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THE PRECLUSION OF PARENTS FROM THEIR PARENTAL RIGHTS - THE MOST SEVERE SANCTION APPLICABLE TO PARENTS FOR MISMANAGING THEIR PARENTAL DUTIES

Exercising inadequately or not exercising the parental rights at all as well as not fulfilling or fulfilling inadequately the parental duties bring sanctions that may be applied to the parents. The preclusion from the exercise of the parental rights¹ is the most severe sanction that may be applied to parents that have not exercised or do not, at present, exercise adequately the parental protection, having as an effect the loss of their parental rights.

Establishing the situations that may determine the proposition to apply this sanction - the source of the material is constituted by art. 109 of the Family Code that establishes the following: "If **the health and physical development of the child is endangered** by the way in which the parental rights are exercised, **by abusive behavior** or **by severe negligence in fulfilling the parental duties** or if the child's education, learning or professional training is not conducted in the spirit of devotion for Romania, the Court of Law, at the request of the tutelary authority, will pronounce the preclusion of the parent from his parental rights. Citing the parents and the tutelary authority is mandatory."

From the ideas mentioned above, it results that applying the preclusion of the parent from the parental rights is conditioned by the fact that these rights have been exercised by abusive behavior or by severe negligence, both able to endanger the child's health or physical development². Consequently, this behavior must not presuppose only aggression, violence or conviction for abandoning the family, but also

¹ See I. Imbrescu, "Treaty of Family Law", Lumina Lex Publishing House, Bucharest, 2006, pp. 421-426; A. Corhan, "Family Law. Theory and Practice", Revised and completed 2nd edition, Lumina Lex Publishing House, Bucharest, 2008, pp. 449-457;

² C.A. Bacău, decision no. 54/18.06.2001, maintained by a civil decision no. 2295/2002 of C.S.J., apud D. Tițian, Constantin Antonia, Cîrstea Mihaela, "The Annotated Family Code", Hamangiu Publishing House, Bucharest, 2008, 2nd Edition, pg. 381

depriving the underage child of his subsistence means, which may endanger the child's health and physical development¹.

In other words, the preclusion of one person from his/her parental rights is disposed for parents only for deeds of a certain degree of severity, when there are no other possibilities in order to determine them to change their conduct.

Thus, the family code states the limits of the situations in which the declining from parental rights may intervene: abusive behavior or severe negligence in fulfilling the parental duties.

The law no. 272/2004 defines in art. 89 the abuse and negligence of the child as follows:

By **abuse on the child** is understood any voluntary action of a person that is in a

➤ relationship of responsibility, trust or authority with the child, by which the child's life, physical, mental, spiritual, moral or social development, his corporal integrity, physical or mental health are endangered.

➤ By **negligence of the child** we understand the voluntary or involuntary omission, from a person that has the responsibility to raise, take care of and educate the child, taking any measure subordinated to this responsibility, fact that may endanger the child's life, his physical, mental, spiritual, moral or social development, his corporal integrity, his physical or mental health.

If the representatives of the general department of social assistance establish that there are good reasons to support the existence of a situation of imminent danger for the child due to abuse and neglect, the general department of social assistance and child protection informs the court of law, requesting the issuing of a **presidential decree to place the child urgently** in the care of a person, a family, a maternal assistant or in a residential type of shelter.²In 48 hours after the date, the presidential decree has been executed, decree that has disposed the urgent placement of the child, the general department of social assistance and child protection informs the court of law in order to decide upon: replacing the urgent

¹ C.S.J., s.civ., dec.no. 2396/10.17.1997, în B.J. 1997, pg. 65, apud D.Tițian, et.al., op.cit., pp. 381

² According to art. 94 par.3 from the Law no. 272/2004

placement of the child with the simple placement, **the total or partial preclusion from the exercise of parental rights**, as well as on exercising the parental rights¹.

As it can be observed, the special law brings more indications regarding the definition of abuse and negligence and it also establishes that the representatives of the general department of social assistance and child protection have the right to inform the court of law in order for the preclusion from the parental rights to take place.

Putting together the two normative laws, there can be observed that the values they protect by applying sanctions to the parents are²: the child's life, corporal integrity, the physical and mental health, his physical, mental, spiritual, or social development, education or professional training.

The court of law may be as well informed for the preclusion from the parental rights by **both the representatives of the tutelary authority and the representatives of the general department of social assistance and child protection**, but also by **the public prosecutor**³.

By analyzing the stipulations of the Family Code and those of the Law no 272, we can see that there are situations when the preclusion from the parental rights may be still solicited by the tutelary authority. We consider especially the situation in which only one of the parents manifests inadequate exercises as far as his parental rights are concerned while the other parent demonstrates an adequate attitude in managing his/her parental duties. In this case, as it is not necessary to take measures to protect the child, the tutelary authority may solicit the preclusion from the parental rights for the guilty parent, without involving the general department of social assistance and child protection. Nevertheless, the literature⁴ says that no matter who is responsible for informing the court of law, there is really the need of a report referring to the child, made by the representatives of the general department of social assistance and child protection. We consider this opinion correct as subsequently, the representatives of the general department of social assistance and child protection must ensure the counseling of the parent for which the

¹ According to art. 94 par.4 from the Law no. 272/2004

² A.Corhan, op.cit., pg. 450

³ According to art. 45 from the Civil Code

⁴ I.Imbrescu, op.cit., pg. 423

preclusion from his parental rights has been adopted in the view of regaining these rights.

In practice, the preclusion of the parent from his parental rights is a sanction that is recommended quite rarely and usually by the representatives of the general department of social assistance and child protection and not by the tutelary authority.

In addition, when analyzing the par. 3 and 4 of the art. 94 of the Law no. 272/2004 carefully, we notice that, especially when a child is separated by his parents through a presidential decree, due to the imminent danger that he/she is in, in the care of his/her parents, the court of law must be notified for the preclusion from the parental rights of the parent/parents. There must be mentioned that, before separating the child from his parents, the public service of social assistance or the people that have attributions of social assistant have the obligation of taking all the necessary measures to find out the situations of risk that may determine the separation of the child from his parents as well as to prevent the abusive behavior of the parents towards their children¹.

Any separation of the child from his parents, as well as any limitation of exercising the parental rights must be preceded by systematically offering services and necessary actions, the focus being on counseling, a thorough informing of the parents, based on a service plan². The service plan is made and put into practice by the public service of social assistance or the people with social assistant attributions from the City Hall, as a result of evaluating the situation of the child and his family.

The service plan has as a goal to prevent the child from being separated from his family but it may have as a result taking the case to the general department of social assistance and child protection in order to ask for special protection measures for the child³.

The general department of social assistance and child protection must inform the court of law when it finds out that all the conditions stipulated by the law have been met for the preclusion from the parental rights of one or both parents⁴.

¹ According to art. 34 par.1 from the Law no. 272/2004

² According to art. 34 par.2 from the Law no. 272/2004

³ According to art. 35 from the Law no. 272/2004

⁴ According to art. 36 par. 3 from the Law no. 272/2004

The court of law is the only competent authority to pronounce itself regarding the preclusion from the parental rights and restoring the parental rights¹.

2. Establishing the competence of the court of law and the procedure that has to be followed in applying the sanction – both the Family Code and the Law no 272/2004 establish the fact that the court of law is the only one competent to give a sentence on the preclusion from the exercise of the parental rights². But none of these normative acts establishes, however, which court of law is competent to judge such a case.

Until the Civil Code has been modified by the O.U.G no. 58/2003, this competence was that of the court of law of first instance. Because now the law does not specify which courts of law is competent from a material point of view, according to art.1 par. 1 of the Civil Code, that stipulates that the courts of law solve, in the first instance, all the law suits and requests, except those attributed by law to other courts of law, the competence to solve the requests having as an object the preclusion from the exercise of the parental rights belongs to the court of law of first instance.

In the specialty literature there was also the opinion³ according to which when the preclusion from the parental rights is requested as a result of putting into practice a presidential decree of placing a child urgently, the competence belongs to the court of law by prorogation of judgment competence, because this sanction is requested along with alternative measures to protect the child.

However, there are situations when the measure of urgently placing the child is instituted by the disposition of the general manager of the general department of social assistance and child protection and the deeds of the parents subscribe to the conditions requested by law to solicit the preclusion from their parental rights. The urgent placement, in this case, may be replaced by simple placement, wardship or reintegration in the natural family and the law does not expressly impose on the General Department of social assistance and child protection to solicit the

¹ According to art. 38 from the Law no. 272/2004

² According to art. 109 from the Family Code and art. 38 from the Law no. 272/2004

³ E. Florian, „The Protection of the child’s Rights”, C.H.Beck Publishing House, Bucharest, 2007, pp. 108

preclusion from the parental rights. Consequently, there was appreciated that in this situation, the preclusion from the parental rights will be solicited in a separate suit, the cause being sent to the local court, not to the higher court. At the court of law too, there will also be analysed the petition for the establishment of the trust. In these cases, we should not discuss anymore the competence extension problem¹.

This division of the competences is not efficient, due to the following reasons:

- The purpose of the Law No. 272/2004, the one to protect the rights of the child, will be achieved in a better way if the same court (eventually a court specialised in the underage children cases) will be called in order to pronounce upon all the situations that require the intervention in favour of the child, court that will have a full comprehension upon the situation of every child;
- The trial court has a larger volume of work than the court of law and insufficient experience in causes so delicate regarding underage children.

It is clear that the law maker intended to give to the court of law in this matter of child protection only the competence regarding the special child protection measures (placement in emergency situations, placement, specialised surveillance), competence that results very clear from the article 124 paragraph 1 of the Law No. 272/2004: «The causes stipulated by the present Law regarding the establishment of the special protection measures are the competence of the court of law from the child's residing area».

Unfortunately, this alternative competence for solving the causes that regard underage children leads to a more difficult resolution and to a slowing of the solution for the cases of the children for which a protection measure has been established or will be established, possibly leading to delays in the solution of the juridical situation of the children and in the identification of the ways to exercise the parents' rights.

From the territorial point of view, the competent court is the one from the address of the defendant, according to article 5 of the Civil Procedure Code.

Another aspect that must be mentioned is the one of the subpoena persons in the causes that have as an object the preclusion of the parental rights Article 109 Paragraph 2 of the Family Code establishes the fact that

¹ A. Corhan, op.cit., pp. 452-453

the citation of the parents and of the tutelary authority is compulsory. The Law No. 272/2004¹ establishes that the general direction for social assistance and child protection from the residence of the child or from the territorial-administrative area where the child has been found makes and presents to the court the report referring to the child that will include data regarding:

- a) The personality, the physical and the mental condition of the child;
- b) The socio-medical and the educational background of the child;
- c) The conditions in which the child was raised and the conditions in which he lived;
- d) Propositions regarding the person, the family or the residential service where the child could be placed;
- e) Any other data regarding the growth and the education of the child that can help reaching for a solution in this cause.

Also the special Law establishes the fact that any child that is capable of judgement has the right to freely express his opinion upon a problem that regards him. The child has the right to be listened in any judicial or administrative procedure and the listening of the child that has 10 years old is mandatory. Even more, the child that has not reached the age of 10 years can be listened, if the court appreciates that this thing is necessary². Although it is imposed that the underage child must be assisted by a psychologist that must know the background of the child when the child is heard by the court and the hearing must be made in the council room.

The court can manage any evidence that is considered as necessary in order to correctly solve the case. The judging of the request for the preclusion of the parental rights is made using the rules of the common procedural law.

The court can appreciate if the request is grounded and can dispose the preclusion of the parental rights for both parents or only for one of the parents. According to the Law No. 272/2004³, the preclusion can be total or partial. In the case of the partial preclusion the court will establish the

¹ Art. 130 al. 1

² According to art. 24 of Law no. 272/2004

³ According to art. 36 par.3 of Law no. 272/2004

rights that make up the object of the preclusion.¹ This delimitation of the preclusion of the parental rights in "total preclusion" and "partial preclusion" is not right in my opinion, taking into account the fact that the legislator does not make any statement concerning the practical modality in which there is going to be established when it is imposed the total preclusion and when it is imposed the partial preclusion of the parental rights. Furthermore, taking into account that this sanction is proposed only for serious deviations from the exertion of the parental rights, we will not be able to appreciate when the deviation is more serious and when it is less serious in order to propose the total or partial preclusion of the parent/parents from the parental rights, the consequences of the abuse and the neglect of the child not being able to be quantified.

3.The effects of the preclusion of the parental rights - as a result of the application of the preclusion sanction, the parent loses both categories of rights (the one concerning the child as well as the ones concerning the child's goods), as well as their parental obligations. It will be maintained only the obligation of the child support² and the right to consent to his/her child adoption³.

The parent precluded from his rights can maintain personal relationships with the underage child if through these relationships the growing up, the education, the studies and the professional preparation of the child would not be jeopardised⁴. We considered that the court of law that pronounced the sentence of preclusion of the parental rights must pronounce itself also upon the necessity of maintaining the personal relationships with the child, because if we talk about a serious abuse upon the child (physical, emotional or sexual), that determined the sanction of the parent or of the parents, the maintaining of the personal relationships with the child is not indicated, this thing triggering the difficult recovery of the child after the trauma that he had.

If the preclusion acts upon only one of the parents, the other parent exerts alone the protection of the child⁵. If both parents are precluded from

¹ E. Florian, op.cit., pp. 104-112;but also D.Lupașcu, „Family Law”, Ed. Universul Juridic, Bucharest, 2008, p. 339

² According to art. 110 of the Family Code

³ According to art. 62 par. 3 of the Law no. 272/2004 and art. 12 al. 2 of the Law no. 273/2004

⁴ According to art. 111 of the Family Code

⁵ According to art. 98 par.2 of the Family Code

the parental rights, or the only parent is precluded from his rights, the trust must be established, because the child cannot remain without the legal tutor¹.

The preclusion can be pronounced concerning the exertion of the parental rights upon one of the children or upon all the children, according to the behaviour of the sanctioned parent or parents.

The preclusion also attracts some side effects such as: the inability to be a tutor² and the inability to adopt.

1. The restoration of the parental rights exercise - the parent who is precluded of the parental rights can be restored back in his rights if the events that led to his preclusion have stopped, in a manner in which, by the restoration of these rights the growing up, the education, the learning process and the professional preparation of the child are not jeopardised. Only the court of law is able to decide the restoration of the parental rights exercise³.

The special law establishes the obligation of the general direction for social assistance and child protection to take all the measures so as the parents precluded from their rights must benefit from specialised assistance in order to increase their capability of taking care of the child, having the aim of restoration of the parental rights exercise. The parents who request the restoration of the parental rights exercise benefit of free juridical assistance from the general direction for social assistance and child protection⁴.

Although it is not specifically stated in any legal document that details the stipulations of the Law No. 272/2004, it is imposed that, taking into account the serious events that determined the proposal of preclusion of the parental rights, the restoration of the parental rights should be realised only after the parent who was precluded attended some psychological guidance and therapy courses for the development of their parental abilities.

¹ According to art. 113 of the Family Code and art. 40 par. 1 of the Law no. 272/2004

² According to art. 117 lit.b of the Family Code

³ According to art. 112 of the Family Code and art. 38 lit. d of the Law no. 272/2004

⁴ According to art. 37 of the Law no. 272/2004

2. **Conclusions:** the preclusion of the parental rights exercise is indeed, the most serious sanction that can be applied to a parent who did not fulfil or mismanaged his parental obligations. We must not neglect the fact that this sanction must be applied only after some proceedings have been made so that the guilty parent to be made responsible and aware upon the consequences of his fact upon the education of the child. In Romania, there are not enough services of this type that are offered to the parents and there were not made enough efforts to change the parents' mentalities towards the modalities of education and the growing up of the child. There must be set up some "parents' schools" and day care centres in order to offer support to the children that are to be found in risk situations as well as to the parents. The Law No. 272/2004 establishes the obligation of the general direction of social assistance and child's protection to take all the measures so that the parents who are precluded from their rights to benefit by specialised assistance to increase their ability to take care of the child with the aim of restoration of the parental rights exercise. The parents that request the restoration of the parental rights exercise benefit from free juridical assistance from the general direction of social assistance and child's protection. Although it is not specifically stated in any legal document that details the stipulations of the Law No. 272/2004, it is imposed that, taking into account the serious events that determined the proposal of preclusion of the parental rights, the restoration of the parental rights should be realised only after the parent who was precluded attended some psychological guidance and therapy courses for the development of their parental abilities.

Last but not least, must be modified the Law No. 272/2004 concerning the protection and the promotion of the child's rights, because the quotation "total or partial preclusion" is totally inadequate taking into account the situations that determine the application of the rights preclusion measure and the fact that the judge has anyway the obligation to establish the modality of maintaining the personal connections with the child depending upon the fact pattern that determined the application of the sanction.

We also hope that very soon the underage courts will be established in which specially trained prosecutors will work dealing with underage cases. This way we can talk about the celerity and the efficiency in the activity of child's protection.