# ASPECTS REGARDING THE REVOCABLE CHARACTERE OF THE DONATION BETWEEN SPOUSES

**Ramona Mihaela MOLDOVAN***

***Abstract:*** *Unlike other donations, donations between spouses are essentially revocable, regardless of the form in which they were made. In this regard, the Civil code provides rules derogating from the general rules applicable to donations. Donation between spouses becomes irrevocable only by the death of the donor spouse, due to the fact that it is an exclusive and personal rights of the donor and may not be exercised by his heirs or creditors. The article also treats the problem regarding the donation of organs and whether revocability can be accepted in this situation.*

***Keywords :*** *donation between spouses, revocability, donation of organs*
***JEL Classification: K 12, K 36***

Irrevocability supposes that once the contract is concluded, the donor can not reconsider his or her decision; the donation can be revoked only in the situations provided by law. The existence of this principle can be explained by the fact that in the event that the donor could reconsider his or her choice, then the grantee would be in a state of permanent uncertainty.[1] In what regards donations (regardless if it was concluded authentically, disguised, indirectly or by manual gift) the irrevocable character regards not only the effects but even the essence of the contract, being a condition for the valid formation of the contract, thus the irrevocability of donations being regarded in the doctrine as 2nd grade irrevocability.[2]

Being so, any conditioned clause in the contract, of which execution depends on the will of the donor, and that would give the opportunity to destroy or decrease either directly or indirectly the benefits of the grantee created by the contract, are incompatible with the essence of donations, attracting therefore, their nullity. (art. 822-824 Civil Code).

***Exception from the principle of the irevocability of donations***

But there are cases expressly provided by law in which donations are still revocable. Thus, art. 829 Civil Code states that: "Donations between living is revoked for failure to fulfill

* Assistant lecturer, "Petru Maior" University of Tîrgu-Mureş, Faculty of Economics, Law and Administrative Sciences, Romania.

[1] See E. Safta-Romano, *Contracte civile. Încheiere, executare, încetare,* Ed. Polirom, Iaşi, 1999, p.179

[2] See Cristiana Turianu, *Contractul de donaţie reflectat în literature juridică şi practica judiciară,* in "*Dreptul" Journal,* no. 1/2001

the conditions that have been made, for ingratitude and in the case of children born after the donation was concluded."

These cases of revocability are applicable to all donations, but there are soma category of donations that are by themselves revocable, in this category entering the donation of future goods (art. 821) and the donation between spouses (Art. 937).

There are views in the doctrine according to which only revocable donation between spouses would be an exception to the principle of the irrevocability of donations, other cases of revocation of donations are not exceptions because they are beyond the donors will[3].

***Aspects regarding donations between spouses***

Donation between spouses is a donation that is made during the marriage, by one of the spouses donating to the other spouse goods. Like any donation, donation between spouses must satisfy the substantive and form conditions prescribed by law in this matter.

This donation can regard only goods that are the property of the donor spouse, and these goods become, if not specified otherwise, the property of the donee spouse[4]. It is inconceivable to donate a common good, such a legal act being null and void, since it would violate the provision of art. 30 para. 1 of the Family Code.

Donation between spouses are valid even if they are made under condition that depends only upon the will of the donor spouse, or even if the it is imposed to the donee to bear the undetermined debt of the donor or even if the donor reserved the right to dispose of the donated goods.

In this way, the donated goods will become the property of the done spouse, in accordance with art. 31 b) of the Family Code, excepted when it was stipulated that the donated goods „will enter into the community of goods", meaning thus „the turnover of the exclusive property rights of the donor spouse will transform into common property belonging to both spouses."[5]

It is allowed for the donor to donate an ideal share of a good that forms his or her property, and that is not included in the common property of the spouses, as it is also allowed to donate the right over an opened inheritance (an universality or a divided share of the universality) that is the private property of the spouse.

Unlike other donations, donations between spouses are essentially revocable, regardless of the form in which they were made. Article 937 para. 1 of the Civil Code provides that "any donation made between spouses during marriage is revocable." In this regard, the Civil code provides rules derogating from the general rules applicable to donations. Donations between spouses, including wedding gifts, made by one of the spouses in favor of the other are revocable in order to allow for the spouse who asks the dissolution of marriage due to the fault of the other spouse, to revoke the donations made before the intervention of the causes determining the dissolution of their marriage.[6]

***Modes for revocation of donations between spouses***

Revocation can be achieved by the unilateral will of the donor spouse; he may revoke the donation any time during the marriage, or after the death of the donee husband and even against his heirs. Donation between spouses becomes irrevocable only by the death of the donor spouse, due to the fact that it is an exclusive and personal rights of the donor and may not be exercised by his heirs or creditors.

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[3] See Liviu Stanciulescu, *"Drept civil. Contracte speciale. Succesiuni.",* Ed. All Beck, Bucureşti, 2002, p. 116

[4] See Camelia Toader, *„Manual de contracte civile speciale",* Ed. All Beck, Bucureşti, 2000, p. 63

[5] See I. Filipescu, "*Tratat de dreptul familiei",* Ed. All, Bucharest, 1993, p.73

[6] Fr. Deak, St. D. Cărpenaru, *„Drept civil. Contracte civile. Dreptul de autor. Dreptul de moştenire",* Universitatea din Bucureşti, Facultatea de Drept, 1983., p.76

Revocation of donation must not be made through a court action, it can be taken in any way, consisting in a subsequent act of the donor from which results the will to revoke the donation[7].

It can be both explicit (e.g. established by a material act or will), and tacit, implicit, materialized in a subsequent act of the donor from which results the willingness to revoke the donation. The essential condition required in this case is the exact identity of the property that was donated and the subject revocation.

Thus, for example, a judicial mandate given to lodge an action of annulment of a donation regarding real property can be considered a revocation even if the mandate was not executed effectively, the action was not lodged, as long as the donor expressed his will to revoke the donation, or another example would be the event when the donor by testament gives the previously donated good to a third person.[8]

Revocation can be achieved by the unilateral will of the donor spouse, regardless the form in which the donation was realized, that is where it was established by an authentic act, indirectly or even as a manual gift.[9] However, if the donation between spouses was realized by simulation (by disguise or by interposition of persons), the problem of revocation is not applicable, due to the fact that according to art. 940 para. 2 of the Civil Code, in this case the donation is null land void. Similarly, according to art. 938 of the Civil Code, mutual donations are nil land void.

It is not necessary that the right of revocation to be stipulated in the act of donation and this right can not be removed by a contrary stipulation, because it is the essence of donation made between spouses. Legal practice decided[10] that according to art. 937, donation between spouses made during their marriage are in principle revocable, and the donor is not obliged to motivate the revocation; the will to revoke a donation can be manifested expressly, for example when the restitution of the good in question is requested, or tacitly.

The convention return of the good is not applicable in the case of when the donee dies (or his descendents), because the donor has the possibility to revoke the donation, regardless the fact that there is or there is not included a clause in the contract tot hat effect.[11] (art. 825 Civil Code).

Similarly, donations between spouses are not revoked in the case of child born, because art. 937 para. 3 Civil Code provides expressly that „such a donation is not revocable if subsequently children were born". The reason for which usual donation are revocable if after the donation the donor has children, is to protect the children in front of the liberal acts of the parents. These argument are not incidental in the case of spouses, due to the fact that they conclude the marriage in order to have children, who are entitled to the patrimony of their parents with the title of heritage.

During the life of the donor is not appropriate to apply any rules regarding the revocation of donation for non-execution of tasks or ingratitude, because the donor may revoke the donation *ad mutum*, without invoking the causes provided by law.

However, after the death of the donor when the donation becomes irrevocable, the heirs of the donor can require the revocation for non-execution of tasks and ungratefulness, according to the legal rules governing this cases of revocation.

From those stated above, may be concluded that the donation between spouses is derogatory not only in the case of the principle of the irrevocability of donations (2nd grade irrevocability), by allowing the stipulation of clauses incompatible with this principle (for

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[7] Radu I. Motica, Florin Moțiu, *Contracte civile speciale,* Ed. Lumina Lex, Bucureşti, 2004, p. 23

[8] See Liviu Stănciulescu – *op.cit.,* p. 117

[9] Fr. Deak, „*Tratat de drept civil. Contracte speciale*", Ed. Actami, Bucureşti,, 1996, p.108

[10] Trib. Suprem, s.civ., dec.nr. 659/1988, in RRD, nr. 1/1989, in Cristiana Turianu, *lucr. cit.,* "Dreptul", nr. 1/2001, p. 153

[11] Fr. Deak, *op.cit.,* p.108

example conditions that depend only upon the will of the donor spouse) but even from the mandatory force of any contract (1st grade irrevocability), in the sense that one of the parties, by his unilateral will can revoke the donation.

In what regards donation between future spouses of partners, it is obvious that those are not made during marriage as required by art. 937 para. 1 of the Civil Code, thus they are not revoked ad mutum, for other reasons of revocation that those provided by law.

In Italian law, the revocability of donations between spouses is made in the same terms as for any other donations, namely for ingratitude, situation provided by art. 801 of the Italian Civil Code. This means the same situation as in the Romanian law. The Italian judicial practice included in the notion of ingratitude the situation of divorce, namely all the reasons that can lead to divorce are considered to fall within the concept of „ingratitude". Thus, in a judgment[12], it was underlined that due to the fact that the wife during several years cheated her husband in the marital apartment, this was considered to be a case of ingratitude, thus being a motive for the revocation of the donation.

The Italian Civil Code also refers to "donatio ante nuptas", meaning the donations made with the purpose of concluding a marriage, but this donations, according to art. 785 do not enter into force until the conclusion of the marriage. The annulment of the marriage will lead to the annulment of the donation.

***Donation of tissues or organs – exception from the exception?***

The donation of organs are provided by Law 2/1998[13] regarding the sampling and transplant of human tissues and organs, repealed by Law 95/2006 regarding the reform in the field of health-care, law that at Title VI speaks about „Sampling and transplant of human tissue and organs for therapeutic purposes". The law is the transposition of Directive 23/2004/CE of the European Parliament and of the Council.

Even if the law does not refers to the term donation, undoubtedly we are in the presence of this legal operation, duet o the fact that the transmition of human tissues is made only freely (the donation for obtaining award is considered a crime)[14].

Of course, in the case of organ transplant donor and donee may be husband and wife, often this is the case in medical practice particularly with regard to donating a kidney. The question is if whether we can accept in this situation that the donations between spouses are revocable. Let us consider what would the results if we could accept this deal. Certainly, the life of the person who has received the organ would be in danger. Accepting revocability in this situation would mean that we implicitly accept that the donor spouse may have the power of decision regarding the life of the donee husband. In other words, we put above the right to life, the right to revoke donation.

On the other hand, we can not accept that in change of the donated organ, the donor can request a sum of money or other benefits as "compensation" because he may not revoke the donation, because through this would give an economic value to human tissue, and would violate legal prohibition on obtaining benefits.

The Italian law, even if prohibits the acts of disposition with ones own body[15], allows a person in life to donate a kidney or a liver, for transplantation. [16] The donation can be made between close relatives (parents, brothers, children) and only in their absence by other relatives (e.g. Husband) or strangers, with respect to the free nature of the act. It always requires the authorization of a judge to confirm the free act.

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[12] Suprema Corte di Cassazione, Sezione II civile, Sentenza 28 maggio 2008, n. 14093
[13] Published in Official Gazette of Romania nr. 39/31 January 2000
[14] See Liviu Stănciulescu, *„Drept civil, Contracte speciale."*, Ed. All Beck, Bucureşti, 2000, p. 123
[15] Art. 5 Italian Civil Code
[16] L. 458/67 şi L. 483/99

In any event, the donation may be revoked until the surgical intervention, from where results clear that after that date the donation is irrevocable.

Therefore, if we accept the theory that transplantation of organs and tissues is a donation, we must accept that it constitutes an exception from de revocability of donations between spouses.