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General Principles of Legal Devolution Exceptions

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ABSTRACT: As far as my choice for this subject is concerned, I should say that I chose it because I considered that it concerns one of the most important institutions in succession matters being necessary in order to establish both the order of the coming to the inheritance among the classes of heirs, but also the priority of the coming to the inheritance of the relatives of the deceased who belong to the same class of heirs. The general principle of legal devolution means that basic rule, which is capable of wide-ranging application; a guiding idea, common to all legal relations aimed at legal development. The devolution of the inheritance is the attribution of the inheritance to certain heirs. By inheritance representation, a legal heir of a more distant degree, appointed representative, ascends, by law, to the rights of his ascendant, appointed representative, in order to reap the part of the inheritance which would have been due to him if he had not been unworthy of the deceased or deceased at the time of the opening of the inheritance. With regard to the term of "successors" and that of "heirs", in the new Civil Code they designate the same person: the one called to the inheritance, but the term heir is preferred. The successor is sometimes used as a synonym for the term "heir", but it is also used with a distinct meaning, also existing in the old Civil Code: that of heir who accepted the inheritance, who is in a situation of individuation with the other successors.

KEYWORDS: succession, heirs, civil code, devolution, principles, exceptions

Introduction

Regarding my option for this topic, I specify that I chose it because I considered that it targets one of the most important institutions in matters of succession being necessary to establish both the order of coming to inheritance among the classes of heirs, but also the priority of coming to inherit the relatives of the deceased who are part of the same class of heirs.

The general principle of legal devolution means that basic, governing rule susceptible of wide applicability; a guiding idea, common to all legal relations aimed at legal devolution.

The notion of "devolution"

The devolution of the inheritance represents the attribution of the succession patrimony to certain heirs (Genoiu 2013, 46).

The legal devolution of the inheritance represents the transmission of the succession patrimony, under the law, to the persons and in the quotas provided by law.

Legal devolution of inheritance takes place in the following cases:

a) When *de cuius* did not leave a will;

b) Although the deceased has drawn up a will, its provisions are not valid or it does not include and bind;

c) Although a will has been drawn up, it only provides for the disinheritance of some legal heirs, without establishing legatees;

d) By will the deceased disposed only of a part of his property;

e) Although a will was drawn up by which he disposed of the entire succession table, the deceased had reserved heirs.

In these last two cases, the same inheritance will be divided both by law and by will, so that the legal inheritance will coexist with the testamentary one.

Delimitation between the terms "successor" – "heir" – "successive"

With regard to the word "successors" and the word "heirs", in the new Civil Code they designate the same person: the one called to inherit, but the term heir is preferred.

The one of successor is sometimes used as a synonym of the term "heir", but it is also used with a distinct meaning, existing in the old Civil Code: that of heir who accepted the inheritance, in the situation of indivisibility with the other successors.

This meaning is used on several occasions or is deduced in different hypotheses. Thus, according to art. 901 para. (4) of the Civil Code, "the provisions (…) cannot be opposed (…) either by universal or universal successors (…)". The same meaning results from a text that defines a term related to the one of successor.

By art. 1100 para. (2) of the Civil Code is defined, as an element of novelty, the successor as the person who meets the condition to be able to inherit, but has not yet exercised his right of option.

Thus, the successor is the person who meets the positive conditions regarding the succession capacity (existence at the date of opening the inheritance), the succession vocation (call to inheritance) and the negative condition of not being unworthy, regulated as a novelty as a general condition of the right to inheritance, and, in the case of testamentary inheritance, the negative condition of not having committed deeds that would attract the judicial revocation of the legatee, but which did not exercise the right of succession option, neither in the sense of accepting the inheritance, nor in the sense of renouncing the inheritance.

After exercising the right of succession option, the successor may become heir (depending on the result of the application of the rules of legal and testamentary devolution) or is a waiver.

A fortiori, he will become his successor when he accepts the inheritance.

The successor therefore has a broad meaning, designating any person who has accepted the inheritance, without concern for its source, law or will.

Instead, restrictively, the term heir is used to designate the person who is called by law to inherit, and in the case of testamentary devolution the term legatees is used.

Each of them, after accepting the inheritance, can be appointed with the term of successor when, in this phase of the application of the inheritance rules (inheritance transmission and sharing), they are no longer interested in what their right comes from (Văduva 2012, 12-13).

Persons who have the right of succession option

The right of option belongs to the person called to inherit under the law or the will of the deceased, namely to persons with a legal or testamentary succession vocation.

Thus, within the legal inheritance, the right of succession option belongs to the legal heirs who have a general vocation to inherit, and not only to those who have a concrete vocation to inherit; therefore, the person called to inherit under the law is concerned, and not the person who actually collects part of the legal inheritance, which means that the right of succession belongs both to the successors summoned first to inheritance (in preferred rank) and to the subsequent successors.

It does not mean that all those who have accepted will receive the inheritance, but the rules of legal succession will apply.

Within the testamentary inheritance, the right of succession option belongs to the legatees, the legal norm referring also to the persons called to inheritance based on the will of the deceased, namely to the persons who have a vocation to inherit based on the deceased's will, regardless of whether they are universal legatees, universal or private because it does not distinguish or exclude a certain category of legatees, on the principle that no one can be forced to accept a legacy that belongs to him.

General principles of legal devolution of inheritance

Article 964 of the Civil Code. provides that:

(1) Relatives of the deceased shall inherit in the following order:

a) First class: descendants;
b) Second class: privileged ascendants and privileged collaterals;
c) Third class: ordinary ascendants;
d) Fourth class: ordinary collaterals.

(2) If, following the disinheritance, the relatives of the deceased from the nearest class cannot collect the entire inheritance, then the remaining part is attributed to the relatives from the subsequent class who meet the conditions to inherit.

(3) Within each class, the relatives of the closest degree with the deceased remove from the inheritance the relatives of more distant degree, except for the cases for which the law provides otherwise.

(4) Between the relatives of the same class and of the same degree, the inheritance is divided equally, unless the law provides otherwise.

Thus, the rather wide scope of the persons to whom the legislator recognizes a general succession vocation to inheritance determines the establishment of an order of calling to inheritance, in order to establish the effective succession vocation.

This order is governed by three principles:

The principle of calling for inheritance in the order of the classes of heirs;

The principle of proximity of the degree of kinship between the heirs of the same class;

The principle of equality between relatives of the same class and the same degree.

The element of novelty is given by the legislator's option to introduce these principles, created by the specialized literature (Eliescu 1966, 87).

I. The principle of calling for inheritance in the order of classes of heirs

Also known as the principle of class priority, this principle expresses the rule of law according to which the classes of heirs are called to collect the succession patrimony in a certain order established by the Civil Code.

The concept of class of heirs means a category of relatives with a general legal succession vocation which, collectively, excludes or is excluded from another category (Deak 2002, 73-74), even if the relatives in the excluded category would be of kinship closer to the deceased than relatives in the called category (e.g., nephew of the deceased's son, second degree relative, excludes from the inheritance the deceased's parents, first degree relatives) (Macovei and Dobrila 2014, 1084-1090).

The class of heirs brings together a category of relatives of the deceased.

Therefore, the reunion of some people in a class of heirs is based on the blood connection.

Blood kinship is assimilated by law to civil kinship - resulting from the adoption concluded under the conditions provided by law - and kinship resulting from medically assisted human reproduction with a third donor.

According to the legal distinction operated according to the source of kinship, it is natural, when it has as its source the blood connection between the relatives, and civil, when it results from the adoption approved by a final court decision.

Natural kinship, either in a straight line - based on the descent of a person from another person, or in a collateral line - based on the fact that several people have a common ancestor, has the same source, namely parentage.

The fact that the filiation is from marriage or out of wedlock, but established according to the law, is not relevant from the point of view of the existence of natural kinship; likewise, no distinction is made as to whether the person was born by natural conception or by a reproductive medical procedure with a third donor.

Civil kinship, unlike the natural one, is not a given, an objective connection but, rather, a fiction of the law (Deleanu 2005, 246) built on the legal operation of adoption (Esme 2014, 491-495). Civil kinship has the potential for amplitude of natural kinship, in the sense that once the

adoption has been finally approved, the kinship is rearranged both in a straight line and in a collateral line.

The distinction between the natural and the civil kinship is interesting from the point of view of the way of establishing the kinship.

It is important to note that whenever the law provides legal effects arising from the relationship, they have the same content regardless of the source of the relationship.

Straight kinship unites people who descend from each other, either directly (children-parents) or in a medium way (grandchildren-grandparents) and can be "carried out" in an ascending sense, ie ascending (for example, from great-grandchild to great-grandfather), or in descending sense, descendant (from great-grandfather to great-grandson).

Collateral kinship is the connection between persons who, without descending from one another, have a common ancestor, as is the case with the brethren.

Thus, this principle implicitly introduces a new technical-legal means of establishing the order of preference between the different categories of relatives (according to the degree of kinship);

It should be noted that the four classes of heirs regulated in the previous civil code are maintained, establishing the order in which they come to succession:

- *Class I,* also called the class of descendants, consisting of all the descendants of the deceased, without limit in degree (children, grandchildren, great-grandchildren etc.);
- *The second class,* also called the class of privileged ascendants and privileged collaterals, consisting of the parents of the deceased, his brothers and sisters, together with their descendants up to and including the fourth degree (nephews of brothers, great-grandchildren of brothers);
- *The third class,* also called the class of ordinary ascendants, consisting of grandparents, great-grandparents etc. of the deceased, without limit in degree;
- *The fourth class* also called the class of ordinary collaterals, consisting of the deceased's uncles and aunts, his primary cousins, the brothers and sisters of the deceased's grandparents.

For example, first-class relatives, who want and can inherit, remove those in the other classes; second-class relatives inherit only if there are no first-class relatives or they will not (are renouncing) or cannot (are unworthy) to inherit.

In principle, a relative belongs to a single class, but, as an exception, it is possible that the relationship is double and the person belongs to two classes, such as the situation of the child born from the marriage between the grandchild of the deceased and the nephew of the deceased's brother, who will be part of the first class as the deceased's great-grandson and of the second class as the nephew of the deceased and who, in this case, will be able to opt for one of the two qualities.

The differentiation of the relatives belonging to the same class of heirs is made with the help of the degree of kinship.

These represent the distance between two relatives, measured on the line of kinship, by the number of births.

The degree of kinship in a straight line can be explained by the fact that the measure of the proximity of kinship between two people is given by the number of births, in other words by the number of generations that separate two people.

Thus, according to the legal exemplification from art. 406 para. (3) lit. a) NCC, children and parents are first degree relatives, grandchildren and grandparents are second degree relatives.

The degree of kinship in collateral line between two persons is determined starting from the first, ascending to the common author with the second counting each birth (generation), then descending from the common ascendant and continuing the counting of births to the second person, who was interested in the degree of collateral kinship of the person from whom it was started.

Thus, the brothers are second-degree relatives, because, starting from one of them to the common author (the father) there is a birth; descending from the common author to the second brother, there is another birth.

We mention that the collateral kinship starts from the second degree and only the collateral relatives of the second or fourth grades have a vocation to inherit.

Exceptions

A) The surviving spouse of the deceased

He is not part of any class of legal heirs, as he is not related to the deceased.

The legislator recognized to the surviving spouse a right of legal inheritance, regardless of the class of legal heirs with which he comes in competition; therefore, it does not exclude and is not excluded by any class of heirs.

B) The call to inherit two classes of heirs at the same time

The hypothesis presupposes the disinheritance of an entire class of legal heirs, who, however, having the quality of reserved heirs, will still collect, as a reserve, a part of the succession patrimony, even against his will.

For example, if all the descendants of the deceased are disinherited by the will left by *de cuius,* then they will only collect the legal reserve, the available quota going to the relatives from the second class of legal heirs.

However, since an inheritance has taken place, it is not possible for the ex-heir to collect the entire inheritance: he will either be entitled to the reserve, if he is a reserve heir, or he will be fully ex-inherited if he is not a reserve heir, and the only situation in which we can speak of the concomitant coming to inheritance of two classes of heirs is when reserved heirs have been disinherited, who will collect the legal reserve and will come to inheritance together with the subsequent class (Macovei and Dobrila 2014,1084-1090).

II. The principle of proximity of the degree of kinship between the heirs of the same class

The principle of proximity of the degree of kinship between the heirs of the same class expresses the rule of law according to which within the same class of legal heirs, the closest relatives with the deceased remove from the inheritance the relatives of more distant rank.

For example, the children of the deceased, as first-degree relatives, remove from the inheritance the grandchildren of the deceased, who are second-degree relatives.

Thus, the concrete vocation to inheritance depends on the closeness of the degree of kinship to the one who leaves the inheritance

Exceptions

A) Mixed class of privileged ascendants and privileged collaterals

In the second grade, the parents of the deceased, although they are first-degree relatives, do not remove from the inheritance the brothers or sisters of the deceased, who are second-degree relatives, nor the descendants of siblings (grandchildren of brother, brother's great-grandchildren), who are third or fourth degree relatives.

Thus, certain predetermined quotas are provided, the same as in the previous civil code: if only one parent comes to the inheritance, he will collect a quarter of the inheritance, and the privileged collaterals, regardless of their number, will collect three quarters, although in doctrine (Macovei and Cadariu 2005, 76-77) it was proposed as a fair share of half even if there is only one parent competing with the privileged collaterals, and if two parents inherit, they will collect half together, the other half going to the privileged collaterals, regardless of their number, noting that when *de cuius* has been adopted with limited effects, the share of 1/2 will be divided equally between the adopter (s) and the natural parents, regardless of whether they are two, three or four.

The members of the second class of heirs will not impute these values on the entire inheritance except in three situations:

- When competing with the surviving spouse;
- When the first class heirs are disinherited by collecting only the reserve;
- When there is a competition between the two situations.

B) Succession representation

By succession representation, a legal heir of a more distant rank, called a representative, ascends, by virtue of the law, to the rights of his ascendant, called a representative, to collect the part

of the inheritance that would have been due to him if he had not been unworthy. to the deceased or deceased on the date of opening the inheritance.

The institution of succession representation allows a legal heir of a more distant rank (called representative) to acquire the inheritance rights of his ascendant (called represented) unworthy or deceased prior to the opening of the inheritance.

The succession representation creates for the representative the possibility to collect the part of the inheritance that would have belonged to the representative if he had not committed the act of indignity or if he had been alive at the date of opening the succession.

Traditionally, it is considered that the application of the principle of proximity of degree and equality between relatives of the same class and of the same degree in determining the concrete vocation can lead to unfair consequences, given the case of *de cuius* has two sons, one of whom predecessor , and his children (second degree relatives) would be removed from the inheritance by their uncle, first degree relative, or if he has two children, both of whom are predecessors, one of whom has a child and the other five, and the succession would be divided equally between them, on the ends (1/6 each).

In both cases, the removal of the consequences of an unforeseen chronology of deaths (children before the parents) and the fulfilment of family obligations to the descendants considered not in isolation, but through the lines of descent - both his offspring children and future generations - are possible through the institution of representation (Grimaldi 2001, 135-136).

As a novelty, NCC extends the application of the representation in favour of the lines of descent of the heir which, by its own decision, also affects the succession rights of its descendants: it is about indignity; unfortunately, the effects of representation do not occur even in the case of renunciation of inheritance.

Although in nominal terms the institution under debate resembles the institution of representation under common law, the two institutions regulate completely different legal issues.

In common law, representation, whether legal or conventional, considers the conclusion by the representative of legal acts in the name and on behalf of the representative, while in inheritance law, representation is a benefit of the law (a succession subrogation) which regulates the conditions under which the inheritance will not be divided by heads, but by stems.

Article 966 of the Civil Code. regulates the scope of this institution, so that, in par. 1 states that "only the descendants of the children of the deceased and the descendants of the deceased's siblings may inherit by inheritance", and paragraph 2 states that "the representation operates in all cases, without distinguishing how the representatives children of the deceased and descendants of siblings of the deceased) are relatives of the same degree or of different degrees in relation to the deceased, if they meet the general conditions of inheritance".

According to the provisions of par. (1), the succession representation is admitted in the case of legal inheritance, regarding the class I and only partially regarding the class II, only regarding the category of privileged collaterals.

Given the exceptional nature of the rules governing this legal institution, the extension of the scope of succession representation is not allowed.

Therefore, neither the parents of the deceased, nor his relatives from the third and fourth classes of legal heirs, nor the surviving spouse, nor the rules of representation in the matter of testamentary devolution can inherit by representation.

In a direct descending line, the succession representation can operate indefinitely.

This means that in all cases where the conditions of representation will be met, not only the grandchildren of the deceased will be able to come to the succession through this institution, but also his great-grandchildren, great-grandchildren etc.

In collateral line, the succession representation cannot extend to infinity, but only up to and including the fourth degree (great-grandson of the brother); this is because the conditions of representation are required to be fulfilled for each generation, and the legal succession vocation of the relatives in collateral line is limited to the fourth degree inclusive.

Therefore, on the collateral line, only nephews of siblings and great-grandchildren of siblings can inherit by representation.

Conditions

1. Conditions regarding the representative

In para. (1) of art. 967 of the Civil Code, two hypotheses are identified that may affect, in the sense of loss, the right of inheritance of a successor and that generate the application of the succession representation.

The first of the situations is external to the will of the successor and refers to the lack of ability to inherit, an expression that happily covers both the hypothesis of the predecessor and that of the Comorians, in the sense of the need to respect the condition of the predecessor (Macovei 2006, 125).

The other situation is directly related to the actions of the heir, referring to indignity, legal or judicial.

The last condition is introduced as a novelty in our legislation, by capitalizing on the strictly personal consequences that indignity must have.

The new institution of representation renounces the condition of the existence of a useful place, considering that even the unworthy in life at the date of opening the succession is represented.

2. Conditions regarding the representative

In order to be able to come by representation to his *de cuius* succession, the representative must have the ability to inherit it, namely: a) the representative must have succession capacity; b) the representative must have his own general legal succession vocation to his *de cuius* inheritance; c) the representative has not given up his *de cuius* inheritance.

Regarding the acceptance of the inheritance by the representative, necessary for the fruition of the representation, we notice that the representative can often be in difficult situations due to the intervention, finding or declaration of indignity of the representative after the date of opening the succession.

3. Conditions regarding the relationship between the representative and the representative

Since the fulfilment by the representative of the conditions of the right of legal inheritance is made exclusively by reference to the person whose inheritance is in question, the indignity of the representative towards the represented or the renunciation of the representative to the inheritance left by the represented is irrelevant. On the other hand, it is obvious that, whether the representation operates in a direct or collateral line, the representative must be a descendant of the representative.

The general effect of succession representation

In cases where the succession representation operates, the inheritance is divided by the stem.

The strain means:

- Within the first class, the first degree descendant who collects the inheritance or is represented in the inheritance;
- Within the second class, the privileged collateral of the second degree that collects the inheritance or is represented at the inheritance.

If the same stem has produced several branches, within each branch the subdivision is also made on the stem, the part due to the descendants of the same degree from the same branch being divided equally among them.

The particular effect of succession representation

The children of the unworthy conceived before the opening of the inheritance from which the unworthy was excluded will report to the latter's inheritance the goods they inherited by representing the unworthy, if they come to his inheritance in competition with his other children, conceived after the opening of the inheritance at which the unworthy was removed.

The report is made only in the case and to the extent that the value of the goods received by representing the unworthy has exceeded the value of the succession liability that the representative had to bear as a result of the representation.

Reporting obligation

The legislator's desire to preserve the equality of the heirs, not in the sense of avoiding disadvantage, but, this time, of privilege, extends in the person of the representatives until the moment when they will debate the succession of the representative, if the reason for the representation is indignity.

Thus, if children are born to the unworthy and after the opening of his succession *de cuius* it is obvious that these descendants are disadvantaged compared to those in whose person the representation operated, and to restore equality NCC provides the latter's obligation to report to debate the succession of the unworthy all goods received under the representation.

For the existence of the reporting obligation, the birth of the unworthy children must be placed after the thirteenth day from the date of opening the succession and, in addition, the reporting obligation will only concern the inherited net assets (Macovei and Dobrilă 2014, 1084-1090).

This report will be made by equivalent, according to the rules of art. 1146 et seq. NCC.

III The principle of equality between relatives of the same class and of the same degree

The principle of equality between relatives of the same class and of the same degree expresses the rule of law according to which the relatives of the same class of legal heirs and with the same degree of kinship in relation to the deceased divide the inheritance equally, by heads.

For example, if three first-degree descendants inherit, the inheritance is divided into three equal parts, or if two good brothers come to inherit, each will reap half.

This equality does not support individual exceptions in terms of sex, age, birth order, adoption etc.

Exceptions

Dividing into stems

If relatives of the same rank inherit by succession, the division is not made on the heads, equally, but according to the number of stems.

Dividing by lines

If several privileged collaterals come from the inheritance who come from different parents (good brothers, uterine brothers or consanguineous brothers), the division is not made on the ends, equally, but is done first on the lines: the paternal line will take half of the share due to the privileged collaterals, and the maternal line will collect the other half.

The half corresponding to the paternal line will be divided equally between the siblings, and the half corresponding to the maternal line will be divided equally between the uterine siblings.

Good brothers (those who are brothers with the deceased after both father and mother) benefit from the share on both lines (the benefit of the double bond).

If the conditions of succession representation are met, the lines will be divided into stems, and then the quota corresponding to each stem will be divided into heads.

Conclusions

Both in the case of the descendants of the children of the deceased, and in collateral line, the representation is allowed in all cases, not only when the children (brothers/sisters) and the descendants of an unworthy, predeceased child (brother/sister) come to the deceased's inheritance, but also when the succession is collected by his descendants other than his children (siblings), without distinguishing according to whether or not these descendants are of the same degree.

For example, suppose that *de cuius* had three sons (C1, C2 and C3), the first son having two children (N1 and N2), and the second and third son having only one child (N3, respectively N4). If at the date of his death *de cuius* C1 is unworthy, C2 renounces, and C3 predecessor, if the

conditions of succession representation are met, it will operate, even if the grandchildren could also inherit in their own name.

In this way, favoring the entity of the strain to the detriment of the individualities that compose it, the representation finds its plenary justification as an exception not only from the principle of proximity of the degree, but especially from the principle of equality of heirs of the same class and degree.

However, given that the new conditions that must be met by the representative in order to operate the representation cover several situations in which a relative does not materialize his kinship with *de cuius* in order to inherit it, we can conclude that there is only one relative condition to the person of the representative, namely the absence of resignation, doubled by the existence of a vacancy in the order of the relatives with concrete succession vocation of *de cuius,* which cannot be occupied by its holder.

References

Deak, Fr. 2002. *Tratat de drept succesoral (Treaty of Succession Law)*. 2nd Ed. Bucharest: Universul Juridic Publishing House.

Deleanu, I. 2005. *Ficţiunile juridice (Juridical fictions)*, Bucharest: All Beck Publishing House.

Eliescu, M. 1966. *Moştenirea şi devoluţiunea ei în Dreptul Republicii Socialiste România (Legacy and her devolution in the Law of the Socialist Republic of Romania)*. Bucharest: Publishing House of the Academy of the Socialist Republic of Romania.

Emese, F. 2014. In *Noul Cod Civil. Comentariu pe articole (The new Civil Code. Comment on articles)*. 2nd Ed. Bucharest: C.H. Beck Publishing House.

Genoiu, I. 2013. *Dreptul la moștenire în Codul Civil (The right to inherit in the Civil Code)*. 2nd Ed. Bucharest: C.H. Beck Publishing House.

Grimaldi, M. 2001. *Droit civil. Successions*. 6th Ed. Paris: Litec.

Macovei, C. 2006. *Drept succesoral. Moştenirea legală (Inheritance law. Legal inheritance)*. Iasi: „Alexandu Ioan Cuza" University Publishing House.

Macovei, C. and Dobrilă M.C. 2014. In *Noul Cod Civil. Comentariu pe articole (The new Civil Code. Comment on articles)*. 2nd Ed. Bucharest: C.H. Beck Publishing House.

Macovei, D. and Cadariu, I. 2005. *Drept civil. Succesiuni (Civil law. Succession)*. Iasi: Junimea Publishing House.

The New Romanian Civil Code, Law 287/2009 on the Civil Code, published in the Official Gazette no. 409 dated 10 June 2011.

Văduva, D. 2012. *Moștenirea legală. Liberalitățile (Legal inheritance. Liberalities)*. Bucharest: Juridical Universe Publishing House. http://www.ujmag.ro/drept/drept-civil/mostenirea-legala-liberalitatile/rasfoire/.