

SOME REMARKS ON THE NEW AMENDMENTS IN THE ADOPTION PROCEDURE REGARDING THE ADOPTION DEFINING TERMS AND SUBSTANTIVE CONDITIONS

Lecturer **Laura CETEAN-VOICULESCU**¹

Abstract

Adoption is one of the most important measures to protect children in need, namely that category of children who are deprived of parental care, loss due to various reasons. If a child in need can not be maintained or reinstated in his natural family, state authorities must have an alternative measure of protection: guardianship, special protective measures provided by Law no. 272/2004 on the protection and promotion of children's rights (placement, emergency placement or specialized supervision) or adoption, regulated by Law no. 273/2004. This paper aims to critically analyze the Adoption of the new rules, with special regard to the definition, principles and conditions for the adoption procedure.

Keywords: *adoption procedure, individualized plan of protection, substantive conditions for adoption, celerity, child's best interests, the principle of continuity.*

JEL Classification: K36

Current regulatory

This year, the Law on the legal status of adoption was republished² in the Official Gazette of Romania no. 259/19 April 2012, subsequently appearing H.G. 350/2012 approving the Methodological Norms for applying Law no. 273/2004. This is the second reprint of mentioned Act after that on the Official Gazette no. 788/2009, as amended by Law no. 71/2011 for the implementation of the new Civil Code.

Regarding republication believe that it was imperative given that the new Civil Code governing this child protection measure, as noted on another occasion³, the regulations contained in two acts were not entirely compatible.

But given that new rules and legal norms are found some critics consider appropriate a succinct analysis of these changes in relation to the regulation of adoption procedures contained in the Civil Code.

Thus, the changes in adoption proceedings are in force, by republication of the Law. 273/2004, starting with April 7, 2012.

General and special law in adoption procedure

If prior to the abrogation of the Family Code, which represent the general law regarding all legal relationships which form the subject of family law, general law presently role in this regard is played by the new Civil Code, which in Book II entitled "On the Family" includes a set of rules generally applicable legally binding marriage relationship, parentage, adoption and other similar reports of family law.

On Adoption, Civil Code includes in Title III (relationship) a separate chapter (Chapter III) a set of legal rules governing the adoption, rules with a general character. Special character rules are found in Law no. 273/2004 on the legal status of adoption, which is intended to be the

¹ Laura Cetean-Voiculescu, „1 Decembrie 1918” University, Alba Iulia, Faculty of Law and Social Sciences, lauravoiculescu@yahoo.com

² Under the provisions of art. X of Law. 233/2011 amending and supplementing Law no. 273/2004, published in Official Gazette us. 880/7 December 2011 and entered into force on 7 April 2012;

³ Laura Cetean-Voiculescu, Ada Hurbean, *Considerations regarding the amendments to legislation on child protection through the new civil code*, in Challenges of the Knowledge Society, ProUniversitaria, Bucharest, 2012;

law governing the particular aspects of the actual procedure of adoption, both the administrative and the judicial.

Regarding the definition of adoption

On another occasion I criticized two parallel existing regulations regarding the legislature option to define this measure on the protection of minors. Thus, we held that a special law should include a provision defining institution has a governing and Civil Code repealed the first article of Law no. 273 defining adoption as "... the legal operation which creates the link between the adopter and the adopted lineage and family ties between the adopted and the adoptive family", without any change in substance, as defined by the new Civil Code one gives adoption by the provisions of art. 451 is identical. Even after the amendment and republication, special law does not include a definition of the institution they govern, even if the art. 2 define a number of terms and phrases, including the domestic and international adoption.

Regarding the adoption principles

At the forefront of adoption, the problem is even more obvious: if the special law, even as amended and republished, lists six principles, the Civil Code refers only to four, leaving aside the principle of informing the child and take into account its opinion, based on the age and maturity of the child and the principle of guaranteeing confidentiality regarding particulars of the adopter or, where appropriate, the adoptive family and regarding the identity of the natural parents.

Of course it will be observed that most of the legislative act provides many, but the problem is the inconsistency of the legislature and lack of legislative technique that characterizes normative acts in general and in child protection are no exception.

On the other hand, the wording of the provisions contained in the Civil Code on principles adoption is flawed. The phrase "... subject ... of principles" is not appropriate, consider that it could be replaced with the words "adoption is governed by the following principles...". And do not see how it could be governed cumulative, but still illustrative of the reasons given above.

There is also a mismatch between the two laws regarding the principle of continuity on the child's education, the special law (Act no. 273) including a minus category, which of ensuring that religious continuity provided instead of the Civil Code. We can only conclude that the entry into force of the new Civil Code was not taken into account the provisions of the special law on the subject and also to modify and republish the special law governing the adoption did not take into account the provisions of the Civil Code in a separate chapter governing this procedure.

Of course it is recommended that the process of selecting the most appropriate person or family for the child in respect of whom it is established that the best alternative is the adoption of protective measures need to be taken into account ethnic, cultural, linguistic, religious and the list goes on, although the word "and" contained in both legislation referred us to believe that although different in the two acts, the list is exhaustive. With another occasion, I stressed the importance of religious continuity in the child's education⁴, why not see what the legislature has not adopted this criterion, although provided for in the Civil Code.

Given the importance of these principles, the basic thesis, basic ideas, fundamental governing adoption procedure, we believe that more attention should be paid a deserved importance of these regulations by the Romanian legislature.

Regarding the substantial conditions in the adoption procedure

⁴ Laura Cetean-Voiculescu, *Law in social assistance*, "Risoprint" House of Printing, Cluj-Napoca, 2008, p. 85;

As regards the substance of adoption (the formal conditions being a part of the adoption procedure and is, therefore, exclusively regulated by Law no. 273/2004) are covered by both laws in question, including a Civil Code section devoted their entire.

Analyzing the two rules we find, first, a mixture of information and a scratchy mixture of positive background conditions and impediments to adoption, which doctrine must classify and order finally to be applicable. For this reason we propose this approach in this paper and we share the discussion of the adoption in several parts, as one approach considered to be insufficient. Besides a logical and orderly presentation of these substantive requirements, we will not abandon critical analysis of legal texts which form the subject of this paper.

The background conditions of adoption can be classified according to several criteria. A classification criterion is achieved even by Civil Code, which regulates the conditions on who can be adopted, the conditions on who can adopt and on consent on adoption procedure.

From another perspective, we can achieve a similar classification on the background conditions of marriage: the background conditions narrowly, as those conditions positively formulated, like conditions that must exist in order to be completed the marriage, adoption in our case and obstacles, like negatively formulated conditions, which must not exist or must be absent for a marriage or an adoption to be valid.

There is also a third possibility, analysis of adoption background conditions without having regard to any classification criterion, the unordered, as it does, in fact, the special law.

Of course we can talk and classification criteria of legal regulation: substantive conditions regulated by special law and substantive conditions for adoption governed by the Civil Code.

In light of the first classification criterion set are positive conditions (background conditions in the narrow sense, as the substantive broadly cover both the substantive narrow and impediments) the following:

- Condition of the adoptee age (up to acquire full legal capacity, and an exception is allowed);
- Condition of plurality of adopted brothers and sisters (siblings adopted by the same person or family is allowed and the exception);
- Condition of the age difference (between the adopter and the adoptee must be a gap of at least 18 years of age, the exception is admitted);
- Condition of the moral and material conditions (the adopter or adoptive family must meet the material and moral guarantees necessary for growth, education and harmonious development of the child);
- Condition of consent;
- The condition of minimum age of natural parents who give their consent to adoption (can not be adopted child whose natural parents have not attained 14 years).

The impediments in the adoption procedure are the follows:

- The quality of sibling is an impediment to adoption, sibling adoption is banned;
- The quality of spouse is an impediment to marriage (adoption of two former spouses or spouses by the same adopter or adoptive family and adopted between spouses or former spouses are prohibited);
- The impediment resulting from lack full legal capacity of the adopter or adopters;
- The impediment resulted by the mental illness or mental disability of the adopter;
- The impediment resulting from simultaneous or successive adoption (exceptions are allowed);
- The impediment on the person who has been convicted of an offense against the person or against family, human trafficking and illicit drug trafficking and consumption, person who can not adopt;

- The impediment on the person whose child has a special protective measure or is deprived of parental rights, an individual who can not adopt.

Classification made by the Civil Code is incomplete and therefore inaccurate. Thus, are conditions on who can be adopted (both substantive conditions and impediments narrowly) the following:

- the age of the adoptee;
- the plurality of the adopted persons;
- the ban adoption among brothers;
- the situation of the spouses.

Are conditions on who can adopt:

- the capacity;
- the health;
- the age difference;
- the moral and material conditions;
- the simultaneous or successive adoption.

Are conditions relating to consent:

- the consent existence;
- the valid consent;
- the consent liberty;
- the giving and revocation of consent;
- the conditions in which are expressed the consent.

Regarding on the regulation of background conditions of the adoption procedure, contained in the Civil Code do the following highlights:

First, the 468th article of the Civil Code on the conditions to express the consent, includes a legal norms of reference to the provisions of the special law "the conditions in which is expressed the consent by the persons who must consent on the adoption procedure are settled by special law consent to adoption is regulated by a special law." But on other conditions, both procedural matters are governed by laws, without this reference, for example if the condition of the adoption together, simultaneously or successively.

Second, even if the new civil code is considered a legal act containing substantive norms and the special Act containing procedural norms, it found in Law no. 273/2004 also the substantial norms which are lacking from the Civil Code. For example, even if we can fit condition to persons sentenced for certain crimes in general the moral guarantees, it is governed only by special law.

Third, the Civil Code provides just conditions for adoption and adopted, but there are some requirements and the natural parents, it fails. For example, the condition of minimum age to express the consent on the adoption.

Conclusions and proposals

In light of revealing in this paper and other items that were not identified, the following:

1. Agreeing provisions of the two acts.
2. Establishing regulatory domain of each of the two acts. For example, the 453rd article and 454th article from the Civil Code contains legal provisions referring to the special law so that it is clear that international adoption and adoption proceedings are governed solely by the Law no.273/2004 as a special law on Adoption.
3. Correcting grammatical errors and inconsistencies in the wording of the two acts, as the grammatical interpretation of legal norms is very important and with many implications for legal practice.

4. A coherent regulation and expression in special terms, excluding common language where we have legal terms. For example, the expressions "to be older than", "attesting fulfillment of ...", "adoption is subject to the following principles" so on.

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