INHERITANCE RIGHTS OF THE SURVIVING SPOUSE

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Article 4 paragraph 1 of Law no. 319/1944 provides that "the surviving spouse, who has no home of his own, until performing the output of possessions and, in any case, for at least one year after the death of his spouse, in addition to the right of inheritance according to the provisions above, will have a right of habitation of the house where he lived, if this house represents part of the succession".

In principle, this right of habitation is identical in nature with the ordinary habitation, representing therefore a real right over another's goods, consisting in the right to use (live) exclusively in the own interest the house being part of the succession, not simply a dept security (location).

Key words: surviving spouse, right of inheritance, the Civil Code, succession, right of habitation.

Legal basis

The inheritance rights of the surviving spouse are currently regulated by Law no. 319/1944 on the right of inheritance of the surviving spouse, by which the provisions of articles 679, 681-684 of the old Civil Code which regulate this field were implicitly repealed. Today, the surviving spouse comes in competition with all four classes of legal heirs, having the right to forced heirship and some other specific rights.

The *Civil Code* in Chapter III entitled "Legal heirs" incorporates the provisions of the current law no. 319/1944 on the right of inheritance of the surviving spouse. All these matters are discussed in articles 970-974 and treated in an approach adapted to the actual needs.

Inheritance conditions required by law to the surviving spouse

In addition to the general conditions required to any heir, the surviving spouse must meet the condition that, at the beginning of the succession sequence, he may have the quality of spouse. If the rights of the other legal heirs are based on kinship with the deceased, the rights of the surviving spouse are based on his legal quality of spouse. Cohabiting relationship does not confer any right of succession to the surviving concubine.

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The Civil Code maintains this condition, inserting it in article970, according to which the surviving spouse heirs the deceased spouse only if, at the beginning of the succession sequence, there is no final decision to divorce.

Having the quality of spouse at the beginning of the succession sequence, there is of no matter the duration of the marriage or the financial situation of the surviving spouse or his sex, whether or not they were actually separated, whether or not they had children and even that divorce proceedings were instituted, as long as there is no irrevocable decision for divorce.

Since marriage may be ending and thus the quality of spouse, by its dissolution by divorce, by declaring its nullity or annulment, I will make some remarks about these assumptions.

In case of divorce, the quality of spouse remains valid until the decision for divorce becomes irrevocable (art. 39, Family Code).

If death occurred during the process of divorce, marriage is terminated by death, in this case, and the surviving spouse will enter the succession sequence with the quality of spouse[1].

If the judicial declaration of the death of one of the spouses occurred, if declaration of death is canceled and the surviving spouse got remarried, according to article 22 of the Family Code, the first marriage is considered dissolved on the completion of the second. The remarried spouse will obviously be able to inherit only the spouse of the second marriage, and not the one of the first marriage.

In case of absolute or relative nullity of marriage, since this is considered retroactively abolished, heritage is no longer an issue even if one spouse's death occurred before the court's decision of absolute nullity or the reference for relative nullity. The quality of spouse is retroactively abolished by the judicial decision to cancel the marriage.[2]

Under the provisions of article 23 of the Family Code, regulating putative marriage, the spouse in good faith retains the quality of spouse in a valid marriage until the decision that was found or declared void remains irrevocable. This means that if one spouse dies in the time period between the completion of marriage and the irrevocable decision of cancellation or declaration of invalidity of marriage, and the surviving spouse was in good faith, he retains the right to enter the succession sequence as the surviving spouse[3].

The Court ruling on the invalidity of marriage is required to determine the good or bad faith of the spouses in marriage[4]. It is the only exception to the reciprocity principle of the legal succession vocation. If death of one spouse occurs after the irrevocable decision that dissolved the marriage,

[1]Ion P. Filipescu, *Family Law Treaty*, ALL Publishing, Bucharest, 1993, p.200.
[2]Fr. Deak, *Inheritance Right Treaty*, Actami Publishing, Bucharest, 1999, p.124.
[3] Ion P. Filipescu, *op. cit.* p.196.
[4] The Supreme Court House. Guidance decisions no. 3/1974, in the C.D. 1974, p.11-14.

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nor the good faith and especially the bad faith retain their succession vocation, after losing the quality of spouse.

Rights conferred by law to the surviving spouse

Law no. 319/1944 provides that the surviving spouse has the following categories of rights:

a right of inheritance in competition with each class of heirs (art. 1);

a special right of inheritance on furniture and household items as well as wedding gifts (art. 5);

a temporary habitation right on the house (art. 4).

a. Inheritance rights of the surviving spouse in competition with each class of heirs.

The surviving spouse doesn't represent a part of any class of heirs, but according to article 1 of Law no. 319/1944, he comes in competition with all four classes of heirs. He is neither removed, nor does he remove the relatives of the deceased spouse from the succession sequence.

The *Civil Code* maintains this position, showing in art. 971 paragraph 1, concerning the inheritance vocation of the surviving spouse, that he enters the succession sequence in competition with any of the classes of legal heirs and in their absence or if none of them doesn't want or cannot come to inherit, the surviving spouse collects all inheritance.

According to article 1 of the law, he has the following succession shares, shares that are found and maintained in art. 972, paragraph 1 of the *Civil Code*:

- In competition with the descendants of the deceased (class I) he has a share of 1/4, regardless of their number;
- In competition with the privileged ascendants and collateral privileged (class II), when they come together to share inheritance, he has a share of 1/3, and if he comes in competition, either only with the privileged ascendants or the collateral privileged ascendants, he has a share of only 1/2 of the inheritance;
- In competition with the ordinary ascendants (class III) or with the ordinary collaterals (class IV) he has a rate of 3/4 of the inheritance, regardless of the number of those who compose this class of heirs.

Establishing the appropriate share of the surviving spouse has precedence over that of the other heirs. This means that the share of the surviving spouse shall be charged to the legal heirs of the deceased spouse.[5]Consequently, the other heirs' share is reduced with the share of the surviving spouse, without any exception.

[5] Fr. Deak, *op. cit.*, p. 128-129;

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The *Civil Code* establishes in art. 972 paragraph 2 that the share of the surviving spouse in competition with the legal heirs of different classes is determined as if he had come in competition only with the nearest of these classes.

To establish the share of the surviving spouse one must take account of the heirs actually coming to inherit, this means one mustn't consider shameful heirs or heirs who gave up the inheritance and ex-Heredia, with the condition, in this latter case, that they aren't forced heirs.

Concerning the legal character of the inheritance rights of the surviving spouse, as they result from Law no. 319/1944, they are the following:

- The surviving spouse is a forced heir;
- The surviving spouse is required to report donations received from the deceased spouse during his lifetime, but only in competition with the descendants of the deceased;
- The surviving spouse is not a saisine heir, so that in order to take possession of the inheritance he shall obtain an heir certificate;
- The surviving spouse can come to inherit only on his own behalf, representation being excluded.

Jurisprudence[6] has established in accordance with the Civil Code that the unreported generosities performed to the surviving spouse who is not the parent of the descendents that he comes into competition with may not exceed the share of the descendent with the smallest share and cannot, in any case, be more than 1/4 of the succession.

This is a special available share, which is included in the ordinary available share, without being able to aggregate with each other and without being able to reach the legal reserves, in which case the limits should be reduced to the limit of the legal reserves. If the special available share is less than the ordinary available share and the deceased has not made any liberality for this difference, the division shall be made according to article 1 of Law no. 319/1944.

For this situation, the *Civil Code* provides the same thing, but stipulates expressly who deserves the difference between the ordinary and the special available share of the descendants, and also that the provisions apply properly in the case when the descendant became ex-Heredia in the advantage of the surviving spouse, who is not his father. On this occasion all controversy from the doctrine on this institution are removed.

Assuming the existence of two or more persons claiming succession rights as surviving spouses (bigamy, polygamy), the inheritance left by the bigamist deceased or a share of this inheritance prescribed by law for the surviving spouse, in competition with different classes of legal heirs, get equally divided between the spouse of the valid marriage and the innocent spouse of the void

[6]The Supreme Court House, Civil Section, decision no. 1615 of august 8, 1972, in R. R. D. no. 4/1973, p.175-176.

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marriage, the innocent spouse in good faith being the victim of common and invincible error, not knowing that the deceased had two marriages[7].

The Civil Code has dealt also with this new approach and inserted it in art. 972 paragraph 3, providing that, if after the putative marriage, two or more persons have the quality of surviving spouse, the preset share is divided equally between them.

b) Special inheritance right of the surviving spouse over the furniture and objects belonging to the household and over the wedding gifts

Law no. 319/1944, through art. 5, gives the surviving spouse, if he does not come in competition with the descendent heirs, apart from his or her succession share, a special inheritance right of the surviving spouse over the furniture and objects belonging to the household and over the wedding gifts

This new provision is also maintained in the Civil Code, art. 974 and it has the following content, "If he doesn't come in competition with the descendant heirs, the surviving spouse inherits, apart from the share established according to article 986, the furniture and the objects belonging to the household that were concretely affected to the joint use of the spouses".

In competition with the first class descendants of the deceased, the goods enter the succession sequence and will be divided between heirs according to the succession share. The legal provision is justified by the intention of the legislator to ensure the natural continuation of life of the surviving spouse. The surviving spouse collects these goods over his succession share from the other goods.

In this category fall the goods serving at furnishing the household of the spouses', the television, the radio, the carpets and the objects that by their nature are designed to serve the household. We must take into account the living standard of the spouses, because according to it we will determine from case to case, to what extent they represent an objective necessity to the future of the living spouse. We may also include here those goods which didn't satisfy a need, but a commodity or a joint pleasure of the spouses[8].

This category does not comprise the goods that due to their nature cannot be used by the spouses in the household or they weren't affected by the joint use of the spouses. The goods affected to the household shouldn't be equal to those of the peasant household with other mission and purpose, being tools of production and which do not cover the inner living of the spouses' household[9].

[7]Ioan Adam, Adrian Rusu, Ioan Adam, Adrian Rusu, *Civil Law. Succession*, All Beck Publishing, Bucharest, 2003, p.118-119.
[8]The Supreme Court House, Civil Section, decision no. 2218/1971, in R. R. D. no. 8/1972, p. 160;
[9] Fr. Deak, *About the special inheritance right of the surviving spouse on goods belonging to household, II*, in R. R. D. no. 11/1988, p. 16-22. ;

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In judicial practice, it was also decided that, from the perspective of law enforcement of the provisions of article 5 of Law no. 319/1944, it isn't very important whether the spouses have lived together continuously or were in fact separated and the location of goods at the time of the death[10]. In case of an irrevocable separation, under article 5 of Law 319/1944, only those assets that were acquired until the failure of living together can be inherited.

For the surviving spouse to benefit from this class of goods, it is provided that the deceased should not have gained his share of the these goods through donations or bequests, these acts being valid, because the surviving spouse, although he's a forced heir, cannot force heirship on this class of goods. The surviving spouse being a forced heir and his forced heirship like the one of the other forced heirs couldn't be violated, the goods presented by article 5 of Law 319/1944 and which have been the object of liberalities will be included in the succession to establish the forced heirship.[11] The surviving spouse will be deprived of this special right only if the predeceased spouse has had through liberalities the entire part of this class of goods.

In case of putative marriage, determined by bigamy, the special right of the surviving spouse is realised according to the household goods concretely affected. The surviving spouse of the valid marriage will collect the goods affected to the joint use of the spouses, while from the void, but putative marriage, only the spouse in good faith will collect the goods from the common household with the deceased, without taking into account the value of those goods.

The special right to inherit of the surviving spouse, introduced by art. 5 of Law no. 319/1944, includes wedding gifts in addition to furniture and objects of the household. These can be given to the spouses at the celebration of their marriage, no matter if these gifts were given to both spouses or to either one of them, by third parties including the gift given by a spouse to the other spouse.

Thus it was specified that the gifts given by third parties only to one of the spouses and those of the surviving spouse given to the deceased, do not comprise the category of those provided by art.5 of Law nr.319/1944, because these belong to him and they do not enter the succession property as we have the situation of the share of the common goods appropriate to the surviving spouse. Some authors [12]argue that the law applies only to the gifts offered to both spouses, because those given to the deceased by third parties merge the inheritance property of the deceased and they are not collected under any special law by the surviving spouse.

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[10] H. A. Ungur, *About the special inheritance right of the surviving spouse on goods belonging to household, I*, in R. R. D. no. 11/1988, p. 11-16.
[11] Fr. Deak, *op. cit*., p. 139;
[12] M. Eliescu,*SuccessionCourse*, Humanitas Publishing, Bucharest, 1997,p. 139-146; C. Stătescu, *Civil Law, Transport Contract, Intellectual Creation Rights, Inheritance, Didactică şi Pedagogică Publishing, Bucharest, 1967,* p. 147;

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The special right of the surviving spouse is also a right of legal inheritance, affected to the purpose prescribed by law, having a special destination and it is no need to presume an unexpressed bequest of the deceased by the legislator, but if this one has such an intention, nothing prevents to implement it, within the legal limits.

According to the provisions of art. 703 of the Civil Code, the prospective inheritor, guilty of hiding or stealing succession goods, cannot collect the hidden goods; he will lose the share of these goods that would have belonged to him.

The sanctions provided by article 703 of the Civil Code for hiding or removing such a good, when it isn't in competition with the descendants, aren't applicable to a surviving spouse, who deserves however, under Article 5 of Law no. 319/1994, besides the legal succession share, also the movable goods that make up the household.

c) The habitation right of the surviving spouse

Therefore, paragraph 1 of art.4 of the Law provides that "the surviving spouse, who has no home of his own, until performing the output of possessions and, in any case, for at least one year after the death of his spouse, in addition to the right of inheritance according to the provisions above, will have a right of habitation of the house where he lived, if this house represents part of the succession".

It shall be deducted from what the legislator says that the following conditions must be fulfilled by the surviving spouse in order to have the right of habitation of the house:

- At the date of the opening of the succession sequence the surviving spouse should have lived in the house that makes the object of the habitation right. In the doctrine it was decided that it isn't necessary that at the moment when death occurred, the spouses should have lived together;
- The surviving spouse has no other house of his or her own;
- The surviving spouse does not become, by inheritance, the exclusive owner of the house. In this case he cannot be the owner of an occupancy right because in principle it is not allowed for someone to have a dismemberment of ownership on a property that belongs to the owner exclusively. (*neminem res sua servit*). In the event that he is only coheir with others, by virtue of the occupancy right, he can use the house according to the needs and only related to the share acquired by inheritance;
- The house on which the right of habitation is constituted must be part of the succession, in whole or in part, being the exclusive property of the deceased or in share with the surviving spouse or another person. Obviously, in case of common property on shares or joint property, the right of habitation shall cover only the part which belonged to the deceased. The rightful part of the joint

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property belongs to him in another title, while he cannot have any rights derived from his spouse's inheritance over the rightful part which belongs to a third party;

-The deceased should have not removed by testament the habitation right of the surviving spouse as this one is a forced heir only related to the goods mentioned in article 1of Law nr.319/1944[13].

According to art. 973 paragraph 1 of the *Civil Code* the surviving spousewho hasn't any right to use another house according to his need, has of a habitation right over the house he lived until the opening of the inheritance, if the house is part of the inheritance.

The new regulation provides, distinctly from the old one, the express provision according to which the surviving spouse shouldn't be owner of any house appropriate to his needs. This opinion was accepted by the doctrine and jurisprudence and it has been applied in the actual regulation.

The habitation right of the surviving spouse, deduced from the old regulation, had the following legal characters:

- It is a legal right that has as object the living house, and to the extent of using the house, his owner can use the land, including the common parts;

- It is a temporary right that lasts until the execution of the exit from the co-ownership or until the remarriage of the surviving spouse. This provision is maintained in the Civil Code in art. 973, paragraph 4 and it contains the following "The habitation right turns off to division, but not earlier than one year from the date of opening the inheritance. This right shall cease, even before the expiration of one year in case of remarriage of the surviving spouse";

- It has a strictly personal character as it cannot be transferred or entailed in favour of another person unlike ordinary habitation regulated in art. 565-575 or the Civil Code. On the contrary, according to art. 4, par. 2-3 of Law no. 319/1944, the other joint heirs have the right to restrict this right if the house is not entirely necessary to the surviving spouse, and according to art. 4 par. 4-5 of the law, they can buy another house to the surviving spouse elsewhere. The content of this provision has been accepted also by the *Civil Code* in art. 973 par. 3, remaining up to date, the legislator being currently in agreement to this solution "Any of the heirs may require, either to restrict the right of habitation, if the house is not entirely necessary to the surviving spouse, or to change the object of habitation, if they provide another suitable house to the surviving spouse". From the personal and inalienable character follows the imperceptible character, the creditors of the surviving spouse not having the right to follow it;

- It has a free character, the surviving spouse being exempted to give the bail provided by art. 566 of the Civil Code and also to pay the rent to the heir who has obtained the ownership of the house.

[13] Fr. Deak, *op. cit.*, p. 150.

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The approach of the *Civil Code* inserts in art. 973 paragraph 2 the provision according to which the right of habitation is free, inalienable and imperceptible. Therefore, besides the legal characters outlined by the doctrine and jurisprudence, these tree will join them successfully, because the legislator considered them necessarily to insert, on opportunity clarifying the conflicting discussions on this topic.

The right of habitation of the surviving spouse being regulated in 1944, and over time more regulations have been effective, the question was to which extent they have prejudiced the right regarding housing. Special locative legislation, as mentioned in the literature[14], didn't abrogate the right of habitation, neither that of common law, nor the one regulated by Law no. 319/1944.

If both spouses were renters, the surviving spouse will have the right to use the house derived from the rental agreement, also if only the deceased spouse was the owner of the rental agreement (art. 27 of Law no. 114/1996). The surviving spouse will continue to use the house by virtue of the habitation right only if this has been the exclusive property of the deceased spouse or their common property, or with a third party, on shares or joint property.

After the cease of the habitation right, if the house is not assigned to his after division, the surviving spouse will pay the rent and he can be discharged under the conditions of the common law.

A useful provision is included in the *Civil Code* in art. 973 paragraph 5 according to which all the disputes regarding the habitation right is settled by the competent Court to judge the heritage division, which will decide urgently in the Council Chamber. This provision is useful for knowing the competent Court to which the action shall be instituted and, at the same time, through this decision an uniformity of the cause is ensured, in the sense that the Court endowed with the division can successfully give a decision regarding the right of habitation and therefore there will be an economy and a depletion of the Courts.

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