„NICOLAE TITULESCU” UNIVERSITY
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DOCTORAL SCHOOL

DOCTORAL THESIS
TESTAMENTARY INHERITANCE
IN THE NEW CIVIL CODE
SUMMARY

Scientific coordinator
Univ. Prof. Liviu STĂNCIULESCU, Ph.D.

Ph.D. Student
SURU Amir Sorin

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INTRODUCTION

TESTAMENTARY INHERITANCE IN THE NEW CIVIL CODE: A SECOND DEGREE INHERITANCE?

The new Civil Code brings together in a single normative act all the components that govern the privacy of citizens throughout it, from conception to death (and even beyond it), namely persons, family law, inheritance law, property and non-property rights, obligations and contracts, real estate advertising, as well as private international law.

The new Civil Code is not a simple legislative adjustment, a simple amendment of the law, but brings with it structural changes meant to restore to the European track the legal relations of national civil law, according to the exigencies and evolution of contemporary society.

The harmonization of national civil law with European law is determined, among others, by a recent element in the life of our society, namely the mobility of Romanian citizens on the territory of the Member States of the European Union and the expansion of commercial activities (with the inherent consequence of cross-border civil relations bearing "EU foreign elements").

The European legislator's strong concern for the uniform regulation of international private law relations between individuals and legal entities in the Member States is constant and is reflected in courageous attitudes. Thus, in the future there is even talk of a "European Civil Code".

In the above context, it can be stated that the New Civil Code "is fully adapted to these legislative developments and that it perfectly responds to the European desire to strengthen a European area of justice for citizens, families and companies".

The changes brought by art. 953 1163 of the Civil Code in force (in matters of succession) are *numerous and, in most cases, also of substance.*

For the introduction in the new legislative context, below, we briefly present the main changes related to the testamentary inheritance.

From its first regulations, the New Civil Code adopts a *new language*, using notions such as: inheritance, deceased, heir, disinheritance, sharing, succession patrimony, etc.

It is noted that the notion of "inheritance" has been adopted to the detriment of that used in the Civil Code of 1864. However, the notion of "succession" is not (completely) abandoned either.

From the beginning, the coexistence of the legal inheritance with the testamentary one and of the multiple vocations to inheritance (respectively the coexistence of the quality of legal heir and legatee) is consecrated (in general).

In the general framework of the general conditions of inheritance, the problem of succession capacity is highlighted by the (relative) presumption regarding the legal time of the conception and of the scientific means of proof by which the contrary can be proved, etc. At the same time, the area of simultaneous death is widened (art. 957 Civil Code).

In the same context, the *legal person's* capacity for succession is recognized (even before the acquisition of legal personality and even if it is not necessary for it to be legally established).

It should be noted that the principle of the specialty of usability must not be respected in the case of legal persons for patrimonial purposes (they can receive, through the *mortis causa* liberties, any kind of goods).

In general, it is appreciated that in the matter of succession capacity, the legislator has achieved a complete regulation and a full consistency in thinking. Thus, *the merit of the New Civil Code is to use a current specialized language*, and to regulate in a unitary manner, the civil capacity.

In art. 957 961 the new Civil Code justly reforms *the issue of succession indignity*. Under the new conditions, inheritance indignity becomes a general condition of the right to inherit (and not of legal inheritance). At the same time, the opinion of "civil punishment" is outlined, in terms of legal nature.

The cases that attract the succession indignity are also reformed, making a precise distinction between legal indignity and judicial indignity (art. 958 and art. 959 Civil Code).

It should be noted that the effects of indignity concern only the unworthy and third parties; the unworthy can be forgiven and can be represented (and, in turn, can represent).

In the matter of the *vocation to inheritance*, the new regulation is superior to the previous one. Thus, art. 1102 of the Civil Code distinguishes between the two forms of inheritance, respectively the legal and the testamentary one, and establishes the multiple vocations to inheritance.

Consequently, we can talk about the general and concrete legal vocation, about the principle of reciprocity of the vocation to inheritance (but also about the two senses in which they work). For example, according to the principle of reciprocity of vocation to inheritance, only the spouse in good faith within the putative marriage has a vocation to inherit the other spouse (in bad faith).

With all the merits of introducing the new concept of multiple vocations, it also creates tailor-made problems. Thus, in the practice of legal inheritance, there are (at least) two situations with different consequences.

For example, it is possible for a successor to be a relative of varying degrees with the deceased (the case of the child born from the deceased's relationship with his daughter) or to be part of two classes (the case of the child born of the deceased's son to the deceased's sister).

In both of the above cases, the successors have a single concrete legal vocation determined by the legal devolution and therefore a single right of succession option.

Likewise, as an exception, the surviving spouse may also be related to the deceased (the case of the deceased's legal marriage to his or her primary cousin).

In the above case, the legal successor has two legal vocations (both as a surviving spouse and as a relative of the deceased), being able to opt separately, twice, for each individual call.

In *testamentary matters*, although the will is not fully defined, it is well outlined in its content, and a delimitation of the special act, as a whole, is made of its main provision - the legacy.

The capacity to dispose of and receive by bequest is conditioned by the possibility for the guardianship court to confer anticipatory capacity on the minor who has reached the age of 16.

In the provisions of art. 1036 of the Civil Code, the reciprocal will is regulated as the equivalent of the conjunctive will from the old regulation, but it is no longer retained among the ordinary testamentary forms, the mystic testament, testamentary form considered to have fallen into disuse.

Through the provisions of art. 1047 of the Civil Code new forms of privileged wills are being regulated.

Art. 1037 and, respectively, art. 1039 of the Civil Code, contain special provisions regarding the proof of the will and two special rules are consecrated for the interpretation of the will.

We appreciate that the provisions of the New Civil Code in testamentary matters (art. 1034 et seq.) are numerous but also modern (compared to those of the Civil Code of 1864).

According to art. 1042 of the Civil Code, the handwritten will is regulated as a unit, in the content of a single article and not disparate (in the content of several legal texts, non-consecutive).

The sanction of non-observance of the special formal conditions that must be fulfilled by the handwritten will is the absolute nullity.

It increases the scope of people who can authenticate wills. Thus, in addition to the notary public and another person invested with public authority by the state may exercise the operation.

A special procedure for the authentication of the will is regulated (unlike the Civil Code of 1864, under whose empire, the will followed the procedure of authentication of any civil legal act).

The authentication of the will in particular situations is regulated, thus covering many of the hypostases that can be encountered in practice (and in a fair manner).

It is mandatory to register in the National Electronic Notarial Register the authentic will and the will on the amounts and values deposited.

New forms of privileged (simplified) wills are regulated, such as: the will made in case of epidemics, catastrophes, wars or other such exceptional circumstances; the maritime and fluvial will, the will drawn up on board an aircraft; the will made by the person hospitalized in a health institution (art. 1047 Civil Code).

Instead of the former "C.E.C. clause" the will of the amounts and values deposited is regulated.

The new Civil Code renounces the regulation of the will concluded by the Romanian citizen abroad, as it contains provisions regarding the law applicable to the form of the will (art. 2633 2636 Civil Code).

The current Civil Code defines *the universal and universal bequest* by reference to the eventual vocation they confer on the beneficiary (and not by reference to the actual emolument collected by the beneficiaries), thus removing one of the countries of the previous civil regulation. With questionable results, we believe.

Specific types of legacies are expressly regulated (for example, alternative legacy, conjunctive legacy, palimony or maintenance claims).

The institution of revocation of the legacy is regulated under new aspects (which were not in the attention of the previous normative act). For example, a distinction is made between voluntary revocation of a will and voluntary revocation of a legacy.

In the provisions of art. 1053 of the Civil Code is also regulated the withdrawal of the revocation of the will.

The causes that attract the tacit voluntary revocation of the legatee and those that attract the judicial revocation of the legatee are established.

In the same context, art. 1068 of the Civil Code reformulates some cases of expiration, but also establishes new ones.

It regulates the consequences of the ineffectiveness of the legacy.

The legal regime of the legacy is established (art. 1073 Civil Code).

In the field of *the limits of the right to dispose by the mortis causa documents*, the institution of the trust substitution has undergone the most significant changes (art. 993 Civil Code).

The new regulation allows for a "simple trust substitution", similar to the legal regime of gradual freedoms in the French Civil Code.

In the same context, the New Civil Code regulates the residual liberties, an aspect appreciated in the specialized literature and in close connection with the trust substitutions (art. 1001 1005 Civil Code).

Novelty elements concern the succession reserve, the most important institution within the limits of the right to dispose of the assets of the inheritance (art. 1086-1090 Civil Code).

It should be noted that the succession reserve is collectively assigned to the reservists and represents half of the succession quota due to the legal heir. Thus, in general, the amount of the reserve under the conditions of the New Civil Code is lower than in the old regulation.

The establishment of the succession mass according to which the succession reserve and the available quota are determined, is established by: determining the gross asset of the inheritance, by summing the value of the assets existing in the succession patrimony at the date of opening the inheritance; determining the net assets of the inheritance, by subtracting the succession liability from the gross assets and fictitious reunification, only for calculation, to the net assets, of the value of the donations made by the one who leaves the inheritance (art. 1091 par. 1 Civil Code).

Important elements of novelty are also found in art. 1091 1099 of the Civil Code, regarding the *reduction of excessive liberalities*.

The new provisions (art. 1093 of the Civil Code) recognize the rights not only of the reserved heirs, but also of his successors, as well as the unsecured creditors of the reserved heirs (unlike the regulation subject to the Civil Code of 1864, in which all use this right).

In accordance with the case-law on the limitation period for the reduction action, the period within which it is to be promoted is 3 years and starts, as a rule, from the date of opening of the inheritance or, as the case may be, from the date on which the reserved heirs lost possession, goods that form the object of the liberty. As an exception, the term begins to run from the date of knowledge of the existence of the liberties and their excessive character (art. 1095 Civil Code).

Under the above conditions, the reduction exception has become time-barred, under extinctive terms.

In conclusion, we specify that this paper aims, *in general*, to perform an *analysis of the testamentary inheritance*, highlighting the novelty elements introduced by the Civil Code of 2011.

Starting from the provisions of art. 1102 para. 2 of the Civil Code (referring to the multiple vocation to inheritance), a successor can collect the inheritance, both under the will (as legatee) and under the law (as legal heir).

Moreover, testamentary and legal inheritance can coexist with vacant inheritance.

In the above context (creator of legal problems), the new succession institution provided by art. 333 Civil Code (preciput clause).

For theoretical (but especially practical) reasons, we appreciate that an answer to the question is increasingly required: whether the two (or three?) forms of inheritance operate in a certain order? and, what is it?

We asked ourselves the above questions, because in the specialized field there is more and more talk (and rightly so!) about the *primordiality of legal inheritance* over testamentary inheritance (deduced from the fact that, in all situations, the rules of legal inheritance represent the common law and therefore it also applies to the matter of testamentary inheritance).

In view of those presented, our approach aims, as a *general objective*, to analyze the testamentary transmission (in relation to the trends of the New Civil Code), but also pursues a *special objective* (subsidiary), namely the relationship between the two forms of inheritance.

In view of the above, we try to answer a topical question in the light of the reforming provisions of the New Civil Code: *testamentary inheritance has become a second-degree inheritance?*

PART I

THE LEGAL WILL: THE ESSENCE OF THE CIVIL LEGAL ACT *INTER VIVOS* AND *MORTIS CAUSA*

Chapter I. The Legal Will: Generating Effects Such as *Inter Vivos* and *Mortis Causa*

Section I. The Will: Complex Psychological Element

Human psychic activity comprises three elements in close interdependence: knowledge, affectivity and will.

The will, in general, cannot be manifested without the involvement of the other two elements.

Will is defined as a complex and interdependent psychic process, with the function of higher regulation, achieved through verbal means. It consists of actions of mobilization and concentration of psycho nervous energy in order to overcome certain difficulties or obstacles in the activity and to achieve the consciously established goals.

Will can be analyzed in the form of social will or individual will.

Social will includes the spiritual and economic manifestations of a community, regulated legally and politically and conditioned cosmically, biologically, mentally and historically.

Individual will is characteristic of a single individual.

Individual will represents the ability of the individual to act rationally to achieve, mentally developed goals, in advance.

Willpower is not to be confused with *motivation.*

Motivation includes all internal motives of conduct, native or acquired, conscious or unconscious.

Motivation is directly related to the voluntary activity of the individual. This involves: setting the purpose and motive; activation of voluntary action; its development until the goal is reached.

The presentation of the will as a human psychological element, as well as of the process that transforms the psychological will into a rational will is very important, because the psychological will constitutes the substrate (premise) of the legal will.

Section II. Legal Will: A Qualified Will

The human will realized with the intention to produce legal effects is also a psychological process, a fact of psychic life.

From a legal point of view, the will is complex because it "brings together in its structure two elements: consent and cause (purpose)".

Consent is a manifestation of will by which a party expresses its determination to conclude a legal act, to "legally commit".

In this sense, consent means the will of the author of a unilateral legal act, as well as the wills expressed separately by the bidder and the acceptor (in the contract).

In another sense, the term consent refers to the agreement of wills of the parties in bilateral or multilateral formation acts.

Legal will "presupposes that the person acting realizes the significance of the consequences of the act he is committing".

In civil law, the legal will is governed by *two principles*: the principle of freedom of will and the principle of real will.

The principle of freedom of will is indirectly established in art. 1169 of the Civil Code according to which, "the parties are free to conclude any contracts and to determine their content, within the limits imposed by law, public order and good morals".

In the same sense, art. 1270 para. 1 of the Civil Code, according to which, "The valid contract concluded has the force of law between the contracting parties".

The principle of freedom manifests itself in *five directions*:

– the subjects are free to conclude or not a civil legal act;

– the subject of civil law is free to choose with whom he will conclude the contract (which implies, among other things, the possibility of breaking negotiations);

– the parties are free to determine, as they wish, its content;

– subjects are free to amend a legal act;

– subjects are free to terminate a previously concluded legal act.

It follows that subjects of law are free to conclude *any legal act*, in the form that the *Principle of Autonomy of Will* presupposes that the conclusion and binding force of legal acts depend exclusively on the will of the parties (and not by law).

In this context, the parties are free to conclude any legal acts they wish, but within the limits imposed by law, public order and good morals (art. 1169 Civil Code).

Consequently, the individual's will to contract cannot be autonomous, but is limited by the mandatory rule of law.

The principle of freedom of legal acts has two main applications:

a) principle of freedom of contract (in matters of bilateral acts);

b) the principle of consensualism (which manifests itself in both unilateral and bilateral or multilateral acts).

When the two wills (declared and real) are in discord, the question arises: which of the two wills should be given priority?

The solution to the above question depends on the concept adopted. Thus, ideologically, two relevant conceptions are manifested: the subjective conception and the objective conception.

According to the subjective conception, the internal (real) will has priority.

The objective conception gives priority to the declared will, "since, as long as the internal will is not externalized, it has no utility or relevance to law."

Section III. The Liberal Will

Liberal intention does not benefit from a legislative definition (both at national and European level).

Doctrinally, the definition of liberal intention is different in relation to the two conceptions that influence it: *objective conception* and *subjective conception*.

According to the objective (abstract) conception, the liberal intention is based on the conscience of the individual and his will to give without receiving anything in return, to make a material sacrifice in favor of another.

In this sense, the reasons that determined its manifestation (of exception, our emphasis added), for example, love, philanthropy, religion, etc., are irrelevant.

According to the *subjective conception*, the liberal intention presupposes a total (radical) disinterested impoverishment, the fruit of a pure (immaculate) altruism. Thus, the liberal intention is the basis of an act of generosity.

The main features that characterize the liberal intention are: the spontaneous character (natural) *intuitu personae* and the unilateral or bilateral character.

The notion of *intuitu personae* means a disposition made in consideration of a person.

The *intuitu personae* character is "inherent" in the notion of liberal intention. Thus, the *intuitu personae* character also implies a series of rules related to the legal regime of the liberal act.

For example, the case of the clause whereby the donor may stipulate the return of the donated goods in his patrimony, both in case the donee would die before him and in case the donee and his descendants would die before him.

Liberal intention can be manifested, both in unilateral legal acts and in bilateral acts.

Inter vivos, the disposer usually manifests his liberal intention through a donation contract, concluded in favor of the donee. Thus, the manifestation of legal will is contractual.

Instead, in legal acts *mortis causa*, the liberal intention represents the will of a single disposer (of the testator).

Consequently, we can state unequivocally that the liberal intention constitutes the exclusive manifestation of the disposer only in the acts of unilateral formation (for example, in the case of the legacy contained in the will).

The claim is based on at least one indisputable argument: the unilateral act is the product of a single person.

As a rule, civil obligations are endowed with "offensive legal means" for their fulfillment. In this case, the obligations are perfect.

Most duty relationships are perfect duties.

Natural obligations are the legal relations of obligations in which the sanction consists in the possibility for the creditor to refuse the refund of the benefit received from the debtor, on the grounds that he has voluntarily paid a debt that he had.

Natural obligations are divided into: imperfect civil obligations and natural obligations "debts of conscience".

Imperfect civil obligations are natural obligations that could not have arisen due to a legal obstacle, present at the time of birth or arising during its existence.

Natural obligations - debts of conscience - are obligations that have their origin and support in the spiritual and moral resources of the human being.

Although they lack the vitality of perfect civil obligations, natural obligations nevertheless produce the following legal effects:

a). By the voluntary execution of the service that is the object of the natural obligation, the debtor makes a *valid and irreversible payment.*

b). Some natural obligations can be expressly confirmed by the unilateral will of the debtor. In this way, they become perfect civil obligations.

c). Natural obligations can be transformed into perfect civil obligations by novation.

d). Natural liabilities may be transferred by assignment of claims, assignment of debt or assignment of contract.

Basically, natural obligations are manifested especially in the field of liberalities. Thus, it has been argued that natural obligations have more of a role in evading the strictness of the legal regime of liberalities.

Doctrinally, however, the relationship between natural obligations and liberalities is difficult to outline (over time, it has been the subject of intense legal disputes).

Chapter II. The Civil Legal Act: Legal Manifestation of Will

Section I. The Notion of Legal Act. Classification of Free Legal Acys

The civil legal act is a manifestation of will made with the intention to produce legal effects, ie to give birth to, modify or extinguish a concrete legal relationship.

In the doctrine, two categories of the civil legal act were expressed.

According to the "traditional definition", the civil legal act is a manifestation of will committed with the intention to produce legal effects, respectively to give birth to, modify or extinguish a concrete legal relationship.

In another support, the legal act was defined as "a manifestation of will - unilateral, bilateral or multilateral, committed with the intention of establishing, modifying or extinguishing (according to the objective law) legal relations, provided that the existence of this intention depends on the very production of legal effects".

Thus, the civil legal act is defined by three elements:

a). The civil legal act is a manifestation of will (which may come from one or more natural or legal persons);

b). The manifestation of will is expressed with the intention to produce civil legal effects;

c). The legal effects pursued by the parties may consist in giving rise to, amending or extinguishing a concrete civil legal relationship.

It should be noted that the term "act" can have two meanings:

a) of legal operation (negotium iuris) or,

b) to be recorded ascertaining the manifestation of will, ie the material support which records or renders the legal operation (*instrumentum probationis*).

In the above context, we distinguish between acts committed with the intent to produce legal effects (i.e. "civil legal acts") and acts committed without the intention to produce legal effects (which effects occur under the law).

According to the purpose pursued at their conclusion, the legal acts are divided into: legal acts for consideration and legal acts free of charge.

The legal act for consideration is the one that, in exchange for the patrimonial benefit procured by one party to the other party, the aim is to obtain another patrimonial benefit. For example, contracts of sale, exchange, lease, etc.

The legal act free of charge is the one in which a patrimonial benefit is procured without seeking to obtain another patrimonial benefit in return. For example, donation, loan, etc.

Free legal acts are divided into: *disinterested acts and liberalities*.

Disinterested acts are those legal acts free of charge by which the disposer acquires a patrimonial advantage to someone without diminishing his patrimony.

For example, free warrant, bailment, etc.

Liberalities are those legal acts free of charge by which the disposer reduces his patrimony with the patrimonial benefit procured to the gratified.

According to art. 984 of the Civil Code, "Liberality is the legal act by which a person disposes of his goods free of charge, in whole or in part, in favor of another person".

It should be noted that liberality retains its gratuitous character, as long as the task does not exceed the value of the liberal act itself.

The Civil Code expressly recognizes two categories of liberalities: donations and bequests contained in wills. Thus, according to art. 984 para. 2 of the Civil Code, "Liberalities can be made only by donation or by bequest contained in the will" (our emphasis).

In the doctrine it has been observed that some legal acts are by their essence, onerous or free, while in other legal acts, their onerous or free character depends only on their nature.

For example, the sale, exchange, lease, etc., are in essence onerous contracts (unable to acquire free character).

Instead, the mandate, the loan, the deposit are contracts essentially free, but which can also be onerous, in the form of a remunerated mandate, a remunerated deposit or an interest-bearing loan.

The relationship between liberalities and disinterested acts is given by the differences, respectively the similarities between them.

In order to carry out the division, the cause-and-effect ratio must be established, which determined the will of the person who assumes obligations by that liberal act.

By number of parties, civil legal acts are classified into: unilateral, bilateral and multilateral.

a). The unilateral legal act is the result of the will of one party. According to art. 1324 of the Civil Code: "The legal act that involves only the manifestation of the will of its author is unilateral".

In doctrine, the phrase "unilateral legal act" is used whenever it is a legal act that expresses the sole will of its author.

This category includes: will, acceptance (or renunciation) of the inheritance, termination of a contract, etc.

It follows that the unilateral legal act is a manifestation of a will for the purpose of producing legal effects (not being conditioned by the consent of another person).

Instead, *the unilateral promise* is conditioned by the acceptance of the co-contractor. Thus, in this case, the unilateral legal act and the unilateral promise are in a "relationship similar to the contract agreement".

b). The bilateral legal act represents the concordant wills of two parties.

This (general) category includes contracts (sales, exchange, donation, etc.).

Of the bilateral legal acts, only the donation contract is a liberal legal act, a liberality (art. 984 para. 2 Civil Code).

The donation is delimited from other civil contracts by its legal characteristics. Thus, the donation is a *unilateral* contract (because only one of the parties has contractual obligations); *free of charge (*because the donee is not obliged, in principle, to pay any equivalent); *solemn* (because it is subject to the authentic form) and *translative of ownership* (because, it transfers ownership from donor to donee).

c) The multilateral legal act is the result of the will of three or more persons.

Section II. The Conditions of the Civil Legal Act

According to art. 1179 of the Civil Code, "The essential conditions for the validity of a contract are: 1. ability to contract; 2. the consent of the parties; 3. a determined and lawful object; 4. a lawful and moral cause. To the extent that the law provides for a certain form of contract, it must be complied with, under the sanction provided by the applicable provisions (nullity, our emphasis) ".

a). The ability to conclude legal acts is a substantial, essential, general condition and represents that part of the capacity of use of natural and legal persons which consists in the ability of the subject of civil law to become a holder of civil rights and obligations (by concluding acts civil law).

Any person has the capacity to use and, except for the cases provided by law, the capacity to exercise (art. 28 of the Civil Code).

The use capacity is the person's ability to have civil rights and obligations. The capacity to use begins at the birth of the person and ceases with his death (art. 34 35 Civil Code)

The exercise capacity is the person's ability to conclude civil legal acts alone.

Full exercise capacity begins when the person becomes an adult.

A person becomes of age at the age of 18 (art. 38 Civil Code).

b). *Consent* is an essential condition for the validity of the civil legal act (art. 1179 Civil Code).

Consent means *the unilateral manifestation of the will*, i.e., the externalized will of the author of the unilateral legal act or of one of the parties to the bilateral or multilateral legal act (for example, the acceptance of an inheritance).

In another sense, consent is the agreement of the parties in the bilateral or multilateral legal acts (*concursus voluntatum*).

In order to be valid, the consent must cumulatively meet the following "requirements":

– to originate from a discerning person;

– to be externalized (declared);

– to be expressed with the intention of producing legal effects;

– not to be altered by any defects of consent.

Defects of consent are circumstances that affect the conscious and free nature of the will to conclude a legal act.

Consent is vitiated when it is given in error, caught by deceit or snatched by violence (art. 1206 para. 1 Civil Code).

Error (defect of consent) is a false representation of certain circumstances at the conclusion of a legal act.

According to art. 1207 para. 1 of the Civil Code, "The party who, at the time of concluding the contract, was in a material error may request its annulment, if the other party knew or, as the case may be, had to know that the fact on which the error was essential for the conclusion of the contract "(emphasis added).

Deception ("cunningness") consists of fraudulent maneuvers performed by one party to induce the other party to conclude the civil legal act.

Consent is vitiated by malice when "the party was in error due to the fraudulent maneuvers of the other party or when the latter fraudulently failed to inform the contractor of circumstances which should have been disclosed to him". (art. 1214 para. 1 of the Civil Code).

Violence consists in the induced (instilled) fear of a person to determine him to conclude a contract.

According to the nature of the evil with which it is threatened, it is distinguished between:

a) *physica*l violence (when the threat of harm concerns the physical integrity or property of the person);

b) *moral* violence (when the threat of harm refers to the person's honor, honor, or feelings).

Injury - defect of consent. According to art. 1221 para. 1 of the Civil Code, "There is injury when one of the parties, taking advantage of the state of need, lack of experience or lack of knowledge of the other party, stipulates in his favor or that of another person a benefit of considerably higher value, higher, at the date of conclusion of the contract, than the value of its own performance".

The injury must meet *three conditions*:

– the injury is related to the respective legal act;

– the injury must exist at the time of concluding the legal act;

– the injury implies a clear disproportion between performances.

In the conditions of the New Civil Code, we appreciate that in solving the legal nature of the injury we must distinguish between the injury in the case of the adult and the injury in the case of the minor.

In the case of a *minor*, the injury can be invoked when the civil legal act is of administration. In addition, the act must be bilateral, commutative and onerous for the minor (art. 1221 para. 3 of the Civil Code).

In the case of the *full-aged*, the provisions of art. 1221 para. 1 of the Civil Code, according to which, "one of the parties, taking advantage of the state of need, lack of experience or lack of knowledge of the other party, stipulates in his favor or that of another person a benefit of considerably higher value , on the date of conclusion of the contract, than the value of its own service".

c). *The object of the civil legal act* is one of the two components of the content *of the legal will*.

Under the New Civil Code, *the object of the contract* is the legal operation, such as sale, lease, loan and the like, agreed by the parties, as it appears from all contractual rights and obligations (art. 1225 para. 1 Civil Code).

Systematizing the requirements imposed by the New Civil Code, the object of the civil legal act must: exist; to be in the civil circuit; to be determined or determinable; to be possible; to be lawful and moral.

d). *The cause* is the reason that determines each party to conclude the contract" (art. 1235 Civil Code). The cause is the "mental foreshadowing of the purpose" pursued by the conclusion of the legal act.

As a condition of validity (art. 1179 of the Civil Code), the cause of the legal act is not confused with the consent, but, on the contrary, together with it, it forms the legal will.

The case is not to be confused with the object of the legal act either. Thus, if the object of the legal act shows "what is owed" (qui debetur), the case shows why it is due.

In its structure, the cause has *two elements*: the immediate purpose and the mediated purpose.

a). *The immediate purpose (causa proxima)* is abstract and invariable within certain categories of contracts.

b). *The mediated purpose (causa remota),* a concrete and variable element from one category of legal acts to another, consists in the determining reason for concluding the legal act.

According to art. 1236 alin. 1 of the Civil Code, "The cause must exist, be lawful and moral". Thus, for the validity of the respective legal act, the case must meet the following requirements: to exist; to be real, to be lawful and to be moral.

e). *The form of the civil legal act (stricto sensu)* is the way of externalizing the manifestation of will, made with the intention of creating, modifying or extinguishing a civil legal relationship.

The form of the civil legal act is subject to the two principles: consensualism and formalism.

The principle of *consensualism* is the rule of law according to which the simple manifestation of will is sufficient for the civil legal act to be validly born.

The principle of *formalism* is the rule of law according to which, for the civil legal act to be validly born, the manifestation of will must also take a certain form (verbal, written, solemn, etc.).

After the legal consequences of non-compliance with the form, lato sensu, the "form of the civil legal act" designates three requirements:

– form required for the very validity of the legal act (*forma ad validitatem*);

– the form required to prove the legal act (*forma ad probationem*), and

– form required for the opposability of the legal act to third parties (*forma ad oposabilitatem*).

The *ad validitatem* form is a condition of validity, essential and special, which consists in the need to fulfill the formalities established by law for the civil legal act.

The form required for proving the civil legal act consists in creating a document to prove the legal act.

The *ad probationem* form is mandatory, and its non-observance attracts, in principle, the inadmissibility of proving the civil legal act with another means of proof.

The form required for *the opposability to third parties* of the civil legal act presupposes the observance of the necessary formalities to make the act opposable to the persons who did not participate in its conclusion (in order to protect their rights or interests).

The form required for opposability is *mandatory.*

Section III. The Modalities of the Civil Legal Act

The modalities represent future elements or circumstances, on the realization of which the parties make the effects of the legal act depend.

The modalities that affect the legal act (regulated in the above provisions) are: "term" and "condition" (art. 1398 Civil Code).

To the two ways above we add the "task", *a way that affects the liberalities.*

a). The term (dies) is a future event and a certain realization, on which depends the production or extinguishment of the effects of a legal act.

The term has the following *legal characteristics*:

a). The term is a *future* event that affects the civil legal act.

b). The deadline is a *safe* event (as an achievement).

c). The term is an event that affects the *execution* of the civil legal act.

In relation to its *effects*, the term is: suspensive and extinctive.

The suspensive term postpones: until its fulfillment the maturity of the obligation is postponed (art. 1412 par. 1 Civil Code).

For example, the maturity of a loan agreement.

The term is extinctive when, upon its fulfillment, the obligation is extinguished (art. 1412 paragraph 2 of the Civil Code).

For example, the date of death of the creditor in the maintenance contract.

The term extinction has the effect of extinguishing the subjective civil right and the correlative obligation. Thus, until the expiration of the extinctive term, the concrete civil legal relationship produces its effects (and after the fulfillment of the term, the acts exhaust their effects).

b). *The condition* is a future event and uncertain as an achievement, on which depends the existence (birth or extinction of the legal act.

The condition has the following *legal characteristics.*

a). The condition is a *future* event that affects the civil legal act.

b). The condition is an *uncertain* event (as an achievement).

c). The condition is an event that affects the birth or extinction of the civil legal act.

In relation to the effects produced, the condition is suspensive and resolving.

The condition precedent is that in which, until its realization, the existence of the rights and obligations of the parties is suspended.

According to the New Civil Code, "The condition is suspensive when the effectiveness of the obligation depends on its fulfillment" (art. 1400 paragraph 1 of the Civil Code).

The resolutive condition is that, until its realization, the rights and obligations of the parties are considered to exist and are executed.

According to the New Civil Code, "The condition is resolutive when its fulfillment determines the abolition of the obligation" (art. 1401 paragraph 2 of the Civil Code).

If the resolutive condition has been fulfilled, the legal act is repealed retroactively, as if it had never been concluded.

When the resolutive condition is not fulfilled, the legal act is consolidated.

c). *The burden* is an obligation to give, to do or not to do imposed on the gratuity by the disposer, in liberalities (donations or wills).

Depending on the *beneficiary person*, the task can be of three types:

– in favor of the disposer (which can only be constituted by a donation);

– in favor of the gratified (when an obligation is assumed that equals or exceeds the value of the emolument of the donation, in which case the legal act is no longer free, but for a fee);

– in favor of a third person (in this case, the pregnancy is a form of manifestation of the stipulation for another).

Effects. The non-execution of the task does not constitute a case of invalidation (nullity) of the civil legal act, but only affects the production of its effects (ineffectiveness of the legal act, our emphasis).

Failure to perform the task entitles the disposer to revoke or terminate the legal act (as is the result of the disposition of the disposer or the letter of the law).

Revocation for culpable non-performance of the task must be requested by court, under the same conditions as the termination of synallagmatic contracts (provided by art. 1020 1021 Civil Code).

The heirs who benefit from the ineffectiveness of the legacy are obliged to execute the task bequest (art. 1073 Civil Code).

PART II

THE WILL: COMPLEX MANIFESTATION OF THE WILL *MORTIS CAUSA*

Chapter I. The Testamentary Inheritance, in the General Context of Successional Transmission

Section I. Inheritance or Succession?

According to art. 953 of the Civil Code, "Inheritance is the transmission of the patrimony of a deceased natural person to one or more persons in existence" (our emphasis).

Inheritance is a way of passing on property. Thus, according to art. 557 para. 1 of the Civil Code, "The property right can be acquired, under the conditions of the law, by convention, by legal or testamentary inheritance (...)".

From the above, it results that by inheritance the patrimony (as a set of rights and obligations) is transmitted to a deceased natural person.

For the designation of the transmission *mortis causa*, the New Civil Code usually uses the term "inheritance" (for example, "legal inheritance", "vacant inheritance", "conditions of the right to inherit", etc.).

However, the legislator often also uses the term "succession", a term established in the field (e.g., "succession representation", "succession quota", "succession reserve", "succession table", "succession option", "Successive" etc.).

Lato sensu, by succession is meant the transmission of a patrimony or a good from a person (natural or legal) to another person, both by legal acts between the living and by legal acts for the cause of death. Thus, in this sense, the sequence includes all transmissions.

Stricto sensu, by succession is meant the transmission of a patrimony or of certain goods from a deceased natural person to one or more natural or legal persons in being or to the state.

We support the term "inheritance" (introduced into circulation especially after its use by the "father of the inheritance"), because in the national language it best expresses the respective domain. From this point of view, we appreciate that the New Civil Code was inspired when it reconfirmed it.

We also mention the term "successive", respectively "the person who meets the conditions provided by law to inherit, but who has not yet exercised the right of succession option" (art. 1100 para. 2 of the Civil Code).

Inheritance is regulated by the Civil Code in Book IV entitled "On inheritance and liberalities", Title I - "Provisions on inheritance in general", Title II - "Legal inheritance"; Title III - "Liberalities" and Title IV - "Transmission and settlement of inheritance" (art. 953 1163).

Section II. Types of Successional Transmission

According to art. 955 para. 1 of the Civil Code, "The patrimony of the deceased is transmitted by legal inheritance, insofar as the one who leaves the inheritance did not order otherwise by will".

It follows from the text above that inheritance is of two kinds:

a) *legal inheritance* (when the transfer of succession takes place under the law), and

b) *testamentary inheritance* (when the succession patrimony is transmitted according to the will of the author, expressed by will).

The *causa mortis* testament of the author can be manifested, both by will (art. 955 para. 1 of the Civil Code) and contractually, by matrimonial agreement (art. 333 of the Civil Code regarding the "Preciput Clause").

Compared to the above, it follows that doctrinally and legislatively, the inheritance is of three types: *under the law* (legal inheritance) and two other types (testamentary inheritance and conventional inheritance), both by *the will of the author* of the succession patrimony.

a) Inheritance is *legal* when the transmission of the succession patrimony is made under the law, to the persons in the order and in the quotas strictly determined by law.

It should be noted that according to art. 955 para. 1 of the Civil Code, the inheritance is legal when the author did not dispose, during his life, of his patrimony by will (in favor of one or more persons).

With all the above, the inheritance will be legal even when the author disposed of his property by will, but his dispositions (legacies) do not exhaust the entire estate. In this case, the inheritance will also be legal, but only for the party that exceeds the value of the legacies.

It is also possible that the deceased has drawn up a will which, however, contains other provisions than the one by which he disposes of his estate. And in this case, the inheritance will be legal (because the will does not include bequests).

b). The inheritance is *testamentary* when the transmission of the succession patrimony is made based on the will of the testator to the persons designated by him by will.

The person who disposes by will is called a "testator", and the person who receives the estate is called a "legatee".

The legal act contained in the will by which the testator disposes of his *mortis causa* patrimony, is called "legacy".

The legacy is the main legal act contained in the will, but the will ("legal form", our emphasis) may include other manifestations of will of its author, such as: provisions regarding burial, exheredation of legal heirs, recognition of a child, etc.

In the context of the relationship in which the two kinds of inheritance are, doctrinally, two questions are asked.

The two types of inheritance (legal inheritance and testamentary inheritance, our emphasis) are *mutually exclusive or may exist simultaneously?*

What is the relationship between the two legacies: relationship of *subordination* or *equal positions*?

According to art. 955 para. 2 of the Civil Code, one part of the deceased's patrimony can be transmitted by testamentary inheritance and the other part by legal inheritance.

It follows that the two forms of inheritance are not mutually exclusive, *but may coexist*. For example, *de cuius* made a will by which he left all his movable property to a certain legatee (universally bound, our emphasis), and one of the real estate to another person (privately bound, our emphasis), and the two ties, taken together, do not exhaust the entire succession table. In this case, the inheritance will be testamentary for the patrimony included in the two related and legal for the difference.

Also, if the deceased left by will the entire inheritance to persons other than the reserved heirs, the latter will receive (under the legal inheritance) the part of the inheritance due to the succession reserve (even against the will of the testator). And in this case, the return of the inheritance will be partly legal and partly testamentary.

When an heir combines the two qualities (of legal and testamentary heir), he has a distinct right of option (for each quality separately), being able to choose differently. For example, to accept the bequest and to give up the legal inheritance (or vice versa - art. 1102 paragraphs 1 and 2 of the Civil Code).

Regarding the issue of the relationship in which the two types of inheritance are (expressly listed in art. 955 para. 1 of the Civil Code), we are to present our opinion at the end of the paper.

c). *Conventional inheritance* in the New Civil Code (art. 333) presupposes two main elements: one general, the matrimonial convention, and another special one, the *mortis causa* clause.

The matrimonial agreement is a legal act (a contract, our emphasis) concluded between the future spouses by which the matrimonial regime applicable throughout the marriage is established or by which it modifies the matrimonial regime under which they married.

Under the sanction of *absolute nullity*, the matrimonial agreement is concluded by a document authenticated by the notary public, with the consent of all parties, expressed personally or by the trustee with authentic power of attorney, special and having predetermined content (art. 330 para. 1 Civil Code).

For opposability, the matrimonial conventions are registered in the National Notarial Register of matrimonial regimes, organized according to the law (art. 334 paragraph 1 of the Civil Code).

The matrimonial agreement may not be opposed to third parties with regard to the acts concluded by them with one of the spouses, unless the publicity formalities have been completed or if the third parties have known it in another way.

Also, the matrimonial agreement cannot prejudice the equality between the spouses, the parental authority or the legal succession devolution (art. 332 Civil Code).

The Preciput Clause "By matrimonial agreement it may be stipulated that the surviving spouse shall take over without payment, before the division of the inheritance, one or more of the common property, held in inheritance or co-ownership" ("The Preciput Clause" - art. 333 para. . 1 C. civ.).

In a broad interpretation, we consider that such a clause can be included in the matrimonial agreement, *regardless of the chosen matrimonial regime*. Thus, the future spouses can conclude a marriage agreement even if they opt for the legal community regime.

In the doctrine, it is appreciated that the regime of separation of patrimonies also allows the application of the preciput clause. In this situation, the provisions of art. 333 para. 1 of the Civil Code, which refers to one or more assets held in co-ownership as the object of the preciput clause (and therefore the spouses can also acquire in this regime, co-owned goods).

Thus, in the construction of the civil legal act, the “preciput clause” is part of its “effects”, because it is an obligation contained in a contract (a clause of the matrimonial agreement, our emphasis).

We remind you, however, that the special interest of our research is the position of testamentary inheritance in relation to legal inheritance. In this context, the conventional inheritance may tip the scales in favor of inheritances arising from the will of the author of the succession.

Therefore, compared to the above, we are in favor of the legislative recognition of the third form of inheritance, namely the *conventional inheritance* (and, implicitly, the reinstatement on new bases of the so-called "preciput clauses").

Chapter II. The Testament – The *Mortis Causa* Legal Pattern

Section I. The Testament – Notion, Characters and Content

According to the law, the will is "the unilateral, personal and revocable act by which a person, called testator, disposes, in one of the forms required by law, for the time when he will no longer be alive" (art. 1034 Civil Code).

The will is regulated in the Civil Code, Book IV entitled "On inheritance and liberalities", Title III called "Liberalities", art. 984-1099 (along with donation).

The definition given to the will by the New Civil Code does not differ much from the previous one (enshrined in art. 802 Civil Code 1864), according to which, "The will is a revocable act by which the testator disposes, for or part of his property".

However, comparing the two notions given in time to the will, at first sight, we find that the previous definition seems to be more comprehensive (including the object of the *mortis causa* disposition).

In the French doctrine of the definition of the will (taken over entirely by the national legislator) it was reproached that the testamentary act can express other wills than the patrimonial ones, such as those referring to the burial procedures, the executor, etc. (which is absolutely real, our emphasis).

The will is individualized as an important institution of civil law through its legal characteristics.

In this context, we recall that according to the law, "The will is the *unilateral, personal and revocable* act by which a person, called testator, disposes, in one of the forms required by law, for the time when he will no longer be alive" (art. 1034 C. civ.).

In the doctrine, *the main identified legal characteristics* of the will are: the *mortis causa* characteristic, the solemn characteristic, the unilateral characteristic, the personal characteristic and the revocable characteristic.

As a rule, the will contains provisions regarding the succession patrimony or the goods that are part of it, as well as the direct or indirect designation of the legatee (art. 1035 Civil Code)..

It follows from the provisions of the Civil Code above that the main content of the will is the *legacies.*

In addition, the will may include other provisions of last will (art. 1035 of the Civil Code), such as: a) provisions regarding the division; b) revocation of the previous testamentary dispositions; c) disinheritance; d) appointment of executors; e) tasks imposed on the legatees or legal heirs.

Other testamentary dispositions "which do not refer to the succession patrimony" and which produce effects after the testator's death are included in the "Notarial Guide" issued by the National Union of Notaries Public in Romania in 2011. We present them briefly below.

a). Recognition of a child out of wedlock, both by the mother and by the father (recognition of the child conceived and born out of wedlock).

The recognition of a child made by will *cannot be revoked* (art. 416 Civil Code);

b). The parent may appoint the person to be appointed guardian of his children (art. 114 of the Civil Code).

c). Each spouse may dispose by will of his share of the community of property, at the end of the marriage (art. 350 Civil Code).

d). The testator may give his consent (or prohibit) after his death, the use of human organs, tissues and cells, for therapeutic or scientific purposes (art. 81 Civil Code).

e). The testator may dispose of the manner of performing his own funeral and may give orders regarding his body after death (art. 80 C. civ.).

f). Appointment of an executor and the limits of his powers.

g) Establishment of a foundation (following that its purpose and patrimony will be specified by the testator).

h) The alienation of an asset may be prohibited by will (or by agreement), but only for a maximum period of 49 years.

i). By legacy(but also by convention), a person may be empowered to administer one or more assets, a patrimonial mass or a patrimony that does not belong to him..

j). By will, the testator can choose the law applicable to his own succession (art. 2634 Civil Code).

It should be noted that, also in terms of content, the "will" is not to be confused with the "legacy" (it can exist valid even without the latter, our emphasis).

Section II. The Legal Nature of the Testament. Is the Testament a Legal Act or a Legal Form?

In the legal literature, the will is described as both a "civil legal act" and a "legal form".

a). *In an opinion,* the will has the legal nature of a "civil legal document".

"Civil legal act means the manifestation of the will or, as the case may be, the agreement of wills made with the intention to produce legal effects, i.e., to give birth to, modify or extinguish a concrete civil legal relationship".

The characteristic elements of the civil legal act derived from the above definition are the following:

- a manifestation of will (or agreement of wills) of one or more natural or legal persons;
- the intention of the natural or legal person to produce civil legal effects (the intention distinguishes the legal act from the legal act, the latter being committed without the intention to produce legal effects);
- the legal effects pursued may consist in the birth, modification or extinction of a concrete civil legal relationship.

b) *In another point of view*, the will is qualified as a "legal form" (pattern, support, carrier, etc.). We present some supports.

A will is "only a legal form", a form in which certain "deeds of last will, such as legacy or execution of a will," or which may bear other such acts, such as the revocation of a testamentary disposition or even acts that are not of the last will "(for example, the recognition of a child out of wedlock).

A will is a complex legal act, but at the same time it is a "carrier vehicle" of other legal acts that are strictly related to this "vehicle" or have a relative autonomy in relation to it (for example, the recognition of a person's parentage).

A will is not a simple legal act, it is *an exceptional legal act*, it is a legal pattern, comprising a multitude of independent legal acts with separate legal regimes..

Thus, the will is more than a simple legal act, namely *a legal form* that may include *various legal acts* with special legal status..

The above statement is important, because it admits that the nullity *of a legal act* contained in the will *does not implicitly entail the nullity of the other manifestations of testamentary wills*.

The will is the "formal support" for all these "provisions with the value of legal acts and must meet the *substantial conditions* provided for the act in question (related to ascendant division, revocation of a previous will, etc.) and the *formal conditions* of the will" (our emphasis).

Section III. The Historical Evolution of the Testament

The institution of the will dates back more than two thousand years. During this period, the evolution of the will has seen increases and decreases, generally due to changes in the companies that adopted it..

a). *In the Roman period*, the right of inheritance knew its first consecration and evolved directly under the influence of the family and the right of property.

The first non-legal rules attributed the inheritance to *members of the gens*.

At this stage, the goods were inherited, according to the maternal kinship, and later, to the paternal one.

After the emergence of the state, customs become legal rules underlying legal inheritance (*ab intestat*).

With the evolution of Roman society, the will appeared.

At first, the will appeared in the form of *inter vivos* deeds. Thus, the testator had his patrimony during his lifetime, and those established as successors became owners from that very moment.

The appearance of the will was therefore the consequence of the consolidation of private property, for which the owner could dispose of his property, both during life and after death.

At that time, legal succession already existed, but did not coexist with testamentary succession (with the particularities of the times).

Old Roman law knew three forms of will: *calatis comitiis, in procinctu and per aes et libram*.

- The will *calatis comitiis*, took the form of a law voted by the *comitia curiata* by which the legal succession could be modified.

The *calatis comitiis* form represented the period in which the will was viewed with reluctance and constituted a compromise between the legal provision and the will of the testator.

- The *in procinctu* will was made in front of the army before the battle, and was also accessible to the common people.

The will *in procinctu* had to be made as simple as possible. Thus, a simple statement made in front of the soldiers was sufficient (and took the place of the formalities previously completed, through the *calatis comtiis*).

The *in procinctu* will had the disadvantage that it was accessible only to soldiers and thus, it could be used only by citizens aged between 17 and 46 years.

- The *per aes et libram* testament was the one through which the *mortis causa* disposer, transmitted by *mancipatio* the patrimony of a person called *emptor familiae*.

The *per aes et libram* testament is an application of fiduciary mancipation.

Thus, the testator concluded with *emptor familiae* various fiduciary pacts in which the name of the heir was shown, as well as the way in which the assets of the succession will be distributed.

Roman classical law knew three other forms of will: the nuncupative will, the praetorian will and the military will. These forms were used in classical law, along with the *per ales et libram* testament (taken from the previous period).

- The *nuncupative* will was a manifestation of will made in the form of a declaration called *nuncupatio*, expressed aloud by the testator, in the presence of seven witnesses, by which he made known the name of his *heir* (as well as other provisions of last will).

- The *Praetorian* will was written and bore the seals of seven witnesses.

By the presence of the seven witnesses (composed of: five witnesses from the *mancipation*, *libripens* and *emptor familiae*), at the conclusion of the document, the praetorian will approached the *per aes et libram* will.

- The *military* will did not presuppose the fulfillment of a formal condition.

The military will could therefore be made anyway, but provided that the testator's last will and testament was clearly expressed.

b). *The old Romanian law* had two important testamentary forms: the dying declaration and the testament.

"The dying declaration" was the first testamentary manifestation of the custom of the earth (with which, in time, it came to be confused with, our emphasis).

The dying declaration consists of a verbal statement of the author, regarding the destination of his property after death.

According to art. 745 of the Calimach Code, "Not wanting or not being able to make a will in writing, stopped by an illness or other volitional cause, is to make an unwritten will".

The dying declaration (as a solemn act) had to be expressed in front of a person belonging to the clergy (a "church face") - who had to remember the things instituted by the testator and communicate them to the heirs; as well as to the witnesses.

The dying declaration was used as a testamentary form for a long time (even after the appearance of the diata testament which had a smaller area of applicability and a difficult procedure at that time).

The *diata* testament (zapis or izvod) was an *official document* regarding the provisions of the testator, who had to meet three conditions of validity: to be signed or bear the imprint of the author; to be dated and assisted by several witnesses.

The diata testament was also known as: „scisoare", „zapis", „isvod", „carte" etc.

For its validity, the diata testament had to meet the following conditions: to be written and signed by the testator with his finger or seal; to be dated; to be assisted by witnesses.

Both men and women could be witnesses to the preparation of the testamentary document. Both had to be people of good faith.

Representative for the quality of witness was the requirement that "there must be conscientious and old witnesses".

The heirs could also assist in drawing up the diata testament (but their presence was not a condition of validity).

Among the heirs, the *assistance of relatives removed from the inheritance* was of particular interest (in order to confirm, by their signature, the validity of the document and the elimination of subsequent disputes).

In addition to the above conditions, the diata testament also knew of *a superior validation procedure*, called "Reinforcement", which consisted in confirming the validity of the *mortis causa* disposition by the counsel of the *boyars*, *ruler* or *metropolitan*.

Within the diary, after specifying the heirs, the testator could distribute a quantity of his patrimony (called the "part of the soul") to a relative or even the priest, to fulfill the religious customs specific to the Orthodox Christian faith (alms, memorials, sanctification for his soul).

The "part of the soul" is the legal institution of the old Romanian law that determined the appearance of the "succession reserve" (of later).

c). According to the *Civil Code* of 1864: No one will be able to dispose of his property or, free of charge, except with the forms prescribed by law for donations among the living or by will (art. 800).

The donation is an act of liberality by which the donors irrevocably give something to the donee who receives it (art. 801).

The will is a revocable act by which the testator disposes, for the time of his cessation of life, of all or part of his property (art. 802).

Substitutions or trusts are prohibited; any provisions by which the donee, the established heir or the legatee will be in charge of preserving and handing over to a third person, will be null and void, even in respect of the donee, the appointed heir or the legatee (art. 803).

As an exception (to the above rule) is *allowed* the provision by which a third person would be called to take the gift, inheritance or bequest, if the donee, the named heirs, or the legatee would not receive or would not be able to receive (art. 804).

It is also allowed the disposition between living or testamentary, by which the usufruct is given to one person and the naked property to another (art. 805).

In principle, “A minor under the age of 16 may not dispose of in any way” (art. 806).

The minor of 16 years can dispose by will and only for half of the goods that the full-aged can dispose of according to the law (art. 807).

Anyone who is conceived at the era of the testator's death is able to receive by will (art. 808).

The minor of sixteen years of age cannot, by will, dispose in favor of his guardian. The minor, who has reached full-age, cannot dispose either by donation among the living or by will, in favor of his former guardian, if the final accounts of the guardianship have not been previously given and received. In both cases, the ascendants of minors who are or have been their guardians are excluded in both of the above cases (art. 809).

General rules. Any person is able to make a will, unless it is seized by law (art. 856).

Two or more persons may not test by the same act, one in favor of the other, or in favor of a third person (art. 857).

A will can be either handwritten, or made through an authentic document, or in mystical form (art. 858).

The handwritten will is valid only when it is written in its entirety, dated and signed by the testator's hand (art. 859).

The authentic will is the one that has been confirmed by the court of competence (art. 860).

When the testator wants to make a *mystic* or secret will, he must necessarily scale it, or as he wrote it himself, or as he had another write it.

Privileged wills are also allowed.

The wills of soldiers and individuals from the army are valid in any country made in the presence of a battalion or squadron leader, or in the presence of any other senior officer, assisted by two

witnesses, or in the presence of two war commissioners, or in the presence of one of the commissioners assisted by two witnesses (art. 868).

The will made in a place that is taken out of communication due to the plague or other contagious disease, can be made before a member of the municipal council, assisted by two witnesses (art. 872).

Wills made at sea during travel are valid:

In all cases, the officials in whose presence these wills are made will be assisted by two witnesses (art. 874).

Section IV. The Conditions of Validity of the Will. Particularities

A will is not an ordinary legal act.

A will is a special, complex legal act, a legal form that may include several manifestations of last will (each having the legal nature of a separate legal act).

In the above context, the analysis of the conditions of validity must distinguish between: the conditions of substance (which each provision must meet, as a separate legal act), and the condition of form (which the will must meet, as a support for the manifestations of will).

a). *The capacity of the testator.* As a general rule, any person can make and receive liberalities, respecting the rules on capacity (art. 987 para. 1 Civil Code).

Thus, the rule is the ability to dispose and receive through liberalities, and the exception, the incapacity.

The incapacity is of strict interpretation and therefore must be expressly regulated by law. It concerns both the person of the testator and the person of the legatee.

According to art. 988 para. 1 of the Civil Code, the person without capacity or with limited capacity may not dispose of his property by liberalities, except in cases provided by law.

From the text of the law, it results that they do not have the capacity to dispose by will, two categories of persons.

Persons who have not reached the age of 18 may not dispose by will or personal representative.

Persons placed under judicial interdiction may not dispose by will neither personally nor through a legal representative.

According to the law, the persons mentioned above may not dispose by liberalities, even after acquiring the full capacity to exercise, *for the benefit of the legal representative or legal guardian* (before receiving discharge for his management).

The liberality granted to a person designated by the disposer shall be *valid*, with a charge in favor of a person chosen either by the gratuity or by a third party designated, in turn, also by the disposer.

Instead, it is considered *unwritten*, "the clause by which, under the sanction of abolition of liberality or restitution of its object, the beneficiary is obliged not to contest the validity of an inalienability clause or not to request the revision of conditions or tasks" (art. 1009 para. 1 Civ. Code).

b). *The consent of the testator.* According to art. 1038 para. 1 of the Civil Code, the will is valid only if the testator had discernment and his consent was not vitiated at the time of making the will.

In matters of wills, it is not sufficient for the testator to have full legal capacity recognized by law, but he must also have "discernment" (at the time of drawing up the will).

Thus, persons who do not have conscious volition at the date of concluding the will cannot dispose by will, even if they are not placed under judicial interdiction.

In testamentary matters, the will of the testator may be altered by error, malice, and sometimes violence.

Often, in testamentary matters, malice is manifested in the form of suggestion and capture.

The capture consists in the use of malicious maneuvers, in order to deceive the good faith of the testator and to determine him to make a liberality (which in other conditions he would not have done).

The suggestion is to use illegal means in order to instill in the testator's mind the idea of making a liberality (which he would not have done on his own initiative).

c). The object of the will. According to art. 1229 of the Civil Code (on the subject of contracts), *but with application present in the will also*, "Only the goods that are in the civil circuit can be the object of a contractual service".

Three "types" of objects have been identified in the doctrine:

- the object of the will (as equivalent to the contract) which consists in the legal operation, respectively the liberality mortis causa performed by the author of the inheritance;
- the object of the obligation (specific to the legatee) consists in the benefit of the legatee in favor of the deceased, in favor of a third party or of himself;
- the derived object (also found in the case of the bequest) which consists in the assets of the inheritance.

Unopened successions cannot be the object of the legacy (art. 956 Civil Code).

d). *The cause of the will* is the impulsive and personal reason that determines the testator to make the will.

The doctrine has argued that the validity of the will (based on the legality and morality of its cause) will be assessed in relation to the *concrete and determining cause* of the act of last will (and not in relation to the liberal intention of the testator common to all liberalities).

In a recent and in-depth study on testamentary formalism, *the theory of the expiration of the will* by the disappearance of the cause was discussed.

According to the author, "a legacy can be considered obsolete when the reasons that determined it have ceased".

e). The form is a special condition, because for validity, it must be respected by the will - support of all the manifestations of *mortis causa* will.

The will is a solemn legal act.

Failure to comply with the *ad validitatem* requirement, in form, entails the absolute nullity of the will.

The new Civil Code (in accordance with the Civil Code of 1864) establishes two formal conditions, common to all wills: the written form and the prohibition of mutual will.

According to, art. 1034 of the Civil Code, the will is the act by which a person, called testator, disposes “in one of the forms required by law”.

It follows that the will must be made *ad validitatem* only in written form.

According to art. 1036 of the Civil Code, “two or more persons may not dispose, by the same will, one in favor of the other or in favor of a third party”.

The above provision regulates the *reciprocal* or *conjunctive* will.

"Legal restraint is usually justified by the damage that the conjunctive will would bring about the essentially revocable nature of the legacies".

It should be noted that the prohibition operates only when two or more persons testify in favor of each other by the same will within the meaning of a legal act (not *de instrumentum*).

Obviously, the prohibition does not apply to the situation in which two wills are drawn up on different papers (or even on the same paper), but which *do not merge intellectually*.

Section V. Testamentary Types in the New Civil Code

The new Civil Code gives the *causa mortis* disposer the possibility to choose between eight types of will: a) ordinary wills b) privileged wills and special wills.

a). *Ordinary wills.* According to art. 1040 of the Civil Code, the ordinary will can be handwritten or authentic.

The handwritten will is the act of last will written in its entirety, dated and signed by the testator's hand (art. 1041 Civil Code).

The handwritten will is the exclusive and personal creation of its author and as an *instrumentum*, it is a document under private signature.

In accordance with the legal provision, we note that the handwritten will has three essential elements regarding its writing, dating and signing.

The three requirements of solemnity (formal requirements, our emphasis), respectively writing, dating and signing, must be met *cumulatively*.

The requirement of writing the will by the author derives from the conception that the act written entirely by the testator is *the free and conscious expression of his will*.

The will must be dated by the testator *proprio manu*.

Consequently, if the date of the will was written by a third party, the will is void.

As a rule, the date must include the day, month and year of the will.

The testator's signature is *essential* for the validity of the will.

Through the signature placed on the handwritten will, the testator shows that he has mastered its contents.

The testator's signature must be executed *proprio manu.*

According to art. 1042 para. 1 of the Civil Code, "Before being executed, the holographic will will be presented to a notary public to be signed to be left unchanged".

The handwritten will has the legal nature of a document under *private signature* (and implicitly, the probative force of such a document).

The will is authentic if it was authenticated by a notary public or by another person invested with public authority by the state, according to the law (art. 1043 par. 1 Civil Code).

It follows from the text of the law that on the territory of the country, the instrumental agent, the only one invested with public authority by the state, is the *notary public*.

Outside the country, the procedure for authenticating wills is performed by the *diplomatic missions* and *consular offices* of Romania (with relatively equal competence as that of the notary public).

The will authenticated by the diplomatic missions of Romania is "totally assimilated to the will authenticated by a notary public from Romania" (art. 18 of Law no. 36/1995).

The Civil Code contains distinct provisions regarding the authentication of the will of a person who knows to read and write and the authentication of the will "in particular situations" (art. 1045 Civil Code).

In order to inform the persons who justify the existence of a legitimate interest, the notary who authenticates the will has the obligation to register it, immediately, in the National Notary Register kept in electronic format, according to the law (art. 1046 Civil Code).

The security of testamentary dispositions is also ensured by the disposition according to which, information regarding the *existence of a will* can be given *only after the testator's death* (art. 1046 Civil Code).

An authentic will is an *authentic document*.

b). *Privileged wills.* According to art. 1047 alin. 1 of the Civil Code, are privileged wills: the will in case of epidemics, catastrophes, wars or other such exceptional circumstances; maritime, fluvial wills or wills made on aircraft; the will of the military and the will of persons interned in a health institution.

According to art. 1047 alin. 1 lit. of the Civil Code, "a will can be validly drawn up", in case of epidemics, catastrophes, wars or other such exceptional circumstances.

According to art. 1047 alin. 1 lit. b C. civ., "a will can be validly drawn up", when the testator is on the board of a vessel under the Romanian flag, during a sea or river voyage.

According to art. 1047 alin. 1 lit. c of the Civil Code, "a will can be validly drawn up", when "the testator is in the military or, without having this quality, is an employee or provides services within the Romanian armed forces".

According to art. 1047 alin. 1 lit. d C. civ., a will can be validly drawn up, when the testator who is hospitalized in a health institution, "in which the notary public does not have access".

Three common rules that characterize privileged wills in general.

- Privileged wills must be *signed* by the testator, the investigating agent and the two witnesses.

- Privileged wills *produce legal effects* only if the testator died in *exceptional circumstances*.

- When the testator died in the special situations provided by art. 1047 of the Civil Code, the privileged will must be presented to the notary public to be *sealed for remaining unchanged.*

The privileged will has the legal nature of an authentic document in a simplified form.

c). The special wills are: the will of the amounts and values deposited, as well as the international will (treated in a separate section).

In the contract concluded by a natural person with a banking institution may be inserted a *mortis causa* clause, by which the holder of deposits of money or other values, designates a legatee for them.

The depositor of sums of money, values or securities in a credit institution may dispose of them, due to death, by a "testamentary disposition" contained in the agreement concluded with the credit institution (art. 1 paragraph 1 of the Order Minister of Justice No. 1903/2011).

The testamentary disposition drawn up in the above conditions, may have as object only the *sums of money, values or securities* deposited by the testator at that credit institution (art. 1 of the Order of the Minister of Justice no. 1903/2011).

Under the sanction of absolute nullity, the testator will complete *in handwriting* the clause containing the testamentary disposition, provided in the annex which is an integral part of this Order (art. 2 paragraph 1 of the Order of the Minister of Justice no. 1903/2011).

Section VI. The Revocation of the Will

According to art. 1034 of the Civil Code, "The will is the unilateral, personal and *revocable* act by which a person, called testator, disposes, in one of the forms required by law, for the time when he will no longer be alive" (s.n.).

The civil code in force regulates the express voluntary revocation, the tacit voluntary revocation and the withdrawal of the revocation of the will (art. 1051 1053 Civil Code).

a). *Express voluntary revocation.* According to art. 1051 alin. 1 of the Civil Code, "A will can be revoked expressly, in whole or in part, only by an authentic notarial document or by a subsequent will".

Express voluntary revocation results from a *direct statement* by the testator.

From the text of the law it results that the will of revocation of the testator can be manifested: either by a *later will*, or by a declaration manifested in an *authentic notarial document* (art. 1051 par. 1 Civil Code).

The revocating authentic notarial document may be a specially drafted document, but may also be included in the content of another authentic document.

Failure to comply with the forms provided by law (above) entails the *absolute nullity* of the act of revocation.

The will that revokes a previous will can be drawn up in a different form from that of the revoked will (art. 1051 para. 2 Civil Code).

Thus, based on the principle of *conversion of testamentary forms*, for example, an authentic will can be revoked by a handwritten will.

b). The revocation of the will is tacit when it results unequivocally from certain acts or deeds committed after the conclusion of the testator's act.

According to art. 1052 alin. 1 of the Civil Code, the testator may revoke the handwritten will and by destroying, breaking or deleting it.

The tacit (indirect) revocation of the will refers exclusively to the handwritten will, not to the authentic will.

Based on the law, the doctrine has identified several situations that determine the tacit voluntary revocation of a previously concluded will. The doctrinally identified situations *are not limiting.*

- According to art. 1052 alin. 2 of the Civil Code, "The destruction, breaking or erasure of the handwritten will known to the testator, also entails the revocation, provided that he was able to restore it".

- According to art. 1052 alin. 3 of the Civil Code, "The subsequent will revokes the previous one only insofar as it contains provisions contrary or incompatible with it".

It follows from the text of the law that the revocation of the will, in the above situation, operates only in case of incompatibility or contrariety.

- According to art. 1068 alin. 4 of the Civil Code, "Voluntary destruction by the testator of the property that is the object of the legacy in private title implicitly revokes the legacy".

- According to art. 1068 alin. 2 of the Civil Code, "Any alienation of the property that is the object of a bequest in a private capacity, consented by the testator, even if it is affected by the manner, implicitly revokes the legacy for everything that has been alienated".

According to art. 1053 alin. 1 of the Civil Code, "The revocatory provision may be expressly retracted by an authentic notarial document or by testament".

The withdrawal of the revocation is done under the same conditions as the revocation, respectively by authentic notarial document or by a subsequent testament.

The practical utility of withdrawing the revocation consists in avoiding the elaboration of a new will, "legally denying only the previous revocation of the old will, which is now restored in rights".

Withdrawal removes the effects of revocation, unless the testator has expressed his will to the contrary or if this intention results from concrete circumstances (art. 1053 para. 2 of the Civil Code).

The withdrawal of the revocation therefore has the effect of *reviving the revoked testamentary dispositions*.

Section VII. The Testament with Foreign Elements

According to the law, "A person may choose, as the law applicable to the inheritance as a whole, the law of the country of which he is a citizen" (art. 2634 Civil Code).

Under the law, a person may choose the applicable law, including his or her legal inheritance, but his or her option is limited to the *law of the country of which he or she is a national*.

The authentic notarial document of choice of the law applicable to the succession is registered in the National Register of evidence of authentic wills.

In the absence of the author's option, as a rule, the inheritance is subject to the law of the country on whose territory the deceased had, at the date of death, his habitual residence (art. 2633 Civil Code).

In the following, we will make brief references to the law applicable to the form of the will with foreign element and the international will.

a). According to art. 2635 of the Civil Code, in the relations of international law, the elaboration, modification or revocation of the will are considered valid if the deed complies with the applicable *formal conditions*, either on the date when it was drawn up, modified or revoked, or on the date of death of the testator, according to the following laws: a) national law of the testator (*lex patriae*);b) law of habitual residence (*lex domicilii*);c) the law of the place where it was drawn up, amended or revoked (*lex loci testamenti*);d) the law of the situation of the real estate that forms the object of the will (*lex rei sitae*); e) the law of the court or body which carries out the procedure for the transfer of the inherited property (*lex fori* or *auctor regit actum*).

For example, a Romanian citizen residing in France draws up and signs a will in the presence of a notary public and two witnesses. After drawing up the will, the testator changes his residence in Romania where he resides for more than 5 years, after which he dies in 2012.

Under the given conditions, France applies the Convention on the Uniform Law Concerning the Form of an International Will, signed in Washington in 1973, and the will will be formally recognized in Romania as well.

Consequently, the will concluded in France will be accepted, although it was not drawn up in one of the forms provided by Romanian law, because "only the substantial validity of the will is

subject to the law applicable to the succession" (while the validity of the form is more widely analyzed, according to article 2635 of the Civil Code).

b). According to the Washington Convention of 26 October 1973 on the Uniform Law on the *Form of the International Will*, a new simplified form of will was regulated.

Pursuant to art. 1 of the Convention, "a will is valid in respect of the form, place of conclusion, situation of property, nationality, domicile or place of residence of the testator, if it was drawn up in accordance with the international will, in accordance with the provisions of uniform law".

The international will has no national legislative support, because the Washington Convention of October 26, 1973 on the uniform law, was not ratified by Romania.

The international will is of special interest to the illiterate, the blind or those who do not know how to write in the language of the country of residence.

Thus, the international will is also addressed to those who cannot test in handwritten form.

Chapter III. The Limits of the Testator's Right to Access their Patrimony

During life (*inter vivos*) any person can dispose of his goods, without restrictions, at his will.

However, the right of the author of the inheritance to dispose of his property by will is not total, but can be exercised restrictively, according to the law.

In the law of succession, the legal diminution of the *mortis causa* will of the testator was established by the "Limits of the right to dispose of the cause of death, by legal act".

Section I. Stopping Documents over an Unopened Inheritance

According to art. 956 of the Civil Code, "Unless otherwise provided by law, legal acts having as object possible rights over an as yet unopened inheritance are struck by absolute nullity, such as the acts by which the inheritance is accepted or renounced before its opening, or the documents by which the alienation or promise of the alienation of certain rights that could be acquired at the opening of the inheritance".

In order to qualify as documents on an unopened inheritance, the manifestation of legal will must cumulatively meet the following conditions:

a). There must be a *unilateral* or *bilateral* legal document (a contract, pact, our emphasis) *irrevocably*, by which a successful party renounces or accepts an unopened succession, or by which the alienation of an asset from an unopened succession is alienated or promised.

b). The inheritance *should not be opene*d on the date of conclusion of the respective legal act.

c). The convention (the pact) must have as its object an inheritance, a fraction of an inheritance or even a property or certain singular goods thereof.

The legal provision, however, allows a document on a future inheritance to be valid, in some cases, expressly regulated by law.

In the above context, the following documents on unopened inheritances are validly concluded:

– the division (settlement) of ascendant carried out through the donation contract, if the substantive and formal conditions provided by art. 1160 1163 Civ. code;

– early waiver of the action for reduction or the request for a report (art. 1091 paragraph 4 of the Civil Code);

– the first degree trustee substitution, by which a liberality may be encumbered by a task consisting in the obligation of the institution, donee or legatee, to administer the goods which are the object of the liberality and to transmit them, at his death, to the substitute appointed by the disposer 994 para. 1 Civil code);

– the clause included in the company contract stipulating that, at the death of an associate, the company may continue by right, with its heirs (art. 1939 Civil Code).

According to art. 956 of the Civil Code, "legal documents having as object possible rights over an inheritance not yet opened (...) are *struck by absolute nu*llity." (our emphasis).

The absolute nullity of the documents regarding an unopened inheritance is justified by infringing the right of the one who leaves the inheritance to dispose freely of his goods, until the last moment of his life.

The absolute nullity of the legal document can be invoked at any time by *any interested person.*

We specify that, in the doctrine, *de lege ferenda*, it was opined that the matter of the pacts on the future successions could be "liberalized", allowing their conclusion, "under certain conditions". For example, "with the participation of the person whose inheritance is in question or the so-called family pacts".

We agree with the above, adding an argument of legislative technique. *De lege lata*, prohibition is the rule, and permission is the exception (quite a few cases provided by law).

In the above context, we ask ourselves: it would not be more natural for the relevant rule to be the *permission* (respectively, the validity of the legal act) and the *prohibition* (in cases expressly provided by law) only the *exception*?

Section II. Stopping Trust Substitutions

According to art. 993 of the Civil Code (marginally called "Notion"), "The provision by which a person, named *instituted*, is instructed to administer the good or goods that are the object of liberality and to transmit them to a third party, named *substituted*, designated by the *disposer*, produces effects only if permitted by law ".

The trust substitution is "permitted by law" only when the transfer of the succession assets to the substitute is made at the *death of the instituted* (art. 994 paragraph 1 of the Civil Code). For example, the testator established his friend A as universal legatee, with the obligation for him to administer the property, and at his death to transmit it to hospital B.

The trust substitution consists of a *double liberality*:

– a liberality is made for the benefit of the first gratified (the instituted) and

– another liberality in favor of the second gratified (substituted).

From the legal point of view, the substitution of the trustee is a task imposed by the disposer to the gratified.

For the existence of the trust substitution (permitted by law), the following *constituent elements* must be met cumulatively.

a). The disposer has made, to different persons, two or more liberalities, which have the same object and which are executed successively.

The first liberality is executed at the death of the testator, and the second at the death of the instituted (when the substitution was of the first degree).

b). The testator must oblige the instituted to administer the good, and at his death to transmit it to the substituted.

According to the testamentary disposition, the assets of the inheritance are made unavailable (until their acquisition by the substituted).

c). The right of the substitute must be born at the death of the instituted.

It follows that, until this moment, the substitute does not have a birth- and current right.

According to art. 995 para. 1 of the Civil Code, *the valid task instituted* by the disposer "produces effects only with respect to the goods that constituted the object of liberality and which at the date of death of the instituted can be identified and are in its patrimony".

The rights of the substituted are born at the death of the instituted (art. 996 para. 1 Civil Code).

When the instituted is the reserve heir of the disposer, the charge cannot violate his succession reserve (art. 998 Civil Code).

So-called legal proceedings are known in judicial doctrine and practice, which cannot be qualified as trust substitutions, but which pursue the same purpose.

These are the remnant legacy, the no-obligation trust and the double conditional bond.

Residual liberality is a provision contained, either in a donation contract or in a will, by which the disposer stipulates that the substituted be gratified with what remains (also called "residue", our emphasis) on the date of the institution's death from donations or bequests made. in favor of the latter (art. 1001 Civil Code).

The trust without obligation is a liberality made to the instituted but without its obligation to preserve the goods and pass them on at the death of its substituted.

Through the no-obligation trust, the testator addresses to the instituted only the *request* to gratify the substituted with the goods that will still exist in his patrimony and that came from the legatee.

The conditional double bond, also known as the "alternative bond", is the provision by which the testator makes two liberalities with the same object, for two instituted, in order.

The two tasks are not to be confused. They differ because the one imposed on the first instituted is resolutive, and the one imposed on the second instituted is suspensive.

Section III. Succession Reserve: The Main Limitation of the Deceased's Will

The succession reserve is the part of the assets of the inheritance to which the reserved heirs have the right, by virtue of the law, even against the will of the deceased manifested by liberalities or disinheritances (art. 1086 Civil Code).

Reserved heirs are the legal heirs, relatives of the deceased, privileged descendants and ascendants, as well as the surviving spouse of the deceased. These are the closest legal heirs of the deceased (it is known that the legal inheritance is built as a "family inheritance").

The succession reserve is separated from other institutions of inheritance law by its two legal characteristics.

a). The estate reserve is *part of the inheritance.*

The calculation of the succession reserve takes into account the fraction of the inheritance that he *would have left if he had not made liberalities* (and not the part of the inheritance that the testator actually leaves when opening the inheritance).

b). The succession reserve is unavailable in the sense that the part of the inheritance that constitutes the succession reserve cannot be diminished by other liberalities (donations or testamentary legacies).

The unavailability of the succession reserve is relative and partial.

The unavailability of the succession reserve is *relative*, as there will always be an available quota (available to the testator).

The unavailability of the succession reserve is *partial*, as it concerns only a fraction of the inheritance (ie the assets that make up the reserve, not those belonging to the available quota).

According to art. 1087 of the Civil Code in force, "The surviving spouse, the descendants and the privileged ascendants of the deceased are reserved heirs".

In order to collect the succession reserve, the legal heirs must meet the general conditions, respectively succession capacity, succession vocation and not be unworthy.

Like any heir, heirs reserve a right of succession. Thus, they can accept the inheritance (reserve) or they can give it up.

a). In order to be a reservist, the surviving spouse must meet a special condition: to have the status of spouse at the date of the opening of the succession.

It follows that the surviving spouse's reserve varies, as he competes with other reservists, so:

- the reserve of the surviving spouse is 1/8 of the inheritance in competition with the descendants;

- the reserve of the surviving spouse is 1/6 of the inheritance in competition with both the privileged ascendants and the privileged collaterals;

- the reserve of the surviving spouse is 1/4 of the inheritance in the contest either only with privileged ascendants or only with privileged collaterals;

- the reserve of the surviving spouse is 3/8 of the inheritance in competition with the ordinary ascendants or with the ordinary collaterals;

- the reserve of the surviving spouse is 1/2 of the inheritance, in the absence of relatives from the four classes of legal heirs.

It should be noted that the surviving spouse is reserved only *in respect of the share of legal inheritance*, but not in respect of the special right over furniture and household objects.

According to art. 1090 alin. 1 of the Civil Code, "Unreportable liberalities made to the surviving spouse, who inherits in competition with descendants other than their common ones, may not exceed a quarter of the inheritance or the part of the descendant who received the least".

The special available quota is justified by the *protection of the descendants* of the deceased, born from other relations, prior to the marriage with the surviving spouse.

The descendants of the deceased may come from a previous marriage, out of wedlock or from the adoption consented only by the author.

b). According to art. 1087 of the Civil Code, the *descendants of the deceased* are legal heirs.

The descendants are "children of the deceased and their descendants in a straight line indefinitely", regardless of sex, regardless of whether they are from the same marriage or from different marriages, and regardless of whether they are the result of natural kinship or adoption (art. 975 para. 1 C civ.).

According to the text of the law, the *child out of wedlock* whose filiation has been established according to the law has the same situation towards each parent and his relatives, as that of a child out of wedlock (art. 448 Civil Code).

And in the case of full adoption, the adopted child becomes a relative of the adopter (and has the same legal status as the above descendants).

c). According to art. 1087 of the Civil Code, the *privileged ascendants of the deceased* are reserved legal heirs.

The privileged ascendants are: the father and mother of the deceased from the marriage, out of wedlock with the established parentage or from adoption.

The calculation of the reserve of privileged ascendants differs in relation to their *number* (one or two parents, usually, but there can be four), but also if they inherit without other relatives of the deceased or if they compete with privileged collaterals or the surviving spouse.

Section IV. The Reduction of Excessive Liberalities

The reduction is the sanction that lacks the liberalities made by the deceased, which affect the succession reserve conferred by law.

The reduction of excessive liberalities determines only their *ineffectiveness* (leaving them without effect), not their nullity.

The Civil Code, in the provisions of art. 1090 alin. 1, imposes the order of reduction of excessive liberalities.

a). Legacies are reduced before donations.

The rule that legacies are reduced before donations is explained by the fact that legacies (although made during the testator's lifetime) take effect *only after the date of opening the inheritance*, while donations, as *inter vivos* liberalities, are concluded and take effect during the disposer’s lifetime.

b). The bonds are reduced all at once and proportionally.

This rule is justified in the fact that all legacies produce legal effects *from the same date*, respectively from the date of opening the inheritance (even if they were made previously, on different dates).

The rule has a *dispositive character* and, consequently, the testator can establish *another order* to the legatees (than the one given by law), according to his preferences, but only until the completion of the reservation (art. 1096 para. 2 Civil Code).

c). Donations are reduced successively, in the reverse order of their date, starting with the newest.

The above rule is based on the principle of irrevocability of donations, but also the presumption that the first donation represents the real will of the donor.

Per a contrario, if donations were reduced in the order in which they were made, this principle would be violated voluntarily by the donor by making a subsequent donation.

According to art. 1092 of the Civil Code, the reduction of excessive liberalities does not operate by law, but *must be demanded*.

The reduction of excessive liberalities can be achieved by good will or in court (by way of exception or by way of action).

a). *The reduction by good will* presupposes that the reserve heirs and legatees agree on the reduction of the excessive liberalities which affect the succession reserve.

b). *Judicial reduction. Where the reduction by agreement cannot be made, the persons concerned may apply to the court*.

The reduction of excessive liberalities can be invoked before the court, by the action in reduction.

The reduction has as effect the *ineffectiveness of the legacies* or, as the case may be, the *abolition of the donations* to the extent necessary to complete the succession reserve (art. 1097 par. 1 Civil Code).

As a result of the reduction, the completion of the succession reserve is made in kind.

As an exception, the reduction is made by equivalent when, before the opening of the inheritance, the donee alienated the good or constituted real rights over it, as well as when the good perished due to a cause attributable to the donee.

PART III

LEGACY AND OTHER MAIN PROVISIONS CONTAINED IN THE WILL

Chapter I. The Legacy. Creation, Types and Delivery

Section I. The Legacy– The Mortis Causa Liberality

The legacy is the testamentary disposition by which the testator stipulates that, at his death, one or more legatees to acquire his entire patrimony, a fraction of it or certain determined goods (art. 986 Civil Code).

The legacy has the following legal characteristics: the legacy is a *unilateral* legal act that expresses the will of a single person, respectively of the testator; the legacy is a *free document*, namely, a liberality; the legacy is a *mortis causa* document which produces effects only after the death of the testator; the legacy is a *personal* act which therefore cannot be concluded by representation.

From the above, it results that the legatee produces effects after the death of the testator, and the good or goods that are his object, is transferred from his patrimony *de cuius* to the patrimony of the legatee, free of charge.

After the opening of the succession, the effects of the legacy occur in favor of the legatee (and to the detriment of his legal heirs).

The legacy must meet the general conditions required by art. 1179 of the Civil Code In addition, due to its *mortis causa* nature, the legacy must also meet a specific condition (regarding the designation of the legatee).

The appointment of the legatee is analyzed on three requirements:

a). The appointment of the legatee must be made *exclusively by the testator*.

b). The appointment of the legatee must be made *by will.*

c). The determination of the legatee *must be possible* at the date when the legacy takes effect.

Failure to meet the above conditions will result in the sanction of *nullity of the legacy*.

The Capacity of the Legatee.

Any person can make and receive liberalities, in compliance with the rules on capacity (art. 987 paragraph 1 of the Civil Code).

The condition of the capacity to receive a legacy must be fulfilled at the *date of opening* the testator's inheritance.

According to art. 989 991 of the Civil Code, *may not receive by will*, as legatees, the following categories of persons.

a). Persons who do not exist at the date of conclusion of the will.

b). The legal representative or protector.

c). Physicians, pharmacists or other similar persons (who, directly or indirectly, provide specialist care to the disposer).

In the field of liberalities, the New Civil Code has brought a number of innovations in the field of their execution and restriction.

a). Thus, when, due to unpredictable and unaccountable situations to the beneficiary, the acceptance of liberality, the fulfillment of conditions or the execution of tasks affecting liberality has become extremely difficult or excessively onerous for the beneficiary, he may request the revision of tasks or conditions (art. 1006 C. civ.).

Based on the above provisions, the beneficiary of the liberality may request the court to review the condition and the burden that affected the liberal act, in terms of quantity or quality.

In order to determine the intervention of the court, three conditions must be met:

– fulfillment of the conditions or the execution of the tasks have "become extremely difficult or excessively onerous for the beneficiary";

– the exceptional situation is due to causes "unpredictable and not imputable to the beneficiary";

– the situations invoked must have appeared after the acceptance of liberality by the beneficiary.

According to art. 1007 alin. 1 of the Civil Code, the court notified with the request for review may order:

– quantitative or qualitative changes in conditions;

– quantitative or qualitative changes in tasks affecting liberality;

– grouping similar conditions and tasks from other liberalities.

The court may authorize the partial or total alienation of the object of liberality, establishing that the price be used for purposes in accordance with the will of the disposer, as well as any other measures that maintain as much as possible the destination pursued by him (art. 1007 para. 2 Civil Code).

b). In the section entitled "Special provisions", the new regulation on liberalities also contains a series of restrictive provisions.

According to art. 1009 para. 1 and 2 of the Civil Code, are "considered unwritten":

– the clause by which, under the sanction of the abolition of the liberality or the restitution of its object, the beneficiary is obliged not to contest the validity of an inalienability clause or not to request the revision of the conditions or tasks;

– testamentary disposition which provides for disinheritance as a sanction for breach of the above obligations or for challenging the provisions of the will which infringe the rights of the reserved heirs or are contrary to public policy or morals.

Section II. The Classification of Legacies

Legacies can be classified according to the ways that affect the will of the testator or according to their object (art. 1054 Civil Code).

From the point of view of the *modality that affects the will of the testator*, we distinguish between pure and simple legacies, term legacies and conditional legacies.

a). The legacy *is simply* not affected in any way.

It takes effect from the date of the opening of the succession.

The right of the legatee over the good of the inheritance is born in his patrimony from the day of the testator's death.

From the moment of opening the inheritance, the legatee also has the right to the fruits produced by the goods that belong to him from the succession patrimony (art. 1058 Civil Code).

When the legatee dies immediately after the opening of the inheritance, the rights acquired by the legatee are retransmitted to their own heirs, even when he died before exercising his right of succession.

b). *The termed legacy* is the one whose execution or extinguishment depends on the fulfillment of a future event and is certain to occur.

The term can be suspensive or extinctive.

The suspensive term postpones the execution of the legacy until the date of its fulfillment.

The term extinctive allows the legatee to take possession of the bequeathed property from the moment of opening the succession.

c). *The conditional legacy* is one whose birth or extinction depends on a future and uncertain event that will occur.

The condition affecting the bequest must be possible and lawful, express or implied.

The condition can be suspensive or resolving.

The suspensive condition suspends, until its realization, the acquisition of the real or receivable right transmitted by the legacy, but, once fulfilled, the legatee's right is born with retroactive effect, from the date of opening the succession.

For example, the legacy made to a certain person provided that the good that forms its object is reconditioned.

The resolutive condition causes the rights (object of the legacy) to be acquired and exercised by the legatee from the date of opening the succession (as if the legacy was simple), but when the *condition is fulfilled*, the legatee's rights are revoked retroactively (from the date of opening the inheritance).

Consequently, the rights of the successors in rights of the legatee (acquirers by deeds between the living or *mortis causa* are also abolished).

Likewise, the rights established in favor of third parties during this period are abolished. For example, the legacy made to the testator's brother provided that he does not give birth to a child until a certain date (after his death).

When the resolving condition *is not fulfilled* (or it is certain that it will not be possible to be fulfilled), the binding is *definitively consolidated*, as if it had been simply bound.

d). *The legacy with charge* is the one by which the testator imposes on the legatees that, in the situation in which he accepts it, to execute an obligation to give, to do or not to do something.

The task may be provided by the testator, both in the case of universal or universal legacies, and in the case of private legacies.

The charge does not affect the acquisition of the right over the legacy from the moment of opening the inheritance (the right is acquired as if the legacy were simple); on the other hand, the non-execution of the task, as well as the non-fulfillment of the condition, produces effects until the moment of opening the inheritance.

Unlike the condition, however, the task - which is not a simple wish (appreciated as such by the court), obliges the accepting legatee of liberality. In case of non-execution, the interested persons (beneficiary of the task, executor, creditors of the beneficiary) may request in court the forced execution, possibly and/or damages.

The task is *specific to the liberalities* and can be provided *in the interest of the testator* (for example, the legatee must pay a debt of the testator, existing at the date of opening the inheritance, to a third party), *in the interest of the legatee* (for example, the testator leaves a sum of money to the legatee, in order to complete his studies) or *in the interest of a third party* (for example, the legatee must ensure the lifelong maintenance of his parents).

From the point of view of *their object*, we distinguish between universal legacies, universal legacies having an universal title and particular legacies.

a). *The universal legacy* is "the testamentary disposition that confers to one or more persons a vocation to the entire inheritance" (art. 1055 Civil Code).

Through the universal legacy, a universal vocation can be created (for the entire inheritance) of several legatees. In this case, the universal legatees who accept the inheritance of its author, will divide among themselves the mass of succession, each collecting an *equal part* of it. Thus, the emolument of the inheritance is reduced for each legatee.

In the case of a plurality of universal legatees, when one or more do not want (or cannot) receive the bequest, the party due to them will benefit the accepting legatee or accepting legatees.

It follows that the absorption power of the universal legacy or universal title consists in the right of accrual (*jus accrescendi*) when another transmission is null, revoked or expired.

For example, if the deceased left a fortune of 300 thousand lei and the universal legatees are his three brothers, the three legatees will actually collect 100 thousand lei each, although they have each universal vocation (at the entire succession table). However, if one of the legatees gives up the inheritance, the other two legatees will each collect 150 thousand lei each.

The legal literature and judicial practice have recognized as universal ties the following provisions: the legacy of all movable and immovable property of the testator; the legacy of the bare property of the whole succession; related to the available quota; the legacy of the remainder or surplus of the estate, by which the testator, after having made one or more legacies in a private capacity, attributes to a universal legatee all that remains of the estate.

The effects of the universal legacy touch open three aspects:

- The universal legatee can take possession of the entire inheritance, if the reserving heirs cannot or do not want to collect the reserve provided by law.

- The fruits of the inherited goods belong to the universal legatee from the day of the opening of the inheritance or from the day when the legatee produces effects on him, unless the one who owned the goods that constitute the object of the legacy is in good faith (art. 1058 Civil Code).

- Universal legatees acquire "legal universality" consisting of assets and liabilities.

Unlike the legatee in a private capacity, they are therefore held liable for *the debts and tasks of the succession* (but only within the limits of what they acquired from the estate, in proportion to the share of each - art. 1114 para. 2 of the Civil Code).

b). *The legacy with universal title (legatum partitionis)* is the testamentary disposition that confers to one or more persons a vocation to a fraction of the inheritance (art. 1056 par. 1 Civil Code).

From the text of the law, it results that the universal bequest is the succession vocation to a part (fraction) of the inheritance, and not to the actual quantity of goods collected by the legatees.

According to art. 1056 alin. 2 of the Civil Code, by "fraction of the inheritance", is understood:

a) or the ownership of a share of it (for example, 1/2, 1/3 etc. of the inheritance);

b) either a dismemberment of the property over all or part of the inheritance;

c) either ownership or a dismemberment of all or part of the universality of goods determined by their nature or provenance.

The difference between the universal legacy and the universal legacy consists in the extent of the succession vocation.

According to art. 1114 alin. 2 of the Civil Code, the legatees with universal title are responsible for the debts and charges of the succession only with the goods from the succession patrimony, proportional to the share due to each one (just like the universal legatees).

When the legatee has as object either all the immovable goods, or all the movable goods, or the usufruct of the succession, the legatee acquires *the exclusive property* over them.

When the legatee with universal title has as object a part of the property of the entire succession patrimony, the legatee acquires a right of individual property.

c). *The bequest with a particular* (singular) title can be "Any bequest that is not universal or with a universal title" (art. 1057 Civil Code).

From the above, it results that the scope of the private legacy is defined in the New Civil Code in a negative way, by exclusion.

Consequently, the scope of private legacies *is not limited to certain goods* (eg a house, a car, a painting, etc.), but may also have another object.

Specifically, private bonds may have as their object: a good (for example, a house); determined goods (for example, a house with all movable property located in it); goods located in a certain place (for example, buildings in Iași); goods determined by their economic nature (for example, all the cars of tester of a certain brand); globally determined goods (for example, an open succession collected by the testator that is not liquidated or a goodwill).

For the validity of the legacy, the object of the legacy in a private capacity must be in the civil circuit, be determined by the testator or at least determinable.

The determination of the object must be made by the testator (and not by another person). Thus, according to art. 989 para. 3 of the Civil Code, under the sanction of *absolute nullity*, the disposer cannot leave to a third party the right to establish its object.

The legatee with particular title of a determined individual good acquires his property from the date of *opening the inheritance* (art. 1059 par. 1 Civil Code).

The private legatee of some kind of property is the holder of a claim on the inheritance. Thus, unless otherwise provided, the person in charge of executing this legacy is "obliged to hand over goods of medium quality" (art. 1059 paragraph 2 of the Civil Code).

Private legacies are manifested in different forms (varieties), such as: usufruct legacy, another's legacy, individual legacy and conjunctive legacy.

a). *The usufruct legacy* is the one by which the testator transmits the bare property to a legatee and the usufruct right over a good or patrimony or fraction of a patrimony, to another legatee.

In practice, the legacy usufruct is established for life, in favor of the testator husband, and the bare property is left to his children.

The legal nature of the usufruct legacy was assessed differently over time (before the adoption of the New Civil Code and after its adoption in 2009).

In short, the legal nature of the usufruct legacy differs from the following two situations:

a) if the usufruct bears on one or more determined goods, then the usufruct will be *particular*;

b) if the usufruct concerns *all* or part of the succession patrimony, the bequest of the usufruct will be *universal* or with *universal title* (art. 1056 paragraph 2 letter b of the Civil Code).

As an effect of the bequest, at the death of the usufructuary, the bare owner will become the full owner of the bequeathed property.

b). *The legacy of another's property* has as object a determined individual good which has been the object of a legacy with a particular title belonging to a person other than the testator and is not included in his patrimony at the date of opening the inheritance (art. 1064 para. 1 Civil Code).

From the definition given to the legacy of another's work, it results that it presupposes the following elements: the object of the legacy to be a determined individual good; the good has become (in turn) the object of a particular bequest; the property belongs to a person other than the testator; the property should not be included in the testator's patrimony at the date of opening the inheritance.

The validity of the legacy of another's property will be assessed as the testator knew when drafting the *mortis causa* document that the property is not his.

When, at the date of drawing up the will, the testator did not know that the property is not his, the bequest is *annulable* (art. 1064 para. 2 Civil Code).

b). When the testator made the legacy knowing that the good is not his, the one in charge of executing the legacy is obliged, at his choice, either to give the good in kind or its value from the date of opening the inheritance (art. 1064 par. 3 C. civ.).

From the above text of the law, it results indirectly that the bequest of another's property *made by the testator knowingly is valid*.

c). *The undivided legacy* is the one whose object is a determined individual good at the date of opening the succession in a state of indivisibility.

The individual legacy is a private legacy.

The legal situation of the undivided legacy is different depending on how he has as object a good or a share part of the indivisibility.

When the bequest has as object an ideal share of the property right over the determined good, the *legacy is valid*.

When the legacy has as his object *a property in indivisibility*, the legal fate of the legacy depends on the legal opinion acquired.

In one opinion it was argued that in this situation *the rules of the legacy of another apply*. Thus, the bequest will be valid or not, according to whether or not the legatee knew the circumstance that the good does not belong exclusively to him.

We support the above proposal, the advantage being that a *unitary legal regime* could be ensured for all dispositions concluded by a single co-owner regarding a good, regardless of whether it is *inter vivos* or *mortis causa* legal operations.

De lege ferenda, we propose the formulation of a provision specific to the undivided legacy in the following formulation: "The legacy which has as its object an indivisible good is unenforceable to the one that has been assigned to it by leaving the indivision".

d). The conjunctive legacy is a legacy with a particular title in which "the testator left, through the same will, an individual or generic determined good to several legacies with a particular title, without specifying the part of each one (art. 1065 para. 1 Civil Code).

It is clear from the text of the law that the testator appointed a *plurality of legatees* with a vocation to all the goods included in the private bequest.

The conjunctive legacy is similar (but not to be confused, our emphasis) with two other institutions of legal succession, respectively with the *trust substitution* and with the *vulgar (ordinary) substitution*.

Chapter II. The Ineffectiveness of Legacies

Like any legal act, validly concluded legacies usually produce legal effects. In this case, the legacies are *effective*.

As an exception, under certain conditions, however, the legacies do not produce the effects expected by their authors. In this case, the legacies are *ineffective.*

The causes of ineffectiveness of the legacies are facts, situations, circumstances and events prior to, concomitant with or subsequent to the drawing up of a legacy, intrinsic or extrinsic to its content, dependent or independent of the will of the testator and the legatee, which make the legacy ineffective.

According to the majority doctrine, the causes of ineffectiveness of the legacies are: nullity, revocation and expiration.

Nullity is a civil sanction that intervenes in case a bequest (or other legal act) is concluded with the non-observance of the essential conditions of validity imposed by law (art. 1179 Civil Code).

The nullity of legacies can be generated, both by general causes (applicable to any legal act) and by specific causes.

The general causes of nullity can be: the incapacity of the testator, his vitiated consent, the illicit object, the illicit or immoral cause, the lack of the form required by law, etc.

The specific causes are expressly provided by law and can be: the conjunctive will (reciprocal), the legacy of another's property, in case the testator did not know that the object did not belong to him, the lack of handwriting of the testator, the date or signing of the handwritten will, lack of signature of the testator, of the instrumental agent or of one of the two witnesses in the case of privileged wills, non-designation of the legatee by will by the testator, etc.

The nullity of the legacies can be absolute or relative.

The legacy is *absolutely void* when it was concluded in violation of a legal provision established for the protection of a general interest.

The legacy is *voidable* when it has been concluded in breach of a legal provision established for the protection of a particular interest.

According to the law, the absolute nullity for formal defects of the will can be covered by the heirs (as a peculiarity of the legal *mortis causa* relations).

Thus, "Confirmation of a liberality by a universal title or universal heirs of the disposer entails the waiver of the right to oppose formal defects or any other grounds for nullity, without this waiver prejudicing the rights of third parties" (art. 1010 C. civ.).

"Confirmation" can be made by universal or universally titled heirs, but mandatory after the date of opening the inheritance.

Revocation, as a civil law sanction, consists in removing the effects of the liberalities due to the ingratitude of the gratuity or the culpable non-execution of the charge.

The revocation is similar to the nullity in that it also represents a cause of ineffectiveness of the civil legal act.

According to its source, the revocation of legacies can be voluntary or judicial.

Voluntary revocation of legacies is the *exclusive expression of the will of the testator*.

According to art. 1068 alin. 1 of the Civil Code, "Legacies are subject to the provisions regarding the voluntary revocation of the will".

Depending on the manifestation of the intention to revoke the will, the revocation can be express or tacit.

The express voluntary revocation of the legacy is made by authentic notarial deed or by a subsequent will that includes an express revocation clause (art. 1051 paragraph 1 of the Civil Code).

The tacit voluntary revocation of the legatee is the one that, without having been expressly declared, results from a will of the testator undoubtedly expressed by him through acts or deeds incompatible with the previous ones.

There are cases of tacit voluntary revocation of the will and, *implicitly of the legacy*, destruction of the handwritten will or of the legacy's property and voluntary alienation of the legacy's property by the testator.

Expiration is that cause of ineffectiveness which consists in the absence of a valid civil legal act concluded by any effects due to the intervention of a circumstance subsequent to its conclusion and which is independent of the will of the author of the legal act.

The intervention of the circumstances that determine the expiration of the legacies is justified especially by the long period of time that usually exists between the moment of closing and the moment of opening of the succession.

The expiration of the legacies prevents the valid legacies from producing their effects from causes that occurred after the conclusion of the will.

As an effect of expiration, obsolete legacies retroactively lose their effectiveness (production of effects, our emphasis).

The causes of the expiration of the legacies are foreign both to the will of the testator and to any fault on the part of the legatee.

According to art. 1071 of the Civil Code, there are causes of expiration: the legatee is no longer alive at the date of opening the inheritance; the legatee is unable to receive the legatee on the date of opening the inheritance, the legatee is unworthy, the legatee renounces the legatee, the legatee dies before fulfilling the suspensive condition affecting the legatee, the good that forms the object of the private legatee has completely perished.

According to art. 1072 of the Civil Code, the heirs benefit from the ineffectiveness of the legatee "whose succession rights would have been diminished or, as the case may be, removed by the existence of the legatee or who had the obligation to execute the legatee".

From the text of the law, it appears that the legal heirs are the ones who can take advantage, as a rule, of the ineffectiveness of the legacies, because they have a vocation to the entire succession universality.

For example, in case of renunciation of the succession of a legal heir, the other *legal heirs* benefit from it.

Chapter III. Other Manifestations of the Testamentary Will. Disinheritance and Execution of Wills

The legacy is the main provision contained in the will. In addition, two other testamentary institutions occupy an important place: the disinheritance and the execution of the will.

Section a I. Disinheritance

Disinheritance (exheredation) is the testamentary disposition by which the testator removes from the inheritance, in whole or in part, one or more of his legal heirs (art. 1074 para. 1 of the Civil Code).

Inheritance is a general (negative) condition of the right of inheritance.

As a result of the inheritance of the legal heir, his quality of heir is generally abolished, with or without emolument (in the case of non-reserved heirs).

According to the manner of manifestation of the testator's will, the disinheritance can be of two types: direct and indirect (art. 1074 par. 2 of the Civil Code).

Disinheritance is *direct* when the testator expressly orders the removal from the inheritance of one or more legal heirs.

The removal of legal heirs by the testator can be done directly (by the manifestation of the author's will) or indirectly (by establishing legatees).

It should be noted that exheredation cannot target the state. In this case, the provision of the legal act (the provision of exheredation) is sanctioned with *nullity*.

Direct disinheritance is *always* express.

Direct disinheritance can be done either by indicating the name of the heir removed from the inheritance, or by indicating a quality of his.

Direct disinheritance can be total or partial.

By *indirect disinheritance* "the testator establishes one or more legatees" (art. 1074 par. 2 Civil Code).

The condition is that the legacies established (in the above situation):

– to consume the entire inheritance (when there are no reserved heirs), or

– exhaust the available quota (when there are accepting reserved heirs).

The doctrine discussed the situation in which the testator (who has legal heirs) establishes a *universal legacy in favor of a third party* (struck by a cause of ineffectiveness).

For example, the testator established his predecessor as a universal legatee, but he also left behind two of his children (of the author of the inheritance).

As the main effect of his testamentary disinheritance, *the legal heir is excluded from the inheritance.*

The succession status of the legal heir is different, depending on whether or not he is a reserve heir, so:

– when the heir is a non-reserved legal heir, *he will be completely removed from the inheritance*;

– when the ex-heir is a reserve heir, he will come and *collect the succession reserve* (being only partially removed from the inheritance).

Please note that the effects of disinheritance presented above cannot be taken advantage of by persons unable to receive legacies.

The testamentary disposition by which the legal heirs were disinherited is subject to the causes of nullity, absolute or relative, provided by law (art. 1076 par. 1 Civil Code).

Section a II. Execution of Wills

Execution of wills is a set of activities necessary to fulfill (execute) the testator's last will and testamentary provisions.

According to art. 1077 alin. 1 of the Civil Code, the testator may appoint one or more persons, giving them the necessary power to execute the testamentary dispositions.

The executor is the person designated by the will (or by a third party determined by the will) to represent the testator after the moment of his cessation of life, guaranteeing the fulfillment of his last wishes.

The executor is a *trustee of the testator*. However, the execution of the will differs from the common law mandate.

As a rule, the executor is appointed by the testator in the *mortis causa* document.

The executor may be appointed by another person (a third party) but the latter must also be determined by the disposer by will.

Through the powers conferred by art. 1080 para. 1 of the Civil Code, the executor may:

a) requires, in accordance with the law, the affixing of seals, if among the heirs there are also minors, persons placed under judicial interdiction or missing;

b) insist on making an inventory of the assets of the inheritance in the presence or summoning of the heirs;

c) asks the court to approve the sale of the goods, in the absence of sufficient sums for the execution of the legacies;

d) submit diligences for the execution of the will, and in case of appeal, to defend its validity;

e) pay the debts of the inheritance if he has been empowered to do so by will;

f) collect the claims of the inheritance.

Also, the testator may order by will that the executor to proceed to the *division of the inheritance assets* (art. 1080 para. 2 of the Civil Code).

The activity of the executor in the testamentary execution can be *free or remunerated.*

As a rule, "The mission of the executor is free" (art. 1083 Civil Code).

The executor is obliged to give an account for his management, even if there are no reserved heirs (art. 1082 par. 1 Civil Code).

When several executors have been appointed, as a rule, their liability is *solidary*. As an exception, the responsibility is individualized when the testator “divided their attributions and each of them was limited to the entrusted mission” (art. 1082 par. 3 Civil Code).

The termination of the will can be determined by general causes (generated from the termination of the mandate) and by special causes (expressly provided by law for the termination of the will).

The general causes ("modes of termination", borrowed from the subject of the mandate) are provided by art. 2030 Civil Code.

CONCLUSIONS

DE LEGE FERENDA PROPOSALS

The paper entitled "Testamentary inheritance in the New Civil Code" has two main objectives:

- a *general object*, namely the identification, analysis and critique of the novelty elements that the important normative act brings (in relation to the provisions of the Civil Code of 1864) and
- a *special object*, namely the relationship between the testamentary inheritance and the legal inheritance.

Thus, the conclusions were structured on three directions derived from the content of the paper: inheritance and will, testamentary problems and proposals *de lege ferenda*, and the relationship between legal inheritance and testamentary inheritance.

I. According to art. 955 of the Civil Code, there are *only* two types of inheritance: legal inheritance and testamentary inheritance.

Notwithstanding the above, other provisions also refer to *the third type of inheritance, the contractual inheritance*.

According to art. 333 of the Civil Code, which bears the marginal name, "*preciput clause*", "By matrimonial agreement it may be stipulated that the surviving spouse take over without payment, before the division of the inheritance, one or more of the common goods, held in inheritance or co-ownership.". *Thus, the preciput clause has the legal nature of a private legacy.*

In the contract concluded by a natural person with a *banking institution* can be inserted a clause *mortis causa*, by which the holder of the contributions of money or other values, designates a legatee of them (art. 1049 Civil Code and Order MJ no. 1903 / 2011).

It follows that, in the contract concluded with the bank, a clause may be inserted which has the *legal nature of a private legacy*.

The category of the above provisions also includes the so-called "donation" of human organs, tissues and cells raises some interesting issues, regulated by Law no. 95/2006 on health care reform and O.M.S. no. 1527/2014.

From the more comprehensive provisions of Law no. 95/2006, we retained only the "donation" of organs, tissues and cells that occurs at the *death of the donor*.

In the case of the organ donor, his *mortis causa* manifestation of will also has the nature of a legacy with a *private title* (made by means of a notarial document, extra-testamentary).

In view of the above provisions, we consider *that the contractual inheritance should also be taken into account (as a third kind of inheritance).*

Whether the inheritance is testamentary or contractual, it is always the fruit of the *mortis causa* will of the of its author.

Essential, in the testamentary inheritance, is *the will of the one who leaves the succession patrimony*. Thus, the will produces effects only if the testator had discernment and *his consent is valid*, at the time of making the will (art. 1038 para. 1 Civil Code).

It should be noted that, in testamentary matters, it is not enough for the testator to have full legal capacity recognized by law, but he must also have "discernment".

In testamentary matters, the will of the testator may be altered, in general, by error, deceit, and sometimes by violence.

Often, in testamentary matters, deceit is manifested by suggestion or capture.

Capture consists in the use of malicious maneuvers, in order to deceive the good faith of the testator and to determine him to make a liberality (which in other conditions he would not have done).

Suggestion is to use illegal means in order to instill in the testator's mind the idea of making a liberality (which he would not have done on his own initiative).

Violence (vice of consent) is rare in the matter, because the testator, even if he was the victim of a threat that affected his freedom of expression of will, has the opportunity, after the violence has ceased, to revoke the legacy he made under violence.

We conclude the brief introductory part of the conclusions, with some references to the legal nature of the will.

In the legal literature, the will has been described as both a "civil legal act" but also a "legal form".

According to the opinion we share, the will is not a simple legal act, it is *an exceptional legal act*, it is a form, a legal pattern, comprising a multitude of independent legal acts, with separate legal regimes..

The above statement is important because it admits that the nullity *of a legal act* contained in the will *does not implicitly entail the nullity of other manifestations of testamentary will*.

The will (in a narrow sense) is the "formal support" for all provisions with the value of legal acts. Thus, the will has two components: the supporting will and the provisions contained in the will.

II. Problems of testamentary inheritance identified in the New Civil Code and proposals *de lege ferenda*. In the summary, we present some of those included in the thesis.

- According to the law, the will is "the unilateral, personal and revocable act by which a person, called testator, disposes, in one of the forms required by law, for the time when he will no longer be alive" (art. 1034 Civil Code).

The definition given to the will by the New Civil Code does not differ too much from the previous one (enshrined in art. 802 of the Civil Code of 1864) according to which "The will is a revocable act by which the testator disposes, for or part of his property".

However, comparing the two notions given in time to the will, at first sight, we find that the previous definition seems to be more comprehensive (including the object of the *mortis causa* disposition).

In short, we appreciate that both the provisions of art. 802 of the Civil Code of 1864, as well as those of art. 1034 of the Civil Code in force did not succeed in satisfactorily defining the notion of will. Thus, art. 1034 of the Civil Code can be criticized, first of all, for not specifying the *object* of the testamentary disposition.

De lege ferenda, we propose that art. 1034 of the Civil Code to be amended as follows: "The will is the unilateral, personal and revocable act by which a person, called testator, disposes patrimonial or extrapatrimonial, in one of the forms required by law, for the time when he will no longer be alive."

- For the validity of the handwritten will, the testator's signature is *essential*.

The testator's signature must be executed *proprio manu.*

The testator's signature must not (obligatorily) include the testator's first and last name. It is important that the way in which the testator is identified *allows* his identification.

However, the signature can also be expressed in other ways (by pseudonym, by the initials of the name and surname, etc.).

In practice, the question has been asked whether a person can use in the same will both his pseudonym and his name (or his initials).

We are of the opinion that the testator who currently uses a signature other than his name and pronoun, by which he is known to the public (for example, an actor who has a pseudonym) cannot choose between the two forms. Thus, for the validity of the signature (and the deed), he must sign, in all his wills, the pseudonym has been established.

- Compared to the holographic will, the authentic will does not ensure, to the same extent, the secrecy of the last will of its author.

The situation considers that several people participate in the conclusion of the authentic will.

In the above context, in the legal literature was questioned the obligation of the notary to publish in the R.N.N.E.L. any authentic will.

We are of the opinion that, along with its general obligation of confidentiality of the public notary and the publication of the authentic will in the R.N.N.E.L. it contributes better to ensuring the secrecy of the manifestation of the *mortis causa* will.

- According to art. 1049 para. 2 of the Civil Code, the handing over of the legacy having as object sums of money, values or securities deposited with banks is made only *on the basis of the court decision* or the *certificate of heir* which ascertains the validity of the testamentary disposition and the quality of legatee.

The above testamentary provisions are subject to "ratio and reduction", under the conditions of common law.

Considering the legal nature of this clause (particularly related, s.n.), which clearly results from the provisions of art. 1049 para. 2 of the Civil Code, in the doctrine it was appreciated that from the text of the law, it is not understood the specification of the legislator regarding its report, as long as the Civil Code regulates only the report of donations, and *not of testamentary legacies*".

We are of the opinion that the observation of the specialized literature is well-founded and *de lege ferenda* we propose to modify the text of the law.

- Through its content, the will can take three distinct forms:

a) the will containing a *single legal manifestation of will*; for example, the heir leaves all his property to a third party (in which case, he qualifies as a true legal act):

b) the will *with several legal manifestations* of will; for example, the *mortis causa* document includes related but also other provisions (in which case, it is a pattern, a legal form with several distinct legal acts):

c) the will that includes *manifestations that do not produce legal effects*; for example, the author describes the course of his life, with all its accomplishments and failures.

Compared to the above, *de lege ferenda* we propose to widen the scope of the notion of will (provided by art. 1034 Civil Code) as follows: "The will is a unilateral, personal and revocable act, by which a person, called testator , manifests itself in one of the forms provided by law, for the time when it will no longer be alive".

- Under the conditions of the Civil Code in force, the right of revocation of the testator is also recognized (see art. 1034 of the Civil Code), but no longer operates on all *mortis causa* provisions.

Thus, according to art. 416 para. 3 of the Civil Code, the recognition of a child out of wedlock, by will, is *irrevocable* (art. 416 para. 3 of the Civil Code).

According to the new provisions, the will is no longer essentially revocable (the testator's right of revocation being established, as a total right and not susceptible to abuse, in the previous doctrine).

In addition, we specify that the right of revocation of the testator belongs to the essence of the *mortis causa* legal relations.

De lege ferenda, we opine *in favor of repealing the provisions* of art. 416 para. 3 of the Civil Code and restoring the right of revocation of the will to the level of its previous establishment.

- According to the New Civil Code, liberalities can be made only by donation or by "legacy contained in the will" (art. 984 para. 1 Civil Code).

However, the notions of liberality and legacy are not confused.

Liberality is the legal act by which a person disposes of his goods free of charge, in whole or in part, in favor of another person (art. 984 paragraph 1 of the Civil Code).

The legacy is the testamentary disposition by which the testator stipulates that, at his death, one or more legatees to acquire his entire patrimony, a fraction of it or certain determined goods (art. 986 Civil Code).

We specify, however, that liberality and the legacy are closely linked, *the relationship between them being that of the general to the special*.

However, we must not forget the relationship in which the legacy is with the will (the legacy being included in the will).

In the above context we appreciate that, although the New Civil Code eliminated the total overlap of the *mortis causa* two institutions (dictated by art. 887 of the Civil Code of 1864) we can say that, in continuation, the *separation is not clear*.

Thus, for example, it is often said that "the legacy is a solemn act" although only the envelope, its respective support and the will is a solemn legal act.

- When the legatee has died before the date of the opening of the succession, the legacy closed in his favor *shall not produce legal effects*.

The expiration of the legacy, due to the predecessor of the legatee, is based on the *intuitu personae* character of the legacy.

We specify that art. 1071 letter a of the New Civil Code refers to the legatee who is no longer "alive".

In the doctrine it was appreciated that "the situation also applies to legal entities", which are no longer in existence, at the date of the testator's death.

We agree with the pertinent doctrinal and *de lege ferenda* observation, we propose that art. 1071 lit. of the Civil Code to have the following wording "the legatee is no longer in existence at the date of opening the inheritance".

m). According to art. 1052 of the Civil Code, "The testator may revoke the handwritten will and by destroying, breaking or deleting it".

Tacit revocation of the testator may produce total or partial effects.

When the destruction, rupture or erasure by the testator of the holographic will took place as a whole, it constitutes a *total (complete) revocation* of his manifestation of *mortis causa* will.

However, if the deletion concerns a provision contained in the handwritten will (for example of a bequest), the revocation will produce effects exclusively on that provision (the rest of the provisions remaining valid and producing effects).

Changes made by deletion must be signed by the tester.

In the doctrine it was appreciated that, in addition to the testator's signature applied on deletion by the testator, it is also necessary to *date the deletion* (by the testator's hand).

We agree with the above opinion, considering that only in relation to the date of the respective revocation can be assessed the capacity of the testator to determine the ineffectiveness of the legacy.

- According to art. 956 of the Civil Code, "legal acts having as object eventual rights over an as yet unopened inheritance, such as ... *are struck by absolute nullity* " (our emphasis)

The absolute nullity of the acts regarding an unopened inheritance is justified by infringing the right of the one who leaves the inheritance to dispose freely of his goods, until the last moment of his life (but also by their immorality).

Such legal acts may arouse the desire for death to the one who leaves the inheritance.

Through the sanction of absolute nullity, in this case a public interest is protected regarding the freedom to test, the representation and the succession reserve, the authority of the right of inheritance as a way of transmitting the succession patrimony, etc.

We specify that in the doctrine, *de lege ferenda*, it was opined that the matter of the pacts on the future successions could be "liberalized".

Thus, their conclusion could be allowed, "under certain conditions". For example, "with the participation of the person whose inheritance is in question or the so-called family pact".

We agree with the above, adding an argument of legislative technique.

In this case, *de lege lata*, prohibition is the rule and permission is the exception.

In the above context, we ask ourselves: it would not be more *natural for the relevant rule to be the permission* (respectively, the validity of the legal act) and the prohibition (in cases expressly provided by law) only the exception?

III. The current relationship between legal inheritance and testamentary inheritance is also a controversial topic. It is the "primordial" legal inheritance ?

In the national law subject to the Civil Code of 1864, it was considered that legal inheritance is "the most natural way of transmitting his *de cuius* patrimony to his blood relatives who are constituted in classes of heirs" (and of the surviving spouse, our emphasis).

In this context, most authors opined that legal inheritance was the rule and testamentary inheritance was the exception.

However, it was also argued that the will of the legislator replaces only the unexpressed will of the deceased.

Consequently, it was stated that, "the fundamental principle is that the legal inheritance *remains subsidiary* to the testamentary one".

And in the current legal regime, there is more and more talk about the *primordiality of legal inheritance over testamentary inheritance*.

The above statement is based on the consideration that, in all situations, "the rules of legal inheritance represent the common law" and therefore, also applies to the matter of testamentary inheritance.

Although the current rules do not differ much from the previous ones, *we do not agree with the above view*, for the reasons set out below.

The legal inheritance intervenes, in principle, only in the absence of the manifestation of the *mortis causa* will of the author of the succession patrimony, therefore, chronologically "the testamentary inheritance intervenes before the legal one".

According to art. 1102 para. 2 of the Civil Code, regarding the multiple vocation to inheritance, "The legatee called to inherit and as legal heir will be able to exercise his option in any of these qualities" results that the two forms of inheritance are in a close interdependence and therefore are not excluded (but can coexist).

Thus, a successor can collect the inheritance, both under the will (as legatee) and under the law (as legal heir).

Even more, testamentary and legal inheritance can coexist with vacant inheritance.

It is true that the legal inheritance imposes the general rules in matters of succession (therefore also applicable to testamentary inheritance), but essential in the matter, is the *will of the natural person* (whose patrimony it is). Likewise, legal devolution occurs, in principle, *only when the testator has not disposed of his estate* (or has disposed of it in part)..

Likewise, the legal devolution of the inheritance, to the persons close to the family of the deceased (who did not leave a legacy), *is justified*, but the imposition of the legal succession reserve, against the will of the testator, seems to be an *excess of the law*.

Basically, there would also be the advantage of *eliminating simulated onerous disposals* of the assets of individuals (in order to remove unauthorized copyright holders).

In conclusion, it can be said that the testamentary inheritance is on a relatively equal position with the legal inheritance (between them there is a close interdependence and coexistence). In fact, at European level it seems that we are witnessing a reconsideration of the testamentary will.

We appreciate that, even under the conditions of the New Civil Code, *the testamentary inheritance has not become a second degree inheritance.*

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