

POWERS OF THE LEGAL REPRESENTATIVE OVER THE ACTIONS OF OTHERS IN THE LEGAL PROSECUTION SYSTEM

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Abstract:

The rights of minors have received unparalleled attention and protection, spanning from divine laws to legislative frameworks such as the Legal Prosecution System, covering the areas of guardianship, custody, and representation. These measures aim to safeguard the rights of minors, those lacking legal capacity, and provide judicial protection for these groups. In implementing this protection, Algerian family law underscores collaboration between the legislator, who enacts laws, and the judge, responsible for interpreting and applying them on a case-by-case basis. The legislator designates individuals meeting legal criteria to act on behalf of the minor in specific transactions.

For individuals deemed insane, mentally incapacitated, or legally incompetent, the legislator has equalized their status. Additionally, specific financial powers granted to the legal guardian are subject to judicial approval when involving the assets of those under guardianship. The legislator has outlined particular authorities vested in the legal guardian, primarily of a financial nature concerning the assets of those under guardianship. However, actions solely benefiting the legal guardian or related to administrative functions, utilization, preservation, and

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maintenance—typically unrelated to the financial responsibility of the person under guardianship—are exempt from judicial authorization and considered free from judicial oversight.

Keywords: Minor, Legal Guardian, Legal Prosecution, Detainee, Absent and Missing.

Introduction:

The Algerian legal system, manifested in family law, delves into the system of legal guardianship over others. According to the law, the legal guardian is the legitimate representative of the minor, standing in their place in all rights subject to representation, including contracts, actions, and disputes in matters of rights. This implies that guardianship extends to both discerning and non-discerning minors, as well as individuals categorized as insane, mentally incapacitated, foolish, negligent, and those under restraint. It encompasses their personal and financial affairs.

The Algerian legislator, in Family Law No. 05-02 dated February 27, 2005, specifically in Articles 42, 43, 85, and 107, has defined the categories falling under the jurisdiction of legal representation, providing detailed provisions and explanations.

Based on the foregoing, the following problem arises:

To what extent has Algerian family law been able to delineate the powers of the legal guardian over the actions of those under their legal guardianship?

To address this issue, the topic is divided into three axes:

- **Axis One:** The authority of the legal representative over the actions of those subject to the Legal Prosecution System.

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- **Axis Two:** Powers of the legal representative not restricted by judicial authorization.
- **Axis Three:** Powers of the legal representative restricted by judicial authorization.

Axis One: The Authority of the Legal Representative over the Actions of Those Subject to the Legal Prosecution System

The Legal Prosecution System grants the legal representative authority over the actions of those under their guardianship. This authority is exercised in two instances: permission or annulment, providing a comprehensive scope over those under guardianship, including minors or those under restraint. Furthermore, the legal representative holds authority over the actions of absent and missing individuals before a declaration of loss or absence.

First: Authority of the Legal Representative over the Actions of Minors and Those under Restraint

The authority of the legal representative over the actions of minors and those under restraint is exercised either through permission or annulment. We will now delineate the actions subject to the authority of the legal representative and specify the procedures for permitting or annulling these actions.

A. Actions Subject to the Authority of the Legal Representative for Permission or Annulment:

In accordance with Article 81 of the Algerian Family Law, which identifies those lacking legal capacity, their actions are inherently void according to Article 82 of the same law (1

Boudiaf Ammar,2010 , page 59..). As a result, these actions do not require permission and are legally ineffective. No prior authorization from the legal representative is valid. Consequently, the legal representative has no authority over these actions as they are considered null and void from a legal standpoint.

If their actions provide pure benefit or cause pure harm, they are valid without the need for permission from the legal representative. However, actions falling between benefit and harm are suspended and subject to the permission of the legal representative. The legal representative's jurisdiction is limited to actions of those lacking legal capacity that fall within the spectrum between benefit and harm.

The Algerian legislator has established legal frameworks regarding the actions of those lacking legal capacity and the authority of the legal representative in dealing with them. In civil law, all these actions are considered void, either valid or voidable until the minor requests the annulment or final permission after reaching the legal age, as stipulated by law.

Some legal scholars emphasize the necessity of applying family law provisions, arguing that family law, being the later law, supersedes civil law. The precedence of family law over civil law is reinforced by Article 223 of the Algerian Family Law, which annuls conflicting provisions, and Article 101 of the civil law contradicts Article 83 of the Algerian Family Law. The latter confirms the applicability of family law provisions. (Mohammed Said Jaafour2011,page 42)

B. Permission of the Legal Representative for Actions of Those Lacking Legal Capacity or Their Annulment:

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Permission is a legal action issued by the legal representative, indicating their waiver of the right to annul the action. It results in the effectiveness of the action and the legal arrangement of its judgment. Permission is an individual action that involves the legal representative relinquishing their right to annul the action.

Actions of those lacking legal capacity remain non-effective until they are granted permission by the legal representative. Permission is a right held by anyone entrusted with the affairs of those lacking legal capacity, whether they be a guardian, a custodian, or a presenter. Once they reach maturity, they have the right to grant permission for the action unless the legal representative has already annulled it before.

If the legal representative perceives that the suspended action does not benefit the minor or the restrained individual within their guardianship, they have the authority to annul the action, rendering it as if it never occurred. Similar to permission, annulment is an action that must be issued by the legal representative through recognized means of expressing their will. It is a requirement that the legal representative has not previously granted permission for the action and that the minor or the restrained individual has not reached maturity or left the legal guardianship.

The Algerian legislator has specified provisions on the nullification of actions by those lacking legal capacity and how actions issued by those lacking legal capacity are annulled, particularly when they cause harm to them. (Mohammed El Sabri El SaThe2004 ,page 272)

Second: The Authority of the Legal Representative over the Actions of the Absent and the Missing

The legal representative finds themselves confronted with various actions that the absent or missing individual has undertaken before their disappearance.

Concerning sales, the annulment of a sale is not valid if it was executed by the absent or missing individual, as they entered into the contract while fully competent. This applies similarly to lease agreements, whether as a lessor or lessee, where the contract becomes binding. This principle extends to various other contracts.

The contracts and actions initiated by the absent or missing individual remain valid, and the appointed agent authorized by the court on behalf of the missing individual is obligated to continue executing these contracts and actions. This is in accordance with Article 88 of the Family Law, known as the "Cautious Man" provision. (Abdel Fattah Taqia, 2012/2013, page 85)

If the absent or missing individual was a minor or under restraint before their disappearance, the legal guardianship remains unchanged concerning the management of their finances, with exceptions for new financial matters arising after their presumed death.

Axis Two: Powers of the Legal Representative Not Restricted by the Judge's Permission

These are actions that the legal representative can undertake without authorization from the judge, and there is no specific legal provision defining these actions. The Algerian legislator only explicitly mentions actions restricted by the judge's permission.

First: Acts of Preservation and Maintenance

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Acts of preservation and maintenance are considered essential as they aim to prevent financial loss. The legal representative is duty-bound to take all necessary measures to preserve the funds of the absent or missing individual without resorting to annulment. The legal representative acts on behalf of the partner and is responsible for all maintenance and preservation activities for shared finances between partners, as per the provisions of Article 719 of the Civil Code, which addresses expenses for managing shared finances.

These activities include but are not limited to, placing mortgages for the benefit of the absent individual, purifying mortgaged properties, performing necessary repairs for old buildings or malfunctioning vehicles, and challenging various judicial judgments and decisions. (Abdelkader El Far,2006, page 185)

Second: Acts of Administration and Utilization

These acts fall between preservation and management, meaning they are less costly than the former and less risky than managerial actions, as they do not result in a fundamental legal or financial change for the individual. And we can specify the actions that the legal deputy may undertake as part of administrative activities, for example:

- The sale of ordinary chattels, with "ordinary chattel" referring to items that do not have significant financial value. (Sellami Dalila, 2007/2008, page 106)
- Harvesting and selling fruits to prevent their spoilage after ripening. The deputy should harvest the fruits during the specified season because it benefits the person he represents and ensures profit.

- Paying off debts on behalf of the person he represents and receiving amounts owed by others, as failure to pay debts may cause damages, such as late fees. (Ahmed Issa,2009,page 88)
- Representing the person he represents in all civil transactions, such as managing a company or shares through inheritance. Representing the person he represents in various legal disputes, allowing the legal deputy to be a party in lawsuits on behalf of the person he represents. (Nadia Foudil,2003,page 35)
- Managing the business of the person he represents. If the person inherits a thriving trade, the deputy can manage it without the need for a judge's permission because the deputy has the authority to act in the best interest of the person he represents. Trading with the person's assets is beneficial for both parties as it leads to the prosperity of the person's wealth, preventing it from being consumed by the charity represented by the Zakat.(Sellami dalila 2007/2008,page 107)
- Renting real estate for a period not exceeding three years as stipulated in Article 468 in civil code, which states: "It is not permissible for someone who only has the right to manage or lease for a period exceeding three years unless there is a provision stating otherwise."

Third: Beneficial Actions Purely for Benefit

These are actions that enrich the financial situation of the represented individual without diminishing it or involving any reciprocal obligations. Any action that benefits them is permissible and becomes effective. This is in line with Article 83 of the Algerian Family Law, which states: "A person who has reached the age of discernment but

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not the age of maturity, according to Article 43 civil code, his actions are effective if they are beneficial to him and void if harmful, subject to the authorization of the guardian or custodian, considering the balance between benefit and harm. In case of a dispute, the matter is referred to the judiciary."

Examples include accepting gifts, acknowledging wills, and managing endowments. (Abdel Fattah Taqia, page 252)

Axis Three: Powers of the Legal Representative Restricted by the Judge's Permission

These are actions for which the legislator obliges the legal representative to obtain permission from the judge in the form of a judicial order. Specific procedures and conditions outlined in Article 44 of the Family Law govern these actions, including selling real estate, mortgaging it, dividing it, and conducting reconciliation. (Abdel Fattah Taqia, , page. 253)

First: Selling Real Estate, Dividing It, Mortgaging It, and Conducting Reconciliation

a. Selling Real Estate:

The process involves two stages. The first is obtaining permission, where the legal representative applies to the regional family court judge, requesting authorization to sell the real estate. The legal representative must provide evidence of the necessity and clarify the anticipated benefit behind the sale, in accordance with paragraph 2 of Article 88. The judge has the discretion to accept or reject the request. If rejected, the legal representative can initiate appeal procedures

against the refusal before the Judicial Council within 15 days. (Saih Senqoufa2011,page 653)

The second stage begins with the acceptance of the judge's request and the issuance of a license. The legal representative cannot sell the property in the usual manner; instead, the sale is carried out through public auction, a process closely monitored by the judge. The Civil and Administrative Procedure Law outlines the procedures for this sale. The guardian or custodian, depending on the situation, must approach the judicial officer, requesting the preparation of a list of conditions for the sale. This list is then submitted to the registry of the competent court regionally.

The list of conditions includes the judge's authorization for the sale, precise identification of the real estate or real property right, specifying its location, boundaries, type, components, area, parcel number, and name when applicable. For buildings, it specifies the street and number, parts of the property, sale conditions, and the base price. Regarding barter, as the law does not explicitly address it, some argue that exchange related to real estate should also be subject to judicial permission, aligning it with the requirements for sales due to their shared rationale and purpose. (Allawa Boutaghrar1998 page 13)

b. Dividing Real Estate:

Division is considered an action that harms the individual's interest, and therefore, Algerian law requires the legal representative to obtain judicial permission to proceed.

Hence, the legal representative cannot engage in this action without obtaining judicial permission, as stated in the Supreme Court decision dated December 19, 1988: "It is legally established that dividing the

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minor's real estate is among the actions for which the guardian seeks permission from the judge. It is also established that the judge can decide on his own not to grant permission when necessary." Deviating from these principles is considered an error in the application of the law.

In the current case, it is evident that the petitioner did not seek the court's permission for the division of the minor's real estate and the filing of the lawsuit. Judges of the council, by endorsing the validity of these actions, breached the law. When such breaches occur, it necessitates a deficiency and annulment of the contested decision.

Therefore, the legal representative may reach an agreement with the heirs for the shared ownership division. In such a case, the legal representative must obtain court permission. If the division does not harm the interest of the represented individual, the court initially allows the legal representative to collaborate with the co-owners to prepare a division project conducted by an accredited real estate expert. After completing the division, it is presented to the court for approval if it is deemed to safeguard the interest of the represented individual. The court then grants permission to the legal representative to formalize the division report in an official contract before a notary in accordance with the law.

If the legal representative does not agree with the heirs on the division or wishes to exit the optional shared ownership through division, they have the right to directly resort to the judiciary to request the division by a real estate expert.

C. Mortgage of Real Estate:

This is considered one of the most complex transactions that require an expert and judicial permission. This is because it is viewed as an act of administration that, if undertaken by the legal representative in the funds of the represented individual, could potentially harm their financial interests. This is due to the possibility of hindering the benefit of the funds, keeping them confined until the legal representative repays the debt. The imprisonment may even extend beyond that if the legal representative is unable to settle the debt promptly. Therefore, the competent judge must ensure the presence of a state of necessity and interest, as well as the potential ability to repay the debt later. (Mohammed El Sabri El Sadi, page 265)

D. Reconciliation Process:

This occurs through the conclusion of a contract, as stipulated in Article 459 of the civil code, which defines it as: "A contract by which the parties settle an existing dispute or prevent a potential one, each relinquishing their right in exchange for a reciprocal concession."

In the case of a common ownership dispute among heirs, if one of them is a legal representative and reconciliation is deemed necessary, the legal representative must act on behalf of the represented individual and seek permission from their guardian or custodian to proceed with reconciliation. If the reconciliation is beneficial and appropriate for the represented individual, and not reconciling could lead to a reduction in their funds, the judge grants permission for the legal representative to conduct the reconciliation. (Mohammed Bouamra 2012/2013 page 96)

However, if the reconciliation results in the abandonment of an established right of the represented individual, such as relinquishing it

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to another person, the judge in this case refuses to allow reconciliation. It is then the responsibility of the legal representative to refrain from proceeding with it, as it would cause harm to the interests of the represented individual.

Second: Sale of Special Importance Movables

Movables are anything unstable in space and not fixed in it. Regarding movables of special importance, the Algerian legislator did not set a standard to determine this special importance or its specific nature, leaving it to the discretionary power of the judge. The absence of a specific criterion for the term "special importance" restricts the legal deputy to (Mohammed El Sabri page265).El Sadithe judge's permission to sell any movable, regardless of its value. Examples of such movables with special importance and value include stocks in stock markets, moral rights, such as intellectual property rights, and commercial properties, etc.

Third: Investing the Minor's Money through Lending or Borrowing or Contributing to a Company

A. Investing the Minor's Money through Lending or Borrowing

Article 88, paragraph 3, of the Family Law stipulates that investing the minor's money through lending or borrowing requires judicial authorization. The wisdom behind restricting this action with judicial permission is to prevent the loss of the minor's money, such as if the borrower is bankrupt, insolvent, or delaying the repayment of debts. (Allawa Boutaghrar page 78)

Therefore, the judge, when granting permission, must ensure the minor's interest by guaranteeing the ability to recover the money within a specified time, and that the money will not adversely affect the minor. (Fatiha Youssef, born Amari,2007 page 87_91) If the judge deems that borrowing from the minor's money is harmful to his interest, he refrains from granting permission to the legal deputy.

B. Investing the Minor's Money by Contributing to a Company

The legal deputy desiring to invest the minor's money through contributing to a company must obtain court permission. Article 88, paragraph 3, of the Family Law emphasizes that the legal deputy should acquire judicial permission to carry out this transaction. However, the legislator did not specify the type of company, leaving the term "company" general. It could be a personal company, such as a solidarity company, or a capital company. (Abdelaziz Maqfuldji,2003,page 77)

As for the former, the minor cannot join because he cannot acquire the status of a merchant. This type of company makes the partners fully and personally responsible for the company's debts towards third parties. In contrast, for capital companies, the minor can join with the condition of obtaining court permission. This type of company operates on financial considerations rather than personal ones, and the partner's liability is limited to his capital. The type of company does not acquire merchant status, and its bankruptcy does not automatically lead to the partner's bankruptcy. Partners in this type of company can also transfer their shares without the need for the consent of other partners. The joint-stock company is considered the most important model in this regard. (Tunsi Hussein2008,page 21_22).

C. Lease of Real Estate for a Period Not Exceeding , Years or Extending Beyond a Year After the Minor Attains Maturity

The legal deputy has the right to lease the minor's real estate unless restricted by the condition that the lease period does not exceed , years or extends a year beyond the minor's attainment of maturity. This condition is outlined in Article 88, paragraph 3, of the Family Law.

Due to one of the reasons for the termination of guardianship being the ward reaching the age of majority, they have the right to manage their property independently. In this case, the ward can handle their real estate in a different way, and leasing becomes a restriction on their administration. The court may grant permission if it deems it in the ward's best interest. (Kouadri Wissem page 41).

As for the authority of someone who has sole control over administration, the deputy in this case, Article 468 of the civil code emphasizes that "it is not permissible for someone who only has the right to perform administrative tasks to enter into a lease exceeding three (3) years unless there is a provision stating otherwise."

The Algerian legislator did not explicitly mention commercial premises, although their rent may often be much higher than that of properties. This exclusion persists despite the significant implications of such leases, such as the lessee acquiring a commercial base under the necessary conditions.

Conclusion:

The system of legal representation in its three areas—guardianship, protection, and judicial representation—aims to safeguard the maximum interests of minors. The legal protection extends to various

legal actions, addressing ignorance and providing judicial protection for this specific vulnerable group. The Algerian family law places emphasis on the balance between the legislator, who establishes laws, and the judge, who interprets and applies them based on specific cases and circumstances.

- The legislator authorizes individuals who meet the legal conditions to act as guardians in certain circumstances.
- The legal guardian is subject to judicial supervision and is liable to criminal and civil litigation in case of neglect of their assigned duties.
- Despite the legislator granting the mother guardianship over her children, he does not confer upon her the right to choose their religion, unlike the father, who is defined by the law as having the authority to choose the religion of the children according to Articles 87 and 92 of the Family Code.
- The legislator grants some authority to the legal deputy under the permission of the judge.
- The Algerian legislator contradicts the provisions of Islamic law by granting the mother authority over the property of the household as a secondary ranking, creating a new hierarchy of rights.
- Despite the fact that the mentally disabled person is considered ignorant, the foolish person with a deficiency in knowledge, as stated by the legislator, is considered to have partial ignorance.
- The legal provisions include challenging the guardian in case of mismanagement of the estate's funds.
- The legal provisions include challenging the guardian in case of mismanagement of the estate's funds.

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