

LEGISLATIVE NOVELTIES BROUGHT ON BY THE CIVIL CODE IN REGARD TO NUNCUPATIVE WILLS

I. NICOLAE¹ D.G. IONAŞ¹

Abstract: *The current study aims to analyze the most important legislative novelties introduced in civil law when the Civil Code came into force, on October 1st, 2011, in regard to nuncupative wills; at the same time, we will provide a comparative presentation of these notions in the 1864 Civil Code. We feel that this comparative presentation is necessary, as for the inheritances started before the coming into force of the new Civil Code, the law which governs their judicial faith is the 1864 Civil Code.*

Key words: *nuncupative will, exceptional circumstance, testator, legacy.*

1. Introduction

According to the Civil Code, the last will of the testator can occur under any of these special forms:

- an ordinary will - holographic will and notarial will (will in solemn form). The ordinary will is signed under normal conditions. The regulation of the forms of ordinary will is stated in article 1040 Civil Code;

- nuncupative will - the will written in case of an epidemic, catastrophe, war or other such exceptional circumstances; the testament written aboard a ship or plane; the testament of military personnel; the testament written by a person admitted to a medical facility.

These wills are written in exceptional circumstances. The regulation of nuncupative wills is stated in article 1047 of the Civil Code.

The will regarding amounts and deposited values. This will is regulated in article 1049 of the Civil Code.

We can notice that the new Civil Code no longer regulated the mystic or secret will, a regulation found in the 1864 Civil Code.

In regard to this form of testament, some authors [3] believe the lack of regulating this type of will in the current regulation to be correct, as the mystic will was not used very often; however, there are contrary opinions expressed by other authors [1].

The new Civil Code no longer regulated the will written by a Romanian citizen abroad, as this is subject to private international law (article 2635 of the Civil Code).

Also, we must point out the fact that the lawmaker had dropped the clause regarding the amounts deposited at banks but introduced the will regarding amounts and deposited values [4].

¹Faculty of Law, *Transilvania* University of Braşov.

We must also point out the fact that, as a legislative novelty, the will written by a person admitted in a medical facility, falls in the category of nuncupative wills; apart from that, all forms of will from the 1864 Civil Code were kept.

Regardless of the form of the will, it must comply, in all cases, to the general conditions for validity: written form and the form of a separate act, under the sanction of absolute annulment.

In regard to the different forms of will, we must underline that these have equal legal value. As it was shown in the doctrine [2], the principle of the equivalence of the forms of will is in force. Thus, if one chooses to revoke or modify his will, there is no need to respect the symmetry of forms. For example, a solemn will can be revoked by a holographic will, later on.

There are, however, significant differences regarding the proof force of each will. We will analyze these later. If a will is proved to be written in the desired legal form, regardless of whether it is an ordinary, nuncupative or of amounts and deposited goods will, the legal effects of the will are to be the same.

2. The notion of nuncupative wills and the legal regulation of nuncupative wills

The lawmaker regulated, especially for the person who is in exceptional circumstances which prevent him from writing an ordinary will, the possibility to write a will in an authenticated simplified form, following some special rules, which waive the law in this domain.

Because they follow rules which waive common law in this area, they were called nuncupative wills. Nuncupative wills represent simplified authenticated wills.

We must keep in mind that the person who is found in an exceptional circumstance, which justifies the use of

such a form of will, can write their will in the form of a holographic will, by respecting the formal conditions analyzed in the section where the holographic will is described. The validity of the nuncupative will does not depend on the possibility to write a holographic will, thus meaning that the person who finds himself in one of the exceptional circumstances stated by law, will have the right to choose regarding the way in which to write a will [5].

The nuncupative will is valid each and every time there is no possibility of writing a solemn will, in the specific situations stated by the lawmaker, even if there had been a possibility to write a holographic will, but the testator chose to write the will in the nuncupative form rather than the ordinary, holographic one[5].

The legal regulation of nuncupative wills is found in articles 1047-1048 of the Civil Code. According to article 1047 of the Civil Code, the following are considered to be nuncupative wills:

- the will written in case of an epidemic, catastrophe, war or other such exceptional circumstances;
- the will written aboard a ship or plane;
- the will of military personnel;
- the will written by a person admitted in a medical facility.

In the following section, we will analyze these four exceptional circumstances of nuncupative wills.

3. The will in case of an epidemic, catastrophe, war or other such exceptional circumstances

Article 1047 alignment 1 letter a) of the Civil Code shows that a valid will can be written in front of a competent worker of the local civil authority in case there is an epidemic, a catastrophe, a war or other such exceptional circumstances. This type of will is written in the presence of 2 witnesses, as stated by article 1047

alignment 2 and, according to article 1047 alignment 3, the will is signed by the testator, the worker and the two witnesses. If the testator or one of the witnesses can't sign, there will be a separate mention regarding the case that prevented them from signing. Disregarding the provisions of article 1047 alignment 3, is sanctioned by absolute annulment.

As for the people who can write a nuncupative will in case of an epidemic, catastrophe, war or other such exceptional circumstances, we must underline that the legal text allows for the use of this type of will by healthy people, as well as sick people.

In order for such a will to be valid, it must be written in front of a competent worker of the local civil authority and in the presence of two witnesses.

The will written under these exceptional circumstances considers three situations in which the testator can't write a solemn will because either there is no notary office where he is currently located or, if such an office exists, the testator can't use it for objective reasons.

We can notice that the lawmaker extended the area of application of nuncupative wills in regard to the provisions of article 868-886 of the 1864 Civil Code, from contagious disease to catastrophe, war and other such exceptional circumstances. Thus, we notice the lawmaker's preoccupation with adapting the current regulation to any situation which might arise in day-to-day practice.

An epidemic is the spread of a contagious disease in a short time, by contamination, involving a large number of people from one region.

Catastrophe is a tragic event on a large scale, followed by cataclysmal consequences; disaster; tragedy; calamity.

War is an armed (extensive) conflict between two or more political groups,

social categories or states, in order to achieve economical and political interests.

To these previously mentioned situations, the lawmaker added "other such exceptional circumstances", thus leaving the possibility of leaving no situation uncovered. Thus, the person who is unable to write a will of an ordinary form, can write a nuncupative will. As it was correctly pointed out in the doctrine[5], the regulation of nuncupative wills is a form of protecting the written form of the will, thus leaving no argument for a person to not be able to test its writing, regardless of the situation he is in.

4. The will written aboard a ship or a plane

Article 1047 alignment 1 letter b) of the Civil Code states that a valid will can be concluded in front of the commander of the ship or the person who replaces him, if the testator is aboard a Romanian ship, during a fluvial or naval journey. The will written aboard a plane is subject to the same conditions.

According to article 1047 alignment 2 of the Civil code, the will written in this form must be concluded in the presence of two witnesses.

The nuncupative will is signed by the testator, the commander of the ship and two witnesses. If the testator or any of the witnesses are unable to sign, there has to be a separate mention regarding the cause that prevented them from signing. The sanction for disregarding these provisions is absolute annulment, as stated by article 1047 alignment 4 of the Civil Code.

The possibility of writing such a testament is acknowledged in case the testator is a member of the crew of the ship or plane, but also if he is just a passenger. What is essential to this type of will is that the testator should be on a fluvial or naval journey, respectively the plane should be

in the air. In case the ship or plane is grounded, the provisions of article 18 fifth alignment of Law no 36/1995 regarding notary acts fulfilled at the headquarters of diplomatic or consulate offices, as well as Romanian ships or planes, will be applied. Thus, if at the location where the ship or plane are grounded there is no consulate or diplomatic office, a nuncupative will can be written.

As shown in judicial literature, we must acknowledge the possibility to write a nuncupative will throughout the fluvial or naval journey or throughout the entire time the person is aboard a ship or a plane. The journey starts at the moment of departure and ends when passengers leave the ship or plane [5].

We must also notice that the lawmaker extended the regulation area, as opposed to the provisions of article 874-883 of the 1864 Civil Code, to the possibility of writing a nuncupative will during the flight.

5. Will of military personnel

According to the provisions of article 1047 alignment 1 letter c) of the Civil Code, a valid will can be written in front of the commander of the military unit or the person who replaces him, if the testator is a member of the military forces or he is just paid personnel of the Romanian armed forces and he can't write a solemn will.

This type of will shall be concluded in the presence of two witnesses.

The nuncupative will is signed by the testator, the agent in front of which it was written and the two witnesses. If the testator or any of the witnesses are unable to sign, there will be a separate mention regarding the cause that prevented them from signing. The sanction for disregarding these provisions is absolute annulment, as stated by article 1047 alignment 4 of the Civil Code.

By analyzing the provisions of the 1864 Civil Code, we notice that this type of will is available to members of the military as well as the assimilated personnel, without there having to be a military conflict, without the need for the testator to be on foreign territory, a prisoner of war or in a location under siege. In order for the testator to use this form of will, it must be impossible for him to address a public notary. As we have seen from the provision of article 1047 alignment 1 letter c) of the Civil Code, the possibility to write this type of will is applied to military personnel and those who are paid personnel of the armed forces, the main condition being that they can't address a public notary in order to write a solemn will. The lawmaker considered the fact that, in real life, auxiliary personnel is subject to the same constraints as military personnel [2].

6. The will written by a person admitted in a medical facility

According to article 1047 alignment 1 letter d) of the Civil Code, a valid will can be concluded in front of the director or chief physician of the facility, or, if they are unavailable, in front of the doctor on call, as long as the testator is admitted in a medical facility where the public notary has no access.

This type of will must be written in the presence of two witnesses.

The nuncupative will is signed by the testator, by the director or chief physician and the two witnesses. If the testator or any of the witnesses are unable to sign, there will be a separate mention regarding the cause that prevented them from signing. The sanction for disregarding these provisions is absolute annulment, as stated by article 1047 alignment 4 of the Civil Code.

Thus, the person admitted in a medical facility where the public notary has no access, can write a nuncupative will in front of the director or chief physician of the medical facility, or, if they are both unavailable, in front of the doctor who is on call. The presence of two witnesses is mandatory.

The admitted person's ability to draw up such a will is acknowledged, regardless of whether the person is sick or not, the only condition being that the person has no ability to contact a public notary. Thus, it is possible for a healthy person who is admitted with a member of his family, to be in the situation in which he can't leave the medical facility and the public notary is forbidden from entering the facility, because of quarantine, for example. In this case, the testator can draw up a nuncupative will, as stated by article 1047 alignment 1 letter d) of the Civil Code. In the light of the facts mentioned above, we can see the illness is not a mandatory condition for this type of will.

7. Common rules of nuncupative wills

Aside from the special rules stated for each will, nuncupative wills must fulfill all validity conditions, namely they must be concluded in writing and they must respect the mutual will interdiction. In regard to these two conditions, please see our analysis hereinbefore.

In this section, we will point out the common rules to be applied to nuncupative wills. These are the following:

a) the nuncupative will must be signed by the testator, the person in front of which it was written and two witnesses. In case the testator can't sign, there will be a separate mention as to why he was not able to sign. Also, if a witness can't sign, there will be a separate mention regarding the reason that prevented him from signing. So, at least one of the two witnesses must sign the

will. All these signatures are stated by law, as a condition for the validity of the will.

b) the nuncupative will shall be opened following the same procedure stated in article 1042 of the Civil Code, the same as the holographic will. Thus, before being executed, the nuncupative will shall be given to a public notary to be certified for not changing. Also, the public notary is the one who opens and validates the nuncupative will and places it in the inheritance file. In regard to the opening and the condition of the will, these will all be written in an affidavit.

Article 106 alignments 2 and 3 of Law no 36/1995 states that, in case of a holographic, mystic or nuncupative will presented to the public notary or found by him, he must open it and certify it for not changing.

When the term is set for it to be debated, its material status will be checked and written in an affidavit. This is comprised by the notary in the presence of all heirs including those who have been left out of the will or were removed from the inheritance procedure or those whose rights are affected by this and who will be called to the procedure.

c) nuncupative wills produce effects from the death of the testator, only if his death occurred in extraordinary circumstances stated by law, and after these circumstances stop, only for a limited period of time.

According to article 1048 first alignment, the nuncupative will becomes void in 15 days since the date the testator had the possibility to draw up a will in any of the ordinary forms.

This term is suspended if the testator is in a state that doesn't allow him to draw up a will.

The ordinary forms to which the legal text is referring are the solemn will and the holographic will.

Thus, if the exceptional circumstance which justified the nuncupative will stop, the will is still valid for 15 more days.

This term is suspended if the testator is in a state which does not allow him to draw up a will as stated by article 1048 alignment 1 of the Civil Code.

We must also notice that the validity term of nuncupative wills is much shorter, as opposed to the provisions of the 1864 Civil Code, which stated that the military will or the will in case of an epidemic were valid for 6 months from the date when the special conditions had stopped.

As for the naval will, the term was 3 months since the date the testator had reached a place which allowed him to draw up an ordinary will.

However, there is an exception to this rule. According to article 1048 second alignment of the Civil Code, the validity of the will clause which acknowledges a child has no time limitation.

Thus, acknowledging a child through a nuncupative will is bound to produce effects, as it is not necessary for the testator to draw up an ordinary will after those 15 days pass.

The reason for this exception is that acknowledging a child is an irrevocable legal act which produces effects from the date it was manifested and not from the death of the testator.

According to article 416 alignment 3 of the Civil Code, the acknowledgement of a child, even if made by will, is irrevocable.

e) although the current Civil Code makes no mention of the date of the nuncupative will, as an essential element of the will, we feel, along with other authors[3], that the date is very important, as it is the element to be taken into account when appreciating the exceptional character of the circumstances which had generated the testator's choice to draw up a nuncupative will.

8. Other forms of will

Aside from ordinary and nuncupative wills, the lawmaker regulated, by distinctive provisions, the will of amounts and deposited goods, as well as the will made by Romanian citizens abroad.

9. The will of amounts and deposited values

According to article 1049 of the Civil Code, the will clauses regarding amounts of money, values or titles deposited in specialized institutions are valid if they respect the formal conditions stated by the special laws which are applied to these institutions.

Specialized institutions will not be able to give amounts of money, values or other titles as a legacy if they don't have a court's decision or an heir's certificate which acknowledges the quality of heir and the validity of the clause as well as the authenticity of the will.

Credit institutions are obliged to communicate the will clause as soon as they know of it, by inscribing it in the register mentioned in article 1046.

This register is the National Notary Register, a digital registry.

Thus, the will of values and deposited amounts is inscribed in this register as is the solemn will.

The holographic will and the nuncupative will are not to be registered in this register, due to their particular conditions.

It is also noticeable that the will of amounts and deposited values must have the appropriate form, which had been stated by the laws that apply to specialized institutions, not the provisions of the Civil Code regarding the will.

The Justice Minister's Order no 1903/2011 regulates the formal conditions for the validity of the provisions of the will

in regard to depositing amounts of money, values or titles at specific credit institutions.

Specialized institutions are credit institutions (banks, credit corporate organizations, economy banks, loan banks according to the Government's Ordinance no 99/2006 regarding credit institutions and the adequacy of capital) but also other institutions which can deposit money, values or titles.

Thus, according to article 1 of the mentioned order, the person who deposits money or values at a credit institution can dispose of these, by death clause, through a clause of the will which is inserted in the convention concluded with the bank. The will clause can refer to amounts of money, values or titles which the testator deposited at that credit institution. This means the testator can't benefit from any other valuables except for what he deposited at that specific credit institution. If he wishes to administer money or values deposited at another credit institution, he will have to conclude a separate will provision for every bank or credit institution.

Article 2 of Order no 1903/2011 states that the testator should write the will in his own holographic hand writing, as stated in the annex which is a part of the order.

The will clause must contain the specific naming of the beneficiary of the will clause, the object of the will, the signature of the testator and the date when the will was drawn up.

In case the testator can't write the will clause by holographic handwriting, he will be guided by the workers of the institution to draw up a solemn will.

Article 4 of Order no 1903/2011 shows that the clauses of the will must be completed, signed and dated by the testator in the presence of two workers of the credit institution, especially empowered for this purpose, who must sign the convention along with the testator. Thus, in order to

have a valid will clause, two conditions must be met: the first requires the writing, dating and signing of the will by the testator and the second refers to the fact that the will must be drawn up in the presence of two bank workers especially appointed for this, who must sign the convention along with the testator.

The credit institution must immediately communicate to the National Union of Public Notaries all the necessary data in order to write the will in the national registry. This provision is applied in case the will is modified or revoked by the testator, as well as in the case when, until the death of the testator, the account or bank deposit where the testator had deposited money was liquidated, according to article 5 of the mentioned order.

We must also point out that the credit institution must provide all information regarding amounts of money, values or titles deposited by the dead person, when asked by the court of law, as stated by article 7 of Order no 1903/2011.

In regard to effectively giving the object of the will clause, we must point out that the credit institution will be able to turn over the amounts of money, values or titles, only based on a court's decision or the heir's certificate which certifies the validity of the will clause and the quality of heir. The previously stated provisions are regulated in article 6 of Order no 1903/2011 and are nearly identical with the provisions of article 1049 alignment 2 of the Civil Code. The only difference between the two texts is that the Civil Code mentions the provisions regarding the inheritance reserve.

After clarifying these aspects, we are going to discuss the judicial nature of the will clause that has as an object amounts of money, values or titles. The legal nature of this will clause is that of a particular legacy. From the previously stated facts, we can conclude that the will clause must

only be dated and signed by the testator, but not entirely written by the testator, as handwriting is only required for the specific sections of the form, annex to Order no 1903/2011, thus we are in the presence of a holographic simplified will [4]. The specialized literature showed that this type of will has elements of both the holographic will (as it is partly handwritten by the testator) as well as elements of the solemn will (as it is written, signed and dated only in the presence of two workers of the credit institution, who are especially empowered for this purpose) [3].

We must also point out that the will clause whereby the testator administers the money or values deposited at the credit institution can be revoked at any time. The rescindment can be express, when the will clause is annulled or tacit, accomplished by drawing up another will. Thus, the testator can modify the will by means of a nuncupative will or by solemn will during his lifetime, without having the obligation to inform the credit institution.

However, the will clause must not be mistaken for the empowering clause. The empowering clause represents a power of attorney which produces effects during the life of the person who empowers and which stops when that person dies, while the will clause produces effects from the time of death of the testator as this is the time when the heir's rights become legal. The moment when the heir benefits from the legacy is subsequent to the inheritance procedures, as previously shown.

To the will clause, as it is a particular legacy, all rules regarding the legal regime of the particular legacy will be applied, except the ones regarding its form.

In conclusion, we notice that the lawmaker adapted the will of amounts and

deposited values to the new social-economic conditions, as the old regulation only allowed for the will of amounts of money deposited in the National Bank. Extending the area of application of this type of will is welcomed.

10. Conclusions

As a result of this study, we can conclude that the current Civil Code regulated nuncupative wills by taking into account the evolution of society and the particular situations which can arise in practice. Thus, we notice significant improvement of the 1864 Civil Code. In addition to the news we have pointed out in this study, we must also notice that the new lawmaker let go of the regulations which were had no longer been applied in practice, hence the mystic will.

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