

ASPECTS CONCERNING THE FIRST CLASS OF LEGAL HEIRS

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ABSTRACT:

THIS PAPERWORK PRESENTS SOME OF THE MOST IMPORTANT ASPECTS RELATING TO THE SETTLEMENT OF THE SUCCESSION RIGHTS OF THE DESCENDANTS OF THE DECEASED IN THE CURRENT LEGISLATION, BY HIGHLIGHTING THE CHANGES IN COMPARISON WITH THE OLD CIVIL CODE.

KEY WORDS: *MOȘTENIRE, DESCENDENȚI, MOȘTENITOR LEGAL, VOCAȚIE SUCCESORALĂ, CAPACITATE SUCCESORALĂ INHERITANCE, DESCENDANTS, LEGAL HEIR, INHERITANCE VOCATION, CAPACITY TO INHERIT*

1. Introductory notions

In matter of succession, Law No. 287/2009 concerning the Civil Code [1] takes the regulations established by previous legislation [2], giving vocation to inheritance to the relatives of the deceased in a straight line up to infinity and to those in a sideline till the fourth degree inclusive (art. 963 para. 2 of the new Civ. Code [3]. Similar regulations are reflected in art. 964 para. 1 of the old legislation, according to which the relatives of the deceased with vocation to legal inheritance were divided into four classes: first class- descendants, second class-privileged ascendants, third class- ordinary ascendants and fourth class- ordinary collaterals. In these classes of heirs the legislator has taken into account the different degrees of kinship existing between the person who leaves the legacy, on the one hand, and its various relatives, on the other hand [4].

In terms of legal principles governing the transmission of inheritance, the new regulation retakes, in art. 964 paras. 2-4, the provisions set out in the previous legislation: the principle of calling relatives to inherit in the order of the classes of heirs, the principle of proximity of degree of kinship within the same classes of heirs and the principle of equality between relatives of the same class and same grade.

Thus, we see that after the legislator established the categories of relatives of the deceased who share general vocation [5], the next stage was that of establishing a hierarchy with regard to them.

2. The inheritance rights of the descendants of the deceased

The current Civil Code regulates in the Fourth Book (About inheritance and liberalities). Title II (Legal Heritage), Chapter III (Heirs), Section II (The descendants of

the deceased), art. 975, the right to the inheritance of the deceased for the first class of heirs, namely, the descendants.

First class of relatives called to the deceased's legacy includes, according to the provisions of article 975 para. 1 of the new Civil Code, his children and their descendants in straight line indefinitely, regardless of whether they resulted in marriage or outside of it.

Art. 669 [6] of the old regulations had a similar content, except to specify that descendants are entitled to inheritance parents regardless of gender and that would result from different marriages.

Regarding the first part of the legal text, we must have in mind that the principle of gender equality is governed by the law, as principle in art. 4 para. 2 and art. 16 para. 1 of the Constitution, for which we consider inspired the choice of the legislator to not resume in the new regulation this provision.

We should also mention that the legislator of the new Civil Code, in Book II (About Family), regulating parentage, stipulates in art. 448 that children have equal rights, regardless of their origin from the same marriage, different marriages or outside the marriage.

So, as concerning the successional vocation of descendants, it presents no legal effect the cancellation or nullity of marriage of parents [7], indicating that descendants resulting from different marriages will inherit only their common parent.

In equal measure, as we mentioned earlier, this category also includes children resulting from outside the marriage, provided that the bond of filiation is established by one of the means provided by law. If the court order establishing paternity to the *de cuius* is pronounced after his death, occurred during the litigation process, so established parentage child is destined to inherit his father retroactive to the date of conception [8]. In the old legislation the child born out of marriage had inheritance rights only to the mother and her relatives, but he was not conferred any right to the legacy of his father out of marriage.

Together with the children from marriage and outside of marriage, from the first class of legal heirs also are part the adopted children [9]. In this respect, we mention that the adopted and his descendants acquire by the effect of adoption, the rights that the child from the marriage has towards his parents. If the person leaving the inheritance is the adopter, it is not important if the adoption has entire or restricted effects [10], in both cases, the adopted and his descendants can come to the legacy of the adopter [11].

The difference between the two types of adoption will result only in relation between the adopted and his descendants with their natural relatives. In this situation, in the case of the adoption with entire effects these relations cease and so the adopted and his descendants have no inheritance vocation as children or grandchildren, for example. Instead, it should be mentioned that in case of adoption with restricted effects [12], natural family ties are maintained, therefore the adopted and his descendants having succession vocation, as descendants, towards the natural ascendants.

Also, if the adoption was done not by the deceased, but his child or other descendant of his, we must distinguish between adoption with entire effects, where the adopted and his descendants have successional vocation to legacy left by the *de cuius* [13], and the adoption with restricted effects, when the adopted and his descendants will have no vocation to the legacy of the ascendants of the adopter, because this type of adoption does not create any kinship with the adopter's relatives, including his ascendant leaves legacy [14].

We remember that, in all cases, adoption will take the shown effects only if it was made in order and purpose provided by law, if the contrary, the adoption was whether fiction, respectively the scope of its conclusion was other than protecting the superior interest of the child, the sanction is the absolute nullity of adoption. In this sense, we can deduce that the right of inheritance should not be the cause of an adoption, but its effect.

As a novelty, the current Civil Code introduces the art. 441-447, legislation concerning medically assisted human reproduction with third donor, those provisions relating to succession showing applicability and because it creates a family relationship between parents and child, and, consequently, mutual inheritance vocation between these people. According to art. 446 new Civil Code, father has the same rights and obligations to the child born through assisted reproduction with third donor, as compared to a child born through natural conception. Moreover, these rights and obligations subsisting in the person of the mother, although the legislator rightly does not considered necessary such clarification. In conclusion, we can say that the child resulting from assisted reproduction medical third donor is assimilated by the current legislation in the field of natural child.

By the provisions of art. 441 para. 1, the current Civil Code has expressly stated that medically assisted human reproduction with third donor lineage does not generate any connection between the child and the donor. As a result of this provision, we note that the descendant resulted through medically assisted human reproduction with third donor has vocation to inherit the deceased. Note that the resulted descendant can not collect inheritance of third donor, as between the child and the third donor is no vocation to inheritance, mutual or unilateral. The solution chosen by the legislator regarding medically assisted human reproduction with third donor is, in the opinion of some reputed authors [15], among which we concur, fair and necessary.

In conclusion, we affirm that part of the first class of legal heirs are the following categories of descendants:

- Children of the marriage and their descendants;
- Children born out of marriage whose filiation has been established according to the law and their descendants
- Adopted children by de cuius and their descendants, less the descendants of the children adopted with restricted effects before 1997;
- Children resulted from medically assisted human reproduction with third donor and their descendants.

It is important to retain that the presence of the heirs from the class already mentioned remove from inheritance those who are part of the subsequent classes, according to art. 975 para. 2 of the new Civil Code [16].

Also, according to art. 964 para. 2 of the new Civil Code, which provides that when after disinheritance, the relatives from the closest class can not collect the whole inheritance,

the remaining part is assigned to the subsequent class relatives who fulfill the conditions to inherit. Thus, we find that in the new regulation, the legislator expressly provides the possibility that to the inheritance of the deceased to come two classes of heirs, namely forces disinherited heirs from preferred class within the limits set by the successional reserves and then heirs from subsequently class, by respecting the limits of freely disposable portion of the estate [17].

Article 975 para. 2 provides an explicit manner that the provisions of article above applies to descendants class, as a result, in the case of disinheritance of forces heirs are

being allowed to inherit two classes of heirs, as follows: first class, in the limits of successional reserve and second class, who will collect the freely disposable portion of the estate.

We must bear in mind that the provisions of art. 964 para. 2 shall apply in the case of the first class of heirs only if all descendants were disinherited by the deceased, because we can not omit the provisions of art. 1075 para. 3 of the new Civil Code, which provides that when, after disinheritance, a heir receives a lower share than his legal share, the heir that comes into the contest will be the one to collect the part which would be recovered to the disinherited. In other words, in case of multiple descendants, of which only one is disinherited, the latter will collect only the reserve and others will gather the rest of the inheritance in equal shares. But if all descendants are disinherited, they will collect the reserve, the remaining heritage returning to relatives from the subsequent inheritance class [18].

3. The division of inheritance between descendants

The new regulation provides, in art. 975 para. 4, a regulation similar to that of the art. 669 [19] of the old law, establishing that the legacy or the part of legacy that descendants deserve will be divided between them in equal shares, they come to their own name to inheritance, or by stem, in the case of successional representation [20].

We mention that when they come to inherit by representation the descendants of deceased of subsequent degrees, the division of the legacy of the deceased will be made by stems.

Also, together with descendants or other classes, inheritance can come the spouse of the deceased. To inherit the deceased, the surviving spouse must meet the general conditions required by art. 957-962 of the new Civil Code to inherit ,e.g.. to have successional capacity, successional vocation and to be not unworthy to inherit, but also a special condition imposed by art. 970 of the new Civil Code, namely to have the quality of spouse at the date of opening the inheritance [21].

Regarding the situation in which to the inheritance of the deceased comes also the surviving spouse [22], regardless of their number, descendants gather together $\frac{3}{4}$ of inheritance, according to art. 972 para. 1 of the new Civil Code [23]. It should be emphasized that the new Civil Code expressly establishes a fixed rate of $\frac{1}{4}$ in what concerns the surviving spouse, this share is, in the opinion of many authors, that we agree with [24], an entitled share, as the surviving spouse is the one who supported the other in accumulating the wealth.

Establishing proper proportion for the surviving spouse [25] takes precedence over setting the other heirs shares, when coming into the contest with any of the classes of heirs, which means that the surviving spouse part shall be charged to the part of the other legal heirs of the deceased [26].

Although the rule of imputing the surviving spouse share on the estate presents practical utility, the legislature fails to regulate this aspect in the new Civil Code [27].

4. Legal character of the right to inheritance of descendants

Inheritance rights of first class of legal heirs have the following characters:

a) The children of the deceased, that are descendants of first degree, can come to inheritance only by their own name, not by successional representation. The situation is different in the case of the descendants of the children of the deceased, grandchildren or

great-grandchildren, as example, which may come to inherit both by their own name, when the conditions for representation are not fulfilled, and through this institution, in case of fulfilling these condition .

b) The descendants are force heirs, so liberties made by *de cuius* (gifts or bequests) which affect their reserves are subject of reduction on request. Descendants benefit according to the law, of a part of the inheritance, called reserved share, even against the will of the deceased, concretized by testament. Consequently, if the deceased by inter vivos or mortis causa liberality, prejudice reserve succession, these will be subject of reduction. In light of art. 1088 of the new Civil Code, which provides the reserve of each force heir is half of the share if, in the absence of liberalities or disinheritance, he would have been entitled as a legal heir, we grasp that the reserve of descendants is $\frac{1}{2}$ of the inheritance if they do not come into together with the surviving spouse of the deceased and $\frac{3}{8}$ of the inheritance (half of $\frac{3}{4}$), in the opposite situation.

We believe that the new regulation, which establishes a unique rate determining successional reserve, it is realized an appropriate simplification in this area and at the same time, it mantained a full equality between forces heirs concerning the amount of reserve.

c) Descendants are seizinarry heirs, according to art. 1126 of the new Civil Code. Therefore, to assess the quality of the certificate of inheritance heirs or by judicial way, descendants and any other seizinarry heir acquire by law the possession in fact of the inheritance. Seizin confers, besides possession in fact of the patrimony of inheritance, and the right to manage these assets and to exercise the rights and actions of the deceased without prior certification of the quality of heir [28].

Descendants are required to report donations received from the person who leaves legacy if the donation was not made in exemption from being registered [29]. In other words, the descendants are required to report (to return to the estate) of donations from the deceased, without exemption from being registered, when they come to the inheritance together with surviving spouse, according to art. 1146 of the new Civil Code. These categories of heirs are required to report donations, unless they had concrete vocation to the legacy of the deceased, where it would be opened at the time of donation. We mention, however, that this obligation is removed by renunciation to the inheritance.

Conclusions

In our opinion, the new Civil Code provides, in matters of successional rights of descendants, an appropriate regulation, taking in some cases already mentioned, certain provisions enshrined by the old Civil Code, or, conversely, eliminating provisions which have no longer utility.

We opiniate also, that the new legislation in successional matters brings, in the same time, additions required, through provision with novelty character.

REFERENCES

- [1]. It was published in the ‘Official Gazette of Romania’, Part I, no. 511 of 24 July 2009 and entered into force on 1 October 2011.
- [2]. Civil Code of 1864 was published in the "Official Gazette of Romania", Part I, no. 271 of 4 December 1864.

- [3]. According to art. 963 para. 2, "descendants and ascendants have vocation to inherit regardless of their relationship to the deceased, and collaterals only to the fourth degree inclusive."
- [4]. F. Deak, R. Popescu, "*Treaty of Successional Law*", Vol I-Legal Inheritance, Third edition, updated and revised, Juridical Universe Publishing House, Bucharest, 2013, p 206.
- [5]. Do not confuse the general nature of vocation inheritance, which means that we are in the presence of conditions that must be satisfied by any testamentary or legal heir, with general legal vocation, which have all degree relatives of the deceased, existing the possibility that only one or some of them also to have also specific legal vocation.
- [6]. According to art. 699 of the old Civil Code, children or their descendants succeed the father, mother, grandfathers, midwives and any other ascendant, irrespective of sex and even if they are born from different marriages.
- [7]. Article 305 of the new Civil Code expressly provides that: "The nullity of marriage has no effect on children, who keep the situation of children from marriage".
- [8]. A. Bacaci, Gh. Comăniță "Civil Law. Successions ", Juridical Universe Publishing House, Bucharest, 2013, p 48.
- [9]. Provisions relating to adoption are found in art. 451 and 470 para. 2 of the new Civil Code, an identical legal status allocating the current legislation in matter, Law no. 273/2004 concerning the legal status of adoption subsequently amended and completed.
- [10]. It should be noted that, since the adoption with restricted effects occurred at a time when it was still allowed (the case of adoptions before 1997), it will produce specific effects, including successional matters, even after the legislator renounced to this institution, repealing it. In this regard, the principle *tempus regit actum* is applicable and it could not support the transformation over time of restricted adoption to one with entire effect.
- [11]. F. Deak, R. Popescu, *op. cit.*, p. 208.
- [12]. Government Emergency Ordinance no. 25/1997 concerning adoption, approved and amended by Law no. 87/1998, was the act which established a unique form of adoption, before this moment, the adoption could be both with entire effects and restricted effects. This was expressly repealed and replaced by Law no. 273/2004.
- [13]. The term is an abbreviation of the formula of Roman Law *de cuius successione (rebus) agitur* - one of whose inheritance / property / is about.
- [14]. F. Deak, R. Popescu, *op. cit.*, p. 209.
- [15]. I. Genoiu, "The right of inheritance in the Civil Code", Edition 2, CH Beck Publishing House, Bucharest, 2013, p 78.
- [16]. According to this art.: "Descendants removes deceased heirs of the other classes and come to inheritance in order of proximity degree of kinship."
- [17]. For the situation of the surviving spouse competes with two classes (subclasses) of heirs - only possible in case of disinheritance of legal heirs who are benefiting of the reserve, in accordance with law, see R. Peptan, D-M. Dijmărescu, "Inheritance Rights of the Surviving Spouse In the Regulation of the New Civil Code". Comparative Approach, Annals of the „Constantin Brâncuși” University of Târgu Jiu, Juridical Sciences Series, Issue 4/2013, p. 80-81.
- [18]. I. Genoiu, O. Mastacan, "Inheritance Rights of deceased relatives in regulating of the new Civil Code," in the Law Revue, no. 7/2010, Union of Jurists of Romania Publishing House, 2010, p 16.
- [19]. Article had the following content: "They (the children of the deceased or their descendants) succeed in equal parts when there are all in first degree and are called by their own law; they succeed on the stem when called all or one of them by representation." This article according to doctrine must be interpreted extensively in the sense that the division into sides benefit not only children who are first degree relatives of deceased, but other till infinity, when they come to their own name to inheritance. An example of this situation might be: the deceased has four children and two grandchildren from the greatest of them, and during the term of successional option, children renounce to collect their inheritance, as a result of this, the grandchildren are the ones which in case of accepting, collect inheritance on their own name in equal shares by ½.
- [20]. Under the provisions of art. 965 of the new Civ Code representation is the legal institution through which a legal heir of a remoter degree, called representative climbs under the law, in the rights of its ascendant, named represent, to collect the part of the legacy that he would have been entitled to him if he were not unworthy to the deceased or deceased at the date of opening the inheritance.
- [21]. For the legal requirements for the surviving spouse to inherit, see R. Peptan, "The General Legal Inheritance Vocation of The Surviving Spouse and Composition of the Deceased Husband's

- Succession in the New Civil Code”, Annals of the „Constantin Brâncuși” University of Târgu Jiu, Juridical Sciences Series, Issue 4/2013, p. 35-39.
- [22]. New Civil Code provisions concerning the inheritance rights of the surviving spouse and the rights of other people with vocation to inheritance are found in Section I, Chapter III (Legal heirs), art. 970-974.
- [23]. Under this aspect, the new Civil Code maintain the fair legal regime previously established by the provisions of art. 972 par. 1. see, R. Peptan, D-M. Dijmărescu, "Inheritance Rights of the Surviving Spouse In the Regulation of the New Civil Code". Comparative Approach, Annals of the „Constantin Brâncuși” University of Târgu Jiu, Juridical Sciences Series, Issue 4/2013, p. 79.
- [24]. I. Genoiu, *op.cit.*, p. 79-80.
- [25]. For the estate’s composition of the deceased spouse, see R. Peptan, “The General Legal Inheritance Vocation of The Surviving Spouse and Composition of the Deceased Husband's Succession in the New Civil Code”, Annals of the „Constantin Brâncuși” University of Târgu Jiu, Juridical Sciences Series, Issue 4/2013, p. 40-42.
- [26]. R. Peptan, D-M. Dijmărescu, "Inheritance Rights Of The Surviving Spouse In The Regulation Of The New Civil Code. Comparative Approach", Annals of the „Constantin Brâncuși” University of Târgu Jiu, Juridical Sciences Series, Issue 4/2013, p. 80.
- [27]. R. Peptan, D-M. Dijmărescu, "Inheritance Rights Of The Surviving Spouse In The Regulation Of The New Civil Code. Comparative Approach", Annals of the „Constantin Brâncuși” University of Târgu Jiu, Juridical Sciences Series, Issue 4/2013, p. 80.
- [28]. F. Deak, R. Popescu, *op. cit.*, p. 212.
- [29]. According to art. 1146 para. 1 of the new Civil Code, the raport of donations is the obligation that they have between them the surviving spouse and descendants of deceased when they come together and effectively to the legal inheritance to restore to the heritage the assets that have been donated to them without exemption from being registered by the person who leaves the legacy.