

THE LIMITS OF THE TACIT MANDATE BETWEEN SPOUSES IN THE CASE OF DONATION OF IMMOVABLE PROPERTY: BETWEEN LEGAL PRESUMPTION AND THE REQUIREMENTS OF EXPRESS CONSENT

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Abstract: This article analyzes the applicability of the presumption of tacit mandate between spouses, provided by Article 345(2) of the Civil Code, in the case where one spouse accepts a donation of immovable property on behalf of both, when the property is intended to become common property. Starting from the regime of legal community property and the legal requirements of donation as an act of liberality, the study highlights the theoretical and practical difficulties caused by the overlap between the donor's will, the unilateral nature of the act, and the tacit mandate mechanism.

It emphasizes that donation essentially requires the express manifestation of the beneficiary's will, and acceptance cannot be implicitly inferred solely from the applicable matrimonial regime or the presumption of tacit mandate. Thus, unilateral acceptance of the donation by one spouse, in the absence of the other's express consent, cannot produce full legal effects concerning both spouses. The conclusions call for good notarial practices and recommend legislative clarification.

Keywords: tacit mandate, donation, common property, legal community, acceptance

I. Introduction

The legal community property regime, enshrined in the Romanian Civil Code (Articles 339–361), reflects a balance between each spouse's autonomy and the protection of common patrimonial interests. In practice, it is not uncommon for only one spouse to participate in concluding legal acts for acquiring property, including immovable property. The Civil Code provides in Article 345(2) **a presumption of tacit mandate between spouses**, allowing each to conclude alone acts of conservation, administration, and acquisition.

The question arises whether this legal presumption **can also cover the acceptance of a donation of immovable property**, a solemn legal act, when only one spouse is present, and the donation is stipulated as benefiting both.

The aim of this article is to analyze, **from a theoretical and practical perspective**, the applicability of the tacit mandate in the case of unilateral acceptance of an immovable donation involving property under the legal community regime. We seek to identify the legal implications, risks to validity, and potential directions for reform.

II. Normative and conceptual framework

2.1. Legal community property regime (Articles 339–361 Civil Code)

The legal community regime is the default matrimonial regime applied **by law**, in the absence of another chosen conventional regime, according to Articles 312 and following of the Civil Code. It means that property acquired by either spouse during marriage belongs **jointly** to both, regardless of the contribution or who is named in the acquisition act.

According to article 339 Civil Code, “property acquired during the legal community regime by either spouse is presumed to be common property, until proven otherwise.” This article

establishes a **relative legal presumption** (*iuris tantum*) favoring the community property. Essentially, any property acquired by one spouse during marriage is, absent contrary proof, common property, even if the acquisition act names only one spouse as the holder.

This presumption mainly covers onerous acts, legal acts acquiring property in exchange for consideration (sale, exchange, adjudication). In the case of **gratuitous acts** such as donation, additional issues arise concerning:

- **The donor's intention** (which may be aimed at one spouse or both);
- **The express acceptance of the donation** (mandatory under Articles 1011–1012 Civil Code);
- **Classification of the property** as common or separate depending on who accepts and how the act is drafted.

Doctrine highlights that this presumption **cannot automatically transform** property donated to one spouse into common property without the other's consent and the donor's intention.

From a typological perspective, legal acts concerning common property can be classified into:

- **Conservation acts**, aimed at preserving property integrity (e.g., urgent repairs, claims for recovery);
- **Administration acts**, pursuing usual exploitation of property (e.g., leasing, collecting rents);
- **Disposition acts**, affecting the patrimonial structure and extent (e.g., sale, establishing real rights, donation from common patrimony).

This classification is relevant for determining the **scope of tacit mandate** and when **express consent from both spouses is required**. According to Article 346 Civil Code, **disposition acts regarding common property require express consent of both spouses**, absence of which renders the act voidable or, in some cases, absolutely null.

2.2. Tacit mandate between spouses – Article 345(2) Civil Code

Article 345(2) Civil Code is an important innovation introduced by the new Civil Code concerning matrimonial regimes. It provides: “Each spouse may alone conclude acts of conservation, administration of common property, as well as acts of acquisition thereof.” This norm institutes a **relative legal presumption of a tacit reciprocal mandate between spouses**, applicable within certain limits:

- **Conservation acts** where urgency or necessity justifies unilateral action;
- **Administration acts** without significant patrimonial risk;
- **Acquisition acts** by which property is brought into the common estate.

Thus, the law **allows each spouse to conclude such acts alone**, presuming they act also on behalf of the other. The mandate need not be expressly proven but is presumed by virtue of economic solidarity and common interest underlying the legal community regime. However, **it is essential to observe the limits of this presumption**:

- **It does not cover major disposition acts** over common property (e.g., sale, establishing real guarantees, donation of property from common patrimony);
- **It does not apply to acts of a deeply personal nature**, such as accepting a donation on behalf of both spouses – the focus of subsequent analysis;
- **It can be rebutted by contrary evidence**, including the other spouse's express refusal or a conflicting personal interest.

The notion of “**acquisition act**” used in Article 345(2) should be interpreted cautiously. At first glance, one might consider that any act bringing property into the conjugal estate (including

donation) is an acquisition act. Yet acceptance of a **liberality**, especially when explicitly concerning both spouses, imposes additional requirements regarding **form, donor's intention, and beneficiaries' consent**.

Therefore, analysis of the tacit mandate's applicability to accepting a donation must start from a clear distinction **between bilateral (contractual) and unilateral (liberal) acts**, considering the **solemn and *intuitu personae* nature of donation**.

III. Donation as a mode of acquisition: unilateral acts and multiple beneficiaries

3.1. Donation – Act of liberality and the condition of acceptance

Donation is defined by Article 1011(1) Civil Code as “the act by which a party, called the donor, gratuitously transfers a property from their patrimony to another party, called the donee, who accepts it.” Essential for validity is the **gratuitous** character, intention to gratify, and the **express acceptance** of the liberal act.

Although it is a form of “acquisition,” donation differs fundamentally from onerous acts by the **unilateral** nature of the offer but **consensual** nature regarding validity: for effects, **express acceptance** by the beneficiary is required.

According to Article 1012 Civil Code, acceptance must be made in authentic form and may take place:

- Either **in the same act** as the donor's offer (classic form of authentic donation);
- **Or subsequently**, by another authentic deed, with proper notification to the donor.

This acceptance requirement directly impacts the discussed issue: **if only one spouse is present at the time of authenticating the donation and accepts the liberality, is he/she the legal donee? Can he/she be considered to accept also for the other spouse?**

3.2. Acceptance by one spouse – effects

In practice, it often happens that the **donor intends to donate an immovable property to both spouses, but only one is present at the signing**. In such cases, the public notary, absent an express mandate, may invoke impossibility to finalize the act **stipulating the property as common**, due to the lack of the other spouse's express acceptance.

The legal question: **Can one spouse accept a donation of immovable property on behalf of both under the presumption of tacit mandate** in Article 345(2) Civil Code? If affirmative, it would mean that, although the act is essentially unilateral (liberality), acceptance by one spouse suffices to acquire it into common patrimony, absent opposition by the other.

Doctrine holds divergent views. Some authors argue that donation, being a **solemn and personal act**, requires the clear will of both beneficiaries. Others hold that **if the donor expressly states the property is intended for both spouses, and one accepts in the absence of the other's express opposition, the tacit mandate under Article 345(2) could apply**.

The central problem thus becomes the **interpretation of the notion of “acquisition act”** in Article 345 Civil Code and **its applicability to acceptance of an immovable donation**.

IV. Analysis of the tacit mandate in the case of real estate donations

4.1. Is donation an “act of acquisition” within the meaning of article 345 paragraph (2)?

In order to assess whether the presumed tacit mandate between spouses can justify the acceptance of a real estate donation in the name of both spouses by only one of them, **it is essential to interpret the concept of “act of acquisition”** as used in Article 345 paragraph (2) of the Civil Code.

On one hand, there are arguments in favor of including donations in the category of acts of acquisition:

- **The term "acquisition" has a broad meaning in legal language**, designating any form by which an asset enters the patrimony of a person, regardless of whether it is for consideration or gratuitous;
- **The economic purpose of the act** is to increase the mass of common property, which aligns with the functional logic of the tacit mandate;
- **The donor explicitly expresses the intention to gratify both spouses**, which implies a shared conjugal interest.

On the other hand, **arguments against this extended interpretation arise:**

- **Acceptance of a donation is a legal act of personal will**, often *intuitu personae*, in which the acceptor consciously chooses to receive a gift, **which exceeds the mere administration of the common patrimony**;
- A donation is not just an act of acquisition but also a **solemn act**, imposing formal and personal consent requirements;
- Unlike onerous contracts, the acceptance of a donation does not involve a reciprocal obligation, but it does imply **recognition of an individual patrimonial benefit**, which cannot be imposed on the other spouse without their consent.

Therefore, interpretation must take into account the *sui generis nature of the donation*: it is both an act of disposition for the donor and an act of receiving a gratuitous benefit for the donee, requiring **the convergence of both parties wills**.

4.2.Unilateral acceptance by one spouse and legal effect

In practice, the following situation may arise: the donor wishes to donate an immovable property to both spouses, but only one is present at the signing. That spouse accepts the donation “for himself/herself and his/her spouse,” and the notary includes a stipulation stating that the property is intended for the legal community.

In such a scenario, the question arises – **Can a valid tacit mandate be presumed that allows the present spouse to legally accept the gift on behalf of both?**

The answer is not clear-cut. Legal doctrine includes opinions stating that **if it is later proven that the other spouse knew about and did not object to the acceptance of the donation, the act can be considered tacitly ratified. However, in the absence of clear proof of the other spouse’s consent, there is a risk of partial nullity** (regarding the portion attributed to the absent spouse).

It is also noteworthy that in the event of litigation (e.g., in a partition proceeding or an action to determine the nature of the property), the court will analyze the **donor’s intention and the parties’ expression of will** in order to determine whether the property enters the common patrimony.

4.3.Doctrinal position and jurisprudence

Legal scholarship is divided on the application of Article 345 paragraph (2) in the case of real estate donations:

- One view argues that **the acceptance of a donation cannot be covered by a tacit mandate**, since it requires a solemn and personal manifestation of will, which exceeds the nature of ordinary administration or acquisition acts;

- A second, more flexible view, considers that in the absence of an express refusal by the other spouse and **in the presence of a clear intention by the donor to gratify both spouses**, acceptance by only one of them may produce valid legal effects, especially if the other does not later contest the act.

Case law on this issue remains limited, but some court decisions have held that merely stating in the donation act that the property will be jointly owned is not sufficient unless both spouses expressly accept. Thus, **courts tend to treat the application of the presumption of tacit mandate with caution in the case of solemn and unilateral acts, such as real estate donations.**

V. Practical implications and proposals

5.1. Risk of nullity or voidability in the absence of consent from both spouses

Applying the presumption of tacit mandate between spouses in the context of real estate donations **may generate significant risks of the act** being invalid with regard to the non-participating spouse.

Since the acceptance of a donation is essential for the valid transfer of ownership, the absence of the express consent of one spouse may result in:

- **Partial nullity**, meaning that the donation is valid only in favor of the spouse who expressly accepted it;
- **Legal challenges**, especially during partition proceedings, where the non-participating spouse could request that the property be recognized as the other spouse's personal property;
- **Voidability** of the act if consent was vitiated or a conflict of interest can be proven.

These risks are amplified in situations such as **divorce, death, or enforcement proceedings**, when the legal characterization of the asset (community vs. separate property) carries concrete patrimonial consequences.

5.2. Recommendations for notarial best practices

Given the complexity and risks discussed, it is imperative that **public notaries adopt a cautious practice**, in line with the principles of the matrimonial regime and the legal requirements of donations. The following are recommended:

- **The involvement of both spouses** at the time the donation is concluded, especially if the donor's intention is to gratify both;
- **Requesting an authentic express mandate from the absent spouse**, if they cannot be present for objective reasons, in order to avoid any suspicion regarding consent;
- **Clearly stating in the document the status of the property as common and the express agreement of both spouses**, including with regard to the acceptance of the donation.

It is also useful to draw up a subsequent **ratification document** by the non-participating spouse if they consent to the donation after it was signed. Although this does not equate to initial acceptance, it may help reinforce the shared intent of the spouses.

5.3. Proposal for legislative intervention/clarification

To eliminate uncertainties regarding the application of Article 345 paragraph (2) in the case of donations, a **clarifying legislative intervention is necessary**, either through:

- Expressly amending the legal text to specify whether "acts of acquisition" include **gratuitous legal acts such as donations**, and under what conditions (express acceptance, shared intent, etc.);

- Or by introducing an **express prohibition on applying the presumption of tacit mandate in the case of donations**, thus ensuring that their acceptance remains a personal and solemn act.

Such an intervention would contribute to the uniformity of notarial and judicial practice and protect the integrity of the matrimonial regime of community of property.

VI. Conclusions

The application of the presumption of tacit mandate between spouses in the case of real estate donations raises significant legal issues, since this type of legal act requires an express manifestation of the donee's will and involves an added solemnity that exceeds the scope of ordinary acts of administration or acquisition. Although the concept of "act of acquisition" under Article 345 paragraph (2) of the Civil Code may be interpreted broadly, the inclusion of donations among the acts covered by this rule remains debatable, especially in the absence of the express consent of the non-participating spouse.

Notarial practice should follow a rigorous approach, requiring the participation of both spouses or, in their absence, an authentic express mandate. Furthermore, a clarifying legislative intervention would be beneficial to eliminate uncertainties and ensure the security of civil transactions.

Practical case

Factual situation: Spouses A and B are married under the legal community property regime. Donor X decides to donate them an apartment located in Bucharest, clearly expressing in the deed the intention to benefit **both spouses**. Only wife A appears before the notary and accepts the donation "for herself and her husband." The deed specifies that the property will be "common property acquired during the marriage."

Later, in a partition proceeding, husband B **claims that he did not agree to the acceptance of the donation** and that the property belongs solely to wife A.

Legal issue: Can the acceptance of the donation be valid for both spouses, based on the presumption of tacit mandate, when only one of them signed the deed?

Solution: In the absence of an express mandate or clear proof of the absent spouse's consent, **the deed produces effects only in favor of wife A**. The inclusion of a clause stating that the property is common does not substitute for the other spouse's will. Therefore, the property may be qualified as separate, not common. The acceptance of a donation, being a personal and solemn act, does not automatically fall within the category of acts covered by the tacit mandate presumed under Article 345 paragraph (2) of the Civil Code.

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