Article title: THE FAMILY AGREEMENT

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Preprint statement: This article is a preprint and has not been peer-reviewed, under consideration and submitted to ScienceOpen Preprints for open peer review.

DOI: 10.14293/S2199-1006.1.SOR-.PPHFN3S.v1

Preprint first posted online: 07 September 2021

Keywords: civil law, agreement, family, death, succession, heredity

THE FAMILY AGREEMENT

The fate of the attributions deriving from the agreement following occurred events - bankruptcy and submission to support administration of the assignee - the supervening legitimate holders.

The family pact introduced in the civil code by Law n. 55 of 2006 is an institution (expressly) derogating from the ordinary rules of the necessary succession, objectively and subjectively qualified and characterized by a very specific purpose consisting in ensuring the integrity and stability of a company compendium on the occasion of an intra-family transmission deed of the same.

With the positivization of the institute, the legislator intended to balance the need to protect the rights of the legitimates of an entrepreneur on the one hand and the need to avoid the disintegration of the business complex following the establishment of the state of hereditary communion on the other. the same, with the intention of safeguarding the productivity of the company and the related super-individual interests that arise from it.

It should be noted that the rationale of the discipline referred to in Articles 768-bis and ss. cod. civ. is oriented by the protection of constitutionally protected positions, which allow and justify a sacrifice of positions that do not enjoy the same "rank" of protection, constituting, in the opinion of the now common feeling, a legacy of the civil system that requires a work of adaptation to the changed socio-economic context.

With reference to the events subsequent to the conclusion of the agreement, with the exception of the position of the supervening legitimators which is expressly provided for and regulated by the code regulations, the legislation of the institute is silent in relation to the appointment of the support administrator or the bankruptcy of the beneficiary descendant, which occurred after the conclusion of the agreement. Therefore, in order to analyze the effect of the supervening changes in the full capacity of the participants with respect to the attributions covered by the family agreement, it is essential to take into account the ratio legis of the institution, which in coordination with the specific sector provisions represents the "milestone" capable of guiding the legal operator.

The supervening legitimates

One of the main objectives that inspired the legislator in the drafting of articles 768-bis and ss. it is certainly that of guaranteeing the stability of the attribution of the business complex; the achievement of this effect is made possible by the "removal" of the company from the settlor's assets that the agreement determines in no uncertain terms, expressly sanctioning the exclusion of the collation of the transferred company, the non-reducibility of the assignment, and unlike the others attributions carried out on the occasion of the agreement the dispensation from imputation.

It can therefore be considered undisputed that the company attributed with the agreement will definitively and permanently exit the settlor's assets, not being included among the assets (not even the so-called donatum) object of a fictitious meeting at the opening of the transferor's succession. Obviously, such an effect is the result of the necessary participation in the family pact of all the legitimate subjects of the settlor at the time of stipulation, who by expressing their consent accept the lapse of the power to reduce the amount assigned to the beneficiary-assignee.

As a further guarantee of the stability of the business transfer, the legislator has established the short term of one year for challenging the stipulation, granted to the participants to request cancellation.

The favor of the legislator for the protection of corporate integrity is clearly identifiable in the provisions that regulate the possible emergence of necessary heirs, who, being full holders of the reduction action, could, in the abstract, with the successful experiment of the same, cease the effects and the consequent stability of the business transfer.

To avoid this inconvenience, the legislator has established in favor of the beneficiary assignee of the company a real potestative right consisting of the power to "block" the action to reduce the supervening legitimate, who cannot object following the liquidation of the share (company) due to him pursuant to art. 536 cod. civ.

Unlike an ordinary donation from the disposable deceased to the descendant, which can be reduced by the necessary heir who has arisen, the company attributed with the family pact cannot be subtracted from the assignee if the supervening legitimate is liquidated.

Article 768-sexies cod. civ. in fact, it establishes that the spouse and other legitimate holders who have not participated in the agreement can request payment of the sum provided for by art. 768-quater to all beneficiaries (assignees and non-assignees), and only in the event of non-fulfillment can they challenge the agreement asking for its cancellation.

The cancellation of the agreement therefore constitutes the last resort, practicable only in case of refusal of payment by the beneficiaries.

The law apparently seems to attribute a right to the supervening legitimators, in reality an oriented reading of the provision makes it possible to assert that the liquidation request represents the only remedy to obtain a pars quanta of the transferred company.

Only a non-fulfillment by the beneficiaries will allow the third parties to call the stipulation into question. Therefore, every possibility of determining the lapse of the family pact is in the hands of the original beneficiaries, who by silencing the supervening legitimate holders have the potestative right to eliminate the power to act in reduction and keep what is assigned to them.

The sacrifice of the supervening lawyer is evident with respect to his counterparts participating in the agreement, to whom, in addition to being attributed a real right of veto with respect to the validity of the agreement, the further right to be an active

party in determining the value of the agreement is guaranteed. agency. The original participants, as necessary parties, have a greater weight in determining the value to be attributed to the company; their consent is an indispensable element for the valid conclusion of the transfer.

Indeed, from a careful analysis it is possible to demonstrate that the position of the supervening legitimate is characterized by a legal and economic treatment which, under various profiles, turns out to be even more favorable than that guaranteed to the original legitimate participants in the pact.

The first necessary heir has, by law, the right to receive the legal interest which is calculated from the date of the conclusion of the agreement. In this case, with the exception of the children whose existence the settlor was unaware of at the time of stipulation (who are persons already existing at the time the agreement is finalized), the other (or rather the only) hypothesis of entitlements occurring can only be identified in the case of descendants of the settlor born after the conclusion of the agreement. The same, as established by law, in addition to being holders of a credit right that arose before their existence, will also receive legal interest accrued even before their birth, or, in the case of a new spouse,

In this case, an unusual hypothesis arises in which a subject is the legitimate holder of a credit right that generates benefits to his advantage even before the active subject of the obligation comes and exists.

Think, specifically, of the second marriage contracted by the deceased after thirty years from the transmission of the family business to the descendants, or even to the child conceived after such a period of time.

A further advantage of the supervening holder can be identified in the passive solidarity regime that characterizes his credit: all the beneficiaries (assignees and non-assignees) and not just the assignee are in fact required to pay jointly and severally the share due to the supervening third party; notwithstanding what would be due to the legitimate if he were obliged to act in reduction against each co-heir beneficiary.

In fact, if the supervening lawyer were to act in reduction to get back what was assigned with the pact by "attacking" every single attribution made to the co-heirs; the insolvency of any of them, would determine the further reduction of its share on the combined assets (the donation no longer recoverable due to the insolvency of the donee would proportionally reduce the shares of the other rightholders, including the claimant in reduction, having to consider the so-called donatum).

The legitimates participating in the agreement, on the other hand, have the right to receive their liquidation quota only towards the beneficiary-assignee who is the only debtor.

But there is more, if the position of the supervening legitimate were governed by ordinary succession law, there would be the not unlikely risk of the "perishing" of the company attributed with the family agreement, which would no longer be attributable or collectible to the opening of the succession.

In the light of these considerations, it can be inferred that the legislator, by attributing to the original beneficiaries the possibility of blocking the action to reduce the occurrences, has exactly balanced this disadvantage with the benefits examined, ensuring equal treatment to the lawyer who has arrived, in terms of assets and financial, compared to the original beneficiaries of the agreement.

Assignee subsequently submitted to support administration

The provisions on the family pact, with the exception of the supervening legitimates, do not offer any starting point regarding subsequent objective or subjective changes capable of altering the original conditions of the parties participating in the pact. Therefore, in the absence of express indications, the question arises as to what effects may be generated by the subsequent appointment of a support administrator for the beneficiary beneficiary.

The answer certainly cannot be considered univocal and universal, but must first of all be modeled on the characteristics of the specific case; in the absence of regulatory provisions, moreover, any repercussions of the appointment decree on the agreement concluded can only be derived from a coordinated application of the individual provisions relating to the institutions involved.

The starting point can only be represented by the very nature of the support administration which is a measure that is not ablative of the beneficiary's ability to act, but preclusive of the performance of specific acts; therefore, with the exception of any other case in point, the one that affects the possible repercussions on the family pact concerns the case in which the beneficiary of support administration who is also the assignee of the company is precluded, in the decree opening the measure, the ability to exercise the business activity. In this case, the question arises as to whether the application of the measure can be considered compatible with the cause of the family pact, and if not, what is the fate of the stipulation.

In order to dispel the doubts relating to the keeping of the agreement upon the occurrence of such a circumstance, the legal nature of the business transfer must first be emphasized.

Considering it to be undisputed that the family agreement can be classified in the category of inter vivos stipulations, the company transfer with the same action must also be considered definitive, whenever the formal and substantive requirements provided for by the regulations are respected by the contracting parties. In fact, it should be remembered that one of the salient features of the negotiation cause of the family pact is the stability of the attributions that are the subject of it, in particular that of the company, for which a real shocking effect occurs.

In the light of the general principles, the definitiveness of the transfer to the assignee can therefore be affirmed, and the impossibility of the unexpected inability to carry out the business activity to determine a just cause for termination of the contract. However, the occurrence of such an event in a period of time falling within the forfeiture period referred to in art. 768-quinquies of the Italian Civil Code. civ.

could justify the exercise by the settlor of the action for annulment of the agreement by mistake on the qualities of the person of the other contracting party.

On the other hand, a particular resolving remedy of the question seems to be able to be found in the exercise of the right of withdrawal pursuant to art. 768-septies cod. civ.

In this regard, it should be noted that the right of withdrawal belongs to the contracting parties only if it has been expressly provided for by the participants in the contractual agreement, therefore where the parties have opted for the inclusion of such a power to dissolve the contractual bond. , the exercise of the same can become a useful tool that can be used by the settlor to unilaterally subtract the company from the person by now unable to operate it, and in this case ensure the achievement of the contractual purpose.

The current state of the art seems to offer the disposing entrepreneur these only two remedies, the exercise of which must be coordinated with the extinguishing and solving effects of the dissolution of the agreement.

A noteworthy detail should be noted in the not remote possibility that the settlor who intends to dissolve the family pact diverging from the planned interests, is at the same time appointed as support administrator of the assignee towards whom he would like to exercise the action of cancellation or withdrawal. In this case it is necessary to evaluate any compatibility profiles between the office exercised and the private law powers exercisable against the assisted person. In such a circumstance, the conditions for a conflict of interest arise, which can only be resolved through the intermediation of the tutelary judge who may be called upon to adopt appropriate measures pursuant to art. 410 co. 2 cod. civ.

It is good to remember that although the company becomes part of the assignee's assets in a definitive way following the stipulation, the ratio legis of the family pact is aimed at protecting the stability of the transfer not only to safeguard the property interests of the settlor and beneficiaries, but also to ensure business continuity which in reality constitutes the main final objective of the legislator.

The facilitating and derogatory regime of the family pact has reason to exist because it tends to protect the interests of third parties, characterized by public relevance, specifically it refers to the protection of the right to work of company employees and the interest of creditors of the company to safeguard its capital guarantee.

In this perspective, it is possible to justify a retrocession of transfers made with the family agreement every time an event occurs, such as that in the present case, which is manifestly an obstacle to company operations. Therefore, a termination clause of the family pact that determines the retransfer to the settlor or the replacement of the beneficiary with another descendant can be considered lawful and legitimate in the event of objective circumstances that could question the integrity and operation of the business. transferred. This remedy must obviously take into account the satisfaction of the property interests of all the contracting parties, who must be ensured that the liquidation obtained will be preserved.

Survival bankruptcy of the beneficiary beneficiary

The regulatory conditions that characterize the case of the beneficiary subsequently subjected to support administration can, *mutatis mutandis*, be considered the same also for the case in which the beneficiary assignee of the company is subsequently declared bankrupt; in this case, however, the different quality of the interests involved should be noted.

The protection of the stability and corporate unity characterizing the family pact must in fact be balanced by the protection of the creditor class of the bankrupt entrepreneur. Therefore, the relationship of forces between the settlor of the agreement and the other parties involved and the bankruptcy trustee cannot be considered equal, the latter, in light of the markedly publicistic nature of the interests it is called upon to protect, certainly has a wider range of action and greater guarantees.

In the event of bankruptcy of the beneficiary of the family agreement, the practical implications that affect the fate of the stipulation are many, and the points of view from which they must be analyzed are also different.

In the first place, it must be established that the trustee takes over all legal property relations of the bankrupt, not for the purpose of protecting or representing the entrepreneur but with the primary task of recovering, in the interest of the creditor class, the largest possible amount of assets. Instrumental to this objective is the exercise of the revocation action pursuant to art. 64 and ss. L. bankruptcy. and the power to dispose of the stipulations in place.

From the trustee's point of view, the family pact stipulated by the entrepreneur can represent the source of a patrimonial advantage to be preserved with respect to the power of withdrawal of the other contracting parties or an act prejudicial to the mass of creditors to be invalidated or rendered ineffective.

From the point of view of the settlor and the non-assignee beneficiaries, the effect on the transferred company arising from the exercise of the right of withdrawal following the bankruptcy of the beneficiary must be considered.

The exercise of the right of conventional withdrawal from the agreement pursuant to art. 768-septies, can be provided *ad nutum*, as there is no positivized obligation in this regard; the same would constitute a rebalancing tool for the beneficiary contracting parties with respect to the renunciation (*rectius* loss) pursuant to the law of the right to act in reduction on the company assigned to the assignee, and with specific regard to the position of the settlor, it must be identified as the possibility of revoking what attributed in a liberal way.

Obviously, this power to unilaterally terminate the contract, albeit based on general principles of law (protection of legitimate rights and the power to revoke provisions free of charge or acts of last will) must be reconciled, in the event of bankruptcy of the taxable person of the dissolution contractual, with the advertising needs of credit protection; therefore its exercise does not determine a change in the assets of the bankrupt entrepreneur's status quo, but a mere modification of the passive status.

In fact, if the family pact were to be dissolved due to the withdrawal, the ordinary real effects of the transfer of the company to the settlor would not occur, but, given the public relevance of the interest in the conservation of the assets, and the provisions of art . 72 l. bankruptcy, would give rise to a mere credit claim on the part of the accused entrepreneur, among other things, to request the registration in the passive status of his claim on company assets like any other creditor.

Furthermore, it is good to remember that the contractual clauses that make the termination of the contract depend on the bankruptcy are ineffective.

A small observation concerns the nature of this credit, which cannot be considered assisted by privilege, as it is not among those strictly provided for by Articles 2745 and ss. cod. civ.

Furthermore, following the exercise of the right of withdrawal, the curatorship would become the holder of a credit with a value equivalent to the amount paid to the legitimate holders on the occasion of the conclusion of the agreement.

The stipulation of the agreement can also be questioned by the bankruptcy trustee, who may deem it profitable to get rid of the company acquired by the bankrupt entrepreneur and recover the sums paid to the legitimate holders. This result can be achieved either by exercising the right of withdrawal if envisaged or by challenging the agreement, contesting its validity or effectiveness by means of a bankruptcy revocatory action.

The first remedy can be considered useful if the trustee prefers to collect the amount of liquidity disbursed to the legitimates by sacrificing the company assets through their disposal. It should also be emphasized that such an operation could have the merit of satisfying further interests, such as safeguarding the level of employment or the operations of the company retrocessed to the original settlor.

The revocatory action aimed at making the family agreement ineffective constitutes, on the other hand, the residual or alternative remedy depending on the reasons that support it.

The curator can in fact:

- Make the agreement ineffective because it was stipulated to the detriment of creditors if it is characterized by an incongruous valuation of the business complex: the contracting parties could in fact attribute an increased value to the company for the sole purpose of determining a higher value to the liquidation quotas, subtracting resources from the assets of the entrepreneur.

In this way, the trustee would get back the liquidated amount to the co-legitimate holders or would paralyze the liquidation obligation if still in existence;

- Make the agreement ineffective not to contest the value of the company established with it but in order to paralyze the waiver pursuant to law to the reduction and collation of what is attributed to the other rightholders at the time of stipulation.

Obviously it should be remembered that the petitum of the revocation action is the ineffectiveness and not the invalidity of the agreement, the latter therefore retains its effects between the contracting parties, but the unfavorable financial consequences are not opposable to bankruptcy.

By activating this remedy, the trustee has the possibility of eliminating the prejudicial effects of the family agreement for bankruptcy and in particular the loss for the bankrupt of the reduction action on the amount assigned to the other participants on the occasion of the agreement and consequently open the way to a asset recovery of the pars quanta of legitimacy on the same due to the bankrupt entrepreneur.

Finally, a clarification of a decisive juridical nature is necessary with respect to the stability of the effects and attributions deriving from the family pact: except for "pathological" cases in which the value of the company is established by agreement to the detriment of the beneficiary, the family pact constitutes for the latter, in the abstract, a patrimonial advantage, since the value of what was received is always greater than what was paid to the other participants. Therefore, if the curatorship is not able to demonstrate the obvious economic disadvantage suffered by the bankrupt on the occasion of the agreement, the attributions paid by the assignee to the other legitimates cannot suffer any prejudice as fulfillment of obligations by law and non-fulfillment of moral obligations as established by art. 64 l. bankruptcy.

The liquidation of the shares made by the settlor: application problems and alternative remedies

A frequent recurring phenomenon in the application practice of the family pact consists in the liquidation of the shares due to the spouse and to the non-assignee descendants carried out by the same settlor with his own funds.

The payment in place of the beneficiary assignee, configures a case of fulfillment by the third party as based on the letter of art. 768-quater of the code civ., the taxable person of the obligation is solely the assignee.

However, following this payment, the settlor will become the holder of a credit right towards the descendant-assignee having as object the amount equivalent to the sums paid.

The fate of this credit will then be governed by the relationships between creditor and debtor, with the specification that any remission of the debt will integrate a case of indirect donation subsumable under art. 809 cod. civ. and as such subject to imputation and collation.

Therefore, if the settlor remits the debt to the assignee, the direct liquidation deed of the other entitlements will be calculated in the donatum for the purposes of the fictitious meeting in the same way as an indirect donation from the settlor (de cuius) to the assignee; it is added to the attributions found in the pact, as the descendant-assignee, not having used his own resources, will have essentially obtained the company for its full value.

From a legal point of view, the sums paid cannot be qualified as attributions made on the occasion of the agreement pursuant to art. 768-quater and consequently cannot be subtracted from the ordinary rules concerning collation and reduction (the fulfillment of the third party, which in this case is linked by family relationships

with debtor and creditor, is a transaction due to an abstract cause, the will of the third party to pay in place of the debtor is exile and remains unrelated to the cause of the transaction which is the source of the obligation).

Therefore, having established that the free fulfillment by the third-settlor in place of the debtor-assignee is in effect an indirect donation, the consequences on the succession plan are:

- the impossibility of bringing the settlement agreement back to the discipline of the family pact, as it is unrelated to the causal device of the same;
- the application to the donations received from the debtor-assignee of the ordinary rules on imputation, collation, reduction and fictitious meeting.

At this point it is necessary to make a clarification concerning the object of the indirect donation: the liquidation made by the settlor, as the fulfillment of a third party of a pecuniary obligation to which the beneficiary beneficiary is indebted, is an indirect donation having as its object a sum of money and not the company.

In fact, if it were considered that the settlor, liquidating the entitlements in place of the beneficiary beneficiary, had indirectly donated the entire company to the latter, we will find ourselves faced with a non-application of the family pact since the beneficiary beneficiary, in the light of the recent guidelines of the jurisprudence of legitimacy, at the opening of the succession of the settlor should charge and collate the mediated object of the donation received, therefore the company (and moreover to the value it has at the opening of the succession and not to that determined by the stipulation of the agreement).

In this way the family pact would be useless.

It can therefore be concluded that the liquidation made by the settlor, when it is a liberal act, constitutes a further attribution to the beneficiary but relates to a sum in money and not the asset obtained with its payment.

Therefore, considering the uncertainties and instability of the liquidation made by the settlor, and considering it possible for the settlor to make, on the occasion of the family agreement, in favor of the participants, further attributions to the transfer of the company, which are subtracted by law from the reduction and to collation, with the sole obligation of imputation; it is possible to take an "alternative route" to direct settlement (intended as a third party fulfillment).

The alternative is given by the express renunciation of the right to liquidation in the face of an attribution made in their favor by the settlor.

In particular:

- The disposition with family agreement assigns the company to the descendant, against whom the obligation of liquidation of the other legitimates arises;
- The right-holders expressly renounce liquidation;
- Following the express renunciation, the settlor assigns additional goods (or money) to the renunciates.

If the final result of the procedure is the same: satisfaction of the rights of the non-assignees with the settlor's assets, the conditions and legal qualifications differ.

In fact, the legitimate holders renounce a credit right towards the assignee and at the same time obtain an attribution directly from the settlor which is subtracted from collation and reduction; no shift of wealth transits (directly or otherwise) from the settlor's assets to that of the beneficiary assignee.

It is evident in this case that the beneficiary beneficiary will not be the recipient of any further attribution because his debt has been remitted by the creditor.

At the same time, the assignment of the settlor to the non-assignee legitimator expressly enters into the causal device of the agreement because it is carried out for the purpose of concluding the contract and is therefore subject to the discipline referred to in Articles 768-bis and ss. (such an articulation of the family pact reflects, by reproducing them in action, the negotiations that characterize each type of stipulation that lead to the development of the definitive contractual synallagm and which are characteristic of a complex contractual case such as the one examined, in which the centers of interest they are even more than two).

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