

CONSIDERATIONS REGARDING LAW NO. 140/2022 ON SOME PROTECTION MEASURES FOR PERSONS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES AND AMENDING AND SUPPLEMENTING SOME NORMATIVE ACTS

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ABSTRACT: *By the Constitutional Court Decision no. 601 of 16 July 2020 on the exception of unconstitutionality of the provisions of article 164, paragraph 1 of the Civil Code was admitted the exception of unconstitutionality and it was found that these legal provisions are unconstitutional. Considering the obligation of the legislator to agree the provisions found to be unconstitutional with the Constitutional Court Decision no. 601/2020 and with the provisions of the Constitution of Romania, Law no. 140/2022 on some measures of protection for persons with intellectual and psychosocial disabilities and amending and supplementing some normative acts was adopted. The present study aims to analyze how the former institution of the prohibition of the natural person has been reconfigured in the normative act to come into force on August 18, 2022, compared to the regulation of the institution of the prohibition.*

KEYWORDS : *article 164; paragraph 1 of the Civil Code; measures of protection; persons with intellectual and psychosocial disabilities; judicial counseling; special guardianship.*

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By the Constitutional Court Decision no. 601/2020 the exception of unconstitutionality was admitted and it was found that the provisions of article 164, paragraph 1 of the Civil Code are unconstitutional.

The considerations of that decision have shown that the deprivation of a person's capacity to exercise and the exercise of that capacity through a guardian is a particularly serious consequence of the prohibition of a person.

Thus, from the way in which the measure of putting under judicial prohibition is regulated by article 164, paragraph 1 of the Civil Code, it does not follow that it concerns the total lack of discernment of the person in relation to the multitude of interests he may manifest in the various areas of life.

However, although the person concerned may manifest a conscious will in a particular area, by putting him under judicial prohibition he loses his capacity to exercise. Although the Convention on the Rights of persons with disabilities establishes that a protection measure is established taking into account the existence of different degrees of capacity,

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Romanian legislation provides for restricted exercise capacity only in respect of the minor aged between 14 and 18 years, not the limited exercise capacity of the major who, as a result of being put under judicial prohibition, will be totally deprived of it, the legal acts will be concluded on his behalf by a legal representative.

The Court holds that the effects of restricting a person's ability to exercise more than is necessary may place him, in terms of freedom of action in areas where he manifests a conscious will, in a situation of inequality with other persons who are not under a measure of protection, being free to exercise their rights and to use their freedoms, with consequences for the principle of equality. Therefore, given that there are different degrees of disability, and that a person may have to a greater or less extent impaired discernment, but not entirely abolished, pending the provision of a measure restricting the person's capacity to exercise, consideration should be given to the imposition of alternative and less restrictive measures than the imposition of a judicial ban. Consequently, in the absence of these alternative measures, it is for the legislator to identify and regulate mechanisms capable of providing the necessary support in decision-making based on the will and preference of these persons.

Therefore, as assumed by the ratification of the Convention on the Rights of persons with disabilities, the Romanian State must provide support in the exercise of legal capacity, by developing mechanisms based on the premise of respecting the rights, will and preferences of persons with disabilities, and, only to the extent that the support thus provided proves ineffective, regulate protective measures adapted to the particular situation of individuals. Therefore, a safeguard measure such as injunction must be regulated only as a last ratio, since it is of extreme gravity involving the loss of civil rights as a whole and must be carefully considered each time, including whether other measures have proved ineffective in supporting the civil capacity of the person. Therefore, the State must not renounce its positive obligation arising from the provisions of article 50 of the Constitution and must provide all the necessary support to avoid such an extreme measure.

At the same time, the Court notes that it was regulated the obligation of the court to communicate the prohibition decision to the competent health service, in order for it to establish permanent supervision over the one placed under judicial prohibition, according to the law. Therefore, a person may be placed under judicial protection for an indefinite period of time, and the permanent supervision of the health service does not necessarily imply a periodic reassessment of the person's capacity, this unambiguously does not result from national regulations. However, given that there is a possibility that the mental deficiency may vary over time, the putting under judicial prohibition for an indefinite period and without a periodic reassessment of the capacity of the person affects the rights and interests of persons who, during certain periods, can be aware of and coordinate their actions. Therefore, the measure of protection of the person with mental disabilities must be individualized in relation to the degree of incapacity.

The Court notes that the measure of the injunction regulated by article 164 paragraph 1 of the Civil Code is not accompanied by sufficient guarantees to ensure respect for human rights and fundamental freedoms. It does not take into account the fact that there may be varying degrees of incapacity or the diversity of interests of a person, it is not disposed of for a specified period of time and is not subject to periodic review. Any protection measure must be proportionate to the degree of capacity, be adapted to the life of the person, be applied for the shortest period of time, be periodically reviewed and take into account the

will and preferences of persons with disabilities. Also, when regulating a protection measure, the legislator must take into account the fact that there may be different degrees of disability and mental deficiency may vary over time. The lack of psychic capacity or discernment can take different forms, for example, total/partial or reversible/irreversible, a situation that requires the establishment of measures of protection appropriate to reality and which, however, are not included in the regulation of the measure of the judicial ban. Therefore, appropriate degrees of protection must be attached to the various degrees of disability, and the legislator in regulating legal measures must find proportionate solutions. An incapacity must not result in the loss of the exercise of all civil rights, but must be considered in each case.

Therefore, the Court holds that in the absence of the provision of guarantees to accompany the measure of protection of the prohibition against the courts, there are violations of the constitutional provisions of article 1, alin. 3, article 16, alin. 1 and article 50, as interpreted in accordance with article 20, alin.11, article 12 of the Convention on the Rights of persons with disabilities.

Indeed, article 164 of the Civil Code regulated the prohibition of a major who no longer has the necessary discernment to care for his interests because of his alienation or mental disability, notions which are defined, according to article 211 of Law no. 71/2022 for the implementation of Law no. 287/2009 on the Civil Code, as a mental illness or a mental disability that causes the person's mental incompetence to act critically and predictively on the social-legal consequences that may arise from the exercise of civil rights and obligations. Therefore, persons who were merely passengers of discernment due to old age, illness or other causes of a permanent or temporary nature could not be put under prohibition (Reghini & Vasilescu, 2013).

Following the admission of the application for prohibition, the person concerned was deprived of the capacity to exercise, the rules of guardianship of the minor who has not reached the age of 14 will be applied, according to the provisions of article 171 of the Civil Code (Nicolae, et al., 2016).

The prohibition measure was applicable until the moment of its removal, according to the provisions of article 177 of the Civil Code, not subject to a periodic review procedure.

At present, by item 22 of Law no. 140/2022 on some measures of protection for persons with intellectual and psychosocial disabilities and amending and supplementing some normative acts, was amended article 164 of the Civil Code, the conditions under which the major may receive legal advice or special guardianship shall be regulated.

A major who cannot take care of his own interests because of a deterioration in the mental faculties, whether temporary or permanent, partial or total, established by medical and psychosocial evaluation, and who needs support in the formation or expression of his will may receive judicial advice or special guardianship, if such action is necessary for the exercise of his civil capacity on an equal basis with other persons.

According to the provisions of art. 164, par. 2 of the Civil Code, as amended by Law no. 140/2022, a person may benefit from judicial counseling if the deterioration of his mental faculties is partial and it is necessary to be continuously counseled in the exercise of his rights and freedoms.

Art. 164, paragraph 4 of the Civil Code, as amended by Law no. 140/2022 provides that a person may benefit from special guardianship if the deterioration of his mental

faculties is total and, where appropriate, it is permanent and must be continuously represented in the exercise of its rights and freedoms.

It can therefore be noted that there is a differentiated form of legal protection, depending on the degree of degradation of mental faculties, which was not in the previous regulation.

Both protection measures, both judicial advice and special guardianship, will only be applicable if adequate protection of the protected person cannot be ensured by the establishment of assistance for the conclusion of legal acts. The establishment of special guardianship can also be done only if adequate protection of the protected person can not be ensured by the establishment of assistance for the conclusion of legal acts or judicial advice.

In this way, the legislator has also instituted gradual protection, depending on the needs of the person concerned, namely the imposition of a measure with a more drastic consequence as regards the person's capacity to exercise, only to the extent necessary.

Minors with limited exercise capacity may also benefit from special tutelage. However, where the guardianship court considers that the protection of the person can be achieved by establishing the guardianship or by putting him under judicial advice, this measure may be ordered one year before the date of the age of 18 and shall begin to take effect from that date.

As regards the scope of persons who may request protection, article 165 of the Civil Code has been amended in the sense of the apparent extension of those who may request protection. Thus, in addition to the persons referred to in article 111 of the Civil Code, the institution of judicial counseling or special guardianship may be requested by the one who needs protection, by his spouse or relatives, by the blueberry, by the person who lives with him.

Thus, on the one hand, the persons living with the one in question are specified in article 111, letter a of the Civil Code, and on the other hand, in article 111, letter d of the Civil Code, any other person is mentioned, concept which includes the enumeration provided for in the new text of article 165 of the Civil Code. In this respect and in the doctrine it was emphasized that the application for prohibition may be made by any person who has become aware of the existence of a case requiring that measure to be taken, without requiring that person to justify an interest.

Similar to the previous provisions, article 166 of the Civil Code provides that the appointment of the guardian may also be made by the person who has full capacity to exercise, by unilateral act or contract of mandate, concluded in authentic form.

In addition, article 166, paragraph 2 of the Civil Code provides that the person who has the full capacity to exercise or the person who benefits from judicial counseling may conclude a warrant of protection for the situation in which he could no longer take care of himself or manage his property.

Both judicial and special guardianship measures can be ordered for a limited period of time, judicial counseling for a period not exceeding 3 years, and special guardianship for a period not exceeding 5 years. If the deterioration of the mental faculties of the protected person is permanent, the court may order the extension of the special guardianship measure for a longer duration, which may not exceed 15 years.

By setting maximum duration of protection measures, the legislator responded to the criticism of the Constitutional Court regarding their unlimited duration and the fact that they are not subject to periodic checks or reviews.

As regards the procedure for establishing judicial advice or special guardianship, Law No 140/2022 makes some amendments. In addition to the information provided for in article 194, the content of the application shall include the facts resulting in the deterioration of his mental faculties and the evidence proposed for that purpose. Also, data on the family, social and property situation of the person, any other elements regarding his degree of autonomy, as well as the name of his attending physician, shall be mentioned, to the extent that they are known to the applicant. It can be seen that the legislator pays close attention to elements that give a full picture of the person who will be subject to the protection measure.

There is also the possibility that the court may establish, under the law, a protection measure different from that requested, as provided for in the amended version of article 937, paragraph 3 of the Civil Code, which is an exception to the principle of availability in civil proceedings, article 9 of the Code of Civil procedure.

The civil process takes place, as in the previous regulation, in two stages:

First, a preliminary stage, in which the president of the court will order to communicate to the person in respect of whom the protection measure is requested copies of the application and of the attached documents. The same communication will be made to the prosecutor, when the request has not been filed by him. Throughout the trial, if the person whose protection is requested has not chosen a lawyer, the court shall take steps to appoint one *ex officio*.

The prosecutor will make the necessary investigations, will order a medical and psychological evaluation, and will also set the deadline within which they must be carried out. If the person in respect of whom the protection measure has been requested is admitted to a health institution, he will order the preparation of a report by it. When carrying out the medical assessment and, where appropriate, the preparation of the report, the opinion of the attending physician of the person whose protection is requested may also be requested. The prosecutor will also order the preparation of a social investigation report by the guardianship authority. The medical and psychological evaluation shall be carried out after the consent of the person whose protection is required is expressed in front of the person making the assessment, if his state of health allows it.

If the person whose protection is requested refuses to assess his or her status or does not appear for it, the court orders his or her appointment with a warrant.

The medical evaluation report and the psychological assessment report of the person whose protection is sought shall include, where appropriate, references to the nature and severity of the mental illness and its foreseeable development, the extent of its needs and the other circumstances in which it is found, as well as indications of the necessity and appropriateness of a protective measure.

If it is necessary to observe longer the state of health of the one whose protection is requested, which can only be achieved by his provisional admission to a specialized health institution, and he refuses admission, the prosecutor, upon notification of the doctor carrying out the medical evaluation, will request the court to take this action.

The measure shall be ordered only after hearing the person whose protection is sought. The court, requesting the prosecutor's conclusions, will be able to order, motivated and

proportionate to the purpose pursued, the involuntary provisional admission of the one whose protection is requested, for a maximum of 20 days, in a specialized health institution.

The court shall rule by enforceable conclusion, which is subject only to appeal, within 3 days, which runs from the pronouncement for those present and from the communication for those missing. The appeal shall be resolved within 5 days of its formulation. In the second phase, namely the trial phase, the court will set the deadline for judgment of the application, ordering the summoning of the parties.

The judgment of the application is urgent.

At the time of the trial, the court is obliged to hear in the council chamber the one whose protection is requested, asking questions to ascertain the necessity and appropriateness of the institution of a protection measure, as well as his opinion on the protection regime and the person of the protector. If it is in the interest of the one whose protection is sought, he shall be heard at his home, where he is cared for, or in another place deemed appropriate by the court. The obligation to listen to the person concerned was also laid down in the previous Regulation, so that the state of his mental health could also be ascertained in this way. (Ungureanu & Munteanu, 2012).

In the hearing of the one whose protection is sought, there may be a person of trust present.

By way of exception, the extension of the special guardianship measure for a duration of more than 5 years may be ordered without the hearing of the protected person if the medical report States that his hearing is likely to affect his state of health or he is unable to express his will.

During the entire duration of the proceedings, the person whose protection is sought shall be informed, in ways adapted to his condition, of the conduct of the judicial proceedings and of the taking of any measure concerning his person and property.

The decision establishing the protection measure that remains final shall be communicated, in certified copy, as follows:

- a) the local community public service for the registration of persons to whom the birth of the protected person is registered, in order to make mention on the margin of the act of birth;
- b) the competent health service, in order for it to establish on the one placed under protection, according to the law, a permanent supervision;
- c) the competent cadastre and real estate advertising office, for the notation in the land register, where applicable;
- d) the trade register, if the person under protection is a professional;
- e) the national Register of records of support and protection measures taken by the notary public and the guardianship court, held by the national Union of notaries public in Romania.

The fulfillment of the publicity formalities is intended to ensure the enforceability of the judgment regarding the third parties. However, if the third person has known the imposition of the protection measure by another way, the lack of exercise capacity may be opposed to it.

The rules regarding the guardianship of the minor who has reached the age of 14 shall also apply to the one who benefits from judicial counseling, unless otherwise provided by law. The provisions of article 171, paragraph 1 of the Civil Code, as amended by Law

no. 140/2022, practically establishes a new category of persons with limited exercise capacity.

With regard to the rules concerning the guardianship of the minor who has not reached the age of 14, they shall also apply to the person who benefits from special guardianship, insofar as the law does not provide otherwise.

Art. 174 of the Civil Code provides for a number of obligations of the guardian, namely: the guardian is obliged to care for the protected one, in order to hasten his healing, restore his autonomy, improve his living conditions and ensure his moral and material well-being, taking into account his condition, his abilities, his degree of incapacity, and the other circumstances in which he finds himself. For this purpose, the income and, if necessary, all the assets of the protected person may be used. However, family memories, personal items and property indispensable to the person protected or intended for his care shall be kept at his disposal through the care of his legal representative or guardian and, where appropriate, of the institution in which he is cared for.

In carrying out his task, the guardian is obliged to:

- a) to take into account, as a matter of priority, the will, preferences and needs of the protected person, to provide him with the necessary support in the formation and expression of his will and to encourage him to exercise his rights and to fulfill his obligations on his own;
- b) cooperate with the protected person and respect his private life and dignity;
- c) to ensure and, where possible, to enable the protected person to be informed and made clear, in ways adapted to his condition, of all acts and facts which might affect him, their usefulness and urgency, as well as the consequences of a refusal by the protected person to conclude them;
- d) take all necessary measures to protect and enforce the rights of the protected person;
- e) to cooperate with natural persons and legal entities with duties in the care of the protected person;
- f) to maintain, as far as possible, a personal relationship with the protected person;
- g) in the cases provided by law, to take the necessary steps to prepare the medical and psychological evaluation reports of the protected person and to notify the guardianship court.

The guardianship court, after hearing the protected person, taking the opinion of the family council and consulting the medical, psychological and social investigation reports, will decide whether the protected person will be cared for at his home, in a social service or in another institution, according to the law. The change of place of care of the protected person is made with the authorization of the guardianship court, at the request of the protected person, his protector, the social service or the institution in which he is cared for or of another person authorized according to the law.

When the care of the protected person is not taken at his home, he or she and the furniture are kept at his or her disposal. The administrative power in respect of these goods only allows the conclusion of rental contracts, which shall cease to exist, by way of derogation from other legal provisions, upon the return of the protected person to his home.

If it becomes necessary and it is in the interest of the protected person to dispose of furniture or rights in respect of his dwelling, the act shall be subject to the authorization of the guardianship court.

When the protected one is married, his husband will also be heard.

The guardian shall not be entitled to prevent correspondence, social relations or the choice of profession of the protected person. Disagreements are settled by the guardianship court, with the hearing of the protected person.

In contrast to the previous regulation, there is a strong concern of the legislator for achieving a high comfort of the person placed under protection from several perspectives. The concrete situation of the person shall also be taken into account, taking into account the different situations of indiscernment of the person liable to lead to the taking of an appropriate protection measure.

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