

EXERCISING PARENTAL AUTHORITY – A RIGHT OR A LEGAL OBLIGATION?

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Abstract: *The child needs a balanced family climate in which he can feel safe and effective communication with his parents. This is possible if the latter are attentive to the child's needs, care about his education, if they show understanding, are affectionate and calm and participate in important events in his life. In civil law, this prerogative is called parental authority and is perceived by most parents as a right. In reality, however, the exercise of parental authority is a legal obligation of the parent and a correlative right of the minor. In this article we will develop this aspect regarding the essence and qualification of parental authority, the impossibility of renouncing it through a notarial declaration and the mandatory involvement of the guardianship court that establishes the limits and concrete way of exercising it, when parents wish to deviate from the rule according to which parental authority is exercised jointly by both parents.*

Key words: *family, minors, parental authority, guardianship court, legal obligation.*

1. Introduction

A lot has been written about the relationship between parents and children and a lot of research has been done lately.

It has already been known, for a very long time, that parents represent the first social model for influencing children and that they contribute to the formation of the conception of life, the behavior and relationship model of children.

The educational models applied by parents in their relationships with children can have negative influences on the personality development of the latter.

For this reason, it is important for parents to find a balance regarding the organization and control of the child and the requirements they have of them.

Any child needs a balanced family climate in which he can feel safe and experience effective communication with his parents.

This is possible if the latter are attentive to the child's needs, care about his education, if they show understanding, are affectionate and calm and participate in important events in his life. At the same time, it is necessary for parents to be firm, to set limits and

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not let the child do everything he wants, aspects that can be fulfilled through adequate parent-child communication (Mintici, 2023).

Parental authority represents the legal component involved in the process of raising and educating a minor and is of particular importance in the social reality of modern society.

According to art. 483 Civil Code, parental authority is the set of rights and duties that concern both the child's person and property and belongs equally to both parents.

In most cases where both parents do not live at the same address and do not live together, the parents exercise parental authority jointly, equally, according to the legal provisions.

However, there are situations, which, although are not the rule in this matter, are quite frequent and refer to parents who do not wish to exercise parental authority in any way, are absent from the life of minors and make the exercise of parental authority by the other parent extremely difficult due to their simple non-involvement or absence from the minor's/child's life.

More and more parents who exercise **de facto** parental authority alone, wonder if there is a possibility *for the absent parent to declare, voluntarily, in front of a notary public, that he renounces definitively and completely the exercise of parental authority.*

2. The Impossibility of Voluntarily renouncing the Exercise of Parental Authority

Waiver of parental authority is not the same as forfeiture of parental rights.

Parental authority and its exercise is not an exclusive right of the parent, but represents his legal obligation and a right instituted in favor of the minor.

For these reasons, the legislator expressly provided for the impossibility of renouncing the exercise of parental authority.

According to art. 36 of Law no. 272/2004 regarding the protection and promotion of the rights of the child, *a parent cannot renounce parental authority, but can agree with the other parent on the manner of exercising parental authority, under the conditions of art. 506 Civil Code.*

The parental authority was instituted by the legislator to protect the minor child, and the parent cannot voluntarily waive this obligation, as it is a right that does not belong to him, but belongs to the minor.

But what happens to parents who do not want to exercise parental authority?

Art.506 of the Civil Code comes to their aid, as it stipulates that, with the approval of the guardianship court, the parents can reach an agreement regarding the exercise of parental authority over the child, if the latter's best interest is respected.

From here we can draw the following conclusion: always, whatever agreement that the parents would like to make regarding the exercise of parental authority, it will be analyzed by the guardianship court through the prism of the best interest of the minor (Ionas, 2021, p.263).

Hence the provisions of art. 36 of Law no. 272/2004, represent mandatory legal norms from which the parties cannot deviate.

Thus, the parent who does not wish to exercise parental authority cannot make a statement or an agreement with the other parent, whereby he will be given all the unlimited prerogatives of exercising parental authority alone, because this would be equivalent to a voluntary renunciation of the exercise of parental authority, and thus it would lead to the violation of the provisions of art. 36 of the Law on the protection and promotion of children's rights.

3. The Termination of Parental Rights

The termination of parental rights does not lead to the loss of parental rights, but only to the loss of the exercise of these rights, a fact that also results from the name of Chapter IV (Loss of the exercise of parental rights) of Title IV of the Civil Code, dedicated to parental authority.

In other words, the parent deprived of parental rights is still the holder of the rights that make up the parental authority regarding his child, only that, as a result of the commission of some limiting acts provided by law, the exercise of these rights is restricted (either temporarily or permanently) .

The termination of parental rights, like any other measure regarding the exercise of parental authority, is not a definitive measure, in the sense that the exercise of parental rights is possible, assuming that the circumstances that justified the adoption of this measure no longer exist. If the reasons that were at the basis of the adoption of the termination decision are perpetuated, without displaying any improvement over time, the measure can acquire a permanent character (Herman, 2021, p.34).

Most of the time, parents whose exercise of parental authority over their own child is made difficult by the disappearance, non-involvement, total absence of the other parent try to find alternative solutions to solve the problem.

We refer here, as an example, to the impossibility of making a passport for the minor without the notarial consent or the effective presence of the other parent, the actual impossibility of leaving the country with the minor, without the express, notarial consent of the other parent. Some parents face real problems when enrolling the child in school or in different courses in the absence of a written agreement from the other parent, and these are just a few simple and common examples in court practice.

Thus, the problem of the parent who de facto exercises parental authority alone is not that the other parent refuses to give his consent for the issuance of a passport or for leaving the territory of the country (in which case, through a common law action or through a presidential ordinance can obtain from the guardianship court a decision to replace the lack of consent).

But the fact that the parent is not actually present in the child's life, cannot be notified about how he should exercise his parental authority, he left the country without the other parent knowing their new residence, or refuses any kind of communication and involvement in the minor's life, as communication with him is not possible.

Although this attitude amounts, from our point of view, to an abusive refusal to fulfill the obligation to exercise parental authority, Romanian legislation does not sanction this slippage with the termination of parental rights.

According to art. 508 of the Civil Code, the parent may be deprived of parental rights if the parent endangers the life, health or development of the child through ill treatment applied to him, through the consumption of alcohol or drugs, through abusive behavior, through serious negligence in fulfilling parental obligations or through serious harm of the best interest of the child.

In addition, the other parent does not have the active procedural capacity to request the guardianship court to terminate the parental rights of the absent, negligent parent, since according to the text of the law cited above but also according to art. 41 para. (1) from Law no. 272/2004 on the protection and promotion of children's rights it is provided that: (1) *"If there are solid reasons to suspect that the life and safety of the child are endangered in the family, the representatives of the public social assistance service or, as the case may be, of the general direction of social assistance and child protection at the level of the sectors of the municipality of Bucharest, they have the right to visit the children at their homes and find out about the way they are cared for, about their health and physical development, their education, training and professional training, giving, if necessary, the necessary guidance.*

(2) If, following the visits made according to para. (1), it is found that the child's physical, mental, spiritual, moral or social development is endangered, the public social assistance service is obliged to immediately notify the general direction of social assistance and child protection in order to take the measures provided for by law.

The mentioned article also expressly states in paragraph (3) that *"The General Directorate of Social Assistance and Child Protection is obliged to notify the court in the situation in which it considers that the conditions provided for by law are met for the total or partial forfeiture of both parents or of one of them from the exercise of parental rights"* - therefore, public administration authorities with attributions in the field of child protection have the capacity to formulate such a request (Civil Judgment no. 2143).

4. Conclusions

Analyzing the past and contemporary jurisprudence, we can come to the conclusion that not only daily life is constantly changing but also the jurisprudence concerning these social issues changes.

More and more cases and situations in which a parent is completely disinterested in the upbringing and education of his children/child have led to a resettlement of the practice of guardianship courts which have formed a judicial practice in the sense of accepting as legitimate that the parents reached an agreement regarding the exercise of parental authority by only one of the parents, actually proceeding to withdraw, at least for fear, parental authority from the parent who unequivocally declares that he does not wish to exercise it.

We appreciate that this judicial practice can prove useful and favorable to the parent who alone exercises parental authority over his own minor child, thus having a much easier task when making decisions that influence the minor's life.

However, if we are talking about the best interest of the child, then we appreciate that this judicial practice, which is beginning to take shape today, can be harmful to the minor who thus loses his right to be protected and cared for by both parents.

As we mentioned at the beginning of the article, parental authority and its exercise is an obligation for the parent and a legal right bestowed by the legislator on the minor. However, the jurisprudence deprives the minor of this right of protection from his parent, allowing the latter to do exactly what the law forbids him to do, namely, to voluntarily renounce, with the approval of the guardianship court, the exercise of parental authority over the person who needs the protection and care of both parents.

It is important to emphasize the obvious, namely the fact that neither the summons carried out pursuant to art. 506 of the Civil Code on restricting the exercise of parental authority, nor the forfeiture of parental rights annihilate the obligation of the deceased parent (or of the voluntarily renouncing parent) to pay the child maintenance owed to the minor.

The right to child maintenance and the right to benefit from parental care/authority belong equally to the minor, not being at the discretion of the parents.

In addition, the European law is consistent with regard to the withdrawal of parental authority on parental consent.

As an example, we quote from the ruling of the supreme court in the Netherlands it is not a sufficient basis to decide on sole custody if one of the parents no longer wishes to collaborate with the ex-husband or ex-wife in the decision-making process regarding the upbringing of the child, this fact is not enough for the court to deviate from the general rule and guarantee sole custody.

The national jurisprudence is not unitary in the sense of the previous paragraphs. There are many court decisions that support European judicial practice.

References

- Batlagan, C. (2012). *Renuntarea benevola la autoritatea parinteasca* [Voluntary renunciation of parental authority], <https://www.juridice.ro/189900/renuntarea-benevola-la-autoritatea-parinteasca.html>, accessed on 12.09.2023
- Herman, D. I. (2021). Loss of parental rights. Child neglect/Forfeiture of parental rights. Neglect of child. *Romanian Journal of Jurisprudence* No. 1/2021, p.31-40. Bucharest: Universul Juridic
- Ionas, D.-G. (2021). *Drept notarial* [Notarial Law. Course notes]. Bucharest: Universul Juridic.
- Mintici, A.M. (2011). *Relația parinte-copil* [Relationship parent-child] <https://www.psihart.ro/relatia-parinte-copil/>, accessed on 12.09.2023
- Civil judgment no. 312/2018 pronounced by the Bârlad Court, definitive, accessed on 12.09.2023 <https://lege5.ro/gratuit/haytanbwgmza/decaderea-din-drepturile-parintesti-neglijarea-copilului-forfeiture-of-parental-rights-neglect-of-child> Civil Judgment no. 2143 of June 28, 2018 pronounced by the Prahova Court, www.rolii.ro)

Law no.287/2009 – Civil Code [Legea nr. 287/2009 - Codul civil], published in *Official Monitor*, Part I, No. 511/2009

Law no. 257/2013 [Legea nr. 257/2013 pentru modificarea și completarea Legii nr. 272/2004 privind protecția și promovarea drepturilor copilului],re published in *Official Monitor*, Part I, No. 607 din 30 septembrie 2013

Supreme Court of the Netherlands, 10.09.1999, NJ 2000, 20m. Nt. SFM Wortmann

Civil Judgment no. 2143 of June 28, 2018 pronounced by the Prahova Court, (www.rolii.ro)