The Role of Guardianship Authority in Providing Guardianship of Minors - Examples of the Republic of Macedonia, Serbia and Montenegro –

Marija IGNJATOVIĆ

e-mail: marija@prafak.ni.ac.rs

Abstract

Analysis of guardianship mechanisms in the family law of Macedonia, Serbia and Montenegro, shows a great degree of similarity of legal norms that regulate this issue. This is probably a result of the fact that in regulating the guardianship, all three family codes rest on the basic principles established in the great codifications of the civil law. The leading law in the area of the guardianship protection is the Family Law of Macedonia (1992) that was used as a model for the Family Law of Serbia (2005) and the Family Law of Montenegro (2006).

Key words: *guardianship authority, guardianship over minors,* ***cura minorum*** *in the Roman law.*

Introduction

In every community there have always been a certain number of people that have not been able, for various reasons, to take care of themselves, their rights and interests. For these reasons, legal systems have established guardianship through which the state provides for direct protection of children without parental care, persons stripped of their legal capacity, and other persons when the need arises to protect their rights and interests.

It is a known fact that laws that regulate guardianship as a family-law category usually do not define guardianship[1] itself and that legislation most often only sets the goals of the guardianship.

Three subjects are typical for guardianship as a legal category: guardianship authority, ward and guardian.[2] The guardianship authority is a public agency established by the state to provide guardianship protection by organizing and offering guardianship protection and its supervision. The ward is a person to whom the guardianship protection is provided to because he is not in a position to look after himself, or he is prevented from looking after his rights and interests, while the guardian is a natural person looking after the rights, obligations, interests and property of the ward.

In particular, this paper deals with guardianship protection provided to minors in order to protect their rights and interests in three regional legal systems. In the legislation of the Republic of Serbia,[3] as well as in those of the Republic of Macedonia[4] and Montenegro[5], great effort has been made in order to provide for children without parental care. In that sense, a special attention has been placed on activities of the Center for Social Services,[6] acting as a guardianship authority, entrusted with a primarily task of providing guardianship protection for children without parental care.

[1] See: Draškić, M. - *Family Law*, Čigoja press, Beograd, 2005, p. 328.; Spirovik-Trpenovska, Lj; Mickovik, D; Ristov, A. – *Family Law*, Blesok, Skopje, 2013, p. 260.

[2] Apart from these perso ns, the following persons may appear, depending on the type of guardianship, as parties to guardianship relations: minor's parents, spouse, cohabiting partner, close relative, child's foster parent, persons living in the common household with a person in need of guardianship, etc.

[3] Family Law of the Republic of Serbia, *Official Gazette of RS, no. 18/2005*; hereinafter referred to as FL RS

[4] Family Law of the Republic of Macedonia, *Official Gazette of RM, no. 80/1992*; hereinafter referred to as FL RM

[5] Family Law, *Official Gazette of the Republic of Monte Negro*, no. 1/2007, hereinafter referred to as FL MN.

[6] Hereinafter: CSS.

1. Legal nature of guardianship protection and its principle features

Guardianship protection emerged from a constant human need to look after those that for various reasons require other people's care and assistance. Primarily that referred to children and therefore the most important role of guardianship is caring for minors and helping them prepare for life.[7] From an historical perspective, in the earliest stages of social development, caring for an individual was a common task of the entire community that is of each and every individual member of the community. However this still did not amount to a legal obligation to provide care.[8]

With development of the Roman law, more precisely with enactment of the Law of the Twelve Tables, guardianship emerged as a legal rule. The Roman law spoke of two categories that provided guardianship protection: tutoring (***tutela***) and guardianship (***cura***). Tutoring was used for minors and women, while guardianship was used for person that, due to illness or such similar conditions, were not capable of looking after their own rights and interests.[9] At the classical stage of social development, around the time the civil society was being established, guardianship had a predominantly private-law character. As a private-law category, it was regulated in all civil codifications of that time. At later stages of development of the guardianship, it became evident that the guardianship could not be sustained on the basis of family solidarity, in particular when it concerned minors. It was in the interest of the state to take over the supervision minors, so guardianship became a form of socially organized protection.

A comparative overview of contemporary legal systems which regulate guardianship has demonstrated that the guardianship today has a

---

[7] It is extremely difficult task to help an individual who has been placed under guardianship to reach full development (guardianship of minors). For this reason we today view guardianship as a comprehensive care for a ward rather than a mere special form of protection. See: Mladenović, M. – *Family and Family Relations*, Rad, Belgrade, 1963, p. 410.

[8] In more detail: Ignjatović, M. – *Guardianship of Minors – then and now*, Andrejević Endowment, Academia Library, Belgrade, 2007.

[9] The essence of guardianship in these two categories, at the time when they were introduced, was to look after property interests of wards rather than to take care of their persona.

social character.[10] However, due to a very complex nature of guardianship, that covers different elements, there is no single understanding of the legal nature of this category in jurisprudence. The guardianship is viewed as a family-law category that is a part of a family law, as a category of civil law, being a part of status, personal law, as a category of social protection or social policy, or as a part of administrative law due to an increasing role of the guardianship authority.[11]

2. Types of guardianships

Regional family law legislation contains provisions regulating different types of guardianships. According to the FMRM (Article 124), guardianship is defined as a special protection of minors that have been left without parental care and adults that have been stripped of, or have limited, legal capacity. According to paragraph 2 of this article, other persons that are not in position to protect their own rights and interests shall be provided with the same type of protection.[12] The FLRS (Article 124) prescribes that a minor without parental care (minor ward) and an adult stripped of legal capacity (adult ward) are placed under guardianship. The FLMN defines guardianship as a collection of measures and activities undertaken by the state through a competent organ, directly or indirectly through a guardian, in order to protect minors without parental care or adults that lack legal capacity or adults that are not capable of looking after themselves or their own rights and interests.

According to provisions of the regional legislation cited above it may be deduced that there are three types of guardianships: guardianship of minors, guardianship of adults stripped of legal capacity and guardianship in special circumstances. A minor is placed under guardianship, because he or

[10] See: Spirovik-Trpenovska, Lj; Mickovik, D; Ristov, A. – *Family Law*, Blesok, Skopje, 2013, p. 260.

[11] For more details see: Lilić, S. - *Special Administrative Law*, Law School Publications, Belgrade, 1998, p. 112.

[12] See: Čavdar, K. - *Family Law – a commentary*, Agency “Akademik”, Skopje, 1998, p. 237.

she has been deprived of parental care,[13] and due to age lacks life experience and ability to look after him or herself, and because he or she does not have legal capacity. In such an event, the law entrusts the guardianship authority to place the child under the guardianship care. Likewise, persons that have been partially or completely stripped of their legal capacity in extra-contentious proceedings are also placed under guardianship. Guardianship for special circumstances shall represents the third group of guardianship present in all three regional family law codifications.[14] This is a special type of guardianship[15] because it does not provide a full scale protection of the ward, rather it provides for the appointment of the guardian only in special circumstances.[16]

3. Competent organ for guardianship affairs

Appointment of the organ competent for guardianship affairs is without a doubt one of the most significant issues of the guardian care. The guardianship authority is a specialized public organ entrusted, among other

[13] The power to place a child under guardianship rests with the Center for Social Services even in cases when child's parents are alive but are temporarily or permanently not exercising parental rights. In that case, although a court's decision on removal of parental rights has not been rendered, the Center for Social Services should act as in the case when parents have been stripped of their parental rights. In more detail: K. Čavdar, *op. cit.* p. 266.

[14] Although this third type of guardianship is regulated in all three family codes, a differences in the method of regulation are noticeable. While in Article 124 paragraph 2 of the FL RM expressly provides for the guardianship for special events, as does the FL MN, FL RS speaks of this type of special guardianship in an indirect manner in Article 132 that regulates temporary guardian. By defining the scope of powers of the temporary guardian the legislator lists all cases of guardianship for special event. See: Art. 124 FL RM, Art. 13 FL MN, Art. 132 FL RS.

[15] On the subject: Cvejić-Jančić, O. – *Family Law*, vol. II, *Parental and Guardian Rights*, Law School Publications, Novi Sad, 2004, p. 153.

[16] Apart from the guardianship authority, the court has the power to appoint the guardian in special circumstances in the event of urgency in the course of proceedings when regular procedure for appointment of the guardian would take up too much time (temporary guardian, guardian for service of process, etc.).

things,[17] with exercising powers in the area of guardian protection. In the regional legal systems, the activities of providing assistance to families in guardianship matters are exercised by the Center for Social Services.[18]

One can discover a great discrepancy in norms that regulate this issue in comparative law because there are different norms that pertain to the organ that provides guardianship care.[19] So, depending on the attitude of the legislation of a particular country, there are several different systems of guardianship organs. The countries that belong to the Roman-law system because they are modeled after the French ***Code civile.***[20] In those countries an important role in exercising guardianship duties is played by the family council as a guardianship organ. However, it is not independent in its work. Starting from the hierarchy or organs competent in matters of guardianship care, it would be appropriate to list them in the following order: court, judge, family council and tutor (guardian).[21] Having in mind the competent organs for exercising guardianship duties in these countries, it can be concluded that these countries accept traditional the concept of determining a competent organ for guardianship. Countries that are modeled after the German system,[22] where the role of the court[23] is dominant in the exercise

[17] The guardianship authority has a wide specter of competences in all areas of the family law. It has powers pertaining to protection and assistance to families, along with the guardianship care, and competences in the area of social care and social protection in solving some of the life's problems for people. For that reason it is considered that a 'technical' term used to denominate this organ, originating from times when guardianship tasks were performed by the administrative organs, is not suitable and that it should be changed. Apart from that, competences of the guardianship authority are exercise by a separate legal entity entrusted with exercise of public authority – the Center for Social Services.

[18] According to FL MN duties of the guardianship authority are also performed by the Center for Social Services, unless the exercise of such duties is delegated to another organ, organization or a community. See Art. 156 of FL MN.

[19] See: Draškić, M. – *Family Law*, Dosije, Belgrade, 1998, p. 294.

[20] For example. France, Spain, Belgium, some South American states, etc.

[21] The system of family council has been reformed in France in 1964. As a result of the reform the family council is not presided over by the judge that appoints members of the family board.

[22] See: Draškić, M. – *Family Law*, Dosije, Belgrade, 1998, p. 294.

guardianship duties,[24] in yet other countries, the legal systems are those in which all the competences regarding guardianship are placed with an administrative organ.[25]

In the regional legal systems that were the focus of our attention, the competences of the guardianship authority cover a wide spectrum of powers.[26] The guardianship authority decides on placement of an individual under guardianship care, appointment and removal of guardians, scope of guardian's powers, rights and interest of persons placed under the guardianship as well as on the reasons for terminating guardianship.[27] For these reasons the activity of the guardianship authority may be divided, depending on the nature of competences exercised, into two groups: activities performed by the Center for Social Services as the guardianship authority, and secondly, activities exercised by the Center within the area of family protection in general.[28] If the Center for Social Services, as part of the

[23] This group consists of the following countries: former FR of Germany, former Czechoslovakia, Austria, Poland, USA and the Great Britain.

[24] In the legal system of the Kingdom of Yugoslavia the procedure in matters relating to guardianship fell within the competence of the court and was a type of a special non-contentious proceedings. See: Culja, S. - *Civil Procedure Law of the Kingdom of Yugoslavia*, vol. II, *Non-contentious proceedings*, Belgrade, 1938, p. 703.

[25] Those being the following: former USSR, Bulgaria and Switzerland. It is interesting to note that today in Sweden there is a court as well as the inspection of guardianship, an administrative organ, that oversees the proper administration of guardianship care. On the subject see: Lilić, S. *op. cit.* p. 116.

[26] For more details see: Spirovik-Trpenovska, Lj; Mickovik, D; Ristov, A. – *Family Law*, Blesok, Skopje, 2013, p. 264.

[27] "The complexity of the function of the guardianship authority is reflected on various, even conflicting, roles in the proceedings. If the guardianship authority is taking part in the court proceedings it appears as a party to the proceedings or as an expert witness or as a representative. When giving the opinion and a proposition for the placement of a child with one of the parents its opinion tends to become the position of the court because the court relies on the expert opinion". (Janjić-Komar, M. ; Korać, R.; Ponjavić, Z. – *Family Law*, Belgrade, 1995, p. 253.)

[28] See: Spirovik-Trpenovska, Lj; Mickovik, D; Ristov, A. – *Family Law*, Blesok, Skopje, 2013, p. 266.

execution of its activities[29] decides on administrative matters,[30] then it acts in accordance with the General Administrative Procedure Law.[31] As competences of the guardianship authority are various, experts from different fields may participate[32] in its work: psychologists, social workers, educational experts, lawyers, etc.[33] The guardianship authority may exercise competences relating to guardianship care independently (direct exercise of guardianship duties) or by appointing persons to act as guardians (indirect exercise of guardianship duties). In the latter case the guardian acts as an intermediary between the ward and the center for social services.

4. Guardian

A guardian[34], as a rule, is a natural person that directly protects the personal and property rights of a ward. According to the provisions of the

[29] In domestic, and even in regional jurisprudence, it is often misspoken of 'activities' performed by the guardianship authority, so this term, belonging to the dictionary of contractual law, is used as a synonym for competences that rest with this specialized public organ.

[30] This type of regulation is contained in all three family codes.

[31] "In performing its activities the guardianship council is obliged to undertake all necessary measures in order to execute the purpose of guardianship in the best possible manner. To that end it may use all forms of social protection and services of social, healthcare, educational and other organizations." (Cvejić-Jančić, O. *op. cit.* p. 154).

[32] According to the legislation of Montenegro the guardianship authority may form a advisory board composed of experts (physicians, education experts, lawyers, psychologists, social workers, etc.), that has a task of dealing with questions from their field of expertise and undertake appropriate measures. See: Art. 160 FL MN.

[33] In recent times, there have been more and more calls to insert in the future legislation regulating the guardianship protection a legal basis for the guardianship authority to use services of humanitarian and other non-governmental (domestic and foreign) organizations, whose help in the area of guardianship protection has shown to be extremely important. See: Draškić, M. – *Family Law*, Dosije, Belgrade, 1998, p. 299.

[34] This term is used by FLRM. In ZBPO [Marriage and Family Law] of Serbia and FL MN a common term used for such person is "staralac". According to FLRS this term has been changed and the law accepted he term "guardian".

regional family codes, the guardian is selected as a natural person that has personal characteristics and special skills necessary for executing the duties of the guardian and who has accepted the position of guardian. However, the term guardian is used to define different types of guardianships.[35]

Apart from natural persons, the duty of the guardian, according to MFL RS (Art. 228) could have been vested in a social-legal person[36] that was in turn obliged to appoint one natural person that would guard the ward and be responsible for him on behalf of that social-legal person. In that case, the guardianship authority would have to give consent to delegating the guardianship role to the guardian (Art. 228 MFL RS). In the event the ward had been placed with a correctional-educational institution, social, medical or some other organization, the guardianship authority would appoint the guardian for activities not performed by the organization as part of its regular activity (Art. 231 MFL RS). Such provision is contained in the FLRM (Art. 137). However, according to the FLRS (Art. 130), the manager of a social service institution used for housing of wards, or a person employed in such institution may act as the guardian of wards placed with such institution, provided the ward consents to it and that it is in his or her best interest.

The guardian is predominantly appointed from among persons close to the person placed under guardianship or his most immediate relatives. This can include: spouses,[37] relatives, or foster parents of the ward, unless

This is only a change in denomination, and the new term is believed to fit the Serbian language better, in other words while the scope of functions of this person has remained the same. See: Art. 126-133 FL RS.

[35] In legal systems of other countries several different terms are used for different types of guardianships. For example in France there is a tutor who is appointed for minors and persons lacking legal capacity, curator for emancipated minors, etc. See: Lilić, S, *op. cit.* p. 117. However, despite different terms used some of which (tutor, curator) date back to Roman law, it is a common place today to accept the term guardian. On this subject see: Spirovik-Trpenovska, Lj; Mickovik, D; Ristov, A. – *Family Law*, Blesok, Skopje, 2013, p. 276.

[36] The law in Montenegro does not leave for a possibility for a guardian to be other legal person except the guardianship authority itself.

[37] Since marriage and cohabitation are equal according to the law, a cohabitating partner may be appointed as a guardian.

interests of the ward dictate otherwise (Art. 126 para. 2 FLRS).[38] Appointment of a close relative to act as a guardian for the ward is, without a doubt in his or her best interest, because the basic assumption is that the person that knows best the needs and habits, and for that matter, general circumstances surrounding the person being placed under the guardianship.

The guardian may not be: a person fully or partially stripped of legal capacity, a person fully or partially stripped of parental rights, a person whose interests are adverse to the interests of the ward, or a person who, given his personal relations with the ward, his parents or other relatives, cannot be expected to perform properly activities of the guardian.[39]

If a person meets the necessary conditions to act as a guardian, it may be the case that that same person is appointed to act as a guardian for several persons.[40] However, the FL RM (Art. 136) requires that such appointment of a person to be the guardian of several wards must be in the interest of the person acting as the guardian, in the interest of the ward. In addition such execution of the guardianship duties does not run contrary to the interests of persons placed under guardianship. According to the FLRS (Art. 129) only the first two of those conditions are listed while the third one is left out.[41]

The guardianship authority is obliged to take into consideration the wishes of the ward (Art. 127 FLRS) when being appointed a guardian, if the ward is able to express such wishes. In that sense a minor that has reached ten years of age and is capable of sound reasoning, may express such wish.

---

[38] While FL RS lists the closest relatives that may act as guardians, the FL RM (Art. 135) contains a general provision that stated that a guardian may be a close relative of the ward without stating who may be considered as a close relative.

[39] See: Art. 139 FL RM; Art. 128 FL RS; FL MN. The content of this legal standard shall be determined by the guardianship authority in the process of appointing the guardian.

[40] See: Spirovik-Trpenovska, Lj; Mickovik, D; Ristov, A. – *Family Law*, Blesok, Skopje, 2013, p. 268.

[41] FLMN (Art. 167) provides that a person may be appointed to act as a guardian to a larger number of wards if that is in the interests of wards. Such guardian is appointed by an individual decision of the guardianship authority.

In the Macedonian law wishes of close relatives must be taken into consideration as well when appointing guardians (Art. 135 para. 4 FL RM).[42]

The guardianship authority may decide to appoint a temporary guardian to a ward, as well as to a child under parental care, or to a person having legal capacity, if it deems it to be necessary in order to provide temporary protection of the person, his legal right or interests (Art. 132 FLRS). Appointment of the guardian for individual cases exists in other regional legal systems, the difference being that those legal systems refer to it as a guardianship in special circumstances and provide an exhaustive list of cases in which the guardian for special circumstances is appointed.[43]

As for his duties, the guardian is obliged to look after the ward in the proper manner, protecting his person, rights and property. In exercising his duties he may enter into various legal transactions on behalf of the ward, as his or her legal representative. Supervision over his work is performed by the guardianship authority to which the guardian is obliged to submit reports and accounts of his work each calendar year for the previous year (regular report), when the guardianship authority so requires (special report), and after the termination of the guardianship (final report).[44]

Considering the fact that relatives of the ward are most often appointed guardian, it is a generally accepted rule that such functions are performed voluntarily, without remuneration. However, the guardianship authority may set remuneration for the guardian, as an award for extraordinary endeavors in executing guardianship duties and his excellent

[42] The provision of the FLRM according to which the guardianship authority should take into consideration wishes of close relatives when appointing the guarding, provided it is in the best interest of the ward, was envisaged by the former MFL of the Republic of Serbia (Art. 230). The FL RS does not contain such provision.

[43] The MFL RS used to have a provision regarding the guardian for special circumstances. However, with enactment of the FL RS, Art 132 thereof regulates rights and duties of the temporary guardian, listing cases in which he may perform guardianship duties. The listed cases are, in fact, the same ones that were previously covered under the provision regulating special guardianship.

[44] See: Art. 144 FL RS, Art. 151 FLRM, Art. 178 FLMN.

performance.[45] The remuneration for and costs of the guardian are paid primarily from the ward's income. However, if doing so would jeopardize the ward's support, the remuneration for and costs of the guardian are, according to the FL RM paid from the budget in Macedonia and Montenegro. The FL RS envisages that the remuneration for and expenses of the guardian to be primarily paid out from the ward's income, unless this would jeopardize his support. In such a case, the expenses and remuneration of the guardian are defined by the minister in charge of family care (Arts. 143 and 144 FL RS).

5. Guardianship of minors

Article 124 of the FL RS contains a general provision based on which a child without parental care is placed under guardianship without listing cases when it is considered that a child is without the parental care.[46] Article 159 of the FL RM provides that a minor without parental care is placed under guardianship. A child is considered to be without parental care, within the meaning of this article, if child's parents are not alive, they are missing, unknown or their place of residence is unknown for a period of more than a year as well as a child whose parents, regardless of the reasons, temporarily or permanently are not performing their parental rights and duties. Similar provision is contained in the FLMN, however the law of Montenegro gives a more detail definition of the minor being placed under the guardianship.[47]

[45] See: Art. 152 FL RM, Arts. 143 and 144 FL RS; Art. 191 FLMN.

[46] In FL RS (Art. 265) used to list cases when it was considered that a child was left without parental care.

[47] This provision states that a minor whose parents are deceased, unknown or residing at an unknown place of residence is placed under the guardianship as well as a child whose parents have been stripped of the parental rights or legal capacity, or a child whose parents are abusing or neglecting their parental obligations, than a child whose parents are absent or are not able to provide parental care on regular basis but failed to leave the child in the care of a person who has been recognized by the guardianship authority as fulfilling the obligations to be a guardian. See Art. 210 FL MN.

If a minor being placed under the guardianship care has parents who are, for any number of reasons, prevented from exercising parental rights, the guardianship over that minor does not terminate parental rights of the biological parents. In that case only a limitation is being placed on exercise of parental rights by transferring certain powers to the guardian. The scope of such powers is set in each individual case by the guardianship authority.[48]

The principle duty of the guardian of a minor is to look after the personal wellbeing of the ward. All three family codes see the guardianship as looking after the ward as a person, representing the ward, acquiring assets to support the ward and managing and disposing of the ward's property.[49] Based on duties that the guardian has towards a minor we may conclude that those duties are quite similar to the duties of a parents towards their child. This is one of the reasons why there is a convergence of guardianship with parenting rights when dealing with minors. However, we have not yet witnessed the complete convergence of these two categories. Differences between these two categories are the following: there is a natural bond between parents and children – blood kinship, which emerges with a birth of a child, while there may be kinship between the guardian and the ward, such kinship is not the result of the guardianship but rather *vice versa*, the existence of kinship may be a reason for appointing a relative to act as the guardian; minors have the right to live with their parents, while ward who is a minor does not necessarily have to live with his guardian; guardian does not have a duty to support the ward from his own resources while parents have a duty to provide such support based on the parent-child relationship; duties of the guardian are temporary while parenting is permanent; parents are not obliged to submit reports to the guardianship authority on the parenting over their child while the guardian has such a duty; the guardian requires approval from the guardianship authority for numerous decisions pertaining to the ward, while a parent must ask for approval for a narrow scope of activities concerning child's property; joint property does not

[48] Interpretation of this provision in the Republic of Macedonia is rather peculiar. Although failure to exercise parental rights in this case does not terminate such rights, the outcome for the minor is the same as if his parents have been stripped of their parental rights. See: K. Čavdar, *op. cit.* p. 266.

[49] Art. 135-141 FL RS, Art. 221-228 FL MN, Art. 160 FL RM.

emerge between the guardian and the ward; guardianship is not a basis for inheritance while parenting is.[50]

Regardless of the stated differences between guardianship and parental rights, in terms of basic duties of providing care (to look after the health, upbringing and education), the position of the guardian is similar to that of a parent. However, we must stress that providing care is a duty of the guardian, is a parental right in the case of parenting (the right to look after the health, upbringing and education).[51]

The scope of guardian's duties depends, among other things on the legal capacity of the ward.[52] In the case that a minor under guardianship care is below the age of fourteen we are dealing with a person that has no legal capacity, on whose behalf the guardian, as his legal representative, must enter into all legal transactions (save for those that are considered to be of lesser importance, such as daily grocery shopping), on the contrary, legal transactions entered into by the minor produce no legal effect and such transactions are void. In the case of a minor ward who is older than fourteen years of age, such ward is capable of entering into transactions of lesser importance on his own, as well as into all other transactions provided he receives prior approval from his guardian,[53] or the guardianship authority, guardian may not independently undertaken such transactions. The law of Montenegro regulates this situation in the same manner. The only difference being that it does not provide that an older minor may independently enter into transactions of lesser importance.[54] According to the FL RM[55] a minor,

[50] In more detail see: Cvejić-Jančić, O. *op. cit.* p. 168-169.

[51] Likewise the Convention on the Rights of the Child provides for the duty of the guardian, as a legal representative of the child, to pay regard to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background. See: *Convention on the Rights of the Child*, Art. 20 para. 3.

[52] Precisely here we can see a great similarity between modern category of guardianship and guardianship based on the Justinian law. Even in the Roman law the duty of the guardian over the minor depended on the age of the ward. In more detail: Ignjatović, M. – *Guardianship over Minors in Roman and Contemporary Law* (Master thesis), Skoplje, 2005.

[53] Art. 137 FL RS.

[54] Art. 212 FL MN.

[55] Art. 162 FL RM.

who has turned fifteen may independently, without guardian's approval, enter into legal transactions. If such transactions are of exceptional importance a prior approval of the minor's guardian is required.[56]

Some affairs that directly concern the minor, the guardian may act only on the basis of an approval granted by the guardianship authority.[57]

In the Macedonian law, regarding the property of a minor, the guardian may, with a prior consent of the guardianship authority undertake the following legal transactions: dispose or lien real estate of the ward; dispose of ward's movable assets of significant value or dispose of property rights of a great value; renounce inheritance or bequest; as well as undertake other measures prescribed by the law.[58] The law of Montenegro[59] in more detail regulates transactions that the guardian may undertake with consent of the guardianship authority. The FLRS does not list cases in which the guardian requires consent of the guardianship authority for property transactions, as it is done in the other two laws. It only lists in Article 137 that the guardian may, only with an approval of the guardianship authority, undertake actions that fall outside the scope of regular management of the ward's property.

In the event the guardianship authority refuses to give approval to the guardian for transactions that fall outside the scope of his regular

[56] Age limit of fifteen years in the Macedonian law was set based on provision of Article 7 of the Labour Law that provides that a person who is fifteen years of age and is of good general health may enter into employment. As a result, according to provisions of the FLRM, a minor who has turned fifteen is deemed to be capable of entering into legal transactions without the approval of the guardian. See: Čavdar, K. *op. cit.* p. 269.

[57] For example, placing a minor in a children's home or in some other organization providing care, upbringing and education for children and juveniles, or giving the minor to some other person for care, upbringing and education, or placing of the minor into a medical institution for prolonged treatment, terminating education of the minor or transferring hi to a different school, deciding on his occupation and etc. (Art. 137 FL RS). In the law of Montenegro this situation is regulated by Art 180 of the FL which in general terms defines affairs that a guardian may engage with an approval from the guardianship authority.

[58] Art. 147 FL RM.

[59] Art. 180 FL MN.

mandate, according to the former MFL RS, the minor had a right to appeal against such decision of the guardianship authority or such other authority denying such approval. The appeal in such cases has to be filed with the court.[60] However, the FLRS does not provide minors with the right to appeal. Likewise, the laws of Montenegro and Macedonia do not recognize such a right to minors.

Apart from affairs that the guardian may only undertake with a prior consent of the guardianship authority, there are certain personal rights pertaining to the minor that the guardian may not exercise at all. Those being: to give statement acknowledging paternity and maternity which may be given by a minor who has turned sixteen, give consent for acknowledging paternity and maternity, request from the court the approval to enter into marriage before becoming of age; deciding on pregnancy termination; or entering into employment.

In situations when a minor ward is to be placed in a correctional institution due to behavior disorders, the procedure is the same as with a child that is under parental care. The guardianship authority decides on such placement and the guardianship authority plays a very active role in the procedure instigated against the minor. The initiation of such procedure depends on the position of the guardianship authority. The role of the guardianship authority in the trial instigated against the minor is equally as important in the pretrial procedure as it is at later stages, at the session of the court's bench and at the hearing itself where the guardianship authority tries to shed light on the delinquent and to offer an adequate assistance with an aim of reaching lawful and just decision. The importance and delicate nature of the role of the guardianship authority is best understood having in mind that the urgency is one of the fundamental principles of such proceedings. This is because the guardianship authority, in order to intervene in timely manner at all stages of the proceedings must have all the necessary data relating not only to the personal character of the minor but data regarding the environment in which the minor grew up in, his social background, and education. Gathering of the relevant data on the personal character of the

[60] Although it may, at a first glance, look as if such solution placed the minor in a more favorable position compared to that of a minor that was under parental care (because such minors did not have the right of appeal), it was not the case.

minor always requires from the guardianship authority a greater organization of work, which on the other hand points to the need to engage all persons that might be of assistance in providing adequate information (neighbors, teachers, and all others that, in same way were in contact with the minor). In its work, the guardianship authority relies on expertise of persons that are capable of determining the mental development of the minor (physicians, psychiatrists, educational and other experts). Needless to say, those experts present their opinion as to the maturity of the minor on the basis of the data the guardianship authority acquired during fieldwork. Therefore, if the guardianship authority does not take an active role in these proceedings, the minor is at risk that the proceedings instigated against him may have deficiencies and that the protection that should have been offered to him in the process may not be adequate. As a result, the role of the guardianship authority would be devoid of any purpose and meaning.

A minor that has entered into employment according to the law regulating employment has a right to dispose of his earnings as he sees appropriate, regardless of the fact whether he in under guardian care or not. In that case the minor has acquired a limited legal capacity and may independently enter into legal transactions and dispose of his earnings. The only limitation is that he contributes to his own support, upbringing and education with those earnings. Such provisions are contained in all three family codes.[61]

Guardianship care over a minor may be terminated when he turns eighteen years of age; by acquiring legal capacity in the court proceedings (court emancipation);[62] adoption; reinstitution of parental rights; or death of the child. In the event the guardianship is terminated, the guardianship authority is required to call upon the guardian to submit a report within a specified period of time, on the care provided to the minor and his personal property, as well as to surrender to the minor his property for further management, provide the minor has gained legal capacity. The transfer of property is conducted in the presence of the guardian, that the ward, his

[61] See: Art. 162 FL RM; Art. 139 FL RS; Art. 213 FL MN.

[62] On the subject: Stanković, G. - Extra-Contentious Proceedings for gaining Legal Capacity, *Pravni Život*, 13/2008; Stanković, G. - Procedure for gaining Legal Capacity, *Zbornik na Pravnim fakultetu "Justinijan Prvi", in honor of Stefan Georgijevski*, Skopje, 2009, p. 27.

parents and adopted parents and the guardianship authority. If it is determined the guardian conducted affairs with malice, an appropriate procedure shall be instigated against him (criminal or civil) and other measures shall be undertaken in order to protect the ward's interests.

6. Procedure for placement under guardianship

The question of placing a minor under the guardianship is put forward at the time it becomes evident that such need exists.

The procedure, primarily, may be initiated by the guardianship authority *ex officio*.[63] The procedure may be initiated by any party having interest is such proceedings that informs the guardianship authority of the need that a minor requires guardianship protection. Initiation of the procedure by a third party is yet another example that the issue of placing the minor under the guardianship is of general interest to the community, that is, that it is in accordance with general interests of the community that primarily pertain to a normal development of each human being. In that sense it is justifiable that the legislation acknowledges the right of any third party having interest to initiate the procedure for provision of guardianship care.

The FLRM precisely determines which individuals may initiate the guardianship procedure by listing, in Article 128, all such persons,[64] while in Serbia the law is not so precise in determining the circle of people that have

[63] This is an exception to the rule that administrative procedure is initiated at the request of the party whose interests are sought to be protected. With guardianship, the guardianship authority initiates the procedure *ex officio*, although the aim of the proceedings is the protection of interests of the person being placed under the guardianship care. See: Lilić, S. – *Administrative Law*, Law School Publications, Belgrade, 1988, p. 122.

[64] "In the event there is a need to place a certain individual under the guardianship or to have him under some kind of care, provided by the Center for Social Services, the following entities are obliged to inform the Center thereof: 1) Registrar and other state agencies that learn of such case in the execution of their duties; 2) parents, family members and neighbors; 3) companies, institutions, local councils and other organizations and communities."

an obligation to inform the competent organ after they become aware that a certain persons needs to be placed under the guardianship care.

After the conditions for placement under the guardianship are met, and when the competent guardianship authority is informed thereof, it is necessary to immediately, without delay, take actions necessary to protect the rights and interests of the minor in order to protect him and his property.

In the procedure for the placement under the guardianship a guardian is appointed and his rights and obligations are set as well as a decision is made on whether he will perform his duty directly or through an institution. Following appointment of the guardian, the guardianship authority introduces the guardian to his duties. This introduction consists of the guardianship authority informing the guardian, the ward (if he is capable of grasping the importance of those words) and members of ward's family of the duties and powers of the guardian and the tasks and aims of the guardianship.[65] In case the ward has property, such property is being placed under the management of the guardian.

When deciding on the most appropriate protection in each individual case, the guardianship authority shall be guided, primarily by the interests of the ward, and in that process it should use modern methods of social protection. However, due to an inability of the guardianship authority to examine all facts crucial to the protection of a child, and having in mind the urgency of the procedure, in practice, the importance of active participation of the guardianship authority is pointed out as a necessity. Here we do not only speak about the guardianship authority that should by legal means exclusively fulfill its protective role, rather we speak of the guardianship authority that, based on the research and through utilizing of modern social methods, be able to take actions in order to prevent all negative effects that this procedure may generate.

The literature stresses the need to even enact special legislation that would define more concretely the role of the guardianship authority in all procedures where children and their rights and interests are being protected, even in the field of guardianship care over minors. More definite role of the

[65] In more detail: Cvejić - Jančić, O. – *Family Law*, Vol. II, *Law regulating Parenting and Guardianship*, Novi Sad, 2004, p. 165.

guardianship authority, as practitioners believe, would be achieved by appointing a special representative of a child. However, the appointment of the child's special representative opens another topic and that is whether such special representative should be viewed as a special (legal) representative or as a supervising organ similar to the guardianship authority that would intervene only in circumstances that call for such action.

The need to introduce the special (legal) representative is being viewed more and more often as a necessity, having in mind that the guardianship authority, due to a wide mandate it is given has not been successful in coping with many tasks that come its way. By introducing the child's special representative, that would come before introducing of the guardianship or that would exist parallel to that procedure, would increase the effectiveness of the controlling function of the guardianship care, advance the organization of work of the guardianship authority and lead to successful implementation of the social methods that would be applied in the process of introducing the guardianship and during the guardianship care itself.

In the procedure of placing a ward under the guardianship, the guardianship authority applies the General Administrative Procedure Law. According to that law, the guardianship authority acts not only in cases when guardianship care is being introduced, but also in cases concerning other legal matters from the area of the family law that fall within its purview and where such actions are necessary.[66]

The procedure of introducing the guardianship comes to an end when a decision, in the form or ruling, is passed. The ruling is submitted to the competent civil registrar within fifteen days from the date when it becomes final and binding. In the event the ward owns real estate the ruling is being entered into the land book real estate registry within the same time limit.

The ruling whereby a minor is placed under the guardianship care does not automatically become final and binding since there is a circle of persons that have the right to seek remedy against such ruling. The minor

[66] *Ibid.* p. 166.

and his relatives, as well as any third parties that have interest may file an appeal.

CONCLUSION

A comparative law overview of norms regulating guardianship protection of minors and the role of the guardianship authority in the process of offering protection to minors in the regional family law systems of Macedonia, Serbia and Montenegro demonstrates the significance and a very delicate role of this agency. With this overview of legislation we intended to encourage lawyers and experts to further develop the role of the guardianship authority, especially in the area of protection of minors. Transferring knowledge into new normative ideas relating to the guardianship protection of minors helps legislators to form adequate types of protection that is to widen the circle of people that ought to participate in such process. Researching these issues is not only important for jurisprudence and legislation but also for the society as a whole. This paper, apart from the comparative law overview, had a task of provoking an application of new norms in the legislation, norms that would enable a more effective mechanisms and create basis for wider social protection of minors when it is necessary such protection is provided through the guardianship authority.

THE ROLE OF GUARDIANSHIP AUTHORITY IN PROVIDING GUARDIANSHIP OF MINORS

Examples of the Republic of Macedonia, Serbia and Montenegro

Summary

Analysis of guardianship mechanisms in the family law of Macedonia, Serbia and Montenegro, shows a great degree of similarity of legal norms that regulate this issue. This is probably a result of the fact that in regulating the guardianship all three family codes rest on the basic principles established in the great codifications of the civil law that are, in turn, rooted in the Roman Law. The leading law in the area of the guardianship protection is the Family Law of Macedonia (1992) that was used as a model for the Family Law of Serbia (2005) and the Family Law of Montenegro (2006).

Bibliography

Čavdar, K. - *Family Law – a commentary*, Agency “Akademik”, Skopje, 1998.

Culja, S. - *Civil Procedure Law of the Kingdom of Yugoslavia*, vol. II, *Non-contentious proceedings*, Belgrade, 1938.

Cvejić-Jančić, O. – *Family Law*, vol. II, *Parental and Guardian Rights*, Law School Publications, Novi Sad, 2004.

Draškić, M. - *Family Law*, Čigoja štampa, Beograd, 2005.

Draškić, M. – *Family Law*, Dosije, Belgrade, 1998.

Family Law of the Republic of Macedonia, *Official Gazette of RM, no. 80/1992*; hereinafter referred to as FL RM

Family Law of the Republic of Serbia, *Official Gazette of RS, no. 18/2005*; hereinafter referred to as FL RS

Family Law, *Official Gazette of the Republic of Monte Negro*, no. 1/2007, hereinafter referred to as FL MN.

Ignjatović, M. – *Guardianship of Minors – then and now*, Andrejević Endowment, Academia Library, Belgrade, 2007.

Ignjatović, M. – *Guardianship over Minors in Roman and Contemporary Law* (Master thesis), Skoplje, 2005.

Janjić-Komar, M. ; Korać, R.; Ponjavić, Z. – *Family Law*, Belgrade, 1995.

Lilić, S. - *Special Administrative Law*, Law School Publications, Belgrade, 1998.

Mladenović, M. – *Family and Family Relations*, Rad, Belgrade, 1963.

Spirovik-Trpenovska, Lj; Mickovik, D; Ristov, A. – *Family Law*, Blesok, Skopje, 2013.

Stanković, G. - Extra-Contentious Proceedings for gaining Legal Capacity, *Pravni Život*, 13/2008.

Stanković, G. - Procedure for gaining Legal Capacity, *Zbornik na Pravnim fakultetu "Justinijan Prvi"*, *in honor of Stefan Georgijevski*, Skopje, 2009.