

ARGUMENTS IN FAVOR OF THE EXTINCTION OF THE RIGHT OF HABITATION DUE TO THE COMMON-LAW RELATIONSHIP OF THE SURVIVING SPOUSE

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Abstract: *As it is known, the remarriage of the surviving spouse causes the extinction of his right of habitation, a just regulation that takes into account the special and personal character of this right. However, we have raised the question of how to assess, in practice, the situation in which the surviving spouse did not remarry, but lives, in a common-law relationship in that house with another person. In this context, with this paper, we aim to give a legal and equitable solution to this problem.*

Key words: *surviving spouse, habitation, common-law relationship*

1. Introduction

From the point of view of succession rights, the situation of the surviving spouse was a difficult one in the period 1864-1944. Thus, according to art. 679 of the Civil Code 1864, the surviving spouse had the right to the inheritance only if the deceased "had no relatives in successive degrees, neither natural children".

The situation changes, however, in 1944, when law no. 319 of June 10, 1944, on the right of inheritance of the surviving spouse is passed. By this law the surviving spouse is recognized the right to the inheritance in competition with any of the relatives (art. 1), the right to habitation on the dwelling used before the death of the spouse (art. 4), the special right of inheritance over household goods and gifts received at the wedding (art. 5) and other rights.

The rights of the surviving spouse as regulated by law no. 319 of 1944 were taken over, with some amendments, by Law no. 278 of 2009, on the civil Code, being regulated by art. 971. The doctrine (Popa, 2022, p.129) appreciates the legislative evolution concerning the inheritance rights of the surviving spouse, considering him the most prominent heir. The status of legal heir of the surviving spouse has been recognized by Article 971 of the current Romanian Civil Code, according to which the surviving spouse is called to inherit in competition with any of the classes of legal heirs.

Thus, the current Romanian Civil Code recognizes the surviving spouse as having the

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following categories of rights:

- a right of inheritance in competition with any of the classes of legal heirs, establishing a differentiated share, depending on the class with which he comes in competition (art.972 Civil Code);

- a special right of inheritance in respect of furniture and household goods (Article 974 of the Civil Code);

- a temporary right of habitation over the dwelling-house (Article 973 of the Civil Code)

In the current legislation, the right to habitation of the surviving spouse is regulated by art. 973 of the Civil Code which states that: "the surviving spouse, who is not a holder of any real right to use another dwelling corresponding to his/her needs, benefits from a right of habitation over the house in which he/she lived until the date of opening the inheritance, if this house is part of the assets of the inheritance".

In the interpretation of our Constitutional Court (Decision nr.439/08.07.2014) , the quoted text "establishes a guarantee for the protection of the surviving spouse, aiming to ensure that, for a period of time, his or her living conditions are not altered in such a way that he or she could be deprived, unjustifiably, of the dwelling in which he or she lived with the deceased spouse".

Although our Constitutional Court admits that this regulation generates, temporarily, for the other heirs a restriction in the exercise of a prerogative of the right of ownership, namely their usage, the measure is nevertheless justified in relation to the fact that the legislator aims to ensure protection and a decent living for the surviving spouse, without touching the substance of the right of the other heirs.

A special right of habitation in favor of the surviving spouse is also recognized in the legislation of other states. For example, the French Civil Code establishes by art. 763 that the surviving spouse who, at the time of death, actually occupies an immovable property belonging to the deceased (immovable property exclusively owned or co-owned by the spouses), has the right, for one year, to use free of charge that immovable property and the objects furnishing it.

Cases of extinguishing the right of habitation of the surviving spouse are regulated by art. 973 para. (4) of the Civil Code. Thus, the right of habitation of the surviving spouse is extinguished by dividing the property subject to habitation (but not earlier than one year after acquiring the right of habitation), as well as by the surviving spouse's remarriage.

There are also instances of extinguishing the right of habitation from the common law, as regulated by art. 754 in relation to art. 746-748 Civil Code, respectively: the death of the surviving spouse, the consolidation of the title of holder of the right of habitation and of the bare owner, the renunciation by the surviving spouse of the right of habitation, the un-usage for 10 years, the abuse of use or the destruction of the property. (Nicolae, 2016, p.201)

2. On the possibility of an extensive interpretation of cases of extinction of the right of habitation recognized to the surviving spouse

Art. 750 of the Civil Code regulates, with a general title, that the holder of the right of

habitation may reside in the building that constitutes the object of the habitation together with his spouse, children, parents and other dependants.

In the case of the right of habitation of the surviving spouse, being a special right, constituted under the law for the benefit of the person who fulfills the conditions required by law, we will take into account, with priority, the special provisions of art. 973 which, in the final sentence of para. (4), establishes that the special right of habitation of the surviving spouse ceases by his/her remarriage.

From the corroboration of the aforementioned texts of law, it follows that the surviving spouse may reside in the building subject to the special right of habitation with his/her children (whether they are only the surviving spouse's or are common with the deceased, born before or after the opening of the succession), with his parents or other dependants. (Negrilă, 2018, p.270)

As we have previously pointed out, the right of habitation of the surviving spouse is extinguished, among other things, by the remarriage of the surviving spouse. Once the marriage is concluded by the surviving spouse the special right of habitation is extinguished, the interested persons may ask the competent court to ascertain the extinction of the right, in accordance with the provisions of art. 973 para. (4) of the Civil Code.

However, given the dynamics of social relations and the way in which current generations relate to marriage, in the sense that many people prefer common-law relationships, the question arises whether a common-law relationship of the surviving spouse can lead to the extinction of the special right of habitation.

In relation to art. 973 para. (4) of the Civil Code, the doctrine opined that in the case of a common-law relationship of the surviving spouse, he/she retains the special right of habitation from which he/she benefits (Negrilă, 2018, p.271).

A view contrary to the above mentioned, in the sense that the common-law relationship of the surviving spouse would lead to the extinction of his/her special right of habitation (under art. 973 para. (4)) would create the presumption that a common-law relationship is equivalent to a marriage. Moreover, if we were to admit that the common-law relationship of the surviving spouse would result in the extinction of his or her special right of habitation, we would create an inequality of treatment with regard to the common-law relationship. Thus, the common-law relationship would lead to the extinction of the special right of habitation, in other words it would produce effects within the relations of succession law, but the common-law partners cannot inherit legally, in this situation the common-law relationship not producing effects in the relationship of succession law.

However, we consider that it is unfair to admit that the surviving spouse who has a common-law relationship, so, after all, an illegitimate marriage, can retain the special right of habitation. Beyond the fairness arguments, we also put forward some legal arguments.

As mentioned earlier, in addition to the causes of extinction of the special right of habitation of the surviving spouse stated by art. 973 para. (4) of the Civil Code, common law cases are incident, as well.

Thus, the special right of habitation of the surviving spouse can be extinguished by

abuse of use, the joint heirs having the possibility to ask the court to ascertain the extinction of the right of habitation, based on this legal argument. (Deak and Popescu, 2019, p.275)

We believe that the abuse of use must be analyzed by reference to the provisions of art. 14 and art. 15 of the Civil Code, in conjunction with which it follows that the surviving spouse must exercise the right of habitation in good faith, in accordance with public order and good morals and not to exercise it excessively and unreasonably or for the purpose of harming the right of (co)property of the other heirs.

In analyzing how to exercise the special right of habitation of the surviving spouse, we can also consider the opinion of our supreme court regarding the notion of abuse of law, but also the various opinions expressed in the doctrine.

Thus, the High Court of Cassation and Justice held that: "the notion of abuse of law implies the exercise of subjective civil law by disregarding the economic and social purpose for which it was recognized, by disregarding law and morals, in bad faith and by exceeding its limits". At the same time, in the interpretation of the High Court "the exercise of a subjective or procedural right will be considered abusive when the right is not used to achieve its end, but with the intention of harming another person or contrary to good faith". [5]

Although the High Court of Cassation and Justice, in its jurisprudence (Decision nr.705/2018) established that the existence of an abuse of right entails the person's bad faith. In the doctrine (Druta, 2016) there is also a contrary opinion, in the sense that the abuse of right does not necessarily imply the existence of bad faith: "reading art. 15 of the Civil Code leads us to the conclusion that the reverse of good faith behavior is a behavior contrary to good faith. The relationship between behavior contrary to good faith and behavior of bad faith is one from whole to part, in the sense that the first includes the second, but is not limited to it. Bad faith implies an unlawful conduct, directly or indirectly intentional, while a conduct contrary to good faith may also include unlawful actions or inactions, committed by fault, with or without provision".

In our opinion, related to the wording of art. 15 of the Civil Code, in the form of abuse of right committed in order to harm or injure another, we can accept the existence of bad faith (as a constituent element of abuse of right), while in the form of abuse of right committed by exercising the right in an excessive and unreasonable way, contrary to good faith, the existence of bad faith of the person is not necessary.

Regardless of the interpretation of art. 15 of the Civil Code, I consider that the surviving spouse who has a common-law relationship loses the special right of habitation because in this situation this right is exercised abusively, with or without bad faith, depending on the circumstances.

Another landmark in our interpretation could be offered by the rulings of our Constitutional Court, being of service us at the level of the teleological interpretation. Thus, according to the decision of the Constitutional Court of Romania no. 439 of 2014: "The contested text of law (*art. 973 of the Civil Code, A.N.*) establishes a guarantee for the protection of the surviving spouse, aiming that, for a period of time, he/she does not change his/her living conditions, in the sense that he/she could be unduly deprived of the dwelling in which he/she lived with the deceased spouse. This regulation (...) allows

the legislator to ensure the protection and a decent living of the surviving spouse”.

Therefore, as the Constitutional Court concludes, the rationale behind the legal establishment of a right of habitation for the benefit of the surviving spouse is to protect him/her from possible material changes that may occur in his/her life with the death of the spouse.

Also, the provisions of art. 309 and art. 325 Civil Code according to which spouses owe each other moral and material support must be taken into account. Although we cannot put the equal sign between the quality of common-law partners and that of spouses, we cannot deny that people who choose to live in a common-law relationship will support each other, but not from a legal obligation, but from a moral obligation.

The right of habitation of the surviving spouse is, therefore, a legal protection that the legislator provides, and the mutual material and moral support that common-law partners owe to each other is a moral obligation.

Thus, in the analysis of the continuation of the exercise of the right of habitation by the surviving spouse, the state of possible material vulnerability of the surviving spouse caused by the death of their spouse must be taken into account. The state of vulnerability disappears, however, in the case of a relationship, including common-law relationships, the partners are obliged to find the most suitable solutions for the common good.

3. Conclusions

The right of habitation of the surviving spouse is a legal right that arises upon the opening of the succession of one of the spouses and is extinguished in the cases provided by law, one of the causes being undoubtedly the remarriage of the surviving spouse.

Having regard, however, to the arguments we have put forward, our opinion is that, equally, a common-law relationship of the surviving spouse leads to the extinction of his/her special right of habitation, not as a result of equating it with a marriage, but as a result of the abusive exercise of the right. The special right of habitation of the surviving spouse will therefore be extinguished as a result of a common-law relationship, since a continuation of it would amount to an abuse of rights, which is an intolerable civil conduct.

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