The successor rights of the surviving spouse - correlation between the rights of the surviving spouse and the chosen matrimonial regime

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Abstract: The current paper aims to analyze the configuration of the right to inheritance of the surviving spouse, subsequent to the coming into force of the new Civil Code, especially from the perspective of the matrimonial regime chosen by the spouses, other than the legal one - the conventional community regime or the separation of goods regime. The successor rights of the surviving spouse presents certain particularities as opposed to the previous regulation stated in Law no 319/1944.

Keywords: surviving spouse; legal inheritance; matrimonial regime; successor capacity.

The notion and historical evolution of the successor right of the surviving spouse

In order to better understand the novelties brought by the Civil Code in regard to the successor rights of the surviving spouse, we will make a short historic presentation of the evolution of rights of the surviving spouse across time.

In the 1864 Civil Code, the rights of the surviving spouse were regulated in article 679 and articles 681- 684, but those legal texts were constantly believed to be inequitable as the surviving spouse could have collected the inheritance only after the last 12th degree collaterals, namely in the absence of any successors of the defunct from any of the four categories of successors.

The partial abolition of these texts occurred once Law no 3581 regarding the progressive tax on succession came into force in the year 1921, a time when the successor rights of the surviving spouse were acknowledged only after the final collateral of the fourth degree came to inherit.

In that legal configuration, certain successor rights were acknowledged for the poor widow who would benefit from a certain part of the life interest if the other heirs were the descendents of the defunct and only in the lack of, she could acquire 1/4 of the inheritance.

Later on, the rights of the surviving spouse were regulated by Law no 319/1944 for the right to inherit of the surviving spouse, a law which in turn, was abolishing the provision of the 1864 Civil Code, by creating a series of improvements in regard to the successor rights of the surviving spouse. Thus, through this law the right of the surviving spouse to inherit along with other legal heirs of the defunct was acknowledged; also, his right to the legal reserve and some special inheritance rights were acknowledged, such as the right to inherit the furniture and objects of the household, as well as the wedding gifts and the right to live in the couple’s home.

Once the new Civil Code came into force on October 1st, 2011, the successor rights of the surviving spouse were regulated by article 970-974 (Section I called The surviving spouse) from Chapter III - Legal heirs from the Second Title - Legal inheritance. We must notice that the lawmaker mainly kept the configuration of the successor rights of the surviving spouse regulated by Law no 319/1944 and incorporated it in the new Civil Code.

The current regulation of the successor rights was achieved before the successor rights of the other legal heirs from the four categories of heirs as the surviving spouse can co inherit along with any of those categories of heirs and because the part of the inheritance which is awarded to the surviving spouse is determined with priority as opposed to the other legal heirs.
1. Conditions stated by law in order for the surviving spouse to be able to inherit

For the surviving spouse to inherit from the defunct, along with the general conditions mandatory for any heirs, he must also fulfill a special condition, that of being the spouse of the defunct at the time of death of his spouse. As a consequence, the conditions stated by law for the surviving spouse are the following:

- to have successor capacity;
- to not be unworthy in regard to the defunct;
- to have the quality of heir;
- to have the quality of spouse at the date the inheritance procedures begin (the special condition mentioned above);

In this analytical context, we notice the fact that if in regard to the heirs from the four categories of legal heirs, the degree of relation to the defunct was considered, in regard to acknowledging the successor rights of the surviving spouse, it is connected to the quality of spouse at the time of death of the defunct. Although the marriage stops when one of the spouses dies, it may be even more accurate to state that, in this case, the rights of the surviving spouse are in close connection to the lack of any juridical decision to dissolve the marriage at the time de cuius dies. Thus, the text of article 970 of the Civil Code states that the surviving spouse inherits from the deceased spouse if, at the time the inheritance procedures begin, there is no final decision of divorce. The term of final court decision mentioned by the legal text implies both the jurisdictional act of the court and the final act of the public notary by which the marriage is dissolved, namely the certificate of divorce. According to the new Civil Code, divorce can also be pronounced by the public notary or the civil officer, as it is no longer an exclusive attribute of the court.

The conditions stated by law in order for the surviving spouse to inherit are divided into positive conditions - successor capacity, quality of heir and quality of spouse and negative conditions - to not be unworthy in regard to the defunct. We can also add the negative conditions that the surviving spouse was not disowned by the defunct, in which case he will only inherit the successor reserve as stated by law in his quality of forced heir of the defunct.

We must also mention that the law does not acknowledge the right to inherit the fortune of the concubine, regardless of how long the concubines were together. In regard to the situation of the surviving concubine, we must show that he can only claim his rights resulted from the contribution he had in acquiring goods during the time spent together, including the amounts of money he deposited at credit institutions [1]. If the concubine has no right to legally inherit at the death of the defunct, he can have successor rights coming from the will of the defunct.

The successor rights of the surviving spouse are acknowledged regardless of the other legal heirs, provided that he was the spouse of the defunct at the time the inheritance procedures began. Thus, we must mention that the duration of the marriage is irrelevant, as is the material status or the sex of the surviving spouse, if they had children resulting from the marriage or not or if they were separated or were living together at the time de cuius died [2]. Furthermore, if there is a petition for divorce filed or about to be decided by administrative procedure by the notary or the civil officer, but the final decision was not made at the time the spouse passed away, the surviving spouse still has all the rights to inherit the fortune of his deceased spouse. In these cases, if the death occurs during the time when the petition for divorce is filed in any of the previously mentioned ways, the marriage is ended by death and the surviving spouse meets the special condition needed to inherit, as there is no final decision of divorce and no divorce certificate released by the civil officer or the public notary. According to article 925 alignment 1 of the Civil Procedure Code, if, during the trial for divorce, one of the spouses dies, the court will acknowledge the ending of the marriage and will rule, by final decision, the dismissal of the complaint.

Also, marriage ends by divorce or by becoming void or annulled.

As article 382 of the Civil Code shows, marriage is considered to be ended from the day the divorce decision is final.

A special situation in regard to the divorce action is that generated by the filing of the complaint by the spouse based on the provisions of article 373 letter b) of the Civil Code, namely when the divorce is demanded for special reasons such as the time when continuing the marriage is no
longer possible because the relations between spouses are damaged beyond repair. In this case, it is matter of divorce based on the exclusive guilt of the defendant spouse. According to article 382 alignment 2 of the Civil Code, by exception (from the rule according to which the date when the marriage ends is the date when the decision was final), if the divorce action is continued by the heirs of the plaintiff spouse, the marriage is considered ended at the time of death. Thus, in case, subsequent to filing the complaint based on the exclusive guilt of the spouse, the death occurs and the action is continued by the heirs and the court rules that the marriage is ended based on the exclusive guilt of the defendant spouse, the marriage will not end by the death of the plaintiff spouse, but at the time of death of the spouse. This means, from a successor point of view, that the defendant spouse will not inherit before the final ruling on the divorce complain, even if at the time of death, the action was not yet resolved. This situation is an exception from the rule according to which the marriage ends by the death of one of the spouses.

The solution stated by article 382 alignment 2 of the Civil Code, namely establishing the date when the marriage ends at the time de cuius dies, is contradicted by the provisions or article 925 alignment 2 of the Civil Procedure Code, an act which came into force later. Thus, according to article 925 alignment 2 of the Civil Procedure Code, when the complaint for divorce is based on the guilt of the defendant spouse and the plaintiff spouse dies during the trial, thus leaving heirs, they will be able to continue the action, which the court will admit only if the exclusive guilt of the defendant spouse can be proven. According to article 925 alignment 4 of the Civil Procedure Code, in case the action is continued by the heirs of the plaintiff spouse, according to alignment 2, the marriage is considered ended from the time the divorce petition was filed.

This is why there are significant differences between the solution regulated by article 382, alignment 2 of the Civil Code and that stated by article 925 alignment 4 of the Civil Procedure Code, as the first text shows that the marriage is considered ended at the time of death, while the text of the Civil Procedure Code states the marriage is considered ended at the time the petition for divorce was filed.

We feel, along with other authors [3], that, by the coming into force of the Civil Procedure Code, subsequent to the new Civil Code, the provision of article 382 alignment 2 was implicitly abolished by article 925 alignment 4 of the Civil Procedure Code, as the marriage is considered ended at the time the petition for divorce was filed and not at the time of death. But, we must also mention that, regardless of the date when the marriage is considered ended, whether it is the time of death according to article 382 alignment 2 of the Civil Code or the time of filing the divorce complaint according to article 925 alignment 4 of the Civil Procedure Code, the defendant spouse has no successor quality, as he doesn’t meet the special condition stated by law, because he will no longer have the quality of spouse at the time of death.

The choice of the heirs to continue the divorce petition of the deceased plaintiff spouse can lead to this result or, if by the evidence entered the exclusive guilt of the defendant spouse can’t be proven, the marriage will be considered ended by the death of the plaintiff spouse. If the marriage is ended by the death of the plaintiff spouse, the defendant spouse will have met the special condition stated by law in order to inherit, namely that he has the quality of spouse at the time of death of the other spouse.

Until the marriage is ended by final court decision or until the divorce certificate is released by the civil officer or by the public notary, the living spouse has the quality of heir and will inherit the fortune of his dead spouse.

In regard to the situation when one of the spouses is declared dead by the court, we must mention that if this decision is annulled and the other spouse remarried, according to article 293 alignment 2 of the Civil Code, the first marriage is considered ended at the time the second marriage was concluded. In this situation, the remarried spouse of good will can only inherit from his spouse of the second marriage, not the one from the first marriage as the marriage is considered ended at the time the second marriage was concluded. If the remarried spouse is of bad faith, thus admitting the fact that the first spouse is not dead and, under these conditions, he still remarries, the second marriage will be void and the first marriage will still be valid. Thus, the spouse of bad faith will only inherit from the first spouse, who has been declared dead but subsequently reemerged.

The annulment or invalidity of the marriage results in the retroactive dissolution of the marriage and the loss of the quality of spouses of both parties. The cases for invalidity of the marriage
are regulated by articles 297-300 of the Civil Code, whereas the annulment cases are regulated in articles 293-295 of the Civil Code. If the death of one of the spouses occurs before the marriage is annulled, the living spouse will not benefit from any successor rights as a surviving spouse because the marriage is retroactively annulled, even if the decision becomes final after the death.

According to article 304 alignment 1 of the Civil Code, the spouse of good faith when entering a void or annulled marriage maintains the situation of a spouse from a valid marriage until the court decision is final. Thus, in case of putative marriage, the spouse of good faith, when concluding an annulled or void marriage, maintains the situation of a spouse from a valid marriage until the court decision if final. This means that if the death of one of the spouses occurs before the court decision is final, the surviving spouse of good faith will inherit from the deceased spouse. In regard to the spouse of bad faith, he will not inherit from the defunct, as he retroactively loses the quality of spouse. If the death occurred after the time the court decision by which the marriage is void or annulled was final, the surviving spouse, regardless of whether he was of good faith or of bad faith, will not be able to inherit from the defunct because, as a result of the court decision by which the marriage is void or annulled, he retroactively lost the quality of spouse.

We must point out that the successor quality of the good faith spouse when entering the annulled or void marriage exists only during the time from the conclusion of the marriage until the court decision by which the marriage is void or annulled, is final [4].

In regard to appreciating the good or bad faith of the spouses, we must point out that the court which rules on a marriage being void or annulled, is forced to also rule on the good or bad faith of the spouses [5]; if the court fails to do so, the situation will become complicated later, when complaints are filed by the heirs, and the court can’t cover the gaps of the first decision.

This exceptional situation stated by article 304 alignment 1 of the Civil Code in regard to the good faith of the spouse when entering an annulled or void marriage, is the only exception stated by law from the principle of the reciprocity of the legal successor quality.

2. The correlation between the right to inherit of the surviving spouse and the chosen matrimonial regime

At the time of death of one of the spouses, in order to establish the successor rights of the surviving spouse and other categories of legal heirs, if the surviving spouse can’t or won’t be able to participate in the inheritance procedures, the remaining successor goods of de cuius must first be determined.

Article 321 alignment 1 of the Civil Code shows that the future spouses can choose, as a matrimonial regime, the separation of goods of the conventional community. Also article 291 alignment 1 of the Civil Code, states that the civil officer will mention the chosen matrimonial regime on the marriage license.

The question of determining the successor goods left by the defunct is achieved in regard to own goods of the defunct and in regard to his share of the common goods acquired by him and the surviving spouse. According to article 319 alignment 1 of the Civil Code, the matrimonial regime stops when the marriage is annulled, void, dissolute or ended. Thus, when the marriage ends by the death of one of the spouses, his part of the common goods acquired during marriage, must be determined as they will be part of the inheritance. The deceased’s part of the common goods will become part of the successor goods. Determining the rights of the spouses in case there is a community of goods is achieved in regard to the provisions of family law.

What interests us in determining the successor goods left by the defunct is the situation in which the chosen matrimonial regime was that of legal community or conventional community, because in case the chosen regime is that of the separation of goods, the spouses only acquire own goods.

The legal community regime is regulated by article 339-359 of the Civil Code. According to article 339 of the Civil Code, the goods acquired during legal community by any of the spouses are common goods, from the time they were acquired. Before October 1st, 2011, the date when the new Civil Code came into force, the legal community regime was the only regime in regard to the patrimonial relations between spouses. Thus, in case the regime is that of legal community, all the goods acquired by the spouses under this matrimonial regime, are commonly owned goods.
According to article 350 of the Civil Code, each spouse can dispose by legate of his share of the fortune when the marriage ends.

When community ends by the death of one of the spouses, the liquidation is made between the surviving spouse and the heirs of the deceased spouse; the obligations of the deceased spouse over the common goods are proportional to their share of the inheritance, as stated by article 355 alignment 3 of the Civil Code.

Until the liquidation is final, community exists in regard to goods as well as in regard to obligations. The liquidation of the matrimonial regime is achieved, according to article 320 of the Civil Code, by definitive court decision or, by solemn act drawn up by the public notary. According to article 1133 alignment 2 of the Civil Code, in order to establish the successor patrimony, the public notary first liquidates the matrimonial regime.

We must mention that, according to article 357 of the Civil Code, in case of liquidating the community, each spouse acquires his own goods, after which the common goods will be partitioned and the debts will be regularized.

For this purpose, first, the share of each spouse is determined, based on his contribution in acquiring common goods and fulfilling common obligations. Until proven otherwise, it is presumed that the spouses had equal contribution.

We must mention that in case the succession regards common goods of the defunct and the surviving spouse, the share of contribution of each spouse in acquiring common goods and fulfilling obligations are established by agreement of the heirs recorded in the act of liquidation, concluded in a solemn form.

If the surviving spouse and the heirs of the defunct can’t reach an agreement, according to article 108 alignment 1 letter b) and alignment 3 of Law no 36/1995, the court shall decide on the matter.

In case of conventional community, by matrimonial convention the provisions regarding the regime of legal community according to article 366 of the Civil Code are waived. The specifics of conventional community has some influence over the inheritance procedure [6], as they are the same as in the case of legal community, given that the convention concluded by the spouses changes only the successor goods of the defunct depending on whether some own goods were included in his patrimony or not, according to article 367 of the Civil Code. Thus, in case of conventional community, the successor goods left by the defunct can be more extensive than in the case of legal community, if the spouses have included own goods in the community by matrimonial regime, goods acquired before or after the marriage was concluded; also the community can be much more narrow than the legal one, if, by convention, the spouses restricted the community only to the goods established by matrimonial convention regardless of whether they are acquired before or during marriage.

In regard to conventional community, article 368 of the Civil Code states that, in case the matrimonial convention does not regulate otherwise, the judicial regime of the conventional community is completed with the legal provisions regarding the regime of legal community. This means that the rules regarding the liquidation of legal community are applied in case of liquidation of conventional community and passing along the goods of the deceased spouse towards the surviving spouse and other heirs of de cuius.

But, as mentioned, the legal provisions of the regime of legal community regime will be applied in case the matrimonial convention did not state otherwise. Thus, it is possible that the matrimonial convention states certain clauses regarding the liquidation and partition of common goods, the inclusion of the preciput clause, the partition of common goods in unequal shares, the unequal; distribution of the successor debts, the preferential awarding of some goods to one of the spouses and so on.

In regard to the preciput clause [7] we must show that according to article 333 of the Civil Code, by matrimonial convention it can be stated that the surviving spouse takes over, without pay, before the partition of the inheritance, one or more of the common goods, owned in common or co property. The preciput clause can be stated in the benefit of any of the spouses or only in favor of one of them and is not subject to the report of donation, only to reduction, under the conditions of law.

According to article 333 alignment 4 of the Civil Code, the preciput clause becomes void when community stops during the life of the spouses, when the beneficiary spouse dies before the
other spouse or when they die at the same time and the goods which were object of the community were sold by request of common creditors.

The execution of the preciput clause is achieved in nature or, if this is not possible, by equivalent.

Thus, if the spouses, by matrimonial convention, stated a preciput clause, the surviving spouse will take over, without pay, before the partition of the inheritance, the common goods owned together which are the object of the preciput clause. We also must take into account the fact that in case the successor reserve is impaired, the goods which are object of the preciput, are object to reduction.

In regard to the regime of the separation of goods, as shown above, establishing the the successor goods is achieved according to article 360 of the Civil Code. Thus, each of the spouses is an exclusive owner of the goods acquired before marriage, as well as the exclusive owner of the goods he acquired in his own name after this date.

Within the regime of separation of goods, the spouses can acquire, according to article 362 of the Civil Code, goods in joined property. These goods belong to both of the spouses, as stated by law. When one of the spouses dies, his share of those goods will be determined and this part will become a component of the successor goods.

The preciput clause can also be stipulated in this matrimonial regime, if the object of this clause is formed of commonly owned goods belonging to the spouses.

Conclusions

The conclusion we have reached as a result of this study is that in regard to successor rights of the surviving spouse and the chosen matrimonial regime, there is a close connection, with consequences in successor law, according to those pointed out throughout this article. Also, ending the marriage by divorce or by the death of one of the spouses causes different effects regarding the successor rights acknowledged to the surviving spouse. Lastly, we have analyzed the situation of the goodwill spouse who enters into an annulled or void marriage, but benefits from successor rights.

References:

[1] Supreme Court, civil section, decision no 1047/1981, in CD, 1981, pp. 54-56;