



Guarding in the Countries of the Western Balkans as the Part of Family Law

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Abstract: Guarding is one of the most important legal institutes of the family law. That is one of the forms of social protection of children without parental care and it differs from adoption. According to the legislation in the Western Balkan countries where there are differences and similarities, the subject to guarding are not only children whose parents have passed away but children whose parent are alive could be the subject of guarding, as well: children left and children whose parents are not able to execute parental care. The organized placement of children from a family to the other is done by both, by parents and by the state competent organ. Besides children, subject to guarding could be also persons that have no children, persons that overcome the age to gain the action capability and that this capacity have not gained based in different reasons. Finally persons that had the capability to act but that that capability was taken by a state organ could be subject of guarding. Law of the Balkans countries regulates guarding in property even in cases when the property has the owner and also in the cases when the owner is not known by institutions. During the analysis, we will see how the organ that decides on guarding taken the decision and of the legislative procedures regulate the process of putting a person under the guardianship.

Keywords: right; law; guarding; care; children

Introduction

The main goal of guardianship is care for persons that that cannot or do not know to care about themselves. This ancient is seen since the Law on XII Tables. With this paper there are analyzed laws of the countries from the region and there were not noted big differences between them. In all countries the guardian is determined form the Organ of Guardianship but the final decision is taken from the Court whereas in some countries the final decision is taken from the Organ of Guardianship. To establish or better said the final decision for setting off guardianship for a child or for a person who is without the ability to act, is taken from Principal Court where is the residence of the minor or the person being put under the guardianship. Because

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of the volume of the analysis the study is done only for minors and the analysis is not broadened for the person whose ability to act was taken off. These cases are basically similar but there are small differences. In addition to this there exist guardianship on the property of the person put under the guardianship and for the property whose owner is unknown. Paper analysis the legal norms in the countries of the Western Balkans which aspire to be part of EU and Croatia that is actually a member state. Apart of establishing the definition of guardianship the paper elaborates also the responsibilities of the guardian and the reasons why persons are put under the guardianship as well as the aims of putting the persons under the guardianship and their property. There are analyzed cases and why the guardian should be independent in exercising his duties, and when he should require special permission from the Guardianship Organ for his acts during the duties of guardianship. Guardian could be dismissed and this by the organ of guardianship only for the cases foreseen by the law.

The end of guardianship closes analyze by analyzing disposals in theory for the way of closing out the guardianship which is done by the death, by emancipation, by adoption and by getting the ability to act.

Guardianship

Guardianship is a very important institute of the family law. This old institute is known since the Roman Empire and it was also regulated with the Law on XII tables. Since children are the most important part of the family, state is obliged to care for them and especially for those that do not have parental care. To the children without parental care it is ensured a special protection as: guardianship, family shelter, residential shelter and adoption. (Ligji për Familjen, i Republikës së Kosovës, 2006, art.7, par. 2)

Apart adoption guardianship also is a phenomenon that as an institution impact the wellbeing of children without parental care or those whose parents are not alive. Apart children guardianship is exercised for persons that do not have ability to act. Ability to act is taken off by a court decision after a determined court procedure. Procedure for taking off the ability to act is an uncontested procedure and it is regulated by the Law on Civil Procedure. Apart these two phenomenon it is also the wealth of determined persons could be put under the guardianship and it is also the wealth whose owner is unknown could be put under the guardianship. Wealth/property is put under the guardianship of determined persons or determined

state institutions. Even though there are similarities in some aspects there are small differences. To the first one a special care should be given because of a minor, whereas to the second it has not to do with the well growth, education or schooling but only with the care. Guardianship on the persons whose ability to act is taken off is a guardianship on persons that are not capable to understand their behavior and their acts.

Albanian Family Code pays a big attention by approaching with some chapters each form of guardianship. It starts in the beginning with the guardianship on children and after that on persons with no ability to act. Guardianship in all countries of regions considered the marital obstacle. Therefore The Kosovo Family Law by its norms determines that marriage between guard and the person put under the guardianship is forbidden during the duration of guardianship (Ligji për Familjen, i Republikës së Kosovës, (2006), art. 24 par. 1). As a marital obstacle guardianship is considered to be also in Croatia and in Monte Negro. There are cases in Kosovo and in Albania when competent court may allow marriage between guardian and the person under guardianship.

According to all analyzed definitions, guardianship is placement of a minor or of a person whose ability to act is taken off or whose ability to act is limited so he should be under the care of a person or under the care of determined state organs. Guardianship is a way to protect child with no parental care, it is a way to protect persons with no ability to act who for different reasons cannot defend their rights and interests (Obiteljski & Hrvatske, 2015, art. 218). Under the guardianship is placed a child that is with no parental care or a person whose ability to act is taken off or a person that is not able to care for his own rights and duties. (Porodični & Crne, 2006, art. 178.) From all this it is seen that notability of persons means that acts and his behavior are put under the institutional care, so the care has to be either direct or indirect one.

Guardianship is a family law institute by which a person (guard) under the control of state organs is burdened to care on minors who don't have parental care, to protect and care the interests of other persons that are not capable to care and to protect their rights and their interests (Begeja, p. 309). From this we see that guardianship has several goals.

The aim of guardianship is protection of personality, wealth/property, rights and interests of minors and other persons that are unable to care themselves. (<http://njohligjin.al/familja/kujdestaria/>) The aim of guardianship is also placement in the family. The aim of placing an adult person under the guardianship is

protection of his rights and interests that were interrupted by court decision in the case of taking off the ability to act. (Obiteljski Zakon, Hrvatske, 2015, art 219, par. 2). With this case it is proved that a minor or a person without ability to act is not able to care for himself, therefore it is primary state obligation to care on them.

According to the Monte Negro law the aim of guardianship is care, education and schooling, characteristics which totally develop the personality of a person and the characteristics that make a child and an adult independent towards an independent life.

This law also as the other goal has the to ensure the care for a person who is not able to care personally for his interests, rights and duties. The goal is also care on property rights and other rights of a person put under the care whom are offered protection (Porodični & Crne, 2006, art. 179, par. 3). by norms determined by law.

Minors are put under the guardianship and enjoy special protection from the state where their parents are unable to exercise their parental responsibilities because both parents have died, these parents are unknown, are declared missing, their parental responsibility is taken off or their ability to act is taken off and for any other reason accepted by the court. (Kodi i Familjes, i Shqipërisë, 2016, art. 263, par. 2.) Person under care is the person about who it is decided.

Croatian Family Law, the issue of guardianship regulates with the fifth part of it. While the Monte Negro Family law regulates this institute with the sixth part. From all of this it is seen that guardianship is a state care on minors that has no parental care, institutional care on persons without ability to act and a care on property whose owner is unknown.

Principles of Guardianship

Minors are put under guardianship and enjoy special protection from public institutions, when children (their) are unable to exercise the parental right, when parents died, in cases when missing persons are declared dead or when the ability to act is taken of their parents or for whatever reason a person is put under the guardianship because of well growth or education of children.

With the guardianship like with the adoption the main goal is protection of the personality and the wellbeing of the child. In cases of property guardianship has the aim to care about the property without care from their owners. Guard of the child has the obligation to care on child either for the personality of child or/and the child's

property, and especially the child's health, education and schooling. (Obiteljski Zakon, Hrvatske, 2015, art. 227, par. 1).

Guardianship on Minors

Under the guardianship is placed a person that is not under the parental care. Article 216, paragraph 1 of Kosovo Family Law and article 263, paragraph 1 of Albanian Family Code regulates precisely who is put under the guardianship. Both laws determine that the competent court to decide on guardianship is the residence of the minor. While Croatian Family Law with the article 225 paragraph 1 emphasis that the responsible organ that decides on guardianship is the organ of guardianship. In Monte Negro the competent organ to decide on guardianship is organ of guardianship (Porodični & Crne, 2006, art. 180). But according to this law A special Commission of the Organ of Guardianship is created to value the amount of wealth the person to be put under the guardianship – if he has a big/lot of wealth/property (Porodični & Gore, 2006, art. 180, par. 4).

From the abovementioned analysis it is noted that in some countries the guardianship is established by two different organs. From Principal Court according to the Albanian Family Code and the Kosovo Family Law, whereas in Monte Negro and Croatia establishment of guardianship is done by the administrative organ – guardianship organ.

According to the law under the guardianship are put minors whose parents have died, missing persons are declared dead, persons whose parents are taken off the parents' rights as well as parents whose residence is not known for one month. (Obiteljski & Hrvatske, 2015, art. 224 par. 1)

Guard is obliged to care and for children education, especially for children health and education preparing him to become independent. Monte Negro law article 179 gives a definition of guardianship by determining as the main duty of a guard raise, education and schooling of the person under the guardianship towards an independent life and work.

It is important to stress out that guardianship is exercised from the guardianship via guard. Guard exercises his duty in the way as to be the parent. He should care on child as it is done by his parents.

Civil law as a part of law determines age when persons could start legal acts as well as when they could establish labor relations. Until age 14 as the legal representative

of child under guardianship is the guard. Minor under 14 years old cannot establish himself legal work, with the exception of some acts of very low relevance. For the acts he couldn't exercise permission from guardian is needed, whereas acts that guard cannot undertake it is a need for permission from the Organ of Guardianship (Ligji për Familjen, i Republikës së Kosovës, 2006, art. 217 par. 1). Guardianship has some functions that the guard has to fulfil and legal norms have determined that guard cares on minor, represents him in all legal deeds and administers his wealth according the disposal of this Code. (Kodi i Familjes, i Shqipërisë, 2016, art. 272). Guard is obliged to care for the personal rights and property rights of the minor and especially for the health, well growth and his education. (Zakon, Hrvatske & Zagreb, 2015, art. 227).

There are cases when minor can administer his property, he can establish labor relations and to administer his personal incomes as well as his wealth won with his judicial work. And it is also the minor under guardianship that with these incomes to contribute education and schooling and his food. (Ligji për Familjen, i Republikës së Kosovës, 2006, art. 217, paragrafi 2).

Croatian Family law in article 229 norms obligation of the child under guardianship and that he should contribute in tuition and education and in the healthcare if he has no material means. Article 230 of Croatian Family Law gives the right to the child to be informed and to decide for his future and for the issues that are important for the interests of child under guardianship. If this right is neglected then child has the right to appeal against the guard to the organ of guardianship to neglect the legal works established by guard. Croatia doesn't expressively emphasis the right to appeal of the guard to the organ of guardianship. Even though the guard has competencies over the care on child in many cases he should ensure special permit related to decisions important for the child especially in the cases when the person under guardianship is minor.

Competence of the guard is limited and he should get permission from the organ of guardianship whenever when: he sends out the child to the orphanage or to any other organization for children and minor for care, education and schooling, to believe the child to any person for education, well growth and care and/or to place child for a long time in the institution of health care, to decide about the profession of child under the guardianship or the selection of the profession of the child and to take any important decision regarding the personality and the interests of the child. (Ligji për Familjen, i Republikës së Kosovës, 2006, art. 219).

Monte Negro Law, article 201 in the same way treats cases when guard should ask for permission from the organ of guardianship when deciding on some important issues for child that is under his guardianship. All countries of the Western Balkans in the same way regulate the issue of request for permission submitted by guard to the organ of guardianship.

Types of Guardianship

Theory of the law recognizes many types of guardianship and they are divided in: basis of the number of persons under guardianship, on the basis of the volume and the nature of authorizations, based on duration of the function of the guardianship, etc.

Organ of the Guardianship

The organ of guardianship has the main role for the children without parental care. Guard together with this organ as a very big and complicated role in exercising his rights. His main role is care, education, schooling of child and the care on wealth of the person whose ability to work has been taken off (partially or totally). This organ exercises his duties directly and indirectly.

Directly the organ of guardianship exercises its duties without the participation of other persons. Indirectly the guardianship organ does its function and its care activities over the care on the personality, rights, interests and the wealth of the person by transmitting these duties to a person who exercises these duties under the supervision of the guardianship organ (Podvorica, 2011, p. 262).

Monte Negro Family Law says that the duties of the guardianship organ are exercised through a nominated guard or through an authorized person (Zakon & Gore, 2006, art. 181).

Duties of the guardianship organ are exercised indirectly through the guard. Based on the laws of the countries from the region the guard is determined by the organ if guardianship. As the guard could be every person which has personal qualities and needed abilities to fulfil duties of guard and which in advance has given hi agreement to be guard (Ligji për Familjen, i Republikës së Kosovës, 2006, art. 236, par. 2). The person nominated to be guard should be a physic person with the high human value qualities and the ability to act.

In the same way this is regulated by the laws of the countries from the region. According to the Croatian Law, articles 220,225 and Kosovo Family Law article 236 it is valued also the will of parents of child, respectively guard can be also from the family persons. Law science takes a position that the persons whom once the parental care was taken off should not be allowed to be guards. The fact that the family right was once taken off clearly shows that the desired result would not be achieved. Results should be well growth, education, schooling of child for an independent life and the representation of the children rights.

Guardianship's duties are taxatively enumerated and his main duty is to replace parents (Begeja, p. 317). According to this we understand that guard should care in good faith on the personality and the rights of the person under the guardianship, to administer his property and to inform the guardianship organ for his leading care process and this is determined by KFL article 244, Monte Negro Family Law article 220, Croatian Family Law article 227 and Albanian Family law article 272. In Kosovo and Albania as the rule the guard exercises his duty without reward. But based on the family laws of the countries from the region the guardianship organ could reward the guard, guard has the right for reimbursement for justified expenses done while doing the job of guard (Ligji për Familjen, i Republikës së Kosovës, 2006, art. 256, par. 2).

Duties of the Minor

Like guard it is also the minor is obliged to fulfil some duties determined by law. Minor should respect and should obey guard. He should not abandon house or institution where he has been put without the permission of the guard (Kodi i Familjes i Republikës së Shqipërisë, art. 273. par. 1). Minor under the guardianship in relation to the guard should behave as the guard is his parent. He should respect and listen to him and vice versa. He should get the opinion of the guard as long as it is necessary.

Discharge of Guard

Based on laws of region guard may be discharged by the guardianship organ in cases when he has misused or when he has exceeded his authorization. After discharge the other guard is appointed by the guardianship organ. The discharged guard in such cases has responsibilities whereas the guardianship organ determines

the caused damage and the guard then is obliged to reimburse minor for his irresponsibility and his negligence. Guard should compensate and reimburse damage to the minor. All these compensations and reimbursements are done through the court decision where the guardianship has submitted the suit for compensation of damage (Alinčić & Bakarić-Mihanović, 1980).

Termination of the Guardianship over Minors

Kosovo Family Law the termination of the guardianship regulates with the article 221. Croatian Family Law foresees this with the article 231 paragraph 1 and it says: Guardianship on minors terminates with the adultery, by marriage after age of 18 (emancipation), by adoption, by return of the parental rights as well as by the death of child. The same is emphasized with the Monte Negro Law article 234. Albanian Family Code in the article 301 enumerates cases when the guardianship is terminated. By return of ability to act to those this was taken off the guardianship terminates.

By termination of guardianship there appear consequences which are caused with this case. Guard is obliged to hand over property of the person under the guardianship and this as per the time determined by the guardianship organ. The Albanian Family Code determines the term of two months for handing over of the property and for the replacement of the guard or for the termination of guard.

Other laws do not foresee term on handing over the items from the person under guardianship for the guard.

Conclusions

Guardianship is one of the oldest institutes of the civil law. It is found also in the XII Tables Law. Guardianship together with adoption is care on the children without parental care. Guardianship differs from adoption because here we do not have the creation of family relations and the person under guardianship does not get the surname of the guard. He also is not written on the civil book as it is with the adoption parents.

Guard is legal representative of children without parental care. All countries of the region regulate this issue in the same way. Guard is obliged to care on child as he is his child. Apart that guard is appointed for care on children without parental care, he

is appointed also for care on persons whom the ability to act was taken off by the decision of court in the civil procedure. Guardianship is established also for some other specific cases. It is expressly noted that guardianship is appointed for the property whose owners are not known. Guard is determined also for property in these cases is called special guard because this guard is in addition to the legal guard. Guardianship to all countries of the region is the legal/judicial act and it is established by competent organs. In some countries it is established by administrative organ and in some others by the courts. Decision for establishing of guardianship in Kosovo and in Albania is taken by Principal Court, while in Croatia and in Monte Negro decision for establishing is taken by the guardianship organ.

Organ of Guardianship is key organ which proposes guard in case of establishing guardianship but it is also a supervising organ over the guardianship. This organ discharges and reappoints guard in determined cases.

Guardianship is exercised on children (minors) without parental care. All laws in homologous way regulate that under the guardianship are put children whose parents have died, children whose missing parents are declared dead, children that have biological parents but to whom the parental rights are taken off or to the children whose parents are alive but for whatever reasons they are not able to exercise the parental rights.

Guard has responsibilities and these responsibilities are equal to those of biological parents. He should be a credible person with the high moral values and ready to contribute the raise, educations and schooling of child who is under his guardianship.

All laws from the region regulate with their norms that the duty of guard is done in a volunteer way and without reward. But there are determined cases when guard can ask reimbursement and compensation for the work done.

Guard could be discharged according the disposals of all countries of the region-he is discharged if he doesn't fulfill determined by law duties. All duties are enumerated taxatively but it is worth saying that he is discharged if he doesn't exercises his duties as a good parent. In this case he will be replaced by another guard appointed by the organ of guardianship.

Law doesn't enumerate types of guardianship but theory enumerates some types of guardianship. All countries have regulated by law termination of guardianship and taxatively enumerate cases when it terminates.

According to these disposals guardianship ends: in case of death, in case when the ability to work is reached, in case of emancipation and by turning back the parental rights. In cases when the ability to work was taken then if the ability to work has been turned back, then guardianship is over.

References

Podvorica, H. (2011). *E Drejta Familjare*. Prishtinë: Universiteti i Prishtinës.

<http://njohligjin.al/familja/kujdestaria/>.

Kodi i Familjes, i Shqipërisë (i azhurnuar 2016). Republika e Shqipërisë, Kuvendi, Qendra e Botimeve Zyrtare, Tiranë.

Ligji për Familjen, i Republikës së Kosovës, Gazeta Zyrtare e Republikës së Kosovës, Shtator 2006.

Alinčić, M. & Bakarić-Mihanović, A. (1980). *Porodično pravo Studenska stamparija*. Zakonodavstvo SR Hrvatske Zagreb.

(2015). *Obiteljski Zakon*. Hrvatske, Zagreb.

Porodicni, Zakon & Crne, Gore (2006). *Skupstina Republike Crne Gore*. Podgorica, Decembar.

Begeja, S.E., *Drejta Familjare e RPS të Shqipërisë*. Shtëpia botuese e librit universitar, Tiranë.