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CONSIDERATIONS OF SURVIVING SPOUSE INHERITANCE RIGHTS UNDER THE LEGAL INHERITANCE

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Abstract

This article examines the inheritance rights of the surviving spouse as a legal heir in light of the current rules of the civil code. The current regulations of The Civil code deals with the complex and comprehensive manner the rights of surviving spouse upon inheritance left by the deceased. The current Civil code operates a subversion of moral rights for the surviving spouse thereof, giving him legal status and dignity that he deserves.

Keywords: **surviving spouse, inheritance rights, the special right of inheritance, the legal heir.**

General notions

Just as remarkable a great Russian writer said, "death is an old joke, but new for every one of us"[1], so is the Romanian legislation in the field of the right of inheritance of the surviving spouse.

In the current legislation established in the Civil code, the surviving spouse, although not a part of any class of heirs, benefit from the inheritance rights of their own regardless of their own class of heirs whom he would encounter.

This situation is somewhat privileged for the surviving spouse if we analyze the position that it had under the old Civil Code of 1864, which was unfair conditions. The Civil Code system after which the surviving spouse would be called to the legacy of the deceased spouse only if they did not leave heir degree inheritance, it was defective and was criticized in the old doctrine[2]. He was gaining inheritance if the four classes of heirs were missing and the widow without fortune had certain rights of succession in competition with other legal heirs. In an exceptional way, she had a share of usufruct when she came into the competition with the descendants of the deceased, and in their absence entitled to a quarter full ownership. This situation of inequity was directed by Law no. 319/1944, for the surviving spouse for the right to inheritance, now repealed, which brought a number of improvements to the surviving spouse inheritance situation, recognizing him the right to inheritance in competition with any other class of heirs, including the right to reserve succession, and some inheritance rights and accessories[3].

Succession rights of the surviving spouse are currently governed by the provisions of art. 970-974 of the Civil Code in Book IV of inheritance and liberties, Title II Legal inheritance, Chapter III Legal heirs, Section I, The survivor spouse. This order of the new rules in civil matters is justified primarily by the fact that the surviving spouse comes to

[1] I. S. Turgheniev, *Părinți și copii*, Colecția Carte de buzunar, Editura Litera, 2010.
[2] M. Eliescu, *Moștenirea și devoluțiunea ei în dreptul RSR*, Editura Academiei, București, 1966, p. 125-129.
[3] Dumitru Văduva, *Moștenirea legală. Liberalitățile*, Editura Universul juridic, București, 2012, p. 45.

inheritance in competition with any other class of heirs, and secondly is the fact that in the contest between the surviving spouse and other heirs the share of the first is determined with priority[4].

The new Civil code has kept its essential lines, the rights of inheritance of the surviving spouse enshrined by Law No. 319/1944.

The Civil code recognizes the following categories of rights for surviving spouse:

- the right of inheritance in the competition with all classes of heirs or relatives in the absence of the four classes of heirs
- the right of inheritance to the furniture and household objects belonging to the household;
- temporary right of habitation on tenant house.

The conditions required for the surviving spouse to be able to inherit

In order to have the right to inheritance, the surviving spouse shall satisfy, in addition to the general conditions of entitlement to inheritance **(to have succession capacity, to have a vocation to be succession, not to be unworthy towards the deceased)**, a special condition (instead of relative with the deceased): to have the quality as spouse on the date of the opening of the inheritance[5]. The quality of spouse is proved through the marriage certificate.

Thus, according to art. 970 Civil code, the surviving spouse inherits the deceased husband if, at the date of the opening of the legacy, there is no final Court decission of divorce. The term Court decission used by the legislator refers both to the Act of jurisdiction of the Court and to the certificate of divorce issued by the public notary or the civil status officer6. In the case of amicable divorce, marriage shall be deemed to have been disposed of at the date of issue of the certificate of divorce.

There is no relevance for what was the duration of the marriage with the deceased, the surviving spouse's sex or material situation, whether or not they had children or lived together at the time of opening inheritance or if in fact they were separated, no matter whose fault of the spouses. As separate domicile of the spouses does not affect the property relations of the spouses during life, it cannot influence neither the right to inheritance of the surviving spouse after the death of one of them. But, if two people of different genders live together(concubines), no matter how durable this was, there is no conferred legal entitlement to the surviving concubine.

Where death occurs during a divorce settlement or application during the process of divorce, the surviving spouse retains succession vocation.

In the case of absolute or relative nullity, the marriage is dissolved with retroactive effect, so the question of inheritance rights may not be put in discussion, even if the Court decision on which was found the nullity or marriage was cancelled and subsequent death occurred one of the spouses7. Whether we are talking about an absolute or relative nullity, whereas the quality of spouse is deemed to have never existed, the right of inheritance of the surviving spouse cannot operate.

By way of exception, article 304 of the Civil Code, which enshrines the institution of putative marriage, provides that "the spouse in good faith at the conclusion of a marriage invalidity, and or cancelled, keeps, until final Court decision, the situation of a spouse of a marriage which is valid". As a result, if the death of one of the spouses has occurred before the final decision of any declaration or pronouncement of invalidity, and the surviving spouse was in good faith at the conclusion of the marriage, he will be able to come to an inheritance, as it keeps the quality of spouse he/she had at the opening of the inheritance. But, if the

[4] Ilioara Genoiu, *Ce drepturi are soțul supraviețuitor la moștenirea soțului decedat*, Editura C.H. Beck, București, 2013, p. 5.
[5] Carmen Teodora Popa, *Drept civil. Succesiuni*, Hamangiu, București, 2010, p. 58;
[6] Ioana Nicolae, *Drept civil. Succesiuni. Moștenirea legală*, Editura Hamangiu, București, 2014, p. 145.
[7] N.C. Aniţei, *Dreptul familiei*, Editura Hamangiu, Bucureşti, 2012, p. 108.

surviving spouse was not of good faith, he/she will not inherit, losing the quality of spouse with retroactive effects. Obviously, if the death intervenes after the permanent court decision through which was pronounced the nullity of marriage, the putative character remains without relevance under the aspect of right of inheritance of the surviving spouse[8].

The correlation between the rights of inheritance of the surviving spouse and the matrimonial property regime

As in regards to the extent of the right of inheritance of the surviving spouse and the determination of succession, first should be set the matrimonial property regime applicable to the marriage of the spouses during the marriage.

Spouses and prospective spouses have the option of opting for one of the following: legal community matrimonial regimes; separation of goods; conventional community.

This option can be made through the conclusion of an agreement in authentic notarized form.

That matrimonial legal community is identical to one that govern economic relations of spouses in the past, under the provisions of the Family Code. Property acquired by either spouse during the marriage, under the sway of this matrimonial regime, are considered common property, according to art. 339 Civil Code. Under this regime, the spouses have two categories of goods: the common property of both spouses and each spouse 's own assets.

With the death of a spouse, the community of property ceases and liquidation of community is made between surviving spouses and heirs of the deceased spouse, the deceased's duties are divided among heirs, proportional with their share of the inheritance. The estate of the deceased will contain the deceased share of joint assets and assets of its own.

The liquidation of the matrimonial property regime is made by final Court decision or by notarial authentic document. In the context of the community, each of the spouses picks up his own goods, then will proceed to the division of the common assets and the settlement of debts. Thus, it determines the part of deceased that belonged to the spouse in the community on the basis of his contribution to the acquisition of goods, which reunited with the other property of the deceased will form the succession. Until proof to the contrary, the legal presumption is established for equal contribution to the acquisition of joint property.

If the surviving spouse is the only heir of the deceased, the notice of liquidation will take the form of a unilateral act (Declaration), which is completed in the final conclusion of the public notary within heritage debate.

The establishment of appropriate share of each spouse shall be made under the same conditions for both the legal community and the conventional community the latter being essential for the convention between the former spouses, through which they have established as nuptial arrangements conventional goods community[9].

Under the separation of property, each of the spouses is the exclusive owner in respect of property acquired before the marriage, as well as those that acquired on its own account after that date. By the marriage convention, the parties may stipulate matrimonial clauses concerning the liquidation of this scheme in relation to the mass of goods purchased by each of the spouses during the marriage, the basis of which the claim participation will be calculated. If the parties have agreed otherwise, the claim of participation represents one half of the difference in value between the two masses of net purchases and will be due by the spuse whose mass is greater than the net purchases, and can be paid in cash or in nature. Assets acquired jointly by spouses under this regime belong to their common ownership shares, according to the law.

The right of inheritance of the surviving spouse in the contest of heir classes without relatives in the four classes of heirs

[8] Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *Noul Cod civil. Comentariu pe articole*, Ediția 2, Editura C.H. Beck, București, 2014, p. 790.

[9] I. Popa, *Drept civil. Moșteniri și liberalități*, Editura Universul Juridic, București, 2013, p. 145.

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The surviving spouse is not part of any class of legal heirs, but the law recognizes its rights to contest all grades succession of heirs. Surviving spouse's share of the inheritance varies depending on the class of heirs that comes in competition.

Art. 972 of The Civil Code establishes in favor of surviving spouse the following share portion of the estate succession:

a) a quarter of the inheritance, if it comes into competition with the descendants of the deceased;
b) one third of the inheritance, if in the contest comes with a mix of both privileged and non-privileged collaterals of the deceased;
c) one half of the inheritance, if in the contest comes either with a mix of privileged or privileged collaterals of the deceased;
d) three-quarters of inheritance, if in the contest comes with either a mix of regular or ordinary collaterals of the deceased;
e) when the surviving spouse is called to the inheritance, because there are no heirs in the four classes of heirs or, although if they exist, they dropped the rightor they are undeserving or excluded to the inheritance, the surviving spouse gets the entire inheritance.

It is observed that the legislature maintained the same share due to the surviving spouse in the competition with four classes of legal heirs as the old regulations. If the surviving spouse comes to inheriting along with relatives of the deceased (a-d), determining the quota for him is done with precedence in relation to the heirs with whom he/ she is competing. Surviving spouse's share shall be charged to the entire inheritance, being the masses which is calculated first10.

In all cases, is taken into account - for the determination of inheritance share of surviving spouse - only relatives with whom he/she comes into the competition, so those who effectively inherit, i.e. they are not undeserving or renuouncers, disinherited (if in the latter case are not beneficiaries). The absence of this category of relatives who do not inherit, take advantage of surviving spouse only in so far as the total lack of them is within the respective class or subclass. For example, if the deceased has two children and only one of them is renouncing, the spouse does not change her/his quota, and the other child is the beneficiary of the part renounced by the other child. But, if both children are renouncing, the spouse will collect the entire inheritance if there are no other relatives.

As novelty compared to the previous regulation, the Civil Code regulates two special circumstances in the matter of succession rights of the surviving spouse:

► Art. 972 par. 3 Civil Code regulates the hypothesis of bigamy or polygamy in which two or more persons come to inheritance as a survivor. According to this legal document, whether as a result of putative marriage, two or more people to a surviving spouse situation, have the share idivided equally between them11. By comparison, in the Muslim laws survivors of the deceased, polygamist wives shared between them equally, the inheritance that if left for the unique survivor wife.

► Surviving spouse share in competition with the legal heirs of different classes shall be determined as if it had come into the contest only with the closest of them. Such a scenario could be met in practice when the deceased disinherits a whole class of heirs and they collect the reserved share, in which case the setting of the share for the surviving spouse, should be

[10] Daniela Negrilă, *Moștenirea în noul Cod civil. Studii teoretice și practice*, Ediția a II-a, Editura Universul juridic, București, 2015, p. 193.

[11] This solution was accepted in doctrine and prior to entry into force of The New Civil code. Thus, Francisc Deak shows that the solution of assignment for each widow of an integral quota could not be accepted because it would lower the quotas for the other competing heirs (descendants, privileged ascendants or privileged collaterals of the deceased), or would exhaust (in competition only with privileged ascendants or privileged collaterals) or would exceed the legacy of the deceased (in competition with the heirs of classes III and IV), which obviously is not possible.

taken keeping account of their presence. For example, the deceased disinherits descendants, the surviving spouse comes in competition with them both, within the reserve succession and the heirs of Class II. In this case, the surviving spouse will share ¼ of inheritance.

Another practical hypothesis in which the surviving spouse can get to compete with an heir, belonging to different classes is when disinheritance of an heir of a class is direct and partial, consisting of a reduction of the legal quota.

For example, if from class II belongs to the sister of the deceased only, whose share was reduced by testament to the ¼ from the inheritance, without the testator mentioning what will happen to the rest of the inheritance12, the surviving spouse will compete with the sister of the deceased (Prime-grade side –class II) and the IVth class of heirs, the surviving spouse share being ½ from inheritance, established only in relation to the closest class, privileged collaterals. It is important to note that the surviving spouse can come to the inheritance of the deceased only in his own name and not by representation. He's an heir recognized by the law and has to report donations received from the deceased if the inheritance comes into the contest with the descendants of the deceased and the direct heir (a relative).

It is noted that the survivor spouse was included in the category of direct heirs, in accordance with article 1126 paragraph 1, Civil code. Previously The New Civil Code, the surviving spouse was not in this category.

The special right of the surviving spouse upon household furniture and household objects and belonging

When it does not come into competition with the descendants of the deceased, the surviving spouse inherits, in addition to the quota laid down under art. 972 civil code, furniture and household items that have been damaged by both spouses during the common use.

The rationale for the establishment of the legislature of this inheritance law (also known as accessory) has been driven by the need to ensure continuity of the surviving spouse living conditions in the household, by recognizing the right to keep some goods which were used together with the deceased spouse[13].

Is supported as the surviving spouse to collect the goods, as according to 974 of the Civil code, over his succession, but the special conditions must be cumulatively fulfilled.

The first requirement is that the surviving spouse would not come to inherit the deceased with the spouse's descendants, regardless of their number. He/she will acquire these goods in full, more than his/her share of the estate, but only if coming into competition with class II-IV of the heirs, or ascendants and collaterals of the deceased spouse. If the surviving spouse comes to inherit even with a single descendant of the deceased, these goods will fall into the same scheme of division as the rest of the assets in the legacy (1/4 for surviving spouse and ¾ for descendants).

In competition with other legal heirs, namely those in Classes II, III, IV, these goods are entitled to the surviving spouse entirely and solely on the basis of art. 974 Civil Code, the rest of the inheritance property shall be divided between the surviving spouse and the deceased's ascendants or collaterals, according to quotas set by law.

The second requirement is that the husband passed away did not dispose its entire portion of these goods (i.e. the totality of his/her party) through donations or linked14.

If only partly disposed, the surviving spouse will take the rest of the goods in this category with the removal of the heirs of class II-IV.

The documents of liberality made by the deceased upon the goods listed in article 974 Civil code, in favor of a third party or other heirs, are valid, the surviving spouse not being heir in respect of those goods.

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[12] Francisc Deak, Romeo Popescu, *Tratat de drept succesoral. Moştenirea legală*, vol. I, Editura Universul juridic, Bucureşti, 2013, p. 253.

[13] Trib. Suprem, s. civ., dec. nr. 2218/1971 în RRD nr. 8, 1972, p. 160.

[14] TS, s. civ., dec. nr. 154/1972 în CD, 1972, p. 177-180; dec. nr. 521/1988 în RRD nr. 2, 1989, p. 68.

The legislature had in mind not all of the property belonging to the household, but only the deceased spouse of common goods and own assets of the deceased in this category.

As well as law no. 319/1944, The New Civil code does not define this concept, its content was determined by the literature and case law.

Because of the current regulation is relatively recent, there is still no case law handed down in this matter. But because of the provisions of The New Civil Code does not bring significant changes to the law nr.319 / 1944, the case practice developed on the old legislation is applicable and currently only had adapted to the new regulations.

Into this category, falls in the movable goods, that by nature and affection are intended to serve within the household to household furnishings or household needs, have a common value and were used for this purpose, corresponding to the standard of living of the spouses, such as furniture, TV, washing machine[15], refrigerator, vacuum cleaner, etc.

Do not fall into the category the goods covered by article 974 Civil code, those which by their nature are not used in the household (for example, car, motorcycle, piano), goods that serve the profession16, objects of art, luxury or with value over the usual objects, or those goods mentioned by art. 974 Civil code, but purchased for investment or to be donated, as well as goods belonging to the countryside household (work animals, agricultural implements).

If the spouses have owned several homes that are equipped with household items, the special right of a spouse has to be correlated with criteria of affection for goods. In that case, if the spouses have lived together effectively in all those spaces and used goods according to their standard of living, is it particularly the right of the surviving spouse to target all those goods.

Therefore, the surviving spouse in the marriage valid with the deceased will reap, if the case, assets in this category that were used in the household shared with the deceased and the surviving spouse in good faith, of the null marriage but putative will reap the common household used with the deceased, without taking into account the value of the goods concerned. Equally sharing solution could only be applied if in an exceptional way, certain goods in this category were used and afected by both surviving spouses.

Distinct from the old regulation, the current Civil Code maintains the provisions of article 5 of Law no nr.319 / 1944 on wedding gifts and no longer incudes them in the content of the special right. They will be included in the estate of succession and attributed to heirs of the deceased regarding the common law.

The temporary right of habitation of the surviving spouse

According to art. 973 Civil Code, the surviving spouse is not entitled of any real right to use another suitable house for his/her needs and has a right of habitation in the house where he/she lived until the opening of the inheritance, if this house is part of property inheritance.
To acquire the right to be the main the following conditions must be carried out:

a) the surviving spouse may have actually lived in the house (apartment);
b) the surviving spouse does not have his/her own housing17;
c) the house (apartment) to be part of the deceased husband;
d) the surviving spouse may not inherit alone, as in this case, gaining from date of opening of the inheritance even ownership of the main house, the right cannot arise;

[15] M.M. Pivniceru, C. Susanu, D. Tătăruşanu, *Moştenirea legală şi testamentară. Împărţeala moştenirii. Practică judiciară*, Editura Hamangiu, Bucureşti, 2006, p. 13- C. A. Iaşi, decizia civilă nr. 1627 din 15 octombrie 2002.

[16] In question were not considered to be mobile and household items belonging to their household, the goods of the deceased were used in his profession, i.e. fixing watches tools worth 5000 lei - Court of Hunedoara, civil decision No. 756 on 19 august 1983 in the Romanian Magazine of law No. 3/1984, p. 72.

[17] Court of Apeal Timişoara, Civil section, decision nr.217/30.01.2002, published in Carmen Simona Ricu, *Moștenirea legală. Partajul succesoral. Practică judiciară adnotată*, Editura Hamangiu, 2009, p.120.

e) the deceased has not ordered otherwise; he can remove the right of habitation, as the right of legal inheritance because the surviving spouse is not recognised by law in this matter, only in regards to inheritance rights provided for by art. 972 of the Civil code.

The duration of the habitation of the surviving spouse is limited until partition, but not earlier than one year from the date of opening the inheritance, or even before the expiry of one year, until the remarriage of the surviving spouse.

The right of habitation of the surviving spouse has the following legal characters:

a) It is a right in rem, dismemberment of ownership of housing and the residential house; by virtue of this law, the surviving spouse may exercise the use of the house, directly, without needing the intervention of another person18.
b) It is a temporary right, lasts up to partition, but not earlier than one year from the date of the opening of the inheritance, or to the surviving spouse's remarriage;
c) It is a strictly personal right for the benefit of the surviving spouse and is inalienable, i.e. it cannot be assigned or encumbered, and unnoticed, creditors of the surviving spouse not having the right to pursue it;
d) is conferred by law for the surviving spouse free of charge, he/she does not owe rent to the heir who acquired ownership of the house, exempion while enjoying this right.

With respect to the right of habitation of the surviving spouse, the legislature introduces the concept of change of the object of habitation. Thus, in accordance with article 3 para. 973 Civil code, any of the heirs may ask the restriction of the right of habitation, if the house is not entirely needed to the surviving spouse, or the change of habittaion object, if the surviving spouse will receive another appropriate house. This house must be equivalent to that of the deceased spouse and situated in the same locality.

Therefore, it is not sufficient that the heirs to make available to the spouse, a house she can use, with any precarious conditions (for example, lease or bailment).

Conclusions

The afection between spouses secures the surviving spouse, in the current regulation, is in the head of the heirs, different of heirs classes, but being in close contact with them regarding the extent of inheritance rights. This is natural if we think that living together daily leads unquestionably to the birth and consolidation of lasting spiritual ties between the two spouses. Protecting inheritance rights of the surviving spouse continues in the civil code in force, which comes with specific elements. Specialty literature offered solutions that the New Code has taken to ensure as complete regulation of this matter. A positive feature of the new regulations is to regulate first the rights of the surviving spouse then take the rights of the other legal heirs. Shares accruing to the surviving spouse in contest with heir classes are taken from the old regulation.

In regards to the wedding gifts, in the Civil code, these goods are no longer expressly mentioned as forming a special object of the right of inheritance of the surviving spouse (as they were covered in article 5 of Law No. 319/1944). Waiving the rules on wedding gifts could compensate for the surviving spouse with more accurate regulation in relation to goods which are considered family heirlooms found in art. 1141 of the Civil code. This idea makes sense considering the desire of the legislator not to deprive the widow of things which he/she used in conjunction with the deceased, this is the virtue of the purpose to which the special right has been granted for the furniture and household appliances and the right of habitation for the spouse that is still alive.

Therefore, since acquiring a privileged status as the successor of the deceased we believe that it was appropriate to include family memories in this category of special right of inheritance of the surviving spouse along with furniture and household items. Family

[18] V. Stoica, *Soţul supravieţuitor. Moştenitor legal şi testamentar*, ediţia a II-a revăzută şi adăugită, Editura Editas, Bucureşti, 2004, p. 93.

memories with a large emotional and affective load representing the past of the spouses, regardless of their material value, would clearly provide a continuity of the spiritual life of the spouses.

Another improvement on the part of the legislature in connection with inheritance rights of the surviving spouse would be able to come with regard to the right of habitation. A more advantageous rule for the surviving spouse would be able to provide the possibility to acquire the right of habitation to be not only temporary, that is, the legislature would have to waive this right or to maintain the temporary right only in the event of remarriage of the survivor. A permanent habitation right should be at least for a share of the former joint home, in this way ensuring fully cover of the needs because after exiting the joint possession there is a possibility that to the spouse would be given a smaller share cote than the one need by him/her, so use of the domicile within the property title may not match his/her needs.

Furthermore, in order to ensure continuity of living conditions existing in marriage, it would be appropriate that surviving spouse to no longer depend on the will of the deceased upon the house, the surviving spouse should have ensured this right regardless of what was ordered by the deceased, in other words the reserved portion of the surviving spouse should operate in respect of this right.

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