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ALTERNATIVE CHILD PROTECTION THROUGH GUARDIANSHIP IN THE REGULATION OF THE CURRENT ROMANIAN CIVIL CODE

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LIST OF ABBREVIATIONS

- AG - United Nations General Assembly;
- alin. - paragraph;
- APCoE - Parliamentary Assembly of the Council of Europe;
- apud - (quoted) after;
- art. - article;
- ANDPD - National Authority for the Rights of Persons with Disabilities;
- ANPDCA - National Authority for the Protection of Children's Rights and Adoption;
- BGB - Bürgerliches Gesetzbuch - German Civil Code (1896);
- *brevitatis causa* - to avoid repetition and ease of expression;
- B. Of. - Official Bulletin of Romania, Part I;
- C. adm. - Administrative Code (GEO no. 57/2019);
- C. Ap. - Court of Appeal;
- C. civ. - Romanian Civil Code (2009);
- C. civ. a. - Austrian Civil Code (1811);
- C. civ. e. - Swiss Civil Code (1907);
- C. civ. fr. - French Civil Code (1804);
- C. civ. i. - Italian Civil Code (1942);
- C. civ. q. - Civil Code Quebec (1991);
- C. civ. sp. - Spanish Civil Code (1889);
- CCR - Constitutional Court of Romania;
- CD - Collection of decisions of the Supreme Court and other courts in civil matters;
- CRC - UN Convention on the Rights of the Child (1989);
- Hague Convention - Convention on Jurisdiction, Applicable Law, Recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children (The Hague, October 19, 1996);
- EC - European Commission;
- ECHR - European Court of Human Rights;
- CFREU - Charter of Fundamental Rights of the European Union;

- C. fam. - Family Code of Romania (Law no. 4/1953);
- C. fam. m. - Family Code of the Republic of Moldova (Law no. 1316 - XIV/2000);
- CJEU - Court of Justice of the European Union;
- *cit. supra* - cited *above;*
- civ. - civil;
- CPDC - Committee on the Rights of the Child;
- CPC - Child Protection Commission;
- CMCoE - Committee of Ministers of the Council of Europe;
- C. mun. - Labor Code (Law no. 53/2003);
- C. pen. - Penal Code (Law No 286/2009);
- C. pr. civ. - Civil Procedure Code (Law No 134/2010);
- C. pr. pen. - Criminal Procedure Code (Law No 135/2010);
- ESC - European Social Charter;
- SCJ - Supreme Court of Justice;
- CSM - Superior Council of Magistracy;
- CoE - Council of Europe;
- DGASPC - General Directorate for Social Assistance and Child Protection;
- dec. - decision;
- *Dex* - Explanatory Dictionary of the Romanian Language, Romanian Academy, Iorgu Iordan Institute of Linguistics, Ed. Univers Enciclopedic, Bucharest, 2016;
- dos. - file;
- Dreptul - Dreptul Magazine (New series);
- UDHR - Universal Declaration of Human Rights;
- Ed. - Editura;
- Éd. – Éditure;
- ed. – ediție;
- éd. - édition;
- etc - et cetera (and others);

- FRA - European Union Agency for Fundamental Rights;
- hot. - judgment;
- HG- Romanian Government Decision;

- ibidem - in the same place;

- idem - same author;

- guardianship court - guardianship and family court;

- INM - National Institute of Magistracy;

- NSI - National Statistical Institute;

- IRDO - Romanian Institute for Human Rights;

- SRI - Social Reference Indicator;

- OJEU - Official Journal of the European Union;

- Jud. - the court;

- ÎCCJ - High Court of Cassation and Justice;

- LGDJ - Libraire Générale de Droit et de Jurisprudence;

- LP - Popular Legality;

- Handbook (I) - Handbook of European Law on the Rights of the Child (2016);

- Handbook (II) - Handbook on Guardianship Services for Children without Parental Care (2015);

- Official Journal of Romania, Part I;

- n. - note;

- no. - number;

- n.n. - our note;

- *op. cit. – opere citato*;

- OPUE - Publications Office of the European Union;

- OG - Romanian Government Ordinance;

- OMJ - Order of the Minister of Justice;

- UN - United Nations Organization;

- OUG - Romanian Government Emergency Ordinance;

- p. - page;

- par. - paragraph;

- point - point;

- p.n. - our parenthesis;

- pp. - pages;

- PR – Pandactele Române;

- R - Recommendation;
- RDF - Family Law Review;
- RNN - National Notarial Register;
- RRD - Romanian Law Review;
- RRDP - Romanian Journal of Private Law;
- RRJ - Romanian Journal of Jurisprudence;
- RRES - Romanian Journal of Enforcement;
- RUJ - Legal Universe Journal;
- S. civ. - Civil Section;
- S. civ. propr. int. - Civil and Intellectual Property Section;
- Sec. - Century;
- Sect. - Sector;
- EEA - European Economic Area;
- Sent. - Sentence;
- n.s. - emphasis added;
- SPCLEP - Local Community Public Service for Personal Register;
- S. pen. - Criminal Section;
- supra - above;
- ș.a. - and others;
- TFEU - Treaty on the Functioning of the European Union;
- Trib - court;
- TS - Supreme Court;
- EU - European Union;
- urm. - following;

- vol. - volume.

** Translator's note: The abbreviations that have an equivalent in English have been translated.*

INTRODUCTION

1. International, European and national normative acts recognize a multitude of rights for children, including the right to alternative care. Over time, the child has evolved from a subject of protection to a holder of rights. The child's right to alternative care arises and can only be exercised if he or she is deprived of the care of both parents or if, in his or her best interests, he or she cannot be left in their care. Alternative care is subsidiary to parental care. The primacy of parental care is based on the principle of parents' primary responsibility to respect and safeguard the rights of the child. In Romania, the child's right to alternative care circumscribes the possibility of establishing guardianship, granting adoption and taking a special protection measure. Among the forms of alternative protection, guardianship takes precedence. In legal systems of Roman origin, the preference for guardianship is traditional. The choice is based on arguments such as the priority of the minor's relatives in assuming the burden of guardianship, the expedience with which the measure can be put in place, the complex content of the guardianship, the control of the State authorities over the guardian's performance of his duties and the time-limit of the measure. The institution of guardianship has been known since time immemorial and is considered to be a veritable legal constant.

2. The aim of the doctoral thesis is to carry out an in-depth, systematic and systemic analysis of the regulations established by the current Romanian Civil Code for the alternative protection of the child through guardianship. From a systemic perspective, the analysis does not bypass the regulations concerning the protection and promotion of children's rights, such as those established by the CRC and Law no. 272/2004. In the area of guardianship of minors, the current Civil Code provides, in addition to substantive law provisions, numerous important procedural rules. For example, it regulates the competence of the guardianship court with regard to proceedings concerning the guardianship of the individual and the manner of dealing with applications in this area, the appointment of the guardian, the supervision of his activity and his removal from guardianship, the establishment of the family council and the supervision of its activity, the settlement of complaints against acts and actions of the guardian that are harmful to the minor; the imposition of civil fines. A significant part of the substantive law issues relating to the guardianship of minors also require a civil procedural approach. Neglecting them would affect the very unity of the analysis. Insofar as the question of alternative protection of the child by way of guardianship

with a foreign element has been raised, we have presented the connections with the provisions of the Hague Convention, to which art. 2.611 Civil Code expressly refers.

3. The unquestionable influence of Roman private law on modern regulations in continental Europe and other countries of the world, including the legal institution of guardianship of minors, has led to references to it. In Romanian legal doctrine at the beginning of the sec. XX, the reverberations of Roman private law were so current that Professor D. Alexandresco, interpreting Art. 3 of the Romanian Civil Code of 1864, recommended that Romanian courts should consult, among other things, *Roman law in* order to rule in cases where the law does not provide for it or is obscure or unwieldy. From the perspective of the legal regime of guardianship of minors in the Romanian legal system evolution, special attention is paid to the regulations laid down by the Calimach Code, the Caragea Code, the Romanian Civil Code of 1864 and the Family Code. The aim of the study is to highlight the elements of continuity, novelty and normative progress in the evolution of this legal institution in Romania. References to normative solutions in comparative law are not omitted, particularly those offered by the French Civil Code and the Civil Code of Quebec, the main sources of inspiration for the construction of the current Romanian Civil Code. Some of the Romanian legislator's choices are also analyzed by referring to other possible sources of influence, such as the Austrian Civil Code, the Swiss Civil Code, the Italian Civil Code and the Spanish Civil Code. To avoid repetition, I have found it appropriate to integrate evolutionary and comparative issues, as well as references to comparative law, in the context of the analysis of current domestic rules. This way of working has facilitated the realization of complex analyses, with the aim of pertinent interpretations of the current regulations.

4. The realization of the purpose of the doctoral research project required the use of appropriate methods of scientific analysis, established in the field of legal sciences:

- historical, to identify and present the main moments in the evolution of the regulations circumscribed to the subject of the doctoral thesis, starting from Roman law, continuing with the old Romanian laws, the Romanian Civil Code of 1864, the Family Code and the current regulations. The diachronic perspective has facilitated retrospective analysis, highlighting elements of continuity and discontinuity in the development of the normative approach and outlining a realistic view of the social determinants that have triggered the legislative evolution in the field. After all, the law follows the thread of social evolution and, in during this evolution, the very level of societal development is mirrored;

- logic, to explain the relevance and coherence of the normative solutions analyzed, as well as to identify possible inadvertences, inconsistencies or inconstancies and to substantiate appropriate proposals for *lex ferenda*, with a view to optimizing the current regulations in the field. The method is closely interrelated with the diachronic method, the unity between them being a basic principle of philosophy and methodology, which is also valid for legal sciences;

- comparative, to compare the rules on the subject in certain legal systems and historical periods. Making comparisons on the existence of certain common or different elements has facilitated the possibility of providing a framework for understanding the legal phenomenon under examination. To facilitate the analysis from this perspective, we carried out fact-finding visits to higher education institutions and courts;

- sociological, to get to know the legal realities of the guardianship of minors - starting from the premise that the law, regardless of its forms, is based on collective recognition, on the establishment of a relationship between the duties of some and the claims of others, manifesting itself, by vocation and content, as social. The method has been useful in achieving one of the objectives of the scientific approach: the formulation of pertinent proposals of *lege ferenda*.

5. The thesis is scientifically argued on the creative use, with indication of the source of information, for the purpose of analysis, commentary, criticism or exemplification, of scientific works elaborated by Romanian authors of scientific prestige, among which I mention personalities such as. Băicoianu, M. - D. Bob - Bocșan, G. Boroi, Gh. Beleiu, Ș. Diaconescu, E. Chelaru, I. P. Filipescu, E. Florian, Vl. Hanga, C. - C. Hageanu, C. Hamangiu, Tr. Ionașcu, M. Jacotă, C. Jugastru, I. Reghini, I. Rosetti-Bălănescu, I. Leș, E. Lupan, B. D. Moloman, C. Stătescu, P. Vasilescu, C. T. Ungureanu and O. Ungureanu. Special attention has been paid to the scientific works elaborated by the PhD supervisor, Prof. habil. Teodor Bodoașcă PhD. The preferential use of works from the Romanian specialized literature was demanded by the very purpose of the doctoral thesis, which is to carry out a thorough, systematic and systematic scientific analysis of the legal regulations concerning the alternative guardianship of the child through guardianship. Even in these circumstances, I have used numerous works from foreign doctrine, especially those whose object of analysis are regulations that have been sources of inspiration for the Romanian Civil Code of 1864 and the current Romanian Civil Code. For the elaboration of the thesis I also used studies published by me during the period of training in the doctoral program on topics related to the guardianship of minors, as sole author or co-author: *Privire critică asupra cazurilor în care poate fi instituită tutela copilului conform art. 110 din actualul Cod civil* (PR no. 1/2019); *Consiliul de familie în*

reglementarea actualului Cod civil (Acta Universitatis "Lucian Blaga" no. 2/2019); *Considerații privind libertatea copilului de a-și exprima opinia și dreptul acestuia de a fi ascultat* (PR no. 1/2020); *Despre tutela impuberilor în dreptul roman* (Vol. "Educație, știință și societate în Secolul XXI - oportunități și provocări", Ed. RisoPrint, Cluj-Napoca, 2020); *Contribuții la studiul competenței instanței de tutelă* (PR no. 6/2020); *Privire de ansamblu asupra reglementării drepturilor copilului* (PR no. 3/2022); *Considerații referitoare la interzicerea căsătoriei între tutore și persoana aflată sub ocrotirea sa și opoziția la căsătoria persoanei care beneficiază de consiliere judiciară sau de tutelă specială* și *Considerații cu privire la incidența unor dispoziții legale referitoare la tutela minorului în cazul persoanei fizice majore care beneficiază de consiliere judiciară sau de tutelă specială* (Vol. "Oportunitățile cunoașterii multidisciplinare", Ed. RisoPrint, Cluj-Napoca, 2022); *Opinii cu privire la practica instanțelor de judecată din circumscripția teritorială a Curții de Apel Mureș pentru soluționarea cererilor de punere a persoanelor fizice sub interdicție judecătorească în perioada cuprinsă între data publicării Deciziei Curții Constituționale a României nr. 601/2020 în Monitorul Oficial și data intrării în vigoare a Legii nr. 140/2022* (RRES no. 3/2023); *Considerations on the Incidence of Certain Legal Provozions Relating to the Guardianship of Minors in the Case of Adult Natural Persons Receiving Advice or Guardianship* (*The opportunities of Multidisciplinary Knowledge* (Ed. Universitară, Bucharest, 2024); *Considerații referitoare la înstrăinarea părintească în reglementarea Legii nr. 272/2004 privind protecția și promovarea drepturilor copilului* (Vol. *" Dreptul în transformare. Soluții teoretice și practice pentru provocările contemporane*"). In the context of the doctoral thesis, these are not simply reproduced. On the contrary, the analyses are developed, updated and most of them substantially revised.

6. The doctoral scientific research project is conceived as a scientific endeavor contributing to the correct interpretation and application of the legal regulations in the researched area, detecting possible inadvertences, inconsistencies or inconstancies in the normative, as well as the substantiation of useful proposals of *lege ferenda*. In accordance with the requirement constantly expressed by Prof. habil Teodor Bodoașcă, PhD any scientific approach aimed at in-depth analysis of legal rules, to be useful and contributive, must be concluded with the substantiation of relevant proposals *of lege ferenda*. Alongside these, I have expressed opinions on certain theses based on doctrine or solutions adopted in judicial practice. The approaches are analytical and sometimes critical. The working method is based on the desideratum to contribute to the correct interpretation and application of the relevant legal regulations, doctrinal theses and case-law solutions, as well as to their scientific refinement. Part of the result of this approach is concretized in a set of proposals

addressed to the Romanian legislator, developed in the content of the thesis and, some of them, summarized in the end of the thesis. In the idea that the approach is addressed not only to specialists, I was concerned with the use of a legal language appropriate to the topic, legible, avoiding unnecessary neologisms and precious expressions.

7. The thesis is organized in five chapters, each focused on a homogeneous legal issue regarding the alternative care of the child through guardianship: introductory notions about guardianship of the minor; the child, the guardian, the family council and the guardianship court in the context of guardianship of the minor; the establishment of guardianship of the minor; the exercise of guardianship of the minor; the termination of guardianship of the minor. In principle, the structure of the thesis follows the grouping of the rules on guardianship of minors laid down in the Civil Code. Certain deviations are determined by the need to optimize systematization and to avoid repetition. The thesis includes a bibliographical list highlighting the scientific works actually used in its elaboration. I was concerned with identifying and using representative works in Romanian doctrine, published especially after the date of entry into force of the current Civil Code. I have not neglected studies elaborated and published earlier, during the period of application of the Civil Code of 1864 and the Family Code. Their use was useful in order to facilitate the explanation of the elements of continuity and novelty in the evolution of the regulations in this area. In order not to generate an unjustified increase in the size of the thesis, the bibliographical list does not usually separately highlight studies and commentaries published in volumes. These are indicated only in footnotes. The bibliographical list includes ECHR judgments, decisions of the CCR or the CCJ that are actually used to substantiate analyses. For the same purpose, the judgments of other courts used to illustrate certain case-law solutions are indicated only in the footnotes. The list of *lege ferenda* proposals contains a summarized and selective presentation of some suggestions addressed to the Romanian legislator. In order not to artificially increase the size of the thesis and to avoid repetition, I have refrained from emphasizing at the end of the list, even by way of example, opinions on certain doctrinal theses or jurisprudential solutions expressed in the contents.

CHAPTER I
INTRODUCTION TO GUARDIANSHIP OF MINORS

SECTION 1.1.
PRELIMINARY CLARIFICATIONS

1. In public international law, the child's right to alternative care has been recognized since 1989, by Article 20 of the CRC. The Romanian legislator expressly regulated this right approximately fifteen years later, under Article 39 of Law no. 272/2004 (which became Article 44 after the republication of this law in 2014). The right to alternative care is recognized to any child who is temporarily or permanently deprived of parental care or who, in order to protect his or her interests, cannot be left in the care of his or her parents. Alternative child protection covers the possibility for the child to benefit from guardianship, one of the special protection measures or adoption. Among the forms of alternative care, guardianship takes precedence. Although the right to alternative care is important, it is subsidiary to the child's right to live with his or her parents and to be protected by them within the framework of parental authority. This right arises and can only be exercised if the child is deprived of the care of both parents or if it is not in the child's best interests to be left in their care.

2. In the Romanian area, although they have not been called, as such, forms of alternative forms of protection, fostering/adoption and guardianship have been regulated a long time ago. For example, the important Calimach Code and the Caragea Code regulated adoption and guardianship, respectively. The Civil Code of 1864 and then the Family Code regulated these forms of alternative forms of protection. Foster care and emergency foster care, as special forms of child protection, were provided for by GEO No 26/1997 on the protection of children in difficulty. At present, the guardianship of minors is governed by Articles 110-163 of the Civil Code, in the context of the provisions intended for the protection of the natural person.

3. In undergraduate studies, the guardianship of minors is usually presented in civil law works in the context of issues relating to the natural person, and parental child custody, adoption and special protection measures in family law works. There are numerous works on family law, which, in addition to the protection of the child by the parents within the framework of parental authority, also analyze the forms and modalities of alternative child protection, including guardianship. The dispersion of the doctrinal analysis was and is influenced by the topography of the regulations on

guardianship. In the previous Romanian Civil Code, the provisions relating to the guardianship of minors were placed in Chapter 2 (arts. 343-420) of Title X (On Minority, Guardianship and Emancipation) of Book I (On Persons). The authors of the current Civil Code, inspired by this topography, have placed the provisions on guardianship of minors (Articles 110-163) in Title III (Guardianship of the natural person) of Book I (On persons). In the context of the current Civil Code, the provisions relating to parental authority, under which parental care of the child and adoption are regulated, are in Book II (On the Family) (Articles 483-512 and 451-482 respectively). Special protection measures are regulated by Articles 44 and 54-71 of Law 272/2004. This situation reveals a dispersal of child protection regulations both within the Civil Code and between the Civil Code and Law No 272/2004. The legislator must concentrate the relevant regulations in a single normative act, in accordance with the rules of legislative technique. To achieve this objective, it seems natural that all the rules on the forms and modalities of childcare should be in the Civil Code, in Book II.

SECTION 1.2.
THE CONCEPT OF GUARDIANSHIP OF MINORS

1. From an etymological perspective, the noun *tutela* comes from the verb *tueor* (*tueri, tuitus*) with the meaning of defense or protection. In Latin, *tutela* means the situation of a child under guardianship (*puer in tutelam traditus*).

2. Justinian, in Institutes, stated that "guardianship is, according to the definition of Servius, the power and authority over a free person, given and permitted by civil law, for the protection of one who, because of his tender age, cannot defend himself" (*est autem tutela, ut Servius definivit, ius ac potestas in capite libero ad tuendum eum qui propter aetatem se defendere nequit, iure civili data ac permissa*). Both the old Roman concept of guardianship, of power (*ius ac potestas)*, and the new vision, as an institution for the protection of the ward, are evoked.

3. In Romania, Article 255, thesis I of the Code of Calimach provided that epitropy is "a right and power that is given over an unmarried person and over the administration of his property, for security, as long as the person, because of his age, cannot govern himself or his property". The similarity of this legal provision to the definition of guardianship given by Servius Sulpicius Rufus has been noted, as well as its outdated character in relation to the realities of the time. Art. 1 para. (2) of Cap. XXI (For the epitropy) of Part Three of the Code of Caragea provided that "the epitrope is the guardian of the father of the child and the governor of his upbringing and estate". The role of

the epitropa was, above all, to administer the minor's property, the duties for the care of the minor's person being the responsibility of the mother or midwife. Later, during the period of application of the Romanian Civil Code of 1864, the idea of guardianship as a means of protecting minors became more firmly established, a reality which is duly reflected in the relevant doctrine.

4. In the absence of an explicit legal meaning, different definitions have been formulated in specialized literature. The aim has been to highlight the particularities of guardianship as a measure for the protection of incapable persons and as a legal institution.

5. Nowadays, guardianship can be analyzed from three points of view: legal institution; task or function of the guardian; alternative form of protection of the minor.

6. As a legal institution, guardianship circumscribes the totality of the legal rules governing this form of alternative protection of minors.

The general legal regime of the guardianship of a minor is laid down in Articles 110-163 of the Civil Code in the following aspects: opening of guardianship, guardian, family council, exercise of guardianship regarding the person and property of the minor, control of the exercise of guardianship and termination of guardianship. In other matters, the Civil Code lays down rules regulating particularities relating to guardianship in general or guardianship of a minor in particular. Article 2.611 of the Civil Code indicates the applicable law as regards "measures for the protection of children" with a foreign element. These measures include alternatives to parental care, including guardianship. The law applicable to guardianship with a foreign element is determined in accordance with the Hague Convention. Under Article 15 of the Convention, in principle, the law of the State in whose territory the child is habitually resident is applicable. Exceptionally, the law of the State with which the child's situation is most closely connected may apply. Where Romania has concluded treaties on legal assistance and legal relations in civil matters with certain States, their provisions on guardianship, including guardianship of minors, shall take precedence. Certain special laws also contain provisions applicable to guardianship of minors.

Unless the law provides otherwise, the provisions relating to the guardianship of a minor who has attained the age of 14 also apply to a person of full age who is receiving legal aid, and those relating to the guardianship of a minor who has not attained that age also apply to a person of full age who is receiving special guardianship. In other words, the legal regime of guardianship of a minor constitutes the common law for the legal advice and special guardianship of an adult with intellectual or psychosocial disabilities.

7. Seen from the guardian's perspective, guardianship is a "duty assumed and exercised, in accordance with the law, by a natural person alone or by husband and wife together to care for the person and property of a minor who is deprived of parental care or who, in order to protect his or her interests, cannot be left in their care".

8. From the minor's perspective, "guardianship is a form of alternative protection to which he or she is entitled if he or she is temporarily or permanently deprived of the care of both parents or if, in his or her best interests, he or she cannot be left in their care".

SECTION 1.3.
THE LEGAL NATURE OF GUARDIANSHIP OF A MINOR

1. Under the Family Code, it was considered that guardianship of minors has a mixed legal nature, of civil and family law. The Family Code's regulation of the legal regime of guardianship of minors was a peremptory argument for the fact that this legal institution belonged to family law. Even under the current rules, the arguments circumscribing the guardianship of minors to family law prevail: it is an alternative form of protection to parental guardianship of the child; the minor's parents have the possibility to appoint the person of the guardian; the role of the guardian with regard to the minor's person has significantly increased, the tendency is to substitute the guardian's duties for those of the parents; the possibility of the exercise of guardianship by husband and wife together and the proper application of the legal duties relating to parental authority; the primacy given to the minor's relatives, in particular those making up the extended family, to assume the guardianship; the possibility of setting up and operating a family council to advise the guardian and the guardianship court and to supervise the guardian's activity in the performance of the guardianship duties; the appointment of the parent or parents together as guardian with priority, if the minor becomes of age and is under special guardianship, etc. A convincing argument in support of the fact that the guardianship of minors is family law is the very fact that the principle of the best interests of the child is regulated by the rules of the Civil Code on family relations (Article 263). Doctrine interprets the best interests of the child as one of the general principles of family law. It has been stated that "the principle of respect for the best interests of the child can rightly be considered one of the principles of contemporary family law". In French doctrine, because of the multiple implications for the family, in particular on the part of the family council, it has been asserted that the guardianship

of minors is a family guardianship (*la tutelle des mineurs est une tutelle familialle*). The thesis is based on Art. 394 thesis II of the French Civil Code.

2. In recent Romanian doctrine it has been stated that "since guardianship is, according to Article 44 para. (1) of Law no. 272/2004, a form of alternative protection to the parental care of the child, its family law nature cannot be questioned". The thesis is correct, since guardianship is intended to replace parental care, which is provided within the nuclear family (parental authority), with the care of the child by the guardian, who is most often a member of the extended or substitute family. Nor should it be overlooked that, under the current rules, guardianship can be exercised by husband and wife together. These facts are consistent with the rules on the guardianship of minors and the right of a child separated for certain reasons from his or her natural family to be integrated into a 'stable permanent family environment'.

3. Guardianship of minors is a form of alternative care. Naturally, its rules should be placed after those on parental authority and in the same context as those on adoption and special protection measures. This topography is in line with the nature of the rules and the rules of legislative technique. The proposed relocation is likely to make the rules on child protection more flowing, coherent and unified.

4. Guardianship of the individual is essentially distinct from administrative guardianship.

SECTION 1.4.
THE PURPOSE OF GUARDIANSHIP OF A MINOR

1. In ancient Roman law, in the beginning, guardianship was considered a way of defending the patrimonial interests of the agnate family. The way in which guardianship was organized was intended to prevent those who were incapable of squandering their assets to the detriment of the agnate relatives who might be called upon to inherit. Subsequently, due to changes in Roman society between the Punic Wars and the end of the Republic, the concept of guardianship changed significantly, and it was seen as a measure of protection for individuals who, for certain reasons,

were incapacitated. The previous conception was abandoned, guardianship was regarded as a public institution (*munus publicum*).

2. The older Romanian doctrine expressed the opinion that "the purpose of guardianship, in the Calimach Code, is *only to protect the minor*, a person who, because of *early age, cannot govern himself, nor his property*" (n.d.). The right and power of the guardian over the person and property of the minor put in question the firm conclusion that the purpose of the guardian was exclusively to protect the minor. In the Caragea Code, guardianship was considered to be the guardian's vicegerent, and the guardian the father's vicegerent "of the child and the administrator of the growth of his estate". From the point of view of the minor's protection, the administrator acted as a veritable trustee of the minor's father. Both the Caragea Code and the Romanian Civil Code of 1864 regulated the guardian's powers, in particular regarding the administration of the minor's property. The Calimach Code also made explicit reference to the guardianship of the minor's person (the guardian "...shall instruct the unmarried man or woman in the fear of God and piety towards the Christian faith and in all good deeds...").

3. During the period of application of the Civil Code of 1864, the view was expressed that guardianship had "...the same purpose as parental power, but that the father and mother, while vested with this authority, have greater power than the guardian". It was held that "guardianship is an institution of private law, the sole purpose of which is the protection of minors and the guardians of the interditee". It was also held that guardianship is "a second degree in the series of protective measures taken by law in the best interests of the minor".

4. Under the Family Code, in the specialized literature, it has been considered that "from the entire legal regulation it follows that the purpose of establishing guardianship is that the guardian should take the place of the natural parents of the minor, to create around him the family climate that they would provide". It was considered that guardianship is "... regulated according to the model of parental guardianship", these institutions having "... a single orientation: the best interests of the child...".

5. At present, the purpose of guardianship is to ensure the protection of a child who is deprived of the care of both parents or who, in his or her best interests, cannot be left in their care. Guardianship is a form of alternative child protection and, under the law, replaces parental care. The conclusion is based on the common denominator of parental care and guardianship - the promotion of the best interests of the child as a priority. Like parental care, the guardian has the duty to care for the child in order to ensure the child's health, physical and mental development, education, learning

and vocational training in accordance with the child's abilities. In terms of property, the guardian has the duty to administer the minor's property, to represent him or her in legal acts or to grant him or her consent to them. If the guardianship is exercised by husband and wife together, "the provisions on parental authority shall apply accordingly".

6. It was noted that, even if "guardianship fulfills the functions of parental care..., this does not mean that the rights and obligations of the guardian concerning the person of the minor are identical to those of the natural parents, but only similar to them". It was emphasized that "in the case of the establishment of guardianship, there is no transfer of parental rights and obligations to the guardian, as in the case of adoption". A comparative examination of the provisions of the Civil Code relating to parental rights and duties regarding the person of the child and those relating to the content of guardianship supports this doctrinal thesis.

7. Indissoluble to the purpose of the guardianship of minors is the promotion of their best interests as a matter of priority, which is a binding principle in all decisions concerning them, as well as in the rights and duties of the persons who have their care.

8. The purpose of guardianship is to ensure the protection of children without parental care is provided for in many legal systems.

SECTION 1.5.
PRINCIPLES OF GUARDIANSHIP OF MINORS

1.5.1. Preliminaries

1. In the specialized literature the following principles of guardianship of minors are presented or only listed: generality; the exercise of guardianship in the best interests of the minor; patrimonial independence between the guardian and the minor; permanent control exercised by the State over the guardianship. Most authors present legality in the context of the legal characteristics of guardianship of minors. Legality is a fundamental principle of the Romanian State or, in doctrinal expression, a "genuine general principle of the entire constitutional regulation". Legality is applicable in all areas of private and public law, including that reserved for the guardianship of minors.

2. The principles in accordance with which the rights of the child are respected and guaranteed are also duly applied in the matter: respecting and promoting the best interests of the child as a matter of priority; equal opportunities and non-discrimination; ensuring individualized and personalized care for the child; respecting the dignity of the child; listening to and taking into account the views of the child; ensuring stability and continuity in the care, upbringing and education of the child; promptness in taking any decision concerning the child; ensuring protection against abuse, neglect, exploitation and any form of violence against the child. At EU level, irrespective of the type of guardianship system and the national child protection system within which it operates, six fundamental principles are recommended: non-discrimination, independence and impartiality, accountability, sustainability and child participation. These principles should not be disregarded in the literature, even if they are recommendations. The general principles of the protection of the individual - necessity, subsidiarity and proportionality - also apply appropriately in this area.

3. Regarding the principles laid down for respecting and guaranteeing children's rights in Law No 272/2004 and those recommended at EU level, I note the lack of reaction from specialist doctrine in Romania. From this perspective, it should be realized that guardianship no longer fits into the pattern in which it was conceived in the middle of the 20th century. XIX and continued in the XX century. Nowadays, guardianship is a form of alternative protection and an important legal means of guaranteeing and promoting the rights of a child who is deprived of the care of both parents or who, in his or her best interests, cannot be left in their care.

4. In the following, I present the classic principles of guardianship of minors, but adapting the analysis to the requirements of the new regulations on the subject and harmonizing them with those set out in the Manual on Guardianship Services for Children without Parental Care, as well as with the principle of promoting the best interests of the child as a priority. In the next section I will discuss the principle of establishing and exercising guardianship in the best interests of the child.

1.5.2. Legality

1. Legality is not specific to guardianship. This principle is of a constitutional nature, which is why it is duly applicable in all areas of social, economic and political life, including the protection and promotion of children's rights.

2. In substance, the legality of guardianship means that it is regulated by law. Prior to the current regulations in Romania, the main normative landmarks on guardianship were Pravila lui Matei Basarab sau Îndreptarea Legii (1652), the Legea pentru epitropii of April 26, 1840, the Calimach Code (1817), the Caragea Code (1818), the Civil Code of 1864 and the Family Code. In

Transylvania, guardianship as a legal institution was laid down in the Tripartitum of Stefan Werboczi (*Tripartitum opus iuris consuetudinarii inclyti regni Hungarie*) [1517]. It was subsequently governed by the Austrian Civil Code (1811) and, after the extension of the application of Romanian civil law, by the Romanian Civil Code of 1864. At present, the legality of guardianship is based on the principle of legality, but also on the public policy nature of protecting and promoting the rights of the child.

3. As a consequence of the principle of legality, Articles 110-163 of the Civil Code regulate the guardianship of minors in the main aspects: the opening of guardianship, the conditions under which a natural person may fulfill the task of guardianship and the situations in which he or she is removed from guardianship, the family council, the exercise, the control of the exercise of guardianship and the termination of guardianship. Certain specific features of guardianship of minors are governed by special laws.

4. It has been emphasized in the specialized literature that "the possibility granted by the new Code to parents to designate the person to be the guardian of their children (Article 114 of the Civil Code) does not affect this character". The right conferred on parents to appoint a guardian satisfies the requirement of legality, since it is established and exercised under the conditions laid down in Article 114 of the Civil Code.

5. The legal rules governing guardianship are, as a rule, mandatory, which is why they cannot be derogated from by unilateral legal acts or agreements.

6. In order to respect the principle of legality in matters of guardianship of minors, the Civil Code regulates specific legal remedies: the nullity of legal acts concluded by the guardian in the exercise of guardianship or by the minor beneficiary of guardianship without complying with legal requirements; the obligation to obtain the opinion of the family council; the approval or authorization by the guardianship court of certain acts of the guardian or the minor; the effective and continuous control exercised by the guardianship court over the way in which the guardian and the family council perform their duties with regard to the person and property of the minor.

1.5.3. Generality

1. In the area of guardianship of minors, generality means that it is possible to establish guardianship for any child who is deprived of the care of both parents or who, in his or her best interests, cannot be left in their care. Currently, the general nature of guardianship is based on the requirements of the principle of non-discrimination in recognizing, respecting and guaranteeing the rights of the child, including the right to alternative care, without distinction on the basis of certain

criteria: race, color, sex, language, religion, political or other opinion, nationality, ethnicity, etc. From this perspective, the CRC and Law No 272/2004 do not offer any alternative care. According to the Handbook (II), non-discrimination itself is a fundamental principle to be applied regardless of the guardianship system. All children deprived of their family environment and parental care have the right to benefit from the same level of protection, regardless of age, immigration status, nationality, gender, ethnic origin or any of the other non-discrimination grounds listed in Art. 21 of the CDFUE.

2. Strictly in law, the generality of guardianship means the legal possibility of this form of protection for any child who is deprived of the care of both parents or who, in his or her best interests, cannot be left in their care. This circumstance is the essential criterion for the establishment of any alternative child protection measure, and the purpose of the measure is to promote the child's best interests as a matter of priority.

3. It has been rightly held that "the idea of the generality of guardianship is also expressed by the comprehensive nature of the guardianship, covering both the personal and the patrimonial aspects, in a composition of rights and duties of the guardian that are only in some cases nuanced, but not different from those recognized for parents". The comprehensive content ensures balance in the upbringing and promotion of the best interests of the child beneficiary of the guardianship.

4. The general nature of guardianship is also suggested by Article 3 of Law no. 272/2004, which sets out the categories of children who benefit from the provisions of this law, including the right to alternative care.

1.5.4. Property independence between guardian and minor

1. The principle, like the others, concerns the promotion of the best interests of the minor. Any confusion of the minor's property with that of the guardian would presumably expose him or her to negative property consequences. The assertion of patrimonial independence between the guardian and the minor in contemporary legislation can also be seen as a reaction to a situation that existed at the beginning of Roman law, when the guardian acted as a true owner of the property of the person under his guardianship.

2. In the period of application of the Family Code, in the absence of an explicit legal provision, it was held that "this principle results implicitly from the whole economy of the legal regulations concerning the guardianship of minors, regulations which, as in the case of parental child custody, always maintain a separation between the assets of the guardian, on the one hand, and those of the minor under his guardianship, on the other hand". Other authors have based this principle on Article

125 of the Family Code, which established the proper application in matters of guardianship of certain provisions relating to the rights and duties of parents towards their minor children, including those of Article 106.

3. Currently, some authors have based this principle on Articles 142 and 143 of the Civil Code. Article 142 governs the guardian's duty to administer the property of the minor beneficiary of the guardianship, and Article 143 his duty to represent the minor in legal acts. Reference is also made to Article 807 of the Civil Code, which regulates the separation of administered property. These legal provisions do not explicitly stipulate the patrimonial independence between the administrator (guardian) and the beneficiary of the administration (the minor), but only suggest it.

4. The patrimonial independence between individuals, including between the guardian and the minor beneficiary of the guardianship, is based on Article 31 para. (1) of the Civil Code, according to which "every natural or legal person is the owner of property...". An essential feature of property is personality. Patrimony is inherent to the natural or legal person and a *sine qua non* condition for its participation in the civil circuit. The main consequence of personality is uniqueness, which means that each legal subject has only one property. Another consequence of personality is the inalienability of the natural person's property by *inter vivos* legal acts, as a universality of rights and obligations that can be evaluated in money or as fractions of that universality. If, because of the institution of guardianship, there were confusion between the assets of the minor and those of the guardian, the minor's participation in the civil circuit would be annihilated or restricted, with serious consequences in terms of respect for his or her best interests from a property perspective.

5. To eliminate the sources of different interpretations on this subject, I consider it appropriate that, *de lege ferenda*, a new paragraph be added to Article 142 of the Civil Code (administration of the minor's property), providing that "Art. 500 of the Civil Code shall apply accordingly, with the exception of the right of inheritance and maintenance'.

1.5.5. Guardianship under the supervision of the guardianship court

1. The idea of controlling the guardian's activity dates to Roman law.

In Romania, the Calimach Code and the Caragea Code laid down rules for the supervision of the activity of the guardian (epitrop) by the state authorities and other individuals. According to the Civil Code of 1864, *guardianship* was "entrusted first to the family council and then to the courts". Under Article 7 of the Law of 25 June 1924 on the organization of the judiciary, in the case of courts organized in several divisions, this task was assigned to a special division (for supervising the administration of guardianships and dowry funds). In courts organized in a single division, a

guardianship judge was appointed. Under the terms of the Family Code, the guardianship authority was given the task of supervising the guardian's activity. Chapter IV (Art. 158-160) was assigned to the guardianship authority. At present, in matters of guardianship, the guardianship authority has powers only in the limited cases provided for by law. Its role, including control over the way the guardian fulfills his or her duties regarding the minor's person and property, is taken over by the guardianship court. The CCR ruled that "the legislator considered it necessary to replace the supervisory powers of the guardianship authority, as an administrative institution subordinate to the local public authority, with those of a specialized court, namely the guardianship court".

2. Supervision as such is governed by Article 151 of the Civil Code, in the section entitled "Supervision of the exercise of guardianship". This section also contains provisions on the guardian's annual report, discharge, prohibition of exemption from accountability and complaints against acts and deeds harmful to the minor. The subject of the inspection is the manner in which the guardian and the family council carry out their duties with regard to the person and property of the minor. Within the framework of the control activity, the guardianship court is obliged, pursuant to art. 2 para. (4) of Law 272/2004, to ensure that the best interests of the child prevail. It is an obligation to take promptly the decisions required by the findings made during the supervision.

3. Contrary to Dec. CCR no. 795/2020, in practice, after February 11, 2020, some courts, instituting guardianship, have obliged the guardianship authority to control how the guardian fulfills his obligations regarding the minor's property. This practice is unlawful as it is contrary to Article 151 of the Civil Code. The Constitutional Court has ruled that "until the establishment of the guardianship court, the authorities and institutions with powers in the field of the protection of the rights of the child, i.e. of the individual, shall continue to exercise the powers provided for by the regulations in force at the date of the entry into force of the Civil Code, except for those exclusively given to the guardianship court". Paragraph (2) of art. 151 of the Civil Code only gives the guardianship court the possibility to request the cooperation of public administration authorities, institutions and public services specialized in child protection in the framework of its control activity. The public administration authorities include the guardianship authority. The court of guardianship can only request its support and not delegate its powers, including the power to monitor the activity of the guardian.

4. Article 151 of the Civil Code contains novel elements that support the superiority of the current regulation. At present, supervision also covers the activity of the family council. The reason for extending the scope of the review to the activity of the family council is based on its important

role in the guardianship of the minor - advisory to the guardianship court and the guardian, as well as supervision of the guardian's performance of his duties and fulfillment of his obligations regarding the minor's person and property. The analysis of the provisions of the Civil Code does not reveal the existence of express rules that ensure control over the activity of the family council. Just as in the case of the guardian, the guardianship court's control over the activity of the family council should be carried out *a priori*, by verifying the legality and appropriateness of the opinions given and decisions taken regarding the person and property of the minor. In order to clarify the power of the guardianship court to review the activity of the family council, it would be appropriate to introduce a rule, *de lege ferenda*, in the context of the provisions intended for the family council, stipulating that 'on application or ex officio, the guardianship court shall rule on the legality and appropriateness of the opinions given or decisions taken by the family council'.

5. The control of the guardianship court must be effective and continuous. Control is effective if it is real, realized in fact. For example, the guardianship court is obliged to verify the reality of the data entered by the guardian in the statements of account. Control is continuous if it is carried out without interruption.

6. The guardianship court shall exercise its power of *a priori* control over the guardian's activity by means of the authorizations which it is empowered by law to grant to the guardian in relation to certain measures concerning the person or property of the minor. For the same purpose, the guardianship court has the power to approve certain acts of the guardian or to require him to perform certain acts. The court of guardianship shall also review the guardian's activity *ex post*, by means of annual reports, reports requested by the court of guardianship of its own motion, and by settling complaints against acts and actions of the guardian that are harmful to the minor.

7. To achieve a uniform record of procedural acts, including those concerning the control activity, Art. 105 para. (1) of the Rules of Procedure of the Courts of Justice provides that "throughout the duration of the protection measures, the procedural acts relating to the exercise of the guardianship court's powers shall be carried out in the same file, randomly assigned to a specialized panel for the trial of juvenile and family cases".

SECTION 1.6.
LEGAL NATURE OF GUARDIANSHIP OF A MINOR

1.6.1. Preliminaries

As a form of alternative protection of minors, guardianship is characterized by certain basic features or legal characteristics: mandatory, gratuitous and personal. Some authors add the social character and uniqueness of guardianship. As in the case of the principles, specialized literature shows little interest in their analysis. There is a lack of concern for analyzing the legal nature of guardianship in relation to the special regulations on the protection and promotion of children's rights.

1.6.2. Mandatory

1. In ancient Roman law, guardianship was conceived as both a right and an obligation for agnate relatives. It was intended to prevent incapable persons from squandering their property to their own detriment. Later, guardianship was seen as a means of protecting incapable persons. Under guardianship dative, the guardian was appointed by the competent State authority (magistrate). The latter could refuse the task of guardianship only if he based his refusal on a legal excuse or proposed a more suitable person to carry out the task of guardian (*potioris nominatio*).

2. In Romania, Article 255 of the Calimach Code provided that epitropy is "a right and a power". The provisions of this code made guardianship obligatory for certain categories of persons. The Caragea Code explicitly and restrictively regulated the cases in which the guardian was "free to renounce guardianship". Implicitly, guardianship was conceived as an obligation for the guardian.

The obligation of guardianship also existed in the Civil Code of 1864. The strict regulation of the situations in which guardianship could be refused made it obligatory. The compulsory nature of guardianship was based on the fact that it was intended to protect an important category of incapacitated persons. Nowadays, compulsory guardianship is enshrined in contemporary comparative law. The Civil Code of 1864 laid down exceptions to the obligation of guardianship, in cases where guardianship could be refused. Art. 370-382 of this code regulated the "causes defending guardianship". These were based on the exercise of a public office or on a private interest (lack of kinship, age, serious infirmity, exercise of another guardianship, large number of minors). The legal excuses were established in the interests of the guardian, which clearly distinguished them from the grounds of incapacity of the guardian, which were established in the interests of the person under guardianship.

Art. 118 para. (1) of the Family Code provided that "the person appointed guardian may not refuse this task". The following paragraph sets out the situations in which, by exception, the task of guardianship could be refused. Some of these cases were taken over from the previous rules, others were new. Unlike the previous legislation, the list was illustrative, since Article 118 para. (1)(e) of

the Family Code also referred generically to "other valid reasons" which may prevent the person from fulfilling the guardianship duties. If these situations arose during the guardianship, the guardian was entitled to request his replacement.

3. The current Civil Code marks a radical change of option from the previous regulations. Although it is possible for the guardian to be appointed by the parent, the guardian is appointed by the guardianship court only with his consent. This situation has led some authors to conclude that, from the proposed person's point of view, guardianship is optional (facultative). The optional nature is restricted in the situation where the guardian is appointed by an agreement concluded with the minor's parent, in which case the appointed guardian may refuse the appointment only for the express and limitative reasons set out in Art. 120 para. (2) of the Civil Code. Voluntary acceptance of guardianship is in accordance with the principle of free will. Since it is not imposed, the exercise of guardianship is more likely to be in the best interests of the child. In these circumstances too, the guardianship court must establish based on evidence that the assumption of guardianship is not a formal act, and that the guardian is, on the contrary, the right person to take care of the child.

4. Without further background, Article 120 of the Civil Code provides that the person appointed guardian is obliged to continue to fulfill the duties of the guardianship until the appointment of a new guardian or the establishment of another guardianship measure. By way of exception, the circumstances in which continuation of guardianship may be refused are laid down. Article 156 et seq. The Civil Code expressly and restrictively regulates the cases and conditions for termination of guardianship.

The possibility for an individual to refuse guardianship is also regulated in comparative law.

1.6.3. Gratuity

1. The principle that guardianship is free of charge is based on the moral and patrimonial solidarity that exists between the person who assumes this task and the minor. Since the task of guardianship is usually entrusted to relatives, relatives by affinity or friends of the child's family, it is presumed that those people have taken it on to protect the minor and not for commercial gain.

2. In the early days of Roman law, when guardianship was regulated for the purpose of protecting the patrimonial interests of the family of the legatee, there was no question of compensating the guardian. Later, when guardianship became a legal means of protecting the incapable, the guardian was also not compensated. This situation can be explained by the kinship that most often existed between the guardian and the ward.

3. Art. 353 of the Calimach Code empowered the Epitropical Commission to establish for the benefit of the guardian a "measured payment", which was capped at five percent of the "excess of the income of the aged" and six thousand lei for one year. The Caragea Code made no provision for the payment of the guardian.

4. During the period of application of the Civil Code of 1864, the moral value of the gratuitous nature of guardianship was sometimes underestimated, which is why this particular feature was criticized. Other authors have noted that "this feature of guardianship is traditional and has the force of law, although it is not enshrined in any positive text". The case-law of the time confirmed the gratuitous nature of guardianship. By implication, the guardianship was also free of charge under the previous Civil Code. For example, Article 398, thesis II, allowed the family council to allow the guardian to be assisted by one or more administrators and procurators in the exercise of the guardianship. Only they could receive a salary for their work.

5. Art. 121 para. (1) of the Family Code expressly provides that guardianship is a gratuitous task. By way of exception, the guardianship authority had the possibility to grant the guardian remuneration. In specialized literature the opinion has been expressed that "the gratuitousness of guardianship is of its nature, not of its essence".

6. Article 123 of the Civil Code (free guardianship) has taken over, with amendments, Article 121 of the Family Code. In comparison with the previous regulation, the remuneration is fixed by the guardianship court, but on the advice of the family council (if it is constituted). Compensation is granted only at the guardian's request and is optional for the guardianship court. These circumstances support the generally altruistic nature of guardianship. Under the same conditions, the allowance may be modified or abolished. The remuneration may not exceed 10% of the income from the minor's property and is fixed in relation to the work done by the guardian in administering the estate.

The principle of gratuitousness of guardianship is also found in comparative law, which inspired the Romanian legislator.

7. The amount of the remuneration is determined based on two criteria: the work done by the guardian in administering the minor's property; and the material circumstances of the minor and the guardian. These criteria are also found in comparative law.

8. The maximum legal limit for remuneration is 10% of the income from the minor's property. Setting the remuneration in relation to the income from the property is likely to motivate the guardian to achieve their proper administration.

9. As under the previous rules, the guardian's remuneration is reassessable. The guardianship court may modify or abolish it, depending on the circumstances. Modification of the allowance means increasing or reducing it. The increase may not result in an allowance of more than 10% of the income from the minor's property. To change the allowance, the guardianship court is obliged to seek the opinion of the family council (if one has been set up).

10. The altruistic nature of the guardianship of a minor was somewhat mitigated in 2014, when a *monthly foster care allowance* was regulated for each child for whom foster care has been taken or guardianship has been established. The allowance is paid from the state budget and is intended to provide the child with the rights set out in Article 129 para. (1) ["food, clothing, footwear, hygienic and sanitary materials, school supplies/manuals, toys, transportation, cultural and sports materials, and money for personal needs"]. Its amount is 1,808 ISR.

11. The view was rightly expressed that "...the fact that the guardianship is free of charge must not mean that the guardian must also assume the financial duties inherent in his office". Examples are given of the expenses incurred for the maintenance of the minor, the administration of the minor's property and those incurred for the preservation of the minor's rights. Without elaborating in context, Art. 148 para. (2) thesis I of the Civil Code expressly provides that "the expenses necessary for the maintenance of the minor and the administration of his property shall be covered by his income".

1.6.4. Personal character

1. Art. 369 of the previous Civil Code took over Art. 407 C. civ. fr. and provided that "guardianship is a personal charge which cannot pass to the guardian's heirs". However, the guardian's heirs, whether minors or adults, were responsible to the minor or his heirs for the way in which their predecessor had administered the guardianship. If the heirs were of full age, they were obliged to continue the guardianship until a new guardian was appointed. Minor heirs were exempt from this duty. The continuation of the guardianship by the guardian's heirs of full age was of an interim nature, since the duty fell to them only until the new guardian was appointed.

2. It has been noted that the assumption of the duties of guardianship by the heirs of full age is a duty of the estate, which is why they "... will be able to evade this duty by renouncing their author's estate".

3. In the Family Code there was no text such as Article 369 of the previous Civil Code. The personal nature of guardianship could be inferred implicitly from numerous provisions of the Code. These included, for example, those which established the guardian's rights and duties in relation to the person and property of the minor, the guardian's obligation to continue the guardianship, and the

guardian's liability for improper exercise of the guardianship. Most of the authors have rightly stated that guardianship is *intuitu personae*, since it is established with regard to the person of the guardian and the specific needs of the minor, which is why it could not be exercised in the guardian's place by another person, by way of representation or by way of heirs.

4. Art. 122 para. (1) of the Civil Code has taken over the principle laid down in Article 369 of the previous Civil Code. Specifically, it states that "guardianship is a personal task". Acts or legal acts concerning the person or property of the minor are performed or concluded personally by the guardian. This is a normal rule, since the appointment and designation of the guardian is carried out by considering the specific needs of the minor and the moral and material capacity of the guardian to meet those needs.

5. In the event of the guardian's death, Article 157 of the Civil Code requires the heirs of full age to take over the duties of the guardianship until a new guardian is appointed. If the heirs are minors, they will not take over the duties of the guardianship, but a special curator will be appointed, who may even be the executor of the will.

6. Due to the personal nature of guardianship, the guardian is prohibited from transferring the duties arising from the guardianship to another person without the consent of the court of guardianship.

7. Article 104 and Article 105 of Law no. 272/2004, by exception from the personal nature of guardianship, gives the guardian who goes to work abroad the possibility to designate the person who will support the child and fulfill the duties of parental authority over the minor while he/she is absent from the country.

8. The personal nature of guardianship is also regulated in comparative law.

1.6.5. Social character

1. The term *social* has the meaning of something that is specific to human society or that is related to human life in society. Since legal rules address human conduct, they necessarily have a social character. Roman jurists stated that *ubi societas, ibi lex.* Seen from this perspective, social character is not specific to guardianship. It is found in particular forms in any legal institution. That is why some authors do not analyze this so-called particularity of guardianship.

2. Currently, Art. 1 para. (3) of the Constitution provides that the Romanian State is, among other things, a *social state*. Strictly legally, the social character of the state is expressed by the respect shown for the rights and freedoms of citizens, both because of the regulations adopted and the day-to-day steps taken to ensure that they are respected. From this perspective, it was considered that the

supreme values of the Romanian state "constitute a point of reference both for the regulations on fundamental rights and freedoms and for those concerning public authorities". The constitutional text concerns all citizens and all their fundamental rights and freedoms. The CCR has ruled that the welfare state is a "constitutional value which signifies, among other things, the idea of *social solidarity* and social security policy" (n.d.). Alternative care measures, including child protection through guardianship, are also an expression of social solidarity.

3. Article 49 para. (1) of the Constitution, "children and young people enjoy a special regime of protection and assistance in the realization of their rights". To give concrete expression to this constitutional principle and to comply with the provisions of the CRC, Law No 272/2004 was adopted, which establishes a special legal regime for the protection and promotion of children's rights. Among these rights is the right of the child to alternative care, which also includes the child's protection through guardianship. In the case of children and their protection through guardianship, the social component of the state's approach is more prominent. The right of the child to social, legal and economic protection is recognized by Art. 17 par. 1 letter (c) of the ESC, which obliges EU Member States to "provide special protection and support ... for the child or young person temporarily or permanently deprived of family support".

1.6.6. Uniqueness of guardianship

1. The uniqueness of guardianship is explained by the fact that the guardian assumes both guardianship of the minor's person and guardianship of the minor's property. It has been emphasized that "guardianship of the minor's person is always a *sole* guardianship in order to preserve coherence in the direction of the minor's education. However, regarding the material administration of the minor's property, it is interesting to note the provision of the new Civil Code, which establishes that the guardianship court may entrust the administration of the property or part of it to a specialized natural or legal person (Art. 122, paragraph (2) of the Civil Code)".

2. The uniqueness of the guardianship also results from the fact that the same minor cannot simultaneously benefit from two or more guardianships. The possibility offered by Article 112 para. (1) of the Civil Code, that a husband and wife may be joint guardians, does not constitute an exception to this rule, since the spouses exercise the same guardianship.

CHAPTER II

THE CHILD, THE GUARDIAN, THE FAMILY COUNCIL AND THE GUARDIANSHIP COURT IN THE CONTEXT OF THE GUARDIANSHIP OF THE MINOR

SECTION 2.1.

THE CHILD - THE SUBJECT OF GUARDIANSHIP

2.1.1 The legal meaning of the term child

1. In public international law, Article 1 of the CRC provides that "a child means every human being below the age of 18 years unless the law applicable to the child sets the age of majority below that age". The rule is suppletive, which is why states parties have the possibility to set an age lower than 18 years. In Romania, Article 38 para. (2) of the Civil Code, an individual becomes of age on reaching the age of 18. Until that age, the person is a minor. The correlation between Article 1 of the CDC and Article 38 para. (2) of the Civil Code may support the conclusion that the minor is a child.

2. The meaning of 'child' in Article 1 of the CRC is the legal parameter used in other international legal instruments, including in Europe. This meaning exists in certain regulations adopted by the CoE, in the interpretation of the European Committee of Social Rights and in the case law of the ECHR. Under the CRC, the status of a child is based exclusively on the individual's minority; the level of capacity has no legal significance. Minority gives rise to a presumption of incapacity.

3. In EU law there is no single, official definition of the term child. The meaning of the term differs depending on the context of standardization.

4. The Romanian legislator considered fit to define the term child in a different way from Article 1 of the CRC. It added to the requirement of minority the condition that the natural person does not have acquired full capacity (Article 4 letter a) of Law no. 272/2004 and Article 263 paragraph (5) of the Civil Code). Until the age of 18, the individual is a minor. On the date on which he or she reaches the age of majority, the individual acquires full capacity. By way of exception, under the conditions of the Civil Code, full capacity is acquired by a married minor and by a minor who, for good reason, has been granted full capacity by the guardianship court. A minor who has been granted special guardianship lacks capacity, while a minor who has been granted legal guardianship has restricted capacity. The combination of the requirements laid down in Article 4(a) of Law No 272/2004 and Article 263 para. (5) of the Civil Code. in conjunction with Articles 38 to

40 of the Civil Code, it follows that, in Romania, a minor without exercise capacity and a minor with restricted exercise capacity has the status of child.

5. The Romanian legislator's solution is correct, as it is in line with the capacity of the natural person to conclude legal acts personally and alone, as well as with the legal provisions intended for parental authority and alternative child protection.

6. There is an important mismatch between the meaning of the term 'child' in Article 1 of the CRC and the meaning established by Romania's domestic regulations. Article 1 of the CRC refers to human beings under the age of 18 without distinction according to the level of their capacity to exercise their rights, which is why it defines all categories of minor natural persons as children. By contrast, national legislation only covers minors without capacity and those with restricted capacity. Article 1 of the CRC has a broader scope, which is why it is more favorable than the national rules and has priority in application.

7. In these circumstances, the Romanian legislator has several options. One is not to amend the domestic regulations; in which case the child is considered to be a natural person who is a minor regardless of the level of his or her capacity. This option calls into question the applicability of the domestic rules on exercise of exercise of legal capacity, parental authority and alternative care, since the international rules are more favorable and have priority in application. Another option is to bring Art. 4 letter a) of Law 272/2004 and Art. 263 para. (5) of the Civil Code with Art. 1 of the CRC, in order to consider the minor as a child, without the requirement of lack of full capacity. In this case, the rules on exercise of exercise of parental authority, parental authority and alternative protection should also be amended accordingly. Lastly, an amendment could be tabled to amend Article 1 of the CRC to stipulate that 'a child is every human being without full capacity up to the age of 18 years, unless the law applicable to the child sets the age of majority below that age'.

8. Under Article 4 letter a) of Law no. 272/2004 and Article 263 para. (5) of the Civil Code, the term child is considered in a restricted sense, i.e. a minor natural person without full exercise of his or her full capacity who is a beneficiary of parental care or of an alternative form of protection. The term can also be understood in a broad sense, as a natural person, irrespective of age and level of capacity, who is a first-degree descendant of another natural person. To identify the meaning in

which the term child is used in certain normative contexts, it is necessary to consider the criterion of protection, in the case of the child in a narrow sense, and the criterion of parentage, if it is considered in a broad sense.

2.1.2. Who is protected by the establishment of guardianship - the minor or the child?

1. The attachment to tradition and its association with the acceptance of new solutions of expression in the field of the protection and promotion of children's rights has led to the use of a non-unitary legal language, contrary to the rules of legislative technique. This explains why there is currently ambiguity as to the legal status of the person who can benefit from the alternative form of guardianship - the minor or the child. Article 105 of the Civil Code sets out the categories of natural persons benefiting from special guardianship measures, minors being mentioned first. Article 106 para. (1) of the Civil Code stipulates that "the protection of minors shall be provided by their parents, by guardianship, by foster care or, where appropriate, by other special protection measures provided for by law". In particularizing these provisions of principle, the Civil Code regulates parental authority and as alternative forms of protection, guardianship of the minor and adoption of the child. Law No 272/2004 lays down the legal regime of special child protection measures.

2. In public international law, the child's right to alternative protection is recognized by Art. 20 para. 1 of the CRC.

3. An analysis of the relevant national legislation reveals a difference in the language of guardianship, on the one hand, and parental authority, adoption and special protection, on the other. While the legal provisions relating to guardianship overwhelmingly concern the minor, those relating to parental authority, adoption and special protection measures usually concern the child or minor.

4. In guardianship matters, the term minor is used synonymously with the term child. From a strictly legal point of view, the synonymy is erroneous, since not all minors are children within the meaning of Article 4 (a) of Law No 272/2004 and Article 263 para (5) of the Civil Code. (5) Only a natural person who is a minor without full capacity or, in other words, a person who has the status of a child in the narrow sense of the term, can benefit from parental care or a form of alternative protection, including guardianship.

5. The fact that the guardian represents the minor beneficiary of the guardianship in legal acts or authorizes them is a peremptory argument to the effect that guardianship can be instituted for the protection of a minor who is a child in the narrow sense and not of any minor, regardless of the level of his or her capacity to exercise his or her rights. The use of the term 'minor' in the current legal rules governing guardianship can be explained by using the traditional legal language on the subject.

This language was based on the fact that, as a general rule, full capacity is acquired when the natural person reaches the age of majority and that the minor does not have full capacity.

6. To eliminate the source of different interpretations on this issue, in accordance with the rules of legislative technique, it is appropriate for the legislator to replace the term *minor* with the notion *child* in all texts regulating the protection of minors. This remedy is likely to bring the rules in this area into line with the reality that only minors without full capacity to exercise their full rights benefit from parental care or alternative forms of protection. This legislative intervention also achieves terminological unity in these matters.

2.1.3. Categories of children in alternative care

1. Article 3 of Law 272/2004 sets out five categories of children who benefit from its provisions. Since the right to alternative care is recognized for any child who is deprived of parental care or who, in his or her best interests, cannot be left in the care of his or her parents, subject to the legal conditions, the categories of children referred to in Article 3 may also be eligible for guardianship.

2. Specifically, these are: Romanian citizens children residing in Romania; Romanian citizens children residing abroad; children without citizenship residing in Romania; children asylum seekers or beneficiaries of a form of protection in Romania, granted under Law no. 122/2006 on asylum in Romania; foreign citizens children residing in Romania, in emergency situations established under Law no. 272/2004 by the competent Romanian public authorities.

2.1.4. Establishment and exercise of guardianship in the best interests of the child

1. In Roman law, in the beginning, the guardianship of the minor was regarded as a way of defending the patrimonial interests of the unmarried family. Subsequently, this concept was abandoned, and guardianship was regarded as a measure for the protection of incapable persons.

In Romania, with reference to the old Romanian laws and the Civil Code of 1864, the doctrine has presented guardianship as a measure of protection of minors, which replaced, to a large extent, parental power. Although it was not explicitly provided for, there were legal provisions that implicitly supported the idea of protecting minors through guardianship.

Art. 114 of the Family Code explicitly provides that guardianship is exercised only in the interests of the minor.

2. Article 114 of the Family Code was taken over with amendments by Article 133 of the Civil Code. It provides that "guardianship shall be exercised solely in the interests of the minor as regards

both the person and the property of the minor". Many provisions of the Civil Code are designed to promote this interest. Article 133 of the Civil Code marks a normative step forward compared to the previous rules, as it provides that guardianship is exercised in the best interests of the minor in respect of both the person and the property of the minor. Even so, it remains at odds with the CRC and Law No 272/2004, which provide that the best interests of the child must be respected in all actions concerning children, regardless of their nature, whether legislative, judicial or administrative.

3. The CPDC has adopted 'General Comment No. 14 (2013) on the right of the child to have his or her best interests prevail'. It was held that Art. 1 of the CRC enunciates one of the fundamental values of the CRC. The CPDC considers that there is no hierarchy of rights under the CRC. All Convention rights are in the best interests of the child. In other words, the best interest of the child is the common denominator for all the rights recognized by the CRC, including the right to alternative care. In the view of the CPDC, the concept of the best interests of the child has three components: a fundamental material right of the child, a fundamental principle of law and a procedural rule.

4. Law No 272/2004 provides *expressis verbis* and develops the principle of respect for and promotion of the best interests of the child as a priority. Art. 2 para. (1) obliges the State authorities, including the legislature, to prioritize the compliance with the principle of the best interests of the child of the regulations they adopt in the field of children's rights. In accordance with art. 3 par. 1 of the CRC and General Comment No 14 (2013) of the CPDC, Art. 24 para. (2) of the CFREU provides that "in all actions relating to children, whether taken by public authorities or private institutions, the best interests of the child shall be a primary consideration". The ECHR case law consistently reaffirms the best interests of the child and its prevalence over other interests, including in cases concerning Romania.

5. Article 133 of the Civil Code is also at odds with Article 104 para. (1) of the Civil Code, which lays down the principle that protective measures are *established* solely in the interests of the protected natural person. This principle requires that protective measures must be established in the interests of the person concerned. Any protective measure must be taken in the interests of the individual concerned. Since it is a matter of public policy, this principle must be always observed when protective measures are taken, not just when they are exercised.

6. In line with the above and with the views expressed in the doctrine, guardianship of a minor, as a form of alternative care, must be established and exercised exclusively in the best interests of the child. From the perspective of General Comment No 14 (2013) of the CPDC, the right to

alternative care is established and must be exercised in the best interests of the child. In logical sequence, the forms and modalities of alternative protection, including guardianship, must be established and exercised in the same paradigm. The difference in language concerns the substance of the protection of the minor, since the promotion of his best interests in this way must provide him with moral and material benefits beyond the quantitative and qualitative level at which they were satisfied before the measure was instituted.

7. As regards other family relationships, the Civil Code expressly lays down the principle of the best interests of the child and specifies the circumstances in certain particular cases. Article 263 of the Civil Code is aimed at the "best interests of the child". In concrete terms, it provides that "any measure concerning the child, whoever the author, must be taken in the best interests of the child".

8. In court practice, in cases concerning guardianship of minors, the situation has given rise to the use of inconsistent language. Some of the courts refer to the best interests of the minor and others, few, refer to his or her best interests. With a few exceptions, specialist literature is not concerned by this mismatch.

9. The Romanian authorities, including the courts, have an obligation to comply with the CRC and the EUCRC. The provisions of the CRC are more favorable to the child than those of Art. 133 of the Civil Code, which is why they have priority in application. Compliance with the principle of giving priority to promoting the best interests of the child in matters relating to the establishment and exercise of guardianship can also be based on the priority in the application of Law No 272/2004 over the Civil Code.

10. The best interest of the child is circumscribed by the principle enshrined in Article 49 para. (1) of the Constitution, which obliges the legislator to provide for children and young people "a special regime of protection and assistance in the realization of their rights". The purpose of this principle is to establish not only a special legal regime, but also a favorable one for children and young people. From this perspective, it was considered that Article 49 para. (1) of the Constitution implies the modern conception of children's rights, which is "based on the fact that children are no longer objects of protection but, on the contrary, must be supported and assisted by special measures for the exercise of their fundamental rights and freedoms". Support and assistance for children must also be provided in specific forms in the case of alternative care measures, including guardianship. This includes, for example, the setting up of a family council to supervise and advise the guardian and the supervision exercised by the guardianship court over the guardian's performance of his or her duties regarding the person and property of the child who is the beneficiary of the guardianship.

11. To eliminate the sources of different interpretations on this issue, to bring it into line with international and EU regulations, as well as with special regulations in the field of protection and promotion of children's rights, it is appropriate to amend Article 133 of the Civil Code accordingly. The express regulation of the principle of the best interests of the child in the area of guardianship is necessary because of its specific content in the framework of alternative protection measures. For these reasons, I suggest that the legislator amends Article 133 of the Civil Code, *de lege ferenda,* as follows: 'guardianship is established and exercised in the best interests of the child'. The topography of this Article must be changed in the context of the rules laid down for the opening of guardianship of minors. On this occasion, a new article should be inserted after Article 133 of the Civil Code, providing that, "in the exercise of guardianship, the guardian has the rights and duties of the parent towards the person and property of the minor, unless otherwise provided by law". The current provisions for guardianship of a minor would merely set out derogations from parental care.

12. The establishment and exercise of guardianship in the best interests of the minor concerns both the person and the property of the minor. This clarification was necessary to avoid the possible interpretation that guardianship concerns mainly patrimonial matters of the minor's care. Even in these circumstances, as under the previous rules, the current Civil Code lays down fewer rules concerning the exercise of guardianship in respect of the minor's person than those concerning the administration of his property. Just as in the case of parental care of the child, in addition to questions of a material nature, covering a wide range of conditions (care, housing, maintenance, etc.), the emotional compatibility between the guardian and the child and the guardian's ability to become directly involved in the child's education, teaching and vocational training are of major importance in the decision to establish guardianship. The entrustment of guardianship to a person with the appropriate moral guarantees and material means is an essential prerequisite for the exercise of guardianship in the best interests of the child. The promotion of the best interests of the child, including through the establishment and exercise of guardianship, is incompatible with regression and setbacks in the child's physical and moral development, with imbalances in the child's social and emotional state or with his or her upbringing in an environment which is hostile or alien to family life.

13. To determine the best interests of the child, Art. 2 para. (6) Law 272/2004 imperatively sets out the minimum criteria to be respected. In foreign doctrine it has been stated that the prevalence of the best interests of the child cannot remain *an empty slogan* but must be emphasized as a *firm right*. In the same vein, the view was expressed that the best interest's principle should not be

understood in an abstract and theoretical way, but on the basis of the particularities of each child's situation and the subject matter in which it applies.

14. The doctrine has drawn up an inventory of the criteria used in judicial practice to determine the best interests of the child, most of which are also applicable where the child is the beneficiary of an alternative protection measure, including guardianship. These criteria have been grouped into three categories: the child's needs; the child's age and maturity; and the ability of the parents to respond to the child's needs.

15. The establishment and exercise of guardianship in the best interests of the minor also means that the interests of other persons may not be promoted in this way. From this perspective, the promotion of the best interests of the minor is exclusive in nature, which is why there are no exceptions. At the same time, "...only the best interests of the child that are lawful, moral and in accordance with the public interest may be promoted by guardianship".

16. To determine whether the protective measure of guardianship is in the best interests of the minor, the court is obliged to administer evidence with which to assess the concrete needs of the child, as well as the moral guarantees and material conditions offered by the future guardian. In the best interests of the child, the current situation of the child is considered, and the establishment of the guardianship measure is aimed at improving the child's protective environment. In practice, the courts usually order social enquiries to be carried out to decide on the establishment of guardianship. These are carried out by the public social welfare services of local public authorities.

17. If the guardianship is not exercised in the best interests of the child, the guardian will be removed from the guardianship under the conditions of art. 158 C. civ.

2.1.5. The child's right to express his/her opinion and to be heard

1. The CRC obliges states parties to recognize the right of the child who is capable of forming his or her own views on any matter affecting him or her. For the purpose of expressing his or her views, the child shall be given the opportunity to be heard "in particular in any judicial or administrative proceedings affecting him or her". At EU level, the right of the child to express his or her views is enshrined in the CFREU. This right is reaffirmed by EU Regulation 2019/1111. In Romania, the right of the child to express his or her opinion and to be heard is regulated by art. 29 of Law no. 272/2004 and art. 264 of the Civil Code. Under the terms of the CRC, the child's hearing is the legal means by which the child can exercise his or her right to express his or her opinion. Paragraph 2 expressly refers to "any administrative or judicial proceedings concerning him or her", but does not exclude the possibility for Member States, through their national legislation, to provide

for hearing the child in other proceedings of a different nature. Romania has not made use of this possibility. Hearing of the child is limited to administrative or judicial proceedings concerning the child. Under Article 29 of Law 272/2004 and Article 264 of the Civil Code, the child's right to be heard implies, among other things, the possibility for the child to express his or her opinion. In other words, contrary to the international regulation, the relationship between expressing an opinion and hearing the child is reversed in domestic law. In the interests of consistency and accuracy, but also to comply with Article 12 para. 1 of the CRC, it is appropriate that, *de lege ferenda*, Article 29 para. (3) Law No 272/2004 should be amended as follows: "the right to express his or her opinion gives the child the possibility to ask for and receive any relevant information, to be consulted, to be heard and to be informed of the consequences (...)".

2. The right of the child to express his or her views in any matter affecting him or her and to be heard in administrative or judicial proceedings affecting him or her shall enable him or her to participate directly in decisions concerning the exercise of his or her rights and the fulfillment of his or her obligations in respect of his or her person and property.

3. Under Article 12 par. 1 of the CRC, the right of the child to express his or her views is of a general nature. It may be exercised in relations with both public and private authorities or institutions and in relations with natural or legal persons, including parents and guardians.

4. The right to express an opinion is recognized only for children capable of discernment. *Per a contrario*, the opinion expressed by the child will not be considered if, for some reason, he or she lacks judgment.

5. The child has the right to express his or her views freely or, in other words, without any constraint of any kind, whether mental or physical. The freedom to express an opinion presupposes, as a *sine qua non*, that the child is informed about the issues that concern him or her.

6. Article 29 of Law No 272/2004 and Article 264 of the Civil Code have similar normative content. For example, both provide for the obligation to listen to a child who has reached the age of 10 in any administrative or judicial proceedings concerning him or her, the possibility to listen to a child under the age of 10, and the right of the child to ask for and receive any information. The transposition *ad litteram* or with minor differences of some provisions of Article 29 of Law No 272/2004 into the content of Article 264 of the Civil Code has led to parallelisms. In order to harmonize domestic rules with the requirements of Article 12 of the CRC and to eliminate the existing parallelisms, it is appropriate to replace, *de lege ferenda,* Article 264 of the Civil Code with a reference rule providing that 'the expression of the child's views and the hearing of the child shall

be carried out in accordance with the law'. In those circumstances, Article 29 of Law No 272/2004 becomes applicable. The same remedy is implied by all the provisions of the Civil Code which provide for the appropriate application of Art. 264 of the Civil Code.

SECTION 2.2.
THE GUARDIAN

2.2.1. Capacity to be a guardian

2.2.1.1. Preliminaries

1. The guardian, alongside the minor, is the central figure in the legal institution of guardianship.

2. Etymologically, the term *tutore* is derived from the Latin noun *tutore* (*oris*), meaning defender, protector or simply guardian.

3. In Romania, in Pravila lui Matei Basarab, the guardian was called *ispravnic*, and in the Calimach and Caragea Codes *epitrop*. Subsequently, the Civil Code of 1864 and the Family Code, without explicitly defining it, referred to the guardian as a natural person appointed under the law by the competent authority to take care of the person and property of an incapacitated person, a minor or a person under court prohibition. Like the previous regulations, the current Civil Code does not provide a definition of guardian. The matter is left to doctrine.

4. *Dex* provides that the guardian is a "person authorized to exercise the right of guardianship". From the perspective of modern regulations, including the current Romanian ones, this meaning is outdated. Under the current rules, there is no longer any question that the guardian has a right of guardianship. The so-called right of guardianship can only be viewed from the perspective of a child who is temporarily or permanently deprived of the care of both parents or who, in his or her best interests, cannot be left in their care.

5. Over time, the Romanian doctrine has expressed different definitions of guardian.

6. The legislator's choices have evolved in close connection with the purpose of guardianship. Irrespective of the historical stage in which the legal institution of guardianship of minors is analyzed, the role of guardian has always been and continues to be given priority to relatives.

7. The analysis of the cases of incompatibility with the quality of guardian, the content of the guardianship, the duties of the guardian in relation to the person and property of the minor, as well as the situations in which he is removed from the guardianship supports the conclusion that the guardian must cumulatively fulfill the following requirements: he is a natural person; he has full capacity to exercise his office; he has moral guarantees and has the material conditions to fulfill the duties of the guardianship in the best interests of the minor; he is not in any of the cases of incompatibility provided by law. The doctrine in this area has also expressed the same view. Most of the requirements are to be found in comparative law or are referred to in foreign legal literature. There are also requirements not expressly laid down by law. They derive from a systemic interpretation of the applicable legal provisions and from the requirements of the principle that guardianship should be established and exercised in the best interests of the child.

8. In a traditional and formal manner, the importance of the guardian in the care of the minor beneficiary of guardianship has been and is reflected in the multitude of regulations on the subject.

2.2.1.2. Whether the guardian is a natural person

1. This condition is expressly laid down in Article 112 para. (1) of the Civil Code: '*a natural person* or a husband and wife together may be guardian, provided they are not in one of the situations of incompatibility provided for by this Code' (n.n.). The courts have also been held along the same lines. *Per a contrario*, a legal person cannot be a guardian.

2. Art. 122 para. (2) of the Civil Code, inspired by Article 189 of the Civil Code, provides that the guardianship court may decide, with the advice of the family council, that the administration of the minor's property or part of it be entrusted to a specialized natural or legal person. Unlike the Quebec legislation, the Romanian legislation does not confer on these persons the status of guardian, but only the powers to administer the property of a minor under the guardianship of a natural person.

3. By exception to Art. 112 para. (1) of the Civil Code, Article 25 of Law no. 448/2006 regulates a *sui generis* case in which the quality of guardian may be entrusted to a legal person, specifically, to the local public administration authority or to a private legal person that ensures the protection and care of the person, if the disabled person has no relatives or persons who accept guardianship.

4. Both for the single natural person and for husband and wife, the requirement of not being in any of the cases of incompatibility is explicitly and imperatively provided for.

5. Unlike the Family Code, under which guardianship could be entrusted only to a single natural person, Article 112 para. (1) of the Civil Code provides for the possibility of a husband and wife jointly being guardians. The possibility of the exercise of guardianship by husband and wife also existed in the Civil Code of 1864, but only in the context of the legal guardianship exercised over a minor child by his or her parents married together. Spouses also meet the requirement of being natural persons. The exercise of guardianship by husband and wife together is based on the right of the child to live in a family environment, but also on the tendency to achieve legal identity between the role of the guardian and that of the parents in the care of the minor. *Per a contrario*, individuals who, although in a stable cohabiting relationship, are not husband and wife, such as, for example, fiancés, cohabiting partners, persons of the same sex who have contracted or concluded a marriage abroad or persons of the same or different sex who have contracted or concluded a civil partnership abroad, cannot be joint guardians.

7. In the absence of an appointed guardian, Article 118 para. (1) of the Civil Code gives the guardianship court the possibility of appointing a relative, relative-in-law or friend of the minor's family as guardian, with priority. The primacy granted to these categories of natural persons is inspired by the rules of the previous Romanian Civil Code, having its origins in Roman law.

8. Art. 118 para. (2) of the Civil Code regulates an exceptional situation in which the appointed person or, failing that, the relative, relative-in-law or friend of the family cannot assume the guardianship, in which case the guardianship court appoints a personal representative of the minor. The person appointed must acquire this status under the terms of the special law.

9. Art. 112 para. (2) of the Civil Code regulates the situation in which several brothers or sisters are in a situation of guardianship. In this case, as a rule, a single guardian is appointed for all minors. The legislator presumes that the brothers and/or sisters living together is in their best interests.

2.2.1.3. Full capacity of the guardian

1. This condition results from the *per a contrario* interpretation of Article 113 (a) of the Civil Code, which declares incompatible with the status of guardian, inter alia, a person who is the beneficiary of special guardianship or legal counsel. Such a person does not have the capacity to exercise civil capacity if he or she benefits from special guardianship or has restricted capacity if he or she benefits from legal advice. Incompatibility on the ground of minority can also be interpreted in this way, since, as a rule, a person who is a minor does not have full capacity.

2. The condition of full legal capacity is essential for the fulfillment of the guardian's role of guardian of the minor. It is undisputed that guardianship also entails representing the minor in legal acts or assenting to some of them, as the case may be.

2.2.1.4. Fulfilment of moral guarantees and material conditions by the guardian

1. This condition is expressly laid down in Art. 115 and Art. 118 para. (1) of the Civil Code. The legislator presumes that the requirement is not met in certain situations which make a person incompatible with the office of guardian, such as, for example, loss of parental rights, restriction of the exercise of certain civil rights, insolvency and misbehavior.

2. The Civil Code does not contain rules on the assessment of the moral guarantees and material conditions available to the person to be appointed guardian. Neither does Law No 272/2004 regulate the assessment of the guardian, although it provides that, in order to determine the best interests of the child, account must be taken, inter alia, of 'the ability of the parents or persons who are to be responsible for the upbringing and care of the child to meet the child's specific needs'.

4. Unlike adoption, in matters of guardianship of minors, there is no requirement to certify, by obtaining a certificate issued by an authority empowered by law, that the person to be appointed guardian meets the moral guarantees and has the material conditions to fulfill the duties of guardianship. There is also no obligation for the authorities to advise the persons appointed before they assume the guardianship. From this perspective, the Manual (II) provides that guardians and, in general, legal representatives of the child should have appropriate professional qualifications in the field of welfare and protection. They should receive appropriate initial and continuous training from the competent authorities. Even in these circumstances, the guardianship court is under an obligation to adduce evidence to establish with certainty that the person has the moral guarantees and material means to carry out the duties of guardianship in the best interests of the child.

5. In practice, to ascertain the minor's situation, as well as the fact that the guardian has moral guarantees and adequate material conditions, the courts usually order social investigations to be carried out by the public social services.

6. Pursuant to Article 117 of the Civil Code, the guardianship court, ex officio or at the request of the family council, may require the guardian, at the time of appointment or during the guardianship, to provide real or personal guarantees. In the absence of any legal provision to the contrary, the guarantees given by the guardian are subject to the general legal regime.

2.2.2. Incompatibilities with the capacity of guardian

2.2.2.1. Preliminaries

1. Art. 113 para. (1) of the Civil Code provides limitatively the situations in which a person may not be appointed guardian: minority, special guardianship, legal advice, assistance in the conclusion of legal acts, guardianship mandate, curatorship, loss of parental rights, incapacity to be guardian, restriction of the exercise of civil rights, misbehavior, removal from a previous guardianship, insolvency, interests contrary to those of the minor and removal by the parent. Most cases of incompatibility are taken over from the previous rules. Some of them were covered by the Calimach Code, the Caragea Code and the Civil Code of 1864. These cases have existed since Roman law. Special guardianship, legal counseling, assistance in the conclusion of legal acts, the guardianship mandate, insolvency and removal from guardianship by the parent are novel. Incompatibilities are also to be found in comparative law.

2. Cases of incompatibility are based on the idea of promoting the best interests of the minor beneficiary of the guardianship. It is presumed that in their presence the person cannot properly fulfill the task of guardianship.

3. Under Article 113 of the Civil Code, cases of incompatibility are of a mixed nature. If their existence is ascertained before the guardianship is established, they lead to the rejection of the application to appoint the person as guardian. Their appearance or discovery during guardianship has the effect of removing the guardian from the guardianship.

4. There are important distinctions between cases of incompatibility and those in which the person may refuse to continue to perform the duties of the guardian. The former are prior to the establishment of the guardianship and prevent the person from being appointed. They are established in the best interests of the minor. As a rule, the cases of incompatibility are attributable to the natural person proposed to be appointed guardian, and those in which he or she may refuse to continue the guardianship are provided for in the guardian's best interests. It is presumed that, in their presence, he or she has difficulties in carrying out his or her duties.

5. The grounds for incompatibility can be grouped according to the criteria of imputability and duration. The first criterion distinguishes between cases not imputable and those imputable to the future guardian. According to the second criterion, there are temporary cases and permanent cases.

2.2.2.2. Minority

1. Incompatibility on the ground of minority is traditional and has been regulated since Roman law. In Romania, incompatibility was provided for by the Calimach Code, the Civil Code of 1864 and the Family Code.

2. The basis of incompatibility is, on the one hand, the young age of the person and, on the other hand, the lack of full capacity to exercise the office.

3. The question has been raised whether incompatibility on the ground of minority concerns any individual who is a minor, regardless of the level of his or her capacity to exercise his or her exercise capacity, or only the person who has no capacity or has a restricted capacity to exercise his or her exercise capacity.

4. An argument against the restrictive interpretation is the very fact that Article 113 para. (1) letter a) thesis I of the Civil Code refers to minors without distinction as to the level of exercise capacity.

5. If the minor is married, Article 113 para. (1), thesis I, of the Civil Code calls into question respect for the principle of equality of spouses in marriage. From this perspective, the child's right to live in a family environment is also affected. In contrast to the previous situation, respect for this right supports the recognition of the status of guardian also for the minor spouse. For these reasons, I propose that the legislature should, *de lege ferenda*, establish an exception to Article 113 para. (1) (a), thesis I of the Civil Code for the situation in which the minor is married and exercises guardianship together with her spouse. The exception is likely to reinforce the extensive interpretation of the text.

2.2.2.3. Legal advice and special guardianship

1. These causes of incompatibility are set out in Article 113 para. (1) letter a), thesis II of the Civil Code. Prior to the amendment and completion by Law no. 140/2022, the Civil Code declared the person placed under a judicial prohibition incompatible. This ground was also provided for in the Civil Code of 1864 (*interdicts*) and in the Family Code.

2. Prior to the amendment and completion by Law no. 140/2022, Article 164 para. (1) of the Civil Code provided that "a person who lacks the discernment necessary to take care of his or her interests, due to mental impairment or mental weakness, shall be placed under judicial interdiction". With insignificant differences of expression, Art. 164 para. (1) of the Civil Code reproduced Art. 142 of the Family Code. Art. 164 para (1) of the Civil Code was subject to constitutional review. As a result, with Dec. no. 601/2020, the CCR found it unconstitutional. The Constitutional Court held that placing an individual under judicial prohibition and, consequently, depriving him or her of the capacity to exercise his or her right did not consider the fact that "there may be different degrees of incapacity" and that "mental impairment may vary over time". It was held that, by law, the different degrees of disability must be given appropriate degrees of protection, that the legislature must

identify proportionate solutions and that "an incapacity must not lead to the loss of the exercise of all civil rights". Law No. 140/2022 brought the provisions of the Civil Code, the Code of Civil Procedure and other normative acts into line with the requirements of Dec. CCR no. 601/2020.

3. As protective measures for persons with intellectual or psychosocial disabilities, legal counseling and special guardianship have replaced the placing of an adult person under court prohibition in the previous legislation. A person of full age under special guardianship does not have the civil capacity to exercise civil rights, whereas a person of full age under legal guardianship has restricted civil capacity.

4. Irrespective of whether the future guardian benefits from legal counseling or special guardianship, he or she does not have full capacity to exercise his or her full powers and is therefore legally unable to represent the minor beneficiary of guardianship when concluding legal acts or to consent to them. In the judgment establishing the guardianship measure, the guardianship court appoints the person to act as guardian. In other words, such individuals benefit from guardianship. The appointment of such a person as guardian is contrary to the best interests of the minor, precisely because he or she is legally unable to fulfill the duty to represent him or her when concluding legal acts or to consent to them. It is also immoral for a person who lacks the capacity to look after his or her own interests and who is protected by another person to be obliged to look after the person and property of another person as guardian.

2.2.2.4. Assistance for the conclusion of legal acts

1. This case was introduced following the amendment and supplementation of the Civil Code by Law 140/2022. The measure of assistance for the conclusion of legal acts may be instituted for the protection of adults with intellectual or psychosocial disabilities. Under the current regulations, this measure has priority over other measures for the protection of adults.

2. This measure shall be available to an adult natural person who, because of an intellectual or psychosocial disability, needs support to care for his or her person, administer his or her property and exercise his or her civil rights and freedoms. *Per a contrario,* a person, irrespective of age, who does not suffer from an intellectual or psychosocial disability is not entitled to assistance in concluding legal acts. An adult who benefits from this protective measure is a person of full capacity.

3. The assistant for the conclusion of legal acts is appointed by the notary public at the request of the sick person for a period of not more than two years.

4. The appointment of the assistant shall not affect the civil capacity of the person being assisted. The assistant shall neither conclude legal acts on behalf of the person assisted nor consent

to them. The assistant shall not act as the legal representative of the person being assisted. The legal acts are concluded by the assisted person alone. The assistant acts only as an intermediary between the person being assisted and third parties. It is presumed that he/she acts with the consent of that person. In dealings with third parties, the assistant has a duty to act in accordance with the preferences and wishes of the person assisted.

4. This ground of incompatibility is based on the idea that the person, who is himself in need of support for the exercise of civil rights and freedoms, although legally fully capable of exercising them, is not in fact capable of performing the duties of guardianship in the best interests of the minor. From this perspective, the incompatibility is doubled by the fact that the person is declared incapable of being a guardian.

2.2.2.5. The mandate of protection

1. Art. 166 para. (2) of the Civil Code gives any natural person with full capacity and the person benefiting from legal counsel the possibility to conclude a guardianship order in case he/she is no longer able to look after himself/herself or to manage his/her property. In the case of persons receiving legal aid, Article 2.029^{1} para. (1), the second thesis of the Civil Code provides for the right to give a guardianship order only for adult natural persons, but with the consent of the legal guardian and the authorization of the guardianship court. *Per a contrario*, this right does not apply to minors who benefit from the measure of legal counseling or to individuals, regardless of age, who benefit from the measure of special guardianship.

2. The execution of the guardianship mandate is subject to the occurrence of the deterioration of the mental faculties of the mandator and to its approval by the guardianship court, according to art. 2.029^{1} para. (4) of the Civil Code. One of the effects of the guardianship mandate is the incompatibility of the mandator with the capacity of guardian.

3. The fact that a natural person's mental faculties are impaired means that he or she is unable to take care of himself or herself or to manage his or her property. It is immoral and unlawful to be obliged to take care of the person and property of another person. Where the principal is a natural person who is a minor and has full legal capacity, the incompatibility based on the granting of the power of guardianship doubles the incompatibility based on minority. If the natural person over the age of majority is receiving legal advice, the granting of a mandate of supervision shall double the incompatibility based on legal advice. To eliminate this duplication, I propose that the legislator should, *de lege ferenda*, confer the right to grant a guardianship order only on an adult natural person of full capacity.

2.2.2.6. Guardianship

1. This case is also novel as it was not regulated before October 1, 2011. Guardianship is instituted for the protection of adult natural persons who, although legally capable, are in fact unable to defend their interests adequately on their own.

2. Since such individuals find it difficult to adequately protect their own interests, it appears unnatural, immoral and unlawful to place them in the position of being obliged to protect the interests of other persons, including minors without parental care.

2.2.2.7. Forfeiture of parental rights

1. Incompatibility based on the disqualification of an individual from exercising parental rights is provided for by Article 113 para. (1) letter b) thesis I of the Civil Code. The case was also covered by the previous regulation.

2. The deprivation of parental rights may have the legal nature of a civil sanction or of an additional or accessory criminal penalty.

3. The deprivation of parental rights gives rise to an irrebuttable presumption that the appointment of the person concerned as guardian is contrary to the best interests of the minor. The facts which give rise to deprivation of parental rights shall support that presumption.

4. Disqualification from exercising parental rights is a cause of incompatibility with the quality of guardian regardless of whether it was established as a family law sanction or as an accessory or complementary criminal punishment or whether it is total or partial.

2.2.2.8. Inability to be a guardian

1. According to Art. 113 para. (1) letter b) thesis II of the Civil Code, "a person declared incapable of being a guardian" cannot be a guardian. In the specialized literature this incompatibility is only evoked, without any analysis. A literal interpretation of the text supports the conclusion that this incompatibility is circumscribed to situations in which the person does not fulfill the conditions for being guardian: he/she is not a natural person; he/she does not have full capacity; he/she is not the spouse of the person with whom he/she is to exercise the guardianship together; he/she does not provide moral guarantees or does not have the material conditions for the proper performance of the duties of guardianship; he/she is in another case of incompatibility with the capacity of guardian, other than those expressly listed in Art. 113 para. (1) of the Civil Code.

2. Incompatibility is generic and is likely to cover situations where, in fact, the person is not capable of fulfilling the duties of guardian.

3. In order to be effective, there must be a final court judgment by which the incompatibility has been established.

2.2.2.9. Restriction of the exercise of civil rights

This case is covered by Art. 113 para. (1) letter c) thesis I of the Civil Code and is also to be found in the previous rules. A guardian cannot be "a person whose exercise of civil rights has been restricted, either by law or by a court judgment". The Civil Code mentions two ways of restricting the exercise of civil rights: by law; by court order.

2.2.2.10. Misbehavior

1. This case was implicitly regulated by the Calimach Code and the Caragea Code. The Civil Code of 1864 and the Family Code explicitly provided for it. Currently, according to Article 113 para. (1) letter c), thesis II of the Civil Code, "a person of bad conduct" cannot be a guardian. The legislator presumes that the person of bad conduct does not fulfill the moral conditions to be appointed guardian.

2. Misconduct includes negative behavior, contrary to legal norms or morality and takes the form of unlawful or immoral acts.

3. Whatever the nature of the misconduct, it must be recognized as such by a court, which means that there is a final judgment.

4. Behavior patterns suggest a negative and persistent behavior, generated by a voluntary attitude of the person.

5. The fact that the misbehavior must be established, as such, by a court judgment obliges the guardianship court to request a copy of the criminal record of the person to be appointed guardian, in accordance with Law 290/2004 on criminal records.

2.2.2.11. Removal from a previous guardianship

1. The case is covered by Art. 113 para. (1) letter d) of the Civil Code and is also found in the previous regulation. At present, "a person who, while exercising guardianship, has been removed in accordance with Article 158 cannot be a guardian".

2. The legislator assumes that there is a risk that the person, if appointed guardian, will commit acts and deeds of the kind that led to the removal from the previous guardianship. Incompatibility applies irrespective of the date on which the removal from the previous guardianship was ordered.

2.2.2.12. Insolvency

1. The case is covered by Art. 113 para. (1) letter e) of the Civil Code. and is new. Insolvency is subject to the condition that the person must have the material means necessary to carry out the duties of guardianship in the best interests of the minor. In the event of insolvency, the legislator irrefutably presumes that this condition has not been met.

2. From a legal point of view, insolvency is not synonymous with unsolvability. Once insolvency has been established, the guardianship court is obliged to reject the application to appoint the insolvent person as guardian.

2.2.2.13. Enjoined interests of the guardian with the minor

1. This case of incompatibility was implicitly provided for in the old Romanian laws and in the Civil Code of 1864. The Family Code explicitly provides for it. Currently, Article 113 para. (1) letter f) of the Civil Code has taken over Article 117 para. (1) letter f) of the Family Code. Specifically, it provides that a guardian cannot be a guardian "who, because of interests adverse to those of the minor, could not fulfill the task of guardianship". It is presumed that the existence of conflicting interests affects the exercise of guardianship in the best interests of the child.

2. A conflict of interests is a cause of incompatibility of any kind: moral or pecuniary. This case does not concern all conflicts of interest, but only those which place the proposed guardian in a position where he or she is unable to perform the duties of guardianship in the best interests of the minor.

3. Like the other cases of incompatibility, this one is in the best interests of the minor. It is presumed that the existence of a substantial conflict of interests will lead the guardian to promote his own interests to the detriment of those of the minor. The conflict of interests renders uncertain the exercise of guardianship exclusively in the best interests of the minor.

2.2.2.14. Removal from guardianship by the parent

1. This incompatibility was provided for by the Calimach Code and, by implication, the Civil Code of 1864. Article 113 para. (1) letter g) of the Civil Code provides that a guardian cannot be "a person removed by an authentic instrument or will by the parent exercising parental authority alone". It is presumed *iuris tantum* that the parent's decision is in the best interests of the minor.

2. For the incompatibility to apply, two cumulative requirements must be met: there is a legal act by which the parent has decided that a particular person cannot be appointed guardian for his or her child; the author of the act is the parent who, before his or her death, exercised sole parental authority over the minor.

2.2.2.1.5. Other incompatibilities

Certain categories of persons are declared by special laws to be incompatible with any public or private office, except for higher education teachers. They include, for example, persons holding the positions of judge of the CCR, judge, public prosecutor, public prosecutor, ombudsman or deputy public prosecutor. Under Article 84 para. (1) of the Constitution, "during his term of office, the President of Romania (...) may not hold any other public or private office". Many texts of the Civil Code refer explicitly to the function of guardian. The exclusion of such persons from the guardianship is unreasonable. In order to remedy this situation, it is appropriate to exempt, *de lege ferenda*, the functions assumed by these persons in the context of special guardianship measures for individuals.

SECTION 2.3.
FAMILY COUNCIL

2.3.1. Preliminaries

1. The legal regime of the family council is laid down in Articles 124-132 of the Civil Code, in the context of the provisions on guardianship of minors. Some of its powers are also found in other divisions of the Civil Code. Many of the solutions in the current Romanian Civil Code relating to the family council are inspired by the Civil Code of 1864 and, in many respects, by the Civil Code of Québec.

2. The legal institution of the family council is not new to the Romanian legal system. Initially, the family council was regulated in Moldova by the Law for guardianships of April 26, 1840. Subsequently, the Civil Code of 1864, modelled on the French Civil Code of 1804, regulated the family council, conferring numerous important powers in relations between parents and children, as well as in the protection of minors by guardianship.

3. Despite some pessimistic doctrinal assertions, the role and powers conferred by the law are intended to provide moral safeguards to promote the best interests of the child within the framework of guardianship, especially by involving family members, including extended family, relatives,

friends of the minor's family and other persons who have had personal relations and direct contact with the minor. The very name Family Council is suggestive from this perspective.

8. To achieve a more complete picture of the organization, functioning and role of the family council in the context of the protection of the child beneficiary of guardianship, I found it appropriate to systematically and systematically analyze the current domestic legal provisions for it, without omitting references to the previous Civil Code regulations and some of the comparative law. The approach is based on the fact that the regulations on the family council are placed in the context of those on guardianship of minors.

2.3.2 The role and concept of the family council

1. In the general context of guardianship, the family council has a consultative role for the guardian.

2. In the context of guardianship of a minor, Article 124 para. (1) of the Civil Code provides that the role of the family council is to "... supervise the manner in which the guardian exercises his rights and fulfills his duties with regard to the person and property of the minor". In this context the role of the family council seems to be supervisory. However, Article 130 of the Civil Code sets out the family council's powers within the framework of guardianship of the minor, empowering it to give advisory opinions at the request of the guardian or the guardianship court and to adopt decisions in specific cases provided for by law. The possibility for the family council to give advisory opinions attests to its role as an advisory body within the guardianship of the minor. The right to take decisions suggests a position of superiority over the guardian. It can be concluded that the family council has an advisory role for the guardian and the guardianship court in the guardianship of the minor, as well as a supervisory role in the guardian's exercise of the guardianship. To avoid different interpretations on the role of the family council in the guardianship of minors, eliminate repetition and economize on the text, I propose that the legislature should, *de lege ferenda*, reword Article 124 para. (1) of the Civil Code as follows: "The Family Council shall supervise the exercise of guardianship. At the request of the guardian or the guardianship court, it gives advisory opinions. In specific cases provided for by law, it gives binding opinions or adopts decisions".

3. The supervisory and advisory role of the family council exists although the minor beneficiary of the guardianship does not have restricted capacity or lacks capacity. Since art. 171 of the Civil Code extends the application of the rules relating to the guardianship of a minor under the age of 14 to the guardianship of a person who is under special guardianship and those relating to the

guardianship of a minor over the age of 14 to a person who is under legal counseling, the family council has a supervisory and advisory role in these cases as well.

4. In the context of the current regulations in Romania, the supervisory and advisory role of the family council is subsumed to the requirements of the principle of promoting and respecting the best interests of the minor beneficiary of guardianship. The conclusion is indisputable, since, according to Article 6 letter (a) of Law No 272/2004, a child's rights are respected and guaranteed in accordance with this principle. This role materialized by the provisions regulating the guardianship of the minor, i.e. of the adult natural person benefiting from legal advice or special guardianship.

8. The Civil Code does not define family council. This is left to doctrine. In order to define the family council, it is necessary to take account of the aspects that characterize it: the role laid down by law, the optional nature of its establishment, and the power of the guardianship court to establish it. The family council is therefore defined as "a body set up by the guardianship court at the request of any interested person, with a consultative role for the guardian and the guardianship court, and for supervising the guardian's activity in the exercise of his or her powers in respect of the minor's person and property".

2.3.3. Composition of the family council

2.3.3.1. Number and persons who may be members of the family council

1. Inspired by Article 222, thesis II, Article 125 para. (1) of the Civil Code provides that the family council shall consist of 3 members and 2 alternates. The small and odd number of members makes it easier to convene and hold meetings of the family council and to give opinions or take decisions by majority vote. The numbers three and two are fixed.

2. Regarding the persons who may be members of the family council, Article 125 para. (1) of the Civil Code, based on Article 357 of the previous Civil Code, gives priority to relatives and relatives-in-law, according to the degree and the personal relations previously had with the minor's family.

3. Art. 125 para. (1) of the Civil Code lays down different requirements for relatives and relatives-in-law, on the one hand, and other persons, on the other. For the former, the degree of kinship or affinity and the person's relations with the minor's family are important. For other persons, previous friendly ties with the minor's parents and interest in the minor's situation are considered. Apart from the degree of kinship and affinity, the requirements for membership of the family council should be the same for all categories of persons, since, irrespective of their status, they are called

upon to fulfill the same role. The combination of these requirements presupposes for both categories previous personal links with the minor's family and interest in the minor's situation.

4. Subject to the fulfillment of the other legal requirements, natural persons who are Romanian citizens, foreigners or non-citizens may be members of the family council. All categories should be subject to the condition of having their domicile in the administrative-territorial unit in which the minor's domicile is located. Otherwise, difficulties will be encountered in convening members and their participation in family council meetings, affecting the speed of the procedure for giving opinions and taking decisions. The supervisory activity which the guardianship court is obliged to carry out in relation to the way in which the family council carries out its duties is also called into question. To eliminate these inconveniences, it would be useful to add a new paragraph to Article 125 of the Civil Code, which would stipulate that 'persons domiciled in the administrative-territorial unit in which the minor is domiciled may be members of the family council'.

5. Irrespective of the category to which they belong, the task of family council members is voluntary, personal and free of charge.

2.3.3.2. Incompatibilities with membership of the family council

1. Article 125 of the Civil Code explicitly provides for two cases of incompatibility of the natural person with the membership in the family council: husband and wife together in the same council; guardian. Incompatibility of husband and wife is based on the presumption of their partiality in casting their votes for giving opinions or taking decisions.

2. There are other cases of incompatibility with membership of the family council, since Article 126 of the Civil Code refers, inter alia, to Article 113 of the Civil Code, which applies accordingly. Therefore, the cases of incompatibility with guardianship provided for by Article 113 para. (1) of the Civil Code also applies to members of the family council.

3. As in the case of the guardian, for certain categories of persons the incompatibility with membership of the family council implicitly follows from special legal provisions. For example, the positions of judge of the CCR, judge, public prosecutor, public prosecutor, ombudsman or deputy public prosecutor are incompatible with any public or private office, except for teaching in higher education.

2.3.4. Setting up the family council

2.3.4.1. The optional nature of setting up a family council

1. The constitution of the family council is optional. The conclusion is firm, since Art. 108 para. (2) of the Civil Code provides that it may be established. The same permissive wording is found

in Article 124 para. (1) of the Civil Code. The optional nature of the constitution of a family council is also apparent from Art. 108 para. (3) of the Civil Code, which provides that the guardianship court is competent to exercise its powers if it is not constituted, and other provisions of the Civil Code.

2. If established, the family council remains in office for the duration of the guardianship. Article 127 of the Civil Code stipulates that the composition of the family council may not be changed during the guardianship.

2.3.4.2. Situations where the family council is not set up

Art. 124 para. (2) Civil Code, inspired by Art. 223 para. (2) of the Civil Code q., sets out the situations in which a family council cannot be set up: the minor is protected by the parents, by foster care or other special protection measures. In these cases, the application to set up a family council is inadmissible. The enumeration is of strict interpretation and application, which is why the guardianship court cannot take other grounds into account. The strict limitation of the cases in which the family council is not set up supports the conclusion that, as a rule, it is set up. These prohibitions are designed to avoid conflict between the protection of the minor by the parents or by special protection measures on the one hand and the role of the family council within the guardianship framework on the other.

2.3.4.3. Procedure for setting up the family council

A. Referral to the guardianship court

Art. 108 para. (2) of the Civil Code provides that the guardianship court may set up the family council "only at the request of the persons concerned". *Per a contrario*, the family council cannot be set up ex officio, on the initiative of the guardianship court. This particularity is inspired by art. 124 C. civ. q.

B. Competence of the guardianship court to establish the family council

This jurisdiction follows implicitly from Art. 107 para. (1) of the Civil Code. Article 128 para. (1) of the Civil Code, which obliges the guardianship court, with a view to constituting the family council, to summon the persons who meet the conditions for membership.

The court of first instance has subject-matter jurisdiction as guardianship court. From a territorial point of view, the court within the territorial jurisdiction of which the minor is domiciled or resident is competent, in accordance with Article 114 para (1) in conjunction with Art. 528 para. (2) C. pr. civ.

C. Rules of Procedure

a. General

b. Venue of the proceedings

c. Administration of samples

d. Listening to the minor

e. Appointment of the family council

D. Modification of the family council

1. Changing the family council means replacing one or two members with other persons. If all the members are replaced, a new family council is set up. Pursuant to Article 127 of the Civil Code, the composition of the family council cannot be changed during the guardianship. The person appointed to the council is obliged, just like the guardian, to continue to carry out the task, unless, due to illness, infirmity, the nature of the activities carried out or other valid reasons, he or she is no longer able to fulfill this task. Continuity in the activity of the members is an important requirement for optimizing the functioning of the family council. By way of exception, art. 127 of the Civil Code provides for three situations in which the composition of the family council may be changed: in the case provided for in art. 131; the interests of the minor require a change in the composition of the family council; one of the members of the council has died or has disappeared.

2. The application for the supplement may be made by the guardian, the minor, any member of the family council or by other persons, such as relatives or relatives in affinity of the minor. There shall be nothing to prevent the guardianship court from acting in its own motion. A change in the composition of the family council is a matter for the guardianship court, in particular the court within whose territorial jurisdiction the minor is domiciled or resident. The change is decided by a judgment subject to appeal to the court.

E. Replacing the family council

1. According to Article 131 of the Civil Code, the guardian is entitled to request the constitution of a new family council if the guardianship court has ruled at least twice, definitively, against the decisions of the family council. The legislator presumes a failure in the work of the initially constituted family council, which necessitates the appointment of another one.

2. The guardian's action to replace the family council is optional. The sole proprietor of the action is the guardian. The court within whose territorial jurisdiction the domicile or residence of the minor is situated shall have jurisdiction to hear such applications. As in the case of the constitution of the council and the replacement of its members, the application is subject to a grace period, which is why the court decides on the replacement by an enforceable judgment.

F. Impossibility of setting up a new family council

1. Article 132 of the Civil Code sets out the cases in which the guardian may apply to the guardianship court for authorization to exercise the guardianship alone: although the guardian has applied, it is not possible to set up a new family council after the guardianship court, in resolving complaints against the decisions of the family council, has ruled definitively against them; there is a conflict of interests between the minor and all the members of the family council and alternates. Both cases constitute grounds for replacing the family council.

2. To rule on the guardian's application, the guardianship court must first establish based on evidence two circumstances: there is a case of replacement of the family council; it is impossible to set up a new family council. The guardian's application to be authorized to exercise guardianship alone is superfluous, since the guardian, even if the family council is constituted, exercises guardianship alone. In exercising guardianship, the role of the family council is merely to supervise and advise the guardian and the guardianship court.

3. The existence of cases of replacement of the family council and the impossibility of constituting a new family council shall be determined by the guardianship court by an enforceable judgment. The court having jurisdiction is the guardianship court, i.e. the court within whose territorial jurisdiction the domicile or residence of the minor is situated.

2.3.5. Functioning of the family council

2.3.5.1. Preliminaries

Art. 129 of the Civil Code regulates the functioning of the family council, laying down rules on: convening the council, the obligation of members to be present at the place indicated in the convening document and the venue of family council meetings. Article 130 of the Civil Code lays down specific procedural rules for giving opinions and taking decisions by the family council.

2.3.5.2. Convening the family council

1. The family council is convened by the guardian. As a rule, the guardian convenes the family council on his or her own initiative. There may be situations in which it is not in the guardian's interest to convene the family council, such as, for example, when measures are to be laid down to supervise the guardian's activity or to formulate and promote complaints against acts and actions harmful to the minor. To counter the possible passivity of the guardian, the members of the family council, the minor who has reached the age of 14 and the guardianship court have the possibility to ask the guardian to convene the family council.

2. Under Article 119 para. (3) of the Civil Code, the family council is convened directly by the guardianship court. This is the case where there is no guardian appointed by the parent and the court has constituted the family council. In this case, the guardian is appointed by the guardianship court only after consulting the family council.

3. The family council must be convened at least 10 days before its meeting. Under Article 129 paragraph. (1) of the Civil Code, with the consent of all members, the family council may be convened even earlier than 10 days.

4. The law does not provide a rhythm for convening and holding meetings of the family council, which means that it will be convened whenever necessary to give opinions, make decisions or to analyze or guide the guardian's work.

5. The guardian attends the family council meeting, even if there is no text expressly providing for this. From the point of view of the role of the family council, the guardian's attendance at meetings is necessary to clarify to the council the opinions or decisions that he or she is seeking or the way in which he or she is carrying out his or her duties.

8. Notwithstanding the fact that family council meetings are not in the nature of judicial or administrative proceedings, it cannot be disregarded that they concern the protection of the minor, which is why the minor must be invited to express his or her opinion and be heard. Art. 130 para. (2) of the Civil Code provides for the obligation to listen to the child who has reached the age of 10 years only in the decision-making procedure of the family council. There is nothing to prevent the child, regardless of age, from being invited to all meetings of the family council. Since the child's expression of his or her views on matters concerning him or her is a right and an important element in determining his or her best interests, the child's participation in family council meetings is indispensable. To eliminate the source of differing interpretations on the issue of the participation of the guardian and the minor in family council meetings, I consider it appropriate to introduce a new paragraph into Article 129 of the Civil Code, *de lege ferenda*, which would expressly stipulate the obligation for the guardian to attend the family council meeting and the possibility for the council to invite the child.

2.3.5.3. Representation of family council members

1. It is the duty of the members of the Family Council to be present in person at the time and place indicated in the convening notice. To be legally constituted, all members must be present at the meeting of the Family Council. That is why absent members must be represented in accordance with the law.

2. According to Art. 129 para. (2), thesis II of the Civil Code, any member who is unable to attend the meetings of the Council may be represented by another person. There are two requirements for a representative: he or she must be a relative or relative by blood or marriage of the minor's parents; he or she must not be appointed or summoned to the meeting in his or her own name as a member of the family council.

3. Art. 129 para. (2) thesis II of the Civil Code allows spouses to represent each other. This concerns situations where only one of them is a member of the family council and cannot attend the meeting. It is not possible for both spouses to be members of the same council, as Article 125 para. (2) of the Civil Code imperatively prohibits the husband and wife from being members of the same family council.

4. The representative of an absent member shall not be in any case of incompatibility.

5. Apart from providing for the appointment of two substitute members, the Civil Code does not lay down rules on their role in the family council. In accordance with their designation, until the appointment of other persons, the substitute members should replace by right those who, being in a situation of incompatibility, can no longer hold this position. Likewise, alternate members should attend meetings of the family council in place of members who are unable to attend. To remedy this situation, I propose that the legislator should, *de lege ferenda*, introduce a new sentence, possibly in Article 125 para. (2) of the Civil Code, which would provide for the role of substitute members of the family council in line with the above.

2.3.5.4. Venue of family council meetings

1. The meetings of the family council are held, as a rule, at the minor's home, in accordance with Art. 129 para. (3) thesis I of the Civil Code. This is a rational solution since, from a legal point of view, this is the place where both the minor and the guardian are domiciled. Moreover, the minor's domicile is located within the territorial circumscription of the guardianship court which decided to set up the family council and which supervises the exercise of guardianship. This solution is likely to alleviate the emotional impact on the minor if the meetings of the family council were to be held at the seat of the court or at another official place.

2. By way of exception, if the family council is convened by the guardianship court, the meeting shall be held at its premises.

2.3.6. Procedure for giving opinions and taking decisions

2.3.6.1. Preliminaries

1. The Family Council shall be chaired by the oldest member.

2. Advisory opinions and decisions of the Family Council shall be validly taken by a majority vote of its members. For an opinion to be given or a decision to be taken, two votes in favor out of a possible three are required.

2.3.6.2. Opinions of the family council

1. Under Article 130 of the Civil Code, the family council is competent to give advisory opinions at the request of the guardian or the guardianship court.

2. The Civil Code regulates situations in which the opinion of the family council is mandatory by law. In such cases, the question arises as to the nature of the opinion. The nature of the opinion has to be analyzed *in concreto*, on a case-by-case basis, depending on the legislator's mode of expression.

3. Under Article 130 para. (4) of the Civil Code, acts concluded by the guardian in the absence of an advisory opinion are voidable. On the other hand, if the act is concluded without opinion, the guardian alone is liable. It also enables the child aged 14, the family council, any member of the family council and all the persons listed in Article 111 of the Civil Code to bring a complaint before the guardianship court if the act concluded by the guardian without seeking the opinion of the family council or without complying with it is detrimental to the minor.

2.3.6.3. Family Council decisions

1. In specific cases provided for by law, the family council takes decisions. Decision-making by the family council is not a general power but limited to cases expressly provided for by law. Under the terms of the Civil Code, the family council adopts decisions in only two cases: to determine or modify the annual amount needed for the maintenance of the minor and the administration of his property; to determine the credit institution to which the guardian must deposit the sums of money exceeding the maintenance needs of the minor and the administration of his property, and the financial instruments.

2. The Family Council is obliged to give reasons for its decisions and to record them in a special register.

3. In the decision-making procedure, the family council is obliged to hear the minor who has reached the age of 10. *Per a contrario*, the child's hearing is not obligatory in cases where the family council gives its opinion. And the opinions concern important acts or facts of the guardian in relation to the person and property of the minor, which is why the guardian's hearing should also be mandatory in their case. To remedy this situation, I propose that the legislator should, *de lege ferenda*, supplement Article 130 para. (2) of the Civil Code with reference to advisory opinions.

SECTION 2.4.
GUARDIANSHIP COURT

2.4.1. Preliminaries

1. This section sets out the duties of the guardianship court regarding the protection of the individual in general and of the child beneficiary of guardianship, including the transitional period until the establishment of this court in particular. Since the guardianship court, together with the child, the guardian and the family council, is a central element in the protection of the child through guardianship, I consider this approach to be useful. At the same time, due to the plethora of existing regulations in this area, the inconsistencies between certain legal provisions and the inconsistent language used in the construction of certain legal rules, the objective is a foolhardy one. A veritable regulatory maze has been created in this area, the deciphering and practical application of which requires a considerable effort of interpretation. The approach is centered on the analysis of issues directly or implicitly related to the protection of the child beneficiary of guardianship. In order not to detract from the unity of the analysis, other legal issues relating to the role of the guardianship court are summarized.

2. Art. 107 para. (1) of the Civil Code establishes the competence of the guardianship court regarding the proceedings provided for by the current Civil Code concerning the protection of the natural person. Article 265, thesis I of the Civil Code extends the jurisdiction of the guardianship court in respect of: the measures provided for in Book II of the Civil Code within the jurisdiction of the courts; disputes concerning the application of the provisions of Book II; child protection measures provided for in special laws.

3. In matters of guardianship of a minor, the guardianship court has unlimited jurisdiction. This jurisdiction is based on Article 107 para. (1) in conjunction with Article 265, thesis II of the Civil Code. and art. 94 paragraph 1 letter a) C. pr. civ., as well as the regulations on the guardianship of minors, which explicitly and overwhelmingly provide for the guardianship court. In the Family Code, these powers were assigned to the guardianship authority. At present, the guardianship authority, although it retains its previous name, has powers in matters of guardianship only in the cases expressly and restrictively provided for by law. This regulatory option is likely to maximize the chances of successfully promoting the best interests of the child beneficiary of guardianship.

4. As a rule, cases in this area are dealt with by way of the non-contentious procedure and the court is obliged to deal with them immediately, without delay or as soon as possible. In practice, the procedure for establishing guardianship of a minor and appointing a guardian usually takes between one and three months.

2.4.2. Transitional rules until the establishment of the guardianship court

2.4.2.1. Establishment of the guardianship court

1. Article 229 para. (1) of Law no. 71/2011 provides that "the organization, functioning and powers of the guardianship court shall be established by the law on judicial organization". More than thirteen years after the entry into force of the current Civil Code, although a new law on judicial organization has been adopted, the guardianship court has still not been established. The postponement of the establishment of this court is due to insufficient human and material resources available to the Romanian judicial system. The lack of responsible concern on the part of the decision-makers cannot be ruled out. Faced with this reality, the legislator has resorted to delegating the guardianship court's powers to the existing courts in the judicial system and to other public authorities. The delegation is achieved by establishing transitional measures, applicable until the date on which the "organization, functioning and functions of the guardianship court" will be regulated by the law on judicial organization. Due to the lack of predictability, a convoluted and open to interpretation transitional legal regime has been created in relation to the competence of the guardianship court. The postponement of the establishment of the guardianship court and the *indefinite* delegation of some of its powers to the guardianship authority has been subject to constitutional review. The Constitutional Court ruled that certain delegations were unconstitutional.

2.4.2.2. Jurisdiction of the guardianship court in matters relating to the protection of the rights of the child, i.e. the individual

1. Art. 229 para. (2) letter c) of Law no. 71/2011 provides that, until the organization and functioning of the guardianship court is regulated by law, "the authorities and institutions in the field of protection of the rights of the child, respectively of the individual, shall continue to exercise the powers provided for by the regulations in force on the date of entry into force of the Civil Code, except for those given to the competence of the guardianship court". This transitional rule derogates from the principle laid down in Article 107 para. (1) of the Civil Code. Specifically, "the proceedings provided for by this Code relating to the protection of the natural person fall within the jurisdiction of the guardianship and family court established by law, hereinafter referred to as the *guardianship court*". During the transitional period, these powers do not fall to the guardianship court *eo ipso*, in

accordance with the principle laid down in Article 107 para. (1) of the Civil Code, but by virtue of express legal provisions.

2. Art. 229 para. (2) letter c) of Law no. 71/2011 must be read in conjunction with letter a) and with Art. 76 of Law no. 76/2012, which is why the guardianship court has jurisdiction not only for the duties explicitly provided for this court, but also for those that are circumscribed to these matters, but they generically provide for the jurisdiction of the court of trial or of a court that may have the capacity of guardianship court (magistrate's court, court or specialized court for minors and family). Restrictive interpretation of Article 229 para (2) letter (c) of Law No 71/2001 is unreasonable, since it results in a drastic restriction, during the transitional period, of the powers of the guardianship court in these matters.

2.4.2.3. Delegation of the guardianship court's jurisdictional powers

1. An important transitional rule is laid down in Article 299 para. (2) of Law no. 71/2011. Specifically, until the organization and functioning of the guardianship court is regulated by law, "its duties, as provided for by the Civil Code, shall be performed by the courts, sections or, as the case may be, specialized juvenile and family panels". Art. 229 para. (2) letter a) Law no. 71/2011 was circumscribed and supplemented by Art. 76 of Law no. 76/2012. Specifically, "until the organization of the guardianship and family courts, the courts or, as the case may be, the courts or specialized juvenile and family courts shall perform the role of guardianship and family courts, with jurisdiction established in accordance with the Civil Code, the Code of Civil Procedure, this Law, as well as the special regulations in force". This article does not mention the specialized juvenile and family sections and panels. Their nomination is not necessary, as the allocation of cases to divisions and panels is a matter of the internal functioning of the courts. Article 76 of Law no. 76/2012 brings under the jurisdiction of the courts or, as the case may be, of the specialized courts and tribunals for minors and the family, both the cases that fall within the jurisdiction of the guardianship court under the current regulations and those that will be brought within its jurisdiction by subsequent regulations. The aim was to avoid further legislative interventions for the delegation of the jurisdictional powers of the guardianship court to judges, tribunals and specialized courts for minors and family established after the entry into force of Law no. 76/2012.

2. A special transitional rule is provided for by Article IV of Law No 257/2013, which amended Law No 272/2004, I might add. Specifically, "until the approval of the law on the organization and functioning of the guardianship court, the duties assigned to it under this law shall be performed by the court of first instance". The purpose of this transitional rule is to remove the ambiguity as to the

competence of the guardianship court in matters relating to the protection and promotion of children's rights, which is caused by the fact that relatively numerous texts of Law 272/2004 generically provide for the court, the court of judgment or the court of first instance or name the court or the Bucharest Tribunal.

2.4.2.4. Delegation of certain tasks of the guardianship court to the guardianship authority

A. Conducting the psychosocial investigation report provided for by the Civil Code

1. According to Article 229 para. (2) letter b) of Law no. 71/2011, until the establishment of the guardianship court, "the report of the psychosocial investigation provided for by the Civil Code shall be carried out by the guardianship authority, except for the investigation provided for by Art. 508 para. (2), which is carried out by the Directorate-General for Social Assistance and Child Protection". The Civil Code provides for the obligation of this means of proof in eight cases, but none of them relates to guardianship in general and guardianship of minors in particular.

2. Interpreted *per a contrario*, Article 229 para. (2) letter b) of Law no. 71/2011 supports the conclusion that the drawing up of the psychosocial investigation report regulated by other normative acts remains within the competence of the authorities or institutions provided for by them.

B. Fulfillment of the duties of the guardianship court in relation to the exercise of guardianship over the property of the minor or of the person benefiting from legal aid or special guardianship or, where appropriate, the supervision of the guardian's management of his property

1. Art. 229 para. (3) of Law no. 71/2011 delegated these powers, until the establishment of the guardianship court, to the guardianship authority. The CCR found that Art. 229 para. (3) of Law no. 71/2011 is unconstitutional, because the lack of intervention of the ordinary legislature to regulate the organization and functioning of the guardianship court is contrary to the constitutional principle of legality and the principle of the administration of justice. It was held that the lack of correlation with the rules of substantive law laid down by the Civil Code, which regulates the protection of the individual, has led to the perpetuation of a transitory situation, namely the performance by a local public administration authority of duties established by law within the competence of a court of law. Following the finding of unconstitutionality, art. 229 para. (3) of Law no. 71/2011 was suspended as of November 4, 2020, the date on which CCR Dec. no. 795/2020 was published in the M. Of. It ceased its activity 45 days after the date of publication of Dec. CCR in the M. Of. Within the 45-day period, a normative act was not adopted to bring Art. 229 para. (3) of the Law no. 71/2011 with the provisions of the Constitution, which is why the CCR decided that, until the organization of the

guardianship court, these duties shall be performed by the courts, sections or, as the case may be, specialized juvenile and family panels.

2. Subsequently, the Parliament adopted the Law amending and supplementing Article 229 of Law no. 71/2011, providing for the delegation of certain tasks to the guardianship authority or other public authorities or institutions until the establishment of the guardianship court. Before being promulgated, the law was subject to constitutional review. It was argued that, in fact, it also establishes a temporary, transitional legislative solution, similar to the provisions declared unconstitutional by Dec. The CCR admitted the exception and declared the law unconstitutional.

C. Appointment of the special curator

1. Art. 229 para. (3^2) of Law no. 71/2011 delegates to the guardianship authority, until the establishment of the guardianship court, the power of this court to appoint the special curator to assist or represent the minor in the conclusion of the acts of disposition and the probate debate. Art. 229 para. (3^2) of Law no. 71/2011 concerns cases in which a minor with restricted capacity of exercise or without capacity of exercise is deprived of parental care and, before or during the establishment of guardianship, is able to conclude legal acts of disposition or to participate in a probate debate.

2. The grounds of unconstitutionality raised in the cases covered by Article 229 para. (3) of Law no. 71/2011 also exist in those provided for by para. (3^2). According to the Civil Code, with a few exceptions, the appointment of the curator, including the special curator, falls within the competence of the guardianship court. As such, a task established by law within the competence of the guardianship court is delegated *sine die* to a local public administration authority. This rule, although transitional, has been in force since April 20, 2012, when Law No 60/2012 entered into force.

2.4.2.5. Establishing and monitoring special child protection measures

Under Article 229 para. (3^1) of Law no. 71/2011, until the entry into force of the regulation on the organization, functioning and powers of the guardianship court, special protection measures shall be established and monitored according to Articles 62-74 of Law no. 272/2004 (Articles 58-70, prior to the 2014 republication). The analysis of Articles 62-74 shows that during the transitional period the court is competent to decide, in certain cases expressly and limitatively provided by law, to establish special protection measures, to terminate or replace them with other protective measures. In other words, during this period, the court does not have a general jurisdiction over the establishment of special protection measures for the child, nor over their monitoring.

2.4.2.6. Temporal conflict of jurisdiction

According to Article 229 para. (4) of Law no. 71/2011, "claims pending at the date of entry into force of the Civil Code shall continue to be settled by the courts or, as the case may be, by the administrative authorities competent according to the law in force at the date of their referral". Unlike the preceding paragraphs, which lay down transitional rules that apply until the date of entry into force of the law on the organization and functioning of the guardianship court, it does not make such a specification, which is why para. (4) will apply after that date. This text highlights a particular case of ultra-activity of the old law of civil procedure and is intended to avoid the disruptive effects that usually occur as a result of a change in the jurisdiction of the court or, where appropriate, of the public administrative authority, subsequent to the granting of a decision on a claim. At the same time, although it is laid down by a substantive law, this rule marks a renunciation of the principle of immediate application of the rules on the jurisdiction of the courts or public administrative authorities.

2.4.3. Subject-matter jurisdiction of the guardianship court

2.4.3.1. Subject-matter jurisdiction of the guardianship court under the Civil Code

A. General

1. Although the Civil Code is a substantive law, it also contains rules on the jurisdiction of the courts in certain matters. This manner of regulation can be justified on practical grounds, determined by the time lag between the entry into force of the current Civil Code and the current Code of Civil Procedure. The corroboration between Article 107 para. (1) and Art. 265, thesis I of the Civil Code shows that the guardianship court is competent to resolve applications concerning: proceedings relating to the protection of the natural person provided for by this Code; measures provided for by Book II within the competence of the courts; disputes arising from the application of the provisions of Book II; the taking of child protection measures provided for by special laws.

2. In the case of proceedings relating to the guardianship of the natural person provided for by the Civil Code, including the guardianship of a minor, the guardianship court has full jurisdiction, which means that it is empowered to carry them out regardless of the subject matter in which they are regulated or the status of the natural person to whom they refer.

3. Within the framework of Book II, the guardianship court shall also have jurisdictions for all measures given within the jurisdiction of the courts and for all disputes concerning the application of the provisions of this Book.

4. Unless the law provides otherwise, Article 107 para. (1) and Art. 265, thesis I of the Civil Code, interpreted *per a contrario*, support the conclusion that the guardianship court has no

jurisdiction in proceedings concerning the protection of the natural person governed by laws other than the Civil Code, except for those concerning the protection of the child.

5. The guardianship court also has a different jurisdiction for the specific cases provided for in the Civil Code.

6. In situations where certain provisions of the Civil Code expressly provide for the jurisdiction of the guardianship court, to determine whether it is the court or the tribunal, these provisions must be read in conjunction with Art. 229 para. (2) letter a) of Law No 71/2011, Art. 76 of Law No 76/2012, Art. 94 et seq. C. pr. civ.

B. Jurisdiction of the guardianship court in matters of guardianship of a minor

1. In matters of guardianship of minors, in the first instance, the guardianship court, specifically the court of first instance, has subject-matter jurisdiction, pursuant to Art. 107 para. (1) and Article 265 of the Civil Code in conjunction with Article 229 para. (2) letter a) of Law no. 71/2011, art. 76 of Law no. 76/2012 and art. 94 p. 1 letter a) C. pr. civ.

2. The duties established for the guardianship court by the Civil Code in matters of guardianship of minors can be grouped according to their subject matter into duties relating to: the establishment of guardianship; guardian (appointment and revocation of the guardian by the parent, the conditions to be fulfilled by the guardian, appointment, control over the way in which the guardian fulfills his duties with regard to the person and property of the minor, replacement or removal from guardianship, his liability); the establishment and functioning of the family council; termination of guardianship; exercise of guardianship; appointment of the special curator; other duties.

3. In this matter, the court has the role of guardianship court. To emphasize this role, in almost all cases, the provisions of the Civil Code relating to the guardianship of minors and persons benefiting from legal advice or special guardianship expressly refer to the guardianship court.

4. In this matter, the court has full jurisdiction irrespective of the person's status: minor, adult, beneficiary of a legal counseling measure or special guardianship.

2.4.3.2. Subject-matter jurisdiction of the guardianship court under the Code of Civil Procedure

A. Preliminaries

To establish *in concreto* the subject-matter jurisdiction of the court or tribunal as guardianship courts, Art. 107 para. (1) and Art. 265 of the Civil Code, as well as Art. 76 of Law no. 76/2012 must be read in conjunction with Art. 94 et seq. C. pr. civ.

B. Substantive jurisdiction of the courts as guardianship courts

1. The current Code of Civil Procedure has brought significant novelties in the distribution of jurisdictional powers, including as regards the competence of the courts. The most important novelty is that the courts no longer have unlimited jurisdiction in civil matters. Under Article 94 of the Code of Civil Procedure, the courts of first instance have jurisdiction limited to the cases provided for by law; they have jurisdiction to review the acts of public administration authorities with jurisdictional activity and of other bodies with such activity, but only in the cases provided for by law; and they have a miscellaneous jurisdiction, which is only exercised on the basis of express legal provisions.

2. Article 94 pt. 1 of the Code of Civil Procedure lays down the categories of claims which, regardless of whether or not they are assessable in money, fall within the jurisdiction of the courts of first instance. It is rightly held that the provisions of Article 94 pt. 1 C. pr. civ. "must be interpreted restrictively, analogy being excluded in order to extend their scope".

3. The first category of applications listed in Art. 94, pt. 1 of the Civil Code is that given by the Civil Code to the guardianship and family court. Irrespective of the subject matter, in cases where the Civil Code provides for guardianship court powers, the court of first instance has jurisdiction. The courts are ordinary guardianship courts in guardianship and family matters.

4. The final part of Article 94 p. (1) (a) of the Code of Civil Procedure exempts 'cases expressly provided otherwise by law'. This concerns cases where the law provides for the jurisdiction of courts other than the courts as guardianship courts. In such cases, although the jurisdiction of the guardianship court is provided for, it is not the courts but the tribunals.

C. Substantive jurisdiction of the courts as guardianship courts

According to Article 95 of the Civil Procedure Code, the courts have jurisdiction of first instance, a jurisdiction as appellate or appellate courts, and a miscellaneous jurisdiction. In civil matters, at first instance, the courts are courts of ordinary law. In their capacity as guardianship courts, the courts have exceptional jurisdiction, limited only to cases specifically provided for by law.

2.4.3.3. Subject-matter jurisdiction of the guardianship court according to Law no. 76/2012

Law no. 76/2012 introduced important amendments and additions to Law no. 134/2012 on the Code of Civil Procedure, but also to other laws. All amendments and additions are incorporated in these laws. The reference of Article 76 of Law No. 76/2012 to the present law is only a precautionary measure to avoid possible omissions in Law No. 134/2012 or in other laws where the guardianship court also has jurisdiction and which, in the transitional period, belongs to the courts or, as the case may be, to the courts or to the specialized court for minors and family as guardianship courts.

2.4.3.4. Subject-matter jurisdiction of the guardianship court under special laws

In terminis, Article 76 of Law no. 76/2012 refers to the jurisdiction of the courts or, as the case may be, of the courts or specialized courts for minors and family (as guardianship courts), established according to the special regulations in force. The jurisdiction provided for by Art. 76 of Law no. 76/2012 is a diverse one, being circumscribed by Art. 94, para. 3, respectively Art. 95, para. 4 of the Civil Code. This rule of jurisdiction applies in situations where certain legal provisions expressly and exclusively establish the jurisdiction of the guardianship court, as well as in cases which, although generically aimed at the court of law, concern child protection measures.

2.4.4. Territorial jurisdiction of the guardianship court

2.4.4.1. Preliminaries

1. The rules of territorial jurisdiction establish a horizontal delimitation of powers between courts of the same level. From a territorial point of view, the jurisdiction of the guardianship court must be analyzed differently, depending on the subject-matter of the applications: protection of the individual under the Civil Code; measures provided for in Book II of the Civil Code falling within the jurisdiction of the court; disputes concerning the application of the provisions of this book; child protection under special laws. With regard to applications relating to the measures given by Book II to the jurisdiction of the court and disputes concerning the application of the provisions of this Book, unless the law expressly provides for the territorial jurisdiction of another court, the rules of ordinary territorial jurisdiction, provided for by Article 107, paragraph 1, et seq. C. pr. civ. shall apply. With regard to applications concerning the protection of a natural person given by the Civil Code to the guardianship court, by way of derogation from the ordinary law, the court in whose territorial district the domicile or residence of the protected person is situated, or in whose territorial district the immovable property in relation to which authorization to conclude legal acts is sought, is situated, pursuant to Article 114 of the Civil Code, has jurisdiction.

2. Just as in the case of subject-matter jurisdiction, in the construction of the legal rules on the territorial jurisdiction of the guardianship court there are relatively numerous cases of inconsistencies in terminology, as well as inconsistencies between the rules of substantive law and those of procedural law, circumstances that may give rise to different interpretations, including an inconsistent practice.

3. As the first two categories of applications are governed by the rules of common law in terms of territorial jurisdiction, I will now present the territorial jurisdiction of the guardianship court only

for the last two categories of applications: proceedings under the Civil Code concerning the protection of the natural person; child protection measures provided for by special laws.

2.4.4.2. Territorial jurisdiction of the guardianship court in proceedings relating to the guardianship of the natural person under the Civil Code

1. After the entry into force of the Civil Code and until the entry into force of Law 60/2012, in the absence of derogating legal rules, the territorial jurisdiction of the guardianship court in this matter was governed by ordinary law. The division of the guardianship court's territorial jurisdiction according to the nature of the claims before it started with the entry into force of Law no. 60/2012, which introduced art. 229^1 to Law no. 71/2011[1] . Subsequently, Art. 229^1 was repealed, but its provisions were taken over by Art. 111^1 of Law No. 134/2010, which became Art. 114 after the republication of Law No. 134/2010 in 2012.

2. Art. 114 C. pr. civ. (guardianship and family claims) derogates from the ordinary law as regards the territorial jurisdiction of the courts. Specifically, "unless otherwise provided by law, applications concerning the guardianship of a natural person given by the Civil Code within the jurisdiction of the guardianship and family court shall be decided by the court in whose territorial jurisdiction the person under guardianship has his domicile or residence" [para. (1)] 'In the case of applications for authorization by the guardianship and family court to conclude legal acts, where the legal act for which authorization is sought concerns immovable property, the court within the territorial jurisdiction of which the property is situated shall also have jurisdiction. In such a case, the guardianship and family court which delivered the judgment shall forthwith communicate a copy of the judgment to the guardianship and family court within whose territorial jurisdiction the person protected is domiciled or resident" [para. (2)].

3. For the application of Article 114 C. pr. civ. three cumulative conditions must be met: the law does not provide for the territorial jurisdiction of another court; the applications concern the protection of the individual, namely the authorization by the guardianship court to conclude legal acts in relation to a real estate; the applications are established by the Civil Code within the jurisdiction of the guardianship court.

4. Art. 114 C. pr. civ. derogates from the ordinary law on the territorial jurisdiction of the courts, where the principle is *actor sequitur forum rei*. Derogation is in terms of the location of the natural person. In the common law, the person is localized by domicile alone. Art. 114 para. (1) adds

[1] Art. I point 28 of Law no. 60/2012.

the residence criterion. Since the provisions of Article 114 are special and established for the benefit of the protected natural person, unless the law provides otherwise, other special rules take precedence in application over those of ordinary law. At the same time, they are of strict interpretation and application.

5. These rules are protective, which means that they are established in the interests of the protected person. As far as the protection of minors is concerned, they are in harmony with the principle of promoting their best interests. Their application does not depend on whether the protected natural person is a plaintiff or a defendant, or on certain circumstances relating to him or her (minor, of full age, without capacity to exercise his or her rights, with restricted or full capacity to exercise his or her rights, beneficiary of guardianship or curatorship, fiancé, spouse, parent, child, etc.). *Per a contrario*, Article 114 para. (1) C. pr. civ. does not apply in situations where the protected person is a legal person or, being a natural person, the protection measure is provided for by a law other than the Civil Code.

6. Art. 114 C. pr. civ. is applicable in the case of two categories of requests: for the protection of the natural person provided for by the Civil Code within the competence of the guardianship and family court, respectively for the authorization by the guardianship court to conclude legal acts in relation to a real estate. *Per a contrario*, it does not apply to other categories of applications, nor to situations where such applications are brought within the jurisdiction of the guardianship court or other courts by laws other than the Civil Code.

7. As regards applications other than those concerning measures for the protection of natural persons provided for by the Civil Code or authorizing the conclusion of legal acts concerning immovable property, the Code of Civil Procedure contains provisions on territorial jurisdiction which provide otherwise, and for this reason they have priority in application.

8. Subject to the proviso that the applications have as their object the protection of the natural person, Article 114 para. (1) C. pr. civ. shall apply both in cases where the Civil Code expressly refers to the guardianship court and in cases where it refers generically to the court or the court of law.

2.4.4.3. Territorial jurisdiction of the guardianship court in the case of child protection measures provided for by special laws

1. An analysis of the rules of territorial jurisdiction laid down by certain special laws shows that, as a rule, in matters of child protection, jurisdiction lies with the guardianship court or, in general, with the court within whose territorial jurisdiction the child is domiciled or resident. There

are also situations where the territorial jurisdiction is determined on the basis of other territorial criteria or where the territorial jurisdiction of a specific court is provided for.

2. A particular case is regulated by Article 45 of Law no. 272/2004 on child guardianship: 'guardianship *is established* according to the law by the court in whose territorial jurisdiction the child resides or has been found' (n.d.). Art. 114 para. (1) C. pr. civ. cannot be applicable, since art. 45 is placed in a special law. Art. 45 of Law no. 272/2004 restrictively concerns the establishment of guardianship, which is why the appointment of the guardian and the claims arising from the exercise or termination thereof fall within the jurisdiction of the court in whose territorial district the child's domicile or residence is located, pursuant to Art. 114 para. (1) of the Code of Civil Procedure, since such claims are provided for by the Civil Code. In practice, paradoxical situations may arise. For example, in the case of a foundling, the establishment of guardianship falls within the jurisdiction of the court in whose territorial district the place is situated. It is not possible to identify the competent court for the appointment of the guardian as the child's domicile or residence is unknown. It is only after the appointment of the guardian that the child is domiciled with the guardian and can be granted residence. To eliminate the source of differing interpretations on this subject, I suggest that the legislature repeal Article 45 of Law No 272/2004 *de lege ferenda*. In these circumstances, the power to establish guardianship, appoint the guardian and settle the applications arising from the exercise or termination of guardianship would be regulated in a unitary manner by Article 114 para. (1) of the Civil Code.

3. There are situations where the law is silent on the subject-matter or territorial jurisdiction of the court. In these cases, since the law does not provide otherwise, Article 107 para. (1) C. pr. civ. In any event, the application of Article 114 C. pr. civ. is excluded for the simple reason that such rules of territorial jurisdiction are laid down by laws other than the Civil Code. By the same reasoning, the applicability of the rules of territorial jurisdiction set out in Article 114 of the Code of Civil Procedure should be extended to measures for the protection of the person provided for by special laws. To achieve this, I propose that the *legislature* amend Article 114 para. (1) of the Code of Civil Procedure by replacing the expression Civil Code with the notion of law.

CHAPTER III
ESTABLISHING GUARDIANSHIP OF THE MINOR

SECTION 3.1.
CASES OF GUARDIANSHIP OF MINORS

3.1.1. Preliminaries

1. Traditionally, guardianship is established on the death of the minor's parents.

2. Cases of guardianship are certain situations provided for by law in which both parents are in a situation in which the minor is temporarily or permanently deprived of parental care or his or her remaining in their care is not in his or her best interests. Article 110 of the Civil Code lists eight cases. To these may be added others provided for in the Civil Code. To the situations expressly provided for by law must be added those referred to generically in Article 44 para. (1) of Law No 272/2004, where it is not in the child's best interests to be left in the care of the parents. In both categories of cases, the child is entitled to alternative care, including the possibility of guardianship.

3. Article 110 of the Civil Code provides for eight cases in which guardianship of a minor is established. With differences in expression and content, most of them were provided for by the former Art. 40 para. (1) of Law No 272/2004 and Art. 113 C. fam. Some of them were introduced by Law No 140/2022 and are of a novel nature. Some of them are also regulated in comparative law, such as the French Civil Code. For guardianship to be established, according to Article 110 of the Civil Code, both parents must be, as the case may be: deceased, unknown, deprived of parental rights, sentenced to a criminal penalty of deprivation of parental rights, beneficiaries of legal counseling or special guardianship, missing or declared judicially dead. Finally, when the adoption is terminated, the guardianship court may order guardianship.

4. In the light of the situations listed, Article 110 of the Civil Code was subject to constitutionality review. In the objection, it was argued that the provisions of Article 110 of the Civil Code are restrictive, as they do not cover all the possible hypotheses that presuppose the establishment of guardianship. The author of the exception requested the addition of a generic case to this article. The Constitutional Court rejected the exception on the ground that it was inadmissible, since the Constitution and Law no. 47/1992 do not confer on the Constitutional Court the power to review possible legislative omissions or, in other words, to amend or supplement the legal provisions subject to constitutional review. The situation invoked in the objection of unconstitutionality can be

circumscribed under Article 44 para. (1) of Law no. 272/2004, constituting a particular case in which the child is temporarily deprived of the protection of both parents. Such situations justify the legislature's proposal that, *de lege ferenda,* Article 110 of the Civil Code should be supplemented by a generic sentence, namely: 'for any reason whatsoever, the minor is temporarily or permanently deprived of the care of both parents, or it is not in his best interests to be left in their care'.

7. If only one of the parents is in at least one of the situations set out in Article 110 of the Civil Code, the other parent will look after the child alone. In these situations, it is not permissible to establish guardianship or any other form of alternative care, since the legal requirement that the minor be deprived of the care of both parents is not fulfilled. The opposite solution is contrary to the principle of the primary responsibility of parents to respect and guarantee the rights of the child.

8. Art. 507 para. (1) of the Civil Code provides for cases in which parental authority is exercised by a single parent: the other parent is deceased, declared dead, has been declared dead, is under special guardianship, is deprived of parental rights or is unable to express his or her will for any reason. *A fortiori*, if both parents are in one of these situations, the child is deprived of parental care and is entitled to alternative care, including the right to guardianship. Naturally, parental authority must be exercised by only one parent, if the other parent is in one of the cases provided for by the law, in which, if both parents were involved, guardianship would have to be established. In other words, between the cases provided for in Article 507 para. (1) and those which allow guardianship to be established there should be a perfect correspondence. Notwithstanding this requirement, not all the cases provided for by Article 110 or other legal texts are explicitly or implicitly listed in Article 507 para. (1). To remedy this inconsistency, I propose that the legislature should, *de lege ferenda*, reword Article 507 para. (1) of the Civil Code as follows: 'parental authority is exercised by one parent only if the other parent is in a situation in which guardianship may be established'.

9. There are cases provided for by Article 110 of the Civil Code that may also arise in the situation where the child is adopted. I have in mind, for example, the situation in which the adoptive parents die, are deprived of their parental rights, have been deprived of their parental rights, are given legal counseling or special guardianship, are missing or have been declared dead by the court. The case-law in this area has also ruled in this respect. From a legal point of view, the adoptive parent is in the same legal position as the natural parent, as he or she has the same rights and duties towards the adopted child as the parent has towards his or her natural child.

10. The situations in which guardianship can be instituted can be grouped according to the criterion of duration and the role of parental culpability in their occurrence and maintenance.

3.1.2. Death of parents

This is the first case listed in Art. 110 Civil Code and the most common in practice. The case was provided for explicitly or implicitly in previous regulations. The death of the parents is a permanent case. The guardianship established for the benefit of an orphaned child lasts, as a rule, until the date on which the child comes of age or acquires full capacity by marriage or on application for good cause.

3.1.3. Parents are unknown

The case evokes the situation where the child's filiation is not established. This is most often the case for foundlings. The situation may also include a child whose parents are unknown and a child whose maternity and/or paternity, having been established, have been removed by the admission of legal proceedings in a dispute or in a filiation claim.

3.1.4 Parents are deprived of parental rights

1. This case is also covered by Article 511 of the Civil Code, which expressly provides that guardianship is established if, after the lapse of parental rights, the child is deprived of the care of both parents. Article 511 of the Civil Code does not derogate from the similar case provided for in Article 110 of the Civil Code, which is why a parallelism has been generated.

2. Article 472 of the Civil Code regulates the possibility of establishing guardianship or other protective measures if the adopter is deprived of parental rights. Where the child is adopted by husband and wife together, if only one of them is deprived of parental rights, guardianship is not established. Parental authority shall be exercised by the adoptive parent who has not been deprived of parental authority.

3.1.5. The parents were sentenced to the criminal penalty of deprivation of parental rights

1. The case concerns situations where, under the conditions of Art. 65 para. (1)-(2) and Art. 66 para. (1) letter e) of the Criminal Code, the parents have been sentenced to the accessory or complementary criminal penalty of "prohibition from exercising parental rights".

2. Between Article 110 of the Civil Code, on the one hand, and the provisions on criminal matters, on the other, there is a mismatch of expression. Whereas Article 110 of the Civil Code refers to the 'criminal penalty of the prohibition of parental rights', the latter refers to the accessory or complementary criminal penalty of 'the prohibition of the exercise of parental rights'. Since Article

53 of the Constitution only allows for "restriction of the exercise of certain rights and freedoms", from the perspective of this case, Article 110 of the Civil Code. and the corresponding provisions in criminal matters are unconstitutional, which is why I suggest that the legislature amend them, *de lege ferenda*, so as to provide for 'restriction of the exercise of parental rights'.

3.1.6. Parents receive legal advice or special guardianship

1. From a substantive perspective, the legal regime of legal counseling and special guardianship is governed by Articles 164-177 of the Civil Code, and procedurally by Articles 936-943 of the Civil Code. I recall that art. 164 para. (1) of the Civil Code was declared unconstitutional and ceased to have effect 45 days after the date of publication of Dec. CCR no. 601/2020 in M. Of.

3. The fact that the parent benefits from legal counseling or special guardianship places him in the legal situation of having restricted civil capacity to exercise his civil rights, i.e. of not having capacity to exercise his civil rights. This parent does not have full exercise capacity, which is why he or she is legally unable to look after the minor. The parent himself needs the care of another person, namely a guardian.

3.1.7. Parents are missing or declared legally dead

1. Not every disappearance can trigger the procedure for the establishment of guardianship of a minor, but only that which is circumscribed by art. 49, respectively art. 50 of the Civil Code. In other words, there must be indications that the parent has ceased to exist or that the disappearance occurred in a particular circumstance which justifies the assumption that his death has occurred.

2. For guardianship to be established on the grounds that the parents are declared judicially dead, the judgment must be final.

3.1.8. Upon termination of the adoption, the court shall order the establishment of guardianship

1. Under Article 482 para. (1) of the Civil Code, after affirming the principle according to which, upon termination of the adoption, the child's natural parents regain their parental rights and duties, the exception is evoked, in which the court decides that it is in the best interests of the child to establish guardianship or another measure of child protection. It reaffirms the primacy of the care of the child by the natural parents and of guardianship in alternative care measures.

2. The adoption is terminated by dissolution, annulment or nullity. If both the adoptive parents are in the other cases provided for by Article 110 of the Civil Code, which do not cause the adoption to terminate, the circumstance makes it possible to establish guardianship or, in other words, although the minor has the legal status of adopted, he or she may benefit from guardianship.

3.1.9 The situation of a minor suffering from mental deterioration

3.1.9.1. Guardianship of minors under special guardianship

1. Under Article 164 para. (6) thesis I of the Civil Code, minors with restricted exercise capacity may also benefit from special guardianship. The text concerns minors who suffer from deterioration of their mental faculties and are aged 14. *Per a contrario*, minors under the age of 14 are not eligible for special guardianship, even if they suffer from mental impairment. The solution is correct, since the lack of capacity to exercise the exercise of rights caused by the fact that the minor is under the age of 14 would be doubled by the fact that the minor is under special guardianship.

2. Art. 176 para. (1) thesis I of the Civil Code lays down special rules for the guardianship of minors under special guardianship: if at the date of the establishment of special guardianship the minor is under the guardianship of his parents, he remains under that guardianship until the date on which he reaches majority, without a guardian being appointed. The fact that the minor remains under parental guardianship is in line with the principle of the primary responsibility of parents to respect and safeguard the rights of the child and confirms the primacy of parental guardianship over guardianship and, in general, over any alternative measure of protection.

3. To the duties of the parents within the framework of parental authority are added those incumbents on the guardian who protects an individual beneficiary of special guardianship, according to Article 176 para. (1), thesis II of the Civil Code in conjunction with Article 174 of the Civil Code.

4. If, at the time the special guardianship is established, the minor is under guardianship, the court shall decide whether the former guardian retains the guardianship or appoints a new guardian. This concerns a minor who is suffering from a deterioration in his mental faculties and who, at the same time, is deprived of the care of both parents or who, in his best interests, cannot be left in the care of both parents. The guardianship court is required to obtain the former guardian's consent in order to decide that the former guardian is to retain the guardianship.

5. Art. 176 para. (2) of the Civil Code regulates the situation when the minor beneficiary of special guardianship has reached the age of majority: "if on the date on which the minor reaches the age of majority, he is still under special guardianship, the guardianship court shall appoint a guardian. In this case, the parent or, where appropriate, the parents of the minor together shall be appointed as guardian with priority".

3.1.9.2. Guardianship of the minor by guardianship or legal advice

1. According to Art. 164 para. (6), thesis II of the Civil Code, "when the court considers that the protection of the person can be achieved by instituting curatorship or by placing the person under judicial supervision, this measure may be ordered one year before the date of reaching the age of 18 and shall take effect from that date". This provision concerns minors aged 14 who are suffering from mental deterioration. Until he or she reaches the age of majority, he or she is under the guardianship of his or her parents and in their absence is covered by an alternative protection measure, including ordinary guardianship. Parental authority and guardianship are exercised in accordance with ordinary law, since the measure of legal guardianship or guardianship takes effect after the minor reaches the age of 18 (the age of majority).

SECTION 3.2.
PERSONS, AUTHORITIES AND INSTITUTIONS REQUIRED TO NOTIFY THE GUARDIANSHIP COURT

3.2.1. Preliminaries

1. Article 111 of the Civil Code requires certain individuals, public authorities and public institutions to notify the guardianship court as soon as they learn that a minor is deprived of parental care. The lack of parental care of the minor must be explained by the fact that the parents are in one of the cases provided for by Art. 110 of the Civil Code or other legal provisions or by art. 44 of Law no. 272/2004.

2. Article 111 of the Civil Code contains an illustrative list. After naming certain categories of natural persons, public authorities and public institutions, it lays down this obligation for any other person.

3. For the same purpose of promoting the best interests of the child, Article 111 of the Civil Code provides that the guardianship court must be notified immediately.

4. The obligation is regulated by a mandatory rule. However, the law does not provide an express sanction for failure to comply. Depending on the consequences of failure to notify the guardianship court, the guilty person may be held criminally liable under Article 203 para. (1) of the Criminal Code, for committing the crime of "leaving a person in distress without assistance" in the form of failure to "immediately notify the authorities that he has found a person whose life, physical integrity or health is in danger and who is unable to save himself".

5. The law does not make any distinction as to the manner in which the notice is to be served, which is why it can be served in any form of communication (written, verbal, by telephone or internet), including by means of a petition addressed to the guardianship court.

6. The guardianship court may also, of its own motion, find that a particular minor is deprived of parental care or that, in his or her best interests, he or she cannot be left in the care of his or her parents and may decide to establish guardianship.

3.2.2. Categories of persons, authorities and institutions obliged to notify the guardianship court

3.2.2.1. Persons close to the minor, administrators and tenants of the house where the minor lives

3.2.2.2. The local community public service for registering persons and the notary public

3.2.2.3. Courts of law

3.2.2.4. The public prosecutor, local public administration authorities, welfare institutions and any other person

SECTION 3.3.
APPOINTMENT OF GUARDIAN BY THE PARENT

3.3.1. Preliminaries

1. The appointment of a guardian is a right conferred on the parent to recommend (indicate), under the conditions of the law, the person to be appointed by the guardianship court as guardian of his child in the event of his and the other parent's deprivation of his or her care. The appointment does not *ipso iure* confer the person *ipso iure the* quality of guardian, but only the possibility of being appointed as guardian by the guardianship court. The appointment is a step prior to the appointment of the guardian by the guardianship court. For the guardianship court, the appointment of the person nominated by the parent is not binding; it appoints him or her only if it finds on the basis of evidence that he or she fulfills the legal requirements and that his or her appointment is in the best interests of the minor.

2. Guardianship under which the guardian is appointed by the parent is called by some authors dative. This name is inspired by the Civil Code of Quebec, where the right of parents to choose the guardian is placed in the context of the rules on dative guardianship (Articles 200-207). Over time, the consideration of dative guardianship has been more nuanced than it is in recent Romanian doctrine.

3. The current Romanian Civil Code only recognizes the parent's right to appoint the guardian, the appointment of the guardian is the exclusive competence of the guardianship court. The Civil Code regulates the modalities for the appointment of the guardian by the parent, the ineffectiveness of the appointment, the revocation of the appointment, the appointment of more than one person and the obligation of the guardianship court to respect the appointment made by the parent.

3.3.2. How to appoint a guardian

1. According to Art. 114 para (1) of the Civil Code, the appointment may be made by unilateral act, agreement or will. The act of appointing a guardian is conditional, subject to the suspensive condition that a situation has arisen in which guardianship is established and the person appointed is appointed guardian, provided that the legal requirements are met.

2. The Romanian legislature has refrained from expressly providing that the act appointing the guardian is *mortis causa*. From this perspective, different opinions have been expressed in the legal literature.

3. To establish the legal nature of the act of designation, Article 114 para. (1) of the Civil Code must be read in conjunction with the other paragraphs of Art. 114 and Art. 110 of the Civil Code, as well as Art. 44 para. (1) of Law No 272/2004. Although unilateral legal acts and agreements are, by their nature, *inter vivos* acts, they, in their entirety or in certain clauses, may be subject to conditions precedent. In this area, the legal act in its entirety or only the clause appointing the guardian is subject to the occurrence of one of the situations provided for in Art. 110 or others of the Civil Code, or in Art. 44 para. (1) of Law No 272/2004. Depending on the situation, they are either *mortis causa* (the parents are deceased or declared dead by a court) or *inter vivos* (the parents are receiving legal counseling or special guardianship, are missing, unknown, have been given a criminal penalty of the prohibition of parental rights, a decision was taken to establish guardianship when the adoption was terminated or it is not in the best interests of the child to leave him in the care of his parents). If the appointment has been made by will, irrespective of the form of the will and of the situation giving rise to the guardianship, the appointment of the guardian is *mortis causa*. The conclusion is supported by the fact that Art. 114 of the Civil Code does not exempt from the *mortis causa* nature of the will

by which the parent has appointed the guardian. Regardless of the nature of the legal act by which the guardian is appointed, if it is *mortis causa*, the effects are conditional on the fact that at the date of death the parent was not deprived of parental rights

4. The unilateral act and the agreement must take the form of an authentic instrument, which is required *ad validitatem*. The form of the will is irrelevant; it may be ordinary (holograph or authentic) or privileged.

6. From a legal point of view, it is debatable whether the guardian can be appointed by the parents together, by the same act, or by each of them, by separate acts. To eliminate the source of different interpretations on this subject, it is appropriate for the legislature to intervene by inserting in Art. 114, after para. (1), a new paragraph to the effect that "the parents may appoint the guardian by the same unilateral legal act or by an agreement concluded in authentic form".

7. The possibility for parents to designate the guardian by separate legal acts does not raise any problems, except that it may lead to conflict between designations when each designates another person.

8. The appointment of a guardian by a parent in a will has been known since Roman law and is found in many contemporary laws. The appointment of a guardian by the parents in the same will is ruled out, as this is a unilateral, personal and individual legal act. The parents have the possibility of testamenting separately and appointing the same person or different persons to be the guardian of their child.

9. A unilateral legal act involves "only the manifestation of the will of its author". For its existence, it is essential that "the will is unique and not the number of subjects". A unilateral legal act implies a single manifestation of will, regardless of the number of persons participating in its realization. In this area, there is unity of will where the parents of the child appoint the same person as guardian by a joint unilateral legal act. The appointment of the guardian by the parents jointly is not possible in the case of unilateral legal acts *intuitu personae*. These legal acts are both personal and individual.

10. The unilateral legal act, in order to produce legal consequences, must be communicated to the person designated in accordance with Article 1.326 of the Civil Code.

11. The appointment of the guardian by agreement is based on the fact that the assumption of the guardianship is voluntary. The legislature has dispensed with the contract of agency and avoided using the term contract. Opting for the convention is likely to increase the legal possibilities for

parents to appoint the guardian by legal acts, since they are no longer obliged to circumscribe their manifestation of their will within the framework of the contract of agency.

3.3.3. The legal act appointing the guardian is void

1. Regardless of the way it was made, the appointment of a guardian is ineffective if at the time of death, the parent "was deprived of parental rights", according to Article 114 para. (2) of the Civil Code. This text is at odds with Art. 508 et seq. Civil Code and Articles 65 et seq. Penal Code, which regulate the disqualification from exercising parental rights, i.e. the accessory or complementary criminal penalty of prohibition from exercising parental rights. The text is also at odds with Article 53 of the Constitution, which allows only the restriction of the exercise of certain rights, and not their prohibition or deprivation.

2. The disqualification must exist at the date of death of the parent who made the designation.

3. The deprivation of effect of the act of designation is a *post factum* sanction for the parent deprived of parental rights.

3.3.4. Revocation of the legal act appointing the guardian

1. Art. 114 para. (3) of the Civil Code gives the parent the possibility to unilaterally revoke the appointment of guardian at any time. The text does not distinguish how the appointment was made. Revocation is based on the parent's assessment that the person appointed does not offer sufficient moral guarantees or does not have the material conditions to fulfill the guardianship task.

2. Irrespective of the way the appointment was made, revocation shall not affect the terms of the will, unilateral legal act or agreement which are unrelated to the appointment of the guardian.

3. Revocation of the appointment may also be effected by a private deed. This exception to the principle of the symmetry of legal acts is likely to reinforce the unilateral nature of revocation. It is presumed that the possibility of appointing a person who does not meet the legal requirements as guardian is effectively eliminated.

4. To be enforceable *erga omnes*, the revocation of the appointment of the guardian, regardless of the nature of the legal act by which it was made, is subject to registration in the National Notarial Register.

5. Art. 114 para. (5) of the Civil Code obliges the notary public or the guardianship court, as the case may be, to check in the register provided for in Article 1.046 or in the register provided for in Article 2.033 whether the person appointed to be appointed guardian has been revoked. Verification of the existence of revocation shall be made in one of the two registers, as the case may be.

3.3.5. Appointing more than one guardian

1. Art. 115 of the Civil Code regulates two distinct situations: several guardians have been appointed; in the absence of an appointed guardian, there are several relatives, kin or friends of the minor's family able to fulfill the duties of guardianship. The order laid down in art. 115 Civil Code is preferential, which is why it is binding for the guardianship court.

2. Irrespective of the category to which it belongs, the appointment of a guardian shall be based on the fulfillment of the material conditions and the existence of moral guarantees necessary for the harmonious development of the minor.

3.3.6. Interim measures

3.3.6.1. Appointing a guardian other than the one appointed by the parent

1. Article 116 of the Civil Code regulates, on the one hand, the conditions under which the guardianship court may appoint a guardian other than the one appointed by the parent and, on the other hand, the conditions under which it may appoint a provisional guardian. The appointment of the person appointed by the parent may be decided by the guardianship court only if he or she meets the legal requirements.

2. Irrespective of how the person has been designated by the parent, he or she cannot be removed by the guardianship court without his or her consent. In order to be removed, the consent of the parent shall not be required, but only that of the person designated. It is presumed that the person appointed guardian has given his or her consent, even if the appointment has been made by an authentic instrument or will by the parent. By way of exception, the person appointed by the parent may be removed by the guardianship court without his or her consent if he or she is in a case of incompatibility or if, by his or her appointment, the interests of the minor are endangered.

3. The removal of the appointed person without his/her consent, if he/she is in any of the cases of incompatibility with the quality of guardian, denotes that Art. 113 para. (1) of the Civil Code is public policy. It is presumed that the appointment and exercise of guardianship by an incompatible person is contrary to the best interests of the minor.

4. The person appointed by the parent will also be removed if "the interests of the minor would be jeopardized by his appointment". The guardianship court has the discretion to assess *in concreto*, on a case-by-case basis, whether the appointment of the person would jeopardize the interests of the minor. *A fortiori,* removal may be ordered if the best interests of the minor are jeopardized.

3.3.6.2. Appointing a provisional guardian

1. Art. 116 para. (2) thesis II of the Civil Code gives the guardianship court the possibility to appoint a provisional guardian, but under the condition that the person appointed by the parent is temporarily prevented from exercising the functions of guardian. *Per a contrario,* if the hindrance is permanent, the guardianship court will remove the person appointed and appoint another person as permanent guardian. If the person appointed is in a case of incompatibility, another person will be appointed guardian.

2. The appointment of the provisional guardian follows the procedure for the appointment of the nominee as guardian. Although he or she is provisional, he or she has all the powers prescribed by law for a guardian. The provisional nature concerns only the duration of the office and not its scope.

3. Under Article 116 para. (3) of the Civil Code, if, after the cessation of the impediment, but within a period of not more than six months from the opening of the guardianship, the appointed person does not request the appointment of a guardian, the provisional guardian shall continue to perform the duties of the guardianship until the appointment of a guardian under the conditions of Article 118 of the Civil Code. The time limit of six months at most from the opening of the guardianship is time-barred, which is why, after this period has elapsed, the application of the appointed person will be rejected by the guardianship court on the grounds of lateness.

4. From a legal point of view, it is necessary to establish what is meant by the opening of guardianship, from which point the period of six months at most starts to run within which the person appointed may apply for the appointment of a guardian. The date on which the guardianship is opened is the date on which the guardianship court, after being notified and finding that a particular minor is deprived of parental care or is inadequately cared for by his parents, because he is in one of the situations referred to in Article 110 or in other situations referred to in the Civil Code or referred to generically in Article 44 of Law No 272/2004, decides to establish guardianship.

5. From the date of the communication of the judgment of appointment of the appointed guardian, the function of the provisional guardian shall cease.

3.3.7. Guardianship order concluded by the parent

1. In the context of the appointment of the guardian by the parent, Article 114 para. (6), thesis I of the Civil Code provides for the possibility for a parent with full exercise of parental capacity, who alone exercises parental authority over his minor child or who is the guardian of his adult child in respect of whom special guardianship has been established, to conclude a contract of guardianship in respect of the child's care, in the event of his death or in the event that he is no longer able to fulfill

the guardianship. In both cases, the condition is that the parent has full capacity, which means that he or she is of full age and is not under legal guardianship or special guardianship or is a married minor or a minor who has been granted full capacity in advance.

2. The guardianship order shall take effect from the date on which the parent dies or is no longer able to care for the child or to fulfill the guardianship duties.

3. The mandate of guardianship given by the parent must adequately meet the requirements set out in art. 2.029^{1} et seq. Civil Code. The minor or adult child beneficiary of the special guardianship does not have the quality of mandator. Even so, for identity of reason, art. 2.029^{5} Civil Code applies. If the mandate of guardianship does not fully ensure the care or administration of his property, the guardianship court may take a measure of guardianship to supplement it. If the guardianship court decides to establish a guardianship, it shall appoint the trustee named in the guardianship contract as guardian with priority.

4. The possibility of concluding a guardianship mandate contract under the conditions set out above is also recognized to relatives up to the second degree inclusive who are guardians of the minor or adult who benefits from special guardianship.

SECTION 3.4.
APPOINTMENT OF GUARDIAN BY THE GUARDIANSHIP COURT

3.4.1. Preliminaries

1. The establishment of guardianship and the appointment of a guardian are successive and interdependent legal operations, since there is a close link between their subject-matter and cause. It is therefore inconceivable that a guardianship could be established without the guardian subsequently being appointed and, conversely, that a guardianship could be appointed without the guardianship first being established. Because of this interdependence, the establishment of the guardianship and the appointment of the guardian are determined in the same proceedings by the same guardianship court.

2. After the entry into force of the current Civil Code and Code of Civil Procedure, the legal basis of the court's jurisdiction to establish guardianship and appoint a guardian is Art. 107 para. (1), art. 118 and art. 265 Civil Code, art. 229 para. (2) letter a) of Law no. 71/2011, art. 76 of Law no. 76/2012 and art. 94 para. 1 letter a) C. pr. civ. Articles 43 (a) and Art. 45 of Law No 272/2004 remained applicable. From a territorial point of view, the establishment of guardianship falls within

the jurisdiction of the court in whose territorial district the child's domicile or the place where the child was found is situated, in accordance with Article 45 of Law no. 272/2004. In cases of establishment of guardianship, Article 114 para. (1) of the Code of Civil Procedure cannot be applied, since Article 45 of Law No 272/2004 is in a special law which provides otherwise. The appointment of the guardian also falls within the jurisdiction of the court within whose territorial jurisdiction the child's domicile or the place where the child was found is situated. Although the appointment of the guardian is circumscribed to a child protection measure and art. 118 Civil Code refers to his appointment by the guardianship court without providing for special rules of territorial jurisdiction, art. 114 para. (1) of the C. pr. civ. pr., since this would lead to a situation where one court establishes guardianship, and another appoints the guardian.

3.4.2. Criteria for appointing a guardian

1. Article 118 of the Civil Code reaffirms the primacy of the will of the parent expressed in the legal act appointing the guardian. Where the parent has appointed the guardian, his will is not absolute. In the best interests of the minor, the guardianship court will appoint the person designated by the parent only if he or she meets the legal requirements. The appointment of the guardian shall also be subject to there being no reasonable grounds for objection and to the guardian's acceptance of the guardianship.

2. In the absence of a designated person, or if the person does not fulfill the conditions laid down by law, priority shall be given to relatives, relatives-in-law and friends. The order in which they are listed shall be order of preference. The guardianship court may proceed to identify the potential guardian in a subsequent category only if there are no persons in the previous category who meet the legal requirements or who do not assume the task.

3. Regardless of the category to which he or she belongs, the person must be capable of carrying out the task, which means that he or she is capable, both in law and in fact, of being a guardian. In deciding between persons belonging to the same or different categories, the guardianship court shall take into account their personal relations, the proximity of their domicile to that of the minor, their material circumstances and the moral guarantees they offer.

3.4.3. Procedure for appointing the guardian

3.4.3.1. General

1. Until the establishment of the guardianship court, the power to appoint the guardian shall lie with the court which established the guardianship, the court within whose territorial jurisdiction the minor is domiciled or has been found.

2. If the application does not present contentious elements, the appointment of the guardian is circumscribed by art. 527 C. pr. civ., being solved according to the non-contentious judicial procedure. To the extent that Article 119 of the Civil Code does not so provide, the general provisions on the non-contentious procedure shall apply accordingly. If the application for appointment of guardian contains contentious elements, Article 119 of the Civil Code is applicable for its resolution, which is supplemented by Articles 152-526 of the Civil Code.

3. Regardless of the nature of the application, under the conditions of Art. 107 para. (2) of the Civil Code, the guardianship court is obliged to resolve it immediately, i.e. without delay.

3.4.3.2. Future guardian's agreement

1. The appointment of a guardian shall be made with the consent of the person appointed. If the guardian has been appointed by the parent by agreement, the person may refuse the appointment, but only if he or she is in one of the situations provided for in Article 120 para. (2) of the Civil Code. *Per a contrario*, if the person has been appointed by unilateral act or will or by the court under Article 118 of the Civil Code, he or she may refuse the appointment without being obliged to give reasons.

2. In practice, it is possible that the person designated by agreement, although not in one of the situations provided for by Article 120 para. (2) of the Civil Code, refuses to assume the task of guardian. I believe the court should not appoint her/him. Her forced appointment may jeopardize the promotion of the best interests of the minor.

3.4.3.3. Consulting the family council

1. In the absence of a guardian appointed by the parent, the appointment of the guardian shall be made by the guardianship court in consultation with the family council (if it has been constituted). *Per a contrario*, consultation of the family council is not mandatory where the guardian has been appointed by the parent.

2. In the silence of the legislator, where the guardianship court appoints the guardian without consulting the family council, the legal remedy must be identified. To identify the legal remedy, it must be borne in mind that the appointment of the guardian is made by final judgment. According to Art. 634, paragraph 1, p 1 of the Code of Civil Procedure, it is not subject to appeal. Under these circumstances, it seems that the only remedy to reform the decision appointing the guardian without consulting the family council is to promote the extraordinary remedy of revision, based on art. 509 para. (1) p. 7 C. pr. civ.

3.4.3.4. Listening to the minor

1. Art. 119 para. (2) of the Civil Code obliges the guardianship court to hear the minor who has reached the age of 10 years, without referring to the appropriate application of Article 264 of the Civil Code, which is why the hearing is carried out under the conditions of Article 29 of Law no. 272/2004.

2. The child's right to be heard on the appointment of a guardian shall entitle him or her, in accordance with the law, to ask for and to be provided with any relevant information concerning the person of the guardian. The purpose of the hearing should be to establish the true relationship between the minor and the future guardian and whether or not there is a bond of attachment between them.

3. For the hearing to be relevant and conclusive, the minor must have full knowledge of the facts, which means that he or she must have been prepared in advance by specialized persons.

4. In the hearing of the minor, art. 226 C. pr. civ. must be respected too.

3.4.3.5. Participation of the prosecutor

The public prosecutor may also participate in the guardianship procedure. His participation is circumscribed by Article 92 para. (2) of the Code of Civil Procedure, which gives him the possibility to submit conclusions in any civil proceedings.

3.4.3.6. Appointment of guardian

The legal nature of the order appointing a guardian is a court judgment. In terms of content, the judgment appointing the guardian contains the elements set out in Article 425 paras. (1) and (3) of the Civil Code.

3.4.3.7. The finality of the decision appointing the guardian

1. Art. 119 para. (1) of the Civil Code expressly stipulates that the guardian is appointed by a final judgment, which is why it is not subject to appeal. If the application is non-contentious, the finality of the judgment is a departure from the common law in matters of grace, under which the judgment granting such an application is subject only to appeal.

2. In practice, there are courts which have established guardianship and appointed a guardian by final judgment. Others have established guardianship and appointed the guardian by judgment subject to appeal. Both solutions are wrong. The first overlooks the fact that the court is seised with two applications: one to establish guardianship and the other to appoint a guardian. In the second, although the court is seised with two applications, the judgment is subject to appeal in its entirety. It is ignored that only the establishment of guardianship is subject to appeal and that the appointment of the guardian is final. Strictly legally, it should be specified in the operative part of the judgment

that the establishment of the guardianship is subject to appeal and that the appointment of the guardian is final.

3. This inconsistent practice is due to the legislature's failure to determine the nature of the judgment establishing guardianship, as it did in the case of the appointment of guardians. In the interests of the unity of the rules, it is only natural that the establishment of guardianship, like the appointment of guardianship, should be established by a final judgment. This solution would emphasize the inseparable link between the establishment of the guardianship and the appointment of the guardian. For these reasons, I propose that the legislature should add a new paragraph to Article 110 of the Civil Code stating that ”guardianship shall be established by the guardianship court by a final judgment”.

3.4.3.8. Notification of the decision appointing the guardian

1. The order appointing the guardian shall be communicated in writing to the guardian and shall be posted at the seat of the guardianship court and at the town hall in whose administrative-territorial district the minor's domicile is located. The notification of the decision appointing the guardian is of practical importance, since the rights and duties of the guardian start from the date of notification, or in other words, the exercise of guardianship starts from that date.

2. Service shall be effected ex officio by an officer of the court or by any employee of the court and, if this is not possible, by post.

3.4.3.9. Interim measures

1. Art. 119 para. (6) of the Civil Code gives the guardianship court the possibility to take provisional measures required by the interests of the minor, including the appointment of a special curator, during the procedure for the appointment of the guardian. The provisional nature consists in the fact that the measures last until the date on which the guardian is notified of the conclusion of the appointment and begins to exercise his powers with regard to the person and property of the minor.

2. There is nothing to prevent provisional measures, including the appointment of a special guardian, from being ordered throughout the proceedings, from the time the guardianship court is seised until the judgment appointing the guardian is served and the guardian takes up his duties. This interpretation is supported by the fact that the minor is without guardianship.

3. The legislator has refrained from specifying, even by way of example, what provisional measures may be taken by the guardianship court, and the specialized literature is not concerned with this subject. Of the many cases consulted, we have not found any judgments in which such measures

have been ordered. In these circumstances, I believe provisional measures are steps taken by the guardianship court to remove factual situations that affect the best interests of the minor.

4. Where the guardianship court decides to appoint a special guardian, the legal provisions relating to the rights and duties of the guardian shall apply accordingly to the special guardian.

3.4.4. Refusal to continue to exercise guardianship

3.4.4.1. General

1. Art. 120 para. (1) of the Civil Code obliges the guardian to continue to fulfill the duties of the guardianship.

2. As an exception to this principle, Article 120 para. (2) of the Civil Code lists certain factual situations arising during the exercise of guardianship which prevent the guardian from properly fulfilling the duties of guardianship. In such circumstances, the guardian may refuse to continue the guardianship. Until the guardianship court has taken a decision to replace the guardian, the guardian has a duty to continue to perform the duties of guardianship.

3. Situations which entitle a person to refuse to continue the duties of guardianship are in the nature of legal excuses. Such excuses have been known since Roman law. In the cases set out in points (a)-(c), to be exempted from the guardianship, it is sufficient for the guardian to prove the existence of the circumstances in question. In other words, in their presence, the legislature presumes that the guardian can no longer perform the duties of guardianship. On the other hand, in the cases referred to in point (d), the guardian must prove that he can no longer perform the guardianship duties.

4. The cases covered by Article 120 para. (2) of the Civil Code are based on the idea that guardianship is exercised by a single natural person. In order to eliminate the source of different interpretations on this subject, it is appropriate that, *de lege ferenda,* Art. 120 be supplemented by a new paragraph, which would establish a rule of reference for the appropriate application of para. (1) and (2) for cases where guardianship is exercised by husband and wife together.

7. If the person refuses to continue guardianship in cases other than those provided for in Article 120 para. (2) of the Civil Code, he may be sanctioned with a civil fine.

3.4.4.2. Cases in which the guardian may refuse to continue to exercise the guardianship

A. The person is over 60 years of age

B. The woman is pregnant or the mother of a child under 8 years of age

C. The person raises and educates two or more children

D. Other good reasons

CHAPTER IV
EXERCISING GUARDIANSHIP OF A MINOR

SECTION 4.1.
PRELIMINARY CLARIFICATIONS

1. The exercise of guardianship means the fulfillment by the guardian of his or her duties under the law in respect of the person and property of the minor. In other words, the exercise of guardianship comprises two aspects: a personal aspect and a property aspect.

2. The guardian's duties can also be found in other areas of the Civil Code and in some special laws.

3. As in the previous regulations, the legislator focused more on the patrimonial issues of the exercise of guardianship and less on those relating to the person of the minor. The duty to represent and assist the minor is also applicable to the exercise of duties in relation to the minor's person. Under Romanian common law, the legal acts of persons who do not have the capacity to exercise their legal capacity are concluded on their behalf, as a rule, by their legal representatives, or with their consent, if they have restricted capacity. In the context of these rules, no distinction is made according to the subject-matter of the legal acts concluded by way of representation or with the consent of the legal guardian. Given that the protection of minors by guardianship is a special matter, subject to strict interpretation and application, in order to eliminate the source of differing interpretations on this subject, it is appropriate for the legislature to intervene by inserting a new paragraph, possibly in Article 134 (content of guardianship), which would provide that 'in exercising his powers in respect of the person and property of the minor, the guardian has the duty, in accordance with the law, to represent the person without legal capacity when concluding legal acts and to grant consent to the person with restricted legal capacity'.

4. A significant part of the current normative solutions is taken over from the previous regulation. There are also important novelties which support the superiority of the current legal regime for the exercise of guardianship of minors. To avoid repetition, I will not repeat here the principle that guardianship should be established and exercised in the best interests of the child. This principle was analyzed in the section on the child as the subject of protection through the establishment of guardianship, on which occasion we based our proposal to change the topography

of Article 133, in the regulations on the opening of guardianship, and to reformulate this principle to provide that "guardianship is established and exercised in the best interests of the child".

SECTION 4.2.
THE CONTENT OF THE GUARDIANSHIP

1. The content of the guardianship circumscribes all the duties incumbent on the guardian regarding the person and property of the minor. Strictly in legal terms, the content of the guardianship only circumscribes the guardian's duties (tasks) in relation to the minor's person and property. Article 134 of the Civil Code admits no other interpretation. The interpretation is in harmony with the fact that guardianship is a measure of protection of the minor, exercising his right to alternative protection.

2. Article 134 of the Civil Code lays down the guardian's duty to care for the minor. After reaffirming this duty in stronger terms, this duty is circumscribed by certain obligations incumbent on the guardian: to ensure the health and physical and mental development, education and vocational training of the minor. Despite its marginal name and the context in which it is placed, Article 134 of the Civil Code concerns only the guardian's duties in relation to the minor.

3. Under the Family Code, the identity between the guardian's duties with regard to the minor's person and those of the parents had legal support, since art. 101 (content of parental care) was reproduced (with some differences of expression) by art. 123 (content of guardianship). At present, the analysis of the guardian's duties regarding the minor's person in relation to those of the parents is more nuanced, since there are differences, some of them quite significant, between Article 134 (content of guardianship) and Article 487 of the Civil Code (content of parental authority). An analysis of the rights and duties of the parents regarding the person of the child (Articles 488-498 of the Civil Code) also reveals important differences.

4. In the absence of an express rule of reference, the application of the provisions of the Civil Code on parental duties relating to the person of the child to the guardian is implicit in their conjunction with certain provisions of Law No 272/2004. The exercise of parental authority by the guardian is also suggested by Article 105 of that law. Without going into the context, under the terms of that article, the guardianship court may delegate to the designated person the parental authority exercised by the parent or guardian.

5. Art. 134 C. Civ. provides for the duty of the guardian to care for the minor in both paragraphs, but the use of the term 'upbringing' has been avoided. However, the guardian's obligation to bring up the child arises from the requirements of the principle of "stability and continuity in the care, upbringing and education of the child". Other texts of Law No 272/2004 also refer to the duty of the guardian to bring up the child who is the beneficiary of the guardianship. It can be argued with good reason that Article 134 of the Civil Code is not in line with the respective provisions of Law No 272/2004. Despite the differences presented, in practice, the courts frequently refer to the exercise of parental rights and duties by the guardian.

6. Regarding the property aspect of guardianship, according to Article 502 of the Civil Code, "the rights and duties of the parents with regard to the child's property are the same as those of the guardian, the provisions governing guardianship being applicable accordingly". As a result, as far as the minor's property is concerned, the doctrinal assessment that the rights and duties of the parents and those of the guardian are identical is fully justified.

7. As guardianship is an alternative form of protection to parental care of the minor, the similarity with parental care is natural. From a legal perspective, guardianship is not only an alternative to parental care, but also a substitute for it. In order to promote the best interests of the child as a matter of priority, the content of all forms of alternative forms of protection, including guardianship, must be circumscribed by the normative standards laid down by law for parental care. This is the only way to ensure the legal framework for promoting the best interests of the child through guardianship. Article 135 para. (1), thesis II, second paragraph of the Civil Code. Thus, if guardianship is exercised by the spouses together, "the provisions on parental authority shall be applicable accordingly". In order to apply this principle also in cases where the guardian is a single natural person, it is appropriate, *de lege ferenda*, in the context of the general provisions on the exercise of guardianship, to introduce a new article providing that 'in the exercise of guardianship, the guardian has the duties of the parent towards the person and property of the minor, unless the law provides otherwise'. This article should be provided with the marginal heading 'content of guardianship'. In this way, the identity between parental duties in respect of the minor's person and property and those of the guardian would no longer have to be identified by way of interpretation. Certain international rules can and should be used to substantiate this proposal, under which 'parental responsibility includes parental authority or any relationship similar to parental authority which determines the rights, powers and duties of parents, *guardian* or other legal representative in relation to the person or property of the child' (n.d.).

8. Under Article 134 para. (1) of the Civil Code, the guardian's obligation to take care of the minor concerns the minor's person alone. This conclusion is supported by the duties that are subsumed under it: health, physical and mental development, education, teaching and vocational training. In terms of content, it is wrong to place Article 134 of the Civil Code within the general provisions on the exercise of guardianship. To remedy this situation, in line with the proposal made above, I suggest that the legislature should, *de lege ferenda*, change the topography of this article in the context of the exercise of guardianship in respect of the person of a minor and amend its marginal name accordingly.

SECTION 4.3.
SPOUSES EXERCISING GUARDIANSHIP TOGETHER

4.3.1. General

1. The married guardians shall be jointly and equally responsible for the exercise of the duties of guardian, whether they concern the person or the property of the minor. They must make an effective contribution to the performance of their duties. Equality, although it cannot be mathematical, must reflect the existence of a balance in their effective participation in the performance of the guardianship duties. As in matters of parental authority, the principle is one of codecision.

2. Joint and equal participation in the performance of the duties of guardianship shall also be obligatory where the guardian spouses are separated for reasons beyond their control and for a fixed period and the minor lives with only one of them. If the separation in fact is attributable to the spouses or one of them and affects the fulfillment of the guardianship duties, the guardianship court may decide to remove the spouses or the guilty one from the guardianship on the grounds that they are not properly fulfilling the duties. The same remedy is also necessary if there are disagreements between the spouses which affect the proper performance of the guardianship duties.

3. In the case of guardian spouses, the presumption of mutual tacit mandate provided for in Article 503 para. (2) of the Civil Code. Regarding bona fide third parties, either of them, by performing a current act alone for the exercise of powers in respect of the person or property of the minor, is presumed to have the consent of the other spouse. The guardian spouse who performs a routine act in the exercise of guardianship is exempted from the obligation to prove that he or she

has the consent of his or her spouse. By virtue of this presumption, bona fide third parties are protected. They cannot be accused of not having sought the consent of both spouses.

4. For the presumption to be applicable, the following conditions must all be met: the act is concluded by the spouse in the exercise of the powers of guardian; the legal act is current; the third party is bona fide.

5. The Romanian legislator refrained from configuring the meaning of the concept, leaving the task to doctrine. In common parlance, something is considered commonplace if it is daily, easy, fluent. It has been pointed out that "an act cannot be considered usual (commonplace) if it has binding consequences for the child's future or if it calls into question the child's fundamental rights, such as ... an act relating to the choice of the type of education or vocational training, to complex medical treatment, surgery, to the establishment of the child's residence, or to the administration of the child's property" (p.n.).

6. In the context of parental authority, this presumption does not operate in situations where the law provides for an obligation of consent by both parents. In matters of joint guardianship, the consent of both spouses is required, for example, when consent is required for a minor to have a residence determined by his or her education and vocational training, and when consent is required for a child who has reached the age of 14 to conclude legal acts.

7. The presumption is relative (*iuris tantum*). The beneficiary is relieved of the burden of proof as to the existence of the consent of the spouse not taking part in the conclusion of the act. It may be overturned in the courts by evidence to the contrary.

8. By way of exception from Article 113 of the Civil Code, the spouse who is the beneficiary of legal counseling, if he or she exercises guardianship together with his or her spouse, does not become incompatible with the capacity of guardian and is not removed from guardianship. This exception is based on the principle of the legal equality of the spouses and, in particular, on the child's right to live in a family environment. The family environment is not achieved by the mere fact that the child lives with both spouses. It presupposes the effective, day-to-day involvement of both spouses in the upbringing of the child, including the exercise of parental responsibilities.

9. If one of the spouses has special guardianship, he or she will be removed from the guardianship. The basis for removal is that the special guardianship measure renders the spouse incompatible with the guardianship.

4.3.2. The spouses' agreement on the exercise of guardianship

1. To take effect, the agreement between the spouses on the manner of exercising guardianship must comply with the provisions of Article 506 of the Civil Code, namely: it respects the best interests of the minor; it is authorized by the guardianship court; the minor is heard in accordance with Article 264 of the Civil Code.

2. It is not permissible for the spouses to agree that one of them is to perform all the duties of guardianship for an indefinite period and the other is to make no contribution, or that one is to perform those in respect of the minor's person and the other in respect of the minor's property. If the guardianship court were to validate such an agreement, the guardianship exercised by the spouses together would *de facto be* transformed into guardianship exercised by one of them, i.e. it would be split.

4.3.3. Exercise of guardianship by one of the spouses

1. According to the reference rule laid down in Art. 135 para. (1), thesis II of the Civil Code, Article 507 of the Civil Code is also applicable to the matter. Guardianship is exercised by one of the spouses alone, if the other spouse is deceased, declared judicially dead, is under special guardianship, is deprived of parental rights or is unable to express his or her will for any reason. The application of Article 507 of the Civil Code in this case results in the termination of the guardianship of one of the spouses.

3. Article 503 para. (1^1) thesis II of the Civil Code in conjunction with Art. 135 para. (1), thesis II of the Civil Code. In concrete terms, if the spouse exercising sole guardianship benefits from the measure of legal counseling, the guardianship court has the option of deciding whether the spouse should continue to exercise guardianship or whether he or she should be removed from guardianship and another person appointed as guardian.

4. A spouse who exercises sole guardianship and benefits from special guardianship is in a special situation. At first sight, the interpretation of Article 507 para. (2) in conjunction with Article 135 para. (1), thesis II of the Civil Code may support the conclusion that the spouse, although removed from guardianship, retains the right to supervise the upbringing and education of the minor and to consent to the adoption of the minor. This interpretation is excluded for the simple reason that the husband is removed from guardianship.

4.3.4. Exercise of guardianship in the event of divorce

1. Where one of the spouses files an action for divorce, the court hearing the action is required to notify the guardianship court of its own motion to order the exercise of guardianship. *A fortiori, the* divorce court is also under this obligation where both spouses bring divorce proceedings.

2. The guardianship court is seised and entitled to rule on the exercise of guardianship before the marriage is dissolved by a final judgment. This is a fair solution, since serious harm to the relationship between the spouses is such as to affect the exercise of guardianship. Depending on the circumstances, the guardianship court may order both spouses or only one of them to be removed from guardianship.

3. Article 135 para. (2) relates exclusively to divorce proceedings, which is why it is applicable only to divorce by judicial process on grounds of fault, divorce on grounds of ill-health and divorce on grounds of a long separation in fact. *Per a contrario*, it is not applicable in the case of divorce by agreement of the spouses, irrespective of the procedure followed (judicial, administrative or notarial). For the same reasoning, the guardianship court should also rule on the exercise of guardianship in the event of an application for dissolution of the marriage by agreement. To eliminate this situation, I propose that the *legislature* amend Article 135 para. (2) of the Civil Code by replacing the phrase 'divorce action' with 'divorce petition'.

4. The legislator was not concerned with the situation where an action for nullity or annulment of marriage is brought. In such cases too, the best interests of the minor are at stake, which is why the legislature needs to intervene. If necessary, a reference rule should be introduced to the effect that ”Article 135 para. (2) of the Civil Code shall apply accordingly where the court is seised with an application for nullity or annulment of the marriage”.

SECTION 4.4.
DELEGATION OF POWERS TO THE GUARDIAN

4.4.1. General

1. The significant exodus of Romanians abroad calls into question the protection of tens of thousands of children left behind. To counteract the negative effects on the upbringing of children caused by this social phenomenon, Articles 104-108 of Law No 272/2004 lay down specific measures for the care of children whose parents/guardian or guardian leave or have left to work

abroad. Where the child is under guardianship, Articles 104-108 of Law No 272/2004 regulate an exception from its personal nature.

2. *Per a contrario*, the measures set out in Articles 104-108 of Law No 272/2004 are not applicable in situations where the parent(s) or guardian goes abroad, even for a significant period, for purposes other than work. For the sake of reason and in the best interests of the child, these measures should also be provided for in such situations. (1) of Law No 272/2004, to replace the expression 'to go abroad to work' with 'to go abroad for a period longer than ...'.

4.4.2. Notification of going to work abroad

1. Art. 104 of Law no. 272/2004 lays down the obligation of the parent exercising sole parental authority or with whom the child resides to notify the public service of the child's domicile of the intention to go abroad to work. The notification must be made at least 40 days before leaving the country and must specify the person who will look after the child during the period of absence. A parent exercising sole parental authority or with whom the child has resided, who has gone abroad to work, is obliged to immediately notify the public social welfare service in the area of his or her residence of the person who will be responsible for the child's maintenance during his or her absence. In both cases, the notification must contain the name of the person responsible for the child's maintenance during the absence of the parent(s) or guardian from the country.

2. Art. 104 para. (4) of Law No 272/2004 lays down a rule of reference according to which "the provisions of this Article are also applicable to the guardian, as well as in cases where both parents are going to work in another State". Whether he is going to work abroad or has already left, the guardian is obliged to notify the public social welfare service in whose territorial district he is domiciled. Like the parents, the guardian must give notice of the intention to go abroad to work at least 40 days before departure and, if already abroad, immediately. The guardian's notification must contain the name of the person responsible for the child's maintenance during the period of absence.

4.4.3. Delegation of the obligation to support the child

1. According to Art. 104 para. (2) of Law No 272/2004, the parent(s) or, where applicable, the guardian are obliged to designate the person who will support the child during their absence from the country. The person designated by the guardian will support the minor under the same legal conditions. Although the costs of maintenance are not borne by the person appointed, there is nothing to prevent that person from assuming the maintenance of the child at his own expense. A strictly literal interpretation of the text leads to a result contrary to the best interests of the child, since the child is deprived of care, supervision and guidance, that is to say, of the essential elements essential

to his upbringing. From this perspective, it has been held that 'the exercise of supervision of the child and the performance of the ordinary acts concerning the child's health, upbringing and education are subject to delegation'. To remedy the inconveniences pointed out, I consider it useful that, *de lege ferenda*, Article 104 para. (2) of Law No 272/2004 should be amended by replacing the term 'maintenance' with 'upbringing and care'. The upbringing and care of the child are essential and all-embracing elements in the context of parental authority and guardianship.

4.4.4. Delegation of parental authority over the person of the child

1. At the request of the parent or ex officio, the court may decide to temporarily delegate parental authority over the person of the child to the designated person, in accordance with Article 105 para. (3) of Law No 272/2004. *Per a contrario*, parental authority cannot be delegated over the child's property. Application of Art. 105 para. (3) to the guardian is ambiguous. In the case of delegation of parental authority in respect of the minor's person there is no rule of reference, such as that provided for by Article 104 para. (4) which provides that the provisions are also applicable to the guardian. Nor can it be overlooked that, under Articles 136-139 of the Civil Code, the guardian exercises guardianship over the person and property of the minor and not parental authority. It may argue that Article 105 para. (3) and in the case of the guardian the fact that the delegation is made to "the person appointed in accordance with Art. 104 para. (2)". This interpretation is supported by Article 105 para. (9), which obliges the court to communicate a copy of the order of delegation "to the mayor of the domicile of the parents or guardian...". In order to eliminate the source of differing interpretations on this subject and to satisfy the best interests of the child, I propose that the legislature should, *de lege ferenda*, add Article 105 para. (3) with a new sentence providing for its corresponding application to the guardian.

2. Reserving the applicability of Art. 105 para. (3) in the case of the guardian, the guardian will only be able to delegate the right to allow the minor to have a residence and the duties relating to his upbringing, education and vocational training. To delegate these duties, the guardian must obtain the prior consent of the family council (if it is constituted). If the child has reached the age of 10, the guardianship court is obliged to hear the child to decide on the delegation of these duties, in accordance with Art. 139 of the Civil Code.

3. *Per a contrario*, it is not possible to delegate parental authority over the child's property. If the minor is under guardianship, the guardian is responsible for the administration of the property. It is easy to imagine the practical difficulties in representing or assisting the minor in the conclusion of legal acts relating to property where the minor lives in Romania and the guardian lives abroad. For

this reason, I recommend that the legislator should, *de lege ferenda*, remove the restrictive requirement relating to the person of the child.

4. Delegation is temporary and may be fixed for a maximum period of one year. If the parents or guardian do not return to the country, the court may extend the delegation for periods of up to one year.

4.4.5 Designated person

1. The person designated to take care of the child in the absence of the parent(s) or guardian must cumulatively meet the requirements set out in Article 105 para. (1) of Law no. 272/2004: he/she is a member of the extended family or of relatives other than those of the third degree inclusive, relatives, friends of the family or of the extended family of the child to whom the child has developed attachment relationships or with whom the child has enjoyed family life ; he/she is at least 18 years of age; he/she fulfills the material conditions and moral guarantees necessary for the upbringing and care of a child; he/she gives his/her consent to the guardianship court.

2. The extended family includes the child's relatives up to and including the third degree of kinship, with whom the child or his or her family has maintained personal relations and direct contacts. Under the current rules, a person who is a relative of the child, other than one of the extended family, a relative or friend of the child's family or extended family, may also be designated. This person is subject to the requirement that, prior to the appointment, the child must have developed an attachment to that person or have enjoyed family life with that person.

3. The requirement that the designated person must be at least 18 years of age is doubly motivated. At that age, generally, the person has full capacity to exercise his or her full rights of exercise, which is essential if he or she is to represent another person in legal acts or have them authorized. The age of over 18 implies life experience compatible with the person's responsibilities for the care of the minor.

4. The person appointed, like the guardian, must fulfill the material conditions and moral guarantees necessary for the upbringing and care of a child.

5. To be appointed, the person must give his or her personal consent before the court

4.4.6. Confirmation of designation

1. The procedure for designating the person goes through an administrative and a judicial stage.

In the first stage, the parent(s)/guardian(s) or guardian(s) must notify the public social welfare service of their place of residence of their intention to go and work abroad. The notification deadline is at least 40 days before leaving the country. Failure to do so constitutes a contravention and is

punishable by a fine of 500 to 1000 lei. The notification must contain the elements indispensable for the social assistance service to initiate and carry out the procedure for the preparation of the psychosocial inquiry report, counseling and informing the appointed person about the responsibility for the upbringing and ensuring the development of the child, as well as other data [identity of the parent(s)/parent(s)/guardian, the child and the appointed person; address of the place abroad where the parent(s)/parent(s)/guardian(s) will work and where they will live; other contact details of the parent(s)/parent(s)/guardian(s) (telephone, fax, e-mail address, etc.); period during which they are working abroad]. If the parent(s)/guardian(s) or guardian(s) are already working abroad and have not given notice of departure before leaving the country, they are obliged to give notice immediately.

2. The designation of the person by the parent(s) or guardian must be confirmed by the guardianship court to have legal effect. Confirmation of the designation is a matter for the court within whose territorial jurisdiction the domicile of the person applying for confirmation is situated. In practice, however, the solutions differ. Some courts rule that they have subject-matter and territorial jurisdiction. Others decline jurisdiction. There are also courts which have decided that they have jurisdiction to rule on applications for confirmation of designation, while others have declined jurisdiction. This inconsistent practice gives rise to an appeal in the interest of the law before the Court of Cassation concerning the court with jurisdiction to confirm the person in whose custody the child will remain or who will exercise parental authority during the absence of the parent(s) or guardian from the country. The court shall confirm the delegation for a period not exceeding one year. The one-year period is a maximum and may not be exceeded. Delegation is not generally confirmed *sine die*. On the contrary, the confirming judgment shall expressly state the rights and duties to be delegated and the period for which the delegation has been granted. Since the procedure is non-contentious, the court gives its decision by an enforceable judgment, subject only to appeal.

3. To prevent situations of conflict, maladjustment or neglect in the relationship with the minor, after confirmation of the delegation, the delegated person must follow a mandatory counseling program. The upbringing and care of a child whose parents are working abroad shall be monitored.

4. If the guardian leaves the country without designating a person to care for the minor in his or her absence, the guardianship court shall remove him or her from the guardianship on the grounds that he or she is not fulfilling his or her duties. This child may benefit from a special protection measure, or another guardian may be appointed.

SECTION 4.5.

4.5.1. Preliminaries

1. Articles 136-139 of the Civil Code lay down special rules regarding the opinion of the family council, the domicile of the minor, the type of education or vocational training and the hearing of a minor who has reached the age of 10. In contrast to the previous regulation, the opinion of the family council and the obligation to listen to a minor who has reached the age of 10 have been introduced. The residence of the minor with the guardian in the previous regulation has been replaced by his residence with the guardian.

2. The exercise of guardianship in respect of the person of a minor obliges the guardian to comply with other legal provisions concerning the protection and promotion of the minor's rights.

3. During the period of application of the Family Code, the so-called right of correction has been analyzed in specialized literature in relation to the guardian's duties with regard to the minor's person. Under the current international and some domestic regulations, there is no question of a right of correction of the parents or guardian over the child. On the contrary, the CRC and Law No 272/2004 prohibit all forms of violence against children.

4.5.2. Opinion of the family council

1. Article 136 of the Civil Code requires the guardian to request and obtain the opinion of the family council to take measures concerning the minor. Exceptions are made in cases where the measures are of a routine nature. If the family council has not been set up, the opinion is sought from the guardianship court.

2. The opinion of the family council is not required in the case of routine measures, whether they materialized in legal acts or facts. Usual, customary or everyday measures are routine.

3. To determine the nature of the opinion of the family council provided for by Article 136 of the Civil Code, the analysis must be nuanced. The opinions of the family council requested on the initiative of the guardian, or the guardianship court are purely advisory. Only in their case does the guardian have a right of option. If the obligation to request an opinion is laid down by law, the nature of the opinion must be analyzed *in concreto*, on a case-by-case basis, depending on the way in which the legislator has expressed it. Since measures concerning the minor's person can only be taken with the opinion of the family council, the mandatory nature cannot be contested. If the opinion is negative and the guardian has nevertheless taken the measure, he or she is liable to be removed from the guardianship on the grounds of abuse.

4.5.3. Domicile of the minor

1. The rule is that "the minor placed under guardianship is domiciled with the guardian". By way of exception, he or she may also have a residence, but 'only with the authorization of the guardianship court'. At common law, the minor beneficiary of guardianship is also domiciled with the guardian.

2. The domicile may not coincide with the natural person's residence. Although the domicile is where the person declares that he or she has his or her main residence, he or she may in fact live elsewhere. The law does not make domicile conditional on the natural person actually living in the dwelling which he declares to the authorities to be his main residence. Nor can it be overlooked that the natural person is also entitled to a residence.

3. Care, upbringing and supervision of the minor by the guardian are inconceivable if they do not live together. At present, in the framework of parental authority, the child resides with the parents. If the minor is looked after within the framework of parental authority, both the domicile and the residence are with the parents. For the same reasoning, this solution must also be adopted where the minor is under guardianship. For these reasons, I propose that the *legislature* amend Article 137 para. (1) of the Civil Code as follows: "The minor beneficiary of guardianship shall live with the guardian. With the authorization of the guardianship court, the minor may have another residence". As a result of this amendment, the minor's domicile remains with the guardian, but only by virtue of ordinary law.

4. In exercising the duties of care, upbringing and supervision of the minor, the guardian shall be entitled to take measures to prevent the minor from leaving the home without reason or without control. If the minor disappears from his or her home, the guardian is obliged to notify the police within 24 hours of the child's disappearance.

5. The guardian is entitled and, at the same time, obliged to seek the return of the minor from any person who wrongfully detains the minor. Doctrine and case-law have ruled to this effect. Within the framework of parental authority, the right of the parents to demand the return of the child from any person who wrongfully detains the child is intended to be an express legal provision. The current Civil Code does not contain a rule referring to the proper application of art. 495 of the Civil Code in matters of guardianship, which is why the possibility for the guardian to request the return of the child from any person who is wrongfully holding him/her can be based on his/her duties in relation to the minor's person. The fact that the minor is legally domiciled with the guardian is an important argument in support of this right. I would point out that, where guardianship is exercised by the

spouses together, the provisions on parental authority are duly applicable, pursuant to Article 135 para. (1), thesis II of the Civil Code. Consequently, Article 495 of the Civil Code is also applicable. It seems unreasonable that the right to request the return of the child should not also be recognized to the person who is the sole guardian. To remedy this situation, I propose that the legislature add a new paragraph to Article 137 of the Civil Code, *de lege ferenda*, stipulating that 'the provisions of Article 495 remain applicable'.

7. At the same time, without a decision of the guardianship court, the guardian may not prevent the minor's personal relations with relatives (grandparents, brothers and sisters) or other persons with whom the minor has enjoyed family life.

8. The legislator was not concerned with the domicile of the guardian, which is why the place where the guardian is located has no legal relevance.

4.5.4. Residence of the minor

1. Art. 137 para. (1) thesis II of the Civil Code provides that "only with the authorization of the guardianship court may a minor also have a residence". This exception is based on the legislator's concern that, as a rule, the minor should live with the guardian. From this point of view, it cannot be overlooked that, after all, the domicile is the natural person's main residence. It is essential for the minor to live with his guardian to perform the duties arising from the exercise of guardianship in respect of his person.

2. By way of exception, with the agreement of the guardian, the minor may also have a residence. To be granted consent, the minor shall be required to substantiate the application on the basis of needs relating to his or her education or vocational training.

3. Art. 137 para. (2) of the Civil Code contains an exhaustive list of the grounds on which a minor beneficiary of guardianship is entitled to apply for a residence. Other situations may arise in practice, which is why it is appropriate *for* Article 137 para. (2) of the Civil Code should be amended by replacing the expression 'his education and professional training' with 'well-founded reasons'.

4.5.5. Education and vocational training of the minor

1. Article 138 of the Civil Code lays down special rules regarding changes in the type of education and vocational training of a minor beneficiary of guardianship. In the case of a minor under the age of 14, the guardian may change the type of education or vocational training he or she was receiving at the time the guardianship was established only with the consent of the guardianship court. This rule is compatible with the requirement to ensure a certain continuity in the child's upbringing if he or she is benefiting from an alternative form of protection.

2. According to Art. 138 para. (2) of the Civil Code, a change in the type of education established by the parents or which the minor was receiving at the time of the establishment of guardianship may be decided only by the guardianship court and with the consent of the minor, if the minor has reached the age of 14.

3. The court within whose territorial jurisdiction the current domicile of the minor beneficiary of the guardianship is situated shall have jurisdiction to grant the application. Since the procedure is non-contentious, the court of guardianship shall grant the application by an enforceable judgment subject to appeal.

5. The legislator was not concerned with establishing the source of the necessary expenses for the education and vocational training of minors. At present, state education is free of charge or tuition fee, and private education is tuition fee, regardless of levels, cycles and curricula. The legislator has neglected this reality. There may be children who are beneficiaries of guardianship and who have a good material situation and who attend private or state educational institutions, where tuition is charged. In their case, it is unfair for the pupil to receive a social scholarship or for the guardian to be obliged to bear the tuition fees. For these reasons, I consider it appropriate that a new paragraph should be added *de lege ferenda* to Article 138 of the Civil Code, stipulating that 'the expenses for the education and vocational training of a minor shall be covered, if necessary, from his or her income or assets'.

4.5.6. Listening to a minor over the age of 10

1. Article 139 of the Civil Code provides that "the guardianship court may not decide without hearing the minor if he or she has reached the age of 10 years, the provisions of Article 264 being applicable". This article applies if the guardianship court allows the minor to have a residence and the guardian to change the type of education or vocational training that the minor under the age of 14 was receiving at the time of the establishment of guardianship. I would point out that the obligation to listen to the child in any judicial or administrative proceedings concerning him or her is laid down in Article 29 of Law No 272/2004 and Article 264 of the Civil Code. From this point of view, Article 139 of the Civil Code is superfluous, which is why I propose that it be repealed *de lege ferenda.*

4.5.7. Exercising guardianship over the minor and parental alienation

1. Law no. 123/2024 made important amendments and additions to Law no. 272/2004. Among the additions, the most important is the one concerning parental alienation. The purpose of this legal

institution is to combat psychological violence against the child by a parent or persons from the extended or substitute family in order to alienate the child from the other parent.

2. In numerous cases concerning the resolution of disputes regarding the exercise of parental authority or the right of the child to have personal relations with the parents, the Romanian courts have found elements of parental alienation, usually materialized in the actions of one parent to denigrate the other and in the manipulation of the child to destroy the natural relationship between parent and child by psychological means. The phenomenon of parental alienation has also been considered in the case law of the Court of Cassation and Justice of the Constitutional Court and is also reflected in the case law of the Constitutional Court of Romania. The ECHR's practice is rich in this perspective, with the European Court also ruling in cases concerning Romania.

3. The perpetrators of the alienation may be the child's parents or persons who are members of the extended or substitute family, as referred to in Article 4 letter c) and d). Art. 4 (d) provides for two categories of persons included in the substitute family: persons with whom the child or the child's family has maintained personal relations and direct contact; persons who are responsible for the upbringing and care of the child. The second category includes "the person, the family or the foster-parent or the foster-assistant who is responsible for the upbringing and care of the child, in accordance with the law". The person or family who is responsible for the upbringing and care of the child may fulfill these duties as guardian or guardians of the child, respectively, according to Art. 112 para. (1) of the Civil Code. It is possible that the guardian or the guardian spouses may become the parent's assignees in those situations where guardianship is instituted for reasons that are temporary, the disappearance of which causes the termination of guardianship and the resumption of parental authority, under which the child is protected by the parents. Guardians or spousal guardians may psychologically abuse the child so that, when the cause that led to the institution of guardianship has ceased to exist, the resumption of parental authority is blocked because the child shows restraint or hostility towards the parent(s).

4. According to Article 4 letter (h) of Law No 272/2004, the alienator acts "intentionally, pursued or assumed and appropriately" to induce the child to show restraint or hostility towards the alienated parent. In other words, the alienator speculates on the situation created to induce the child's negative behavior towards the parent. Although open to interpretation, the expression 'intentionally, intended or assumed and appropriate' supports the conclusion that the alienator acts intentionally in order to induce the child to show restraint or hostility towards the parent. The intentional acts of alienation and the pursuit of the purpose of alienation show that the alienator is acting in bad faith.

It has been judiciously held in the literature that 'alienation by fault (unintentional) cannot reasonably be accepted as a legal institution, because, if it were accepted, parental alienation could in theory apply in absolutely all situations in which the relationship between one of the parents and the child would be sub-optimal, without taking into account any other criterion'.

8. In the case of parental estrangement, "the child shows unjustified or disproportionate apprehension or hostility towards either parent". If the abductor is one of the parents, the child's apprehension or hostility is towards the other parent. If the alienator is a relative, relative-in-law, guardian or foster carer, one or even both parents may be alienated.

SECTION 4.6.
EXERCISING GUARDIANSHIP OVER THE MINOR'S PROPERTY

4.6.1. Preliminaries

1. The section begins with a presentation of the issue of the guardian's administration of the minor's property.

2. Recent scholarly works usually disregard Articles 792-857 of the Civil Code concerning the administration of another person's property, which are also applicable as common law in the case of the guardian's administration of the minor's property. Even if it is not necessary to analyze them *in extenso* in the context of the guardianship of a minor, their role as common law for this matter cannot be neglected, and this fact must be duly reflected in any approach, whether doctrinal or case law.

3. The guardian shall perform the guardianship duties under the supervision of the family council and the permanent control of the guardianship court. In the period between the date of entry into force of the Civil Code (October 1, 2011) and until December 28, 2020, when Dec. CCR no. 795/2020 was published in the Official Gazette, the powers of the guardianship court concerning the exercise of guardianship over the minor's property and those concerning the supervision of the guardian's management of the minor's property were delegated to the guardianship authority. As presented above, the CCR found that the provisions of art. 299 para. (3) of Law no. 71/2011 are unconstitutional. As of 28 December 2020, these duties "shall be carried out by the courts, sections or, as the case may be, specialized juvenile and family panels", specifically by the court.

4.6.2. Administration of the minor's property

4.6.2.1. General

1. An important duty of the guardian is the administration of the minor's property. The acts of administration or management are considered to be "useful legal acts aimed at the normal development of property in accordance with its nature or its usual purpose". In specialized literature, a distinction is made between the administration of a singular asset (*ut singuli*) and the administration of a patrimony (*ut universi)*. The administration of an asset means putting it to good use without alienating or consuming its substance. The administration of an estate may also include the alienation of property. Both in the case of guardianship and at common law, the guardian or administrator has the possibility of disposing of assets at risk of depreciation or destruction.

2. The guardian's obligation to administer the minor's property is traditional, being found in Roman law and in modern Roman-inspired regulations, including those in Romania.

3. At present, Article 142 para. (1) of the Civil Code, establishing the guardian's duty to administer the minor's property, is an absolute novelty. It refers to the proper application of the rules on the administration of another person's property. It removes the ambiguity in the previous rules as to the content of the administration, its limits and the guardian's obligations arising from the performance of this important duty. The guardian's duty to administer the minor's property is also regulated in comparative law, from which the Romanian legislator drew inspiration.

4.6.2.2.Duty of the guardian to administer the minor's property

1. The guardian has the duty to administer the minor's property, according to Art. 142 para. (1) of the Civil Code. In principle, any holder of property rights also has the right to administer his property. He may administer it himself or appoint another person to do so. The person so empowered is the administrator of another person's property. The guardian's duty to administer the minor's property arises from the law and is carried out in accordance with the conditions laid down by law. Once the guardianship task has been accepted and the guardianship order has been served, the guardian is obliged to administer the minor's property under the conditions laid down by law. In matters of guardianship, by way of exception from the ordinary law, the administration of the minor's property is not left to the guardian's discretion. The exception is subject to the principle of promoting the best interests of the minor and is based on the minor's lack of life experience, which is reflected in the legal system by his lack of full capacity to exercise his rights.

2. It is the guardian's duty to administer the minor's property, not the minor's assets. There are important differences between the concept of *property* and *patrimony*. Whereas property is the tangible or intangible object of a property right, patrimony is the entirety of the rights and debts of a person, which can be valued in money. The administration of the minor's property does not also

confer on the guardian the possibility of concluding legal acts concerning the property in its entirety or its division.

3. In the context of guardianship of a minor, the Civil Code does not contain rules on important aspects of the administration of property, such as, for example, the guardian's duties as administrator, the obligation to maintain the destination of the property and the prohibition on using the administered property for one's own benefit. These aspects are regulated in ordinary law, by Articles 792-857 of the Civil Code, which are intended for the administration of another person's property.

4. The guardian, although assuming the guardianship voluntarily, has the duty to administer the minor's property under the conditions laid down by law. At common law, the arrangements for assuming the administration of another person's property are different. The administrator can be empowered only by a legacy or agreement.

4.6.2.3. The minor's property exempt from administration by the guardian

1. Property acquired by will or gift is exempt from administration by the guardian. In order for such property to be administered by the guardian, there must be an express provision in the will or deed of gift. Failing this, the property shall be administered by a curator, or a person appointed by the deed of disposition or by the guardianship court, as the case may be. This exception shall give priority to the will of the disposer in appointing the person who is to administer the property with which the minor has been awarded. This exception shall not apply to property acquired by lawful inheritance. They shall be administered by the guardian.

2 If the person making the disposition has appointed a curator, the curator shall administer the property under the conditions laid down by law for guardians. If a person has been appointed but is not a guardian, subject to public order and morality, the administration shall be carried out in accordance with the conditions laid down in the instrument of appointment. Lastly, the guardianship court may appoint a curator, in which case the provisions laid down by law for the guardian apply, or a person, in which case it will lay down special rules for the administration of property. Provided that the guardian has not been expressly excluded by the authorizing officer, the guardianship court may appoint the guardian.

3. If, at the time the inventory is drawn up, the minor has property which is not subject to administration by the guardian, that property shall not be entered in the inventory, but there shall be nothing to prevent its being entered in the inventory record. If they are to be administered by the guardian, they shall be entered into the inventory under the same conditions as any other property of the minor.

4.6.2.4. Duties of the guardian as administrator of the minor's property

1. The guardian is entrusted with the simple administration of the minor's property, which is why he is obliged to perform two categories of legal acts: necessary for the preservation of the property; useful for the use of the property according to its usual purpose.

2. Inspired by Art. 1.302 para. (1) Civil Code q., Art. 796 para. (1) of the Civil Code provides that "the person entrusted with simple administration is bound to collect the fruits of the property and to exercise the rights attached to the administration thereof". The duty to reap the fruits exists irrespective of the category to which they belong (natural, industrial or civil) and of the nature of the assets producing them (movable or immovable). The fruits of property acquired by gift or will are excepted if they are administered by a curator or a person other than the guardian.

3. Art. 796 para. (2) of the Civil Code requires the administrator to collect the claims and to exercise the rights attached to the securities it manages, such as the right to vote, conversion and redemption. Following the collection of claims, the administrator is entitled to issue the corresponding receipts.

4.6.2.5. The guardian's duty to manage the minor's property in good faith and as a good owner

1. Over time, the legislator has shown a particular concern to establish the diligence with which the guardian administers the minor's property.

2. The guardian has the duty to administer the minor's property in good faith. Good faith obliges the guardian to act with sincere, loyal and honest intention and in the best interests of the minor. In the absence of proof to the contrary, it is presumed that the guardian performs his or her duties as administrator of the minor's property in good faith. Since the presumption is relative, it may be rebutted in legal proceedings by evidence to the contrary. As regards the administration of another person's property, Article 803 para. (2) of the Civil Code obliges the administrator to act honestly and loyally in the fulfillment of the assumed duty. The administrator's honesty and loyalty are intrinsic requirements of good faith.

3. In the context of the legal regime of the administration of the property of another, the administrator is obliged to act with the diligence that a good owner would exercise in the administration of his property. There is no rule in the rules governing guardianship of minors which provides otherwise, which is why the principle is also applicable to the guardian in his capacity as administrator of the minor's property.

4. The requirement to act as a good owner in property relations is a real principle, applications of which are to be found in certain matters governed by the Civil Code. Guardians must act with the

prudence and diligence shown in managing their own property. In administering the minor's property, the guardian must act "as he would if he were administering his own property, with honesty and loyalty and avoid conflicts of interest between his obligations and his own interests". The guardian's due diligence obliges the guardian to manage the minor's property with due regard for public order and good morals. Finally, the acts and actions of the guardian as administrator must be circumscribed to the requirements of promoting the best interests of the minor.

4.6.3. Inventory of the minor's property

4.6.3.1. General

1. The duty of the guardian to draw up an inventory of the property of the minor beneficiary of the guardianship has been found since Roman law, including in earlier Romanian regulations.

2. The current Civil Code devotes Article 140 (drawing up the inventory) and Article 141 (acts concluded in the absence of an inventory) to the inventory of a minor's property. Article 540 of the Code of Civil Procedure lays down procedural rules concerning the appointment of a delegate, the summoning of persons to attend the inventory and the data to be entered in the inventory. Articles 818 et seq. C. Civ. on inventory in the context of the legal regime of the administration of another person's property. The new rules contain important new elements which make them superior to the previous ones.

4.6.3.2. Drawing up the inventory

1. To facilitate supervision by the family council and control by the guardianship court of the manner in which the guardian exercises his or her duties, as well as to avoid confusion between the minor's assets and those of the guardian, the drawing up of an inventory of the minor's assets is mandatory in principle, there is no legal possibility for exceptions or exemptions.

2. The inventory shall be drawn up by a representative of the guardianship court, in the presence of the guardian, the members of the family council and the minor aged at least 14 years. The inventory shall be approved by the guardianship court.

3. The inventory shall be drawn up after the appointment of the guardian. In the best interests of the minor, this date should be as close as possible to the date of appointment of the guardian. In concrete terms, the drawing up of the inventory must begin no later than ten days after the date of appointment of the guardian by the guardianship court. The legislator has not set a time limit within which the inventory must be completed. The fact that, in practice, there may be situations where the minor's assets may be complex in nature, and the minor's assets may be located or may be situated in the territorial jurisdiction of different guardianship courts other than the one in which the minor is

domiciled or resident, has probably been taken into account. The appointment of the representative of the guardianship court must be made immediately, i.e. immediately after the appointment of the guardian. The guardianship court must also decide immediately to summon the guardian, the members of the family council and the minor who has reached the age of 14. The inventory is subject to approval by the guardianship court.

4. The inventory concerns all the minor's property, whether movable or immovable, and therefore contains a complete list of the property. The representative of the guardianship court must inspect the property in the presence of the persons summoned, on the spot, i.e. where it is located or situated. The contents of the inventory shall include the identification details of the movable and immovable property (address, quantity, surface area, neighborhood, cadastral number, land register number, etc.), a brief description of the property, a description of its condition and approximate value, and an indication of any existing documents relating to it. In the absence of indications as to the condition of the goods, it shall be presumed that they were in good condition at the date of the inventory. The inventory must include the identification of sums of money and a list of financial instruments. Lastly, the inventory shall mention any claims, debts or other claims declared by the guardian or the members of the family council against the minor.

5. To avoid possible conflicts of interest and suspicions as to the way in which the guardian will exercise his or her powers regarding the administration of the minor's property, the delegate of the guardianship court shall expressly require him or her to declare in writing any claims or other claims or debts he or she has against the minor. This declaration is also required from the members of the family council. The declarations are recorded in the inventory record. By their legal nature, these declarations are made on the child's own responsibility. If the guardian or the members of the family council knew that they had claims or claims against the minor, but did not declare them, they are presumed to have waived them. The presumption is relative, which is why the guardian, and the members of the family council can prove otherwise. If the guardian and the members of the family council do not declare the debts they owe to the minor, they may be removed from office. In this case, the legislator presumes that the guardian and the members of the family council are aware of the existence of the debts. In the best interests of the minor, debts owed to the minor by the guardian or any of the members of the family council, the spouse, relatives in the direct line, brothers or sisters, may be paid voluntarily only with the authorization of the guardianship court.

6. The inventory shall be signed and dated by the delegate of the guardianship court. The inventory shall also be signed by the guardian, the members of the family council and the minor

participating in the activity. The representative of the guardianship court shall draw up a record of the inventory, which shall contain a record of the activity, the statements of the guardian and the members of the family council concerning claims, other claims and debts they have against the minor, any observations they or the minor may have on the inventory and the content of the inventory.

4.6.3.3. Legal acts concluded by the guardian before the approval of the inventory

Article 141 of the Civil Code provides for two categories of legal acts that the guardian may conclude in the name and on behalf of the minor before the inventory is drawn up: conservatorship and administration, which are not subject to postponement. Article 141 of the Civil Code concerns the situation in which the minor lacks the capacity to exercise his or her rights, since it is only in this case that the guardian has the possibility to conclude legal acts in the name and on behalf of the minor. If the minor has restricted capacity, the guardian can only consent to legal acts.

4.6.4. Legal acts of the guardian and of the minor respectively

4.6.4.1. General

1. The administration of a minor's property involves carrying out material operations and concluding legal acts. In this context, the legal acts concluded by the guardian or the minor in relation to his or her property are of interest. Depending on the minor's degree of capacity, the guardian acts either as the minor's legal representative or as a guardian called upon to approve the legal acts concluded personally.

2. In the best interests of the minor, the law lays down a special regime for legal acts of disposition by the guardian and, in principle, prohibits the conclusion of legal acts, whatever their nature, between the guardian, his spouse or relatives on the one hand and the minor on the other hand. By way of exception, certain categories of legal acts and the special conditions under which a minor without capacity or with restricted capacity may conclude them alone, without the guardian's consent or the opinion of the family council and the authorization of the guardianship court.

4.6.4.2. Representation of a minor without legal capacity in legal acts by a guardian

A. Normative milestones

1. The idea of representation of the minor beneficiary of the guardianship in legal acts has been around since Roman law.

2. Under the previous Civil Code, the guardian was the administrator of the minor's property, which is why he could only perform acts of administration permitted to any administrator.

3. Art. 124 para. (1) of the Family Code has combined the guardian's obligation to administer the minor's property with the duty to represent him in civil legal acts, but only until the age of 14. In other words, the minor under the age of 14 who was the beneficiary of the guardianship was represented in legal acts by the guardian. The solution was based on the lack of capacity of the minor.

B. Representation of minors under the current Romanian Civil Code

4. As in the previous rules, the guardian's representation of a minor under the age of 14 is provided for in the context of the administration of the minor's property. Representation of a minor by a guardian in other legal acts is implicitly laid down in the ordinary law by Article 43 para. (2) thesis I of the Civil Code. This refers to legal acts without any distinction as to their nature, which is why they may be non-patrimonial or patrimonial and, in the case of the latter, of administration, conservation or disposition. The legal representatives of a minor without full capacity are the parents, in the case of parental authority, and the guardian, in the case of guardianship. In matters of guardianship of minors, representation in legal acts means that the guardian concludes acts in the name and on behalf of the minor, and assistance means the assent to acts concluded by the minor. Except for the legal acts referred to in Article 43 para. (3) of the Civil Code, the guardian represents the minor in all other acts. In practice, the guardian, like the parents, is empowered with general representation of a minor under the age of 14.

C. Exceptions to representation

1. Article 43 para. (2) thesis I of the Civil Code provides for certain exceptions, in which the person lacking civil capacity, including minors under 14 years of age, is entitled to conclude certain legal acts alone: those specifically provided for by law; those of conservation and disposition of small value; legal acts of a current nature and which are executed at the time of their conclusion. Provided that the law does not prohibit it, the guardian may also conclude these categories of legal acts, in accordance with Article 43 para. (4) of the Civil Code. The possibility given to a minor lacking capacity to conclude these legal acts alone supports the conclusion that there is a minimum content of capacity. Thesis II of Article 43 para. (3) refers to the corresponding application of Article 168 para. (4) of the Civil Code. If the minor is under special guardianship, the court judgment establishing the measure must be complied with in relation to the categories of legal acts for which the representation of the minor or the consent of the legal guardian is required. In this case, the factual capacity of the minor to conclude legal acts is analyzed *in concreto*, on a case-by-case basis, according to the degree of autonomy and the specific needs of the minor.

2. They may be circumscribed by legal acts specifically provided for by law, for example, those relating to the exercise of rights or the fulfillment of obligations arising from legal acts concerning the minor's work, artistic or sporting activities.

3. The possibility offered to a minor who lacks capacity to exercise his or her rights to conclude acts of guardianship is based on the idea that they are not likely to harm him or her. On the contrary, such acts have the effect of maintaining, strengthening or preventing the loss of a subjective right. Unlike acts of disposition, the law does not impose any restrictions in the case of acts of preservation.

4. As regards dispositive acts, *per a contrario*, a minor who lacks the capacity of exercise cannot conclude legal acts of medium or high value, nor legal acts of low value if they are not current or are subject to terms or conditions or are with successive execution.

4.6.4.3. The legal regime of acts of disposition performed by the guardian on behalf of the minor

A. General

In legal doctrine, disposition is "the legal act of disposing of an asset or right or encumbering it with encumbrances (rights) in rem, such as rights in rem of use (usufruct, use, inhabitation, easement, etc.) or of guarantee (mortgage, pledge).

The legislator has shown and continues to show a particular concern for the acts of disposition that the guardian may conclude in the administration of the minor's property. Special and strict rules are laid down regarding the disposition of the property of a minor who lacks capacity to exercise his or her rights, which the guardian may conclude in the name and on behalf of the minor. Depending on the freedom granted to the guardian, Article 144 of the Civil Code lays down special rules for three categories of legal acts of disposition: legal acts prohibited to the guardian; legal acts which the guardian may conclude with the consent of the family council and the authorization of the guardianship court; legal acts which he may conclude without the consent of the family council and without the authorization of the guardianship court.

B. Legal acts of disposition prohibited to the guardian

1. As administrator of the minor's property and as representative of a person without legal capacity, the guardian shall be prohibited from making gifts on behalf of the minor or from guaranteeing the obligations of third persons. Ordinary gifts are exempt, provided that they are appropriate to the minor's material circumstances. This exception is new and not found in the previous rules. The basis for the prohibition of these legal acts is the harmful consequences they cause or may cause to the minor. As these acts are prohibited by law, they cannot be concluded by

the guardian even if the family council's opinion and the guardianship court's authorization are available.

2. At common law, the administrator is prohibited from disposing of the assets or rights administered free of charge. Exceptions shall be made where the interests of sound administration so require. This exception shall not apply to the administration of the minor's property by a guardian.

3. Under Article 144 para. (1) thesis II of the Civil Code, ordinary gifts made on account of the minor's property are exempt. The legislature refrained from determining its meaning. Different opinions have been expressed in legal literature. Art. 144 para. (1), 2nd thesis of the Civil Code sets an objective limit to the scope of gifts. In concrete terms, they must be appropriate to the material circumstances of the minor. The purpose of this criterion is to avoid situations in which, because of such gifts, the material situation of the minor is significantly affected. To determine whether a gift is customary, the analysis must be carried out on a case-by-case basis, depending on the extent of the gift and the material situation of the minor.

C. The legal acts that the guardian can conclude only with the opinion of the family council and the authorization of the guardianship court

1. Art. 144 para. (2) of the Civil Code forbids the guardian to conclude certain legal acts on the minor's property without the consent of the family council and the authorization of the guardianship court: alienation, division, mortgaging, encumbrance with other real encumbrances, waiver of the minor's patrimonial rights and any acts exceeding the right of administration. Compared with the previous Civil Code, the categories of legal acts requiring the opinion of the family council, and the authorization of the guardianship court have been extended: division, mortgages and encumbrances on the minor's property. The legal nature of the acts listed is circumscribed by legal acts of disposition. Since they are exceptions to the guardian's duty to administer the minor's property, it is natural that such legal acts should be subject to certain restrictive requirements, in particular the opinion of the family council and the authorization of the guardianship court. The enumeration is illustrative, since, in general, the guardian is prohibited from entering into any legal acts going beyond his duty to administer the minor's property.

2. If a family council is established, its opinion is mandatory. In other words, the guardian has both an obligation to seek the opinion of the family council and a duty to respect it.

3. Art. 145 of the Civil Code sets out the conditions under which the guardianship court grants the authorization: the act meets a need or is of unquestionable benefit to the minor; the authorization is given for each legal act; in case of sale, the guardian must comply with the manner of carrying out

the transaction as determined by the guardianship court; the money obtained is used as directed by the guardianship court. These requirements must be cumulative. The court of guardianship will, where appropriate, lay down the conditions for the conclusion of the act (price, quantity, quality, duration, etc.) In the case of a sale, the court must indicate whether it is carried out by agreement of the parties, by public auction or otherwise. Irrespective of the nature of the act, the guardianship court can determine how the guardian will use the money obtained.

4. Authorization to conclude the act is within the competence of the guardianship court in whose territorial circumscription the domicile or residence of the minor is located, according to art. 114 para. (1) C. pr. civ. If the authorization concerns immovable property, the court in whose territorial circumscription the immovable property is situated shall also have jurisdiction, pursuant to para. (2). The procedure is non-contentious, the court deciding by an enforceable judgment subject to appeal.

D. Annullability of legal acts concluded by the guardian in the name and on behalf of the minor

1. Failure to comply with Art. 144 para. (1) and (2) of the Civil Code entails the nullity of the acts thus concluded. Accordingly, the following categories of legal acts concluded by a guardian in the name and on behalf of and for the account of the minor's property shall be voidable: gifts which have as their object the minor's property, with the exception of ordinary gifts; deeds by which the obligations of third persons with the minor's property are guaranteed; deeds of alienation, division, mortgage or encumbrance with other real encumbrances made on the minor's property without the consent of the family council and the authorization of the guardianship court; deeds of waiver of the minor's patrimonial rights; any deeds exceeding the right of administration concluded without the consent of the family council and the authorization of the guardianship court. If the act concluded by the guardian without the authorization of the guardianship court is an act of alienation and has caused harm to the minor, the application for its annulment may be accompanied by an application for full compensation for the harm. Depending on the seriousness of the consequences, the guardianship court may even order the removal of the guardian from the guardianship, in accordance with Article 158 of the Civil Code.

2. From a strictly legal point of view, the nullity of these legal acts is determined by the failure to comply with certain requirements laid down by law for their valid conclusion. Irrespective of the nature of the legal acts, their voidability is intended to protect the best interests of the minor.

3. The nullity provided by art. 144 para. (3) of the Civil Code is relative. Under Article 144 para. (3) of the Civil Code, the guardian, the family council, any member of the family council and

the public prosecutor have the right to bring proceedings. The legitimation of these persons is in the best interests of the minor.

4. Guardians conclude voidable legal acts in the name and on behalf of the minor. In other words, the minor is a party to the legal acts in question and has a direct interest in their annulment, which is why he or she should have standing to bring proceedings.

5. The action for annulment is time-barred within the general term of 3 years.

6. The court within whose territorial jurisdiction the minor's current domicile or residence is situated shall have jurisdiction to hear the application for annulment. The court shall give its decision by a judgment subject to ordinary appeal.

E. Confirmation of voidable legal acts concluded by the guardian

Art. 48, thesis II of the Civil Code gives a minor who has reached the age of majority the possibility to confirm the legal acts concluded by the guardian in his name and on his behalf, but without complying with the formalities provided by law. For the confirmation to be valid, four cumulative requirements must be met: the minor has reached the age of majority; the legal acts that can be annulled belong to the category of those which the guardian may conclude as the minor's representative; the guardian has been discharged; the confirmatory act complies with the conditions laid down by law. The recognition of this right of the minor who has reached majority is based on the fact that the acts of the guardian have been concluded as the representative of the minor beneficiary of the guardianship or, in other words, they have been concluded in the name and on behalf of the minor. Under these conditions, the right to confirm the voidable legal acts concluded by the guardian is also recognized to the person who previously benefited from legal counseling or special guardianship and subsequently the measures were terminated. In the interests of consistency of reasoning and unity of the rules, this right should also be recognized for minors aged 16 who have acquired full capacity as a result of marriage or earlier. Like a minor who has reached majority, this minor has full capacity. In his case, guardianship ceases since the cause which gave rise to it has ceased to exist.

F. The legal acts of disposition that the guardian can conclude without the opinion of the family council and the authorization of the guardianship court

1. By way of exception from para. (2), para. (4) of Article 144 of the Civil Code gives the guardian the possibility to alienate certain property of the minor without the consent of the family council and without the authorization of the guardianship court: property subject to destruction, degradation or depreciation; property no longer useful to the minor.

2. Unlike the previous regulation, the exception is not limited to a certain maximum value of the goods (250 lei). In other words, subject to the condition that they are subject to decay, degradation or depreciation or that they have become useless to the minor, these goods may be disposed of by the guardian without the opinion of the family council and the authorization of the guardianship court, regardless of their value. For the exception to operate, the existence of a danger of one of the consequences listed in the text is sufficient.

3. As regards the guardian, the risk of such consequences must be fortuitous. Otherwise, the occurrence of the risk is imputable to him, and the diligence with which he has discharged his duty to administer the minor's property is called in question.

4.6.4.4. The guardian's approval and authorization of legal acts of a minor with restricted capacity

A. General

1. Article 146 of the Civil Code sets out the conditions under which a minor with restricted capacity, beneficiary of guardianship, may conclude legal acts and prohibits him from making gifts, wills or guaranteeing the obligations of other persons with his property. In the same context, the nullity of legal acts concluded without complying with Article 146 paras. (1) - (3) of the Civil Code. Article 146 of the Civil Code is an application of Article 41 of the Civil Code, which, under ordinary law, lays down the conditions under which minors with restricted capacity may conclude legal acts on their own. Clearly, the provisions of Art. 146 are special in comparison with those of Art. 41, which have a common law role in the matter. Both sets of rules are intended to counteract the lack of experience of minors in the conclusion of legal acts and are established in the best interests of the minor.

2. Article 146 of the Civil Code refers exclusively to "a minor who has reached the age of 14 years". Not all minors over the age of 14 have restricted capacity. Persons benefiting from a special guardianship measure, irrespective of age, lack capacity to exercise their rights, whereas minors aged 16 who are married or emancipated have full capacity to exercise their rights. To avoid confusion from this point of view, it is preferable to use the expression "minor with restricted capacity".

B. The acknowledgment of legal acts by the guardian or curator

1. In principle, minors with restricted capacity conclude legal acts on their own, but with the consent of the guardian or, where appropriate, the curator. The law refers to legal acts without distinction as to their nature, which is why they may be of administration, conservation or disposition. Only gifts, wills and the guaranteeing of the obligations of other persons are prohibited.

2. Whatever the circumstances of the request, the consent must be in writing.

3. Unlike the previous rules, there is no requirement that consent must be given prior to the date of conclusion of the legal act. This lacuna in guardianship is covered by ordinary law, under which the consent to the conclusion of the legal act by a person with restricted capacity 'may be given at the latest at the time of conclusion of the act'. It is compulsory for a minor to obtain consent. In the absence of consent, the act is not legally concluded and is therefore voidable.

4. At present, certain situations in which the declaration must be given by a curator are not nominated. As a result, the acknowledgment is given by the curator whenever during the guardianship the guardianship court appoints a special curator.

C. The legal acts that a minor with restricted capacity can conclude with the opinion of the family council and the authorization of the guardianship court.

1. By way of exception, a minor with restricted capacity may conclude certain legal acts with the consent of the family council and the authorization of the guardianship court. Article 146 para. (2) of the Civil Code lays down this condition in the case of legal acts that the guardian can only make with the consent of the family council and the authorization of the guardianship court. It implicitly refers to Art. 144 para. (2) of the Civil Code. Thus, the minor needs the opinion of the family council and the authorization of the guardianship court in order to conclude, in respect of his or her property, legal acts of alienation, division, mortgaging or encumbering with other real encumbrances, waiver of patrimonial rights and any acts going beyond the right of administration. In the case of such legal acts, the consent of the guardian or curator shall also be required

2. The opinion of the family council is required only if it has been established. If the family council has not been established, the consent of the guardian or curator and the authorization of the guardianship court shall be sufficient.

3. Just like the guardian's consent, the opinion of the family council and the consent of the guardianship court must be obtained by the minor at the latest at the time of the conclusion of the act.

4. Article 146 of the Civil Code does not refer to the corresponding application of Article 145 of the Civil Code (authorization by the guardianship court), although, for the same reasoning, it was necessary to apply it in this case. In the absence of a reference rule, Article 145 of the Civil Code is not applicable, as it concerns the guardianship court's authorization of the guardian to conclude legal acts in the name and on behalf of a minor under the age of 14. Art. 146 para. (1) of the Civil Code

concerns the authorization given to a minor over the age of 14 to conclude certain legal acts personally.

5. The court within the territorial jurisdiction of which the current domicile or residence of the minor is situated is competent to authorize the conclusion of such legal acts. If the authorization is sought for the conclusion of a legal act relating to immovable property, the application may be lodged with the court within the territorial jurisdiction of which the property is situated.

D. Legal acts prohibited for minors with restricted capacity

1. Article 146 para. (3) of the Civil Code, a minor is forbidden "to make gifts or wills, other than gifts customary according to his material condition or testamentary dispositions of property of small value, or to guarantee the obligations of another". The purpose of this prohibition is to protect the best interests of the minor.

2. Following the amendment of Art. 146 para. (3) of the Civil Code by Law no. 140/2022, in principle, minors are also prohibited from making wills. This restriction constitutes an exception to the principle according to which, by way of inheritance, a natural person may transfer his or her property, irrespective of its value, *mortis causa* to a natural or legal person in existence. The will of a minor with restricted capacity may be testamentary only to assets of low value. *Per a contrario,* a minor without legal capacity is prohibited from bequeathing his or her property by will, irrespective of its value, while a minor with restricted capacity can only be bequeathed property of high value.

E. Annullability of legal acts concluded by a minor with restricted capacity

1. According to Art. 146 para. (4) of the Civil Code, the legal acts concluded without complying with para. (1)-(3) are voidable. *In terminis*, the provisions of Art. 144 para. (3) are applicable accordingly. As a result, the following categories of legal acts are voidable: legal acts concluded by a minor without the written consent of the guardian or curator; alienation, division, mortgaging or encumbering with other real encumbrances, waiver of property rights and those exceeding the right of administration without the consent of the guardian, the opinion of the family council or the authorization of the guardianship court; gifts, wills concerning assets other than those of small value and the guarantee of the obligations of another person.

2. If the minor is a party to the voidable legal acts, he or she may have the right to be a party to the proceedings, either as an active or passive party, as the case may be. Where the minor is a defendant, he or she may defend himself or herself by invoking the voidability of the act on the ground of infringement of the legal provisions on capacity, in accordance with Article 44 para. (2) of the Civil Code. To bring an action for annulment, the guardian, the family council, its members

and the public prosecutor are entitled to bring an action. Par. (4) is not correlated with para. (1), as the curator is implicitly omitted. If the legal act has been concluded without the curator's consent, his entitlement to bring proceedings is as justified as that of the guardian.

3. The action is prescriptible within the general term of 3 years, which runs from the date on which the person bringing the action became aware of the cause of annulment.

4. Jurisdiction shall lie with the court within whose territorial jurisdiction the domicile or residence of the minor is situated. The court shall give its decision by a judgment subject only to ordinary appeal.

F. Legal acts that a minor with restricted capacity may conclude alone

1. In common law, Article 41 para. (3) thesis I of the Civil Code lays down the categories of legal acts which the person with restricted capacity may conclude alone, without the consent of the legal guardian or the opinion of the family council or the consent of the guardianship court: acts of conservation and administration which do not prejudice him or her; acts of acceptance of an inheritance or of gifts without encumbrances; acts of disposition of small value, of a current nature which are executed on the date of their conclusion. These provisions are also applicable in the case of a minor with restricted capacity who is the beneficiary of guardianship. The conclusion is supported by the fact that the text refers generically to the person with restricted capacity, by the lack of distinction in relation to the form of guardianship under which he or she is placed, and by the reference in the thesis II to the appropriate application of Article 168 para. (4) of the Civil Code.

2. Art. 41 para. (3) thesis I is similar to Art. 43 para. (3) of the Civil Code. There are also important differences between them.

3. Thesis II provides that "the provisions of Article 168 para. (4) remain applicable". The reference concerns the situation in which the minor receives legal advice or special guardianship, in which case the court judgment establishing the measure of protection must be complied with in respect of the categories of legal acts for which the minor must obtain authorization or be represented.

G. Confirmation of voidable legal acts of the minor

1. In accordance with Article 48, thesis I of the Civil Code, a minor who has reached the age of majority has the possibility to confirm legal acts concluded alone in a situation where, in order to be valid, they had to be concluded by his legal representative or with his legal representative's assistance. It is also possible to confirm the legal acts of a minor with restricted capacity concluded without the consent of the guardian or, where appropriate, the authorization of the guardianship court

and the opinion of the family council. For the same reason, a minor aged 16 who has acquired full legal capacity by marriage or in anticipation of marriage may also confirm such documents.

2. During minority or during the period of legal counseling, the confirmation of voidable legal acts may be made only under the conditions of Articles 1.263 and 1.264 of the Civil Code, according to Article 48, last thesis of the Civil Code. Three conditions must be met in order to confirm a voidable legal act: the confirmation must come from the person who has the right to invoke the relative nullity of the legal act; the holder of the action for annulment must be aware of the cause of the nullity; at the date of confirmation, the act must meet the conditions of validity prescribed by law. These legal acts may be confirmed by the guardian, the family council or the guardianship court, as the case may be.

4.6.4.5. Prohibition of certain legal acts

1. Art. 147 para. (1) of the Civil Code prohibits the conclusion of legal acts between the guardian or the spouse, a relative in the direct line, his brothers or sisters, on the one hand, and the minor, on the other hand. In the absence of a restriction provided by law, these legal acts may or may not relate to the minor's property.

2. The prohibition is established in the best interests of the minor. As the parties usually promote their own interests through legal acts, the guardian is in a position, directly or indirectly, to act against the best interests of the minor.

3. Acts concluded with the minor by the guardian, the guardian's spouse or the guardian's relatives may be annulled. In the absence of legal provisions to the contrary, actions for annulment may be brought in accordance with ordinary law.

4.6.4.6. Buying the minor's property at public auction

According to Article 147 para. (2) C. civ., as an exception from para (1), the guardian, the guardian's spouse, the guardian's relatives in the direct line, as well as the guardian's brothers or sisters may purchase the minor's property under the following conditions: the purchase takes place at a public auction; the person concerned has a security interest in the property or holds it in co-ownership with the minor. The conditions are cumulative.

4.6.4.7. Creation of bank deposits

A. General

Article 149 of the Civil Code sets out the legal regime of the sums exceeding the needs for the maintenance of the minor and the administration of his property: the deposit of these sums with a credit institution; the conditions under which the guardian may dispose of these sums.

B. Depositing money with a credit institution

1. The guardian is obliged to deposit with a credit institution the amounts exceeding the needs for the maintenance of the minor and the administration of his property and financial instruments. The amount established for the maintenance of the minor may also be deposited with a credit institution. For the sake of consistency of reasoning, the possibility of depositing in a credit institution also the amount required for the administration of the minor's property should be regulated.

2. Those sums and financial instruments shall be deposited with the credit institution established by decision of the family council. Where no family council is established, the credit institution shall be determined by the guardianship court.

3. The deposit of money with the credit institution is carried out by concluding a funds deposit agreement. Financial instruments are deposited under a securities deposit agreement. Both contracts are variants of the bank deposit. All sums and financial instruments are deposited in the name of the minor. Amounts intended for the maintenance of the minor are placed in a separate account from the account for amounts exceeding the maintenance needs and for the administration of the minor's property.

4. The guardian is obliged to deposit the sums exceeding the needs for maintenance and for the administration of the minor's property with the indicated credit institution within 5 days from the date on which they have been received. Financial instruments must also be deposited within the same time limit.

C. Use of sums by the guardian

1. Amounts exceeding the needs for maintenance and for the administration of the minor's property, as well as financial instruments deposited with a credit institution, may be the subject of legal acts of disposition concluded by the guardian, but only with the prior authorization of the guardianship court. The guardianship court decides how the sums for which it has given authorization are to be used, and the guardian is obliged to comply with them.

2. Even with the authorization of the guardianship court, the guardian is prohibited from trading on the capital market, in the name of the minor, sums exceeding the needs for maintenance and for the administration of the minor's property and financial instruments.

3. The amounts set by the family council for the maintenance of the minor deposited with a credit institution may be withdrawn (withdrawn) by the guardian without the authorization of the

guardianship court. The absence of this condition is due to the fact that these sums are made available to the guardian by decision of the family council and with the guardianship court's notification.

4.6.5. The annual amount for the maintenance and administration of the minor's property

4.6.5.1. General

Art. 148 of the Civil Code regulates the manner of establishing the annual amount necessary for the maintenance of the minor and the administration of his property. The main novelty introduced by the current rules is that the family council is empowered to determine this amount. If the family council is not established, the amount is set by the guardianship court.

4.6.5.2. Setting the amount

1. The family council shall set this amount by a decision. If it is not constituted, the guardianship court shall fix the amount by order. The family council and the court of guardianship shall have the possibility to modify this amount according to the circumstances. The amount may be increased or decreased, depending on the evolution of the minor's maintenance needs and the expenses incurred in managing the minor's property. The decision of the family council fixing the amount and the decision to modify the amount shall immediately be notified to the guardianship court.

2. The amount of maintenance must cover not only living expenses (food, housing, clothing, care, etc.), but also the minor's education, schooling and vocational training. In determining the amount needed to administer the minor's property, account must be taken of a number of factors.

4.6.5.3. Covering the costs of maintenance and administration of the minor's property

1. In principle, expenses for the maintenance and administration of property are covered by the minor's income. The solution whereby maintenance costs are covered out of the minor's income is based on the fact that, in principle, there is no legal obligation of maintenance between the guardian and the minor. Where they are relatives in the direct line, brothers or sisters, Article 148 of the Civil Code, being of a special nature, takes precedence over Article 516 et seq. Civil Code.

2. If the minor's income is insufficient, the guardianship court shall order the sale of the minor's property. Assets that have an emotional value for the minor or the minor's family will be sold only exceptionally.

3. If the minor is deprived of property and has no parents or other relatives obliged by law to provide maintenance or the maintenance is insufficient, he/she is entitled to social assistance.

4.6.6. Appointment of the special curator

4.6.6.1. General

1. Article 150 of the Civil Code regulates the cases in which a special guardian is appointed during guardianship: there is a conflict of interests between the guardian and the minor; the guardian is prevented from performing a certain act on behalf of the minor he represents or whose acts he authorizes; the special guardian appointed provisionally by the notary public in the succession proceedings. The appointment of the special guardian, whatever the circumstances, is in the nature of a measure of circumstantial protection of the minor beneficiary of the guardianship.

2. The special curator appointed under Article 150 of the Family Code shall exercise his rights and perform his duties under the same conditions as those laid down by law for guardians. The legislature saw fit to derogate from the institution of curatorship, which is governed in principle by the rules of the mandate and assimilated the role of the special curator to that of the guardian. The legislature's choice is a natural one, since the appointment of the special guardian is not triggered by the termination of the guardianship or the guardian's function. On the contrary, the minor continues to be protected by the guardianship and to be in a guardianship relationship with the guardian, but a special guardian is appointed during the proceedings to represent or assist him in the conclusion of certain legal acts.

3. In the first two cases, the court within the territorial jurisdiction of which the actual domicile or residence of the minor is situated shall have the jurisdiction to appoint a special guardian. In the latter case, the provisional special curator is appointed by the notary public before whom the notarial succession proceedings are conducted. As the procedure is non-contentious, the court appoints the curator by an enforceable judgment, subject only to appeal. The notary public appoints the special provisional curator by means of a special decision.

4.6.6.2. Conflicting interests between the guardian and the minor

Conflicting interests between the guardian and the minor are among those that do not attract the removal of the guardian from the guardianship. In other words, conflict of interests is not irreducible. The appointment of the special guardian is likely to remove the suspicion that, in the case of certain legal acts, the guardian will promote his own interests to the detriment of the best interests of the minor.

4.6.6.3. Preventing the guardian from performing a certain act

The guardian's impediment concerns the performance of an act on behalf of the minor whom he represents or whose acts he authorizes. The first hypothesis concerns the guardian's preventing the guardian from representing the minor without legal capacity in legal acts, and the second concerns the guardian's preventing the minor with restricted legal capacity from consenting to legal

acts of the minor. There may be various reasons for preventing the guardian from performing a particular legal act. Whatever the reason may be, it must prevent the guardian from performing a particular act. If the reason prevents the guardian from performing any act, the guardianship court will remove the guardian from the guardianship, as he is unable to perform the duties of the guardianship.

4.6.6.4. Appointment of the special curator by the notary public

1. The last case concerns the appointment of a special curator by the notary public in probate proceedings. *Per a contrario*, the notary public is not entitled to appoint a special administrator in other notarial procedures, such as, for example, for the authentication of documents and the liquidation of the estate. The appointment of the special liquidator must be supported by well-founded reasons. In principle, the appointment of such a special guardian is necessary in those situations where the promotion of the best interests of the minor is at stake if the guardian would represent or assist the minor in the succession proceedings.

2. For the notary public, the appointment of the special curator is optional. The notary shall be free to decide on a case-by-case basis, depending on the circumstances, whether or not it is necessary to appoint a special liquidator.

3. The appointment of the curator is provisional, as it must be validated or replaced by the guardianship court.

SECTION 4.7.
SUPERVISION OF THE EXERCISE OF GUARDIANSHIP OF A MINOR

4.7.1. Preliminaries

1. Articles 151-155 of the Civil Code regulate: the control of the guardianship court, the report, the discharge of the guardian, the prohibition of dispensation and the complaint against the guardian. In order to avoid repetition, this section does not return to the issues raised in the context of the analysis of the principle of "exercise of guardianship under the supervision of the guardianship court". Compared with the previous rules, there are many new elements.

4.7.2. Reporting

4.7.2.1. General

1. Art. 152 of the Civil Code regulates the guardian's obligation to submit to the guardianship court, annually or whenever the court so requires, an account of the way in which he has cared for

the minor and administered his property. Where the minor's property is of minor importance, the guardianship court may authorize the guardian to submit reports at intervals of more than one year, but not exceeding three years. The major novelty introduced by the current rules is that the account is submitted to the guardianship court.

2. Articles 842-845 of the Civil Code regulate the annual report in the context of the legal regime of the administration of another person's property. In so far as the law does not provide otherwise, they are also duly applicable in matters of guardianship of a minor as a matter of common law.

3. The duty of the guardian to draw up and submit the account is an important legal lever available to the guardianship court, which enables it to carry out an effective control of the guardian's performance of his duties regarding the person and property of the minor. The supervision exercised by the guardianship court by checking the reports drawn up and submitted by the guardian is intermediate and *a posteriori*. If the guardian fails to submit the report by the deadline laid down by law or by the deadline set by the guardianship court, he or she is liable to a civil fine and removal from guardianship.

4.7.2.2. Concept and content of the report

1. In both the previous and the current rules, the legislature has refrained from determining the meaning of the expression 'report'. I consider that the statement of account is 'the document drawn up by the guardian under the conditions laid down by law, in which he presents to the guardianship court, annually or at the times set by the court, the manner in which he has looked after the minor and administered his property '. In legal terms, the report is a legal act of the guardian. One of the essential characteristics of the report is that it is not voluntary. On the contrary, its preparation and submission to the guardianship court is a legal obligation of the guardian. Failure to do so exposes the guardian to a civil fine.

2. In practice, the report is drawn up in writing and contains two categories of information: on the way in which the guardian has cared for the minor; and on the way in which the guardian has administered the minor's property. The report is accompanied by documentary evidence to prove the accuracy of the information contained therein.

3. Article 152 of the Civil Code does not involve minors, although the submission of the report by the guardian to the guardianship court and its approval is a procedure that concerns them. The minor should be given the opportunity to express his or her opinion on the content of the report and, if he or she has reached the age of 10, to be heard by the guardianship court. Article 845 of the Civil

Code also applies to minors. He may ask the guardian or, where appropriate, the specialized person who administered his property to allow him to consult the registers and supporting documents relating to the administration of his property.

4.7.2.3. Annual report and reports requested by the guardianship court

According to Article 152 of the Civil Code, the guardian is obliged to draw up and submit to the guardianship court three categories of reports: annual reports; reports for a period of more than one year; reports submitted at the request of the guardianship court whenever it deems necessary.

2. By exception, Article 152 para. (3) of the Civil Code allows the guardianship court to authorize the guardian to submit an account of the guardian's administration of the minor's property for longer periods. These cannot exceed 3 years. The report on the minor's person remains governed by paras. (1) and (2) of Article 152 of the Civil Code. The guardian must draw it up annually and submit it to the guardianship court within 30 days of the end of the calendar year. The three-year term is a maximum.

4. The guardianship court may require the guardian, in addition to the annual report, to submit at any time an account of the guardian's care of the minor and the administration of the minor's property. Such a request for an annual report shall not release the guardian from the obligation to submit the annual report.

4.7.2.4. Prohibition of exemption from accountability

1. Article 154 of the Civil Code, in a novel way, prohibits a waiver of accountability. This prohibition is circumscribed by the legislator's concern to promote the best interests of the minor beneficiary of the guardianship, on the assumption that the dispensation to account is likely to cause him material harm. Specifically, Article 154 of the Civil Code provides that "a waiver of accountability granted by the parents or by a person who has made a liberality to the minor is considered unwritten".

2. Dispensation concerns the guardian in particular. As he is the administrator of the minor's property, he may also be able to administer property that the minor has acquired by way of gifts. The impersonal wording of the text supports the conclusion that the dispensation may also concern other persons, such as the person designated by the act of disposition or, as the case may be, appointed by the guardianship court.

3. Clauses in a donation or will which are considered unwritten are contrary to the law or, in other words, unlawful. Since the rule disregarded is imperative and, moreover, is in the best interests of the minor, the clauses in question render the donation null and void, albeit in part. These clauses

are replaced by the applicable legal provisions applicable. If there are no such provisions, the clauses in question are absolutely null and void and thus have no effect.

4.7.2.5. Discharge of the guardian

1. Article 153 of the Civil Code regulates the conditions under which the guardianship court decides to discharge the guardian. Article 162 of the Civil Code, on the other hand, being situated in the context of the rules on the termination of guardianship, lays down the conditions under which the guardianship court discharges the guardian. The different wording is determined by the differences between these operations. Discharge takes place during the guardianship and is interim. The discharge does not terminate the guardian's office. On discharge, the guardian's function ceases. The operation is final, since it is conditional on the assets under administration being handed over, the accounts being verified and approved.

2. To decide to discharge the guardian, the guardianship court is obliged to verify the accounts presented by the guardian in the statement of account of the expenses incurred for the maintenance of the minor and the administration of the minor's property, and to ascertain whether they are accurate and correspond to the facts. If this is not the case, the guardianship court must ask the guardian to redo the account and, if necessary, will not discharge him. There is an asymmetry between Art. 152 para. (1) and Article 153 of the Civil Code. While the statement of account must include the way the guardian has cared for the minor and administered his property, the application for discharge is admissible if the accounts of the minor's income and the expenses incurred in his maintenance and the administration of his property are correct and correspond to reality. For these reasons, I propose that the legislature amend Article 153 of the Civil Code *de lege ferenda* as follows: "the guardianship court shall verify the information contained in the report and, if it is correct and corresponds to the facts, shall discharge the guardian".

4. Regardless of the elements that are concerned, the verification carried out by the guardianship court must be effective (real, concrete) and thorough. The guardianship court may, of its own motion, ask the guardian for additional data, information or documents relating to what has been entered in or annexed to the report. The court may, at the request of any interested person, order a hearing of the report drawn up and submitted by the guardian.

5. In the absence of an exonerating legal provision, after discharge, the guardian is liable for the damage caused to the minor in the activity of administration of property under the conditions of common law (Article 802 et seq. Civil Code).

6. Applications to discharge a guardian shall be dealt with in a non-contentious judicial procedure by the court within the territorial jurisdiction of which the domicile or residence of the minor is situated. The court of guardianship shall give its ruling in an enforceable judgment subject only to ordinary appeal

CHAPTER V
TERMINATION OF GUARDIANSHIP OF THE MINOR

SECTION 5.1.
PRELIMINARY CLARIFICATIONS

1. Articles 156-163 of the Civil Code lay down rules on: cases of termination of guardianship, death of the guardian, removal of the guardian, appointment of the special curator, general account, surrender of property, discharge of the guardian and civil fine. For the sake of systematization, this chapter also examines the issue of the legal liability of the guardian for the exercise of his duties, including the issue of complaints against his acts and deeds, civil fines and removal from guardianship.

2. The termination of guardianship is not synonymous with the termination of the guardian's function. There are situations which lead only to the termination of the guardian's function, without the minor's right to benefit from guardianship being extinguished.

SECTION 5.2.
CASES OF TERMINATION OF GUARDIANSHIP OF A MINOR

5.2.1. Disappearance of the situation which gave rise to the guardianship

1. This case must be analyzed in accordance with Art. 44 para. (1) of Law no. 272/2004 and Art. 110 Civil Code. From a legal perspective, a person can benefit from guardianship if he or she has the status of a child analyzed in a narrow sense. The fact that the person acquires full capacity to exercise his or her rights, because he or she has reached the age of majority, has married or has been recognized in advance, constitutes a peremptory cause that determines the extinction of the right to alternative care and, therefore, the definitive termination of guardianship and the guardian's function. Art. 110 of the Civil Code specifically establishes the cases in which, if both parents are present, guardianship of the minor is established. Provided that it is in the best interests of the minor, if the parents, or at least one of them, are no longer in one of these cases, guardianship will cease, and the minor will be placed in the care of one or both parents. The resumption of parental authority and, as part of it, the care of the child, does not intervene *ope legis*. The guardianship court must find that it is in the best interests of the minor, in accordance with Article 44 para. (1) thesis II of Law 272/2004.

If it is found that the parental authority is not in the best interests of the minor, the guardianship court may order the continuation of the guardianship or the establishment of another alternative protection measure. If, in the circumstances, on the date of termination of guardianship, the person has acquired full capacity, there is no longer any question of resuming parental authority, much less of being granted guardianship.

2. Art. 176 para. (3) of the Civil Code regulates the termination of guardianship on the ground that the minor benefits from special guardianship. The guardianship court will consider the best interests of the minor and will decide whether the former guardian takes over the special guardianship or appoints another guardian. In the case of a decree of adoption, if the minor has been granted guardianship, the guardianship shall cease on the date on which the judgment of the court granting the decree of adoption becomes final.

5.2.2. Death of the minor

Termination of guardianship on this ground is natural, since, as a result of the death, the minor ceases to be subject by operation of law. The death of the minor constitutes grounds for irreversible termination of the guardianship. Termination of guardianship on this ground is based on the fact that the death of the natural person marks the end of his or her capacity to use and, consequently, to exercise rights.

5.2.3. Death of the guardian

5.2.3.1. Preliminaries

1. The death of the guardian is one of the grounds for termination of the guardian's office. This cause is mentioned in Article 156 para. (2) and developed by Article 157 of the Civil Code: the duty of the guardian's heirs of full age and of the persons referred to in Article 111 to notify the guardianship court of the guardian's death; the duty of the guardian's heirs of full age to take over the guardianship duties; special rules applicable where the guardian's heirs are minor natural persons.

2. Article 157 of the Civil Code concerns the situation in which, on the death of the guardian, the minor continues to be deprived of the care of both parents or it is not in his best interests to be left in their care. This is the only way to explain the obligation on the guardian's heirs to take over the guardianship until a new guardian is appointed.

3. In the context of Article 157 of the Civil Code, the expression "heirs of the guardian" refers to natural persons of full age or minors, as the case may be. Both categories are subject to the condition of acceptance of the inheritance. The provisions of this Article are not applicable where the heirs are legal persons or where the estate is vacant.

5.2.3.2. Notification of the guardianship court of the guardian's death by his heirs of full age or other persons

1. The duty to notify the guardianship court of the guardian's death is incumbent on his heirs or any other person referred to in Art. 111 Civil Code. The generic expression, any other person, supports the conclusion that the obligation is incumbent on both natural and legal persons referred to in Article 111 of the Civil Code.

2. The text refers to the guardian's heirs without distinction as to their legal status. However, they must be of full age and have full capacity. This clarification is necessary since Article 157 para. (3), thesis I of the Civil Code exempts the guardian's minor heirs from this duty, irrespective of their level of civil capacity. The duty does not exist in the case of heirs of full age who benefit from legal advice or special guardianship, since they are in the same situation as minor heirs who do not have full capacity. Provided that they are of full age and have full capacity, the duty of notification is incumbent on the heirs, whether they are legal or testamentary.

3. The nomination of the heirs and the referral to the persons referred to in Article 111 of the Civil Code are based on the presumption that they are aware of the guardian's situation, either because of the close relations they have had with him, or by virtue of the functional duties with which they are vested by law.

4. Regardless of the category to which they belong, it is a legal obligation for them to notify the guardianship court. Service must be effected immediately. In the silence of the legislature, the manner and form of service are irrelevant. For the guardianship court, the notification is in the legal nature of a writ of summons, which is why, once it has received the notification, it is obliged to initiate legal proceedings to appoint a new guardian or, where appropriate, to decide on another measure for the protection of the minor.

5.2.3.3. Notifying the guardianship court of the death of the guardian if the guardian's heirs are minors

3. According to Art. 157 para. (3), thesis I of the Civil Code, if the guardian's heirs are minors, notification of the guardianship court may be made by any interested person, as well as by the persons referred to in Article 111 of the Civil Code. Heirs who are minors are exempt from the duty to notify the guardianship court of the death of the guardian. To avoid situations in which minor heirs with full capacity are exempt from this obligation, or adult heirs without full capacity have this obligation, I propose that the *legislature* amend Article 157 para. (3) thesis I of the Civil Code by replacing the term minors with incapable.

5.2.3.4. Taking over the duties of guardianship by the guardian's heirs of full age

1. To avoid vacancy of guardianship, but by exception to its personal nature, Article 157 para. (2), thesis 1 of the Civil Code obliges the guardian's heirs to take over the guardianship until another guardian is appointed. This rule must be read in conjunction with Art. 113 para. (1), Art. 120 para. (2) and Art. 157 para. (3), thesis I of the Civil Code. Consequently, the duty to take over the duties of guardianship is incumbent only on heirs of full age who meet the legal conditions for guardianship and are not in one of the situations that entitle them to refuse to continue the guardianship. Heirs who are minors are exempt from the obligation to take over the duties of guardianship under Article 157 para. (3), thesis II. Their exemption is natural, since their minority is incompatible with the office of guardian. By the same reasoning, the guardian's heirs who are of full age and who are in one of the cases of incompatibility with the office of guardian are also exempt from this obligation.

2. The law does not expressly provide for any formalities to be completed in order to take over the duties of guardianship. Since this is a case of termination of the guardian's office, the heirs are required to draw up the general account.

3. The assumption of guardianship by the guardian's heirs of full age shall be of an interim nature, as it lasts until the new guardian is appointed.

4. Under Article 157 of the Civil Code, the duty to assume the duties of guardianship is incumbent on all the guardian's heirs of full age. They exercise the duties of guardianship jointly. In order to eliminate practical difficulties that may arise due to the exercise of the duties of guardianship by several persons together, Art. 157 para. (2), thesis II, of the Civil Code gives the heirs the possibility of appointing one of them to carry out the duties of guardianship. The appointment is made by a special power of attorney. The performance of the duties of guardianship by the designated heir is of a provisional nature, since it lasts only until the date provided for in the power of attorney, but not beyond the date of appointment of the new guardian.

5. As the heirs will take over the duties of the guardianship, they are obliged to exercise the duties that their predecessor had regarding the person and property of the minor. If the heirs refuse to take over the duties of guardianship, the guardianship court has no possibility to penalize them with a civil fine, since Art. 163 Civil Code applies only in situations where the guardian refuses to continue the guardianship, in cases other than those listed in Art. 120 para. (2) of the Civil Code or fails to perform this task properly. Depending on the circumstances of the minor and the consequences that have occurred or could have occurred to the minor due to the failure to take over

the duties of guardianship, the guardian's heirs may be held criminally liable for the offense of leaving a person in need without assistance.

6. Taking over guardianship is a duty of the estate, which is why the guardian's heirs of full age may exempt themselves from it by renouncing the inheritance in accordance with the law. The waiver of inheritance does not release the heirs of full age from the obligation to notify the guardianship court of the guardian's death.

5.2.3.5. Appointment of a special curator

1. If all the heirs are minors, the guardianship court will appoint a special curator as a matter of urgency. For the same reason, this measure should also be taken in cases where the incapacity is due to causes other than the minority of the heirs. The exemption of minor heirs is based on the fact that minority is one of the causes of incompatibility with the capacity of guardian.

2. The appointment of the special curator is mandatory for the guardianship court.

3. The appointment of the special curator shall be made as a matter of urgency, which means that, from a procedural point of view, the rules laid down for urgent cases are duly applicable.

4. *In terminis*, Article 157 para. (3) of the Civil Code allows the guardianship court to appoint the executor of the will as curator. If more than one executor has been appointed, the guardianship court is free to decide which of them will be appointed special curator. The court of guardianship shall decide on the appointment of the special curator by an enforceable decision.

5.2.4. Procedure for termination of guardianship of a minor

1. The legislator refrained from laying down procedural rules on the termination of guardianship. In practice, termination of guardianship is determined by the court. Some courts, by the same judgment, have declared the guardianship terminated and ordered the guardian to cease exercising parental rights and performing parental duties in relation to the person who was under his guardianship. It is natural that the applications should be dealt with at the same time, since the termination of guardianship entails, among other consequences, the termination of the guardian's duties. Other courts have, depending on the circumstances of the case, declared the guardianship terminated and, by the same judgment, appointed a new guardian.

2. Since the establishment of guardianship and the appointment of the guardian fall within the competence of the guardianship court, the principle of symmetry of legal acts requires that the termination of guardianship and the guardian's office should be decided by the latter following the same procedure. Contrary to this wish, only for the removal of the guardian from guardianship on the grounds set out in Article 113 para. (2) of the Civil Code provides that the same procedure applies

as for his appointment. To eliminate the source of different interpretations on this issue, it would be appropriate to add a new paragraph to Article 156 of the Civil Code, *de lege ferenda*, providing that 'the termination of guardianship and of the guardian's function shall be decided by the guardianship court in chambers, by final judgment'.

3. The judgment of the court ordering the definitive termination of guardianship is declaratory, which means that it has retroactive effect back to the date on which the event that caused the termination occurred.

SECTION 5.3.
GENERAL REPORTING

5.3.1. Preliminaries

1. The general account is the document drawn up by the guardian or other persons required by law, which is presented to the guardianship court, upon termination for any reason of the guardianship or the guardian's office, the manner in which he has administered the minor's property. Art. 160 Civil Code. lays down rules on: the duty of the guardian to draw up and submit this account to the guardianship court upon termination of the guardianship for any reason whatsoever and upon his removal from the guardianship; the drawing up of the general account and its submission to the guardianship court by the guardian's heirs of full age or, where appropriate, by the representative of the incapable heirs or by a special curator, in the event of the guardian's death; the content of the general statement of account; the possibility for the court of guardianship to impose a civil fine on persons bound by the law if they fail to draw up and submit the general statement of account to the court of guardianship.

2. Compared with the annual statement of account, the general statement of account has a number of significant features: it is unique in that it is drawn up and submitted to the guardianship court only once by the same guardian or, on his behalf, by his heirs or other persons prescribed by law; it is drawn up and submitted only on the termination for any reason whatsoever of the guardianship and on the removal of the guardian from the guardianship its content shall relate to the development of the minor's material circumstances during the period during which he or she has been under guardianship; the guardianship court may compel the guardian or the persons required by law to draw up and submit the general report, and may impose a civil fine.

4. The purpose of the general account is to allow the guardianship court to verify *a posteriori* how the guardian has managed the minor's assets.

5. The general report is necessary not only for the guardianship court to carry out *a posteriori* checks on the guardian's activity, but also for the protected person, who has become fully competent to exercise full capacity and to manage his or her own assets. If only the guardian's office is terminated, the general report is also necessary to make it easier for the new guardian to perform his duties with regard to the minor's property.

6. Passivity on the part of the guardian or other person required by law to draw up and submit the general account affects the interests of the person previously protected by the guardian, since it prolongs the provisional status of the guardian's assets. The guardianship court has the power to compel the person bound by the law to draw up and submit the general account and, if it considers it appropriate, to impose a civil fine.

7. The legislature refrained from specifying which fine may be imposed on the person required to draw up and submit the general statement of account: a fine not exceeding one minimum wage, which may be repeated no more than three times at seven-day intervals, or a fine not exceeding three average wages. To decide, the court must assess which of these fines is likely to induce the person to draw up and submit the general statement of account.

5.3.2. Situations in which the general report is drawn up and submitted to the guardianship court

1. Art. 160 para. (1) of the Civil Code requires the guardian to submit a general report to the guardianship court "upon termination of the guardianship for any reason whatsoever". This obligation is also imposed on the guardian in the event of removal from guardianship. It is of no legal significance for the existence of the guardian's obligation to draw up and submit this account whether the termination of the guardianship is definitive or has been brought about solely by the termination of his office.

2. Art. 160 para. (1) of the Civil Code also stipulates the obligation for the guardian's heirs. The heirs of the guardian are liable, as the case may be, which is why they will only draw up and submit the general account if the guardian's office has ceased due to his death, since only in this case can we speak of the guardian's heirs.

5.3.3. Persons required to draw up and submit to the guardianship court the general report

1. The duty to draw up the general report and submit it to the guardianship court rests primarily with the guardian. This duty shall apply irrespective of the reason for the termination of the guardianship, including where the guardian is removed from the guardianship.

2. By way of exception, where the office of guardian ceases due to the death of the guardian, the obligation to draw up and submit the general account shall be incumbent on his heirs of full age who have accepted the succession.

4. Where all the guardian's heirs are minors (incapable), the obligation to draw up and submit the report lies with their legal representative. The legal representative of incapable heirs may be the parent, guardian or curator, as the case may be. Irrespective of their capacity, the legal representative of incapable heirs may not also be required to assume the duties of guardianship.

5. As it is a burden of the inheritance, the heirs can exempt themselves from this obligation by renouncing the inheritance. If there is more than one heir of full age, the duty is incumbent only on those who have accepted the inheritance. The legislature was not concerned with the situation where, although there are heirs of full age, they have all renounced their inheritance. In this case, for the sake of reason, a special curator should be appointed to draw up and submit the general account within the time limit set by the guardianship court.

6. If there are no heirs or if they are unable to act, the guardianship court will appoint a special curator to draw up and present the general account. This curator is a special curator, as, as a rule, he has only this duty. Under the terms of Article 161 of the Civil Code, he may also be entrusted with handing over the property administered by the guardian during the guardianship.

7. Irrespective of the person to whom the obligation is incumbent, the general account shall be drawn up for the final years of the guardianship. The law shall leave it to the discretion of the guardianship court to determine the specific period for which it is to be drawn up.

5.3.4. Deadline for drawing up and submitting the general report

1. The time limit for drawing up and submitting the general account shall be 30 days for the guardian and his heirs of full age. This time limit shall be fixed and the guardianship court may not approve a longer or shorter time-limit. For the special guardian, the guardianship court may set a shorter or longer period, depending on the circumstances. In the absence of a legal stipulation to the contrary, the 30-day time limit is on days off.

2. The date from which this period starts to run varies according to the capacity of the person responsible for drawing up and submitting the general report to the guardianship court. For the guardian, this date is the date on which the guardianship ends. In the case of the guardian's heirs of

full age, the period shall run from the date of acceptance of the guardian's estate, and in the case of the guardian's representative, from the date on which the guardianship court requires him to draw up and submit the account. For the special guardian, that date shall be fixed by the guardianship court.

5.3.5. Content of the general report

1. The general statement of account is different from the annual statement of account requested by the guardianship court in terms of content. It must contain three elements: income and expenditure; assets and liabilities; and the stage reached in any legal proceedings brought by the minor. The first two elements concern exclusively patrimonial matters. The third may also relate to the stage reached in non-pecuniary proceedings.

2. The inventory of the assets of the person who has been granted guardianship should also be analyzed in the general report. The analysis of the inventory is useful since, on termination of guardianship, including the guardian's function, the assets that have been administered by the guardian must be handed over to the persons entitled.

3. The legislator has focused on the patrimonial elements of the general statement of account with the idea that it is drawn up when the guardianship is definitively terminated. However, in cases where the termination of the guardian's function is caused by his removal or replacement, the minor may find himself in a situation where he continues to benefit from guardianship, but under the protection of another guardian. In such cases, elements relating to the way in which the previous guardian has discharged his or her duties in respect of the minor are also important. For these reasons, it is appropriate for the legislature to intervene to supplement Article 160 para. (3) of the Civil Code, in such a way as to provide that the general report shall also include data relating to the person of the person protected by the guardian.

4. Article 160 para. (3) shall be supplemented accordingly by Article 850 para. (2) of the Civil Code which, in common law, provides for the elements of the final account.

SECTION 5.4.
HANDING OVER OF GOODS

1. On the termination of the guardianship or of the office of guardian, the property which has been administered by the guardian shall be subject to surrender. In the absence of specific legal provisions, the general rules relating to the handing over of property by the administrator on termination of the administration relationship shall apply accordingly.

2. As a sequence in time, this operation is placed after the termination of the guardianship or the guardian's function, but before the verification of the settlements, their approval and the discharge of the guardian.

3. The obligation to hand over the property shall be incumbent on the guardian, his heirs of full age who have accepted the inheritance, the legal representatives of heirs who are incapable or unable to act and, in the absence of heirs, the special curator appointed by the guardianship court, where appropriate.

4. Depending on the circumstances, the property is handed over to the former minor, his heirs or the new guardian. If the deceased minor or former minor has no heirs or none of them has accepted the inheritance, and the succession has been declared vacant, the property shall be handed over to the commune, town, municipality or district of Bucharest within whose administrative-territorial radius the property is located at the date of the opening of the inheritance and shall become part of their private domain.

5. The rules on the extent of the obligation to surrender laid down in the common law shall apply accordingly.

6. The law does not lay down any special rules on the formalities for the handing over of goods. The persons concerned are free to agree on this.

7. The place of handing over of the property shall be the place at common law. Unless otherwise agreed by the persons involved in the operation, the administered property shall be handed over at the place where it is located.

8. The property must be handed over after the termination of the guardianship, but before the settlements have been verified, approved and the guardian discharged. The court of guardianship is not entitled to authorize the property to be handed over after this date, as this would disregard a mandatory legal limit.

SECTION 5.5.
GUARDIAN'S DISCHARGE

5.5.1. Preliminaries

1. Article 162 of the Civil Code is intended to discharge the guardian. Discharge is the operation by which the guardianship court decides to terminate the guardian's obligation to

administer the minor's assets, after finding that the assets administered have been handed over and the accounts in the general account are correct.

2. Although the discharge as such is an important operation, the legislature has refrained from devoting other rules to it in the context of guardianship of minors. In ordinary law, only Article 850 para. (2) and Article 851 of the Civil Code concern discharge but are not applicable in matters of guardianship. However, there is nothing to prevent the guardianship court from deciding to carry out an expert's report when the report is complex in content and its relevant analysis requires the expression of an opinion by specialists. For the same reasons, the court may take any other evidence permitted by law.

5.5.2. The guardian's discharge procedure

1. Discharge falls within the subject-matter jurisdiction of the guardianship court, in this case the court of first instance. Article 162 para. (1) of the Civil Code provides that "the court of guardianship shall discharge the guardian from his or her management". From a territorial point of view, the court in whose territorial district the current domicile or residence of the person under guardianship is located has jurisdiction, pursuant to Art. 114 para. (1) C. pr. civ. An application for discharge is also within the jurisdiction of this court in cases where the guardianship is definitively terminated.

2. In practice, in the same process, the courts decide to approve the general account and discharge the guardian. This case-law confirms the conclusion that the verification of the accounts and the discharge are successive operations which are carried out in the same process.

5.5.3. Guardian's liability after discharge

1. Art. 162 para. (2) of the Civil Code provides that the guardian is liable for the damage caused by his fault, even if the guardianship court has discharged him. This text regulates a *sui generis* case of tortious civil liability. *A fortiori*, the guardian is also liable in tort to the minor for the damage caused intentionally. Discharge does not act as a ground for releasing the guardian from his tortious civil liability for damage caused to the minor through his fault before that date. In order for the guardian to be held liable on this ground, the damage must have been caused by the guardian in the performance of his or her activity of managing the minor's property. In the absence of a legal exception, the guardian shall be liable for the slightest fault.

2. The liability of the guardian shall be excluded where the right of action is barred by prescription or where there is a cause of action which exculpates the guardian from civil liability.

3. In the silence of the legislator, Article 162 para. (2) of the Civil Code applies in all situations where a general report is submitted to the guardianship court and the guardian is discharged, regardless of whether the guardianship has definitively terminated or only the guardian's function has ceased.

5.5.4. Liability of a guardian who has replaced another guardian

1. Art. 162 para. (3) of the Civil Code regulates an unprecedented duty of diligence of a guardian who has replaced another guardian. In concrete terms, he is obliged to require the guardian whom he has replaced to make reparation for the damage caused to the minor through his fault. This obligation continues after the new guardian has been discharged. During the guardianship, this obligation is circumscribed to the guardian's role of safeguarding the minor's property interests. After discharge, it is an obligation incumbent on any guardian.

2. Strictly legally, Article 162 para. (3) of the Civil Code regulates a *sui generis* case of tortious civil liability for another person's act. The basis of liability is the idea of promoting the best interests of the minor beneficiary of the guardianship.

SECTION 5.6.
GUARDIAN'S RESPONSIBILITY

5.6.1. Preliminaries

1. The question of the legal liability of the guardian for failure to fulfill or defective fulfillment of duties has arisen since Roman law.

2. In the Romanian area, the Calimach Code and the Caragea Code did not provide special rules on the guardian liability for the way in which he fulfilled his duties. The Calimach Code regulated only the cases of removal of the guardian from the guardianship (criminal conviction, lack of guarantees for the "good upbringing of the unmarried or the useful management of his property" and misbehavior), and the Caragea Code only the conditions that the person had to fulfill in order to be appointed guardian.

3. Art. 384-389 of the previous Civil Code regulated the incapacity to be guardian, exclusion from guardianship, respectively removal from guardianship. Under the terms of this code, removal from guardianship acted as a specific sanction imposed on the guardian.

4. When the Family Code was in force, the guardian's liability could be administrative, civil or criminal. For failure to fulfill his or her duties, the guardian could be subject to special liability (removal from guardianship) and, where appropriate, ordinary civil liability and criminal liability.

5. The current Civil Code introduces important novelties as regards the legal liability of the guardian, including the complaint against the guardian, the civil fine and the guardian's liability as administrator of the minor's property. The forms of liability known in the previous regulations are still the same: removal from guardianship, ordinary tort liability for one's own fault or the fault of the minor, contravention liability and criminal liability.

6. Since common law tort liability, criminal liability and tort liability are the subject of analysis for other subjects of law, in this doctoral thesis I present only the issues of guardian's liability: the complaint against the guardian, the civil fine, removal from guardianship and the limits of the guardian's liability as administrator of the minor's property. In order to avoid repetition, neither the tortious civil liability of the guardian after discharge nor the liability of a guardian who has replaced another guardian are dealt with in the context.

5.6.2. Complaining against the guardian's acts and deeds

6.2.2.1. General

1. Taking over with modifications Art. 138 para. (1) of the Family Code, Article 155 of the Civil Code lays down the legal regime for complaints against acts and deeds of the guardian that are detrimental to the minor. Unlike the previous regulation, there are important new elements.

2. The complaint is in the nature of a legal action available to persons entitled by law to ask the guardianship court to find that certain acts and actions of the guardian are harmful to the minor and to decide to hold him or her legally liable. From the guardianship court's point of view, the settlement of the complaint enables it to carry out an *ex post* review of the way in which the guardian has exercised his duties with regard to the minor's person and property.

3. Article 155 Civil Code is based on the idea of promoting the best interests of the minor. This is the reason that led the legislator to derogate from the principle of availability by enabling other persons to bring the complaint. It also departs from the requirement in ordinary civil procedural law that the interest in suing must be personal.

4. Provided that the harmful acts or deeds of the guardian are among those referred to in Article 158 of the Civil Code, regardless of the quality of the person who brings the complaint, it may be accompanied by a request for removal of the guardian from the guardianship.

5. If the complaint is brought by the minor, it may also be accompanied by a claim for damages to cover the damage caused by the acts or deeds of the guardian.

5.6.2.2. Admissibility of the complaint

1. For the complaint to be admissible, regardless of who lodges it, the acts and deeds of the guardian must be harmful to the minor. In other words, the complainant must prove that the admission of the complaint is in the best interests of the minor. The acts or deeds of the guardian harmful to the minor must have been committed in the exercise of the guardianship. If the acts or omissions of the guardian are not connected with the exercise of the guardianship, any damage caused by the guardian to the minor may be covered by an action for damages but brought under ordinary law.

2. The acts or deeds harmful to the minor are the basis of the complaint regardless of the nature of the damage: moral or patrimonial.

5.6.2.3. Legal standing

1. The complaint may be lodged by the minor under the age of 14, the family council, its members, as well as by the persons, authorities and institutions referred to in art. 111 Civil Code. In other words, anyone can be the holder/holder of the complaint. The wide circle of natural and legal persons entitled to lodge a complaint is established in the best interests of the minor.

2. The persons entitled to lodge a complaint do not include a minor under the age of 14. Since the acts or actions of the guardian may also be detrimental to him, the omission of this minor is surprising. It was probably considered that the minor does not have the legal capacity to exercise legal standing and therefore does not have the legal possibility to lodge the complaint himself. However, there is the remedy of lodging the complaint by way of representation, through a special guardian appointed by the guardianship court under Article 150 para. (1) of the Civil Code. The failure to legitimize this minor with the right to lodge a complaint is contrary to his best interests and the principle of non-discrimination. To eliminate this situation, I propose that, *de lege ferenda*, amending Article 155 para. (1) of the Civil Code by replacing the expression 'minor who has reached the age of 14' with the term 'minor'.

3. Under the condition that the minor under the age of 14 years brings the complaint, he or she has the status of party. The law recognizes the full legal capacity of the minor. This is the only way to explain the fact that he can bring the complaint alone, without assistance. The complaint may also be lodged by the public prosecutor under Article 92 para. (1) C. pr. civ. Contrary to the previous regulation, the complaint may also be lodged by the family council or by any member of it. Although

it is not their task to supervise the activity of the guardian, it is presumed that the persons, authorities or institutions referred to in art. 111 of the Civil Code are also aware of acts and actions of the guardian that are harmful to the minor, either by the nature of the activities they carry out or because of their relations with the minor. By way of derogation from the common law on procedural matters, these persons are not required to prove that they have a personal interest in bringing the action.

5.6.2.4. Jurisdiction and complaint handling procedure

1. The court has subject-matter jurisdiction as guardianship court. Territorial jurisdiction shall lie with the court within whose territorial jurisdiction the domicile or residence of the minor is situated. Under Article 155 para. (2) of the Civil Code, the complaint is dealt with as a matter of urgency. From a procedural point of view, the requirement that the complaint be dealt with as a matter of urgency is stricter than the requirement that it be dealt with immediately, since it entails the application of special and precise procedural rules laid down by the Code of Civil Procedure for urgent cases.

2. The parties and the members of the family council have been summoned, which shows that the proceedings are contentious, and that the adversarial principle is duly applicable. Summoning the guardian as defendant is based on respect for his rights of defense. If the complaint is brought by a person other than the members of the family council, they will be brought into the case ex officio. Given the conflict of interest between the minor and the guardian, in the absence of a special guardian appointed under Article 150 para. (1) of the Civil Code, the guardianship court will appoint a special guardian in accordance with Article 58 para. (2) C. pr. civ. The minor, irrespective of the level of capacity, should also be summoned in cases where the complaint is brought by another person. His or her participation in the resolution of the case is based on the purpose of the complaint, the protection of his or her best interests. Moreover, the judicial procedure concerns him, which is why he has the right to express his opinion and to be heard. Inexplicably, Article 155 para. (2), thesis II of the Civil Code provides that the court will hear a minor who has reached the age of 10 only if it deems it necessary. Given that hearing the child is a right of the child and an obligation for the judicial authority, if the minor is 10 years old, the legal text is surprising. For these reasons, I recommend that the *legislature* repeal Article 155 para. (2) thesis II of the Civil Code. As a result, the hearing of this minor becomes mandatory under common law. On request, the guardianship court is also obliged to hear the minor under ten years of age. There is nothing to prevent the guardianship court from administering other evidence admitted by law.

3. The court shall issue an enforceable judgment in accordance with Article 155 para. (2) of the Civil Code. It may be amended by appeal. The judgment may be enforceable by operation of law, but only provisionally. The time limit for lodging an appeal or the lodging of an appeal shall not suspend enforcement. If the complaint is upheld, the guardianship court may order the removal of the guardian from the guardianship and order him to pay a civil fine.

5.6.3. Civil fine

5.6.3.1. General

Article 163 of the Civil Code regulates civil fines. By its legal nature, the civil fine is a special pecuniary sanction, applicable to the guardian in the cases and under the conditions provided for by law. The name suggests that the sanction is civil in nature, although it has pecuniary content. Its purpose is to induce the guardian to continue to exercise his guardianship, i.e. to show diligence in the performance of his duties regarding the minor's person and property.

5.6.3.2. Situations in which a civil fine may be imposed and its amount

1. Article 163 of the Civil Code provides for two cases in which the guardianship court may impose a civil fine. To these must be added the case provided for in Article 160 para. (4) of the Civil Code. As the last case has been presented in the context of the general report, I will present only the cases provided for in Art. 163 Civil Code.

2. The first case is where the guardian unjustifiably refuses to continue the guardianship. The refusal is justified if the guardian is in one of the situations set out in Article 120 para. (2) of the Civil Code. If the guardian unreasonably refuses to continue the guardianship, the guardianship court may impose a civil fine, which may not be higher than one minimum wage. The wording is permissive. As a result, depending on the circumstances of the case, the guardianship court has a discretion. If the guardian has been fined three times and has not resumed his duties, the guardianship court appoints another guardian. The guardian may also be removed from the guardianship on the grounds that he is not fulfilling his duties. Until the new guardian takes up his duties, the guardianship court may appoint a special guardian.

3. The second case is where the guardian, through his or her own fault, fails to fulfill the guardianship duty. In this case, the guardian is liable to pay a civil fine not exceeding three times the average wage. In contrast to the previous case, although the guardian performs his or her duties, he or she does so defectively through fault, in other words, through negligence or recklessness. *A fortiori*, Article 163 para. (2) of the Civil Code is also applicable where the guardian fails to perform his duties in bad faith or, in other words, where he acts with intent. Another important difference is

that the guardianship court is not free to choose whether or not to impose a civil fine, since the text imperatively provides that the guardian "shall be liable to pay a civil fine". Even more so if the guardian has acted in bad faith. In the case provided for by Article 163 para. (2) of the Civil Code, the fine may not exceed three times the average wage.

5.6.3.3. Setting the fine

Art. 163 para. (3) of the Civil Code provides that the fine shall be imposed by the guardianship court by an enforceable judgment. It may be appealed to the court. The order may be enforced provisionally. The time allowed for lodging an appeal or lodging an appeal does not suspend enforcement. Whatever the facts for which it is imposed, the fine is paid into the State budget.

5.6.4. Removal from guardianship

5.6.4.1. General

1. Strictly in legal terms, removal from guardianship is a cause of termination of the guardian's function, which usually occurs as a specific non-pecuniary civil sanction.

2. Contrary to some strong doctrinal emphases, removal from guardianship is not in all cases in the legal nature of a sanction imposed on the guardian. Removal acts as a sanction only in cases where the reasons are imputable to the guardian.

5.6.4.2. Grounds for removal from guardianship attributable to the guardian

1. Article 158 of the Civil Code lists three grounds for removal of the guardian from guardianship: abuse, gross negligence and inadequate fulfillment of the task. Generic, it mentions "other cases provided by law".

2. As a rule, the reasons for removal are attributable to the guardian. From this point of view, the typical cases are the three listed in Article 158 of the Civil Code. Other cases provided for by law may also be attributable to the guardian.

3. The analysis of the grounds for removal listed in art. 158 Civil Code does not confirm the requirement that the violations must be systematic or, in other words, that the guardian must persist in committing them. On the contrary, Art. 158 C. Civ. refers to abuse, negligence, i.e. improper performance of duties. Except for misbehavior, the analysis of the cases provided for in Art. 113 para. (1) of the Civil Code does not confirm the requirement of being systematic. The condition of gross negligence is only laid down for negligence. From this point of view, in the best interests of the minor, the legislator has shown intransigence for the guardian's conduct in the performance of his duties.

4. Abuse is the exercise of powers over the person or property of a minor outside the limits permitted by law or contrary to the law, with the aim of harming the minor or causing him or her harm. There is also abuse where the guardian exercises a particular power excessively or unreasonably, contrary to good faith. It is also abusive if the guardian unreasonably refuses to allow a minor who has reached the age of 14 to have a residence determined by the nature of his or her education or vocational training, or to prevent the minor from attending compulsory general education. For removal from guardianship on this ground, it is sufficient that the guardian has committed only one abuse. This is a natural solution, since the guardian's bad faith is incompatible with promoting the best interests of the minor.

5. The next ground is gross negligence on the part of the guardian. In contrast to the previous regulations, Article 16 of the Civil Code sets out the meaning of the forms of culpability (intent and culpa) and its modalities (direct and indirect intent, culpa with foreseeability and culpa without foreseeability). In concrete terms, the act is committed negligently (negligence with foreseeability) if the person foresees the result of his or her act but does not accept it, unreasonably assuming that it will not occur. The fault is severe (*culpa lata*) if the person has acted with negligence or recklessness that even the most unskillful person would not show towards his own interests. Strictly in law, the person is not grossly negligent, but a certain act is committed with gross negligence. This may include, for example, the act of a guardian neglecting to discharge his duty of supervision of a minor to protect him from danger or to prevent him from committing acts harmful to other persons or to prevent him from vagrancy, begging or prostitution. Depending on the consequences of the lack of supervision, the guardian may be liable to civil, administrative or criminal proceedings in addition to removal from guardianship.

6. The last reason mentioned in Article 158 of the Civil Code is that the guardian does not fulfill his or her duties properly. In other words, the guardian fails to fulfill his legal duties with regard to the person or property of the minor.

5.6.4.3. Removal from guardianship procedure

In the absence of special procedural rules, the removal of a guardian shall follow the same procedure as that laid down by law for his appointment. For the same reasoning, the same procedure also applies where the removal is based on Article 158 of the Civil Code. Art. 119 Civil Code is correspondingly applicable. In practice, the new guardian is usually appointed by the same judgment.

3.6.5. The limits of the guardian's liability as administrator of the minor's property

1. As the trustee entrusted with simple administration, the guardian is bound by the provisions of Title V (Administration of the property of another person) of Book III (on property). Article 802 of the Civil Code (limits of the administrator's liability) and Article 812 of the Civil Code (conditions under which the court may order the administrator's liability to be reduced) shall apply to him accordingly.

2. In that capacity, the guardian shall be bound by his or her obligations under the law. If the minor suffers injury as a result of his or her failure to comply with his or her legal obligations, the guardian shall be liable under ordinary law.

3. Art. 802 para. (2) of the Civil Code establishes a particular case of the *res perit domino* principle. In concrete terms, the administrator is not liable for the damage suffered by the beneficiary for the deterioration of the goods due to force majeure, age, perishable nature or use. The exemption from liability under Art. 802 para. (2) of the Civil Code is based on the fact that the destruction of the property is not attributable to the guardian. If the assets have perished due to a situation of force majeure, the absence of fault on the part of the guardian cannot be contested. For the person facing a case of force majeure, it is objective.

4. Where the assets administered by the guardian have perished due to their age, perishable nature or use, Article 802 para. (2) must be read in conjunction with Article 144 para. (4) of the Civil Code, which obliges the guardian, as administrator of the minor's property, even without the consent of the family council and the authorization of the guardianship court, to dispose of property subject to deterioration, degradation, alteration or depreciation, as well as property that has become useless to the minor. The fact that the guardian did not dispose of these goods and let them perish can be analyzed as a lack of diligence and, in substance, as a failure to fulfill a legal duty. In this case, the guardian will be liable for the damage caused to the minor.

5. As an exception to the principle of full coverage of damages, under Article 812 of the Civil Code, the court, considering the circumstances in which the administration was assumed and its gratuitous nature, may order a reduction in the extent of the damages. Article 812 of the Civil Code is also applicable in matters of guardianship of a minor, since the assumption of this task is voluntary and, in principle, exercised free of charge.

CONCLUSIONS AND PROPOSALS FOR *LEGE FERENDA*

1. As was to be anticipated, the elaboration of the doctoral thesis on "Alternative guardianship of the child in the current Romanian Civil Code" proved to be a laborious scientific endeavor, in the realization of which I had to overcome numerous obstacles, among which the most difficult were generated by the vastness of the regulations circumscribed to this legal institution, by the numerous and complex connections with other private or public law institutions, as well as by the coexistence of novel elements with those taken from previous Romanian regulations or from other legal systems.

2. In a rational manner, for the conception and realization of the legal regime of the guardianship of a minor, the authors of the Romanian Civil Code opted for combining elements of continuity with numerous aspects of novelty.

From the perspective of continuity, with adjustments and additions determined by the new regulatory context in Romania, certain solutions from previous regulations have been taken over, such as: the cases in which guardianship of a minor is established; the persons obliged to notify the guardianship court of the existence of a minor deprived of the guardianship of both parents; the situations of incompatibility with the capacity of guardian; the gratuitousness of guardianship; the personal nature of guardianship; the situations in which the person may refuse to continue the guardianship task; the type of education and vocational training which the minor beneficiary of the guardianship receives; the inventory of the minor's property; the determination of the annual sum necessary for the maintenance of the minor and the administration of the minor's property; complaints against acts and actions of the guardian which are detrimental to the minor; cases of removal of the guardian from the guardianship.

In terms of novelty, many solutions are inspired by foreign regulations, in particular the French Civil Code and the Civil Code of Quebec, the main models for the Romanian Civil Code. This category includes, for example The competence of the guardianship court to establish the guardianship, appoint the guardian and remove from the guardianship, as well as control over the way the guardian and the family council fulfill their duties; the possibility of exercising the guardianship by husband and wife together; the appointment of a single guardian in the case of several siblings being in a situation of being beneficiaries of the guardianship; the appointment of the guardian by the parent; voluntary assumption of the guardianship by the guardian; the possibility of setting up a family council to supervise the guardian's activity and advise the guardian, as well as a guardianship court; the appropriate application of the Civil Code rules on the legal regime for the

administration of the property of another person; the possibility of imposing a civil fine on the guardian or other persons. All this has made a significant contribution to reshaping the legal system of guardianship of minors and to genuinely increasing the chances of promoting their best interests in this way.

3. In addition to these are the important amendments and additions made by Law no. 140/2022, from the perspective of the cases in which guardianship is established, the persons, authorities and institutions obliged to notify the guardianship court of the existence of a minor in one of the situations provided for by Article 110 of the Civil Code, incompatibilities with the capacity of guardian, the appointment of the guardian by the parent, the appointment of a personal representative of the minor, legal acts prohibited to the minor and the protection of the minor by the establishment of special guardianship. Numerous provisions of Law 140/2022 required a significant effort of interpretation and correlation with other legal provisions. The legislator, aware of the perfectibility of this important and innovative normative act for the protection of persons with intellectual and psychosocial disabilities, obliges the ANPDPD and the CSM, after three years from its entry into force, to draw up reports on its impact and, if necessary, to substantiate proposals for the improvement of the legislation in this field.

4. In a critical register, I have noted that the authors of the current Civil Code, motivated by the idea of preserving or reverting to certain solutions from previous legislation, have neglected to harmonize the regulations on the guardianship of minors with those on the protection and promotion of children's rights. The very name 'guardianship of minors', under which this important legal institution is referred to, and its topography in the Civil Code, support the attachment to the rules laid down in the Civil Code of 1864. The fact that the CRC establishes the right of the child to alternative protection is overlooked, while Law No 272/2004, reaffirming this right, sets out the forms in which it may be exercised: guardianship, special protection measures and adoption. The child's eligibility for guardianship is the consequence of the exercise of this right. The rules governing guardianship, like those for adoption and special protection measures, cannot be dissociated from the principles in accordance with which the rights of the child are respected and guaranteed, including, in the first place, the best interests of the child. The legal system of guardianship must be based on these principles. Despite this desire, the current legal regime of guardianship of minors circumscribes certain questionable legal provisions. The classic example is Article 133 of the Civil Code, which has taken over, with amendments, Article 114 of the Family Code, but without bringing it into line with Article 6 (a) of Law No 272/2004, which lays down the

principle of respect for and promotion of the best interests of the child as a priority in all actions concerning him or her, including those of a regulatory nature. Other aspects also reveal the lack of a well-founded concern to circumscribe this legal institution to the requirements demanded by the protection and promotion of children's rights: a generic case is not provided for the establishment of guardianship such as to cover all possible practical situations in which the child is temporarily or permanently deprived of parental care or it is not in the child's best interests to be left in their care; the condition of prior attestation by the future guardian as to the fulfillment of the moral and material conditions to cope with the duties of guardianship in the best interests of the child is not regulated; as in the previous regulations, the legislator focused more on the guardian's duties in relation to the minor's property and not enough on those relating to the person of the minor; some regulatory inadequacies are taken over from the previous regulations; sometimes the language used in the construction of certain legal rules is not harmonized with the fact that guardianship is a form of alternative protection of the child, etc. All these aspects have been analyzed in the PhD thesis, and appropriate proposals of *lege ferenda have been* made to remedy them.

5. In order to eliminate the source of different interpretations and to achieve a uniform judicial practice in matters of guardianship of minors, following the model of the legal regime of adoption and special protection measures, it is useful to establish common procedural rules, such as: settlement of cases according to the ordinary non-litigious procedure; territorial jurisdiction of the guardianship court of the domicile or residence of the minor for the settlement of all applications in the matter; settlement of cases in urgent cases; hearing of the child under art. 29 of Law no. 272/2004; social inquiry under Law no. 292/2011; mandatory participation of the public prosecutor in the judgment of the applications in the matter; finality of the decisions in the matter, etc.

6. In line with the rules of legislative technique, it remains an important issue for the legislator to concentrate in the same legislative act the rules on parental childcare and alternative forms of protection. As part of this approach, terminology should be unified, so that the term child is used consistently in the construction of legal rules for alternative forms and modalities of protection, regardless of the legal act or the context in which they are placed. The redundant expression 'placed under guardianship', taken from the previous regulation, should be abandoned and the term should be used in line with the fact that guardianship is a form of alternative care. Following the model of the regulations on legal aid and special guardianship, we have proposed the use of the expression 'beneficiary of guardianship'.

To avoid repetition, among the many proposals of *lege ferenda* substantiated in the doctoral thesis, we have selected in context some of them, without claiming that they are the most significant.

1. Between the meaning of the term child, provided for in Art. 1 of the CRC, on the one hand, and that established by Art. 4 letter a) of Law no. 272/2004 and Art. 263 para. (5) of the Civil Code, on the other hand, there is an important mismatch which calls into question the legal significance of this important legal concept in Romanian law. Under international law, the status of a natural person as a child is determined exclusively by his or her age, which is under 18 years of age or younger. In Romanian law, a child is a minor natural person who does not have full exercise capacity. Art. 1 of the CRC circumscribes the notion of child to all categories of minors: without exercise capacity, with restricted exercise capacity and with full exercise capacity. On the other hand, under Article 4(a) of Law No 272/2004 and Article 263 para. (5) of the Civil Code, only minors without capacity and those with restricted capacity are children. Being more comprehensive, the international regulation is more favorable, which is why it has priority in application. Under these circumstances, the Romanian legislator has several options, among which: to harmonize domestic regulations with Art. 1 of the CRC; to promote an amendment to amend Art. 1 of the CRC accordingly (to consider as a child a person who has not reached the age of 18 and does not have full capacity). This would mean launching a lengthy procedure for the revision of the CRC, with little chance of completion. However, the Romanian authorities would have the opportunity to present to the Member States the arguments on which the national legislator based its choice of the meaning of the term child.

2. Art. 507 para. (1) of the Civil Code provides for cases in which parental authority is exercised by a single parent. By the same reasoning, it should be exercised by a single parent in all cases in which the other parent is in one of the situations provided for by Article 110 of the Civil Code or Article 44 para. (1) of Law No 272/2004, which gives rise to the child's right to alternative care, including guardianship. Contrary to this wish, not all cases are explicitly or implicitly included in the list provided for by Art. 507 para. (1) of the Civil Code. To eliminate this inconsistency, I have proposed that the legislature reword Article 507 para. (1) of the Civil Code, as follows: "parental authority is exercised by one parent only if the other parent is in one of the situations provided for by law allowing the establishment of guardianship".

3. For the sake of the identity of reasoning and the unity of the regulation, the rule of reference provided for in Article 135 para. (1), thesis II of the Civil Code should also be extended to the situation where guardianship is exercised by a single natural person or by the surviving guardian

spouse. At present, the provisions on parental authority are properly applicable only where guardianship is exercised by husband and wife together.

4. Between Article 110 of the Civil Code, on the one hand, and Articles 54 and 65 paras. (1) and para. (2) and Articles 55 letter. a) and Art. 66 para. (1) letter. e) of the Criminal Code, on the other hand, there is a mismatch of expression. While the former refers to "the criminal penalty of the prohibition of parental rights", the latter refers to the accessory or complementary criminal penalty of "the prohibition of the exercise of parental rights". Moreover, the provisions of both the Civil Code and the Criminal Code call into question compliance with Article 53 of the Constitution, which only allows for "restriction of the exercise of certain rights and freedoms" and not the prohibition of rights or their exercise, which is why we suggested that the legislator amend these legal provisions to refer to "restriction of the exercise of parental rights".

5. Article 133 of the Civil Code, which is intended to exercise guardianship in the best interests of the minor, is not correlated with the regulations on the protection and promotion of the rights of the child, which consider the best interests of the child both at the time the measure is established and during its exercise. To achieve this correlation, Article 133 of the Civil Code must be reworded as follows: 'guardianship is established and exercised in the best interests of the minor'. In the interests of the flow of the rules, the topography of this article should be changed in the context of the rules on the opening of guardianship of minors.

6. To eliminate the source of differing interpretations of the content of guardianship, a new article should be inserted after Article 133 of the Civil Code, providing that 'in the exercise of guardianship, the guardian has the rights and duties of the parents in respect of the person and property of the minor, unless otherwise provided by law'. This rule would serve as a reference to all the rules designed to ensure parental care of the child. The current provisions on guardianship would only provide for derogation from them. The amendment is in line with the proposal to extend the reference rule laid down in Article 135 para (1) thesis II of the Civil Code.

7. Intended for the expression of the child's views and listening to the child, Article 264 of the Civil Code is not consistent with the requirements of Article 12 of the CRC and, compared to Article 29 of Law No 272/2004, has generated parallelism. For these reasons, it would be appropriate to replace Article 264 of the Civil Code with a reference rule stating that 'the expression of the child’s views and the child's hearing shall be carried out in accordance with the law'. As a result, Article 29 of Law No 272/2004 would become applicable. The same remedy is provided for by all the provisions of the Civil Code which refer to the proper application of Article 264.

8. For the expression of the child's views and the child's hearing in judicial or administrative proceedings concerning him or her to be relevant and conclusive, the child must be informed, which means that he or she must have been informed beforehand. During the hearing, the child should be assisted by a specialized person, which is why I consider it appropriate to add a new paragraph to Article 29 of Law No 272/2004, stipulating that 'the hearing of a child under the age of 10 shall be carried out in the presence of a psychologist and only after prior preparation'.

9. To eliminate the source of differing interpretations on the role of the family council in the guardianship of a minor, to eliminate repetitions and to economize on the text, Art. 124 para. (1) of the Civil Code should be reworded as follows: "The family council supervises the exercise of guardianship. At the request of the guardian or the guardianship court, it gives advisory opinions. In specific cases provided for by law, the family council shall give binding opinions or adopt decisions'. In these circumstances, Article 130 para. (1) of the Civil Code becomes unnecessary and should be repealed.

10. In order to eliminate the source of different interpretations on the issue of the participation of the guardian and the minor in family council meetings, it is appropriate for the legislator to intervene to supplement Article 129 of the Civil Code with a new paragraph, which would provide, following the model of the Civil Code of Quebec, the obligation of the guardian to attend family council meetings, as well as the possibility of the council to invite the child.

11. The Civil Code does not lay down rules on the role of substitute members of the family council. In accordance with their designation, until the appointment of other persons, the substitute members should replace by right those who, being in a situation of incompatibility, can no longer act in that capacity. In the same way, substitute members should also attend the meetings of the family council in place of members who are unable to attend, which is why Article 125 para (3) of the Civil Code, a new sentence should be inserted setting out these duties for substitute members.

12. To eliminate the inconsistent practice with regard to the competent authority to draw up the social inquiry report, in Article 119 of the Civil Code, after para. (2), a new paragraph should be inserted to provide that "the fulfillment of the material conditions and material guarantees by the guardian shall be established on the basis of the social inquiry report drawn up in accordance with the law". As a result, the provisions of Law No 292/2011, which lay down this attribution for social services within local public administration authorities, would become applicable.

13. Where the minor is married, the incompatibility of the minor being a guardian calls into question respect for the principle of equality of spouses in marriage. The child's right to live in a

family environment is also affected. For these reasons, an exception to Article 113 para (1) (a) thesis II of the Civil Code, for cases where the minor is married and exercises guardianship together with her spouse. This exception reinforces the extensive interpretation of Art. 113 para. (1) letter a) thesis I Civil Code.

14. To eliminate the source of different interpretations on the possibility for parents to appoint the guardian by a joint legal act, it is appropriate for the legislator to intervene in order to introduce, in Article 114 of the Civil Code, after paragraph. (1), a new paragraph providing that "the parents may appoint the guardian by the same unilateral legal act or by an agreement concluded in authentic form".

15. By way of derogation from the common law in non-contentious matters, the judgment appointing the guardian is final. For the sake of consistency of reasoning and unity of the rules, Article 128 of the Civil Code, which is intended to establish the family council, should be supplemented by a new paragraph providing that 'the guardianship court shall establish the family council by a final judgment'.

16. In practice, some courts, in the same trial, decide on the establishment of guardianship and the appointment of guardian by a final judgment, while others establish guardianship and appoint guardian by an appealable judgment. This inconsistent practice is due to the legislature's failure to specify the nature of the judgment establishing guardianship. In the interests of the unity of the rules, it is normal that the establishment of guardianship, like the appointment of guardian, should be determined by a final judgment. This remedy emphasizes the indissoluble link between the establishment of the guardianship and the appointment of the guardian. As a result, I consider it appropriate to introduce a paragraph, possibly in Article 110 of the Civil Code, stating that 'guardianship shall be established by the guardianship court by final judgment'.

17. Intended for the exercise of guardianship in cases where one of the spouses initiates divorce proceedings, Article 135 para. (2) of the Civil Code concerns divorce by judicial process on grounds of fault, divorce on health grounds and divorce on grounds of a prolonged separation in fact. *Per a contrario,* it is not applicable to divorce by agreement of the spouses, regardless of the procedure followed. For the same reasoning, the guardianship court should also rule on the exercise of guardianship in the event of an application for dissolution of the marriage by agreement. To eliminate this situation, Article 135 para. (2) of the Civil Code should be amended by replacing the expression 'divorce action' with 'divorce petition'.

18. The legislator has not been concerned with the situation in which an action for nullity or annulment of the marriage is brought by spouses who jointly exercise guardianship. Even in such cases the best interests of the minor are at stake, which is why we have expressed the opinion that it is necessary for the legislature to intervene in order to introduce a reference rule providing that "the provisions of Art. 135 para. (2) of the Civil Code shall apply accordingly where the court is seised with an application for nullity or annulment of the marriage".

19. Care, upbringing and supervision of the minor by the guardian are inconceivable if they do not live together. Within the framework of parental authority, it is provided that the child shall reside with the parents. The child's domicile with the parents is determined in the context of the rules on the identification of the natural person. If the minor is under parental authority, both the domicile and the residence are with the parents. For the same reasoning, this solution should also be adopted if the minor is under the guardianship of a guardian. We have therefore proposed that the legislature amend Article 137 para. (1) of the Civil Code as follows: "The minor shall live with the guardian. Only with the authorization of the guardianship court, he may have another residence". As a result of this amendment, the minor's residence with the guardian would be expressly enshrined in law in matters of guardianship, and his domicile would remain with the guardian under the rules designed to identify the natural person.

20. In the situation where guardianship is exercised by the spouses together, the provisions on parental authority are duly applicable, in accordance with Art. 135 para. (1), thesis II of the Civil Code, which is why Article 495 of the Civil Code (return of the child) is also applicable. It seems unreasonable that the right to request the return of the child should not also be recognized to the person who is the sole guardian. To remedy this situation, we have proposed to the legislature that a new paragraph be added *de lege ferenda* to Article 137 of the Civil Code (domicile of the minor), stipulating that "the provisions of Article 495 remain applicable".

21. For the same reasoning, the applicability of the rules of territorial jurisdiction set out in Article 114 of the Code of Civil Procedure should be extended to measures for the protection of the individual provided for by special laws. To achieve this objective, Article 114 para. (1) C. pr. civ. should be amended by replacing the expression Civil Code with the term law.

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