

## THE JUDICIAL REGIME OF ANNULMENT OF MARRIAGE AND THE EFFECTS OF MARRIAGE ANNULMENT

I. Nicolae

**Ioana Nicolae**

Law Faculty, Law Department

“Transilvania” University, Braşov, Romania

\*Correspondence: Ioana Nicolae, “Transilvania” University of Brasov, 25, Eroilor street, Brasov, Romania

E-mail: ioana.nicolae@unitbv.ro

### **Abstract:**

*We have chosen to put together this study with the intent of examining the judicial regime of marriage annulment and the effects of marriage annulment. Such action involves researching the rules which govern absolute annulment or relative annulment of marriage, who can invoke annulment, the term in which it can be invoked, if annulment can or can't be reclaimed. The second part of the study discusses the effects of the annulment of marriage.*

**Keywords: absolute annulment, relative annulment, limitation, fictional marriage, putative marriage**

### **Introduction**

Even though the lawmaker<sup>1</sup> did not define the notion of “marriage annulment”, it is easily understandable that annulment is the sanction which is applied for the disrespect of formal conditions stated by law for the valid conclusion of marriage, with the consequence of the dissolution of the marriage<sup>2</sup>. Thus, the main effect of absolute and relative annulment is the same: the dissolution, in regard to the future and the past, of the marriage. In detail, we are about to analyze putative marriage, the situation of children born within an annulled marriage, the opposability of the court's decision to acknowledge the annulment or the court's decision to annul the marriage.

### **The judicial regime of the absolute annulment of marriage**

Before analyzing the regulations which govern the judicial regime of absolute annulment, we will list the cases of absolute annulment<sup>3</sup>, as they are pointed out by the lawmaker, in articles 293-295 of the Civil Code:

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<sup>1</sup> Marriage annulment is regulated, in Romanian law, in Chapter IV (Marriage annulment) of the Second Title (Marriage) of Book II (About family) of the Civil Code passed by Law no. 287/2009, specifically articles 293-306. In regard to the enforcement in time of the provisions which regulate marriage annulment, article 25 of Law no. 71/2011 states that: “(1) The validity of marriage concluded between the coming into force of the new Civil Code is established according to the provisions of the law which was in force at the time when the marriage was concluded.

(2) However, if, after the coming into force of the new Civil Code, a fact that covers annulment occurs, the marriage can no longer be dissolved after the coming into force of the Civil Code.

(3) In case the event that covers annulment involves a certain term, the marriage can't be annulled after that term passes from the time the Civil Code came into force”.

<sup>2</sup> C. Mareş, *Marriage annulment in the regulation of the new Civil Code*, in „Law” no. 9/2012, p. 61.

<sup>3</sup> For a comparative view with the previous legislation see also R. Matefi “Cases of annulment”, Bulletin of Transilvania University of Brasov, Vol. 14(49), Series B ISSN-1223-964X, Transilvania University Publishing House, 2007.

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- marriage between people of the same sex (article 293 alignment 1 corroborated with article 271 first thesis of the Civil Code);
- the lack of free and personal consent from the future spouses (article 293 alignment 1 corroborated with article 271 second thesis of the Civil Code);
- bigamy – an already married person who enters into another marriage (article 293 alignment 1 corroborated with article 273 of the Civil Code), with the mention provided by article 293 second alignment of the Civil Code - “In case the spouse of a person declared as dead remarries and, after this, the decision by which the spouse is declared dead is annulled, the new marriage is still valid, if the spouse of the person declared dead was of good faith. The first marriage is considered to be dissolute at the date the second marriage was concluded”;
- marriage between direct relatives or collateral relatives to the fourth degree included (article 293 alignment 1 corroborated with article 274 of the Civil Code);
- marriage between the person who is mentally ill, regardless of whether that person is placed under judicial interdiction<sup>4</sup>, as this is a biological and social impediment, even if the conclusion of marriage occurred in a rare moment of lucidity<sup>5</sup> (article 293 alignment 1 corroborated with article 276 of the Civil Code);
- marriage without consent from the spouses or without the presence of at least two witnesses, at the City Hall, in front of the general registry office ( article 293 alignment 1 corroborated with article 287 alignment 1 of the Civil Code);
- entering into marriage by the minor who is under the age of 16 (article 294 alignment 1 of the Civil Code);
- entering into marriage with any other purpose than to start a family - fictional marriage<sup>6</sup> (article 295 alignment 1 of the Civil Code).

The people who can invoke absolute annulment: under this marginal name, article 296 of the Civil Code states that: “any person who is interested can file a complaint for the absolute annulment of marriage. Given all these, the prosecutor can not file this complaint after the marriage is dissolute, except for the case in which he would act for the protection of the rights of minor children or people placed under interdiction”.

Thus, the people who can file a complaint for the absolute annulment are the people who can prove an interest in the matter, namely any of the spouses. In regard to article 1247 alignment 3 of the Civil Code, which describes the general rules in the matter of annulment, the court is forced to invoke absolute annulment by its own will.

The term in which annulment can be invoked: there is no specific term in which such a complaint can be filed. We have reached this conclusion by way of interpretation<sup>7</sup> because the special text who regulates this matter - article 296 of the Civil Code states no specific term, thus common law is to be applied – article 1249 alignment 1 of the Civil Code: “If the law does not state otherwise, absolute annulment can be invoked at anytime, by filing a complaint or by exception”.

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<sup>4</sup> For more aspects regarding the judicial interdiction see also Roxana Matefi – Protecting the judicial interdiction under the regulations of the New Civil Code, in Bulletin of the Transilvania University of Brasov, Series VII: Social Sciences and Law, 2066-7701; 2066-771X (CD), 2012, p. 75-78.

<sup>5</sup> Bistrita Nasaud County court, civil section, decision no 74/A/6 June 2012 *apud* Gabriela Cristina Frentiu, *Family law. Judicial practice according to the new Civil Code. ECHR jurisprudence*. Hamangiu Publishing House, 201, p. 7.

<sup>6</sup> The essence of fictional marriage is “the simulated, fake character of the will expressed in order not to start a family, but to obtain certain benefits for one or both spouses”, states specialty doctrine in the comments made about this cause -see Emese Florian, Comment (on article 295 Civil Code) in *The New Civil Code. Comments by articles*. Article 1-2664, coordinators Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, C.H. Beck Publishing House, 2012, p.300.

<sup>7</sup> Emese Florian, Comment (on article 296 of the Civil Code), in *The New Civil Code. Comments by articles*. Article 1-2664, coordinators Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, C.H. Beck Publishing House, 2012, p. 301.

The possibility of covering by confirmation: It is generally acknowledged that absolute annulment can not be confirmed. However, in the matter of marriage, the Civil Code states two cases in which absolute annulment can be confirmed:

- the marriage of the minor, for the facts stated in article 249 alignment 2 of the Civil Code as follows: “Given all these, marriage annulment is covered if, by the time the court decision is final, both spouses have turned 18 or if the wife gave birth or got pregnant”. We can observe<sup>8</sup> that “in the old as well as in the new regulation, the non fulfillment of demands regarding matrimonial age is based on the disappearance of the cause who determined it and the lawmaker’s preoccupation is to satisfy the child’s right to live with his parents and his natural family”;
- fictional marriage, when one of the conditions stated in article 295 alignment 2 of the Civil Code is fulfilled, as follows: “However, marriage annulment is covered if, by the time the court’s decision is final, the spouses have been living together, the wife gave birth or got pregnant or at least two years have passed since the marriage was concluded”.

### **The judicial regime of the relative annulment of marriage**

As we have done before when analyzing the judicial regime of absolute annulment of marriage, we have chosen to first point out the causes of relative annulment of marriage:

- entering into marriage without the authorizations stated in article 272 alignment 2 and 4 (article 297 alignment 1 of the Civil Code);
- a vice of consent of one of the spouses by error in regard to the identity of the future spouse or by violence or devious ways (article 298 of the Civil Code);
- entering into marriage by the person who is temporarily unable to give consent (article 299 of the Civil Code);
- marriage between a legal guardian and the minor placed in his care (article 300 of the Civil Code).

The people who can invoke relative annulment: the rule is that such a complaint is a personal matter (as is the marginal name of article 302 of the Civil Code) which states: “The right to file such a complain is not passed on to the heirs. Given all these, if the complaint was filed by one of the spouses, it can be continued by any of his heirs”.

Starting from the principle according to which the complaint for the annulment of marriage can be filed by the person protected by the regulation of the law, judicial doctrine<sup>9</sup> describes the following categories of people who can file such a complaint:

- the person or the authority which was supposed to provide consent for entering into marriage by the minor who is 16 years of age – article 297 of the Civil Code: “annulment can be invoked only by the person whose authorization was required”;
- the prosecutor called on by the tutelage authority, in case the tutelage authority did not provide authorization for marriage, although it should have;
- the spouse whose consent was vitiated by error, violence or devious ways;
- the person who, at the time of entering into marriage, was temporarily unable to give consent;
- the minor placed under tutelage.

The term in which this type of annulment can be invoked: article 31 alignment 1 of the Civil Code states that annulment can be filed within 6 months. The time from which those 6 months are calculated is different, depending on the cause of relative annulment which is invoked in the matter, as follows:

- in case there is no legal authorization, the term is calculated from the date when the people whose authorization was required found out about the marriage (article 301 alignment 2 of the Civil Code);

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<sup>8</sup> T. Bocoască *Opinions regarding marriage annulment in the regulation of the new Civil Code*, in „Law” no 1/2010, p.19.

<sup>9</sup> C. Mareş, *Op. Cit.*, page 73.

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- in case of annulment for vices of consent or for the lack of consent, the legal term is calculated from the date when the violence stopped or, from the date when the person who proves interest, knew the error or the temporary lack of the ability to give consent (article 301 alignment 3 of the Civil Code);
- in case of marriage concluded between the legal guardian and the minor placed in his care, the term is calculated from the date the marriage was concluded (article 301 alignment 4 of the Civil Code).

The possibility to cover by confirmation: relative annulment can't be covered.

Thus, the lawmaker chose to regulate general causes of covering by confirmations which are to be applied in all cases of relative annulment. According to article 303 alignments 3 of the Civil Code, these are: both spouses turn 18, when the wife gave birth or got pregnant or some special causes<sup>10</sup>, as stated by article 303, alignments 1-2 of the Civil Code as follows:

- in case authorization is required from the legal guardian or the tutelage authority, the relative annulment is covered if all authorization was provided before the court's decision to dissolve the marriage is final;
- in case consent is affected by any vice, the relative annulment is covered if the spouses have lived together for 6 months since the time the violence stopped or the error was discovered;
- in case there is no consent, the relative annulment of marriage is covered if the spouses have lived together for 6 months since the temporary lack of consent was discovered.

### **The effects of marriage annulment**

Marriage annulment causes retroactive effects, thus meaning that the personal and patrimonial rights and obligations of the spouses have never existed<sup>11</sup>.

The consequences of the fact that the spouses are considered to never have been married were listed by specialty literature<sup>12</sup>, as follows:

- the spouses had no obligations deriving from their statute of married persons;
- the spouses will have the name they had before marriage;
- the term in which they were entitled to file a complaint for annulment of marriage did not start to pass, unless the spouses were in fact separated;
- the loss of exercise of all rights if the marriage is found to be void or annulled before the spouse turned 18
- the matrimonial regime did not exist;
- the obligation to provide between spouses did not exist;
- the surviving spouse's right to inheritance does not operate.

In regard to the retroactive effect of marriage annulment, the Civil Code regulates one exception in article 304, that of putative marriage; this means that the retroactive effect of marriage annulment "is produced in regard to both spouses, only when neither of them was of good faith when entering the annulled marriage, meaning that neither of them knew the cause for annulment"<sup>13</sup>.

According to article 304 of the Civil Code: "(1) The spouse of good faith when entering into a void or annulled marriage maintains the status of a spouse from a valid marriage until the court's decision is final.

(2) In the situation listed above, the patrimonial relations between spouses are subjected, by resemblance, to the provisions regarding divorce".

Starting from this legal text, doctrine<sup>14</sup> defined putative marriage as "that marriage which, although void or annulled, produces some effects in the relations between spouses considering the fact that at least one of those spouses was of good faith". Good faith is based on two

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<sup>10</sup> C. Mareş, *Op. Cit.*, pages 73-74.

<sup>11</sup> Marieta Avram, *Civil law. Family*, Hamangiu Publishing House, 2013, p. 101.

<sup>12</sup> C. Mareş, *Op. Cit.*, page 74.

<sup>13</sup> Marieta Avram, *Op. Cit.*, page 101.

<sup>14</sup> Emese Florian, *Family law. Fourth edition*, C.H. Beck Publishing House, 2011, p. 67.

subjective elements: error and the belief that the legal act is valid, thus not knowing the annulment causes which affect it<sup>15</sup>. Good faith, as a *sine qua non* condition must exist at the time the marriage is concluded<sup>16</sup> and it is believed that that person who challenges good faith must prove otherwise.

The effects of putative marriage are analyzed in specialty literature<sup>17</sup>, from a double perspective:

- that of good faith of both spouses in which case the court's decision to dissolve the marriage produces effects only for the future;
- that of the good faith of one spouse, a situation in which the court's decision produces effects for the future and for the past.

Also, absolute annulment does not produce retroactive effects in regard to the relations between parents and children, a normal solution if we consider the principle of protecting the child's best interest; the child has the status of a child inside a marriage and his inheritance rights regarding his parents are maintained. This fact is regulated in article 305 of the Civil Code: "(1) Marriage annulment has no effects in regard to children, who maintain their status of children from inside a marriage.

(2) In regard to the rights and obligations between parents and children, the provisions regarding divorce will be applied".

This means that, much like in case of divorce, as the marriage is annulled, the courts decide, in accordance with the provisions of article 396 alignment 1 of the Civil Code, on the relations between divorced parents and their minor children, taking into account the best interest of the child, the psychological and social report and the parent's agreement, should it be the case. The matters which will comprise a court's decision will regard the exercising of parental authority, establishing the location of the minor child, the right of the separated parent to have personal relations with the minor and to supervise his education and professional training<sup>18</sup>.

Also, the child born or conceived during a dissolute marriage for the mother has, as a father, the mother's husband so the paternity presumption works in this case.

After having analyzed the effect of annulment in regard to the relations between children and parents, we must direct our attention to the effects of the court's decision to annul the marriage in regard to third parties.

Relevant in this matter are the provisions of article 306 of the Civil Code which state that: "(1) The court's decision to annul the marriage is opposable to third parties under the provisions of law. The dispositions of article 291, 334 and 335 will be applied accordingly.

(2) Marriage annulment can't be opposable to third parties in regard to an act concluded by one of the spouses before entering into marriage, except when the publicity formalities stated by law were fulfilled or when the third party knows the cause for annulment of the marriage. The provisions of article 291, 334 and 335 will be applied accordingly to publicity for annulment of marriage".

By this legal text, the opposability of the court decision regarding the person civil state<sup>19</sup> is reaffirmed as it is regulated by article 99 third alignment of the Civil Code. From the interpretation of article 306 of the Civil Code we can deduce<sup>20</sup> that "based on the definitive decision to annul the marriage communicated to the general registry by the court (article 101 second thesis of the Civil Code) the general registry office is obliged, by article 271 of the Civil Code to communicate a copy of the general registry act to the Matrimonial Regimes Registry

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<sup>15</sup> Emese Florian, *Op. Cit.*, page 67.

<sup>16</sup> *Idem.*

<sup>17</sup> C. Mareş, *Op. Cit.*, page 75.

<sup>18</sup> *Idem.*

<sup>19</sup> For further aspects regarding the person civil state, see also T. Prescure, R. Matefi, *Civil law. Backgrounds. The persons*, Hamangiu Publishing House, Bucharest, 2012, p. 280.

<sup>20</sup> Emese Florian, Comment (on article 306 of the Civil Code), in *The New Civil Code. Comments by articles. Article 1-2664*, coordinators Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, C.H. Beck Publishing House, 2012, p. 314-315.

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(article 334 alignment 1 of the Civil Code), as well as to the public notary who authenticated the matrimonial convention when that is the case, in order to fulfill all publicity formalities for opposability to third parties. The general registry officer's obligation to communicate a copy of the act of marriage to the Matrimonial Regime Register is general, regardless of whether the spouses had a matrimonial convention or not and is doubled, in case such a convention existed, by the obligation to send a copy to the public notary who authenticated the convention".

**Conclusions**

By examining the judicial regime of marriage annulment in general we can conclude that these are a few "compromises" made by the Romanian lawmaker, exceptional situations. This, given the absolute character of marriage annulment, reclaiming is possible in certain cases which are strictly regulated by the Civil Code. These provisions can be explained by the preoccupation of the new lawmaker to adopt measures in order to maintain marriage and protect family.

In regard to the other plan of our analysis - the effects of the annulment of marriage, we have noticed the orientation of legal text towards protecting the spouse of good faith who had no knowledge of the annulment causes which affected the marriage, hence the regulation of putative marriage, but also normal solutions in regard to the status of the children who are protected as they are not a subject of their parents annulled marriage.

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