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### **Primary Qualification of the General Effects of Marriage Notion**

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# Primary Qualification of the General Effects of Marriage Notion

Nadia Cerasela ANIȚEI<sup>1</sup>

## Abstract

*On October 1<sup>st</sup> 2011 entered into force the new Civil Code, which is based on the monistic conception of regulation of private law relations in a single code, thus changing not only the institutions of family law, but also the other institutions belonging to private law.*

*The regulation of family relations is based on the *lex ferenda* solutions and proposals outlined over time by the doctrine and jurisprudence, and also on the provisions of the following laws: the French Civil Code, the Civil Code of Quebec, the Swiss Civil Code.*

*Also, considering the fact that Romania is a member state of the European Union and that more and more Romanian people are living abroad or marry foreigners we consider the harmonization of legislation in order to determine the law applicable to such relationships as a highly important requirement.*

*Given these issues I will devote the present study to: primary qualification of the general effects of marriage notion.*

## Keywords:

*primary qualification; effects of marriage in Romanian law; general effects of marriage in Romanian private international law.*

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## **1. Primary qualification of the general effects of marriage notion. Legal headquarters**

Article 2589 of the new Civil Code with the marginal title *of The law applicable to the general effects of marriage* states that:

"General effects of marriage are subject to the law of the common habitual residence of the spouses, and in the absence of such law to the law of common citizenship of spouses. In the absence of common citizenship, the law of the State where marriage was celebrated is applied. (paragraph 1)

The law determined under paragraph (1) applies to both personal effects and economic effects of marriage that this law governs and from which spouses are not allowed to derogate, irrespective of the matrimonial regime of their choice. (paragraph 2) Notwithstanding the provisions of paragraph (2), the rights of spouses on family housing, and the regime of certain legal acts on the housing are subject to the law of the place where it is located" (paragraph 3).

Article 2596 of the new Civil Code with the marginal name of *Change of the habitual residence or citizenship* provides:

The law of the common habitual residence or the law of common citizenship of spouses continues to regulate the effects of marriage provided that one of them changes, as appropriate, the habitual residence or citizenship. (paragraph 1). If both spouses change their habitual residence or, where appropriate, their citizenship, the common law or the new common habitual residence or common citizenship shall apply to the new matrimonial regime only for future situations, if the spouses have agreed otherwise, and in any case, it cannot prejudice the rights of third parties. (paragraph 2). However, if the spouses have chosen the law applicable to the matrimonial regime, it will remain the same even if the spouses change their habitual residence or citizenship. (paragraph 3).

## **2. The notion of the general effects of marriage in Romanian law**

### **2.1. Introductory concepts**

To clarify the meaning of the conflict of laws of art.2589 of the new Civil Code first of all we should perform the primary qualification of the *general effects of marriage* notion. According to art.2558 paragraph 1 of the new Civil Code, primary qualification is always made by Romanian

law, namely in accordance with the terms used by the Romanian legal system.

Marriage generates between those who contract it a multitude of relationships, of a different nature: social, moral (Sandu, 2012), legal. The legal effects of marriage (Anitei, 2012) are the personal and patrimonial (economic) relations that arise between spouses as a result of the contracting of marriage.

The relations that arise between spouses during marriage, under the current legislation, are under the sign of *equality between man and woman*.

The effects of marriage are governed by the Civil Code in Title II, entitled "*Marriage*" Chapter V is devoted to personal rights and responsibilities of spouses (art. 307-311) and Chapter VI, to property rights and obligations of spouses (art. 312-372). The Civil Code also devotes to the effects of marriage different chapters as follows: Art. 1031 of the new Civil Code provides that any donation concluded between spouses is revocable only during marriage, Art. C 970-974 of the new Civil Code establishes the inheritance of the surviving spouse and the right of habitation.

Effects of marriage are regulated in some international laws to which Romania is party or which we have ratified or acceded to, namely the Universal Declaration of Human Rights (Article 16), the International Covenant on Civil and Political Rights (art. 23 paragraph 4 and art. 24), the International Covenant on Economic, Social and Cultural Rights (art. 10 paragraph 1) etc (Anitei, 2012: 113-116; Anitei, 2011: 36-47).

In relation to *the sphere of people between which these effects take place* (Lupascu, 2009: 80), we can distinguish the following types of relationships:

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

In turn, relationships between spouses include:

- 1) personal relationships;
- 2) economic relationships;
- 3) exercise capacity.

## **2.2. Personal effects of marriage (Anitei, 2012: 9-14)**

Personal effects are the main category of consequences of marriage, which subordinate their class to economic effects and materialize in a wide range of marital relations devoid of economic content, their assessment in money being impossible. The most important relationships of this category are explicitly or only implicitly regulated by the Romanian legal system, (Filipescu, 2002: 36-40; Florian, 2008:76-82) 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, which corresponds to the obligation of spouses to agree to act in agreement in relation to any matter relating to marriage. The principle of equality of spouses assumes the mutual character of most rights and obligations with a strictly personal non-monetary character that marriage establishes between spouses.

Family law doctrine (Filipescu, 2002: 36-40; Florian, 2008:76-82) considers that the personal effects of marriage are mainly the following non-patrimonial obligations that spouses assume by marriage:

- providing moral support to each other;
- fidelity;
- common residence;
- conjugal duties;
- the obligation to decide on the name spouses will bear in marriage (Filipescu, 2002: 36-40; Florian, 2008:76-82).

The doctrine also states that the principle of equality of spouses stands against the following personal effects of marriage:

- the control exercised by a spouse on the mail and other social relations of the other spouse;
- authorization of a spouse by the other to choose a profession;
- acquisition by a spouse of the citizenship of the other spouse only through the act of marriage.

Law no. 217/2003 on preventing and combating domestic violence establishes a personal obligation incumbent only on the

husband. We refer to *the observance of the fundamental rights and freedoms of women* [art. 2 paragraph (2) of the Act].

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

- take all decisions together (art. 308 of the new Civil Code);
- offer respect and moral support [art. 309 paragraph (1) new Civil Code];
- fidelity [art. 309 paragraph (1) new Civil Code];
- live together [art. 309 paragraph (2) new Civil Code];
- have consensual sexual relations with [art. 197 paragraph (2) letter b1) Penal Code., art. 1491) Penal Code.]
- independence of the spouses (art. 310 new Civil Code);
- to decide on the name they will bear in marriage (art. 311 of the new Civil Code)

a) *The obligation of spouses to make decisions together* (art. 308 of the new Civil Code). Spouses are obliged to act jointly in all matters relating to marriage. This requirement is based on mutual trust and respect which they owe to one other. Spouses shall decide on their public and private life together, will make decisions on all their acts and deeds, as the consequences of acts or deeds of a spouse may affect the other, in varying forms and intensities, even as an insidious manner of assault on the sensibilities of the latter.

b) *The obligation of mutual respect and moral support between spouses* [art. 309 paragraph (1) of the New Civil Code]. Spouses owe each other respect and moral support. This requirement is a consequence of the friendship and affection on which marriage relationships are established and is based on honesty, patience, understanding and matrimonial community of life, mutual encouragement and fostering in family, professional and public activities, by also defending when needed the honor and reputation of the other spouse, offering mutual assistance in case of illness, disability or other such special circumstances. This is a legal obligation. Failure in moral support may provide grounds for divorce.

c) *The obligation of fidelity between spouses* [art. 309 paragraph (1) of the new Civil Code]. Although the Family Code does not expressly provide it, there is no doubt that the duty of loyalty of each spouse to

the other spouse exists. However, this obligation is inferred from the regulation of its consequences. Thus, the presumption of paternity is based on the wife's obligation of fidelity, but, as this obligation exists for women, by virtue of the principle of gender equality, it exists for men as well. Breach of the duty of loyalty is grounds for divorce.

In the new Civil Code this obligation is expressly provided.

We believe that the duty of fidelity should not have been provided in the same paragraph with that of respect and moral support, but must be provided separately. Its content says that spouses must refrain from having sexual intercourse with other people. The duty of fidelity belongs, above all, to the intimate sphere of conjugal life. In its physical sense, "the duty of faithfulness" involves two aspects: a positive one, namely the fulfillment by each spouse of the conjugal duties and a negative one, that of not having marital relations outside of marriage. Infidelity, the antonym of fidelity, has also an intellectual sense, more subtly connected to the duty of respect, manifesting itself through a disagreeable public behavior, equivocal friendships, etc..

In conclusion, as the research literature states of a moral essence and assuming reciprocity, the duty of respect, fidelity and moral support to which any spouse is entitled does not have separately or all together, any *manu militari* "guarantee"; appropriate behavior cannot be achieved by force; improper conduct is punishable indirectly through dissolution of marriage, including due to the exclusive fault of the spouse who has ignored any of these duties.

d) *The obligation to live together* [art. 309 paragraph (2) of the new Civil Code]. Relations between spouses require them to live together. This obligation is imposed by the purpose of marriage, namely the establishment of a family. Despite the fact that it has not been expressly established, it follows from art.26 of the Family Code., of the provisions of Law no.61/1991 and art. 305 paragraph (1). a) Penal Code. Currently, it is expressly stipulated in the new Civil Code.

Spouses may, for good reasons, have separate housing, for example, in case of the exercise of a profession, the need for specialized training, health care, when their homes do not ensure the housing norm. Where there are no grounds for the spouses to live separately, the refusal of one of them to live together may provide grounds for divorce. However, during marriage, between spouses, misunderstandings likely to cause one of them to leave the marital home can occur. The spouse who

leaves the marital home, regardless whether they left the marital home on their own initiative or constrained by the nature and the forms of family conflict or they were expelled by the other spouse does not lose the right to return to the marital home.

The new Civil Code regulates in art.321-324, in detail the legal status of the family home as part of the primary regime, regardless of the matrimonial property regime chosen. Thus, art.321 of the new Civil Code provides: "(1) family housing is common residence of the spouses or, failing that, the home of the spouse with whom the children live. (2) Either spouse may request registration in the land registry, under the law, of an immovable as family housing, even if he/she is not the owner of the immovable. "

e) *The obligation to have consensual sexual relations* [art. 197 paragraph (1) The Penal Code and art.63 of G.E.O. no. 194/2002]. The content of this obligation is the duty of spouses to have consensual sexual relations. As a result, unjustified refusal of one spouse to fulfill marital obligation may constitute grounds for divorce. Whatever the circumstances, reasons or explanations for the refusal of a spouse to have marital relations, the quality of marital partner of the other does not authorize him/her to resort to violence.

f) *Independence of spouses* (art. 310 of the new Civil Code). Although the Family Code does not expressly provide it, there is no doubt about the existence of the spouses' independence, as a result of the principle of full equality between men and women.

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

*Profession of spouses.* Each spouse can choose their profession or occupation they wish, without needing any permission from the other. Of course, the spouses shall consult in choosing their profession or occupation.

g) *The obligation to decide on the name spouses will bear in marriage* (art. 311 of the new Civil Code). At the termination of marriage, the spouses have the possibility to choose the name they want to bear during marriage from the following possibilities:

- choose as common name the name of one of them;



- keep their maiden name;
- choose as common name their reunited names;
- a spouse can keep their maiden name, while the other bear their reunited names.

If the spouses have agreed to bear during marriage a common name and declared it to the civil status officer until the termination of marriage, a spouse can ask to change it by administrative means<sup>2</sup> only with the consent of the other spouse.

If one spouse takes on the name of the other or both their names, which thus formed is a common name in marriage, in case of death of the spouse whose name was taken or in case of divorce, if the spouse keeps the name acquired by marriage, it can become the common name in a new marriage (Frențiu, Moloman, 2008: 71) .

h) *Refraining from any act of domestic violence* [art. 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 performed by a family member (Lupascu, 2009: 84), against another Preventing prevent women from exercising their rights and freedoms is also a case of domestic violence. We have also considered the provisions of the Criminal Code relating to the criminalization of domestic violence (art. 175, 176, 179-183, 189-191, 193, 194, 197, 198, 202, 211, 305-307, 309 , 314-316, 318).

Personal obligations imposed on spouses can limit the affirmation of their personality, for example, marriage should not affect rules that protect physical and psychological integrity of spouses. Therefore, each spouse shall decide on their own health, because every person disposes of their own body freely, and the right to life is a fundamental right. However, we have to make a mention: regarding certain issues, the principle of joint decision must be applied. For example, the wife cannot decide an abortion or artificial insemination without the husband. Also, these rules apply in terms of personality rights, such as the right to honor, the right to image or the right to privacy.

Each spouse has the right to choose freely their profession and exercise it, disposing, under the law, of the revenues collected, respecting

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<sup>2</sup> See O.G. no. 41/2003 on the acquisition and administrative changing of the names of individuals (Official Gazette. No. 68 of February 2<sup>nd</sup> 2003).

their obligations in terms of marriage expenses. However, each spouse has the right to have feelings and artistic, literary, sports, political, trade union, religious, etc. opinions, provided that their manifestation does not affect the interests of marriage.

### **2.3. Property relations between spouses (Anitei, 2012: 15-17)**

Marriage produces profound changes in the patrimonial status of an individual, creating a specific configuration of rights and obligations, distinct from the status of unmarried individuals, even if they live in an actual union (Avram, Nicolescu, 2010: 1).

It has been showed that of all legal acts and facts giving rise to legal family relationships, marriage produces the greatest economic effects on an individual. On the one hand, during marriage arise certain patrimonial rights and obligations between spouses, circumscribed to family life within which emotional relations between spouses often prevail over individual interests; on the other hand, the person entering along with third parties in the network of legal relations which form the civil circuit cannot be regarded as an ordinary co-contracting party. Even when a spouse concludes a legal act by him/herself it cannot be disregarded that, in fact, spouses are "a whole", which would "disrupt" the standards of current legal operations<sup>3</sup>.

The *property relations between spouses* are the totality of social relations valued in money, which arise between two people of the opposite sex united by the legal act of marriage. These economic relations which turn the spouses into two independent actors of the social life in an economic unity and of action, affect all pecuniary relationships between third parties and one or both spouses. This influence is so overwhelming, that economic relations established between spouses and others end up being absorbed by the concept of "property relations between spouses".

So overwhelming is this influence that economic relations established between spouses and others end up being absorbed by the concept of "property relations between spouses".

In conclusion, property relations between spouses are all the patrimonial legal relationships established between spouses, and between spouses (taken together or separately) and others as a result of marriage.

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<sup>3</sup> Ibidem.

Many economic relationships that are emerging between spouses during marriage may be included in three categories (Bacaci, Dumitrache, Hageanu, 2005: 44):

- relationships that are born in terms of the contribution of spouses to marriage expenses;
- relationships on their property;
- relationships regarding the mutual obligation of maintenance.

The content of patrimonial relations between spouses is composed of patrimonial rights and obligations.

Traditionally, as mentioned in the section on personal relations between spouses, and in case of patrimonial rights and obligations only the obligations must be analyzed, as the correlative rights are implied.

Through the provisions of the new Civil Code, the Romanian legislature reconsidered family relations by going back to their traditional inclusion in the Civil Code, which tends to assign marriage the character of a contract. In the new Civil Code, Chapter VI of Title II of Book II is entitled "Property rights and obligations of spouses" and its provisions relate to:

- Section 1 "*Common Provisions*" (Articles 312-338);
- Section 2 "*The legal community regime*" (art. 339-359);
- Section 3 "*The separation of property regime*" (art. 360-365);
- Section 4 "*The conventional community regime*" (art. 366-368);
- Section 5-"*Change of the matrimonial regime* " (art. 369-372).

#### **2.4. Marriage effects with respect to legal capacity**

Under the provisions of the new Civil Code, young people can marry at the age of 16 years, and under the terms of art.276 paragraph 2 of the new Civil Code the minor who marries at the age of 16 acquires full legal capacity under art.39 of the new Civil Code.

Where marriage is annulled, the minor who was in good faith at the contracting of marriage preserves full legal capacity.

### **3. The scope of the notion of general effects of marriage in Romanian private international law**

As mentioned in section 3.1. the conflict of laws in the field of the general effects of marriage are laid down in art.2589 of the new Civil Code.

The provisions of art.2589 paragraph 1 of the new Civil Code show that in terms of the determination of the law applicable to general

effects of marriage consideration of the particular situation in which the spouses find themselves in terms of habitual residence or, in the absence of citizenship is required:

- Spouses have the same common habitual residence - in which case the law of their common habitual residence is applied;
- Spouses have different habitual residence, but common citizenship - in which case the law of the state of common nationality of the spouses is applied;
- Spouses have both different habitual residence and different nationalities - in which case the law of the State where the marriage was celebrated is applied.

This solution, called "Kegel's Row", named after the German author who proposed it, will lead to the finding that the connection points are allowed "in cascade" and not alternatively.

The provisions of art.2589 paragraph 2 of the new Civil Code show that the law applicable to the effects of marriage governs especially the following:

- Personal effects between spouses (personal obligations between spouses, change of name as an effect of marriage);
- Property effects between spouses, and between them and third parties regulated by the Civil code and from which spouses cannot derogate, regardless of the matrimonial regime they chose (eg the primary regime);
- Marriage effects on the legal capacity of the minor spouse, etc..

As an exception to the provisions of paragraphs 1 and 2 of art.2589 of the new Civil Code under paragraph 3 of the same article some aspects are not subject to the law applicable to the general effects of marriage, but to other laws such as:

- A person's capacity to marry before coming of age - is subject to national law;
- The legal regime of spouses' property - for real aspects it is subject to the location law (*lex rei sitae*);
- Spouses' rights on family housing and the regime of legal acts on this housing are subject to the law of the place where it is located (Lupascu, 2012: 152-153).

The provisions of art.2596 of the new Civil Code show that in case of change of habitual residence or citizenship we have the following possibilities:

- If one spouse changes his/her habitual residence or citizenship, the effects of marriage shall be governed by the law of the common habitual residence or by the law of their common citizenship. So, in this mobile conflict of laws, old law is given priority, so the law of common habitual residence or the law of common citizenship will continue to govern the joint effects of marriage;
- If both spouses change their habitual residence or their citizenship, the effects of marriage shall be governed by the law of the new common habitual residence or by the law of the new common citizenship, but only in the future if the spouses have agreed otherwise, and in no case can be prejudicial to the rights of third parties. We support the view of the research literature (Lupascu, 2012: 155; Sitaru, 2001: 341; Diaconu, 2007: 189; Filipescu, IP. Filipescu A., 2007: 402; Fuerea, 2005: 175; Ungureanu, Jugastru, Circa, 2008: 221-222) that states that "this provision does not mean that the old law shall be applied in case of third parties, since it is possible that the new law is without prejudice to them (but rather perhaps an advantage), a situation in which there is no reason to deprive third parties from the benefit of the new law;
- If the spouses have chosen the law applicable to the matrimonial regime, it will be the same even if spouse change their habitual residence or citizenship.

Once the operation of primary qualification is completed, by framing the legal relation of private international law within the case of conflict of laws of art.2589 and 2596 of the new Civil Code and by determining the law applicable, the notion of marriage effects will acquire new content and a new scope, as a result of the secondary qualification operation which is achieved by *lex causae*, namely after the substantive law applicable to the legal relation in question. The solution of qualification by *lex causae* is supported by most private international law doctrines (Filipescu, 1999: 109; Jakota, 1999: 223; Audit, 1997: 203-204; Bourel, . Loussouarn, 1996:201-203).

### References:

- Aniței, N., C., (2011). General Considerations on Personal Relations between Spouses under the Provisions of the New Civil Code. *Postmodern Openings*, Year 2, Vol. 7, September, pp: 7-16
- Anitei, N., C., (2012) The preciput clause in the matrimonial agreement, *Jurnalul de Studii Juridice*, 7(3), pp: 151-163.
- Anitei, N., C., (2012). Regimurile matrimoniale potrivit noului Cod civil (Matrimonial Property Regimes under the New Civil Code), Hamangiu Publishing House, Bucharest.
- Audit, B., (1997). *Droit international privé*, 2e édition, Economica Publishing House, Paris.
- Avram, M., Nicolescu, C., (2010). *Regimuri matrimoniale* (Matrimonial Property Regimes), Hamangiu Publishing House, Bucharest.
- Bacaci, Al., Dumitrache, V., C., C., Hageanu, C., (2005). *Dreptul familiei* (Family Law), 4th edition, All Beck Publishing House, Bucharest.
- Filipescu, I., P., (1999). *Drept internațional privat* (Private International Law), Actami Publishing House, Bucharest.
- Filipescu. I., P., Filipescu A., I., (2002). *Dreptul familiei (Family Law)*, All Beck Publishing House, Bucharest.
- Florian, E., (2008). *Dreptul familiei* (Family Law), 2nd edition, C.H. Beck Publishing House, Bucharest.
- Frențiu, G., C., Moloman, B.D., (2008). *Elemente de dreptul familiei și de procedură civilă* (Elements of Family Law and Civil Procedure), Hamangiu Publishing House, Bucharest.
- Fuerea, A., (2005). *Drept internațional privat* (Private International Law), 2<sup>nd</sup> edition revised and enlarged, Universul Juridic Publishing House, Bucharest.
- Jakotă, M., V., (1997), *Drept internațional privat* (Private International Law), vol. I., Editura Fundației Chemarea, Iași.
- Loussouarn. Y., Bourel. P., (1996) *Précis de Droit international privé*, Editions Dalloz, Paris.
- Lupașcu, D., (2009). *Dreptul familiei* (Family Law), 4th edition amended and updated, Universul Juridic Publishing House, Bucharest.
- Lupașcu, D., (2009). *Dreptul familiei* (Family Law), 4th edition amended and updated, Universul Juridic Publishing House, Bucharest.

- Lupascu, D., (2012). *Drept internațional privat* (Private International Law), Universul Juridic Publishing House, Bucharest.
- Sandu, A., (2012) Some considerations regarding the relation between morality, ethics and law, *Jurnalul de Studii Juridice*, 7(S4), pp: 289-319.
- Ungureanu, O., Jugastru, C., Circa, A., (2008). *Manual de drept internațional privat* (Private International Law Handbook), Hamangiu Publishing House, Bucharest.