

PARTICULARITIES OF FORCED HEIRSHIP

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Abstract

Forced heirship is that part of the inheritance assets to which the heirs entitled to a portion of the inheritance shall have access, under the law, even against the late person's will, manifested by liberalities or by disinheritances. By regulating the forced heirship, the legislator defends forced heirs against excessive donations or testament legacies, operated by the defunct in favor of tierces, thus ensuring them at least a part of the inheritance to which they are entitled by law. The disposable portion is part of the inheritance assets not reserved by law which the late person could dispose of unencumbered by liberalities. We shall mention as forced heirs the surviving spouse, the late person's privileged descendants and ascendants. The forced heirship of each forced heir is half of the inheritance share which, in the absence of either liberalities or disinheritances, they would have been entitled to as legal heir.

Key words: *forced heirship, disposable portion, liberality, legacy, forced heir*

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1. Preliminary remarks

As a principle, natural persons may freely dispose of their assets, for good or valuable considerations or on a free basis, so that the chart of heirs subsequent to their death be insignificant. Furthermore, no one can be forced to leave legacies, even though there are surviving spouses and close relatives.

However, the right to dispose of, on a free basis, by *liberalities inter vivos* (donations) and *mortis causa* (legacies), as well as the disinheritance (*ex-heredities*) by testaments, can be limited, to the circumstances provided by the law. One of these circumstances refers to the above-mentioned *forced heirship*¹, which is part of the inheritance which shall be attributed, under the law, to persons having the quality of forced heirs. Therefore, should the inheritance originator have forced heirs (surviving spouse, descendants and parents), the liberalities and the disinheritances which he orders shall fall within certain limitations, provided by the law, without thus affecting (diminishing) the forced heirship.

In exchange, even in the presence of forced heirs, the deeds considered onerous or gratuitous which are not classified as liberalities (for example, altruistic deeds) may be concluded with no restrictions, freely, because they do not diminish the heirs'

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¹ On the origin of the forced heirship and other remarks in connection with the Romanian legitimate, the French customary law and the forced heirship in the Napoleon Code, see D. Chirică, *Civil Law. Successions and Testaments*, Rosetti, Bucharest, 2003, p. 302-303.

patrimony. Furthermore, whether the late person has only heirs entitled to a portion of the inheritance, the liberalities and the disinheritances are not limited.

2. The notions of "forced heirship" and "disposable portion"

In compliance with art. 1086 of the Civil code, *forced heirship* is that part of the inheritance assets which forced heirs are entitled to in compliance with the law, even against the late person's will, manifested by liberalities or disinheritances.

By regulating the forced heirship, the legislator defends forced heirs against excessive donations and testament legacies, performed by the defunct in favor of tierces, providing and granting them at least a portion of the inheritance which they are entitled to by law.

Furthermore, we shall specify that forced heirship (the legal provisions which regulate it) defend forced heirs not only against possible excessive liberalities operated in favor of tierces, but also against excessive liberalities operated in favor of certain legal forced heirs². Therefore, considering that the late person may have several children, the defunct shall not be able to gratify one of them except by observing the others' forced heirship³.

The disposable portion refers to that part of the inheritance assets which is not reserved by law and which the late person could dispose of freely, unencumbered, by liberalities (art. 1089 of the civil Code.).

As a consequence, in all the situations in which the defunct has forced heirs, considering that they shall effectively be present to the inheritance, whether the defunct has disposed of his patrimony either by donations, testament legacies or by disinheritances, the chart of heirs shall be divided in two distinct value shares: ***the forced heirship***, which shall be attributed, by law, to legal forced heirs and the ***disposable portion***, which shall be attributed according to the provisions of the inheritance originator⁴. The forced heirship and the disposable portion shall be expressed by fractions of the unit which forms the chart of heirs⁵.

Whether the originator of the inheritance has also disposed of the forced heirship by liberalities (or at least a part of it), upon request of forced heirs, such legal deeds shall be subject to reduction, being cancelled, entirely or in part, so as to recompose the forced heirship/the legitimate heirship.

² See F. Deak, R. Popescu, *A Treaty of Successoral Law. Vol.II. Testament Inheritance*, The 3rd Edition updated and completed, Universul Juridic, Bucharest, 2014, p. 249.

³ See F. Deak, *A Treaty of Successoral Law*, The 2nd edition updated and completed, Universul Juridic, Bucharest, 2002, p. 302.

⁴ See M. Mureșan, I. Urs, *Civil Law. Inheritance/Successions*, Cordial Lex, Cluj-Napoca, p. 87.

⁵ See D. Chirică, *Civil Law. Inheritance/Successions and Wills, op.cit.*, p. 300.

3. Justify the forced/legitimate heirship

Forced/legitimate heirship has been and is one of the most controversial institutions of the inheritance law. At a European level two great systems have been created:

- one recognizing and acknowledging such forced/legitimate heirship, enshrining the principle of absolute testamentary freedom⁶; for example the Anglo-Saxon law systems, conferring absolute freedom to dispose of such *mortis-causa*;
- another one regulating the right to forced/legitimate heirship, as a limitation of the right to dispose of the inheritance assets; for example, the European continental law systems consecrating the principle of protecting forced/legitimate heirship, there being only small differences as for the circle of forced/legitimate heirs and the quantum of the legitimate heirship⁷.

Both systems have generated a large number of arguments, pro and against forced/legitimate heirship. Against such forced/legitimate heirship arguments have been formulated on the fact that it was one of the main causes of family disintegration, as it destroys the authority of the patrimony holder, depriving them of the possibility to allocate the assets based on the skills of each heir⁸. Under the Romanian Civil Code system, the same as the French Civil Code, we shall consider that the social and family debt of transmitting close relatives a part of the inheritance assets prevails over the liberty of willingly disposing of someone's own assets⁹. Should the testator be acknowledged his right to dispose of his assets with no limitation, this could generate situations in which parents would gratuitously estrange their assets, without leaving their children anything, situations considered unacceptable. In the same manner, children could gratuitously dispose of their assets, with no interest in the material situation of their parents.

Forced/legitimate heirship shall find its justification in the fact that it has been and is meant to preserve a part of the assets left by the defunct in the family, being conferred to blood relatives close to the late person and to their surviving spouse¹⁰.

Furthermore, the principle of protecting forced/legitimate heirship also interests society. Without such principle of forced/legitimate heirship, certain persons, having lived lives of high standards, who could find themselves in precarious material conditions, could commit anti-social actions so as to preserve the lifestyle standards which they have got used to. This because every living being has the natural tendency of preserving their normal lifestyle and even of improving them. Or, they do not always use legal means to get to better material conditions, which they have been used to. Thus, forced/legitimate heirship has been conceived as a legal instrument

⁶ See F. Deak, R. Popescu, *A Treaty of Successoral Law. Vol.II. Testament Inheritance, op.cit.*, p. 249.

⁷ *Ibidem* p. 250.

⁸ See F. Deak, R. Popescu, *A Treaty of Successoral Law. Vol.II. Testament Inheritance, op.cit.*, p. 251.

⁹ See D. Chirică, *Civil Law. Inheritances and Testaments, op.cit.*, p. 301.

¹⁰ See D. Chirică, *A Treaty of Civil Law. Inheritances and Liberalities*, C.H.Beck, Bucharest, 2014, p. 398.

insuring relative eligibility between the heirs, cohesion and family strength, suppressing anti-family liberalities - a spring of hate and discord between the members of the same family¹¹.

By the new civil Code, our legislator intended, on one hand, to maintain forced/legitimate heirship, whereas, on the other hand, intended to regulate a reasonable disposable portion, which the testator may use as he pleases, in support of one or another of the legitimate heirs (for example, for the benefit of the heir/child having reduced physical or intellectual possibilities, for those having large families, health problems, etc.¹²) or even in support of helpless foreign tierces.

4. Legal aspects of forced/legitimate heirship

Forced/legitimate heirship implies the following particularities:

a) *Forced/legitimate heirship is a part of the inheritance (pars hereditatis)*¹³. As underlined by the provisions of art. 1086 C. civ., forced/legitimate heirship is “*that part of the inheritance assets*” which shall be attributed, based on the forced/legitimate heirs law, even against the will of the late person.

Forced/legitimate heirship, as part of the inheritance, shall be determined (calculated) at the specific date on which the inheritance procedure is initiated. To this effect, the effective patrimony of the late person shall be considered at the specific date on which the inheritance procedure is initiated, together with the donations during the lifetime, which shall be added to the inheritance net assets.

Forced/legitimate heirship shall go to legitimate heirs in their quality of legal heirs, in compliance with the legal inheritance regulations¹⁴. Therefore, it can be claimed only by the forced/legitimate heirs (surviving spouse, privileged descendants and ascendants of the late person), *who effectively participate to the inheritance procedure*, namely those who, under the law, meet the requirements of the inheritance legislation (inheritance capacity, specific vocation to the inheritance, those who are not unworthy) and who have accepted the inheritance. Forced/legitimate heirship shall be attributed to legitimate heirs under the regulations of the inheritance legal devolution/transfer. For example, in the presence of descendants, the late person's parents are not entitled to legitimate heirship as, falling under the second category of legal heirs, they do not have specific vocation to the inheritance. In the same manner, in the presence of children, grandchildren are not entitled to the inheritance as they

¹¹ See for details F. Deak, R. Popescu, *A Treaty of the Inheritance Law. Vol.II. Testamentary Inheritance, op.cit.*, p. 251.

¹² Ibidem. p. 252.

¹³ See F. Deak, R. Popescu, *A Treaty of the Inheritance Law. Vol.II. Testamentary Inheritance, op.cit.*, pp. 252-253; D. Chiriță, *A Treaty of Civil Law. Inheritances and Liberalities, op.cit.*, p. 395; A. Bacaci, G. Comăniță, *Civil Law. Inheritances*, Universul Juridic, Bucharest, 2013, p.155; D. C.Florescu, *The Inheritance Law by the new Civil Code*, 2nd Edition revised and amended, Universul Juridic, Bucharest, 2012, p. 129; M. Eliescu, *The Inheritance and its Devolution by the Law of the Socialist Republic of Romania*, Academiei R.S.R., Bucharest, 1966, p. 324.

¹⁴ See F. Deak, *op.cit.*, p. 303.

are second degree relatives of the late person, removed from the inheritance by the children, who are first degree relatives. Likewise, unworthiness or renunciation to the inheritance also triggers the loss of the right to forced/legitimate heirship.

As part of the inheritance, the receipt of the forced/legitimate heirship implies the obligation of the legitimate heirs to pay the inheritance debts and encumbrances.

Legitimate heirs cannot draft deeds of acceptance or renunciation to the legitimate inheritance before the initiation of the inheritance procedure, as such deeds over unopened inheritances are null and void (art. 956 of the civil Code).

b) Forced/legitimate heirship is of an imperative nature, of public order. Both the dimension of forced/legitimate heirship and the legitimate heirs are imperatively established by the law¹⁵, not being modified by the late person's will, not even based on the agreement of the future legitimate heirs who might consent to diminishing the legitimate inheritance or to naming other persons as legitimate heirs (would create deeds over unopened inheritance, considered null and void based on art. 956 of the civil Code) Consequently, any testament disposals by which the testator would decide the diminution of the legitimate inheritance or would encumber it¹⁶ shall be considered null and void¹⁷. As decided by the legal practice, the disposer is forbidden any disposals, encumbrances, terms or clauses which would prejudice the rights of the legitimate heirs¹⁸. Furthermore, based on art. 1009, paragraph 1, of the civil Code, we shall consider unwritten the testament provision by which disinheritance shall be regarded sanction for the contestation of the testament disposals which prejudice the rights of the legitimate heirs.

Nevertheless, we shall specify that the law imperatively regulates only the legitimate inheritance right, but not the liability of exercising this right. Subsequent to

¹⁵ As the legitimate heirship is imperatively regulated by the law, it shall be understood of a public order nature. It protects the heirs against possible abuses of *de cuius* (see C. Macovei, M. C. Dobrilă, *The New Civil Code. Article debates. Art. 1-2664*, coordinators F. A. Baias and others, C. H. Beck, Bucharest, 2012, p. 1118); D. Chirică, *A treaty of Civil law. Inheritances and Liberalities, op.cit.*, p. 395-396; F. Deak, R. Popescu, *Tratat A treaty of the Inheritance Law. Vol.II. Testamentary Inheritance, op.cit.*, p. 253.

¹⁶ As the legitimate heirship goes to the legitimate heirs' full property, it cannot be encumbered by the *de cuius* by any types of obligations, even though, as value, the rights of the legitimate heirs would be observed (see D. Chirică, *A Treaty of Civil Law. Inheritances and Liberalities, op.cit.*, p.396).

¹⁷ As underlined by the legal literature "the deeds failing to observe the legal provisions relative to the legitimate heirship are sanctioned by absolute nullity as the legitimate heirs' disinheritance contravenes the most elementary morals, norms of equity, as the legitimate heirship is attributed, last but not least, a social nature as well, the family being the basic core of society" (see F. Deak, *op.cit.*, p. 304). The specific sanction applicable for breaking the legitimate heirship right is the reduction of the excessive liberalities, but not nullity. Nevertheless, there may be situations in which the legal papers shall be considered null and void. For example, the testament disposals by which the testator modifies the circle of the legitimate heirs or the quantum of the legitimate heirship, being declared null and void as they contravene the imperative provisions of the law which protects the legitimate heirship (see F. Deak, R. Popescu, *A treaty of Inheritance Law. Vol.II. Testamentary Inheritance, op.cit.*, p. 254).

¹⁸ See the Supreme Court of Justice, the civil judgment, decision no.1314/1994, in the magazine "The Law"/"Dreptul" no. 7/1995, p. 87.

initiating the inheritance procedure, the legal heir may waive their rights under the law.

c) *The legitimate inheritance right is a personal right, granted by the law to the legitimate heirs on the inheritance procedure initiation date, therefore it shall not be understood as a right inherited from the defunct by the inheritance*¹⁹. It means that the legitimate heirs are not successors in rights of the late person as for the liberalities operated by the latter which might prejudice the right to legitimately inherit (they are not opposable, the legitimate heirs being considered tierces). In exchange, legitimate heirs are successors in rights as far as the other legal papers entered by the late person are concerned (deeds of onerous titles, gratuitous deeds), which shall imply legal effects as far as they are concerned.

d) *Legitimate inheritance shall be attributed in nature.* Legitimate heirs are entitled to the inheritance in nature²⁰, and not to its equivalent in money. In other words, legitimate heirs are entitled to receive inheritance assets in nature, as they are the owners of the inheritance. They are not creditors of the inheritance for the value of the legitimate inheritance, therefore they cannot be forced to be satisfied with the counter value of the part of the inheritance to which they are entitled, but they have the right to claim the assets in nature²¹.

Naturally, the legitimate heir may accept to receive or complete the inheritance by its equivalent in cash, as they have the right, nevertheless not the obligation, to claim the inheritance in nature²². Furthermore, whether the value of the donated good ranges within the limits of the disposable portion, the liberality beneficiary may keep it, whereas the legitimate inheritance shall be attributed in nature of other assets existing within the inheritance patrimony, inclusively in cash.

Only under exceptional situations, in specific cases provided by the law, the legitimate inheritance can be attributed as the equivalent in cash (for example whether the donator has estranged the donated asset before initiating the inheritance procedure, whereas the inheritance patrimony does not cover any other assets).

e) *The legitimate inheritance individual nature.* The legitimate inheritance is individual because, although attributed in joint tenancy to the legitimate heirs, it shall be calculated depending on each legitimate heir who actually participates to the

¹⁹ See F. Deak, R. Popescu, *A Treaty of The Inheritance Law. Vol.II. Testamentary Inheritance, op.cit.*, p. 254.

²⁰ See F. Deak, R. Popescu, *A Treaty of The Inheritance Law. Vol.II. Testamentary Inheritance, op.cit.*, p. 255; D. Chiriță, *A treaty of Civil Law. Inheritances and Liberalities, op.cit.*, p. 399; D.C. Florescu, *op.cit.*, p. 129; A. Bacaci, G.. Comăniță, *op.cit.*, p. 155.

²¹ See M. Mureșan, I. Urs, *op.cit.*, p. 89. The legal court practice has decided that the deceased person cannot break the in-kind inheritance right, deciding the real estate sales by auction and its attribution or round up from the price thus obtained (to this effect, see The Supreme Court of Justice, the civil judgment., decision no.1314/1994, above-cited.).

²² See F. Deak, R. Popescu, *A Treaty of The Inheritance Law. Vol.II. Testamentary Inheritance, op.cit.*, p. 256.

inheritance procedure²³. Therefore, based on art. 1088 of the civil Code "*the legitimate inheritance of each legitimate heir is half of the inheritance quota which, in the absence of liberalities and disinheritances, would have been attributed to them as legal heirs*".

f) *The legitimate inheritance is intangible, therefore it cannot be prejudiced by donations or by legacies*²⁴. As pointed out by the legal literature, in the case and presence of legitimate heirs (who, on the inheritance opening procedure would meet the legal inheritance requirements), the late person's liberalities, which could prejudice the legitimate inheritance, are subject to reduction up to the disposable portion limit. Nevertheless, it does not mean that the assets forming the patrimony of a person alive are unavailable and, moreover, inalienable and non-sizable (as it has been erroneously appreciated by a case decision²⁵). During their lifetime, any person is free to estrange their assets, even gratuitously, the future and the possible legitimate inheritance not implicitly meaning inalienability, just that *it cannot be prejudiced by donations or by legacies or disinheritances*²⁶. For example, during their lifetime, persons can make donations and may dispose by testament legacies of their entire fortune in favor of tierces, specifying that from the inheritance opening procedure the legitimate heirs have the right to claim the reduction of excessive liberalities up to the to the disposable portion limit.

Legitimate heirs *cannot be disinherited*, either directly (by express testamentary disposal of removal from the inheritance) or indirectly (by instituting legatees), because legitimate heirship is *a part of the inheritance "which the law defers, imperatively, to the legitimate heirs, without considering the deceased person's free will"*²⁷.

²³ See C. Macovei, M. C. Dobrilă, *op.cit.*, pp. 1118-1119. In the same sense, see F. Deak, R. Popescu, *A Treaty of The Inheritance Law. Vol.II. Testamentary Inheritance, op.cit.*, pp. 256-257. According to another opinion, the legitimate inheritance shall be attributed to the legally entitled heirs, in all the cases, collectively, (to this effect, see D. Chirică, *A treaty of Civil Law. Inheritances and Liberalities, op.cit.*, pp. 397-398; I. Genoiu, *The Right to the Inheritance by the new Civil Code*, C.H.Beck, Bucharest, 2012, p. 267; I. Popa, *The Legitimate Heirship and the Legitimate Heirs by the regulations of the new civil Code*, in "The Law" no. 6/2011, pp. 33-34). We do not share this opinion as art. 1088 of the civil Code regulates the legitimate heirship of each legitimate heir depending on the inheritance share attributed to them as legal heirs, which confers it an individual nature.

²⁴ See M. Eliescu, *op.cit.*, p. 325; F. Deak, *op.cit.*, p. 307; C. Macovei, M. C. Dobrilă, *op.cit.*, p. 1118.

²⁵ See M. Mureșan, *Note under dec.C.S.J.nr.1314/1994*, in "*Thematic Collections of Legal Practice. Inheritances*" / "*Colecție tematică de practică judiciară. Succesiuni*" by M. Mureșan, J. Kocsis, Cordial Lex, Cluj-Napoca, 1996, p. 64.

²⁶ See F. Deak, *op.cit.*, p. 307; F. Deak, R. Popescu, *A treaty Of the Inheritance Law. Vol.II. Testamentary Inheritance, op.cit.*, p. 258.

²⁷ See M. Eliescu, *op.cit.*, p. 326.

4. Legitimate heirs

Based on art. 1087 of the civil Code, we shall mention as legitimate heirs *the surviving spouse, the deceased person's privileged descendents and ascendents*²⁸. Therefore, the new civil Code maintains the same legitimate heirs as the former civil Code dated 1864.

Consequently, ordinary ascendants and collateral relatives of the deceased shall not be entitled to the legitimate heirship. As a consequence, they may be removed from the inheritance with no limitation.

5. The legitimate heirship extent

Unlike the former civil Code dated 1864²⁹, the new civil Code differently regulates the legitimate heirship extent.

Based on art. 1088 of the civil Code the legitimate heirship of each legitimate heir is *half of the inheritance share* which, in the absence of liberalities and disinheritances, would have been attributed as legal heir.

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²⁸ The deceased person's surviving spouse, descendents and parents are legitimate heirs in most of the Occidental states (for example, art. 536 of the Italian civil Code art. 762-763 of the Austrian Civil Code, art. 470 of the Swiss Civil Code; in exchange, the English Law does not provide the legitimate inheritance institution - see F. Deak, *op.cit.*, p. 308).

²⁹ It devotes a different quantum to the legitimate heirship, depending on the number of the descendents: 1/2 of the inheritance for one child; 2/3 of the inheritance for two; 3/4 of the inheritance for three or more children.

11. M. Mureșan, I. Urs, *Civil Law. Inheritance/Successions*, Cordial Lex, Cluj-Napoca.
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