

FICTITIOUS MARRIAGE

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Abstract:

When by marriage the parties are pursuing purposes other than starting a family we are in the presence of fictitious marriage. The parties, in fact, do not want to marry, to establish personal and financial relationships with each other specific to the family, but are pursuing interests which otherwise would not be reached. The real relations between them are the hidden ones [1]. Marriage is fictitious if the following conditions are met: a) their consent (of one or both spouses) does not reflect their real intention, is not honest, so that such a marriage was not entered into in order to start a family; b) the desired purpose (of one or both spouses) was to either obtain some secondary effects of marriage or to circumvent certain mandatory legal provisions, other than those governing marriage; [2] c) the spouses have not been living together, the wife has not given birth or is not pregnant or 2 years from the conclusion of marriage have not passed. According to art. 295 par. 2 Civil Code, the nullity of marriage is covered if, until the final decision of the court, the cohabitation of the spouses has occurred, the wife has conceived or is pregnant, or two years have passed since the marriage.

Key words: *fictitious marriage, absolute nullity, Civil Code, marriage of convenience.*

Marriage was defined as the freely consented union between a man and a woman concluded according to the law, in order to start a family, and governed by the mandatory rules of law [3].

Fictitious marriage is regulated by art. 295 Civil Code [4]. According to this text, marriage contracted for purposes other than to start a family is null and void (para. 1). However, the nullity of marriage is covered if, until the final decision of the court, the cohabitation of the spouses has occurred, the wife has conceived or is pregnant, or two years have passed since the marriage (para. 2).

Consequently, when the marriage is pursuing purposes other than starting a family we are in the presence of fictitious marriage. The parties, in fact, do not want to marry, to establish personal and financial relationships with each other specific to the family, but are pursuing interests which otherwise would not be reached. The real relations between them are the hidden ones [5].

Marriage is fictitious if the following conditions are met:

a) their consent (of one or both spouses) does not reflect their real intention, is not honest, so that such a marriage was not entered into in order to start a family [6];

From this point of view, fictitious marriage appears as a form of simulation [7].

b) the desired purpose (of one or both spouses) was to either obtain some secondary effects of marriage or to circumvent certain mandatory legal provisions, other than those governing marriage [8].

In terms of the latter condition, fictitious marriage appears as a circumvention of the law, using legal means to obtain illicit results. The parties get married, which is legal, but do so in order to achieve results that otherwise would not have been obtained and which are illegal, as long as they have not pursued and established a relationship specific to marriage [9].

It follows that a fictitious marriage is both a simulation and circumvention of the law. [10]

c) the spouses have not been living together, the wife has not given birth or is not pregnant or 2 years from the conclusion of marriage have not passed.

As mentioned above, the Civil Code, art. 295 par. 2 provides that the nullity of marriage is covered if, until the final decision of the court, the cohabitation of the spouses has occurred, the wife has conceived or is pregnant, or two years have passed since the marriage.

There are difficulties in proving the fictitious nature of marriage, but it is widely accepted that any evidence is admitted, because it is proving a status quo [11].

In practice, it has been shown the fictitious character of the marriage cannot be pronounced based on the mere fact that the dwelling was obtained by the husband from the unit where he worked, and in the divorce it was attributed by law to the wife, because these acts have nothing illicit nor do they prove that the purpose of marriage was, for the wife, that of obtaining use of the dwelling and not to start a family. [12]

Among other cases of fictitious marriage, in practice it was established that it represents a fictitious marriage the marriage ended in order to obtain solely the surname changes and benefit from a new identity and a new passport, when for certain illegal acts committed in Greece, on the previous passport the Greek authorities had stated the prohibition of residence in that country [13].

A form of fictitious marriage is the marriage of convenience [14].

The Government Emergency Ordinance no. 194/2002 regarding the regime of foreigners in Romania [15], republished [16], with subsequent amendments [17], in art. 2 letter 1), defines the marriage of convenience as marriage contracted solely to circumvent the conditions of entry and residence of foreigners and to obtain the right to stay in Romania.

According to art. 63 para. 2 of the Government Emergency Ordinance no. 194/2002 on foreigners in Romania, the elements based on which it can be shown that a marriage is of convenience may be the following:

- a) matrimonial cohabitation does not exist;
- b) the spouses have not met each other before marriage ;
- c) the lack of an effective contribution to fulfilling the obligations arising from marriage;
- d) the spouses do not speak a language understood by both;
- e) data are available that previously one of the spouses has entered into a marriage of convenience;

- f) the spouses are inconsistent or there are disagreements in statements of personal data, regarding the circumstances in which they met or other relevant information about them;
- g) the marriage was subject to payment of a sum of money between spouses, except for the amounts received as dowry.

In accordance with par. 3 of the same article, ascertaining the elements in para. 2 is done by the interview officer [18]. These elements can result from:

- the information obtained following the interview;
- written documents;
- statements of the parties or of third parties;
- checks at the marital home or other additional checks.

The consequence of finding elements of a marriage of convenience by the interview the officer is not the dissolution of that marriage, but the entitlement of the Romanian Immigration Office to refuse to extend the right of residence obtained on the basis of the marriage. Pronouncing the nullity of marriage is the exclusive prerogative of the court [19].

In terms of covering the annulment of the fictitious marriage, the law establishes three conditions, which, if occurred before the final decision of dissolution, cover the nullity of fictitious marriage [20]:

- the cohabitation of the spouses has occurred; no minimum duration is provided or any other temporal criterion, nor of any other nature, but it stands to reason that a factual situation with accents of stability and continuity is considered, signalling that starting a family is no longer foreign in the intention of the spouses;

- the wife has conceived or is pregnant;

- two years have passed since the marriage; it is sufficient to fulfil the term of two years since the marriage until a final court decision, even if the spouses have not lived together. The legislator's solution is a practical one. Being an absolute ground for invalidity that can be invoked at any time, by any interested person, and whose effects could disrupt the security of the spouses' legal relations with third parties or of each of them, the option to maintain marriage is judicious [21].

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