

# Risks of Donation Acts and Alternatives

## Is it true that donations are risky acts?

Donation is an act whose effects are considered definitive after twenty years from its transcription, or after ten years from the death of the donor.

Within this period, it is possible for any legitimate heirs of the donor (spouse, parents, and also natural children) to contest the donation as harmful to their inheritance rights if the value of the donated asset exceeds the freely disposable share of the estate itself.

Not all donations are dangerous from a purchase security perspective, but the risk needs to be assessed on a case-by-case basis.

The problem may also be posed by banks that may be required to grant a mortgage in future resales of the donated asset and, reasoning abstractly, may refuse to do so even in the case of donations where the donor is single without children (there could theoretically still be the existence of a natural child or an unknown spouse).

These limitations on the future circulation of the donated asset can be overcome (with the uncertainty of any natural and subsequent children remaining) if close relatives (spouse, parents, and known children) all agree, involving them in the donation deed;

they would then renounce simultaneously to the action for recovery provided for by article 563 of the Civil Code, that is, the right to recover the donated asset from third parties who have acquired it from the donee. However, case law and doctrine have developed other types of acts that can contribute to the certainty and security of the legal transaction of the donated asset, the stability of the rights of third-party purchasers, and the legitimate reliance of banks and potential buyers.

## What are the reasons why clients still request to draw up a donation deed?

For example, if Tizio and Tizia each own a share of the property of the house they live in, and Tizio wants to dispose of his share in favor of Tizia without any consideration being paid, the most common actual reason is to achieve tax savings because Tizio wants to buy another primary residence and pay property tax, VAT, and registration tax at reduced rates.

It should be clarified in this regard that if the donation is made for tax-saving purposes, it cannot go so far as to constitute an "abuse of right".

## What does that mean?

For there to be an abuse of right, certain conditions established by Legislative Decree 128/2015, which entered into force on September 2, 2015 (article 10 bis), must be met, and the burden of proving it rests with the Revenue Agency:

firstly, the act constituting the abuse of right must be a mere legal architecture, devoid of real economic substance, entered into with the sole and decisive purpose of achieving tax savings, which renders such savings undue.

If economic substance exists instead, meaning that Tizio has definitively divested himself of ownership of the asset that has passed into his wife's estate and thus has primarily satisfied the reorganizational needs of the family's assets and secondarily also the need to achieve tax savings on the new purchase, then the pursuit of that tax saving is considered legitimate (article 10-bis, paragraph 4).

## So, how can one avoid both the risk of a challengeable donation deed by the donor's relatives and the risk of undue tax advantage?

It is necessary to consider alternative contractual schemes to donation, if applicable to the specific case, highlighting that Tizio is only a trustee of the share of an asset and intends to transfer it back to Tizia in fulfillment of a pactum fiduciae or a previous agreement between them;

or in fulfillment of the obligation to repay a sum of money previously lent by Tizia (so-called *datio in solutum*);

other proposed contractual schemes in the absence of a money transfer include the mandate without representation to alienate, the maintenance contract, and the abdicative renunciation of the co-ownership share.

Let's look at them in detail.

### When can the transfer in fulfillment of a *pactum fiduciae* be suggested?

In this scenario there's a transfer from the trustee to the trustor, such as:

Tizio, living with Tizia, is the owner of the house and intends to transfer it back to Tizia, from whom he is separating, in fulfillment of a previous pact (*pactum fiduciae*) between them made at the time of purchase in the form of a mandate to purchase without representation.

The Court of Cassation with judgment no. 20051 of September 2, 2013, established that such a mandate to purchase without representation could also have been orally conferred, without written form *ad substantiam*, as it is not in itself a source of transfer of a real right over an immovable property, but only a source of an obligation to purchase, which, if violated, entails damages;

only the phase of spontaneous execution of the obligation requires written form as a transfer of rights in fulfillment of an external obligation (precisely the oral mandate).

Therefore, Tizio will declare that the property was purchased by him in trust, in his own name but on behalf and for the benefit of Tizia, who fully paid the purchase price, based on a verbal agreement only;

Tizia asked him for the transfer of the property back to her in fulfillment of the aforementioned fiduciary agreement (*pactum fiduciae*), and Tizio, despite the lack of a written deed evidencing the agreement, is aware of being bound by it under a civil obligation (article 1706, 2nd paragraph of the Civil Code) and therefore intends to fulfill it also to definitively reflect the real situation of ownership in the public land registers;

he will also declare that the transfer of ownership takes place without any consideration, finding its cause in the fulfillment of the aforementioned mandate.

### When can the transfer in fulfillment of a recognition of debt be suggested?

This is the case of Tizio living with Tizia and being the owner of the house, who intends to transfer it back to Tizia, from whom he is separating, in fulfillment of a civil obligation to repay a sum of money previously lent by Tizia under an oral agreement or through an exchange of emails, acknowledging that he is a debtor to her under article 1197 of the Civil Code (so-called *datio in solutum*).

It should be noted initially that it is not a problem that the original loan was concluded verbally and therefore without being taxed, as the announcement of a verbal contract not subject to registration within a fixed term, under article 22, second paragraph of the Consolidated Law on registration tax DPR 131/1986, does not give rise to the application of an additional tax when it occurs between the same parties (in our example, the parties of the transfer deed - Tizio and Tizia) and the effects of the stated provisions have already ceased or will cease by virtue of the announcement deed (i.e., the transfer deed between Tizio and Tizia).

In our case, being a *datio in solutum*, it is by definition extinguishing the obligation arising from the stated financing, therefore falling within the exemption from registration provided for by the 22nd second paragraph of the Consolidated Law on registration tax (in this regard, Cassation 24102 of 12/11/2014).

As for the acknowledgment of the debt by Tizio, being an extrajudicial confessional declaration, it should theoretically incur on a tax of 1%, but as a provision closely connected and instrumental to the transfer between Tizio and Tizia, it is absorbed by the taxation generated by the latter.

In essence, the transfer in fulfillment of a recognition of debt, although containing multiple provisions with a patrimonial content, is subject to a single taxation.

### When can the mandate to alienate without representation be suggested?

This is the scenario where Tizio grants a mandate without representation to Tizia with the task of selling property X within a specified period, at a price not less than Euro ..... and with an obligation to render accounts.

The mandate is a contract with obligatory effects under which the obligation arises on the part of the mandator pursuant to Article 1719 of the Civil Code to provide the indispensable means (provision) to the mandatary for the execution of the mandate.

If Tizio transfers the property to Tizia concurrently with the mandate to her to sell the same property, such transfer will constitute fulfillment of the obligation arising from the mandate, i.e., it will be instrumental to its exact execution.

At this point, ownership passes to Tizia, who, however, holds it solely for the purpose of fulfilling the mandate to sell the house.

The need for segregation of the asset in the mandatary's estate then arises (Tizia), in terms of conflict between the mandatary's creditors and the mandator's creditors, in terms of the succession of the mandatary, and in terms of falling into any legal community of property of the mandatary (if married to a third party).

A means of segregation could be to subject the transfer to the resolutive condition of the failure to retransfer the property to a third-party buyer within the agreed term.