REFLECTIONS ON THE INSTITUTION OF DISINHERITANCE

Police officer **Denise MARTALOG**[1]

Abstract

This study is dedicated to the analysis of the regulations regarding the will of the deceased in connection with the division of his succession patrimony, both in terms of his will manifested directly by the removal of legal heirs and indirectly by the establishment of legatees. In the elaboration of the study, we take into account the legal institution of disinheritance, the implications it has in the context of the return of the inheritance, as well as the possible situations that would not be covered by the current legal provisions. Thus, through art. 1.075 of the Civil Code, which highlights the effects of disinheritance, the legislator analyses the disinheritance of the surviving spouse, ordering that the part remaining after the allocation of the quota of the surviving spouse, be collected by the heirs from the class with which he comes in competition. We notice that the legislator discusses the "quota attributed to the surviving spouse" and does not take into account the hypothesis of allocating the succession reserve, for example in the situation of establishing a bequest smaller than the succession reserve. The disinheritance of the other heirs, other than the surviving spouse, is presented in the same way. In this situation it is necessary that we consider all possible hypotheses in case of disinheritance, so that the legal provisions to be adapted accordingly.

Keywords*: disinheritance, will, bequest, reserve heir.*

JEL Classification: K11, K15

1. General considerations

Disinheritance as a legal operation is established by art. 1074 Civil Code, which provides: "(1) Inheritance is the testamentary disposition by which the testator removes from the inheritance, in whole or in part, one or more of his legal heirs. (2) The disinheritance is direct when the testator orders by will the removal from the inheritance of one or more legal heirs or indirect when the testator establishes one or more legatees."

Starting from the provisions of art. 1074 of the Civil Code, it results that the heirs who do not benefit from the provisions of art. 1087, corroborated with art. 1088 of the Civil Code, can be removed from the inheritance, without being able to benefit from the succession patrimony. Reserved heirs may be removed, but only in respect of the share that exceeds the succession reserve, which is due to them under the law; that is, the legal heir loses only the concrete vocation to inheritance, not the title of heir.[2]

The origin of this institution is found in Roman law[3] under the name of *querela inofficiosi testamenti*[4], which until the emperor Justinian was a quarter of what they would have legally deserved - *portio legitima*. Justinian, however, decided that the legitimate *portio* should be 1/3 of the ab intestate portion, if there were a maximum of four heirs and 1/2 if there were more than four heirs. The changes also[5] affect the beneficiaries of the right la querela, which is established only with regard to descendants and parents. Wanting to draw more clearly the situations of ex-inheritance, Justinian establishes 14 reasons for disinheriting the descendants and 8 for disinheriting the descendants from

[1] Denise Martalog - Police Academy "Alexandru Ioan Cuza", Romania, denisemartalog@yahoo.com.

[2] Fl. A. Baias, E. Chelaru, R. Constatinovici, I. Macovei, *Noul Cod civil. Comentariu pe articole*, 2nd edition, Ed. C. H. Beck, Bucharest, 2014, p. 1178; D. Chirică, *Tratat de drept civil Succesiunile și liberalitățile*, Ed. C. H. Beck, Bucharest, 2014, p. 783; Ph. Malaurie, L. Aynes, *Les successions. Les liberalites*, 3e edition, Ed. Defrenois, 2008, p. 269, no. 502; M. Grimaldi, *Droit patrimonial de la famille*, 3e edition, Ed. Dalloz, 2008, p. 880, no. 323.90

[3] I. C. Cătuneanu, *Curs elementar de drept roman*, 2nd edition, Ed. Cartea Românească, 1924, p. 534.

[4] Cf. Note 1, The descendants, ascendants and consanguineous brothers and sisters had *the right to sue (querela)*, only if they were preffered a *persona trupis* (a person disregarded, dishonored by his deeds). In the situation of *adoptio plena* (full adoption), the adoptee had the right to complain only in respect of the adoptive father, and in the situation of *adoptuio minus plena* (adoption with limited effects), the adoptee could exercise that right only in respect of his natural father. *Querela inofficiosi testamenti* was a lawsuit by which the Tribunal of 100 Men sanctioned the testator's violation of the duty of love to his close relatives. Since the aim was at the same time the observance of the act of last will (will) considering that it would be disgraceful to die without a will, the will was partially annulled, being rectified. Thant court held that the testator was not in full mental capacity when he omitted his close relatives from succession.

[5] I. C. Cătuneanu, *op.cit.*, p. 537.

the inheritance of the descendants, thus removing the judgment of these cases according to the judge's assessment.

As regulated in Roman law[6], the purpose of the querela was the possibility of attacking an act done without natural affection for his close relatives of *de cuius*.

We note that unlike the Civil Code of 1864, in the current Civil Code, disinheritance is regulated as a separate institution, in Section 5, Chapter III ("The Will"), Title III ("Liberalities"), from Book IV ("On inheritance and liberalities").

The regulations of the Civil Code of 1864 regarding the will of the deceased to dispose of his patrimony are found mainly in the provisions concerning liberalities, Book III "On the various ways in which property is acquired", Title II "On living donations and on wills", Chapter 4 "About the available part of the property and about the reduction", Section I "About the available part of the property"[7], Chapter 5 "About testamentary dispositions", Section III "About the institution of heirs and about connections in general"[8], Section IV "About the universal legacy"[9].

According to the provisions of the current Civil Code, the institution of disinheritance is invigorated compared to the provisions of the Civil Code of 1864.

In accordance with art. 1074 para. (2) Civil Code, disinheritance can be direct and indirect.

Thus, by direct disinheritance, the deceased establishes by will the dispositions according to which he removes from his inheritance his legal successors. This can be total (when targeting all legal heirs), or partial (when targeting one or more legal heirs).[10]

Indirect disinheritance envisages the establishment of bequests, so that the testator does not expressly establish the disinheritance of legal heirs. In this situation, the available quota, or as the case may be, the entire inheritance will be collected by the legatee or legatees established by will.

Although the current Civil Code no longer provides for disinheritance as a sanction, we consider, according to the ideas supported in the doctrine[11], that the testator cannot be prevented from ordering by the act of last will the disinheritance of those who attack the will in court.

Regarding the effects of disinheritance, we note that art. 1075 of the Civil Code offers four different situations, but without being very clear and precise, thus leaving the opportunity for interpretations regarding the transmission of the succession patrimony following the disinheritances.

2. Disinheritance of the surviving spouse

Article 1075 para. (1) of the Civil Code[12] considers the division of the inheritance following the disinheritance of the surviving spouse. We notice that in establishing the rules of devolution, the legislator discusses the "share due to the surviving spouse" and not about the succession reserve due to him, as a result of the disinheritance[13].

From the content of this paragraph, we can interpret that the legislator considers only an indirect disinheritance, by establishing a bequest to the surviving spouse lower than his legal quota, but not lower than the succession reserve. For example, the surviving spouse who comes in competition with a child of the deceased, has established a bequest of 1/6 of the inheritance. Thus, the legatee is lower than the due legal quota (1/4), but not less than the succession reserve that would

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[6] P. F. Girard, *Manuel elementaire de droit romain*, sixieme edition, Ed. Libraire Arthur Rousseau, Paris, 1918, p. 874.

[7] Art. 841 Civil Code of 1864 states that: "Liberals, whether made by deeds between living persons or made by will, may not exceed half of the property of the disposer if he leaves a legitimate child at death; over a third if he leaves two children; over a fourth if he leaves three or more."

[8] Art. 887 Civil Code of 1864 states that: "It is possible to dispose by will with a pot or of a fraction of one's state or of one or more determined objects."

[9] Art. 888 of the Civil Code of 1864 stated that: "The universal legacy is the disposition by which the testators leave after the death of one or more persons the universality of their property". Art. 889 of the Civil Code of 1864 stated that: "When the testator has reserve heirs, the universal legatee will request from them the possession of the good included in the will".

[10] Fl. A. Baias, E. Chelaru, R. Constatinovici, I. Macovei, *op.cit*., p. 1178.

[11] I. Genoiu, *Dreptul la moștenire în Codul civil*, 2nd edition, Ed. C. H. Beck, Bucharest, 2013, p. 190.

[12] „In case of disinheritance of the surviving spouse, the heirs of the class with which he comes in competition collect the part of the inheritance left after the allocation of the due quota to the husband as a result of the disinheritance".

[13] Observation also found in I. Genoiu, *op. cit*., 2013, p. 193.

have been due to him (1/8) in the situation in which the deceased would have totally disinherited him, or in the situation in which the legatee would have been less than the succession reserve.

Regarding the option of succession on inheritance, art. 1100 para. (1) Civil Code, stipulates that: "The person called to inherit under the law, or the will of the deceased may accept the inheritance or may renounce it." Thus, as stated in the doctrine[14], the successor has the right to choose, to choose between consolidating or abolishing the title of heir.

All the more so as art. 1102 Civil Code [15] - *"Vocation to inheritance"* which, taking into account the situation in which the legal vocation coexists with the testamentary one, brings to attention the fact that the legatee who is also the legal heir has a distinct right of option for any of these options. Of course, as it is presented in the doctrine[16], the situation is forked taking into account that it is possible for a person to collect part of the inheritance as legal heir and another part of inheritance as testamentary heir. With a separate right of option, the person benefiting from it can either accept one and give up the other, accept both (as they are different parts of the inheritance), or give up both.

The situation changes if we consider the possibility that the same person has both a legal and testamentary vocation to the same part of the inheritance. We find that, unlike the situation mentioned above, it would not be possible for the person in question to opt for both vocations.

However, having the right of separate option for each one, art. 1102 para. (2) Civil Code introduces, however, a limitation of this right, so that the legatee who is also the legal heir can choose only on the basis of the testamentary vocation with the observance of three conditions:

- the bequest should be less than the legal quota due as a legal heir
- the inheritance reserve should not be violated (we deduce that the legislator also considers the reserve heirs when referring to these aspects)
- from the bequest to result the intention of the testator to decrease the share of the legal heir. As a result, a simple presumption is not sufficient to limit the right of option enjoyed by the legatee who is also the legal heir.

Of course, in case the legatee violates the succession reserve, the legatee can request the reserve as a legal heir.

Corroborating art. 1102 with art. 1075 of the Civil Code, we consider that in the situation where the legislator wanted to cover by establishing this paragraph both direct (total or partial) and indirect disinheritance (by establishing legatees), it would have been appropriate for the text to take into account *"the allocation of the succession reserve, or as the case may be, the share due to the surviving spouse as a result of the disinheritance."*

Also, art. 1075 para. (2) The Civil Code[17] is expressed in confusion, so that the legislator considers that in addition to the surviving spouse (reserved heir), another heir comes to inherit (without specifying precisely whether he wants to be a reserved or non-reserved heir), as well as the one who benefits from disinheritance[18]. The text is treated in the same direction, taking into account that it is established that the person benefiting from the disinheritance *"collects the remaining part after the allocation of the share of the surviving spouse and the share of the disinherited."*

We will analyze the situations that could be possible from the interpretation of art. 1075 para. (2) Civil Code, as well as to try to eliminate any imprecise expressions that may lead to interpretations that could lead to different practical solutions:

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[14] F. Deak, R. Popescu, *Tratat de drept succesoral*, 3rd edition updated and complete, Vol. III. *Transmisiunea și partajul moștenirii*, Ed. Universul Juridic, Bucharest, 2014, p. 17 - 19.

[15] Art 1102 para. (1) "The heir, who based on the law or the will, accumulates several vocations to inheritance, has for each of them, a distinct right of option. (2) The legatee called to inherit and as legal heir will be to exercise his option in any of these qualities, If, although the reservation has not been violated, it results from the will that the deceased wanted to reduce the share that would have been due to the legatee as legal heir, the latter can only choose as legatee".

[16] Fl. A. Baias, E. Chelaru, R. Constatinovici, I. Macovei, *op.cit*., p. 1210 -1212

[17] "If, in addition to the disinheritance, in addition to the surviving spouse, both the disinherited and the one who benefits from the disinheritance inherit, the latter collects the remaining part after the allocation of the quota of the surviving spouse and the quota of the disinherited one."

[18] Perhaps art 1075 para. (2) Civil Code, is more difficult to interpret, given that it would address the situation in which the disinherited is a reservist.

- **the situation in which, in addition to the surviving (disinherited) spouse, another disinherited reservist and the one who benefits from the disinheritance come to inherit.**

For example, the deceased has a surviving husband and a child, both disinherited and a sister. If we analyze the above-mentioned paragraph, we notice that for the beginning it is necessary to apply the rules of legal devolution, so that: the surviving spouse comes in competition with the first class of legal heirs and has a share of 1/4 from the inheritance. It turns out that the succession reserve[19] of the surviving spouse is 1/8. The rest of 3/4 belongs to the first class of legal heirs, i.e. the child. Being ex-inherited, the latter will acquire a 3/8 succession reserve. The available quota resulting from the allocation of the succession reserves to the reserve heirs, will be collected by the one who benefits from disinheritance, in our example, the sister of the deceased.

However, the result of this example is the consequence of the allocation of succession reserves and not of the shares of the disinherited, as the legislator establishes in the same paragraph.

Interpreting the text word for word, we could have the possibility of an indirect disinheritance through a bequest established to the surviving spouse (since his share is considered) and a bequest established to another reserve heir (since the share of the disinherited is considered). Of course, the bequest should not be less than the succession reserve of the two reserve heirs, otherwise it would be necessary to assign the reserve and not the succession quota.

Under these conditions we could comply exactly with those established by the legislator.

We consider that even in this situation the possible situations are not covered, so that the text of the paragraph could be improved by a more precise expression: *"after the allocation of the succession reserve or, as the case may be, the share of the surviving spouse and the reserve or in this case, the share of the disinherited."*

- **the situation in which, in addition to the surviving (disinherited) spouse, a disinherited non-reserve heir and the one who benefits from the disinheritance come to inherit.**

For example, the deceased has a disinherited surviving husband, a disinherited brother, and a sister. Applying the rules of legal devolution, the husband receives the reserve of 1/4 of the inheritance, and the remaining 3/4 belongs to the privileged collaterals (brother and sister of the deceased). As the brother is inherited, the sister receives the remaining 3/4 of the inheritance.

Although in this case we discuss, as the legislator states, the "share of the disinherited", since the brother is not a reserved heir, we cannot discuss the succession reserve, we still cannot consider a direct disinheritance regarding the surviving spouse, as we encounter the same "share" of the surviving spouse.

Thus, we consider that in order to precisely distinguish the intention of the legislator and also to cover the situation of disinheritance of another heir who is not a reservist, the text could be adapted as follows: "the allocation of the succession reserve or, as the case may be, the share of the surviving spouse and the share of the disinherited."

- **the situation in which, in addition to the surviving (uninherited) spouse, a disinherited reserve heir and the one who benefits from the disinheritance come to inherit.**

For example, the deceased has an unmarried surviving husband, a disinherited child, and a sister. Applying the rules of legal devolution, the husband receives the share of 1/4 of the inheritance, the child the inheritance reserve of 3/8, and the rest of 3/8 belongs to the privileged collaterals (sister of the deceased).

In this situation, we can discuss the share of the surviving spouse, since we analyze the case if the spouse is not inherited. However, further on we have the same situation as the ones mentioned previously, namely the „share of the disinherited". In our example, the legal text does not cover the situation in which the disinherited is a reserving heir, which is why we appreciate its adaptation, as it follows: "assigning the share of the surviving spouse, or as the case may be, the quota or reserve of the disinherited."

- **the situation in which, in addition to the surviving (uninherited) spouse, a disinherited**

[19] Art. 1088 of the Civil Code stipulates that: "The succession reserve of each reserve heir is half of the succession quota which, in the absence of liberalities or disinheritances, would have been due to him as legal heir".

non-reserved heir and the one who benefits from the disinheritance come to inherit.

For example, the deceased has an unmarried surviving husband, a disinherited brother, and a sister. Applying the rules of legal devolution, the husband receives the share of 1/2 of the inheritance, and the privileged collaterals the remaining 1/2. As the brother is disinherited, the deceased's sister will reap the remaining 1/2 of the inheritance.

We note that this example falls exactly in the provisions of para. (2) of art. 1075 of the Civil Code, because, the husband not being disinherited, and the disinherited one is not a reserve heir, we consider the quota and not their succession reserve.

However, in order to set out more clearly the above-mentioned situations, we consider that it would be appropriate that para. (2) be revised as follows**: if, as a result of the disinheritance, in addition to the surviving spouse, both the disinherited and the beneficiaries of the disinheritance inherit, the latter collects the remaining part after *the allocation of the succession reserve or, as the case may be, the share of the surviving spouse and the reserve, case, of the share of the disinherited.***

In this way a clear distinction is made between possible situations of ex-inheritance, regardless of whether it is direct or indirect or whether the surviving spouse is disinherited or not.

3. Disinheritance of other heirs than the surviving spouse

Analyzing art. 1075 para. (3) Civil Code[20], we notice that we can be in the presence of two situations, namely:

- the situation in which the disinherited is an unreserved heir and receives a share lower than his legal quota, the other heir with whom he comes in competition also receives the part that belonged to the disinherited. For example, the deceased has a brother and a sister and orders for the brother to have a share of 1/3 of the inheritance. It turns out that being assigned to the brother a lower share than his legal quota, the sister will collect 2/3 (and the part that belonged to the brother).
- the situation in which the disinherited person is the reserve heir and is given a lower share than his legal quota, but not lower than the succession reserve, as well as the situation in which he is given a lower share than the reserve. We will try to analyze these two cases:
  - ✓ the situation in which the disinherited person is the reserve heir and is given a lower share than his legal quota, but not lower than the succession reserve.

For example, the deceased has two children, C1 and C2. Applying the rules of legal devolution, C1 deserves 1/2, and C2 deserves the other half of the inheritance. However, if the deceased makes C2 a legatee of 1/3 [less than his legal quota (1/2), but not less than the succession reserve (1/4)], C1 will collect the remaining 2/3 of the inheritance, as a result of the indirect disinheritance of C1 by assigning a lower quota to its legal quota. We certainly fall within those established by the text of para. (3) in art. 1075 Civil Code.

  - ✓ the situation in which the disinherited person is a reserve heir and is given a lower share of his succession reserve.

Having the same example, the deceased makes C2 a bequest of 1/5 and thus violates his succession reserve, as we apply the provisions of art. 1075 para (3) Civil Code?

We consider, for a better management of the possible situations, the adaptation of the text as follows**: "When, following the disinheritance, an heir receives a share lower than his legal quota or *his reserve*, the heir with whom he comes in competition collects the part that would have returned to the disinherited, *respectively the part left after the allocation of the succession reserve*."**

Nor in art. 1075 para. (4) Civil Code[21], we do not find the regulation of the total disinheritance

[20] "When, as a result of the disinheritance, an heir receives a share lower than his legal quota, the heir with whom he comes in competition collects the part that would have returned to the disinherited".

[21] "If, as a result of the disinheritance, a person is completely removed from the inheritance, the due to him shall be allocated to the heirs with whom he would have entered the competition or, in their absence, to the subsequent heirs".

of the reservists. The text applies to non-reserved heirs or to reservists who consider waiving this right.[22]

As a result, it would be appropriate to include this aspect in the paragraph, thus treating the possibility of disinheriting reservists who do not waive this right**: If, following the disinheritance, a person is totally removed from the inheritance, the share due to him *or, as the case may be, the part of the inheritance remaining after the allocation of the succession reserve,* it is attributed to the heirs with whom he would have entered the competition or, in their absence, to the subsequent heirs.**

As provided in art. 1075 para. (5) Civil Code, *"*The provisions provided in para. (1) - (4*) may not benefit persons incapable of receiving bonds."*

Corroborating art.1.075 para. (5) with art. 988 of the Civil Code[23], we notice that the interdiction refers to the persons who had the quality of legal representative or protector and did not previously received the discharge from the guardianship court.

At the same time, we consider art. 991 of the Civil Code[24], which limits the opportunity to benefit from these liberalities to the persons involved in the procedure of making the will, otherwise, the applicable sanction being the relative nullity.

Also, according to art. 990 para. (1) Civil Code, "The liberalities made to pharmacists or other persons may be annulled, during the period in which, directly or indirectly, they provided specialized care to the disposer for the disease that is the cause of death." However, from this rule, para. (2) art. 990 of the Civil Code[25], establishes certain exceptions.

4. Conclusions

In view of the above, we are of the opinion that the provisions relating to disinheritance are imprecisely expressed and may give rise to various interpretations. We believe that the regulations should be adapted to other situations not covered by the current legal provisions, so that the judicial practice that falls under them is a uniform one.

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9. Romanian Civil Code of December 4, 1864.
10. The new Civil Code.

[22] Fl. A. Baias, E. Chelaru, R. Constatinovici, I. Macovei, *op. cit.*, p. 1179

[23] "The person without capacity of exercise or with limited capacity of exercise cannot dispose of his goods through liberalities, except for the cases provided by law. (2) Under the sanction of relative nullity, even after acquiring the full capacity of exercise the person may not be dispose by liberalities for the benefit of the one who had the quality of his legal representative or protector, before he received from the court of guardianship discharge for its management. Except where the representative or, as the case may be, the legal guardian is the ascendant of the disposer".

[24] "The bequests in favor of: a) the public notary who authenticated the will; b) the interpreter who participated in in the will authentication procedure; c) witnesses, in the cases provided in art 1043 para. (2) and art. 1047 para. (3); d) the instrumental agents provided in art. 1047; e) persons who have legally provided legal assistance in drafting the will; are annullable.

[25] "They are extempted from the provisions of para. (1): a) the liberalities granted to the spouse, direct relatives or privileged collateral; b) the liberalities made to other relatives up to the fourth degree, including, if, on the date of the liberality, the disposer has no husband and no direct or privileged collateral relatives."