Research and Science Today
WWW.RSTJOURNAL.COM

DOI: 10.38173/RST.2022.23.1.8:75-81

Title:	*THE INHERITANCE RIGHTS OFTHE SURVIVING SPOUSE*
Author:	Ionuț IORDACHE

Section: LEGAL SCIENCES

Issue: 1(23)/2022

Received: 6 January 2022	**Revised:** 9 February 2022
Accepted: 16 February 2022	**Available Online:** 15 March 2022

Paper available online HERE

RST Research and Science Today
WWW.RSTJOURNAL.COM
SPRING 2022
No. 1(23)/2022
ISSN-P: 2247-4455 / ISSN-E: 2285-9632

Legal Sciences

THE INHERITANCE RIGHTS OFTHE SURVIVING SPOUSE

Ionuț IORDACHE[1]

ABSTRACT:
THE MAIN PURPOSE OF THE PRESENT RESEARCH IS TO ANALYSE THE WAY IN WHICH THE LAW REGULATES THE SURVIVING SPOUSE'S RIGHT OF SUCCESSION FOLLOWING THE ENTRY INTO FORCE OF THE NEW CIVIL CODE. ATTENTION WILL ALSO BE PAID TO THE SITUATION IN WHICH THE SPOUSES HAVE OPTED FOR THE CLASSIC LEGAL FRAMEWORK, AS WELL AS TO THE SITUATION IN WHICH THE SPOUSES HAVE OPTED FOR A MATRIMONIAL REGIME OTHER THAN THE LEGAL ONE, I.E. THAT OF CONVENTIONAL COMMUNITY OR THAT SUBJECT TO SEPARATION OF PROPERTY, BEFORE THE DEATH OF ONE OF THEM. THE BASIC IDEA OF THE RESEARCH IS THAT THE INHERITANCE RIGHTS OF THE SURVIVING SPOUSE HAVE A NUMBER OF SPECIFIC FEATURES IN COMPARISON WITH THE RULES OF PREVIOUS LEGISLATION REFLECTED IN LAW NO 319/1944.

KEYWORDS: SURVIVING SPOUSE; INHERITANCE, LEGAL INHERITANCE; MATRIMONIAL REGIME; INHERITANCE LAW.

INTRODUCTION

Over time, society has evolved, which is why the principle of the preservation of property in the family has gradually been watered down, replaced and transposed into law in the form of a succession order. In modern society, it seems logical that the surviving spouse should benefit from preferential recognition of the order of succession, in particular because of the link and contribution he or she has made to the common property.

These relations between spouses generate the strengthening of lasting ties, motivated mainly by the affection and reciprocity of obligations between the two spouses. As a consequence, it is imperative to recognise a right of inheritance in favour of the surviving spouse. The main argument is that the obligation of mutual support during the marriage is transformed into a right of inheritance following the death of one of the spouses.

The present research focuses on the specific aspects of how the surviving spouse's right of inheritance is regulated by law following the entry into force of the new Civil Code. Attention will also be paid to the situation in which the spouses opted for the classic legal framework and to the situation in which the spouses opted before the death of one of them for a matrimonial regime other than the legal one, i.e. that of conventional community or that subject to separation of property.

[1] Police officer Phd– "Alexandru Ioan Cuza" Police Academy of Bucharest, iordache.john@yahoo.com.

In order to achieve the proposed objectives, the defining aspects of inheritance law will be set out, followed by a series of conclusions based on the specific concepts, which are intended as a point of reference for further research in this field.

CONCEPTUAL BOUNDARIES

Two terms of reference are used in the field of inheritance law, namely “inheritance” and “succession”. Despite the fact that the two terms are relatively easy to confuse, the legal literature uses the term "inheritance" to refer to transfers of rights following death, and the term "succession" in the legal sense to refer to inheritance in the sense of the right to inherit following death.

Summarising the above idea, the relationship between “inheritance” and “succession” is defined by the relationship between the whole and the part. The national legislation set out in the old Civil Code, prior to Law 287/2009, used the two terms equally to express the same legal meaning, without making a clear conceptual distinction.

However, the current Civil Code makes distinctive use of the term "inheritance" (see Chapter IV of Law No 287/2009 "On Inheritance and Liberalities"), and regulates the manner in which the division of inheritance is carried out using this term in the sense of the whole of the property to be subject to succession.

At the same time, the Civil Code uses the term "succession" to mean "*the inheritance or the part of the inheritance that is due to the descendants*"[2]. In other words, succession is the part of the estate which is due to the survivors following the death of a person, when they come to inherit either in their own name or by representation of succession.

According to Article 953 of the current Civil Code, succession is defined as "*the transmission of the estate of a deceased natural person to one or more living persons*"[3] . The Civil Code therefore refers to succession as the transmission of property following the occurrence of death. This transmission is from a deceased person to one or more living persons and involves the joint assumption of rights and obligations from the deceased person.

In the following subsection I will focus on the specific aspects of the right of succession of the spouse as heir, starting from the conceptual delimitations set out in this section.

RULES ON THE INHERITANCE RIGHTS OF THE SURVIVING SPOUSE

In the previous subsection we pointed out that the relationship between "inheritance" and "succession" is defined by the relationship between the whole and the part, with succession being defined as the transmission of property in parts to heirs following the occurrence of death.

In order to see how the right of inheritance of the surviving spouse is regulated in civil law, attention will be drawn to all the aspects of reference in the current Civil Code.

After a brief analysis of the legislation in force, it can be seen that the present Civil Code maintains the right of the surviving spouse to live in the house if he or she has no other real right to use a suitable dwelling and also if the house is an integral part of the property subject to inheritance.

At the same time, both the old Civil Code and the current Civil Code, in Article 973, provide that any of the heirs may request the restriction of the surviving spouse's right to a dwelling if the dwelling in question is not entirely necessary for the surviving spouse or if the

[2] Art.975, para. (4) of Law no. 287/2009, as amended
[3] Art.953, para. (2) of Law no. 287/2009, as amended

heirs can provide the surviving spouse with another suitable dwelling[4]. In such cases, the assessment of the appropriate space shall be made pursuant to Law No 114/1996 as amended and supplemented.

This right shall be extinguished once ***the partition of the estate has taken place***[5], but not earlier than one year from the date of the opening of the inheritance, provided that the surviving spouse has not remarried within that time.

With regard to the special right of inheritance of the surviving spouse, Professor Lucian Mihai, in his work entitled "Civil Law Treatise", points out that "*if the surviving spouse does not come into competition with the descendants of the deceased, he will inherit including the furniture and household objects that were affected to the common use of the spouses*"[6].

As regards the right of disposal, this is further made up of the right of material disposal and the right of legal disposal. Although the legislator does not give an explicit definition of the concept of the inheritance reserve, an analysis of the texts of the Civil Code set out under the heading "Available part of property" shows that the heir spouse may have a reserve as part of the inheritance, unavailable in his or her favour, which cannot be reduced either by inter vivos deeds of gift or donation or by will.

Therefore, as stated in the present subsection, the current rules governing the surviving spouse's right to inheritance establish the part of the legal inheritance due to the surviving spouse, which cannot be reached by gifts. In the light of legal doctrine and practice, the surviving spouse's share is determined by reference to the marital status of the surviving spouse and the rights delegated by the deceased prior to his or her death.

THE LEGAL NATURE OF THE WILL

The current Civil Code, by Law No 287/2009, amended by Law No 71/2011 and rectified in the Official Gazette of Romania, Part I, No 427 of 17 June 2011, establishes in Article 1035 that the Will, as a unilateral, personal and revocable act, "*contains provisions relating to the estate or the property forming part of it, as well as the direct or indirect designation of the legatee. In addition to these provisions, (...) the will may contain provisions relating to partition, disinheritance, executors of wills, duties imposed on legatees or legal heirs and other provisions which take effect after the testator's death*"[7] .

A will is subject to succession, which designates the transmission of the estate of a deceased individual to one or more living persons.

In relation to the will, the university lecturer Dr. Anica Merișescu, points out that "*current civil legislation gives any natural person the right to establish or remove their successors, to distribute their inheritance as they wish, in other words it fully ensures the realisation of the right of private property*"[8].

The Romanian Civil Code states that the inheritance may be transferred both by law to the persons designated by law, in the order and in the proportions laid down, and by the will of the person leaving the inheritance, expressed in a will. In the latter case, the inheritance is deemed to be testamentary.

[4] https://www.codulcivil.ro/art-973-dreptul-de-abitatie-al-sotului-supravietuitor/
[5] https://lege5.ro/gratuit/gezdmnrzge/partajul-succesoral-si-raportul-codul-civil?dp=gqytsnzzgq3de
[6] Lucian Mihai, *Tratat de Drept Civil*, (București:Editura Universul Juridic, 2020), 121
[7] Art. 1035/ Law No 287/2009, amended by Law No 71/2011 and corrected in the Official Gazette of Romania, Part I, No 427 of 17 June 2011
[8] Anica Merișescu, *Testament and Donation*, (Bucharest:Lumina Lex Publishing House, 2012), 54

A will can therefore be defined as "*a unilateral, gratuitous, solemn, legal act, essentially personal and revocable, by which a person, called a testator, disposes of all or part of his estate in the event of his death and may express his last will in relation to himself or to other persons*"[9].

In general, a will is made up of legacies, but it may, depending on the case, also contain other expressions of the deceased's last will and testament in addition to the legacies. However, the existence of legacies is not a mandatory condition of the will, which may also contain only testamentary dispositions of the testator's last will.

Specialised studies have established that the will is not a simple legal act, but is considered an exceptional legal act, which contains a multitude of legal acts in their own right with their own legal regimes.

The law enshrines the principle of testamentary freedom, with any person having the freedom to leave (or not to leave) a will and to dispose of their estate on death. The legal provisions governing wills have a number of legal characteristics.

A will is a ***legal act***[10] because it is a manifestation of the testator's will, with the intention of producing legal effects, which must meet certain substantive conditions laid down by the Civil Code and specific to gifts: un vitiated consent, capacity, a specific, lawful and possible object, and a real, lawful and moral cause.

A will is a ***unilateral legal act***[11], the testator's will being binding, irrespective of the legatee's attitude, even before acceptance. The legacy is acquired at the time of the opening of the inheritance by unilateral act of the testator, unless the legatee renounces the legacy. Acceptance of the legacy should not be confused with the acceptance required to conclude a contract. The will and the acceptance of certain provisions of the will are separate unilateral acts with their own effects and do not combine to form a bilateral legal act.

A will is a solemn legal act and must be ***concluded ad validitatem***[12], in one of the forms laid down by law, on pain of absolute nullity. The testator's freedom to express his will with regard to his estate is valid only if it takes a form determined and regulated by law.

The effects of testamentary dispositions are produced only on the death of the testator, the will being ***a legal act for cause of death***[13] . The conditions for the validity of a will are assessed in relation to the time of its drafting, the effects of the provisions being assessed in relation to the time of the testator's death.

As long as the testator is alive, the legatee has no right to the testator's property, as the testator disposes of his property until his death and has the right of disposal over it.

Another legal feature of a will is its ***revocability***[14]. The testator may unilaterally revoke or amend his testamentary dispositions until the last moment of his life, having an absolute right to revoke these dispositions and not being able to renounce them. Any clause by which the testator declares that he renounces the power of revocation or amendment is null and void.

A will is a ***free legal act***[15], i.e. a donation. Dr Anica Merișescu also points out that a will is a ***secret legal act***[16], the right to disclose its contents being vested solely in the testator.

---

[9] Cristinel Murzea, Emil Poenaru, *Donation and will. Study of doctrine and jurisprudence*, (Bucharest:Hamangiu Publishing House, 2007), 88

[10] https://legeaz.net/dictionar-juridic/act-juridic-civil

[11] https://lege5.ro/gratuit/gi2tsmbqhe/actul-juridic-unilateral-codul-civil?dp=gu3dmnjsga3dm

[12] http://notarmarginean.ro/testamentul/

[13] https://www.rubinian.com/dictionar_detalii.php?id=2733

[14] http://www.uniuneanotarilor.ro/?p=4.1.4

[15] https://www.univnt.ro/wp-content/uploads/doctorat/rezumate_doctorat/Suru_Amir_Sorin_ro.pdf

In support of this assertion, Professor Merișescu points out that "*persons who participated in the drafting and authentication of the will do not have the right to disclose its contents*"[17].

Therefore, as noted in this subsection, a will is a unilateral, personal and revocable act which designates the transfer of the estate of a deceased individual to one or more living persons. In the following subsection, attention will be drawn to the subject matter and content of the will.

We have already pointed out that a will is a unilateral, personal and revocable act which designates the transfer of the estate of a deceased natural person to one or more living persons.

The main object of the will is ***the testamentary legacy***[18], which is a provision relating to the estate or the property forming part of that estate. The person to whom the testator leaves the entire estate is called the universal legatee. The testator is not obliged to dispose of all his assets in a will; he may only dispose of part of his assets in a will, the other part being subject to the rules of succession.

The will may contain, in addition to legacies, or even without them, other manifestations of the testator's will, such as:

a) Exceduces[19] - i.e. the removal from the estate of legal heirs, within the limits laid down by the Civil Code;
b) Appointment of an executor - this is an authorised representative who ensures the execution of testamentary dispositions;
c) Revocation (in whole or in part) of the provisions of a previous will or withdrawal of the previous revocation;
d) Partition by descent[20] - i.e. the distribution by the testator to his descendants of the estate or part of the estate;
e) Recognition by the mother of the child listed in the civil status register as born of unknown parents or by the father of the child born out of wedlock;
f) Other dispositions of last will and testament, such as those concerning funerals and burials, acknowledgement of debt, etc.

Bequest is the provision contained in a will by which the testator designates one or more persons who, on his death, will receive the entire estate, a fraction of it or certain assets of his estate. The legatee must be designated in the will, i.e. the testator must specify in the deed the person of the legatee, or at least give certain indications so that that person can be identified. If the testator verbally communicates the name of the legatee to someone else, it is not valid, even if the will specifies the name of the person to whom he has communicated the name.

The designation of the legatee must be made in such a way that he or she can be identified when the will is executed. The testator must appoint the legatee personally, and the legatee cannot be appointed by another person, even if the testator agrees. The Civil Code provides that the testator may transfer mortis causa bare ownership of property to a legatee and the right of usufruct of property to another legatee. Usually, the usufruct bequest is left in favour of the deceased's spouse, and on the death of the deceased, the legatee who has the right of ownership becomes fully entitled to the property or estate in question.

---

[16] https://e-justice.europa.eu/content_succession-166-lu-maximizeMS_EJN-ro.do?member=1
[17] Anica Merișescu, *Testamentul și donația*… 45
[18] https://e-justice.europa.eu/content_succession-166-lu-maximizeMS_EJN-ro.do?member=1
[19] https://www.legal-land.ro/codul-civil-adnotat/art-1-074-notiune/
[20] https://www.avocatmateigabriel.ro/codul-civil-despre-partajul-de-ascendent/

Testamentary dispositions, if formulated in accordance with the law, produce legal effects. If the legacy is legally ineffective, it will be cancelled retroactively. Legacies may therefore be void or voidable, depending on the extent to which the legal provisions have been affected.

Revocation of testamentary dispositions may be voluntary, when it is due to the unilateral will of the testator, or judicial, as a result of culpable acts committed by the legatees.

According to the provisions of Article 1040 of the current Civil Code, an ordinary will may be a holograph will or an authentic instrument[21]. In addition to these ordinary forms of will, there are also certain privileged wills, but the law also regulates certain simplified forms of will.

However, whatever their form, wills are valid if they comply with the formal conditions applicable, either at the time of their drafting or at the time of the testator's death, under the testator's national law, the law of the testator's domicile, the law of the place where the document was drawn up, or, where applicable, the law of the court or body carrying out the procedure for the transfer of inherited property.

CONCLUSIONS

This article has focused on issues relating to the surviving spouse's right to inherit from the perspective of the way the Romanian civil law system works and the legal nature of the will. The basic idea is that the law bears the imprint of the social more than any other discipline. The social environment is subject to profound changes, which are becoming increasingly marked as society evolves. This social environment needs a normative framework to regulate social relations.

It has been shown that as society has evolved, the law has changed out of the need to incorporate new situations into its field, since legal rules which were modern at the time of their appearance and whose value was generally recognised have come to no longer correspond to social requirements.

It has also been pointed out that in modern law the relationship between 'inheritance' and 'succession' is defined by the relationship between the whole and the part, with succession being defined as the transmission of property in parts to heirs following death.

With regard to the surviving spouse's right to inherit, it has been pointed out that the current rules governing the surviving spouse's right to inherit establish the part of the legal inheritance due to the surviving spouse, which cannot be reached by gifts. In the light of legal doctrine and practice, the surviving spouse's share is determined by reference to the marital status of the surviving spouse and the rights delegated by the deceased prior to his or her death.

Regardless of legislative shortcomings or criticisms of the current legal framework, it should be borne in mind that any innovation in the area of the surviving spouse's right of inheritance must be made in accordance with the spirit of the fundamental principles of law, and in particular of civil law.

[21] https://legeaz.net/noul-cod-civil/art-1040-formele-testamentului-ordinar-formele-testamentului-testamentul

REFERENCES

1. **Lucian Mihai,** "Tratat de Drept Civil", Eitura Universul Juridic, București, 2020, SBN/ISSN: 978-606-39-0109-6;
2. Law No 287/2009, as amended and supplemented;
3. Lecturer Dr. Anica Merișescu, "Testament and Donation", Lumina Lex Publishing House, Bucharest, 2012, ISBN (13) 978-973-52-0385-6;
4. **Cristinel Murzea, Emil Poenaru**, Donation and will. Study of doctrine and jurisprudence, Hamangiu Publishing House, Bucharest, 2007, ISBN/ISSN: 978-973-1836-40-9
5. http://notarmarginean.ro/testamentul/
6. https://legeaz.net/dictionar-juridic/act-juridic-civil
7. https://lege5.ro/gratuit/gi2tsmbqhe/actul-juridic-unilateral-codul-civil?dp=gu3dmnjsga3dm
8. https://www.rubinian.com/dictionar_detalii.php?id=2733
9. https://www.univnt.ro/wp-content/uploads/doctorat/rezumate_doctorat/Suru_Amir_Sorin_ro.pdf
10. https://e-justice.europa.eu/content_succession-166-lu-maximizeMS_EJN-ro.do?member=1
11. https://www.codulcivil.ro/art-973-dreptul-de-abitatie-al-sotului-supravietuitor/
12. https://lege5.ro/gratuit/gezdmnrzge/partajul-succesoral-si-raportul-codul-civil?dp=gqytsnzzgq3de
13. https://www.avocatmateigabriel.ro/codul-civil-despre-partajul-de-ascendent/
14. https://legeaz.net/noul-cod-civil/art-1040-formele-testamentului-ordinar-formele-testamentului-testamentul