

ORIGINAL SCIENTIFIC PAPER

DONATION IN PROSPECT OF DEATH
(*DONATIO MORTIS CAUSA*)Đorđe Raković¹*Law Faculty Banja Luka University*

Abstract: *Donation in prospect of death represents a legal transaction with a long legal tradition. This institute shares common Roman legal roots with a testament and legacy. In different time periods of the development of Roman law, donatio mortis causa had variable legal nature, with the dominance of the one created in the time of Justinian's law wherein donatio mortis causa represented a legacy. It was an unencumbered desposal of a donor for the benefit of a donee with effect after the death of the donor, under the condition the donee outlived the donor. As such, donatio mortis causa could be revoked.*

The disputable legal nature had marked further development of a donation in prospect of death. Hence, ACC accepted double nature of a donation in prospect of death, as a legacy and as a donation contract, while SCC accepted Roman conception. Such divergent interpretation has remained to date, since donatio mortis causa has not been regulated neither by current contract nor inheritance law. It is, generally, believed that donatio mortis causa represents a type of donation contract inter vivos, wherein the handing over of the object of donation has been postponed until the death of the donor. It is a donation contract entered into under suspensive condition that occurs at the moment of death of the donor, and the condition is for the donee to outlive the donor. If the donee happens to die before the donor, his heirs have a right to request handing over of the object of donation. Donatio mortis causa contract, as a rule, is irrevokable.

Key words: *donation contract, donatio mortis causa, testament, legacy, donation in prospect of death.*

¹ LL.D., assistant professor at the Law Faculty Banja Luka University; e-mail: djordje.rakovic@pf.unibl.org

1. OCCURRENCE OF DONATION CONTRACT

There is a great number of legal transactions and big differences between them, so it is necessary to classify them by using different criteria.²

Using the criteria of occurrence of the legal effect of a legal transaction, we distinguish legal transactions between the living (*inter vivos*) and legal transaction in prospect of death (*mortis causa*). Legal transactions between the living produce legal effect during the lifetime of persons and they are the most common legal transactions such as sale, exchange, lease, loan, proxy. Contrary to that, legal transaction in prospect of death produces legal effect only after the death of a person and they are rarer legal transactions such as testament, inheritance contract, donation in prospect of death etc.³

Division of legal transactions to the ones between the living and the ones in prospect of death is not exclusive, because legal transactions exist that can be partially between the living, and partially in prospect of death. They could be named mixed legal transactions because they produce certain legal effects during the lifetime of persons, and some legal effects after death of a person. Such is for example life-long support contract which represents a legal transaction between the living in a part pertaining to giving support, but it is also a legal transaction in prospect of death in a part pertaining to compensation for the support, which, generally,⁴ passes to a giver of support in moment of death of a receiver of support.

Donation in prospect of death (*donatio mortis causa*) is, according to said classification, a legal transaction in prospect of death. It is a contract whose legal effect is such that a donee acquires right of ownership on a gifted thing by concluding the donation contract, but the exchange of the subject is delayed until the death of a donor.⁵

Such as many other institutes of civil law, donation in prospect of death finds its origin in Roman law. *Donatio mortis causa* was a gifting in which completion takes place only in case when a donee outlives the donor. It was usually contracted when the donor was facing mortal danger (war, overseas trip

² Obren Stanković and Vladimir Vodinelić, *Introduction to civil law, third revised edition* (Belgrade: Nomos, 1996), 161.

³ *Ibidem*, page 164; Ilija Babić, *Civil law: Book I – Introduction to Civil law* (Banja Luka: University in Banja Luka – Faculty of law, 2011), 154; Vladimir Vodinelić, *Civil law – Introduction to civil law and general part of civil law* (Belgrade: *Official Gazette*, 2012), 456; Zoran Rašović, *Civil law* (Podgorica: 2006), 252 etc.

⁴ The clause in a lifetime support contract is also valid, when the supported is obliged to transfer to the giver of support a property right or some other right in the moment of conclusion of this contract, see Ilija Babić, *Contracts of civil law – Individual part of obligations law*, second revised edition (Belgrade: *Official Gazette*, 2008), 218.

⁵ *Ibidem.*, 98.

etc.) so he wanted to avoid gifting if he returns alive from that mortal danger.⁶ The donor's motive for concluding a donation contract in prospect of death is donee's ownership of the thing prior to his descendants, but not transferring property permanently to the donee, because he would rather own this property himself.⁷ The motive affects the donation in prospect of death in a sense that this legal transaction can be concluded in two modes. According to the first mode, the donor immediately transfers ownership and the possession of property to a donee, and if the mortal danger would pass, the donor could ask for a restitution through the *condiction* (obligational claim). According to the second mode, it was considered that a donation was done under suspensive condition: if a donee outlives the donor. In that case the property would transfer onto the donee in a moment of donor's death, and if the property would be transferred before that moment, the donor could ask it back using the revision charge (action in rem).⁸

The possibility of withdrawal of a donation contract in prospect of death is a trait that differentiates it from a donation as a legal transaction *inter vivos*. However, in classical Roman law donation in prospect of death was one form of a donation and a legal transaction *inter vivos*, but in the later period (Justinian's law) the donation in prospect of death completely equalized with legacy and *fideicommiss*. Donation in prospect of death, as well as legacies, in Justinian's law could be freely withdrawn no matter the reason for withdrawal, and not only in case of avoiding mortal danger, like in earlier period. Withdrawal could also be demanded by using the *condiction* and revision charge.⁹

2. DONATION IN PROSPECT OF DEATH IN SCC

The Roman law construction of donation in prospect of death was the same in Serbian civic code (SCC) from 1844. That doesn't mean that the donation contract in prospect of death was not known in our legal scope until the enactment of SCC, but it was defined exactly in these civic codes enacted in XIX century in a way that it is defined in modern law.

As is known, SCC represents the work of Jovan Hadžić modeled by Austrian civic code (ACC) from 1911. Although SCC represents the shortened version of ACC, it is considered that the law itself is adjusted to medieval and Roman

⁶ Marijan Horvat, *Roman law* (Zagreb: School book, 1977), 343.

⁷ *D.39,6,1 Marcianus libro nono institutionom*: „*Mortis causa donatio est, cum quis habere se vult quam eum cui donat magisque eum cui donat quam heredem suum.*“

⁸ Horvat, *Roman law*, 343; Ante Romac, *Roman law, People's paper* (Zagreb: 1989), 397.

⁹ Horvat, *Roman law*, 343; Romac, *Roman law, People's paper*, 397.

law in certain solutions so that it differs from its original¹⁰. This specifically refers to donation contract because in this area, SCC mostly took solutions from Roman law, and contrary to the solutions from ACC.¹¹

Donation in prospect of death should be distinguished from a contract in prospect of death which is regulated in paragraph 781 of the SCC and which by its legal nature represents an inheritance contract.¹² Donation in prospect of death in SCC is regulated within the donation provisions¹³ in paragraph 568: „*Donation done in prospect of death is considered to be a legacy, and it shall be judged so*“.¹⁴ Judging by this definition of a donation in prospect of death it can be concluded that this legal transaction was equated with legacy. This definition differs from the definition of the donation contract in prospect of death in paragraph 956 (Gifting in prospect of death) of the ACC: „*Gifting, that will come to pass only after the death of the gifter, is valid as a legacy, if the formalities were met, which the law prescribes. Only then gifting will be considered a bargain, if the giftee accepted the gift, if the gifter waived his right to deny it, and if the gifter gave to giftee a written document.*“¹⁵ As it can be seen from the cited paragraph of ACC, donation contract in prospect of death consists of elements of legacy and elements of a contract. This is exactly why it differs from the donation in prospect of death in Justinian's law where it was considered exclusively a legacy. It follows that the SCC accepted Justinian's concept of a donation in prospect of death as a legacy, and not the concept from ACC which represents the basis of the SCC. However, SCC regulated the donation in prospect of death within the donation provisions (Section XVIII – about donations), ie the provisions of obligational law, and not within the inheritance law provisions. Such systematics in SCC is taken from ACC which regulates donation in prospect of death within donation provisions, ie obligational law provisions (Section XVIII – about donations).

Because of the inconsistencies in regulation of donation in prospect of death in SCC, ie defining this legal transaction as a legacy (inheritance law), and at the same time by regulating within the donation provisions (law of obligations), different interpretations existed regarding the characteristics of donation in

10 Dragan Panić, *Donation in prospect of death* (Belgrade: Faculty of law University of Belgrade, 2015), 267 and further.

11 *Ibidem.*, page 259.

12 Miloš Stanković, „Donation in prospect of death in Serbian civil code“, Milena Polojac, Z. Mirković and Marko Đurđević (editors), *Serbian civil code – year 170*, (Belgrade: 2014), 198 and further.

13 Section XVIII (On donations), art. 561-568 of SCC.

14 Cited by text published on: https://sr.wikisource.org/sr/Српски_грађански_законик_-_оригинал, from 14.11.2017.

15 Cited by text published in Adolfo Rušnov, *Interpreter of General Austrian civil code* (Zagreb: Second book, 1891), 422.

prospect of death. So it was considered that the contractual donations were allowed in accordance with the principle of autonomy of will.¹⁶ That was also in accordance with the general provisions of the SCC which stated that any legal transaction could be made if it is not contrary to the public order or public morale. Donation in prospect of death was considered a type of a donation contract to which the rules of contract law applied. Its validity was not conditioned by donee outliving the donor, the validity existed in the moment of conclusion of the contract, and only the moment of the execution of the contract was being postponed until the death of the donor. In that case, if the donee dies before the donor, the subject of a donation contract in prospect of death would belong to the heirs of the donor.¹⁷

However, there were some notions that the donation contract in prospect of death is valid only on the condition that the donee outlives the donor.¹⁸ Therefore, it was about the concept of a donation in prospect of death in the form of legacy.¹⁹ Such an understanding was the result of the impact of a double approach in regulating the donation in prospect of death in ACC. Therefore, alongside the solution contained in the first part of paragraph 956 of ACC, that the donation in prospect of death is a legacy, the second part of this paragraph regulates donation in prospect of death in a form of contract. Donation in prospect of death in contract form is valid if these conditions are met: that the donee accepted the donation, that the donor waived his right to recall a donation, that the contract is made in written document submitted to the donor.²⁰

To understand different opinions regarding the nature of donation in prospect of death regulated in SCC, different opinions in the matter of nature of legacy and donation in prospect of death should be kept in mind. Donation contract in prospect of death is, like any other contract, according to the number of declared wills criteria, a bilateral legal transaction because the donee has to declare his will to accept the donation.²¹ Contrary to that, legacy is transferred using the testament which is a unilateral legal transaction.²² Validity of a donation contract in prospect of death is not conditioned by the donee outliving the donor.

16 The principle of will autonomy is regulated in paragraph 13 of SCC and reads: „Volja i naredba čovečija zastupa zakon, a zakon naknađa volju i naredbu čovečiju. No u onome, što se tiče javnoga poretka i blagonaravija, ne može se ništa izmeniti voljom ili ugovorom.“

17 Dragoljub Arandelović, *Inheritance law* (Belgrade: 1925), 145.

18 Rušnov, *Interpreter of General Austrian civil code*, 422-424.

19 „Zakonska ustanova § 956 o.g.z. hoće samo, da iztiče, da se darovanje za slučaj smrti u p r a v i l u ima smatrati zapisom, a samo iznimno, ako ima nedvojbenih obilježja pogodbe, darovnim ugovorom“, Rušnov, *Interpreter of General Austrian civil code*, 422.

20 Rušnov, *Interpreter of General Austrian civil code*, 423.

21 Babić, *Civil law: Book I – Introduction to civil law*, 153-154.

22 Ilija Babić, *Inheritance law* (Banja Luka: 2012), 174.

Conversely, for legacy to be valid, the legatee needs to outlive the testator. Accordingly, the property in donation contract in prospect of death, passes to the heirs of the donor if the donor dies before the donee, while in case of death of the legatee property does not pass to legatee's heirs because they are not the heirs of the testator²³.

Donation contract itself regulated in SCC (paragraph 561-568) differed from the donation contract regulated in ACC (938-956). The definition given by the SCC relies on Roman law where *animus donandi*²⁴ is particularly emphasized compared to the definition given by the ACC which emphasizes the non-encumbrant nature of the contract²⁵.

3. DONATION IN PROSPECT OF DEATH IN SOCIALIST LAW

After the end of World War II in the newly-established state there were difficulties in establishing a new legal order. It was not easy to bring laws and other legal regulations that would regulate all aspects of social life. For this reason, the Law on the Invalidity of Legal Provisions passed before April 6, 1941 and during the Enemy Occupation (hereinafter referred to as the "Invalidity Act")²⁶ which gave authorization to apply the legal rules of civil laws that applied to the territory of the former Yugoslavia.²⁷ The Invalidity Act enabled the application of the provisions of SCC, ACC and GPL relating to the donation or the donation in prospect of death. The reason why a donation in prospect of death was not regulated in the period of the Second Yugoslavia is its controversial legal nature. For this reason, the donation contract in prospect of death was left out in the 1955 Federal Inheritance Act, as it was considered that it should be regulated under the Contracts and Torts Act. With the passage of legislative competence in the area of succession to the republics and provinces of SRBiH, the Inheritance law was passed,²⁸ which also did not regulate the donation contract in prospect of death.

Since regulations in the area of inheritance law did not regulate a donation contract in prospect of death, it was expected that this would be done within the provisions of Contracts and Torts Act. The opportunity for such regulation was

23 According to paragraph 473 of SCC: „ *If the heir or the deliverer (legator) died before the testator, the part left does not go to their heirs unless otherwise entitled to.*“

24 According to paragraph 561 of SCC: „*Donation is made, when someone gives something voluntarily, and not asking anything in return.*“

25 According to paragraph 938 of SCC: „*Contract, by which an item is given to someone without charge, is called a donation.*“

26 „*Official Gazette FNRJ*“, no. 84/46.

27 Babić, *Civil law: Book I – Introduction to civil law*, 48.

28 „*Official Gazette SRBiH*“, no. 7/80.

provided during the preparation for the adoption of the Contracts and Torts Act (hereinafter referred to as CTA) adopted in 1978²⁹. The draft of this law included provisions on donation in prospect of death within the donation provisions, but in the opinion of the legislator this contract did not belong to contracts in the field of goods and services transport, as in the case of other regulated agreements, so it was not adopted in the final text of the CTA. In such a standpoint, the legislator did not accept the opinion of Professor Mihajlo Konstantinović who considered that the donation contract and the donation contract in prospect of death should be regulated in CTA.³⁰

Such statutory irregularity of the donation in prospect of death neither in the Inheritance law provisions or the Law on obligations provisions, is retained in our legal framework to this day. Namely, the break-up of the SFRY and the emergence of new states within the borders of the former Yugoslav republics have gradually undergone new legal regulation while retaining some of the old regulations to bring new ones in a particular area. Thus, in Art. 12 of the Constitutional Law for the Implementation of the Constitution of the Republika Srpska³¹ regulates: “*Until the adoption of the relevant laws and other regulations of the Republic, the laws and other regulations of the SFRY and the SRBiH, which are in accordance with the Constitution of the Republic and which are not contrary to the laws and other regulations adopted by the Assembly of Serbian people in BiH, or the National Assembly*”

Pursuant to this provision, in the Republika Srpska, the BiH Inheritance Act of 1980 was valid until the year 2009 when the Inheritance Act that is currently in effect was passed³². The same provision was adopted by the CTA of 1978, but unlike the Inheritance law, no new law was passed in the field of relations in obligational law. The amendments to the Law on obligations³³ made only some changes to the CTA from 1978. However, none of these inheritance and obligation’s law regulations has made any changes in terms of the contracts, or donation contract in prospect of death so this legal institute is still unregulated in our positive law.

29 „Official Gazette SFRJ“, no. 29/78.

30 Mihajlo Konstantinović, *Obligations and contracts – Torts and Contracts– Sketch of the Contracts and Torts Code* (Belgrade: 1969), 157.

31 „Official Gazette of Republic of Srpska“, no. 21/92.

32 “ Official Gazette of Republic of Srpska“, no. 1/09.

33 „ Official Gazette of Republic of Srpska“, no. 17/93 and 3/96.

4. CONCEPT OF DONATION CONTRACT IN PROSPECT OF DEATH

In support of the fact that the donation contract, whether it is legal transaction *inter vivos* or legal transaction *mortis causa*, is not positively regulated by our postwar legislation, although inheritance laws have been passed in the meantime, as CTA also speaks of the fact that its definition remained unaltered. Thus, in the textbooks of Professor Perovic, the same definitions were given before and after the CTA was passed: “*A donation contract is a contract by which one contractor (donor) transfers or is obliged to transfer to the other party (donee) the right to property of certain things, the right or to make a profit on the account of his property, without any appropriate remuneration.*”³⁴

To the donation contract in prospect of death general rules apply which apply to the donation contract as well, with certain specifics related to the donation contract in prospect of death, including the fact that the transfer of the donation item was postponed until the moment of death of the donor.³⁵ One of the main features of the donation is the intention (*animus donandi*) of one contracting party (donor) to give a certain benefit to the other contractor (donee), i.e., it's a unencumbered legal transaction. Aside from the donation contract, unencumbered disposition of property can also be done through a testament, or legacy. However, donation contract differs from testament and legacy so it is important to keep in mind their mutual difference when defining the donation contract in prospect of death.

Donation is as unilateral legal transaction *inter vivos* which validity is conditioned by compliant statements of will of both parties, donor's and donee's. It is a formal contract because it is necessary for its formation to have the appropriate form. In our law, the Law on Notaries³⁶ regulates the mandatory notarial processing of documents for “*legal affairs that promise a doing as a donation, and the lack of a notary form in this case is replaced by the execution of the promised act.*”³⁷

The important attribute of donation is its unencumbered nature, because other contracts exist that can be free, but what is so specific about the donation is the donor's intent of gifting to the donee (*animus donandi*). Because of this, in addition to the subject of donation, *animus donandi* was the essential element of the donation contract.³⁸ This is the cause of the donation contract. Donation

34 Slobodan Perović, *Law on obligations – First book* (Belgrade: „Privredna štampa“, 1980), 602 and Slobodan Perović, *Obligations law I, third edition* (Belgrade: 1976), 386.

35 Perović, *Law on obligations – First book*, 608 and Perović, *Obligations law I*, 390.

36 „*Official Gazette of Republic of Srpska*“, no. 86/2004, 2/2005, 74/2005, 76/2005 - ., 91/2006, 37/2007, 74/2007 – CC decree, 50/2010, 78/2011, 20/2014 and 68/2017.

37 Art. 68, sec. 1, i. т. Notaries Act.

38 Babić, *Contracts in civil law: Individual part of obligations law*, 84-87.

is an unilateral contract because it implies the fulfillment of the obligation only on the donor's side, while the donee does not do anything in return. However, the donor voluntarily gives a donation, without the possibility of the donee asking the transfer of the donation item on some legal basis. The donor wants to increase the property of the donee for some other reason, not for the benefit that he expects from him.³⁹ The motives or incentives of the donor may be different, but the inadmissible incentive in unencumbered legal transactions always leads to nullity of a legal transaction⁴⁰.

For a donation as a unencumbered legal transaction, special rules apply to termination of contract and reimbursement of donation items in encumbered legal transactions. *Animus donandi* is mainly motivated by the personality of the donor and this intention should remain present even after the donation contract has been executed and if the donee presents a rough irreverence then the donor can terminate the contract. Likewise, the donor may seek a return of donation items if he has no necessary means of life (the impoverishment of the donor) as well as in case of divorce or annulment of marriage.⁴¹ In addition to these reasons for the revocation of the gifts of interest to the parties themselves, there are also reasons relating to the rights of third parties, ie cases of rejection of the donation contract. Third parties who can contest the donation contract are the necessary heirs in the event of a violation of the right to a necessary inheritance part, then the persons who have the legal right of support from the donor as well as the creditors of the donor.⁴²

In addition to the regulations in the field of obligation-legal relations, inheritance regulations as well contain certain provisions on donation. Such as the provisions of Inheritance law which pertain to calculating of the necessary part of inheritance and accounting the donation and legacy into the part of inheritance. Thus Art. Article 34 (Donation and assessment of its value) of the Inheritance law in the Republika Srpska stipulates that “*a donation in the sense of this Law shall also be considered a waiver of the right, debt relief, all that the possessor has given to his successor during the lifetime for his inheritance or for the establishment or expanding a household or for carrying out an occupation, as well as any other disposition without charge.*” The donation can also be given in the form of insurance in favor of the donor.⁴³ In general, anything can be a donation no matter how it's obtained as a donation from the testator.⁴⁴

39 Perović, *Obligations law – First book*, 614.

40 Art. 53, sec. 3 of 300.

41 Babić, *Contracts in civil law: Individual part of obligations law*, 91-93.

42 *Ibidem.*, 93-96.

43 Art. 58 (Donation for insurance purpose) of Inheritance law.

44 Art. 51 (Calculating the donation in for a lawfull) of Inheritance law.

The donation contract also exists in case of apparent conclusion of a contract covering the donation contract so that a concealed (disguised) and not apparent (simulated) contract will be valid.⁴⁵

A donation in prospect of death is a type of donation contract where the donation or donations have been postponed until the moment of the death of the donor, and it produces legal effects only in case that the donee outlives the donor.⁴⁶ As with any other donation contract, accordance of the donor's and donee's will is required, as opposed to the legacy that represents a one-sided statement of will. A donation in prospect of death is not a base for inheritance, nor is a donee a successor, but a creditor whose right to demand surrender of donation items is postponed until the moment of the death of the donor. The donation contract in prospect of death applies the general rules applicable to the recall of donations, so there is no possibility of revocation at will, as is the case with testament and legacy.⁴⁷

The donation contract in prospect of death also has certain similarities to the testament or a legacy. Testament can be defined as "... *one-sided, personal, always recalling the last statement of will of a testamentary capable person, by which he places his inheritance in the case of his death in the legally prescribed form.*"⁴⁸ The Testament, as well as a donation, is a unencumbered legal business, but has different legal effects. It is a unilateral legal transaction so for his validity is sufficient the statement of will of only one person, the testator. The statement of the will of the testator must be free and true and directed to forming a testament (*animus testandi*). It must be done personally, without the possibility of using a representative. It can be revoked, either wholly or partially, at any time until the death of a testator, and the testator cannot waive this right. It is made during the testator's lifetime, but produces legal effects only after his death, and testamentary heirs may claim the items and rights that were left to them by the will only after the death of the testator.

Relating to content of the testament a legacy can be bequeathed⁴⁹ and the testament is the only form that it can be used so. The legacy does not set the heir but is a special kind of donation in prospect of death that seems to be beneficial to a particular person. The testament leaving the legacy produces legal effect only in the case of the death of a testator, and in the case that it does not produce a *mortis causa* effect, then such a statement of will represents another

45 Babić, *Inheritance law*, 81.

46 Babić, *Contracts in civil law: Individual part of obligations law*, 97.

47 Perović, *Obligations law – First book*, 608.

48 Babić, *Inheritance law*, 115.

49 Art. 103 of Inheritance law: „*The testator can leave one or more legacies by testament.*“

legal transaction.⁵⁰ The testator bequeathes to legatee “*one or more specific items or a right to a particular person*”,⁵¹ while the testator determines the heir to “*inherit all his property or part of the property determined by the entire property*”⁵². A heir is also a person who has “*left one or more particular items or rights if it is determined that the will of the testator was to have that person as a successor*.”⁵³

In the event of suspicion if a testator appointed a single person for a successor or a legatee, a successor is considered to be a person to whom items or rights are left directly so that he acquires them at the moment of delation, and the legatee is usually the person to whom the item or right is left indirectly so that the legatee acquires it directly by getting it handed over by the successors.⁵⁴ Heir is a universal, and the legatee is the singular successor. Right to a legacy is acquired at the moment of death of the testator *ipso iure* provided that the legatee has outlived the testator or was conceived at the moment of the testator’s death and is worthy to obtain the legacy.⁵⁵

The right to a legacy is an obligational right⁵⁶ and in accordance with such a legal nature may be transferred to another person as well as any other obligational right. The legatee can renounce his right to a legacy, to burden the subject of the legacy with a hypothec, compensate the claim with the legatee’s debtor etc., and if the legatee dies after acquiring the legatee status, his right is inheritable.

Based on the mentioned characteristics of a legacy, certain similarities can be observed, but also differences in relation to the donation in prospect of death. So the similarities between these legal institutes are that the donee, as well as the legatee, must outlive the donor or the testator; both the donee and the legatee have a legally enforceable obligational right in relation to the subject of the contract, ie the legacy at the time of the death of the donor or the testator; the legacy left to the lawful successor is included in his legally inherited part as a donation.⁵⁷ In contrast to the similarities, there are more differences between a donation and a legacy: a donation is the institute of the obligational law, and the legacy an institute of inheritance law, the donation contract in prospect of death only relates to the moment of the death of the donor, and all the rules of the Law on obligations apply, while a legacy is regulated completely by the rules of inheritance law; the obligation to execute the donation contract in prospect

50 Milan Kreč and Đuro Pavić, *Inheritance Act - commentary* (Zagreb: People’s paper, 1964), 271.

51 Art. 108, sec. 1 of Inheritance Act.

52 Art. 101, sec. 2 of Inheritance Act.

53 Art. 101, sec. 3 of Inheritance Act.

54 Babić, *Inheritance law*, 167.

55 Art. 113, sec. 1 of Inheritance Act.

56 Babić, *Inheritance law*, page 173.

57 *Ibidem.*, 167-168.

of death is on the side of all the heirs, and the obligation to execute a legacy is only on the side of the legacy debtor; in the event of a violation of inheriting the necessary part of the inheritance, the testamentary disposition is reduced, as is the legacy, and possibly the dispositions made by donations; decreasing the testamentary disposition in the event of a violation of inheriting the necessary part of the inheritance is carried out proportionally, while the donations are returned in reverse order they were made.⁵⁸

5. LEGAL NATURE OF DONATION CONTRACT IN PROSPECT OF DEATH

Since the occurrence of the donation contract in prospect of death in Roman law, to this day there is no unified standpoint regarding its legal nature. There is a constant dilemma whether this is a contract or a legacy, because the attitude on this matter depends on which legal rules will apply to a donation in prospect of death. Thus, Article 956 of the SCC stipulated that a donation to be fulfilled after the death of the donor is valid as legacy if the form prescribed by law is complied with, and is considered as a donation contract if the donee accepted it, if the donor explicitly waived the right to reclaim the donation and if a written document is given to the donee. SCC regulated the donation in prospect of death in a form of legacy in paragraph 568. Older legal theory was based on Justinian's law and as such regulated the donation in prospect of death as a legacy.

The donation contract that meets the requirements of the provisions of Art. 108 - 116 (provisions on legacy) and Art. 64-81 (testament provisions) of the Law on Inheritance in Republic of Srpska, left in the form of a testament is considered to be a legacy.⁵⁹ A donation in prospect of death is not the basis for inheritance, and the inheritance contract is, in the law frameworks where it is permissible. In our legal area, donation in prospect of death is considered a donation contract *inter vivos* where the handover of donation items is postponed until the moment of the death of the donor.⁶⁰ In relation to the donation contract in general, the essential characteristic of the donation contract in prospect of death is, accordingly, the condition relating to the moment of the handover of donation items, and whose aging is necessary for the legal transaction to produce legal effect.⁶¹

⁵⁸ *Ibidem.*

⁵⁹ Babić, *Contracts in civil law: Individual part of obligations law*, 98.

⁶⁰ Perović, *Obligations law – First book*, 608.

⁶¹ Panić, *Donation in prospect of death*, 281-282.

„The condition is a future and uncertain circumstance that affects or leads to legal transaction by acting or disengagement.“⁶² The condition does not affect the validity of the legal transaction but only the effect of the legal transaction, ie the legal effect of the will with which the legal transaction depends on the occurrence of an uncertain event.⁶³ Different types of conditions are distinguished: suspensive, resolutive, potestative, causal, mixed, unfavorable, negative and positive. Regarding the legal nature of the donation in prospect of death, it is of particular significance the legal effect of the suspensory and the resolutive condition.

A suspensory or dilatory condition removes the effect of the legal transaction until the condition is fulfilled and if the condition does not fulfill the legal transaction will not produce legal effect.⁶⁴⁶⁵ Thus, legal transaction exists validly and without contractual conditions, but its effect is conditioned by the realization or failure of the suspensory condition.⁶⁶ There is an uncertainty regarding the fulfillment of the suspensory condition, and if this condition is realized the legal transaction produces effect from the moment of its establishment (retroactively), and if it is not realized, it is considered that the legal transaction did not arise. As long as there is uncertainty regarding the fulfillment of the suspensory condition contractual parties are bound by the concluded contract. The transferor of the right at that time is entitled to property right and can treat the contract subject matter as any other possessor of property rights, but the fate of the contract subject matter will depend on the fulfillment of the condition. The acquirer has the right that is emerging, and can take actions aimed at preserving this right such as, for example, enrollment in public records.

Legal work concluded under a resolutive or terminative condition produces legal effect from the moment of conclusion of legal transaction. There is uncertainty about the duration of a legal transaction, whether the resolutive condition will be fulfilled or not. The acquirer of rights has the right to demand the surrender of the subject of the contract immediately upon conclusion of the legal transaction and if the termination condition is not fulfilled, he shall retain the surrendered thing. However, if the resolutive condition of the legal

62 Babić, *Civil law: Book I – Introduction to civil law*, 168.

63 Lazar Marković, *Civil law: Book I – General part and real law, second edition* (Belgrade: 1927), 253.

64 Babić, *Civil law: Book I – Introduction to civil law*, 169.

65 Also according to art. 74, sec. 2 of CTA: „If it is concluded under the suspensory condition and the condition is fulfilled, the contract shall have an effect from the moment of its conclusion, unless the law, the nature of the transaction or the will of the party do not result in something else“.

66 Contrary to this is the opinion of Professor Marković: „Under one of the conditions the establishment of a right in legal transaction, depends on the occurrence of an event, which is imposed as a condition. These are delayed or suspensory conditions“, Marković, *Civil law: Book I – General part and real law, second edition*, 254.

transaction is fulfilled, legal transaction ceases and the acquirer is obliged to return the item back to the person from whom it was received.⁶⁷

The condition under which the donation contract in prospect of death is concluded refers to the moment of handing over donation items to the donee, which is the moment of death of the donor. Thus, a donation in prospect of death produces legal effect at the time of the conclusion of the contract, but its legal effect has been made dependent on a future circumstance whose realization is uncertain, which is the moment of death of the donor. In legal theory, the question is whether or not this is a suspensive condition or suspension period because it has a different legal effect for each of these institutes.

If the moment of death of the sponsor in the donation contract in prospect of death is a suspensive condition then the legal effect of the contract arises if the donee outlives the donor.⁶⁸ *Donatio mortis causa* had such legal effect in Roman law. However, assuming that the donor in the donation contract in prospect of death is determined with a suspensive condition, then in case the donee dies before the donor, his heirs have the right to the left donation in prospect of death.⁶⁹ Accepting the conception of how the effect of the donation contract in prospect of death occurs under a suspensive period, and not the suspensive condition, leads to a stance that this is a posthumous donation (*donatio post mortem*).⁷⁰ The essential feature of a *donatio post mortem* is that it is not necessary that the donee outlives the donor for its validity.

It is considered that a donation in prospect of death can not be concluded under a resolutive condition.⁷¹

Based on the given statements on the legal nature of donation in prospect of death, it can be concluded that there are two opposing views. According to the first view, a donation in prospect of death is a legal transaction *inter vivos* which contains a provision that the donation item will be handed over to the donee after the death of the donor. In this case, „neither the death of the donor, nor the death of the donee, nor the fact that the donee died before the donor, is affecting the donation.“⁷² On the other hand, a donation in prospect of death is a legal transaction containing a suspensive condition by which the transfer of subject of the contract is postponed until the death of the donor, but only if he is outlived by the donee. Both sides have their own arguments, but the view that

67 According to art. 74, sec. 3 of CTA: „If it is concluded under the resolutive condition, the contract shall cease to be valid when the condition is fulfilled“

68 Babić, *Contracts in civil law: Individual part of Obligatinos law*, 97.

69 Panić, *Donation in prospect of death*, 286; Marko Đurđević, „Donation contract in prospect of death“, in *to Zbornik radova Pravnog fakulteta u Novom Sadu, nr. 1* (Novi Sad: 2011), 241.

70 Đurđević, „Donation contract in prospect of death“, 241.

71 Panić, *Donation in prospect of death*, 289.

72 Đurđević, „Donation contract in prospect of death“, 242.

a donation in prospect of death is a type of a donation contract concluded under a suspensive condition deserves special attention. As a special argument to this point, the fact taken into consideration is that the donation contract expresses in particular the personal characteristics of the contracting parties, that is, *animus donandi* is of particular importance.⁷³ Namely, the donor in donation contract in prospect of death takes into account in particular the personality of the donee, not the personality of his heirs. The donor here does not have to know who the heirs are, so in most cases he does not want to give a donation to heirs, so it would not be justified to claim the donation after the donor's death in case the donee did not outlive him.

The specificity of the donation in prospect of death in the sense that the personal traits of the donee are expressed in it may arise with the revocation of this contract. The revocation of a donation contract in prospect of death, as well as with every donation, is only possible for legally prescribed reasons, not by the free will of the donor⁷⁴. So „*whoever presents a donation once, cannot take it back*“⁷⁵. However, a possibility exists for a donor to revoke a donation in prospect of death by his will,⁷⁶ and this is also possible in the case of death of the donor⁷⁷.

6. CONCLUSION

The donation in prospect of death is, along with the testament, or legacy, an unencumbered legal transaction. The concept of donation in prospect of death in Roman law based on Justinian's law had a form of a legacy. This means that the same purpose could be achieved through the *donatio mortis causa* and by legacy, with certain differences, especially in terms of forme. The donation in prospect of death is a compliant statement of will of the donor and the donee which produces the legal effect for the life of the contracting parties. However, this consent of wills was being achieved under a suspensive condition that the donee outlives the donor. If this was not the case, the successors of the donee would not have the right to demand the surrender of the subject of legacy. Also like legacy, a donation in prospect of death could be freely revoked regardless of the reason for the revocation.

⁷³ *Ibidem.*, 88.

⁷⁴ Perović, *Obligations law – First book*, 608.

⁷⁵ Đurđević, „Donation contract in prospect of death“, 250.

⁷⁶ Such a point has been made by professor Konstantinović in his *Sketch of the Contract and Torts Code*, and see Konstantinović, *Torts and contracts – Sketch of the Contract and Torts Code*, 157.

⁷⁷ Such a solution has the French Civil Code, see *Art. 951 of Code Civil*.

In paragraph 956, ACC regulated the donation in prospect of death, which in its definition also contains the elements of legacy and elements of the donation contract, even though it has been regulated by the provisions of the obligational law. Contrary to its original, the SCC accepted the Roman conception and in paragraph 568 regulated the donation in prospect of death as a legacy but within the obligations provisions on donations.

Pursuant to the Invalidity Act, the provisions of the ACC, SCC and GPL applied in Socialist Yugoslavia to all legal relations that were not regulated by a positive law. Such a case was also with a donation in prospect of death which, because of its legal nature, was not regulated either within the scope of the inheritance regulations nor in the provisions of the CTA.

In our legal framework donation contract in prospect of death is considered a type of a donation contract. It is a bilateral legal transaction *inter vivos* which validity is conditioned by a consent of wills of both contracting parties, donor and donee. In addition to the subject of donation, *animus donandi* is an important element of a donation contract in prospect of death. This contract is concluded under a suspensive condition, which means that it produces legal effects only in the event of death of the donor, and the donee may ask for the handing over of donation items only at the time of delation. Unlike the Roman conception, it is not required that the donee must outlive the donor so that in the case of an earlier donor's death his successors are entitled to inherit him. Based on this, the essential characteristic of the donation contract in prospect of death is that it is an irreversible legal transaction. This means that, unlike a legacy, a donation contract in prospect of death can be revoked only for legally prescribed reasons, and not at the will of the donor.

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ПОКЛОН ЗА СЛУЧАЈ СМРТИ (DONATIO MORTIS CAUSA)

Ђорђе Раковић⁷⁸

Правни факултет Универзитета у Бањој Луци

Апстракт: *Поклон за случај смрти је правни посао са дугом правном традицијом. Заједно са тестаментом и легатом има своје коријене у римском праву. У различитим временским периодима развоја римског права и donatio mortis causa имао је различиту правну природу али је доминантна била она настала у Јустинијановом праву гдје се поклон за случај смрти сматрао легатом. Радило се о добротном располагању поклонодавца у намјери даровања поклонопримца које је производило правно дејство након смрти поклонодавца али само под условом да поклонопримац надживи поклонодавца. Као такав donatio mortis causa је у правилу био опозив.*

Спорна правна природа обиљежила је даљи развој поклона за случај смрти. Тако је АГЗ прихватао двојну природу поклона за случај смрти и као легата и као уговора о поклону, док је СГЗ прихватао римску концепцију. Различно тумачење је задржано и до данас јер поклон за случај смрти није регулисан позитивним прописима, било облигационоправним, било насљедноправним. Углавном се сматра да је поклон за случај смрти врста уговора о поклону inter vivos гдје је предаја предмета поклона одложена до тренутка смрти поклонодавца. Ради се о уговору о поклону који је закључен под суспензивним условом који настаје у тренутку смрти поклонодавца, а услов није да поклонопримац надживи поклонодавца. Уколико поклонопримац умре прије поклонодавца његови насљедници имају право да захтијевају предају предмета поклона. Уговор о поклону за случај смрти схваћен као врста уговора је у правилу неопозив.

Кључне ријечи: *уговор о поклону, поклон за случај смрти, donatio mortis causa, тестамент, легат, посмртни поклон.*

⁷⁸ Доцент на Правном факултету Универзитета у Бањој Луци. Е-mail: djordje.rakovic@pf.unibl.org