

# Forced Execution of the Surviving Spouse

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**ABSTRACT:** In Romania, the situation of the surviving spouse has undergone several changes starting from the principle that reserved heirs follow the bloodline consequently his inheritance rights were limited, until the New Civil Code when his reservation is just and clearly defined. This change led to new problems, namely the forced execution of the surviving spouse. The most common problems in practice are those related to the division of the inheritance and the exit from the indivision in the situation where *de cuius* is the debtor.

**KEYWORDS:** Inheritance, debtor, forced execution, surviving spouse

## Introduction

Inheritance or succession means the transmission of the patrimony - namely the rights and obligations of a deceased person - to one or more natural persons who are alive - or to legal persons (state, protection institutions, etc.). Article 1155 of the Civil Code stipulates that (1) “Universal and universal heirs contribute to the payment of debts and tasks of inheritance in proportion to the succession share due to each”. Judicial practice has revealed several issues regarding how forced execution is applicable.

The new Civil Code dedicates a distinct section to the succession rights of the surviving spouse (Section I, art. 970-974, Chapter III), reproducing the provisions of Law no. 319/1944, but with some specific elements. The new Code regulates the succession rights of the surviving spouse before the rights of other legal heirs, this order being justified both by his right to inherit in competition with any of the classes of heirs, and by the priority determination of his share of the inheritance, before the other heirs of the deceased. Regarding the extension of the succession rights of the living spouse, the new regulation takes over the provisions of Law no. 319/1944, bringing only certain changes related to the amount of the surviving spouse’s reserve, the right to housing, the seat, etc.

## Forced execution of the surviving spouse

Forced execution is one of the fundamental institutions of civil procedural law and an important component of justice in a rule of law. Like any other important institution of civil procedural law, forced execution is characterized by certain principles, namely by certain general rules based on which the structure and conduct of forced execution are regulated. These rules, which are complemented by the fundamental principles of the civil process and the principles of organizing the profession of bailiff, have not only a theoretical importance, but also a practical one (Garbuleț 2010, 13-15).

Forced execution may be instituted against any natural or legal person, under public or private law, except those who enjoy, under the law, immunity from forced execution.

Articles 1155 of the Civil Code provide: (1) “The universal and universal heirs contribute to the payment of the debts and tasks of the inheritance in proportion to the succession quota that belongs to each one.

(2) Prior to the division of the estate, creditors whose claims come from the preservation or administration of the assets of the inheritance or were born before the opening of the inheritance may request to be paid from the assets in the division. They may also request forced execution of such property”.

The claim rights of the deceased, as well as the succession liability are divided by right between the universal heirs and those with universal title, proportional to the succession share of each (art. 1060 Civil Code) - *nomina hereditaria ipso jure inter heredes divisa sunt*. Consequently, this also applies to the surviving spouse.

Article 687 para. (1) of the Code of Civil Procedure provides that: “if the debtor dies before the notification of the bailiff, no forced execution can be initiated (...)”.

For the surviving spouse, because he evades the forced execution, there is the possibility of not accepting the succession.

In the case of the execution of the surviving spouse, the courts encountered several situations. For example Hunedoara - Civil Section I, as follows: Decision no. 338/A of March 29, 2016, in File no. 3.953/243/2015, by which the incidence of the provisions of art. 687 of the Code of Civil Procedure, which stipulates that if the debtor dies before the notification of the bailiff, no forced execution can be initiated. Most cases refer to the time when forced execution can begin. Thus, most of the rulings of the Bucharest Court of Appeal, including the Bucharest Tribunal, were in the sense that there is a possibility to start the forced execution of inheritance property against the accepting heirs of the deceased debtor, as long as the succession quotas and their heir status were not established succession. Such a situation has reached the High Court of Cassation and Justice.

### **Forced execution in relation to the establishment of succession quotas**

One of the problems with the forced execution of the surviving spouse is that of the forced approval of the surviving spouse before the succession has been debated and the quotations of all the heirs have been established. In this situation the provisions of art. 688 para. (2) of the Civil Procedure Code reported to art. 1.155 alin. (2) of the Civil Code.

Regarding the legal division of the succession liability between the universal and universal heirs, in proportion to the succession quotas, there are regulations since the Civil Code of 1864, art. 774, art. 775, art. 777, art. 893, art. 896, art. 902 and art. 1.060, until the current Civil Code, art. 1.114 alin. (2) and art. 1.155 para. (1).

There is derogation from the rule of legal division of payment obligations by art. 1.155 alin. (2) of the Civil Code, which provides that “Prior to the division of the estate, creditors whose claims come from the preservation or administration of the assets of the inheritance or were born before the opening of the inheritance may require to be paid from the assets in the division. Also, they can request the forced execution on these goods” (Baias, Chelaru, Constantinovici, and Macovei 2012, 1202-1203; Deak and Popescu 2014, 127). By this exception, the creditors identified by art. 1.155 alin. (2) of the Civil Code, “may pursue the assets of the estate that are in indivisibility, without worrying about the legal division of liabilities and the fact that the payment of debts and tasks of inheritance is borne in proportion to the share of inheritance vocation”. Moreover, this solution was applied before the entry into force of the New Civil Code, representing a common judicial practice, due to the fact that the application in all cases of the rule of legal division of liabilities, brought shortcomings in the case of unsecured creditors.

The rule established by the Civil Code of 1864 had four exceptions by which the succession liability is not divided proportionally with the hereditary parts in the New Civil Code with the hereditary parts, under the rule of the Civil Code of 1864, were regulated by art. 1.061 points 1, 2, 3 and art. 893, art. 896. In addition, there is the exception based on the general right of pledge of creditors, which remains indivisible as long as the indivisibility between the heirs lasts and which gives the creditors of the inheritance the possibility to pursue the succession assets for the entire debt, without bearing the risk insolvency between heirs (Eliescu 1966, 231; Zinveliu 1973, 121; Toader, Popescu, Stănciulescu, Stoica, Deak 1996, 157; Chirică 2003, 443).

In March 2019, the High Court of Cassation and Justice ruled on whether there is a possibility to start the forced execution of inheritance assets against the accepting heirs of the deceased debtor, as long as the inheritance quotas and their heir status have not been established in the succession debate. In this case it was about 2 reserved heirs, the surviving wife and the son of the deceased.

The legal issue that came before the High Court of Cassation and Justice was in the following situation, the bailiff, based on the creditor's request, a commercial bank, requested that, based on a promissory note issued in December 2013 and due in 2014, the Bucharest District 1 Court, to approve the forced execution against the assets of the inheritance of the debtor who died after the due date of the respective note, and of the two accepting heirs.

In this case, the Court "rejected, as unfounded, the request for approval of the forced execution, considering that, at this moment, the persons indicated as accepting heirs do not have the quality of heirs and, implicitly, of debtors, within the meaning of art. 645 para. (1) of the Code of Civil Procedure, and, according to the provisions of art. 688 para. (2) of the Code of Civil Procedure. The court reasoned that an execution cannot be initiated on the assets of the inheritance, because, as long as the succession was accepted, the forced execution should have been directed at the heirs" (Decision no. 12 of 11 March 2019 of the High Court of Cassation and Justice).

In its reasoning, this court also specified that the execution can be started only in the case of those who have made acts of acceptance, because otherwise "one could reach the situation in which, in the procedure of forced execution, persons regarding to which it would later be proved that they do not have the quality of heir." (*Ibidem*).

In law, the District 1 Court motivated the fact that it rejected the action of the commercial bank through the provisions of art. 688 para. (2) of the Civil Procedure Code, which provides that forced execution will be initiated against all major heirs, in conjunction with art. 1.155 of the Civil Code, which stipulates that: "universal and universal heirs contribute to the payment of debts and tasks of inheritance in proportion to the succession quota that belongs to each one".

The commercial bank appealed to the Bucharest Tribunal, motivating that the right specified by art. 688 para. (2) of the Civil Procedure Code, respectively art. 1.155 alin. (2) of the Civil Code, by which any creditor can enforce a claim born before the opening of the inheritance of his deceased debtor, even before the completion of the division of succession. He also considered that his ability to recover his claim was unjustifiably limited.

The theoretical opinions expressed by the majority of judges concluded that the beginning of the forced execution is possible in the stated hypothesis. The explanation is based on the reason of art. 1.155 alin. (2) of the Civil Code, namely, the creditors of the deceased are considered "creditors of the succession", consequently they do not have to wait for the succession debate and the division. Also, in the event of a long period of time from the date of opening the succession, the creditors are protected from the risk of insolvency of some of the heirs.

A minority of the judiciary argued that there was no possibility of enforcing the assets against the deceased debtor's accepting heirs, as long as the inheritance quotas and their heir status had not been established in the succession debate.

In this case, the High Court of Cassation and Justice considered that "the provisions of art. 688 para. (1) of the Civil Procedure Code transpose in procedural plan this right of preference of the creditors of the succession in the matter of forced execution, ruling, on the one hand, that forced execution in order to realize their claims may begin after the death of the debtor and that, on the other part, in its place will stand, in the execution procedure, pursuant to par. (2) of the same article, after the acceptance of the succession, all the accepting heirs, if they are only major heirs" (*Ibidem*).

## Conclusions

Forced execution is the second stage of the civil process which refers to the procedure by which the creditor, who is the holder of the right recognized by a court decision or other enforceable act, constrains his debtor who does not perform his obligations with the help of the competent state bodies, in order to fulfill them in a forced way (Zilberstein and Ciobanu 2001, 23; Deleanu 2003, 538; Gârbuleț and Stoica 2010, 3).

In the case of successions, as we have seen, the law does not provide for all situations. The courts do not have a unitary practice, with only a majority one. The forced execution of the surviving spouse has the same problems as all the reserved heirs. The problem that remains is that the courts must weigh between the creditor's rights to recover his debt from the deceased debtor, or that the payment of the debt must be proportionate to how much each heir has received. For the future, it is preferable that this situation be expressly stated in a regulation.

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