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Nadia Cerasela ANIȚEI

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General Considerations on Personal Relations between Spouses under the Provisions of the New Civil Code

Nadia Cerasela ANIȚEI ¹

Abstract

The effects of marriage are brought under regulation in the Civil Code in Title II entitled "Marriage" Chapter V is dedicated to personal rights and duties of spouses (art. 307-311) and Chapter VI is dedicated to property rights and obligations of spouses (art. 312-372). Also, the Civil Code establishes the effects of marriage in other articles from different chapters. Also, we find some rights and obligations of spouses brought under regulation by rules belonging to other branches of law as follows: the Civil Code contains for example provisions relating to the irrevocability of donations between spouses (Article 937 Civil Code), Law no. 319/1944 in art. 1-5 sets the hereditary vocation of the surviving spouse and his/her right to habitation, etc.

Moreover, the effects of marriage are set to rights in some international laws to which Romania is party or has ratified or acceded to, namely: the Universal Declaration of Human Rights (Article 16), the International Covenant on Civil and Political Rights (Article 23 paragraph 4 and art. 24), International Covenant on Economic, Social and Cultural Rights (art. 10 paragraph 1), etc.².

In relation to the area of people, between whom these effects are produced,³ we distinguish the following types of relations:

- a. relationship between spouses;*
- b. relations between spouses and their children;*
- c. relations between a spouse and the relatives of the other spouse (affinity relations);*
- d. relations between family members and other natural persons or legal persons.*

Relations between spouses refer to:

- a. personal relationships;*
- b. economic relations;*
- c. capacity of exercise.*

Keywords:

effects of marriage; rights and obligations of spouses; personal relations between spouses; new Civil Code.

¹ Nadia Cerasela ANIȚEI - Associate professor, Ph.D., Faculty of Law, „Petre Andrei” University of Iași, România, e-mail: ncerasela@yahoo.com

² T., Bodoaşcă. *Dreptul familiei (Family Law)*, All Beck Publishing House, Bucharest, 2005, pp. 113-116.

³ D., Lupaşcu. *Dreptul familiei (Family Law)*, 4th edition, amended and supplemented, Universul Juridic Publishing House, 2009, Bucharest, p. 80.

1. General considerations on personal effects of marriage

Personal effects are the main category of the effects of marriage, which subordinates the class of patrimonial consequences and materializes in a wide range of marital relations without economic content, making their financial evaluation impossible. The most important relations in this category are brought under regulation explicitly or implicitly by the Romanian legal system⁴, the rest being governed solely by religious and moral norms. The entire legal regulation is subject to the principle of equality of spouses in marriage. This principle is referred to in the Constitution, which states in Article 48 paragraph 1: "The family is based on the freely consented marriage of the spouses, on their full equality ..." as well as in the Family Code, which provides: "In the relations between spouses and in the exercise of rights in relation to children, men and women have equal rights "(Article 1 paragraph 4) and "Men and women have equal rights and obligations in marriage "(Article 25). This principle corresponds to spouses' obligation to jointly decide on any matter relating to marriage, as required by Article 26 of the Family Code.

The principle of equality of spouses involves mutual character of most rights and obligations strictly personal, impossible to be financially evaluated, which marriages creates between spouses.

Family law doctrine⁵ considers that the **personal effects** of marriage mainly represent the following non-patrimonial obligations, which are assumed by married spouses:

1. providing moral support to each other (Article 2 of the Family Code);
2. fidelity;
3. common house;

⁴ Mutual rights and obligations of spouses are revealed by the Family Code, the Criminal Code, by Law no. 197 / 18 November 2000, of Law no. 61/1991 republished and by Law no. 217/2003..

⁵ For details see T. Bodoaşcă, *Dreptul familiei*, (Family Law C.H. Beck Publishing House, Bucharest, 2005, pp.116-125, I.P. Filipescu, *Tratat de dreptul familiei*, (Family Law Treaty) 5th edition, All-Beck Publishing House, Bucharest, 2000, p.36-40 and E. Florian, *Dreptul familiei (Family Law)*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2008, pp.76-82; N., C., Dariescu. C., Dariescu. R., A., Petraru. *Dreptul familiei (Family Law)*, Lumen Publishing House, Iași, 2009.

4. marital duties
5. the obligation to decide on the name the spouses will bear in marriage⁶.

In doctrine, it is showed that the principle of equality of the spouses opposes the producing of the following personal effects of marriage:

1. the control exercised by a spouse to correspondence and other social relations of the other spouse;
2. the authorization of a spouse by the other in order to choose a profession;
3. the acquirement by one spouse of the other spouse's citizenship through the act of marriage.

2. The regulation of personal relations between spouses

2.1. The regulation of personal relations between spouses in Civil Code

Article 307 states: "The provisions of this chapter shall apply to personal relationships between spouses, whatever their marriage regime."

Article 308 provides: "Spouses shall agree in all matters of marriage."

Article 309 states: "Spouses owe each other respect, fidelity and moral support (paragraph 1). They have a duty to live together. For good reasons, they may decide to live separately (paragraph 2)."

According to art. 310, "A husband has no right to censor correspondence, social relationships or spouse's choice of profession.

Article 311 provides: "Spouses are required to bear the name declared at the contracting of marriage (paragraph 1). If the spouses have agreed to bear during marriage a common name and declared it under the provisions of art. 281, a spouse cannot request the change of this name only administratively without the consent of the other spouse. "

⁶ For details see T. Bodoaşcă, *Dreptul familiei*, (Family Law) C.H. Beck Publishing House, Bucharest, 2005, pp.116-125, I.P. Filipescu, *Tratat de dreptul familiei* (Family Law Treaty), 5th edition, All-Beck Publishing House, Bucharest, 2000, p.36-40 and E. Florian, *Dreptul familiei (Family Law)*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2008, pp.76-82.

Taking into account the provisions of the Civil Code we believe that personal relations between spouses assume the following obligations:

- a. **to take decisions together** (art. 308 Civil Code);
- b. to give respect and moral support (art. 308 Civil Code);
- c. **fidelity between the spouses** (Art. 309 para. 1 Civil Code);
- d. **to live together** (art. 309 par. 2 Civil Code)
- e. **to have sexual relations** (Article 1, Section 10 of Law no. 197/2000 and art. 63 of the Emergency Ordinance no. 194/2002);
- f. **independence of spouses** (Article 310 Civil Code);
- g. obligation to decide on the name the spouses will bear in marriage (of Art. 311 Civil Code)

a. The obligation of spouses to take decisions together (art. 308 Civil Code)

Spouses are obliged to act jointly in all matters relating to marriage. This obligation is based on mutual trust and on the respect they owe to each other. Spouses will decide together on both their public and private life. They shall take decisions on all their acts and deeds, as the consequences of the deeds and acts of a spouse can act upon the other spouse, in varying forms and intensities, even in the insidious manner of assault on the sensibilities of the latter.

b. The obligation of spouses to give respect and moral support (art. 309 par. 1 Civil Code)

Spouses owe each other respect and moral support. This requirement is a consequence of friendship and affection on which marriage relationships are based. The obligation is based on: honesty, patience, understanding and matrimonial community of life; their mutual encouragement and stimulation in their family, professional and public activities, the need to defend the honor and reputation of the other spouse; mutual support in case of illness, disability or other special situations. This is a legal obligation. The subject of the obligation is mutual moral support.

The non-observance of the moral support obligation may be grounds for divorce, but may also take the shape of offense as provided by art. 2 Section 30 of Law no. 61/1991 *to punish violations of rules of social*

life, order and public peace, or even the crime of abandonment of the family.⁷

c. The obligation of fidelity between spouses (Art. 309 paragraph 1 of the Civil Code)

Although the Family Code does not expressly provide it, there is no doubt about the existence of the duty of fidelity of each spouse to the other spouse. However, this obligation results from the bringing under regulation of some consequences of this obligation. Thus, the presumption of paternity is based on the obligation of fidelity of the wife. As this requirement exists for women, under the principle of equality between the sexes, it also exists for men. The breach of the fidelity obligation is grounds for divorce. In the Civil Code this requirement is expressly provided.

We believe that the obligation of fidelity should not have been provided in the same line with that of respect and moral support but that it should have been provided in another paragraph.

The content of the duty of fidelity refers to the fact that none of the spouses is allowed to have sexual relations with other persons.

The duty of fidelity refers, above all, to the intimate sphere of marital life. In its physical meaning "the duty of faith" involves two aspects: a positive one, namely the performance by each of the spouses of conjugal duties, and a negative one, not to have conjugal relations outside marriage. Infidelity as antonym of fidelity, has also an intellectual meaning, more subtly linked to the duty of respect, manifested by an objectionable public behavior, equivocal friendship, etc..

In conclusion, as the research literature states⁸, essentially moral and assuming reciprocity, the duty of respect, fidelity and moral support that a spouse is entitled to, has neither in part, or all together any "guarantee" *manu militari*; the appropriate conduct cannot be obtained by force, but the non-compliant behavior is punishable, indirectly, by divorce, including from the exclusive fault of the one spouse who has ignored any of these duties.

⁷ Article 305 paragraph 1 letter a of the Criminal Code sanctions the leave, expulsion or leaving without support of the one entitled to maintenance by the one bound to maintenance, exposing him to physical or moral suffering. This offense is punishable by imprisonment from 6 months to 2 years or by a fine.

⁸ E. Florian, *Dreptul familiei (Family Law)*, 3rd edition, C.H. Beck Publishing House, Bucharest, 2010, p. 95.

d. The obligation to live together (art. 309 paragraph 2 Civil Code)

The relationship between spouses requires their obligation to live together. This obligation is imposed by the purpose of marriage that is the foundation of a family. Although not specifically established by the Family Code, this obligation results from Art. 26 of the Family Code, of the provisions of Law no. 61/1991 and of the provisions of art.305 letter a of the Criminal Code).

Spouses may, in case of consistent reasons, have separate homes, for example: the exercise of a profession, the need of specialized training, health care, in case their homes do not provide standard housing.

If there are no consistent reasons for the spouses to live separately, the refusal of a spouse to live together may provide grounds for divorce.

However, during marriage disagreements between spouses may arise likely to cause one of them to leave the conjugal home. The spouse who leaves the marital home, regardless whether he/she left the conjugal home on his/her own initiative or forced by the nature and forms of manifestation of family conflicts or was ousted by the other spouse, does not lose the right to return to the conjugal home.

The Civil Code brings under regulation in art. 321-324 in detail the legal status of the family home as part of the primary regime regardless of the matrimonial regime chosen. Thus, art. 321 of the new Civil Code provides: "The family home is the common house of spouses or, in their absence, the home of the spouse who has their children into care (paragraph 1). Either spouse may request the registration in the cadastral register, under the law, of a building as family home, even if he/she is not the owner of the building (paragraph 2).

e. The obligation to have sexual relations to one another (Article 1, Section 10 of Law no. 197/2000 and art. 63 of the Emergency Ordinance no. 194/2002)

The content of this obligation refers to the duty of spouses to have consensual sex⁹. As a result, the unjustified refusal of a spouse to perform their marital obligation may constitute grounds for divorce.

Whatever the circumstances, the reasons or explanations of refusal of a spouse to have conjugal relations, the quality of marital partner of the other spouse does not allow him/her to resort to violence.

f. Independence of spouses (art. 310 Civil Code)

Although the Family Code does not expressly provide it, there is no doubt on the independence of spouses resulting from the principle of full equality between men and women.

The correspondence and social relations of spouses. Neither spouse is not entitled to exercise control over the mail and social relations of the other spouse. Disagreements between spouses on correspondence and social relations that one of them intends to maintain may constitute grounds of divorce.

Spouses' profession. Each spouse can choose the profession or occupation they want, without the need for any declaration from the other. Of course, the spouses shall consult on the choice of their profession or occupation.

g. The obligation to decide on the name that the spouses will bear during their marriage (Article 311 Civil Code)

At the contracting of marriage the spouses may chose the name they will bear during the marriage in three ways:

- select as common name the name of one of them;
- keep the name they had before marriage;
- choose as common name their names gathered in the same order.

If the spouses have agreed to bear during marriage a common name and have declared it to the delegate of civil status, until the end of

⁹ Article 1, Section 10 of Law no. 197/2000 and Art. 63 of the Emergency Ordinance no. 194/2002 (although the discretionary condition of the consent of each spouse eliminates its binding character).

marriage one spouse can request the change of this name administratively¹⁰ only with the consent of the other spouse.

If one spouse takes the other's name or both unite their name, which thus formed represents a common name in marriage, in case of the death of the spouse whose name was taken or in case of divorce, if the spouse keeps the name acquired by marriage, this name may become a common name in a new marriage.¹¹

h. Refraining from any act of domestic violence (Article 2 paragraph 1 of Law no. 217/2003 *on preventing and combating domestic violence*)

According to art. 2 paragraph 1 of Law no. 217/2003 domestic violence is any physical or verbal action committed intentionally by a family member¹² against another member of the same family, which causes physical, psychological, sexual or material damage.

Preventing the woman from exercising her fundamental rights and freedoms is also an act of domestic violence.

2.3. The correlation between personal rights and obligations of spouses, on one hand, and their individual freedom, on the other hand

The personal obligations of spouses imposed on spouses cannot restrict the assertion of their personality. For example, marriage may not affect the rules that protect the mental and physical integrity of the spouses. Therefore, each spouse will decide on their own health, because each person disposes of their own body freely, and the right to life is a fundamental right. But a clarification is necessary: on certain issues, the principle of joint decision must be applied. For example, the wife cannot decide an abortion or artificial insemination without her husband's

¹⁰ See Government Ordinance no. 4 / 2003 on the *administrative acquisition and change of names of individuals* published in Part I, no. 68 of February 2, 2003 with subsequent amendments.

¹¹ Frențiu. B. D. Moloman. *Elemente de dreptul familiei și de procedură civilă, (Elements of Family Law and Civil Procedure)* Hamangiu Publishing House, Bucharest, 2008, p. 71.

¹² According to art. 3 Law. 2172003 (published in Official Gazette no. 367 of May 29, 2003) a family member is: a) the spouse, b) close relative as defined in art. 149 of the Criminal Code.

consent. Also, these rules apply to the rights of personality, such as: the right to honor, the right to image or the right to privacy¹³.

Each spouse is entitled to freely choose their profession and to pursue it, disposing, in conformity with the law, of the revenue collected, in compliance with the obligations of marriage expenses. However, each spouse has the freedom of feelings and artistic, literary, sports, political, religious or otherwise opinions, provided that their manifestation does not affect the interests of marriage.¹⁴

Conclusions

The contracting of marriage generates between those who contract it a variety of relations, of a different nature: social, moral, legal.

The legal effects of marriage are the personal, and patrimonial relations arising between spouses as a result of marriage.

The relations that arise between spouses during marriage, under the current legislation, are under the sign of equality between men and women.

Personal effects are the main category of the consequences of marriage, which subordinate the class of economic effects and which materialize in a wide range of marital relations without economic content, making their financial evaluation impossible.

In conclusion, in light of current regulations, the notion of **personal effects of marriage**, of the Romanian family law, must be understood as the sum of the following duties:

- spouses must jointly agree on any matter relating to marriage;
- providing mutual moral support;
- obligation to live together;
- consensual sexual relations;
- refraining from any act of domestic violence;
- fidelity;
- obligation to decide on the name the spouses will bear during marriage.

¹³ D., Lupașcu. *Dreptul familiei (Family Law)*, 4th edition, amended and updated, Universul Juridic Publishing House, Bucharest, 2009, p. 84.

¹⁴ Ibidem.

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