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GENERAL ASPECTS REGARDING THE CIVIL INSTITUTION OF LEGACY AND WILLS IN THE NEW CIVIL CODE

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Abstract: *The testament is the unilateral, personal and reversible document through which a person called bequeather disposes in one of the forms provided by the law for the time when he/she will no longer be alive. The main object of the testaments is represented by legacies. But the legacy is the testamentary provision through which the bequeather stipulates that when he/she passes away, one or more legatees will acquire his/her entire inheritance, a part of it or certain assets. In consequence, the modality of transmission and acquiring of property is the legacy, and not the testament. That is why, in the reference books, a question often asked is the one regarding the legal character of the testament and, in consequence, its characteristic features in relation to its legal character of generosity, like donation.*

Key words: *testament, legacy, judicial character, characters.*

1. Introduction

When a person passes away, his/her inheritance is passed on to those entitled according to the law. Although the inheritance ab intestat represents the rule, it can be superseded by decuius by drawing up a testament. According to article 1034 in the New Civil Code, the testament is a unilateral, personal and reversible document, through which a person called bequeather disposes in one of the firms provided by the law for the time when he/she will no longer be alive.

The main object of testaments is represented by legacies. The legacy is defined in article 986 from the New Civil Code and is the judicial document comprised in a testament through which the bequeather appoints one or more people who, when he/she passes away, will receive his/her entire inheritance, apart of it or certain assets.

In such a situation, the following question was asked in the reference books: which is the legal character of the testament?

According to one opinion [1], the testament was characterized as being a *legal pattern* which records a manifestation of will expressed in the form of a legacy. Therefore, the role of the testament is that of a legal document which contains legacies, namely dispositions of last will with a character of translative ownership. In case it comprises other testamentary dispositions apart from legacies, then a single document comprises

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two or more distinct legal documents: a testament together with other documents [1].

In the same respect, it was also stated that the testament is only the document, the certificate (instrumentum) in which the consented freedom materializes in view of death (negotium), the testament being only *the probative document of the legacy* [2].

In another opinion [3], it was stated that the testament is a *legal form* through which the bequeather can dispose of his assets through legacies. But the testament can contain not only dispositions regarding assets, but other dispositions like: direct or indirect appointment of the legatee, dispositions referring to partition, the reversal of previous testamentary dispositions, disinheritances, appointing executors, duties imposed to the legatees or the legal heirs and other dispositions which come into effect after the death of the bequeather.

It is conceived as a legal document in the sense of *negotium juris*, but as a way of expression, as a legal form, the testament is a certificate elaborated with the solemnity given by the law. That is why the testament is not a homogenous legal document, but it represents a simple form, a pattern which contains a plurality of self-contained legal documents, each one with its own legal status [4].

The opinion shared by the majority is the one related to the testament being a *legal document*, as it can be defined, namely "the exercise of will intervening in order to produce legal effects materialized in creating, modifying, transmitting or fighting a concrete legal relationship." [5].
In the motivation of this situation, it was assumed that the testament is the result of a unilateral manifestation of will and the purpose of the bequeather's manifestation of will aims at producing legal effects after the death of the bequeather, namely the release of the patrimony to the legatee as soon as the event of the bequeather's death occurs [6]. In consequence, it was considered that the legal document is the genre and the testament is the species [6], which comprises both legacies with translative effect regarding property, and other measures taken by the bequeather. In this view, the testament presents itself as a complex, heterogeneous legal document, which contains in itself more legal documents, independent in terms of legal regime and finality [7]. The validity of these dispositions of last will is subject to regulations concerning the solemnity conditions of the testament.

The testament is regulated in the Civil Code together with the donation, as munificence, meaning the legal document through which a person voluntarily disposes of entirely or in part of his/her assets in favour of another person. The Civil Code limits the possibility to voluntarily dispose of the entire patrimony or a part of it in two ways: donation and testament. Liberalities, together with unselfish procedures, represent nothing else but a division of the voluntary documents. The legacy included in the testament is a genuine liberality since through it, a diminution of the voluntary transmitter's patrimony takes place when he/she passes away and, simultaneously, an increase of the heritage of the one gratified.

Although it is a liberality equal to donation, the testament has a series of specific features which differentiate it from donation.

In this sense, the testament is not a contract, but a document, because it represents a unilateral and personal manifestation of will. The simple manifestation of the bequeather's will is sufficient in order to operate the transmission of the assets when he/she passes away, the legatee's acceptance doing nothing else but to consolidate the voluntary conveyance [2].

In consequence, the validity and the effects of the testament do not depend on its subsequent acceptance or rejection of it by the legatees. Being a personal legal document, the testament cannot be signed through representatives or assisted by the legal guardian.

Moreover, unlike donation, the testament is a fundamentally reversible document as long as the bequeather is alive. Reversibility being the essence of the testament, the bequeather cannot give up on changing or repealing his dispositions, as this reversal would constitute an agreement regarding a future inheritance prohibited by the law. The legacy becomes final only on the bequeather's death. The voluntary repeal of the testament is regulated by the provisions of articles 1051 – 1053 from the New Civil Code, article 1068, paragraph 1 stipulating that the legacies are subject to the provisions regarding the voluntary repeal of the testament. Thus, in what concerns the New Civil Code, the voluntary repeal of the legacy takes place in the same conditions as the voluntary repeal of the testament.

According to the way in which the bequeather expresses his/her will, the repeal can be express or tacit.

A testament can be expressly repealed, be it entirely or partially, only through an authentic notarial document or a subsequent testament, under the nullity sanction. The testament which repeals a former testament can be elaborated in a different form from the repealed testament, complying with the symmetry of forms not being necessary in this case. The tacit repeal can be done through destroying, tearing up or erasing the testament. The erasure of a disposition in the holograph testament by the bequeather implies repealing that disposition. The changes made by erasure must be signed by the bequeather. The destruction, tearing or erasure of the holograph testament, known by the bequeather, also entail the repeal, on condition that he/she could have been able to rewrite it.

The subsequent testament can repeal the previous one also to the extent to which it contains inconsistent or contrary provisions with it. The effects of repeal are not eliminated in case of caducity or repeal of the subsequent testament. Also, any alienation of the asset which represents the object of a several legacy, consented by the bequeather, even if it is affected by modalities, repeals the legacy for everything that has been alienated, the alienation of the legacy representing another form of tacit repeal. The ineffectiveness of alienation affects the repeal only on condition that:

a). it is determined by the incapacity or the vitiation of the bequeather's will; or

b). the alienation represents a donation in favour of the legacy's appointee and has not been done under conditions or with substantially different obligations from the ones which affect the legacy.

The voluntary destruction by the bequeather of the asset which represents the object of the several legacies implicitly repeals the legacy.

The retraction of repeal is done under the same conditions as the repeal, namely by notarial document or testament, the retraction having the effect of revival of the testamentary dispositions repealed.

The testament does not make the legatee rich if it does not take one of the forms expressly prescribed by the law and mandatorily required for its validity, the Civil Code sanctioning with absolute nullity the inobservance of the form required by the law. In this sense, according to the provisions of the New Civil Code, testaments are of three categories: ordinary testaments, privileged ones and other testamentary forms. The holograph testament and the authentic testament are part of the ordinary

testaments. It is to be seen that the lawmaker has given up on the legal regulation of mystical testament, an intermediary form of testament, situated somewhere between the holograph testament and the authentic one [8].

Running the risk of being declared absolutely null if elaborated otherwise, the holograph testament must be entirely written, dated and signed by the bequeather himself/herself.

As a novelty, we find in the New Code the necessity to meet certain formal proceedings subsequent to the elaboration of the testament and opening the heritage, consisting in presenting the holograph testament in front of a notary public in order to endorse it for proof of non-alteration. In this sense, article 1042 from the New Civil Code stipulates that, before being executed, the holograph testament will be presented to a notary public in order to be endorsed for proof of non-alteration.

During the inheritance proceedings, the notary public proceeds to opening and validating the holograph testament and enclosing it in the inheritance file. The opening of the testament and the state in which it is found are both recorded in a minute. After the completion of the inheritance procedure, the original of the testament is handed in to the legatees, according to the agreement among them, and, in case there is no such thing, to the person appointed by court order. The lack of formality is not executed by the law, so the holograph testament will come into effect even if it was not presented to the notary public [9]. This type of testament constitutes a prima facie proof.

The authentic testament is the one which has been authenticated by a notary public or another person who, according to the law, was invested with public authority by the state. When authenticating it, the bequeather can be assisted by one or two witnesses.

The bequeather dictates his/her dispositions in front of the notary public, who carefully writes the document and then reads it to him/her or, according to the case, gives it to him/her to read it, mentioning expressly the fulfillment of these formalities. If the bequeather has already dictated the document containing his/her last will, the authentic testament will be read to him by the notary public. After reading, the bequeather must declare that the document expresses his/her last will.

The testament is then signed by the bequeather, and the authentication report by the notary public. In order to inform the people who justify the existence of a legitimate interest, the notary public who authenticates the testament has the obligation to register it immediately in the National Notarial Registry kept in electronic form according to the law. The authentic testament has probative power up to the statement of forgery in what concerns the personal conclusions of the notary public. If the existence of the declarations given in front of the notary public and registered by him/her in the authentication report can only be rebutted through the statement of forgery, the authenticity of these declarations can be rebutted through any means of proving [9].

Privileged testaments are the testaments which can be elaborated in special situations, fulfilling some simplified formalities and are, in fact, only some simplified authentic testaments. Their simplicity is justified by the fact that they are elaborated in exceptional conditions and investigated by people without special preparation in this sense.

The New Civil Code acknowledges four types of such privileged testaments. A valid testament can be elaborated in the following special situations:

a) in front of a competent magistrate of the local civil power in case of catastrophes, wars or such other extraordinary circumstances;
b) in front of the captain of a ship or the person replacing him if the bequeather is on board of a ship under the Romanian colours, during a sea or river travel. The testament elaborated on board of an aircraft is subject to the same regulations.
c) in front of the commander of a military unit or the one who replaces him, if the bequeather is a military or, without having this quality, he/she is an employee or provides services in the Romanian armed forces and he/she cannot address a notary public.
d) in front of the manager, the chief physician of the health institution or the chief physician of the service or, in their absence, in front of the doctor on call as long as the bequeather is hospitalized in a health institution in which the notary public has no access.

What is characteristic to all privileged testaments is the fact that they have to be signed by the bequeather, two witnesses and the agent who investigates the case under the nullity sanction; they are valid and produce effects only if the bequeather has died in the exceptional circumstances in which the testament was elaborated; and before being open, it must be presented to a notary public in order to be endorsed for proof of non-alteration.

Although the law does not provide it expressly, the opinion that these testaments must be dated has been expressed in the reference books, dating being considered an essential element in evaluating the exceptional circumstances which justify the use of these types of testaments.

Apart from the ordinary and privileged forms of testaments stipulated by the New Civil Code, the bequeather can make use of other two forms of testaments, the so-called special testaments. These are: the testament of sums and stored values and the testament made abroad.

Regarding the testament of sums and stored values, article 1049 from the New Civil Code stipulated that the testamentary provisions regarding the sums of money, the values or the certificates deposited in specialized institutions are valid with the observance of the terms regarding form provided by the special laws applicable to these institutions.

The specialized institution will be able to proceed to delivering the legacy consisting in sums of money, values or certificates only based on a court order or the certificate of inheritance which ascertains the validity of the testamentary provision and the title of bequeather, the provisions regarding the report and reduction being applicable.

The credit institutions are required to communicate immediately when establishing a testamentary provision, the entry in the registry book mentioned in article 1046. According to the Ordinance of the Justice Ministry no. 1903/2011 on the terms regarding the form necessary for the validity of the testamentary provisions regarding the sums of money, the values or the certificates deposited by the clients of the credit institutions, the depositor of a sum of money, value or title can dispose of these for the mortis causa through a testamentary provision included in the convention signed with the credit institution. The bequeather must fill in the clause containing the testamentary provision by hand, under the nullity sanction.

The testamentary provision must be signed and dated by the bequeather in the presence of two clerks of the credit institution, especially instructed in this respect, who sign the convention together with the bequeather. This testamentary provision has the legal character of a

legacy with particular title, related to the sums of money which will be found deposited in the credit institution on opening of the heritage [9].

Regarding the testament elaborated abroad, being a matter of Private International Law, the doctrine considers that "a Romanian citizen will have the possibility to bequeath abroad in any of the forms provided by the law of the place." [1].

Still, the New Civil Code maintains the law regarding the conversion of the testamentary form, allowing to keep the effects of a null testament because of a vice of form if it meets the requirements provided by the law for another testamentary form (an exception from the rule quod nullum est nullum producit efectum).

Another characteristic feature of the testament is that it represents a legal document for the mortis causa. Although it is valid since the date of its elaboration, it will only produce effects after the death of the bequeather.

Therefore, if in the case of donation, the donor is deprived of the donated assets from the date of signing the contract, in case of the testament, the conveyance of assets given through legacy, operates only from the date of opening the heritage, namely the date when the bequeather passes away.

The bequeather remains the owner of the assets which constitute the object of the legacies, and the legatees acquire no rights during the bequeather's life.

Thus, the testament is regarded as a personal legal document by the lawmaker, essentially repealable, solemn and, for mortis causa, through which the bequeather provides for the time when he/she will no longer be alive.

Although it is a liberality which is similar to donation, and through it a decrease of the correlative bequeather's heritage takes place, the testament presents a series of characteristic features which differentiate it essentially from that.

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