

PROCEDURAL GUARANTEES CONCERNING THE RESPECT OF THE CHILD'S BEST INTEREST

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Abstract: *The legislator has enshrined the rights of the child as human rights and transposes into national law the universal standards applicable to all children. There has been a general transposition from a child's needs regulation to a full legal valorization of their rights as a natural person undergoing protection and covering the child's entire person. The absence or insufficiently outlined characters of the child's discernment associated with limited life experience are legally compensated by a system of means of protecting both the person and the child's heritage. In scientific papers it is mentioned that, as a rule, in ordinary situations, the legal guardian is called upon to identify the direction of the child's interest and to decide accordingly. In all processes concerning minors (divorce, child custody, establishing or termination of placement) the court can not offer a solution without hearing the minor if he has reached the age of 10 years. Therefore, according to the provisions of article 264 Civil Code, the court of tutorship will settle the dispute only after the minor has been heard in the respective case. The purpose of this paper is to show procedural guarantees and psychological implications in the extraordinary situations in which the child can be found. Special situations arise from external forces generated by parents or others in civil society. The magistrate must ensure the trust that the relationship between him and the child should be based on. The hearing technique essentially pursues the observance of the general principles of the protection and promotion of child rights in close connection with the principle of truth finding by the magistrate.*

Key words: *child; best interest; protection; procedural guarantee; hearing.*

Introduction

The origin of the notion of best interest of the child comes from the realization that it is an individual who has needs and rights distinct from those of the parents. Therefore, his interest may be different from that of his or her parents or guardians, and it is normal for the child's interest to prevail over other interests when taking action on the child.

The minor's best interest is to keep it as long as possible in a normal and balanced family environment in the presence of both parents because the risk of breaking his soul balance is very high when he or she is entrusted to one or other of the parents. Therefore, after separation of the parents, the maintenance and

encouragement of the child's relationship with the parent who has not been entrusted to him becomes vital for his normal moral development.

Both in national and international law as well as in the practice of the European Court of Human Rights, the right to personal relations is enshrined as a fundamental right recognized both by the parent and the child, and the states are obliged to take positive measures for its effective realization. Personal relationships must be unrestricted, and their restriction is only necessary under particular conditions to protect the child.

The child's best interest is circumscribed to the child's rights to normal physical and moral development, social-emotional balance, and family life. The principle of the best interests of the child is also enforced in relation to the rights and obligations of the child's parents, other representatives, and any persons to whom he or she has been legally placed. (Article 2, paragraph 2-5 of Law 272/2004)

The family should be involved in any decision of the authorities regarding the best interests of the child. Authorities and the public persons are required to involve the family in all decisions, actions and measures concerning the child and to support the care, growth and training, development and education of the child.

Parental rights are at the same time obligations, which mean that parents are held to exercise parental rights. The exercise of these rights is done by parents through legal acts and deeds. Parental rights are native, based on the establishment of the parentage relations under the law. The child can not escape parental authority; he is in a relationship of dependence on parents. Parents are pillars of support in respecting and guaranteeing children's rights. They are the ones who educate, initiate and shape a conscious child's behavior. Parents' accountability suggests their awareness of what the child belongs to. Here the law can only recommend "specialized assistance to increase the capacity of parents to take care of children" (Article 42 paragraph 1 of Law 272/2004)

1. Parents hearing

Article 263 (3) of the Civil Code provides that procedures relating to parental and child relations must ensure that the wishes and interests of parents concerning the child can be brought to the attention of the authorities and that they are taken into account in the decisions they take. It is materialized by listening to them in the cases in which the judicial function "exercises the functions of the parents" in relation to their children (Avram, 2013: 463).

Listening to parents is expressly imposed by the legislator on how to exercise parental authority and gives parents the right to, in the absence of consensus on a concrete measure relating to the child, express their position before the judge in deciding which of the options expressed by parents has the capacity to better meet the child's best interest. The court can not opt for a different solution to those opposed to the parents than in cases where it would directly assess the object of the

claim, such as the case where the child aged 14 is referred to change the way it is taught, or professional training in the event of parents' opposition or in case of misunderstandings between parents regarding the extent of the child's maintenance obligation, the manner and modalities of execution or the contribution of each parent. In all other cases, the court listens to parents and decides on misunderstandings between them without being able to substitute for parents by imposing a solution. (Civil Code - Articles 486; 498; 499)

Parents' differences in parental authority exercises in their resolution, the procedural guarantee of their hearing by the court may arise in areas such as the establishment of the child's home, change of the dwelling of the child, the establishment and execution of the maintenance obligation, the relationship between divorced parents and their children, as well as on the assumption that there are differences with children about changing their teaching or vocational training or when the child is taken back from other people. (Civil Code - Articles 496; 497; 499; 396; 498; 495)

Parents should have the opportunity to be heard and answer the observations made during the court proceedings; the right to be heard correlates with the right of the party to a fair trial. Parents must therefore be legally represented in procedures such as taking social protection measures, be given access to the information on which the child protection measure was taken, even if it was not requested, and communicated the evidence. (Pivniceru, 2016: 68)

Parents involved in any judicial proceedings concerning the child should be given the opportunity to express themselves, correlatively to the court's obligation to listen. This means their right to be informed of all the legal and factual elements of the case, to effectively discuss all the legal and factual elements of the case in the whole of the proceedings.

2. Child's hearing

2.1 The child's right to be heard and informed

The child is a holder of rights but with incomplete autonomy in relation to adults. He has to participate directly in the judicial proceedings that concern him and helps to determine the best interests of the child.

The best interests of the child is legally guaranteed and one of the principles for ensuring and respecting the rights of the child is to hear his opinion and to consider it, taking into account his / her age and degree of maturity. (Civil Code - Article 264; Law 272/2004 - Article 6 Letter h.)

In the matter of the immediate return of children illegally displaced or detained in any State Party to the Hague Convention on the Civil Aspects of International Child Abduction, their opinion may be a consideration in refusing to return to the judicial or administrative authority, in the conditions in which he

opposes his return and has reached the age and level of maturity that makes it necessary to take his opinion into account (Pivniceru, 2016: 70).

The principle means to value the individuality of the person of the child to express his opinion freely on any matter that concerns him, without automatically incorporating the mature identity of his parents. The right to be heard gives the child the opportunity to ask for and receive any relevant information, to be consulted and informed of the consequences his opinion may have, and the consequences of any decision affecting him.

The distinction must be made between the child's right to be informed and heard in court proceedings and his right to express his opinion on any matter concerning him and the right of the child to be informed and heard in court proceedings and to express his consent in cases provided by law. The child has the right to express his opinion on any matter that affects his daily life, not just rights derived from his vulnerability or dependence on adults. If the first hypothesis addresses broad opinion on any issue of interest to the child, the hypothesis of listening to the child in court proceedings concerns the procedures in which he is hired or promoted directly or through his legal representative (Pivniceru, 2016: 70-71).

Listening to the child must be free, which means that expressing opinion means the absence of any pressure, influence or manipulation and refers to the child's own view of the situation in which he is involved, as well as informing the child about the decision that can be taken and its consequences. Listening is of a general nature and relates to any judicial or administrative proceedings which concern it and is compulsory in the case of a child that reach the age of 10 and can be ordered by the competent court or requested by the child in the case of the child who has not reached the age of 10, provided that listening is considered necessary or that the refusal to listen is motivated.

2.2 Child's mandatory listening

The hearing is mandatory in solving parental misunderstandings regarding the exercise of parental authority, in resolving the misunderstandings about restricting the rights of the child to maintain relationships with other persons with whom he has family ties, in cases of requesting the return of the child to any person who holds it without the right, to resolve the misunderstanding between parents regarding the establishment or change of the dwelling of the child, in the case of changing the way of teaching or vocational training, in the case of the court's consent to the parents' understanding of the exercise of parental authority, in the court ruling on the relations between divorced parents and their children and in the case of establishing the parent's separate ways of having personal relationship with the child after the divorce (Pivniceru, 2016).

2.3 Child consent

Distinct from the right to be heard, the legislator regulated and the child's right to express his consent. Requesting the consent of a child aged 10-14 is an exception to the rules on legal capacity. Thus, in terms of adoption, consent is a condition of the validity of adoption. The choice of the child in this situation is final and can not be remedied in any other legal way (Cod civil, Art. 463).

Participation of children aged up to 14 years in public debates in the case of audio-visual programs can only be done with their consent. Also, the religion of the child who has reached the age of 14 can not be changed without his consent and under the same age and consent of the child the special protection measures provided for, in the individual child protection plan, are established, but the court may pass, for grave reasons, over the child's refusal to express his consent to the proposed measure.

2.4 Child commitment

Except where the law requires the consent of the child, the legislator considers the child's involvement in any matter that concerns him, but the valorization of his opinion depends on his age and degree of maturity, the existence of discernment.

In favor of the child, it operates a simple presumption of his ability to formulate his own opinion. In this way, the judge must assess in each case both the degree of comprehension of the child and his ability to understand the implications of the given particular situation, whether the child is able or not to formulate an opinion of its own and independently. Therefore, the judge must re-evaluate the degree of maturity of the child that involves analyzing emotional, cognitive and social development. The fact that the opinion of the child will be valued only to the extent that, in the context of the child's development level, it can have the legal significance of a position that correctly represents his best interests. (Pivniceru, 2016)

In principle, the courts give positive meaning to the child's option, or motivate the reasons for which the child's opinion has not been taken into consideration. There are court judgments that do not add to the child's listening, although it occurred in the first instance, and the omission of assessing the position of the child results from the criticism of the judgment appealed against to the appellant, as there are also court judgments sanctioning the failure to comply to the right of the child who fulfilled the age of ten years, to be heard. (Pivniceru, 2016)

Listening to the child requires the judge's knowledge and psychological skills to facilitate a correct opinion expressed by the child, in which the judge should generally go through the following stages:

„a. Prepare the hearing, which involves building a relationship of trust between the child and the judge that hears it;

b. Investigating the child's skills to make the difference between truth and lie, linguistic competence and linguistic style in order to assess the child's opinion;

c. Active listening to the child in order to stimulate communication with the child and to obtain the necessary information to improve the climate of discussion and to reduce the difficulty of understanding;

d. Free listening to the child's storytelling and asking questions, techniques whose use is likely to obtain the information necessary for configuring the child's opinion and the degree of maturity expressed." (Pivniceru, Luca, 2009: 16-28)

The judge must remember the child's sensitivity and the delicate situation in which he resides in the separation or divorce of the parents and the consequences that they imply on their existential universe, in which the judge must act with tact and use knowledge, skills and abilities of psychological nature to avoid traumatic consequences for the child. For these reasons, the content of court rulings in which the discussions with the child in the council's room are faithfully related, defeats the legal provisions on the listening of minors. If the judge decides not to participate in the hearing of the minor, it does not correspond to the requirements of the text, the detailed recording of the discussions with the child in the council room in order to become public through the court decision (Pivniceru, 2016)

The judge who communicates with the child, gaining confidence in him, must carefully consider the language used by the child expressing emotional states or attitudes. The child's sincerity with the judge can not be turned against the child, as a consequence of accurately telling in the court decision the discussions held together in the council chamber. In fact, this means generating the risk of exposing the child to a sense of guilt, he can feel responsible for the decisive character of his statement of the judgment. For these reasons, even if the conversation with the child has a high degree of fidelity in the court hearing, the child's opinion should be recorded with caution in the judgment, and the reasoning should only refer to the fact that there is a reasonable opinion of the child knowingly, a consequence of the public character of the judgment.

3. Psychosocial inquiry

The psychosocial inquiry is a consequence of the child's visibility in the protection of his rights and represents both an important procedural guarantee and a measure to protect the rights of the child, the state through its organs providing the judge with the necessary information about the child and its habitat. (Pivniceru, 2016)

The notion of tutelage authority used by the Civil Code expresses a function that the state has assumed in order to ensure a protection that meets the requirements of the Romanian Constitution. In this regard, the legislator appointed the mayor in his duties as a representative of the State and the function of guardianship authority. The legislator considered that this function should be exercised at the level of the local public administration through the executive

authority within the territorial administrative units. The reason was the proximity between these authorities and the community.

Regardless of the fact that the mayor directly or by delegation exercises the function of guardianship authority, the report of psychosocial inquiry is an act originating from a local public administration authority. The mayor or his specialty officer acts as a public official when exercising the function of guardianship authority, without the report of a psychosocial inquiry being classified as an administrative act, as it does not give birth, does not extinguish or modify legal relations. All that is found in this report can be countered in the process, the burden of proof being the one who challenges the results of the report. (Pivniceru, 2016: 78)

The obligation of the social inquiry is expressly regulated in the following situations:

„– establishing relationships between divorced parents and their minor children;

- resolving misunderstandings between parents about the exercise of rights and duties fulfilled by the parents;

- establishing and changing the child's home in case of misunderstanding between parents;

- changing the way of teaching or professional training required by the child in the case of parental opposition;

- establishing the extent of the support obligations towards the child, the manner and modalities of the execution, as well as the contribution of each of the parents in case of misunderstandings between them;

- decline in the exercise of parental rights.” (Pivniceru, 2016)

By regulating the psychosocial inquiry, the legislator extended his regulatory vision and added a new existing component. It was hoped that the elements of social investigation, economic and social status of the persons or the family context investigated would fully reflect the present status of the child and the family environment in which the court's intervention is requested, so that the measure taken by the court corresponds to the best interests of the child.

The minimum content standard of the psychosocial survey should include elements related to the economic, social, health, education, living conditions, risk behaviors identified in parents, children, and other persons in relation to which in claims keeping contact with the child. These elements will have to include subdivisions whose inclusion in the content of the report could provide the court with data and information about the child and its environment so as to contribute to identifying the best interests of the child. (Pivniceru, 2016)

Any situation regarding the child, which requires the intervention of a body of the legislative, judiciary or executive body, must be resolved immediately in order not to leave uncertain the situation of the child, a rule which is part of the common law established by the European Convention on Human Rights.

The State is responsible for the malfunctioning of its bodies and the effectiveness of the right to a court is part of the process and includes both the right of access to a court, that involves the analysis of the length of proceedings, and the right to enforcement of judgments.

Conclusions

Legal protection of the child is circumscribed to the concept of the best interest of the child, a reference matrix that covers all child-related regulation and which reflects on any measure that concerns it, no matter who it is. (Pivniceru, Luca, 2009)

At all stages, the judge must also show psycho-intellectual and moral-emotional knowledge. Listening is not a means of administering any evidence, but a means of revealing the child's opinion about the exercise of the rights that concern him. The judge must use a simple language adapted to the age and level of understanding of the child, adequate tone with avoiding the authoritarian tone.

The questions asked must be brief, clear and open, and the child should be treated with sensitivity and care, following the personal situation, needs, desires and feelings the judge will prepare for listening and before any interview. Legal representatives and advocates have the task of preparing the child before listening, explaining to him what is going to happen and what will he be asked, but without his emotional influence, and the judge must inform the child about the purpose of the hearing, how it will take place, the importance of the details to offer them and try, as far as possible, to establish a relationship of trust with the child, which can lead to the child being stress free.

The child's best interest is a legal requirement, which reflects the specific differences in relation to the child's development characteristics as well as the context of his life. The measures that can be taken in relation to the child should be individual and will be based on the child's personality, the social context in which they are located, the specifics of the measure and the identification of appropriate family alternatives.

The primary guarantee of the best interest of the child is based on the variable probation system according to each case. In the absence of a convention concluded between parents, the judge's decision will lay the basis of a new way of relationship between the child and each of them in the structure of the component elements regarding the subsequent development of the child.

To this end, the judge comes after the administration and evaluation of the evidence when the facts alleged or challenged by the parties will be substituted for the established factual situation to which the legal framework articulated around the best interests of the child.

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