

CURRENT AND FUTURE PROSPECTS REGARDING SANCTIONING NON-COMPLIANCE OF WILLS VALIDITY CONDITIONS IN ROMANIAN LAW

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Abstract in original language

Orice persoană are dreptul de a dispune de proprietatea sa sau a ei pe moarte. Aceasta este una dintre politicile sociale fundamentale în dreptul românesc, dar și în dreptul internațional. Legea pune în aplicare această politică socială fundamentală prin impunerea că proprietatea unei persoane decedate să fie distribuită în funcție dorință a acesteia dar în limitele impuse de lege. Cu toate acestea, în unele cazuri, deși intenția testatorului testamentare a fost clară testamentul va fi nul ca urmare a nerespectării condițiilor de valabilitate a acestora.

Key words in original language

Moștenire, testamente, sancțiuni, condiții de validitate.

Abstract

Everyone is entitled to dispose of his or her property on death. That is one of the fundamental social policies in Romanian law but also in international law. The law gives effect to this fundamental social policy by requiring that a deceased person's property be distributed according to the deceased person's will and in the limits imposed by law. However, in some cases, although the testator's testamentary intention was clear the will is invalid because of failure to comply with their validity conditions.

Key words

Inheritance, wills, sanction, validity condition.

In the Romanian Legal System, the succession law is guaranteed as constitutional¹, by this being assured, at a principle level that this right can be obtained through the active intervention of the state's institutions².

The Civil Code stipulates in the IIIrd Book the ways of obtaining ownership and includes two titles that establish successions: Title I- On Successions (art. 650-799) and Title II- On Donations among Living People and Wills

¹ Art. 46 Romanian Constitution

² For the legislative evolution of succession in the former Romanian law: V. Stoica, *Sotul Supravietuitor, Mostenitor Legal si Testamentar* ed. Editas, Bucuresti, 2004, p 14-23.

(art. 800-941). Together with these depositions there are other regulations in the Civil Code which come to the depositions regarding the succession. By virtue of the new regulations as stipulated by the New Civil Code³, the depositions regarding the Succession are regulated by the IV the book- On Succession and Disposable Portions (art.953-1163)

As shown previously, The Civil Code settles, in art. 560, two ways of passing the successoral assets: through the law (with reference to the people, in the order and share determined by the law) and through *de cuius*⁴ will expressed in a legal act called testament. The very two modalities of passing successoral assets are stipulated in the New Civil Code⁵ which states that "the deceased's assets are transmitted through legal inheritance, in case the deceased does not decide otherwise through Will. We thus distinguish, in both regulations, the difference between legal succession and testimonial succession. In the Romanian Legal System, however, the legal succession is regarded as the norm while the testimonial succession is considered to be the exception, although having the power to change the legal succession through the testimonial decisions taken by *de cuius*⁶, one form of passing inheritance does not exclude the other⁷.

In order to be able to deal with the punishments in the case of terms of validity of testaments we first must define what a testament is and then establish which these trms are. So, as stated in dogmas⁸ and in the legislation⁹ the Will has been defined as a solemn, personal and unilateral legal act which can be revoked during the deceased life, through which the latter decide upon their entire or a portion of their assets for the time after their death.

The testament can contain not only bequests and devises but other depositions which do not concern the assets, thus reaching the conclusion

³ Law nr. 287 , 17 July 2009 regarding the Civil Code, published in the Official Gazette nr.511/24 July 2009.(this will become operative at the date established by the law that brings this into force)

⁴ The testator.

⁵ Art.955. alin1

⁶ Fr Deak, *Tratat de drept succesoral*, second edition, Ed. Universul Juridic, Buc. 2002, pg 115.

⁷ M. Eliescu, *Mostenirea si devolutiunea ei in dreptul R.S.R*, ed Academiei, Buc., 1996, p 53; Fr.Deak *op.cit*, p 8-11; Tribunalul suprem, s. civ. nr.2275/1984. See also art.955 alin2 of The New Civil Code.

⁸ Al. Baccaci, Gh Comanita, *Drept Civil. Succesiunile* ed. II Ed. C.H. Beck, Bucuresti 2006, p.1; C.Stanescu, *Drept Civil. Contractul de transport. Drepturile de creatie intelectuala. Succesiunile*, Ed. Didactica si Pedagogica, Buc., 1967, p. 115; I. Dogaru, V. Stanescu, M. M. Soreata, *Bazale dreptului civil. Vol V. Succesiuni*, Ed. C.H. Beck, Buc 2009, p.192; Fr. Deak, *op.cit*, p.156.

⁹ Art. 1035 New Civil Code.

that “ we stand before two (or more) legal acts, gathered together under the form of a Will” and these acts can be independent form one another¹⁰; given this, the validity of these testimonial depositions must be analyzed separately for each situation for there is the possibility of one of the act being invalid¹¹; since there is a common testimonial form, the formal flows influence all the depositions whose validity are conditioned by the validity if the will.¹²

In order for the testimonial provisions to be valid they must meet the requirements of a legal act in general¹³ (the capacity of signing the legal document, a valid consent, a real cause, legal and moral, legal object) but also some formal special requirements regarding wills¹⁴.

As far as capacity is concerned, we mention art. 856 from Civil Code which stipulates that “any person has the capacity of making a will if they are not forbidden by the law” and art. 808 alin 2”¹⁵. It is capable of receiving through will any person who had been conceived by the time of the testator’s death” but also art. 987 alin 1. of The New Civil Code: “Any person can give and receive portions within the regulations regarding capacity” so, the ability is the rule and the inability is the exception.

The intestacies, since they are regarded as exceptions, are specifically regulated by law and strict interpretation¹⁶. They are grouped into two categories: Incapacity of leaving through will and incapacity of receiving through will.

The following are considered incapacities of giving through will: total incapacity of a minor under 16 years of age to dispose through will (art. 806 Civil Code, we also mention the provisions from the civil code which stipulate in art. 988 ali.1. that the person who lacks the capacity or has a restricted capacity can not dispose of their assets through portions, with the exception of the situations regulated by law), the incapacity of the person under judicial interdiction(who, according to art. 147 from Family Code¹⁷ had the same judicial status as a minor), the partial incapacity of a 16 year

¹⁰ C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, vol.III Buc., 1928, p. 826 nr.1229.

¹¹ Ex. the nuly of the ascendent partition does not affect the availability of the undisposed proportion (Tribunalul Suprem, dec.nr.1196/1956 în CD, 1956, vol.I, p.350-352.)

¹² Fr. Deak, *op. cit.*, p.159.

¹³ As reffered to in art.948 C. civ. and art.1179 from the New Civil Code.

¹⁴ Art. 800, 858 and next Civil Code. and art.1040 and next from the New Civil Code

¹⁵ Similar disposition reffered to inart.957 from the New Civil Code

¹⁶ According to the principal in the Roman Law *exception est strictissimae interpretationis*.

¹⁷ Law nr.4 din 1953 with the subsequent changes

old minor (who, according to art.807 of the Civil Code can dispose of only half of the assets they could dispose as an adult), the 16 year old minor incapacity of disposing through will in favor of their tutor(art. 809 alin.1 of the Civil Code and art. 988 alin.2 of the New Civil Code¹⁸), to all these is added the incapacity of the temporarily injudicious person who is not under interdiction.

The sanction for the incapacity of disposing through will is the relative invalidity of the will as these incapacities have been stated as a means of protecting the stator and their family and are not based on public interest. The action whose objective would be to determine that incapacity is prescriptible according to Decree 167/1985¹⁹, the passage of time being marked from the moment the succession is opened not from the moment the will was written²⁰.

The incapacities of receiving through will are incapacities of use(absolute: the incapacities of the inconceived²¹ and of legal person without a legal status, but also the incapacity of the legal person of receiving through will portions which do not correspond to their established by law purpose, certificate of incorporation or legal status²² and relative the incapacity for doctors and pharmacists who cannot receive portion from the person who was in their care before their death²³., the incapacity of marine officers who cannot receive portions from travellers on board unless their are relatives with the testator²⁴ and the incapacity of a legal guard to receive through will from the under aged person in their care²⁵)²⁶.

¹⁸ „In the relative nullity sanction, not even after the acquiring full capacity of exercise, the person can not dispose of their portions in the benefit of the one who had the quality of legal representative or guard, before receiving from the court release from management. the exception to this is the situation in which the legal representative or guard is the ascendant of the testator”.

¹⁹ Decree 167/1958 regarding extinctive prescription, published in official Gazette. nr.19 of 21 aprilie 1958.

²⁰ Supreme Court, s.civ., dec.nr.1558/1972, în CD, 1972, p.162.

²¹ Art. 808 alin.2 C.civ.

²² Art. 34 din Decretul 31/1954 regarding private and legal people, published in Official Gazette, 8/30 ianuarie 1954; See also: Fr. Deak, *op. cit.*, p. 166; Al. Bacaci, Gh. Comăniță, *op.cit.*,p.45.

²³ Art. 810 C.civ., Supreme Court, s.civ., dec. nr.826/1978, în I.Mihuță, *Repertoriu de practică judiciară în materie civilă a TS și a altor instituții pe anii 1975-1980*, Editura Științifică, București, 1982, p.141.

²⁴ Art.833 Civil Code

²⁵ Art.809 Civil Code

²⁶ For a detailed analyses see also: Fr. Deak, *op. cit.*, p. 166; Al. Bacaci, Gh. Comăniță, *op.cit.*,p.45; M. Eliescu, *op.cit.*, p.168; I. Dogaru, V. Stănescu, M. M.Soreață, *op.cit.*,p.210.

These incapacities affect the abilities of use for the people who are object to the legal texts which means that not obeying them may lead to punishment of absolute invalidity which may be invoked by any interested part²⁷.

The New Civil Code stipulates that portions are affected by relative invalidity if they are offered to doctors, pharmacists and others, in the period in which, directly or indirectly, gave professional help to the testator for the condition that caused death²⁸. There are exceptions to these provisions that is the portions given in favour to the spouse, blood relatives or privileged collaterals and other relatives up to the fourth degree provided the testator does not have a spouse or any other of the above mentioned. Also affected are the portions given in favour for the notary public that certifies the will, the interpreter and witnesses who took part to the authentication of the document but also the portions given in favour for the agents who must take part, according to the law, in establishing privileged testimonial acts and the portions given to people who gave legal assistance in writing the will²⁹.

As far as the Consent is concerned it needs to be mentioned that in order for any legal act to be considered valid, the basic requirement is the existence of the free consent unaltered by any judicial vice such as an error, or violence³⁰. The lack of consent or to be more exact, in case of the will, the lack of unilateral manifestation of the will gives cause to the sanction of absolute invalidity, because one of the essential elements of the legal act is missing. Specific elements are shown in the case of deceit under the form of suggestion. The sanction in this case is the relative invalidity of the will, while the injudicious leads to absolute invalidity of the will³¹.

Regarding the testator's consent, the New Civil Code stipulates in art1038 alin 1 the fact that the will is valid provided that the testator, the consent and the faculty haven't been altered and furthermore it is mentioned the fact that the case of deceit may lead to the annulment of the will even if the maneuvers haven't been used by the beneficiary nor were they known to them³².

Together with the requirements regarding capacity and consent, in order for a will to be valid, it needs to meet some requirements regarding the object of the will which must be determined and determinable and the cause must

²⁷ See: Al. Bacaci, Gh. Comăniță, *op.cit.*,p. 66; Tribunalul Suprem, s.civ., dec. nr.1426/1979, în C.D. 1979, p. 125.

²⁸ Art. 990 alin.1 New Civil Code.

²⁹ See art. 991 din New Civil Code

³⁰ Al. Bacaci, Gh. Comăniță, *op.cit.*,p. 67.

³¹ *Idem*, p. 68.

³² See art.1038 alin.2 of the New Civil Code.

be legal and real. these requirements are governed by the regulations of the common law so we will not get into details

The requirements of form, provided by the Romanian legislation, which must be fulfilled in case of all wills³³ are: the written form and the form of a separate document³⁴.

The sanction given in the case of not following the requirements is according to art.866 of the Civil Code, absolute annulment³⁵, so this can be demanded through any means(action or exception) by any interested part, at any time, this right being unprescriptable .

The law practice and dogma allows certain extenuations of the sanction³⁶. In this respect a null will, based on informality, produces effects if it fulfills the requirements of the law destined for another testimonial form(the conversion of the testamentary form)³⁷. this kind of will gives rise to a moral obligation for the heirs; although absolute , the annulment may be removed through confirmation, if the heirs voluntarily and informed execute the will annulled for informality, after the death of the testator³⁸.

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³³ The legislation also provides with some ordinary forms of will, which the testator can willingly use, such as authentic, handwritten and mystical testament and extraordinary forms such as privileged testaments. due to its falling into desuetude, the mystical testament has been removed from the New Civil Code.

³⁴ According to art.857 Civ.code. „two or more people cannot bequeath, through the same act one in favor for the other or in favour for a third person.”

³⁵ See also art. 1041 of the New Civil Code.

³⁶ Al. Bacaci, Gh. Comăniță, *op.cit.*,p. 72.

³⁷ See art. 1050 of the New Civil Code

³⁸ C. Stătescu, *op.cit.*, p.171.

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