

# **Guardianship, a Means of Protecting the Individual from the Perspective of Legal History: Between Roman Law and Romanian Law**

**Marilena Marin**

*Ovidius” University of Constanța, Romania, marilena.marin@365.univ-ovidius.com*

**ABSTRACT:** The need to protect individuals who lack the capacity to protect themselves has led the legislator to impose a set of conduct rules in this regard. The role and purpose of establishing these rules have been dictated by the legal order encountered in each era, in various forms, according to the level of evolution and development of society. This serves as the starting point of this study, considering that the institution of guardianship represents a longstanding concern, which we have continued to analyze over time, drawing on the doctrine and jurisprudence encountered up to this point. Within the scope of this work, we will bring to attention aspects of the ancient world related to the institution of representation through guardianship and curatorship, after which we will focus on the institution of curatorship as we find it in modern days.

**KEYWORDS:** curatorship, guardianship, history of law, Roman Law, Private Law

## **Introduction**

Subrogation in the rights of a person considers at least two aspects: on one hand, the necessity of exercising rights recognized by law and fulfilling obligations assumed by another person, but also maintaining the necessary balance for legal order in a society, at a given moment. The institution of guardianship, seen as a means of protecting the person, has been encountered and regulated since ancient times until the present day. For example, on the one hand, in public law, we can mention the emergence of regency, where the minor heir, usually eligible for the highest position in the state, was represented by an adult (mother, father/clergy, or another adult designated by law in this capacity) until the minor reaches maturity. On the other hand, in private law, we consider at least three examples: the institution of guardianship, guardianship, and representation through the conclusion of a contract to this effect.

This paper addresses the institution of guardianship as a means of protecting a person who cannot independently manage their relationships with others, cannot enter into legal acts, and cannot manage their own property.

## **1. Means of Personal Protection in Ancient Rome**

The means of protecting individuals, known in ancient Roman law, were guardianship (*tutela*) and curatorship (*curatela*). Regarding the institution of guardianship, ancient Roman law presumed that the person designated as a guardian had the duties of managing the estate and supplementing the will of those deemed incapable, for the protection of the interests of the agnatic family, formed on the basis of civil kinship. Those placed under guardianship were minors and women, these being the categories of individuals for whom ancient Roman society deemed legal protection necessary (Sâmbrian 1994, 74).

According to historical sources, both written and unwritten, acknowledged by legal doctrine, it is said that the notion of "curatorship" is linked to the Roman Empire. This observation takes into account that the Romans placed great importance on the concept of "patrimony", primarily concerned with safeguarding property and only then with protecting the individual. Property itself was viewed as a relationship between the asset and the individual, not as a relationship between individuals regarding an asset, as we perceive it today. The Romans were concerned with "remedying factual incapacities" to protect the

wealth of the incapacitated individual, pursuing the interest of the civil/agnatic family and the transmission of the inheritance of the incapacitated person (Ciucă 2014, 330-339). The legal institution of curatorship, like guardianship, served as means of protecting individuals with factual incapacity. Therefore, the person considered incapable had legal capacity but lacked representation of the consequences of their actions.

Against this backdrop, the institution of curatorship emerged, applicable in various cases, including: curatorship of the insane, curatorship of the prodigal or spendthrift, and curatorship of minors up to the age of 25. In essence, by virtue of its right to enact and enforce laws, the Roman state was concerned with protecting the individual's estate and their heirs. It is noteworthy that the term "sanction" is not used here in the sense of punishment but rather as an "interpretation of a legal provision" (Mitra-Niță 2021, 161-169).

### ***1.1. Types of Guardianship in Roman Antiquity***

Guardianship of minors. Regarding this form of representation, Roman antiquity established two conditions to qualify as a person with the status of a minor: the minor must be born out of wedlock and be *sui iuris* (that is, an independent person), and the minor must have exited paternal authority. This means of personal protection could be established as follows: through the testament of the *pater familias*, for a wife married *cum manu*, for his minor children, and even for the grandchildren through sons, if their father was deceased; by law (legitimate guardianship), granted to the closest agnatic/civil relative of the minor/incapacitated person; by appointment of a guardian (*dativus tutela*) by a magistrate/state authority, which was subsidiary and occurred when a guardian was not appointed by the *pater familias* in their testament. As for the wife, although we find different regulations in today's legislation, Romanian law continues to provide special protection for the surviving spouse regardless of whether they entered into a marriage contract or not (Duță 2010, 172-180).

The methods of estate administration, according to ancient Roman law, were: *auctoritas*, in the case of minors over 7 years old, requiring only supplementation of their capacity, not total substitution; *gestio/negotiorum gestio* (business management) for the estate of minors up to 7 years old or absent minors (both referred to as "wards" or "protégés"), and the acts were concluded on behalf of the ward by the guardian, who was not considered a representative (Oancea 2009, 172).

The guardian's liability was assessed concretely or in the abstract, as appropriate. As a means of legal protection, two types of actions were available: direct actions against the guardian or contrary actions brought by the guardian. Guardianship of women. As mentioned earlier, another form of personal representation was the guardianship of women. Roman law recognized the same conditions and methods for establishing guardianship over women as for guardianship of minors. In this second type of personal protection, the guardian's obligations included approving acts of a patrimonial nature without managing the woman's assets.

### ***1.2. Guardianship***

In Roman law, guardianship represented a complementary legal institution to guardianship. Through this institution, the protection of family interests based on civil kinship (agnatic) was pursued. Roman law established two important criteria for classifying guardianship: in relation to the protected persons and in relation to the manner of establishing this form of personal protection.

According to the first criterion, the following persons were placed under this form of protection: the mentally ill (*cura furiosi*), prodigals (*cura prodigi*), children and young people up to 25 years of age (*cura pupilli*). Initially, this form of protection for young people was established for debauchery and madness, later generalized by the provision of Emperor Marcus Aurelius. Regarding young people who had not reached the age of 25, they were not necessarily considered persons with mental health problems, but were considered incapable of managing their property through various legal acts. A form of protection for adults is also

found in our days, when the Romanian legislator created the normative framework to protect the adult person unable to conclude valid legal acts.

Roman law also knew other forms of guardianship, namely, for the administration of the assets of missing persons, for the unborn child whose father died, or for deaf-mute persons. In terms of the manner of establishment, the Romans recognized the following types of guardianship: legitimate guardianship and appointed guardianship.

As a method of administering assets, only one procedure was recognized, called *gestio/negotium gestio*, which aimed, in fact, at organizing, managing, and representing the person considered incapable, in concluding legal acts (Molcuț 2011, 106).

## **2. Means of Personal Protection in Current Romanian Law**

### **2.1. Private Law**

In the field of private law, we talk about the means of protecting the person through guardianship and guardianship, usually in civil law relationships and family law. Here we find representation, guardianship, and guardianship in material and procedural legal acts, the institution of the special curator, and the representation of the subjects of the legal relationship before authorities/courts.

As a legal basis, we find legal provisions regulating the situations in which special guardians can be appointed, such as: Articles 106-111, Article 164 para. 1, 4 and 5, Articles 165-177, Article 399 of the Civil Code. In the set of regulations mentioned above, we note several important aspects, which are also found in Romanian judicial practice. It is noted that Romanian legislation regulates protective measures, namely, the protection of minors is carried out by parents, by establishing guardianship, by placement, or, as the case may be, by other special protection measures specifically provided by law, and the protection of adults is carried out by placing them under judicial interdiction or by establishing guardianship, under the conditions provided by the Romanian Civil Code (Jurcă, Botină, Condurache, Guerard 2014, 43). The phrase "guardianship court" refers to the procedures provided by this Code regarding the protection of natural persons within the jurisdiction of the guardianship and family court established by law, hereinafter referred to as the guardianship court. In all cases, the guardianship court shall promptly resolve these requests.

Unfortunately, the organization of the guardianship court in the Romanian judicial system has not been fully resolved, which makes it impossible to apply the law according to the legislator's intent.

### **2.2. Public Law**

From the area of public law, administrative guardianship is one of the examples that can be associated with the theme analyzed in this work. Administrative guardianship consists of the right of supervisory (administrative) authorities to approve, annul, or suspend certain acts of decentralized authorities, for reasons of legality (Ghencea 2021, 97-106). The scope of representation through a curator or through guardianship is more limited compared to the institution of guardianship. In the latter case, the representation of the person in need is ensured for the entire range of rights of the represented person (Niță 2023). Administrative guardianship in the Romanian administration is a very important legal instrument for the protection of state interests and citizens. Through it, higher authorities exercise supervision and control over subordinate entities, ensuring compliance with legislation and the proper functioning of public institutions. It is an efficient way to manage resources and maintain the integrity of public administration (Ghencea and Apostolache 2023, 55).

Administrative guardianship exercised by the prefect is a public law institution regulated in most European states, fulfilling not only the right but also the obligation of the state to ensure the legality of local administration through the representative of the central executive in the territory, known in Europe under various names, but with the same decisive

role in achieving the rule of law. Actions in justice involving administrative guardianship fall within the competence of the administrative contentious sections of the courts (Botină, Nedea, Mirea 2018, 37).

### **2.3. Representation under mandate or power of attorney**

A notion that can be compared to the institution of guardianship is that of mandate, power of attorney, or proxy. This is mostly applied in the field of contracts and is used only for individuals who have full legal capacity and who, at a certain point, need to be represented (Topor 2021, 56).

The mandate represents that civil agreement in which a person, called the mandatary, is empowered by another person, called the mandator, to represent them in front of authorities, to perform certain legal acts on behalf of and for the account of the mandator. A power of attorney or mandate in the sense of an instrument of proof (*instrumentum probationis*) is the act that proves the conclusion of the mandate contract and explains the origin/source of the legal relationship of the mandate. This agreement also aims, among other things, to protect a certain social value (Mitra 2003, 29). Such an act can be represented by a document authenticated by a public notary or by a legal authorization presented by the lawyer to the court, after having previously concluded a legal assistance contract allowing them to present the authorization.

### **2.4. Litigation guardian – Curator litis**

Romanian legislation regulates both the mandate or power of attorney given by the client to their conventional representative, as well as the appointment by the court of a lawyer in cases where legal assistance is mandatory. In both situations, we are talking about a legal professional who represents the interests of one of the parties involved in the litigation.

The current regulation of guardianship has allowed the application of this institution in the field of commercial law as well, specifically regarding the guardianship of legal persons. This circumstance is less addressed, detailed within the context of research conducted by Transylvanian practitioners in the field.

The notion of "litigation guardian" is found in the current regulation of the Romanian Code of Civil Procedure and refers to those lawyers who expressly manifest their intention to be appointed in this capacity, in those cases pending before the courts for resolution. The manifestation of intention is materialized by the written request of interested lawyers, addressed to the bar associations to which they belong, in order to be included in the specially prepared lists for this purpose. These lists are subsequently communicated to the courts.

Before the entry into force of the new civil codes (the Civil Code and the Code of Civil Procedure), Romanian legislation, namely the Code of Civil Procedure (Art. 7 para. 3 and Art. 44) and the Law on the Organization of the Legal Profession no. 51/1995 (Art. 3), also knew and regulated the notions of guardian and fiduciary. These had a limited scope of application regarding the representation of the interests of associates of commercial companies or specific professional activities of the legal and notary professions.

The designation by the court of special guardians in cases concerning insolvency proceedings occurs when service cannot be made because the debtor legal entity no longer has a real and current address of its registered office. Faced with this situation, the mentioned courts proceed to appoint special guardians to represent the interests of legal persons, with bona fide creditors being obliged to pay the established fee to avoid the sanction of suspending requests concerning the opening of the procedure.

As a legal basis of procedural law, we mention the provisions of Art. 58 of the Civil Procedure Code, according to which the Romanian legislator regulated the institution of special guardianship. Thus, through the mentioned text, the use and exercise of procedural rights are regulated, respecting the fundamental right to a fair trial of every Romanian citizen.

The Romanian legislator has provided that, in case of urgency, if a natural person lacking legal capacity to exercise civil rights does not have a legal representative, the court, at the request of the interested party, will appoint a special guardian to represent them until the appointment of a legal representative, according to the law. Also, the court will appoint a special guardian in case of conflict of interest between the legal representative and the represented person or when a legal entity or an entity called to court does not have a representative.

The same regulation applies to persons with restricted legal capacity.

It is also mentioned that the appointment of these guardians will be made by the court hearing the case, from among the lawyers specifically designated for this purpose by the bar association for each court. The special guardian has all the rights and obligations provided by law for the legal representative.

At the same time, the legislator regulates the remuneration of the appointed guardian according to the previous provisions. Therefore, the provisional remuneration of the guardian thus appointed is determined by the court, by decision, also establishing the method of payment. At the request of the guardian, upon termination of their status, taking into account the activities performed, the remuneration may be increased.

### **3. Guardianship of the Person through Curatorship**

#### ***3.1. Guardianship of the Legal Person***

In contemporary times, guardianship is considered a means of safeguarding/protecting the physical person who cannot manage their interests due to specific reasons. The measure of guardianship will persist as long as it protects the interest for which it was established. Unlike adults, minors also benefit from a specific protective measure tailored to their age category. Guardianship established for minors is seen as a subsidiary and temporary legal means to protect the respective minor. The Romanian Civil Code regulates the conditions under which a person, considered incapable of valid legal acts, can be protected and assisted to legally participate in contemporary legal life. We observe the provisions of Article 109 of the Civil Code, which state that "the protection of the physical person through guardianship occurs only in the cases and conditions provided by law", precisely to avoid any infringement on the free expression of consent if the person does not have limited capacity.

#### ***3.2. Procedure for Designating a Special Curator***

Roman civil law, as substantive law, regulates the cases and conditions under which the protection of a physical person is necessary, as previously mentioned. The procedure for establishing protective measures is regulated within the framework of the civil procedure code and special laws. Within the procedure for safeguarding a person incapable of entering into valid legal acts, Romanian legislation presupposes a series of steps that must be followed to obtain a definitive court decision. These steps vary depending on the type of guardianship required.

Establishment of guardianship for minors. For the establishment of guardianship to represent a minor child in the conclusion of disposition acts, we will have a specific form of the summons with which we engage the court for resolution. We will propose a certain type of evidence and justify their approval through a different evidentiary thesis than the special guardianship situation applicable to the incapable person. In the first situation, where we refer to the conclusion of disposition acts, Romanian law imperatively requires the establishment of guardianship for the minor through legal means. The child will be represented by the guardian in the completion of these acts, and the respective guardian will be designated and validated through the court. The court also authorizes the conclusion of disposition acts by the minor and, if necessary, determines compensatory measures and/or the removal of a privilege established over the property that will enter the minor's patrimony. Establishment of

guardianship for incapacitated adults. Regarding the protection of incapacitated adults from entering into valid legal acts, there were aspects concerning the status of persons who lack the necessary discernment to care for their own interests due to alienation or mental debility. These were to be placed under judicial interdiction. The issue of these categories of persons was referred to the Constitutional Court of Romania for resolution.

Considering the referral, the constitutional court deemed that the applicable legislation violates fundamental rights and legal provisions contained in the Convention on the Rights of Persons with Disabilities. For these reasons, the Constitutional Court upheld the referral and established that any protective measure must be taken considering each individual and only after a direct analysis of the degree of capacity. The same court also established that the protective measure must be adapted to the person's life for whom interdiction is requested and must apply for a short period of time. After the expiration of this period, the measure of interdiction must be periodically reassessed. Clearly, this opinion establishes that individuals must be subject to different protective measures according to their degrees of disability, and the judge entrusted with establishing a protective measure must identify optimal and proportionate solutions according to the respective disability.

Following the pronouncement of that decision, the legal regulation took into account the provisions of the Constitutional Court, with the legal text taking the following form: "guardianship of adults occurs through the establishment of the measure of judicial counseling or special guardianship, or guardianship or another measure provided by law". The issue currently faced by Romanian courts is related to the duration of the processes and the cost of evaluations. From the date of filing the summons until the establishment of the first hearing, approximately 12 months may pass. The high cost of medical and psychological evaluations, as well as the transportation of the person to be evaluated, is borne by that person or their family, despite these being individuals who have contributed to the health insurance system throughout their lives.

As for the method of resolving the process, it involves court sessions where the participation of the Public Prosecutor's representative is mandatory, and debates on the merits of the case take place according to the principle of adversarial proceedings. Evidence is proposed, approved, and administered to prove the claim of the action and the necessity of appointing a curator, then the court decision is pronounced, and it is communicated to the parties participating in the process. After the expiration of the period during which the specific appeal for this type of process can be exercised, the court decision is legalized to be enforceable. Legalization takes place within the court that pronounced the respective decision. Each of the parties participating in the process can legalize the decision that was communicated to them, as well as other copies of the same decision.

## Conclusions

Guardianship has been an essential instrument in the history of law, both in ancient Rome and contemporary Romanian law, with the main concern being the protection of vulnerable individuals. In ancient Rome, guardianship was one of the most important forms of protecting individuals, alongside actual guardianship. This involved protecting persons with limited legal capacity, such as minors, certain categories of adults, or persons with disabilities. In Roman law, guardianship was especially necessary for persons with restricted legal capacities, being a legal protection instrument.

In contemporary Romanian law, means of protecting individuals are diverse, encompassing aspects from private and public law. Representation based on mandate or authorization is an important aspect, providing a solution for individuals who cannot directly exercise their rights without necessarily being hindered by a medical issue affecting their discernment. The protection of the individual (Rotaru 2019, 214-215) is essential in ensuring a balance and the protection of persons involved in legal relationships. Consequently, we



consider it crucial to simplify the procedure for appointing a special curator and ensure efficient and professional representation.

Therefore, we believe that future regulation could aim to shorten the duration of the trial process in these cases and bear all the expenses necessary for establishing this protective measure from the state budget to ensure equal access to justice and protection for all citizens (Rotaru 2016, 29-43), regardless of their financial resources. Thus, it can be guaranteed that the establishment of guardianship remains an effective means of protecting vulnerable individuals within a modern and equitable legal system.

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