

The role of ad hoc guardian in real estate sale and purchase agreements to be entered with minors

The law ensures protection for the assets of minors with different limits considering the limited capacity of discretion of minors. Businesses to be concluded with minors require careful consideration having regard to these limits.

Under the Civil Code, a person can be considered as minor who is under the age of 18, namely zero hour of her/his 18th birthday on the day on which the real estate sale and purchase agreement is entered into. Two categories must be differentiated within the scope of minors: incapacitated minors and minors with limited capacity. The minor under the age of 14 or above but placed under guardianship by court order is qualified as incapacitated minor pursuant to the Civil Code.

Upon conclusion of a real estate sale and purchase agreement, parents exercising parental custody rights acting as representatives of an incapacitated minor jointly sign the real estate sale and purchase agreement. If the minor has attained the age of 14 years and the court did not place her/him under guardianship, he is qualified as minor of limited capacity, who may sign the real estate sale and purchase agreement but the consent of the parents included in the real estate sale and purchase agreement is required for the validity of her/his legal statement. Therefore, parents must also sign the real estate sale and purchase agreement as persons giving their consent.

In addition, the Civil Code specifies that the approval of the guardian authority is also required for the legal statement made by parents on behalf of an incapacitated minor or for the validity of declaration of consent of parents in case of a minor of limited capacity. We will analyse in details this consent of the guardian authority on our next article. The present article deals with the case when the parent may not act on behalf of the incapacitated minor and may not give her/his consent to the real estate sale and purchase agreement to be entered into by the minor of limited capacity.

The parent can be considered as the legal representative of a minor who can exercise the parental custody right over her/him. Normally, both parents of a minor have parental custody right. At the same time, it must be taken into consideration that the law basically presumes a conflict of interests between the parent and the minor in the case when they take conceptually opposite contractual position. Under the Civil Code, the parent may not represent her/his child in a case where s/he herself/himself, her/his spouse, her/his partner, her/his lineal relative or other person under his legal representation is a party taking an opposite position towards the child. Based on this rule, the law essentially presumes a conflict of interests in cases when the contractual position of the parent limits the contractual rights of



her/his minor child. It can be considered such a case when the minor purchases ownership interest in the real estate encumbered with usufruct right, mortgage or other right of the parent incumbent on it. Not only the encumbrance but also the case presume a conflict of interests when one or both of the parents in the position of seller and buyer oppose to their child. Considering that parents jointly exercise their parental custody rights over their minor child, therefore they should jointly sign the agreement on behalf of the child too and they should jointly give their consent. But, due to the conflict of interests, the same parent may not sign the agreement on behalf of the minor child or as a person consenting to it and as the beneficiary of usufruct right, since the signature of both parents is necessary based on the foregoing if they collectively exercise the parental custody right.

Conflict of interests may not only arise between the parent and her/his minor child. There may also be the case when the minor children of the parents are in opposite contractual position. In such case the solution may not be implemented when one parent represents one child, while the other parent represents the other one; not to mention the cases when parents have at least three children and all of them are party to the agreement in a contractual position, in which a conflict of interests must be presumed in all relations. In such cases, the place of the parent eliminated due to a conflict of interests may be replaced by the appointment of an ad-hoc guardian.

At the same time, ad hoc guardian may not be necessary. It may also happen that one of the parents no longer has parental custody right or her/his power to act as a trustee in respect of the minor is limited. In this case, the problem ceases to exist that both parents must sign the agreement on behalf of the minor. Parental custody right may terminate in case the parents get divorced if the court ordered it at the time of the divorce or the court limited it to specific cases. Parental custody right terminates upon death of a parent. The termination or limitation of parental custody right must be certified with an adequate document not only at the time of signature of the real estate sale and purchase agreement before the countersigning attorney but also during the land registry procedure.

Having regard to the foregoing, there is no need to consider the appointment of the ad-hoc guardian straightaway; before doing so, it is worth analysing more carefully the existence of parental custody right as well as its scope in case of businesses relating to minors.