

OPINIONS REGARDING THE PRINCIPLE OF PROMOTING WITH PRIORITY THE SUPERIOR INTEREST OF THE CHILD IN THE REGULATION OF LAW NO. 272/2004 AND THE ROMANIAN CIVIL CODE

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Summary: *The study is devoted mainly to the logical-legal analysis of the provisions of art. 2 of Law no. 272/2004 on the promotion and protection of children's rights, as well as art. 263 of the Civil Code, which establish the main normative solutions regarding the "priority promotion of the principle of the best interests of the child". Although the phrase "the best interests of the child" is used in the construction of many rules of Law no. 272/2004, the Civil Code and other normative acts, the legislator refrained from establishing its significance, leaving this approach to the doctrine. The proposed study is intended to be a contribution to achieving this goal. We were also concerned with the identification of normative inaccuracies and the substantiation of pertinent proposals of lege ferenda for the improvement of the regulations regarding the principle of promoting with priority the principle of the best interest of the child.*

Keywords: child, interest, superior, priority, principle, parallels.

1. Preliminaries

Under the conditions of art. 6 of Law no. 272/2004, the observance and guarantee of the rights of the child is carried out in accordance with some principles, among which, the most important, is "the observance and promotion with priority of the best interest of the child" [let. a)]. This principle is operationalized, in general, by art. 2 and, especially, by numerous other texts of Law no. 272/2004 [1].

Also, art. 263 of the Civil Code, being placed in Title I (General Provisions) of Book II (On the Family), under the marginal name "the principle of the best interests of the child", details some aspects. We point out that other texts of the Civil Code also refer to this principle. In this context, without going into details, we point

out that, despite the role of common law, "for all areas referred to in the letter and the spirit of its provisions", some provisions of the Civil Code, including those of art. 263, have an obvious special character in relation to various provisions of Law no. 272/2004 dedicated to the principle of promoting the best interests of the child with priority [2].

At the national level, the principle of the best interests of the child is also found in some special laws. Moreover, this principle can be circumscribed to the provisions of art. 49 para. (1) of the Romanian Constitution, according to which "children and young people enjoy a special regime of protection and assistance in the realization of their rights".

The national regulations regarding the priority of the best interest of the child transpose the provisions of art. 3 para. 1 of the United Nations Convention on the Rights of the Child, which establishes the "principle of the best interests of the child" in all actions concerning children, undertaken by public or private welfare institutions, courts, administrative authorities or legislative bodies. We emphasize that some texts of the Convention, being drafted in a more suggestivemanner, refer to the "best interests" and others to the "best interests" of the child.

At European Union level, the expression "the best interest of the child" has received explicit legal consecration starting with December 7, 2010, through art. 24 para. 2 of the Charter of Fundamental Rights of the European Union. This text provides that, "in all actions concerning children, whether carried out by public authorities or private institutions, the best interests of the child shall be a primary consideration" (s.n.). Most likely, the national provisions, which refer to the "priority of the best interests of the child", have as legal basis these provisions of the Charter of Fundamental Rights of the European Union.

2. The meaning of the expression "best interests of the child"

Despite the fact that this expression is used in the construction of numerous legal norms, the Romanian legislator refrained from establishing its meaning. Also, the specialized doctrine did not show a systematic concern in this regard. Although it seems difficult to establish this meaning, it is necessary, in particular, to facilitate the correct and uniform application of the rules in which the expression in question is found.

In the absence of an explicit legal meaning, the only possibility is to consider the meaning of the terms that make up the analyzed phrase (interest, superior, child).

Regarding the terms "interest" and "superior", because the legislator does not define them, we will have to appeal to their current meaning in the modern Romanian language, as provided by the norms of legislative technique for the elaboration of normative acts. Instead, the term "child" has established the legal meaning by art. 4 lit. a) of Law no. 272/2004 and art. 263 para. (5) C. civ.

"Interest" means "advantage, benefit, gain, profit." Without insisting, we emphasize that, from a logical-legal point of view, it cannot be conceived to obtain a "lawful advantage" other than by exercising a right recognized by law. Obviously, any other solution is contrary to the principle of legality. So, strictly legal, the "interest" (advantage) can only be the consequence of the exercise of an objective right. To summarize, "interest is the moral or patrimonial advantage obtained by the person through the exercise of a right."

The nickname "superior" has the meaning of something that is of better quality.

Instead, according to art. 4 lit. a) of Law no. 272/2004, "child" is "a person who has not reached the age of 18 and has not acquired the full capacity to exercise, according to the law". In other words, the "natural" is the minor natural person without exercise capacity and the one with restricted exercise capacity.

The reference to the "conditions of the law" refers to those provisions of the Civil Code that regulate the beginning of full exercise capacity (art. 38), the situation of the married minor (art. 39) and anticipated exercise capacity (art. 40). Their corroboration and their *per a contrario* interpretation also show that the child is a minor without exercise capacity and a person with limited exercise capacity. Basically, this reference is useless. However, the incidence of the provisions of art. 38-40 of the Civil Code is imposed by their role of common law in the matter of

civil capacity of exercise of the natural person.

On the other hand, the adult and the married person are not “children” or the one whose guardianship court recognized in advance the full capacity to exercise.

In this context, we point out that, in contempt of the provisions of art. 16 para. (1) of Law no. 24/2000, the provisions of art. 4 lit. a) of Law no. 272/2004 are reproduced *ad litteram* by art. 263 para. (5) of the Civil Code, thus achieving a parallelism. Compared to the obvious uselessness of the norm provided by art. 263 para. (5) Civil Code, in accordance with the provisions of art. 16 para. (2) of Law no. 24/2000, we suggest to the legislator that, by law, they repeal them.

Without going into details, we specify that the term “child”, as regulated by art. 4 lit. a) of Law no. 272/2004, represents the restricted legal meaning (*stricto sensu*). This term is also susceptible to a broad meaning (*lato sensu*), by a natural person, regardless of age and the level of his ability to exercise, descending from the first degree of another person.

In conclusion, we consider that the expression “the best interests of the child” could be understood in the sense that “the exercise of rights by the child must provide him with better moral or patrimonial advantages than those obtained by other persons in the exercise of the same rights”.

The proposed interpretation cannot be considered contrary to the principle of equality before the law, since, as we have already mentioned, art. 49 para. (1) of the Constitution obliges the ordinary legislator to carry out a special regime of protection and assistance in the realization of children's rights.

3. The aspects under which the principle of the best interests of the child must be respected with priority

3.1. Preliminary details

From the analysis of the provisions of art. 2 of Law no. 272/2004, we find that the priority of the principle of the best interests of the child is imposed under three aspects: the observance and promotion of the rights of the child [para. (1)]; of the rights and obligations of the child's parents or other persons [para. (2)]; of the approaches and decisions concerning the children [para. (4) and (5)]. We specify that, in a different expression, these aspects are resumed by art. 263 C. civ.

3.2. Respect and promotion of children's rights.

According to art. 2 para. (1) of Law no. 272/2004, “any other regulations adopted in the field of observance and promotion of the rights of the child, as well as any legal act issued or, as the case may be, concluded in this field shall be subordinated with priority to the principle of the best interests of the child”. Also, art. 263 para. (1) The Civil Code stipulates that “any measure regarding the child, regardless of its author, must be taken with respect for the best interests of the child”.

In our opinion, the texts reproduced presuppose some particular observations.

First of all, the expression “any other regulations” refers to all categories of possible normative acts allowed by the Constitution (laws, ordinances or decisions of the Government, normative acts of the specialized central public administration or of the local public administration, etc.).

Secondly, the regulations must be adopted in the field of “respect for and promotion of the rights of the child”. However, for identity of reason, the same solution is required if, even if the regulations are adopted in other areas, they also include issues regarding the observance and promotion of children's rights. In order to avoid various interpretations on this topic,

we suggest to the legislator that, *lex ferenda*, to reformulate, under this aspect, the provisions of art. 2 para. (1) of Law no. 272/2004. Eventually, the phrase "respect for and promotion of the rights of the child" could be replaced by the phrase "in connection with the observance and promotion of the rights of the child".

Thirdly, the expression "legal act" has the meaning of manifestation or agreement of will. This conclusion is supported by the fact that the analyzed text states that the legal act is "issued" or "concluded". Obviously, "unilateral legal acts" are issued and "bi- or multilateral legal acts" are concluded. Moreover, "any legal acts" are considered. Practically, all categories of possible legal acts are included in this category, regardless of their nature (civil, commercial, administrative or jurisdictional).

Fourth, art. 2 para. (1) of Law no. 272/2004 refers to "any other regulations" and "any legal act" without distinguishing in relation to the nature of the "author" who adopts them, respectively issues them or concludes them. As a result, it can be any public authority or institution or, in general, any legal person under public or private law. It is not excluded that the author of the act is even a natural person, such as, for example, the guardian who, under the conditions of art. 143 et seq. C. civ., Represents the child under his guardianship in various patrimonial legal acts.

Fifth, the generic reference of art. 263 para. (1) of the Civil Code, "any measure concerning the child, regardless of its author", supports the interpretation that all measures, regardless of their nature (normative, administrative, judicial, civil, disciplinary, educational, social, economic, etc.) or the "quality" of the one who disposes of it (public authority or institution, legal person of public or private law or natural person). Practically, from the aspect of the nature of the measure, the provisions of art. 263 para. (1) The Civil

Code doubles the provisions of art. 2 para. (1) of Law no. 272/2004. In this context, we point out that, in the content of art. 263 para. (1) of the Civil Code, the specification regarding the "priority" of the superior interest of the child in taking the measures concerning him was omitted.

3.3 The rights and obligations of the child's parents or other persons

Article 2 para. (3) of Law no. 272/2004 provides that "the principle of the best interests of the child is imposed including in relation to the rights and obligations of the child's parents, other legal representatives, as well as any persons to whom they have been legally placed"

We specify that the "rights and obligations" that belong to the parents in connection with the person and the child's property constitute, according to art. 483 para. (1) and art. 487 of the Civil Code, "the content of parental authority" [3]. Moreover, in its initial part, art. 483 para. (2) The Civil Code provides that "parents exercise parental authority only in the best interests of the child". Compared to the provisions of art. 471 para. (1) of the Civil Code, the parental authority has the same content in case of adoption. Indeed, "the adopter has the rights and duties of the parent towards the adopted child towards the adopted child".

Article 263 para. (3) The Civil Code provides that "procedures relating to the relationship between parents and children must ensure that the wishes and interests of parents regarding children can be brought to the attention of the authorities and that they take into account the decisions they take". In accordance with those expressed in the doctrine, the minimum requirement of this principle is that, in these procedures, parents be summoned (summoned) and heard to express their views on the relationship between them and the child.

In this context, we appreciate that the text is intended to give legal relevance to "the wishes and interests of parents". However,

due to the faulty way in which it is drafted, it can also be interpreted as meaning that, in proceedings relating to the relationship between parents and children, there is no question of respecting the principle of the best interests of the child. Thus, the text, referring to a "special category of proceedings" (on the relationship between parents and children), takes precedence over other legal provisions, including those establishing the "priority of the best interests of the child". Also, as I mentioned earlier, congenitally, interests are legal (legitimate). Instead, "desires" may or may not be in accordance with the law. Obviously, under this aspect, art. 263 para. (3) The Civil Code ignores the requirements of the principle of legality. In view of these observations, we consider it appropriate, as a matter of law, to amend this text, possibly, in the sense that "the procedures relating to the relationship between parents and the child must ensure that they take them into account in the decisions they take, but only in so far as they are compatible with the best interests of the child".

On the other hand, other "legal representatives" of the child, evoked by art. 2 para. (3) Civil Code, in reality, are only the guardians, according to art. 42 para. (2) and art. 43 para. (2) C. civ.

Instead, the "guardian" does not have the quality of "legal representative" of the child. Indeed, pursuant to art. 183 para. (1) of the Civil Code, "in cases where guardianship is established, the rules of the mandate shall apply, unless, at the request of the interested person or ex officio, the court of guardianship will decide that it is necessary to invest the curator with the rights and the obligations of an administrator in charge of the simple administration of another's assets". The lack of the quality of "legal representative" of the curator results more clearly from the provisions of art. 58 para. (1) thesis I C. pr. Specifically, according to them, "in case of

emergency, if the natural person lacking the capacity to exercise civil rights does not have a *legal representative*, the court, at the request of the interested party, will appoint a special curator to represent him until the appointment the *legal representative*, according to the law".

A special situation has *the president of the county council and the mayor of the sector of the municipality of Bucharest* in whose territorial area the child resides, against whom the court has ordered the opening of the adoption procedure. Thus, according to art. 32 para. (5) of Law no. 273/2004, from the date of finality of the court decision ordering the opening of the adoption procedure, "the parental rights and obligations of natural parents or, as the case may be, those exercised by natural or legal persons shall be suspended and shall be exercised by the chairman county or, as the case may be, by the mayor of the sector of the Bucharest municipality in whose territorial area the child resides "[letter a)]. We specify that "the parental rights and obligations exercised at the moment of admitting the request by the president of the county council, the mayor of the Bucharest municipality in whose territorial area the child resides or, as the case may be, as guardian are maintained" [lit. b)]. Under the conditions of par. (6), "the effects of the court decision to open the adoption procedure are maintained until the child reaches the age of 14 (thesis I). "As an exception, the effects of the decision extend beyond this date, until the approval of the adoption, in the case of the child for whom there are requests for adoption from some families or certified persons" [Thesis II].

In extremis, the analyzed text also refers to any "persons to whom he (the child) has been legally placed" (p.n., s.n.).

We emphasize that, pursuant to art. 44 of Law no. 272/2004, "any child who is, temporarily or permanently, deprived of the protection of his parents or who, in order to protect his interests, cannot be left in their

care has the right to alternative protection" [para. (1)] Alternative protection includes the establishment of guardianship, special protection measures and adoption [paragraph 2] .According to Article 59 of Law No 272/2004, protection measures are placement [letter a)], placement in emergency regime [letter b)] and specialized supervision [letter c)].

From the analysis of the provisions of Law no. 272/2004, dedicated to placement and emergency placement, it results that the placement of the child can take place in a family, foster carer, special protection service [day, family or residential type (public or private)].

Finally, we point out that, under the provisions of art. 2 para. (3) of Law no. 272/2004, in disagreement with the provisions of art. 6 lit. a) and even with par. (1) and (4), the legislator failed to specify that the principle of superior interest is imposed with "priority". Basically, we are in the presence of a normative inconsistency that, by law, should be eliminated.

3.4. The steps and decisions that concern children

According to art. 2 para. (4) of Law no. 272/2004, "the principle of the best interests of the child shall prevail in all proceedings and decisions concerning children, regardless of whether they are taken by public authorities or authorized private bodies or by the courts in resolving cases."

Also, pursuant to par. (5), „the persons provided in par. (4) are obliged to involve the family in all decisions, actions and measures concerning the child and to support the care, upbringing and formation, development and education of the child within the family”.

The reproduced texts give us some particular underlinings.

First of all, under the conditions of this norm, the prevalence of the best interests of the child does not aim at “respecting and promoting the rights of the child”, but “all steps and decisions concerning children”. Obviously, these steps or decisions, being regarding children, have as object, either directly or indirectly, their rights.

Secondly, "steps" have the meaning of actions taken by an authority or institution or even a natural or legal person in order to obtain a certain result favorable to the child. For example, art. 19 para. (4) of Law no. 119/1996 on civil status documents obliges the public social assistance service in whose administrative-territorial area the child was found to take the necessary steps in order to register his birth [4]. In this case, the purpose of registering the birth of the child is to respect the child's right to identity. Obviously, in order to be in the best interest of the child, these steps must have as finality the establishment of the child's identity as soon as possible.

Thirdly, in the context of the rule under review, the term 'decision' is generic, having the meaning of a decision taken by a body following the analysis of an issue. However, the text refers *expressis verbis* to "public authorities", "private bodies" and "courts". We point out that the courts are provided both explicitly and implicitly, by listing the public authorities”. We also note that "public institutions" are omitted.

Fifth, the term "family" has the meaning provided by art. 4 lit. b) of Law no. 272/2004, ie "their parents and children". However, the provisions of art. 2 para. (5) are meant to give satisfaction to the child's right to live in his natural family environment, according to art. 35 et seq. of Law no. 272/2004.

References

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- [2] *Civil Code*, art. 2 para. (2), art. 262 para. (2), art. 272 para. (2), art. 324 para. (1), art. 383 para. (2) and art. 396 para. (1);
- [3] Teodor Bodoaşcă, *Opinions regarding the parental authority in the regulation of the Civil Code*, in *Studies of family law*, cit. supra, p. 330 et seq .;
- [4] *Law no. 119/1996*, published in the Official Gazette of Romania, Part I, no.282 of November 11, 1996 and, then, republished in the Official Gazette of Romania, Part I, no.339 of May 18, 2012, being subsequently amended and supplemented[6];
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- [6] Cosmina Flavia Bobar, *Considerations on the Best Interests of the Child as a Principle of Exercising Parental Authority*, Journal of Legal Studies, Sibiu, 2016;
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