Aspects related on the issue of special free estate in relation to the provisions of the Romanian Civil Code

Professor **Veronica STOICA**[1]
Lecturer **Laurențiu DRAGU**[2]

Abstract

In our study, we will analyze a special issue of Civil Law, a problem of whom application may generate controversies as a result of how it is solved by current legal provisions. This is the special free estate of the living spouse, established by the art. 1090 Civil Code. Thus, the legislator forbids the donations whereby the forced estate of the forced heirs (Article 1086-1088 of the Civil Code) is breached, and limits the right of disposal of the patrimony holder, as a rule, to the ordinary free estate. Instead, when the living spouse is gratified at the expense of the deceased's descendants who are "not common", that is, they are not the survivors of the deceased and of the living spouse, the legislator sets a special limit of the right to dispose, established by the art. 1090 Civil Code. In the elaboration of the study we will interpret logically and systematically the provisions of the Civil Code that have an impact on the subject to analysis, trying to provide solutions to different factual situations that would be subject to the provisions in question.

Keywords: *donation, living spouse, descendants, forced estate, special free estate.*

JEL Classification: K11, K15

1. General considerations

The free estate of the living spouse was established by art. 939 Civil Code of 1964, which stipulated that "A man or woman who, having children from another marriage, will pass in the second or subsequent marriage, could give the latter only a part equal to the part of the legitimate child who took less, and it is not possible the fact that the donation pass over the quartet of goods."

The current civil code, similar to the Code of 1864, stipulates the free estate of living spouse in Art. 1090, pointing out: "(1) The unreachable liberalities made to the living spouse, which comes to inheritance in concurrence with descendants other than their common descendants, cannot exceed a quarter of the inheritance nor the part of the descendant who received the least. (2) If the

[1] Veronica Stoica - "Alexandru Ioan Cuza" Police Academy in Bucharest, Romania, verostoica@yahoo.com.
[2] Dragu Laurențiu - "Alexandru Ioan Cuza" Police Academy in Bucharest, Romania, laurentiudragu@yahoo.com.

deceased did not dispose by liberalities of the difference of the free estate, established according to art. 1.089 and the special free estate, then this difference belongs to the descendants. (3) The provisions of paragraph (1) and (2) shall apply also when the descendant referred to in paragraph (1) was directly disfigured, and this disinheritance would benefit the living spouse".

According to that provision, the living spouse may be gratified by the deceased in the presence of descendants who have not come from his marriage, within the limits of a special free estate, different from the usual free estate, at most equal to the part of the descendant who took the least (variable limit) and which cannot exceed a quarter of the inheritance (fixed limit).

The origin of this regulation is found in Roman law[3] which limits the right of the remarried husband to dispose by will in the favor of the spouse in the last marriage to the equivalent of a part due to a child born of the first marriage.

It is interesting that the Romans, besides this special provision, imposed other limits on the freedom to dispose by tying in the sense that the legator could not receive more than relatives (the Voconia Law) and, moreover, the heir had the right to benefit from quartet of legacy (*quarta legis Falcidiae*, name derived from the law that made it, Falcidia Law). We note that, from the Roman succession right, the two limits established by our legislator in 1864 and reiterated in art. 1090 of the 2009 Civil Code; a part of the descendant, or the quarter of the inheritance.

2. The children reffered to in the art. 1090 Civil Code

deceased who are not, at the same time, children of the living spouse. Starting from the cited provision, it is unanimously admitted in the literature[4] that they will enjoy

[3] For details, see D. Alexandresco, *Explicaţiunea teoretică şi practică a dreptului civil român*, t. IV, p. I, Socec Publishing House, Bucharest, 1909, p. 750-751.

[4] M. Eliescu, *Moştenirea şi devoluţiunea ei în dreptul R.S.R.*, Academia Publishing House, Bucharest, 1966, p. 340-341; Fr. Deak, *Tratat de drept succesoral*, Universul Juridic Publishing House, Bucharest, 2002, p. 312; C. Turianu, *Curs de drept civil. Dreptul de moştenire. Curs selectiv şi teste grilă*, Universitara Publishing House, Bucharest, 2007, p. 199; E. Safta-Romano, *Dreptul de moştenire, vol. I*, Graphix Publishing House, Iaşi, 1995, p. 316-317; D. Chirică, *Tratat de Drept civil. Succesiunile şi liberalităţile*, C.H. Beck Publishing House, Bucharest, 2014, p. 405; R. Popescu, *Dreptul de moştenire. Limitele dreptului de a dispune prin acte juridice de bunurile moştenirii*, Universul Juridic Publishing House, Bucharest, 2004, p. 167; Veronica Stoica, *Soţul supravieţuitor moştenitor legal şi testamentar*, Editas Publishing House, Bucharest, 2005, p. 138; I. Adam, A. Rusu, *Drept civil. Succesiuni*, All Beck Publishing House, Bucharest, 2003, p. 323; I. Dogaru (coord.), *Drept civil. Succesiunile*, All Beck Publishing House, Bucharest, 2003, p. 445; St. D. Cărpenaru, *Drept civil. Drepturile de creaţie intelectuală. Succesiunile*, Didactic and Pedagogical Publishing House, Bucharest, 1971, p. 274; C. Stătescu, *Drept civil, Contractul de transport. Drepturile de creaţie intelectuală. Succesiunile*, Didactic and Pedagogical Publishing House, Bucharest, 1967, p. 165; D. Macovei, M. S. Striblea, *Drept civil. Contracte. Succesiuni*, Junimea Publishing House, Iaşi, 2000, p. 446; L. Stănciulescu, *Curs de drept civil. Succesiuni*, Hamangiu Publishing House, Bucharest, 2012, p. 159; I. Genoiu, *Dreptul la moştenire în Codul civil*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2013, p. 222, I. Nicolae, *Drept civil. Succesiuni. Moştenirea testamentară*, Hamangiu Publishing House, Bucharest, 2014, p. 168-169; I. Popa, *Drept*

the special protection established by art. 1090 Civil Code, the children of the deceased from a previous marriage, outside the marriage or adopted only by the marriage, regardless of whether the adoption has been limited or full effect.[5]

If, in respect of children in marriage, their right to inherit their parent and, implicitly, to benefit from the provisions of art. 1090 of the Civil Code is undeniable, some clarifications are imposed on descendants outside the marriage or adopted by the deceased. Thus, according to art. 448 Civil Code "The child outside the marriage, whose affiliation was established according to the law, has the same situation for each parent and his relatives as the one of a married child", and according to art. 471 par. 3 of the Civil Code "The Adopt has to the adopter the rights and duties that any person has to his or her natural parents". It is clear from the legal provisions cited that a child out of marriage or adopted enjoys, in relation to his or her parents, the same rights as a child from marriage, including the right to inheritance. The aspect only confirms that, alongside children from another marriage, those outside the marriage or adopted will be included in the notion of "other descendants than their common ones."

Some clarifications are also required in connection with the wording used by the legislator in art. 1090 par. 1 Civil Code "The unrecoverable liberalities made to the living spouse, who comes to inheritance in competition with other descendants than their common ...". Observations are necessary because, on the one hand, the interpretation of the text results in the condition that the descendant should exist at the date of the death of the possessor [6], and, on the other hand, as we have seen, the child entitled to invoke in his favor art. 1090 The Civil Code is not always from an earlier marriage, in which case the application of the special provision would not raise particular problems.

Therefore:

- With regard to descendants outside marriage, it is necessary that they be at least conceived at the time of the death of the person whose inheritance is concerned, because, due to the Art. 36 t. I Civil Code "The rights of the child are recognized from the concept, but only if he is born alive". They do not care about

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civil. Moșteniri și liberalități, Universul Juridic Publishing House, Bucharest, 2013, p. 423; M. Popa, *Drept civil. Succesiuni*, Oscar Print Publishing House, Bucharest, 1995, p. 135-136.

[5] Even under the old rule (article 939 of the Civil Code of 1864), which spoke of "children from another marriage", it was admitted that the provision concerned not only the children of the deceased in another marriage, but also children outside the marriage or adopted only by the deceased. The solution was a natural one considering that according to art. 63 of the Family Code "The child outside the marriage, whose affiliation has been established by recognition or by a court order, has the same situation as the legal situation of a child in marriage to the parent and his relatives." Also, Art. 50 par. 2 of the Law no. 273/2004 on the legal status of adoption stated that "Adoption establishes the relationship between the adopted and the adopter, as well as the connection of the adopted person with the adoptive family".

[6] Article 939 of the Civil Code of 1864 spoke of "The man or woman who, having children from another marriage, will pass in the second or subsequent marriage ...", which meant that the descendant had to be reported at the time of the last marriages. In the sense that this law would subsist under this law, see Fr. Deak, R. Popescu, *Tratat de drept succesoral, vol. II, Moștenirea testamentară*, Universul Juridic Publishing House, Bucharest, 2014, p. 279.

the date when the relationship with the inheritor is established, as they enjoy the quality of the deceased's child from the date they were conceived. This means that the filiation can also be established after the death of the husband who leaves the inheritance.

It does not, however, fall within the scope of the descendants established by art. 1090 Civil Code, those who, although conceived before the end of their last marriage, can be considered, according to art. 414 par. 1 Civil Code, children of this marriage.

It should also be noted that, since the special provision does not require the condition of the child's existence at the date of the marriage, the right to dispose of the patrimony holder will be circumscribed by the provisions of the 1090 Civil Code, and when the child outside the marriage is conceived behind end of the late marriage of the deceased.

For example, if the deceased is married and conceives a child outside of marriage, will be able to gratify her husband only within the limits of the special free estate.

- for the adopted children, the provisions of art. 1090 The Civil Code shall apply regardless of whether the act of approval of adoption is prior to or after the conclusion of the subsequent marriage.

- finally, we believe that art. 1090 of the Civil Code limits the right of disposal of the owner of the patrimony also when he has entered into several invalid or dissoluble marriages with persons of good faith whose invalidity has not been ascertained until the date of the inheritance.

At the same time, although art. 1090 of the Civil Code speaks of descendants, using the noun in the plural, it is unquestionable that it also applies in the interest of a single descendant not deriving from the last marriage of the deceased[7].

It should be noted that they enjoy the provisions of art. 1090 of the Civil Code, not only descendants of the first degree, but also those of the 2nd, 3rd, etc. grades, regardless of whether the latter come to inheritance in their own name or by representation.

In all cases, in order to benefit from the provisions of art. 1090 of the Civil Code, children from a previous marriage, outside the marriage or adopted by the deceased spouse must fulfill all the conditions of the right of inheritance: have the capacity to succeed, have a succession and are not unworthy of inheritance. They also must not have given up succession, because the right to reserve lies only in those who can and will come to the inheritance of the deceased ascendant.[8] The solution requires that the legislator makes no distinction between the hypothesis that the graceful husband of the last marriage is called to inheritance only with "non-common" descendants and where the living spouse is competing by several descendants of which at least one is not "common", and *ubi lex nos distinguit, not nos distinguit debemus*.

[7] M. Eliescu, *op. cit.* p. 341.
[8] R. Popescu, *op. cit.*, p. 169.

3. The liberties envisaged by art. 1090 Civil Code

Article 1090 The Civil Code, when establishing the special free estate of the living spouse, states that the deceased can make in the favor of the living spouse "unrecoverable liberties" within the limits set by this article.

It must be accepted that the "unreachable liberalities" envisaged by art. 1090 of the Civil Code is both donations and will disposal [9]. A limitation of the liberties referred to in art. 1090 of the Civil Code only in the sphere of donation acts or only that of the links would violate the purpose pursued by the legislator and the meaning to be given to the terms used.

In addition, from the teleological interpretation of art. 1090 Civil Code, we note that the endpoint envisaged by the legislator was the protection of descendants who did not result from the marriage of the deceased with the living spouse of the influence that the latter might exert, or this goal could not be attained by the reduction only the donations or only the links, because the deceased may order in favor of his husband through the act of liberty that would not impose the application of the special limit.

Using the phrase "unremittable liberalities", the legislator understood to include in the sphere of the special limit both the donated and will disposals and the interpretation to be given to the law is that the predecessor's husband will not be able to grasp the husband in the subsequent marriage to the extent required by art. 1090 Civil Code, without giving any relevance to the form in which liberty took place.[10].

They will thus come under art. 1090 Civil Code the following categories of liberties:

a. All donations and will disposal made to the living spouse during the subsequent marriage;

b. Donations made by the deceased even before the subsequent marriage, to the extent that they were made for it; so the impulsive and determined cause of donation (*causa remota*) was the prospect of marriage. In this case, the burden of proof rests on the one who invokes the provisions of art. 1090 Civil Code, respectively the descendants who are not "common". If the descendants fail to prove that the conclusion of the marriage in the future is the cause of the donation act, they can no longer rely on the special regulation (article 1090 of the Civil Code), their rights being safeguarded by the common regulation in the matter - art. 1088 Civil Code. It should be noted that in all cases (whether we are considering donations made during the marriage or donations prior to the conclusion of the last marriage), it must be donations not subject to the report, otherwise it would be considered an advance on the inheritance , to be returned to inheritance in nature or equivalent[11].

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[9] D. Chirică, , *op. cit.*, p. 405-406.
[10] Veronica Stoica, *op. cit.*, p. 139.
[11] M. Eliescu, *op. cit.*, p. 342, footnote no. 114; Fr. Deak, *op. cit.*, p. 322.

Relationships made before the subsequent marriage, even if they were not made for it, since it can be assumed that the testator retained the bond only as regards the status of spouse acquired by the legatee after the marriage. The provisions of art. 1090 The Civil Code does not apply to the liberties accorded to a concubine, because the cohabitation does not produce its own legal effects and does not give the concubines a certain status. As has been shown in the literature[12], and judicial practice [13], the application by analogy of incidents in family relations regarding husband-wife relationships and concubine relations is inadmissible, so that the regime of the property community does not use concubines. In the patrimonial relations between the concubines, the provisions of the common law governing the ownership of shares are applicable insofar as the existence of such property is proved[14]. By law, the descendants of the deceased who did not result from the concubinage relationship may request the nullity or annulment of the act of liberty made to the concubine, subject to the existence of a cause of nullity Most often, although the relationship of concubinage itself is not a cause of nullity [15], in practice, the question of absolute nullity of liberty for immoral cause is raised when the decision to gratify was determined by the commencement, continuation or resumption of relations to concubine or to pay intimate relationships between concubines.[16]

A further clarification is required in connection with the disinheritance of some descendants from those referred to in art. 1090 of the civil code: if the deceased disinherits directly (expressly) and partially (nominally) the descendants mentioned, and the disinheritance benefits the spouse from the subsequent marriage, then this disinheritance will take effect only insofar as it does not affect the reserve of the descendants, by introducing the special free estate. Although it is not a bond or a donation, the provisions of art. 1090 paragraph 1 Civil Code are also applicable in this case (article 1090 paragraph 3 of the Civil Code).

In the literature [17] the question has also been whether the provisions of art. 1090 of the Civil Code becomes incidents also when the deceased has been married

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[12] I. Filipescu, A.Filipescu, *Tratat de dreptul familiei*, eighth edition, revised and completed, Universul Juridic Publishing House, Bucharest, 2006, p. 75; A. Bacaci, *Raporturile juridice patrimoniale în dreptul familiei*, Dacia Publishing House, Cluj-Napoca, 1986, p.3; E. Florian, *Dreptul familiei*, Lumina Lex Publishing House, Bucharest, 1997, p. 13.

[13] T.S., s. civ., dec. no. 147/1979, in *CD, 1979*, p. 146; T. S., s. civ., dec. no. 2581/1980, in *RRD* no. 9, 1980, p. 57; T.S., s. civ., dec. no. 226/1982, in *RRD* no. 1, 1983, p. 63; CSJ, s.civ., dec. no. 2426/1992, in *„Dreptul"* no. 10-11, 1993, p. 122; T.M.B., s. civ., dec. no. 22/1990, in *„Dreptul"* no. 3, 1992, p. 64.

[14] T.S., s. civ., dec. no. 830/1972, in *CD*, 1972, p. 76; T.S., s. civ., dec. no. 1559/1974, in *Repertoriu…, 1969-1975*, p. 97.

[15] For details, see C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, vol. III, National Publishing House, Bucharest, 1928, p. 715; M. Eliescu, *op. cit.*, p. 185; Fr. Deak, *op. cit.*, p. 174. In the same sense, in the judicial practice, see T.S., s. civ., dec. no. 144/1983, in *RRD* no. 2, 1984, p. 104; T.J. Cluj, dec. civ. no. 1219/1983, in *RRD* no. 5, 1984, p. 59.

[16] T.S., col. civ., dec. no. 1051/1961, in *CD*, 1972, p. 194.

[17] M. Eliescu, *op. cit.*, Pp. 342-343; E. Safta-Romano, *op. cit.*, p. 319; Fr. Deak, *op. cit.*, p. 324, footnote 1.

several times, gratifying two or more spouses of the marriages he has completed. In a first opinion [18] it was argued that in the case of successive marriages the spouses of each marriage could be gratified but provided that all the liberalities summed up did not exceed the amount of the special free estate, who are not "common" would turn, for them, into a dispossess.

According to another opinion [19], which we consider to be the correct one, our Civil Code only refers to the liberties made to the living spouse, so that the previous spouses fall into the category of third parties, being able to be graced within the limits of the ordinary free estate (Article 1089 Civil Code). Although French law proposed by art. 1098 Civil Code, corresponding to art. 1090 of the Romanian Civil Code, a different solution, referring to the liberties made "*a son nouvel epoux*" - to the new husband (today, in French law, the successive reforms of Article 1098 of the Civil Code, the special free estate) that the solution provided by art. 1090 of the Romanian Civil Code is fairer. This is because the influence of the former husband on the author of liberality, which could have caused him to dispose free of charge, will not be exercised even after the termination or dissolution of the marriage; Thus, the donations made during the marriage are revocable (Article 1031 of the Civil Code), this provision allowing the husband to annihilate the influence of the donor, by revoking the donation made to him (although the revocation can only take place during marriage) the case of the imminence of a divorce can no longer be related to the influence of the donor husband to determine the donor to keep the donation to the detriment of the descendants), and art. 1034 of the Civil Code allows the testator to revoke the testamentary provision until the last moment of his life.

4. Establish the special free estate

The current legislation does not differ significantly from that of 1864. The legislature of 2009 has maintained the limbs in which the deceased can gratify his living spouse who comes to inheritance in competition with "other descendants than their common", that is, a quarter of the inheritance or the part of the descendant who received the least. The novelty brought about by the current regulation is that, unlike Art. 939 of the Civil Code from 1864, by art. 1090 par. 2 Civil Code, the way of dividing the difference between the ordinary and the special free estate is also indicated. If in the past, in the silence of the law, it was considered that this difference should be shared between the living spouse and descendants according to the rules of the legal inheritance, today art. 1090 par. 2 of the Civil Code states that "this difference belongs to the descendants". The clarification is of practical relevance in determining the extent of the special free estate, since the "the part of the descendant who took the least" is not confused with its forced estate, since the descendant will add to that forced estate the part which is due to the difference of the ordinary and special free estate. Hereinafter,

[18] M. Eliescu, *op. cit.*, p. 342-343; E. Safta-Romano, *op. cit.*, p. 319.
[19] Fr. Deak, *op. cit.* (2002), p. 324, footnote 1.

we will set out how to determine the special free estate and sharing of the inheritance for the hypothesis in which the deceased had directly disinherited the descendant or dispensed with acts of liberty in favor of the living spouse with the consequence of applying the provisions of Art. 1090 Civil Code. In order to solve the various situations that may arise in practice, we will also take into account the aim pursued by the legislator by establishing the special free estate, namely the protection of the descendants of the deceased who are not descendants of the living spouse.

a) in the presence of at least one descendant who is not common, the deceased has established a universal legatee on the living spouse. If the living spouse would have been gratified by a universal bond, and the descendants who would come along would be common, the living spouse would accumulate its forced estate (1/8) with the free estate (1/2), receiving 5/8 of inheritance. When at least one of the descendants indirectly disinherited by gratification of the living spouse is not common, the provisions of Art. 1090 Civil Code, which means that the living spouse will not be able to add to its spare part all the ordinary free estate but the special free estate, which is inferior to the ordinary one.

In order to determine the special free estate and to divide the inheritance mass, we will have to perform the following operations [20]:

- Since the living spouse is an heirs of a grateful retired, he will accumulate his forced estate with the free estate (special in our matter). Thus, we will give the living spouse the 1/8 reserve, as much as it is for the hypothesis of the contest with the descendants.
- 7/8, obtained after the survival of the living spouse has decreased, contains the share of the descendants and the special free estate of the living spouse. Considering that the husband cannot receive, by an act of liberty consented by the deceased, a greater share than the part of the descendant who received less, and on the assumption that all descendants are completely disinherited by the deceased, means that in the 7/8 we will find the part of each descendant (equal in our hypothesis) and another part of the descendant, representing the special free estate. Starting from this finding, we can determine the maximum variable limit to which the liberty of the living spouse must fall. So:

- In the case of a contest with a descendant, the part of the child, which will determine the maximum variable limit of the special free estate, will be 7/8: 2, ie 7/16.
- For the contest with two descendants, the maximum limit of the special free estate will be 7/8: 3, so 7/24.
- When the husband competes with three descendants, the maximum variable limit of the special free estate will be 7/8: 4, ie. 7/32.
- In the four descendants contest, the maximum variable limit of the special free estate will be 7/8: 5, ie 7/40 etc.

[20] In the same sense Fr. Deak, R. Popescu, *op. cit.*, vol. II, p. 281-286.

- After determining the special maximum (determined by a part of the descendant), we will compare the share with the general maximum of 1/4 (the limit over which, in any case, the liberalities made by the deceased to the living spouse competing with a non-common descendant can pass). We will notice that:

- When the husband competes with a descendant, the 1/4 share is inferior to the part of the child (7/16), which means that the husband will receive 1/4 as a special free estate.
- If the husband competes with two descendants, the special free estate will be also 1/4 (the lesser part of the descendant, 7/24, is greater than 1/4).
- For the contests of a spouse with three or more descendants, the extent of the special free estate will be determined by the part of the descendant who received least, that is 7/32, 7/40, etc., odds below the $1/4^{th}$ overall.

- We will decrease the specially free estate (1/4, 7/32, 7/40, etc.) from the ordinary free estate (1/2) and we will divide the difference to the number of concrete descendants, whether they are common or not, because art. 1090 par. 2 of the Civil Code does not distinguish between different categories of descendants.

- We will enumerate the survivor's forced estate with the special free estate, determined on a case-by-case basis, and obtain the part of the inheritance that is due to him.

- Descendants who are disinherited due to the will, in turn, accumulate an individual froced estate, with the proportion that is due to the difference between the ordinary free estate and the particular free estate. The solution set out above also applies if all descendants of a particular vocation are directly disinherited, and their living spouse benefits from their disinheritance (article 1090 paragraph 3 of the Civil Code).

b) in the presence of at least one descendant that is not common, the living spouse is gratified by a universal tied person of by an irresistible donation. If the liberty made to the living spouse is greater than the free estate, it will be reduced to the special limit set by art. 1090 par. 1 Civil Code (see examples in letter a). If the liberality is inferior to the special free estate, it will be executed (if tied) or will be preserved (if donated), and the odds laid by law for the hypothetical husband's contest will apply to the difference between the succession mass and the liberty living with descendants.

For example, assuming that the living spouse who comes to heritage along with three descendants, of which at least one is not common, is gratified by a tied one-sixth legacy, it will be necessary to divide the succession mass, the following operations:

- establishing the forced estate of the living spouse, of each descendant, as well as the free estate. Thus, the spouse will benefit from a 1/8 forced estate, each of the descendants of a 1/8 forced estate (half of the legal quota of 1/4), resulting in a total forced estate of 1/2 and an free estate 1/2.

- calculating the specially variable maximum (the lowest share of the descendant) to which the liberty of living spouse must fall. Given that the deceased leaves three descendants and that the liberty made to the spouse can not exceed the

share of one of them, the share of 7/8, obtained by subtracting the husband's forced estate from the inheritance (the forced estate is due to the husband since, as a grateful retired heir , is entitled to accumulate the forced estate with the special free estate) will be divided to 4, resulting in a 7/32 share that will constitute the maximum variable of the special free estate.

- we compare the liberality made to the husband with the limits of special free estate (1/4 - the general limit and 7/32 - the special limit) and we notice that it is inferior to them, which means that liberty can be executed.
- we carry out the liberality (1/6) of the succession mass and get a 5/6 rest.
- on the quota obtained after the exercise of liberality (5/6) we apply the quotas established by the law for the hypothesis of the contest of the spouse with the descendants. Thus, the living spouse will receive 1/4 x 5/6, ie 5/24, and each descendant, 1/4 x 5/6, ie 5/24.
- we add the part to the husband from the difference between the succession and the tie (5/24) with the liberality that was made (1/6), deducting a 9/24 quota for it. Each descendant will receive 5/24. We note that in our example the husband receives a 9/24 share, although the legatee in his favor is only 1/6 of the inheritance, which is greater than the share the husband receives when he is gratified by a tied universal (11/32 - the example in letter a). Apparently excessive, the solution is logical, however, as the legislator sanctions in our subject matter not the liberal intention materialized in favor of the living spouse but the intention to disadvantage the descendanst who are not common through the liberality made to the living spouse. A liberality that does not exceed the limits of the special free estate can not be considered unfair to the descendats and will not alter the right of the owner of the patrimony.

c) in the presence of at least one non-common descendant, the deceased disputes by universal ties in favor of the spouse and a third party. In this hypothesis, in practice, several situations are possible:

i. The liberality of the husband falls within the limits of the free estate, and the sum of the liberalities (that of the husband and that in favor of the third party) does not exceed the ordinary free estate. For example, in the presence of three descendants, of which at least one is not common, the deceased has a testament of 1/8 in favor of the husband and 1/4 in favor of a third party. In this case, first of all, we will have to calculate the special free estate. It can be noticed that the bonding to the third party can be done, which means that in determining the part of a descendant we will not only consider the difference between the succession and the husband's forced estate, apart from the two quotas, it is necessary to deduct the tie to the third party. In fact, by subtracting from the inheritance mass the forced estate of the husband (1/8) and the tie in favor of the third (1/4), we will get a share of 5/8 which we will divide to 4 (3 descendants plus the living spouse who can receive part of a descendant), and the result will be 5/32. We find that the liberality of the husband (1/8) is inferior to the special quotient and that the sum of the liberalities (1/8 + 1/4 = 3/8) is less than the ordinarily free estate (1/2), which means that both

liberties may be executed as agreed by the deceased. By performing the liberalities in the succession table we will get a 5/8 rest, which we will divide according to the rules of legal inheritance between husband and descendants. Thus, the husband will receive, in addition to the tie (1/8), a share of 5/32 (1/4 x 5/8), and each descendant will benefit from a 5/32 quota. Finally, the living spouse will collect a 9/32 share.

ii. the liberality of the husband exceeds the limits of the special free estate, and the sum of the liberalities (that of the husband and the one in favor of the third party) falls within the free estate. Starting from the previous example, we will assume that the bond in favor of the husband is 1/3 and the one in favor of the third person of 1/8. Since the deceased has been in favor of a living spouse who competes with other descendants than the common ones, we will have to determine the special free estate. This time, we will lower the husband's forced estate (1/8) from the inheritance and the tied to the third person (1/8), which, within the limits of the free estate, can be executed. We will get a 6/8 (2/3) share, which we will divide to 4, resulting in a special 1/6 free estate. It can be noticed that the bond to the spouse exceeds the special free estate, which means that he will be reduced to the limit of this amount (from 1/3 to 1/6), and the tie in favor of the third party will be executed, given that the amount of the relationship made to the husband, as has been reduced, and the bonding to the third party falls within the limits of the ordinary free estate. In accordance with Art. 1090 par. 2 Civil Code, this time, the difference between the ordinary free estate (1/2) and the sum of the links (1/6 + 1/8 = 7/24), that is 5/24 will be divided between the three descendants, the resulting quota 5/72) adding to the forced estate of each (1/8). In addition to the reduced link to the limits of the special free estate (1/6), the living spouse will also receive his forced estate of 1/8. Finally, each descendant will benefit from a 14/72 quota (7/36 by simplification), the living spouse by a 7/24 share, and the third one by 1/8.

iii. Given the previous examples, we assume that the husband's tie is 1/12 and the one in favor of the third half. In this situation it is obvious that the legacy exhausts the ordinary free estate (the binding made to the third party alone exhausts that amount), which means that the rights of the descendants will be limited to their forced estate (1/8), a forced estate that will determine the extent of the special free estate the special maximum, representing 1/8 of the inheritance, is less than the general maximum of 1/4). Although the bond in favor of her husband does not exceed the special free estate, the amount of liberalities is higher than the ordinary free estate, which means that both liberties, and so on, will be subject to the proportional reduction. Following the reduction, the living spouse will receive, by virtue of the testament, 1/14, and the third 3/7. As a consequence, the husband will add to his/her forced estate (1/8) a share of 1/14 and will receive 11/56, each descendant will receive a forced estate of 1/8 and the third-grade.

iv. the liberality of the spouse exceeds the limits of the special free estate, and the sum of the liberalities (that of the husband and the one in favor of the third party) is greater than the ordinary free estate.

Example 1. We assume that the deceased leaves three descendants, of which at least one is not common, and dispose by a testament of 2/3 in favor of the

husband and 1/3 in favor of a third party. As the provisions of art. 1090 Civil Code, we will perform the following operations:

- establish the forced estate and the ordinary free estate. Concerning a contest between three descendants and a living spouse, each legal heir will have a forced estate of 1/8. The available free estate will be 1/2.
- we reduce proportionally the bonds up to the limit of the ordinary free estate. Following the proportional reduction, the tie in favor of the husband will be 1/3 and the one in favor of the third party is 1/6. If it is certain that a third party can benefit from a tie at least within the quota of 1/6 obtained as a result of the reduction, it can not be established whether the spouse will be entitled to a 1/3 share because we do not know whether it falls within the limits of the special free estate.
- we determine the special free estate. For this we will decrease the survivor's forced estate (1/8) and the third-party share of the reduction (1/6), obtaining a 17/24 share. We divide the quota so obtained for 4 (3 descendants and the surviving spouse) and will result in a quota of 17/96, which will represent the special free estate (it is obvious that this quota is lower than the general maximum of 1/4 - 24/96, established by Article 1090 paragraph 1 of the Civil Code).
- we compare the share representing the special free estate (17/96) to what we obtained from the first reduction in liberty in favor of the living spouse and we find that 17/96 is less than 1/3 (32/96). This means that the liberty made to the husband will again be reduced to the limit of the special free estate (17/96).
- the reduction of liberty in favor of the living spouse will benefit the grateful third party whose share will increase to the limit of the ordinary free estate, without obviously exceeding the value of the relationship he has been made. Thus, the third party will be entitled to receive 1/2 - 17/96, ie 31/96, a share lower than the initial value of the bond (1/3, ie. 32/96).
- determine the extent of the husband's rights, which will be 1/8 (forced estate) + 17/96 (free estate), ie. 29/96. Each descendant will receive a share of 17/96 from the inheritance.

Example 2. Taking the data from the previous example as a reference, we assume that the ties for the husband is 1/3 of the inheritance and the one in favor of the third 2/3 of the inheritance. After determining the forced estate (1/2) and the ordinarily free estate (1/2), we will perform the following operations:

- we reduce proportionally the bonds up to the limit of the ordinary free estate. The relationship to the living spouse will be reduced from 1/3 to 1/6 and the one in favor of the third party from 2/3 to 1/3. The share of 1/3 in favor of the third party is the minimum amount he is entitled to receive (it is certain that he will benefit from at least this quota). The living spouse, on the other hand, will receive 1/6 of the inheritance but only if this quota does not exceed the limits set by art. 1090 par. 1 Civil Code.
- we determine the free estate. In order to determine this amount, we will deduct from the inheritance mass the husband's forced estate (1/8) and the tie in

favor of the third party as it was reduced (1/3), resulting in a 13/24 share (1-1/8-1/3). We will divide the share so obtained at 4 (three descendants and the living spouse), resulting in the maximum variable of the special free estate, which will be 13/96 (is less than the overall maximum of 1/4).

- we compare the special free estate 13/96 with the reduced value of the bond to the husband (1/6, ie 16/96) and note that the link will have to be reduced again to the limit of the special free estate (from 1/6 to 13/96). This new reduction will benefit the third party, who will add to 1/3 (the share gained from the reduction of his bond) and the difference obtained from the reduction of the spouse's bond to the limit of the special number, this is 3/96 (1/6 - 13/96).
- Finally, each descendant will receive a quota of 13/96, the living spouse, adding to his tied the forced estate, will receive 25/96 (1/8 + 13/96) and the third will receive 35/96 (1/3 + 3/96).

v. the deceased has, by tied in favor of non-common descendants and in favor of the living spouse, exerting directly on the common descendants. For example, the deceased is grateful to the two children of the previous marriage by 1/4 of the legacy, the living spouse by a 1/4 tied, and it directly disinherited the child resulting from his marriage to the living spouse. We appreciate that in this case the special free estate cannot exceed the reserve of a descendant (1/8), as the rights of the directly disinherited child cannot exceed the amount of this forced estate. Reducing the bond to the husband from 1/4 to 1/8 will only benefit the children of the previous marriage. The same solution must also be allowed when legacies in favor of children in the previous marriage would not cover the available inheritance (the value of each would be, for example, 1/6 of the inheritance, provided that the spouse's relationship would be 1/4). This conclusion derives from the teleological interpretation of art. 1090 Civil Code, the aim pursued by the legislator is to protect the descendants who are not common against the influences exercised over the deceased by the living spouse who determined the act of liberality in favor of the latter. The common descendants, being directly exerted on a non-arbitrary basis, will not be able to redeem them beyond their forced estate. The fact that the common descendants take advantage of the favorable provisions of art. 1090 Civil Code is the consequence of limiting the deceased's right to mood in favor of the living spouse to a lower limit than the ordinarily free estate, which means that the part of the census that the deceased did not have to be paid to the heirs of concrete descent (not to the living spouse, because they oppose the provisions of article 1090 paragraph 2 of the Civil Code).

5. Conclusions

From the above, it follows that the application of the provisions of art. 1090 Civil Code raises issues determined by the many practical situations that fall within its scope. We believe that the provisions under review should be simplified by establishing a single objective limit (eg. 1/4) to circumscribe the living spouse's rights that stem from the act of liberty. Otherwise, with the exception of the

hypothesis of indirect and total descendants' disinheritance, different interpretations are possible, capable of generating controversy, with the consequence of non-uniform application of the analyzed provisions.

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