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PRESENT IN CASE OF DEATH IN OUR LAW

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Abstract. *Discussed in this paper is a present in case of death observed, first of all, through the prism of the existing status of legislature in our law. Particular attention has been paid to determining legal nature of this civil law institute and its delimitation from delivery (legacy). Since the present in case of death has not, after the Second World War, because of a specific legislative law technique applied in this territory, found its place in none of law texts, the author proposes in this paper possible solutions for its legal norming. The existing decades-old legal vacuum, according to the author, must be "filled" by provisions of appropriate contents, for it is only in that way that uniformity of the court practice, respect of subjects equality principles in the legal commerce can be achieved as well as a certain level of legal safety.*

Key words: *present in case of death, delivery, future codification of civil law*.

1. INTRODUCTORY NOTES

The present in case of death, as a particular form of donation where transfer of title on a certain things or any other right of a donor is postponed to the moment of his death, has a long and rich history.[1]

In the times past, presents in case of death were usually made with regard to any mortal danger (imminente periculo) imminent to a donor (for example, going to war, serious disease, departure for faraway and dangerous journey). Roman legal sources, in addition to these mortis causa donations, also make mention of presents in case of death motivated by the temporariness of life (human mortality).[2]

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[1] For more details on origin of this legal phenomenon in ancient Greece and Roman state see: S. Avranmović, Evolucija slobode testiranja u antičkom grčkom pravu (doctoral thesis), Beograd , 1981, pp. 79-91, 123, 154; A Malenica, Poklon u rimskom pravu (doktoral thesis), Novi Sad, 1977, Introductory notes, p. XIX; I. Puhan, Rimsko pravo, Beograd, 1977, p. 399; A. Romac, Rimsko pravo, Zagreb, 1981, p.397; V. Radovčić, Pravna problematika i razvitak instituta darovanja (doktorska disertacija), Zagreb, 1983, p 6.

[2] See; Digesta, 39, 6, 2. Cited after: A. Romac, Izvori rimskog prava, Zagreb, 1973, p. 533.

Although a present in case of death in its principal characteristics was more related to inter vivos present than to certain forms of singular succession mortis causa, the Romans began relatively early to connect its existence to deliveries. Already in classical law, in addition to the regulations of Augustus' family law, applied to donatio mortis causa were all those restrictions that for deliveries with regard to their bequest were effective on the basis of Lex Furia, Lex Voconia and Lex Falcidia.[3] According to views exposed in literature,[4] one need not see in expanding application of the aforementioned laws to presents in case of death the first stage of their identification with deliveries, but only as a precaution measure of a legislator by means of donatio mortis causa to evade restrictions provided for deliveries. Proper approaching of a present in case of death to delivery begins by introducing absolute revocation of donatio mortis causa. Further step in their identification is connected with the possibility of placing a burden on the presentee with fideicommissa, as well as in the right of the presentee by querella inofficiosi testamenti to request cancellation of the will if he was encroached in his rights.[5]

In Justinian Code, the process of assimilation of a present in case of death and delivery is ended by introducing, as binding, a form of codicil for donatio mortis causa. Although a present in case of death in Justinian Law was formally classified in ultimae voluntates (ultimate will disposition) and equalized with delivery, that equality was not consistently carried out, because, in addition to suspensively conditioned presents in case of death, which were identical to deliveries, the Roman legal sources of that time also recognized donatio mortis causa where transfer of property was carried out immediately upon the moment of its conclusion. Just because of that, donatio mortis causa is deemed neither in Justinian Code a conceptually and materially clear legal institute, and that contained in it are both characteristics of a present and characteristics of a delivery.[6]

Donatio mortis causa was also known in the medieval law. Because of the general legal particularism in the Middle Ages, it is not possible to present a generalized review of a present in case of death. Available data confirm that a present in case of death, suspensively conditioned by earlier death of donor, was only taken over by the medieval law from the Roman Law. A present in case of death was widely used by the German and other neighbouring peoples of the Middle Ages and served, first of all, in addition to donatio inter vivos, as an effective means to evade principles on the exclusive, that is, predominant effectiveness of lawful inheritance.[7]

2. In Short on a Present in Case of Death in Certain Modern Legal Systems

A present in case of death is nowadays a subject of legislative regulations of many states all over the world. Thus, French Civil Code (of 1804)[8] prohibits donatio mortis

[3] See: Gaius, Institutiones, 2, 25, 226, 227. Cited after: O. Stanojević, Gaj, Institucije, Beograd, 1982, p. 153.

[4] V. Radovčić, op. cit., p.34.

[5] A Romac, Rimsko pravo ..., p. 397; D. Stojčević, Rimsko privatno pravo, Beograd, 1983, p. 330.

[6] V. Radovčić, op. cit., p.107.

[7] Ibid., pp. 116-117.

[8] Used for the purposes of this paper was Code civil, Dalloz, Paris, edited by G. Goubeaux – Ph. Bihr. – X.

causa (Article 893). Truly, a present in case of death was allowed in the old French law, but rarely applied because of the "donner et retenir ne vaut" rule.[9] It was already in the 17th century that they began to identify a present in case of death with the inheritance disposals to fully equate donatio mortis causa with the will under Ordonnance of 1731.[10] That is why FCC allows only two forms of good-will disposals: a present during life (donation entre vifs) and will (testament).[11]

A present in case of death is allowed under the Austrian law and as such it is regulated under the Austrian Civil Code (of 1811)[12] in the part dedicated to contracts. For donatio mortis causa, ACC stipulates a combined solution, determining it, on the one hand, as a delivery and, on the other hand, as a contract. A present in case of death will be effective as a delivery if requirements of form stipulated for a delivery are observed, and as a contract, if a presentee has accepted the present, if a donor has explicitly renounced the rights to recall the present done and if a document in writing has been handed to a presentee (paragraph 969 of ACC).

A present in case of death is also allowed under the German law. The German Civil Code (of 1900)[13] stipulates that regulations on orders for a case of death (paragraph 2301) shall be applied on the promise of present given under the condition that presentee outlives the donor.

Similarly to the German law, the Swiss legislator recognizes, in the Code of Obligations (of 1883)[14], the possibility of making a contract on a present in case of death, but states it precisely that for this form of donation rules relative to the disposals in case of death shall be valid (Article 245 paragraph 2).

The English law and other laws constructed upon its influence also recognize a present in case of death, which may be done only in case of existence of imminent life danger of the donor. But, in contrast to the aforementioned legal systems where transfer of that being presented is postponed until the donor's death, in English law, the present validity condition is the very delivery of the subject of present at the time of this legal business conclusion. Consequently, as far as revocation of such donation in case of death is in question, it shall be only possible in case when there is no more that death danger the donor was in.[15]

Henry. Further in this paper, abbreviation FCC will be used for this Code.

[9] Contained in this principle is prohibition to retain the rights of disposition of the subject of present by the donor.

[10] For more details, see: V. Radovčić, op. cit., p.123, Note 394 and the there cited literature.

[11] See Articles 893-1100 of FCC.

[12] Used for the purposes of this paper was Allgemeines bürgerliches Gesezbuch, translated by D. Arandjelović, Beograd, 1921. Used hereinafter will be abbreviation ACC for this Code.

[13] Used for the purposes of this paper was Bürgerliches Gesezbuch, band 6, Erbrecht, Stuttgart, Berlin Köln, Mainz, 1974, edited by Hs. Th. Soergel – W. Siebert.

[14] Used for the purposes of this paper was a translation of Codes des Obligationis of the Institute for Comparative Law, Beograd, 1976.

[15] For details, see: A.R. Mellows, The Law of Succession, London, Dublin, Edinburgh, 1993, pp. 520536.

3. HISTORICAL REVIEW ON A PRESENT IN CASE OF DEATH IN OUR LAW

In this territory, a mention on the present in case of death dates back to the Middle Ages. Available data speak that this legal institute was often applied, usually under a descriptive name "to give for soul" in favour of churches and monasteries. Such presents could have been granted both by the ruler and landowners as well as by the dependent population. Such form of donatio mortis causa is encountered in Serbian charters, according to which he who donates reserves the right to enjoy the donated inheritance until his death.[16]

Evolutive development of a present in case of death in our law may further be tracked through an analysis of provisions of the Serbian Civil Code (of 1844), rules of the Montenegrin customary law and regulations of the Hungarian private law (effective in the territory of Vojvodina) dedicated to this legal institute.

Under the Serbian Civil Code, a present in case of death was identified with delivery, stipulating unambiguously paragraph 586 that "a present in case of death done shall be deemed a legacy or delivery and consequently justice shall be administered pursuant to it". Only one part of the legal regulations on a present in case of death in the Austrian law was a model to this regulation. In addition to this solution, also stipulated under ACC, as we have already said, was a contractual nature of a present in case of death, along with fulfilment of certain conditions.

Montenegrin customary law[17] says that a present in case of death was identified with deliveries, so that all rules effective for this form of singular acquiring mortis causa were analogously applied to a present in case of death as well. Available in literature is information that no difference was made within people between delivery and a present in case of death.[18]

Hungarian private law stipulates that a present in case of death had to fulfil formal requirements of validity, issued for written wills and material requirements of validity, provided for presents and disposals mortis causa. With regard to legal effects, regulations effective for wills and hereditary law contracts were applied to a present mortis causa.[19]

After the Second World War, a present in case of death was not a subject of legal regulations. That legal gap was neither filled under the Law on Obligation Relations[20], because regulated under this legal text were only basic obligation relations, including contractual and other obligation relations in the field of commerce of goods and services. Belonging to the normative competence of the then federal units were legal regulations of other obligation law relations. However, until the dissolution of the Socialist Federative Republic of Yugoslavia none of the republics had passed regulations under which they would be regulated on the whole. In the meantime, certain contractual relations (lifetime

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[16] Thus, in Archangel Charter of 1348, Nikola Utolčić, a landlord, and his wife donated their village Ljubočevo to the monastery of St. Archangel under the condition to reserve the rights of usufructuaries until their death. Cited after: A. Solovjev, Zakonodavstvo Stefana Dušana (doctoral thesis), Beograd, 1928, p. 115.

[17] Prince Danilo I's Code of 1855 did not contain provisions on a present in case of death, while inter vivos present (Articles 480-493 and Articles 896-899) were regulated under the General Property Code of 1888.

[18] See: B. Tomović, Nasledno običajno pravou Crnoj Gori, Beograd, 1925, pp. 104-105.

[19] See; A. Jassensky – P. Protić, Privatno pravo u Vojvodini, Sombor, 1922, pp. 172-173.

[20] "Sl. list SFRJ", Nos. 29/1978, 39/1985, 57/1989; "Sl. list SRJ", No. 31/93.

maintenance and ceding and distribution of property during one's life) were regulated under the laws on inheritance of the federal units, but in expectation of the regulations of the republics by means of which other untypical contracts in the field of commerce of goods and services (servants, lifetime rent, present, including a present in case of death) would be regulated, still in usage are legal rules of the pre-war law on the basis of the Law on Nonvalidity of Legal Regulations passed prior to April 6, 1941 and during the Nazi occupation.[21]

A mention should be made here that over this long period of time there have been attempts of legislators to legally regulate a present in case of death. Thus, included in the Draft Law on Inheritance of 1954 were provisions on this form of donation, but they were cancelled in the final version of the text of the Federal Law on Inheritance, with an explanation that they belonged to the domain of obligation law. Also, incorporated in the Draft Law on Obligation Relations and Contracts of 1974 were provisions on a present in case of death, but they, together with the provisions dedicated to the contract on present, were left out in the Draft Law on Obligation Relations of 1976 and the Law on Obligations Relations, with an explanation that federal units were responsible for their regulation.

Mihailo Konstantinović pointed to the need of regulating a present in case of death in his work "Obligations and Contracts – Draft Law on Obligations and Contracts". A gift in case of death, as it is called by the above law writer, was worked out in the Draft under one article only (Article 552) within Section 5 dedicated to a present.

4. Legal Nature of a Present in Case of Death

Tracking the evolution of a present in case of death, we could notice that, because of its characteristics, this legal phenomenon was always at the borderline between the contractual law and the law on inheritance. It is just because of that that there are differences in understanding its legal nature.

As we have already said, legislatures of certain legal systems worldwide identify a present in case of death with legal affairs mortis causa, regulating that valid for them are rules applied to these legal affairs. Also encountered in literature is equating a present in case of death with delivery. That equality reflects in several segments. For origination of a present in case of death, the donor's statement of will in the form as requested for a testament shall suffice. The presentee's statement on acceptance of the present is not a condition on validity, which is not requested from a person who receives delivery. The presentee must live to see the moment of opening the heritage of the donor and must be capable of inheritance. Like the person who receives delivery, the presentee may realize his right only after the unavoidable heirs and donor's creditors have been compensated. A present in case of death may be revoked upon the presentee's will, without any restrictions with regard to the reasons for revocation.[22]

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[21] "Sl. list FNRJ", No. 84/1946.

[22] See: D. Arandjelović, Nasledno pravo s naročitim obzirom na gradjanski zakonik Kraljevine Srbije, Beograd, 1925, pp. 145-146; I. Ćepulić, Sistem općeg privatnog prava, Zagreb, 1925, p. 680; B. Tomović, op. cit., pp. 102-103.

In the context of understanding a present in case of death as a legal affairs mortis causa, a view exposed in the theory should also be mentioned that a present in case of death suspensively conditioned by earlier death of the donor is, in fact, a type of hereditary-legal contract. However, why it is considered a hereditary law contract, no closer argumentations are given.[23]

In addition to the aforementioned views, particular attention is also due to a view that a present in case of death is a form of a contract on present and that, in principle, valid for it are rules referring to presents.[24] This practically means that a present in case of death, as a modification in the contract on present, comes as a result of the agreed statements of will of contractual parties, the donor and the presentee. He that donates must, as a rule, be fully capable to contract, while he who receives donation need not be capable to contract. The presentee holds a position of creditor and after opening the donator's heritage, he, together with other creditors, settles his demand, prior to the legal and willed heirs and the person who receives delivery, but after the unavoidable heirs. To conclude donatio mortis causa an appropriate form is requested, most usually a form of a public document, in view of the fact that delivery of the subject of the present has been postponed till the death of the donor. A present in case of death cannot be revoked at the free will of the donor. Revocation is possible only for reasons stipulated for revocation of the inter vivos present.[25]

Analysing the aforementioned views on the legal nature of a present in case of death we can draw the following conclusions:

a) Treatment of donation in case of death as an institute similar to delivery may be acceptable for more reasons. Both legal phenomena produce effect only upon opening the donor's, that is, testator's heritage. Also, both a present in case of death and delivery produce singular succession mortis causa, the presentee, that is, the person who receives delivery acquire, as a rule, only certain rights, but not obligations. In addition, that what links donatio mortis causa and delivery is their subject, delivery of a thing to the presentee, that is, the person who receives delivery after the donor's death, that is, that of the the person who gives delivery.

b) Assigning a present in case of death "under the cap" of inheritance law contracts cannot be justified, because a present in case of death, although comes under the agreed statement of the donor and the presentee is not a legal basis of inheritance as is the case with inheritance law contracts. Inheritance law contracts, as a rule, produce a universal succession, but as for a present in case of death only singular succssion into certain rights of the donor is possible.

c) Insisting on the contractual nature of a present in case of death can be justified, because this legal affairs may come only as a result of the agreed wills of the donor and the

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[23] See: See; A. Jassensky – P. Protić, Privatno pravo u Vojvodini, Sombor, 1922, p. 172; Vismara Storia dei patti successori, Milano, 1941, p. 110 and the like. Cited after: V. Radovčić, op. cit., p. 49. Note No. 183.

[24] D. Arandjelović, op. cit.,p. 147; I. Ćepulić, op. cit., p. 681; S. Perović, Ugovor o poklonu, Enciklopedija imoviskog prava i prava udruženog rada, tom, Beograd, 1978, p. 868; V. Šeparović, Ugovor o darovanju, Naša zakonitost, No. 10/1988, p. 1171.

[25] Such view was taken in the court practice: "Contract on donation in case of death falls – in spite of its name – in legal affairs among the alive the efficiency of which has been postponed to the death of the donor. That contract is an allowed legal affairs and it cannot be equated with a null and void contract on inheritance from Article 108 of the Law on Inheritance. Decision of the Supreme Court of Croatia, Gž 281/67, cited with Č V. Šeparović, op. cit., p. 1171.

presentee. Therefore, bequest of some property benefit in a testament is not donatio mortis causa, but delivery.

Summing up the aforementioned, we can draw a conclusion that it is in vain to determine oneself strictly to the inheritance law or contract law nature of a present in case of death. This legal phenomenon is permeated both by the obligation law and inheritance law elements, so that is why we think that it is a civil law institute sui generis.

5. PRESENT IN CASE OF DEATH – DELIVERY RELATION

A present on case of death and delivery are, in addition to certain differences, closely related institutes of civil law.

A present in case of death differs from delivery in its origin. While an agreement of the stated wills of the donor and the presentee for a present mortis causa is required, statement of will of only one person shall suffice for delivery. In that context, the donor may be, in principal, only a person fully capable to contract, while delivery may be bequeathed by any testamentary capable person. The subject of a present in case of death may only be a prestation manifested in the form of donation. In contrast to that, the subject of delivery is more widely determined and may consist of donation, prestation, refraining and suffering. A present in case of death must be veiled in a form of a public document, while for delivery a form of testament is required that may be in a written or oral form, public or private.

That what makes a present in case of death and delivery close to each other reflects in the following characteristics. A present in case of death and delivery are a basis for a singular succession, and in view of that both institutes produce legal effect only after the donor's, that is, testator's death, it follows that they are a basis for a singular succession mortis causa.

A present in case of death also comes coincidental with delivery in view of their subjects. The presentee may only be a person that has lived to see the moment of donor's death, which in substance corresponds to a legal position of the person who gives delivery. The presentee, as well as the person who receives delivery, may demand the benefit left only from the donor's universal successor (or more of them), that is, from the person who gives delivery. A property benefit may be left to both the presentee and the person who receives deleivery with an order to perform certain obligation.

A present in case of death (this also applies to the inter vivos presents) may be, for the purpose of equating co-heirs in the good-will receipts, a subject of assignment to a hereditary part (collatio bonorum) as well as a delivery. This applies, under the condition that intention of the testator on their nonassignment does not result from the will.

A present mortis causa may also be, if the right to unavoidable part (as an actual right) has been violated, returned to the aim of its compensation. Similar destiny may also be that of delivery, because its value is being decreased until the unavoidable heirs have been compensated.[26]

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[26] When the right to unavoidable part as an actual right has been violated, and there is no any part of inheritance left, reduction of testamentary inheritance is first taken up and then (if unavoidable part cannot fully be compensated) restitution of the present. When return of a present is in question, the first to be returned

6. PRESENT IN CASE OF DEATH IN OUR LAW DE LEGE FERENDA

Scant attention is being paid to a present in case of death these days in our law. Reasons for this are, probably, many. This is to point to some of them. Because of a particular legislative and legal technique used in this territory, a present in case of death has not found appropriate place in any legal text. As a consequence, legal literature "avoids" to work out dontaio mortis causa, because it is still "unclear", in view of the characteristics of this legal institute, whether it is a task of the theoreticians in the field of Obligation Law or Inheritance Law.

In expectation of a civil codex, under which a present in case of death should be, in addition to other things, regulated, here are some proposal-guidelines for its regulation.

A present in case of death should be standardized in the part dedicated to contracts of specific importance for the institution of inheritance. Included there would also be: contract on lifetime maintenance, contract on ceding and distribution of property during one's life, contract on lifetime rent, contract on present and classical inheritance law contracts.

A present in case of death may come only under the agreed statement of wills of the donor and the presentee.

Any person fully capable to contract may have a role of a donor. Juveniles who have turned 15 may be donors only in view of that property that is the result of their work. Other persons of limited capability to contract could also be donors, but consent of their legal representatives and tutor organs shall be necessary for conclusion of contracts on a present in case of death.[27]

In principle, any person may have a role of presentee. Contract on present shall be, on behalf of a presentee incapable for business, concluded by his legal representative. A person of limited capability for business may conclude himself a contract on a present in case of death, but consent of his legal representative shall be required for validity of such contract, if any obligation has been taken over by such legal business.

Since transfer of that what is being donated has been postponed until the donor's death, the presentee must live to see the moment of the donor's heritage opening, and in view of the fact that acquiring without compensation mortis causa is in question, it seems acceptable that he must, at the same time, fulfil assumptions on the capability and worthiness for acquiring according to the inheritance law basis. Therefore, the presentee would, in view of compensation of his demand, occupy the same legal position as the person who receives delivery. If the presentee dies prior to the donor, the subject of present shall not pass to the presentee heir.

A present in case of death may have transfer of one or more rights of the donor for a subject.

A present in case of death may be made only in the form of a public document.

A donor may always, upon his own will, including also the possibility of disposal of the subject of present, both by legal businesses inter vivos and, by legal businesses mortis causa, revoke donatio mortis causa in view of its character.

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is a present in case of death, because it is, in its effect, the last present. This applies unless otherwise stipulated by the testator.

[27] Consequently, provisions of Articles 122 paragraph 1, Article 267 paragraph 1 and Article 277 paragraph 2 of the Law on Marriage and Family Relations of the Republic of Serbia ("Sl. glasnik SRS", No. 22/1980, 11/1988; "Sl. glasnik RS", No. 22/1993, 25/1993, 29/2001) should be applied here.

POKLON ZA SLUČAJ SMRTI U NAŠEM PRAVU

Nataša Stojanović

U radu je analiziran poklon za slučaj smrti, u prvom redu, kroz prizmu postojećeg stanja zakonodavstva u našem pravu. Posebna pažnja je posvećena određivanju pravne prirode ovog građansko-pravnog instituta i njegovom razgraničenju od isporuke (legata). Kako poklon za slučaj smrti nije posle Drugog svetskog rata, zbog specifične zakonodavno-pravne tehnike korišćene na našim prostorima, našao svoje mesto ni u jednom od zakonskih tekstova, autor u radu predlaže moguća rešenja za njegovo pravno normiranje. Postojeći višedecenijski pravni vakuum, po mišljenju autora, mora biti "ispunjen" odredbama odgovarajućeg sadržaja, jer samo tako se može postići ujednačenost sudske prakse, poštovanje načela ravnopravnosti subjekata u pravnom prometu i određeni nivo pravne sigurnosti.

Ključne reči: *poklon za slučaj smrti, buduća kodifikacija građanskog prava.*