

AN ASSESSMENT OF HEREDITARY RIGHTS ENJOYED BY PRIVILEGED COLLATERALS OF A DECEASED PERSON ACCORDING TO THE PROVISIONS OF THE NEW CIVIL CODE

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Summary

Analysing the provisions of the recent Law No. 287/2009 on the Civil Code is undoubtedly a fundamental aspect and starting point, on the basis of which we shall deal, within the present work, with all the issues concerning hereditary rights enjoyed by the privileged collaterals of a deceased person (they who make up the second class of heirs, together with privileged ascendants), in their entire complexity: definition, division of the inheritance, juridical features. As a consequence, it will be possible to identify the resemblances and the distinctions between current and future regulations in terms of hereditary rights enjoyed by the privileged collaterals of a deceased person and to make an assessment of the advanced character of the new Civil Code’s provisions.

1. Introduction

According to art. 964 align. (1) of the Law No. 287/2009¹ on the Civil Code, privileged collaterals are part of the second class of heirs, together with privileged ascendants. Thus, the new Civil Code also provides for a mixed second class of heirs comprising relatives of different lines and degrees. Practically, privileged collaterals - represented by the deceased’s brothers and sisters and their descendants - constitute collateral relatives of II-IV degree [art. 967 align. (2) and art. 963 align. (2) of the new Civil Code], whereas privileged ascendants - represented by the deceased’s parents [art. 976 align. (1) of the new Civil Code] - represent I degree relatives on a direct upward line. This description is also provided by the current valid Civil Code which at art. 671 describes the constituency of the subclass made up of privileged collaterals.

Judging by the principle according to which relatives are entitled to the inheritance in accordance with the order of heir classes, principle which the new Civil Code also considers as one of those which govern the legal transmission of the inheritance, the II class relatives enjoy hereditary rights only if:

- a) the deceased person has no descendants at all;
- b) the deceased person has descendants but they gave up at the inheritance;
- c) the deceased person has descendants but they are not inheritance worthy;

¹ Art. 2664 align. (1) states that the “Current Civil Code shall become effective at the date provided by the law for its enforcement”. According to the provisions of align. (2) of the same legal text “Within 12 months from the publication of the current Civil Code, the Government shall submit for approval to the Parliament the bill for the enforcement of the Civil Code”.

d) the deceased person has descendants but they were disinherited, thus having access only to the legal hereditary stock, whereas the rest of the inheritance goes to the II class heirs.

Judging by the same principle mentioned above, the presence of the II class heirs removes from the inheritance the heirs belonging to subsequent classes (III and IV).

2. Definition

Privileged collaterals are called like this as a result of the fact that they remove from the inheritance the other collaterals called *ordinary collaterals*, who are represented by uncles, aunts, cousins-german, brothers or sisters of the deceased person's grandparents.

According to the provisions of art. 976 align. (2) of the new Civil Code, privileged collaterals belong to the following categories of relatives:

- a) brothers and sisters of the deceased person - II degree relatives;
- b) children of the deceased person's brothers and sisters – III degree relatives;
- c) grandchildren of the deceased person's brothers and sisters – IV degree relatives.

Therefore, within the succession field, the new regulations have the considerable advantage of limiting hereditary rights enjoyed by collateral relatives to the fourth degree included.

At the opposite pole, the current Civil Code points out at art. 672 that privileged collaterals are represented by brothers, sisters or their descendants, but makes no reference in respect to their degree of relation. Still, it may be observed that at another article – 676 – the same Civil Code states that relatives succeed until the twelfth degree included. Yet, this legal text was abrogated by the provisions of the Law of 28th June 1921 regarding the progressive tax on succession, according to which (art. 4) hereditary rights enjoyed by collateral relatives were limited to the fourth degree included. At the same time, this limitation principle is also present within Law No. 319/1944 on hereditary rights enjoyed by the surviving spouse. In conclusion, it is not the current Civil Code the one which limits hereditary rights enjoyed by collateral relatives of the deceased person to the IV degree included, but a special law, an inconvenient which has been luckily removed by the complete provisions of the new Civil Code.

The class of collateral heirs succeeding the deceased person includes the following categories of siblings:

- a) natural brothers and sisters, having the same mother and father and resulting from the same marriage;
- b) uterine brothers and sisters, having the same mother but different fathers, or consanguine brothers and sisters, having the same father but different mothers, being the issue of different marriages or coming from outside marriage;
- c) foster brothers and sisters.

Even if, according to art. 451 and art. 470 align. (2) of the new Civil Code², adoption determines relations of a degree not only between the adopted child and the adopting parent but also between the adopted child and the adopting parent's family, there being put an end to the relations of a degree between the adopted child and his natural family, it is still important, from a practical point of view, to make a distinction between the juridical consequences of the adoption with full effects and those of the adoption with limited effects - forms regulated prior to 1997³, given the fact that the persons adopted according to the provisions of Law No. 11/1990 on the approval of adoption preserve one of the two statutes mentioned above until they die. Thus, it is being applied the principle *tempus regit actum*.

² A similar juridical regime is also provided by the current legislation within the field, that is by Law No. 273/2004 on the juridical regime of adoption.

³ The G.E.O. No. 25/1997 on adoption, approved and modified with Law No. 87/1998, represents the normative act which regulated an unique adoption form. Until that time, adoption could be performed both with limited and full effects.

As a consequence, only brothers and sisters resulted from the adoption with full effects enjoy hereditary rights, since this is the only case when there are being established relation of a degree both with the adopting parent and his family. For instance: two parents have three biological children resulted from their marriage and adopt a fourth one, with limited effects; one of the three biological children dies; the persons entitled to the inheritance of the dead child are his parents together with his natural siblings, but not also his foster brother or sister, given the fact that the latter, through the adoption with limited effects, became only a relative of the adopting parents and not also of their biological children. Similarly, if the child adopted with limited effects died, his inheritance would go both to his biological and adopting parents, but not also to the latter's three children.

At the same time, the child adopted with limited affects will be entitled to the inheritance of his natural brothers and sisters just as they will be entitled to his inheritance.

All these rules apply as well for the descendants of brothers or sisters, when the adoption with limited effects is performed by the deceased person's brother or sister or by his/her children. For example, the deceased person has nephews who were adopted by his brother with limited effects; these nephews enjoy no hereditary rights to the inheritance of the deceased person given the fact that, through the adoption with limited effects, there was not established any relation of a degree between the adopted nephews and the deceased person – their uncle.

In practice, there may also be the case when the adopting parent adopts several children. They enjoy different hereditary rights, in relation to the adoption type, such as follows:

- if all the adoptions were performed with full effects, then the adopted brothers will be able to inherit one another, having become relatives through the effect of the adoption;
- if all the adoptions were performed with limited effects, then the adopted brothers will not be able to inherit one another, given the fact that they did not become relatives. But by exception, even if they were adopted with limited effects, the adopted children will be able to inherit their natural siblings;
- if adoptions are different in respect to their effects, then the adopted children do not inherit one another⁴.

Similarly, it may also happen that the biological parents of the child given for adoption adopt other children. Thus, their biological child given for adoption will be able to inherit only the fortune of the children adopted with full effects.

d) brothers or sisters/collaterals resulted from assisted human reproduction with a third person – the donor.

In an advanced manner, the new Civil Code regulates, through its art. from 441 to 447, the issues concerning assisted human reproduction with a third person – the donor, given the fact that this aspect is important also within the succession field, by generating relations of a degree between the parents and the child and, consequently, mutual hereditary rights. According to the provisions of art. 446 of the new Civil Code, “The father enjoys the same rights and duties both in regard to the child resulted from assisted human reproduction with a third person – the donor and the child resulted from natural conception”. What is more, all these rights and duties apply as well for the mother, but the lawmaker did not even think it was necessary to restate it. As a consequence, according to the new Civil Code, the child resulted from assisted human reproduction with a third person – the donor is assimilated to a biological child.

⁴ See for justification D. Macovei, *Drept civil. Succesiuni*, „Chemarea” Publ. House, Iași, 1993, p. 47. Specialized literature has also provided for a contrary solution that we nonetheless do not we agree with. According to this solution, children adopted with full effects are entitled to the inheritance of the children adopted with limited effects, since they become relatives of the adopting parent, including the children adopted by the same parent with limited effects. For that purpose, see M. Eliescu, *Moștenirea și devoluțiunea ei în dreptul R.S.R.*, Academiei Publ. House, Bucharest, 1966, p. 124.

Moreover, at art. 441 align. (1), the new Civil Code clearly states that “assisted human reproduction with a third person – the donor determines no relation of a degree between the child and the donor”.

Consequently, when the person resulted from assisted human reproduction dies, his inheritance goes to his privileged collaterals, that is to the other children of his parents who agreed, according to the law, to this method of conception. On the other side, the donor’s children enjoy no hereditary rights for that matter. It may also happen the other way round and the fortune of a deceased person go to his collaterals - brothers, nephews or nieces, grandnephews or grandnieces resulted from assisted human reproduction with a third person – the donor. According to the new Civil Code, children resulted by means of such a method become relatives of the husband of their mother who agreed to it, but also of the relatives of their mother, acquiring hereditary rights in relation to them.

In our opinion, the provisions of the new regulations on civil matters are necessary and welcomed, given the fact that the method involving human assisted reproduction with a third person is also being resorted to in Romania, undoubtedly requiring a legal background to enshrine the relations of a degree which are established between the parents resorting to assisted human reproduction and the child resulted, but also between the latter and his parents’ other relatives. At the same time, we consider correct the solution adopted by the lawmaker when clearly stating that there are established no relations of a degree between the donor and the child resulted from assisted human reproduction, let alone between that child and the donor’s relatives.

3. The division of inheritance between privileged collaterals and between the latter and privileged ascendants

When it comes to the division of inheritance between privileged collaterals, the new Civil Code makes a distinction between the following hypotheses:

A) privileged collaterals come to inheritance in competition with the deceased’s surviving spouse and privileged ascendants.

In regard to the II class of heirs, the new Civil Code provides for an exception from the principle regarding the proximity of the degree of relation, so that privileged collaterals, albeit II-IV grade relatives, are not removed from the inheritance by privileged ascendants who are I degree relatives. Neither is the surviving spouse of the deceased person who, albeit not a relative of the latter, comes to the inheritance in competition with any of the heir classes [art. 971 align. (1)].

If privileged collaterals come to inheritance in competition both with the surviving spouse and privileged ascendants, in order to establish the quota to which each of them is entitled, there must be met the following two phases:

a) determining the quota enjoyed by the II class, in competition with the surviving spouse;

According to art. 977 align. (1) of the new Civil Code, “if the surviving spouse comes to inheritance in competition both with the deceased’s privileged ascendants and privileged collaterals, the quota to which the II class is entitled amounts to two thirds of the inheritance”. Thus, after going through this phase, it can be known only the quota going to the II class as a whole, in competition with the surviving spouse. Consequently, it is necessary to go also through the second phase, in order to determine the quota to which privileged collaterals are exclusively entitled.

b) determining, within the II class, the quota enjoyed by privileged collaterals.

According to the provisions of art. 978 of the new Civil Code, the quota to which privileged collaterals are entitled varies according to the number of privileged ascendants with whom they compete, such as follows:

- if only one parent comes to the inheritance, he will obtain $\frac{1}{4}$ of the latter, whereas the rest of $\frac{3}{4}$ will go to privileged collaterals, irrespective of their number;

- if both parents come to the inheritance, they will obtain together $\frac{1}{2}$ of the latter, whereas privileged collaterals, irrespective of their number, will get the other half.

Nonetheless, it must be stressed the fact that these quotas shall be limited to $\frac{2}{3}$ of the inheritance, given the fact that, in the case that we have taken into account, privileged collaterals have also to deal with the presence of the deceased's surviving spouse who receives $\frac{1}{3}$.

To understand better the way in which the deceased person's inheritance is divided, let us give the following example: a person dies and his inheritance must be divided between his surviving spouse, two parents and three natural siblings. In such case, the surviving spouse shall receive $\frac{1}{3}$ of the inheritance, the two parents shall also receive $\frac{1}{3}$ of the inheritance, that is $\frac{1}{6}$ for each of them, whereas the three siblings will receive the rest of $\frac{1}{3}$, that is $\frac{1}{9}$ for each of them.

It can be thus noticed that the new regulations on hereditary matters provide for the same quotas as the current Civil Code, having the first and foremost advantage of regulating together the hereditary rights enjoyed by the deceased's relatives and surviving spouse. As a consequence, the new Civil Code offers a clear view on how the deceased's inheritance is being divided⁵.

B) privileged collaterals come to inheritance only in competition with the deceased's surviving spouse, case in which they will receive a quota amounting to $\frac{1}{2}$ of the inheritance [art. 977 align. (2) of the new Civil Code].

C) privileged collaterals come to inheritance only in competition with privileged ascendants, case in which the inheritance shall be divided, according to art. 978 of the new Civil Code, such as follows:

- if only one parent of the deceased enjoys hereditary rights, he will receive $\frac{1}{4}$ of the inheritance, the rest of $\frac{3}{4}$ going to privileged collaterals, irrespective of their number;

- if both parents of the deceased enjoys hereditary rights, they will receive $\frac{1}{2}$ of the inheritance, the other half going to privileged collaterals, irrespective of their number. The quota enjoyed by privileged collaterals cannot be influenced under any circumstances by the presence of three or four privileged ascendants, since the latter, no matter their number, will receive the same quota equal to $\frac{1}{2}$.

D) privileged collaterals come to inheritance alone, case in which they will obtain the entire inheritance.

The quota of inheritance to which privileged collaterals are entitled is, in all cases, divided equally between the heirs of the same degree [art. 981 align. (1) of the new Civil Code]. Yet, this rule has two exceptions:

a) if the descendants of the deceased's brothers and sisters come to the inheritance through representation, the division of the inheritance shall be performed on braches [art. 981 align. (2) of the new Civil Code];

b) if at the inheritance of the deceased person come both natural siblings and uterine or consanguine brothers or sisters, the division of the inheritance shall be performed on lines [art. 981 align. (3) of the new Civil Code].

Natural siblings are those who have the same mother and father, no matter if they are the result of the same or different marriages, if they come from outside marriage or from an adoption with full effects approved by both parents.

⁵ Given the fact that the provisions of the Civil Code of 1864 regarding hereditary rights enjoyed by the surviving spouse have been abrogated, this matter being currently regulated by Law No. 319/1944, it is necessary, in order to determine the quotas received by the persons who enjoy concrete hereditary rights to the deceased's inheritance, to take into account both the provisions of the first normative act mentioned above, regarding hereditary rights enjoyed by the deceased's relatives, and the second, regarding hereditary rights enjoyed by the surviving spouse.

Uterine brothers are those who have the same mother, no matter if they are the result of the same or different marriages, if they come from outside marriage or from an adoption with full effects approved only by their mother.

Consanguine brothers are those who have the same father, no matter if they are the result of the same or different marriages, if they come from outside marriage or from an adoption with full effects performed only by their father.

In this case the quota enjoyed by privileged collaterals is divided in two equal lines: *dimidia maternis* and *dimidia paternis*. The maternal line shall be divided between uterine brothers, whereas the paternal line shall be divided between consanguine brothers. Natural brothers shall benefit both from the line *dimidia maternis* and the line *dimidia paternis*, since they share a double bound [art. 981 align. (4) of the new Civil Code].

The division on lines is required, together with the division on branches, when the deceased's brothers or sisters – either natural, uterine or consanguine – are represented. Moreover, the division on lines is also required when at the deceased's inheritance come, on their own, only his nephews/nieces or grandnephews/grandnieces – children of his brothers or sisters (natural, uterine or consanguine). This case is possible if the deceased's brothers or sisters belonging to several lines give up at the inheritance or are not inheritance worthy.

In order to perform the division on lines, it is necessary for the deceased's brothers or sisters to belong to different lines, being of no importance whether their descendants come from different marriages or whether the deceased has privileged ascendants and/or surviving spouse at the opening of the inheritance.

But if the deceased person has brothers or sisters belonging to one and the same the line, then they will obtain the whole quota of privileged collaterals.

An example of division on lines: at the opening of the inheritance, the deceased has 2 natural parents and 6 brothers (2 uterine, 3 consanguine and one natural). The inheritance shall be divided such as follows:

- a) parents will receive $\frac{1}{2}$ of the inheritance
- b) the rest of $\frac{1}{2}$, representing the quota of privileged collaterals, shall be divided in two equal parts ($\frac{1}{4}$ each), since the deceased person has brothers on several lines;
- c) *dimidia maternis* shall be divided in three equal lines ($\frac{1}{12}$ each), since the deceased person has one natural and two uterine brothers;
- d) *dimidia paternis* shall be divided in four equal lines ($\frac{1}{16}$ each), since the deceased person has one natural and three consanguine brothers;
- e) thus, the natural brother has obtained two lines, one from his mother (of $\frac{1}{12}$) and one from his father (of $\frac{1}{16}$), given the fact that he shares a double bound with the deceased person.

It can be therefore noticed that the equality principle between relatives having the same degree is applied only inside lines.

At the same time, it may be added another possibility to the example given above, in order to demonstrate better the representation in regard to brothers or sisters belonging to different lines. Thus, we may assume that one of the uterine brothers and one of the consanguine brothers of the deceased person are dead at the opening of the inheritance. What is more, the deceased person has three nephews from his uterine brother who died before him and two nephews from his consanguine brother who died before him. These nephews, who are representatives of their ascendants, shall receive the latter's part such as follows:

- a) the three nephews from the dead uterine brother shall obtain together the quota of $\frac{1}{12}$, so that each of them will get $\frac{1}{36}$ of the inheritance;
- b) the two nephews from the dead consanguine brother shall obtain together the quota of $\frac{1}{16}$, so that each of them will get $\frac{1}{32}$ of the inheritance.

After analysing the way provided by the new Civil Code in regard to the division of the deceased's inheritance between his privileged collaterals, it can be clearly seen that the new regulations are based on the same principles and ratios provided by the current Civil Code. Thus, we consider that the choices made by the new Civil Code are natural and inspired.

4. Juridical features of hereditary rights enjoyed by privileged collaterals

Hereditary rights enjoyed by privileged collaterals evince the following juridical features:

- privileged collaterals can receive the inheritance both on their own and through representation;
- privileged collaterals enjoy no hereditary stock;
- privileged collaterals become seisine heirs only in the absence of the surviving spouse, descendants and privileged ascendants of the deceased person [art. 1126 align. (1) of the new Civil Code].

This would be the novelty brought by the new Civil Code in relation to the juridical features which govern hereditary rights enjoyed by privileged collaterals. At the same time, we consider just the solutions offered by the new regulations, given the fact that privileged collaterals benefit from seisine only in the absence of the heirs belonging to closer classes and degrees.

- privileged collaterals are not bound to report donations.

5. Conclusions

To conclude, we would like to state that the new Civil Code ensures a just and complete regulation in relation to the field of hereditary rights enjoyed by privileged collaterals but not only, reflecting at the same time the new social reality, bringing specialized language up to date, preserving the correct principles provided by the current Civil Code and operating the necessary additions. As a consequence, all the issues debated within the present work have been successfully regulated by Law No. 287/2009 on the Civil Code.

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