

Exercise of the Right to Visit the Child by the Non-Resident Parent in Case of Declaring a State of Emergency in the Context of the Covid-19 Pandemic

Ciprian Raul Romițan

*Lecturer, PhD “Romanian-American” University, Faculty of Law, Bucharest, Romania
Lawyer Partner SCA „ROȘ și Asociații” ciprian.romatian@rsva.ro*

ABSTRACT: For raising and educating their minor children, parents have rights and duties, including the right to have personal relations with the minor if, as a result of a divorce, the child lives with one of them. In this respect, the law establishes that the parent at which the child does not reside has the right to have personal connections (relations) with the minor at his or her home. During the period when the state of emergency was established in Romania, the right of the child and of the parent to accomplish their natural connections in the best possible conditions was made with difficulty, but the courts ruling the best measures for such situations were decisive. This study analyzes how the minor’s visitation schedule can be carried out by the parent with whom the child does not actually live, in case of declaring a state of emergency in the context of the Covid-19 pandemic when, for a certain period of time, in order to prevent the spread of the virus and to ensure the public health of its citizens, public authorities have restricted the exercise of several human rights.

KEYWORDS: minor, parent, right of visit, personal relations with the minor, pandemic, state of emergency, Covid-19, restriction of rights

Introductory concepts

In Romania, according to the provisions in art 487 of the Civil Code (Law No. 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part I, No 511 of July 24, 2009), “parents have the right and duty to raise the child by taking care of his/her health and physical, mental and intellectual development, his or her education, learning and professional training, according to their own convictions, the qualities and needs of the child; they are responsible for giving the child the guidance and advice necessary for the proper exercise of the rights which the law recognizes to him/her”.

At the same time, Article 36(1) of Law No 272/2004 on the protection and promotion of the rights of the child, republished (Official Gazette of Romania, Part I, No 607 of 30 September 2013) states that “both parents are responsible for raising their children”, and in paragraph 2 of the same Article, the law states that “the exercise of parental rights and the fulfillment of parental obligations must take into account the best interests of the child and ensure the child’s material and spiritual well-being, in particular by caring for the child, by maintaining **personal relations** with him/her, by ensuring his/her raising, education and support, as well as through his/her legal representation and the administration of his/her assets” (s.n.).

From the interpretation of these rules, as well as from the analysis of the various opinions expressed in literature (Florin 2018, 538-544; Avram 2016, 487-488; Bodoașcă 2015, 565-568; Lupașcu and Crăciunescu 2017, 545-552; 2017 Irinescu 2015, 208-2011; Moloman and Ureche 2016, 699-702; 324 326 Barbur 2016, 64-67) it follows that in order to fulfill the obligation to raise the child, parents have several rights and obligations (duties), including **the right to have personal relations with the minor**.

The right of the child and the parent to have personal connections

Internationally, *the fundamental right of the minor child and the parent to have personal connections (relations)* was enshrined in Article 21 of the Hague Convention on the Civil aspects of International Child Abduction of 25 October 1980 (ratified by Romania by Law No 100/1992, published in the Official Gazette of Romania, Part I, No 243 of 30 September 1992), according to which “(...) central authorities, either directly or through intermediaries, may initiate or favor legal proceedings in order to organize or protect the right of visitation and the conditions under which the exercise of that right may be subject to”.

This *fundamental right of the minor child and the parent to have personal connections (relations)* was taken over by the Convention on personal relations concerning children (concluded in Strasbourg on 15 May 2003 and ratified by Romania by Law No 87/2007), Published in the Official Gazette of Romania, Part I, No 257 of 7 April 2007) which in its art. 4, stipulates that the parents and their children “have the right to obtain and maintain constant personal relations. Such personal relations may not be restricted or excluded unless this is necessary in the best interests of the child”.

At European level, Article 24(3) of the Charter of Fundamental Rights of the European Union (published in Official Journal of the European Union No C 326/391 of 26 October 2012) provides *the right of every child to maintain regular personal relations and direct contacts with both parents, unless they are contrary to his or her interest.*

Under national law, according to Article 496(5) Civ. Code, the parent to whom the child *does not reside in a constant manner* has the right to have *personal connections (relations)* with the minor at his/her home. However, *the family court may limit* the exercise of this right if it is in the best interests of the child. It should be noted that in keeping with the principle of the best interests of the child, *the court is sovereign* in determining the best way for the minor in carrying out the visiting schedule established in favor of the parent who does not live with the minor [Frențiu in Avram (coord.) 2018, 79 and footnote 30].

The forms of realization of *the right to have personal relations* with the minor child are complex, as they are illustrated in Article 18(1) of Law No 272/2004, republished, namely: “(a) *meetings of the child with the parent or another person who has, under this law, the right to personal relations with the child; (b) visiting the child at his or her home; (c) accommodation of the child for a fixed period by the parent or other person with whom the child does not normally reside, with or without supervision of the way in which personal relationships are maintained, in accordance with the best interests of the child; d) correspondence or other communication with the child; e) the transmission of information to the child on the parent or other persons who, under this law, have the right to maintain personal relations with the child; f) transmitting information on the child, including recent photographs, medical or school assessments, to the parent or other persons entitled to maintain personal relations with the child, by the person with whom the child resides; g) meetings of the child with the parent or other person to whom the child has developed attachment links in a place neutral to the child, with or without supervision of the way in which personal relationships are maintained, depending on the best interests of the child”.*

As one can notice, among the different forms of realization of *the right to have personal relations* with the child, under point (b) of that Article, *the right of the non-resident parent to visit the child at his or her home* is also regulated.

The right to visit the child in the context of the Covid-19 pandemic

In Romania, taking into account the evolution of the international epidemiological situation resulting from the spread of SARS-CoV-2 coronavirus to more than 150 states, and the declaration of ‘pandemic’ by the World Health Organization on March 11, 2020, following in-

depth analyzes by specialists on the evolution of the epidemiological situation on the territory of Romania and the assessment of the risk of public health for the forthcoming period, the president of the state rightly decreed the establishment of a state of emergency on the entire national territory, for a duration of 30 days (Decree No 195/2020 on the establishment of the state of emergency on the territory of Romania, published in the Official Gazette of Romania, Part I, No 212 of March 16, 2020). By Decision No 3/2020 (published in the Official Gazette of Romania, Part I, No 212 of March 19, 2020), the Romanian Parliament granted the state of emergency throughout Romania for a period of 30 days, as of March 16, 2020, as an exceptional measure adopted by the president of the state.

According to Article 2 of Decree No 195/2020 on the establishment of a state of emergency in Romania, in order to prevent the spread of COVID-19 and to carry out the consequences management in relation to the evolution of the epidemiological situation, the exercise of several rights during the emergency situation has been restricted, namely:

- The right to free movement;
- The right to private, family and intimate life;
- The right to inviolability of residence;
- The right to education;
- The right to freedom of assembly;
- The right to private property;
- The right to strike;
- The right to economic freedom.

Also, under Decree No 195/2020 on the establishment of the state of emergency at national level and taking into account the provisions of the Government Emergency Ordinance No 1/1999 on the regime of the state of siege and the emergency state regime (published in the Official Gazette of Romania, Part I, No 22 of January 21, 1999, approved with amendments and additions by Law No 453/2004, published in the Official Journal of Romania, Part I, No 1.052 of November 12, 2004, as amended), as well as the assessment carried out by the national Committee for Special Emergency Situations, approved by Decision No 14 of 24.03.2020, the minister for the interior issued Military Ordinance No 3 of March 24, 2020 on measures to prevent the spread of COVID-19 (published in the Official Gazette of Romania, Part I, no 242 of March 24, 2020).

Article 1 of Military Ordinance No 3 of March 24, 2020 provided for a number of restrictions on the free movement of persons:

- moving for work purposes, including between house/household and place(s) of work and back;
- travel to provide goods which cover the basic needs of persons and pets/domestic animals, as well as goods necessary for the pursuit of the professional activity;
- travel for medical care which cannot be delayed or made from a distance;
- traveling for justified reasons, such as childcare/assistance to the child, assistance to elderly, sick or disabled persons or the death of a family member;
- short journeys, close to the house/household, linked to the individual physical activity of persons (excluding any team sports) and to the needs of pets/domestic animals;
- travel for the purpose of blood donation to blood establishments;
- traveling for humanitarian or voluntary purposes;
- traveling for the purpose of agricultural activities;
- traveling of agricultural producers to sell agro-food products.

In view of the issuing of these restrictions, a number of questions have been raised in all days' life on how it will be possible to carry out during this period of emergency, the minor's visiting schedule where the parents are separated as a result of the marriage dissolution (divorce) and a court ruling or notarial agreement has established the execution of a visitation

schedule by one of the parents or if the parent to whom the child resides and where he/she has his/her home can refuse to hand over the minor to the other parent. (For an analysis of the effects that the declaration of state of emergency on Romanian territory and the coronavirus pandemic may have on the right of the non-resident parent to have personal connections with his/her minor child, see Barbur 2020; Lupu and Stoica 2020; Viorescu 2020; Trifan 2020, all studies available online at <https://www.juridice.ro>).

The answer to these natural questions was given by the courts, which, in our opinion, decided the best measures for personal relations between the non-resident parent and his/her child to be achieved under the best conditions and during these periods of exceptional measures. Thus, in a dispute, *the court has established that, on a provisional basis*, pending the final settlement of the application in case file no 935/235/2020, the personal connections of the claimant (father) with the minor will be made on a *gradual schedule*, given that one of the parents lives in Gherla and the other in Cluj-Napoca, the distance between the two localities is 45 km (about 27.96 miles). In this respect, the court ruled that *'until the end of the state of emergency introduced by the President of Romania's Decree No 195/16.03.2020 (...), the claimant will have personal connections to the minor by making daily telephone and video calls, by means of distance communication, with the assistance of the mother, to prevent the minor from moving between parents' homes. After the end of the state of emergency introduced by the President of Romania's Decree No 195/16.03.2020 (...), the claimant will have the following schedule of personal connections with the minor, having the possibility of taking the minor from the mother's home and the obligation to return her at the end of the schedule, as follows:*

A. An alternative weekend (one weekend with mother and the next weekend with father) from Friday, after the end of the kindergarten program of the minor from 17:00 to Sunday 17:00.

B. During the periods of holiday of the minor: (a) During the summer holiday, each parent will spend with the minor half of each holiday, depending on the program of the minor (b) During the winter holidays, the mother will spend time with a minor in the first half of the holiday in the odd years, and the father will spend time with the minor on the first half of the holiday in even years, so that every year, the minor to spend Christmas with one parent and New Year with the other parent. The parties shall divide their winter holiday in such a way that the minor spend time equal to their parents, except for Christmas and New Year, which shall be spent alternately. (c) During the spring holiday the father will spend time with the minor on the first half of the holiday in the odd years, and the mother will spend time with the minor on the first half of the holiday in even years, so that the minor will spend her Easter holiday alternately each year with another parent. d) For the rest of the holidays, half will be spent with each parent' (Gherla Law Court, Civil judgment No 221 of March 27, 2020).

In another dispute, the claimant noted that *"in 2016 she divorced her husband and under the divorce agreement agreed that the minor would live alternate one week at a time with each parent and two weeks in school holidays. The claimant also showed that the defendant has a well-known concubine relation with a female person working as a flight attendant for Blue Air and, in the current global context, the spread of infection with COVID-19 virus she fears that her son could contract the virus from his father's partner during the intervals he was at his home. She also reported that she had learned from the minor that the defendant had planned skiing holiday in Italy, Austria and Germany, areas already affected by the viral infection, and that despite her efforts to negotiate with the defendant a way to limit the minor's exposure to the risk of contracting the virus, he did not come up with any response."*

Consequently, for the protection of her son, the claimant brought that action. The defendant (father of the child), in his turn, lodged a statement of defense and a counterclaim requesting the rejection of the main application as inadmissible and, in the alternative, as

groundless. He also requested, by counterclaim, that the claimant, under the penalty of the fine, be forced to allow him to contact his son in accordance with the notarial agreement concluded in divorce proceedings, to order the establishment of the defendant's right to spend time with the minor for a period of 3 consecutive weeks in view of the infringement of the convention by the claimant and the minor's detention during the periods when he was to stay with the father.

Following the producing of the evidence, the court ruled that *“the claimant's request is, as far as the possibility of the minor was being contaminated by the father and in relation to the events shown, not only without urgency, but without the much grounded character.*

As regards her second argument, namely the risk that the minor will contact the viral infection from the partner of the defendant working in the aviation environment and traveling a lot, the court again takes the view that the request is groundless.

In order to decide thus, the court takes into account the fact that the claimant's fear is not a concrete one caused by an imminent danger, but a generic, presumed one.

The court understands that the crisis situation currently faced by the public may give rise to high suspicions of the health of any person in relation to their contacts and the possibility of infestation, but it also considers the protective measures taken by the authorities, prohibitions and limitations imposed.

It establishes, therefore, that the defendant and his partner, although in transit and the latter goes to work, none is subject to surveillance and containment measures as they do not present a suspicion of infestation because they have no symptoms and are not known to be contacts of infested persons.

Without any concrete reference to a possible suspicion of infestation, the general fear that one of the two might take the virus and transmit it to the child is all the more unreasonable because the applicant himself can contact an infected person without knowledge, by passing on the virus to its children without intending it, and especially despite all the precautionary and safety methods taken.

For these reasons, the court considers that its request is groundless and the unilateral decision to isolate and protect the child from the father, taking into account the possibility of infestation, is seriously detrimental to the father's relationship with the child, all the more so since, in explaining the decision, the claimant faces the minor with the fear of taking the viral disease from his father and creates an unjustified fear and reluctance in his interaction with his father.

These minor's experiences are proven by the documents deposited in the file, transcripts of the minor's conversation with the father, in which the former agrees to the decision not to spend time with his father, he requires evidence to analyze them and to ensure that his father is not a danger to him.

These are, in the view of the court, unnatural attitudes for a child of his age, which only create an unfounded panic in the consciousness of such a small child who has to face the inherent tension of the global crisis caused by the COVID-19 virus.

For the above reasons, the court considers that the claimant did not prove concrete aspects that would cause the urgency, the worthiness and the validity moving the minor's house exclusively to her, so that her request shall be rejected (...)” (Law Court 1 Bucharest, Civil sentence no. 2068 of March 13, 2020).

Conclusions

From the analysis of these decisions, we believe that in Romania there has started to develop a consistent case law of the courts confronted with requests from non-resident parents to have personal connections with their children, even in such emergency situations, with courts refusing the request of parents who, for various fears, more or less justified, intended to limit the other

parent's right to have personal relations with the minor for fear of transmitting the virus to their child.

Although, as is well known, mere telephone or online communication between the non-resident parent and his or her child is insufficient to develop normal parent-child relations, the decisions of courts which, for a short period of time, also having in view the situation in cases brought before the court (the long distance between parents' homes), decided that relations between the minor and the non-resident parent would be achieved in this way.

We also appreciate that in this situation, when the state authorities have to take the most drastic measures to limit the spread of the pandemic and to ensure a safe environment in terms of the public health of its citizens, the good faith of parents and cooperation between them is very important, so that, at all times, to seek new solutions that allow the non-resident parent to communicate with his or her minor, all of which are in his or her best interests.

References

- Avram, Marieta. 2016. *Drept civil. Familia (Civil law. The family)*, 2nd edition. Bucharest: Hamangiu Publishing House.
- Barbur, Diana Flavia. 2016. *Autoritatea părintească (Parental authority)*. Bucharest: Hamangiu Publishing House.
- Barbur, Diana Flavia. 2020. *Exercitarea dreptului părintelui nerezident de a avea legături personale cu copilul minor pe durata stării de urgență și a pandemiei de Coronavirus (Exercising the right of the non-resident parent to have personal connections with the minor child during the state of emergency and the Coronavirus pandemic)*. <https://www.juridice.ro>, accessed on June 23, 2020.
- Bodoașcă, Teodor. 2015. *Dreptul familiei (Family law)*, 3rd edition. Bucharest: Universul Juridic Publishing House.
- Florian, Emese. 2018. *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația (Family law. The marriage. Matrimonial regimes. Parentage)*, 6th edition. Bucharest: C.H. Beck Publishing House.
- Frențiu, Gabriela Cristina. 2018. "Relațiile personale dintre copil și părintele la care acesta nu locuiește (Personal relationships between the child and the parent he does not live with)". In Marieta Avram (coord.). *Autoritatea părintească. Între măreție și decădere (Parental authority. Between greatness and decay)*. Bucharest: Solomon Publishing House.
- Gherla Law Court, Civil sentence no. 221 from March 27 2020, at http://portal.just.ro/235/SitePages/Dosar.aspx?id_dosar=2350000000063486&id_inst=235, accessed on June 23, 2020.
- Hageanu, Cristina Codruța. *Dreptul familiei și actele de stare civilă (Family law and civil status documents)*. 2nd edition. Bucharest: Hamangiu Publishing House.
- Irinescu, Lucia. 2015. *Curs de dreptul familiei (Family law course)*. Bucharest: Hamangiu Publishing House.
- Law Court district, Bucharest, Civil sentence no. 2068 from March 13, 2020, în www.rolii.ro, accessed on April 10, 2020.
- Lupașcu, Dan and Crăciunescu, Cristiana Mihaela. 2017. *Dreptul familiei (Family law)*, 3rd edition. Bucharest: Universul Juridic Publishing House.
- Lupu, Paula Alina and Stoica, Adrian. 2020. *Problematika restrângerii dreptului de păstrare a legăturilor personale cu minorul în contextul Covid-19 (The issue of restricting the right to maintain personal ties with the minor in the context of Covid-19)*, în <https://www.juridice.ro>, accessed on June 23, 2020.
- Moloman, Bogdan Dumitru and Ureche, Lazăr Ciprian. 2016. *Noul Cod civil. Cartea a II-a. Despre familie (The new Civil Code. Book II. About the family)*. Art. 258-534. *Comentarii, explicații și jurisprudență (Comments, explanations and jurisprudence)*. Bucharest: Universul Juridic Publishing House.
- Trifan, Bianca Elena. 2020. *Restricții COVID-19 vs. Programul de vizitare al minorului Restrictions (COVID-19 vs. The minor's visiting schedule)*. <https://www.juridice.ro>, accessed on June 23, 2020.
- Viorescu, Răzvan. 2020. *Jurisprudență privind soluțierea urgentă a ordinii prezidențiale privind măsurile interimare privind exercitarea dreptului părintelui nerezident de a avea relații personale cu copilul minor în timpul stării de urgență (Jurisprudence on the urgent settlement of the Presidential Order concerning - interim measures regarding the exercise of the right of the non-resident parent to have personal relations with the minor child during the state of emergency)*. <https://www.juridice.ro>, accessed on June 23, 2020.