

Disinheritance in the vision of the new Romanian Civil Code

Assitant professor Phd. **Ioana NICOLAE**¹

Abstract

Once the new Civil Code came into force on October 1st, 2011, disinheritance became a new legal institution, with own characteristics and specifics established by the lawmaker. While the 1864 Civil Code was still in force, doctrine and jurisprudence acknowledged that disinheritance existed, but it was not expressly regulated. The current study aims to clarify the notion of disinheritance, to describe its legal regulation, to identify the different categories of disinheritance and to list the effects of disinheritance over the heirs of the testator, but also to point out the limits of disinheritance.

Keywords: *will, forced heirs, disinheritance, disownment, limits of disinheritance*

JEL Classification: K11

1. Introduction – presentation of disinheritance and legal regulation

Before approaching the matter at hand, namely the institution of disinheritance, we must first list a short presentation of the will and the most important provisions of the will. This is necessary as disinheritance by the testator is included in his will, which is a complex legal act. Also, we must distinguish between the testator's forced heirs, who, according to the law, are entitled to the successor reserve, even against the testator's will and the testator's chosen heirs.

Dividing the heirs in those two categories is relevant as we are about to show that disinheriting forced heirs can only be achieved within a certain limit, namely by respecting the certain part of the inheritance to which they are entitled; in the case of non forced heirs, disinheritance can be achieved without respecting any limits, according to the will of the testator.

We will also point out disinheritance doctrine and jurisprudence solutions from the time the 1864 Civil Code was in force. We will see that the main opinions expressed in doctrine and found in the previous legal practice were considered by the lawmaker when he expressly regulated the institution of disinheritance.

Before making a short presentation of the will, we will show that, according to article 955 of the Civil Code, the patrimony of the defunct is passed by legal inheritance to the extent to which the defunct did not make different provisions by will. Thus, a part of the defunct patrimony can be passed on by legal inheritance and another part can be passed on by testamentary inheritance; those two ways can coexist. The general rule is that the patrimony is passed on by legal

¹ Ioana Nicolae – Transylvania University of Brasov, Law School, ioana.nicolae@unitbv.ro

inheritance; however, some heirs can be completely or partly removed by the will of the defunct, manifested in the form of a will.

The will can contain a series of distinctive legal acts, with own judicial nature; however, the main object of the will is the act by which the testator passes on, completely or partly, his successor patrimony. Passing the patrimony, completely or partly, in regard to certain goods is achieved by legates. As shown in doctrine², the notion of legate describes what the testator passes on (through his own will) to a person, as it does not come from the verb „to tie” (to force), but from the verb „to leave” (laisser), because it shows the part of the inheritance which is being left to the heirs.

We must also point out that the Romanian lawmaker succeeded in correctly regulating in the provisions of the new Civil Code, the essential distinction between legate and will, showing that the will is the final act of will of the testator. It can contain patrimonial provisions and legates. However, it is not mandatory that each will contains legates, as a will can contain non patrimonial provisions, all these without questioning the will’s character of final will of the testator. In doctrine, a series of opinions were expressed regarding the judicial nature of the will. But regardless of whether it is characterized as a legal act or a judicial form or pattern, the will must also be looked at as a form of expression of the last will of the testator, which contains, along with legates, a series of acts of a different legal nature, representing the legal „support” of the legate and other last will provisions of the testator.

As the will is a judicial act, it must fulfill the general conditions of the legal act as well as the formal conditions stated by the lawmaker. Particularly, the will represents a unilateral judicial act, which is personal, solemn and with a death clause. If, from the point of view of the will, it must be of a certain *ad validitatem* form, the law does not state the will must be expressed in sacred terms. This is why, in case there is any doubt regarding the testator’s will, jurisprudence expressed the opinion according to which the real will of the testator must be considered and not the declared will of the testator and the literal sense of the words, thus reaffirming the principle of the real will, established as a liberal matter.

The will is valid ever since it was drawn up by the testator, but the effects of the will shall not be produced until the death of the testator, once the inheritance procedures begin. Thus, the passing on of the goods left by legate operates since the time of the beginning of the inheritance procedures, namely the time of death of the testator; this is also the date from which all other will provisions will operate, including disinheritance. We must also mention that the testator is still the owner of the goods which form the object of legates and can freely dispose of them, because the legatees have no right over these goods during the life of the testator. As the will produces *mortis causa* effects, its validity is appreciated in regard to the date when it was drawn up, while its effects are appreciated in regard to the date when

² D.Chirică, *Tratat de drept civil. Succesiunile și liberalitățile*, Universul Juridic Publishing House, Bucharest, 2014, p. 278

the inheritance procedures begin. We will point out this aspect when we will analyze the annulment of the disinheritance.

As shown in doctrine, the will was characterized as special unilateral act, given that his effect of passing on property is exceptional and is not considered to be one of the usual effects of unilateral acts³.

Disinheritance, along with other manifestations of will by the testator and the legates, forms the provisions of the will.

In the present legal regulation, disinheritance is regulated by article 1074-1076 of the fifth section of the third chapter called *The will*, from the fourth book called *About inheritance and other liberalities* of the Civil Code. We must also notice that the regulation of disinheritance is a novelty, as the 1864 Civil Code did not regulate this institution. However, even if this institution was not regulated in the 1864 Civil Code, disinheritance or disownment, as it was called, was unanimously acknowledged by doctrine and the previous legal practice.

As article 1035 of the Civil Code states, the will contains provisions regarding the successor patrimony or the goods which are part of it, as well as the direct or indirect appointment of the legatee. Even in the lack of such provisions, the will can contain provisions regarding the partition of goods, the revoke of previous will provisions, disinheritance, naming will executors, certain tasks for the legatee of legal heirs or other provisions which cause effects after the death of the testator. So, the will can contain both positive provisions, in regard to the awarding of the successor patrimony to the legatees, naming will executors and so on, but also negative provisions, by which some legal heirs are removed from the inheritance.

Also, according to article 1074, alignment 1 of the Civil Code, disinheritance is the will provision by which the testator removes some of his legal heirs, completely or partially, from the inheritance.

In regard to the disinheritance of forced heirs (the privileged descendants and ascendants and the surviving spouse of the defunct are forced heirs) we must show that this can be made only to the extent of the available part of the inheritance, as the reserve, namely the part of the inheritance to which they are entitled, is awarded to them by the power of law. In other words, disinheriting forced heirs is limited to the available part of inheritance. Article 1086 of the Civil Code shows that the successor reserve is that part of the inheritance to which the forced heirs are entitled by way of law, even against the will of the testator, manifested by liberalities or disinheritance provisions, and the available part represents the part of the inheritance which is not reserved by law thus allowing the testator to award it to whomever he choose by liberalities, as stated by article 1089 of the Civil Code.

In regard to the non forced heirs of the defunct, namely the ordinary ascendants, privileged collaterals and ordinary collaterals, they can all be removed from inheritance, if the testator chooses to do so.

³ Avram M., *Actul unilateral în dreptul privat*, Hamangiu Publishing House, Bucharest, 2006, p. 198

In this context, we must also mention that the disinherited legal heirs lose only the emolument of the inheritance, not the title of heir. Also, the disinherited legal heirs can request the annulment of the will provisions, the judicial revoke of the legatees, and acknowledgement of the fact that the legatees are void, the reduction of excessive liberalities, the inventory and conservation of successor goods and so on. When starting the inheritance procedures, the disinherited legal heirs are called, even if they are forced heirs and even if the entire inheritance was finished by legates.

2. Categories of disinheritance

Disinheritance can be direct or indirect as pointed out by the provisions of article 1074 alignment 2 of the Civil Code. We must also mention that, while the 1864 Civil Code was in force, specialty literature mentioned disinheritance as a sanction.

According to article 1074 alignment 2 of the Civil Code, *disinheritance is direct* when the testator removes one or more legal heirs from inheritance by will. Thus, in judicial literature⁴, it was called decisive disinheritance. If the disinheritance concerns all legal heirs or the only legal heir, we are in the presence of a general disownment. If the disinheritance regards only a certain part of legal heirs, the disownment will be partial. In case the legal heirs are completely disinherited and the testator did not name any legatees, the inheritance becomes vacant. In case of partial disinheritance, if the testator did not name any legatees, the entire inheritance or just the available part will be awarded to the coheirs of the disinherited person or, if there are no coinheritors, by the subsequent inheritors, according to the rules of legal inheritance.

In the hypothesis of disinheritance, if there are forced heirs, disinheritance can only be partial, as, according to the law, the legal forced heirs have the right to the successor reserve awarded by law, even against the will of the defunct; the disinheritance will only regard the part of inheritance of which the testator can dispose of, according to his will, by liberalities, both *inter vivos* and *mortis causa*. However, if non forced legal heirs are disinherited, this means that the entire inheritance will be awarded to the coheirs and, in lack of, to the subsequent heirs.

As it was pointed out in doctrine⁵, legal heirs who invoke in their favor the effects of disinheritance regarding other inheritances, will only be subject to the will provisions regarding their disinheritance, as their own quality of heirs is based on law, namely they have the quality of legal and not testamentary heirs.

In the following section, we will analyze the second kind of disinheritance, the indirect disinheritance. According to article 1047 alignment 2 second thesis of the Civil Code, *disinheritance is indirect* when the testator names one or more legatees who will be awarded the entire inheritance or just a part of it, without

⁴ D.Chirică, *Tratat de drept civil. Succesiunile și liberalitățile*, Universul Juridic Publishing House, Bucharest, 2014, p. 339

⁵ Fr.Deak, *Tratat de drept succesoral*, Universul Juridic Publishing House, 2002, p. 272

expressly removing the legal heirs from inheritance. Indirect disinheritance of the legal non forced heirs results in their complete removal from the inheritance of the testator. If indirect disinheritance regards the legal forced heirs, it will always be partial, as it will result in their removal from the available part of the inheritance.

We must also mention that, in case of indirect disinheritance, if the legate or legates by which legatees were named are ineffective (as a result of annulment, becoming void or being judicially revoked), there is the question of what will happen to the goods which form the object of the legate. As shown in doctrine⁶, in order to answer this question, we must analyze the will of the testator. Thus, if the testator awarded a mere preference to the legatee and the disinheritance is conditioned by the effectiveness of the legate, the disinheritance no longer has effects and the successor goods will be awarded to the legal heirs according to the rules of legal inheritance. However, if the testator wished for the inheritance to operate unconditionally, thus independent from the legate, as a result of the ineffectiveness of the legate, the complete inheritance or the available part of it will become vacant and will be passed on according to the rules regarding vacant inheritance⁷.

If the testator voluntarily revokes the provisions of his act of final will, thus, indirectly disinheriting, and did not name other legatees, the disinheritance will not cause effects and the legal heirs of the testator who should have been removed will benefit from this.

As shown, the judicial literature from the time of the 1864 Civil Code, mentioned another type of disinheritance, namely the *sanction disinheritance*. This was defined as that will clause by which the heirs who will file complaints for the annulment of the will shall be removed from inheritance. The so-called sanction disownment can concern both legal and testamentary heirs. As showed in doctrine⁸, such a provision of the will (naming a legatee) is affected by criminal clause and is analyzed as a legate under an express resolution condition.

The sanction disownment is considered to be valid as the testator can decide and protect his goods by drawing up a will.

However, sanction disownment has certain limits stated by law. Thus, according to article 1009 of the Civil Code, the clause by which the beneficiary is forced not to argue the validity of a non selling clause or not to ask for the reappraisal of the condition or tasks, is considered to be an unwritten clause, the sanction being the annulment of the liberality or the restitution of the object of the liberality.

The condition by which disinheritance is stated as a sanction for violating the obligations of alignment 1 or for arguing the provisions of the will which

⁶ Fr. Deak, R. Popescu, *Tratat de drept succesoral. Moștenirea testamentară*, Volume II, Universul Juridic Publishing House, Bucharest, 2014, p. 188

⁷ M. Eliescu, *Moștenirea și devoluțiunea ei în dreptul RSR*, The Academy Publishing House, Bucharest, 1966, pp. 286-287; C. Hamangiu, I. Rosetti-Balanescu, Al. Băicoianu, *Tratat de drept civil român*, Bucharest, 1928, p. 879

⁸ Fr. Deak, R. Popescu, *Tratat de drept succesoral. Moștenirea testamentară*, Volume II, Universul Juridic Publishing House, Bucharest, 2014, p. 189

damage the rights of the forced heirs or are contrary to public opinion or ethics are also considered to be unwritten clauses.

As shown in doctrine⁹, sanction disownment can't cause effects if it maintains an annulled will, thus the heirs can't be prevented from exercising annulment action against the will which violates public order or ethics or impairs on the part of the will which is not available. However, sanction disownment will not cause effects in regard to the available part of the inheritance, if the will was called into question for legates which did not impair on the available part of the inheritance of the forced heirs.

The disinherence criminal clause¹⁰ can oblige the heirs to execute only those provisions of the will which are not contrary to public order, ethics or the imperative provisions of the law, according to article 11 of the Civil Code. But, as shown by the author, in case the heirs invoke an immoral clause and it is subsequently proven that the liberality is not of immoral character, the criminal clause and all its consequences will operate.

3. The effects of disinherence

The effects of disinherence are regulated by article 1075 of the Civil Code, as the lawmaker mentions several hypotheses:

- a) the first hypothesis is the one regulated by alignment 1 of article 1075 of the Civil Code, Thus, in case the surviving spouse is disinherited, his coheirs will be awarded the remaining part of the inheritance, the part left after the surviving spouse is awarded his part of the inheritance, as a result of disinherence. The surviving spouse of the defunct is a forced heir, which means he will be awarded his part of the inheritance as stated by law, depending on the degree of the other heirs. The legal coheirs of the disowned surviving spouse will be awarded that part of the inheritance which is beyond the reserve of the surviving spouse. According to article 1088 of the Civil Code, the successor reserve of each forced heir is half of the inheritance to which he would have been entitled, in lack of liberalities or disinherences.

Thus, if the surviving spouse is disowned, he will have:

- 1/8 of the inheritance if the other heirs are the descendants of the defunct and they will be entitled to 7/8 of the inheritance;
- 1/6 of the inheritance if the other heirs are of the second class of heirs (privileged ascendants and privileged collaterals) and they will have 5/6 of the inheritance;
- 1/4 of the inheritance if the other heirs are just privileged ascendants or just privileged collaterals and they will have 3/4 of the inheritance;

⁹ Al. Bacaci, Gh. Comanita, *Drept civil. Succesiunile*, Universul Juridic Publishing House, Bucharest, 2013, p. 136

¹⁰ D.Chirică, *Tratat de drept civil. Succesiunile și liberalitățile*, Universul Juridic Publishing House, Bucharest, 2014, p. 345

- 3/8 of the inheritance if the other heirs are of the third and fourth class of legal heirs (ordinary ascendant or ordinary collaterals) and they will have 3/4 of the inheritance.
- b) the second hypothesis is regulated by alignment 2 of article 1075 of the Civil Code. Thus, if as a result of disinheritance, along with the surviving spouse, the other heirs are the disinherited person and the person who benefits from the disinheritance, the latter will be entitled to the part left after the surviving spouse and the disowned person are awarded their part. This hypothesis describes the situation in which the surviving spouse stands to inherit along with other legal forced heirs, but one of them is disowned. In this case, the part of the surviving non disinherited spouse is established and the reserve available to the disowned forced legal heirs and the rest of the inheritance is divided among the other legal heirs. If the disowned legal heir is not a forced heir, he will have no part of the inheritance, as it will be divided between the surviving spouse and the other legal heirs. Although the lawmaker did not expressly regulate the hypothesis in which disownment concerns both the surviving spouse and one of the forced legal heirs, we must point out that they will only be awarded the successor reserve and the rest of the inheritance will be awarded to the other legal heirs of the testator;
- c) the third hypothesis is regulated by alignment 3 of article 1075 of the Civil Code. Thus, when, as a result of disinheritance, one of the heirs receives a part of inheritance which is below his legal part, the other heir will be awarded the part which was supposed to belong to the disinherited person. This text refers to the hypothesis in which the only heirs are relatives of the fourth category of successors and the defunct disinherited one of the legal heirs. The surviving spouse of the defunct will not have any part of the inheritance. In this situation, we must analyze if the disinherited heir is or is not a forced heir. If the legal heir who is completely or partially disinherited is not a forced heir, his part of inheritance will be given to the other heirs or, in lack of, to the subsequent heirs, according to article 1075 alignment 4 of the Civil Code. Thus, we must clarify what happens in case there is a partial disinheritance of a legal forced heir, namely that he will receive a part of inheritance which is smaller than the part he should have been entitled to, as stated by article 1075 alignment 3 of the Civil Code. The solution in this case is that the other heir will be awarded the part of the heir who was disowned.
- d) The fourth hypothesis is regulated by alignment 4 of article 1075 of the Civil Code. Thus, as a result of disinheritance, a person is completely removed from inheritance; his share will be awarded to the other heirs or, in lack of, to the subsequent heirs. This is the situation in which non forced legal heirs are disinherited, as previously mentioned. Finally,

alignment 5 of article 1075 of the Civil Code show that the people who are incapable of receiving legates will not benefit from the provisions of alignments 1 to 4. The text refers to the four analyzed hypothesis. Thus, in order to benefit from the disinheritance of legal heirs, the coheirs or the subsequent heirs must have the capacity to receive legates, although they will inherit as legal heirs.

4. The invalidity of disinheritance

As mentioned in the introductory part of our study, although disinheritance is a legal act mentioned in a will, its legal faith is independent from that of the other legal acts mentioned in the will, but not entirely. As shown, if the testator overstepped the limits of inheritance by liberal acts, thus affecting the successor reserve of the forced heirs, they will be subject to reduction in order to complete the successor reserve to which the forced heirs are entitled.

The will, just like any other legal act, must fulfill certain conditions in order to be valid: all the general validity conditions of the legal act, namely – the capacity to conclude the act, valid consent, determined object, legal and moral cause, as stated by article 1179 of the Civil Code. However, there are certain conditions of the will which are added to the general ones.

In regard to the invalidity of disinheritance, article 1076 of the Civil Code shows that the will provision by which the legal heirs were disowned is subject to annulment as stated by law.

The statute of limitation for the right to file a complaint is counted from the date the disowned person knew of the will provision by which he was removed from inheritance, but no sooner than the date when the inheritance procedures began.

5. Conclusions

In the present study we analyzed the notion of will and the most important will clauses, pointing out the specific characteristics of the will; in the end, we focused on disinheritance, as a distinctive legal act. The presentation of the institution of disinheritance followed the legal regulation, as stated by the lawmaker. Thus, we defined the notion of disinheritance, we identified the different types of disinheritance and we showed the specific effects of disinheritance, both direct and indirect, over the heirs of the defunct. Again, the study described two distinctive categories, the forced heirs of the defunct as well as the non forced heirs; we have also pointed out the differences between the two. The comparative presentation of disinheritance in the 1864 Civil Code doctrine and practice was meant to salute the legal initiative to regulate the institution of disinheritance once the new Civil Code came into force.

In conclusion, the institution of disinheritance, as presented in its new legal coating, has a distinctive legal appearance and a specific legal regime.

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