NEW ASPECTS IN THE MATTER OF PROTECTION MEASURES FOR PEOPLE WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES

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Abstract

In order to comply with the Decision of the Constitutional Court no. 601/2020, the Law no. 140/2022 on some protection measures for persons with intellectual and psychosocial disabilities and amending and completion of some normative acts was adopted. According to article 26 of the Law, most of its provisions entered into force 90 days after the date of publication in the Official Gazette of Romania, i.e. on August 18, 2022, except for the provisions of article 20 paragraph (6) thesis III and of article 23, which entered into force 3 days after publication. The measure of placing under judicial interdiction has been replaced, the current study aiming to analyze the new legal instruments of support and protection that are addressed to these categories of vulnerable persons that were created by Law no. 140/2022. The adoption of this normative act, whose solutions we will present in this study, is welcome and long awaited because the lack of a legislative framework in this important matter starting with the date of the publication of the Constitutional Court Decision left open the way for the courts to issue divergent solutions in cases having as object the "judicial interdiction". Within 3 years from the entry into force of Law no. 140/2022, the ex officio re-examination of the injunction measures by the courts is carried out, in the sense of ordering either their replacement with the protective measures provided for by the new regulation, or the lifting of the measure, and the fulfilment of the deadline does not remove the obligation of the courts to re-examines, further, ex officio, all the measures of placing under judicial interdiction.

Keywords: *persons with intellectual and psychosocial disabilities, assistance for concluding legal documents, judicial counselling, special guardianship, protection mandate.*

1. Introduction

According to article 164 paragraph (1) of the Civil Code, in the form prior to the amendments made by Law no 140/2022, "A person who lacks the discernment necessary to look after his or her own interests, due to alienation or mental debility, shall be placed under a judicial interdiction." The doctrine extracted the following features of the judicial interdiction: a civil law protection measure; a measure taken by judicial means; it applies absolutely strictly only to natural persons lacking discernment due to alienation or mental debility; its effect consists in depriving the natural person of exercise capacity and establishing guardianship[1]. The singular criticisms that were expressed in the doctrine related to this regulation were rightfully aimed at the fact that "for the most part, the New Civil Code would merely resume, almost unchanged, the provisions of the Family Code of 1953 with regard to the substantive aspects of the

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[1] O. Ungureanu, C. Munteanu, *Drept civil. Persoanele în reglementarea noului Cod civil (Civil law. Persons under the new Civil Code)*, Hamangiu Publishing House, Bucharest, 2011, p. 264. For a presentation of the judicial interdiction, see also M. Nicolae (coordinator), V. Bîcu, G-A Ilie, R Rizoiu, *Drept civil. Persoanele (Civil law. Persons)*, Universul Juridic Publishing House, Bucharest, 2016, pp. 239-251.

measure, and the New Civil Procedure Code on those of Decree no. 32/1954, regarding the procedure for taking this measure, or, given the age of the Family Code and Decree no. 32/1954, it is obvious that since then concepts have evolved and practical needs demanded a more modern and flexible regulation, as is the case in most modern states, as well as other legal systems"[2].

The need for a paradigm shift in the matter was imposed in order to align the national legislation with the standards provided for by article 12 of the Convention on the Rights of Persons with Disabilities, signed by Romania on September 26, 2007 and ratified by Law no. 221/2010[3] which enshrines certain guarantees that must accompany the protection measures instituted regarding persons with disabilities and provides in point 1 that "persons with disabilities have the right to recognition, wherever they may be, of their legal capacity". Ever since 2018, the Commissioner for Human Rights of the Council of Europe has requested the Romanian authorities to take measures to replace the system of "substituted decision-making" with that of "assisted decision-making", which would ensure these people some independent assistance, away from conflicts of interest and subject to regular judicial control[4].

By Decision no. 601[5] of July 16, 2020, the Constitutional Court found that the provisions of article 164 paragraph (1) of the Civil Code, as stated above, are unconstitutional. The Court held that in the absence of the establishment of the guarantees that accompany the measure of protection of the placing under judicial interdiction, prejudices are brought to the constitutional provisions of article 1 paragraph (3), of article 16 paragraph (1) and of article 50, as interpreted according to article 20 paragraph (1) and in the light of article 12 of the Convention on the rights of persons with disabilities. For the compliance with the Decision of the Constitutional Court no. 601/2020, the Law no. 140/2022 on some protection measures for persons with intellectual and psychosocial disabilities and amending and completion of some normative acts was adopted[6].

The adoption of this normative act, solutions of which we will present below, is welcome and long awaited because the lack of a legislative framework in this important matter starting with the date of the publication in the Official Gazette of the Constitutional Court Decision no. 601/2020 left open the way for the courts to issue

[2] C. Chirică, *Ocrotirea anumitor persoane fizice prin măsura punerii sub interdicție judecătorească în lumina dispozițiilor Noului Cod Civil și a Noului Cod de Procedură Civilă (The protection of certain natural persons by means of a measure of injunction in the light of the provisions of the New Civil Code and the New Code of Civil Procedure)*, in Law Review no.1/2012, p. 55.

[3] Published in the Official Gazette of Romania, Part I, no. 792 of November 26, 2010. The Convention on the Rights of Persons with Disabilities was adopted in New York by the United Nations General Assembly on December 13, 2006 and opened for signature on March 30, 2007. See also General Comment no. 1/2014.

[4] Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, Report following her visit to Romania from 12 to16 November 2018, paragraph 53 of the Report.

[5] Published in the Official Gazette of Romania, Part I, no. 88 of January 27, 2021. For a presentation of the jurisprudence of the Constitutional Court on the matter, see also I. Bratiloveanu, *The judicial interdiction. Special review on the jurisprudence of the Constitutional Court*, in CKS 2021 (Challenges of the Knowledge Society), Bucharest, 2021, pp. 569 – 579.

[6] Published in the Official Gazette of Romania, Part I, no. 500 of May 20, 2022. For a presentation of the new legal framework in this matter, see also R.M. Roba, *Considerations regarding Law no. 140/2022 on some protection measures for persons with intellectual and psychosocial disabilities and amending and supplementing some normative acts*, in Legal Current no. 2(89)/2022, pp. 82-89.

divergent solutions in cases having as object the "judicial interdiction"[7]. Within 3 years from the entry into force of Law no. 140/2022, the ex officio re-examination of the injunction measures by the courts is carried out, in the sense of ordering either their replacement with the protective measures provided for by the new regulation, or the lifting of the measure, and the fulfillment of the deadline does not remove the obligation of the courts to re-examines, further, ex officio, all the measures of placing under judicial interdiction[8]. The new regulation provides for the organization by the National Institute of Magistracy with priority of continuing professional training actions for judges and prosecutors for the years 2022-2024 in this field[9].

2. Assistance for concluding legal documents

The new support measure of assistance for the conclusion of legal documents is regulated in Chapter I of Law no. 140/2022, articles 1-6, being a non-jurisdictional measure under the competence of the notary public that does not affect the exercise capacity of the major person.

The measure of assistance for the conclusion of legal documents is addressed to the major person who, due to an intellectual or psychosocial disability, needs support to take care of his person, manage his patrimony and to exercise, in general, his rights and civil liberties. It is a priority measure; the judicial protection measures (judicial counseling and special guardianship) are subsidiary in nature and will not be able to be instituted if the protected person can be adequately protected through assistance for the conclusion of legal documents[10].

As well as the duration, the measure of assistance for the conclusion of legal documents is ordered for a maximum of 2 years, which can be renewed. Law no. 140/2022 does not include provisions limiting the number of renewals. The measure is free of charge, but the major person is obliged to reimburse the assistant for the reasonable expenses advanced by the latter in the performance of his task.

The assistant is authorized to act as an intermediary person between the major person who benefits from the assistance and third parties. According to the law, it is presumed that the assistant acts with the consent of the major person in granting the assistance, it being a simple presumption. The personal assistant can transmit and receive information on behalf of the major person and can communicate the decisions related to him to third parties, but he does not conclude the documents on behalf of the assisted major person nor approve the documents that the assisted major person concludes alone. By virtue of this role, the assistant must act in relations with third parties according to the preferences and wishes of the assisted major person.

According to article 4 paragraph (1) of Law no. 140/2022, the quality of assistant can be held by a person who can be appointed guardian; being applicable the

[7] I-A Filote-Iovu, *Divergențe jurisprudențiale în cauzele având ca obiect "punere sub interdicție judecătorească*" (*Differences of case-law in cases concerning "injunctions"*), available at https://www.juridice.ro/750387/divergente-jurisprudentiale-in-cauzele-avand-ca-obiect-punere-sub-interdictie-judecatoreasca.html.

[8] According to article 20 paragraphs (2) and (6) of Law no. 140/2022.

[9] According to article 25 of Law no. 140/2022.

[10] According to article 164 paragraphs (3) and (5) of the Civil Code, as amended by article 7 point 22 of Law no. 140/2022.

cases of incompatibility with the quality of guardian provided in article 113 paragraph 1) letter a)-d), f) and paragraph 2) of the Civil Code. It is about the following cases of incompatibility: the minor, the person who benefits from special guardianship or judicial counseling, assistance for the conclusion of legal acts, who has been granted a protection mandate or placed under guardianship; also, the person deprived of the exercise of parental rights or declared incapable of being a guardian; the person whose exercise of civil rights was restricted and the one with bad behavior that must be recognized as such by the court; the person who was removed from the exercise of guardianship under the conditions of article 158 of the Civil Code[11], and, finally, the person who, due to conflicting interests with those of the represented minor, could not be his guardian. As can be noted, the case of incompatibility determined by the state of insolvency of the person provided for by letter e) was excluded. Also, the case provided for by letter g) was excluded from the incompatibility with the quality of assistant, according to which the person who was removed by authentic document or by will by the parent who exercised alone at the time death the parental authority cannot be a guardian.

Regarding the control mechanisms of the measure, article 5 of Law no. 140/2022 stipulates the role of the guardianship authority to which the assistant is obliged to submit an annual report or, as the case may be, at the end of the term for which he was appointed regarding the fulfillment of his task and the role of the guardianship court in whose territorial jurisdiction he is domiciled or the residence of the major person who benefits from the measure of assistance that will resolve the complaints that any person can make regarding the activity of the assistant harmful to the major. The complaint regarding the activity of the assistant is urgently resolved by the court of guardianship, through an executive order, with the summoning of the parties and the hearing of the assisted major person, the order being communicated to the notary public and the guardianship authority[12].

Finally, article 6 paragraph (1) letters a) - e) of Law no. 140/2022 lists the cases in which the measure of assistance for the conclusion of legal documents ceases. Thus, this measure ceases upon the expiration of the term for which it was ordered. Also, the assisted major person can make a request for the termination of the assistance that he addresses to the notary public. Another case of termination of assistance concerns the situation in which a protective measure is ordered against the major person or the assistant. The measure of assistance also ceases if the guardianship court admits the complaint regarding the activity of the assistant harmful to the major person. Finally, the assistance ends on the date of the death of the major person or the assistant, as well as by the express resignation of the assistant.

It should be noted that the appointment of the assistant and the termination of the assistance are registered in the National registry of support and protection measures taken by the notary public and the guardianship court[13]. In case of replacing the assistant, according to article 6 paragraph (2) of Law no. 140/2022, it is sufficient to

[11] Article 158 of the Civil Code with the marginal name *"Removal of the guardian"* provides: *"Apart from other cases provided by law, the guardian is removed if he commits abuse, serious negligence or other acts that make him unworthy to be a guardian, such as and if he does not properly fulfill his task"*.

[12] Article 5 paragraphs (3) – (5) of Law no. 140/2022.

[13] According to article 138[4] paragraph (2) of the Law on public notaries and notarial activity no. 36/1995, republished, amended by article 9 point 5 of Law no. 140/2022.

register the new assistant in the aforementioned register.

The procedure for appointing the assistant for the conclusion of legal documents is regulated in Chapter V, Section 7^1-a, articles 138^1-138^5 of the Law on notaries public and notarial activity no. 36/1995[14], as supplemented by article 9 point 5 of Law no. 140/2022, to which we will refer further.

The application for appointment made by the major person together with the person to be appointed assistant includes the identification data of the applicants, the reasons on which it is based, a summary inventory of the assets of the major person, as well as any other relevant documents that justify the institution of the measure. According to article 15 letter f^1) from Law no. 36/1995, the notary public in the notary office located in the jurisdiction of the court where the major person has his domicile or residence is competent.

From a procedural point of view, the notary public sets a deadline for resolving the request and communicates it, in a copy, to a person from the major's family so that he or she can raise objections to the institution of the measure. At the request of the major, a person with whom he lives can be cited, even if he is not his relative. The law provides that any other concerned person can participate in the procedure of appointing the assistant, provided that the major person does not object.

According to article 138^2 of Law no. 36/1995, it is mandatory to listen to the major person, in the presence of the person to be appointed assistant, and in terms of the obligations of the notary public, he must check if the major person understands the meaning of the procedure and if he is able to express his wishes and preferences.

The request for the appointment of the assistant is resolved by a reasoned conclusion that is communicated to the major person, the assistant, the guardianship authority specifying that in addition to the conclusion, the guardianship authority will receive copies of the documents attached to the request and the National register of records of support and protection measures taken by the notary public and the guardianship court.

Art. 138^5 of Law no. 36/1995 lists the situations in which the notary public rejects the request to appoint an assistant, the most common in practice being the one provided for in letter a), respectively when there are serious doubts about the major's understanding of the meaning of the request. The other situations, as provided for in letter b) - e) refers to the existence of serious doubts regarding the possibility for the major to express his wishes and preferences, the fear that he will suffer damage by appointing the assistant, the formulation of objections by a member of the major's family or another interested person and, finally, failure to fulfill the legal conditions for appointment.

According to the law, the major person or the person indicated in the application can file a complaint against the decision rejecting the application within 30 days of its communication. The guardianship court in whose territorial constituency the major person who requested the appointment of the assistant resides is competent to resolve the complaint. The complaint is resolved by a decision that is not subject to any appeal[15].

[14] Republished in the Official Gazette of Romania, Part I, no. 237 of March 19, 2018, with subsequent amendments.

[15] Art. 138^5 of the Law of Public Notaries and Notarial Activity no. 36/1995.

3. Judicial counselling and special guardianship

Depending on the degree of deterioration of his/her mental faculties, the adult person can benefit from the measure of judicial counselling or the measure of special guardianship, as regulated in Book I, Title III, Chapter III of the Civil Code whose name was changed from *"Protection of the court-ordered interdiction"* to *"Protection of the major person through judicial counselling and special guardianship"*. The measure of assistance for the conclusion of legal documents is a priority, being followed by judicial counselling and, last but not least, by special guardianship. A measure of protection cannot be taken toward a major person unless it is necessary for the exercise of his/her civil capacity.

A person can benefit from judicial counselling if the deterioration of his/her mental faculties is partial and it is necessary to be constantly advised for the exercise of his/her rights and freedoms. Such a protection measure is ordered for a period that cannot exceed 3 years. As far as the scope of the persons who can benefit from the measure of judicial counselling is concerned, it is about adults or minors with restricted capacity to exercise their rights, with the clarification that in the case of the latter, the measure can be ordered one year before reaching the age of 18 and begins to take effect from this date.

A person can benefit from special guardianship if the deterioration of his/her mental faculties is total and, as the case may be, permanent and it is necessary to be constantly represented in the exercise of his/her rights and freedoms. Such a protection measure is ordered for a period that cannot exceed 5 years. However, according to the law, if the damage to the protected person's mental faculties is permanent, the court can order the extension of the special guardianship measure for a longer period that cannot exceed 15 years. Both adults and minors with restricted exercise capacity can benefit from the measure of special guardianship.

In the following, the effects of judicial protection measures will be exposed in terms of the legal capacity of the natural person, some of which are common to both measures, others being specific to each of them.

If the law does not provide otherwise, in the case of the person who benefits from judicial counselling, the rules regarding the guardianship of minors who have reached the age of 14 are applied, and in the case of the person who benefits from special guardianship, the rules regarding the guardianship of minors who have not over the age of 14[16]. So, pursuant to the decision based on which the protection measure was instituted, the guardianship court shall establish, depending on the degree of autonomy of the protected person and his/her specific needs, the categories of documents for which approval is necessary or, as the case may be, his/her representation. Therefore, the guardianship court can order that the protective measure concerns even only one category of documents. In addition, the court can order that the protection measure refers only to the person under protection or only to his/her assets. The order of the protective measure shall not affect the capacity of the protected person to conclude the legal deeds for which the court has established that the consent of the protector or, as the case may be, his/her representation is not necessary.

In the matter of non-patrimonial relations, with regard to the marriage of the person who benefits from a judicial

[16] According to article 171 of the Civil Code as amended by article 7 point 29 of Law no. 140/2022.

protection measure, article 276 of the Civil Code, as amended by article 7 point 41 of Law no. 140/2022, establishes a possible preventive control by regulating the obligation of the person who benefits from judicial counselling or special guardianship to notify in advance, in writing, the guardian who can formulate opposition to the marriage, in which case the guardianship court will decide on the validity of the opposition. Article 275 of the Civil Code, as amended by article 7 point 40 of Law no. 140/2022, establishes the impediment to marriage based on guardianship status. The protected person can conclude or modify a matrimonial agreement only with the consent of the legal guardian and with the authorization of the guardianship court[17]. The court can pronounce the separation of assets when this is in the interest of the protected person and the request is made by the guardian of the protected spouse or the family council[18]. Article 375 paragraph (3) of the Civil Code, as amended by article 7 point 51 of Law no. 140/2022, stipulates that divorce by the consent of the spouses cannot be admitted by the agreement of the spouses by administrative means or by notarial procedure; the new regulation, unlike the previous one, allows divorce by agreement of the parties only through the courts, specifying that there can be no agreement on requests ancillary to the divorce[19].

If one of the parents benefits from the measure of special guardianship, according to article 507 of the Civil Code, as amended by article 7 point 57 of Law no. 140/2022, he retains the right to supervise the child's upbringing and education, as well as the right to consent to his adoption, unless he is unable to express his will due to lack of discernment, this being, in our opinion, a case of unilateral exercise of parental authority.

If with respect to one of the parents, judicial counselling was instituted, according to article 503 paragraph 1^1 of the Civil Code, introduced by article 7 point 56 of Law no. 140/2022, the guardianship court can decide that the rights and duties regarding the child's assets are exercised by the other parent, and if the protected adult exercises parental authority alone, the court orders, depending on the circumstances, on the continuation of the exercise of parental authority or establishing guardianship over the child.

In the matter of patrimonial relations, the person protected by the measure of judicial counselling, having limited exercise capacity, can conclude the legal documents that the minor who has reached the age of 14 can also do. The rule is that the legal acts are concluded by the protected major through judicial counselling with the consent of the guardian, and in the cases provided by law[20], also with the authorization of the guardianship court. Article 41 paragraph (3) of the Civil Code lists the legal acts that he can conclude on his own, without any approval or authorization: conservation acts, administrative acts that do not prejudice him, acts of acceptance of an inheritance or acceptance of liberalities without encumbrances as well as dispositional acts of small value, current and which execute on the date of their conclusion.

[17] Article 337 of the Civil Code, the form in force from August 18, 2022.

[18] Article 370 paragraph (1) of the Civil Code introduced by article 7 point 48 of Law no. 140/2022.

[19] Article 930 paragraph (2) of the Civil Procedure Code, as amended by article 8 point 22 of Law no. 140/2022.

[20] These are the acts of disposal provided for in article 144 paragraph (2) of the Civil Code: acts of alienation, division, mortgage or encumbrance with other real charges, relinquishment of patrimonial rights and any act that goes beyond the administration acts.

Regarding the person for whom the special guardianship is established, the legal acts are concluded in his name by the guardian, it being forbidden to conclude them directly by the protected person. The categories of acts that the person protected by this measure can conclude alone, are listed in the content of article 43 paragraph (3) of the Civil Code: the specific acts provided by law, conservation acts and disposition acts of small value, current in nature and executed at the time of their conclusion.

Regarding the sanction applicable to acts concluded with non-compliance with the legal provisions by the major person who benefits from a measure of judicial protection, article 172 paragraph (1) of the Civil Code[21], provides that acts are voidable or benefits arising from them can be reduced, even without proof of damage and even if at the time of their conclusion he had discernment. Herewith, testamentary dispositions of the protected adult are considered valid, provided they are authorized or confirmed by the guardianship court[22]. On the other hand, the legal acts concluded before the establishment of the protection measure are voidable or the benefits arising from them can be reduced only if the condition provided by article 172 paragraph (2) of the Civil Code is met that "*on the date when they were concluded, the lack of discernment was notorious or known to the other party*". The new regulation[23] gives the possibility to the co-contractor of the protected adult, even if he knew about the establishment of the judicial protection measure, to request the maintenance of the contract, to the extent that it offers balancing benefits, by reducing or increasing his own benefit; he cannot oppose the annulment of the contract, nor can he exercise the action for annulment. Paragraph (1) of article 1205 of the Civil Code remained unchanged, according to which *"The contract concluded by a person who, at the time of its conclusion, was, even if only temporarily, in a state that made him unable to realize the consequences of his act is voidable"*.

Regarding civil liability in tort, the law distinguishes depending on the measure of protection instituted and the discernment of the protected person at the time of the commission of the offence; thus, by the provisions of article 1366 of the Civil Code, as amended by article 7 point 66 of Law no. 140/2022, the relative legal presumption regarding the lack of tortious capacity of the person benefiting from special guardianship and the relative legal presumption regarding the tortious capacity of the person benefiting from judicial counselling were established.

For the benefit of the protected person, the new regulation contains a series of guarantees such as the regular revaluation of the chosen protection regime or the possibility of the permanent individualization of the protection measure by the guardianship court, considering the specific situation of the adult person in question. Thus, article 168 paragraph (6) of the Civil Code, as amended by article 7 point 26 of Law no. 140/2022, orders that the guardian or the legal representative of the protected person to have the obligation to notify the guardianship court whenever there are data or circumstances justifying the revaluation of the measure, as well as at least 6 months before the expiry of the duration for which it was ordered, with a view for its revaluation. The guardianship authority has the role of verifying the fulfilment of this duty. In case of non-fulfilment, the

[21] Amended by article 7 point 29 of Law no. 140/2022.
[22] Article 172 paragraph (3) of Law no. 140/2022.
[23] According to article 46 of the Civil Code as amended by article 7 point 7 of Law no. 140/2022.

guardianship authority shall notify the guardianship court, which can order, following the same procedure, the extension, the replacement or lifting of the protection measure.

In the new regulation, considering the inner features that animate them, the protection of the disabled adult remains primarily the responsibility of the family. Thus, article 170 paragraph (2) of the Civil Code, as amended by article 7 point 28 of Law no. 140/2022, stipulates as follows: *"In the absence of an appointed guardian, the guardianship court shall appoint, as a matter of priority, in this quality, if there are no valid opposite reasons, the spouse, the parent, a relative or in-laws, a friend or a person who lives with the protected person if the latter has close and stable ties with the protected person, able to fulfil this task, taking into account, as the case may be, the bonds of affection, the personal relationships, the material conditions, the moral guarantees presented by the person considered to be appointed guardian, as well as the proximity of their homes or residences"*. As a novelty, it is also considered the situation in which none of these persons can assume guardianship, in which case the guardianship court shall appoint a personal representative, aiming to create a profession for the personal representative[24]. Upon the appointment of the guardian, the guardianship court shall take into consideration the preferences expressed by the protected person, his/her usual relationships, the interest expressed with regard to his/her person, but also any possible recommendations formulated by the people close to him/her, as well as the lack of interests contrary to the protected person[25].

Article 174 paragraph (2) of the Civil Code, as amended by article 7 point 32 of Law no. 140/2022, lays out in detail the legal guardian's duties that emphasize his/her role as a person who provides permanent support to the protected person, namely: to take into account, as a matter of priority, the will, the preferences and the needs of the protected person, to provide the support necessary in establishing and expressing of his/her will and to encourage his/her to exercise his/her rights and fulfil his/her obligations alone; to cooperate with the protected person and to respect his/her private life and dignity; to ensure and to allow, whenever possible, the information and the clarification of the protected person, in a manner adapted to his/her condition, about all the acts and the facts that could affect him/her, about their utility and degree of urgency, as well as about the consequences of a refusal from the part of the protected person to conclude them; to take all necessary measures in order to protect and to achieve the rights of the protected person; to cooperate with natural and legal persons with duties in the care of the protected person; to maintain, as far as possible, a personal relationship with the protected person; in the cases provided by law, to undertake all the necessary steps for the preparation of evaluation reports and notification to the guardianship court.

The protected person can be cared for at home, in a social department or in another institution. According to article 174 paragraph (3) of the Civil Code, as amended by article 7 point 32 of Law no. 140/2022, the guardianship court will decide the place of care after listening to the protected

[24] Article 170 paragraph (3) of the Civil Code, the form in force from August 18, 2022. The provisions of article 118 paragraph (2) and article 170 paragraph (3) of Law no. 287/2009 regarding the Civil Code, republished, with subsequent changes, as they were regulated, respectively modified by Law no. 140/2022 will enter into force on the date provided by the special law regarding the personal representative.

[25] Article 170 paragraph (4) of the Civil Code, the form in force from August 18, 2022.

person, taking the opinion of the family council and consulting the medical, psychological evaluation and social investigation surveys. The authorization of the guardianship court shall be necessary to change the place of care.

Article 177 paragraph (1) of the Civil Code, as amended by article 7 point 35 of Law no. 140/2022, lists the causes of termination of the protection measure: 1) death of the protected person; 2) expiration of the duration; 3) the replacement of the measure; and 4) lifting the measure.

Furthermore, we shall present the changes brought by Law no. 140/2022 regarding the procedure for establishing judicial counselling and special guardianship.

By article 8 point 25 of Law no. 140/2022, Chapter I of Title II, Book VI, articles 936 - 943, with the generic name *"Procedure for the establishment of judicial counselling or special guardianship"* was introduced in the Civil Procedure Code[26].

Law no. 140/2022 has not brought any changes with regard to the territorial competence of the courts that must rule on the protection measure, the request for the establishment of judicial counselling or special guardianship falling within the competence of the guardianship court in the jurisdiction of which is located the domicile[27].

In addition to the elements provided for by common law (Article 194 of the Civil Procedure Code), the request for the establishment of the protective measure shall include the facts from which it results the deterioration of his/her mental faculties, the means of evidence, the data related to the family, social and patrimonial situation of the person, any other elements regarding his/her degree of autonomy, as well as the name of his/her attending physician, to the extent that they are known to the applicant, the purpose of the rule being that the court could form, from the very beginning of the process, an accurate and exhaustive picture of the situation of the person in question.

Given that the protective measures must correspond to the degree of incapacity and be individualized according to the needs of the protected person, a favourable provision for the person in question is also that the court is not restricted by the object of the application and can institute a protective measure different from the one requested.

As in the previous regulation[28], the procedure for establishing the protective measure goes through the following phases: the pre-judgment phase, non-contentious[29]; the trial phase, contradictory phase[30] and the

[26] Law no. 134/2010 regarding the Civil Procedure Code, republished in the Official Gazette of Romania, Part I, no. 247 of April 10, 2015, with subsequent amendments and additions.

[27] For the interpretation according to which the notion of "domicile" can have no other meaning than that assigned by the rules of the Civil Code, see I. Ilies Neamt, I.-A. Filote-Iovu, *O analiză a orientărilor jurisprudențiale privind competența teritorială a instanțelor învestite cu soluționarea cererilor având ca obiect ocrotirea persoanei fizice (An analysis of case-law guidelines on the territorial jurisdiction of the courts dealing with applications for protection of the individual)* in Family Law Review no. 2/2022, pp. 164 – 190.

[28] For a presentation of the procedure of placing under judicial interdiction, see A. Tabacu, *Drept procesual civil (Civil Procedural Law)*, Universul Juridic Publishing House, Bucharest, 2019, pp. 542 – 547; M. Fodor, *Punerea sub interdicție în reglementarea Noului Cod Civil și a Noului Cod de Procedură Civilă (The injunction under the New Civil Code and the New Code of Civil Procedure)*, in Law Review no. 2/2013, pp. 29 - 47; G. Boroi, M. Stancu, *Drept procesual civil (Civil Procedural Law)*, 5th edition, revised and added, Hamangiu Publishing House, 2020, pp. 962 – 967.

[29] Article 938 et seq. of the Civil Procedure Code.

[30] Article 940 of the Civil Procedure Code.

phase of the communication of the decision[31].

In the preliminary phase, the president of the court notified with the request for the establishment of the measure of judicial counseling or special guardianship shall order to communicate to the person of whom the establishment of the protection measure is requested the copies of the application and from the attached documents, the same communication being made to the prosecutor, when the request was not introduced by him. As a novelty, in this procedure, shall be to the benefit of the person in respect of whom the establishment of the protection measure is requested the provisions of article 938 paragraph (2) of the Civil Procedure Code which allow the appointment of a lawyer ex officio in case the person in question did not choose a lawyer.

In this phase, the prosecutor shall carry out the necessary research, among which, he shall order the performance of a medical and a psychological evaluation[32], for the person hospitalized in a health institution, he will order the drawing up a report and he shall order the preparation of a social survey report by the guardianship authority.

With regard to the person in respect of whom the establishment of the protection measure is requested, involuntary temporary hospitalization can be ordered pursuant to the conditions of article 939 of the Civil Procedure Code, as amended by article 8 point 29 of Law no. 140/2022. The prosecutor, upon notification of the physician who performs the medical evaluation, shall request, on solid grounds, the guardianship court to take this measure. Involuntary temporary hospitalization in a specialized health institution shall be ordered in case of need for a longer observation of the health condition of the person whose protection is required, which cannot be carried out otherwise, and the person refuses hospitalization. As a novelty brought by Law no. 140/2022, it is stipulated that the measure of involuntary temporary hospitalization can be taken for a maximum of 20 days, compared to 6 weeks which was the maximum duration in the procedure of placing under judicial interdiction and it is ordered only after listening to the person whose protection is requested. The involuntary temporary hospitalization is ordered on solid ground and proportionally to the goal pursued. The measure restricting the freedom of the person and being ordered for the period of carrying out the evaluation reports, the provisions of article 939 paragraph (6) of the Civil Procedure Code according to which the specialized health institution immediately proceeds to the discharge of the person whose protection is requested, are to be welcomed, if it is established before the expiration of the duration of the temporary involuntary hospitalization, that this measure is no longer necessary. The court shall issue a decision that is only subject to appeal, within 3 days[33], an appeal that is to be settled within 5 days from its submission, the legislator establishing short deadlines considering the

[31] Article 941 of the Civil Procedure Code.

[32] Also see *The joint order of the Ministry of Health and the Ministry of Labor and Social Solidarity no. 3423/2128/2022 regarding the approval of the methodology and the medical and psychological evaluation report of persons with intellectual and psychosocial disabilities* published in the Official Gazette, Part I, no. 1128 of November 23, 2022. It must be said that this medical and psychological evaluation report constitutes a very important evidence because it includes conclusions regarding the nature and degree of severity of the mental condition and its foreseeable evolution, the extent of the person's needs and the other circumstances in which he is found, as well as mentions regarding the necessity and opportunity of establishing a protective measure for its benefit.

[33] The term flows from the pronunciation for those present and from the communication for those absent.

maximum duration of involuntary hospitalization.

In the next phase, the trial phase, after receiving the documents prepared in the preliminary phase, the trial term is fixed. If the law did not provide a time limit for the execution of the procedure of placing under interdiction, this being carried out according to the provisions of the common law[34], article 940 paragraph (2) of the Civil Procedure Code provides that the judgment of the application for taking new protective measures to be done urgently and as a matter of priority. On the date set for the judgment, the court is obliged to hear in the Council Chamber the person in respect of whom the protective measure is requested, asking him/her questions in order to ascertain the necessity and the advisability of instituting a protective measure, as well as to find out his/her opinion with regard to the protective regime and the person of the protector. If the court deems it to be in his/her interest, he/she can be heard at his/her home, where he/her is taken care of, or in any other place deemed appropriate by the court. Upon hearing him/her, a trustworthy person can also be present. We consider that this provision is in agreement with the overall vision of Law no. 140/2022 which emphasizes the trial: the will and the preferences of the protected person, but also his/her specific needs. If, in the case of the establishment of the measure of special guardianship, the hearing of the person whose protection is requested is mandatory, by way of exception, article 940 paragraph (5) of the Civil Procedure Code provides that the extension of the measure of special guardianship for a period longer than five years can be ordered without hearing the protected person if the medical report states that his/her hearing may be likely to affect his/her state of health or he/she is not able to express his/her will. The prosecutor attending the trial shall be mandatory. The new regulation provides that when the plaintiff waives the trial, the prosecutor can ask for the continuation of the trial, the criterion being that of the interest of the person whose protection is requested. Finally, the obligation to inform the person whose protection is requested is maintained for the entire duration of the procedure.

After the decision to institute the protective measure has remained final, the court that ruled it (First Instance or Court of Appeal) shall immediately communicate the decision in a certified copy to the institutions mentioned in article 941 of the Civil Procedure Code, as amended by article 8 point 31 of Law no. 140/2022, namely: the Local Public Community Service for Personal Records where the birth of the one placed under protection is registered, in order to make some mention on the birth certificate; to the competent health service, in order to establish a permanent supervision; the competent Office of Cadastre and Land Registration, for the registration in the Land Register, if applicable; the Trade Register, if the person placed under protection is a professional; and, the newly established National registry of support and protection measures taken by the notary public and the guardianship court.

4. Conclusions

Law no. 140/2022, taking over the recommendations of the Constitutional Court made on the occasion of delivering Decision no. 601/2020 brings the modern solutions which I have exposed in this study in order to appropriately respond to the

[34] A. Tabacu, *Drept procesual civil. Legislație internă și internațională. Doctrină și jurisprudență (Civil procedural law. Domestic and international law. Doctrine and case law)*, Universul Juridic Publishing House, Bucharest, 2019, p. 543.

needs of people with intellectual and psychosocial disabilities, by adopting this normative act aiming at combating social exclusion and discrimination, encouraging the active participation, under equal conditions, of these categories of people in civil life, as well as their social and economic reintegration, with beneficial effects including on their health condition. The solutions offered by the new regulation are perfectible, its application is to be subject to monitoring for a period of 3 years from its entry into force, at the end of which the National Authority for the Protection of the Rights of Persons with Disabilities and the Superior Council of Magistracy will draw up impact assessment reports and formulate proposals to improve the legislation.

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