

Considerations regarding parental authority in Romanian private international law

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Abstract

Parental authority is the entirety of rights and obligations concerning both the person and the property of the child and belongs equally to both parents. In Romanian private international law, parental authority is governed by art. 2611 of the Romanian Civil Code. This legal provision is a reference rule which establishes that the law applicable to parental authority and children's protection is determined under the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, adopted in Hague on 19 October 1996. This convention is part of the complex process of aligning the Romanian legislation to EU regulations.

For an overview of relevant legal regulations addressed by the Convention, in the present study we analyzed the main issues referring to the domain of application of the Convention, the law applicable to child protection measures, parental responsibility, and the recognition and enforcement of measures regarding parental responsibility and child protection.

Keywords: *parental authority, conflict of laws, protection measures, parental responsibility*

JEL Classification: K33, K36

1. Introductory considerations

The Romanian Civil Code addresses parental authority in Title IV of Book II, entitled "On Family", grouping the provisions relating to this institution into four chapters, as follows: Chapter I – "General Provisions" (Art. 483-486), Chapter II – "Parental Rights and Obligations" (art. 487-502), Chapter III "Exercise of Parental Authority" (art. 503-507), Chapter IV "Loss of exercise of parental rights". These provisions are supplemented by those of Law no. 272/2004 on the protection and promotion of children's rights, as republished³.

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³ Law no. 272/2004 was published in the Official Gazette of Romania, Part I, no. 557 of 23 June 2004, as amended and supplemented by Law no. 257 of 26 September 2013 published in the Official Gazette of Romania, Part I, no. 607 of 30 September 2013, then republished in the Official Gazette of Romania, Part I, no. 159 of 5 March 2014.

In international documents, the term used to describe the rights and obligations that parents have in relation to their children is that of parental responsibility. For example, Recommendation R (84) 4 of the Committee of Ministers of the Council of Europe on parental responsibilities, the 1989 UN Convention on the Rights of the Child, the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, concluded in The Hague on 29 May 1993, etc.

According to art. 483 para. 1 of the Romanian Civil Code, parental responsibility means all the rights and obligations concerning both the person and property of the child and belongs to both parents equally.

Thus, as the institution of parental authority is defined in the Romanian Civil Code, we believe that some *clarifications* need to be made:

- first, this is a set of rights and obligations granted or imposed by law to parents, in the interests of their minor children (art. 483 par. 1 of the Romanian Civil Code). Parental rights and obligations are not correlated, meaning that the rights conferred to parents do not correspond to certain reciprocal obligations that children would be bound to. In relation to their minor children, parents practically only have obligations, and parental rights exist only in their relations with third parties, being designed as tools for mediation of execution of their obligations to the children⁴;
- second, parental authority belongs equally to both parents (art. 483 para. 1 of the Romanian Civil Code), whether the child is born from a marriage, out of it, or adopted;
- third, parental authority is exercised only in the interests of the child, with due respect to its person (art. 483 par. 2 of the Romanian Civil Code);
- fourth, parental rights and obligations cover both the person of the child and its assets and represent the contents of parental authority.

2. Conflicting rules on parental authority

Art. 2611 of the Romanian Civil Code stipulates that the law applicable to parental authority and child protection is determined under the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, adopted in Hague on 19 October 1996⁵ (hereinafter referred to as “*The Convention*”). This agreement is part of the complex process of aligning national legislation with EU regulations.

⁴ E. Florian, *Protecția drepturilor copilului*, C. H. Beck Publishing House, Bucharest, 2006, p. 93.

⁵ Ratified by Romania by Law no. 361 of 11 December 2007, published in the Official Gazette no. 895 of 28 December 2007.

2.1 Scope of the Convention

For an overview of relevant legal regulations addressed by the Convention, we shall further present issues referring to the conflict of laws, as well as conflict of jurisdictions.

Thus, according to art. 1 para.1 of the Convention, its aims are:

- to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
- to determine which law is to be applied by such authorities in exercising their jurisdiction;
- to determine the law applicable to parental responsibility;
- to provide for the recognition and enforcement of such measures of protection in all Contracting States;
- to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of the Convention.

These legal regulations show that two aspects are contained within the scope of the Convention, namely:

- a. determining the law applicable by the competent authorities to take measures to protect the person or property of the child, and
- b. determining the law applicable to parental responsibility⁶.

For the purposes of this Convention, the term “parental responsibility” includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child (art. 1 para. 2).

The provisions of the Convention apply to children from the moment of their birth until they reach the age of 18 years (art. 2). This legal provision does not establish a substantive rule concerning the attainment of full capacity at this age, but indicates the category of children to whom its stipulations applies, even if they became, according to national law, adults since a younger age (e.g. through marriage). Also, art. 2 stipulates that the starting point is the moment of birth, and not that of conception.

If the competent authority under the Convention establishes that the child is an adult under the law which, under its private international law, governs capacity, that authority shall determine whether or not the establishment of protection measures is appropriate⁷.

According to art. 3 of the Convention, protection measures for the person and property of the child refer to the following:

⁶ D. A. Sitaru, *Drept internațional privat*, C. H. Beck Publishing House, Bucharest, 2013, p. 237.

⁷ L. C. Gavrilescu, *Convenția din 1996 de la Haga referitoare la competența, legea aplicabilă, recunoașterea, executarea și cooperarea cu privire la răspunderea părintească și măsurile privind protecția copiilor*, „Analele Științifice ale Universității ”Al. I. Cuza””, Iași, vol. LIII, Științe Juridice, 2007, p. 114.

- a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;
- b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;
- c) guardianship, curatorship and analogous institutions;
- d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
- e) the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution;
- f) the supervision by a public authority of the care of a child by any person having charge of the child;
- g) the administration, conservation or disposal of the child's property.

Measures to protect the person or property of the child can be taken, as shown by the provisions art. 5 para. 1 of the Convention, by the judicial or administrative authorities of the Contracting State of the habitual residence of the child.

In case of lawful change of the child's habitual residence to another Contracting State, jurisdiction lies, under art. 5 para. 2 of the Convention, with the authorities of the State of its new habitual residence.

In the case of refugee children and children who, due to disturbances occurring in their country, are internationally displaced, as well as children whose residence cannot be established, the power referred to in art. 5 is exercised by the authorities of the Contracting State on whose territory these children are found (art. 6 of the Convention).

In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and (art. 7 para. 1 of the Convention):

- a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
- b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

According to art. 7 para. 2 of the Convention, the removal or the retention of a child is to be considered wrongful where:

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Under art. 7 para. 3, in conjunction with art. 11 of the Convention, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures as are necessary for the protection of the person or property of the child.

By way of exception, however, art. 8 para. 1 of the Convention stipulates that the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either:

a) request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or

b) suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.

The Convention restricts the meaning of the term of “another Contracting State” whose authorities have jurisdiction, according o para. 1 of art.8 of the Convention, to:

a) a State of which the child is a national;

b) a State in which property of the child is located;

c) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage;

d) a State with which the child has a substantial connection⁸.

The authority addressed may assume jurisdiction if it considers that this is in the child's best interests.

If the authorities of a Contracting State referred to above der that they are better placed in the particular case to assess the child's best interests, they may either:

a) request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, that they be authorized to exercise jurisdiction to take the measures of protection which they consider to be necessary, or

b) invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.

The authority initiating the request may exercise jurisdiction in place of the authority of the Contracting State of the habitual residence of the child only if the latter authority has accepted the request.

Thus, as provided for in art. 8 and art. 9 para. 2 of the Convention, the authorities concerned may proceed to an exchange of views.

⁸ See art. 8 para. 2 of the Convention.

Pursuant to art. 10 of the Convention, the authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce or legal separation of the parents of a child habitually resident in another Contracting State, or for annulment of their marriage, may, if the law of their State so provides, take measures directed to the protection of the person or property of such child if:

a) at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and

b) the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child.

This jurisdiction to take measures for the protection of the child ceases as soon as the decision allowing or refusing the application for divorce, legal separation or annulment of the marriage has become final, or the proceedings have come to an end for another reason.

In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection (art. 11). These measures shall lapse as soon as the authorities which have jurisdiction according to the above-mentioned rules have taken the measures required by the situation. The measures taken with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognized in the Contracting State in question.

Pursuant to art. 12 of the Convention, the authorities of a Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under the above-mentioned rules.

These measures all lapse as soon as the authorities which have jurisdiction according to the above-mentioned rules have taken a decision in respect of the measures of protection which may be required by the situation. If the measures were taken with regard to a child who is habitually resident in a non-Contracting State, they shall lapse in the Contracting State where the measures were taken as soon as measures required by the situation and taken by the authorities of another State are recognized in the Contracting State in question.

According to art. 13 of the Convention, the authorities of a Contracting State which have jurisdiction to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction at the time of the request and are still under consideration. The preceding provisions shall not apply if the authorities before whom the request for measures was initially introduced have declined jurisdiction.

The measures taken in application of art. 5-10 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

2.2 *The law applicable to child protection measures*

Art. 15 para. 1 of the Convention, which determines the law applicable to child protection measures, establishes a general rule which states that the authorities of the Contracting States shall apply their own law in this matter. This paragraph establishes the application of the law of the forum, or the law of authority.

Para. 2 of the same article also establishes an exception, in the sense that the states may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection. The term “substantial connection”, as used in this statutory provision, shall be construed in that, in this matter, the law which is most favorable to the minor shall apply. The justification for this exception takes into account situations where, for example, the law of habitual residence of the minor provides for a protection measure that the law of authority does not have, but which can be more favorable to the child, in which case the law of habitual residence will apply, or otherwise the law of the place where the child’s property is located, when such property is subject to sale for the purpose of protection, requires the existence of an approval which the law of authority does not provide, that approval will have to be obtained, etc.⁹

If the child’s habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change (para. 3). This legal provision solves the mobile conflict of laws that might occur in this matter.

2.3 *The law applicable to parental responsibility*

As regards the law applicable to parental responsibility, this legal regulation is contained in art. 16 – art. 18 of the Convention.

The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child (art. 16 para.1).

The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child’s habitual residence at the time when the agreement or unilateral act takes effect (art. 16 para.2).

Para 3 and 4 of art. 16 govern the mobile conflict of laws in two situations. Thus, parental responsibility which exists under the law of the State of the child’s habitual residence subsists after a change of that habitual residence to another State

⁹ For details see D.A. Sitaru, *op.cit.*, p. 239.

(para. 3). This provision refers to the responsibility that exists, whether it exists by operation of law, or pursuant to an agreement or unilateral act (situations referred to in art. 16 para. 1 and para. 2). If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence (para. 4)¹⁰.

Regarding the exercise of parental responsibility, it is governed by the law of the State of the child's habitual residence, and if the child's habitual residence changes, it is governed by the law of the State of the new habitual residence (para. 17). As for the settlement of the conflict of laws, a difference can be seen between the provisions of art. 17 and para. 3 of art. 16. Thus, while according to art. 17, if the child's habitual residence changes, the new law prevails in terms of exercise of parental responsibility, in para. 3 of art. 16, parental responsibility "which exists" under the old law shall still apply after the child's change of habitual residence to another state.

Parental responsibility attributed by operation of law or by an agreement or a unilateral act, without intervention of a judicial or administrative authority, may be terminated, or the conditions of its exercise modified, by measures taken under the Convention (art. 18).

3. Recognition and enforcement of measures on parental responsibility and child protection

The measures taken by the authorities of a Contracting State shall be recognized by operation of law in all other Contracting States (art. 23 para. 1). To recognize means to admit, in one State, the authority of a measure taken in another state, as well as the effects that it produces under the law of the State where it was taken¹¹. Thus, in order to obtain recognition, it not necessary to fulfill any formalities, as long as the person relying on that measure does not take any action for enforcement. However, the Convention establishes a preventive procedure in art. 24, which provides that the measure must be proven by the document originating from the authority of origin and incorporating the decision taken by it¹².

Recognition may be refused in the following circumstances (art. 23 para. 2):

- if the measure was taken by an authority who had no jurisdiction;
- if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;

¹⁰ Such situation can occur, for example, when the law of the former habitual residence of the child would confer parental authority to only one of the parents, whereas the new law confers parental authority to the other parent.

¹¹ See D. Ungureanu, *Reglementarea conflictului de jurisdicție în materia raporturilor de drept internațional privat*, „Dreptul privat al afacerilor”, no. 1/2004, p. 5.

¹² L. C. Gavrilesco, *op. cit.*, p. 127.

- on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard¹³.
- if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;
- if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State. In this case, preference shall be given to the measure taken subsequently in a non-Contracting State, by an authority that is closer to the child and which can better evaluate his or her interests.
- if the procedure provided in art. 33 of the Convention (mandatory consultation procedure) has not been complied with.

Under art. 24 of the Convention, any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State. Under a procedural aspect, the law of the requesting State shall apply. Given that, according to art. 23 para. 1, measures taken by authorities of a Contracting State recognized by operation of law in all other Contracting States, any interested person may request, for sound reasons, that the seized authority would pronounce itself on the recognition or non-recognition of a measures taken in another State.

Pursuant art. 25 of the Convention, the authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction. Thus, the authority of the requested State will not be able to re-examine the facts on which the authority of origin based its jurisdiction, nor to revise the measure taken substantially¹⁴.

In accordance with art. 26, if measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State. Each Contracting State will enforce, in this matter, a simple and rapid procedure. The enforcement or consideration for enforcement can be refused only for the reasons mentioned in art. 23 (para. 2).

Art. 28 of the Convention states that measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child, and only after completing the exequatur procedure.

¹³ For example, if authorities having jurisdiction withdraw parental responsibility without hearing the person in cause, that person can invoke disregard for his or her parental responsibility in order to oppose the recognition of that measure.

¹⁴ See art. 27 of the Convention.

4. Conclusions

In the matter of Romanian private international law, parental responsibility and child protection is governed by art. 2611 of the Romanian Civil Code. This legal provision establishes that the law applicable to parental authority and child protection is determined under the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, adopted in Hague on 19 October 1996. The scope of the Convention is to: to determine which law is to be applied by authorities having jurisdiction to take measures to protect the person or the property of the child, and to determine the law applicable to parental responsibility.

With reference to the law applicable to child protection measures, the Convention establishes a general rule which states that authorities of the Contracting States shall apply their national laws in this matter, as well as an exception, in the sense that states can apply or take into consideration the law of another State with which the factual situation has a substantial connection.

As regards the law applicable to parental responsibility, legal regulation is contained in art. 16 – art. 18 of the Convention. Therefore, parental responsibility can be attributed or extinguished, either by operation of law or by agreement or unilateral act.

The measures on parental responsibility and child protection taken by the authorities of a Contracting State are recognized by operation of law in all other Contracting States.

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