

Representation in Court (Ad litem) in Albania

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Abstract

The representative besides judicial acts that he/she undertakes on behalf of the represented undertakes other legal acts as well. One of those acts/actions is that of representing the actions on behalf of the represented in front of the court. Court representation is one of those representations that have been recently codified in the articles 90-99 of the Civil Code.

“Thus, representation before the court (judicial representation) is defined as a relationship on whose basis a person (the representative) undertakes procedural acts on behalf of and in the interests of another person (the represented that is a party in court) exercising the procedural rights and obligations of the represented within the limits of the rights that have been granted¹”.

The right of intra-court/judicial parties that pursue the litigation in court via the mediation of a representative is not constrained or limited by any condition. Therefore, the court has no right to refuse the nomination of a representative by any of the intra-court litigation parties, in those cases in which the representative is a person that has the right to function as a representative. Judicial representation as one of the types of representation has these features:

The judicial and procedural acts/actions of the representative are not undertaken by the representative but on behalf of the person that is represented in civil court.

The judicial consequences of the procedural activities of the representative, which are exercised within the limits of the rights given by the represented, belong to the latter.

For example, in case the indictment that is defended in court by the representative is disqualified, the claimant has no right to present the same case in court, because this has already been decided earlier.

Keywords: Representation in Court (Ad litem), Albania, judiciary.

Introduction

Judicial representation differs from procedural replacement. In the case of judicial representation, a person acts in court on behalf of a third party with the intention to defend the rights of the third party and therefore, the judicial representative is not party in the court. Whereas, in the case of procedural replacement, this representative acts in court on his/her own behalf in order to defend the rights of a third party. Therefore, he or she, in this regard, is considered a party in the court.

Article 90, second paragraph of the Code of Civil Procedures stipulates that: “No one can represent in a civil court the right of the others, unless the law foresees otherwise”. In fact, the law recognizes the possibility of the litigant parties to be represented in court by other persons. This kind of judicial representation can be of two forms:

- a) Upon will or contractual;
- b) Obligatory or legal.

A representation that is based on will or that is contractual derives from an agreement

¹ Refer to Alqviadh Lamani , Procedural Civil Law f. 53-57

between a court intraparty (the represented) and the person that exercises the representation (the representative). This representation is based on proxy, that one of the court intraparty provides to the person who acts as his or her representative. The format that the procurator should have is explained in the article 72 of the Civil Code: *"The proxy for the actions to be done in front of the court has to be accomplished via a notarial act"*. In case this format of the procurator is not followed then the proxy becomes invalid and the as a consequence, the person that is nominated as representative cannot act as such. However, in the article 96 of the Code of Civil Procedures there is an exception that allows the procurator be transmitted verbally in the court that investigates the case. This declaration of one of the court intraparty that expresses its will in front of the court to be represented by a particular person is documented in court records of the case. Indeed, despite the fact that this declaration of will is done verbally in court, it is still documented by giving it an official status.

According to the Code of Civil Procedures of 1954 in the article 60, as well as the Code of Civil Procedures of 1981 in the article 110 different from the current Code of Civil Procedures and the actual Civil Code stipulated that besides the notarial that the procuration should contain, which was obtained by the representative in court, or expressed verbally in front of the court that investigated that particular case, this proxy could be designed or testified by:

- By the head of the popular council or secretary of the village or of the city in those places where notarial offices did not exist;
- By the administration of the health institution in which the person represented had been hospitalized;
- By the military command in which the person represented took part;
- By the penitentiary administration or by the venue in which the person who provided the proxy had been detained.

The proxy which is provided to the representatives of the intra-court parties can be a specific one or a general one. In those cases in which, one of the intra-court parties is a commercial society, for example, a limited common property, and the right of representation belongs to the administrator. In this case it is not necessary that the administrator does not need to obtain a proxy. It is sufficient that the administrator proves that he or she administers this particular company.

Whereas in those cases in which the administrator is not the representative of the company in front of the court, but another person is represented the company in his/her stead, then this person needs to obtain a proxy by the administrator of the company. This particular proxy does not need to have a notarial seal. It is enough that it has the signature of the proper instance and the seal of the company.

The obligatory and legal representation is considered to be a representation based on the law. This type of representation is foreseen by the law based on various reasons and henceforth it takes different forms. Legal and obligatory representation is valid in these particular cases:

When persons do not have the capability to act in court (procedural capability) due to age or when one of the intra-court parties is a minor or when the procedural capability is curtailed due to a previous court decision. Parents of custodians are the legal representatives of minors.

Whereas for the persons who have their procedural capability curtailed, the person who represents them in court is the one appointed as their custodian. Let's illustrate this with an example from the court practice:

The Civil College of the Supreme Court in their decision number 1364 of 12.12.2000 has overruled the decision number 279 of 14.09.1999 of the Court of Appeal in Shkoder and the decision number 918 of 19.05.1999 of the First Instance Court Shkoder by terminating the case arguing that: Based on the birth certificate of the claimant A.S. it appears that she is born on the 7th July 1981, whereas the charge written by the claimant A.S. and signed by her is presented to the court on 02.12.1998. Henceforth, at the time of the indictment, the claimant A.S. did not reach 18 years of age. As a consequence, given that the claimant was not yet 18 years old at moment of presenting the indictment she does not have the capability to act and to put a claim. According to the article number 33 of the Civil Procedural Code, no one who lacks the judicial capability to act cannot put a claim. Thus, her rights could be defended and represented only by her parents or her custodian if she had been put under custody. On the other hand, one could ask if the minors that are already 14 years old or persons whose capacities to act have been curtailed, have the right to represent by themselves their rights in those court cases, which relate to their own job contract, and to the profits that originate from their work as well as the savings that are deposited in a bank? In the article 6 of the Civil Code it is stipulated that:

"When the person is already 18 years old, he or she has the full capacity to exert his or her rights as well as to take on obligations". According to this legal stipulation made by the Civil Code and the Code of Civil Procedures in the article 33 it is stated that: "No indictment or claim can be made by a person who lacks the legal capacity to act". Therefore, the Civil Procedures Code limits the procedural capacity of the participants in the court under the conditions that he or she has full capacity to act, otherwise no claim can be presented. Contrary to the article 7 second paragraph of the Civil Code which recognizes the right of the minors that have reached the age 14 for certain actions, such as depositing the income gained, without the approval of the legal representative, the Civil Procedural Code does not recognize the right of the minors and those persons whose capacities to act have been curtailed, to put a claim or indictment unless represented by their legal representatives. These persons cannot be considered as capable to understand the importance and consequences of their actions. Contrary to the actual Code of Civil Procedures, the Code of Civil Procedures of 1954 in the article 58 third paragraph as well as the Code of Civil Procedures of 1981 in the article 108 recognized the right of the minors that have reached age 14 as well as persons whose capacities were curtailed to fulfill their procedural acts without the help of the legal representative in those court cases which related to the job contract, the inflow of income and profit as well as saving deposits. Another case of legal representation is the appointment by the court of a temporary custodian for the person whose rights and capacities to act have been recently curtailed. In this case, the temporary legal representative exerts all the procedural rights that belong to the person whose capacity to act shall be curtailed. Moreover, the legal representative has the right to file a claim against the decision of the court on the curtailment or abolition of the capacities to act of the person he or she is representing.

As it was mentioned above, persons who could not exercise their capacity to act, could take part in court in those cases when represented by their legal representatives (article 91 of the CCP). In those cases, in which the legal representative is absent in the court and when strong reasons exist that require a swift process then the court can appoint a special legal representative. *This is another case of legal representation, in which the law (article 94 of CCP) gives to the court that is investigating the case the right to appoint a representative when facing the situations mentioned above.* Obviously, the power of this special legal representative is limited as long as the case can be pursued by the person who is in charge to represent the claimant.

2. Another case of legal representation is that foreseen in article 344 of the Civil Code. *"The court appoints a custodian of inheritance of the person bequeathing the inheritance in those cases when it is not clear who are the inheritors. In this case the appointed custodian takes on the attributes of the legal representative."* One of his or her rights is the right to file a claim on behalf of the person bequeathing the inheritance as well as the legal representative responds to all the claims made with regard to the inheritance wealth. Another instance of judicial/legal representation is the one stipulated in the article 90 of the Family Code, according to which *any of the spouses is the legal representative of the other in the court for those issues that are related to the management of the common wealth and property.*

Another instance of judicial representation is the case of a judicial representative of the minor in court in those cases in which there is a conflict of interest between the legal representative and the minor. A similar case is the conflict of interest between a person who is not capable of legal acts and the legal representative. As a consequence, the court appoints a special legal representative in court for the minor or for the person who is devoid of legal capability to act (article 94, second paragraph of the Code of Civil Procedures).

When the legal representative is not recognized by the court and is also contested by the other intra- court party, he or she is obliged to prove the ability as a legal representative. In order to prove his status, the legal representative should show the documents which indicate that he or she is the legal representative of the intra-court party. These documents could be a passport, a birth certificate and family genealogy, or a court decision regarding a minor who has been placed under custody or a court decision that shows that a person is not capable for legal acts and his/her custodian (article 307 of the Family Code).

Judicial or court representation is not obligatory in the first instance court and in the court of appeals according to the procedural civil code. In the Supreme Court, court representation is obligatory for intra-court parties due to the lack of their abilities to accomplish their defense. On the other hand, legal representation is obligatory in all court instances because, as it is mentioned above, the party that is represented does not possess the legal procedural capacities to act in front of the court. However, even the legal representative in order to defend the interest of his/her client at best, can appoint another person via proxy to represent the minors or the persons who lack the ability to act. As it is noted earlier, even in the case of legal representative exercising this right is optional in the first instance and in the court of appeals, but it is obligatory in the Supreme Court.

According to the article 96 of the Code of Civil Procedures, representatives of the

intra-court parties via proxy could be: *attorneys, spouses, the pre-born, the after-born, brothers or sisters; jurists, and other workers that are authorized by state institutions or judicial persons; or persons allowed by the court to be representatives of the intra-court parties.* According to the first paragraph of the article 96 of the Code of Civil Procedures not every person can act as a representative of any of the intra court parties in a civil case. Henceforth, a limited number of persons can act as representatives of an intra-court party due to their profession such as attorneys, or due to family relations, or due to job relations with any of the intra court parties or because the court recognizes such a right. If the court notices that the representative by proxy of any of the intra-court parties is appointed regardless of the rules, as it is stipulated in the article 96 of the Code of Civil Procedures, then the court can refuse such representation.

In the second paragraph of article 96 of the Code of Civil Procedures are stipulated the cases in which a person cannot act as a representative of one of the intra-court parties. These cases include: persons who are not yet 18 years old; persons who have no recognized legal ability to act; attorneys/lawyers whose right to work in their profession has been suspended; judges and prosecutors. As it is mentioned above, even those persons who do not belong to the group of the recognized persons according to the first paragraph of the article 96 of the Code of Civil Procedures cannot act as representatives.

When the representative is appointed according to the article 96 of the Code of Civil Procedures he or she has the right to accomplish all the procedural acts including also the right to ask for the implementation of the court decision as well as demanding the opposing party to pay the court expenses unless those expenses are related to availability of the right and when the law stipulates differently (second paragraph of the article 97 of the Code of Civil Procedures). Therefore the representative cannot solve the case through reconciliation, nor accept the charge fully or partially. He or she cannot give up on the decision, however partially, (by retreating partially from the decision on the charge or by retreating from the counter-charge including the disavowals of the plaintiff), nor give up on the right to present a claim, to put a complaint regarding the court decision, to obtain money or valuable material on behalf of the representative, and to concede with regard to the complaint.

Let's look at an example of the court practice defined by the Supreme Court:

Example 1

According to the decision number 976 of the date 27.09.2000 the Civil College of the Supreme Court has decided, rightly so, to abrogate the decision number 88 of the date 23.02.1999 of the First Instance Court of Berat and the decision number 340 of the date 21.09.1999 of the Court of Appeals Vlore and sending the case back for reconsideration to the Court of First Instance Berat asking for a new court investigation with the following decision: During the initial decision of the case it turned out that the plaintiff K.Q. has issued a general proxy to his father to represent him in court. Upon inspection of this proxy, it transpired that the proxy was a general one and not a specific proxy.

According to the article 97 of the first paragraph of the Code of Civil Procedures: *"When the court parties are represented in the court by a representative, the latter can take*

upon all the necessary acts on behalf of the represented that the law does not forbid." Whereas, according to the second paragraph of this article it is stipulated that: *"In any case the representative cannot get involved in acts that dispose of the right, unless those cases in which there is an explicit approval by the law."* Resolving the case through reconciliation constitutes a disposition of the right. In this case, the above-mentioned disposition requires that the one represented obtains a special proxy. Henceforth, by accepting the solution of the case through reconciliation, when the representative of the claimant party does not have such a right, the Court of First Instance Berat has infringed the law. Even the Court of Appeals Vlore should have canceled the previous decision of the Court of First Instance Berat, once it noticed this flaw and send the case for reconsideration in the same court.

Example 2

The Civil College of the Supreme Court in the decision number 939 of 27.09.2003 has decided in favor of existing decision number 2 of 30.3.2001 of the Court of First Instance Tirana, which had ruled that the court would dissolve the case, and in favor of the decision number 1112 of 07.03.2002 of the Court of Appeals Tirana based on the following arguments: The claim of the plaintiff that their representative by proxy has not been licensed to ask for absolving the case does not apply because as it transpires due to the procuration of 07.07.1998 and of 16.09.1998 among others, the plaintiff authorized her representative to get involved in any act that she considered useful and rational and that those acts would have been considered valid. Regardless of the fact that their representative did not have the precise license to demand the dissolution of the case, this act has already been approved by the following acts because such a decision by the representative has not been put into question. However, one of the intra court parties, in the claim that it has presented in the Court of Appeals, has demanded that the court should decide even on the counter-claim made by the other intra-court party by acknowledging the approval that has already been made regarding the concern presented by their representative for the dissolution of the case.

In the two cases, one of the them refers to the instance when the representative of the intra court parties has been involved in certain procedural acts that is related to the disposition of the right without having the permission by the party he or she represented. Whereas, the second case refers to the instance in which albeit the representative lacked the permission to do those procedural acts that involved the disposition of the right such as the dissolution of the case, the representative still due to the content of the proxy and due to the following acts of the plaintiff has been equipped with such a permission.

Due to death or the loss of judicial capability to act of one of the intra court parties, according to the article 297 of the Code of Civil Procedures the case is dissolved forever, even when the intra court party that has passed away or has lost the judicial capability had been represented in court by lawyers or other persons. This suspension and dissolution shall continue until another person takes upon the rights that belonged to the person that has passed away or that has lost the judicial capabilities to act. Therefore, once the new person becomes involved in the court case, the first

representative has to be renamed again by the new person as an intra court party, or a new representative has to be appointed. Hence, with the passing away of the represented or the lack of capabilities to act, the representation loses its effects. The same stance is observed in the Code of Civil Procedures of 1954, and that of 1981. Whereas in the Code of Civil Procedures of 1929 article 89, contrary to the above-mentioned Codes, the court representation continued. However, the inheritors of the represented, upon his/her death or of the legal representative that was appointed when he had lost the judicial capability to act, had the right to revoke at any time the representation granted. The representation in court ceases when during the court investigation, the representative of one of the intra-court parties dies or loses the judicial capability to act. However, this fact does not amount to the dissolution of the case. The represented needs to appoint another representative or to take over on his/her own all the procedural acts in front of the court. The opposite takes place when the legal representative of one of the intra court parties passes away or loses the capacity to act. In this case, the court decides the dissolution of the case until the represented gets another legal representative.

Conclusions

The court representation is over when the judicial person of the represented is over. As a rule, court representation ends when the represented has completed all the acts. As a result, the case has gone through all the instances of the court decision.

According to the general rules of the representation, the represented has the right to dissolve the procuration that he or she has given to the representative. Even the representative has the right to give up representation at any time (article 98 of the Code of Civil Procedures). However, the dissolution or the surrender has not effect on the other intra court party, given that the substitution of the representative has not taken place.

Another characteristic of the court representation is the individual dimension of representation which means that regardless of the fact that the represented party in court could be represented by various representatives, any of them can represent it in an independently from other representatives, unless the law foresees differently (article 98 Code of Civil Procedures). The phrase that is used in the article 98 of the Code of Civil Procedures "unless the law foresees differently" is referred to those instances when regardless of the fact that the right of representation is given to more than one person, those do not have the right to act independently of each other, but only together (collective court representation). However, such a condition should be stipulated clearly by the law.

References

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