

The Coexistence of the Legal Inheritance with the Testamentary Inheritance

PhD. student Denise Cătălina MARTALOG¹

Abstract

The research surprises the cases and the conditions in which the legal inheritance coexists with the testamentary inheritance. In the period of the old roman law the testamentary inheritance was priority, because the gratified successor through the will for a part of the inheritance was extending the vocation for a part of the inheritance of which *de cujus* didn't dispose of. In the actual legislation, the legal inheritance coexists with the testamentary inheritance in some cases, so that a part of the inheritance is sent to the gratified one based on the will and the other part is sent to the legal heir through the virtue of the law. The cases in which the inheritance can be legal or testamentary are different, because the sping of the successoral vocation is the law or the will of the one who lets his fortune (*de cujus*). Therefore, the two types of inheritance can exist at the same time not only when the deceased disposes of a part of his fortune by will, but also when the will contains legates which consume the full successoral mass. The coexistence of the two forms of inheritance represents the result of the bound between the freedom of the will with the instituted protection by law of the mandatory heir.

Keywords: legal inheritance, testamentary inheritance, coexistence, the freedom of the will.

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1. Introduction

In the old roman law, the succession was testamentary (*intestat*), legal (*ab intestat*) and opposed to the testamentary one.² The right to establish a heir through a will – the final willing act of the deceased was considered in the roman law one of the main rights of the citizen.

The right to appropriate land or rights to heirs was referred to by the Law of the 12 tablets which was granting to *pater familias* the freedom to dispose of his fortune as: *pater familias, uti legassit super pecunia tutelave suo rei, ita ius esto*.³

The legal inheritance was subsidiary to the testamentary inheritance, because it was opened only when the deceased didn't let a will.

The testamentary inheritance was preferred to the legal inheritance, because every time there was a will through *de cujus* was manifesting his gratifying will, so many times it was used that interpretation in the favour of the will⁴, and the heir which was inherited with a part of the succession by will, was considered having vocation for the whole succession according to the rule: *nemo proparte testatus, proparte intestatus decedere potest*.⁵ Therefore, the vocation of the testamentary heir was not only admitted to a part of the succession and for the other to be considered legal heir, because given the fact that any vocation was applying to the whole succession, so the right of the heir was applying to the part of the free succession.

¹ Denise Cătălina Martalog - Doctoral School of Law, Bucharest University of Economic Studies, Romania, denisemartalog@yahoo.com.

² The counter testamentary succession was a transmission of the inheritance which, in the conditions of an existing will, it will be made in another way than the one foresaw by the deceased, see T. Sambrian, *Roman Law*, Ed. Helios, Craiova, 2001, p. 195.

³ *What the head of the family statuated through the will, for the goods and the authority for his children, to be as a law-* see D. Alexandresco, *The Principels of the Romanian law*, Bucharest 1926, p. 443.

⁴ I.C. Cătuneanu, *Elementary Roman law course*, Ed. Cartea Românească, 1927, Cluj-București, p. 496.

⁵ *Ibid.*

The right acquired by the testamentary heir could only be limited by the existence of other heirs, and as they disappeared, the living heir's vocation was extended to the vacant succession, according to the principle of accretion. The heir established over the entire inheritance was called *heres ex asse*.⁶ According to the article 953 (Civil Code), the inheritance is the submission of the heritage to a deceased natural person to one or many other persons alive.⁷

The Civil Code⁸ provides for one of the ways of gaining a property is through legal or testamentary will. Also, from the article 955 Civil Code⁹, we understand that the inheritance can take 2 forms: legal¹⁰ or testamentary¹¹. Therefore, depending on the successoral vocation of the heirs of the deceased person, the inheritance can be legal or testamentary.

The inheritance is legal¹² when:

- the transmission of *de cuius* ' succession takes place in the virtue of the law to the persons, in the order and the odds determined by the law. So, the inheritance is legal when the deceased didn't dispose through a will for the cause of death or the manifestation of the will doesn't produce effects totally or partially. The fundament of the legal inheritance is family connection between the deceased and the ones inherited for the succession or the status of husband or wife of the *de cuius* and the surviving husband or wife at the moment of death.

- although the deceased let a will, the will didn't have depositions regarding the transmission of the succession, but other depositions, as for example: depositions regarding funerals, choosing a testamentary executor, depositions regarding the removal of a mandatory heir etc. Referring to the last example, if the disinherited is a mandatory heir, he will get the successoral reserve as a legal heir, and the quantity available will be offered by the virtue of the other heir's law which benefit from the succession.

- although the deceased let a will, it is useless. As for example, we have the situation in which the deceased lets a part of the succession through a universal legate to a person. The legate is an act concluded *intuitu personae*, and if the legate precedes to the disposal, the legate becomes obsolete.

- although the deceased let a will, the heirs doesn't accept the succession.

So, the inheritance is legal, regarding the fact that the succession is distributed to the persons in the odds and in the order statuated by the law. The legal inheritance carries the name of the inheritance *ab intestat* (without a will). Although the mentioned cases previously had situations in which the deceased let a will, though the will doesn't produces the effects, regarding the valid transmission of the succession through the will, the inheritance is also *ab intestat*.

The inheritance is exclusively¹³ by will in the case when the legates made by the deceased are covering the whole successoral mass and aren't existing mandatory heirs. The persons chosen to receive the inheritance are named legates. The legates can be universal (have vocation to the whole inheritance), with universal title (have vocation to a part of the inheritance), with universal title (have vocation to an individual good determined by the will).¹⁴

⁶ Although the name was attributed to the old amber coin weighing 327 grams which was named *pondo*, this was meaning the hole fortune of a person, cf. I.C.Catuneanu, *op.cit.*, p. 513, 3rd note.

⁷ In this case, look up F. Deak, R. Popescu, *Succession law Treaty*, 1st volume, legal inheritance, 3rd edition updated and completed, Ed. Universul Juridic, Bucharest, 2013, p. 19; I. Dogaru (coord.), *Civil Law: Successions*, Ed. All Back, Bucharest, 2003, p. 13

⁸ Art. 557 line (1) Civil Code foresees: „(1) The property right can be obtained, according to the law, by a convention, legal or testamentary inheritance, , access, prescription, as an effect of the good-will possession, in the cases of mobile goods or products, through occupation, tradition, as through judiciary term, when it is possible to be sent for property through itself”.

⁹ Art. 955 Civil Code foresees: „(1) The deceased's fortune is translated through legal inheritance, as long as the one that gives the fortune didn't change his mind. (2) A part of the deceased's fortune can be offered through testamentary inheritance, and the other part through legal inheritance.”

¹⁰ D. Chirică, *Civil Law Treaty. Successions and liberalities*, 2nd edition, Ed. Hamangiu, 2017, p. 3.

¹¹ *Ibid.*

¹² I. Dogaru (coord.), *op. cit.*, p. 22; F. Deak, R. Popescu, *op.cit.*, p. 23-24; S.D. Cărpănu, *Civil law. The rights of intellectual creation and the successions*, Ed. Didactică și Pedagogică, Bucharest, 1971, p. 154.

¹³ I. Dogaru (coord.), *op. cit.*, p. 22; F. Deak, R. Popescu, *op. cit.*, p. 24; S.D. Cărpănu, *op. cit.*, p. 154.

¹⁴ F. Deak, R. Popescu, *op. cit.*, p. 20.

2. The coexistence of the legal inheritance with the testamentary inheritance

As i presented previously, in our law, the transmission can operate in the virtue of the law, in which case the inheritance is legal or in the virtue of the desire of the deceased, in which case the inheritance is testamentary. Regarding the article number 955, the second line, The Civil Code, there can be situations in which the two inheriting parts coexist, which means that a part of the succession to be distributed according to the law, and the other part according to the will let by the deceased. Mostly when the deceased makes a will, the 2 types of inheritance coexist if he didn't dispose of his whole fortune, no matter is there are or there are not mandatory heirs, or because even if he disposed of the whole fortune, there are mandatory heirs¹⁵.

I. The author of the won't have the whole fortune and doesn't let mandatory heirs. As for an example, in the presence of a brother and a grandpa, the deceased decides that half of his fortune to be given to third party „X”. In these conditions, given the fact that the brother and the grandpa of the deceased are not mandatory heirs¹⁶, the third party „X” will gain half of the fortune according to the will, and for the other half, it will apply the rules of the legal inheritance. The brother, second class privileged collateral, removes from the inheritance the deceased's grandpa, third class ordinary ascendant of legal inheritors, on the basis of the principle of coming to the inheritance in the classes order, collecting in the virtue of the law¹⁷, half of the remained fortune.

II. The author of the won't have the whole fortune and leaves mandatory heirs. As for an example, in the presence of the sole son, the deceased disposes a legate with universal title of 1/3 of the succession. Indirectly, the deceased partially disinherits his child. But the article 1087 from The Civil Code states that the descendants are mandatory heirs, they receive the mandatory heritage. The mandatory heritage is according to the article number 1088 from The Civil Code: „... half of the heritage odd which, in the absence of the liberalities and disinherits, would have been possessed by the mandatory heir”. The reserve of the child will be half of the fortune¹⁸, and the other half represents an available part. As the value of the will is smaller than the available part of the heritage, they will be executed, and the part which remains after the will's execution from the whole successoral mass will be, according to the rules, to the child.

But, if in the same example, according to the will, the third party will inherit 3/4 of the fortune, the inheritance would be bigger than the whole quantity available of the fortune, and as a consequence, it wouldn't be possible to be executed. In this situation, the fortune will be reduced at the value of the available quantity. The deceased's child will get the mandatory inheritance of 1/2 according to the law, and the third party will get only 1/2 as he initially would have inherited 3/4.

III. The author of the will has the whole fortune and leaves mandatory heirs. As for example, in the presence of the parents and brothers, the deceased leaves all his fortune to third party „X”. The deceased's parents are mandatory heirs and it's compulsory to be given the mandatory successoral reserve. So, the parents will get 1/4, half of 1/2, that would have inherited alongside with the privileged collaterals (article 978, point b, The Civil Code), and the available quantity of the fortune will be 3/4.¹⁹

¹⁵ For a comparative international view see Ciara Breathnach, *An exploration of testamentary behaviour in twentieth-century Ireland*, in „The History of the Family”, 14:3, 2009, pp. 309-322, DOI: 10.1016/j.hisfam.2009.08.001; Chi-Leung Lam, Bonnie W. M. Siu & Victor C. K. Yau, *Advancement in the medicolegal requirement for testamentary capacity assessment in older adults: the dilemmas in Hong Kong*, „Psychiatry, Psychology and Law”, 29:4, 2022, pp.563-576, DOI: 10.1080/13218719.2021.1956381.

¹⁶ Art. 1087 Civil Code foresees: „Are mandatory heirs the surviving husband or wife, the privileged descendants or successors of the deceased.”

¹⁷ Art. 964 line (1) Civil Code foresees: „The relatives of the deceased come at the inheritance in the next order: a) first class: descendants; b) second class: privileged descendants and successors; c) third class: ordinary ascendants; d) fourth class: ordinary collaterals.”

¹⁸ Given the fact that in the absence of the liberalities, the child would have got the whole fortune, his reserve is half of the whole fortune, 1/2.

¹⁹ See some comparative details on the last three examples: a comprehensive view in Kenneth G. C. Reid, Marius J. de Waal and Reinhard Zimmermann (eds.), *Comparative Succession Law: Volume I: Testamentary Formalities*, Oxford, 2011, online edn, Oxford Academic, 19 Jan. 2012, pp. <https://doi.org/10.1093/acprof:oso/9780199696802.001.0001>, accessed 10 March 2024; Alexandra Braun, *Claiming a Promised Inheritance: A Comparative Study*. Oxford University Press, 2022, pp. 23-58; Egzone Osmanaj, *Restriction of*

3. Conclusion

In conclusion, the coexistence of the legal inheritance with the testamentary inheritance represents the result of the testamentary freedom, which is recognized by the law to every individual, which has the ability to let a will (freedom which can be proven in wills that don't cover the whole successoral mass), as of the idea of protection for close relatives and of the surviving husband of the deceased, which was stated by offering a successoral reserve in their favour.

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