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THE MANDATE BETWEEN SPOUSES UNDER THE PROVISIONS OF THE CIVIL CODE

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THE MANDATE BETWEEN SPOUSES UNDER THE PROVISIONS OF THE CIVIL CODE

Nadia Cerasela ANIȚEI[*]

Abstract

In order to perform various acts and operations that are required to be met by the spouses during marriage and to give legal certainty to the civil circuit, in the interests of third parties in good faith who would deal with the spouses, the new Civil Code established by art.314 the conventional mandate between spouses. We note that the conventional mandate between spouses, regulated by art.314 of the Civil Code shall fall within the general terms that define the contract of mandate. Research literature indicates that although art.314 of the Civil Code has a clear and concise regulation expressing the essence of the conventional mandate between spouses institution, however this legal text cannot answer all questions that might arise in practice in connection with this mandate. Thus, to find the best solutions, we will need to refer to other articles of law, to the fundamental principles of civil law, to the contract of mandate of the new Civil Code, and to the extent possible, to the doctrine. Marriage can go through crisis situations whether it's an internal crisis, caused by the inevitable disagreements between spouses, reckless, individualistic attitudes of one of them, or outside family life, with an objective character (for example, the impossibility of s spouse to manifest the will to conclude a specific act necessary and useful to the conjugal union). The primary system's goal is to provide solutions to overcome the crisis, having two types of mechanisms that are intended to dose spouses' powers, either to extend the powers of one of them, or by limiting the powers of the other. An important role in these moments has the court, which is called to order the provisos needed, adjusting thus, until the return to normal the patrimonial relations between spouse.. Judicial expansion of powers of a spouse occurs in certain situations where, in the interest of the family, a spouse is entitled by justice, exceptionally, to exercise the rights of the other spouse according to the matrimonial regime. In terms of procedure, the establishment of the judicial mandate may be qualified as non-judicial procedure (graceful). Next we will try to analyze the contract of conventional mandate between spouses in terms of art.314 of the Civil Code and art.2009-2038 of the new Civil Code.

Keywords*:*

new Civil Code; conventional mandate between spouses; the judicial mandate

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1. The conventional mandate between spouses

1.1. Term, parties, object, type, power of representation, and operation of the conventional mandate between spouses

The notion of conventional mandate between spouses

According to art.314 of the Civil Code in conjunction with art.2009 in the new Civil Code we can define *the conventional mandate between spouses* as the contract whereby one spouse named trustee is obliged to conclude one or more legal acts according to the matrimonial regime chosen on account of the other spouse, called the principal.

The parties of the conventional mandate between spouses

The parties of the conventional mandate between spouses contract as shown in this definition are the two spouses: one spouse is called trustee and the other the principal.

Types of the conventional mandate between spouses

The conventional mandate between spouses may be by gratuitous title or by onerous title.

Basically, the conventional mandate between spouses is presumed to be free. However, in accordance with art.2010 paragraph 1, second thesis of the new Civil Code it is presumed that the mandate for acts to pursue a professional activity is by onerous title. Thus, we believe that the mandate given for acts of exercise of a professional activity by a spouse to the other spouse may be presumed to be a mandate by onerous title. If the trustee spouse's remuneration is not determined by contract, it shall be established by law or based on the value of the services. The right of action to establish the amount of remuneration is prescribed with the right of action for its payment.

Relating the provisions of Article 2011 of the Civil Code to the provisions of art.314 of the Civil Code we see that the conventional mandate between spouses is a representation mandate. As such, the power of representation of the trustee spouse will be born out of the will of the other spouse - the principal.

For a spouse to represent the other, it is necessary to receive a mandate, which his/her spouse may or may not give, and in the absence of the mandate no representation is allowed. We note that the representation arises only from the will of the other spouse and the mutual tacit mandate between spouses exists only as legal presumption.

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So, the spouses, in their relations with third parties when acting for each other will do it only on the basis of a conventional term.

Relating the provisions of art.2012 of the new Civil Code to the conventional mandate between spouses we conclude that the trustee spouse represents the principal spouse at the conclusion of the legal acts (including contracts) for which he/she was entitled under the document called mandate.

The object of the conventional mandate between spouses

The object of the conventional mandate between spouses is specific, as shown in art.314 of the Civil Code, only to relations between spouses. So, the conventional mandate between spouses is a special representation mandate, which may be concluded only between spouses, for its object concerns the exercise of rights arising from the matrimonial regime of the spouses, a regime which is applicable only to property relations between spouses.

Operation of conventional mandate between spouses

The conventional mandate between spouses operates in each matrimonial regime governed by the Civil Code, namely: the legal community regime, the legal community regime and the separation of property regime.

1.2. The form, the special case of tacit acceptance, the duration and extent of the conventional mandate between spouses

The form of the conventional mandate between spouses

Regarding the form of the conventional mandate between spouses we mention that since art.314 of the Civil Code makes no reference whatsoever, we apply the provisions of art.2013 of the Civil Code. So, the conventional mandate between spouses may be concluded in written form, authentic or under private or verbal signature. Accepting the mandate may result from its execution by the trustee. The mandate given to a spouse for the conclusion of a legal document that is subject, by law to respect a certain form it must respect that form, under the sanction of the act itself. The provision does not apply when the form is only required for enforceability of the act against third parties, unless the law provides otherwise.

The special case of tacit acceptance

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We believe that as art.314 of the Civil Code makes no reference to the special case of tacit acceptance of the mandate, we shall apply the provisions of art.2014 of the new Civil Code, and of the conventional mandate between spouses. Thus, in the absence of an immediate refusal, the conventional mandate between spouses shall be considered accepted if it refers to the acts which fall within the exercise of the profession of the trustee spouse (for example the spouse is a lawyer, doctor, notary, etc..) or for which he/she has provided services either publicly or directly to the principal spouse. However, the application of these provisions shall take into account, among other things, the legal provisions, the practices established between parties and practice.

Duration of the conventional mandate between spouses

We believe that as art.314 of the Civil Code makes no reference whatsoever, in case of the duration of the conventional mandate between spouses we shall apply art.2015 of the new Civil Code provisions. As such, if the couple has not set a deadline for termination of this contract between them, this contract is terminated at the end of 3 years from its conclusion.

Extent of the conventional mandate between spouses

Because art.314 of the new Civil Code makes no reference whatsoever to the extent of the conventional mandate between spouses we shall apply the provisions of art.2016 of the new Civil Code. The contract of mandate between spouses authorizes the trustee spouse to perform only preservation and management acts based on the matrimonial regime chosen by the couple. To conclude alienation or encumbrance documents, transactions, or compromise, to be bound by bills of exchange or promissory notes or to bring legal actions before court, and to conclude any other acts of disposal, the trustee spouse must be empowered expressly. The mandate extends to all acts necessary for its execution, even if not expressly stated.

1.3. Obligations of trustee spouse

Since art.314 of the new Civil Code makes no reference to the obligations as trustee spouse we will try to outline it in view of art.2017-2021, art.2024 of the new Civil Code.

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Enforcement of the conventional mandate between spouses

The trustee spouse may not exceed the limits set by the conventional mandate between spouses. As an exception, the trustee spouse may deviate from the instructions, if he/she finds it impossible to notify the principal in advance and can be assumed that this deviation would be approved if they had known the circumstances. In this case, the trustee spouse is obliged to immediately notify the principal spouse on *changes on the enforcement of the mandate.*

The diligence of the trustee spouse

If the conventional mandate between spouses is by onerous title, the trustee spouse is bound to execute the mandate with diligence of an own property. But if the mandate is by gratuitous title, the trustee spouse is obliged to meet it with the diligence they show in their business. The trustee spouse shall give notice to the principal spouse about the circumstances that occurred after the conclusion of the conventional mandate between spouses which may cause the revocation or modification thereof.

The obligation to give account

The trustee spouse is bound to give account of his/her management and submit to the principal spouse everything he/she received under his/her empowerment, even if what he/she received was not due to the principal spouse. During the period when the property received on the occasion of enforcement of the conventional mandate between spouses from the principal spouse or on behalf of him/her is held by the trustee spouse, he/she is obliged to preserve it.

Interest on due amounts

The trustee spouse owes interest on the amounts used for his/her own use starting from the day of use and for those still owed, from the day the notice was made.

Liability for third party obligations

Unless otherwise agreed, the trustee spouse who has fulfilled conventional mandate between spouses does not respond to the principal spouse regarding the enforcement of the obligations assumed by persons with whom they signed a contract, unless their insolvency was or should have been known at the conclusion of the contract with those people.

Measures of preservation of the principal spouse

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The trustee spouse shall exercise the rights of the principal spouse to third parties, if the property received for the conventional mandate between spouse shows signs of damage or arrived late. In an emergency, the trustee spouse can sell the property with the diligence of a property. In these two cases the trustee spouse must notify the principal spouse immediately.

1.4. The obligations of the principal spouse

Since art.314 of the new Civil Code makes no reference whatsoever to the principal spouse's duties we will try to outline it in view of art.2025-202, art.2029 of the new Civil Code.

The amounts required for the enforcement of the conventional mandate between spouses

Unless otherwise agreed, the spouse of the principal is obliged to place the necessary means for the enforcement of the conventional mandate between spouses at the disposal of the trustee spouse. The principal spouse shall refund to the trustee spouse the reasonable expenses advanced by the latter for the enforcement of the conventional mandate between spouses, together with statutory interest thereon, calculated from the date of expenditure.

Compensation of trustee spouse

The principal spouse is obliged to repair the damage suffered by the trustee spouse in the enforcement of the conventional mandate between spouses, unless this prejudice is from the guilt of the trustee spouse.

The remuneration of the trustee spouse

If the conventional mandate between spouses is by onerous title, the trustee spouse must pay to the principal spouse the remuneration, even if, without fault of the trustee spouse, the conventional mandate between spouses could not be enforced.

Retention right of trustee

To ensure all claims against the principal spouse arising from the conventional mandate between spouses, the spouse has a right of retention on property received for the enforcement of the conventional mandate between spouses from the principal spouse or on behalf of this spouse.

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1.5. Termination of the conventional mandate between spouses

Since art.314 of the new Civil Code makes no reference whatsoever to the conventional mandate between spouses of office of the spouses will try to outline their view of art.1321, 2030 to 2038 of the new Civil Code.

Modes of termination

Besides the general causes for termination of contracts[1], the conventional mandate between spouses ceases by any of the following ways:

a) its revocation by the principal spouse of the conventional mandate between spouses contract;

b) renunciation of the trustee spouse;

c) death of a spouse;

d) inability or bankruptcy of the trustee spouse or of the principal spouse. However, when its object is the conclusion of successive acts within a continuing activity, the conventional mandate between spouses does not cease if this activity is ongoing, with the respect of the right of revocation or withdrawal of parts or of their heirs.

Revocation conditions

The principal spouse may at any time revoke the conventional mandate between spouses, expressly or implied, regardless the form of the contract of mandate and even if declared irrevocable. The empowerment given to a new trustee for the same business revokes the initial mandate.

The effects of revocation

The principal spouse who revokes the conventional mandate between spouses remains bound to perform his/her obligations to the trustee spouse. He/she is also obliged to repair the damage suffered by the trustee spouse because of the unjustified dismissal or unexpected revocation. Where the parties have declared the mandate irrevocable, the revocation shall be deemed unreasonable if it is not determined by the fault of the trustee spouse, by unforeseeable circumstances or force majeure.

[1] Article 1321 of the new Civil Code is entitled *Causes of termination* and provides "the contract terminates under the law, by enforcement, agreement by will of the parties, withdrawal, time limit, compliance or, where appropriate, non-compliance of the condition, accidental impossibility of enforcement, and any other cases provided by law.

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Publicity of the authentic notary mandate revocation

The trustee spouse is empowered to enforce the conventional mandate between spouses on the basis of conventional document called mandate. If the mandate was issued in authentic notary form, to inform third parties, the notary public who is required to authenticate the revocation of such power of attorney is required to submit immediately the revocation to the Notary National Register, held in electronic format, according to law the public notary who authenticates the act for the conclusion of which the power of attorney was issued is required to check at the Notary National Register weather the mandate has been revoked. Also, these measures are applicable for authentication achieved by diplomatic missions and consular offices of Romania.

Renunciation of the trustee

The trustee spouse may withdraw at any time from the conventional mandate of the spouses, notifying the principal spouse about his/her renunciation. If the conventional mandate between spouses is by onerous title, the spouse may claim remuneration for the acts she/he concluded on behalf of the principal spouse until the renunciation date. The trustee spouse is obliged to compensate the principal spouse for damages suffered due to the renunciation effect, unless further execution of the conventional mandate between spouses would have caused significant damage to the trustee spouse him/herself, which could not have been foreseen at the time of acceptance of the conventional mandate between spouses.

Inability or bankruptcy of a party

In case of incapacity or bankruptcy of the principal spouse we believe that the trustee spouse is obliged to inform third parties about the situation. The trustee spouse shall continue the enforcement of the conventional mandate between spouses if its delay is likely to endanger the interests of the principal spouse.

Disclaimer of the grounds for termination of the conventional mandate between spouses

Everything the trustee spouse performed on behalf of the principal spouse, before knowing or being able to know the cause of termination of the conventional mandate between spouses is considered as valid.

Maintenance of certain obligations of the trustee

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Upon termination in any way of the conventional mandate between spouses, the trustee spouse is held to fulfill the obligations stipulated in art.2019 (*relating to the obligation of the trustee to give an account*) and art. 2020 (relating to *the interest on amounts owed by the trustee*)

2. The judicial mandate

2.1. Term, parties, object, type, power of representation, and operation of the judicial mandate

The notion of a judicial mandate

According to art.315 of the Civil Code in corroboration with art.2009 in the new Civil Code we can define the judicial mandate as the contract by which the guardianship court approves for the spouse named trustee, to exercise on behalf of the other spouse, called the principal rights which the latter has under the matrimonial regime chosen.

From the marginal qualification of art.315 of the Civil Code it is observed that the judicial extension of powers of a spouse has the nature of a judicial mandate. In this matter the provisions of the contract of mandate are applied, provided that conditions, extent and duration of validity of this mandate are established by court order.

Parties of the judicial mandate

The parties of the judicial mandate of the spouses as shown in this definition are the two spouses: one of the spouses called trustee the other spouse called principal.

The judicial mandate is applicable in situations where one spouse is unable to express their will. This inability to express their willingness must have occurred during marriage validly concluded being the cause that justifies the other spouse to ask the guardianship court permission to represent him/her to exercise the rights they have under matrimonial regime.

We note that the law gives legitimacy to the right to require a judicial mandate, so the representation of the spouse in special circumstances, only to the other spouse, of course, if between spouses there is no conflict of interest, case in which the guardianship court may establish guardianship or trusteeship.

Types of judicial mandate and powers of representation

Relating provisions of Article 2011 of the Civil Code to the provisions of art.315 of the Civil Code we note that the judicial mandate

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is a special representation mandate. As such, the power to represent of the trustee spouse is born by the guardianship court's decision which sets out the conditions, limits and validity of the judicial mandate, and the cases when it ceases.

The representation has two forms:

a. General - to exercise all the rights / powers of the represented spouse, but as in the common law only in respect of acts of administration;

b. Special - limited to a particular act, either of administration or of disposal, having as object specific assets.

The content of the court decision must include the conditions of representation.

The spouse who received judicial empowerment acts a trustee, the consequence being that the effects of the legal act occur only in relation to the person and property of the represented spouse. Only in case of the common property, if the law requires the consent of both spouses, then the act will be concluded by the spouse represented both on their behalf and on behalf of the represented spouse.

The object of the of judicial mandate

The object of the judicial office is specific as shown in art.315 of the Civil Code only to the relations between spouses. So, the judicial mandate is a special representation mandate likely to be concluded only between spouses, for its object concerns the exercise of rights arising from the matrimonial regime of the spouses, which is applicable only to the patrimonial relations between spouses.

The operation of the judicial mandate

The judicial mandate functions within each matrimonial regime governed by the Civil Code, namely: the community legal system, the community legal regime and the separation of property regime.

2.2.The form, the acceptance, the duration and extent of the judicial mandate

The form of the judicial mandate between spouses

Regarding the form of the conventional mandate between spouses we mention that since art.315 of the Civil Code makes no reference whatsoever, we apply the provisions of art.2013 of the Civil Code. So, the judicial mandate between spouses may be concluded only in written

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authentic form. The acceptance of the judicial mandate results from the willingness of a spouse, in front of the court of guardianship, by which he/she requires approval to represent for the exercise of the rights he/she has under the matrimonial regime chosen, the spouse who is unable to express their will. The mandate given to a spouse for the conclusion of a legal document that is subject, by law to respect a certain form it must respect that form, under the sanction of the act itself. The provision does not apply when the form is only required for enforceability of the act against third parties, unless the law provides otherwise.

Duration of the judicial mandate

We believe that according to thesis II paragraph 1 of art. 315 of the new Civil Code the validity of the judicial mandate is established by the guardianship court.

Extent of the judicial mandate

We believe that according to thesis II paragraph 1 of art. 315 of the new Civil Code the extent of the judicial mandate is determined by the guardianship court. The judicial mandate contract authorizes the trustee spouse to perform acts of preservation, use and management and acts of alienation and encumbrance according to matrimonial regime chosen by the couple.

Paragraph.3 of art.315 of the Civil Code provides the applicability to judicial mandate of the provisions of art.346 and 347, which relates to acts of alienation and encumbrance with real rights of the common for which both spouses' consent is required, and the sanction applied in relation to acts concluded without observing the express consent of the other spouse. This means that in case of common property, for the situations where the law requires the consent of both spouses (for example, serious acts of disposal on immovable property) one may also obtain a judicial mandate, if one spouse is unable to express their will. If a spouse concludes such acts by him/herself, without court approval, the act is affected by relative nullity, according to art.347 of the Civil Code.

2.3. Obligations of trustee spouse

We believe that according to the second thesis paragraph 1, art.315 of the new Civil Code the obligations of the trustee spouse are established by guardianship court by court order.

Enforcement of the conventional mandate between spouses

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The trustee spouse may not exceed the limits set by the guardianship court by court order for the judicial mandate according to the matrimonial regime chosen by spouses.

The diligence of the trustee spouse

The trustee spouse is obliged to comply it with diligence they show in their own business all the duties incumbent upon the exercise of rights they have under the matrimonial regime chosen in accordance with the provisions of the guardianship court established by court order.

The obligation to give account

The trustee spouse is held to give account to the guardianship court on the strength of the empowerment given by court order on the fulfillment of all obligations arising from the exercise of the judicial mandate.

2.4. The obligations of the principal spouse

From the provisions of art.315 paragraph 1 of the new Civil Code we can see the obligations that the principal spouse has within the judicial mandate. As such, these obligations will be established by judicial decision of the court of guardianship based on the matrimonial regime chosen.

2.5. Termination of the judicial mandate

According to art.315 paragraph 2 of the new Civil Code "besides other cases provided by law when the represented spouse is no longer in the situation referred to in paragraph 1 or when a guardian is appointed or, if necessary, a curator". We see that the judicial representation is intended as a substitute of legal guardianship or, where appropriate, of trusteeship, with a temporary character, until the establishment of these protective measures.

Given that the judicial mandate is basically a legal guardianship and trusteeship substitute, the reason why it ceases by taking these measures to protect the person, it follows that the phrase "unable to manifest one's will" can have the content given by the causes justifying the establishment of guardianship or, where appropriate of the trusteeship.

Summarizing, it may be considered that the notion of "inability to manifest one's will" covers two types of situations, the impossibility can be either physical (the event in which one of the spouses cannot develop

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properly, for example, insanity, mental debility, paralysis, coma, etc..) or social (long absence, disappearance, imprisonment - in which case the spouse's will remains unknown).

In conclusion, the judicial mandate ceases by:

1. expiry of validity of the mandate (established by court order);

2. by taking a measure of protection for the spouse who is unable to express their will (guardianship, curatorship), according to law;

3. general causes for termination of contracts under the provisions of art.1321 of the new Civil provide: "the contract is terminated under the law, by enforcement, agreement of the parties, withdrawal, time limit, compliance or, where appropriate, non-compliance of the condition, accidental impossibility of enforcement, and any other cases provided by law; "

The modes of termination provided by art.2030 of the new Civil Code are: a) its revocation by the principal spouse; b) renunciation of the trustee spouse; c) death of a spouse, inability or bankruptcy of the trustee spouse or of the principal spouse. However, when its object is the conclusion of successive acts within a continuing activity, the conventional mandate between spouses does not cease if this activity is ongoing, with the respect of the right of revocation or withdrawal of parts or of their heirs.

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