THE BEST INTEREST OF THE CHILD. CONCEPT ANALYSIS FROM THE PERSPECTIVE OF THE REGULATIONS OF THE NEW ROMANIAN CIVIL CODE

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Abstract:

The authors present, in a meticulous approach, the concept of best interest of the child, as it is regulated from the perspective of the new Romanian Civil Code.

After a brief presentation of Romanian legislation regarding the concept of the best interest of the child, the authors make a relevant study upon, in the global context of the new legislation.

First, the authors study the provisions of paragraph 273, which states the best interest of the child as a concept with general applicability in all fields of the law.

Also, the authors expose in detail a comparative study of this concept with others from the new Civil code, as the parental authority, adoption and tutorship.

Second, after a study of the foreign jurisprudence and doctrine, the authors propose elements to be considered in the study of the application of the concept of the best interest of the child, in family matters, once the new Civil code comes into force.

In conclusion, you can say that this article, by its new subject, represents a contribution to the doctrine to appear as a result of the new provisions of the Romanian Civil Code.

Keywords:

Code, civil, Romanian, child, interest, tutorship, authority, adoption, family.

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The best interest of the child is a well-established principle both on an international level, within various organizations and on a national level, constituting one of the major preoccupations of legislators.

In the Preamble of the Convention regarding the rights of the child, adopted by the General Assembly of the United Nations on November 20, 1989 and in force as of September 1990, it is established that fact that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights, in the International Covenant on Economic, Social and Cultural Rights and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children.

In May 2008, in Warsaw, on the occasion of the conference lecture called "The Principle of the Best Interests of the Child – What It Means and What It Demands from Adults", Thomas Hammarberg[1] mentioned with regard to this International Convention that it extends the principle to cover *all* decisions affecting the child. This is a radical departure. The best interests of the child shall now be a primary consideration in all actions concerning children – not just actions taken by the state authorities, parliamentary assemblies and judicial bodies but also those taken by relevant private institutions.

The first line of article 2 also sets forth that the states parties of the Convention, are bound to respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

In article 3, the Convention sets forth the premises of the principle that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[1] Commissioner for Human Rights within the Council of Europe, 2008

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Short presentation of the principle of the best interest of the child in the Romanian legislation until the present day

Romania has adhered as early as 1990[1] to this Convention regarding the rights of the child, adopted by the General Assembly of the United Nations we previously mentioned.

With regard to the concept of the best interest of the child, we appreciate that it was regulated and defined as a principle by the Romanian legislator in 2004, through a package of laws in the field of adoptions, protection and rights of the children. In this perspective we would like to mention Law no. 272/2004 regarding the protection and promotion of the rights of the children, Law no. 273/2004 regarding the legal regime of adoption, republished in 2009 as well as Laws 274 and 275, in the same field of interest[2].

Article 2 of Law no. 272 stipulates that this law, as well as any other regulations adopted in the field of observance and promotion of the rights of the child, together with any legal document issued, or, as the case may be, signed in this field is subject primarily to the principle of the best interest of the child. It is also stipulated that this principle is also imposed in relation to the rights and obligations of the child's parents, of his or her legal representatives or any other legal guardian. The law also creates a presumption in the sense that it states that the best interest of the child shall prevail in all actions and decisions that regard children, conducted by the public authorities and authorized private organisms as well as in the cases solved by the courts, the latter being bound to involve the family in all the decisions, actions and measures regarding the child and to support the education, welfare, growth and development of the child within the family.

We appreciate it is necessary to mention the fact that this concept of the best interest of the child can be met before 2004, yet without being regulated as a well-established principle with general applicability, as Law 272 sets forth.

Thus, we can invoke the Emergency Ordinance no. 26 from 1997 regarding the protection of the child in difficulty, approved by Law no. 108 from 1998. Within this legislative framework, the legislator analyzes the best interest of the child in distress, determining that a child is in difficulty if "his or her development or physical or moral integrity is endangered". In this case, the

[1] Law no. 18 from 27 September, for the ratification of the Convention regarding the rights of the child, republished following the identification of several differences of translation from English to Romanian in the contents of the Convention in the Official Monitor no. 314 from 13 June 2001.

[2] Dan Lutescu, Observations regarding certain legal criteria of appreciating the best interest of the child in difficulty upon taking a special protection measure, to be consulted at: http://www.uab.ro/reviste_recunoscute/reviste_drept/annales_10_2007/lutescu_ro.pdf (7 octombrie 2010).

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Commission for the child protection takes measures in view of respecting the best interest of the child in difficulty, according to art. 7.

Another normative act that regards the child in difficulty is the Decision no. 539 from 7 June 2001 for the approval of the Governmental Strategy in the field of the protection of the child in difficulty (2001 - 2004) and of the Operational Plan for the implementation of the governmental strategy in the field of the protection of the child in difficulty (2001 - 2004), published in the Official Monitor no. 321 from 14 June 2001. Romania's government stated through this decision that the solution of adoption "serves the best interest of the child and constituted the only special protective measure of a permanent nature, able to offer children the environment of a family, so necessary for a harmonious growth and development of their personality".

In the same light, in the Order no. 18/3989/416/142 from 26 February 2003 regarding the approval of the Methodological Guide for the evaluation of the child with disabilities and the determination of a disability degree, published in the Official Monitor no. 538 bis from 25 July 2003 it is stipulated, among the principles of the evaluation of the child with disabilities, that the evaluation "must be subordinated to the best interest of the child – the increase of the level of "functionality", of active involvement in the sphere of individual and social life".

In 2003, the Decision no. 1052 regarding the approval of the reform Strategy of the legal system, published in the Official Monitor no. 649 from 12 September 2003, stipulates with regard to the legal reform for minors, that it "requires a special attention from society and especially from those in charge of the application of the law. The decision originated in the need to create certain specific conditions for minors, different from those for adults, having as a general purpose the protection of the child". This Decision refers to the 2001 – 2004 Governmental Program regarding the creation of a unitary legislative system concerning the protection of the rights of the child, juvenile justice and the responsibilities of the non-governmental organizations with activities in the field, in agreement with the UNO Convention regarding the rights of the child and with the principles established by the conventions forming the acquis communitaire. The legislator enumerates in this Decision the basic principles in view of realization of a justice for minors, mentioning as well the priority of the best interest of the child in all decisions of the courts, administrative agencies and legislative power.

Following the package of laws from 2004, The National Authority for Child Protection issued a series of Orders by means of which it underlined the concept of the best interest of the child.

Thus, in 2006, through Order no. 95 for the approval of the Work Methodology regarding the collaboration between the general directions of social assistance and child protection and the public services of social assistance/individuals with attributions of social assistance in the field of the

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protection of the rights of the child, published in the Official Monitor no. 305 from 2006, the fundamental concept of Law no. 272/2004 is reiterated, namely that all children have rights, among which those which are applied taking into consideration the best interest of the child.

Through Order 288 from 2006 for the approval of the minimum obligatory standards regarding case management in the field of the protection of the rights of the child, the case management in the field of the protection of the rights of the child is defined as "a method of coordination of all activities of social assistance and special protection performed in the best interest of the child by professionals from various services or public and private institutions".

In 2007, through Order no. 14 for the approval of the minimum obligatory standards regarding the Service for the development of familiarization with an independent life and of the methodological guide of implementation of these standards, it is stipulated that "in all actions performed within the service for the familiarization with an independent life, the best interest of the child is prevailing (the principle of the best interest of the child).

Together with the normative acts regarding underprivileged children or children with disabilities, the legislator extends the presence of the concept of the best interest of the child to normative acts that regard the situation of children generally, within the family environment and not only.

Thus, Law no. 192 from 16 May 2006, regarding the mediation and organization of the profession of mediator mentions in article 65 that "the mediator shall monitor that the result of the mediation is not against the best interest of the child and shall encourage parents to focus primarily on the child's needs, while the determination of parental responsibility, separation or divorce shouldn't impede the growth and development of the child".

We nevertheless appreciate that by the acknowledgement of the principle of the best interest of the child in the new Civil Code the Romanian legislator gave a new orientation to this concept, through its existence as a central institution in itself, in the field of the rights of the family, as well as through its connection to other large institutions of regulation in the New Code, such as adoption, tutelage, parental authority.

2. The principle of the best interest of the child in the New Civil Code

The Government Decision no. 277 from March 2009 for the approval of the Preliminary Theses of the bill – the Civil Code, published in the Official Monitor no. 213 from 2 April 2009, stipulates, among the most important novelties, the "acknowledgement of the best interest of the child in agreement with the provisions of the Convention of the United Nations Organizations regarding the rights of the child and with the provisions of Law no. 272/2004

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regarding the protection and promotion of the rights of the child, with its subsequent modifications".

Thus, the best interest of the child is regulated as principle in the new Civil Code in article 263.

We can see in this article that the legislator aims at a restructuring of the basic ideas we can find in the special legislation in force at the moment, as well as of the dispositions of the international Conventions our country adhered to.

A line by line analysis is necessary to underline this idea.

Thus, in the first paragraph it is stipulated that any measure regarding a child, regardless of its author, needs to be taken in agreement with the best interest of the child.

In the second paragraph of article 263, the legislator stipulates that in order to solve the requests related to children, the competent authorities must provide all guidance so that the parties can resort to amiable ways of resolving conflicts.

According to the legislation in force, such a modality is mediation. The aforementioned Law no. 192 from 2006 sets forth in article 1, modified by Law no. 370/2009, that mediation is a way of resolving conflicts amiably, with the help of a third party specialized as mediator, under neutral, impartial, confidential conditions and with the free consent of the parties.

With respect to the same second paragraph of article 263 we would like to point out that the Romanian legislator reiterates in the context of the new Civil Code ratified international regulations. We mention in this light one of the principles of resolving litigation in the matter of personal relationships, as it is set out in article 7 of Law no. 87 from 2007 for the ratification of the Convention on personal relationships regarding children, adopted in Strasbourg on 15 May 2003, published in the Official Monitor no. 257 from 17 April 2007. In this Convention, transformed into an internal disposition, it is stipulated that when conflicts in the matter of personal relationships are solved, the judicial authorities should take all necessary steps to "encourage parents and other individuals related to the family to reach a consensus amiably with regard to the personal relationships, especially by means of family mediation and other ways of resolving conflicts".

In the third paragraph of article 263 which establishes the principle of the best interest of the child it is mentioned that "the procedures regarding the relationships between parents and children must guarantee that the parents' wishes and interests regarding children can be brought to the attention of the authorities and that they are taken into consideration in taking their decisions".

We also appreciate it necessary to mention that the dispositions of this paragraph, as well as the entire article 263 for that matter, is analyzed in the context of the whole Civil Code. In this sense, article 396 of the new Code sets forts, with regard to the relationships between the divorced parents and their minor children, that the tutelage court shall decide, once the divorce is

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pronounced, upon the relationships between divorced parents and their minor children by taking into consideration the best interest of the child, the conclusions of the psychosocial investigation as well as, if applicable, of the parents' agreement".

We believe it is important to complete the analysis of this paragraph with that of article 264 of the new Civil Code which introduces the principle of hearing the child.

As we can see, the legislator refers in the new legislation not only to the parents' wishes, but also to those of children, of which the authorities learn by hearing the child during the related procedures.

Thus, in article 264 of the new Code, it is stipulated that in the related administrative or legal procedures hearing the child who has turned 10 is mandatory. If the competent authority nevertheless believes that this might prove necessary to solve the case, the child under 10 can also be heard.

The legislator establishes in paragraph two of this article the right of the child to be heard, which also implies the possibility of the child to request and receive any information, in agreement with his or her age, to express his or her opinion and to be informed on the consequences it might have, whether it is respected or not as well as on the consequences of any decision that concerns him or her. In fact, the legislator stipulates that the opinion of the child heard shall be taken into consideration in relation to his/her age and maturity level.

According to the third paragraph, any child may require to be heard; the denial of the request by the competent authority must be well grounded.

All these provisions are accompanied by any other special legal dispositions regarding consent or the child's presence, in the related procedures, as well as by the provisions regarding the nomination by the court of a representative in case of conflict of interests. For instance, the legislator mentions in article 401 of the new Code that, in case of misunderstanding between the parents, hearing the child is mandatory for the tutelage court when it decides on the modalities of exercising of the parent's right or, as the case may be, the rights of the parents separated from their child to have personal relationships with him/her.

Another example is article 486 which stipulates that every time there are misunderstandings between the parents regarding the exercise of rights or the fulfillment of parental duties, the tutelage court, after hearing the parents and taking into consideration the conclusions of the report regarding the psychosocial investigation, decides on the basis of the best interest of the child and the hearing of the child is obligatory, the dispositions of article 264 being applicable.

The clearly determined cases regulated by the new Civil Code when the hearing of the child in case of misunderstanding between the parents or absence or the parents' consent are the choice of the child's home, according to article

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496, the change of the child's domicile, in article 497, the change of the type of education or professional training, in article 498.

Coming back to article 263, line 4 stipulates that the procedures regarding children must be carried out in a reasonable period of time, so that the best interest of the child and the family relationships should remain unaffected.

In the same context of establishing the principle of the best interest of the child, in article 263, the legislator, in the final line, determines the interpretation of the notion of "child', namely the individual who hasn't turned 18 and hasn't gained full capacity of exercise, according to the law. In this context we believe we must mention that in article 38 of the new Code, the legislator also stipulates that an individual becomes major when he/she turns 18. With regard to the capacity of exercise, the Romanian legislator clarifies certain aspects. Thus, in article 41 it is stipulated that the minor who turned 14 has a restricted capacity of exercise, being allowed to carry out acts of conservation, acts of administration to his/her favor as well as acts of disposition of small value, with a current character, executed on the date of their conclusion.

On the other hand, the legislator establishes in article 40 the case of anticipated capacity of exercise, namely the fact that, for solid reasons, the tutelage court can acknowledge the minor who turned 16 full capacity of exercise[1].

Thus, we can ask: when the legislator defines the notion of "child", two cumulative conditions must be met? If yes, in the event the minor gains anticipated capacity of exercise he/she is no longer considered a child, on the basis of the general legal dispositions applicable in his/her life? Personally, we appreciate that in the event the minor gains capacity of exercise after the age of 16, the solid reasons which lead the court to take such a decision also entitles it to no longer consider the minor as a "child", in the sense of the law, with all the deriving implications.

3. The best interest of the child and the institution of parental authority in the New Civil Code

In the new Civil Code, in article 106 it is stipulated that the protection of the minor is accomplished by his/her parents.

The parental authority is mentioned in the new Civil Code under Title IV of Book II, "On family". It is established in article 483, being defined as "the totality of rights and obligations that concern both the person and the goods of the child and belongs equally to both parents".

The legislator establishes, in the second paragraph, that parents exercise their parental authority "only to the best interest of the child, with the respect

[1] To this purpose, the parents or legal guardians of the minors will be heard, the opinion of the family council being also taken into consideration, if applicable.

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due to his/her person, and associate the child to all the decisions that regard him/her, taking into consideration the age and the maturity level".

From the analysis of all articles regarding parental authority we can see that the legislator concluded them based permanently on the best interest of the child, his/her needs, care, physical, mental, spiritual, moral and social harmonious development, the respect of his/her dignity and rights, as they are established by the special legislation, in the particular fields.

As we can see, the best interest of the child as a general principle is present within the institution of parental authority, as a well established institution in the new Civil Code.

4. The best interest of the child and the institution of adoption in the New Civil Code

The relation between the institution of adoption and the concept of the best interest of the child is found in the domestic legislation ever since 1954, when, in the Family Code, in article 66 it was established that "the adoption is carried out only to the interest of the adoptee".

On the other hand, the Convention regarding the rights of the child, ratified by Romania, as we have already pointed out, by Law no. 18 from 27 September 1990, stipulated in article 21 that in the matter of the adoption the fundamental criterion is the best interest of the child.

In the new Civil Code, adoption is defined in article 451 as "a legal operation by means of which kinship is established between the adopter and the adoptee, as well as between the adoptee and the relatives of the adopter".

Article 452 determines the principles of adoption. It is mentioned that the adoption is cumulatively subject to the following principles: the best interest of the child, the necessity to ensure the development and education of the child in a family environment, the continuity of the development and education of the child, taking into account his/her ethnic, linguistic, religious and cultural origin.

It is also established that, to the extent the adoption was concluded to a different purpose than that of the protection of the best interest of the child, it is considered by law as fictitious and it is sanctioned with absolute nullity, according to article 480 of the new Code.

The legislator looks after the best interest of the child in all stages of the adoption. Thus, article 482 stipulates that, at the termination of the adoption, regardless of the reason, the natural parents of the child regain the parental rights and obligations, except the case when the court decides that it is to the best interest of the child to institute a tutelage or another protective measure for the child, under the conditions of the law.

Therefore, as we can notice, from the analysis of the texts of law it results expressly that the institution of adoption is closely connected with the

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principle of the best interest of the child, established as such in the new monistic conception of our legislator.

5. The best interest of the child and the institution of tutelage

In the new Civil Code, the legislator stipulates that the protection of the minor is carried out by the parents or by the institution of tutelage or other special protective measures expressly stipulated by the law.

The minor's tutelage, according to Chapter II of Title III called "The Protection of the Individual" is instituted when both parents are, depending on the case, either deceased or unknown, or when the parents lost the exercise of their parental rights or a criminal punishment was sentenced to forbid the parental rights, or when the parents are placed under juridical interdiction, missing or declared dead from a juridical point of view, as well as when, at the termination of the adoption the court decides that it to the best interest of the child to institute a tutelage.

We can see that within the institution of the tutelage the legislator fails to speak of the principle or concept of "the best interest of the child", but only of the "minor's interest".

Thus, in article 133 it is stipulated, with a general character, that the tutelage is exercised only to the minor's interest, both with regards to the person and his/her belongings. The content of the tutelage is regulated in the sense that the legal guardian is bound to ensure the care of the minor, his/her health, mental and physical development, education and professional training in agreement with his/her abilities.

With regard to the goods of the minor, the legislator stipulates that the legal guardian is bound, according to article 142, to administer in good faith the minor's goods, acting as an administrator in charge of the simple administration of the minor's goods, according to the new institution of the administration of somebody else's goods after the model of the institution „Administration du bien d'autrui" regulated in the Civil Code of Quebec, Canada.

Therefore, through the articles that regulate the tutelage in the new Civil Code, the legislator set forth as a fundamental rule the fact that the tutelage is exercised only to the best interest of the child and all the other dispositions follow this principle.

At the same time, with regard to the tutelage, we would like to mention that the legislator, through article 114, establishes a new method of appointing the legal guardian, by the parent of the child him/herself. Thus, the parent may nominate, by a unilateral act or power of attorney, in authenticated form, or, as the case may be, under the form of a testament, the person to be appointed legal guardian of his/her children, in the event he/she, as a parent, would become incapable of exercise or would die. The nomination performed under the

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conditions of this article can be revoked at any time by the parent, even through a privately signed document.

6. The best interest of the child in the jurisprudence

At the moment, in the judicial practice in Romania, various criteria are taken into consideration in the determination of the best interest of the child in particular cases. Thus, the material possibilities of raising, care and education of the child are considered, the criterion regarding the affective relationships of the child with his/her parents or legal guardian, in general, together with the analysis of abuse cases.

Under the circumstances, we appreciate as particularly important the principle of the hearing of the child, within the related procedures, when his/her physical and mental capacity, as well as the age allows it.

Taking into consideration the new regulation of the concept of the best interest of the child, as a principle regulated in the Code, we appreciate it is necessary to extend its analysis by the courts.

In the foreign doctrine[1] it is appreciated that in the family law we can divide the elements of analysis of the best interest of the child into two large categories: elements of the best interest of the child with regard to parents and elements of the best interest of the child with regard to the child him/herself. Among the elements related to parents are mentioned the parents' behavior, the availability of the parent in charge of the child to facilitate contact with the other parent as well as the case of open conflict between the parents. Among the elements related to the child, the doctrine reminds of his/her age and option.

Foreign jurisprudence, on the other hand, suggests totally independent criteria such as: the needs of the child, the affective relationship between the child and his/her parents as well as between the child and his/her relatives, the capacity of the parents to satisfy the needs of the child, the psychosocial environment factors, physical and mental health of the child as well as of the parent in charge of him/her, the life conduct of the parents, the observance of brotherhood, and last but not least, the wish of the child.

As we can notice, all these criteria are also found in the dispositions of the new Civil Code, which leads us to the idea that the jurisprudence in our country will implicitly make reference to these factors we can see largely analyzed in the foreign jurisprudence. The court decisions determine in detail, based on these criteria, the manner the parents shall conduct their relationships with regard to their child as well as between themselves at the moment a misunderstanding occurred.

[1] Collection de droit 2009-2010, 3e volume, « *Personne, famille et succession* », Édition Yvon Blais, Montréal, 2009, pp. 117

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Conclusions

As we can see, the new regulation not only sets out this concept as a principle of general applicability, establishing relations with other institutions of the Code, as we showed above, but also extends its applicability and implication to all the levels when we speak of "the child". Therefore, this principle shall be enforced, according to the law, not only in the case of an underprivileged child, a child with disabilities or whose protection is carried out through institutions or special protective measures but also within any litigation in the family environment when a child is involved.

Moreover, we appreciate it necessary to underline that, by its regulation as a principle, the legislator enforces the observance of the best interest of the child not only in a litigation background, but also in the everyday life, by respecting the person of the child similarly to the respect shown to any individual.

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