Specifics of successor representation from the perspective of the New Civil Code

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Abstract: In the following study, we aim to examine the institution regulated by the present Civil Code in the fourth book “About inheritance and liberalities”, Title II “Legal inheritance”, Chapter II “Successor representation”, articles 965-969. Our presentation will follow the specific of this new regulation in regard to the enforcement of these provisions, the conditions to fulfill and the general and particular effect awarded by the lawmaker to successor representation. Also, the analysis of successor representation will be made by comparison with the provisions of the 1864 Civil Code, thus pointing out the legislative novelties and the positions of doctrine and jurisprudence.

Keywords: successor representation; representative; represented.

Introduction

Through this section we will set the guidelines of the judicial notion of successor representation, in regard to the legal definition of article 965 of the Civil Code [8], after which we will separate this concept form other similar institutions, in regard to the terms and judicial profile.

First of all, we must mention that successor representation is an exception from the principle of proximity of the kinship within the same category of heirs, as well as from the principle of equality between relatives of the same degree and category. As shown in doctrine, successor representation is meant to remove some unjust consequences of these two principles [10].

Also, we must mention the fact that successor representation must not be mistaken for convention representation of common law which refers to the representing of someone else’s will when concluding legal acts or for the legal representation of incapable people, namely the minor or the person placed under judicial interdiction.

As doctrine [11], correctly pointed out, successor representation is one of the most dynamic successor techniques of the new Civil Code.

Thus, in the regulation of article 965 of the Civil Code “by successor representation, a legal heir of a more distant degree, named a representative, will ascend, by power of law, in the right of his ascendant, called a represented, in order to collect the share of the inheritance which should have been awarded to the represented, had he not been unworthy in regard to the defunct or deceased at the time the inheritance procedures began”.

In the comments of this text of law [2, 10], it is noted that “the institution of successor representation allows one legal heir of a more distant degree (called a representative) to acquire the successor rights of his ascendant (called a represented), unworthy or deceased previous to the beginning of the inheritance procedures”. It is also appreciated [2, 10] that, through this legal institution, “the removal of the consequences of an unpredicted timeline of the deaths (children before parents) and the fulfilling of the family obligations in regard to the descendents - both the children of de cuius, as well as the following generations” is possible.

Successor representation is, as we have previously pointed out, an exception from the principle of proximity of kinship within the same category of heirs and from the principle of equality of the successors between relatives of the same category and of the same degree [5]. Also as an introductory matter, we must keep in mind that successor representation operates only in case of legal succession, not in case of testamentary succession [3].

In regard to the conceptual delimitation. Romanian judicial doctrine directs our attention at the distinction between successor representation, which is a benefit of law [2, 10] and conventional
representation generated by mandate, or the legal representation of the minor or the person placed under judicial interdiction [1].

On the other hand, there must be confusion with the legal institution of transmitting the right of successor option, regulated by article 1105 of the Civil Code; thus, specialty literature [5] made an inventory of the following differences:

- the division of the inheritance is achieved by strains only in case of representation, as the passing on is achieved by ends;
- successor representation operates only in case of legal inheritance, unlike the retransmission which can operate in case of testamentary inheritance;
- in case of retransmission, as it concerns two or more inheritances, they must be separately examined, under all aspects: structure, successor option, shares for each successor;
- in case of retransmission, the territorial competence of the notary offices and the court of law is determined depending on the place where the final succession is started;

1. Cases when successor representation applies. Conditions to meet

The cases in which successor representation applies are stated by article 966 of the Civil Code, as follows: “(1) Only the descendants of the children of the defunct and the descendants of brothers or sisters of the defunct can come to inherit”. (2) Within the limits stated in article (1) and if all conditions stated in article 967 are met, representation operates in all cases, regardless of whether the representatives are relatives of the same degree or of different degrees in regard to the defunct”.

We must also keep in mind [1] that successor representation is allowed only in case of descendants of the children of de cuites and the descendants of brothers and sisters. In a collateral line, the relatives of the defunct can come to inherit until the fourth degree included, thus only the nephews and the grandchildren will benefit from successor representation. Only in these cases the law presumes the affection of the defunct for his closest relatives influences his descendants.

As this is an exceptional provision of the law, it must be strictly interpreted, which means that successor representation is not allowed for privileged ascendants, nor ordinary ascendants, nor the ordinary collaterals or the surviving spouse [1].

In regard to the conditions to meet, these are listed by article 967 of the Civil Code. Thus, according to article 967 alignment 1 of the Civil Code, only the person who has no capacity to inherit as well as the unworthy person, even if alive at the time of succession, can be represented.

The absolute novelty brought by the Civil Code in the matter of successor representation is the possibility to be represented, awarded to the person who is unworthy in regard to the defunct. In the 1864 Civil Code, the unworthy person representation was not allowed. Judicial specialty literature has constantly pointed out this inequity, namely the fact that the representation of the unworthy by his children was not allowed, even if he was deceased at the time the inheritance procedures began. We must appreciate the fact that the new Civil Code removed this inequity, by introducing representation for the unworthy person. Thus, the present Civil Code kept the possibility of representing the predeceased person but included the unworthy, whether deceased or alive, at the time the inheritance procedures begin. The main argument which supports this legislative novelty is generated by the fact that the descendents of the unworthy have no guilt in connection to the deed of their author and it is inequitable that they be removed from the inheritance of the defunct for these reasons.

Successor representation does not work in case the person gives up the inheritance. The person who gave up on the inheritance can’t be represented in the present configuration of the new Civil Code. There have been suggestions to include the person who gave up on the inheritance in the category of people for which successor representation is allowed, but so far, there has been no breakthrough in this matter. In justifying this position of the lawmaker, the following arguments were considered [4]:

- giving up the inheritance might be determined by the wish of the potential heirs to not inherit anything from the defunct, for different subjective reasons;
- giving up the inheritance might be represented by the desire of the heir to not take over the expenses and tasks of the inheritance, when they believe that the inheritance is insolvable or poorly solvable;
giving up on the inheritance might be generated by the wish of the heirs to fraud their creditors. In this case, if he gives up on the inheritance, the successor goods will not end up in his patrimony and the creditors will not be able to use these goods. According to article 1122 of the Civil Code, the creditors can ask the court to revoke the act by which the heir gave up the inheritance within 3 months from the date they knew of the act; in most cases, giving up the inheritance is made with the purpose of favoring the other coheirs, a situation in which, if successor representation would be allowed, this purpose will no longer be achieved, namely the situation in which the descendant of the person who gave up the inheritance chooses the institution of successor representation;

These arguments help in creating a wider picture, but far from being real, over the operations for which the lawmaker did not wish to include the people who gave up on the inheritance in the category of people who can’t be represented.

Lastly, we must keep in mind that, according to article 967 alignment 1 of the Civil Code, the person who doesn’t have the capacity to inherit can’t be represented. Article 957 alignment 2 of the Civil Code shows that, in case several people die and whether one of them survived the other can’t be established, they do not have the capacity to inherit from one another. By corroborating the provisions of these texts of law, we feel, along with other authors, that the people who died at the same time as de cuius can be represented [4]. If we were to admit the contrary solution, namely that the person deceased at the same time with de cuius couldn’t be represented, an inequity might occur. For example, in case de cuius had two sons and one of them dies at the same time as de cuius and he would have descendants and the other son would still be alive, if the representation would not be allowed, the living son would collect the entire inheritance based on the principle of proximity of kinship and the other descendents of the defunct would not inherit anything from their grandfather. This solution would be inequitable.

The missing person is considered to be alive, so he can’t be represented. According to article 53 of the Civil Code, the missing person is considered to be alive, unless there is a final court decision which declared the death of the missing person. However, if the missing person is unworthy in regard to de cuius, his representation operates, as the living unworthy people can be represented according to article 967 alignment 1 of the Civil Code.

In case of the missing person, if the death is pronounced by final court decision, the following situations might arise:
- if the time of death established by the court is previous or simultaneous with the time of death of de cuius, representation is allowed;
- if the time of death is subsequent to the time of death of de cuius, his descendants can’t inherit by representation, as their author was alive at the time de cuius died, when the person declared dead will inherit from de cuius and his descendants will inherit by retransmission;

From the interpretation of article 967 alignment 1 of the Civil Code we can conclude that the living disowned person can’t be represented by his descendants, even if he is a forced heir, as in this case the living disowned person would inherit the legal reserve and his descendants will inherit the rest in their own name and not by representing the disowned person.

As we have mentioned before, the representation of living people is forbidden, except for the unworthy ones. This interdiction results in the fact that representation is not allowed omissio medio or per saltum, meaning that representation can be made by ascending and not by leaping. This means that the representative must ascend from one degree to another until he reaches the closest degree with the defunct.

2. Effects of successor representation

We are about to distinguish between the two types of effects of successor representation - that stated by article 968 of the Civil Code (the general effect) and the one regulated by article 969 of the Civil Code (the particular effect).
In regard to the general effect, we pointed out the relevant provisions as being those of article 968 of the Civil Code, which states: “(1) In the cases where successor representation operates, the inheritance is divided by strains. (2) A strain is: - within the first category of descendants, the first degree descendant who inherits or is represented in the inheritance procedures; - within the second category, the privileged collateral of the second degree who inherits or is represented in inheritance. (3) If the same strain produces multiple branches, within each branch, the division will be made by strains, as the part to which the same degree descendants are entitled to will be equally divided between them”

The particular effect of representation is presented in article 969 of the Civil Code as follows: “(1) The children of the unworthy conceived before the inheritance procedures begin and if the unworthy person was disinherited, will inherit from the latter, thus acquiring the goods inherited by representing the unworthy if the other heirs are other children conceived after the inheritance begins. The report is made only in case and to the extent to which the value of the goods received by representation of the unworthy are of a greater value than the successor debt which the representative had to take over as a result of representation. (2) The report is made according to the provisions of the second section, chapter IV of the fourth title of the present book”.

The general effect of representation, stated in article 968 alignment 1 of the Civil Code is that the division of inheritance is made by stains ad not by ends, considering their number. The legal text shows that the case in which representation operates, the inheritance is divided by stains. The new regulation of the Civil Code doesn’t bring any novelties in this matter, keeping the general effect of representation form the old Civil Code. This means that the representatives will always inherit the part which should have been inherited by the antecessor they represent. In order to provide an example, we imagine the hypothesis in which at the death of de cuius, his three sons are unworthy or predeceased and they have, in turn, the following descendants: the first one has one child, the second one has two children and the third one has three children. All six grandchildren of de cuius will inherit by representation. In this case, the inheritance will be divided in three strains, one third for each strain and not in six equal parts, as the six grandchildren of de cuius inherit by representation. The part of the first child of de cuius will be given to his only son, who will inherit 1/3 of the inheritance. The 1/3 part of the second child will be inherited by representation by his two children who will split it in equal parts, each inheriting 1/6 of the inheritance. Finally, the 1/3 of the third child of de cuius will be inherited by his three sons, who will split in equally, thus each inheriting 1/9 of the inheritance. Thus, each of the grandchildren of de cuius will inherit the part to which his represented ascendant would have been entitled had he been alive at the time the inheritance began.

If the grandchildren accept the inheritance, representation operates by law. But the grandchildren can turn down the inheritance, as they have a distinctive successor option, meaning some can accept the inheritance and others can repudiate it.

If they accept the inheritance, they acquire both rights and obligations, depending on the vocation of each. Thus, they inherit the successor debt and tasks along with the goods of the inheritance, each proportional with his share, as stated by article 1114 alignment 2 of the Civil Code, regardless of whether they accepted or gave up the inheritance left by the represented. This solution results from the provisions of article 967 alignment 3 of the Civil Code, according to which representation operates even if the representative in unworthy in regard to the represented or has given up the inheritance or was disowned.

Alignment 2 of article 968 of the Civil Code defines notion of strain - thus strain means: - within the first category of heirs, the first degree descendant who inherits or is represented in inheritance; - within the second class of heirs, the privileged second degree collateral who inherits or is represented in inheritance. The notion of strain was previously regulated by the 1864 Civil Code, thus welcoming the definition in the new legal text.

According to article 968 alignment 3 of the Civil Code, if the same strain produced more branches, within the same branch, the division is made by strain, as the descendants of the same degree must divide it equally. In order to provide an example, we imagine the following situation: one of the grandchildren of de cuius is in turn deceased at the time of inheritance, leaving two children, the great grandchild of de cuius. They will inherit the part of their predeceased ascendant of that strain by representation.
There are certain novelties in regard to the particular effect of successor representation. According to article 969 alignment 1 of the Civil Code, the children of the unworthy person conceived before the inheritance began will inherit from the latter the goods they acquired by the representation of the unworthy if they inherit along with other children, conceived after the inheritance began. The report is made only in case to the extent to which the value of the goods received by representing the unworthy are of greater value than the successor debt resulted from representation.

The reason for this regulation from the French Civil Code [article 754 alignment (2)], is that of not favoring the conceived children of the unworthy who fulfill the conditioni of successor and can represent their unworthy author as opposed to the children conceived and born afterwards and who couldn’t inherit from de cutius, by representing their unworthy ascendant. Thus, in order to provide the children of the unworthy equal successor shares, the lawmaker obliges the children of the unworthy, conceived at the time the inheritance began or born before the inheritance began, to report the inheritance if they inherit along with other children of the unworthy who were born after this date. The obligation to report exists only in case the value of the inherited goods is greater than the value of the successor debt, meaning the children of the unworthy must report the inheritance only in cases it enriched them [5].

The children of the unworthy who were conceived before the inheritance will not be forced to report the goods they inherit by representation, if they give up the inheritance of the unworthy.

There is no obligation to report in case the child born afterwards can’t or won’t inherit from the unworthy. The child born after this date can ask not to exercise his right to report or he can expressly give up this right. If he gives up in order to fraud his creditors, they will be able to ask for a report by oblique action if all conditions stated by law for such an action are fulfilled.

Article 969 alignment 2 of the Civil Code states that the report is made according to the provisions of the second section of the fourth chapter, fourth title of the present book. We must mention that these provisions regard the report of donations (article 1146-1154). We must also state that between the two kinds of report there are certain differences but they also have one thing in common - the rules by which they are regulated.

Thus, in case of the particular effect of representation, the goods inherited by representation are reported, whereas the donation report concerns the donations made by the defunct during his lifetime. Furthermore, only the donations which violate the successor reserve are subject to reduction, not the ones reported based on article 969 alignment 1 of the Civil Code.

In case of donation, the person who donates can absolve the receiver from the obligation to report; however, in the case stated by article 969 alignment 1 of the civil Code this is not possible, thus the child who inherited by representation is forced to report the goods he inherited. If the unworthy decides, in order to indirectly neutralize this obligation, he can gratify the child previously born by a non report donation or by legate, with respecting the reserve of the subsequently born child [4].

The report will be made by equivalent according to article 11851 alignment 1 of the Civil Code. According to article 1151 alignment 3 of the Civil Code, the report by equivalent is achieved by taking over, by imputation or in money.

As shown in doctrine, both categories of reports are meant to ensure equality between relatives of the same category of heirs [5].

Another matter which must be mentioned in regard to the situation of the unworthy first degree descendant is that of the influence exercised by his forgiveness in regard to successor representation, The effects of the rightful and legal unworthiness can be removed by forgiving the unworthy under the conditions of article 961 alignment 1 of the Civil Code.

There are two situations in which the unworthy can be forgiven: - if forgiveness occurs before the inheritance begins, the forgiven unworthy descendant meets the legal conditions for inheriting, thus having successor capacity and, being alive, he has the quality of heir as the first degree descendant of the defunct and also fulfills the negative condition of not being unworthy as a result of the forgiveness by the defunct, under the conditions of article 961 alignment 1 of the Civil Code; - if the forgiven person is predeceased, he will be represented by his descendants, but in this case the representation is based on the death and not on being unworthy.
Conclusions

This study allows us to draw the conclusion according to which in case of successor representation, there is a new legal configuration. As pointed out in the Civil Code memorandum [9], „in regard to successor representation some rules which were deduced by doctrine and jurisprudence interpretation were expressly regulated and this institution was regulated in a unified manner”.

As a novelty, we keep in mind the possibility of representing the unworthy person as well as the possibility of the defunct to remove the indignity by forgiving the unworthy person. Also, we notice the particular effect regulated by article 969 alignment 1 of the Civil Code and the definition of the notion of strain.

As a conclusion, the institution of successor representation has a new dimension and a new regulation once the new Civil Code came into force on October 1st, 2001, as all observations made by doctrine and jurisprudence were taken into account.

References: