

## General Considerations on Matrimonial Regime under the Provisions of the New Romanian Civil Code. Mutual Implicit Mandate between Spouses\*

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### Abstract:

Without being provided with a legal commitment in formal terms of *mutual implicit mandate between spouses*, the new Romanian Civil Code establishes, under the provisions of art. 345–347, included in Book II (Second Book) – *About Family*, Title II (Second Title) – *Marriage*, Chapter VI – *Patrimonial rights and obligations of the spouses*, second section – *Legal Matrimonial Regime*.

Though, related to the mass of common goods, *lato sensu*, spouses are enabled with the same patrimonial rights and obligations, the legislator operates a distinction, according to the type of legal act concluded by one of them. Thus, each spouse may freely use, preserve, administer common goods, under the law requirements, but the spouse cannot conclude papers of disposition, with reference to the family goods, without the consent of the other spouse. The present article analyses equally, the elements that form the common law incident to mutual implicit mandate between spouses, including legal sanctions suitable to states of inobservance and the particular rules, waiving from the general civil principles.

**Keywords:** matrimonial regime, matrimonial property regime, mutual implicit mandate between spouses, juridical act, nullity

In the field of the institution of marriage, the New Civil Code makes a number of changes and completions designed to clarify some aspects which, in the regulation of the Family Code, could only be inferred by way of interpretation.

The regime of legal community is governed by articles 339–359 NCC and is applicable when the spouses or future spouses do not choose another regime by matrimonial agreement and also in the case of the matrimonial convention nullity.

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This regime has not changed radically as a result of the entry into force of the New Civil Code, the new elements introduced mainly referring to the regulation and exercise of disposition rights, of administration and use of the spouses' property.

Giving way to the exclusive mandatory legal matrimonial regime (under the provisions of Family Code recalled by the New Romanian Civil Code, there was only one legal, exclusive, mandatory matrimonial regime imposed by the legislator as marriage effect, Vasilescu, 2003: 258), the Romanian legislator furnishes the spouses with the freedom of choosing the appropriate rules of governing their patrimonial reports.

To the fore of the New Romanian Civil Law dedicated to the effects of marriage, one may notice an increased concern of the legislator materialized in widely and elaborately enacting the patrimonial rights and obligations of the spouses (there are 61 articles from 312 to 372 included in The New Civil Code, unlike only 8 articles of Family Code). It also may be noticed, the elements of absolute novelty as *conventional and judicial mandate* (art. 314–315 NCC), *patrimonial independence of spouses* (art. 317 NCC), *income got from the job* (art. 327 NCC), *the preciput clause* (art. 333 NCC), *list of mobile goods* (art. 361 NCC) etc.

Concurrently, the legislator focuses on the preventive way of enacting some civil institutions that have generated various and multiple lawsuits.

Giving, thus an answer to the questions raised by doctrine and the needs prompted by case law, the New Civil Code ensures juridical solutions to fundamental issues derived from *the acts of disposal that are seriously threatening family interests* (art. 316 NCC), *right to information* (art. 318 NCC), *family residence* (art. 321–324 NCC), *each spouse's work done in the house-hold and for bringing up the children* (art. 326 NCC), *juridical character of work incomes and those asimilated* (art. 341), *nullity of disposal and entailed acts of common assets without both spouse consent* (art. 346–347 NCC) and *company intake of common assets* (on company, association establishing art. 348 NCC).

Without being provided with a legal commitment in formal terms of *mutual implicit mandate between spouses*, the new Romanian Civil Code establishes, under the provisions of art. 345–347, included in Book II (Second Book)- *About Family*, Title II (Second Title) – *Marriage*, Chapter VI – *Patrimonial rights and obligations of the spouses*, second section – *Legal Matrimonial Regime*.

Though, related to the mass of common goods, *lato sensu*, spouses are enabled with the same patrimonial rights and obligations, the legislator operates a distinction, according to the type of the legal act

concluded by one of them (Bacaci; Dumitrache; Hageanu, 2012). Thus each spouse may freely use, administer common goods, under the law requirements, but the spouse cannot conclude papers of disposition with reference to the family goods without the consent of the other spouse.

In order to supplement the Civil Code's provisions, the doctrine has defined the mutual implicit mandate of spouses as a relative assumption (*iuris tantum*) which entails every spouse to use, administrate or alienate common assets, being presumed that he/she has the consent of the other spouse. In this context, strictly juridical, the mutual implicit mandate represents *an exception to the Equality Principle of Spouses* stipulated by art. 308 NCC *spouses decide on mutual agreement about all aspects of marriage*. The main juridical effect originates by this exception is to facilitate and to protect civil circuit. Concurrently, this provision protects the third parties acting in good faith.

Thus, as an exception to the above-mentioned principle, on the strength of the mutual implicit mandate, every spouse can decide himself/herself, the other spouse's consent not being required. He/she may freely use and administer common goods.

By comparison with art. 35 Family Code, one may notice while the provisions of Family Code generally mentioned the juridical acts (use, administer, disposal), that can be concluded by one spouse consent, the new Civil Code focuses on limitative and *expresis verbis* acts that may be the object of mutual implicit mandate. Essentially, as we already underlined, mutual implicit mandate represents an exception to The Principle of Juridical Equality of Spouses; the exceptions for being of strict interpretation and application, must have a limitative character. For this reason, the new legislative technique adopted by the Romanian law giver, proves to be judicious and appropriate.

The doctrine (Hageanu, 2012) interpreted that, according to New Romanian Civil Code, in the context of legal matrimonial regime, the mutual implicit mandate finds its legitimation related to the following juridical acts concluded only by one of the spouses, that concern common assets: *acts of use* [art. 345 par. (1) teza I]; *acts of conserving, administration and acquisition* [art. 345 par. (2)]; *alienation on onerous purpose, of common movable property when it is not subject to any publicity-related formalities* [art. 346 par. (2) 1<sup>st</sup> thesis]; *usual gifts* [art. 346 par. (3)].

Actually, even when considering the above-mentioned circumstances, if one of the spouses proves express opposition on concluding the act, that act cannot be validly concluded by only one consent.

This aspect ensues from the relative character of the presumption of mutual implicit mandate (*iuris tantum*).

For being a relative presumption, it can be overturned, by disposing the opposite proof, i.e. by averring the fact that the other spouse went expressly against concluding the act related to joint property assets.

Instead, the same doctrine pointed out that express agreement of spouses is required for concluding the following acts: of *changing the destination of common goods* art. 345 par. (1) 2<sup>nd</sup> thesis]; of *disposal related to rights on the matrimonial home, of removing or alienating the goods that furnish or decorate it*, [art. 345 par. (3) in conjunction with art. 322 par. (1) §i (2)], of *alienation or entailing with real-estate rights the common goods* [art. 346 par. (1)], of *non-onerous disposal acts of common movable and immovable assets when they are subject of publicity-related formalities* [art. 346 par. (2) *per a contrario* interpreted], of *disposal on common assets as company intake or for getting shares, or stocks* [art. 349 par. (1)]. Synthetizing, according to legal provisions, we may operate a distinction on the common or individual way the spouses can act depending on the sort of act that will be concluded: preservation, administration or disposal act.

Hence, it rallies to the principle *every spouse is allowed to use the common good without the express consent of the other spouse* ( art. 345 par. 1 NCC), indifferently of the nature of good, *movable or immovable*, and the sort of act, i.e of *preservation, administration or acquiring*.

*The acts of preservation and administration of common goods*, (being acts that profit both spouses for having as the fundamental goal maintenance and common benefit obtaining resulted from appropriate use, according to their destination) may furthermore be concluded without the express consent of the other spouse (art. 345 par. 2 NCC).

On the same judgement, considering the act of acquiring assets as an act of common patrimony administration, the provisions of art. 345 line. 2 NCC, allows spouses to procure common goods, regardless of their nature: movable or immovable.

The spouse who did not participate to act a legal concluding, his/her interests being harmed by that legal act, can only claim damages from the other spouse, *without affecting the rights of third parties in good faith* (art. 345 par. 4 of the New Civil Code). Article 345, par. 4 provisions are set to equally facilitate civil circuit and to protect both spouses and third parties interests.

On the other hand, *changing destination of a common goods is assimilated to disposal acts*, the law being imperative on stressing as mandatory the mutual agreement of spouses (art. 345 parag. 1 NCC).

When it comes to *disposal acts*, the mutual agreement of spouses is expressly requested.

The provisions of art 346, par. (1) NCC embodies the common law, emphasizing the rule: *the acts of alienation or entailing with real rights whose object are common goods can be concluded only with express consent of both spouses*. Thus, every spouse may participate to act concluding in person or by means of legal or conventional mandate.

As any important rule, this too, has some must – know exceptions:

*The first exception* stipulated on art. 346 par. (2) NCC applies to *onerous disposal acts of common movable assets when they are not subject of publicity-related formalities*.

The act may be concluded with the consent of only one spouse, under the presumption of mutual implicit mandate. This provision underlines both the exceptional and the limited character of the exception related to two aspects: the nature of the goods (only the assets that are not subject of publicity-related formalities) and the type of the act to be concluded (only acts of disposal of onerous title, the non-onerous acts bidding under the provisions of general juridical regime).

*The second exception*, provided by art. 317, par. (2) and (3) NCC, concerning mutual agreement of spouses in case of disposal acts whose object is represented by common assets, emphasizes the faculty of each contracting part of concluding and freely ruling *the amounts relative to personal bank accounts*, opened during legal matrimonial regime span, without the other spouses consent.

The provisions of art. 346 par. (3) set up the *third exception*, related to *ordinary gifts*.

I strongly believe that the notion of ordinary gifts will engender case law distinct solutions, as long as the legislator did not established the nature and the content of this term.

Hence, the significance of *ordinary* will be treated according to social-economical context, the unwritten law, the statute of the spouses, the receiver of the gifts etc. for each particularly case etc.

*The fourth exception* is situated on the field of *company intake of common assets* (art. 348 NCC). Placing intake regime on disposal act category, Romanian Civil Code establishes the principle of mutual consent related to it, too. The legislator operate no distinction between diferent category of goods, movable or imovable. Under the same rules, the legislator places the money intake, aspect that places this institution under common law regime.

Thus, the party who brings such an asset as a contribution to the capital of a company, or uses that asset for the acquisition of shares,

must obtain the prior written consent of the other party. If the other party has not given consent then the contribution is invalid.

Accordingly, when it comes to immovable goods we shall apply the rule of mandatory written consent, drawn up in front of the public notary and written in The Land Registry Book.

When it comes to movable assets, we will distinguish between two categories: those who are subject of publicity-related formalities – in such case mutual express consent being compulsory – and those who are not subject of publicity-related formalities – in the last case the mutual implicit mandate being presumed (art. 346 NCC).

The final item of art. 349 NCC, par. (1) which sets up the principle related to the spouse who gave not his written consent on company common goods disposal acts, stresses the written form imperative, equally *ad probationem* and *ad validitatem*, suitable to all circumstances when mutual express consent is required).

When comes to *mortis-causa juridical acts*, though the legislator declares that they belong to disposal acts category, each spouse has his own, individual the rights, incompatible with any form of censorship carried ou by the other spouse. This is *the fifth and last exception* set up by Romanian Civil Code legislator.

When the rules of the present section are infringed, *the sanction* imposed by the legislator is *relative nullity* ( provisions of art. 347 NCC). The act may be confirmed according to the provisions of art. 1262–1263 NCC. For reasons related to civil circuit security, the law protects *bona fide* third parties, from the negative effects of annulling the act.

The spouse who did not participate to act a legal concluding, his/her interests being harmed by that legal act, can only claim damages from the other spouse, *without affecting the rights of third parties in good faith* (art. 345 par. 4 of the New Civil Code).

As a general rule, the relative nullity applies to all circumstances of this kind, *excepting* the context *commercial company transactions developed on a organised market*. Thus, the spouse who did not express his/her consent to participate in legal act concluding, his/her interests being harmed, can only *claim damages from the other spouse, without affecting the rights of third parties in good faith*.

The doctrine (Filipescu, 2007) underlines that the sanction of relative nullity comes against the non-observance of diligence obligation and bad faith proven by the spouse who even if he/she intended to carry out a legal obligation did not use all the necessary diligences for obtaining the other spouse consent. E.g. In this case may be the spouse

who sold a common asset for carrying out a contractual statement in benefit of third parties.

As the doctrine (*Ibidem*) has already emphasized, the solution seems to be inappropriate. Hence, the spouse who did not express his consent, being considered third parties beside the concluded act, he/she is not allowed to act against the third by promoting a legal action.

The provisions of art. 347, par (1), interpreted *per a contrario* and *a fortiori*, entails the conclusion that the unnecessary act, according to the law, stays under absolute nullity. E.g. when one of the spouse, without the other consent, alienates a common asset, and wastes the money. Another interpretation is not acceptable for a just juridical point of view.

Nevertheless, the specialized literature makes reference to the existing disaccord between the provisions of art. 347 par. (1) the provisions of other article. The difference between *the express consent of the other spouse* and *spouses agreement* comes from the semantic field and shall imply different juridical meanings.

Obviously, in strictly juridical terms, one cannot put the sign of equality between *consent* and *juridical will*. Hereby, it is universally acknowledged that the *juridical will* represents the sum of *consent and intention*. Hence, the juridical will means the general, while the consent means the particular.

For optimizing the accuracy of the legal notion, as a *law ferenda* supply, the legislator may rewrite art. 347 par. (1), therefore, alluding to juridical acts concluded by one spouse without the other agreement.

*In conclusion*, the novelty of the new Romanian Civil Code which reformed the regulation of the Family Code of patrimonial relations between spouses in Romania, rests in the possibility of future spouses to choose between several matrimonial regimes, responding thus to the continuous need for adaptation of existing legislation to socio-economic needs and to the trends manifested in this field at European level.

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