CONSIDERATIONS REGARDING THE SPECIFIC RIGHT TO INHERIT OF THE RELATIVES OF THE DECEASED IN LEGAL PRACTICE

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Abstract: *Usually,the succession is based on the principle of ties of blood between the persons in the same family. Not all the relatives of the deceased, no matter their degree, are called to receive an inheritance, because if they are called to receive an inheritance in an indefinite way and at the same time it would lead to an excessive partition of the inherited patrimony, fact which is not desired. In order to know the relatives who have the right to inherit the de cujus, the legislator uses two points of reference in order to establish the persons called to receive an inheritance, namely: the order of heirs and the degree of relationship between the deceased and the heirs. That is why, from the persons with legal rights, the legislator has established a certain specific order to call to receive an inheritance based on three general principles, each of them having some exceptions. Thus, the legislator has created four orders of heirs, establishing between them a priority sequence, according to their degree of kinship to the deceased. As we have previously mentioned, in the Civil Code the relatives of de cujus are classified in four orders of heirs, they being called to receive an inheritance in a pre-established sequence. Thus, if there is a single heir in the first order of heirs, who did not waive the inheritance and who has not been disqualified by conduct, he or she excludes from the succession the heirs in the subsequent orders. The heirs in the second order are called to receive the inheritance only if there are no relatives in the first order or if they have waived the succession or have been disqualified by conduct, the ones in the third order only if there are no heirs in the first two orders and so on. In the case there are heirs from different orders, in order to effectively call to receive an inheritance it is essential to establish the sequence of orders, and not their degree of relationship to the deceased. When we talk about the right to inherit of the relatives of the deceased as a necessary condition of the right to inherit, we must analyse it from two points of view, namely: the general right to inherit and the specific right to inherit. Thus, for a person to be effectively called to receive an inheritance, therefore to have a specific legal right, it is not enough for them to be included in the category of legal heirs, with general rights, but they also must meet a negative condition, namely they must not be excluded from the inheritance by another person called by the law in a priority order. We must take into consideration the fact that the right to inherit as an abstract fitness, becomes potential by the general right to inherit and effective, useful, by the specific right.*
Keywords: *succession, general right to inherit, specific right to inherit, order of heirs, time frame of the right to accept or waive a succession, waiver of inheritance, acceptance of inheritance, request of main voluntary intervention, intervenors.*

The idea to elaborate the present paper was suggested to us by the hearing of a complex dispute regarding inheritance, which involves several specialized debates, dispute solved by Lugoj Court in the Case no. 1469/252/2019, whose hearing began on September 19th, 2019 and ended on November 19th, 2021 (a period of 2 years and 2 months) and during which, among many other aspects of material and procedural law, the idea of the specific right to inherit of the relatives of the deceased was also raised. Through the present approach we thought we can have a much clearer representation of a legal issue the present dispute arises when we analyse it not only from the theoretical point of view, but we can also take into consideration the way it is represented from practical, jurisprudential

approach. The dispute we refer to had as an object the inheritance debate of two successive successions, apparently nothing complicated.

It is known the fact that successions are debated in order the deaths take place.

At the first succession after the deceased B.I. the surviving wife B.D. and the son of the deceased from a previous relationship I.E. had specific rights to inherit. Evidence was submitted, from documents and witnesses, that the surviving wife of the deceased B.D. expressed the right to accept or waive a succession within the legal time frame of 6 months, expressly accepting the succession (because the succession was to be debated under the old Civil Code from 1864, taking into consideration the year 2000 as the date of death of the deceased). The son of the deceased, in capacity of descendant, although legally subpoenaed in this case, did not present himself at any hearing and did not formulate any defence in writing. The second succession was debated for the deceased B.D. (born S) who died in 2014, this one being the surviving wife of the first de cujus. There were her parents who had specific rights to inherit , respectively her mother Ș.A. (the plaintiff in dispute), and the father of the deceased S.I. (deceased at the date the dispute took place) in capacity of privileged ascendants and Ș.R. in capacity of nephew of the predeceased brother, respectively privileged collateral relative, who participated in the succession of their aunt by representing his father. This succession was debated according to the present Civil Code because the death took place in the year 2014. Evidence was also submitted regarding this succesoral debate, respectively documents and testimonial evidence with witnesses. After submitting the evidence, it was proved that the heirs of the deceased B.D. (born S) accepted within the legal time frame of a year the succession left after her, making documents of tacit acceptance.

As we have previously mentioned, the defendant I.E. (the son of the first deceased B.I.) was not present at any hearing, and the conclusions of the plaintiff Ș.A. were to admit the action as it was formulated, by requiring:

1. to consider open the succession of the deceased B.I., who died on June 15th, 2000, whose estate is made of: - ½ of the real estate situated in Lugoj ……, registered in the Land Registry ……. topographical number ……..;

- to certify that B.D. (in capacity of surviving wife) who died on October 6th, 2014 is the only consenting legal heir of the deceased B.I., expressely accepting the succession within the legal time frame of 6 months according to the expressed acceptance declaration from the file;

2. – to consider open the succession of the deceased B.D. (born Ș) who died on October 6th, 2014 in Lugoj …… whose estate is made of: - the real estate situated in Lugoj ……. registered in the Land Registry ……. topographical number ……..; to notice that the only consenting legal heirs of the deceased B.D. (born Ș) who died on October 6th, 2014, are: the plaintiff Ș.A. and their husband Ș.I. (deceased at the moment) – the parents of the deceased, in capacity of privileged ascendants) in proportion of ½ (respectively ¼ each) and Ș.R., by representation (in capacity of nephew of the predeceased brother of the deceased – third degree privileged collateral relative) in proportion of ½, all three tacitly accepting the succession within the legal time frame of a year.

3. – to dispose the registration in favour of the plaintiff Ș.A. and their wife Ș.I. and the nephew Ș.R. the right of property regarding the real estate in Lugoj ……, registered in the Land Registry ……. Lugoj topographical number …….. with title of

succession, in proportion of ¼ on the name of the plaintiff Ș.A., ¼ on the name of his wife Ș.I. and ½ on the name of the nephew Ș.R.;

Following the submission of all evidence and the debate of the substance of the matter, on September 17th, 2019, the court postponed ruling, thus postponing the decision for October 31st, 2019. Being a relatively simple cause, which did not raise any special issues, the postponement was a little surprising. Until October 28th, 2019, respectively the term set for debating and ruling, the court registered a request of main voluntary intervention and at the same time a request to reinstate the case, requests drawn up by two sisters of the deceased B.I., from the first successoral debate, respectively B.A. and P.E. Following these requests, the court decided to reinstate the case in order to bring other evidence regarding the first request, regarding the relatives with the right to inherit the deceased B.I. andsubpoena the plaintiff in order to mention if after this deceased, there are also other relatives with the right to inherit, setting a date of trial on December 5th, 2019. Through the request of main voluntary intervention, the two sisters of the deceased B.I. required rights to inherit together with the surviving wife, claiming to have the specific right to inherit and that they tacitly accepted the succession after their brother within the legal time frame. Although through the statement of defence the plaintiff vehemently opposed the admission in principle of the request of main voluntary intervention, mentioning arguments based on norms of material law as well as procedural law, as well as jurisprudence, in the closure of June 23rd, 2020, the court admitted in principle the request of main voluntary intervention drawn up by the sisters of the first deceased B.I..

The main argument on which this solution was based was the fact that the court admitted that the two intervenors had specific right to inherit their brother. The court explains this solution in the sense that the specific right to inherit of the intervenors (the sisters of the deceased, strictly theoretically, in the context of supporting all parties regarding the consenting heirs), although it is not defined as a consequence of the fact that the defendant I.E. (the son of the deceased) waived his right to inherit, it must be recognised as a consequence of the fact that there is no acceptance form his part within the legal time frame of 6 months of the right to accept or waive a succession, regulated by article 700 (the old Civil Code). The court also acknowledges that the old Civil Code did not admit regarding succession to tacitly waive the inheritance and there is any presumption in this regard, the only expression of will regarding this waiver being those expressly expressed.

In the reasoning it is mentioned that the failure to exert the right to accept or waive a succession within the legal time frame has as a consequence the end of the right to inherit with retroactive effect, the heir becoming non-party to the inheritance. In fact, it is considered that by failing to exert the right to accept or waive a succession within the legal time frame has as a consequence the fact that the heir loses their right to inherit. The heir that did not exert the right to inherit thus cannot be assimilated to a genuine person who waived, the situations being similar but not identical. Unlike the person who waived the inheritance, the heir who did not exert their right to accept or waive a succession within the legal time frame, can, for example, be reinstated.

In conclusion, the court shows that the son of the deceased did not accept the succession within the legal frame time, fact which has as a consequence the end of the right to inherit with retroactive effect, the succession being debated between the surviving wife and the second order of heirs, respectively the two sisters of the deceased – the intervenors. We cannot admit such an approach and forwards we will explain our point of view

regarding the specific right of the intervenors, confirmed by the court. In these circumstances, for the beginning, we will briefly present the principle regarding the rights the relatives of the deceased have to inherit according to the order of heirs. The legal debate regarding succession means to effectively establish the persons who have the right to inherit according to legal provisions. It is based on the degree of relationship, which represents its essence. Usually, the transmission of succession is based on the principle of blood relation, which exists between the persons of the same family (S, 2012).

Article 405 paragraph 1 of the Civil Code states that the relationship represents the blood relation which is based on the descent of a person from another person, or on the fact that more persons have a common ascendant, and paragraph 2 of the same article states that civil relationship represents the relation which results from adoption in the circumstances provided by the law. Not all the relatives of the deceased, no matter their degree, are called to receive an inheritance, because if they are called to receive an inheritance in an indefinite way and at the same time it would lead to an excessive partition of the inherited patrimony, fact which is not desired. In order to know what relatives have the right to inherit de cujus, the legislator uses two points of reference in order to establish the persons called to receive an inheritance, namely: the order of heirs and the degree of relationship between the deceased and the heirs. That is why, from the persons with legal rights, the legislator has established a certain specific order to call to receive an inheritance based on three general principles, each of them having some exceptions. Thus, the legislator has created four orders of heirs, according to their degree of relationship to the deceased, establishing between them a priority sequence, and within each order, the specific right to inherit is also based on their degree of relationship, in the sense that the relatives with a closer degree exclude the ones with a more distant degree.

In the direct line, the relatives of de cujus are infinitely called to receive the inheritance, but in the collateral line, the legislator limits their rights up to the fourth degree inclusively (paragraph 1 of the Civil Code). The right to inherit de cujusthe relatives as well as the surviving spouse have is based on the interest to preserve the acquired goods, sometimes, even by successive generations within the same family, presuming the natural affection between the deceased and these persons decided by the legislator. Thus, according to the provisions of article 964 paragraph 2 of the Civil Code, legal inheritance is governed by three principles, but in the present paper we will refer only to the first principle, namely that of calling the relatives based on the orders of heirs.

As we have previously mentioned, in the Civil Code the relatives of de cujus are classified in four orders of heirs, they being called to receive an inheritance in a pre-established sequence. Thus, if there is a single heir in the first order of heirs, who did not waive the inheritance and who has not been disqualified by conduct, they exclude from the succession the heirs in the subsequent orders. The heirs in the second order are called to receive the inheritance only if there are no relatives in the first order or if they have waived the succession or have been disqualified by conduct, the ones in the third order only if there are no heirs in the first two orders and so on. In the case there are heirs from different orders, in order to effectively call to receive an inheritance it is essential the sequence of orders, and not their degree of relationship to the deceased. Thus, for example: the grandson of the deceased, second degree relative, heir from the first order, excludes from the inheritance the father of the deceased, heir from the second order, although they are relatives of first degree with the deceased.

When we draw up the legal succession (table) which includes all the deceased's heirs who have the right to inherit it is very important to establish correctly the quality of each heir in relation to the deceased (D et al. 2013). Regarding the previously mentioned principle, it is natural to ask oneself if it is however possible to call simultaneously two orders of heirs to receive an inheritance. It is possible to call simultaneously to receive an inheritance heirs from two orders of heirs only in the case of direct disinheritance through will of the heirs in a preferred order(paragraph 2 of the Civil Code). Also, article 964 paragraph 2 of the Civil Code states that "if following a disinheritance, the deceased's relatives in the closest order cannot receive all the inheritance, then the remaining part is assigned to the relatives in the subsequent order who meet the conditions to inherit". We welcome this legal text which expressly regulates the situation when two orders of legal heirs are called simultaneously to inherit, but only the case of direct disinheritance must be taken into consideration. As an example, we mention the case of disinheritance by will of forced heirs in a priority order (descendants of the deceased), who are entitled to a reserved portion, not being possible to be fully disinherited, while the heirs in the order subsequently called to receive the inheritance receive only the remaining of the succession (the available share) in their capacity of legal heirs of the deceased, and not of legatees.

This point of view which aims at simultaneously calling to receive an inheritance two orders of heirs is regarded with reservations by some authors (C, 2014) because the text of article 964 paragraph 2 of the Civil Code does not mention with what title the deceased's relatives in the subsequent order will inherit, thus not being possible to state that the legislator expressly mentioned that two orders of heirs may simultaneously be called to receive the legal inheritance of the deceased.

We mention that it is not only about a partial disinheritance, but also a direct one. This is a proper disinheritance. We consider that indirect disinheritance following some legacies in the favour of other persons has another meaning. It has the consequence of another type of inheritance, the testamentary one, which coexists with the legal inheritance or it even replaces it, if the object of the legacy or legacies refer to the entire estate. However these acts do not have the legal character of disinheritance acts. But, if there is no such manifestation of will, there is no disinheritance.

All relatives, due to the fact that the law includes them as potential heirs, have general rights. Regarding the surviving spouse, we consider that the legal base to inherit gives them a general right, with the specification that it is always doubled by the specific right. Indeed, the living spouse of de cujus is not excluded from inheritance by any relative with right to inherit, no matter the order of heirs they might be included. The surviving spouse participate in the succession together with any of the orders of heirs at law, thus, they don't have any priority compared to one or some of them.(G et al. 2018)

Nevertheless, when we talk about the right to inherit of the deceased's relatives as a necessary condition of the right to inherit, we must analyse it from two perspectives, namely general right to inherit and specific right to inherit. The right to inherit or the call to receive the inheritance is given to the successor either by the will of law, or the disposition of de cujus expressed by the will. The general right to inherit of the deceased's relatives does not mean that they could be called to receive an inheritance together with the surviving spouse all together and at the same time. Their right to inherit is a general one, potential one, certifying only their possibility to inherit. In order to receive the inheritance it is necessary to also meet a negative requirement, namely not to be excluded from the

inheritance by another successor, who has priority by order and degree. This condition is the essence of the specific right to inherit.

Therefore, the relatives of the deceased (the intervenors) in our case with a general right which cannot be contested, must also have a specific right in order to receive the inheritance. Correlating the general right with the specific right, it is to be noticed that not all relatives with general right also have specific right to inherit. The specific right to inherit is even more restrictive than the general right, because, it belongs only to the relatives of the deceased who are included in a priority order of heirs and degree. We also consider that the abstract right to inherit does not give the intervenors active procedural legitimacy in this case, because their succession right is subsidiary to the succession right of the descendant. Thus, for a person to be effectively called to receive an inheritance, therefore to have a specific legal rights, it is not enough for them to be included in the category of legal heirs, with general rights, but they also must meet a negative condition, namely they must not be excluded from the inheritance by another person called by the law in a priority order, who therefore has a specific, useful right, like the son of the deceased. Consequently, the siblings of the deceased who are included in the second order of legal heirs have general (potential) right to inherit, and to also have a specific (effective, useful) right to inherit, it is necessary for the deceased to not have any descendands, which are included in the first order of heirs (or if they are, they shouldn't be able to inherit because they have been disqualified by conduct, or because they do not wish to inherit, because they waived the inheritance), and who are called to inherit with priority by the law(D et al 2013).

The presence of even one single descendant, who is included in the first order of legal heirs (children, grandchildren, great-grandchildren of the deceased, without limit of degree), excludes from the inheritance those included in subsequent orders of heirs (respectively second, third, fourth orders of heirs).

In the case the deceased has no descendants or the existing ones cannot (because they have been disqualified by conduct or they have been disinherited, case in which they receive only the reserved share) or they do not want to inherit (expressly waiving its benefit), the law calls to receive the inheritance the relatives included in the second order of heirs. (Civil sentence no. 726/C dated September 9th, 2004)

If the descendant in direct line from the first order of heirs is alive, did not waive the inheritance and has not been disqualified by conduct, no other relative from another order of legal heirs cannot receive the inheritance left by the deceased. The defendant I.E., son of the deceased B.I. neither has been disqualified by conduct, nor waived the inheritance from their father, as it can be noticed in the certificate of the notary public submitted to the file. The inheritance waiver is a personal, solemn act and it must have an authentic form, therefore the defendant I.E. did not express their option in this sense, not making an express waiver regarding the succession after his father. The fact that he did not express his right to accept or waive a succession within the legal time frame can be considered neither tacit waiver of succession, nor presumption of waiver which is expressly regulated only in the present Civil code. The fact that he did not defend himself during the process and he did not express his procedural position cannot lead to the idea that the relatives from the subsequent order of heirs, respectively the sisters of the deceased, are entitled to be called to receive the inheritance, as long as the son participated in succession together with the surviving spouse of the deceased who, within the legal time frame,expressly accepted the succession.

We consider that the failure of the deceased's son to accept the succession within the legal time frame gives the surviving spouse, together with whom he participated in the succession, the right to receive the entire estate, the deceased's relatives from the subsequent order not being entitled to be called to receive the inheritance. Thus, in conclusion, the relatives from the second order of heirs may be called to receive the inheritance, only if there are no relatives in the first order or the existing ones cannot (because they have been disqualified by conduct) or they do not want (they waived the inheritance) to receive the inheritance. Thus, if the deceased's son with specific right to inherit, together with whom the surviving spouse participate in the succession, did not expressly waive the inheritance and has not been disqualified by conduct, but did not make the proof of accepting it within the legal time frame, the surviving spouse who expressly accepted the succession inherits the entire estate of the deceased. We must take into consideration the fact that the right to inherit as an abstract aptitude becomes potential by the general right to inherit and effective, useful, by the specific right to inherit, so that the intervenors cannot take advantage of a right which is not effective and useful as long as there is an heir in the first order, the son of the deceased.

Although the court admitted in principle the request of main voluntary intervention of the intervenors, on the merits of the case through the civil sentence no. 3710/2021 from November 19th, 2021, unpublished, Lugoj Court partly admitted the main request and rejected the request of main voluntary intervention without granting court costs to the plaintiff.(N et al. 2016) Unfortunately, not even up to this moment, the decision was not justified in order to see the arguments of the court regarding the solution.

Even in the case the intervenors who are not pleased by the decision would appeal, ordinary and devolutive appeal, and would request new proves, even if the court may approve other proves orremake or supplement the proves managed by the court of first instance, we consider that in this case all the proves required by the parties were administrated, especially by the intervenors, in a correct way and thus led to a legal solution. (N. et al. 2013). Because the case in point is complex and approaches several institutions of the succession law, after the justification of the decision we will come back with a new paper which aims at other interesting aspects with high incidence in legal practice, as for example the way in which the parties exerted or not,within the legal time frame, their right to accept or waive a succession.

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