THE RIGHT TO DISPOSE OF AN ITEM OF PROPERTY ACQUIRED IN MARRIAGE

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Abstract

This research article analyzes the right of disposal of marital property in relation to the undertaking of those legal actions that imply the highest authorizations that legal subjects can have over things.

Having in consideration the fact that according to the legislation in the Republic of Macedonia, marital property is joint as are the authorizations of spouses over their joint items, it is important to determine the extent of the disposal, i.e. who disposes of the items of the joint property and to what extent. Referring to the normative framework, which regulates disposal relations of spouses, the article emphasizes the concept and importance of the authorization of disposal of things (alienation or assignment of things from joint ownership), through legal activities (sale, donation, exchange, etc.). In this context, the article tends to draw a divisive line between the administration with the joint item, referring to continuative actions and measures and the disposal of the thing, which is not continuative but, due to legal consequences it causes, has great importance in practice, and as a result, enjoys greater attention in legislators in terms of its limitation compared to the acts of administration with joint items in marriage.

Key words: *disposal, administration, property, spouses, ownership, property acquired during a marriage.*

5. Disposal of things in joint ownership of spouses

Provisions of Article 70, Paragraph 1 of the Law on Property and Other Real Rights (2001) state: “The spouses jointly and on the basis of agreement dispose of joint property.”¹ However, in order to interpret the above-cited provision correctly, we should set off from the definition of the legislator on the category of joint property, according to which: “joint property is real property owned by ‘tenants in joint’ who each have an ‘undivided interest’ in the entire property”. This means that since the spouses’ ownership of things in marriage is joint, none of them has the right to independently dispose of or burden them with juridical act among the living before their share in the joint property is determined (Zhivkovska, 2001, p. 17).

The inability of independent disposal of the share in joint ownership, by any of the spouses, is first of all related to the legal nature of joint ownership, namely the fact that spouses’ shares in the joint property are undefined (Article 70, Paragraph 1 of the Law on Property and Other Real Rights- LPOOR). According to this, the legal work with which any of the spouses has alienated or burdened the item in joint ownership without the consent of the other spouse, before it has been divided between the spouses, will not produce any kind of legal effects (Decision by the Supreme Court of the Republic of Macedonia; rev. nr. 282/86, “Summary of court decisions”, Records 4, p. 62).

Despite the existence of legal assumptions, according to which in cases of possible division of joint property, any one of the spouses would get half of the item, the spouse has no right to dispose of that specific item, or the ideal part of it.²

¹ Pursuant to Article 67 of the Law on Property and Other Real Rights of the Republic of Macedonia (Official Gazette of the RM”, nr. 18/2001) - LPOOR: The property, which the spouses acquire during marriage, represents their joint property.

² The disposal of items in joint ownership represents the highest disposal authorization within the framework of authorizations that subjects of the law can have on the item. However, put in the sphere of property relations between the spouses, this authorization can cause disagreements between them, in the context of who has more rights in disposing the joint items in marriage. In order to determine the dimensions of the disposal of items and to avoid possible disagreements and disputes in this quite sensitive field of marital relations, the law has provided the boundaries of authorizations given by spouses. In this context, the legislator has created the expressions such as regular administration, disposal within the regular administration and extraordinary disposal.

The regular administration of the item refers to the undertaking of factual and legal actions related to the items that make the joint property of the spouses, e.g. reparation and maintenance of the joint item, regular land farming, fruit vintage, payment of necessary

Based on the provision of Article 70, Paragraph 2 of the LPOOR, according to which “The spouse cannot independently use or burden the legal right among the living before their share in the joint property has been determined”, it results that the opposite may not be excluded, i.e. the possibility of disposal in the case of death (*mortis causa*), by last will, but only with regard to his/her ideal portion (Çavdar, 1998, p. 343). In this context, in the Court practice the approach according to which the spouse has the right to conclude a contract on eternal tenure of his/her portion in the joint property (Article 1029, Law on obligation relations (“Official Gazette of RM” nr. 18 / 2001) – LOR). Therefore, even though the contract on eternal tenure represents a juridical act among the living, having in mind that the effects of transferring the right to disposal over the items included appear after the death of the recipient of the tenure, the possibility of such disposal has been granted, similarly to the testamentary disposal. The tenure granter in this case has the right to request that his/her right on the given real estate, which is obtained in exchange with the tenure granting, is registered in the public book (Article 1031, LOR).³

Despite the legal limitation, which prevents spouses from independently disposing of items in joint ownership, they can agree, with a contract so that not both of them take part in the realization of all works, rather, only one of them can be authorized to dispose of all or some of the items of the joint property. (Article 71, Paragraph 1, LPOOR) In this context, the law has provided several possibilities, so that the spouses can agree, with a contract, on one of them to be authorized to realize all of the acts of disposal of items in joint ownership, limit the disposal only within the regular administration

expenses such as heating, electricity, rent, etc. the legal assumption of the existence of an agreement between the spouses is applicable in this case.

The disposal of the item within the regular administration refers to actions and continual measures undertaken by the spouse who administers the joint property, whereupon s/he has the right to alienate consumable items such as fruits, etc., but s/he has no right to alienate the main items. The consent given by the other spouse in any form (written, oral, silent) is required for undertaking such measures.

- The authorization of extraordinary disposal of the items refers to the undertaking of those temporary legal actions that surpass the boundaries of the regular administration of main items in joint property and which imply the alienation or burden of items through legal affairs, such as sale, gifts, exchange, giving for rent, impawning of movable items, mortgages on real estates, creation of servitude, creation of real burdens, etc.), as well as the factual disposal of main items (e.g. demolition of the old and construction of a new house). In cases of undertaking actions that represent extraordinary disposal of joint property, the spouse has to obtain the consent by the other spouse, compiled in the form, which is required by the respective legal affair that is to be established.

³Check for more the decision by the civil court in Skopje 2 (Decision by the Principal Court in Skopje 2, 10. 06. 2008 XXIX nr .3951/07)

with items or just the management of exactly specified works. (Article 71, Paragraph 2, LPOOR).

The contract with which one of the spouses is authorized to dispose of all of the items of joint property, or some of them, i.e. to undertake those tasks, which are otherwise known as tasks of disposal with items within the regular administration (sale of fruits, for instance), can be concluded in any form – in a written form or orally or even silently. Moreover, in practice, the assumed consent of one of the spouses to dispose of the item and not be opposed by the other can also exist. This assumed consent can often be met in practice (Gelevski, 2002, p.154).

The fact that the spouse whom the disposal of the item in joint ownership has been entrusted is proved to be unable to dispose of the item or even undertakes actions of disposal with which s/he harms the spouse's interests, gives the right to the other spouse to give up from the contract of disposal of the given item at any time. Of course, the right of the spouse to break the contract will not be able to be realized if the act of breaking the contract would inflict damage on the other spouse. (Article 71, Paragraph 4 LPOOR). The other spouse's interests would be harmed if, e.g. the act of giving up from the contract on disposal of the item in joint ownership by one of the spouses would prevent the sale of the item, which may be nondurable, and as a result be damaged or completely destroyed.

Quite often, in practice, usually in unstable marital communities, disagreements between the spouses may occur in relation to the disposal of items in joint ownership. This happens because one of the spouses does not agree with the alienation, or the burden of the joint item,⁴ namely, with the inclusion of new items in joint ownership. In most cases, such issues are resolved by the act of division of the joint property during the length of the marital relation, either through an agreement between the spouses themselves or through litigation (Article 74, Paragraph 1 and Article 75, Paragraph 1 LPOOR).

⁴According to a decision made by the Supreme Court of the RM, the contract with which one of the spouses has alienated or burdened the earned item in marriage without the consent of the other spouse and before it has been divided between the spouses, does not produce any kind of legal effect. (Decision by the Supreme Court of Macedonia, Rev. nr. 282/86, "Collection of court decisions", Records IV, p.62)

6. The form of contract with which one of the spouses is authorized to dispose of the items in joint ownership of both

When it comes to judicial works through which the authorization of disposal of crucial items, especially real estate from the joint property is realized, the consent of the other spouse is needed, given in a specific form. This kind of consent is required in cases when actions dealing with e.g. the sale or burden of construction or non-construction sites, the sale, burden or demolition of houses or construction of a new house instead, are undertaken (the latter action refers to the initiation of all procedures for obtaining permission, engaging workers, using deposited means from the bank, etc.).

The written consent of the other spouse should have the form required for the validity of the respective judicial work that has to be concluded. (Article 72, LPOOR).

The legislator does not expressively determine a specific form for concluding an agreement with which the other spouse is authorized to possess items from the joint property, but guides towards the form, which is required for the binding of the respective judicial work, namely it creates the possibility for the contract which authorizes one of the spouses to possess items in joint ownership, to have the form of judicial work, which the spouse will bind in the role of an authorized person by the other spouse (Article 72, LPOOR). This comes as a result of the rule according to which the form specified by law for the conclusion of a contract is valid for the given authorization and its conclusion. In this context, the contract which authorizes any of the spouses to possess real estate, namely to conclude a contract through which the right of ownership or the right of utilization of the real estate, is transferred, as well as conclude a contract with which the mortgage right to real estate in joint ownership is established, has to be in a written form (Article 9 of the Law on Circulation of Lands and Buildings, “Official Gazette of the Republic of Macedonia”, nr. 4/1993). The spouses’ signatures in this contract have to be verified by a notary public and it also has to be registered in the public book of real estate, so that third parties can be introduced to this fact.

The written consent by any of the spouses is needed in the conclusion of some other contracts related to the disposal of movable property, for which the law has anticipated a written form (Article 65 LOR & Article 72 LPOOR).

If the judicial work is concluded by one of the spouses, who has been entrusted the disposal of joint property through an internal agreement, that same work in principle obliges the other spouse, whereupon s/he has no right

to ask for its cancellation just because s/he has not taken part in it in person. If third parties are informed about the internal agreement between the spouses (through the registration of the authorization in the public book), then it is considered that the spouse who has been entrusted the disposal of a given item acts on behalf of the other spouse, with an authorization, as his/her legal representative. If the authorized spouse surpasses the limits of the internal agreement during the disposal with the item, this cannot by any means harm the third conscientious party. However, in this case, the spouse who has not taken part in the realization of the judicial work from which s/he has been harmed has the right to ask for compensation according to the provisions of the civil law.

In practical implementation (the verdict by the Principal Court Skopje 2, 10.04.2008 XII A.nr.3091/06), the provision of Article 72 of the Law on Property and Other Real Rights (2001), which requires a written consent by one of the spouses in order to enable the disposal of items in joint ownership by the other spouse, has caused numerous problems. Such problems emerge due to the fact that the issue of recording of real estate has not been completely resolved, and that the transaction contracts include only one of the spouses (because of outdated ideas according to which only the husband, i.e. the man should sign the contracts); this is why the purchaser or the person in whose favour the mortgage has been initiated, is not able to know if the person appearing as a seller, or mortgage debtor, is married, or if the real estate that is the object of the contract is part of the seller's joint property, namely the mortgage debtor and his/her spouse.

The above-mentioned provision (Article 72, LPOOR) only emphasizes the need for granting a written consent by the other spouse, without providing an expressive answer to the question regarding the destiny of the judicial work bound by one of the spouses without the consent of the other one? Therefore, the question is whether the spouse who has not been part of the conclusion of the judicial work has the right to ask for its cancellation? Moreover, we are fully aware that the number of such affairs is huge.

As regards the granting of the consent by the spouse, the judicial practice is unique and defends the attitude according to which regardless if the buyer or the mortgage creditor have known or not that the real estate is part of the joint property between the spouses, the consent by the other spouse has to be given, orally or in a written form (Supreme Court of the RM verdict, Rev. 282/86, "Collection of Court Verdicts" of the same court, Records 4, decision 3).

7. The approaches of legal theory related to the need for granting consent to the spouse for disposing of joint property

While legal practice has a unique approach, in the legal theory there are various different approaches related to the question whether the consent of the other spouse has to be given for establishing the judicial work.

According to a view, the judicial work that has been established without the other spouse's consent will be considered valid if the third party has acted upon the principle of trust in the public book. This approach promoted by legal theory, is based on the interest of maintaining legal security in legal transactions, as well as in the protection of third party interests. According to this theory, it is considered that judicial circulation would become difficult if the third party would be forced to verify if the concrete real estate is part of the spouses' joint property or separate property. Therefore, if one of the spouses alienates a moveable item or real estate, which is subject to joint property, while this can be an unknown fact to his/her co-contractor, since the existence of joint property is not visible in itself (this fact would be visible if the real estate – subject to the contract – is registered in the name of two spouses), then the consent of the other would be requested (Gelevski Sllavko, 2002, p.156). However, if this real estate has been registered in the public book in the name of only one spouse, who alienates it without the consent of the other partner, the validity of the judicial work will depend on the purchaser's consciousness. If the purchaser did not know and based on the normal flow of events (separate living of spouses) was not able to know that real estate is part of the joint property and that the spouse alienates it without the consent of the other partner, then the contract will be valid. In addition, the purchaser as a third party will also benefit from the principle of trust in the public book, according to which, the fact that only one of the spouses appears to be the owner of the item in the public records, cannot damage third parties, who did not know and were not obliged to know (Article 59, Paragraph 3, LPOOR). The judicial work that has been concluded in support of this principle cannot be cancelled, whereas the profit gained from the sale of the real estate, according to rules of subrogation, will be part of the joint property of the spouses, meaning that the harmed spouse will have the right to disposal over the given amount of cash, gained from the profit (Gelevski Sllavko, 2002, p.156).

According to the second approach, it should be taken into consideration that the judicial work, which represents an act of disposal by one of the spouses of the item in joint property obliges the other spouse, whilst the co-contractor

did not know, and according to the normal flow of events, was not able to know that the other spouse has not granted his/her consent. Furthermore, if the spouses live together, then the co-contractor has no reason to doubt about the issue of the consent by any of the spouses. The refutable assumption for the existence of the consent granted by the other spouse comes to expression only in reciprocal contracts with reward, not in those without. This assumption can be explained in such a way as to create the impression (externally) that there is an assumed general authorization given to one spouse by the other for concluding the acts of disposal. However, this general authorization can be revoked for any concrete work or co-contractor (Çavdar, 1998, p.346).

According to the third approach, in practice, the assumption according to which if one of the spouses alienates the given item from the joint property, s/he also does it as a legal representative of the other partner, based on the expressive or silent authorization. The third person will be considered as the entrusted holder of the item, unless it is proven that at the moment of concluding the contract s/he has been aware of the fact that the disposal of the item has not been consented by his/her spouse (Gams, 1966, fq.74). This happens due to the judicial nature of marital relations; since they are spouses, it is considered that they have previously agreed on the conclusion of the given judicial work. The opposite solution would probably stop the judicial circulation and would cause judicial insecurity having in mind the great amount of judicial works that emerge on daily bases (Drashkić, 2005, p.402). For instance, if one of the spouses alienates an item in joint ownership of the two, without the consent of his/her partner, such a contract is in contradiction to the imperative norms and as such is invalid. The conscientious holder can defend him/herself only by calling on the general rules of civil law regarding obtaining of property. However, we should make the distinction as to whether we are talking about moveable or immoveable items. In this respect, the conscientious holder can be defended by calling on the general provisions of the civil law regarding acquisition of ownership. However, the distinction should be made whether the item in question is movable or immovable. Therefore, if a movable item is concerned, the conscientious holder can claim that s/he has acquired the right to ownership of this item through a claim (ownership through trust, legal and the expiration of time determined by law) (Article 124, Paragraphs 1 and 2, LPOOR) or based on the regulations on acquiring the right of property from the non-owner, the conscientious holder will become the owner of the item if: 1) the item is moveable, 2) the item has been acquired with trust (the conscientious holder did not know and did not have reason to suspect that the item is in joint ownership of the spouses), 3) if the item has been acquired through legal work with reward, 4) if the item has been acquired by the non-owner who delivers such items in circulation within

the framework of his/her activities, 5) if the item has been acquired by the non-owner who has been given the item in disposal by the owner on the basis of the legal work, and 6) if the item has been acquired in public sale (Article 147, LPOOR). In this case the contract cannot be cancelled, whereas the spouse who has disposed of the item in an unauthorized way, is obliged to compensate the damage to the other spouse. The damage compensation is assessed based on the market value at the moment of decision-making. The damaged spouse will be entitled to the level of compensation based on the contribution s/he has made in the creation of the alienated item (Drashkić, 2005, p. 402). When it comes to immovable items, the judicial work established by one of the spouses without the consent of the other will be invalid, except in cases when the conscientious holder meets legal terms for acquiring property through the winning claim.⁵

However, this issue has already been resolved with the help of Article 72 of the Law on Property and Other Real Rights, according to which “the authorization, with which the other spouse is authorized to dispose of real estate, has to be given in the form, which is required for the conclusion of the respective judicial work”. In this context, in order to conclude a contract, which transfers the right of utilization or the right of ownership of the real estate, a written authorization by the spouse who does not take part in the conclusion of the contract, is required.

Based on the above-mentioned, we can conclude that the approaches of the legal theory provide exceptions from the legal regulation according to which “The spouses jointly and in agreement manage and use the joint property. (Article 70, Paragraph 1, LPOOR). Therefore, according to the legal theory, the concluded judicial work by one of the spouses, without the consent of the other spouse will be considered valid, if a third party will trustfully act according to the legal principle of trust in the public book (Article 59, Paragraph 3, LPOOR). The legal theory also allows for the possibility of the

⁵The conscientious and legal holder of a movable item, the right of disposal of which belongs to another, acquires the right to disposal of that item with maintenance after an expiration of a period of three years.

The conscientious and legal holder of an immovable item, the right of disposal of which belongs to another, acquires the right to disposal of that item with maintenance after an expiration of a period of ten years.

The conscientious holder of a movable item, the right of disposal of which belongs to another, acquires the right to disposal of that item with maintenance after an expiration of a period of ten years.

The conscientious holder of an immovable item, the right of disposal of which belongs to another, acquires the right to disposal of that item with maintenance after an expiration of a period of twenty years. (Article 124, LPOOR)

application of the legal assumption (*praesumptio iuris*), according to which it will be considered that the spouse has granted consent if the opposite is not proven, with the aim of facilitating judicial circulation in terms of the regular disposal with the joint item, in order to facilitate judicial circulation and consider judicial work as valid in the case of regular disposal of the joint item (Mladenović, 1981, p.654). On the contrary, if it had not been for the possibility of the assumption for the existence of the other spouse's consent, the amount of invalid judicial works would be enormous and this would hinder the judicial circulation. The refutable assumption for the existence of the consent granted by the other spouse comes to expression only in reciprocal contracts with reward, not in those without. Otherwise, in extraordinary works, the so called affairs that surpass the boundaries of regular administration, the consent should be expressive and given in a specific form. The legal theory has also created the assumption according to which it is considered that the spouse, who alienates the item from joint property, does this in the role of the other spouse's representative, based on the silent or expressive authorization (Gams 1966, p. 74). Therefore, the conscientious holder will be considered trustful if he did not know nor was able to know that his/her co-contractor acts without his/her spouse's consent at the time of concluding the contract.

The above-mentioned approaches are still valid in practical life, since our provisions do not answer many questions with regard to the disposal of joint item; in addition, the complete implementation of the provisions of Article 72 would cause big problems in practice. In this context, at the time of transition, many mortgages created on items in joint ownership by only one of the spouses, despite being verified in the court, could not be realized due to the lack of expressive consent of the other spouse. The court has announced them as invalid, whereas the creditors have not been able to realize their requests ensured by the mortgages (Gelevski, 2002, p.153).

Such approaches correspond to the real nature of marital relations, since in everyday life spouses decide about many important issues in their lives through agreements, including disposal acts. The spouse would rarely undertake actions of disposal of joint items contrary to the other spouse's will, moreover when the profit acquired from the alienation of the joint item will be included in the joint property.

Usually in cases of factual termination of the marriage community or during the divorce procedure, the acts of disposal of the joint item are carried out without the consent of the other spouse. In this respect, the solution according to which the spouse who disposed of the items in joint ownership without the consent of the other spouse, is obliged to compensate the damage to the other spouse, is appropriate. The court has ordered the defendant (the

spouse) who had sold the vehicle bought with the means from the joint property to pay out half of the sale profit to his/her spouse (because the plaintiff did not manage to convince the judge that his/her contribution in purchasing the vehicle had been greater), along with the legal interest, calculated from the date of the sale till the last payment (Decision made at the Principal Court in Skopje 2, 10.04.2008, XII A.nr. 3091/06).

The assumption about the existence of the consent by the other spouse is a mechanism created from practice and it is valid only with regard to rewarding judicial works (Gelevski, 2002, p.157). This means that if items in joint ownership are disposed of through non-rewarding judicial works, an expressive consent by both spouses will be required for their validity. If the case refers to immovable items, this consent will have to be given in a written form. Therefore, the spouse who has not given the consent for such works, has the right to ask for their cancellation. In this case, the holder of the item has no right to defend him/herself by calling on the regulations of the Civil Law (Article 70, Paragraph 1 of the LAW ON PROPERTY AND OTHER REAL RIGHTS), for acquiring the right of property from the non-owner, because this is a non-rewarding judicial work. According to a decision made by the Primary Court in Tetovo, the contract of gift is valid and produces judicial effects, although it has been concluded by only one of the spouses. In this case, the court has decided that the spouse who has orally agreed to give away the real estate to the other spouse (while the contract of gift is executive), provided that once the real estate has been granted to the other spouse, there have been no counteractions to confront such an action by the other spouse, it is considered that there has been a contract of gift including his/her part in the real estate (Decision made by the Principal Court in Tetovo, A.nr. 146 / 00-1, 17.03.2000).

8. Conclusion

Spouses as holders of the joint property are authorized to administer and possess items in joint ownership jointly and by agreement. This authorization of theirs comes as a necessary consequence of the judicial nature of joint property, its mode of acquisition, and the principle of equality and solidarity between the spouses within our judicial system.

Even though there is a legal limitation, which prevents spouses from disposing of items in joint ownership, they can still regulate the way and scale of the disposal of items in joint ownership by a written contract, i.e. they can agree not to take part both in the conclusion of all judicial works, but rather authorize each other (one of them) to be able to dispose of all or some of the

items of the joint property. The risk of possible abuse with the rights that derive from the contract has been dealt with by the provisions of the Law on Property and Other Real Rights (Article 71, Paragraph 4), which says, “Each spouse can break the agreement for management or use of the joint property at any time, unless when obvious damage is inflicted on the other spouse with the breaking of the agreement.”

Despite the fact that the authorization for disposal with the wealth created in marriage represents a legal work, it can be concluded that the normative framework, which regulates the spouses’ authorizations on joint property in marriage, has to be complemented by a number of provisions with which this field would be regulated in more detail. This is because positive legal provisions are insufficient, incoherent and create difficulties in terms of their implementation, whereas the used legal language also allows for misinterpretations and contradictions, which are then reflected in legal transactions, in terms of the stoppage of the thrift of juridical acts and the suffocation of the legal transactions in general.

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