The inheritance rights of the surviving spouse

DOCTORATE PAPER

SUMMARY

The inheritance rights of the surviving spouse must be looked upon from the general perspective of the institution of inheritance. The institution of inheritance has developed like a river whose bottom has been shaped, amongst others, by superstition, material or power-related interests, level of education, ignorance etc.

Based on different arguments, in different eras of the written or unwritten law, the institution of the right of inheritance of the surviving spouse witnessed an evolution determined primarily by his status within the nuclear and extended family.

Because people in their large numbers could not find a way to make laws together they decided to pass this prerogative to a few of their own. Those few are and have always been motivated not so much by the general good, but rather by their own good. Thus, the finality of passing laws by the few for the many often supports the interests of the few.

The efforts of the populations to determine the legislative body to pass laws in order to alleviate the lives of the many have failed almost every time. The revolt against raising fuel prices in our country did not result in determining the rulers to take measures to determine the lowering of fuel prices. The Occupy Wall Street movement started with the declared goal of starting a world revolution against capitalist greed; not only did it not attract overwhelming support from masses and populations plagued by this economic-political system but has also been presented by the mass media as a freak movement.

The hope of improving the quality of life for human kind dies crushed by the fatality of ignorance and lack of education of the masses. Just like in a Greek tragedy, humanity cannot avoid the implacable destiny of being condemned to a miserable existence precisely as a result of its actions.

In the spirit of the above mentioned, the Romanian legislator has preferred to bring little changes to the institution of inheritance in the New Civil Code and even less to the rights of the surviving spouse to inherit.

The first two chapters of the present doctorate paper deals with the institution of inheritance and the evolution of the right of the surviving spouse to inherit. The third chapter analyzes the right of the surviving spouse to inherit as it was regulated by the Law no. 319/1944 as well as by the New Civil Code in force from October 1st 2011. The fourth chapter looks into the legislation of European states and states from different continents while the last chapter describes, in short, the inheritance procedures at the notary's office. The last chapter is followed by conclusions and *de lege ferenda* propositions.

In chapter one, we attempt to define the notion of inheritance and to determine the need to regulate this institution. On what grounds can one person establish who is to inherit mobile and immobile goods as well as rights on immaterial goods? On what grounds can the ruling power (shaman, leader, hospodar, king, emperor, state) determine the form and content of *mortis causa* transfer of property?

In the same chapter, we attempt to highlight some of the aspects that have determined the sense of evolution for the institution of inheritance, in general, and of the spouse's right to inherit, in particular.

Therefore, the notion of "inheritance" has a double meaning: a first meaning refers to inheritance as the passing of property over mobile or immobile goods from a deceased person to a living one and a second meaning

which refers to the entire amount of goods and rights that a deceased person leaves ho his heirs.

The institution of inheritance which comprises three coordinates - the deceased, the goods, and the heir – has evolved, developed and has been shaped, among other factors, by religion, customs, economic and power-related factors.

Religious beliefs have determined people to dwell on their passing to the world of the dead. In any given society, this moment was associated with different ceremonies. Some of these were to be fulfilled by the deceased himself during his lifetime, while others and perhaps the most important ones as noncompliance could have brought dreadful consequences to the deceased in the other world, were fulfilled by deceased's dearest persons. From one point of view, the consolidation of the idea of inheritance can also be seen as a means to fulfill all the ceremonial duties that the deceased was to receive. To this purpose, the safest way to ensure that the heir would accomplish the due ceremony was to pass down to him a significant portion of his goods.

Once the conviction regarding the need to fulfill funeral ceremonies and the obligation of the relatives to carry these out and to inherit the deceased's goods became deeply rooted, customs and tradition evolved into unwritten law.

There were no longer heated issues related to the quality of the heir – must he or not be a relative –, or to the future of the deceased's fortune - should it be passed down to his heirs - ; the focus is on whether the fortune is to be bequeathed as a whole to the heirs and whether the right to inherit belongs to all relatives (children – men or women, spouse) or just to some of them (the first, last born etc.).

Throughout history, the bare existence of inheritance as an institution has been questioned. Is there a justification for inheritance? Should it be abolished? What justifies that one person born with a silver spoon in his mouth will inherit a fortune, while another will only inherit his family's dire poverty?

Is the institution of inheritance an element conducive to progress and evolution of humanity? Is the idea of succession just or is it merely to the benefit of the fortunate ones?

"The contrast between the millionaire's palace and the worker's hut" baffled those who dwelled, with a critical eye, on the idea of inheritance. Other critics analyzed the possibility to effortlessly acquire fortune and regarded inheritance as a source of economic inequality.

The abolition of inheritance is a futile undertaking, just as futile as the ban on coffee by sultans of the Ottoman Empire in the XVIth andXVIIth century or the ban on alcohol by Burebista on our territories; despite this, there was a moment in history when, while disregarding the deep roots of religious beliefs, customs, or the spirit of private property, the leaders of a people dared to implement it.

We argued that inheritances of a considerable net value should either be taxed by 90 per cent or enter the state's budget with a view to fund education, charity, research in the health field; basically, these values should contribute to the improvement of people's daily existence because their own existence is determined by that of the people.

We have also highlighted that the classic view on the concept of inheritance is no longer fully justifiable in developed and developing countries where life expectancy has risen in the past decades.

According to Life Expectancy web site, the average life-spam for women in Romania is 76,2 years, while that of Romanian men is 69 years. According to the same source, the average life-spam for women in developed countries is exceeding 80 years while that of their men counterparts is over 75.

Thus, if a baby is born into family when his parents are in their 30s and they die 39 or 45 years later, there is sufficient time for the baby to grow and become financially independent and establish a self-supporting family, while

relying on in-family and institutionalized education; there would be therefore no need to wait for the family fortune to be passes down to him.

Chapter II depicts the evolution of the spouse's right to inherit in Roman law, from the times of the Twelve Tables to those of imperial Rome, as well as in the territories that nowadays constitute Romania.

There were at least three stages in the development of the institution of inheritance in Roman law: the Law of Twelve Tables, Pretorian law and Imperial law.

It was with great difficulty that, throughout these times, the spouse's right to inherit took shape, its existence being limited to no more than a legal provision that would rarely materialize in reality.

We have seen how the whole issue of the spouse's right to inherit concerns mostly women, since, in a way or another, the husband is seldom financially affected by the death of his wife.

Marriage in early Roman times was either *cum manu* or *sine manu*. In the first case, the wife would exit her father's authority and enter that of her husband, her properties becoming her husband's. In the second case, the wife would not enter under the authority of her husband and all her belongings remained her property. The first form of marriage could only be applied to roman citizens while the second one could be used by both romans and foreigners. With time, the second form of marriage became exclusive.

In Roman law, the wife could only be under the authority of a male figure.

As far as *ab intestat* succession is concerned, in those times, if the wife was married *cum manu,* she had the right to inherit a portion of the bequest equal to that of any of the children and, in the absence of offspring, she was entitled to receive the total inheritance; if she was married *sine manu,* there was no mutual vocation to inherit. Only later did the Justinian legislation grant the

indigent widow the right to have demands concerning the succession of the spouse who had died in normal conditions.

The inexistence of written law for a considerable time in the territories that now compose the state of Romania has determined researchers to carefully analyze the legislation of neighboring peoples concerning the institution of inheritance and the spouse's right to inherit, in order to make educated guesses regarding the traditions of the populations that lived in the geographical area shaped by the Carpathians, the Danube and the Black Sea.

Later, in written law prior to the 1864 Civil Code, the rights of the surviving spouse grew and were, in certain times, superior to those of the French-inspired code.

From 1864 Civil code to the 1944 Law on the rights of the surviving spouse (no.319), the legal provisions that we analyze in this paper did not grant the surviving spouse ample rights. He or she could only inherit in the absence of family from the part of the deceased.

Neither the 1864 civil code, nor the 319/1944 Act on the rights of the surviving spouse regarded the surviving spouse as a relative to the deceased.

Chapter III provides an extended analysis on the inheritance rights of the surviving spouse provided by Act no. 319/1944 in force prior to October 1st 2011.

The above-mentioned Act introduced major changes. Besides the limitation of inheritance order previously operated and enforced by art. 6 of Law no. 319/1944, the surviving spouse was granted larger rights which consisted of the quota of the inheritance allocated when sharing the inheritance with different legal classes of heirs; he was also given a special right to reside in the house, in certain circumstance, he was exempted from the bail regulated by art. 566 of the Civil Code and was granted an inheritance right over the mobile goods and objects of the household as well as over the wedding gifts.

In accordance with the principle of sexual equality, the new legislation overcame sex-related limitations, disregarded inequalities based on wealth, did not distinguish between the existence and inexistence of descendants, and did not attribute any value to the *de facto* separation of the spouses.

Despite the justified need to grant the surviving spouse his due inheritance rights on the grounds of the presumed affection between the spouses, he was not included in the first class of heirs (the deceased's descendants), but competed with any of the classes of heirs, his quota varying accordingly.

According to this law, the surviving spouse, was not part of any of the legal classes of heirs, did not exclude any classes of heirs and could not be excluded by them.

The legal provisions on the rights of the surviving spouse in accordance with the new Civil Code are also analyzed throughout and at the end of this chapter, for a more concise exposition of the matter.

The new legislation introduces slight amendments to the rights of the surviving spouse concerning, for instance, the right to reside, the quota of the inheritance reserve, or the status of heirs who benefit from seisin.

As far as the extent of the spouse's rights is concerned, the new legislation reiterates the provisions of Act no. 319/1944. Thus, the surviving spouse competes with any of the legal classes and heirs and, if there are not any, he receives the entire bequest.

We consider that an opportunity was missed to introduce a new system of inheritance rights for the surviving spouse, who is still viewed as an outsider to the deceased's family.

We also highlight that, in any time, regardless of legal provisions, the leading and the educated have always had the possibility to transfer *mortis causa* rights to the surviving spouse.

Chapter IV provides an analysis of the rights of the surviving spouse in the French legislation, in the legislation of other European states as well as in countries from other continents.

Unlike the Romanian law-maker, characterized by an uncommon passivity as far as inheritance legislation and mainly legislation on the rights of the surviving spouse are concerned, the French law-maker has repeatedly attempted to identify an inheritance formula that would satisfy all parties (the deceased – as far as the freedom to testate, the deceased's family, the surviving spouse, the state, the French society, the institution of the notaries – as far as the application of the legal provisions and the interests' of the powerful are concerned etc.).

Paradoxically, prior to the 2001 and 2006 reforms of the legislation on the rights of the surviving spouse, the Romanian legislation was superior to the French one. The equality of rights between spouses was introduced in Romania long before it was introduced in France, which only happened in 1985 through Act no. 85-1372 of December 23rd.

Once Act no. 319/1944 was promulgated, the surviving spouse was granted a quota of the bequest in full property, while in France, after being practically omitted by the Napoleon Code, the surviving spouse was granted in 1866 the usufruct right over the literary and artistic creations of the deceased; then, in 1891, he was given a quarter of the inheritance in usufruct and an allowance that was to be taken from the inheritance when competing with descendants, and in 1925 he was given the right to receive the entire inheritance in usufruct when competing with ordinary collaterals.

The French legislation was often amended to reach the status that the rights of the surviving spouse currently has. The French, the Soviet and the Common Law model have had considerable influence on the legislation on inheritance rights of the surviving spouse in other European countries, which have adapted these models to the specifics of the respective populations.

The same observation is largely accurate for the legislation of other states of the world whose provisions on inheritance are influenced by the specific system of law: civil law, common law, Muslim law, mixt law.

In chapter V, we briefly discuss the inheritance notarial procedure, not comprehensively but rather in close connection to the subject of our paper, namely the rights of the surviving spouse to inherit.

We have addressed specific issues regarding the inheritance notarial procedure regulated by the legislation in force prior to the New Civil Code as well as certain aspects of the subject matter that are applicable after October 1st 2011.

Currently, the inheritance notarial procedure is not mandatory prior to addressing the court of law with a petition regarding the judicial inheritance procedure. It is our opinion that, should the inheritance notarial procedure be compulsory, the courts of law would be invested with less non-contentious petitions regarding inheritance.

As an example, the new civil legislation introduces the clearance of matrimonial regime – a new institution that operates along with the divorce or during the inheritance notarial procedure.

Our conclusions and de *lege ferenda* propositions point toward the idea of new system in the inheritance area that would grant greater freedom to dispose of one's properties *mortis causa* and that would provide the surviving spouse with a new status within the deceased's family, namely by including the surviving spouse in the first class of legal heirs.

As far the surviving spouse and his inheritance rights are concerned, it is of great importance that he be treated by society as a genuine member of the deceased's family, and not as an outsider.

We also propose that this new system should provide the circumstances in which certain heirs can benefit from specific rights, that originate from marriage

and not from blood, that would be meant to provide those heirs with a decent living and whose cost should be taken from that of the inheritance.

We express our reserves on the opportunity of the undertaking consistent with the current trend on legislative unification in the European Union in the inheritance area and on the issue of the certificate of inheritor.

The introduction of a harmonized approach on the way to divide the bequest in all member states will not only determine the frustration of the populations where the system was imposed but would also considerably hider the development of inheritance law.

It is true that a harmonized approach of the inheritance institution would provide the leading structures, both on a national and a European level, with new mechanisms and means to exert control on the individual and on the circulation of goods.

With a crucial impact on human life, the legislation of a state must keep up with the development of society and actually be an incentive for development.

In this quest, the law-maker should not set off with prejudice and inert constraints, with shallowness and interests to serve a certain area of society, but with honesty and openness and the aspiration to provide people with the means for a dignified living and with confidence that their rights are being safeguarded.

Law can be a liaison, a factor for unity and confidence between the members of a given society, but is more often than not a means to perpetuate and deepen differences and social inequalities.

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