

Right to Compensation of the Spouse who is Innocent of the Dissolution of Marriage in Romanian Civil Law

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ABSTRACT: In Romanian Civil Law, once a marriage is dissolved due to the fault of one of the spouses, the spouse who is innocent of the event is entitled to compensation and the spouse who suffers material or moral damage can claim compensation from the guilty spouse. The right to granting compensation is a form of tort liability and, as will be shown in the course of our study, in order for such a claim to be admissible, several conditions must be met cumulatively: the divorce must have been pronounced solely due to the fault of the spouse from whom compensation is sought; the claimant spouse must have suffered damage as a result of the dissolution of the marriage; the damage must be certain, determined or determinable, unrepaired, and closely connected with the dissolution of the marriage. The application for granting compensation is settled by the guardianship court in the divorce judgment, the text of the law being mandatory in this respect.

KEYWORDS: marriage, dissolution of marriage (divorce), fault, guilty spouse, innocent spouse, material damage, moral damage, compensation

1. Preliminary specifications

Right to compensation of the innocent spouse who suffers damage as a result of the dissolution of the marriage is a new legal institution in Romanian law, inspired, as is also indicated in the specialized literature, by Article 266 of the French Civil Code, before the amendments made by Law No 439 of 26 May 2004, Floare 2013, 152).

In Romania, the right to compensation of the innocent spouse was regulated for the first time in the Civil Code adopted in 2011 (adopted by the Romanian Parliament by Law No 287/2009 on the Civil Code, published in Official Gazette No 511 of 24 July 2009 and entered into force on 1 October 2011, according to Law No 71/2011 for the implementation of Law No 287/2009 on the Civil Code, published in Off. G. No 409 of 10 June 2011, which also introduced a number of amendments. The Civil Code was republished in the Official Gazette no.505 of 15 July 2011) and, according to Professor Emese Florian, it is a “reward” given by the legislator to the spouse who has behaved in an exemplary manner during the marriage and cannot be blamed for the dissolution of the marriage (Florian 2021, 344).

2. The “innocent” spouse’s right to compensation

According to the provisions of Article 388, sentence I of the Civil Code, “*the innocent spouse who suffers damage by the dissolution of the marriage may ask the guilty spouse to compensate him/her*”. It follows from an analysis of this text that the right to compensation

arises only if the divorce is the sole fault of one of the spouses and the innocent spouse has suffered material or moral damage through the dissolution of the marriage. On a per a contrario interpretation, if the divorce was based on the agreement of both spouses, or if the court found joint fault in the deterioration or breakdown of the marital relationship, neither spouse is entitled to claim damages.

Claim for damages “*shall be settled by the guardianship court by a divorce judgment*” (Article 388, 2nd sentence, Civil Code). Although it does not appear from the legal text what is the procedural moment in which the innocent spouse can claim material or moral damages, most Romanian authors consider that damages must be claimed in the divorce proceedings, in the form of an accessory claim (Florian 2021, 347; Avram 2022, 228; Lupașcu and Crăciunescu 2021, 358; Bodoașcă 2021, 356; Nicolescu 2020, 152; Motica 2021, 154).

The courts have also ruled in the same sense, stating that “*the claim for damages is settled by the divorce judgment, the text of the law being imperative in this respect, therefore such a claim can only be made in the divorce action, its lodging separately from the divorce application being inadmissible*” (Oradea Court, Civil Judgment no. 893/2013, 2019). In another dispute concerning a claim for awarding damages, heard on appeal, the court held that “*An innocent spouse who suffers damage by the dissolution of the marriage may ask the guilty spouse to compensate him/her. The guardianship court settles the claim by divorce judgment (art.388 Civil Code). The right to compensation enshrined in Article 388 of the Civil Code is designed to ensure compensation for the damage caused to the innocent spouse by the dissolution of the marriage, being a particular application of the general principle of tort liability. This explains why this right can only be enforced within the divorce proceedings, and not by direct action after the judgment has become final. Failure to exercise the right within the time limits laid down entails forfeiture of the right, i.e. the loss of the possibility of pursuing such a claim through the courts; in theory, there is nothing to prevent the former spouses from agreeing (after the divorce) on benefits of a remedial nature. The timing and procedural context of the enforcement of the right to compensation is part of the legislator's strategy - no doubt judicious - that, as far as possible, the claims in connection with the dissolution of the marriage should be brought together and settled in the same procedural framework, in order to avoid or limit, at least, post-divorce litigation and the temptation to take action against one or other of the former spouses. In conclusion, the district court considers that the right to compensation governed by Article 388 of the Civil Code is the consequence of the dissolution of the marriage and can only be enforced in the divorce proceedings*” (Călărași District Court, Civil Decision no. 1067 of 18 December 2019).

In another opinion, which is also unique, the author points out that given the provision in the second sentence of Article 388 of the Civil Code, according to which it is not mandatory, “*if the damage occurs later, the claim for compensation may be lodged separately, within the general limitation period, which will begin to run from the time of the damage occurring*” (Hageanu 2017, 194).

Since the Romanian Civil Code does not define the concept of fault, this task was incumbent upon the Romanian specialists in the matter who pointed out that “*a spouse is guilty of marriage dissolution if his or her actions or inactions had the effect of seriously damaging the relationship between the spouses and making it impossible to continue the marriage*” (Hageanu 2019, 171).

For example, in a dispute concerning the dissolution of the marriage, the court established from the evidence produced that “*the plaintiff proved the exclusive fault of the defendant in the breakdown of the family relationship, proving that he became aggressive during the marriage and that he exercised both physical, mental and*

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economic violence against the plaintiff, contrary to the provisions of Art 325 of Civil Code. At the same time, the court held that the family relations between the two parties were irreparably damaged, as their marriage was clearly deprived of its natural purpose and aims” (Măcin Law Court, Civil Judgment no.1050 of 9 October 2020).

An analysis of the provisions of Article 388 of the Civil Code shows that the right to compensation of the “innocent” spouse is a right distinct from the right to the compensatory benefit provided for in Article 390 of the Civil Code, which, according to Art. (1) of the same article, may be granted in order to compensate “*as far as possible, for a significant imbalance which the divorce would cause in the living conditions of the person requesting it*”. The right to compensation is also distinct from the right to maintenance between the former spouses, regulated in Article 389 of the Civil Code, which, in paragraph 2, stipulates that “*the divorced spouse is entitled to maintenance if he or she is in need because of an incapacity to work which occurred before the marriage or during the marriage (...) or when the incapacity arises within one year of the dissolution of the marriage, but only if the incapacity is caused by a circumstance connected with the marriage.*”

As has been shown in recent doctrine (Avram 2022, 226), the right to awarding damages is a form of tort liability. Thus, in order for such a claim to be admissible, the cumulative conditions set out in Article 1.357 of the Civil Code must be met, namely: wrongful act, damage, causal link and guilt.

In other words, as the case law of the courts shows, “*the legal norm recognizes the right of the innocent spouse to claim from the spouse who is guilty of the dissolution of the marriage, compensation for the damage suffered through the dissolution of the marriage. Such a right is acknowledged only to a spouse who is not at fault for the breakdown of the marriage, and is a particular application of the principle of civil liability in tort. The following cumulative conditions must be met in order for this right to be granted:*

(a) the divorce was granted solely on the fault of the spouse from whom compensation is sought;

(b) the plaintiff spouse has suffered damage as a result of the dissolution of the marriage;

(c) the damage must be certain, determined or determinable, unrepaired and closely connected with the dissolution of the marriage” (Bârlad Law Court, Civil Judgment no. 2870/2015).

For example, in a dispute concerning a claim for damages, the court held that “*the cumulative conditions justifying the award of damages are met. The evidence produced shows that the plaintiff’s fault in the dissolution of the marriage is exclusive, given the assumption of the failure of the marriage. It also considers that the defendant has suffered damage as a result of the dissolution of the marriage and that the damage results from all the factual circumstances of the case. The damage incurred by the defendant is a moral one and relates to the emotional trauma resulting from the change of status, the damage to the image caused by the loss of married status. The Court holds that the parties have been married for a long period of time and have become accustomed to each other, so that a separation after a long period of time spent together has a negative effect on the defendant’s personality. Breaking up a relationship cannot be done immediately, from one day to the next, but requires long reactions of adjustment, of acceptance of a new status. It is also noted that the parties live in rural areas, a community in which the dissolution of a long-standing marriage leads to discussions, affecting the defendant’s image, given that, according to witness statements, the plaintiff is involved in another relationship. The defendant’s*

psychological state is revealed by the witnesses heard in the case. Thus, the witnesses reported the plaintiff's state of sadness caused by the separation de facto. The claims made to the court, the bailiff and the local authorities for reintegration into the shared accommodation have caused stress to the defendant, are unpleasant and are likely to affect her psychological integrity. For the reasons de facto and de jure stated above, the court granted the claim for damages based on Article 388 of the Civil Code. and held that, in the light of the actual damage, the defendant's condition, the actual loss and the defendant's professional status (pensioner), the sum of 2,000 lei represented fair compensation” (Bârlad Law Court, Civil judgment no. 2870/2015).

In another dispute, in which, by counterclaim, damages of 35,000 lei were sought for causing moral suffering as a result of the divorce, the court held that *“the plaintiff-defendant has suffered, in addition to the emotional suffering caused by the dissolution of the marriage, damage to her image. This moral damage was caused by her husband's defamatory actions during the marriage and subsequent to the initiation of the divorce proceedings referred to above, the plaintiff-defendant suffering moral damage through the dissolution of the marriage, the defendant plaintiff's defamatory approach to her having caused her, naturally, feelings of shame and of being forced to explain herself, alienation from friends and, therefore, loneliness, and the disparaging discussions about her in her close circle, causing her to suffer damage to her own confidence and self-image. The defendant - plaintiff acted with the aim of provoking such consequences, which he naturally foresaw, an attitude which cannot remain unsanctioned, given that, in relation to the degree of culture and education, specific to a person with such a profession, his conduct exceeded the limit of decency”*(Iași District Court, Civil Decision no.151 of 9 February 2017).

An analysis of the provisions of Article 388 of the Civil Code shows that these conditions must have certain characteristics, namely:

- only the spouse who is innocent of the divorce can claim damages. Therefore, if the divorce is ordered on grounds of joint fault, neither spouse will have the right to claim damages under Article 388 of the Civil Code;

- the damage must be certain, definite or determinable, unrepaired and closely connected with the dissolution of the marriage. For example, in a dispute concerning a claim for damages, the court found that the appellant - defendant had been living alone for the last six years because her husband had left the marital home and she had been living alone, for which *“no evidence could be produced that the appellant-defendant had suffered any damage as a result of the dissolution of the marriage, since she has been in the same situation for more than six years and the depressive disorder mentioned in the certificate issued in 2013 by the family doctor is not accompanied by documents from the specialist doctor, does not appear to be a sufficient argument for the award of compensation.”* The court therefore held that the legal conditions for the award of damages were not met (Lupu 2019, 147-150).

As mentioned above, the harm suffered by the innocent spouse must be only as a direct result of the dissolution of the marriage, any other harm cannot be redressed on this basis. In this regard, in the specialized literature (Frențiu 2012, 335.) it has been shown that on this basis, the material damage suffered by the innocent spouse during the marriage as a result of physical or mental violence exercised on him/her by the other spouse, violence which ultimately led to divorce, cannot be claimed. For example, in a dispute concerning a claim for damages, on the basis of the evidence produced, the court held that *“the diseases from which the defendant suffers are not a direct effect of the dissolution of the marriage. The diseases were acquired over time and existed prior to the divorce, according to the documents on file”* (Bârlad Law Court, Civil Judgment no. 2870/2015).

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From an analysis of the provisions of Article 919(1)(d) of the Code of Civil Procedure, it follows that the harm suffered by the “innocent” spouse may be both material and moral. For example, as mentioned in the doctrine, the damage suffered by the innocent spouse, as a result of the dissolution of the marriage, may be of “*a material nature (loss of a contract, which could not be concluded because of the divorce), moral (an image damage, for a politician in an electoral campaign) or even professional (for example, in the case of an Orthodox priest who could lose his parish in case of dissolution of the marriage)*” (Lupașcu and Crăciunescu 2021, 356). It may also constitute material damage “*any material loss incurred by one of the spouses, caused by the loss of his or her status as a married person, if the benefit he or she was to obtain was closely related to this status (for example, in the case of a loan application, the status of married person generates a higher score in the applicant’s assessment)*” (Frențiu 2012, 336; Moloman and Ureche Lazăr 2022, 602-603).

The right to compensation of the spouse who is innocent of the dissolution of the marriage ceases with the death of the debtor as this right is *intuitu personae*. In this respect, the Civil Code states that only the spouse who is innocent of the dissolution of the marriage can claim compensation from the former partner.

3. Transitional right

It should be pointed out that, according to Article 45 of Law no. 71/2011, the provisions of Article 388 of the Civil Code on the award of damages are applicable only if the grounds for divorce arose after the entry into force of the Civil Code, i.e., 1 October 2011. For example, in a dispute in which compensation was sought for damages caused by a divorce, the district court found that “*the provisions of Article 388 of the Civil Code invoked by the appellant-defendant in support of her claim for damages are not applicable to the present case, according to the provisions of Article 45 of Law No. 71/2011. Thus, Article 45 of Law no. 45/2011 states that the provisions of Article 388 of the Civil Code are applicable only in the situation where the grounds for divorce arose after the entry into force of Law no. 284/2010 and, as Law no. 284/2010 entered into force on 01.10.2011, and the grounds for divorce invoked are prior to that date (the parties have been separated de facto since 2008), the appellant-defendant cannot claim compensation for the dissolution of the marriage within the meaning of Article 388 of the Civil Code*” (Gorj District Court, Civil decision no. 834 of 5 September 2014).

4. Conclusions

Now, at the end of our study on the compensation of the innocent spouse who suffers a damage as a result of the dissolution of the marriage, we can specify some conclusions:

- the settlement of the claim for granting compensation is a matter for the guardianship court which has been seized of the divorce application. In other words, a separate or subsequent application for divorce is inadmissible;
- compensation can be claimed and awarded separately from the entitlement to a compensatory benefit;
- compensation can only be awarded by divorce judgment. Therefore, the claim for damages takes the form of a claim ancillary to the application for dissolution of the marriage;
- the debtor of the obligation to pay damages can only be the spouse who is at fault for the divorce;
- if the divorce is ordered on grounds of joint fault, neither spouse will be able to claim damages;

- if the divorce was based on the consent of the spouses, neither spouse is entitled to claim damages;
- since the legal text does not refer to the nature of the damage, the innocent spouse can claim both material and moral damages;
- the damage must be certain, definite or determinable, unrepaired and closely connected with the dissolution of the marriage.

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