

THE GUARDIANSHIP MANDATE

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Abstract:

The guardianship mandate is a new type of mandate, unfamiliar to traditional Romanian law, inspired by the modern legislation of other states such as Quebec, France, and Belgium. It aims to meet the requirements of the 2007 United Nations Convention on the Rights of Persons with Disabilities, ratified by Romania, as well as the Decision of the Romanian Constitutional Court No. 601 of July 16, 2020. This decision imposes the reconfiguration of the protection system for persons with disabilities by adapting the measures taken to provide minimal legal intervention in their lives, particularly regarding their legal capacity. This type of mandate is unique and takes the form of a solemn contract that is valid only when scripted in authentic notarial form, and its effects come into play only when there is a deterioration of mental faculties, following the procedure established by law.

This article aims to analyze the new type of contract based on its characteristics, the approval procedure, and its effects, while also considering comparative law.

Keywords: *guardianship mandate, protection of persons with disabilities, legal capacity*

Introduction

The protection of individuals with intellectual and psychosocial disabilities is regulated by Law No. 140 of May 17, 2022, regarding certain measures for the protection of individuals with intellectual and psychological disabilities. This law is intended to complement and amend several normative acts, including the Civil Code and the Code of Civil Procedure, and was published in the Official Gazette No. 500 of May 20, 2022.

This law is the Romanian legislator's response to the Decision of the Romanian Constitutional Court No. 601/2020, published in the Official Gazette of Romania, Part I, No. 88 of January 27, 2021. This decision refers to the unconstitutionality exception of the provisions of Article 164 paragraph (1) of Law No. 287/2009 on the Civil Code, republished with subsequent amendments, published in the Official Gazette of Romania, Part I, No. 88 of January 27, 2021. The Romanian constitutional court ruled that the provisions of Article 164 paragraph (1) of the Civil Code, which established that a person lacking the necessary discernment to care for their own interests due to mental alienation

or debilitation, should be placed under judicial interdiction, were inconsistent with the constitutional provisions contained in Article 1 paragraph (3), Article 16 paragraph (1), and Article 50, as interpreted in light of Article 12 of the Convention on the Rights of Persons with Disabilities. Article 20 paragraph (1).

The protection of individuals with intellectual and psychosocial disabilities can take various forms regulated by Law 140/2022, such as assistance in concluding legal acts. However, the most important forms, intended to replace the former institution of judicial interdiction, are two: judicial counseling and special guardianship, treated in Chapter III, which amend Articles 164-177 of the Civil Code, which previously represented the judicial interdiction, as well as other provisions of the Civil Code.

Thus, Law no. 140/2022 provides several protection measures for people with intellectual and psychosocial disabilities, with a different legal nature: conventional (assistance at the conclusion of the legal act), judicial (judicial counseling, special guardianship and guardianship) and mixed (mandate of protection and guardianship), when the interested party appointed, by authentic deed, a curator.[1]

The legislative solutions proposed, essentially aim to reconfigure (and rename) the current institution of judicial interdiction and create a new protective mechanism - judicial counseling. The entire legislative framework is based on three fundamental pillars: necessity (the protective regime is established with the purpose of adequately safeguarding the vulnerable person), subsidiarity (protective measures for adults are ordered only when the court deems that other measures provided by law are insufficient to safeguard the interests of the person under protection, applying the general legal rules for protecting a general or specific interest, those concerning representation or assistance, those relating to the rights and obligations of spouses, or approving a guardianship mandate concluded by the person in question), and proportionality (the protective regime corresponds to the degree of incapacity and is individualized according to the needs of the person under protection and the circumstances they face)[2].

Legal Provisioning

The legal framework for protective measures through legal counseling or special guardianship is primarily provided by Articles 164-177 of the Civil Code, in terms of

substantive conditions, and Articles 936-943 of the Code of Civil Procedure, in terms of procedural conditions. The placement under protection of individuals with intellectual and psychosocial disabilities is normatively established to replace the institution of interdiction, which is substantially modified in terms of conditions, procedure, effects, and termination.

Both interdiction and protective measures have as a common element the essential condition of a pre-existing illness, documented in medical records based on specialized evaluations.

Based on the provisions of Article 164 of the Civil Code, we can define the placement under protection of adults with intellectual and psychological disabilities through legal counseling or special guardianship as a civil protective measure, which is ordered only by the court, for adults or minors with limited legal capacity who, due to medical conditions (reflected in specialized documents based on medical and psychosocial evaluations) leading to the deterioration of mental faculties, whether temporary or permanent, partial or total, require support in their care and interests, to the extent that taking this measure is necessary for exercising their legal capacity on an equal basis with others.

Regardless of the chosen form of protection (legal counseling or special guardianship), the appointed person to exercise the role of guardian will be named from the date of the final decision, according to Article 170 of the Civil Code.

Following the example of modern legislations, the Romanian legislator has adopted the possibility for individuals who may benefit from a protective measure in the future to appoint a guardian through a new form of civil mandate, the guardianship mandate.

The guardianship mandate is regulated in Article 166 of the Civil Code, which states in paragraph 1 that *any person with full legal capacity can designate, through a unilateral act or agreement executed in authentic form, the person to be appointed as a guardian to take care of their person and assets in case they are placed under legal counseling or special guardianship.*

Paragraph 2 of the same article provides that *"a person with full legal capacity or a person benefiting from legal counseling may conclude a guardianship mandate for the*

situation where they are no longer able to take care of themselves or manage their assets."

Article 2009 of the Civil Code has also been amended by Law 170/2022, so that in paragraph 1, the mandate contract is defined as "the contract by which one party, called the mandatary, undertakes to conclude one or more legal acts on behalf of the other party, called the mandator," and paragraph 2 is dedicated to the guardianship mandate itself, stating that "*the mandate may also include the conclusion of acts aimed at ensuring the protection of the mandator's person, the administration, in whole or in part, of their assets, and, in general, their moral and material well-being.*"

Article 2016, paragraph 2 of the Civil Code provides that "*to conclude acts of alienation or encumbrance, transactions or compromises, to be bound by bills of exchange or promissory notes, or to file legal actions, as well as to conclude any other acts of disposal, the mandatary must be expressly empowered, except when the guardianship mandate explicitly authorizes the mandatary with full administration of the mandator's assets.*"

In Book V, Title IX, Chapter IX, Section 2 of the Civil Code, after Article 2,029, a new paragraph, § 3¹, comprising Articles 2,029¹-2,029¹⁰, is introduced, dedicated to the regulation of the mandate of protection.

As it is a separate contract of mandate, the mandate of protection has a special regime. Article 2016(2) of the Civil Code provides the possibility for the mandatary in such a contract, if granted full authority to administer the mandator's assets, to perform any act of disposal or encumbrance, transactions or compromises, including the obligation to issue bills of exchange or promissory notes or to initiate legal actions, all of which are normally within the competence of a mandatary with a special power of attorney.

Article 2029(1) of the Civil Code captures the specificity of this type of contract, stating that "the mandate of protection is given by a person with full legal capacity for the situation in which they can no longer take care of themselves or manage their assets. The mandate of protection can also be given by an adult who benefits from legal counseling, with the consent of the legal guardian and the authorization of the guardianship court."

Therefore, the mandate of protection will only take effect in the event that the mandator becomes incapable of taking care of themselves or their assets in the future,

as a result of a significant deterioration of their mental faculties, which will be ascertained through a medical and psychological evaluation.

The new regulation is welcome and intended to provide a certain level of control to a person who, prudently relying on a family history or presumed or early diagnosed conditions, wishes to ensure that in the event of a deterioration of their mental faculties preventing them from taking care of themselves or their assets, they can designate a trusted person to take care of them and their interests.

The mandatary can be a person with full legal capacity, as well as an adult for whom the measure of legal counseling has been instituted, provided that their mental faculties are only partially impaired, with the consent of the legal guardian and the authorization of the guardianship court. Such a provision was necessary, especially since a person who has already been subjected to legal counseling can reasonably anticipate the need for someone to fully take care of their person or assets in the future.

In the future, the mandate of protection may become a widely practiced extrajudicial protective measure, as there are areas of intersection with those established through a maintenance contract, which enjoys extensive practical applicability, as it can assign the mandatary with the care of the mandator and their living conditions after the onset of incapacity, in accordance with Article 2029(2), paragraph 2.

The form in which this type of mandate contract is concluded is, as explicitly provided in Article 2029¹, an authentic notarial form. It will be registered in the National Notarial Registry of Powers of Attorney to comply with the publicity requirements that allow third parties to know the specifics of the contracting party.

Although the contract is validly concluded by fulfilling the specific substantive and formal conditions of this solemn contract, its execution will be conditioned by the occurrence of mental faculties deterioration of the mandator, as determined through medical and psychological evaluation reports, and by the approval of the guardianship court, at the request of the designated mandatary in the contract, as stipulated in Article 2029(1), paragraph 4 of the Civil Code.

Therefore, the invoked legal text imposes a dual condition: the ascertainment of the deterioration of the mandator's mental faculties through a dual medical and psychological evaluation, following the methodology set forth in Order no.

3423/2128/2022 of November 11, 2022, regarding the approval of the methodology and the report on the medical and psychological evaluation of persons with intellectual and psychosocial disabilities in the context of the imposition, extension, replacement, or lifting of protective measures, as well as the approval of the guardianship court through the procedure regulated by the Code of Civil Procedure.

Even though Article 2029(1), paragraph 5 of the Civil Code provides that "the guardianship court may, when approving the mandate in order to prevent serious harm to the mandator, take any necessary measures to protect the person of the mandator, represent them in the exercise of their rights and freedoms, or administer their property. The choice of such measures, when they do not complete the protective mandate but modify those decided by the protected person, must be made in accordance with the principles of necessity, subsidiarity, and proportionality.[3]

The object of the protective mandate contract may include, in addition to the conclusion of legal acts on behalf of the mandator and the conclusion of acts aimed at ensuring the protection of the mandator's person or the administration, in whole or in part, of their property, the well-being of the mandator, both morally and materially, as provided in Article 2009 of the Civil Code.

Furthermore, the contract will also include "the person designated by the mandator to whom the mandatary must account, as well as the frequency of fulfilling this obligation, which cannot exceed 3 years. If the mandator has not designated such a person, it will be designated by the guardianship court when approving the mandate," according to Article 2029(2) of the Civil Code.

The obligations of the mandatary are listed in Article 2029(3) of the Civil Code and are an expression of the principles that should govern the protection of persons with disabilities, as enunciated in the New York Convention, stating that "any decision regarding the execution of the mandate is taken in the best interest of the mandator and ensures respect for their dignity, rights, and freedoms, as well as the preservation of their will, needs, preferences, and the safeguarding of their autonomy."

This article directly refers to the applicability of Article 174(1) and (2) which regulate the obligations of the guardian, with the mandatary being a guardian designated in advance by the protected person, subject to court approval.

In specialized doctrine [4], it has been noted the absence of the requirement for periodic verification, at a precisely established time interval, of the continued existence of the conditions that warrant the application of the extrajudicial protective measure. Although there is always the formal possibility for the mandator, once capable again, to revoke the mandate, as well as the possibility for the mandatary, the healthcare institution providing periodic care, or even close relatives to notify the guardianship court to determine the termination of the protective mandate, it has been appreciated that meeting the requirements demanded by the decision of the Constitutional Court also requires mandatory periodic reassessment for this form of protection established by the vulnerable person, similar to the one provided for legal counseling (3 years) or guardianship (5 years). This is because, hypothetically, the protective mandate can operate independently of these protective measures.

When the scope of the protective mandate is doubtful, the mandatary interprets it according to the rules regarding the special guardianship of adults, as indicated in Article 2029⁴ of the Civil Code.

But what happens when the protective mandate is not comprehensive enough regarding the care of the person or the administration of their property?

The answer is provided by Article 2029⁵ of the Civil Code, which allows, in the procedure for approving the mandate or subsequently, separate from it, the guardianship court to order a protective measure that complements it. In such a case, the mandatary will be appointed "with priority as the guardian in the function of the mandatary from the protective mandate contract. If the mandatary also fulfills the function of the guardian, they will continue to perform their mandate and, at the request and at least once a year, they will submit a report to the guardian of the mandator, and at the end of the mandate, they will also account to them."

Therefore, the aim is to cover all the needs of the protected person, including by adopting a mixed system that combines extrajudicial protection resulting from the protective mandate and the judicial, subsidiary protection, meant only to supplement the shortcomings of the protective mandate, giving priority to respecting the parties' will and preferably appointing the mandatary as the guardian.

Among the obligations of the mandatary, when entrusted with the administration of the principal's assets, is the obligation to inventory the principal's assets. This obligation must be fulfilled within 10 days from the approval of the protective mandate contract, which is transmitted, in copy, to the guardianship court and to the person to whom the mandatary is accountable, designated according to Article 2029², paragraph 2. The provisions of Articles 820-822 apply if the parties have not agreed otherwise in the contract, as stated in Article 2029⁶ of the Civil Code.

The legal regime of acts concluded by the mandatary is regulated in Article 2029⁷ of the Civil Code, making a distinction between acts concluded by the mandatary before the approval of the protective mandate, which can be annulled or the obligations arising from them can be reduced only if, at the time they were concluded, the lack of discernment was notorious or known to the other party. In contrast, legal acts concluded by the mandatary after the approval of the mandate and incompatible with its provisions cannot be annulled, and the obligations arising from them can only be reduced if the mandatary suffered a prejudice.

Therefore, the law imposes the condition of prejudice when examining an action for the annulment of a legal act concluded by the mandatary, a person protected by the ongoing execution of the protective mandate following its approval by the guardianship court, with a third party, regardless of whether the latter was aware of the mandatary's situation or not, similar to the regime of the lesion.

The ways in which the protective mandate contract ceases are provided in Article 2030 of the Civil Code, which states that, in addition to the general causes of termination of the mandate contract, the following special cases apply: revocation of the contract by the mandatary, renunciation by the mandatated, death, incapacity or bankruptcy of the mandatary or mandated. Additionally, the regaining of the mandatary's capacity to exercise rights, as provided in Article 2029⁹ of the Civil Code.

Regarding the determination of the termination of the mandate execution, the holder of the application for determination, to be addressed to the guardianship court, can be the mandatary, to whom this legal obligation is legally incumbent, the healthcare institution where the principal is being cared for, as well as the principal who has regained capacity.

Similarly to the initiation of the contract execution, the termination of the contract execution is also determined by the court, which will analyze whether the mandatary has regained the capacity to exercise rights and therefore whether it is no longer necessary for the administration of their assets or decisions regarding the mandatary's person to be made by the mandated.

Revocation of the protective mandate can be done by the mandatary before its approval by notifying the revocation to the mandated and the notary public who drew up the document. The mandated can also renounce the mandate by notifying the renunciation to the mandatary and the notary public, as stipulated in Article 2031⁴ of the Civil Code.

However, revocation can also be requested by any of the persons mentioned in Article 111 of the Civil Code, the same as in the case of revocation of guardianship, in the event that the mandate is not properly executed. These persons can address the court to request both the revocation of the mandate and the fulfillment of the mandated's obligation to account, as well as a protective measure to prevent harm to the principal.

In line with the primary safeguarding of the principal's interests, the possibility of renunciation of the mandate by the mandatary is also regulated in Article 2029(10) of the Civil Code.

According to the mentioned legal text, the mandated cannot renounce their mandate without substituting another person for the execution of the mandate, if expressly authorized by the mandatary, or without requesting the guardianship court to institute a protective measure regarding the mandatary. Any contrary clause is considered null and void. The person substituting the mandated is obliged to immediately notify the guardianship court of the substitution.

The other causes for termination of the protective mandate contract concern the death, incapacity, or bankruptcy of one of the parties. (1) In the event of death, incapacity, or bankruptcy of one of the parties, the heirs or representatives of that party have the obligation to immediately inform the other party. In the case of the protective mandate, the mandated shall promptly inform the guardianship court about the death of the mandatary. (2) In the case provided for in paragraph (1), the mandated or their heirs or representatives are obliged to continue the execution of the mandate if the delay would

endanger the interests of the mandatary or their heirs. In the case of the protective mandate, the heirs or representatives of the mandated shall promptly request the guardianship court to take protective measures regarding the person of the mandatary.

By Law 170/2022, the Code of Civil Procedure was also amended, which dedicates Book VI, Title II, Chapter II to the procedure for approval of the protective mandate, comprising Articles 943¹-943⁷.

The competent court to adjudicate the request for approval is the court at the domicile of the principal or, as the case may be, the domicile of the beneficiary of the protective mandate, maintaining the already established rule in the general procedure, namely the domicile of the protected person.

The request for approval of the protective mandate exclusively has as its holder, as indicated in Article 943² Civil procedure code, the mandated named in the contract.

In specialized doctrine, it has been proposed that it might not be without practical utility to extend the possibility of submitting the request to the guardianship court by the vulnerable person (when their discernment is only diminished) as well as by other family members, especially since, according to the legislative proposal, the revocation of the protective mandate is expected to use the same procedure, apparently including the requester (in contradiction with the proposed amendment to Article 2030² Civil Code)[5].

The request shall be accompanied by a copy of the protective mandate contract, medical and psychological evaluation reports as provided in Article 938⁶, and, if applicable, the report provided for in Article 938³, drawn up no more than two months before the date of submission to the court. In the case provided for in Article 114(6) of the Civil Code, the death certificate of the mandatary or, as the case may be, the evidence regarding the reasons why they can no longer fulfill their guardianship duties towards the beneficiary of the protective mandate shall also be included, as well as a copy of the decision by which special guardianship was established for them.

As preliminary measures, Article 943³ Civil procedure code, provides for the communication of a copy of the request together with the attached documents to the mandatary or the beneficiary of the mandate, to the prosecutor, and to the person designated to be accountable.

By resolution, the court shall also order verifications in the National Notarial Register kept in electronic format if "the protective mandate has not been revoked by the mandatary or if the mandated has not renounced the mandate," requesting the instrumenting notary to transmit, electronically, a certified copy of the contract, according to Article 943³ Civil procedure Code.

The procedure for approval of the protective mandate is clearly non-contentious, as the law establishes that it shall take place entirely in chambers, with the short-term citation of the mandatary or, as the case may be, the beneficiary of the protective mandate and the mandatary, and with the participation of the prosecutor.

The procedure requires that the court must hear the mandatary or, as the case may be, the beneficiary of the mandate, asking them questions to ascertain the necessity and appropriateness of approving the protective mandate, in order to personally assess the condition of the principal.

Article 943⁴ of the Civil procedure code. establishes that the court verifies whether the principal has designated a person to whom the mandated must be accountable in the contract, and if not, designates such a person with their consent.

The law does not specify whether the agreement must be in writing, in an authentic or private signature deed, or oral, taken directly in front of the court. Without such specification, it means that it can be given in any of these forms.

The court shall approve the protective mandate by means of a concluding order, subject only to appeal, and after the finality of the order approving the protective mandate, the court that issued it shall immediately communicate its dispositif, in certified copy, to the institutions provided for in Article 941, as well as to the notary public who drafted the protective mandate.[6]

In French law, in 2007, as a result of the conclusion of the New York Convention, the explicit regulation of this form of extrajudicial protection, called a future protection mandate, was established.

It allows the mandatary to designate in advance one or more persons, designated mandataries in the contract, who will protect the personal and/or patrimonial interests of the mandator in the event of their mental incapacity.

The French Civil Code provides for two types of future protection mandates: the first type is the mandate for oneself, which can be concluded by any adult or emancipated minor with one or more persons designated to represent them for the day when they will no longer be able to care for their own interests due to a medically established impairment of their mental or physical faculties that prevents them from expressing their will, according to Article 425 of the Civil Code.

The second type of future protection mandate allows parents of children with disabilities to designate one or more mandataries to represent them in the event that the child is unable to take care of their own interests due to a medically established impairment of their mental or physical faculties that prevents them from expressing their will.

Unlike Romanian law, under French legislation, the future protection mandate can be concluded either in a private signature document or in an authentic document and will be registered in a special register.

The procedure for approving the future protection mandate is simplified and differs from the one adopted by the Romanian legislator, being more of an administrative procedure. Thus, for the approval of the mandate, the mandatary will request the determination of the health status of the mandator by one of the doctors listed in an approved list, and once the document is obtained, they will appear together with the mandator - the mandator's presence not being mandatory if there is a medical certificate attesting that their presence is not compatible with their health status - at the registry office of the judicial or proximity court at the mandator's domicile and will submit, along with the mentioned medical document, the original or certified copy of the future protection mandate, the identification documents of the parties, and proof of the mandator's domicile.

The control carried out by the clerk is purely formal, as they will verify that the mandator was of legal age or an emancipated minor at the time of drafting the mandate, the methods of verifying the activities of the mandatary are expressly provided, that the lawyer countersigned the mandate in the case of a private signature mandate, that the mandatary as a legal person is listed in a special list, and if the conditions are met, the

clerk will initial each page of the mandate and will mention, at the end of the document, that this mandate will take effect from the date of submission to the court registry.

The procedure will involve a judge only if the clerk refuses to approve the mandate, considering that the purely formal conditions are not met, in which case the judge can decide without hearings, and if the request for approval is granted, the judge will order the clerk to initial the mandate. If the request is rejected, the rejection order is not subject to appeal.

In conclusion, the regulation of the protective mandate for persons with disabilities is welcome and necessary in national law, even if the adopted legislation does not provide an answer to all the questions that may arise in practical situations, judicial practice being expected to provide a comprehensive interpretation of the legal norms in order to resolve the situations that arise.

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