

PERSPECTIVES AND PROBLEMS ARISING IN THE ESTABLISHMENT OF GUARDIANSHIP AS A MEASURE OF JUDICIAL PROTECTION

DOI: <https://doi.org/10.53486/dri2025.57>

UDC: 347.64(478)

CORJAN ANGELA

"Constantin Stere" University of European Political and Economic Studies
Kishinev, Republic of Moldova
avocat_angela_corjan@yahoo.com
ORCID ID: 0009-0002-9706-3974

VOINSCAIA VIOLETTA, PhD

"Constantin Stere" University of European Political and Economic Studies
Kishinev, Republic of Moldova
violetta.voinscaia@gmail.com
ORCID ID: 0009-0003-5119-9590

Abstract: *In this article we propose to make an analysis and evaluation of some aspects related to the application of legislation regarding the establishment of judicial protection measures, the grounds, forms and principles of judicial protection, in order to protect the rights and legitimate interests of the persons placed under protection. We will pay particular attention to the principle of respecting the wishes and feelings of the person concerned when establishing and implementing measures to protect, in this case, the incapacitated adult, the concerns of the international community in terms of protection based on the past and present wishes and feelings of the person concerned. The regulation of the procedure for the establishment of protective measures is the internal competence of the state, so that each state has its own treatment of this aspect. We will make recommendations for further research in the field of civil procedure for the establishment of judicial protection measures.*

Key words: *protective measure, provisional protection, legal representative, special civil procedure, legal representation, rights.*

1. Introduction

The object of judicial activity in civil procedure changes depending on the category of legitimate rights and interests to be defended in court. For these reasons, civil procedure also includes several types of procedure, including special procedure. Research methodology used. The results of the work were obtained by using the following methods of knowledge: synthesis, analysis, and comparison. The latter contributed to highlighting the way in which special procedures are regulated in the Code of Civil Procedure of the Republic of Moldova. Presentation of the basic content According to art. 280 para. (1), (2) and (3) of the CPC. (1) In special procedure, cases are examined by courts according to the rules for examining civil actions, with the exceptions and additions established in this code in chapters XXIII-XXXIV and in other laws. According to art. 279 para. (1) letter e) of the Code of Civil Procedure of the Republic of Moldova [2], "The court examines cases regarding contractual and judicial protection measures in a special procedure".

Regarding the notion and legal nature of the special procedure in the specialized literature, different opinions are expressed. Some authors also mention the fact that in the order of the special procedure, not only the legal facts are established, on which the emergence or extinction of personal or patrimonial rights of citizens or organizations depends, but the presence or absence of the non-contentious right is confirmed, as well as the legal status of the citizen or patrimonial property is also established [1, p. 117].

In paragraph (1) letter f) of article 302 of the CPC of the Republic of Moldova, the legislator provided for the possibility of expanding the number of cases to be examined in a special procedure on protection measures. The list of cases listed in paragraph (1) letter (a) – letter (e) of article 302 of the CPC of the Republic of Moldova is non-exhaustive. Thus, article 302 paragraph (1) letter (a) – letter

(e) of the CPC of the Republic of Moldova stipulates non-exhaustively the cases for establishing facts that have legal value, to be examined in the procedure on protection measures, as follows: a) for establishing, renewing or revoking a judicial protection measure (provisional protection, guardianship or curatorship); b) for modifying the conditions under which a judicial protection measure is exercised; c) to appoint and revoke the temporary guardian, curator, tutor, members of the family council, substitute curator, substitute guardian, special curator, special guardian; d) to challenge the decisions of the family council or the guardianship authority in any aspect related to the contractual or judicial protection measure; e) to challenge the fact of producing the effects of a protection mandate in the future, to suspend, revoke the protection mandate in the future, as well as to grant additional powers to the trustee or a special trustee; f) to resolve other issues regarding contractual or judicial protection measures which, according to the law, are within the jurisdiction of the court.

Pursuant to art. 64 para. (1) and (4) and art. 96 para. (1) and (4) of the Civil Code of the Republic of Moldova no. 1107 of June 6, 2002 (republished in the Official Gazette of the Republic of Moldova, 2019, no. 82, 86, art. 661), the Government published the Draft for the approval of the Regulation on the publicity of protection measures, which approves the Regulation on the publicity of protection measures (according to annex no. 1) and the Model of the extract on the judicial protection measure (according to annex no. 3). According to point 3 of the same draft, the decisions and rulings by which guardianship or curatorship were established, modified or revoked in respect of the minor by the guardianship authorities and family councils, as well as the court rulings by which judicial protection measures are established, modified or revoked (hereinafter – protection measures), issued from the moment of entry into force of Law no. 66/2017 on the amendment and completion of certain legislative acts and until the moment of entry into force of this Government Decision, shall be communicated by the issuing authorities to the authority competent to publicize the protection measures, within 30 days from the date of entry into force of this Government Decision.

At the same time, the Court Administration Agency is to submit a monthly Statistical Report on judicial protection measures established, modified and revoked by national courts to the competent authority for the publicity of protection measures.

By approving the Regulation on the publicity of protection measures, the aim is to regulate the manner in which publicity will be ensured for the establishment, modification and revocation of guardianship and trusteeship in respect of a minor, of the judicial protection measure in respect of a person of legal age or who has acquired full legal capacity in another way (hereinafter - publicity), the information disseminated on the occasion of the respective publicity and the right of interested persons to obtain extracts regarding the guardianship/trusteeship of the minor or the judicial protection measure. The competent authority for the publicity of protection measures is the Ministry of Justice, with the direct support of the Legal Information Resources Agency [2].

According to art. 74 of the Civil Procedure Code of the Republic of Moldova: „In cases established by law, the competent public authorities, on their own initiative, at the request of the participants in the process or ex officio of the court, may intervene in the process until the decision is pronounced in the first instance, as well as in the appeal court, in order to submit conclusions, according to their function, in order to defend the rights, freedoms and legitimate interests of other persons, the interests of the state and society.

The court may, as the case may be, ex officio introduce the competent public authority into the process to submit conclusions on the case under examination. The authorities mentioned in this article have the procedural rights and obligations of participants in the process specified in art. 56 of this code, as well as in other laws.

The provisions of the mentioned article stipulate another form of participation in civil proceedings of public authorities for the protection of the rights, freedoms and interests of other persons – submission of conclusions [3, p. 262].

Thus, the purpose of participation in the proceedings of public authorities for the submission of

conclusions is the fulfillment of their duties [4, p. 35] in order to protect the rights, freedoms and interests of other persons, the interests of the state and society.

Submission of conclusions by competent public authorities may take place on the basis of three grounds: on the public authority's own initiative; at the request of the participants in the process; ex officio of the court [5].

Submission of conclusions as a form of participation of public authorities in civil proceedings is made only if this is expressly provided for by law. Legal provisions may stipulate the obligation to submit conclusions or the possibility of this action [4, p. 36].

The cases of participation of public authorities in the trial for the submission of conclusions are provided, in principle, by the norms of family law, civil law and civil procedural legislation. Most often, the guardianship authority participates in the civil trial for the submission of conclusions.

The Civil Procedure Code of the Republic of Moldova stipulates the mandatory participation of the guardianship authority in the examination of the following cases: the establishment of judicial protection measures. According to art. 302 para. (3) of the Civil Procedure Code of the Republic of Moldova: "The court examining the application for the initiation of the trial regarding the protection measure requests the personal file from the guardianship authority at the domicile of the individual."

2. Trends and evolution of the procedure for establishing protective measures

By Law No. 133 of 15/11/2018, the Civil Code of the Republic of Moldova was modernized. To this end, the latest legislative developments at the international and European level were studied and taken into account, and in particular: The Draft Common Frame of Reference of the European Union, developed by the academic environment in Europe, published in 2008. In the part where certain provisions are taken from the DCFR, their interpretation and application took into account the official commentaries and illustrations accompanying the DCFR, the German, French and other Civil Codes were studied, the amendments were made according to the latest European and international trends in the matter, in order to make the legislation in the matter more accurate and predictable [8].

The amendments to art. 1408 and 1409 of the Civil Code of the Republic of Moldova adjust the terminology regarding incapacitated persons to the new terminology of the protection of the individual. At the same time, the provisions of the new Civil Code and the modernized Civil Procedure Code of the Republic of Moldova reflect the trends of international legislation towards equality between persons with full and partial discernment.

According to art. 66 of the Civil Code of the Republic of Moldova: "The court and the guardianship authority exercise general supervision of protection measures, according to the competence provided by law. Both the court and the guardianship authority may visit or request visits to protected persons and those in respect of whom a request for the establishment of a protection measure has been submitted". In the case of examining the request provided for in art. 302 paragraph (1), the court hears the individual. He or she may be accompanied by another person of his or her choice, who will not have the capacity of representative in the process. The hearing takes place in a secret session, which may be attended by the persons listed in art. 4830 paragraph (1) of the Civil Code. The person's lawyer is informed of the time and place of the hearing. The individual may request to be heard individually and in private, accompanied, if desired, by a person of his or her choice. If necessary, the individual may also be heard in the presence of the other participants. According to paragraph (3) of art. 308 of the Civil Code of the Republic of Moldova: "The individual may request to be heard individually and in private, accompanied, if desired, by a person of his or her choice."

If necessary, the individual may also be heard in the presence of the other participants. At the same time, if it deems it necessary, the court may conduct the hearing of the individual in the presence of the doctor treating him or in the presence of another relevant person". The provisions of the Code of Civil Procedure stipulate the mandatory participation in the trial by the guardianship authority when examining the following cases: the establishment of provisional protection (art. 297 CC of the RM); the establishment

of judicial protection measures in the form of guardianship and trusteeship (art. 102 CC of the RM).

In accordance with art. 94 of the Civil Code of the RM: "The request for the establishment of a judicial protection measure may be submitted by the guardianship authority. However, the guardianship authority may submit the request provided for in art. 94 paragraph (1) only if the persons indicated in paragraph (1) letters a)-e) have failed to submit it within 3 months from the date of their notification by the guardianship authority".

Art. 96 of the Civil Code of the Republic of Moldova stipulates the obligation to comply with the formalities of publicity of protection measures, under penalty of non-enforceability against third parties. At the same time, if by decision of the family council the guardian is appointed or revoked or by decision of the family council, as the case may be, of the guardianship authority, pursuant to Art. 136 of the Civil Code of the Republic of Moldova, the guardianship authority is obliged to send a copy of this decision to the competent authority for the purpose of carrying out the respective registration, except in the case of contesting the decision in court.

In the cases provided for by law, rights, acts, facts or legal relationships become opposable to third parties exclusively by notation, unless it is proven that they were known in another way, except in the case where the law results that mere knowledge of them is not sufficient to compensate for the lack of publicity.

The absence of the notation provided for in art.435 paragraph (2) point 15) CC does not eliminate the opposability against third parties if the advertising formalities provided for in the said article have been fulfilled (art.96 paragraph 5).

According to art. 302 of the Civil Procedure Code of the Republic of Moldova: "In the procedure regarding protection measures, the following cases are examined: for the establishment, renewal or revocation of a judicial protection measure (provisional protection, guardianship or curatorship); for the modification of the conditions under which a judicial protection measure is exercised; for the appointment and revocation of the provisional protector, curator, tutor, members of the family council, substitute curator, substitute guardian, special curator, special guardian; for contesting the decisions of the family council or the guardianship authority in any aspect related to the contractual or judicial protection measure; for the resolution of other issues regarding contractual or judicial protection measures which, according to the law, are within the jurisdiction of the court.

At the request of the participants or ex officio, the court may order a social investigation or the making of findings by any relevant authority or person. (art. 308/3 CPC). Public authorities that intervene in the process to submit conclusions shall only exercise the procedural rights and obligations of participants in the process specified by art. 56 CPC and other laws. Thus, the procedural rights and obligations of public authorities that participate in the process to submit conclusions are more restricted than in the case of the first form of participation in the process of public authorities in order to defend the legitimate rights and interests of other persons (art. 73 CPC).

At the same time, the action in defense of the interests of a person in respect of whom a measure of judicial protection (provisional protection, curatorship or guardianship) is established may be filed independently of the existence of the request of an interested person or his legal representative (art. 73 paragraph 1 CPC).

If the bodies, organizations, individuals who filed the lawsuit withdraw their action filed in the interests of the plaintiff, and the latter does not wish to intervene in the lawsuit, the procedural effects provided for in art.72 paragraph (2) occur.

Thus, the plaintiff's waiver of the claims filed in defense of the interests of the protected person does not deprive him of the right to request examination of the case on the merits. The issue of participation in the lawsuit of the competent public authorities for submitting conclusions is resolved by the judge at the stage of preparing the case for judicial debates (art. 185 paragraph (1), letter a) CPC).

The court examines cases in special procedure regarding contractual and judicial protection measures (art.279 par.1, letter e) CPC). In special procedure, the court examines cases with the participation of the petitioner, other interested persons, as well as public authorities according to art.74 CPC.

Individuals may defend their interests and rights protected by law in court personally or through representatives [7, p. 14]. Depending on the legal importance of the will of the represented persons for the emergence of judicial representation, we highlight: legally mandatory representation – for the emergence of which the consent of the represented person is not required; and non-mandatory representation – which can occur only at the request of the represented person [6, p. 58].

According to art.306 of the CPC of the Republic of Moldova: "In the case of a request for the establishment, modification or revocation of a judicial protection measure, the natural person may choose a lawyer or may request the appointment of a lawyer who provides state-guaranteed legal assistance" [9].

3. Perspectives and problems arising within the procedure for the establishment of protection measures

A person who has reached the age of majority or who has acquired full legal capacity in another legal way and who, as a result of a mental illness or a physical, mental or psychological deficiency, cannot fully be aware of his actions or express his will may benefit from a protective measure, established according to his condition or situation.

The protective measure aims to protect both the person and his patrimonial interests. Protective measures pursue the interest and well-being of the person in respect of whom they are established and promote, as far as possible, his autonomy.

The article 92 Civil Code of the Republic of Moldova, provides subsidiary nature of judicial protection measures: " **The judicial protection measure may be instituted by the court only if it is necessary and if the person is not sufficiently protected by applying the legal provisions regarding the maintenance obligation of the spouse and relatives, regarding the regime of the common property of the spouses, regarding the assistance in decision-making or by the mandate for the protection of the respective person in the future.**" Also, the measure of judicial protection must be individualized and proportionate to the degree to which, as a result of a mental illness or physical, mental or psychological deficiencies, the person cannot become aware of his actions or express his will." [10].

In case no. 2r-2374/22 before the Chisinau Court of Appeal, the validity period of the psychiatric-legal expertise is invoked, which is short at only 2 months, and in case the request for the establishment of the judicial protection measure is returned, it will be necessary to conduct a new expertise, a situation that creates inconveniences for both the incapacitated person and his/her caregiver, in the person of the appellant, the latter having to bear additional travel and expenses. [11].

In case no. 2r-1321/22 before the Chisinau Court of Appeal, it was held that art. 303 paragraph (1) of the Code of Civil Procedure establishes that the petitioner is exempt from paying the costs related to the process regarding the protection measure. Thus, corroborating the legal provisions cited above, the College concludes that in this case, the petitioner is exempt by law from paying the state fee for filing the application. As for the need to present the extrajudicial expert report, the College points out that, indeed art. 307 paragraph (2) of the Code of Civil Procedure provides that, the application shall be accompanied by the report of the extrajudicial psychiatric expert report of the person in respect of whom the institution of the protection measure is requested, issued no later than 2 months before the date of filing the application. However, art. 304 paragraph (1) of the Code of Civil Procedure provides that the court, ex officio or at the request of the participants, in preparing the case for judicial debates, may order the performance of a psychiatric examination of the individual. In the case, by application, the case was requested to be put on the list, the petitioner explained that her daughter has a childhood disability and is periodically subjected to an examination. At the same time, she indicated that she is

unable to pay the cost of an extrajudicial examination, requesting exemption from its payment. Here it is noted that art. 303 paragraph (1) of the Code of Civil Procedure establishes that the petitioner is exempt from paying the expenses related to the process regarding the protection measure. [12].

In case no. 2r-745/22 of the Chisinau Court of Appeal, it was held that according to the stated legal norms, the psychiatric expertise can be performed both extrajudicially and ex officio or at the request of the participants in the preparation of the case for judicial debates, thus the Civil Board considers the court's conclusion to return the application submitted by the petitioner premature. For the reasons mentioned, in order not to violate the appellant's right to a fair trial, provided for by art. 6 §1 ECHR, the Civil, Commercial and Administrative Litigation Board of the Chisinau Court of Appeal comes to the conclusion to admit the appeal, to fully quash the decisions of the Chisinau Court of Appeal, Centru headquarters of December 10, 2021 and January 13, 2022, with the return of the case to the trial court, in the same panel of judges, at the stage of receiving the application. [13].

In case no. 2a-1981/21 the Chisinau Court of Appeal held that, in accordance with art. 103 paragraph (2) of the Civil Code (edition of 01.03.2019) by way of derogation from paragraph (1) of the given article, in the case of the establishment of guardianship, the court, based on the psychiatric expert report confirming that, given the stage of development of science, there are no obvious signs that the person's condition will improve, may establish, by reasoned decision, a term of up to 10 years. [14].

According to the data of the National Bureau of Statistics of the Republic of Moldova, persons recognized as disabled (beneficiaries of disability pensions and state social allowances for disability) represent about 7 percent of the population with habitual residence in the country. The majority of persons recognized as disabled are aged 30-45. On January 1, 2024, according to data from the National Social Insurance House, the number of people recognized as disabled in the Republic of Moldova was 161.9 thousand people, including 11.4 thousand children aged 0-17 years. (Figure 1).

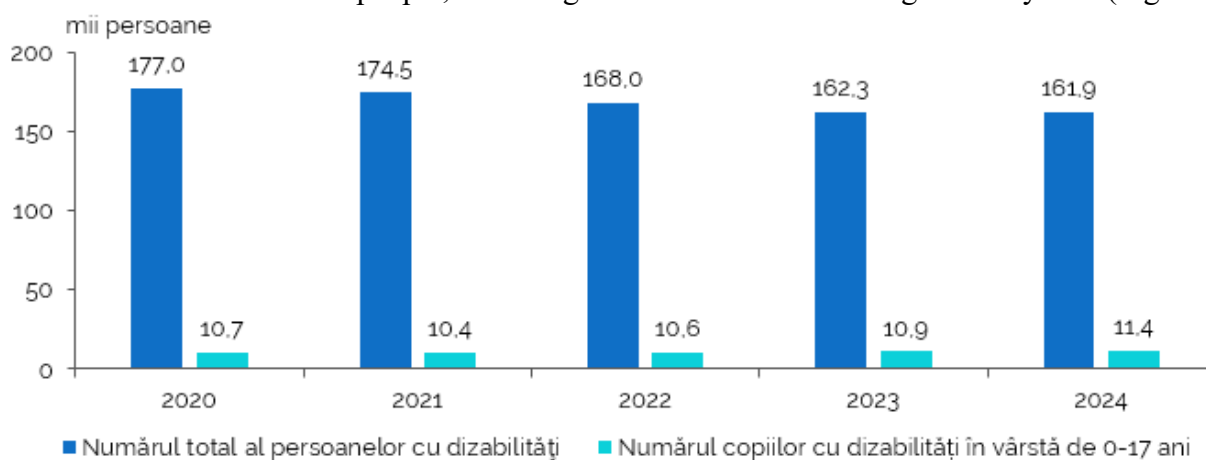


Figure 1. Number of people recognized as disabled on January 1, 2024

Source: www.bns.md

The demographic situation in the Republic of Moldova shows that the elderly population is growing both in absolute and relative terms. The share of elderly people recognized with primary disability constitutes 11.4% of the total number of people certified with primary disability (Table 1)

Table 1. Disability pensioners, by age group and gender, as of January 1, 2024

	2023			2024		
	Total	Woman	Man	Total	Women	Man
Total disability pensioners, thousands	105,2	53,8	51,4	101,7	52,7	49,0
including by age group (%):						
16-29 years	0,5	0,5	0,5	0,5	0,5	0,5
30-54 years	28,9	31,6	26,0	27,6	30,0	25,0
55-64 years	45,3	40,5	50,3	44,9	40,6	49,6
65 years and over	25,3	27,4	23,2	27,0	28,9	25,0

Source: The National Statistical Office of the Republic of Moldova

The share of people aged over 60 is continuously increasing. In the last five years, the share of the elderly in the age group 70-74 years in total elderly has increased by 6.0 percentage points (from 16.3% at the beginning of 2020 to 22.3% at the beginning of 2024), while the share of the other groups has decreased slightly. (Figure 2) [15]

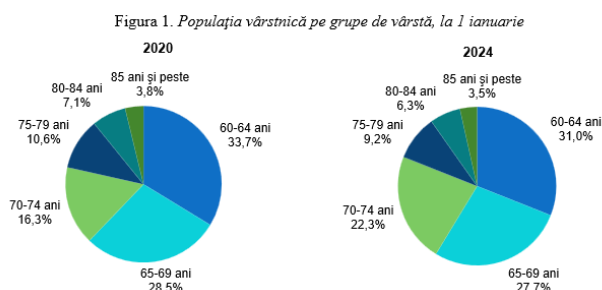


Figure 2. Elderly population by age group, on January 1, 2020 – and on January 1, 2024

Source: www.bns.md

Republic of Moldova that provides support to persons with disabilities, their family members who require protection, support and information through the Free Telephone Assistance Service for Persons with Disabilities at telephone number 080010808 (FTASPD). This service was launched in January 2017 by the Keystone Moldova Association and is funded by the European Union between 24.01.2017 and 27.04.2019. Since June 2019, the Keystone Moldova Association has been administering and managing the Free Telephone Assistance Service for Persons with Disabilities by contracting with the Ministry of Labor and Social Protection of the Republic of Moldova.

This National Service provides to disabled people and their family members: telephone information support; telephone counseling; multidisciplinary collaboration to resolve cases of rights violations; identification of suspected cases of violation of the rights of disabled people and reporting them to competent bodies and partner organizations; notification of situations of risk to the life, security and integrity of the disabled person. Disabled people, their family members, elderly refugees from Ukraine can also benefit from the assistance provided by FTASPD. [16]

The FTASPD service provides: information support on accessing services for refugees; support in completing online applications for requesting monetary assistance; support in accessing the services of mobile teams for disabled people, people with serious health conditions, in order to benefit from monetary assistance; identification of accommodation places for people with severe disabilities, families with children with autism; identification of assistive equipment and providing it; psycho-emotional support.

Measures to protect people with disabilities are:

-Assistance contract (Article 74,75 of the Civil Code of the Republic of Moldova), when the protected person (with disabilities) signs a contract with any freely chosen person (assistant). The assistant will be obliged to be present at the conclusion of legal acts and the making of other decisions by the protected person, to provide him with necessary information, to help him in communicating with third parties. The assistant can countersign the act concluded by the protected person.

-Mandate for future protection (Article 76-91 of the Civil Code of the Republic of Moldova), when the person who has reached the age of majority and has full legal capacity (the principal) can empower one or more persons (mandates) to represent him in the situation where, as a result of mental illness or physical, mental or psychological deficiencies, he will not be able to realize his actions or express his will in the future. The mandate may take the form of a power of attorney, a mandate contract or other notarized legal document. In this case, during the execution of the mandate for future protection, the mandate can be revoked only by a court decision, according to Article 83 of the Civil Code of the Republic of Moldova. In practice, if the agent exercises the protection mandate in the future in a way that harms the interests or well-being of the principal, the court may revoke the powers of attorney of the agent in whole or in part.

At the same time, the court may intervene in the manner of exercising the protection mandate in the future, to cancel the countersignature of the protection mandate in the future by the guardianship authority carried out according to art. 81 para. (1) Civil Code of the Republic of Moldova, if the legal conditions have not been met, as well as to interpret its content or to determine the conditions and manner of execution of the protection mandate in the future, according to art. 84 of the Civil Code of the Republic of Moldova.

In practice, if the trustee exercises the future protection mandate in a manner that harms the interests or well-being of the principal, the court may revoke the trustee's powers in whole or in part. At the same time, the court may intervene in the manner of exercising the future protection mandate, to annul the countersignature of the future protection mandate by the guardianship authority carried out in accordance with art. 81 para. (1) of the Civil Code of the Republic of Moldova, if the legal conditions have not been met, as well as to interpret its content or determine the conditions and manner of executing the future protection mandate, according to art. 84 of the Civil Code of the Republic of Moldova.

-Temporary protection (Article 97 of the Civil Code of the Republic of Moldova), the court may establish, by court decision, temporary protection with respect to a person who, pursuant to Article 65 paragraph (1) of the Civil Code of the Republic of Moldova, needs temporary protection or representation for the performance of only certain legal acts.

By way of derogation from paragraph (1), temporary protection may be established by the court by decision, for the period of the procedure for establishing guardianship or tutelage.

In judicial practice, civil cases arise regarding the need to establish temporary protection, ex officio, by the court, if the request for the establishment of a judicial protection measure in the form of tutelage is rejected on the grounds that the petitioner has not lived with the person under protection for the last 3 years in accordance with Article 108 of the Civil Code of the Republic of Moldova. [17]

In our opinion, in accordance with the provisions of the Civil Procedure Code of the Republic of Moldova, it is necessary for the court to express itself regarding the voting ban in this case, if according to the psychiatric expert report, it was concluded that the person concerned is indiscriminate and cannot be aware of his actions, having a diagnosis of mental disabilities that are irreversible over time according to the findings of the judicial expert doctor with at least 15 years of experience in the field.

By Decision No. 25 of 2018 of the Constitutional Court of the Republic of Moldova, it was found that Article 38 of the Constitution of the Republic of Moldova establishes that, in cases provided for by law, the right to vote may be restricted. The manner and conditions in which this can be achieved are listed in the provisions of Article 54 of the Constitution. At the same time, the Republic of

Moldova, in order to guarantee the right to vote to a person with mental disabilities, should be accompanied by the declaration of unconstitutionality of certain provisions of the Civil Code and the Criminal Code, which establish the nullity of the legal act concluded by a person in respect of whom a measure of judicial protection is established and, respectively, the impunity of criminal liability in the case of an irresponsible person. In the case of *Alajos Kiss v. Hungary*, 20 May 2010, the Hungarian government argued that depriving persons placed under guardianship of the right to vote ensures the maintenance of society's trust in the electoral system. The European Court confirmed the legitimacy of such a purpose (§ 40). The Court admits that this legitimate aim could also be invoked in the case of the electoral legislation of the Republic of Moldova. [18]

-Curatorship (Article 102-105 Civil Code of the Republic of Moldova), is established by the court over a person who, without being completely lacking in discernment, needs to be assisted continuously. Curatorship is established only if the person cannot be sufficiently protected through **temporary** protection. The maximum term of the guardianship can be 5 years.

-Guardianship (Article 102-105 Civil Code of the Republic of Moldova), is the last measure of continuous protection and is established only if neither **temporary** protection nor **curatorship** can ensure sufficient protection for the person. The maximum term of guardianship is 5 years, and as an exception 10 years.

Conclusions

The adversarial phase is the trial itself, which involves the mandatory hearing of the person whose placement under interdiction is requested, followed by the communication of the decision to place under interdiction, after it has become final in Romanian legislation according to art. 941 of the Romanian CPC [19, point 16].

The court and the guardianship authority that exercises general supervision of protection measures according to the competence provided by law, may visit or request visits to be made to the protected persons and those in respect of whom a request for the establishment of a protection measure has been submitted, according to the provisions of art. 66 of the Civil Code of the Republic of Moldova in order to find out the wishes of the person to be placed under judicial protection. When examining the case on the merits, the public authority will present the conclusion formulated in writing.

It is obvious that if the person to be placed under protection does not have discernment or has diminished discernment, or if the action has been filed and/or withdrawn by the guardianship authority, in order to prevent a conflict of interest, the lawyer appointed ex officio by the court will appear as his/her legal representative, for the representation and defense of his/her legitimate interests in court.

In the case provided for by the provisions of paragraph 58/1 paragraph (5) of the CPC RM, at the request of the protected person or ex officio, with the consent of the protected person, the court examining the case may appoint, by decision, a special curator who will assist the person in the respective case or a special guardian who will represent the person in the respective case (the capacity to exercise civil procedural rights of the person in respect of whom a judicial protection measure is established).

The procedural position of the guardianship authorities that intervene in the process regarding the establishment of the protection measure as an interested person to submit conclusions is to be differentiated from the procedural position of the petitioner in defending the interests of the beneficiary of the protection measure. In the latter case, the court must appoint ex officio a legal representative for persons with full and partial discretion, a measure similar to that established under Romanian law. If necessary, the guardianship court may appoint a special curator until the final resolution of the request for interdiction (art. 167 Civil Code of Romania). [20].

Thus, a provisional protection measure is established, and if the application is rejected, the guardianship established during the process ceases by law [20, 19, point 16]. In the opinion of the

Romanian authors, in the absence of a guardian or curator, certain persons with disabilities could benefit from a personal representative who would ensure that their rights are respected and exercised, this is the proposed legislative project to amend Law no. 448/2006 of Romania on the protection and promotion of the rights of persons with disabilities in order to introduce the personal representative, who will be a state employee. In the explanatory memorandum, the initiators of the bill argue that these new provisions will prevent violations of the rights of persons with disabilities and that such amendments are necessary, because in Romania there is currently no effective mechanism for independent representation [21].

Therefore, it is necessary to introduce some new provisions that would guarantee the representation of the legitimate interests of the protected person in court, for example by a legal representative established by law. The regulation of the procedure for establishing protection measures is within the internal competence of the state, so each state has its own treatment of this issue. Particular attention is paid to the principle of respecting the wishes and feelings of the person concerned when establishing and implementing protection measures, in this case, of the incapable adult, the concerns of the international community in matters of protection are based on the past and present wishes and feelings of the interested party [22].

In Romanian legislation, it was proposed that in the absence of a guardian or curator, certain persons with disabilities could benefit from a personal representative who would ensure that their rights are respected and exercised. The representative will be for persons who need someone to represent them, but who do not have such a form of legal protection. Judicial practice has shown that the civil procedural law of the Republic of Moldova does not cover all forms of representation of the person placed under protection before the court, and the cases, requesting the establishment of a judicial protection measure examined in the special civil procedure or at the request of any interested person or by the court ex officio, must be examined in adversarial manner.

When making any decision concerning the person in respect of whom a protection measure is established (the protected person) or his/her patrimonial interests, the court, the guardianship authority and the person entrusted with the protection (the assistant, the representative empowered by a protection mandate in the future, the provisional guardian, the curator, the tutor, the members of the family council) shall give priority to the wishes and feelings of the protected person, expressed independently or, at his/her request, with the help of the person of trust.

The wishes and feelings of the protected person shall have priority, even if they are likely to expose the protected person to a certain risk, except in the case where he/she exposes himself/herself to a serious risk that cannot be diminished by taking certain additional measures.

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