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Agreement on Transfer of Property during Lifetime in the Legal System of the Republic of Macedonia

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Abstract

The agreement on transfer of property during lifetime in Republic of Macedonia is a contract that has many specifics, specially deriving from his mixed nature. This is a type of contract in the area of obligations that has legal effects of succession, and therefor many specifics that are the subject of our paper. These specifics, at first, occur in the matter of the contracting parties in this agreement, and in the contents of their rights and obligations. From these specifics arise the specifics regarding the prerequisites of vality and the conversion into agreement on donation. The object of our analysis is, also, the retention of rights when property is transferred as well as the transferor's debts and their destiny after the property is transferred, and at the end we will analyze the possibilities and the conditions of termination and revocation of this agreement.

Keywords: obligation; agreement; succession; property; prerequisites; validity; donation; transfer of property; revocation.

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1. Introduction

In the Macedonian law, this agreement on transfer of property during lifetime is studied in obligation law and inheritance law. The reasons for this are the existence of obligation - legal and inheritance - legal features. The agreement on transfer of property during lifetime is regulated with the Law on obligations (in the text referred as Law on obligations) [1], which clearly set it in the field of obligations, but it is without doubt that they produce succession effects, and therefore are subject of analyses in the law on succession. In this paper we are presenting the obligation as well as succession effects of the agreement on transfer of property during lifetime, separated in the sections below. In this introduction we would like to point that the roots of this agreement in the Macedonian legal system are found in the lifestyle of Macedonian people, or to be more precise in the inability of the ancestor to cultivate his land and the need to transfer his property to his descendants during lifetime. This life practice was legislated in 1955 in the Federal Law on succession [2], and today it is part of the Macedonian positive law as well.

1.1. The definition and legal effect

The agreement on transfer of property during lifetime is a type of obligation, or to be more accurate it is a type of contract, as a specific type of obligations – contractual relationships. The other types of obligations in Macedonian law are: the obligations that arise out of causing damage, unjust enrichment, management of another's affairs without instruction (known as *negotiorum gestio* in the Roman law) and unilateral statement [3]. As a type of contract, the agreement on transfer of property during lifetime is classified among the contracts that are legal base for transfer of ownership of property, together with the agreement on sale, the agreement on donation, agreement on exchange and the agreement on loan [4].

The definition of the agreement on transfer of property during lifetime is given within the provision in article 1022 of the Law on obligations which says: *“With the agreement on transfer of property the transferor is obligated to transfer all of his property or part of his property to the descendants.”* The term descendant includes the birth children of the transferor, his adopted children, as well as his grandchildren and further descendants through proper application of the right of representation, and in accordance with law. When the transfer is performed properly the descendants of the transferor acquired ownership of the property that is subject of the agreement. The content of this contract is consisted of the obligation of the transferor to hand the property, and the right of his descendants to require handing over the property. Because of these contents of the agreement on transfer of property during lifetime, we say that it is unilaterally binding contract, with a character of donation in the same time. But, the agreement on transfer of property during lifetime can be bilaterally binding agreement as well, that is in case of retention of rights regarding the transferred property in favor of the transferor or other persons determinate with law. The party of the agreement that is called the transferor only has an obligation. The other party more often is a complex party, because usually there are more than one descendants of the transferor. But, party of this agreement is the spouse of the transferor as well. Provided with article 1027 (1) of the Law on obligations, the spouse of the transferor can be a party of this agreement, and the transferor can transfer a part of his property to him as well, or he can retain certain rights on the transferred property in favor of the spouse. In accordance with article 1027, with this agreement, the transferor can to cover

and his spouse to that it is need and his consent, but if the spouse is not covered with the agreement, his right for compulsory share keep it, and in this case. The transfer remains valid, but at determining the value of the estate for determination and settlement of the compulsory share of spouse, the parts on property of the deceased which transferred to his descendants are considered as a gift.

Having in mind the characteristics of this agreement, we can say that it is completely acceptable the conclusion in regard the agreement on transfer of property during lifetime in Macedonian legal theory that: "*... the way that it is set up today, in a way, it is situated between the agreement on donation and the agreement on inheritance.*" [5]. We would like to point up that in Macedonian law, the agreement on inheritance is not allowed and provided with article 7 from the Law on succession [6], the contract in which one of the contracting parties leaves his estate or one part of it to the other contracting party or to a third person is void contract, except in the case of the agreement for lifetime support. On the other hand, the agreement on transfer of property during lifetime differs from another agreement that has effect of succession too, that is the agreement for lifetime support. In the legal theory it is noted that "*for what is truth, the agreement on transfer of property during life time compared with the agreement for lifetime support, has some advantages, due to the fact that for the validity of the agreement on transfer of property during lifetime all the descendants must consent, and that is better guarantee for the protection of eventual abuse of specific category of successors*" [7].

Elements of the agreement of transfer of property during lifetime are: the property that is transferred and the consideration to transfer the ownership of the property [8]. Regarding the property that is the object of the transfer, only the existing property in ownership of the transferor in the moment of the conclusion of the agreement can be transferred. As provided with article 1024 of the Law on obligation, the property that is acquired after the conclusion of the agreement or the property that existed in the moment of conclusion but the parties of the agreement didn't know of its existence, can't be subject of the transfer, and any provision in the agreement on transfer of property during lifetime that provides the opposite is void.

Regarding the legal effects of the agreement on transfer of property during life time we can say that it consisted with the fact that the property covered by this agreement isn't part of the estate, i.e. do not enter into the estate. In connection with this, in legal theory said that: "*this transferred and distributed property during lifetime, do not enter into the estate of that person, so with reference to this it can't be object of inheritance in the moment of his dead*" [9], while, in the legal practice of the Supreme Court of Republic of Macedonia, by announcement addressed to the public, also is stated that: "*the transferred property not enter in the estate*" [10].

Also, the legal effect of this agreement is that the descendants that have received property of the transferor with this agreement are not liable for the debts of the transferor by law. On the other hand, the parties of the agreement on transfer of property during lifetime can agree on this matter otherwise than it is predicted in the law, and if this is a provision of the agreement on transfer of property during lifetime it is valid, and the descendants will be liable for the debts of the transferor in case of his death in way and scope provided with the agreement [11].

1.2. Prerequisites of validity

The following conditions are provided for the validity of this agreement according to article 1023 of the Law on obligations:

- All of the descendants of the transferor who will have the right to inheritance by law in case of transferors' death need to give their consent to the transfer of property for the transfer to be valid and if some of the descendants has not given his consent he can do that additionally (later) in the same form. Beside the descendants of the transferor, the consent of the transferors' spouse is needed to, for the agreement to be valid. If any of the specified parties don't give their approval, the consequence is conversion of the agreement into another agreement, which is elaborated in the next segment of this paper. The law does not provide for other possible successors of his to be part of this agreement. Parties of this agreement are only the children of the transferor or his grandchildren, further descendants that have the right of inheritance in the specific case based on their right on representation of their deceased ancestor. Regarding this prerequisite we can determine that the subjects of this contract are: the ancestor (the father, the mother, the grandparent) in the role of transferor, and on the other side of the contract the descendants (the children of the transferor, the grandchildren of the transferor) in the role of recipients of the property. The determination made by law on the matter who can by party of the agreement on transfer of property during lifetime is a specific that differs this contract from all the other contracts because one of the general principles of the contract law is the principle of freedom of contracting which includes deciding whether to be a part of a contract or not, as well as making a choice who the other party will be. *"On the other hand, the fact that the subjects of this agreement are the ancestor and the descendants in the first line of legal inheritance makes this agreement more close to the law on successions, than to the law on obligations"* [12].
- The agreement on transfer of property during lifetime must be in concluded in written form and certified by the court that has the jurisdiction or the notary. Until the amendments made in the Law on obligations in year 2008, only the court and the judge were entitle to participate as a public authority in the conclusion of the agreement on transfer of property during lifetime. With the amendments, this right was given to the notary too, so now the parties can decide which of these public authorities will be involved when concluding the agreement [13].
- During the procedure the court or the notary is obligated to read the agreement to the contracting parties and to warn them of the legal consequences of the agreement. According to the general theory of the contract law, when we speak about this kind of form of the contract, it is not only a matter of a formal contract (contract that must be concluded in a given form), but we also speak about the most strict form that is known in theory and in the legislation of Republic of Macedonia. This form is called form of public document, and it defers from the basic written form and the form of a certified public document where the court or the notary has a duty only to confirm the authenticity of the signature, but not the contents of the document, or its legal effects. But in case of the agreement on transfer of property during lifetime, the judge, or the notary has a duty to do more than this. They have to read the document to the parties and to warn them of the legal consequences of the agreement, which in this case are change of ownership of the property that is being transferred.

1.3. Conversion into Agreement on Donation

If some of the descendants are not consent with the agreement on transfer of property during lifetime, the parts of the property that is transferred to the other contracting parties, that is, the other successors are considered as gifts that the transferor has given to the successors during life. This is applicable also in case after the transfer of property with this agreement, a child is born to the transferor, or a successor that is considerate dead appears alive [8]. This is applicable in respect of the transferors' spouse too. We already said that the spouse of the transferor can be a party of this agreement together with the descendants of the transferor, or the transferor can retain certain right regarding the transferred property in favor of his spouse. However in any of these cases, the spouse has to be consent with the agreement for it to be valid and to have the legal effect of an agreement on transfer of property during lifetime. If the spouse or any of the descendants of the transferor don't agree with the contents of this agreement, the agreement on transfer of property during lifetime is not valid. Aldo a valid agreement on transfer of property during lifetime can't occur in this case, the agreement of the transferor and part of his descendants is not without any legal effect. There is a possibility of conversion of the agreement that the parties wanted to conclude into an agreement that fulfills the conditions for validity. In this case, that agreement is the agreement on donation, and so it is considered that the parties have concluded agreement on donation.

1.4. Retention of Rights when Property is Transferred

There are two options of retention of rights when property is transferred provided with the provisions that regulated the agreement on transfer of property during lifetime, with article 1026 of the Law on obligations.

According to the first one, the transferor can retain the right of usufruct (which is a real right, or in rem right) of all the transferred goods, or only part of them. The second option is for the transferor to arrange (by agreement) life annuity in things or in money or lifetime support or other type of compensation (payment). The options that are listed here can be retain for the following categories of persons:

- *for the transferor or for his spouse,*
- *for the transferor and for his spouse,*
- *for another person.*

Anyway, when retention of rights is predicted with the agreement, the characteristics of the agreement change in certain way. Aldo we already said that this agreement is unilateral binding agreement, in case of retention of rights, which is possible, but only by agreement of the parties, this agreement changes into bilateral binding contract, and produces obligations for all the parties, not only for the transferor. Bilateral contracts were said to bind both parties the minute the parties exchange promises, as each promise is deemed sufficient consideration in itself, and they differ from the unilateral contracts which bind only the promisor and do not bind the promisee. In this case the agreement is no longer with character of donation like in the case of unilateral contract, and it becomes:

- Commutative and aleatory contract in case the transferor has made an agreement for lifetime support or

- Onerous contract in case the obligation of one of the parties is much smaller than the obligation of the other party, or said otherwise, the obligations are disproportionate and aren't equal [14].

1.5. Termination and Revocation of the agreement on the transfer of property

The agreement on transfer of property during lifetime can be terminated as well as relocated under conditions provides with law, in this case the Law on obligations. Aldo there are some general rules regarding this matter which are part of the general contract law theory, in accordance with the specifics of this agreement, the law provides some rules that are rather exceptional. Furthermore, the transferor has the right of unilateral termination of the agreement applying the provision of the Law on obligation for unilateral termination of bilateral binding obligations [15], which is exception because the agreement on transfer of property is unilateral binding obligation, and not a bilateral binding obligation.

The revocation of the agreement on transfer of property during lifetime is allowed and possible under the condition provided in the Law on obligations for revocation of the agreement on donation. The provision regarding the revocation of the agreement on transfer of property during lifetime assigns us to the provisions on this matter that regulate the agreement on donation, and its revocation because of extreme ingratitude of the person to whom the property is transferred, regulated with article 563 of the Law on obligations. Applying this provision in the field of the revocation of the agreement on transfer of property during lifetime we can conclude that the revocation can be done in period one year (subjective term) starting of the day when the transferor learned about the ingratitude of the other party or parties of the agreement and period of five years (objective term) from the day the act of ingratitude was made. The legal effect of the revocation of this agreement is that the descendant or the descendant against who the revocation is made, is obligated to return everything that he has received base on this agreement.

2. Concluding remarks

The agreement on transfer of property during lifetime is an agreement that was born out of the real needs related with the lifestyle of the Macedonian people, and beginning from 1955 it is part of the legal system of Federal Republic of Yugoslavia (and Macedonia as a part of it). In 1991 with the proclamation of independence of Republic of Macedonia, this agreement became part of Macedonian legal system too. Today it is regulated with the Law on obligations. The agreement on transfer of property during lifetime, have obligation – legal and inheritance - legal features. This agreement according to its legal nature is obligation and as a type of obligation it is contractual relationship or agreement, and this agreement has inheritance – legal effect, and as we could see in some moments it was more close to the law on succession than the law on obligations. This is especially evident in the matter of the parties of this agreement, who are predetermined by the law. This is exception in regard the general principles of the law on obligations and more alike to the law on succession, even more if we take into account that the contracting parties are the possible deceased (that is the ancestor) and his successors by law (his descendants and the spouse). This is why the agreement on transfer of property during lifetime is often called "*anticipated inheritance*" because the descendants of the transferor that will be entitle to the inheritance by law in case of transferors death are acquiring ownership of the property (the inheritance) during

lifetime. When we talk about the estate, we can conclude that the property covered with this agreement, does not enter into the estate of the diseased.

The meaning of this agreement in the social life of the Macedonian people is very significant because this is an instrument that provides the successors to acquire the inheritance before the death of their ancestor, but also to manage the property in better way than their ancestor, and on the other hand, the authority of the ancestor is an instrument that prevents eventual conflicts that may occur between the descendants regarding the property. In case the descendants don't agree with the will of their ancestor to transfer the property, the agreement is not valid, but it is converted into agreement on donation, and the parts of the property that are transferred to the descendants of the transferor are considered to be gifts.

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