

# FAMILY COUNCIL AND THE TUTELAGE IN THE LIGHT OF THE NEW CIVIL CODE

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## **Abstract**

*An important area to which the Law No 287/2009 brings significant modifications is represented by the means in which are approached to legal ways for protecting the natural person. By comparing the actual regulation with the one previous to the new Civil Code (Family Code – Law No 4/1953 repealed and Law No 272/2004 on the protection and promotion of the rights of the child) – Art 40 Para 1, Art 41-42, repealed) we notice that if most of the means for protecting the natural person are still the same – the tutelage, guardianship and the placement under interdiction –, the application of these measures has registered significant changes. The family council stated by the new Civil Code is totally different in its composition, role and situations for which is established, by the institution with the same name stated by the Law No 217/2003 for the prevention and combat of domestic violence, defined as being the “association without legal personality and patrimonial purpose, formed by the family members with full capacity of exercise”, for the prevention of the conflictual situations and the mitigation between the family members. From the content of the texts referring to the family council it results that it is a consultative organ (without legal personality), appointed by the family court, with the role of overseeing the means in which the guardian fulfils his rights regarding the minor’s person and assets.*

**Keywords:** family council, child protection, guardianship, children’s rights, Civil Code

**JEL Classification:** K36

## **1. Introduction**

An important area to which the Law No 287/2009<sup>2</sup> brings significant modifications is represented by the means in which are approached to legal ways for protecting the natural person.

By comparing the actual regulation with the one previous to the new Civil Code (Family Code – Law No 4/1953 repealed and Law No 272/2004 on the protection and promotion of the rights of the child) – Art 40 Para 1, Art 41-42, repealed) we notice that if most of the means for protecting the natural person are still the same – the tutelage, guardianship and the placement under interdiction –, the application of these measures has registered significant changes.

Also, the family council is a new institution stated by the Civil Code. The Council may gather to oversee the means in which the tutor performs his rights and fulfils his obligations regarding the minor as a person and his assets.

Due to the fact that in practice the most frequent situations are the ones in which provide the establishment of the tutelage for the minor without protection, we shall introduce this notion from the perspective of the new provisions of the Law No 287/2009 *on the new Civil Code*.

Art 110 of the Law No 287/2009 explicitly states the cases in which the tutelage of the minor is established: “*when both parents are, where appropriate, deceased, unknown, deprived of the exercise of parental rights or were enforced the penalty of denial of parental rights, placed under interdiction, declared dead or missing by a court of law, as well as when, upon the termination of the adoption, the court of law rules that this is in the best interests of the child the appointment of a tutor*”<sup>3</sup>.

Partially reiterating Art 115 of the Family Code, the legislator maintains the obligation to inform the competent institution (in the former regulation that is the guardianship supervisory

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<sup>2</sup> Law no. 287/2009 on the Civil Code, republished in the Official Gazette, Part I no. 505 of 15 July 2011, as amended.

<sup>3</sup> For the comment in the doctrine of art. 110 of the Civil Code see Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Noul Cod civil. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2012, p. 122; Carmen Tamara Ungureanu, Corina Voicu a.o., *Noul Cod civil. Comentarii, doctrină și jurisprudență*, vol. I, art. 1-952, Hamangiu Publishing House, Bucharest, 2012, p. 155, 156. On the definition of the tutelage under civil law see Mircea N. Costin, Călin M. Costin, *Dicționar de drept civil de la A la Z*, Hamangiu Publishing House, Bucharest, 2<sup>nd</sup> edition, 2007, p. 973.

agency, and in the current legislation that is the family court), obligation which must be fulfilled by the “persons closer to the minor”, together with “the administrators and the tenants of the house in which the minor resides”, “the Civil Service”, for the registration of a person’s death, “the public notary”, with the opportunity of inheritance opening procedures, “the courts and the local public administration organs, institutions for protection, as well as any other person” (Art 111 of the Law No 287/2009). We notice that from the new regulation it disappears also the term stated by Art 115 of the Family Code (5 days “from the date when it becomes aware of the existence of a minor without parent protection”), being replaced by the notion “as soon as it finds out about the existence of a minor without parent protection”.

Moving forward with the analysis of this institution, we note that, for the purpose of protecting the superior interest of the minor, the legislator expands the area of the situations for incompatibility with the activity as legal guardian. Thus, from Art 113 of the Law No 287/2009, we note that there might not be guardian: “– the minor, the person placed under interdiction or under guardianship; the person decayed from the parenting rights or the person declared incapable of being a guardian; the one whose exercise of certain civil rights has been restrained, either based on the law, or by a judicial decision, as well as the person with bad behaviors noted as such by a court of law; the person who, by performing a guardianship, has been removed from this position according to Art 158; the person who is insolvable; the person who, because of the interests adverse to those of the minor, could not fulfil the conditions of a guardianship; the person removed by an authentic writing or by a will by the parent who, at the moment of his death, was the parenting authority”<sup>4</sup>.

Thus, in essence, any natural person with full capacity of exercise can be a guardian, if he is not found under any of the above mentioned conditions. Is any of these situations emerges during the guardianship, that person shall be removed from the guardianship, with the appointment of a new guardian.

## 2. Family council and the tutelage in the light of the new Civil code

The absolute novelty inserted by the Law No 287/2009 refers to the means of appointing the guardian. If in the previous regulation (the Family Code – Law No 4/1953), this attribution belonged to the guardianship supervisory agency, in the light of the new Civil Code, the appointment of the guardian can be made by the parent of the minor or by the family court. By representing a takeover from the Anglo-Saxon law, the establishment of the possibility that the parent alive and with full capacity of exercise to appoint a guardian for his minor child, consolidates the premises of the exercise of the parenting rights and obligations and totally respects the superior interest of the minor.

According to Art 114 of the Law No 287/2009, the appointment of the guardian by the parent shall be made by a “unilateral act or by a mandatory contract”, authenticated. The measure may also be established by will. The parent may at any time revoke the appointment of the guardian, being sufficient an act with a private signature in this meaning. We must also mention that the person who has been appointed as guardian by this means cannot be revoked from the guardianship by the court, only if he is found (temporarily) in any of the conditions stated by Art 113 of the Law No 287/2009 or if “by his appointment the interests of the minor would be endangered” (Art 116 of the same law).

If there is no guardian appointed by the parent, the family court shall appoint a as guardian “a relative, a kinsman or a family friend of the minor, capable of fulfilling this engagement, considering, where appropriate, the personal relations, the closeness of the residences, the material

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<sup>4</sup> For the comment in the doctrine of art. 113 of the Civil Code see Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op.cit.*, p. 124; Carmen Tamara Ungureanu, Corina Voicu a.o., *op. cit.*, p. 158-160; Boroi Gabriel, Anghelescu Carla Alexandra, *Curs de drept civil. Partea generală*, Hamangiu Publishing House, Bucharest, 2011, p. 276.

conditions and the moral guarantees presented by the person to be appointed as guardian” (Art 118 of the Law No 287/2009).

Regarding the appointment procedure, we mention that it is mandatory the accept of the future guardian (except the case in which the guardian is appointed based on a mandatory contract, case in which he shall not be able to refuse the guardianship only for the reasons stated by Art 120 Para 2 of the Law No 287/2009). The hearing of the minor who has turned the age of 10 is mandatory. The appointment shall be made in the advisory chamber, by a definitive decision, which “shall be communicated in writing to the guardian and shall be displayed on the panel at the family court and in the city hall from the minor’s domicile” (Art 119 Para 4 of the Law No 287/2009).

Regarding the situations in which a person may refuse to be appointed as guardian, unlike the old regulation (Art 118 of the Family Code), Art 120 Para 2 of the new Civil Code limits their area, identifying 4 cases: “the person who has 60 years old; the pregnant woman or the mother of a child less than 8 years old; the person raising and educating 2 or more children; the person who, due to a disease, infirmity, the nature of the activities performed, the distance between the domicile and the location of the minor’s assets or for other grounded reasons, could no longer fulfil this task”.

For the purpose of aiming and fulfilling the superior interest of the minor, the guardianship has, through its essence, a personal and free feature, except the cases listed by Art 122-123 of the Law No 287/2009.

For a more efficient management of the activity performed by the guardian and to have a control over the fulfilment of his obligations regarding the person and the minor’s assets, the new Civil Code introduces the institution of the family council, taken also from the Anglo-Saxon law. The family council shall be appointed also by the family court and shall be formed by “3 relatives or kinsmen, considering the degree of kinship and the personal relations with the minor’s family”, or in their absence, even by “other persons who have had relations of friendship with the minor’s parents or have an interest for his situation” (Art 125 Para 1 of the Law No 287/2009). The appointment, functioning, attributions and replacement of the family council are performed under the careful observation of the family court.

The family council stated by the new Civil Code is totally different in its composition, role and situations for which is established, by the institution with the same name stated by the Law No 217/2003 *for the prevention and combat of domestic violence*<sup>5</sup>, defined as being the “association without legal personality and patrimonial purpose, formed by the family members with full capacity of exercise”, for the prevention of the conflictual situations and the mitigation between the family members.

From the content of the texts referring to the family council it results that it is a consultative organ (without legal personality), appointed by the family court, with the role of overseeing the means in which the guardian fulfils his rights regarding the minor’s person and assets. Until the establishment of the family courts, their attributions were performed by judges.

As part of the family council may be the relatives or kinsmen, considering their degree of relationship and personal relations with the minor’s family. In the absence of the relatives or kinsmen, other persons who have had relations of friendship with the minor’s parents or have an interest for his situation may be appointed in the family council. The spouses cannot, together, be part of the same family council.

Cannot be members of the family council: the guardian, the minor, the person placed under interdiction or the person placed under curatorship; the person decayed from the exercise of the parenting rights or declared incapable of being a guardian; the person with limited exercise of civil rights, either based on the law, or on a court decision, as well as the person with bad behavior noted as such by the court; the person who, by performing a guardianship has been removed from this position based on Art 158 of the Code; the person who is insolvable; the person removed by an authentic writing or by will by the single parent representing, at his death, the parenting authority.

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<sup>5</sup> Law no. 217/2003 on preventing and combating domestic violence, republished in the Official Gazette, Part I no. 205 of 24 March 2014 as amended.

May refuse to be part of the family council the person suffering from a disease or infirmity, or who, due to the nature of his activities, of the distance between his domicile and the minor's assets or from other grounded reasons could no longer fulfil this position.

The family council is established when the minor is in the situation of needing a guardian. The minor's guardianship shall be established when both parents are, where appropriate, deceased, unknown, decayed from the exercise of their parenting rights or prohibited from parenting rights, placed under interdiction, missing or legally declared deceased, as well as in the case in which, at the termination of the adoption, the court shall decide that is for the minor's interest the establishment of the guardianship.

For the protection of the minor using his parents, by placement or by other special protection means stated by the law, shall not be established a family council.

The family council may be established by the family court only at the request of the interested persons; the persons fulfilling the conditions to be members of the family council shall be summoned at the minor's domicile by the family court, *ex officio* or at the notification of the minor, if he has turned the age of 14, of the appointed guardian, of any other persons aware of the minor's situation.

The family court shall appoint a 3 persons council among those with vocation, considering the degree of relationship of the members and the personal relations with the minor's family. The appointment of the council's members shall be made with their agreement.

The minor who has turned the age of 10 is heard, and among the 3 members of the family council, the court shall also appoint 2 substitutes.

The family council, presided by the oldest person, fulfils his role to oversee the means in which the tutor fulfils his rights and obligations regarding the minor's person and assets: gives consultative opinions, at the request of the guardian or of the family court, and takes decisions, in the cases stated by the law. The consultative opinions and decisions are adopted by the majority of its members. In taking the decisions, the minor who has turned the age of the 10 shall be heard. The decisions of the family council are motivated and registered in a special registry held by one of its members, appointed with this purpose by the court. The acts concluded by the guardian in the absence of the consultative opinion shall be annulable. The conclusion of the act for non-complying with the opinion entails the responsibility of the guardian.

Examples of consultative opinions: the measures regarding the minor's person shall be taken by the guardian, with the approval of the family council, except the measures with a daily feature; the opinion of the family council and the authorization of the family court are necessary for any acts of alienation, division, mortgage or encumbered by a lien of the minor's assets made by the guardian, for the waiving at the patrimonial rights of the minor and for the valid conclusion of any acts exceeding the right to manage; for the recognition of the full capacity of exercise of the minor placed under guardianship, who has turned the age of 16, the guardianship shall ask for the opinion of the family council.

The family court, having the approval of the family council, may, considering the size and composition of the minor's patrimony, to decide that its administration or of a part of it, to be entrusted, according to the law, to a specialized natural or legal person. Though the guardianship is a free of charge obligation, during its performance, the guardian may receive a remuneration whose value shall be established by the family court, with the approval of the family council, and also with its approval the guardianship shall be able to modify or terminate this remuneration.

Examples of decisions: the family council shall decide the annual amount necessary for the maintenance of the minor and the management of his assets and shall be able to modify, according to circumstances, this amount; the family council shall indicate the credit institution to which shall be deposited, in the name of the minor, the amounts of money exceeding the needs for his maintenance and for the administration of his assets, as well as the financial instruments.

Also, the family council may submit a complaint to the family court regarding the acts or facts damaging for the minor; the family council or any other member of the council may submit an action for annulment for the acts of disposition or which overcomes the right to administration

performed by the guardian. During the appointment or, where appropriate, during the guardianship, the family council may submit a request to the family court for the guardian to present real or personal guarantees.

Other attributions: the members of the family council must be present at the inventory of the minor's assets. The members of the family council are required to declare in writing for the representative of the family court the claims, the debts or other pretensions from the minor. If under these circumstances he has not declared them it is considered that were waived. In the absence of an appointed guardian, if the family court has established the family council, the guardian shall be appointed after the consultation with the latter one.

If the family council has not been established, its attributions are being performed by the family court.

Regarding the rules for the performance of the guardianship, it must be mentioned that the fundamental principle is that it must be performed only considering the superior interest of the minor, "*both regarding the person, as well as his assets*" (Art 113 of the Law No 287/2009).

In relation to the old regulations stated by Art 126 and next of the old Family Code, it must be noticed that, the new Civil Code transfers the attributions of the guardianship authority and its representative towards the family court and the family council (if there are any). Thus, regarding the performance of the guardianship for a minor, the decisions shall be taken by the guardian "*with the consultative opinion of the family council*" (Art 136 of the Law No 287/2009). Are exempted from this rule the measures with a daily feature.

The minor shall have the domicile at his guardian and only as exception and with the approval of the family court he shall be able to have a second residence. Nevertheless, in cases in which his education and professional training require this, the guardian may decide for the minor to reside elsewhere, the family court being notified immediately.

In the spirit of protecting the superior interest of the minor, Art 138-139 of the Law No 287/2009 limits the decisional power of the guardian regarding the changes in the education or professional training of the minor at the date when the guardianship has been established (and which in most cases has already been chosen by the parent). According to the above mentioned texts, in order to decide in this meaning, it is mandatory the consent of the family court, and if the minor has turned the age of 14, the court shall not be able to change "*the education or professional training decided by the parents*", or which the minor received "*at the date of the guardianship*". It is mandatory for the minor who has turned the age of 10 to be heard by the court.

A second component of the performance of the guardianship is represented by the rights of the guardian regarding the minor's assets. Offering a more detailed regulation than the one of the previous Family Code, the Law No 287/2009 tries to protect in a more efficient manner the patrimony of the minor left outside the legal protection. It is given a higher importance to the inventory of the minor's assets and paid close attention to the claims of the guardian or the members of the family council towards the minor.

Given Art 140 Para 2 of the Law No 287/2009, at the inventory of the minor's assets, the guardian and the members of the family council have the obligation to declare in writing "*the claim, debts or any other pretensions from the minor*". If contrary, it results the legal presumption that they have waived them, being possible the application of the penalty to remove them from their position. Para 4 of the same article states the possibility of the voluntary payment of the claims towards the minor, for the guardian, his spouse, a direct relative or his brothers/sisters, only with the consent of the family court.

Regarding the administration of the minor's assets, we note that it must be performed with good faith, its result representing the welfare of the minor. In performing this activity, the appointed guardian has, *de plano*, the quality as administrator of someone else's assets, being forced to comply with the legal provisions in this area.

Until the age of 14, the minor shall be represented in the legal documents by his guardian, after the age of 14 he shall be able to conclude them on his own, with "*the written consent of his*

guardian” or “curator” (Art 143 and 146 of the new Civil Code), except the donations and acts guaranteeing other person’s obligation, which are totally prohibited to him.

Law No 287/2009 grants a special importance for the acts of disposition which the guardian could conclude in the name of the minor. In relation to Art 144 of the new Civil Code we ascertain that it is prohibited for the guardian to conclude the following legal acts, under the sanction of their annulment: donations and acts guaranteeing other person’s obligation (in the name of the minor), acts of alienation, division, mortgage or encumbrance with other real tasks of the minor’s assets, acts waiving his patrimonial rights or any other acts overcoming the right to administration, in the absence of the family council’s opinion and the consent of the family court. The only exception is represented by “*the assets subjected to lost, decay, alteration or depreciation, as well as those which have become useless for the minor*” (Art 144 Para 4), for whose alienation are not necessary the family council’s opinion and court’s consent.

Forbidding us on this special provision, we are attracted by the notion “*useless assets*”, which, in our opinion, has a high degree of subjectivism, creating the premises of an incorrect decision from the guardian, decision which may be disadvantageous for the minor and which, in the absence of the family council’s opinion and the court’s consent is not subjected to any form of control. In this context, a rephrasing or a coming back to the adequate value ceiling (as it has been created by Art 129 Para 4 of the old Family Code) would remedy the situation.

Returning to the limits imposed by the legislator for the acts which the guardian may conclude in the name of the minor, it is noticeable that are excluded from their area the legal acts “*concluded between the guardian and his spouse, a direct relative or the guardian’s brothers/sisters on the one hand, and the minor on the other*”, under the sanction of the relative nullity (Art 147 of the Law No 287/2009), except certain sales with public auction.

The new Civil Code also states the situations in which between the minor and his guardian emerge conflictive interests, cases which do not lead to the replacement of the guardian, but may clearly affect the guardianship and therefore, the superior interest of the minor. In these cases, Art 150 of the Law No 287/2009 allows the appointment of a special curator. According to the same text, the same measure shall be applied when “*because of the disease or for other reasons the guardian is prevented from concluding a certain act in the name of the minor*” or “*for grounded reasons, during the successional procedures*”.

Regarding the means of the guardianship, we mention that an extremely important obligation of the guardian is the notification of the minor. In the old regulation, the guardian had the obligation to annually present to the guardianship authority a report about the means in which he has taken care of the minor and administered his assets.

In the actual regulation, the control is taken by the family court, to which the guardian is compelled to annually present the same report.

According to Art 152 Para 2 of the Law No 287/2009, the term for the submission of the report is of 30 days starting from the end of the calendar year. The term “*annual*” can be prolonged only by the family court (without exceeding 3 years) and only for the cases in which “*the minor’s estate has little significance*”. The result of this step is represented by the verification of the calculations with the expenses and incomes generated by the minor, and if are incorrect, the disclaiming of the guardian.

Also for a higher responsibility of the person acting as guardian, as well as to strengthen the guarantee of the compliance with the minor’s rights, the new Civil Code reconfirms the possibility to submit complaints against the guardian regarding the “*acts or actions detrimental for the minor*” (Art 155 Para 1 of the Law No 287/2009). The complaint may be submitted by the minor who has turned the age of 14, by the family council and its members, but also by any of the persons mentioned by Art 111 of the new Civil Code. The complaint shall be resolved by the family court, with emergency, by an enforceable court resolution.

Regarding the cases for which the guardianship is terminated, the Law No 287/2009 identifies 2 types of situations: those who generate the so-called termination of the guardianship (the situation which generated the guardianship is no longer valid after the minor’s death), and those

who generate the conclusion of the guardian's position (his death, the removal from the guardianship or his replacement).

Regarding the conclusion of the guardian's position by his death, the novelty is represented by the transmission of the guardianship services to his heirs, until the appointment of a new guardian (according to Art 157 of the Law No 287/2009). Surely this measure has been inserted also for the protection of the rights and interests of the minor placed under guardianship. Thus, by the temporary handover of the duties specific to guardianship towards the heir of the deceased guardian until the appointment of a new guardian, it is aimed the removal and minimization of the effects that the guardian's death could generate over the minor's rights and interests.

Reiterating Art 138 Para 2 of the old Family Code, the new regulation states the removal of the guardian from his position if "*he commits an abuse, a serious negligence or other actions making him unworthy to be a guardian, as well as if he does not properly fulfils his obligations*".

According to Art 160 and next of the Law No 287/2009, we identify the obligation of the guardian or of his heirs that at the conclusion for any cause of the guardianship, to present to the court a general report. Only after the verification of the calculations and handover of the assets, the court shall discharge from administration the guardian or his heirs. This discharge of administration does not exonerate from legal liability former guardian for a prejudice caused to the minor because of him, and the new appointed guardian shall have the obligation to ask from the first one the reparation of the damage. On the contrary, the new guardian shall himself be forced to repair the prejudice.

### 3. Conclusion

As a conclusion, we note that until the entrance into force of the Law No 287/2009, in the area of the guardianship, the main institution involved was the guardianship authority, the procedure being more administrative and only for exceptional cases, judicial. By the modifications inserted, and especially by the creation of the family court, the new Civil Code practically transfers this procedure from the administrative area to the judicial area, creating a new institution of law, with a pioneer jurisprudence and whose evolution worth watching.

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