

WLC 2016 : World LUMEN Congress. Logos Universality Mentality Education Novelty 2016 |
LUMEN 15th Anniversary Edition

The New Outline of the Institution of Adoption in Romania following the Amendments of Law no. 273/2004 on the Legal Status of Adoption

Irina Apetrei^{a*}

* Corresponding author: *Irina Apetrei, ireneapetrei@yahoo.com*

^aLecturer Ph.D., "Mihail Kogălniceanu" University of Iași, Romania, ireneapetrei@yahoo.com

Abstract

<http://dx.doi.org/10.15405/epsbs.2016.09.9>

In Romania after 1989, the institution of adoption has suffered numerous legislative modifications. Thus, the following regulations were successively adopted: Law no. 11/1990 regarding the approval of adoption, which brought a series of corrections to the Family Code of 1954, Government Emergency Ordinance no. 25/1997 regarding the legal status of adoption, which created a new and unitary framework for this institution by repealing all previous regulations, and Law no. 273/2004 regarding the legal status of adoption, which was passed in order to harmonize the Romanian legislation on adoption procedures with the international regulations and practices in the field. As far as the basic conditions of adoption, these are currently comprised in the Civil Code of 2011 (Book II: *ABOUT FAMILY*, TITLE III: *Kinship*, Chapter III: *Adoption*, Articles 451-482), which abrogated the Civil Code of 1864 and the Family Code.

At the moment, Romania's Parliament has adopted the Bill on amending and supplementing Law no. 273/2004 on the legal status of adoption and sent it for promulgation to the President of Romania; the law is to come into force 120 days after its publication in the Official Gazette.

The paper conducts an analysis of these latest legislative modifications in the field of adoption, regarding the reduction of certain terms of the applicable procedure, the speedy granting of the status of adoptable child, the revision of the procedure of matching the child with the adopter/adopting family, the increase of the validity term of the certificate of adopting family, the approval of a maximum one year leave for the parent and child to get accustomed to one another, as well as the sanctions for the parents who are indifferent to the fate of the children they have abandoned and who fail to approve their adoption.

© 2016 Published by Future Academy www.FutureAcademy.org.uk

Keywords: The Institution of adoption; amendments to Law no. 273/2004.



1. Introduction

Adoption, as an institution of family law through which natural kinship is replaced by civil kinship, is consecrated in the legal systems of most countries (except for the Islamic states in which the majority rule is to ban adoption, for reasons related to family and religious traditions) (Gare, 1998, p. 33). In Romania, this area of family law suffered most numerous and substantial legislative changes after 1989 (Lupaşcu, 2004, pp. 119-149). The most recent regulation, Law no. 273/2004 on the legal status of adoption¹, which harmonized the Romanian legislation in this field with the international regulations on adoption, subsequently received a series of amendments. This article presents a theoretical analysis of the latest amendment of this legal act, made by means of Law no. 57/2016² amending and supplementing Law no. 273/2004, emphasizing the main legal developments and their significance, related, mainly, to the simplification of the adoption procedure, which has been strongly demanded in recent years both by the Romanian legal practitioners and the representatives of civil society.

2. Materials and Methods

In elaborating this study we have used the texts of the two analyzed legal regulations on adoption - Law no. 57/2016 amending and supplementing Law no. 273/2004 and Law no. 273/2004 on the legal status of adoption -, as well as Romanian legal literature on adoption and a range of online legal resources.

As our intention is, at least for now, to theoretically analyze a new legal text, we have used the comparative method in the approach of the previous and present regulation, with emphasis on the new aspects, supplements and amendments, highlighting the superiority of the new law, but also the its imperfections.

3. Results

3.1. *The speedy acquisition of the status of adoptable child*

One of the remarkable novelties of Law no. 57/2016 is the introduction of some provisions aimed at ensuring the speedy acquisition of the status of adoptable child.

Thus, in the case when the legally summoned biological parents fail to appear at two consecutive hearing dates set by the court, the legislator of the current regulation interprets this as their abusive refusal to consent to the adoption, aspect which has the effect of rendering the child adoptable [Art. 8 para. 2 of Law no. 273/2004, amended through Art. I.4. of Law no. 57/2016].

If for valid reasons, one of the biological parents cannot be present in the court of law, the new law also allows his/her consent being obtained through a rogatory commission.

According to Art. 8, para. 3 of Law no. 273/2004, amended through Art. I.5. of Law no. 57/2016, the consent to adoption cannot be expressed, on behalf of the biological parents/legal guardian, by the

¹ Law no. 273/2004 on the legal status of adoption, into force since 1 January 2005, republished in the Official Gazette of Romania, Part I, no. 259 of 19 April 2012.

² Law no. 57/2016 amending and supplementing Law no. 273/2004, published in the Official Gazette of Romania, Part I, no. 283 of 14 April 2016, to come into force 120 days after its publication, except for Art. VII, which came into force 3 days after the publication date.

curator, mandatory or other person authorized in this regard. In our opinion, *de lege ferenda*, in order to fulfil the purpose of adoption and strictly observing the minor's best interest, in cases of curatorship of the minor or when the parent especially empowers a person in this regard, the curator or mandatory with special power of attorney should also be allowed to express consent to adoption.

If, despite all efforts, one of the parents cannot be found to express his/her consent to the adoption, the consent of the other parent will be sufficient, and if both parents cannot be found, the adoption can be completed without their consent.

Also, according to Art. 26, para. 3 of Law no. 273/2004, amended through Art. I.21. of Law no. 57/2016, adoption can also be completed if the parents or relatives of the child initially say they do not want to raise and educate him/her, but later do not give their consent which would allow the child to be considered adoptable.

Furthermore, the current law reduces the period in which parents can retract their statement of not wanting to care for the minor, from 60 days to 30 days [Art. 26 para. 1 letter d of Law no. 273/2004, amended through Art. I.21. of Law no. 57/2016].

For the same reasons of expeditious adoption procedure, Law no. 57/2016 shortened the term during which the child's relatives up to the fourth degree could be sought and asked if they want to assume the child's upbringing (if the parents abandoned the child) from one year to six months [Art. 26 para. 1 letter c of Law no. 273/2004, amended through Art. I.21. of Law no. 57/2016].

A provision illustrating the principle of the best interests of the child (which governs all procedures involving minor children, regulated by Art. 263 of the Romanian Civil Code³) (Florian, 2010, pp. 546-548) is Art. 27 para. 1 of Law no. 273/2004, amended through Art. I.22. of Law no. 57/2016, which provides that for a child placed with a relative up to the fourth degree, the individualized protection plan⁴ may result in internal adoption, only if the case manager appreciates it is in the minor's best interest to open the adoption procedure.

In order to keep the status of adoptable child for a longer period of time, the new regulation eliminates the term of two years, during which the court decision opening the adoption procedure produced effects, so that, at present, such a decision produces effects until the child reaches the age of 14 [Art. 29 para. 6 of Law no. 273/2004, amended through Art. I.26. of Law no. 57/2016].

3.2. Changes in the provisions regarding the match of the adoptable child with the prospective adopter/adoptive family

The match is defined by Art. 36 of Law no. 273/2004, amended through Art. I.26. of Law no. 57/2016, as a "preliminary stage to entrusting a child for the purpose of adoption, when the person/family certified as fit to adopt and which meets the particular needs of that child is identified and selected and the compatibility between child and the adopting person/ family is established". In establishing the match between the prospective adopter and the adoptable child, the relatives of the

³ Law no. 287/2009 on the Civil Code was republished in the Official Gazette, Part I, No. 505/2011 and entered into force on 1 October 2011.

⁴ According to Art. 4 letter e of Law no. 272/2004 on the protection and promotion of children's rights, the individualized protection plan is the documentation setting the planning of services, benefits and special child protection measures, based on the psycho-social evaluation of the child and his/her family, in order to integrate the child, who was separated from his family, in a permanent stable family environment, in the shortest time possible.

child in the extended family⁵ and others persons with whom the child enjoyed family life for at least 6 months (if this is not contrary to the child's best interest) and who have a valid certificate of adopting person/family take precedence. The legislator also explains the meaning of the phrase "other persons with whom the child enjoyed family life" by including in this category the following persons: the guardian, the professional caregiver, the foster person/family or other persons who have lived with the child, if they have been directly involved in the child's care and education and the child has developed relationships of attachment to them [Art. 36 para. 3 of Law no. 273/2004, amended through Art. I.28. of Law no. 57/2016].

This matching process includes an initial component and a practical one and it is achieved by the department of adoptions and post-adoptions within The General Directorate for Social Assistance and Child Protection⁶ (from now on, the directorate).

Initial matching is achieved by identifying and selecting from the National Register for Adoptions, all certified persons/families that meet the needs of each child for whom the adoption procedure was opened. Subsequently, to carry on the matching process, the list generated by the National Register for Adoptions will be accessed by the directorate having jurisdiction over the child's domicile.

The methodological rules for the application of this law, which will be adopted in the near future, will establish the methodology for the initial and practical matching between the child and the person/family certified as fit to adopt, as well as the criteria to be considered in establishing the match.

No later than five days after the issue of the matching report, the directorate in whose jurisdiction the child's residence is, will petition the court to start the second procedural stage of adoption – entrusting the child in view of adoption.

3.3. Legislative novelties regarding the accommodation leave given to the adopter

One of the significant novelties of Law no. 57/2016 consists in the possibility of the adopter or any of the spouses of the adopting family, who has an income subject to income tax according to Law no. 272/2015 on the Fiscal Code⁷, to take an accommodation leave of up to one year, including the period the child is entrusted in view of adoption. Thus, adoptive parents are legally perceived the same manner biological parents are, since Government Emergency Ordinance no. 111/2010⁸ provides the possibility to take a maternity/paternity leave for the latter.

During the accommodation leave, the adopter is also granted a monthly allowance, relative to the social reference indicator, in the amount of 3.4 SRI⁹ [Art. 461 newly introduced in Law no. 273/2004, through Art. I.35. of Law no. 57/2016] (ISR, 2013). The allowance will be provided from state budget funds, through the budget of the Ministry of Labor, Family, Social Protection and Elderly Persons. During this leave, the adopter cannot simultaneously be beneficiary of leave entitlements and monthly

⁵ According to Art. 4 letter e of Law no. 272/2004 on the protection and promotion of children's rights, extended family includes the parents, children and their relatives up to the fourth degree.

⁶ The General Directorate for Social Assistance and Child Protection carries out, at county level or at local level in the sectors of Bucharest Municipality, welfare measures in the protection of children, single persons, elderly, people with disabilities, as well as any person in need.

⁷ Published in the Official Gazette no. 688 of 10 September 2015.

⁸ Government Emergency Ordinance no. 111 of 2010 (approved with amendments through Law no. 132/2011) published in the Official Gazette no. 830 of 10 December 2010, in force since 1 January 2011, with subsequent amendments and supplements.

⁹ The social reference indicator represents the unit expressed in RON, in relation to which welfare benefits, paid from state budget, are granted both for the protection of persons within the social care system and in order to stimulate people benefiting from welfare to get employed.

child care allowance¹⁰. However, during the accommodation leave, the adopter has the right to payment of his/her individual contribution to social and health insurance.

During this leave, the adopter cannot simultaneously be beneficiary of leave entitlements and monthly child care allowance (granted by Articles 2 and 7 of Government Emergency Ordinance no. 111/2010 approved with amendments by Law no. 132/2011, with subsequent amendments). However, during the accommodation leave, the adopter has the right to payment of his/her individual contribution to social and health insurance.

Article 462, letters a-f, newly introduced in Law no. 273/2004, through Art. I.35. of Law no. 57/2016, establishes the cessation of the accommodation leave and allowance payment in the following situations: when the maximum period of one year accommodation leave expires; at the request of the prospective adopter; when the adoptable child reaches the age of 18; following the death of the child; following the death of the single adopter; when a court decision revoking the entrustment of the child in view of adoption becomes final.

The legislator also took into account the possibility of suspending the accommodation leave and allowance payment the day after one of the following situations has occurred [regulated in Art. 463 para. 1 letters a and b, newly introduced in Law no. 273/2004 through Art. I.35. of Law no. 57/2016]: emergency child placement was ordered; the court decision revoking entrustment of the child in view of adoption is being enforced.

Apart from the accommodation leave, the law establishes the employer's obligation to grant free time, of up to 40 hours a year, to the one who wants to adopt, in order for him/her to pass through the evaluations necessary to obtain the certificate of adopting person, without his/her remuneration being reduced [regulated in Art. 465 para. 1, newly introduced in Law no. 273/2004 through Art. I.35. of Law no. 57/2016]

3.4. Amendments to the legal status of information on adoption

The new law supplements a number of provisions on the information that can be requested and obtained regarding the personal history of the adoptee, which we shall further present in detail.

Similar to the old regulation, Law no. 57/2016 stipulates in Art. 48 that the adopted persons, who acquired full exercise capacity, have the right to obtain information concerning their birthplace, institutional route and personal history, without, however, the identity of the biological parents and relatives being disclosed.

A new provision of Art. 671 para. 2, newly introduced in Law no. 273/2004 through Art. I.50. of Law no. 57/2016, states that prior to petitioning the competent court (the court in whose jurisdiction adoptee's domicile is or Bucharest Tribunal, if the adopted person is not domiciled in Romania) to authorize his/her access to that information, the adoptee has the obligation to request from the National Authority for Protection of Children Rights and Adoption (NAPCRA)¹¹ (ANPDCA, 2016) a document certifying the occurrence of the adoption and if, previous to the adoption, the adoptee had his/her

¹⁰ Granted by Articles 2 and 7 of Government Emergency Ordinance no. 111/2010.

¹¹ The National Authority for Protection of Children Rights and Adoption, established under the provisions of Government Decision no. 299/2014 on the organization and functioning of NAPCRA, is tasked with monitoring observance of all children's rights and with taking all measures to help create a dignified society for children, by involving in this process local and central public administration authorities, civil society, parents and children.

filiation to at least one of the biological parents established. This provision is necessary because only a lineage established according to law, and not just in fact, can legally validate the biological truth and grant the adoptee the right to information concerning his/her biological family.

The previous regulation stated that for court admissibility of the adoptee's application for personal information, he/she had to have previously received adequate counselling, while the current law provides that the adoptee has the obligation to attend at least one session of counselling which would certify that he/she is psycho-emotionally balanced. Moreover, the new law also gives details regarding the documents which are to be attached to this application and the solving procedure [Art. 673 paragraphs 1-4, newly introduced in Law no. 273/2004 through Art. I.50. of Law no. 57/2016].

Regarding the information on the adoptee that his/her biological parents and relatives can have access to, Law no. 57/2016 provides more detail, developing the phrase "general information", used in the previous regulation. Thus, Art. 674 para. 1, newly introduced in Law no. 273/2004 through Art. I.50. of Law no. 57/2016, states that natural parents or biological relatives can have access to information about the adoptee referring to: confirmation of the adoption, the year of the approval, the national or international character of the adoption, as well as whether the adoptee is registered with the authorities as alive or deceased. While the old regulation stated that general information about the adoptee could be obtained only with his/her express consent, or with the consent of the adoptive parent or family (if the adoptee was a minor), the new law requires this consent only for additional information on the adoptee, as the current legislator considers it natural that a minimum of information be supplied to the biological family, upon request [Art. 674 para. 2, newly introduced in Law no. 273/2004 through Art. I.50. of Law no. 57/2016].

Furthermore, in fulfilment of the adopters' obligation to gradually inform the child, starting at an early age, that he/she has been adopted, the new law states that adopters may receive support from the professionals within the department of adoptions and post-adoptions of the directorate or from authorized private bodies, individual or associated offices or civil societies for social care and/or psychology which have concluded agreements with NAPCRA [Art. 68 para. 1 of Law no. 273/2004, amended through Art. I.51. of Law no. 57/2016].

3.5. Changes in the matter of international adoption

Since internal adoption was defined by Art.3 letter c of Law no. 273/2004 on the legal status of adoption as the one in which both the adopter or adoptive family and the adoptee have domicile in Romania, it was deemed as international adoption (Court of Appeal of Bucharest, Decision 903/2005, Bucharest) the one where either the adopter or one of the adopting spouses or the adoptee has domicile abroad.

The new regulation allows for the international adoption of the children for whom an adopter or adoptive family, habitually residing in Romania, could not be identified within a period of one year since the final court decision admitting the request for opening the adoption procedure [Art. 52 para. 2 of Law no. 273/2004, amended through Art. I.37. of Law no. 57/2016]. Under the previous regulation, a child was eligible for international adoptions for a term of 2 years.

3.6. Speedy resolution of cases referring to adoption by reducing procedural terms

Under the new regulation, the court shall rule in cases of applications for entrustment of a child in view of adoption based exclusively on the documents filed by the directorate in whose jurisdiction the child's domicile is and without summoning the parties.

Furthermore, for procedure celerity, the first hearing date in cases concerning adoptions will be set by the court in maximum 15 days from the date of the application being filed [Article 76¹ para. 3, newly introduced in Law no. 273/2004 through Art. I.59. of Law no. 57/2016]. Also, if the application is postponed, the granted term shall not exceed 15 days [Article 76¹ para. 5, newly introduced in Law no. 273/2004 through Art. I.59. of Law no. 57/2016].

The same reasons have led the legislator to establish that judgment may be postponed for maximum 48 hours, while the drafting of the decision cannot exceed 7 days since its delivery. The decision shall be communicated to the parties within 48 hours of it being drafted filed [Article 76¹ paragraphs 7 and 8, newly introduced in Law no. 273/2004 through Art. I.59. of Law no. 57/2016].

Regarding the ways of appealing a decision, court rulings on applications in the field of adoption are only subject to one appeal, whose term is reduced in the current regulation from 30 days to 10 days, with the exception of decisions on applications for opening the adoption procedure, which are still subject to an appeal term of 30 days. The appeal is judged urgently and with priority, summoning the parties, in the council chamber [Art. 76² para. 2, newly introduced in Law no. 273/2004 through Art. I.59. of Law no. 57/2016]. The decisions on applications under the current law are enforceable from the date they become final, unless the law provides otherwise.

4. Discussion

The amendments and changes brought by Law no. 57/2016 in the matter of adoption are the result of numerous and insistent proposals that have been made in recent years by specialists in the field of adoption theory and case law, but also upon the recommendations made by civil society representatives, who, since the adoption of Law 273/2004, had faced a complicated procedure that took place over an unreasonable long period of time.

Since the entire current Romanian civil procedure is characterized by celerity, the legislator has decided that cases concerning adoptions must be similarly solved and, thus, introduced a number of provisions which have reduced the procedural terms established by the previous regulation, including the provisions designed to ensure the speedy acquisition of the status of adoptable child.

Whereas adoption is an institution designed to serve primarily the best interest of the minor child, the new law develops and details a number of provisions regarding the match of the prospective adopter/adoptive family and adoptee, so that the persons with the highest compatibility to the adoptee be identified. The methodology for the initial and practical match between the child and the person/family certified as fit to adopt, as well as the criteria to be considered in establishing the match, are to be provided by the methodological rules for the application of this law.

As civil filiation established by adoption was created as a substitute for natural lineage, Romanian legislation in the field has regulated, for the first time and in detail, the accommodation leave granted to the adopter, in order for an adopter to have the same position as a biological parent, who has been

granted a maternity/paternity leave. To the same effect, it has been established a monthly allowance for the adopter, similar to the child care allowance a parent receives.

The new law also brings several necessary amendments, which we have already analyzed in this paper, in order to meet the adoptee's legitimate expectations to obtain information about his/her origins and biological family, but also to grant biological parents the possibility of obtaining information about the adoptee.

A welcome change brought by Law no. 57/2016 in the matter of international adoption is the reduction of the term a child is eligible for this type of adoption, from two years to one year.

Undoubtedly, all legislative changes and novelties brought by Law no. 57/2016 have responded to the expectations of both the specialists in this field and the "main actors" involved in the adoption procedure: the adopted child, the adopter(s) and the biological parents. It has simplified the procedure and reduced the time in which it takes place, and also succeeded to clarify some aspects insufficiently detailed in the previous regulation. Nevertheless, as always, the shortcomings and imperfections of this new law will become visible and be brought into discussion with the passing of time, especially by means of the judicial practice that will subsequently develop in the field.

References

- Court of Appeal of Bucharest, 3rd civil department for cases involving minors and family matters. Decision no. 903/2005. *National Case Law 2004-2005*. Piatra Neamț: Brilliance Publishing, pp. 261-263.
- ISR, (2013). Indicatorul social de referință (ISR) – baza de calcul pentru indemnizații, beneficii și ajutoare sociale. *Revista de actualitate financiară (Journal of current financial matters)*.
- Autoritatea Națională pentru Protecția Drepturilor Copilului și Adoptie (The National Authority for Protection of Children Rights and Adoption). Available online: <http://www.copii.ro/despre-noi/misiune/> (accessed on 25/04/2016).
- Florian, E. (2010). Adoption. In E. Florian, *Family Law*, 3rd ed., C.H.Beck Publishing: Bucharest, Romania, 2010, pp. 546-548.
- Gare, T. (1998). *Droit des personnes et de la famille*. Paris, France: Montchrestien, <http://codfiscal.net/37158/indicatorul-social-de-referinta-isr-baza-de-calcul-pentru-indemnizatii-beneficii-si-ajutoare-sociale> (accessed on 20/04/2016).
- Lupașcu, D. (2004). Theoretical aspects and judicial practice regarding adoption, with special reference to the regulation established by Law no. 273/2004. *P.R. 2004, 4*, 119-149.