Jurnalul de Studii Juridice

Journal of Legal Studies

ISSN: 1841-6195 (print); e-ISSN: 2067-8509 (electronic)

Covered in: Index Copernicus, Ideas RePeC,

EconPapers, Socionet, CEEOL

THE FAMILY COUNCIL – SUBSIDIARY MEAN FOR MINOR'S WELFARE

Diana Anca ARTENE

Jurnalul de Studii Juridice, Year X, No. 1-2, June 2015, 85-96

Published by:
Lumen Publishing House

THE FAMILY COUNCIL – SUBSIDIARY MEAN FOR MINOR'S WELFARE

Diana Anca ARTENE[1]

Abstract

The current Civil Code introduced significant changes to the guardianship institution, transforming it into an institution much more human, closer to both, the minor and his/her interests. This is mainly due to the possibility granted to the parent to appoint a guardian for her/his minor child, guardian who must protect the minor when the parents can no longer do. Along with the changes made to the guardianship institution reappears the institution of the family council, thus creating the possibility of a more efficient protection of the minor's interests.

The Family Council is an advisory institution which may be established for the supervision of the way in which the guardian shall exercise his rights and performs his duties on the juvenile person and property.

The Guardianship Court can be a family council made up of three relatives or in-laws of the family taking into account the personal relationships with the minor's family. In the absence of relatives and in-laws can be appointed other persons who had ties of friendship with the minor's parents or show interest in this situation.

The role of the new institution is to protect the interests of the juvenile through its supervision by the biological or extensive family in how the guardian duties were performed.

Keywords:

Family Council, minor, protection of minor's interests, guardianship

[1] Spiru Haret University, Faculty of Law and Public Administration Bucharest, dianaartene@yahoo.com.

Artene, D. A. (2015). The family council – subsidiary mean for minor's welfare. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 85-96.

The Family Council is an advisory institution which may be established for the supervision of the way in which the guardian shall exercise his rights and performs his duties on the juvenile person and property.

The current Civil Code introduces significant changes to the guardianship institution, transforming it into an institution much more human, closer to both, the minor and his interests. This is mainly due to the possibility granted to the parent to appoint a guardian for his minor child, guardian who must protect the minor when the parents can no longer do.

The appointment of a guardian by the child's parent can be done according to the provisions of the art. 114 paragraph 1 from the New Civil Code, through a deed poll or through a mandatory agreement, concluded in authentic form or, as the case may be, through a will. Therefore, the parents dispose of a series of legal documents by means of which they can validly appoint the person they want to become the guardian of their minor child in extreme cases and restrictedly provided by the law, when they cannot ensure the parental safeguarding any more.

Along with the changes made to the guardianship institution reappears the institution of the family council, thus creating the possibility of a more efficient protection of the minor's interests. By means of the family council, the minor's protection is not let exclusively in the state's charges, through its institutions, but also in the family's charge, either biological or extended.

The Family Council is an institution introduced by the current Civil Code through the articles 124-132, but it isn't under any circumstances new because we met it again after an absence of some decades.

For the first time, the Family Council appears in the Romanian legislation, more precisely in the legislation of Moldova Country, in 1840, introduced through the Vestries Law from 26th of April 1940. In the article 15 of this law, the Family Council is defined as being "the assembly of kin or persons connected by marriage or known persons who had friendship relationships with his parents, which, established by the court from the region where the death person would have had his seat, commit things which affect their competence".

The institution is retaken by the Cuza Civil Code and kept till 1954, with few amendments (brought through the implementation of the Law no. 96/1932 and of the Law 18/1948), when it is abolished by the provisions of the Decree 32/1954.

Artene, D. A. (2015). The family council – subsidiary mean for minor's welfare. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 85-96.

But this institution has the origin in the French Civil Law, subsequently being taken over in the legislation of other European states, like the Italian or the Swiss legislation.

1. Brief history of the institution

The Family Council is an institution taken by the French common law. Pre-war authors defined the Family Council as being "that assembly composed of the kin or the friends of the minor's father and mother, charged with the organization of the personnel and of the expenses needed for the maintenance, education and administration of the minor's estate, especially for the supervision of the guardian's administration" (B., George, (1901) : 30) From this definition it's obviously that in those times too, the Family Council had a very important role in the safeguarding of the person and the patrimonial interests of the minor in ward, especially through the supervision of the way in which the guardian fulfilled his obligation regarding the administration of the minor's estate.

The Family Council had three essential attributions, namely:

- The appointment, the exclusion or the discharge of guardians in the cases provided by the law;
- The authorization or the refuse regarding the authorization of the documents for which the guardian had the obligation to submit for its approval;
- The presentation of its decisions resulting from the Court's debates, in the cases provided by the law.

The Family Council was composed of at least five members[2], from whom three were part of the father's kin and two were part of the mother's kin. When enough kin weren't alive from the father or from the mother's part, in order to complete the minimum number of members, the Court called the relatives or the in-laws of the other spouse, always preferring the closest relatives. Between the relatives and the in-laws of the same degree, were preferred the relatives, and between the old relatives and the young relatives, were preferred the old relatives. The number of members wasn't limited in respect to the full brothers of the minor and to the men of full sisters, who were, in right, members of the Council. When the minimum number of the members of the council couldn't be ensured by them, were called other relatives of the minor from the district where the succession was

[2] The persons who were previously excluded or discharged from the position of guardian couldn't be members in the Family Council.

Artene, D. A. (2015). The family council – subsidiary mean for minor's welfare. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 85-96.

opened and, in case of need, were also called relatives from other districts (G., Beldimano , (1901) :30-31). Even if, within the same district, was found a sufficient number of relatives or in-laws in order to form the Family Council, the Court, if it considered adequate, could call other relatives more closer in degree or with the same degree of the minor, from other districts, in order to form or to complete the Family Council (C. Hamangiu, (1999) :462). The Family Council was moderated by the oldest member. The members had the obligation to be present in person, but, if this wasn't possible, they could be represented by procurators, previously appointed in this purpose. (C. Hamangiu, (1999) :462).

From those previously exposed, it is obviously that it was wanted that this institution be composed of persons who had close connections with the minor and who benefited from a greater experience in the raising and education of children and also in the administration of the estate.

The Family Council could also be convoked by its members, by the minor's relatives, by creditors or by other interested parties and also by the guardian when this thing was needed (S., Călugăru, (1904) :38). It was met at the head office of the Court from the district were the minor's guard was instituted. The term for the meeting was established by the Court, depending on the distance between his head office and the house of the members of the council, in order to ensure the possibility for their presentation. When the Family Council wasn't met on the date established by the Court, the last one fulfilled the obligation of the Family Council in order to not bring prejudice to the minor's interests. The Court concluded a report for recording this circumstance. The consequence of the non-attendance of the council was that of not being able to make any proposal regarding the question on which the Court decided by default, any subsequent proposal regarding that question being rejected (S., Călugăru, (1904) :39).

The debates took place in the presence of most members convoked, who should be an odd number in order to ensure the implementation of the decisions with plurality of votes. As a result of debates, the Family Council decided on the appointment of the guardian in the cases provided by the law, the destitution or the exclusion of the guardian, the authorization of the guardian's documents for which the authorization was needed, etc... (C., Hamangiu, (1868-1925) :483).

The formation of the Family Council wasn't random; it followed the rules prescribed by the law. The law giver of those times understood the minor's need to be rounded by the greatest guarantors of his interests, providing that this be composed of the closest relatives and, in their

Artene, D. A. (2015). The family council – subsidiary mean for minor's welfare. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 85-96.

absence, by the friends of that person who was able to pronounce it a guardian will be instituted or not for the minor (n.n. minor's father). To this effect, the Court of Appeal rejected that a Family Council gratuitously composed, in this way violating the imperative rules which regulate its establishment, it's not legal ruling that only a council legally formed can develop its activity[3].

From the case decisions of those times it also results that the Court can be convoked upon the demand of the relatives or of other persons concerned or ex-officio regarding the convocation of the Family Council. Under the same conditions, it has the duty to compose the council, according to its will, from the persons provided by the art. 357, 358, 359 and 360 Cuza Civil Code. The Court's freedom is bounded and conditioned by the observance of the legal provisions mentioned above and, as a result, any establishment with the non-observance of the law could have been hit by nullity. Even if it would exist irregularities, third parties cannot bear the consequences of such violation of the rules which govern the establishment of the council, because the law doesn't ask them to know the Court's conclusions. Herewith, the Court can be misled when, on the establishment date, it isn't informed about the relatives, their degree or from which parent are they.

In this case, the Court's decision through which it chose the Family Council was appealed. As the Court of Appeal showed, the Court's discretionary power to choose the members of the Family Council from the persons listed by the dispositions of the Civil Code cannot be censured by means of the appeal, not being submitted to any way of appeal. Nevertheless, the Court of Appeal has the competence to settle the appeals declared against the court's decisions on the debates of the Family Council[4].

According to the art. 356 and following from the Cuza Civil Code, the Court appointed the members of the Council from the persons restrictedly provided by the law. The appointment of the members couldn't be resumed to the first convocation of those persons to whom the law recognizes the legal capacity to be appointed, because it's possible that relatives more closer to the minor be, for a short time, over the border, and then they return, having the right recognized by the law to ask their appointment in the Family Council. As a result, the Court's discretionary power shall be carefully exercised, taking into consideration the minor's

[3] Decision no. 394 from 24th of November 1875 in B. Cas. For the year 1875, p. 338

[4] Decision no. 411/1901 in B. Cas for the year 1901, p. 1442; contrarily, Decision no. 104/1903 in B. Cas. for the year 1903, p. 189

Artene, D. A. (2015). The family council – subsidiary mean for minor's welfare. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 85-96.

interest. The non-existence of an emergent situation which demands the constitution of the Family Council imposes a second convocation in order to not damage the minor's interests through the rashly establishment of the council from relatives less closer to the minor. Once established, the Council can be changed only under the conditions prescribed by the law, from where implicitly results the impossibility to appeal, before the Court, the conclusion by means of which the Court appoints its members. However, the conclusion for the appointment of the members of the council doesn't enjoy the case law regarding the appointment and the members could successfully convoke, in the future, the recognition of the legal capacity to be appointed members.

If it would be submitted for appeal, it would mean that the last choice of the members would belong to the Court of Appeal or to the law giver who didn't provide such a possibility, giving in the competence of the Superior Court only the judgement of the appeals against the Court's decisions on the debates of the Family Council (C., Hamangiu, (1999) :459).

The choosing of the Council members from the persons provided by the art. 357 and following is the Court's exclusive attribute. Its discretionary power cannot be censured being an appreciation made by the court in order to protect the minor's interests, being limited only in respect to the person who can be appointed members in the Family Council. The circumstance according to which the Court proceeded to the completion of the Family Council with relatives and in-laws more far away than other persons closer in degree, but who, on the establishment date of the council, weren't in the country and couldn't make known their intention to be part of the council, doesn't lead to an inequality of the establishment while the Court couldn't knew their existence and their expressed will to be appointed as members.

Therefore, any appeal declared against the establishment conclusion will be rejected as inadmissible. Bringing the irregularity regarding the establishment of the Family Council into the Court's focus could be possible only by the occasion of the exercise of the appeal remedy against the debates of the council already formed[5].

A different and very interesting aspect of the previous legislation referred to the appointment of the guardian when the guardianship is chosen by the Family Council, fact considered in the case law of the times as not being an exclusive attribute of this last one. As opposed to the French legislation, where the Family Council decides with sovereignty on the

[5] Iaşi Court of Appeal II 1914 in Curierul Judiciar for the year 1915, p. 663

Artene, D. A. (2015). The family council – subsidiary mean for minor's welfare. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 85-96.

appointment of the guardian, the Romanian law giver understood to put all the documents of the Family Council under the Court's control. The Court's sovereignty is not absolute, but conditioned by the proposals of the Family Council, as it is, for example, that for the appointment of the guardian. The apparent sovereignty of the Court regarding the appointment of ad hoc guardians is only apparent, because these can be appointed only after the permission of the Family Council. As a result, the Court will border only on the notification of the Family Council regarding the persons chosen in order to receive this charge.

Although the appointment of the guardian presupposes the getting over a judiciary procedure regarding the minor, the Public Ministry won't participate to this. The procedure doesn't follow the natural course of the common law procedure in the public session. Won't be received the written conclusions of the persons who participate, being a procedure characterized by colloquial speech and the Court's conclusion won't be declared null as a result of the non-attendance of the public prosecutor (C., Hamangiu, (1999): 455).

Usually, the decisions of the Family Council shouldn't be motivated, except the decision regarding the exclusion or the destitution of the guardian and the decision by means of which was determined the amount of money within the limit of which the mortgages registration will be instituted, correspondingly indicating the properties of the guardian on which it will be established.

The decision regarding the guardian's exclusion shall not be confounded with the Council's decision through which the guardianship is not let on the mother passed in a second marriage. This last one is not a decision for the exclusion of the mother from the guardianship within the meaning of the art. 388 Civil Code, because the exclusion from the guardianship is the consequence of a criminal conviction of the guardian, of the bad faith or of the guardian's incapacity to fulfil the guardianship obligations. The mother's removal from the guardianship is done for other cause which cannot be framed, not even by analogy, in the cases of exclusion or destitution of the guardian. In contrast with the current legislation when, not only that the guardianship can be instituted only in case of death or forfeit of parental rights of both parents, cannot raise the question to remove the mother (except the case of forfeit of parental rights), in the Cuza Civil Code, the mother's removal from the guardianship was possible having a preventive purpose, when the Family Council suspected the mother's affection for the interests of the child from the first marriage or

Artene, D. A. (2015). The family council – subsidiary mean for minor's welfare. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 85-96.

when it suspected the good faith of the husband in respect to the interests of the children of his wife from the first marriage, because he will be appointed guardian with her. Therefore, when deciding on letting the guardianship to the remarried woman, the Council shall take into account the confidence inspired by her new husband and the possible influence which he could have on her regarding the children from the first marriage. This decision won't be motivated, considering that such reasons would affect the relationships between the spouses and the law doesn't provide that this decision be motivated. The circumstance according to which the Council's decisions are adopted with majority of votes doesn't necessarily lead to the conclusion that the report concluded by the Council shall include the opinions of the members or those of the members in minority, which shall be motivated (C., Hamangiu, (1999) :484-485).

2. Comparative opinion on the main provisions of the Family Council

2.1. Structure and establishment of the Family Council

In the current Civil Code, in the art. 125 are mentioned the members of the Family Council: three persons chosen by the guardianship authority among relatives or in-laws and, in their absence, among other persons closed to the family, persons who show their interest for the situation of the family. Together with these three members, with full rights, will be also appointed two substitute members who take their attributions, in case when the first ones are in the impossibility to exercise their attributions according to the law (C., Hamangiu, (1999) :484-485).

In the ancient legislation, according to the art. 357 from the Cuza Civil Code, the Family Council was composed of at least 5 relatives, from which three were from the father's part and two were from the mother's part. The Family Council was appointed through the decision and it had the role of a control institution of the guardianship, intervening and giving its permission in respect to some actions which the guardian could not make by himself.

Except the cases expressly provided by the law and which we further present, the structure of the Family Council cannot be amended during the guardianship.

The structure of the Family Council can be amended when the minor's interests would impose such a change, but also when, according to

Artene, D. A. (2015). The family council – subsidiary mean for minor's welfare. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 85-96.

the provisions of the art. 131, against the decisions of the Family Council were formulated various complaints by the guardian and the Court decided, at least two times and in a definite way, against the decisions of the Family Council.

Another reason for the amendment of the structure is determined by the death of one of the members of the Family Council.

In the structure of the Family Council cannot enter two spouses and neither the minor's guardian, except the case when the minor's interests would impose such a change or if, through the death or through the disappearance of one of the members, the completion would be needed.

The appointment of the members of the Family Council is made by the Guardianship Court after the getting of their consent. If he has 14 years old, the minor can make also proposals for the structure of this Council; in order to establish the Family Council, the persons who fulfil the conditions for being members are convoked to the minor's domicile by the Guardianship Court, ex-officio or upon the minor's intimation, if he is 14 years old, upon the intimation of the appointed guardian, of any other persons who have information about the minor's situation.

2.2. The role and the attributions of the Family Council

The Family Council can be established in order to supervise the way in which the guardian exercises his rights and fulfils his obligations in respect to the person and to the goods of the minor (art. 124 paragraph 1); therefore, this Council won't be established if the minor's welfare is done by other means: parental safeguarding or giving in foster care.

The Family Council gives advisory permits upon the request of the guardian or of the Guardianship Court and takes decisions, under the conditions provided by the law.

The Family Council establishes the annual amount needed in order to maintain the minor and to manage his goods and it can change this amount, according to circumstances. The decision of the Family Council is immediately notified to the Guardianship Court.

Without the permission of the Family Council and the authorization of the Guardianship Court, the guardian cannot elaborate alienation, division, mortgage or encumbrance documents with other real charges of the minor's goods; he cannot renounce to his patrimonial rights and he cannot validly conclude any other documents which exceed the administration right. However, the guardian can alienate, without the

Artene, D. A. (2015). The family council – subsidiary mean for minor's welfare. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 85-96.

permission of the Family Council and without the authorization of the Guardianship Court, all the goods submitted for destruction, degradation, alteration or depreciation and also those which became useless for the minor.

If the document which will be concluded by the minor who reached 14 years old is part of those documents which can be elaborated by the guardian only with the permission of the Guardianship Council and of the Family Council, will be needed both its permission and the permission of the Family Council.

The amounts of money exceeding the needs of the minor's maintenance and of the administration of his goods, and also the financial instruments are deposited on the minor's name, at a bank indicated by the Family Council, in 5 days, at most, from the date of its collection.

2.3. Functioning of the Family Council

According to the provisions of the art. 129 from the new Civil Code, the convocation of the Family Council is realized with at least 10 days before the meeting date, but, if there is the consent of all the members of the council, it can be realized earlier than the fulfilment of the term of 10 days before the meeting date. In all cases, the presence of all the members of the Family Council covers the irregularity of the convocation.

The convocation can be done upon the request of any member of the Council, but also upon the minor's request, if he reached 14 years old, upon the guardian's request or upon the request of the Guardianship Court.

The persons convoked have the obligation to be present, in person, at the place indicated in the convocation document. If they cannot be present, they can be represented by persons who are relatives or in-laws with the minor's parents, if these persons aren't appointed or convoked in their own name as members of the Family Council. The spouses can be reciprocally represented.

The sessions of the Family Council are held at the minor's domicile or at the head office of the Guardianship Court, if the convocation was done for that place.

The Family Council will be moderated by the oldest person, the advisory permits and the decisions will be validly taken with the majority vote of its members. The decisions of the Family Council will be motivated and registered in a special register.

Artene, D. A. (2015). The family council – subsidiary mean for minor's welfare. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 85-96.

For the validity of the decisions taken, the minor who reached 14 years old will be also heard.

Usually, the structure of the Family Council cannot be changed during the guardianship. The changing of the structure of the Council can be realized when the minor's interests would impose such a change or if, through the deaths or through the disappearance of one of the members, the completion would be needed.

The Family Council can be replaced with another one, upon the guardian's request, motivated by the impossibility to cooperate with that council, if the Court decided for at least two times, in a definite way, against the decisions of the Family Council.

Conclusions

Since the apparition of the first types of protection of the minor, these had always a subsidiary character in respect to the minor's protection ensured by his parents.

The introduction of the Family Council and the changes produced in the guardianship case are two of the substantial amendments brought by the new law, amendments which create the premises of a more efficient minor's welfare both from emotional point of view, given the inter-communion between the minor and his guardian, on one hand, and, on the other hand, due to the safeguarding more responsible and co-interested of the family through the Family Council.

The means of protection of the minor, although called in other way, in certain periods of their evolution, didn't serve to this purpose, but were subordinated to the protection need of relatives who had inheritable vocation at the minor's inheritance and also to the tendencies of the times. The Family Council represents that border given by the state through the regulation of the conditions and of the ways in which the minor's relatives and the parents' kin can guard, together with the Courts, to the efficient protection of the interests of the minor put under guardianship.

Analysing the provisions of the current Civil Code, we can notice the essay to transform the guardianship from a public charge in a personal charge, thing to which the reinstitution of the institution of the Family Council fully contributes. While the minor benefits from the parental protection, the institution of another mean of protection either cannot be instituted; either needs the fulfilment of some conditions regarding the parents. Being possible the situation that a minor, although he has the parents alive, these cannot give, temporarily or definitively, the protection

Artene, D. A. (2015). The family council – subsidiary mean for minor's welfare. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 85-96.

needed to their minor child, the law giver created special measures for the protection of the minor, since in such situations the institution of the guardianship and the establishment of the Family Council cannot take place.

Selective Bibliography

1. Artene Diana Anca, Drept civil. Persoanele. Sitech Publishing House, Craiova, 2014
2. Beldimano George G., Despre tutelă în dreptul roman şi român M. P. Popovici Typography, Iaşi, 1901
3. Călugăru Syomara, Despre tutelă. Teză pentru licenţă Facultatea de Drept din Bucureşti, Clemenţa Typography, Bucharest 1904,
4. Hamangiu Constantin, *Codul civil adnotat Vol. I, reeditat*, *cu trimiteri la doctrina franceză şi română şi jurisprudenţa completă de la 1868-1925* All Beck Publishing House, Bucharest, 1999
5. Cuza Civil Code
6. Civil Code (Law 287/2009)

Artene, D. A. (2015). The family council – subsidiary mean for minor's welfare. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 85-96.