# CHAPTER I – GENERAL ASPECTS REGARDING MARRIAGE, THE SUBSTANTIVE AND FORMAL REQUIREMENTS FOR CONTRACTING A MARRIAGE

## 3.1. PRELIMINARY ASPECTS

### 3.1.1. A historical perspective regarding marriage

Marriage is one of the oldest institutions known to the human society, an institution which featured the most diverse characteristics, having been influenced by coordinates pertaining to religion, territory or historical era[1].

In the Carpathian-Danube-Pontic space, in the period of the village community (year 271/275-VIII$^{th}$ century A.D.), marriage was entered into through the free consent of the future spouses, and the Orthodox Church played a decisive role, the marriage being contracted by means of receiving the religious blessing[2]. In the IX$^{th}$- XIV$^{th}$ centuries, marriage continued to be under the influence of the Orthodox Church, and the free consent of the future spouses was expressed by the stages preceding the marriage, namely "seeing each other" and "talking to each other", when the future spouses would meet and agree upon the marriage[3].

The Calimach Code[4] defined marriage, under art. 63, as being the agreement "by which two persons, the male side and the female side, lawfully expressed their will and decision, to live together, in love, in fear of God, in honesty and with inseparable companionship, to bear children, to help each other as much as possible in all matters." Subsequently, under the Romanian Civil Code of 1864[5], the lawmaker

[1] See C. - C. Hageanu, *Family Law and Civil Status Deeds*, Hamangiu Publishing, Bucharest, 2012, p. 22.

[2] See E. Cernea, E. Molcuț, *History of the Romanian State and Law,* "Șansa" S.R.L. Press and Publishing House, Bucharest, 1992, p. 43.

[3] Idem, p. 116.

[4] Calimach Code or Civil Code of Moldova was the legislation which, both through content and through form, came as close as possible to the bourgeois civil codes. The Calimach Code was in force starting with the year 1817 and until December 1$^{st}$, 1865 (in this respect, see E. Cernea, E. Molcuț, *op. cit.* p. 152-153).

[5] The Romanian Civil Code of 1864 was promulgated on December 4$^{th}$, 1864, entered into force on December 1$^{st}$, 1865 and was repealed as of October 1$^{st}$, 2011, as per art. 230 let. a) of Law no. 71/2011 for the application of Law no. 287/2009 regarding the Civil Code (published in the Official Gazette of Romania, Part I, no. 409 dated June 10$^{th}$, 2011).

radically altered the definition of marriage, by transforming it into a civil contract, following the French model[6].

### 3.1.2. The legal concept of marriage

As per some opinions expressed by the specialized literature[7], the term "marriage" has five meanings: a fundamental civil right, a *sui generis* legal deed with a civil nature, a ceremony, the legal status of a married person, as well as a legal institution.

The analysis of marriage as a *sui generis* legal deed with a civil nature presents certain particularities which are common to studying the legal nature of marriage. Thus, as per the specialized literature[8], the legal deed of marriage represents the manifestation of will of a man and a woman, for the purpose of starting a family, as well as a consequence of their exercising the right provided under art. 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms[9], as per which, starting with the age determined by the law, the man and the woman have the right to get married and to start a family, as per the national legislation regulating the exercise of this right.

Another meaning of the term "marriage"[10] is the one referring to the ceremony officiated on the date of execution of the legal deed of marriage, as *negotium.* Equally, marriage also refers to the legal status of the married person. Such legal status of the married person is regulated by the provisions of Chapter V, named "Personal Rights and Duties of the Spouses" (art. 307- 311 Civil Code), as well as the provisions of Chapter VI – "Patrimonial Rights and Obligations of Spouses" (art. 312- 372 Civil Code).

Not lastly, marriage as a legal institution[11] comprises the legal norms which regulate the right of the person to get married, the legal deed of marriage, the legal status of married person.

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[6] As per art. 7 of Title 2 of the French Constitution of 1791, the law considers marriage to be but a civil contract (in this respect, see C. Hamangiu, I. Rosetti- Bălănescu, Al. Băicoianu, *Civil Law Treaty*, vol. I, All Publishing, Bucharest, 1996, p. 185).

[7] See T. Bodoașcă, *Family Law*, III[rd] Edition, reprised and supplemented, Universul Juridic Publishing, Bucharest, 2015, p. 32 and following.

[8] Ibidem

[9] The Convention was signed within the Council of Europe on November 4[th], 1950 and became effective on September 3[rd], 1953. Romania ratified the Convention by Law no. 30/1994, published in the Official Gazette of Romania, Part I,. no. 135 of May 31[st], 1994.

[10] See T. Bodoașcă, *op. cit*., p. 34 and following.

[11]Ibidem.

### 3.1.3. Definition of marriage in the current Romanian legislation

As per the provisions of art. 259 par. (1) Civil Code, "*marriage is the freely-consented union between a man and a woman, executed under the conditions of the law*".

The definition of marriage, as it is provided by art. 259 par. (1) Civil Code, was justly criticized by the specialized literature for multiple reasons, out of which we can mention the use of the term "union". In regard to this matter, we concur with the opinion of the author who defined marriage as being the agreement of will between a man and a woman, occurred under the conditions of the law, for the purpose of starting a family[12].

### 3.1.4. The legal nature of marriage

For the purpose of identifying the legal nature of marriage, during history, the specialized literature has drawn up three theories: a) contractual; b) institutional; c) contractual-institutional.

As per the contractual theory, the contractual character[13] is of the essence of marriage, which is born as a result of the agreement of will of the future spouses, expressed in a solemn manner, in front of the marriage officer. This theory was also the one resulting from the contents of the Romanian Civil Code of 1864, respectively of the French Civil Code of 1804.

The institutional theory was launched by C. Lefebvre, at the beginning of the XX$^{th}$ century, as a reaction to the contractual theory. The followers of the institutional theory claimed that, unlike the freedom granted to the parties to a contract to set their own rights and obligations, the future spouses cannot stipulate the contents of their rights and obligations, reason for which marriage cannot be considered to be a contract.

The contractual- institutional theory (3.1.4.4) grants marriage a double nature, that of a contract and of an institution.

The specialized literature[14] identified the following distinctions between marriage and a contract: in case of a contract, the parties determine, by their agreement, the obligations that they understand to undertake, while with respect to marriage, the future spouses do not benefit from this possibility, and once

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[12] See T. Bodoaşcă, *Analysis and certain critical observations regarding family and marriage as per the new Romanian Civil Code* in *Family law studies, cit. supra*, p. 7 and following.

[13] See C. Hamangiu, I. Rosetti- Bălănescu, Al. Băicoianu, *op. cit.*, p. 184.

[14] See Ionaşcu, I. Christian, M. Eliescu, V. Economu, Y. Eminescu, V. Georgescu, I. Rucăreanu, *op. cit.*, p. 18 and following; A. Pricopi, *Marriage under Romanian law*, Lumina Lex Publishing, Bucharest, 2000, p. 16 ; I. P. Filipescu, A. I. Filipescu, *FamilyLaw*, VII$^{th}$ Edition, revised and supplemented, All Beck Publishing, Bucharest, 2002, p. 14; D. Lupaşcu, *Family Law*, Rosetti Publishing, Bucharest, 2005, p. 31; C. Mareş, *Family Law*, C. H. Beck Publishing, Bucharest, 2015, p.37.

marriage is contracted, the spouses fall under the status of married persons, the content of which is imperatively established by the law. Equally, by executing the contract, the contracting parties pursue different purposes, but in case of marriage, the future spouses have a common goal, the one of starting a family.

In this respect, additional arguments were presented which prove that the thesis of the contractual nature of the legal deed of marriage is unacceptable[15], respectively: the right to execute a contract is recognized both to legal persons and to natural persons, while the right to get married only belongs to natural persons; if, in case of contracts, each party can be composed from one or more natural or legal persons, in case of marriage, only a man and a woman may be parties; a contract is a consensual legal deed, while marriage is a profoundly solemn deed; upon execution of a contract, the parties can be personally present or may be represented by another person, while in case of marriage, the parties must be personally present. As for us, we concur with this latter opinion, and in support thereof, we may also add that, if in case of contracts, under the provisions of art. 1276 Civil Code, the parties may proceed to unilateral termination without cause, such institution of unilateral termination without cause is not applicable to marriage.

### 3.1.5. The legal characteristics of marriage

As per the opinions of certain authors[16], in a generic meaning, the characteristics of marriage are the following: marriage is a union between a man and a woman; marriage is based on free consent; marriage is monogamous; marriage is contracted under the forms required by the law; marriage has a civil nature; marriage is contracted for life; marriage is based on the full equality of rights between man and woman; marriage is contracted for the purpose of starting a family.

By comparing the above-mentioned characteristics with the general principles of family law, we concur with the opinion of the authors[17] who state that part of these are, in fact, principles, while others are subordinated to the secular or solemn nature of marriage. Thus, the legal characteristics of marriage are the secular and the solemn ones.

The secular character of marriage results from the provisions of art. 48 par. (2) I$^{st}$ thesis of the Constitution. Thus, the conditions for the contracting of marriage, for the termination thereof and the causes of nullity of marriage are established by the law.

The solemn character of marriage results from the imperative conditions required for the valid contracting of marriage, the provisions of art. 278- 289 Civil Code, as well as the provisions of art. 24-31

[15] See T. Bodoașcă, *Family law, cit. supra*, p. 36 and following.

[16] See I. P. Filipescu, A. I. Filipescu, *op. cit.*, p. 14- 15.

[17] See T. Bodoașcă, *Family law, cit. supra*, p. 39- 40.

of Law no. 119/1996 regarding civil status deeds. As an example for the above-mentioned imperative conditions, we can mention the following: the requirement of issuance of the marriage statement for the future spouses, the posting of the marriage statement, the performance of the marriage ceremony at the competent office.

## 3.2. THE SUBSTANTIVE CONDITIONS FOR CONTRACTING A MARRIAGE

### 3.2.1. General aspects regarding the substantive conditions for the contracting of marriage

The substantive conditions for contracting marriage are "requirements of the law" which need to be fulfilled by the persons who intend to get married, without being important whether these are positive or negative legal requirements, while the impediments are factual circumstances affecting the future spouses, which are not in accordance with the legal requirements[18]. In this respect, the provisions of art. 271-277 Civil Code are essential, regulating the substantive conditions for the contracting of marriage, the provisions of art. 278-289 Civil Code regarding the formalities for the contracting of marriage, and of art. 24-31 of Law no. 119/1996 regarding civil status deeds.

The valid contracting of marriage implies the compliance with all the substantive and formal conditions imposed by the lawmaker, the failure to comply with such conditions leading, as the case may be, to the absolute or relative nullity of marriage. The Civil Code regulates the absolute nullity of marriage (art. 293-296) and the relative nullity of marriage (art. 297-303) in Chapter IV of Title II of Book II, entitled "About Family".

### 3.2.2. The existence of a sexual difference between the future spouses

Under the current legal provisions, the lawmaker expressly stated the fact that the marriage between persons of the same sex is forbidden (art. 277 Civil Code), the breach of this requirement being sanctioned with the absolute nullity of marriage. The validity condition of marriage, regarding the sexual difference, is also clearly specified under the provisions of art. 271 Civil Code, as per which "marriage is contracted between a man and a woman by their personal and free consent", respectively under the provisions of art. 259 par. (2) Civil Code, as per which "a man and a woman have the right to get married for the purpose of starting a family." In this manner, a legislative gap was remedied, which existed in the previous legislation, as the Family Code did not specifically provide the requirement of sexual differentiation upon contracting of marriage, as the lawmaker had not taken into consideration the anomaly of claiming the right to execute a valid marriage between persons of the same sex.

[18] Idem, p. 58 – 59.

The inexistence, within the Family Code, of the condition of sexual differentiation upon contracting of marriage placed under a question mark the interdiction of marriage between persons of the same sex, and the ambiguity[19] was increased by the fact that the Constitution itself did not settle this matter, art. 48 par. (1), providing that "family is based on the freely-agreed marriage between spouses", without any other distinction. For the purpose of amending the provisions of art. 48 par. (1) of the Romanian Constitution, by replacing the term "spouses" with the phrase "between a man and a woman", on 6th and 7th of October 2018 a Referendum was held for the revision of the Constitution for the purpose of defining the family. Following the fact that the conditions provided by art. 5 par. (2) of Law no. 3/2000 regarding the organization and development of the referendum[20] were not met, conditions imposing that at least 30% of the number of persons registered on permanent election lists should participate to a referendum so that it would be considered as valid, the referendum was invalidated. Consequently, as the provisions of art. 151 par. (3) of the Constitution were not complied with, the provisions of art. 48 par. (1) of the Constitution remained unchanged, and continue to stipulate that "family is based on the freely-agreed marriage between the spouses ...".

### 3.2.3. Becoming of matrimonial age

Civil legal deeds represent prevision deeds, as the parties pursue the accomplishment of a certain purpose and estimate the achievement of a certain result, reason for which it is understood that their execution implies the existence of the parties' discernment, namely their faculty to judge and fairly ascertain on the necessity and opportunity of the execution of a legal deed, after a rational analysis of its consequences[21]. Therefore, it was correctly stated that a person possesses these faculties only after a certain age and only after acquiring certain life experience[22]. Having regard to the above, as well as to the importance, purpose, respectively the implications of marriage for the life of a person, the lawmaker provided, under art. 272 par. (1) Civil Code, the fact that the minimum age when the future spouses may contract marriage is of 18 years old.

[19] See T. Bodoaşcă, *Ensemble Examination and Critical Observations regarding Family and Marriage under the New Civil Code, cit. supra*, p. 29.

[20] Law no. 3/2000 regarding the organization and development of the referendum was published in the Official Gazette of Romania, Part I, no. 84/2000.

[21] See I. Reghini, Ș. Diaconescu, P. Vasilescu, *op. cit.* p. 133-134.

[22] Ibidem.

### 3.2.3.3. The Exception from the Principle of Matrimonial Age

By means of exception from the provisions of art. 272 par. (1) Civil Code, the minor aged 16 is able to get married under the following conditions: if there are solid reasons justifying this decision, if there is a favourable medical approval for the minor, if there is a consent of the parents (or, as the case may be, of the guardian or of the authority exercising the parental rights), as well as the authorization from the guardianship court.

The first requirement which should be met, in order for the marriage to be allowed under the conditions of art. 272 par. (2) Civil Code, is that the minor, irrespective whether it is a man or a woman, should be 16 years of age. In our opinion, this requirement must be met on the date the guardianship court is vested with the request of authorization of the marriage, and not on the date of contracting the marriage. In our opinion, without supporting cohabitation out of wedlock, the age of 16 may prove to be incompatible with the simultaneous fulfillment of obligations resulting out of marriage, respectively with the continuation of studies by the under-age future spouses. Without a doubt, in case the future spouses have conceived a baby, there may be voices to argue that the latter's interest should be of utmost importance in this context, and that the age of 16 of the future spouses should not be an impediment in their raising and educating the child, who could only benefit from a proper family within a married couple. But, considering that usually people graduate from high school at an average age of 18-19, we wonder whether the future spouses, becoming parents at an age of 16, would have the necessary means of living, respectively the life experience necessary to ensure a healthy upbringing and education of the child, or whether authorizing the contracting of marriage of the future spouses under the age of 18 would actually represent a mistake or even a danger both for the future spouses, and for their child. Without a doubt, the provisions of art. 272 par. (2) Civil Code regarding the authorization of marriage to the minor who is 16 years of age represents and exception and not the rule, but it is our opinion that the institution of authorizing the marriage of minors should be regarded with caution, in which respect we believe that the minimum age for authorizing such marriage should be amended, either to 17 years of age, or to 17 years and 6 months, for reasons pertaining to the education and life experience of the future spouses.

Separately, in case the marriage is annulled, the provisions of art. 39 par. (2) Civil Code provide that the minor who had acted in good faith upon execution of the marriage, preserves their full capacity of exercise of their rights. The text of art. 39 par. (2) Civil Code requires various observations. First of all, the minor who had acted in bad faith upon contracting of the marriage does not get to preserve their full capacity of exercise of their rights, if, on the date the court decision for annulment of the marriage becomes definitive, they are not yet 18 years old.

On the other hand, the circumstance that on the date the court decision of annulment of the marriage becomes definitive, the bad faith spouse had become of age, is not synonymous with preserving

their capacity of exercise of their rights for the interval elapsed between the date of contracting the marriage (date of acquiring full capacity of exercise of their rights) and the date of becoming of age. In such case, some authors[23] have fairly pointed out that, as a result of retroactivity of the nullity of marriage, it will be deemed that the bad-faith spouse had not had a full capacity of exercise of their rights between the date of contracting marriage and until the date of becoming 18 years of age.

Another issue most discussed in the specialized literature was related to establishing whether the minor who has obtained their capacity of exercise of their rights in advance, under the conditions of art. 40 Civil Code, should still follow the procedure provided under art. 272 par. (2)- (5) Civil Code, in order to get married in a valid manner.

In our opinion, the emancipated minor should carry out the procedure provided by art. 272 par. (2)- (5) Civil Code, in compliance with the principle *ubi lex non distinguit, nec nos distinguere debemus*, as art. 272 par. (2) Civil Code does not make any distinctions between the minor's presence or absence of full capacity of exercise of their rights. Similarly, we note that as per the previous legal provisions, the consequence of contracting marriage under the conditions of art. 4 par. (2) Family Code was the one that the married minor acquired full capacity of exercise of their rights. Thus, the lawmaker had ensured the existence of chronological steps, which we deem appropriate. The circumstance that a minor got married under the conditions of art. 4 par. (2) Family Code represented the most eloquent proof that they had reached the level of maturity equivalent of acquiring full capacity of exercise of their rights.

Separately, the case law has considered as solid grounds justifying the marriage of the under-age woman or man, as the case may be: the pregnancy of the future wife[24], the birth of a child, a grave illness of one of the spouses, the future spouses living out of wedlock or notorious intimate relations between the man and the woman he intended to marry[25] .

As for the condition of the medical approval, it has been justly pointed out that the purpose of such requirement is that the lawmaker deemed necessary to ensure that the minor was psychologically, physically and intellectually fit to undertake the obligations arising from the act of marriage, as well as the consequences of married. Thus, even though the content of the approval is not clearly specified in the legislation, it should comprise elements regarding the health condition, the degree of physiological, psychological, intellectual maturity of the minor who intends to get married.

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[23] See I. Reghini, Ș. Diaconescu, P. Vasilescu, *op. cit.*, p. 140.

[24] See Piatra Neamț Court, Decision nr. 3733/ 2018, available online at: https://sintact.ro/#/jurisprudence/535105756/1/incheiere-nr-3733-2018-din-02-oct-2018-judecatoria-piatra-neamt-casatorie-minor-minori-si-familie?keyword=autorizare%20casatorie%20varsta&cm=SREST

[25] See: G. C. Frențiu, *op. cit*., p. 46; A. Gheorghe ,,*Conditions of Validity of the Legal Deed of Marriage*" in the *New Civil Code, Studies and Commentaries, cit. supra,*. p. 642.

The consent/approval of the parents of the future spouses represents a manifestation of will, a unilateral legal deed by which they agree with the contracting of the marriage but, at the same time, a deed meant to attest the existence of the justified reasons. However, the consent of the parents cannot be qualified as a component of the consent for marriage of the spouses, as it is known that for the contracting of marriage, the sole consent of the future spouses is sufficient and necessary[26]. At the same time, irrespective of the person approving the marriage, it should be made in writing.

From a procedural point of view, the request of authorization of the marriage falls under the competence of the guardianship court from the domicile of the future underage spouse, as per the provisions of art. 272 par. (2) Civil Code. For settlement of this request, the court will mandatorily hear the minor future spouse, as per the provisions of art. 264 par. (1) and (4) Civil Code.

### 3.2.4. Not Being Already Married

Similarly to the previous legal provisions (art. 5 Family Code), monogamy is, in the current legislation as well, one of the general principles of family law. Thus, the provisions of art. 273 Civil Code forbid the contracting of new marriage by the person who is married, while the provisions of art. 293 Civil Code sanction the breach of these provisions with the absolute nullity of the subsequent marriage.

As for the provisions of art. 273 Civil Code, we must reach the conclusion that the persons who are about to contract marriage should be single, divorced or widowed. In this respect, for avoiding bigamy cases, regarding the future spouses who had already been married, the provisions of art. 42 par. (1) let. d) of the Methodology state that they will attach to the marriage statement "documents, in original and in copy, translated and legalized or certified by the marriage officer, attesting the termination of marriage (divorce certificates), if the case", while art. 42 par. (3) of the Methodology provides that "the proof of termination of the previous marriage is the death certificate of the former spouse".

A case regulated by the lawmaker both under the previous and under the new current legislation is the one of new marriage being contracted after one spouse had been declared dead, by court decision, and subsequently the spouse declared dead returns. Thus, this situation is provided in the current legislation under art. 293 par. (2) Civil Code, and the solution offered by the lawmaker is the maintaining of the second marriage and the termination of the former one, on the date of contracting the second marriage, provided that the spouse of the one who had been declared dead should have acted in good faith. Concurring with other authors[27], we note that in case the spouse of the one who had been declared dead had acted in good faith, it would be preferable to terminate the second marriage, as of the date the

[26] See T. Bodoaşcă, *op. cit.*, p. 274.

[27] Ibidem.

court decision of annulment of the declaration of death of the first-marriage spouse remained definitive. This solution is based on the argument of good-faith of the spouses of the second marriage, who contracted the marriage being in error with respect to the fact that the person declared dead was actually alive, as well as on the principle of retroactivity of the effects of the annulment of the court decision declaring the death of the first spouse, which should lead to the annulment of the subsequent legal deed, namely the annulment of the second marriage[28].

### 3.2.5. The Inexistence of Natural or Civil Kinship

As per art. 274 par. (1) Civil Code, marriage between straight-line relatives, as well as between collateral relatives up to the fourth degree inclusively is forbidden. The sanction for breach of this interdiction is provided by art. 293 Civil Code and consists in the absolute nullity of marriage. The notions of "straight-line relatives", respectively "collateral relatives" are clarified as per art. 406 par. (1) Civil Code, "straight-line relatives are in case of a person being the descendent of another person", and collateral relatives "result from the fact that various persons have a common ascendant". In case of straight-line relatives, the degree is established depending on the number of births, children and parents are first degree relatives, and grand-children and grand-parents are second-degree relatives.

As per the provisions of art. 406 par. (3) let. b) Civil Code, in case of collateral relatives, the degree of kinship is established by the number of births, going up from one of the relatives until the common ascendant and then going down from that person to the other relative.

As the law does not distinguish, we concur with the authors who state that the interdiction of concluding marriage between straight-line relatives, and between collateral relatives up to the fourth degree inclusively, is valid irrespective whether the kinship is from a maternal or paternal side, resulting from marriage or from outside marriage[29].

Most of the authors[30] have deemed that kinship resulting from outside marriage represents an impediment for marriage, irrespective whether or not it has been ascertained under the forms provided by the law, and in support of this point of view, it was shown[31] that it would be monstrous to allow the marriage between father and daughter, motivated by the lack of ascertainment of the paternity by means of court decision, respectively in absence of the daughter's recognition by her father. In this regard, it was

[28] Ibidem.

[29] See T. Bodoaşcă, *op. cit.,* p. 71.

[30] Idem, p. 71-72. Similarly, also see M. M.Oprescu, M. A. Oprescu , M. Șcheaua, *op. cit.,* p. 51.

[31] See T. Ionașcu, I. Christian, M. Eliescu, V. Economu, Y. Eminescu, V. Georgescu, I. Rucăreanu, *op. cit.,* p. 49.

justly stated that both the provisions of art. 6 par. (1) Family Code, and the ones of art. 274 par. (1) Civil Code do not distinguish between the kinship relationship having been legally ascertained or not.

As per art. 274 par. (2) Civil Code, "for justified reasons, marriage between collateral family of the fourth degree may be *authorized* by the guardianship court in the jurisdiction of which the claimant of *approval* has their domicile. The court may issue its decision based on a special medical approval issued in this respect." In our opinion, the text of art. 274 par. (2) thesis I Civil Code may be criticized for at least two reasons. First of all, such marriage should be subject to the authorization of the guardianship court, similarly to the provisions of art. 272 par. (2), (4) and (5) Civil Code, but the lawmaker shows inconsistency, by using in the final part of the provision the term "approval", which in our opinion contradicts the provisions of art. 36 par. (1) of Law 24/2000 regarding the norms of legislative technique for the drafting of normative acts. Without a doubt, the two notions – "authorization" (authorization has the meaning of granting someone the right to do something[32]), respectively, "approval" (approval means consent, agreement[33]), although apparently similar, have different meanings, which is why the lawmaker should have used them with more caution.

Similarly, art. 272 Civil Code, which regulates the age exemption, comprises both notions, both the approval and the authorization, however it being specified that in this case, the notions are clearly differentiated and used in an appropriate manner. Or, unlike the case of the age exemption provisions, in case of the kinship exemption, it is not necessary to obtain the approval of the parents or of the guardian. Our opinion is that the lawmaker chose to use the notion of "approval", either to avoid the repetition of the term "authorization", or, as a result of the fact that the similar provisions comprised in the previous regulations (art. 6 par. 2 Family Code) regarded the approval of the marriage between fourth degree collateral family members by the general mayor of Bucharest or president of the county council where the claimant had their domicile.

As for the conditions to be fulfilled for the purpose of authorization of marriage between collateral fourth degree family members, the lawmaker provided a special medical approval and justified reasons (the comments made in this respect within the chapter related to the marriage with age exemption are also applicable to the marriage with kinship exemption).

[32] See *Dex,* p. 86.

[33] See *Dex*, p. 596.

### 3.2.6. The Absence of the Guardianship Relation

As per the previous regulations, the provisions of art. 8 of the Family Code stated that during the term of guardianship, marriage is prohibited between the guardian and the minor person under guardianship. However, the non-observance of this impediment did not produce any effect as for the validity of the marriage, as the lawmaker had not instated any sanctions in case of breach of the provisions of art. 8 Family Code.

As per the current regulations, the lawmaker reprised, by the provisions of art. 275 Civil Code, the provisions of art. 8 Family Code, also stating that the breach of the provisions of art. 275 Civil Code was provided under the sanction of the relative nullity of the marriage (art. 300 Civil Code). The interdiction of marriage between the guardian and the minor under guardianship is limited in time, until the date of termination of the guardianship or until the termination of the guardian's capacity, however noting that it is mandatory that the guardian be released of their duties as per the provisions of art. 162 par. (1) Civil Code.

### 3.2.7. The Existence of Discernment

As per art. 276 Civil Code, it is forbidden for the mentally alienated and mentally ill to be married. Similar provisions were also found in the Family Code. In this respect, art. 9 Family Code would forbid the marriage of the mentally alienated, mentally ill as well as of the person temporarily lacking mental capacities, while the latter did not possess discernment over its deeds.

The interdiction of marriage for the mentally alienated or mentally ill is justified by the fact that the future spouses must express their valid consent, or the state of mental alienation or mental illness represents a state which excludes the freedom of consent[34]. On the other hand, by forbidding marriage of the mentally alienated or mentally ill, the lawmaker aimed to ensure, within marriage, the existence of normal relationships both between the spouses and between the spouses and the children, as well as the removal of the possibility of procreation of children with psychological deficiencies[35].

The notions of mental alienation and mental illness included, in history, illnesses such as schizophrenia, mental retard, as well as other similar illnesses which have in common an altered discernment of the person, even if they would sometimes have lucid moments. As for epilepsy, the courts

[34] See I. P. Filipescu, A. I. Filipescu, *op. cit.*, p. 26.

[35] See Supreme Court, DeCivil Code nr. 1517 dated 1967 apud I. P. Filipescu, A. I. Filipescu, *op. cit.*, p. 26.

have deemed that it represents an illness which affects the nervous system, but which does not represent an impediment for a valid marriage.[36]

Returning to the provisions of art. 276 Civil Code, we may note that the lawmaker does not distinguish with respect to the interdiction for the mentally alienated or mentally ill person to get married, between whether they have been placed under court interdiction or not, as this impediment has a biological and social nature, and the sanction applicable in case of breach of this interdiction is absolute nullity, irrespective whether the contracting of marriage had occurred during a temporary moment of lucidity of the mentally alienated or mentally ill person.

### 3.2.8. Expressing the Consent for Marriage

The Roman law consecrated the principle as per which "the consent is the one making the wedding"[37]. Thus, the consent is of the essence of a marriage. As per the provisions of art. 271 Civil Code, "marriage is contracted between a man and a woman, by means of their personal and free consent". Therefore, the consent is a primordial requirement for the purpose of a valid marriage. The condition of consent also results from the provisions of art. 48 par. (1) of the Constitution of Romania, respectively from the ones of art. 16 par. (2) of the Universal Declaration of Human Rights.

On the moment of contracting the marriage, the consent needs to be expressed in a clear manner, in full awareness, and with a matrimonial intention[38], thus a potential promised made previously to the marriage does not present any legal force, and neither does the consent expressed in writing within the statement of marriage replace the consent validly expressed for the contracting of the marriage[39].

The consent may be affected by faults such as fraud, violence or error.

The good-faith is an element which should govern marriage, even from the moment of its contracting, which is why the lawmaker has set the sanction of relative nullity of marriage in case the consent of either spouse has been affected by fraud [art. 298 par. (1) Civil Code].

Fraud, as a fault of consent, represents as well a false representation of reality generated by the conduct of the other party which, by devious means, or by fraudulent omission of providing information

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[36] Supreme Court, S. civ., DeCivil Code nr. 1134/1974, I. G. Mihuţă, Al. Lesviodax, *Repertoire of case law in civil matters of the Supreme Court and other courts during the years 1969-1975*, Scientific and Encyclopedic Publishing, Bucharest, 1976, p. 15.

[37] Lat. *Nuptiae consensus contrabentium fiunt (*in this respect, see V. Gavrilă, *Marriage – File for the Kingdom of Heaven*, "Romanian Tradition" Foundation, Bucharest, 2004, p. 40 apud A. Gherghe *Conditions of validity of the legal deed of marriage* in the *New Civil Code, Studies and commentary, cit. supra,* p. 633).

[38] See E. Florian, *op. cit.,* p. 22.

[39] See M. M. Oprescu, M. A. Oprescu, M. Șcheaua, *op. cit.,* p. 44.

on aspects which should have been communicated, manages to mislead the other party. Under this aspect, as per a point of view, the main fraud – related to aspects which were essential for contracting marriage, is liable to lead to the annulment of marriage. Consequential fraud, related to elements which were not determining for the contracting of marriage, should not lead to the annulment of marriage. It has been deemed that determining aspects for contracting marriage are aspects such as the person and personality of the future spouse, which have a predictable effect on the conjugal relationship, such as age, reputation, education, health, marital history.[40]

As per the specialized literature[41], violence was defined as the fault of consent consisting in the threatening of a person with an act likely to unlawfully cause fear, determining them to execute a legal deed which otherwise they would not have executed. At the same time, as it was suggestively stated in the specialized literature[42], the error and fraud are faults of consent which undermine from inside the conscious character of the legal will, while violence opposes the freedom of will from the outside. Violence may be physical, if the threat is related to the physical integrity, assets of the person, or moral, when the threat regards the honour or the feelings of the person or of their close ones[43].

The specialized literature has created the idea that the violence must present a degree of intensity likely to affect the will of the person consenting to the marriage[44]. Considering the circumstances in which marriage is contracted, the cases of faults of consent by physical violence are very rare, but this does not exclude the cases of moral violence, or of physical violence exercised prior to the moment of contracting marriage. Not lastly, we note that, as per the provisions of art. 1220 par. (1) Civil Code, corroborated with the fact that in the field of marriage there are no derogatory provisions from the rules stated above, it may be concluded that the violence may be exercised by a third party as well, and not only by the future spouse, however the annulment of marriage will be conditional upon the fact that the other spouse, whose consent was not faulty, had known or should have reasonably known about the violence exercised by the third party.

[40] See E. Florian, *op. cit.,* p. 57.

[41] See G. Boroi, L. Stănciulescu, *Civil Law Institutions in the New Civil Code*, Hamangiu Publishing, 2012, Bucharest, p. 109.

[42] See I. Reghini, Ș. Diaconescu, P. Vasilescu, *op. cit.* p. 510.

[43] See O. Ungureanu, C. Munteanu,*op. cit.,* p. 280.

[44] See: M. Avram, *op. cit.,* p. 97; A. Gherghe *Validity Conditions of the Legal Deed of Marriage in the New Civil Code, Studies and commentaries, cit. supra,* p. 691.

As per art. 298 par. (2) Civil Code, "error represents a fault of consent only when it concerns the physical identity of the future spouse". As for the scope of the error, some authors[45] have stated that the lawmaker limited the error strictly to the physical identity of the future spouse, so consequently any other error related to physical or psychological features, professional training, social status, temperament, character, does not produce any effect as to the validity of marriage.

### 3.3. FORMAL REQUIREMENTS FOR THE CONTRACTING OF MARRIAGE

#### 3.3.1. Preliminaries

The solemn character of marriage requires the observance of certain formal requirements for the contracting of marriage, conditions consisting of the formalities provided by the law for the purpose of execution of the legal deed of marriage, as *negotium*[46].

#### 3.3.2. Formalities Prior to the Contracting of Marriage

The statement of marriage is the legal deed through which the future spouses express their intention of getting married, as it results from the provisions of art. 280 par. (1) Civil Code. Moreover, similar provisions also existed in the previous regulations, namely in art. 12 par. (1) Family Code.

With respect to the statement of marriage, some authors have justly noted that it is not the equivalent of the consent for marriage, because it would not comply with the requirement of the actuality of the consent for marriage[47] and neither does it represent an irrevocable promise for the contracting of marriage, thus the role of the statement of marriage is the one of setting out the premises for the execution of marriage and of establishing whether the conditions of the law for the validity of marriage are met[48]. In accordance with the provisions of art. 281 Civil Code, respectively art. 25 par. (1) thesis II of Law no. 119/ 1996, the statement of marriage comprises the following: the manifestation of will of the future spouses with respect to the fact that they wish to marry each other, the identification data of the future spouses, their statement that there are no legal impediments for the contracting of marriage, the understanding of the future spouses on the name they will have during marriage (as per art 282 Civil Code, they may agree to keep the name they had before the marriage, to take the name of either of them or their reunited names), the chosen marital regime (legal community, asset separation or conventional community).

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[45] See: E. Florian, *op. cit.*, p. 34; A. Gherghe, *Validity Conditions of the Legal Deed of Marriage in the New Civil Code, Studies and commentaries, cit. supra,* p. 635.

[46] See T. Bodoaşcă, *op. cit.,* p. 77-78.

[47] See I. Albu, *op. cit.*, p. 75.

[48] See T. Bodoaşcă, *op. cit.,* p. 80- 81.

As for the statement of the future spouses resulting that there are no impediments for marriage, it actually represents a statement on own liability, which is why, in case they knowingly issued a statement which did not correspond to the reality, they would be guilty of the crime of false under private signature documents, provided by art. 322 Criminal Code.

As for the formal conditions of the statement of marriage, it should be issued in person by the future spouses, in writing, exclusively in front of the marriage officer or of its delegate and it must be submitted with the City Hall where the marriage will take place. However, only in expressly permitted cases, the statement of marriage may be submitted outside the City Hall headquarters, as per art. 280 par. (2) Civil Code.

#### 3.3.2.1. The Attributions of the Marriage Officer regarding the Statement of Marriage

As per art. 283 par. (1) Civil Code, "on the same day of receipt of the marriage statement, the marriage officer decides the publication thereof, by posting an excerpt thereof in a specially designated place at the City Hall headquarters and on its webpage, at the place where the marriage would be contracted and, as the case may be, at the headquarters of the City Hall where the other spouse has their residence or domicile." The purpose of the above-mentioned provisions resides in the need to ensure the publicity of the statement of marriage, which would become known to third parties, who as per art. 285 Civil Code, may file an opposition to the marriage, within 10 days from the date of posting the excerpt of the statement of marriage.

If, based on the verifications that it is required to perform, the oppositions received or the information it holds, to the extent to which they are notorious, the marriage officer ascertains that the conditions provided by the law are not met, under art. 286 Civil Code, as well as under art. 28 of Law no. 119/1996, it shall refuse to officiate the marriage.

#### 3.3.2.2. Mutual Information on the Health Conditions

The obligation of the future spouses to communicate each other their health condition, prior to the contracting of marriage, is provided under art. 278 Civil Code. As for the purpose pursued by the lawmaker through these provisions regarding the spouses informing each other of their health condition, it has been judiciously concluded[49] that it was intended to draw attention to the persons intending to get married on the dangers that may exist for themselves but also for the children which would result from the marriage, if the future spouses contracted the marriage being unaware of their improper health conditions.

[49] See T. Ionașcu, I. Christian, M. Eliescu, V. Economu, Y. Eminescu, V. Georgescu, I. Rucăreanu, *op. cit.*, p. 45.

The breach of the provisions of art. 278 Civil Code is not provided under sanction of the nullity of marriage, but the omission of a spouse to communicate the other the illness affecting them may represent fraud by reticence, if the ill spouse had been aware of such illness affecting them[50].

### 3.3.2.3. Oppositions to the Marriage

As per the specialized literature[51], the opposition to marriage was defined as the deed by which a person informs the marriage officer of the existence of factual or legal circumstances which do not allow the contracting of the marriage.

Some authors have expressed the opinion as per which the opposition to marriage[52], as a typology, may be considered as a claim, namely a means of petition, the legal regime of which is provided by the Government Ordinance no. 27/ 2000 regarding the activity of solving petitions[53]. As for the right to file an opposition to marriage, it was characterized as a potestative right[54]. Concurring with the above stated opinions, however we believe that through this claim, the right of opposition to marriage materializes, as a potestative right.

The term for submission of the opposition results from the provisions of art. 283 par. (2) Civil Code, respectively within 10 days from the date of posting the statement of marriage. The opposition[55] must be made in writing and must comprise the proof supporting it, while the author of the opposition shall not be obliged to justify an interest.

### 3.3.2.4. The Celebration of Marriage

Marriage is executed in front of the marriage officer or of a person delegated by it, and in the presence of two witnesses, as per the provisions of art. 287 par. (1) Civil Code, respectively of the UN Convention on the consent for marriage, minimum age and registration of marriage. As per some

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[50] See T. Bodoașcă, *Family Law, cit. supra,* p. 82

[51] See I. P. Filipescu, A. I. Filipescu, *op. cit.*, p. 31.

[52] For the opinion as per which the opposition to marriage is a negative potestative act, see I. Najjar, *Le droit d'option. Contribution a l'etude du droit potestatif et de l'acte unilateral*, Paris, LGDJ, 1967, p. 119 apud M. Avram, *op. cit.*, p. 64.

[53] Government Ordinance no. 27/2002 was published in the Official Gazette of Romania, Part I, nr. 84 of February 1st, 2002, as subsequently amended and supplemented.

[54] See I. Reghini, *Consideration on potestative rights, in* "Pandectele Române" nr. 4/2003 available on https://sintact.ro/#/publication/150998689?keyword=IONEL%20REGHINI%20CONSIDERATII%20PRIVIND%20DREPTURILE%20POTESTATIVE&cm=SFIRST

[55] See C. - C. Hageanu, *Family Law and Civil Status Deeds*, Hamangiu Publishing, Bucharest, 2012, p. 42.

authors[56], in accordance with the provisions of art. 29 of Law no. 119/ 1996, on the date and hour scheduled for the execution of marriage, the marriage officer or the delegated person shall perform the following formalities: they identify the future spouses, based on their identification documents; they ascertain the fulfillment of the conditions provided by the law for the valid execution of marriage; they establish that there are no oppositions to marriage or that the ones filed are not grounded, premature or tardive, as the case may be; they verify the presence of at least two witnesses; they request the future spouses to express their consent of marriage; if the future spouses express their consent, they publicly declare the marriage as contracted; they read to the spouses the provisions of the Civil Code regarding the rights and obligations of the spouses; they immediately register the marriage deed in the civil status registry; they sign together with the spouses and witnesses in the civil status registry; they make the registration, in the identity document of the spouse who changed their name; they issue the marriage certificate to the spouses.

Unlike the previous regulations which did not comprise express provisions regarding the moment of contracting the marriage, which is why it was considered that the moment when the future spouses granted their consent for marriage was the moment of contracting the marriage, in the current regulations the lawmaker decided that the moment of contracting marriage is the moment when, after having heard the consent of each of the future spouses, the marriage officer declares them to be married (art. 289 Civil Code).

### 3.3.3. Formalities Subsequent to the Contracting of Marriage

Once the future spouses have expressed their consent for the contracting of the marriage, as per art. 290 Civil Code "the marriage official immediately drafts, in the registry of civil status deeds, the deed of marriage which is signed by the two spouses, the two witnesses and the marriage officer". The registration of the marriage in the civil status registry is not a solemn condition for the contracting of marriage, thus the case law[57] has justly stated that the omission of such registration does not entail the nullity of marriage.

As per the provisions of art. 53 par. (1) of the Methodology, "after the contracting of marriage, the marriage officer cancels the identity card of the spouse who changes their name by marriage". Moreover, as per art. 291 Civil Code, after the registration of the legal deed of marriage, the marriage officer shall mention, on the marriage deed, the chosen marital regime and shall communicate, at once, a

[56] See T. Bodoaşcă, *Family Law cit. supra.*, p. 84

[57] See Dec. no. 1721/1979 in "Romanian Law Magazine" nr. 2/1980, p. 56 and C.D. 1979, p. 138.

copy thereof to the National Notary Registry of Marital Regimes, as well as to the notary who authenticated the marital convention.

## 4. CHAPTER II. GENERAL ASPECTS OF THE NULITY OF CIVIL DEEDS

### 4.1. PRELIMINARIES

The specialized literature has defined nullity as being "the civil law sanction which suppresses, to the extent established by court decision, the effects of the legal deed which are contrary to the purpose pursued by the legal provisions regarding its conditions of validity"[58]. Noting that the current regulations also provide the notion of amicable nullity, one must notice that the nullity should no longer only refer to the court decision, which is why we concur with the opinion as per which the nullity is the sanction which renders the legal deed devoid of the effects contrary to the legal norms provided for its valid execution[59].

### 4.2. THE DIFFERENCE BETWEEN NULLITY OF THE LEGAL DEED AND OTHER CIVIL LAW SANCTIONS

The caducity is a cause of ineffectiveness affecting a legal deed, which is prevented from producing its effects, as a result of an event which occurs independently of the will of the parties, subsequently to the execution of the legal deed. Unlike caducity, nullity occurs at the same time with the execution of the civil legal deed. At the same time, the cause of nullity may be attributed to the parties of the deed, while in case of caducity, the cause is independent of the will of the parties. Another difference is that nullity has retroactive effect - *ex tunc*, while caducity does not cancel the legal deed, thus having only effect for the future (*ex nunc*). Considering these aspects, nullity represents a sanction, while caducity is not a sanction but an incident which prevents the occurrence of the desired effects of the contract, as it renders the deed devoid of one of its elements (object, cause) or even of the subjects that its effects envisage[60].

Termination for cause represents the civil sanction consisting in the retroactive termination (*ex tunc*) of a synallagmatic contract with immediate execution (*uno ictu*), upon request of one of the parties, following the non-execution of the obligation of the other party, for reasons attributable to the latter's

[58] See P. Cosmovici, *Civil Law Treaty,* Academy of the Socialist Republic of Romania Publishing, Bucharest, 1989, p. 212.

[59] See G. Boroi, C.A. Anghelescu, *Civil Law Class. General Part.,* Second Edition, revised and supplemented, Hamangiu Publishing, Bucharest, 2012, p. 236.

[60] See I. Reghini, Ș. Diaconescu, P. Vasilescu, *op. cit.,* p. 582

fault[61]. Termination for cause is similar to nullity considering that both legal sanctions represent causes of ineffectiveness of the legal deed and require, in principle, a court decision. At the opposite end, the differences between nullity and termination for cause are the following: termination for cause affects synallagmatic contracts, while nullity may affect any legal deed; termination for cause targets a valid contract, while nullity targets legal deeds which lack validity; if in case of nullity, the reasons of ineffectiveness is simultaneous to the moment of execution of the deed, the reason generating the termination for cause is subsequent to the execution of the contract; in case of termination for cause, even if the faulty non-execution of obligations is proven, the court may first grant a grace term to the debtor, without being required to pronounce the termination, while in case of nullity, the court is obliged to ascertain or to pronounce the nullity.

On the other hand, nullity and termination for cause are similar considering that they produce retroactive effects, namely as of the date of execution of the legal deed, in principle.

An important aspects, underlined in the specialized literature[62], is that in case the legal deed is affected both by nullity and by a cause of termination, the cause of nullity will be analyzed with priority, because once nullity is ascertained or declared, the analysis of the cause of termination becomes futile.

Rescission is the civil sanction consisting in the termination, for the future, of the effects of a synallagmatic contract with successive execution, following the faulty non-execution of one or more contractual obligations by one of the parties. The rules of rescission are provided under art. 1549- 1554 Civil Code. The sanction of rescission is identical to the termination for cause, however in case of rescission, the effects only occur for the future, as per art. 1554 par. (3) Civil Code

Opposability was defined[63] as the ability of a contract or of another legal deed, of the legal situation created thereby, or of a subjective civil right to produce effects between the parties thereto and to impose such effects to be respected by other persons than the ones who are parties (subjects) thereto. On the contrary, non-opposability means that third parties are authorized to ignore the effects of a legal deed.

A first difference between non-opposability and nullity is that the non-opposable deed does not produce effects towards the third party pleading the non-opposability, while the deed affected by nullity no longer produces effects, without any distinction, towards its the parties and towards third parties.

Moreover, if non-opposability only concerns legal deeds for which publicity is required, nullity is applicable for all legal deeds. Furthermore, non-opposability sanctions the non-observance of publicity requirements, while nullity sanctions the non-observance of conditions of validity of the legal deed,

[61] See M. N. Costin, M. Mureșan, V. Ursă, *Civil Law Dictionary,* Scientific and Encyclopedic Publishing, Bucharest, 1980, p. 469.

[62] See O. Ungureanu, C. Munteanu, *Civil Law, General Part, cit. supra*, p. 364.

[63] See M. N. Costin, C. M. Costin, *op. cit.*, p.737.

formal or substantive ones. Another difference between non-opposability and nullity consists in the fact that non-opposability regards a deed valid between the parties, while nullity concerns a deed lacking validity. Similarly, relative nullity may be fixed by means of confirmation, while non-opposability may be fixed by ratification, in matters of representation.

Lastly, the causes of nullity are simultaneous to the execution of the deed, while non-opposability requires the non-observance of formalities which are subsequent to the execution of the legal deed.

Revocation consists in the removal of the effects of liberalities due to the ingratitude of the beneficiary or of a faulty non-execution of the obligation. The main similarity between revocation and nullity consists in the fact that they both represent causes of ineffectiveness of the civil legal deed. As for the differences between revocation and nullity, we note that: revocation may occur, in principle, only in case of liberalities, while nullity can affect any legal deed; revocation implies the existence of a validly executed legal deed, while nullity affects a legal deed executed with non-observance of a validity condition, from a formal or substantive point of view. At the same time, the cause of nullity is simultaneous to the execution of the legal deed, while revocation is based on causes subsequent to the execution of the civil legal deed.

The lapse of rights represents the loss of the possibility to exercise a subjective civil right, following the failure of exercising it within a certain term. The lapse of rights is provided under art. 2545-2550 Civil Code.

The lapse of rights is different from nullity through its causes, respectively through the effects generated by each of these sanctions. The lapse of rights occurs because of the failure to exercise a certain right within a specific interval of time, while nullity is determined the breach of legal provisions upon execution of a deed. Moreover, the consequence of nullity is the fact that the legal deed becomes devoid of its effects which were contrary to the law, while the lapse of rights leads to the loss of a subjective right.

Reduction was defined[64] as the civil sanction consisting in the reduction of excessive liberalities, with retroactive effect as of the date of opening of the succession, the legates and the donations made by the deceased, upon request of the heirs benefitting from succession reserve, to the extent necessary to reinstate their succession reserve. However, reduction does not affect only excessive liberalities, but it can also occur for reasons related to lesion. Reduction is evidently different from nullity through the fact that it is applicable only in case of excessive liberalities and commutative and onerous legal deeds, while nullity is applicable for any legal deeds.

[64] See O. Ungureanu, C. Munteanu, *op. cit.*, p. 366.

Furthermore, in case of nullity, its cause is the breach of a legal provisions for the valid execution of the legal deed, while in case of reduction of excessive liberalities, the deeds concerned by this sanction were validly executed but, afterwards, they are affected by total or partial ineffectiveness, as a result of the breach of the succession reserve.

### 4.3. GENERAL ASPECTS ON THE CLASSIFICATION OF NULLITIES OF THE CIVIL LEGAL DEED

Depending on the nature of the protected interest, one shall distinguish between absolute nullity – for the protection of general interests, and relative nullity – for the protection of individual interests. Thus, absolute nullity sanctions the execution of a contract in breach of a legal provision concerning public order, imposing conditions of validity of the legal deed meant to protect a general interest, as it results from the provisions of art. 1247 par. (1) Civil Code. On the other hand, relative nullity sanctions the non-compliance, upon execution of a legal deed, with a legal provision of private order, imposing a condition of validity for the legal deed meant to protect a private interest [art. 1248 par.(1)].

Depending on the type of conditions of validity breached on the moment of execution of the legal deed, nullity may be *substantive*, in case the substantive conditions of the civil legal deed are not observed (consent of the parties, capacity of the parties, object of the deed, the cause thereof), respectively *formal*, when legal provisions regarding the formal conditions of the legal deed are not observed.

Pursuant to the legislative provisions, nullity may be express (textual or explicit nullity) and virtual nullity (implicit or tacit nullity). Thus, express nullity is the one declared as such by a legal provision, while virtual nullity, although not *expressis verbis* provided by the law, it results from the manner in which the execution of legal deeds has been regulated by the lawmaker.

With reference to the criteria of its legal effects, nullity may be partial or total. Total nullity terminates the legal deed fully and does not allow it to produce any effects, while partial nullity only terminates part of the effects of the civil legal deed.

Depending on the manner of operation, nullity may be amicable and judicial. However, the parties cannot create nor suppress any cases of nullity, any contrary convention or clause in this respect being deemed as unwritten [art. 1246 par. (4) Civil Code].

### 4.4. GENERAL ASPECTS ON THE LEGAL REGIME OF NULLITY

#### 4.4.1 Legal Regime of Absolute Nullity

Absolute nullity may be pleaded by any interested person, either by means of claim or by means of exception [art. 1247 par. (2) Civil Code], including by the prosecutor, under art. 45 par. (1) Civil Procedure Code, respectively "for the defense of the legitimate rights and interests of minors, of persons placed under interdiction and of disappeared persons, as well as in other cases expressly provided by the law". Therefore, the person pleading absolute nullity must prove its interest for the absolute nullity to be ascertained, interest which should be determined, legitimate, personal, existing and accrued, as per art. 33 Civil Procedure Code, otherwise the court will reject the claim as lacking interest.

Equally, as per the provisions of art. 1247 par. (3) Civil Code, the court must ascertain absolute nullity ex officio. Thus, vested with a claim related to the execution of a legal deed, the court, based on the principle of contradictory debate, will require the parties to discuss the issue of absolute nullity of the deed, and in case it should ascertain that the legal deed which is under analysis in the said claim is affected by absolute nullity, it will proceed to the rejection of the court claim as lacking grounds, being noted that the court will not pronounce the nullity of the said deed, unless the defendant requests the annulment, by means of counterclaim[65].

As per art. 1249 par. (1) Civil Code, absolute nullity of the legal deed may be pleaded anytime, either by means of claim or by means of exception. Absolute nullity cannot be, in principle, fixed by confirmation, as it results from the provisions of art. 1247 par. (4) Civil Code, as per which the legal deed affected by absolute nullity is not susceptible of confirmation, except for cases provided by the law.

#### 4.4.2. Legal Regime of Relative Nullity

As per art. 1258 par. (2) Civil Code, "relative nullity may be pleaded only by the person whose interest is protected by the breached legal provision". Relative nullity may be pleaded by the person whose interest was breached upon execution of the legal deed, by the legal representative of the person lacking capacity of exercise of their rights, the legal guardian of the minor with a limited capacity of exercise of their rights [under art. 43 par. (2) Civil Code and art. 42 Civil Procedure Code], the successors of the party protected by the legal provision breached upon execution of the legal deed, except for claims which are *intuitu personae*, by the creditors of the protected party (through the oblique claim, except for the case when strictly personal rights or claims are concerned - art. 1560- 1561 Civil Code), the prosecutor (under art. 46 par. (3) Civil Code, respectively art. 92 par. (1) Civil Procedure Code).

[65] See G. Boroi, C. A. Anghelescu, *op. cit.*, p. 265.

Unlike absolute nullity, relative nullity cannot be claimed ex officio by the court, as it results from the provisions of art. 1248 par. (3) Civil Code

By means of claim, relative nullity may be pleaded only within the legal statute of limitation of 3 years (art. 2517 Civil Code, respectively art. 2529 Civil Code), unless the law provides a shorter term. By means of exception pleaded with respect to a claim, relative nullity is not subject to the statute of limitation, according to art. 1249 par. (2) Civil Code, as per which the party which is requested to execute a contract may plead the relative nullity of the contract anytime, even after the lapse of the statute of limitation of the annulment claim, giving efficiency to the Latin principle *quae temporalia sunt ad agendum, perpetua sunt ad excipiendum* (the nullity claim is temporary, the exception is perpetual).

Relative nullity may be fixed through confirmation, under the conditions of art. 1263 Civil Code, being stated that there is a difference between express and tacit confirmation.

### 4.5. EFFECTS OF THE NULLITY OF THE CIVIL LEGAL DEED

The effects of the nullity of the civil legal deed are regulated under art. 1254- 1260 Civil Code and are based on the principles of retroactivity, the reinstatement of the parties in the situation prior to the execution of the legal deed, respectively of the annulment of the legal deed subsequent to the initial one.

The principle of retroactivity of the effects of nullity is the rule as per which nullity produces its effects both for the past and for the future, being effective as of the moment of execution of the civil legal deed. In the current legislation, the principle of retroactivity is provided under art. 1254 par. (1) Civil Code, as per which "the contract affected by absolute nullity or annulled is deemed to have never been concluded".

One of the exceptions from the principle of retroactivity is that in case of the null or annulled marriage, in which at least one spouse had been of good faith, retroactivity shall not operate for good faith spouse, the latter preserving its status of spouse from a valid marriage for the period lasting between the moment of contracting marriage and the moment the court decision declaring the nullity of marriage becomes definitive [art. 304 par. (1) Civil Code].

The principle of reinstatement of the parties in the situation prior to the execution of the legal deed is a consequence of the principle of retroactivity of nullity, and based on such principle, all the acts executed based on a null legal deed are meant to be restituted [art. 1254 par. (3) Civil Code], "even if they were successively executed or had a continuous character". There are a series of exceptions from the principle *restitutio in integrum*, out of which we can mention the fact that the good-faith holder keeps the fruit obtained during the term of their being of good faith, under art. 948 Civil Code corroborated with art. 1645 par. (1) Civil Code

The principle of annulment of the subsequent legal deed designates the rule as per which the annulment of the initial legal deed also leads to the annulment of any subsequent legal deeds, as a result of the legal connection between the two deeds [art. 1254 par. (2) Civil Code, but it also results from the provisions of art. 1648 Civil Code]. As for the exceptions from the principle of annulment of the subsequent legal deed, we may mention the case of the good-faith tenant, the lease agreement of which shall produce effects even after the annulment of the lessor's title, during the term agreed by the parties, without exceeding however one year as of the annulment date [art. 1819 par. (2) Civil Code].

On the other hand, the rule *quod nullum est, nullum producit efectum* is not applicable in case of conversion of civil legal deeds, which represents a manifestation of will for the purpose of giving validity to a legal deed, not just deeming it affected by nullity[66] [art. 1260 par. (1) Civil Code]. As an example, we may note that the institution of conversion is applicable in case the authentic testament is null for formal faults, but it is valid as a handwritten testament, if it had been entirely handwritten, signed and dated by the author of the testament (art. 1050 Civil Code).

## 5. CHAPTER III – CAUSES OF NULLITY OF MARRIAGE

### 5.1. PRELIMINARIES

Non-observance of the conditions provided by the law for the valid contracting of the legal deed of marriage is sanctioned by the absolute or relative nullity of marriage. However, the formalities provided for the purpose of contracting marriage, as well as the role of the marriage officer of verifying the fulfillment of the legal conditions and of refusing to perform the marriage unless such requirements are complied with, contribute to the significant decrease of the risk of marriages which are null or liable to be annulled[67].

The nullity of marriage is regulated under Chapter IV of Title II of Book II of the Civil Code, by art. 293-306. In the previous regulations, the nullity causes were provided under art. 19 and art. 21 Family Code and under art. 7 of Law no. 119/1996.

### 5.2. CAUSES OF ABSOLUTE NULLITY OF MARRIAGE

#### 5.2.1. Introductory aspects

The following cases are causes of absolute nullity of marriage: the contracting of marriage by persons of the same sex [art. 293 par. (1) corroborated with art. 271 thesis I Civil Code]; the material

[66] Idem., p. 285.

[67] See E. Florian, *op. cit., p. 62.*

absence of the consent for the execution of marriage; the contracting of marriage by a person already married (bigamy) [art. 293 par. (1) corroborated with art. 273 Civil Code]; the contracting of marriage by members of the family in the degree prohibited by the law [art. 293 par. (1) corroborated with art. 274 Civil Code]; the contracting of marriage by the mentally ill or alienated [art. 293 par.(1) corroborated with art. 276 Civil Code]; the contracting of marriage with non-observance of the related solemnity and publicity formalities [art. 293 par.(1) corroborated with art. 287 par. (1) Civil Code]; the contracting of marriage by the minor under the age of 16 [art. 294 par. (1) Civil Code]; the contracting of marriage for another purpose than the one of starting a family (fictive marriage) [art. 295 par. (1) Civil Code].

Comparing the previous regulations with the current ones, one may easily observe that the lawmaker eliminated from the causes of absolute nullity of marriage the following cases: the lack of publicity of the statement of marriage (art. 19 corroborated with art. 13 [1] Family Code), the contracting of marriage by a person temporarily lacking mental capacity (art. 19 corroborated with art. 9 thesis II Family Code). Moreover, it consecrated the absolute nullity of the fictive marriage, as well as of marriage contracted between persons of the same sex. As for the contracting of marriage by the person temporarily lacking mental capacities, while such person does not have discernment on its acts, the current regulations deem it to be a cause of relative nullity of marriage.

### 5.2.2. Contracting of Marriage by Persons of the Same Sex

The contracting of marriage by persons of the same sex is sanctioned by absolute nullity of marriage, as it results from the provisions of art. 293 par. (1) corroborated with art. 271 thesis I Civil Code. The sexual differentiation is proved by the birth certificates which attest the sex of the persons[68]. As per the courts of law, physiological dissonance which affects or prevents the normal performance of conjugal relations cannot lead to the nullity of marriage[69]. In case physiological dissonance is indicated as grounds for divorce, the court may issue a decision only after a medical examination is performed in the said case and brought as evidence. In our opinion, concurring with the above-mentioned decision, physiological dissonance, even in case the medical examination report concludes that it prevents the continuation of marriage, shall not be deemed a cause of nullity of the marriage, but grounds for divorce. In this respect, such conclusion is based on the fact that the said physiological harmony between spouses is not provided by the lawmaker as a substantive condition for the execution of marriage.

[68] See A. Bacaci, C.- C. Hageanu, V.- C. Dumitrache, *op. cit.*, p. 23.

[69] See Supreme Court, S. civ., Civil Dec. nr. 1823/1971 in C. D., 1971, p. 143-145 apud I. Albu, *Family Law*. Didactică şi Pedagogică Publishing, Bucharest, 1975, p. 195.

### 5.2.3. Material Absence of Consent upon Contracting Marriage

Consent is of the essence of marriage, conclusion resulting as well from the provisions of art. 16 of the Universal Declaration of Human Rights, as per which marriage cannot be executed in absence of a free and full consent of the future spouses.

From a practical point of view, as per the opinion expressed in the specialized literature[70], we may find ourselves in a case of absolute nullity of marriage based on the absence of consent in case one or both of the future spouses refused to consent to the execution of the marriage, and despite such circumstance, the marriage officer declared the marriage as contracted, or in case marriage was officiated in absence of one or both spouses.

### 5.2.4. Execution of a New Marriage by a Married Person (Bigamy)

The lawmaker intended to sanction the breach of the principle of monogamy in a firm manner, in which respect, as per the provisions of art. 293 Civil Code, marriage contracted with non-observance of the provisions of art. 273 Civil Code is affected by absolute nullity. This cause of absolute nullity was also provided by the previous regulations (art. 5 Family Code corroborated with art. 19 Family Code). The case law has ascertained the absolute nullity of the subsequent marriage executed by one of the future spouses, who claimed that they were unaware of the fact that, on the date of contracting the subsequent marriage, the former marriage was still valid, as a result of having the conviction that his wife from the former marriage would handle the divorce personally, after their actual separation[71]. On the other hand, the specialized literature has expressed the opinion, to which we concur, as per which the submission of the marriage statement[72] or the execution of an engagement[73] subsequent to a marriage cannot lead to a state of bigamy, since it is necessary that the second marriage be effectively contracted.

### 5.2.5. Execution of Marriage Between Family Members of the Legally Prohibited Degree

Marriage between straight-line family members, irrespective of the degree, as well as between collateral members of family up to the fourth degree inclusively, irrespective whether kinship is natural or

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[70] See E. Florian, *op. cit.*,p. 64.

[71] See Cluj Napoca Court, Decision nr. 4883/2017 of 26 June 2017, available online on: https://sintact.ro/#/search?sl=RO&q=Decizie%20nr.%204883~2F2017%20din%2026-iun-2017,%20Judecatoria%20Cluj%20Napoca.

[72] See A. Bacaci, C.- C. Hageanu, V.- C. Dumitrache, *op. cit.,* p.142.

[73] See I. Nicolae, *Family Law in the National Context and in International Private Law,* Hamangiu Publishing, Bucharest, 2014, p. 51.

civil[74] is sanctioned by absolute nullity (art. 274 par. (1) Civil Code, corroborated with the provisions of art. 293 Civil Code). We note that similar provisions were also included in the previous legislation, respectively art. 6 and art. 19 Family Code.

As for kinship resulting from adoption, from the provisions of art. 274 par. (3) Civil Code it results that marriage between the adopter and their family, on one side, and the adopted person, on the other side, is forbidden, such provision being the natural consequence of the provisions of art. 470 par. (1) Civil Code. These provisions arise from the fact that adoption creates a connection that the law assimilates from all points of view with natural family relations[75], which is why, as per art. 293 par. (1) Civil Code, marriage contracted in breach of the provisions of art. 274 Civil Code is sanctioned by absolute nullity.

As per the provisions of art. 441 par. (1) Civil Code, medically assisted human reproduction with a third party donor does not determine any kinship between the child and the donor, such kinship being established only between the parents or parent, as the case may be, who resorted to the medically assisted human reproduction with a third party donor and the child resulting from this procedure. Therefore, the impediment of kinship, respectively the sanction of nullity of marriage, shall be taken into consideration with respect to the filiation and kinship established by the law, thus absolute nullity will affect the marriage executed between, on one side, the child resulting from medically assisted human reproduction with a third party donor and the parents who resorted to this procedure, respectively the members of the family of such child, on the other side.

### 5.2.6. Contracting of Marriage by the Mentally Alienated or Ill

Unlike the previous legal provisions, the current legislation firmly provides that the execution of marriage by the mentally alienated or ill is sanctioned by absolute nullity (art. 276 Civil Code corroborated with art. 293 Civil Code), while the absence of discernment upon contracting marriage was provided under sanction of relative nullity (art. 299 Civil Code).

With respect to the correct settlement of a claim for ascertaining the nullity of marriage executed by the mentally alienated or ill (spouse upon the moment of contracting marriage), the case law[76] decided that the psychiatric evaluation was necessary in such case, in order to determine whether the spouse was mentally alienated or ill on the date of contracting marriage, considering that only in such case, would the marriage be affected by absolute nullity.

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[74] See E. Florian, *op. cit.*,p. 42.

[75] See M. M. Oprescu, M. A. Oprescu, M. Șcheaua, *op. cit.*, p. 51.

[76] See C. S. J., S. civ., Dec. nr. 2980/29 November 1995 in Case Law Bulletin, *Decisions Repertoire for the year 1995*,"PROEMA" Publishing Baia Mare, 1996, p. 71.

### 5.2.7. Execution of Marriage by the Minor Under 16 Years of Age

Marriage requires maturity, necessary for undertaking the obligations that marriage entails, which is why, as per art. 272 par. (1) Civil Code, the matrimonial age is 18.

However, through the provisions of art. 272 par. (2) – (5) Civil Code, the lawmaker granted an exception, allowing the marriage of minors who are 16 years of age, under firmly established conditions, being noted that in accordance with the provisions of art. 294 par. (1) Civil Code, marriage executed by the minor who is not 16 years of age is affected by absolute nullity. In the previous legislation, this cause of absolute nullity was provided by art. 19 Family Code corroborated with art. 4 Family Code.

Another important aspect to be noted[77] is that absolute nullity occurs irrespective whether, on the date of contracting marriage, one or both spouses were under 16, respectively irrespective whether they had obtained or not the consent, approvals and authorization provided by art. 272 par. (2) - (5) Civil Code.

### 5.2.8. Contracting Marriage for Another Purpose than Starting a Family (Fictive Marriage)

Fictive marriage is provided under art. 295 Civil Code, under the sanction of absolute nullity. As for the manner of wording the provisions of art. 295 Civil Code, in their current form, we personally believe it is subject to criticism, as the conclusion arising from these provisions is that, in order to be the case of fictive marriage, the future spouse or spouses must be animated not just by one purpose, but by "other purposes – *more than one purpose* (o.n.) than the one of starting a family". Under this aspect, we believe that this approach is not correct, considering that one of the future spouses or both of them do not need to be motivated by a multitude of other purposes which are different from a matrimonial intention, in order to execute a fictive marriage, but a sole different purpose should suffice, purpose which is not of starting a family by means of marriage. Considering the above, we hold the opinion that *de lege ferenda*, the provisions of art. 295 Civil Code should have the following content "marriage executed for another purpose than for starting a family is affected by absolute nullity".

The reason for the sanction of nullity of the fictive marriage is due to the fact that the parties do not express an honest consent, but execute the marriage for the purpose of obtaining certain secondary effects[78], not mandatorily specific to marriage, but generated by the contracting of marriage.[79]

The marriage for convenience is a conclusive example of the fictive marriage, this being "marriage executed with the sole purpose of eluding the conditions for the entrance and residence of

[77] See E. Florian, *op. cit.*, p. 64.

[78] During the history of case law, courts have proceeded to annulment of marriages for being fictive, for example the spouses did not intend to start a family, but they wanted to obtain a bank loan for acquisition of a home by newlyweds, or even for a priest obtaining a parish.

[79] See E. Florian, *Family Law*, Edition 4, C. H. Beck Publishing, 2011, p. 72.

foreign persons and for obtaining the right of residence on the territory of Romania" [art. 2 let. l) of Government Emergency Ordinance no. 194/2002 regarding the regime of foreigners in Romania [80]].

### 5.2.9. Execution of Marriage with Non-observance of the Relevant Solemnity and Publicity Formalities

The act of marriage has a solemn character, which results from the obligation of the future spouses to be present, on the established date, at the headquarters of the competent authority, in front of the marriage officer, together with two witnesses [art. 287 par. (1) Civil Code]. Thus, absolute nullity of marriage will occur if the court ascertains the non-observance of one of the formalities listed under art. 287 par. (1) Civil Code. The same approach of the lawmaker was found under the former regulations (art. 16 Family Code corroborated with art. 19 Family Code).

Considering that the drafting of the marriage deed and registration thereof in the civil status registry represents a formality subsequent to the contracting of marriage, such operation cannot be qualified as an element of solemnity[81], this conclusion undoubtedly resulting from the provisions of art. 289 Civil Code. Consequently, the failure to draft the marriage deed does not lead to the marriage being null.

The lack of competence of the marriage officer, upon execution of the marriage, is also a cause of absolute nullity of the marriage. However, the lack of competence of the marriage officer implies two components: the one regarding their capacity (lack of competence *rationae materiae*), respectively the one regarding the territory on which they may act (lack of competence *rationae loci*).

## 5.3. CAUSES OF RELATIVE NULLITY OF MARRIAGE

### 5.3.1. Introductory aspects

If under the previous legislation, there was only one case of relative nullity of marriage, respectively a faulty consent of one of the spouses due to the error on the physical identity of the other spouse, by deception or violence (art. 21 Family Code), the current legislation provides the following cases of relative nullity of marriage: execution of marriage in absence of the necessary approvals or authorizations [art. 297 par. (1)]; faulty consent of one of the spouses (art. 298 Civil Code); execution of marriage by a person temporarily lacking discernment [art. 299 Civil Code] and the execution of marriage between the guardian and the minor under their guardianship [art. 300 Civil Code].

[80] Government Emergency Ordinance no. 194/2002 was published in the Official Gazette of Romania, Part I no. 955 on December 27th, 2002 and afterwards republished in the Official Gazette of Romania, Part I, no. 421 on June 5th, 2008, as subsequently amended and supplemented.

[81] See T. Bodoaşcă, *op. cit.*, p. 83 and following.

### 5.3.2. Execution of Marriage in Absence of the Necessary Approvals or Authorizations

The marriage of the minor aged at least 16 for justified reasons represents an exception from the provisions of art. 272 par. (1) Civil Code. Considering the limited capacity of exercise of their rights of the minor, as per art. 41 par. (1) Civil Code, they execute legal deeds with the approval of the parents or guardian, if the case, and the authorization of the guardianship court, in the cases provided by the law.

The absence of approvals, respectively of the authorization mentioned under art. 272 par. (2), (4), (5) Civil Code is sanctioned with the relative nullity of marriage, as provided by art. 297 Civil Code.

Therefore, relative nullity will affect the marriage executed without the approval of the parents or of one of the natural or adopting parents, not divorced on the moment of execution of the minor's marriage, as well as the marriage executed without the consent of the divorced parents, who exercise the parent authority together[82]. Moreover, the sanction of relative nullity of marriage also occurs when the marriage is contracted in absence of the approval of the parents or of one of the parents outside marriage living together[83]. At the same time, the same sanction shall apply in case marriage is executed in absence of the approval of the parent exercising alone the parental authority, as a result of the fact that the other parent is either deceased or unable to express their will, or following a court order, their parental authority has been withdrawn.

### 5.3.3. The Faulty Consent of One of the Future Spouses

The faults of consent upon the moment of execution of marriage, by error, fraud or violence, are sanctioned with relative nullity of marriage, as per the provisions of art. 298 par. (1) Civil Code

As per art. 298 par. (2) Civil Code in the matter of contracting marriage, error is a fault of consent only when it is related to the physical identity of the other spouse. Thus, any other errors (spontaneous or unprovoked) on physical or psychological qualities, on the character, temperament, professional training, social or material status or even on the civil status of the future spouse do not produce any consequence as to the validity of the marriage[84].

The faulty consent of at least one of the future spouses, as a result of **fraud**, upon contracting the marriage, is sanctioned by the relative nullity of marriage, as per the provisions of art. 298 par. (1) Civil Code.

Considering that the purpose of the fraudulent behaviour is to execute the marriage, it has been judiciously stated under the case law[85] that, in order to lead to the relative nullity of the marriage, the

[82] See E. Florian, *op. cit.*, p. 74.

[83] Ibidem.

[84] Idem, p. 34,

[85] Ibidem, p. 72.

fraud must be related to aspects concerning the person and personality of the future spouse, which might influence the marital relations, such as the health condition, age, professional status, education, reputation, marital antecedents, confession respectively their material status.

As per the provisions of art. 298 par. (1) Civil Code, marriage may be annulled upon request of the spouse whose consent had been faulty as a result of violence. However, considering the formalities regarding the execution of marriage, it is difficult to imagine a case of violence simultaneous with the moment of contracting marriage.

Violence may be exercised not only by the future spouse, but also by a third party, provided that the spouse whose consent was not affected had known, or should have known the violence performed by the third party. Moreover, vested with a claim for the annulment of marriage for faults of consent through violence, the court will render its decision with compliance of the provisions of art. 1216 par. (4) Civil Code, respectively taking into account the age, social status, health and character of the person subjected to violence, but also any other circumstance which could influence their condition on the moment of execution of the legal deed of marriage[86].

### 5.3.4. Execution of Marriage by a Person Temporarily Lacking Discernment

As per art. 299 Civil Code, marriage executed by a person temporarily lacking discernment is liable of annulment. An essential note[87] is that there may exist situations when, although from a legal point of view, a person has discernment, such discernment may be temporarily absent – such as persons under hypnosis, drunkenness, delirium, extreme rage[88]. The relative nullity of the marriage executed by the person temporarily lacking discernment may be fixed if the spouses lived together for more than 6 months from the moment of discovery of the temporary absence of mental capacities, as well as in case the wife had a child or became pregnant.

### 5.3.5. Execution of Marriage Between the Guardian and the Minor under Guardianship

The interdiction of marriage between the guardian and the minor under its guardianship was set up for moral reasons and it is aimed at the protection of the minor under guardianship, considering that the guardian has an obligation to ensure the minor's upbringing, which is why, pertinently, some authors[89]

[86] See Supreme Court, S. Civ., Dec. nr. 1005/1974, in CD 1974, p. 166-167. As per this court, evaluation of acts of violence needs to take into account the psychological state of the respective spouse.

[87] See A. Gherghe, *Nullity of the Legal Deed of Marriage in New Civil Code, Studies and Commentary, cit. supra*, p. 691.

[88] See I. Reghini, Ș. Diaconescu, P. Vasilescu, *op. cit.*, p. 586.

[89] See I. P. Filipescu, A. I. Filipescu, *op. cit.*, p. 26.

have deemed that these obligations should not be affected by the possibility of existence of conjugal relations between the guardian and the minor under their care. This is the reason why the lawmaker regulated, under art. 275 Civil Code, the interdiction of marriage between the guardian and the minor under their guardianship and set up the sanction of relative nullity for the breach of this provision, as per art. 300 Civil Code.

## 6. CHAPTER IV- LEGAL REGIME OF THE NULLITY OF MARRIAGE

### 6.1. PRELIMINARIES

The provisions of art. 1246 par. (3) Civil Code allow the nullity of the civil legal deed to be ascertained or declared by consent of the parties, unless the law provides otherwise. However, the nullity of marriage needs to be submitted to the control of the courts of law, through the filing of court claims[90].

### 6.2. Legal Regime of Absolute Nullity of Marriage

In accordance with the provisions of art. 296 Civil Code, any interested person may have an active court capacity in a claim regarding the absolute nullity of marriage. Consequently, the claim of annulment of marriage could be filed by either spouse, the relatives of the spouses, the creditors of the spouses, the civil status officials, third parties, however being stated that either of these persons must prove an interest upon filing the said claim, under sanction of the claim being rejected as lacking interest. However, as per the provisions of art. 296 thesis II Civil Code, the prosecutor cannot file the claim of annulment or termination of marriage, except for the case when they act for the defense of the rights of minors or of persons placed under interdiction.

The provisions of art. 296 Civil Code regulating the holders of the right of claiming the absolute nullity of marriage do not provide an applicable statute of limitation, which is why the provisions of art. 1249 par. (1) Civil Code are applicable, as per which "unless the law provides otherwise, absolute nullity may be claimed anytime, either by means of court claim, either by means of judicial exception". In this context, similarly to the French law (art. 184 French Civil Code) which allows interested parties, as well as the Public Ministry, to file the claim regarding the nullity of marriage within 30 years as of the date of its execution, our opinion is that *de lege ferenda* the absence of a statute of limitation of the claim regarding the absolute nullity should be eliminated from our system of law. The solution provided by the French law is preferable, for reasons pertaining to ensuring the safety of the civil circuit, which may be

[90] See A. Gherghe, *Nullity of the legal deed of marriage in* M. Uliescu, in *New Civil Code, Studies and Commentary, cit. supra,* p. 687.

under threat in case of approval of a claim regarding the absolute nullity of marriage, after such marriage had produced effects for long periods of time.

As per the provisions of art. 294 par. (2) Civil Code, absolute nullity of the marriage executed by the minor under 18 years of age is fixed if, prior to the moment the court decision remains definitive, both spouses are 18 years old or if the wife becomes pregnant.

As per the provisions of art. 295 par. (2) Civil Code, the nullity of the fictive marriage shall be fixed if, by the moment the court decision ascertaining the absolute nullity of the marriage remains definitive, the spouses have lived together, the wife has had a child or has become pregnant or if two years have passed from the moment of execution of the marriage.

With respect to the aspect of the spouses living together, considering that the lawmaker has not provided a minimum duration for such cohabitation, this is the easiest way to fix the nullity, thus we believe that *de lege ferenda* the cohabitation of the spouses should be likely to fix the cause of nullity of the fictive marriage only if it has not occurred subsequently to the commencement of the litigation regarding the nullity of the marriage.

### 6.3. The Legal Regime of Relative Nullity of Marriage

The claim for declaring the nullity of marriage has a personal character, which is why it may only be filed by the persons towards whom the conditions generating the relative nullity of marriage have not been observed.

As per the provisions of art. 301 par. (1) Civil Code, the claim for annulment of marriage may be filed within 6 months, being noted that this 6-months' term elapses differently, depending on the situations generating the relative nullity of the marriage.

As per art. 303 par. (1) Civil Code, in the cases provided by art. 272 par. (2), (4) and (5), the possibility to annul the marriage is canceled, if, by the moment the court decision remains definitive, all approvals and authorizations required by the law have been obtained.

As for the manner of drafting the provisions of art. 303 par. (1) Civil Code, our opinion is that referring to "the cases provided under art. 272 par. (2), (4) and (5) Civil Code", without an express reference to the breach of the provisions of art. 272 par. (2), (4) and (5) Civil Code, is not correct, considering that the possibility to annul the marriage is generated by the breach of these provisions, and not by the provisions of art. 272 par. (2), (4) and (5) Civil Code themselves. Thus, *de lege ferenda,* we suggest rephrasing the text of art. 303 par. (1) Civil Code, as follows: "the possibility to annul the marriage resulted from the breach of the provisions of art. 272 par. (2), (4) and (5) is cancelled if, by the moment the court decision remains definitive, the approvals and/or authorization required by the law, as the case may be, have been obtained."

As per the provisions of art. 303 par. (2) Civil Code, the relative nullity resulting from a faulty consent, or from the absence of the mental capacities on the date of execution of the marriage, may be fixed if the spouses have cohabitated for a term of 6 months from the date of cessation of the violence, or from the date of discovery of the fraud, error or temporary absence of mental capacities.

At the same time, as per art. 303 par. (3) Civil Code, in all cases, nullity is fixed if in the meantime both spouses have become 18 years old or if the wife has had a child or she has become pregnant. The text of art. 303 par. (3) Civil Code gives rise to a series of observations. In our opinion, the provisions are applicable to the persons who, on the date of contracting the marriage, were minors, with or without a full capacity of exercise of their rights, considering that the provisions of art. 272 par. (2), (4), (5) Civil Code do not distinguish between the cases when the minor who is 16 years old has or does not have a full capacity of exercise of their rights.

In the same context, we must note that the case when both spouses are, on the date of execution of the marriage, minors who are 16 years old and who have fulfilled the procedure provided by art. 272 par. (2) Civil Code, supposing that one of the future spouses does not obtain the approvals or authorizations provided by the said legislation, while the other spouse obtains both the approval, respectively necessary authorization, our opinion is that the requirement of the lawmaker for the fixing of the cause of nullity in case both spouses become 18 years old, is excessive. In the above example, in our opinion, the relative nullity of marriage should be fixed once the spouse who had not obtained the approval or authorization under the conditions of art. 272 par. (2) Civil Code becomes 18 years of age.

## 7. CHAPTER V - PROCEDURAL ASPECTS REGARDING THE ASCERTAINING OR DECLARING THE NULLITY OF MARRIAGE

As per art. 265 Civil Code, the competent court to settle the claim regarding the termination of marriage for grounds of nullity is the court for guardianship and family, and from a material point of view – the court house, as it results from the provisions of art. 94 par. (1) let. a) Civil Procedure Code. The territorial competence of settlement of the claims on the absolute/relative nullity of marriage belongs to the court from the domicile of the defendant, as per art. 107 par. (1) Civil Procedure Code.

The court claim regarding the absolute or relative nullity of marriage should comprise the elements provided under art. 194 Civil Procedure Code. As for the documents attached to the court claim, our opinion is that, similarly to the provisions of art. 916 par. (3) Civil Procedure Code, regarding the divorce, in case the plaintiff in the claim for termination of the marriage is one of the spouses, they shall

also submit the marriage certificate, as well as copies of the birth certificates of the minor children resulting from the marriage.

As per the provisions of art. 208 Civil Procedure Code, the statement of defense is mandatory, and failure to submit it within the term of 25 days from the communication, provided by art. 201 Civil Procedure Code, leads to the defendant no longer being able to submit evidence and to claim exceptions, other than those of public order, unless the law provides otherwise.

Once the marriage is terminated, the guardianship court will decide on the matters related to the relation between the parents and their minor children, as per art. 396 par. (1) Civil Code. Therefore, the guardianship court will also decide on the exercise of the parental authority (art. 397- art. 399 Civil Code), the child's domicile (art. 400 Civil Code), the rights of the parent who becomes separated from the child (art. 401 Civil Code), establishing the contribution of the parents to the expenses with the upbringing, education, schooling and professional training of the children (art. 402 Civil Code).

The decisions issued with respect to claims for nullity of marriage are constitutive of rights. These are opposable *erga omnes*, as it results from the provisions of art. 306 par. (1) Civil Code, because they amend the civil status of the persons who had been married, and the civil status having an indivisible character, is not different to the persons towards whom it is considered[91]. In order to be opposable *erga omnes*, the above mentioned decisions should be mentioned on the side of the marriage deed, as provided by art. 43 let. c) and art. 48 of Law no. 119/1996.

As per art. 99 par. (3) Civil Code, the court decision[92] issued with respect to the civil status of a person is opposable to any other person, unless a new decision states the contrary. Thus, in accordance with art. 101 thesis II Civil Code, the court which issued the last decision on the merits will communicate, ex officio, the definitive decision ascertaining the relative or absolute nullity of marriage to the local public community service for population records.

As per art. 306 par. (2) Civil Code, the nullity of marriage is not opposable to third parties with respect to a deed executed previously, occurred between said third party and the spouse/spouses, except for the case when the publicity formalities provided by the law have been fulfilled with respect to the claim of absolute or relative nullity of the marriage, or the third party had been aware, prior to the execution of the deed, in another manner, of the cause of nullity of the marriage.

[91] See I. P. Filipescu, A. I. Filipescu, *op. cit.*, p. 205.

[92] In our view, the provisions of art. 99 par. (3) Civil Code actually refer to the definitive court decision.

## 8. CHAPTER VI – THE EFFECTS OF NULLITY OF MARRIAGE

### 8.1. PRELIMINARIES

The effects of the nullity of marriage are provided by the Civil Code under Title II, Chapter IV, Section 3, entitled "The Effects of the Nullity of Marriage", section which comprises: the putative marriage (art. 304), the situation of children (art. 305), the opposability of the court decision (art. 306). We note that, irrespective whether the court ascertains the absolute or the relative nullity of marriage, the effects will not be any different.

The main consequence of the sanction of absolute or relative nullity of marriage is that it will be deemed that the rights and obligations between the spouses had never existed, following the rule of the retroactive termination of the marriage, which must also be applied to the personal relations between the spouses, their capacity of exercise of their rights and their patrimonial relations.

There are two situations which are considered to be exceptions from the rule of retroactivity of the nullity of marriage, namely the putative marriage, respectively the case of children born out of a marriage affected by absolute or relative nullity, which we will analyze below.

### 8.2. THE PUTATIVE MARRIAGE

#### 8.2.1. Introductory Aspects on Putative Marriage

Putative marriage was defined as the null or annulled marriage, through a definitive court decision, upon execution of which at least one of the spouses had been of good-faith[93]. The purpose of the notion of putative marriage and, consequently, the purpose of setting this exception to the rule of retroactivity of the nullity of marriage resides in the fact that the effects of the nullity of marriage should be less severe towards the spouse who had been of good-faith, when having contracted a marriage affected by nullity. Thus, the institution of the putative marriage seems to be an example of combining good-faith with equity, considering that the idea of both the good-faith and the bad-faith spouse receiving the same treatment in such case would be contrary to equity[94].

#### 8.2.2. Substantive Conditions of the Putative Marriage

The three conditions of a putative marriage are: the existence of a null or annullable marriage, the good-faith of one or both spouses, the existence of a definitive court decision regarding the nullity or annulment of the marriage.

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[93] See F. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei,*op. cit.*, p. 244.

[94] See D. Gherasim, *Good Faith in Civil Legal Relations*, Romanian Socialist Republic Academy Publishing, Bucharest, 1981, p.196.

The condition of existence of a null or annullable marriage results from the provisions of art. 304 Civil Code, which mention "the good-faith spouse of a null or annulled marriage". Thus, the benefit arising from a putative marriage can only be granted to someone part of a marriage celebrated and registered as per the law[95].

The current legislation includes the principle of exercising rights and obligations in good-faith, under the provisions of art. 14 par. (1) Civil Code, and by art. 14 par. (2) Civil Code, a relative legal presumption is instated[96].

Within the context of marriage, the good-faith represents the very substance of the putative character of the marriage, and consists in the circumstance of one or both spouses being unaware of the fault affecting the respective marriage. In other words, the good faith is based on the absolute conviction of one or both spouses that, when contracting the marriage, they had all the right to act in that manner[97]. As it results from the provisions of art. 304 par. (1) Civil Code, when ascertaining on the case of putative marriage, it is fundamental to take into consideration the moment when the good faith of the spouses must be verified, namely the moment of contracting the marriage[98], respectively the moment when the marriage officer, after receiving both of their consents, pronounces them as married.

As per art. 14 Civil Code, good faith is presumed and the person invoking the bad faith must prove it, however having the right to use any means of evidence in this respect. When validating the good faith, the court will consider subjective criteria, depending on the specific conditions related to each person.[99].

As for the good faith of the future spouses upon contracting the null or annullable marriage, the case law has concluded that, in certain cases of nullity of marriage, such as bigamy, or fictive marriage, good faith may only be invoked by one of the spouses and thus only the latter may avail itself of the putative character of and benefit from such marriage[100].

The main effect of the court decision regarding the annulment of marriage is the amendment of the civil status of the spouses, and it is opposable to third parties, who have the obligation to acknowledge and respect it.

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[95] See M. M. Oprescu, M. A. Oprescu, M. Șcheaua, *op. cit.,* p. 90.

[96] See F. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *op. cit.,* p. 15.

[97] See D. Gherasim, *op. cit.,* p. 197 și urm.

[98] See T. Bodoașcă, *Family law, cit. supra,* p. 283.

[99] See T. R. Popescu, *op. cit.,* p. 344.

[100] See I. P. Filipescu, G. Beleiu, *Case Law for Nullity of Marriage,* in "*Romanian Law Magazine*" nr. 9/1971, p. 81.

As it results from the provisions of art. 304 par. (1) Civil Code, the lawmaker considered the notion of definitive court decision, which is why we must take into consideration the provisions of art. 634 Civil Procedure Code, which provide a limitative description of the definitive decisions.

However, the nullity of marriage is not opposable to third parties with respect to a deed executed between said third party and the spouse(s), as the case may be, within the interval between the fulfillment of the publicity formalities of the matrimonial convention and the performance of the publicity formalities under the definitive decision for the termination of the marriage.

### 8.2.3. The Effects of the Putative Marriage

**The effects of the putative marriage in case of good faith of both spouses**

Similarly to the previous legislation, in case both spouses had been of good faith upon execution of the marriage, the nullity of marriage will only result in effects for the future, not for the past as well[101]. Currently, as per the provisions of art. 304 par. (1) Civil Code, the cessation of the effects of marriage occurs as of the date the court decision on the nullity of marriage remains definitive.

a. Non-patrimonial effects

In case both spouses had been of good faith upon execution of the marriage, until the date the court decision of nullity or annulment of the marriage remains definitive, they maintain their capacity of spouses, preserving their mutual obligations of respect, fidelity, moral support as well as the obligation to live together, and the non-compliance by one of them of the obligation of fidelity until the court decision remains definitive, constitutes adultery[102].

With respect to the name, in case upon execution of the marriage, one of the spouses took the name of the other spouse, or their reunited names, they will not be able to keep using such acquired name, after the moment the court decision for the nullity or annulment of marriage has become definitive. At the same time, until the moment the court decision for the nullity or annulment of marriage has become definitive, between spouses, the statute of limitation of the right to file claims, as well as the statute of limitation for the right to request forced enforcement, are considered to be suspended, as per art. 2532 pt. 1 Civil Code, respectively under the condition that the spouses had not been separated in fact.

As per art. 39 par. (2) Civil Code, the spouse who had acquired capacity of exercise of their rights by means of marriage shall be able to preserve this right, if, on the date the court decision for the nullity or annulment of marriage has become definitive, they are already 18 years old.

b. Patrimonial effects

[101]See D. Lupașcu, C. M. Crăciunescu, *op. cit.*, p. 198.

[102] See I. P. Filipescu, A. I. Filipescu, *op. cit.*, p. 207.

As for the patrimonial relations generated by a putative marriage, the essential provisions are the ones of art. 304 par. (2) Civil Code, as per which, the legal provisions related to the divorce become applicable in case both spouses had been of good-faith on the moment of contracting the marriage.

First of all, the chosen marital regime – legal or conventional – shall be deemed to have existed between the spouses and shall produce its effects until the moment the court decision for the nullity or annulment of marriage has become definitive. In this respect, as per the provisions of art. 319 par. (1) Civil Code, "the marital regime ceases by means of ascertaining the nullity, annulment, cancellation or termination of the marriage".

Second of all, it shall be deemed that there has been an obligation of maintenance between the spouses, which shall subsist under art. 389 Civil Code, a legal provision which entitles each of the former spouses to receive alimony "if they require it, due to labour incapacity occurred prior to marriage or during the marriage". Equally, each former spouse is entitled to alimony in case the incapacity occurs within one year as of the termination date of the marriage, provided such incapacity be related to a circumstance connected to the marriage.

Third of all, as a result of the mutual succession vocation, the surviving spouse shall receive part of the inheritance of the other spouse, if the latter's death occurs before the date the court decision for the nullity or annulment of marriage has become definitive.

Fourth of all, each of the spouses shall be able to keep the donations received for the purpose of contracting of marriage, under the provisions of art. 1030 Civil Code[103]

Fifth of all, in case the spouses had executed a matrimonial convention containing a preciput clause, as per which the surviving spouse would take over, without payment, prior to the division of the inheritance, one or more assets held in co-ownership or joint ownership, that spouse shall have the right to take over the asset or the assets which are subject to the preciput clause, in case the other spouse dies before the court decision for the nullity or annulment of marriage has become definitive, as the case may be[104].

Sixth of all, with respect to the compensation regulated by the provisions of art. 390-395 Civil Code, some authors[105] have pertinently noted that such compensation cannot be claimed by both spouses, as the above-mentioned legal provisions are aimed at granting a benefit to the non-defaulting spouse, so as to compensate as much as possible a significant imbalance that the nullity of marriage may bring into their life. Or, in such case, the default of neither spouse may be invoked. Not lastly, another essential

[103] See M. M. Oprescu, M. A. Oprescu, M. Șcheaua, *op. cit.,* p. 92.

[104] See A. G. Gavrilescu, *Discussions on putative marriage in the current regulation of the Romanian civil code,* in „Dreptul" nr. 5/2014, p. 116.

[105] See: M. M. Oprescu, M. A. Oprescu, M. Șcheaua, *op. cit.,* p. 92; E. Florian, *op. cit.,* p. 85.

aspect regarding the compensation is that, as per the provisions of art. 390 par. (2) Civil Code, it may only be granted if the marriage had lasted for at least 20 years.

**The Effects of Putative Marriage in Case of Good-Faith on One Spouse**

In case only one of the spouses had been of good faith upon execution of the marriage, with respect to them, the nullity of marriage shall produce its effects only from the date the court decision for the nullity or annulment of marriage has become definitive. As for the good-faith spouse, the effects of marriage remain intact, until the date the court decision for the nullity or annulment of marriage has become definitive, while for the bad-faith spouse, the nullity produces retroactive effect which reaches up to the moment of contracting the marriage.

a. Non-patrimonial effects

With respect to non-patrimonial relations between spouses, it is deemed that the obligations of fidelity, respect, moral support, the obligation of living together as well as the conjugal obligations only existed for the good-faith spouse.[106].

At the same time, in case of good faith of only one of the spouses, the following consequences are also applicable: the suspension of the statute of limitation is deemed to have operated only in favour of the good-faith spouse, neither spouse shall be able to keep the name acquired through marriage thus they will both return to the names they had before getting married, because the rules applicable to divorce will not be applicable to the name either.

As it results from the *per a contrario* interpretation of the provisions of art. 39 par. (2) Civil Code, the bad faith spouse who had acquired the capacity of exercise of their rights through marriage shall not be able to preserve this right if on the date the court decision for the nullity or annulment of marriage has become definitive they are not 18 years old.

Moreover, the bad faith spouse is deemed to never have had the capacity of spouse, as a result of the fact that nullity has a retroactive effect for them, which is why they are unable to avail themselves of any of the rights granted in consideration of the capacity of former spouse[107].

b. Patrimonial effects

The application of art. 304 par. (2) Civil Code, namely the submission of the patrimonial relations between former spouses to the rules of divorce, has generated ample debate in the specialized literature. Thus, in case art. 304 par. (2) Civil Code and art. 304 par. (1) Civil Code are interpreted to the extent to which the patrimonial relations are governed by the rules of divorce, it will result that the bad faith spouse

[106] See C. Mareș, *op. cit.,* p. 146.

[107] See E. Florian, *op. cit.*,p. 86.

is assimilated, from the point of view of patrimonial effects, to the spouse of a valid marriage, terminated through divorce[108].

In an opposite manner, if the above provisions are interpreted to mean that only the good faith spouse should receive the treatment applicable to divorcees, the marital regime becomes difficult to anticipate. In this respect, if we suppose that only the good faith spouse is able to invoke the clauses of the marital convention, and if such convention does not exist or it is affected by nullity, the applicable marital regime shall be the one of legal community, which will be terminated by annulment of marriage, but the spouses will remain joint co-owners, until establishing the quotas belonging to each of them, as per art. 355 par. (2) Civil Code, respectively art. 356 Civil Code[109].

Considering these situations, we concur with the opinion[110] as per which, considering that the provisions of art. 304 par. (2) Civil Code refer to the "former spouses" without making any distinction between their good faith or their bad faith, the conclusion we must reach is that the provisions regarding the divorce are applicable to both former spouses, irrespective whether only one had been of good faith.

For the same purpose of protecting good faith and of sanctioning bad faith of former spouses, it has been suggested[111] to amend the provisions of art. 304 par. (2) Civil Code, to state that the rights and obligations of the good-faith former spouse should be identical to the ones of the spouse who won the divorce, and the ones of the bad-faith former spouse should be identical to the ones against whom the divorce is pronounced. Such an amendment would entitle the good-faith former spouse to benefit from the right to damages, to alimony, respectively to compensation.[112]

As for patrimonial relations, only the good-faith spouse may benefit from alimony, under the conditions of art. 389 Civil Code, stipulated for divorce, respectively the inheritance right with respect to the assets of the other spouse, provided the death had occurred before the date the court decision for the nullity or annulment of marriage has become definitive.

Similarly, only the good-faith spouse may claim the granting of damages as per art. 388 Civil Code, respectively compensation as per art. 390-393 Civil Code, respectively alimony as per art. 389 Civil Code. As for the bad-faith spouse, considering that for them marriage is deemed to have never existed, they will not be entitled to any of the above-mentioned benefits.

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[108] Ibidem.

[109] Ibidem.

[110] See T. Bodoașcă, *Consideration on putative marriage in the regulation of the Romanian civil code*, *cit. supra*, p. 183.

[111] Ibidem, p. 184.

[112] Ibidem.

At the same time, the nullity of marriage leads to the nullity of the donation made to the bad faith spouse during the marriage which has been deemed null or annullable.

If the spouses had chosen a community marital regime, both the bad faith spouse and the good faith spouse will benefit from it. If it were deemed that the assets acquired by the good faith spouse were their own assets, and the assets acquired by the bad faith spouse were common assets, we would be in the presence of a marital regime not regulated by the law.[113].

Finally, if the spouses had executed a marital convention containing a preciput clause, the spouse in favour of whom such clause had been stipulated will be entitled to proceed with the takeover of the asset which was subject to the clause, in case the death of the future spouse occurred prior to the moment the court decision for the nullity or annulment of marriage has become definitive. If the marriage is terminated afterwards, and the surviving spouse in favour of whom the preciput clause had been set had been of good-faith on the execution of marriage, they will keep such asset; if they had been of bad faith, they will have the obligation to return the asset.[114].

### 8.3. THE EFFECTS OF NULLITY REGARDING CHILDREN

As per art. 305 par. (1) Civil Code, the nullity of marriage will not have any effect on children, who will keep their status of children resulted from marriage.

As per art. 305 par. (2) Civil Code, as for the rights and obligations between parents and children born or conceived during a null or annullable marriage, the provisions regarding divorce will be applicable. Consequently, as per art. 396 par. (1) Civil Code, the guardianship court, at the same time when pronouncing or ascertaining the nullity of marriage, will also decide on the relationship between parents and their minor children, respectively exercising parental authority (art. 397 Civil Code- art. 399 Civil Code), the domicile of the child (art. 400 Civil Code), the rights of the parent who is separated from the child (art. 401 Civil Code), establishing the contribution of the parents to the expenses for upbringing, education, schooling and professional training of children (art. 402 Civil Code).

When deciding on the relationship between parents and children, as per art. 396 Civil Code, the court will consider the children's best interest, the conclusions of the social investigation, as well as the agreement of the parents, if such exists. Moreover, as per the provisions of art. 396 par. (2) Civil Code, corroborated with the provisions of art. 264 Civil Code, it is mandatory to hear the opinion of the child who is 10 years of age.

[113] See D. Lupaşcu, C. M. Crăciunescu, *Family Law*, *cit. supra*, p. 199- 200.

[114] See A. G. Gavrilescu, *op. cit.*, p. 103.

If more than one child resulted from the marriage, the court will decide on each of the children, considering each of their specific interests, as the court cannot decide on granting all the children to one of the parents without first ascertaining whether such measure is in the interest of each child separately.

As for the effects of the nullity of marriage with respect to patrimonial relations between parents and children, by applying the provisions of art. 400 par. (1) Civil Code, in absence of the parents' agreement or if such agreement is contrary to the interest of the child, the guardianship court will also determine the domicile of the child with the parent with whom they had lived before in a stable manner.

As per art. 400 par. (2) Civil Code, if before the claim regarding the nullity / annulment of marriage, the child had lived with both parents, the court will determine their future domicile with one of them, taking however into consideration the child's best interest. Exceptionally, and only if it is in the child's best interest, the domicile may be set with their grandparents or other family members or persons, with their consent, or within a guardianship institution [art. 400 par. 3, thesis I Civil Code]. These persons shall ensure the supervision of the child and shall fulfil all regular acts regarding their health, education and schooling [art. 400 par. 3, thesis II].

As per art. 401 par. (1) Civil Code, the parent(s) separated from the child has / have the right to have personal connections with the child.

The contribution of the parents with the expenses for upbringing, education and schooling is decided by the guardianship court, as per art. 402 Civil Code, the provisions of Title V regarding the alimony obligation being applicable accordingly. Therefore, the court will decide on the contribution of the parent who has not been entrusted with the care of the minor, under the form of a quota of their net income.