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Abstract

During marriage one or both spouses are or may be employed under an employment contract. By this contract the legal work relation arises.

Following the exercise of the respective work or profession, the individual (in our case the spouse) is paid for the work they perform.

The question in the literature is: Can the salary and other income from employment obtained during the marriage be considered as own property of one of the spouses, or, conversely, is it common good?

The article will try to answer this question.

Keywords:

the salary; the spouses; Civil Code; matrimonial regime; marriage.

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The doctrine states that in case of the salary we are in the presence of two successive rights:

• a right to claim on wages and unpaid;

• a right of ownership on the received wage.

Qualification of labor income of the spouses as common property has been the object of numerous discussions in the legal literature (I., P. Filipescu. A., I., Filipescu, (2006) :104-110; A., Bacaci. V., C., Dumitrache. C., C., Hageanu , (2010): 63-68; T., Bodoaşcă, (2009) :175-177; E., Florian, (2010) :131-138) The origins are in the diversity of features that the Family Code, on the one hand, and extrinsic law, especially the labor law, on the other hand, confers to the income from work. Thus, we have outlined the following opinions:

• *the salary is common property*. It is said that this is the only conclusion that is allowed by the corroborated interpretation of the provisions of art.30 and 31 of the Family Code, because only the categories specifically mentioned can be exempted from the rule of the community property acquired during marriage, and the income from work is not among them. This is the dominant view in the literature and practice;

• *the salary is own good*. It is argued that the non-stipulation by art.31 of the Family Code of the salary among property exempted from the community is not because it would be common property, but because the salary is not property acquired without work or coming from savings earned from money gained through labor, but a means by which one can acquire both common property and own property. The salary may be suited for the own debts of the spouse employed, which means that it cannot be common property. Spouses owe each other maintenance, and this is determined in relation to the income of each spouse. Also, spouses are required to contribute to marriage expenses in relation to the means of each. Thus, conclude the supporters of this view, the salary cannot be considered anything other than own property of each of the spouses;

• *the salary in both its forms is common property in relations between spouses*. According to this view, the qualification of the salary as common property in the relations between spouses, whether we refer to the unpaid or to the received salary, falls within the situation envisaged by art.30 paragraph. 1 of the Family Code, as it is acquired during marriage by a person who is a spouse;

• *the salary is a special assignment own good*. According to this view, there is a distinction between the unpaid salary, on the one hand, part of the spouse's own property and is governed by the rules of labor law, and the

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salary received, on the other hand, the latter serving both for the purchase of common goods, being therefore a special assignment asset;

• *the salary does belong neither to the category of common property nor to own property category*. In this view the following distinction is made: while it is part of the employed spouse's patrimony as a claim right, the wages is a separate legal category, belonging to labor law and after it is received the salary is common property or own property according to the assignment it is given;

• *the salary as claim right is own good and the salary as real right is common property*. In a latest opinion, authors distinguish between: salary - as claim right governed by the Labor Code, salary - as property, subject to the rules of the Family Code, then specifying that the provisions of labor law and family law provisions cannot be applied simultaneously, but only successively. The salary received does not appear as special assignment own property, since the Family Code provisions are incidental, the presumption of community applies only to property acquired from wages if, it is understood in this way, the property acquired by use of the salary acquired by either spouse does not fall in any of the categories of own property established by art.31 of the Family Code.

Regarding the solution on the legal nature of remuneration received, it was decided that there are common goods:

a. the money acquired during marriage deposited at the in mutual aid funds;

b. the money acquired by either spouse as a pension under social security for his work performed in the past;

c. the grant received by a spouse abroad on the basis of scientific cooperation agreements concluded between the Romanian State and another State;

d. the allowance received during the period in which the spouse worked abroad.

According to judicial practice, the amounts received as remuneration for carrying out works of intellectual creation are common, as the provisions of art.31 letter d of the Family Code admit the quality of own good only in case of the scientific and literary manuscripts, drawings and art projects, projects of inventions and innovations, in a word, only in case of the materialized expression of the work of intellectual creation. Patrimonial rights, which arise from the moment of valorization of his work of intellectual creation, earned during marriage, will be included in community property, even if the work was created before marriage; if the actual payment of copyright due for the intellectual creative work made during marriage was

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subsequent to the dissolution of marriage, the sum thus obtained will be own good. Compensation due to the author for using his work without the right will be common or own, as the moment of birth of the claim right is included or not during marriage (E., Florian, (2010) :133-134).

The focus was, first, the salary of each spouse, and then the conclusions were extended to all other forms of earnings from work, such as the remuneration due by way of copyright, attorneys' fees, etc., except the income declared as one's own by the legislator himself through art.31 of the Family Code (E., Florian, (2010) :63).

Controversies regarding the qualifications of the labor income were generated and fueled by the lack of uniform regulations of the contents of the term "labor income", but also by the diversity of characteristics that are assigned by Family Code provisions and extrinsic law, particularly to the employment law (E., Florian, (2010) :63).

The controversy concerning the legal nature of the salary was set by art.341 of the Civil Code which provides: "labor income, the money due in respect of pension under social security and the like, and revenues due under an intellectual property right are common property, regardless of the date of acquisition, but only if the claim on their collection becomes due during the community".

We believe under the provisions that the expression "labor income" means the amounts received from: wages, pensions, intellectual property rights, bonuses, fees, etc. and are considered joint property of spouses.

Unlike the provisions of the Family Code, the Civil Code by art.341 relates the quality of common property to the due date of the claim, which must be within the community regime operation. As such, if the date of payment ranges during community, the collected money even after the cessation of the community regime is own property. Conversely, if the date of payment is prior to the commencing of this regime operation, the amount of money collected even during community is own property.

Incomes of the profession are regulated by art.327 of the Civil Code and we can notice from those provisions that although spouses may use as they want the labor income, marriage expenses are imputed on it. The spouse who actually participated in the work of the other spouse, has, according to art.328 of the Civil Code, the right to compensation, according to the enrichment of the latter, if his participation exceeded the limits of material support obligation and of the obligation to contribute to the expenses of marriage.

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Research literature (M., Avram. C., Nicolescu, (2010) :150-151) states that, the category of "earned income" includes all those professional income of a spouse, whatever their origin and nature: not only the wages *stricto sensu* but also all its accessories (compensation awards, etc..) and the amounts money received as a substitute of wage (compensation paid in case of dissolution of individual employment contract, pensions, etc.).. within the scope of this notion we must also include the professional income resulted from a non-salary activity (fees, royalties and the like).

From a practical perspective, the text is likely to improve the patrimonial situation of the spouse who contributes to the work of the other spouse.

The doctrine in terms of the copyright (Al., Bacaci, (2007) :38-39) as *lex ferenda* - under the regulation of the Family Code of the labor income - it is considered that, generally, the remuneration for creative intellectual works of any kind should be considered one's own good of the one carrying out such work. The author justifies this *lex ferenda* draft through the following:

• Such activity can not be equated with normal activity conducted in a unit, the result of which - retribution - is considered common property. Precisely the exceptional nature of this activity, strictly related to the quality, talent and great effort of the one who creates works of its kind, calls for the consideration of the remuneration of copyright as own property, especially because this creative activity takes place, most often, in addition to the usual, remunerated activity of the author. Considering as own property only the things touched by intellectual creation is too little as compared to the fact that the remuneration and other rewards for intellectual creation are considered common property;

• Inclusion of copyright in the category of common property in the event of their division, has serious consequences, the spouse who created works of this kind benefiting from material advantages from an activity in which he did not participate in any way, did not submit any effort. This is a win without work, without merit, which we consider to be unfair.

In principle we agree with the proposal of *lex ferenda* of the distinguished author but specifying that a certain amount of income received from copyright should constitute expenses for marriage tasks where copyright is the only source of income of the respective spouse.

Since the provisions of art.327 of the Civil Code are mandatory, and given the fact that it is included in the primary regime, it is not allowed for spouses that by conventional way (by inserting in the contents of the matrimonial agreement the so-called *jointly administration cause*) to annihilate or

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limit this power of which they directly benefit under the law (M., Avram. C., Nicolescu, (2010) :151).

Article 327 of the Civil Code provides freedom of spouse to dispose of "the earned income under the law." Note that this freedom is not absolute, because the spouse is limited by the obligation to contribute financially to marriage expenses.

Depending on the matrimonial regime we can determine the legal nature of wage as follows:

• Within the community of property regime the received salary has the legal nature of a common property but also presents some peculiarities, as it can be used both for acquisition of common property and for the acquisition of own property, as from the salary one can pay both common debts and own debts;

• Within the separation of property regime the salary is own property for each spouse.

Research literature(M., Avram. C., Nicolescu, (2010) :151) states that within the community regimes, a spouse cannot dispose freely among the living, from the common property. Therefore, the question arises whether, after having paid the obligation to contribute to the expenses of marriage, the spouse may freely dispose of the salary, including by free acts between living, the solution being controversial.

The authors further state that in French jurisprudence and doctrine it is considered, rightly, that the rule of the primary matrimonial regime takes precedence over the rule of the community property regime and therein lies its derogatory nature.

Article 328 of the Civil Code states: "The spouse who actually participates in the work of the other spouse may obtain compensation, according to the enrichment of the latter, if his/her participation exceeded the material support obligation and the obligation to contribute to the expenses of marriage".

Research literature (M., Avram. C., Nicolescu, (2010) :152) states that the application of art.328 of the Civil Code involves some distinctions:

- To the extent that the participation of a spouse is part of the general duty of mutual support between spouses, without referring to "an effective participation" in the latter's work, the respective spouse is not entitled to compensation;

- To the extent that the spouse who provided the work as agent of the other spouse, then common law will be applied in relation to the contract of mandate;

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- Between spouses an employment contract may be concluded and in this case the relationships between spouses will be working relations, under which the employee spouse is entitled to salary.

Conclusion

In conclusion, the right to compensation exists if a spouse has actually participated for a long period of time in the work of the other spouse, without claiming or receiving remuneration, the limits of his/her obligation of material support and of the obligation to contribute to marriage expenses being exceeded. The right to compensation is an application in this matter of the principle of unjust enrichment(M., Avram. C., Nicolescu, (2010) :152).

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