

THE EXECUTION OF COURT DECISIONS AND OF OTHER ENFORCEABLE TITLES REGARDING MINORS, ACCORDING TO THE ROMANIAN CIVIL PROCEDURE CODE

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Abstract: *Starting from the specific nature and difficulties that occurred during the forced execution of measures regarding minors, by means of this article we intend to present the particular characteristic rules of this procedure, according to the Romanian Civil Procedure Code. We took into consideration, in the elaboration of this study, the updated regulations on this matter and recent jurisprudence developed on relevant legal provisions but also the view of the European Court of Human Rights in such cases.*

Key words: *forced execution, minors, opposition to forced execution, refusal of the minor*

1. Introduction

The enforcement of Court decisions regarding minors is regulated in Romania by the Civil Procedure Code (Law no.134/2010 republished in the Official Gazette of Romania Part I, no. 247/10.04.2015, with the subsequent amendments and completions), the source of the matter being Section 2 (art.910-914) of Title III-“Direct forced execution” within Book V titled “On forced execution”.

It is believed (Măgureanu G., 2011, p.50) that the new regulation takes into consideration the protection of children’s rights, especially their best interest, complying with the jurisprudence of the European Court for Human Rights.

A series of measures are therefore established, for the easement of the materialization of orders given by enforceable titles, without traumatizing the minor, who can be submitted to the contradictory influences exercised by the parents in certain cases.

Thus, art.910 paragraph 1 of the Civil Procedure Code, sets the field of application of the procedure submitted to our analysis, related to measures regarding minors, provided in an enforceable title, such as: establishment of the minor’s residence, assignment in foster care, handing over of the minor by people unlawfully keeping him, exercise of the right to personal relations with the minor, as well as other measures provided by the law. This latter expression “other measures provided by the law” leads to the interpretation according to which the enumeration of the lawmaker is exemplifying but not limiting,

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referring to any type of legal measures regarding the legal situation of the minor. (Fodor M, 2013).

Before passing to the analysis of the applicable procedure in the matter of interest to us, we find adequate to refer to the interpretations given by the European Court for Human Rights in cases in which it was claimed that the national authorities did not take appropriate measures for the enforcement of court decisions regarding minors.

2. Interpretations of the European Court of Human Rights in Cases of Enforcement of Court Decisions related to Minors

The cases we will present as examples bring into discussion the violation of art. 8 of the European Convention on Human Rights, that guarantees the right to respect one's private life.

We indicate, in this sense, the regulative content of art. 8 of the Convention: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority in the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

Regarding the obligations of the states in order to comply with art.8 of the European Convention on Human Rights, the European contentious court pointed out, in the *case of Ignacolo-Zenide/Romania* (Judgment published in the Official Gazette no.6/08.01.2001), that the signing states of the Convention have a series of positive obligations to ensure the parent's right to proper measures taken by the authorities in order to be together with his child.

Mainly, as the European Court decided in the judgment of the above-mentioned case, a measure is appropriate depending on the celerity of its enforcement, considering the fact that the enforcement of decisions ordered in cases concerning minors require urgency, since the passing of time may generate irreversible effects between the child and the parent not living with them.

Being a more delicate field, coercive measures on minors must be excluded, conversely applying sanctions to the parent that displays an illegal conduct by impeding the enforcement of the measures in the enforceable title.

At the same time, it must be taken into consideration, as the Court mentioned in the *case of Pini/Romania* (Judgment published in the Official Gazette no.1245/23.12.2004), that art. 6 of the Convention protects the enforcement of the final and mandatory court decisions, that in a state complying with the preemption of the right, it cannot remain without effect in the detriment of one party.

The obligations of the authorities mentioned above, must not be interpreted in an absolute manner, since the reunion of a child with their parent may require preparatory measures.

Thus, in another case, the *case of Hokkanen/Finland* (settled by Judgment no. 23 September1994), The European Court for Human Rights decided that the nature and extent of the measures depend on the circumstances of each case, the understanding and cooperation of all persons concerned being always an important factor. According to the view of the Court, if national authorities must try to facilitate such collaboration, their

obligation to use constraining measures in this matter must be eliminated: they must consider the interests of the people involved, their rights and liberties and especially the child's best interest as well as the rights acknowledged by article 8 of the Convention. In the situation in which contact with the parent represents a threat for these interests or may prejudice these interests, national authorities must aim for the just balance between them.

Equally, in the view of the Strasbourg Court (Judgment in the case of *Amănălăchioai/Romania*, published in the Official Gazette no.720/26.10.2009), where the reasons for the refusal to return the child are due to the lack of contact between the parties and to the elapsing time, the state must act in the direction that would allow the consolidation of this relationship. Therefore, the obligations of the state are not limited to supervision, namely to allow the child to be reunited with his father, but they contain the totality of the preparatory measures leading to this result.

One of the concrete measures that can be taken is the psychological support that can improve the relationship with the parent that the child had become distant from, eventually making possible the return of the child to the parent that he had been separated from. Such a measure, states the Court in the *Amănălăchioai case*, „would have ensured the convergence of the plaintiff's interests with those of the child, and not a divergence between the two, as it happened in the present case”.

3. The Procedure Applicable according to the Romanian Law in Force

Regarding the court enforcement, the officer competent to instrument this procedure, it was found (Măgureanu G., 2011, p.52) that there are no special regulations in this matter, therefore we will relate to common law regarding forced execution of the obligations “*to do*”, which leads us to the conclusion that the court enforcement officer in the jurisdiction of the court of appeal where the execution will take place, is the competent one.

According to art.910 paragraph 2 of the Civil Procedure Code, the first action undertaken by the court enforcement officer is to send the parent or the person where the minor is located, the enforcement order, together with a notice with the date when he should appear at his office or any other location set by the enforcement officer, in order to be taken over by the creditor, or, as the case may be, will order to allow the other parent to exercise the right to have personal relations with the minor, according to the visitation schedule set in the enforceable title.

For the situation in which the debtor fails to comply with the enforcement officer's note, paragraph 3 of the cited article grants him the prerogative to inform the enforcement court in order to apply penalties provided by art.906 of the Civil Procedure Code. This penalty provided by the lawmaker is interpreted (Leş I., 2015) as exercising an economic pressure on the debtor in order to comply with the decision of the court.

As Romanian courts stated (Târgu Mureş First Instance Court, civil sentence no.3936/15.09.2015) the application of penalties in the conditions of art.906 of the Civil Procedure Code is justified by the *intuitu personae* characteristic of the obligation regarding minors, set by the enforceable title, obligation that could not be fulfilled by a person other than the debtor, considering the relation that he is in with the minor.

Art. 911 paragraph 1 of the Civil Procedure Code indicates the fact that force execution will take place after one month from the notice regarding the approval of the forced execution order, if the debtor did not fulfill their obligation. It can be observed (Leş I., 2015) that this term of one month has an equivalent legal regime to that of a prohibitive

term, which means that if a procedure act is performed, this will render the enforcement void.

The rule of compliance with the prohibitive one month term was not exempt from doctrine critics (Leş I., 2015) who said that this is not a reasonable term considering the stake of enforcing such a decision, therefore proposing a shorter term, specifically of 15 days.

According to art. 911 paragraph 2 of the Civil Procedure Code, the execution will take place in the presence of a representative of the Social Services and Child Protection Department and when it is deemed necessary, the presence of a psychologist assigned by it.

This order was issued due to reasons concerning the fulfillment of the procedure in a coherent manner, non-traumatic for the minor, leading to the accomplishment of the desideratum of an expeditious and effective forced procedure (Măgureanu G., 2011, p.57).

Another stipulation regarding the protection of the minor during this procedure is contained in art. 911 paragraph 4 of the Civil Procedure Code according to which nobody is allowed to treat harshly or to exercise pressure on the minor for the accomplishment of the execution.

Regarding the compliance with this interdiction, in the specialty literature it was specified (Leş I., 2015) that this concerns not only public force agencies, namely the enforcement body or the representative of the Social service and child protection department, but also the creditor in whose interest the procedure is executed.

Another constraining modality exercised on the debtor, is the one provided by art.912 of the Civil Procedure Code. Such cases in which the debtor does not fulfill his/her obligation within 3 months from the notice of the enforcement approval, as well as when the debtor acts in bad faith hiding the minor, the court enforcement officer will notify the prosecutor's office at the execution court to begin the criminal investigation for the crime of failure to comply with a court decision.

The Civil Procedure Code covers legislatively another delicate situation that may arise during the forced execution submitted to our analysis. To that effect, there is a possibility for the court enforcement officer to find that the minor himself refuses categorically to leave the debtor or manifests aversion towards the creditor, so for this purpose he will act according to the disposition provided by art.913 paragraph 1 of the Civil Procedure Code, namely he will draw up a minute containing his findings which he will notify the parties, respectively the representative of the Social care and child protection department.

Further, the text of paragraph 2 of the previously cited article, sets out the obligation of the general social aid and child protection department to inform the competent court in the minor's jurisdiction to order a psychological counseling program, for a maximum period of 3 months.

Regarding "the competent court in the jurisdiction where the minor is" we accept the opinion (Dinu M., Stanciu, R., 2015, p.396) stating that this is the custody court and not the enforcement court, since it is a procedure involving opinions on the minor's personal situation.

In fact, regarding the psychological support that the minor should benefit from, mention should be made of the provisions of art. 18 paragraph 4 of Law no.272/2004 on the protection and promotion of the rights of the child (republished in the Official Gazette no.159/05.03.2014, with the subsequent amendments and completions) by virtue of

which: “for the establishment and preservation of the child’s personal relations, the public social aid service and, as the case may be, the general social aid and child protection departments within each district of the city of Bucharest, have the obligation to provide counseling by specialists to the children as well as to their parents, upon their request”.

As it was rightfully noticed (Măgureanu G., 2011, p.58), the regulation regarding the pursuit of a psychological counseling program lacks a sanction that could be applied under those circumstances, to the parent that fails to comply with the psychological counseling program.

In accordance with art.913 paragraph 3 of the Civil Procedure Code, the psychological counseling program will be finalized with a report drawn up by the psychologist that will be submitted to the court, to the court enforcement officer and to the general social aid and child protection department. Upon reception of this report, the enforcement officer will resume the forced execution procedure.

There are cases (Constanța First instance court, civil sentence no.7139/03.06.2016) in which in his/her report the psychologist advises both parents to start a systemic family therapy for the acceptance of the divorce, in order to learn how estrangement can be stopped and to find a common language in terms of child upbringing and education. In the previously mentioned case, it was deemed necessary for the maternal and paternal grandmothers not to participate in the therapy sessions, considering that these persons can fuel and even amplify the conflict between the former spouses. Then, the child should be introduced gradually into the therapy process only after the parents and grandmothers would accept the divorce and there would be mutual forgiveness.

From the previous statements results, as the courts of law have also found (Blaj First instance court, civil sentence no.317/12.05.2016), that the forced execution can be initiated and executed even when the impossibility of execution is determined by the refusal of the concerned minor, not only by the bad faith of the other parent.

According to the provisions of paragraph 5 of art.913 of the Civil Procedure Code, if after the psychological counseling program and after resuming the forced execution, the fulfillment of the obligation still cannot be achieved by means of the respective forced execution, the creditor may notify the execution court in the jurisdiction of the minor in order to apply for the enforcement of the sanctions provided by art.906 of the Civil Procedure Code.

Thus, the payment of delay penalties has the same goal, the fulfillment by the state of its positive obligation to ensure the necessary frame for the effective exercise by the plaintiff of their right to personal relations with the minor (Constanța First Instance Court, civil decision no.7139/03.06.2016).

In the cited jurisprudence an objective criterion is offered for the establishment of the accurate amount of the penalty, namely the period elapsed from the initiation of the forced execution procedure, until the effective accomplishment of those ordered in the enforceable title, this circumstance grounding the conclusion that the application of a higher penalty rate than the minimum provided by the law is necessary.

4. Conclusions

As the European Court for Human Rights ruled, the right of a parent to be with their child represents a fundamental element of family life, even if the relationship between the parents had been destroyed.

The enforcement of the decisions regarding minors ordered by an enforceable title, many times can prove to be an extremely difficult legal issue.

Considering the recommendation of the European Court for Human Rights, the Romanian lawmaker provided in the Civil Procedure Code a special enforcement procedure meant to provide a balance between the interest of fulfilling an enforceable title and the best interest of the minor child.

Within this procedure, a series of constraining measures are enforced upon the parent in debt, who in bad faith obstructs the execution of the enforceable title, as well as preparatory measures, such as a psychological counseling program, gradually establishing an interaction and eventually the reunion of the minor with the parent that he/she had been separated from.

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