



ORIGINAL PAPER

Investigating the New Legal Concepts on the Real Protection for the Child at Risk: Shifts in Family Relations and Caregiving

Răducu Răzvan Dobre*

Abstract

The plan of social relations developed in the family has experienced a major transformation in recent years. Legislative changes have occurred in two ways: once in the enactment of a special nature that govern the protection and promotion of children's rights (law no. 272/2004 modify with law no. 257/2013) and in the second plan following the adoption of the new Civil Code in 2011. The motivation by reconfiguration the provisions of law no. 272/2004 content is represented by findings made in practice. Those generated many controversies about what exactly authorities must intervene in certain limited circumstances where there is a minor. The Civil Code was elaborated because was wanted an approximation to the exprimation used and the principles learned due to the new legal reality determined by the current political system and by the Romania's E.U. accession. In this new conception family relations are embedded in the new Civil Code, repealedled with the old Civil Code and Family Code. A number of issues such as determining the contact with the minor, establish the living place of the minor, exercise of parental authority, forfeiture of parental rights, establishing an order of preference at the time of disposition of the juvenile special protection measures were contained in both intertwined mentions regulations that have been made above speech. The ratio between the two categories of rules, namely general - particular is not observed in its entirety when are analyzed these texts. The support to children considered the main beneficiary of this provision will become effective with the revision of these inconsistencies.

Keywords: *family, special protection mesures, minor, parental rights, Civil Code*

* Lecturer, Phd, University of Pitești, Faculty of Orthodox Theology, Social Work Department, Phone: 0040723309495, E-mail: raducu.dobre@upit.ro.

The development of the individual occurs usually within the family, but there are exceptions when the community or the state bodies must intervene and regulate certain malfunctions. In addition, or in some cases even as an alternative to family appears the social worker, the specialist which intervenes in the framework of the national system of social assistance. Youth development is the natural process of growing up and developing one's capabilities, which is too important to be left to chance. Positive youth development occurs from an intentional process that promotes positive outcomes for youth by providing support, relationships and opportunities. Youth development takes place in families, peer groups, schools, in neighborhoods and communities, and prepares youth to meet the challenges of adolescence and adulthood through coordinated, progressive research-based experiences that help them to become socially, morally, emotionally, physically and intellectually competent. Although law no. 272/2004 refers to promotion and protection of the rights of the child, practice has shown that in many cases the minor is vulnerable due to shortcomings of this normative act itself. As a result, they adopted in the year 2013 the law no. 257 in order to eliminate a number of inaccuracies of the special law on the issue. Worth to see now is that a special rule regulates a substantive institution: personal connections between the minor and the parent from whom he left-whose place was supposed to be in the Civil Code and common law. Entry into force of the new Civil Code has determined also implementation of the family relationships in this new regulatory action, which up to that point were contained in the former Family Code (Dobre, 2011: 45).

As such the current provisions of the Civil Code do not clarify the personal connections between the child and the parent that he or she does not live with, although reference is made to this article: sequentially 262 paragraph 2: "the child who does not live with his parents has the right to have personal connections with him. The exercise of this right may not be restricted except in the conditions stipulated by law, for serious reasons, taking into account the best interests of the child". Article 401 specifies that the parent or, if necessary, the parents separated from their children have the right to have personal connections with them. In case of disagreement between the parents, the guardianship court shall decide on the procedures for the exercise of this right. The social worker can be the bridge thru which the divorced family members can solve their problems related to education and child care (Spânu, 1998: 44). Investing the Court with the settlement of the set up a programme under which personal relations to take place between the minor and the parent who does not have established the house guides now after a series of legal criteria. If the standard situation family composed of married parents and the children resulting from this legal union determined a number of stable relations is normal that exceptional situations including in these interactions should be recognized by law. The role of the father and mother must be preserved: "the most important function of the contemporary family is to assure the integration of their children in social life. Time spent with children has three functions: maintenance and repair function (domestic activity); comfort function (game, tenderness); development function (specific educational goals). If mother is able to provide all three functions independent of the presence/absence of the father, this is "specialized" exclusively in the comfort function. However, the difference between women and men refers especially how they relate and degree of involvement (Constantinescu, 2004: 113-115).

According to article 14 paragraph 4 of the special law constitutes circumstantial elements depending on which it evaluates the content of the parent-child relationship following minor: age of the minor, the specificity of the needs a child has in relation to

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the care and development of further education, the degree of emotional dependency between the child and parent to the jurisdiction, not the way in which the parent who require these personal connections with your own child is viewed in the community. As a result of the texts that speech was made personal connections between the child and the parent who does not live with the minor constitute a right with two facets: both subjects may require the exercise of this statutory prerogatives. Regarding the content of this right the article 15 of law no. 257/2013 brings the necessary conclusions.

The usual meaning of the notion of personal relationships with the minor was until the adoption of the current civil legislation that of "right to visit". Moreover, "dilemmas of child protection are based on contradictions between the rights and obligations of parents and children's rights, including the right to privacy of families and obligation (not only the right) of professionals to intervene in interests of the children" (Roth, 1999:18). From now on the coverage of the notion is extended because it covers three categories of elements. A first set of rights including rights to which the minor parent has no established residence: right to visit the child, the right to host him on it's own at a certain limited period of time, the right to correspond with the child in different forms, more or less classics: letter, landline phone, mobile phone, electronic mail, internet virtual discussion, etc. In the new regulation is established judiciously that the minor has the same type of rights in relation to the parent who does not have the property: the right to meet with the parent who does not live with, in the steadfast way, either directly or under a specific surveillance-in some places called neutral (except the residence of the minor and the residence of the parent does not live with the minor-already analysed situations).

The last form that express the relation between the minor and the parent who does not live with consists of information that a third part-the parent of the child where he has established permanent address-is required to transmit information. It is the parent's right to receive information regarding the minor's physical, psychological, and educational evolution and children's right to receive information of activity and life of the parent with whom he has established personal relationships through court order or as a result of a family transaction. Monitoring of such personal connections between the minor and the one of the parent (or other person to whom the minor has developed a specific attachment-situation assimilable) is transferred to the competent social worker within the specialized public service. Furthermore, the protection of the child in need of Romania, recognizing the role to ensure that the risks which may negatively affect childhood, have to approach increasingly more the child welfare system (Zamfir, 2002: 44). The inability to effectively protect the principle of the best interests of the minor because there were people who had prearranged to intervene in situations limited hypothesis has generated this new provision. The nomination of a social worker as a decision-maker in an organism such time enhances the importance of the profession again. On the other hand interest of the child principle content is questionable. Moreover, it was supported even before the advent of this legislative changes regarding the content of the notion that the lack of interest of the child is not a legislative lacuna but voluntary omission of the legislature indigent to anticipate complex and varied situations in which the child can learn (Drăghici, 2014: 29). Information mediation between the minor and the parent the child does not live with is realized through the establishment of a genuine obligation of the parent where the child lives. Distorting the truth by the subject of this obligation in such a way that the minor to build an image far from reality on the other parent may lead to consequences in legal form. Must be underlined in the probation plan the value of documents made by the social worker named in such a case. The report monitoring issues related to the moment took

over the juvenile from the parent where he has established residence, return the minor at the end of the time spent together with the other parent, also including interviews with the two parents, and also with the minor concerned.

The establishment of the minor in the house of one of the parents is not a definitive measure because it is based on factual data interpreted by the Court of guardianship at that moment. Therefore, on the basis of the monitoring report filed by the social worker on the case and other related means of proof the Court may be required to change the minor's domicile to the other parent. It is not necessary to extrapolate this position of social worker as a guardian of the interpersonal relationships between the parent and the minor considering its classic status: "the support who can be offered by social workers from social institution to young people who leave the protection institutions at 18 years old is represented by multiples roles that they can actually take it, namely the social worker, a facilitator, teacher, mediator and lawyer (Neamțu, 2003: 336-337). Using the same legislative drafting technique have defined legal criteria in the special law (although it would have been natural for them to be included in the common law of the Civil Code) which can be considered by the Court when it establishes the juvenile home at one of the two parents. Although it is not mentioned explicitly as such legal criteria would meet a certain ranking, in listing them in a certain order, give us such a conclusion. Interesting is the fact that the first two criteria related to the personality of the individual, the ability of the parent (which will live together with the minor chose) to accept the idea according to which the other parent feels the need to relate with his own child and last but not least the best interest of the minor determine categorically its access unconditionally to affectivity of the parent he does not live with. So the main criteria are the availability of parent to the other parent involved in the taking of important decisions related to the future of the minor and parent's willingness to respect the personal links between the minor and the other parent.

According to the Civil Code-general law in family relations: a family home may not be subject to a discretionary right of one of the spouses (inability to alienate the property, prohibition of making even administration acts to obtain an income such as rent) even when it is the sole owner of the property (article 322). After the dissolution of marriage through divorce are provisions that ensure for example that the benefit in terms of a lease (when the titular is only one of the former spouses) to return to the parent which is not contracting party (article 324). Here's one of the reasons to which reference is made is the best interest of the child (in the idea that it would have established home to parent that although was not part of the contract of rent will be the future user of the property). In reverse logic, a special law indicate now as criteria of preference when the housing situation of the real estate of the minor's two parents for the last 3 years from the time of the request in question. If you would take into account this principle would mean that the parent who has his own real estate or patrimony which has higher income than the other parent will have an advantage in winning at Court "child custody" (article 16, paragraph 2, point c). Even if "permeability social barriers in a given society is the most important feature of social stratification system" (Bădescu, 1994: 21) this does not necessarily lead to a preference right in favor of a parent with such status "acquired".

There is a problem of interpretation: what the rule will be applied: the general or special-although at the theoretical level the answer would be clear: the special one which is derogatory from the general. "Translation" of the child's best interest behave here two meanings: one that refers to the potentiation of affective element (represented in the Civil Code where the parent may benefit from the family home after the divorce although does

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not have a pre-existing right of dwelling) and another one that covers the idea of comfort, the higher standard of living for that the child might enjoy (according to law no. 257/2013 where reference is made to the housing situation of the history of the parent). It's hard to choose between the two versions so the practice Court will be called to indicate that a certain guideline. Hierarchy of legal criteria which must be taken into account in determining the principal residence of the minor is wrong whereas violence coming from the minor's parents or other persons is located toward the base of the pyramid, being among the last issues to which reference is made.

Incidentally this positioning between the other criteria may be the only argument, based on which we would not be in the presence of a hierarchy but it would be just the sum of the elements on which the Court can evaluate them in the light of the arrangement of free will. May not be talking about ensuring harmonious development and growth of the child abuse or violence while abuse, regardless of what nature would be (especially the physical and mental) is a behavioural habit of the parent in question. According to an earlier study in which the research aimed the educational methods used by parents is found that there is "an increased risk of ill-treatment in rural areas than in urban areas" (Rotaru, 1996: 114). Statistical data show that recent physical abuse (beating, hitting, burns, injury) is 68% (of those interviewed - 110 professionals in the field), 16% reprisals and 16% deliberate action (Brătianu, Roșca, 2005: 176).

The last legal criteria are the distance between the home of each parent and formative-educative unit where the minor learns a specific type of skills and/or knowledge school. Heated discussion can occur here when determining the principal residence of one of the parents would accomplish in a building that it owns no property but under a rental contract. Even if the period for which ended the lease is a long one (5 years), kindergarten/school of the juvenile is an excellent one and convenience is one high Court must compare with "offer" other parent. If the latter is the proprietor (or the user) of the building in which the minor has grown up to the moment of separation of the parents the priority of fixing the residence of the child should be understood on its own.

Accommodating the juvenile with a particular lifestyle (certain daily habits closely related to the house where he lives) could lead to a significant change in it emotionally at the time at which it would intervene in the issue of changing its residence. Changing the child's home may take place even when the parent who lives with the minor (due to the decision established by the Court of guardianship) decides to move with child at another location. Furthermore, it is argued that the prior consent of the parent who does not live with the child is mandatory, since it has the legal right to maintain personal relations with the child. Fortuity change of residence of the parent who lives with the child can be interpreted in this situation as an obstruction of the right to private and family life of the other parent. It is not less true that, in certain situations, the right to maintain personal relations with the minor can be used as element of blackmailing, unduly the best interest of the child. In this situation the Court is all that you need to establish a balance between the interests of those involved (Drăghici, 2013: 205).

An interesting evolution has known the adoption of law no. 257/2013 and approach the concept of the exercise of parental authority. In the light of the old regulations in terms of family (formerly Family Code) according to art. 98-99 act as the exercise parental rights is done by mutual agreement and in case of disagreement, it will appeal to tutelary authority who will decide. The exercise of these prerogatives exclusively by one parent take place only when the impossibility of objective cases appeared in the other parent to express his point of view. However, the importance of the right conferred

by the law equally to the two parents do not have a specific transposition and rule of civil procedure at dissolution of marriage through divorce. What is imperative to decide in Court for a divorce trial (as long as was in effect the old Code of Civil Procedure) when the minor was in order to advance his education and by one of the parents (article 613 index 1 paragraph 4). There is nowhere in the old speech about provisions to establish the way in which they exercise parental authority after the divorce moment.

Also home of the minor shall be considered a default that is set to the parent to whom it had been entrusted. According to the article 930 paragraphs 2 from new Code of Civil Procedure the Court must pronounce about the form in which it will exercise parental authority by both parents, after the dissolution of marriage. The special law on the protection of children's rights detailed in what consist parental authority: "important decisions, such as those relating to the choice of the way of the learning or professional training, advanced medical treatments or surgery, the residence of the child or the administration of its property" (article 31, paragraphs 2, point 1 of the law no. 257/2013). They keep the old principle according to which regulatory exercise "parental power" in making a decision on the future of the juvenile capitals is carried out exclusively in common and only about exceptional parent with whom the child lives will decide alone only when the other parent does not express his views.

There is still a difference of nuance here: in the Family Code are different cases in which the expression of the will of the parent does not take place because it was dependent on other external factors (the parent was deceased, the parent lost his parental rights etc.), while in law no. 257/2013 includes the assumptions and independent of any external compulsion means one of the parents does not express either approval or disapproval of the proposal coming from the other parent. The last mention is different with total available found in article 507 of the new Civil Code that retrieves the same expression mentioned above, in the old Family Code. You will need a clarification in the future in terms of how misinterpretation of these texts. Because the authority has a special significance that in the new philosophy of the rights of the child, the parents will not be able to trade the disclaiming of them relating to this right (article 31, paragraphs 2, point 4 of the law no. 257/2013). The imposition of such limitations is a consequence of the fact that only when one or both parents do not provide moral and material warranties for their growth and education of the child may dispose of the sanctions Court. You have also edited the following very interesting issue: establishment of exercising parental authority by a single parent by way of sanction for the other parent is equivalent to losing of parental rights? This is based on the article 31 provisions, paragraph 2 point 5 of law 257/2013 and that articles 508-512 of the civil code. The special rules are catalogued as grounds to determine the exercise of parental authority solely by the other parent as a result of the decision of the Court: "alcoholism, mental illness, drug addiction, violence towards the child or another parent, convictions for offences of trafficking in human beings, drug trafficking, offences relating to the sexual life, crimes of violence, and any other reason related to the risks for the child ...". According to the common law losing the parental rights occurs when "the father puts the life, health or development of the child through ill-treatment applied by consumption of alcohol or narcotic drugs, by wearing improper behaviour, through serious negligence in fulfilling parental obligations, or by tapping the serious interest of the child". We believe that there are not two identical notions in terms of coverage. According to the legal definition (article 483 of the Civil Code) parental authority "is the set of rights and duties which relate to both the person and property of the child" while as seen from telling the other notion is used only "parental rights". The

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same ideas are pointed out that in article 510 of the new Civil Code stipulates that the parent is not relieved from the obligation to perform to give maintenance even though it's fallen out of the parental rights.

In this direction, this solution was outlined in the doctrinal and jurisprudential before entry into force of the civil code, showing that the losing of parental rights is termination of parent rights, but not of the rights of the child to the parent or, meaning that they maintain parental rights correlative obligations (Tițian, Constantin, Cîrstea, 2007: 353).

The same conclusion can be drawn if we analyse the distribution of the two concepts that are distinct in chapter III of the Civil Code entitled exercise of parental authority and chapter IV of the same regulatory action in the corruption of “parental rights” exercise. However, in article 507 of the new Civil Code hereinafter referred to as “the exercise of parental authority by a single parent” are not found none of the causes of the sanction the removal of one of the parents from exercising parental authority (which are listed in the sample article 31 paragraph 2 point 5 of law no. 257/2013). The family is about to become a construction where the child is in centre of family. Some consequences are not devoid of a certain oddness: the parental rights and duties will be performed, as a rule, shared by parents, including during the marriage of the mother, or by the latter with a third party-father; changing home by father, including divorced, at which the child is placed, requires the prior consent of the other parent if the change of housing affects the exercise of authority or parental rights by the latter (article 497 new Civil Code). In our opinion, an obsessive suspicion towards any differentiation as bearing the germs sprout unequal implausible generalizations of status, role, etc., losing sight a crucial fact: the family itself is the symbol of complementarity of differences: between the married and the unmarried, between genders, between generations (Emese, 2011: 12).

A fundamental change is recorded about the special protection measures which is taken in case the minor is in a situation of risk: family reintegration, integration into the extended family (in both cases the placement measure), placement in a professional placement from another family or person, the guardianship, placement in a residential facility and adoption. It follows from the interpretation of the Civil Code in conjunction with the special law in the matter. After the General Directorate of Social Assistance and Child Protection has been notified of the existence of a case that requires a special protection measures, or after it has already been taken the measure of placement in a matter of urgency, by the Director of the institution in question, it will begin operation of individualized protection plan (P. I. P.) This plan aims to reintegrate the minor within the natural family, and only exceptionally within the extended family (composed of child, parents and relatives up to the fourth degree inclusive). When the exceptional measure of placement outside the family requires costs for maintenance of (note in a specialized centre) the parents will have the monthly payment of an amount under that title. Because not every time parents receive income (it is well known that investment in residential centres usually takes place when a family living conditions, food, hygiene, access to education, etc. are harmed just because of the financial situation of the parents) they will be able to perform community service work.

Such an approach was possible because on the basis of old legal provisions “the parents transfer the full responsibility of taking care of children to these institutions, or in other words, *the state*”. They meet often argue about the state's role in caring for children. *The state is obliged to raise my child* or *I want to give the child to the state* are phrases that social worker often hears from parents who want to abandon their children (Miftode,

2002: 263). We are in the presence of an unique legal obligations of maintenance, without denying the existence of peculiarities arising from the nature of the persons among which is born. Background of this obligation is unique and results from the aim of fulfilling (providing the means of sustenance of a people in need because of inability to work) (Drăghici, Duminică, 2014: 85). Among the special protection measures of the minor are specialized supervision. It consists of maintaining the child in the family but with the obligation of parents to pay special attention to the way he has learnt, to cultural knowledge, but also to civic knowledge as well in an attempt to explain to the minor the adverse consequences he has produced to community through his delinquent act. The dialogue that the family must wear in these cases with the minor often relies on specific therapeutic techniques. There are some families that made a negative socialization of young people, inducing them in discordant patterns of conduct are desirable social norms and values, thus favoring the propensity for delinquency (Rădulescu, Banciu, 1990: 21). That the family should dialogue wear it in these cases with the juvenile often rely on specific therapeutic techniques to be acquired by them. In this sense, in the special law has been introduced in article 80 paragraph 3 which provides that: “the child's parents who commits criminal offences and are not criminally responsible are obliged to participate in counselling sessions conducted by the General Directorate of Social Assistance and Child Protection, based on a customized program of psychological counselling”.

Under these conditions, we assist to an instrumentalisation of human relations, to a rift between generations and we are in the presence of a generation that has lost its common places to speak, to meet, to live together. There's an identity crisis, because there was a rift between adolescent's culture and adult culture... Family problems are those related to the functions of the family: the family arrangement, the couple's life, the issue of education, parental system. Parents consider much farther young people, particularly adolescents as too libertine, lacking respect for traditions, moral values of society, etc. Negotiation occurs as a tool in a kind of modern enterprises specific to interpersonal communication report, not in a family life only, but also of the school where it works the same law of supply and demand (Voinea, Bulzan, 2003: 71). That support is given to the child who is not criminally responsible by adapting interfamilial reactions that the parents should have. Since in many cases the children were exposed to the public “mercy” in order parents can obtain various materials advantages quickly and without any sort of physical or intellectual effort they felt the need to add to the law (article 91 index 1 law no. 257/2013): “parents or legal representatives are obliged to supervise the child and to take all measures in order to prevent the practice of begging”. As such, besides the criminal responsibility of legal representatives is put in question in another light concept of the parental authority which so enriches content by adding a new obligation. Another phenomenon with implications on growth and education of children which knew a major development is the exodus of the parents who go to work abroad. The intention of those who are trying to win more is a good one meaning that the excedent will be directed in most of times in the future of children.

However, increased volume migrations can be a growth factor divorce, especially when migration is accompanied by decreasing social control over social behaviors and produce imbalances (Mihăilescu, 1999: 108). In other news, positive or negative effect of money sent to Romania by those who left to work abroad “depends on patterns of spending this money over a long period of time and the state's ability to influence their origin” (Constantinescu, 2006: 297). This attempt to change the living standards must be put in the balance with the negative effects they generate those adults

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which leave their own children in Romania. The effort of family members to perform the duties of the left ones is often felt negative (Șerban, Grigoraș, 2000: 52).

Lack of supervision of the minor's educational evolution, emotional deficiencies that we felt at these children due to receipt of parental affection only "from away" have prompted the intervention of the legislature. In statistical terms "two out of three children whose parents work abroad feel the lack of their love. Those children, psychologists and sociologists say that develop disharmonious personality and therefore it is possible that, once matured, to form a generation of adults with social integration problems" (Constantinescu, 2008: 215).

In conclusion, in order not to create the risk of losing the parental rights, the adults who go to work abroad will have to notify the public of social service person they delegate those responsibilities (article 97 index 1 of the law no. 257/2013). The designation of the person who will substitute the parent left to work abroad is not done in discretionary manner but will be censured by the Court of guardianship. The Court will have competence to verify fulfilment of the minimum conditions in respect thereof: to be part of the extended family, to have the ability to exercise and meet the material and moral guarantees required. It may deem this procedure of verification of these conditions with the procedure of certification of persons wishing to adopt. The persons designated to replace the parent for the period in which he works abroad will have to express their consent directly in front of the Court. And here we find similarities with the principles applicable to the procedure of adoption (consent expressed by adopting article 15 of law no. 273/2004 republished in 2012).

In conclusion, it is preferable that the legislative changes in the field of protection of children's rights were a faithful reflection of the facts carried out in practice. Equally true is that there are certain inaccuracies or subsist in certain cases even contradictions between the texts of special legislation and common right - new Civil Code. The future harmonisation of legislation in this area of activity will lead to a better correlation of administrative measures clause which are unconditionally and subordinate to the principle of the best interests of the minor.

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