Considerations Regarding the Common Exertion of Parental Authority by the Parents in the Regulation of the New Romanian Civil Code

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Abstract: The article wants to analyse the problems of the common exertion by the parents of the parental authority which, at the same time with the validation of the new Romanian Civil Code, constitutes the rule in the matter of exerting the parental authority. After an introduction presenting the parental authority notion, there is the examination of the aspects related to the common exertion of the parental authority by the cohabiting parents and by the separated parents, the parents’ agreement regarding the exertion of the parental authority, the disagreements between the parents regarding the exertion of the parental authority and the final part spotlights the conclusions of this study.

Key-Words: parental authority, parents, child, divorce, parental rights and obligations, the new Civil Code, the agreement presumption

1. Introductive considerations regarding the parental authority

In the new Romanian Civil Code [1] the parental authority is regulated in Title IV “Parental Authority” [2] of the 2nd Book “About Family”. The name of this title represents a new element in the Romanian law in matter of the relations between parents and children. But the parental authority constitutes no innovation of the Romanian legislator, as it is also consecrated in other legislations (for example, in the French Civil Code, in the Luxembourg Civil Code, in the Québec Civil Code). The Romanian legislator preferred this notion to the injury of the one of protecting the minor by means of the parents (parental protection) previously stipulated by the stipulations of the Family Code, but this option of the legislator does not seem to be the best solution. This happens whereas the authority term interpreted \textit{stricto sensu} rather spotlights the idea of power, of the children’s subordination to the parents than the one of protection the parents are obligated to provide to the child. This is why, regarding us, we consider that the responsibility term would have been much more indicated to be used in the regulation of the minor’s protection by means of the parents whereas it spotlights the care for providing and guaranteeing the child’s protection and the rights recognized by the law, according to its higher interest, as the parents are together the first ones responsible for raising their child, for the way the understand to accomplish their parental obligations and to exert their parental rights.

The Romanian legislator defines the parental authority notion in art. 483 paragraph 1 of the new Civil Code as the ensemble of rights and obligations regarding both the child’s person and goods and equally belonging to both of the parents. The Romanian legislator defines the parental authority notion in art. 483 paragraph 1 of the new Civil Code as the ensemble of rights and obligations regarding both the child’s person and goods and equally belonging to both of the parents.

The parental authority has two sides:
1. a personal side composed of parental rights and obligations regarding the minor’s person, considered as such: the right and the obligation to guide the minor child, the right and the obligation to survey the minor child, the right to settle the child’s residence and to keep him, the right to demand the child’s return from any person who keeps him with no right, the right to agree with the child’s displacement inside the country or abroad, the right to keep personal connections to the child, the right to consent to the child’s adoption, the right to consent to the child’s marriage, the right to survey the child’s raising and education, the right and the obligation to represent the minor in the civil documents or to accept his juridical documents, the obligation to raise the child, the obligation to support the child [3].
2. a patrimonial side composed of parental rights and obligations regarding the minor’s goods, respectively: the parents’ right and obligation to administrate the minor’s goods, the parents’ right and obligation to represent the minor in the civil documents or to accept his juridical documents (regarding the patrimonial side of the parental authority) [4].

The Romanian legislator does not regulate the parental authority regarding the minor’s present differently from the one regarding his goods, as it happens, for example, in the French Civil Code or in the Luxembourg Civil Code, preferring to keep the model of the Family Code and to regulate in the same chapter (Chapter II) the parental rights and obligations regarding the minor’s person together with the parental rights and obligations regarding his goods [5].

The parental authority is the most important effect of the filiation [6]. The beneficiary of the exertion of the parental rights and of the accomplishment of the parental obligations is the child, namely the person who has not reached 18 years old and who has not gained a full capacity of exertion according to the law (art. 263 paragraph 5 of the new Civil Code).

From the stipulations of the new Civil Code, it results that the exertion of the rights and the accomplishment of the parental obligations are made by respecting the following principles:

- The principle of the child’s high interest consecrated by the stipulations of art. 483 paragraph 2 of the new Civil Code stipulating that the parental authority is exerted by the parents only in the child’s high interest, with the respect due to his person;

- The principle of equality before the law between the child outside the marriage and the one inside the marriage, and also the adopted one, which is regulated by art. 260 of the new Civil Code;

- The principle of the parents’ equality in exerting the parental rights and accomplishing the parental obligations. This principle results both from the stipulations of art. 483 paragraph 1 of the new Civil Code showing that the rights and the obligations regarding the minor’s person and goods equally belong to both of the parents, and also the ones of art. 503 paragraph 1 of the new Civil Code consecrating the rule according to which the parents exert together and equally the parental authority;

- The principle of patrimonial independence in the relations between parents and children. This principle is regulated by art. 500 stipulating that the parent has no right on the child’s goods and the child has no right on the parent’s goods either, beside the right to inheritance and support.

- The principle of respecting the child’s person, resulting from the stipulations of art. 483 paragraph 2 of the new Civil Code;

- The principle of associating the child to all the decisions related to him, considering his age and maturity degree reflected by the stipulations of art. 483 paragraph 2 of the new Civil Code.

The parental authority stops the day when the child gains the full capacity of exertion (art. 484 of the new Civil Code). Considering that the person becomes major when reaching 18 years old (art. 38 paragraph 2 of the new Civil Code) and gains a full capacity of exertion (art. 38 paragraph 1 of the new Civil Code) the parental authority stops the day when the child reaches this age. Before this date, the parental authority may stop if the minor who reached 16 years old gets married in the conditions of art. 272 paragraph 2-5 of the new Civil Code and gains the full capacity of exertion by marriage (art. 39 paragraph 1 of the new Civil Code) or if the guardianship court recognizes for strong reasons the full capacity of exertion of the minor who reached 16 years old (art. 40 of the new Civil Code).

2. Exerting the parental authority in common by the parents when they live together

According to the principle according to which both of the parents have common responsibilities for raising and developing the child mentioned by art. 18 paragraph 1 of the Convention regarding the child’s rights, the legislator consecrates in art. 503 paragraph 1 of the new Civil Code the rule according to which the parents exert together and equally the parental authority. The idea of exerting the parental authority in common also results from the stipulations of art. 483 paragraph 1 of the new Civil Code defining the parental authority, showing that it represents an ensemble of rights and obligations regarding both the child’s person and goods and equally belonging to both of the parents, and also the ones of art. 483 paragraph 3 of the new Civil Code establishing that both of the parents are responsible for the raising of their minor children.

The way of exerting together and equally the parental authority by the parents means that the decisions regarding the minor’s person and goods are taken by the parents by mutual agreement [7]. In order to facilitate the daily exertion of the parental authority, the legislator regulates in the new Civil
Code an agreement presumption allowing each parent to act alone when he or she accomplishes a current act of the parental authority. In this sense art. 503 paragraph 2 of the new Civil Code stipulates that, to the honest thirds any of the parents accomplishing alone a current act for exerting the parental rights and accomplishing the parental obligations is presumed to have the other parent’s consent. Therefore, in the Romanian legislator’s conception, the common exertion of the parental authority does not actually involve each parent’s material participation to the accomplishment of the current acts for exerting the parental rights and accomplishing the parental obligations.

This presumption accompanying each parent when he or she accomplishes alone a current act for exerting the parental authority operates only to the thirds and only if they are honest. It offers them juridical security by giving them the possibility to treat with only one parent, authorising them to grant total trust to him or her. The thirds’ honesty is presumed until it is proved contrarily.

The presumption regulated by art. 503 paragraph 2 of the new Civil Code is relative [8] and it may be turned over by the contrary by the parent who opposed to the accomplishment of the act, if he or she manages to prove the opposition, and also to prove that the third was dishonest, namely the third knew the disagreement regarding that act.

The legal presumption has as an object only the current acts accomplished for exerting the parental rights and for accomplishing the parental obligations. The legislator does not show, not even as an example, the type of acts of this category so that, in case of contestation of the parent who does not participate to the act, the guardianship court is supposed to establish whether the act accomplished by the other parent is or is not a part of the category of the current acts mentioned by art. 503 paragraph 2 of the new Civil Code. The doctrine [9] appreciated that an act exceeds the category of the current acts if the parents’ consent is necessary for the exertion of a certain right or accomplishment of a certain parental obligation, according to the express stipulation of the law, for example: establishing the name of the child from the marriage if the parents have no common name (art. 449 paragraph 2 of the new Civil Code); establishing the name of the child outside the marriage who, having the filiation established to one of the parents, subsequently establishes the filiation to the other parent (art. 450 paragraph 2 of the new Civil Code); establishing the child’s domicile if the parents do not live together (art. 496 paragraph 2 of the new Civil Code); changing the child’s domicile together with the parent where he or she lives at, if this affects the exertion of the parental authority or of certain parental rights (art. 497 paragraph 1 of the new Civil Code).

Whereas art. 503 paragraph 2 of the new Civil Code refers to the current acts for exerting the parental authority without distinguishing between the parental authority related to the minor’s person and the one related to the minor’s good, it may be stated that that the agreement presumption operates both in case of accomplishing a current act for the exertion of the parental authority on the personal side and in the situation of accomplishing such an act for exerting the parental authority on the personal side. Regarding these latter ones, we believe that the mandate presumption operates only for the accomplishment of the conservation and pure administration acts and also of other acts that, according to the regulations of the new Civil Code, may be accomplished by the parent, without needing an authorisation, as it is the case of alienating the goods submitted to disappearance, damage, alteration and depreciation, and also the goods become useless to the minor that the parent may accomplish without needing the authorization of the guardianship court (art. 144 paragraph 4 of the new Civil Code). Besides, this solution should have been expressly regulated by the stipulations of the new Civil Code, as it happens in other legislations (for example, in the French Civil Code, in the Luxembourg Civil Code).

According to art. 505 paragraph 1 of the new Civil Code, the parents exert together and equally the parental authority even if the child is from outside the marriage, if the child established his or her filiation, either concomitantly or successively to both of the parents and if the parents live together [10].

3. Exerting the parental authority in common by the separated parents

We may speak of the parents’ separation, in case of the child from the marriage, when they are separated in fact, or when their marriage is annulled or abolished, and in case of the child from outside the marriage when the parents do not live together. a) The situation when the parents are separated in fact. The stipulations of the new Civil Code do not contain any stipulations regulating expressly the exertion of the parental authority by the parents separated in fact. In such a hypothesis, the stipulations of art. 503 paragraph 1 of the new Civil Code are applicable, as the parental authority.
is exerted in common and equally by both of the parents.

b) The situation when the parents are divorced. As it is stipulated by art. 504 of the new Civil Code, if the parents are divorced, the parental authority is exerted according to the stipulations referring to the divorce effects in the relations between parents and children.

As a new element, the stipulations of art. 397 of the new Civil Code regulates the rule according to which the parental authority belongs in common to both of the parents, even after the divorce, except for the case when the court decides differently. By commenting the stipulations of art. 397 of the new Civil Code, the doctrine showed that the court should decide on the exertion of the parental authority only after the divorce only if it takes the exceptional measure mentioned by the final part of art. 397; in the absence of such a mention in the reasons and the device of the decision, the parental authority is exerted even by both of the parents after the divorce according to the principle of art. 397 of the new Civil Code [11].

Deciding regarding the exertion of the parental authority at the marriage annulment, the judicial practice stated that, after the validation of the new Civil Code, the institution of entrusting the minor is not stipulated anymore, but the parental authority institution is stipulated [12]. But this formulation is inexact whereas the parental authority institution, in its ensemble, replaces the parental protection one previously regulated by the Family Code. Regarding the entrusting notion stipulated by the stipulations of the same Family Code, it was replaced by the rule of the common exertion of the parental authority.

At the same time with the divorce pronouncing, the guardianship court should establish the minor child’s residence. In the absence of the understanding between parents or if it is against the child’s high interest, the child’s residence is established by the court at the parent whom he or she usually lives with (art. 400 paragraph 1 of the new Civil Code). If the child lived with both of the parents until the divorce, the court establishes his or her residence at one of them, considering his or her high interest [13] (art. 400 paragraph 2 of the new Civil Code). Establishing the child’s residence at one of his or her parents does not affect the other aspects of the parental authority which continues to be exerted by the divorced parents together.

The exertion in common of the parental authority imposes for the parent where the minor lives to consult with the other parent regarding the basic elements regarding the child’s life [14] so that the important decisions regarding the minor’s raising and education are made by the parents in common (for example, in problems of health, schooling etc.) except for the acts of current caring which are exerted exclusively by the parent whom the minor lives with [15].

Whereas the legislator does not distinguish between the married parents and the divorced ones when it institutes the agreement presumption in art. 503 paragraph 2, this presumption continues to apply even after the divorce in case of common exertion of the parental authority. In consequence, to the honest thirds, each parent continues to be presumed as acting with the consent of the other parent when he or she accomplishes alone a current act for exerting the parental rights and for accomplishing the parental obligations (for example, a demand to register the child in school) [16].

The rule of the common exertion of the parental authority by the divorced parents is not an absolute rule in the system of the new Civil Code. Thus, as an exception from this rule, art. 398 paragraph 1 of the new Civil Code regulates the court possibility to decide, when there are strong reasons, and considering the child’s high interest for the parental authority to be exerted by only one of the parents. Regarding the other parent, paragraph 2 of the same article shows that he or she keeps the right to survey the child’s raising and education and also the right to consent to the child’s adoption. Also, this parent is the holder of the right to maintain person connections to the child and has the obligation to support the child.

c) The situation of marriage dissolution. In case of finding the absolute nullity or of dissolving the marriage, art. 305 paragraph 2 of the new Civil Code stipulates that the stipulations regarding the divorce apply, by similarity, regarding the rights and the obligations between parents and children. In consequence, the parental rights and obligations are exerted and accomplished together by both of the parents unless the court decides for the parental authority to be exerted by one of the parents.

d) The situation of the parents outside the marriage who do not live together. If the parents of the child from outside the marriage do not live together, art. 505 paragraph 2 of the new Civil Code stipulates that the exertion way of the parental authority is established by the guardianship court, as the stipulations regarding the divorce are applicable by similarity [17]. Therefore, in this case the parental authority may also be exerted in common by the parents unless the court decides for its exertion to belong to only one parent.
When there is a demand regarding the establishment of the filiation, the court has the obligation to decide on the exertion way of the parental authority, as the stipulations referring to the divorce are also applicable by similarity (art. 505 paragraph 3 of the new Civil Code).

4. The parents’ agreement
Without distinguishing between the married parents and the ones from outside the marriage, between the parents during the marriage and the parents after dissolving or annulling the marriage between the parents from outside the marriage, the ones who live together and the ones who do not live together, the Romanian legislator establishes in art. 506 of the new Civil Code that the parents may agree regarding the exertion of the parental authority or regarding the taking of a measure for the child’s protection if his or her high interest is respected and with the consent of the guardianship court. In such a situation, the child’s hearing is compulsory, applying the stipulations of art. 264 of the new Civil Code. For producing effects, the parents’ agreement should be homologated by the court, and in order to be homologated, the agreement should respect the child’s high interest. Therefore, the stipulations of art. 506 of the new Civil Code institute the surveying and controlling role of the guardianship court, even when the parents agree, meaning that the simple presentation of a convention is not enough for the court to consent [18].

The agreements which are not homologated by the guardianship court cannot be considered as valid, especially if they give up a right belonging to the child or which is in his or her interest or it is acknowledged a right which is not legally consecrated because of the public order feature of the parental authority [19].

5. The disagreements between parents
The rule of the common exertion of the parental authority should not be interpreted as it is imperatively necessary for the parents to get to a consensus in every case. Thus, in practice there may be disagreements between the parents despite the consecration of the rule according to which the parental authority is exerted in common by them. The legislator considered this reality establishing in art. 486 of the new Civil Code that, if there are disagreements between parents regarding the exertion of the parental rights or the accomplishment of the parental obligations, the guardianship court decides according to the child’s high interest, after having heard the parents and having considered the conclusions of the report referring to the psycho-social investigation. The child’s hearing is compulsory, applying the stipulations of art. 264.

6. Conclusions
The system of the new Civil Code consecrates the rule according to which the parents exert together and equally the parental authority (art. 503 paragraph 1 of the new Civil Code). The parents exert together and equally the parental authority even if the child is from outside the marriage, if the child established his or her filiation either concomitantly, or successively to both of the parents and if the parents live together (art. 505 paragraph 1 of the new Civil Code).

As a new element, the stipulations of art. 397 of the new Civil Code consecrate the rule according to which the parental authority belongs in common to both of the parents even after the divorce, except for the case when the court decides differently. As an exception from the rule of the common exertion of the parental authority by the parents and after dissolving the marriage art. 398 paragraph 1 of the new Civil Code regulates the court possibility to decide, when there are strong reasons, and considering the child’s high interest, for the parental authority to be exerted by only one parent.

Still as a new element, the stipulations of the new Civil Code institute an agreement presumption allowing each parent to act alone when he or she accomplishes a current act of the parental authority. In this sense art. 503 paragraph 2 of the new Civil Code stipulates that, to the honest thirds, any parent accomplishing alone a current act for exerting the parental rights and for accomplishing the parental obligations is presumed as having the other parent’s consent.

References:

[2] The stipulations of the new Civil Code regulating the parental authority are grouped in 4 chapters: Chapter I containing general stipulations, Chapter II treating the parental rights and obligations, Chapter III organizing the exertion of the parental authority and Chapter IV consecrated to the decedence from the exertion of the parental rights.


[4] Idem

[5] This model is also used by the Belgian legislator who, in Title IX of Book I of the Belgian Civil Code regulates as “Parental Authority” both the parental authority related to the minor’s person and the one regarding the minor’s goods.


[7] Regarding the authority exertion by the parents by mutual agreement, the Italian doctrine emphasized that it does not mean that any act should be accomplished simultaneously by both of the parents when it is stated that the parental authority should be exerted by both of the parents by mutual agreement (art. 316 paragraph 2 of the Italian Civil Code). The parents should establish together the direction they intend to give to the child’s raising so that the individual acts of this direction could be accomplished by each of them. See in this sense Livia Pomodor, Paolo Giannino, Piero Avallone, Manuale di diritto di famiglia e dei minori, UTET Giuridica, 2009.

[8] Meaning that the presumptions stipulated by art. 503 paragraph 2 of the new Civil Code is absolute whereas this text does not stipulate the possibility to remove it by proving the contrary, see Teodor Bodoaşcă, Aurelia Drăghici, Ioan Puie, Family Law. University Course, Universul Juridic Press, Bucharest, 2011.


[10] The condition of the parents’ cohabitation for the common exertion of the parental authority regarding the natural child recognized by both of the parents is also regulated by the stipulations of art. 317-bis paragraph 2 of the Italian Civil Code.


[13] In the system of the Belgian Civil Code, as an application of the principle of the common exertion of the parental authority when the parents do not live together, the court may settle the child’s alternative housing at their places (art. 374 of the Belgian Civil Code).


[17] In the regulation of the Italian Civil Code, if the parents do not live together, the authority is exerted by the parent whom the child lives with, and if the child lives with none of the parents, by the parent who recognized it first. The judge may decide differently, in the child’s exclusive interest; he may exclude both of the parents from the exertion of the parental authority, proceeding to the assignment of a guardian (art. 317-bis paragraph 2 of the Italian Civil Code). The parent who exerts no authority has the power to survey the minor child’s instruction, education and living conditions (art. 317-bis paragraph 3 of the Italian Civil Code).
