

SOME LEGAL IMPEDIMENTS IN RESPECTING THE DECEASED'S WILL

Roxana MATEFI¹

Abstract: *The Romanian Civil code expressly enshrined in article 80 the respect for the deceased's will. Thus, any person can determine the way of their own funeral. However, the will of the deceased person is not imposed on the heirs in absolute terms. The current legal framework on cemeteries, human crematoriums and funeral services imposes some limitations on the organization of funerals. Also, canon law can influence the fulfilment of the deceased's will. As such, this article will highlight some of the legal impediments faced by the family of the deceased that may arise when planning the funeral according to the wishes of the dearly departed.*

Key words: *personality rights, funeral arrangements funeral services, burial, cremation, secular law, canon law.*

1. Preliminary Considerations

The right to determine the type of one's own funeral was enshrined in the Romanian legal framework through article 80 paragraph (1) of the Civil code (Law no. 287 from 17th of July 2019) having the marginal name: "the respect for the deceased's will". The provision was most probably inspired by the Civil code of Quebec which in article 42 expressly states that a person may determine the nature of his funeral. This is a personality right and is part of the rights that concern the respect for the privacy and dignity of the human person (Bîcu, 2016, p. 40).

Article 2 paragraph (2) from the Law no. 102/2014 on cemeteries, human crematoriums and funeral services also incorporates this provision: "in determining the place of burial and organising the funeral services, the entitled persons and the providers of funeral services are obliged to collaborate with each other and to *take into account the will expressed by the deceased during his lifetime*". By entitled persons we understand those enumerated by the Law no. 102/2014 in article 17 paragraph (1) regarding the persons obliged to dispose as to the funeral: the person who was under contract that will take care of the funeral, for example through a donation contract with a duty (Pavel, 2016, p. 184); the person designated by the deceased's will; in the absence of will, the spouse of the deceased person, who lived in the same dwelling with the deceased in the last part of his life; another close relative of the deceased, up to the

¹ *Transilvania* University of Braşov, roxana.matefi@unitbv.ro.

fourth degree inclusively. Thus, Law no. 102/2014 establishes “the order in which those obliged to take care of the funeral of the deceased are called upon to actually perform that obligation” (Şchiopu, 2018b, p. 157), respecting the will expressed by the deceased during his lifetime.

In order to emphasize the importance of respecting the deceased's will, article 16 paragraph (2) from the same law stresses that “the place and the type of funeral will be in accordance with the will expressed by the deceased during his or her life, *without any change of their last will*”. According to the French jurisprudence (Maurie & Brenner, 2014, p. 31) and the Romanian doctrine (Chelaru, 2014, p. 101) it is not necessary that the will of the deceased should take on the testamentary form.

Article 16 paragraph (2) from the Law no. 102/2014 provides with value of principle that the funeral may be religious or secular, whether or not preceded by incineration. Thus, the interested person can choose between burial and incineration, a secular or a religious funeral. The concerned person can also pre-determine how and which funeral services will be performed, such as the preparation for funeral. According to article 2 paragraph (1) from the Technical and Health Rules regarding the funeral services approved by the Government Decision no. 741 of 12th of October 2016, the preparation of the deceased for the funeral includes mortuary care that is directed to the body of the deceased, such as washing and hygiene, embalming and tanatopraxis.

Given the wide range of options available to the concerned person, one might think that the deceased can make any choices regarding his funeral and this will is to be entirely respected. Nothing could be further from the truth. That's why, in what follows, we will analyze to what extent this freedom of choice is limited by the imperative rules of secular or canonical law, without taking into account local funeral customs whose non-compliance is sanctioned by “public opprobrium” (Pavel, 2016, p. 183).

2. Law on cemeteries, human crematoriums and funeral services

Given that the transport of the deceased person outside the locality in which the death occurred may be done only after embalming according to article 29 paragraph (4) from the Law no. 102/2014, the deceased cannot demand not to be embalmed while being buried in a cemetery situated in another town.

In this case the person obliged to dispose as to the funeral will have to choose between the embalming and the place of the burial. Since article 16 paragraph (2) from Law no. 102/2014 stipulates that “the place and the type of funeral will be in accordance with the will expressed by the deceased during his or her life” and the place of the burial is mentioned first, we consider that person obliged to dispose as to the funeral should give priority to the place of the burial at the expense of embalming.

3. Technical and Health Rules regarding the funeral services

According to the doctrine, the scattering of the ashes in the wind fell into disuse (Ungureanu & Munteanu, 2010, p. 186). Nowadays, the Technical and Health Rules establish that the storage of an ash urn is subject to the following conditions: it can be deposited in the specially arranged places of the crematory/cemetery, or it can be

buried in a cemetery at a depth of at least 0.5 m from the ground level or it may be deposited in a tomb.

Therefore, respecting the dearly departed wish that the ashes should be “buried at the root of a tree that is not on a burial plot would turn the person entrusted to carry out the task into an offender” (Șchiopu, 2017b, p. 217) since the violation of the mode of storage of the ash urns constitutes a contravention and is punishable by a fine between 500 lei and 1000 lei. We also point out that, due to article 1179 paragraph (1) point 3 of the Civil code, no one can validly oblige themselves in the sense that they will scatter the ashes of the deceased at sea since the object of the obligation would not be lawful.

However, given that the contraventional sanction is not a heavy one, we believe that the person who takes care of the funeral – although not obliged – may choose to fulfil the deceased’s wish out of reverence towards the memory of the deceased which is protected under article 79 of the Civil code.

4. Impediments Ensuing from Canon Law

4.1. Burial

Statistically, Romanian religious faith is dominated by the Romanian Orthodox Church, followed by the Roman Catholic Church. According to article 40 of the Orthodox Confessional Cemeteries Regulations, the Orthodox Christian deceased who switched to another religion can no longer be buried among the Orthodox deceased in a monastic or parish cemetery under the authority of the Romanian Orthodox Church.

In the case of inter-confessional marriages, we could find ourselves in the unnatural situation in which the surviving spouse, due to the lack of a community of faith between spouses, cannot be buried next to predeceased spouse when the time comes. In practice, often the impediment to the funeral was removed by statements made by the surviving spouse and descendants of the deceased who attested to the fact that the deceased had the same religious affiliation, “a solution that essentially has the character of an expedient” (Șchiopu, 2017a, p. 115). However, this rule is not really enforced in practice, but it’s still an impediment in planning a funeral considering that at any time the monastery or the parish could decide to enforce it.

The Roman Catholic Church has a different approach to inter-confessional marriages. For example, the Status of administering the cemeteries of St. Michael's Roman Catholic Parish from Săcele-Turcheș, allows the deceased family member belonging to another denomination to be buried in the family grave, as well as sons and unmarried daughters belonging to other confessions.

The doctrine considers that the surviving spouse and the closest members of the family are entitled to the burial plot even if they don’t inherit the estate (Munteanu, 2009, p. 62; Popa, 2013, p. 49). We would add to this idea that they should also have a right over the family grave even in the absence of a community of faith, the blood and marriage ties fully justifying such an approach. However, for the moment, in order to avoid the canonical restrictions as to the burial in a confessional cemetery, the spouses who lack the same religious affiliation, in order to have a common grave, should lease a

burial plot located in a municipal or a private cemetery whose regulation does not impose a confessional character to the right to be buried.

4.2. Cremation

The official position of the Romanian Orthodox Church is expressed in the Decision no. 4529 of 5th of July 2012 of the Holy Synod in connection with the non-Christian practice of the incineration of the dead. The Romanian Orthodox Church had and still has a clear and firm attitude towards those who choose incineration: the priests should inform in advance the parishioners that if any of them wished to be cremated, the Church will deny them any religious assistance, either at the funeral or the memorial service after the funeral. In order to do that, prior to the funeral service, the priest should gather from the family information about the cemetery in which the deceased is to be buried.

Therefore usually “no Romanian orthodox parishioner who chooses to be cremated can have a funeral mass or a memorial service, unless those that remain behind misinform the priest” (Şchiopu, 2011, p. 246). In rare circumstances, if the cremation was performed for objective reasons (financial or legal, specific laws of states where incineration is compulsory) without or against the wish of the deceased, only the Trisagion service with individual remembrance can be performed when depositing funerary urns in crypts.

However, unlike the Romanian Orthodox Church, cremation is accepted by the Catholic Church under these terms: “The Church earnestly recommends that the pious custom of burying the bodies of the deceased be observed; nevertheless, the Church does not prohibit cremation unless it was chosen for reasons contrary to Christian doctrine” (Code of Canon Law, 1176 §3). Thus, the Roman Catholic worshipers will not have to choose between cremation and a religious funeral, the two being compatible, to the extent that incineration was not chosen for reason contrary to Christian faith.

5. Impediments Ensuing from the Legal Status of the Graves

Often there are several heirs over the same burial plot and the situation becomes problematic if the number of available places is insufficient to receive all the heirs, because they all have “an equal right to use the grave” (Munteanu, 2009, p. 62). The same happens when, although initially the number of vacancies in a mausoleum is sufficient for all co-concessionaires of the burial site, one of the concessionaires buries his spouse relying on the equal right to use the mausoleum.

Thus, if someone has planned his funeral by choosing to be buried in a mausoleum crypt, the person who takes care of the burial may find that the chosen place is no longer available at the time of the funeral. To avoid such situations, when the heirs agree, they can make a division of usage, each assuming the exclusive use of a certain crypt.

Usually the courts are reluctant in admitting that the division of usage may also be achieved through judicial proceedings. However, some authors consider that, when there are several heirs, disallowing the judicial usage division of the subterranean funeral constructions, such as mausoleums, would annihilate the effectiveness of the

right to properly plan your own funeral and the obligation that the burial place be in accordance with the will expressed by the deceased while alive (Șchiopu, 2018a, p. 63).

6. Conclusions

From what we have seen in the above, the provision according to which “the place and the type of funeral will be in accordance with the will expressed by the deceased [...] *without any change of their last will*” must be interpreted as having the meaning that, the person required to take care of the funeral will be able to put into practice the deceased’s last will without a contravention sanction only to the extent to which the organization of the funerals complies with the imperative rules of secular law.

On the other hand, in terms of canon law, the desire to be cremated is incompatible with a religious funeral insofar as the deceased belongs to the Romanian Orthodox Church and therefore the will of the deceased to have a religious burial preceded by incineration cannot be fulfilled.

Not least, difficulties can arise when the deceased chose a burial place which, at the time of the death, cannot receive any more human remains. In order to prevent such situations, especially when a mausoleum has several free crypts, the heirs of such a funeral construction should conclude a usage partition of the crypts so that each of them can benefit from a crypt regardless of the moment of death.

References

- Bîcu, V. (2016). Drepturile personalității [Personality rights]. In M. Nicolae (coord.), *Drept civil: persoanele* [Civil Law: persons] (p. 37-75). Bucharest: Universul Juridic.
- Chelaru, E. (2014). Comentariu la art. 80 Cod civil [Commentary on article 80 from the Civil code]. In Fl.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Noul Cod civil: comentariu pe articole* [New Civil Code: comment on articles] (p. 100-102). Bucharest: C.H. Beck.
- Malaurie, Ph., Brenner, C. (2014). *Les Successions, les libéralités*. Issy-les-Moulineaux: Lextenso éditions, LGDJ.
- Munteanu, C. (2009). Despre amintirile de familie și morminte [About Family Memories and Graves]. *Revista română de drept privat*, no.2, p.53-64.
- Parohia Sfântul Mihai Săcele-Turcheș (2013). *Statutul de administrare a cimitirelor* [Status of administering the cemeteries]. Retrieved from http://www.ntpleb.ro/ro/page-49-regulamentul_cimitirelor.html. Accessed on 15 th September 2018.
- Patriarhia Română (2003). *Regulamentul pentru organizarea și funcționarea cimitirelor parohiale și mănăstirești din cuprinsul eparhiilor Bisericii ortodoxe române* [Regulations for the organization and functioning of the parish and monastery cemeteries in the dioceses of the Romanian Orthodox Church]. Retrieved from <http://bibliocanonica.com/regulamentul-pentru-organizarea-si-functionarea-cimitirelor-parohiale-si-manastiresti-din-cuprinsul-patriarhiei-romane/>. Accessed on 15th September 2018
- Pavel, F. (2016). Partea sufletului. Un vechi obicei de sorginte romană, încorporat în conținutul desemnat prin noțiunea de „sarcină a moștenirii” [The part of the soul. An

- old custom of Roman origin embedded in the content designated by the notion of „duty of the inheritance”. *Revista română de jurisprudență*, no.4, p.179-184.
- Pontifica Commissio Codici Iuris Canonici Recognoscendo (1983). Codex iuris cononici [Code of Canon Law]. *Acta Apostolicae Sedis*, 75, part 2, p.1-324.
- Popa, I. (2013). *Drept civil: moșteniri și liberalități* [Civil law: inheritances and liberalities]. Bucharest: Universul Juridic.
- Sfântul Sinod al Bisericii Ortodoxe Române, *Hotărârea nr. 4529 din 5 iulie 2012 în legătură cu practica necreștină a incinerării morților* [Decision no. 4529 of 5th of July 2012 of the Holy Synod of the Romanian Orthodox Church in connection with the non-Christian practice of the incineration of the dead]. Retrieved from http://patriarhia.ro/images/pdf/HotarariSinodale/2012/4529_Comunicare_practica_incinerarii.pdf. Accessed on 29th September 2018.
- Schiopu, S.-D. (2011). Burial vs. Cremation in Romania – A Legal Perspective. In C. I. Murzea, A. Repanovici (eds.), *Legal Practice and International Laws* (p. 241-246). WSEAS Press.
- Schiopu, S.-D. (2017a). Unele considerații asupra evoluției dreptului de a-ți determina felul propriilor funeralii în România [Some considerations on the evolution of the right to determine your own funeral in Romania]. In Academia Română (ed.), *10 ani de la aderarea României la Uniunea Europeană. Impactul asupra evoluției dreptului românesc* (pp. 110-117). Bucharest: Universul Juridic.
- Schiopu, S.-D. (2017b). Short Preliminary Considerations on some Funeral Arrangements in the Light of Government Decision no. 741/2016. *Bulletin of the Transilvania University of Braşov, Series VII: Social Sciences and Law*, no.1/2018, p.213-218.
- Schiopu, S.-D. (2018a). Unele particularități ale partajului judiciar al locurilor de înhumare și al lucrărilor funerare [Some particularities of the judicial division of the burial plots and funeral constructions]. *Dreptul*, no.5, p. 55-63.
- Schiopu, S.-D. (2018b). Persoanele obligate să dispună cu privire la înmormântare [The persons obliged to dispose as to the funeral]. *Revista Universul Juridic*, no.8, 155-160.
- Ungureanu, O., Munteanu, C. (2010). *Eseu asupra clasificării bunurilor în dreptul civil* [Essay on the Classification of Goods in Civil Law]. Bucharest: Universul Juridic.
- *** *Hotărârea Guvernului nr. 741 din 12 octombrie 2016* pentru aprobarea Normelor tehnice și sanitare privind serviciile funerare, înhumarea, incinerarea, transportul, deshumarea și reînhumarea cadavrelor umane, cimitirele, crematoriile umane [Government Decision no. 741 of 12th of October 2016 for the approval of the Technical and Health Rules regarding the funeral services, burial, cremation, transport, exhumation and reburial of human corpses, cemeteries, human crematoriums], published in The Official Journal of Romania, Part I, no. 843 from 24th of October 2016.
- *** *Legea nr. 102 din 8 iulie 2014* privind cimitirele, crematoriile umane și serviciile funerare [Law no. 102 from 8th of July 2014 on cemeteries, human crematoriums and funeral services], published in The Official Journal of Romania, Part I, no. 520 from 11th of July 2014.
- *** *Legea nr. 287 din 17 iulie 2009* privind Codul civil [Law no. 287 from 17th of July 2019 on the Civil code], republished in The Official Journal of Romania, Part I, no. 505 from 15th of July 2011.