

CONSIDERATIONS REGARDING THE ADOPTION ACT IMMUTABLY

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In September the third, 2008 the Government has approved the immutably and completion of the Adoption Act no. 273/2004. This modification is caused by a Constitutional Court Decision, no. 369/2008 which declared unconstitutionality of some stipulations of this Act, because the confidentiality principle regarding the adopter identification dates and natural parents' identity.

1. The main immutably of the Adoption Act by the Government Ordinance no. 102/2008

1.1. In the Official Gazette of the Romania, part I, no. 639/September the fifth, 2008 was published the Government Ordinance no. 102 for the Adoption Act immutably and completion. According to the immutably, if the child is adopted by his parent' husband or wife, the natural parent consent must be express in front of the court when the adoption claim is judged. This immutably was made by the 15th article, the second and third paragraph which previous stipulated that the natural parent consent in authentically form through the notarial document.

1.2. Regarding the confidentiality mention by the Constitutional Court decision, was insert a new paragraph to the second article and a new principle of the

adoption – the principle of confidentiality – regarding the adopter identification dates or adopter family and regarding the natural parents' identity.

Through the Constitutional Court decision no. 369/2008 by march the 20th, 2008, published in the Official Gazette, Part. I, no. 238 by March the 27th, 2008 was declare unconstitutional the stipulations of the 35th article, the second paragraph, letter I, the first these and the stipulations of the 63rd article, the third and fourth paragraph by the Adoption Act, stipulations that became inapplicable after 45 days according to the Constitution, the 147th article.

The Constitutional Court criticism refer the fact that from the stipulated article arise that the adoption claim judgement was made without the consent of the natural parents, in this level of the trial, only on base of documents which certify the consent in the phase of the procedure' opening. As well is considered unconstitutional the fact that the natural parents aren't parts in the adoption consent phase of the procedure, the claims judgement is made only through the citation of the direction from the child residence, of the direction from the adopter or adopter family residence.

In practical, is uncovered from the settlement point of view, the situation in which the consent for the adoption is give only by a parent because the other one is unknown, declared dead or messing, under interdiction and further, on de adoption trial route, this cause ceased.

1.3. Another immutably regarding this situation. If further of the decision irrevocability of the adoption procedure opening, the cause which made impossible the one parent consent is disappeared¹, against the decision can be made the claim of recession, which can be introduced until the adoption approval decision by the any natural parent or by the direction which asked the adoption procedure opening. If the recession is consent, the court will ask the parent consent after the direction conciliation and information rapport. According to the 12th article, the third paragraph, if one of the natural parents is deceased, unknown, declared dead or messing, under interdiction or in other situation which made him in impossibility to show clearly his will, the other parent consent is enough for the adoption procedure opening.

Considering that in practical is possibly that after the adoption procedure opening to ceased the motive which determined the impossibility of the consent expression by the natural parent – for example through the paternity establishment, through the appearance of the declared dead or messing person, through the interdiction abduction or the other cause ceased – is settled a recession procedure for the adoption procedure opening decision, in which the court has the possibility to re-examine, alongside the direction, the new familial context effect to the child situation, so that the court possess all the essential elements to establish if the adoption is the most appropriate protection measure and if maintain the decision of the adoption procedure opening.

¹ After the 23rd article are introduce the 23¹ - 23⁵.

1.4. Is set up the possibility to ask again the natural parents consent to adoption, when are sign that after the irrevocability of the consent, was interfere new elements, which determined the initial consent revival. The direction which ask the adoption procedure opening has the duty to inform the court, through the direction from the adopter/adopter family residence, the existence of the new elements regarding the natural parent or extended family situation, which can bring the modify of the protection plan finality. If the natural parents are personally in front of the court and express the denial to consent of adoption, the court will suspend the adoption claim getting up and the natural parents statement and the decision of suspend will be send to the competent direction which will introduce the recession claim for the decision of adoption procedure opening.

The natural parents consent must be take by the court which judge the adoption claim in determined conditions, therefore the part quality of the natural parents in the adoption claim, with the possibility to accrue anytime and in any conditions on the consent to do not affect the entire procedure, all the steps to find a adopter family and for the verifying the compatibility between this family and the child, and do not permit the access to all the document of the trial, considering this content a lot of personal information (material situation, health situation, criminal record, psycho-social profile etcetera). The invitation will be addressed to the natural parents in confidential conditions, in the council room, without announce dates regarding the case or other dates which permit the identity divulgation of the adopter or family adopter.

1.5. Regarding the moment of the adoption procedure opening, the immutably consist in the obligatorily of the natural parents citation or, in case, of the trustee and of direction from the child residence, indispensable for the claims regarding the adoption procedure opening. In the case of admittance of the adoption claim opening, in the decision device will be notice the parents consent existence, the consent of a single parent, the consent of the trustee or the neglect of the abusive refuse to consent for the child adoption, according to 13th article and will be admit the adoption procedure opening.

1.6. Regarding the child entrusting for the adoption, the claim judgement is made through the citation of the child residence direction, of the adopter/adopter family residence direction and of the adopter or adopter family, according to the 28th article, the second paragraph.

1.7. A new document which must be annexed to the adoption consent claim id the irrevocable decision of adoption procedure opening, according to the 35th article, the second paragraph, the letter i.

2. The argument for the Adoption Act immutably

Beside the Constitutional Court Decision, an argument for the Adoption Act immutably is the European Convention regarding the child adoption, sign to Strasbourg on April the 24th 1967, which will be analysed in a different section.

In consideration of the Constitutional Court Decision no. 369/2008, which declared unconstitutional the 35th article, the second paragraph settlements of the Adoption Act no. 273/2004, the legislator considered that is compulsory a new settlement for the adoption procedure continuity considering all the guarantees, including the procedural ones, for the child concern observance and the private, intimate and family life protection and for the personal dates defence. In the meantime, those stipulation can affect the 20th article settlements from the child adoption European Convention, Strasbourg, ratified by Romania through the 15/1993 Act.

3. The European Convention for the child adoption, sign on Strasbourg in April 24th, 1967

The European Convention for the child adoption, sign on Strasbourg in April 24th, 1967 and ratified by Romania through the 15/1993 Act stipulate on the 20th article the exactingness for the confidentiality assurance regarding the dates and information on the private life of the natural parents and of the future adopters.

Observing this principle and the general conception of the 273/2004 Act, the new normative act will permit to the court to ask again the natural parents consent, in the third level of the adoption procedure – the adoption approval level – according to the Constitutional Court decision no. 369/2008, in certain conditions and considering the adoption file dates.

The 20th article form the Convention stipulated the following rules:

„1. The adopter identity will not be communicate to the natural family of the child, if it is possible;

2. The adoption procedure will be take place in the secret session, if it is possible;

3. The adopter and the adopted will can obtain the public register documents which attest the birth fact, date and place, but cannot revealed the adoption and the natural parents identity;

4. The public register will be draw up or those content will be reproduce in a such manner that the persons without a legitimate interest cannot noticed that a person is adopted or the natural parents identity.

In consideration for this principle, the project propose the natural parent consent to be take by the court which judge the adoption claim approval in determined conditions, thus so the quality of the part giving and those citation in the third part of the procedure, with the possibility to accrue anytime and in any conditions on the consent to not affect the entire procedure, all the steps for the adopter family finding and for the compatibility verifying between this family and the

child, and do not confers to the engaged persons – the natural parents and adopters – the access to all the file documents and acts, considering that it contained personal information (the material situation, the health situation, criminal file, psycho-social profile etc).

The court can ask again the consent for adoption, to the natural parents, if there are clues that after the irrevocability of the consent appeared the new elements which determined the initial consent accrue. The natural parents call in from of the court competent to judge the adoption approval will be made by a addressed invitation, in confidential conditions, in the council room, without indicate dates regarding the file or other dates which permit the identity divulgation or other information regarding the adopter or adopter family.

If the natural parents, considering the new elements in their family or in the large family, modify the consent and refuse to accept the adoption, the project stipulated the suspend of the adoption claim judgement and the return of the case to the court which opening the adoption procedure. It is kipped the law conception which divided the adoption procedure in three levels: the first one – the adoption procedure opening – regarding the relation between child and the natural parents, is developed by the court from the child residence, which is to the natural parents, placing centre or in the other protection institution, the second level – the entrust claim for adoption, in the competence of the same court and the third level – the adoption approval, which regard the adoption from another point of view, the relationship between the child and the adopter or adopter family. This last level is separated by the previous from the procedural and the territorial competence point of view, conforming to the European Convention regarding the legal background and a procedure which discountenance the cognition between the natural parents and the possible adopters. The tribunal form the adopter or adopter family in competent in this case, according to the 61st article, the third paragraph and the 30th article the first paragraph.

In succession, because the court which disposed the adoption procedure opening know better the child family situation, the steps made by the Direction for the social assistance and the child protection for the child reinstatement and for the better measure for the child finding, is natural that the new consent analyses to determined the same court competence which pronounced the decision for the adoption procedure opening.

For the second situation, in case in which after the adoption procedure opening ware cased the motifs settled by the 12th article, the third paragraph which determined the impossibility of the natural parents to that time, is settled a procedure for the recession of the decision regarding the adoption procedure opening. In this recession the court must have the possibility to re-examine in company of the direction the new family context effects for the child situation, in a such a manner to confer to the court all the essential elements for decide if the adoption is the most adequate measure for the child protection and if it is necessary to keep or not the decision of the adoption procedure opening. The reasons regarding the three levels of the adoption procedure and the territorial competence for the each level are available in this situation, too.

The Ministers Committee of the European Council was passed a bill in May the 7th, 2008, to the 118th session from Strasbourg, the new European Convention regarding the Child Adoption.

The new settlement insert are²:

- The father consent is asked in all the cases, even if the child is birth outside the marriage;
- The child consent is necessary if the comprehension level of the child permit;
- The adoption is extending to the unmarried and heterosexual couples, which have a civil partnership in states which recognise this institution and to single persons. It is possible to extend the adoption to the married homosexual couples or unmarried but which live together and has a stabile relationship;
- The new convention respect the rights of the adopted child to know their identity and the natural parents right to keep anonymity;
- The minim age of the adopters must be 18astablish its proper age between these intervals. The age difference between the adopter and the adoptee must be minimum 16 years.

4. The procedural aspects

The law immutably stipulated some procedural aspects, too. The judgement of the adoption approval claims must be made with the citation of the direction from the child residence, of the direction from the adopter or adopter family residence and of the adopter or adopter family. The judgement of the adoption approval claims stipulated by the 5th article, the third paragraph is made by the adopter or adopter family citation and the judgement of the adoption approval claims stipulated by the 20th article, letter b is made by the adopter and natural parents' citation³.

Regarding the international adoptions, the judgement of the international adoption approval claims is made by the citation of the child residence direction, of the the adopter person or family and of the Romanian Adoption Office, according to the 1st paragraph of the 46th article, introduce by the Governmental Ordinance.

Two paragraphs (the second and the fifth) of the 63rd article, which stipulated the persons quotas in the trial ware abrogated.

² The Convention text can be analysed on the site of the European Council, www.coe.int;

³ Through the first and second paragraph of the 36th article, introduces by the Ordinance, the previous article becoming the third;