

PROTECTION MANDATE CONSIDERATIONS

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ABSTRACT: *Law no. 140/2022 regarding some protection measures for people with intellectual and psychosocial disabilities and the modification and completion of some normative acts introduced a new paragraph in the content of the Civil Code in book V, title IX, chapter IX, section 2, § 31, including articles 2029¹ - 2029¹⁰, entitled Provisions regarding the protection mandate.*

The protection mandate is the one given by a person with full exercise capacity for the situation in which he would no longer be able to take care of his person or manage his assets. The protection mandate can also be given by the adult who benefits from judicial advice, with the consent of the legal guardian and with the authorization of the guardianship court. The present study aims to analyze this new institution compared to other institutions as well as in the context of the protection measures related to the elderly.

KEYWORDS: *the protection mandate, Law no. 140/2022 regarding some protection measures for people with intellectual and psychosocial disabilities and the modification and completion of some normative acts, guardianship court, the legal guardian.*

JEL Code: *K 15*

By Decision no. 601/2020 on the exception of unconstitutionality of the provisions of article 164 paragraph 1 of Law no. 287/2009 on the Civil Code, republished, as amended, published in the Official Gazette of Romania, part I, no. 88 of 27 January 2021, The Romanian Constitutional Court found the non-compliance of the provisions of article 164 paragraph 1 of the Civil Code, which established that the person who does not have the necessary discernment to care for his interests, due to alienation or mental debility, was to be placed under a judicial ban, with the constitutional provisions contained in article 1, alin. 3, article 16, alin. 1 and article 50, as interpreted in accordance with article 20, alin. 1, and in the light of article 12 of the Convention on the rights of persons with disabilities.

Considering the obligation of the legislator to agree the provisions found to be unconstitutional with the Decision of the Constitutional Court no. 601/2020 and with the provisions of the Constitution of Romania, republished, through a wide-ranging legislative intervention in the field of civil law protection measures that can benefit individuals with intellectual and psychosocial disabilities, which involves the creation, in common law, but also special law, of legal instruments of support and protection appropriate for these

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categories of persons, in order to ensure the respect of dignity, rights and freedoms, but also of their will, needs and preferences, as well as the safeguarding of their autonomy, Law no. 140/2022 regarding some protection measures for people with intellectual and psycho-social disabilities and the modification and completion of some normative acts¹ was adopted.

1. NOTION AND FORM

The protection mandate is an institution introduced in the Civil Code by Law no. 140/2022 under Subsection 31. The definition of the protection mandate is contained in the provisions of article 2029¹, according to which the protection mandate is that given by a person with full capacity to exercise for the situation in which he could no longer care for his person or manage his assets. The mandate of protection can also be given by the major who benefits from judicial advice², with the consent of the legal protector and with the authorization of the guardianship court.

Therefore, the mandate of protection is a variety of mandate. Moreover, in article 2009 of the Civil Code are mentioned the two forms of the mandate contract. Thus, on the one hand, the previous definition of the mandate contract is maintained as the contract by which a party, called a trustee, undertakes to conclude one or more legal acts on behalf of the other party, called principal, and on the other hand the variant of the protection mandate is included. Thus, the contract may also have as its object the conclusion of acts intended to ensure, in the event of the failure of the principal to care for his person or to administer his property, the protection of the principal's person, the administration, in whole or in part, of his property and, in general, his moral and material well-being.

Analyzing the definition of the protection mandate, it follows that it is a contract concluded under a suspensive condition, which will produce legal effects only if the mandator becomes unable to care for his person or to manage his assets.

From the point of view of form, the contract of mandate under common law is not a solemn legal act only by exception, that is, if a legal act is concluded subject, according to the law, to a certain form. Thus, as a rule, the mandate contract is a consensual legal act. The acceptance of the mandate may also result from its execution by the trustee. In contrast, the term of protection always ends with authentic notarial writing. The solemn form of the mandate of protection aims to protect the mandatory, being capable of drawing his attention to the importance and consequences of the concluded legal act, the expression of the care that the legislator bears to him (Diaconescu & Vasilescu, 2013)³. Moreover, the appointment of the person to be appointed as a guardian to take care of his person and property if he would be placed under judicial advice or special guardianship is also carried out by unilateral act or convention, concluded in authentic form, as provided for in article 166, Section 1 of the Civil Code. This designation can be revoked even by a private

¹ Published in The Official Gazette of Romania no 500/2022.

² According to article 164, paragraph 2 of the Civil Code, a person may benefit from judicial advice if the deterioration of his mental faculties is partial and it is necessary to be continuously advised in the exercise of his rights and freedoms.

³ Ionel Reghini, Șerban Diaconescu, Paul Vasilescu - Introducere în dreptul civil, Ed. Hamangiu, București, 2013, pag. 547.

signature (Marian , et al., 2016)⁴. In the case of the protection mandate, although there is no express mention, we consider that it is possible to revoke in this way, in compliance with the formalities of notification of the public trustee and notary, if this revocation is carried out before the court's approval.

As mentioned above, the execution of the mandate is conditioned by the deterioration of the mental faculties of the mandator, found as a result of the preparation of medical and psychological evaluation reports, and by his approval by the court of guardianship, at the request of the agent designated in the contract. The guardianship court may, on the occasion of the approval of the mandate, in order to avoid serious damage to the principal, take any measures necessary for the protection of the person of the principal, his representation in the exercise of his civil rights and freedoms or the administration of his property.

The act by which the trustee has already entrusted another person with the management of his property shall continue to have effect, unless it is revoked by the guardianship court, for good reasons.

2. THE CONTENT OF THE MANDATE OF PROTECTION

The mandate may include the wishes expressed by the principal with regard to his care and living conditions after the incapacity has occurred.

The mandate shall include the person appointed by the principal to whom the trustee must give an account, and the frequency of fulfilling that obligation, which may not exceed 3 years. If the trustee has not appointed such a person, he shall be appointed by the guardianship court upon the date of the principal's approval.

In order to ensure the moral and material well-being of the principal, any decision relating to the execution of the mandate shall be taken in the interest of the principal and shall ensure respect for his dignity, rights and freedoms, his will, needs and preferences, and the safeguarding of his autonomy.

3. THE EFFECTS OF THE MANDATE OF PROTECTION

The trustee in the contract of mandate of protection shall be subject to the legal provisions relating to the duties of the guardian provided for in articles 174, paragraphs 1 and 2 of the Civil Code⁵. Also, when the scope of the protection mandate is doubtful, the

⁴ Marian Nicolae, Vasile Bîcu, George-Alexandru Ilie - Drept civil. Persoanele, Ed. Universul Juridic, București, 2016, pag. 250.

⁵The guardian is obliged to care for the protected one, to speed up 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, but also the other circumstances in which he finds himself. For this purpose, the income and, if necessary, all the property of the protected person may be used. However, family memories, personal belongings and goods indispensable to the person protected or intended for his care shall be kept at his disposal, through the care of the representative or legal guardian and, where appropriate, the institution in which he is cared for. In carrying out his or her task, the guardian is obliged to: (a) take into account, as a matter of priority, the will, preferences and needs of the protected person, to provide him or her with the necessary support in the formation and expression of his or her will and to encourage him or her to exercise her rights and fulfill her obligations alone; (b) cooperate with the protected person and respect his private life and dignity; (c) ensure and permit, where possible, information and clarification of the protected person, in ways appropriate to his or her condition, about all acts and acts which may affect him or her, their usefulness and degree of urgency, as well as the consequences of a refusal by the protected person to conclude them; d) to take all necessary measures to

trustee shall interpret it according to the rules concerning the special guardianship⁶ of the major.

If the mandate of protection does not fully ensure the care of the person of the principal or the administration of his assets, the trusteeship court may, during the procedure for the declaration of office or subsequently, order a protection measure to complement it. In this case, the guardianship court appoints the trustee in the protection mandate contract as a guardian.

Legal acts concluded by the principal prior to the approval of the protection mandate may be annulled or the obligations arising therefrom may be reduced only if at the time when the lack of discernment was concluded it was notorious or known to the other party.

Legal acts concluded by the principal after the mandate has been granted and incompatible with its terms may not be annulled or the obligations arising from there may be reduced only if he has suffered damage.

In the same way as the situation of the trustee under the mandate contract, he is entitled to receive remuneration and to refund the reasonable expenses incurred by the latter for the execution of the mandate. The principal is also obliged to compensate the damage suffered by the trustee in the execution of the mandate, if this damage does not stem from the fault of the trustee.

4. TERMINATION OF THE MANDATE OF PROTECTION

The term of protection shall cease if the causes for the approval of the mandate have ceased. In such a situation, the trustee is obliged to immediately refer the matter to the guardianship court for the purpose of finding that the performance of the contract is terminated as a result of the mandator's reacquisition of the capacity to exercise. If the trustee is cared for in a health institution, the same obligation rests with that institution.

The mandate shall cease to take effect if the court finds the termination of the performance of the contract as a result of the mandator's reacquisition of the capacity to exercise.

The trustee who has become able may revoke the mandate at any time. The question arises whether the court still needs to declare the termination of the contract, provided that it can be revoked at any time by the capable agent. The revocation case is a way of terminating the mandate provided for in article 2030, paragraph 1, letter a of the Civil Code, which, of course, takes into account the capable mandator.

Another situation of revocation of the protection mandate may occur until its approval, by notifying the revocation of the trustee and the notary public instrumentator. This situation is similar to that of the common-law mandate, because the mandate ends in the

protect and enforce the rights of the protected person; e) to cooperate with natural persons and legal persons 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 reports of medical and psychological evaluation of the protected person and to notify the guardianship court.

⁶ According to Article 164, paragraph 4 of the Civil Code, a person may benefit from special guardianship if the deterioration of his mental faculties is total and, as the case may be, permanent and it is necessary to be continuously represented in the exercise of his rights and freedoms.

interest of the principal and on the basis of the trust he gives to the trustee (Comăniță & Comăniță, 2013)⁷.

Also, in the case of the protection mandate, any person referred to in article 111 may, if the mandate is not properly executed, request the guardianship court to order its revocation, the fulfillment of the obligation of the trustee to give an account, as well as a protection measure with regard to the trustee.

For reasons of protection for the trustee, the trustee may not waive his mandate without replacing another person in the execution of the mandate, if the trustee has expressly authorized him, or without requiring the trustee court to establish a protection measure with respect to the trustee. Any clause to the contrary shall be deemed unwritten. The legal text does not provide for the consequences if a waiver by the trustee would take place that does not comply with the legal provisions. With regard to the necessary formalities for the waiver, the trustee may waive the mandate by notifying the waiver to the trustee and the notary public instrumentator.

Such a situation is not, of course, in the case of a contract of mandate under common law where the trustee can at any time waive his mandate by notifying the trustee of his resignation (Cărpenaru, 2012)⁸. The only obligation of the trustee is to compensate the trustee for the damage suffered by the effect of the waiver, unless the continued execution of the mandate would have caused the trustee himself significant damage, which could not be foreseen at the time of the acceptance of the mandate.

Other means of termination of the mandate contract under common law are the death, incapacity or bankruptcy of the mandator. In the case of the protection mandate, it can be noted that the death of the mandator or, respectively the inability of the mandator, may constitute means of termination. The mandate for free protection does not end by the bankruptcy of the mandator, the express provision being contained in article 2030, paragraph 3 of the Civil Code.

In case of the death of the trustee, the legal text does not provide for a remedy in the sense that the heirs of the trustee should inform the trustee and continue to execute him in order not to cause any damage to the trustee⁹.

The acts concluded by the trustee after the termination of the mandate are null and void¹⁰.

The person replacing the trustee is obliged to immediately notify the guardianship court of the substitution. With regard to substitution, in the case of the protection mandate, it is only possible if it has been expressly authorized by the principal. There are no provisions for objective situations in which substitution is possible even without the authorization of the principal, provided for in art. 2023, paragraph 2 of the Civil Code. Therefore, in the absence of express authorization for substitution, where there are reasonable grounds preventing the trustee from fulfilling the mandate, the only remedy is to notify the court for a measure of protection.

⁷ Gheorghe Comăniță, Ioana-Iulia Comăniță - Drept civil. Contracte civile speciale, Ed. Universul Juridic, București, 2013, pag. 258.

⁸ Stanciu D. Cărpenaru - Tratat de drept comercial român, Ed. Universul Juridic, București, 2012, pag. 527.

⁹ Smaranda Angheni - Drept comercial. Tratat, Ed. CH Beck, București, 2019, pag. 588.

¹⁰ Dumitru C. Florescu - Contractele civile în Noul Cod civil, Ed. Universul Juridic, București, 2012, pag. 245.

5. CONCLUSIONS

The mandate of protection is the means of protection of the natural person who gives expression to the autonomy and will of the natural person regarding the choice of the person to represent him for the situation in which he could no longer care for himself or manage his assets. It is thus distinguished from special guardianship and judicial guardianship, measures which are instituted only when the natural person suffers from a deterioration of his mental faculties, total and, where appropriate, permanent and partial respectively.

The execution of the mandate is conditioned by the deterioration of the mental faculties of the mandator, established as a result of the preparation of medical and psychological evaluation reports, and by his approval by the guardianship court, at the request of the trustee designated in the contract. Therefore, unlike judicial advice or special guardianship in respect of which a wide range of persons may request that such measure be taken, the mandate for protection appears to be only required by the trustee, which implies that there is a situation in which the trustee is closely aware of the situation of the principal.

For the purpose of protecting the principal, the guardianship court may, in order to avoid serious harm to the principal, take any measures necessary to protect the person of the principal, to represent him in the exercise of his civil rights and freedoms or to administer his property.

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