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Irina APETREI

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THE INSTITUTION OF GUARDIANS BOARD ACCORDING TO THE NEW ROMANIAN CIVIL CODE

Irina APETREI[1]

Abstract

The paper deals with the institution of guardians board as it is settled by the provisions of the New Romanian Civil Code (287/2009 Law).

Already existing in the settlement of the French Civil Code (1804) and the Romanian Civil Code(1864), the institution of the guardians board was re-introduced by the New Romanian Civil Code, as an optional way of the infant protection, having a consultative role.

The paper approaches the role of the board of guardians, its structure and change, the procedure of creating the institution of guardians board, the way this organism functions, its prerogatives, the way of substituting the board of guardians.

Keywords: *guardians board, new Romanian Civil Code.*

[1]Irina Apetrei , Ph.D., Lecturer at "Mihail Kogalniceanu" University, Iaşi, Romania
Contact: Tel. +40 727 315419; ireneapetrei@yahoo.com

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1. Preliminary considerations. The New Romanian Civil Code (287/2009 Law) re- establishes the family relationships in its structure , as a variety of civil relationships between spouses, parents and their children and other relationships assimilated by law with the family relationships.

Among the legislative novelties suggested by the New Romanian Civil Code as far as family relationships are concerned, the guardians board is counted as an optional organism[2] of infant protection, having a consultative role.

Already existing in the Napoleon French Civil Law(1804), the institution of guardians board was taken over by the Romanian Civil Code(1864), abrogated[3] afterwards and reintroduced by the New Romanian Civil Code (287/2009 Law).

2. Settlement. In the 1864 Romanian Civil Code, the guardians boards was settled in Book I "About Persons", Title X: "About Minority, about guardianship and emancipation", Chapter II: "About guardianship", The Section about guardianship chosen by the guardians board (art. 355 - 367).

The New Romanian Civil Code settles the institution of the guardians board in Book I "About Persons", the Title III: "The protection of the private person", Chapter II: The guardianship of the infant", Section 3:"The guardians board" (art. 124 - 132).

Thus, it is sanctioned the role of guardians board, its structure, the way of changing the guardians board, the constitution of the guardians board, its working, the prerogatives of this consultative organism, the way of substituting the guardians board and the incapacity of constituting the family board, as well.

3. The guardians board settled by the 1804 French Civil Code. The legislator of the 1804 French Civil Code conceived the

[2] According to the art.108 (1) of the New Romanian Civil Code, "the protection by guardianship is exercised by the tutor, designated or appointed, under the conditions of the present code, as well as by the guardians board as an optional organism.(2) The guardians board may be established by the guardianship court only by request of the interested persons.(3) In case the guardians board is not constituted, its prerogatives may be exercised by the guardianship court."

[3] By art 49 of the 32/1954 Decree (executive order) for enforcing the Family Code and 31/1954 Decree (executive order) regarding private persons and corporate bodies.

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guardians board as an organism with a consultative role, having a series of prerogatives regarding the guardianship.

Thus, in certain circumstances, the guardians board could appoint the tutor and also, could have, as prerogatives, the supervision of the way in which the guardianship was administered and stating the terms of making an agreement on the legal acts by the tutor.

According to the Old French Civil Code the structure of the guardians board consisted in the following persons:

- the justice of the peace[4], as Chairman of the guardians board and ex officio member of this organism;
- six relatives of the infant from both the maternal and parental side, chosen equally by the justice of the peace;
- in case no relatives of the infant existed, they were replaced by friends of the family or acquaintances of the infant's parents.

The persons that could not be a member of this organism were: the infants, the judicial banned (forbidden) persons, the female persons (with the exception of the ascending line relatives), persons being in litigation with the infant's parents concerning his/her goods, the persons discharged from the tutor quality, the persons convicted to a sentence accompanied by losing the right of being a member in the guardians board.

From the procedural point of view, convening the guardians board was the duty of the justice of the peace within the territorial domicile of the infant based on the application of the parents, creditors, other interested persons or ex officio (in special cases provided by law). The members of the guardians board could stand personally or by vicarious (with a special power of attorney), the mandatory being able to represent only one member of the guardians board. The members of the guardians board missing without a solid reason could be fined by the justice of the peace, without any appeal.

The members of the guardians board would assemble on the justice of the peace premises or in other place, the sessions not being public. The validity of the decisions taken by the guardians board was conditioned by the presence of the minimum five members of the board

[4] If the justice of the peace(or magistrate in some countries) does not attend the decision-making process or he/she attends but does not express his/her vote, the deliberation of the guardians board is considered null.

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and of the justice of the peace. The decisions of the guardians board was taken with an absolute majority.

The tutor, the guardian or the members of the guardians board had the possibility to appeal against the decisions of the board in case the legal decisions concerning the way in which it was summoned, the structure of the board, the deliberation and the decision – taking process of the guardians board were violated.

4. The guardians board settled by the 1864 Romanian Civil Code

Drawing its inspiration primarily from the 1804 French Civil Code, the 1864 Romanian Civil Code settled the guardians board as a "superior organism of the guardianship" (Hamangiu, C., I., Balanescu-Rosetti, C., I., (1928) : 648-656) which supervised the acts of the tutor and the infant.

According to the 1864 Romanian Civil Code , the guardianship could be legal guardianship (in case of the decease of one of the infant's parents), will established guardianship (created by the surviving parent), the legal guardianship of the ascending line relatives (in case of the decease of both parents, the law stipulated that the ascending line relatives were the most entitled to take care of the infant and its goods) and the court established guardianship (created in the absence of the parents and ascending line relatives, the tutor being chosen by the guardians board).

The guardians board was composed of, at least, five persons, (three paternal relatives (agnates) and two maternal relatives); if some relatives from one side were unavailable, the guardians board was completed with relatives from the other side.

Priority had blood relation (consanguinity) before allied relatives, and between the two relatives with an equal degree of relationship priority had the oldest one. By right, members of the guardians board were the infant's brothers and brothers-in-law.

In case there were insufficient relatives to make up the guardians board, it can be completed with other persons, friends of the deceased parents.

Minors cannot be members of the guardians board as well as the judicial banned (forbidden) persons, female persons (except the mother and the female ascending line relatives) and those persons proven to have

legal disputes with the infant which could result in compromising the civil status of the infant or his/her fortune.

As for the functioning of this organism, the meeting of the first guardians board would take place where the guardianship was instituted (or initiated), that is at the legal domicile of the infant. Afterwards, the guardians board used to meet either in the guardianship court or in some other place established by the presiding judge.

The meeting of the guardians board would take place at the tutor's request or a relative of the infant, at the request of the infant's creditors or any other interested person, or at the request of the guardianship court (ex officio), the reason for its meeting being clearly stated.

The guardianship court would establish the date of the guardians board's meeting, a date at which the members of the board had be present personally or vicariously.

The court could postpone the meeting if more members could not be present on serious grounds. The board was presided by the oldest member present there, and the decisions were taken with a majority vote.

According to art. 366 of the 1864 Civil Code, it was necessary that the number of the members present at the meeting should be an odd number, the parity of votes being avoided. In comparison with the 1804 French Civil Code, the Chairman did not have a casting vote.

In case, at the set time, the guardians board could not meet, the court would take decisions on the guardians board's behalf so that the infant's interests should not be prejudiced.

Not all the decisions taken by the guardians board had the same character. Some of them, called "notes" (or "notices")[5] consisted in only informing elements that were to be presented in court, without any obligation of the court to take them into consideration; others called "decisions" or "orders"[6] were, as a rule, compulsory and executory.

To execute some of these orders it was necessary to have the agreement of the guardianship court, called "ratification". It was accepted or not whether the court appreciated the decision taken by the guardians

[5] Such as, for example, the note (or notice) regarding the calculations of the tutor's administration (art. 416 of the 1864 Civil Code); the note (or notice) regarding the banning of the alienated person (art 416 from the same code).

[6] For example, in case the board authorizes the tutor to conclude some acts; in case the board establishes what expenses the tutor can incur for the infant; in case the board decides the appointment, exclusion or suspension of the tutor.

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board correspond with the infant's interest or not. The court could not ratify partially the decision of the guardians board, neither could replace it with another decision.

The attributes of the guardians board were varied. Thus:

- it would appoint the "court established" tutor in the absence of a "legal" or "will established" tutor;
- it would appreciate, according to art. 370, upon the exoneration reasons from the guardianship or replacement of the tutor;
- according to art. 384, 385 and 386, the guardians board would exclude, dismiss or preclude the tutor and replace him/her with another one.
- it would supervise the education of the infant given by the tutor and the infant's studies, establishing the annual sum of money that the tutor was to allocate for upbringing and education of the infant;
- it would supervise the way in which the infant's fortune was administered[7];
- it had the right to emancipate the infant and would give the accordance to the tutor to have the possibility of asking for the infant's arresting or serving a punishment.

As a conclusion, in the 1864 Romanian Civil Code, the guardians board played an active role both in case of the person and the infant's goods.

5. The guardians board according to the settlement of the new Romanian Civil Code (287/2009 Law)

Setting the guardians board in the chapter dedicated to the infant's guardianship, the new Romanian Civil Code establishes, first of all, the role of this organism, which is supervising the way in which the tutor exercises his/her rights and fulfill the obligations concerning the person and the infant's goods.

The guardians board shall not be instituted if the infant is protected by the parents, if there is the measure of the placement in a

[7] For example, for the deeds of settlement of the infant's patrimony (such as selling or mortgaging) the tutor needed the consent of the guardian board. At the same time, the tutor could not accept or renounce to an infant's inheritance, without the consent of the guardians board.

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foster care center or by means of other measures of special protection provided by the law.

According to the new provisions, the guardians board is instituted by the guardianship court[8] and consists of a number of three relatives or allied relatives, being preferred the immediate family of the infant. In the absence of the above mentioned relatives, in the guardians board can be also appointed friends of the infant's parents or persons interested in the infant's situation.

The husband and the wife together cannot be members of the guardians board. Other persons who cannot be members of the guardians board are the following:

- the tutor;
- the infant, the judicial banned (forbidden) person or the person under curatorship;
- the person who lost the parental authority or was declared incapable of being a tutor;
- the person whom the exercising of some civil rights were limited or restricted (according to the rule of law or a court order), as well as the person with a bad conduct as the court stated.
- the person who was removed from a guardianship;
- the person who could not exercise the encumbrance of the guardianship, having interests contrary to the infant;
- the person removed by an authentic document or will of the parent who exercises alone the parental authority, at the moment of decease.

There are persons who can refuse to be a member of the guardians board. These are:

- the person who because of his/her illness, infirmity, the activity he/she is involved in, the distance of the domicile from the place where the infant's goods are housed, or from other solid reasons could not exercise this duty. If such a circumstance appears soon after, the person appointed member in the guardians board can ask the guardianship court to be replaced until the resolution to

[8] According to art. 107 of the new Civil Code, "the procedures provided by the present code concerning the protection of the person through guardianship and curatorship are the jurisdiction of the guardians and the family boards as provided by the law, called guardianship court.

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the claim, that will be solved urgently, he/she is obliged to continue exercising his/her attributes.

No legal documents can be concluded between a member of the guardians board, her husband, one of the members ascending/descending line relatives, his/her brothers and sisters on one hand and the infant, on the other hand; in case such documents are concluded they will be sanctioned with relative nullity.

The structure of the guardians board is also made up of two vice deputies.

During the guardianship, the structure of the guardians board cannot be changed, except in case of decease or disappearance of one of the members, when the infant's interests would necessitate such a change as well as in the case provided by art.131 of the new Civil Code (if, in the petitions addressed to the court, they decided, definitively, at least twice, against the decisions of the guardians board).

The way in which the guardians board is constituted , is settled by the art.128.Thus, the guardianship court convenes[9] at the infants domicile, all those persons who fulfill the conditions of being members of the guardians board.

The appointment of the members composing the guardians board is realized with their consent.

The hearing[10] of the minor who reached the age of 10 is compulsory. If the guardianship court considers that the hearing is necessary in order to solve the case, even the minor who did not reach that age can be heard.

As far as the functioning of the guardians board is concerned, it can be convened with at least ten days before the date set for the

[9] Calling together of the guardians board is realized ex officio at the minor's notice (if he/she reached the age of 14), at the appointed tutor's notice or at the notice of any other persons who know the minor's situation.

[10] According to art.264 (2) of the new Civil Code "the right to be heard means the possibility of the child to ask and get any information, according to his/her age, to express his/her opinion and to be informed on the consequences it can have if it is respected, and also on the consequences of any decision which concerns him/her".
According to art.264 (4) "the opinions of the child's hearing will be taken into consideration according to his/her age and level of maturity".
According to art264 (5) "the special legal dispositions concerning the child's consent or presence at the procedures which concern him/her, as well as the provisions concerning the appointment, by the court, of a representative in case of conflict of interests are applicable".

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meeting[11], at the request of any member of the board, of the minor who reached the age of 14, the tutor or guardianship court.

The members of the guardians board have the obligation to be present personally at the appointed meeting place; in case they found themselves in the impossibility to come, they can be represented by relatives or in-laws- of the minor's parents, with the exception of the case in which they are not appointed or convened personally as members of the guardians board. At the same time, the spouses have the possibility to represent themselves mutually.

The sessions of the guardians board take place either at the minor's domicile or in the guardianship court.

According to the provisions stipulated in art 130, the guardians board has as its prerogatives the issue of consultative notes (at the request of the tutor or of the guardianship court) and taking the decisions, in cases provided by the law, in both situations with the majority vote of its members, the board being presided by the oldest of its members.

Taking the decisions is realized after the minor, who reached the age of 10, was heard. The decisions of the guardians board must be justified and recorded in a special register.

If, in the claims against the decisions of the guardians board, the court gives, at least twice, a final decision, the tutor can ask the court to institute a new board. In case this is not possible, the tutor alone can exercise the guardianship , with the authorization of the guardianship court (a situation similar to the case in which there exist contrary interests between the minor on one hand and all the members of the guardians board and vice deputies on the other hand.)

The guardians board gives notice on the measures taken by the tutor, with the exception of those with a current character, this in case the guardianship is exercised on the minor's person. But in case the guardianship is exercised on the minor's goods, after the tutor was appointed, in his/her presence and the members of the guardians board, a delegate from the guardianship court will examine or control the minor's goods and inventory them. The list will be afterwards submitted, in order to be approved, to the guardianship court.

[11] The calling together may take place even before the term of 10 days established for the meeting, if all the members of the guardians board agree. In all the situations the irregularity of the calling together can be covered if all the members of the board are present.

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An inventory official record is drawn up, in which claims, debts, and other demands of both the tutor and the members of the guardians board towards the minor are declared. If these were not declared, even if they were summoned, it is presumed they abjured the claims. If the tutor or the members of the guardians board do not declare their own debts towards the minor, after being summoned to declare them, they can be removed from this position.

The debts of the tutor, a member of the guardians board, the husband, a descending line relative, their brothers or sisters towards the minor can be paid voluntarily only with the agreement of the guardianship court.

The legal documents of disposition on the minor's inheritance (legal documents of alienation, partition, burdening the minor's goods with real tasks, renouncement at the minor's patrimonial rights) cannot be concluded by the tutor without the notice of the guardians board and the authorization of the guardianship court, otherwise these documents are sanctioned with relative nullity. The action for nullification can be exercised by the tutor, the guardians board or by any member of this board, as well as by the prosecutor.

But the tutor has the possibility of alienate or sell, without the notice of the guardians board, those minor's goods which are submitted to ruin or degradation as well as those goods unnecessary to the minor.

According to art.146 of the new Civil Code, the guardians board gives notice and the guardianship court authorizes the legal documents that the minor, who reached the age of 14, is going to conclude, if these documents are one of those the tutor cannot conclude without this double permission. The guardians board also establishes the annual sum of money necessary for the minor's support and administration of his/her goods and can change, under given circumstances, this sum of money. The guardianship court must be notified immediately about the decision of the guardians board. The guardians board will indicate the bank where the money will be deposited, on the minor's name (the sum of money exceeding the necessities of the minor's support and his/her good's administration) as well the financial instruments.

Both the tutor and the guardians board are submitted to a real and continuous control of the guardianship court, of the way the two parties fulfil their prerogatives concerning the minor and his/her goods.

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In case the acts or the deeds of the tutor cause damages in the minor's inheritance, the guardians board or any other member of the council can complain to the guardianship court. The members of the guardians board must be summoned together with the parties for the settlement of the complaint, an action which takes place immediately, ending in an executory conclusion given by the guardianship court.

6. The guardians board settled by the present French Civil Code (Buffelan-Lanore Y., (1995), : 220-223; Bihr, P., (2000) : 155-156)

According to the present French Civil Code, the guardians board establishes the general conditions of support and education of the minor, taking into account the parents' will the already expressed on this matter (art.449).

Beginning with the opening of the guardianship, the guardianship court initiates and summons the guardians board, which in its turn , chooses the supervising tutor[12] and, eventually, the tutor.

The structure of the guardians board is made up of 4-6 members , including the supervising tutor, but not the tutor, neither the judge of the guardianship court.

The appointment of the guardians board is the duty of the judge of the guardianship court, who has a large freedom of choice among the relatives and allied relatives of the minor, on maternal and paternal line in equal proportion, but also from the friends, neighbours or any other person interested in the minor's upbringing.

Some persons may refuse to be appointed in the guardians board. These are those persons who, because of the advanced age, illness, distance from the minor's domicile , professional status, an extremely solicitous family or their engagement into a previous guardianship, cannot fulfill their prerogatives in this position.

The competence for analyzing this refusal as well as ruling the incapacity causes the exclusion, removal or rejection of the members of the guardians board is performed by the judge of the guardianship court.

[12] The supervising tutor is one of the members of the guardians board, appointed by this organism who supervises the way in which the guardianship is administrated and the conclusion of the legal documents for the minor, by the tutor. He/she has also the obligation of notifying the guardianship court whether the tutor fulfil his/her duties. If the tutor is a relative or an allied relative with the minor on one ascending line of his/her parents, the supervising tutor will be appointed from the relatives or allied relatives of the other parent.

In comparison with the previous settlement, the members of the guardians board are basically appointed for the whole duration of the guardianship, but the judge of the guardianship court may replace one or more members of the guardians board during the guardianship, due to some changes in the situation of the parties.

The guardianship court summons the guardians board either ex officio or at the request of two of its members, the tutor, the supervising tutor or even of the minor if he/she reached the age of 16.

The calling together must be done with, at least, 8 days before the set time, the guardianship court having also the possibility to renounce to call together the guardians board, if the court appreciates that the decision may be taken without consulting the board. In this case it is sufficient that the court should communicate the decision taken, accompanied by the necessary arguments, to each member of the guardians board and send the vote in written form, at the set term, under the sanction of a fine.

The members of the guardians board have the obligation to be present personally or by a representative (a relative or an allied relative of the minor's mother or father, who does not take part in the guardians board, or the husband of one member of the board). The members of the guardians board who miss or are not represented, without a serious reason, will be sanctioned with a civil fine, according to art.412 from the French Civil Code and art.1230 from the French Code of Civil Procedure.

The guardians board can deliberate only in the presence (or in the conditions of representation) of one half of its members, otherwise the guardianship court must summon again the guardians board and, in an emergency case, to decide alone.

The decision of the guardians board are taken with an absolute majority, in case of partition, the decision of the judge of the guardianship court, who presides the guardians board, is a decisive one.

The tutor has no right to vote but attends the meeting alike the minor (who reached the age of 16) who has the right to attend only with a consultative title.

The supervising tutor has the right to vote with the exception of the situation in which he/she replaces the tutor at the meetings.

The deliberation of the guardians board takes place in the form of secret meeting, and decisions must be motivated. In case there is no unanimity, the opinion of each member of the board must be mentioned

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According to art.1221 of the French Code of Civil Procedure the decisions of the board are executory, and the appeal (within an interval of 15 days) suspends the execution.

The guardians board has three roles:

- organizing the guardianship;
- concerning the minor's person;
- concerning his/her goods.

Regarding the organizing of the guardianship, the guardians board appoints the tutor (with the exception of the will established guardianship or that of the ascending line relatives) to convene the guardianship court, ex officio or at the request of the minor's relatives or allied relatives, his/her creditors, any other interested person or the Prosecution Service.

The guardians board analyses the eventual cases concerning the refusal of the duty as a tutor or supervising tutor and rules upon the incapacity situations, exclusion or rejection of the persons mentioned above.

At the same time the board decides if necessary, on the removal of the tutor or the supervising tutor, after a previous hearing of these persons, in order to present their defense, as far as the reasons of their removal are concerned.

Regarding the minor's person, the guardians board is the substitute of the deceased parents, without being the holder of the parental authority. Thus, the guardians board establishes the general conditions of the minor's upbringing and education, depending on the eventual wishes expressed by the parents and the value of the minor's goods , existing in the administration of the guardians board.

The guardians board expresses the agreement on the marriage, emancipation or adoption of the minor.

Finally, regarding the minor's goods, the guardians board plays the role of a decisive organism: they authorize the tutor to conclude the legal documents of disposition, establish the annual sum of money necessary for the minor's upbringing, education and the administration of his/her goods, the guardianship court being unable to intervene, except in an emergency case or in case of legal documents with a reduced value.

The guardians board keeps in touch with the tutor regularly which is his/her executive organism.

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7. Conclusions

Taking over the traditional institution of the guardians board from the 1804 French Civil Code, which also exists in the initial settlement on the 1864 Romanian Civil Code , the new Romanian Civil Code tries to bring into attention again this organism with optional prerogatives in the matter of guardianship.

In the present time, characterizes by a crisis of the family and relationships between its members, we consider that returning to this institution of tradition in the legislation of the European States and its re-thinking, depending on the present realities, cannot be but beneficial.

What will be the legal problems arising from the enactment of the new Romanian Civil Code on the matter of the guardians board? Will it be a dynamic institution really used by those entitled to use it? Will the members of the guardians board find time and necessary inclination to really exercise their prerogatives?

Here are some questions, rhetorical for the time being, which surely will arouse discussions and debates and will also find solutions, after the enforcement of the new Romanian Civil Code.

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