art. 64 paragraph (3) from Law no. 272/2004]. The transfer of rights mentioned above makes it that the tutor's responsibility can reach superior levels, in the conditions in which the efforts to reintegrate the child inside the family are not abandoned (obviously, if this think is objectively reachable) and without this measure being as categorical and irreversible as in the case of adoption – subsidiary solution as opposed to tutelage –

¹⁰ This point of view also seems to be adopted by the judiciary practice. In a recently delivered judgment, it is shown that adoption is a subsidiary alternative protective measure for a child, after tutelage and special protective measures, in the hierarchy of measures conceived by the law giver; consequently, adoption, as final measure, can be agreed with only if the child was reintegrated in the family, or the steps taken for applying the other protective measures failed. (Craiova Court of Appeal, section for cases with underage children and family, judgment no. 516/2005, in B.J. data base, C.H. Beck Publishing House).

¹¹ There are two cases when the young person who benefited from a special protective measure during childhood can ask for the maintenance of assistance: he/she continues his/her studies; he/she is faced with the risk of social outcast.

when the akin relations themselves are concerned, without the possibility of reintegrating the child in his/her biological family, at least as long as adoption is valid.