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The Patrimony of Professional Affectation

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THE PATRIMONY OF PROFESSIONAL AFFECTATION

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Abstract

Despite its obvious importance, the patrimony did not have a legal definition under the influence of The Civil Code of 1864. The 2011 Civil Code aims to limit controversies in this matter, including the first legal definition of patrimony and covering the possibility of creating patrimonies of affectation and the patrimonial transfer.

Keywords:

patrimony of professional affectation, separation of patrimonies

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Introduction

In The French Civil Code the concept of patrimony was not even mentioned. However the Romanian legislation of 1864 preferred to remember it, in a laconic way. The implicit references to the term patrimony are predominant, and the most important of them is the art.1718 from the old Civil Code which provides that "everyone who is personally obliged should be held to fulfill his duties with his entire properties, movable or immovable, current and future".

Despite the importance of patrimony, as a fundamental institution of the private law, an *explicitly specific* definition was missing from the legal regulations in the field. Regarding the new Civil Code, the situation has changed somewhat, the provisions of paragraph 1 of art. 31 of the Civil Code might be interpreted as the first legal definition of patrimony in Romanian law. Therefore, it is considered that the assets of a person include all the rights and liabilities that can be monetized and belong to him. Without forgetting that this definition is entirely dependent on the doctrine, we have to recognize this significant progress registered by the Romanian legislator.

Definitions in the specialized literature do not differ in their essence, most of them sharing the same legitimated through legislator idea in the present that patrimony consists of all rights and obligations of economic value, belonging to a subject of law. In other words, patrimony, as a distinct juridical entity, represents the totality or universality of patrimonial rights and obligations belonging to a person (C., Barsan, (2013); I., Sferdian, (2013))

The Civil Code aims to limit controversies in this matter, starting with the definition of the patrimony, its mass and patrimony of affectation and continuing with the regulation of the patrimonial transfer and the professional individual patrimony.

Analysis of the Professional Affectation

The patrimony is considered juridical or law universality because it is regulated by law. It is distinct from its elements, so that its rights and obligations, seen in their individuality, can be subject to change, without affecting the autonomous, self-contained existence of the patrimony. Every person has a patrimony, and it cannot be conceived without a holder. But it can be noticed that, unlike the doctrine that considers the elements of the patrimony to be the rights and obligations of economic

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nature, in the Civil Code is introduced, along with rights, the term debt, less used and imprecise.

The uniqueness of patrimony remains a pristine heritage from the writings of Aubry and Rau. The current civil code does not change this principle: any person holds a single heritage and any patrimony assets require a holder according to art.777 and art.792 of the Civil Code. What the current Civil Code sanctions *in terminis* is the possibility of establishing divisions of the patrimony.

Incidentally saying, there was such possibility under the old legislation, The Family Code and the Government Emergency Ordinance no.44/2008 on economic activity by authorized individuals, individual undertakings and family businesses, containing examples in this matter. At the same time, explicit references to heritage arose regarding separation of patrimony (art. 781 of the old Civil Code). According to the mentioned article, *de cujus* creditors could require 'separation of the patrimony of the deceased from the patrimony of the inheritor'. The term 'separation of patrimony' also appeared in art. 784 and art.1743 of the previous Civil Code, associated to the matter of privileges. Judges of the High Court of Cassation and Justice considered (in Decision no.l072 of March 31, 2009 in appeal of the Commercial Division of the High Court of Cassation and Justice) that, according to the regulations of the Government Emergency Ordinance no.44/2008, the authorized individual has the status of a legal entity different from the status of the individual and that the authorized individual is liable for its obligations with the patrimony of affectation, if it was formed, and in addition the whole heritage. In this instance the court took the view that the property in question was purchased and registered in the real estate register under the name of the authorized natural person, used for his commercial activity, so the wife's consent was not necessary when the asset was moved out, since the asset was not part of the common patrimony of married couple.

Beyond this division remains a single person, not susceptible of juridical division or multiplication. There is only one person and this person has a single legal status. But his heritage might be subject of patrimonial division and each mass of patrimony might have a distinct juridical status. No matter how seductive would be the idea of a person with multiple personalities (legally speaking) and no matter how much tax authorities would attempt to suggest the idea that any professional individual suffers from 'multiple personality', the present Civil Code bring

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us down to earth, explaining that the person is unique and so is his patrimony.

Nowadays, through several special laws and by the provisions of the art.31 of the Civil Code marginally titled '*The Patrimony. Patrimonial masses and patrimonies of affectation',* is expressly specified the possibility of creating patrimonies of affectation or dividing the patrimony. The patrimony may be subject of a division or of an affectation only in the cases and conditions provided by law (I., Bilouseac, (2013)). Patrimonial divisions are generally referred to 'patrimonial masses'. They are veritable patrimonies in miniature, consisting of rights and obligations that are related to each other and in which real subrogation rule works as universal, according to art.2324 of the Civil Code. They represent legal universalities unlike de facto universalities which are just collections of goods as shown in art.541 of the Civil Code. But patrimonial masses have a single owner – the owners of the patrimony within these divisions were made.

It can be observed the difference made between the patrimonial masses and the patrimonies of affectation. The mass of patrimony is an amount of goods without claims and liabilities; within patrimony of affectation there are included, in addition to the goods having specific purpose by the will of the holder, claims and liabilities occurred in connection with those goods and the affectation (destination) in question. It was also expressed the opinion that the new civil settlement, amid an ambiguous juridical regime on masses of patrimony with distinct purposes, would set a synonymy between the term "mass of patrimony" and "patrimony of affectation"(A. D., Buzura, (2013))

The legislator exemplifies the types of patrimonies of affectation: fiduciary masses of patrimony, those affected to the practice of an authorized profession, and other patrimonies determined according to the law (for example, the patrimony of affectation intended to be administrated by a third person).

The fiduciary relationship is a contract by which the settlor enables the trustee to manage and dispose of a mass of goods, rights and guarantees. The trustee will pay to the settlor (or to a third beneficiary, for example, a bank, a foundation, a descendent known or hide publicly, etc.) the benefits from the mass of goods, minus his fee. Meanwhile, the trustee acts like an owner of goods (in case of real estate, the fiduciary even enrolls, on behalf of the settlor, in the real estate register). Therefore,

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the personal creditors of the settlor cannot legally pursue these goods, unless such goods have registered real collateral before perfecting the fiduciary relationship or the court has closed the fiduciary for fraud. Fiduciaries can include a lawyer, a notary, a bank or an investment management company. Obviously, the fiduciary will be a favorite tool for businessmen to limit the forced execution of the assets affected to a business or have better legal relation with the bank.

Full property management is broadly similar to the fiduciary. An individual or a legal entity might give an administrator full property management of specific assets or a fraction of heritage (P., Zaharia, (2013)). Within the limits of the contract, the administrator can act like the owner, without having his express authorization. The difference between fiduciary and assets management is that the fiduciary is intended to establish the management of a whole, while the assets management generally refers to specific assets.

To carry on his business, a professional (commercial or noncommercial) might form a professional patrimony. The patrimony of professional affectation includes all assets, rights and obligations of an authorized individual, business owner or member of a family company, constituted as a distinct part of the patrimony of an authorized individual, business owner or members of a family company, separated from the general collateral of their personal creditors.

Within professional patrimony are included: assets needed for professional activity already existent in the patrimony of the person while affectation; assets acquired to exercise the profession, after affectation, i.e. assets needed for professional activity, that did not exist in the professional patrimony while affectation. This category might include patients, clients or commercial customers. For example, a doctor can acquire from another physician the so called praxis–all patients and service logistics for doctors (Gh., Piperea, (2011). In the patrimony of professional affectation are also included the assets as a result of exercising the profession.

Setting the patrimony of affectation is achieved by simple unilateral act of the natural person. The transfer of rights and obligations from a mass of patrimony to another, within the same patrimony is subject to conditions provided by law and without prejudice to the creditors 'rights on each mass of patrimony. The transfer of rights and

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obligations from a mass of patrimony to another is not considered alienation.

It is established a heritage segmentation in two or more distinct masses of patrimony; the creditors from each of the distinctive masses no longer interfere, which means they no longer enter the competition in an equal way to follow debtor's property. According to the art.2324 of the Civil Code paragraph 3, creditors whose claims occurred in relation to a division of patrimony, legally authorized, must first pursue the goods subject to that patrimony. If these are not sufficient to satisfy claims, other assets of the debtor can be traced.

It is established a separation of a person's creditors depending on asset mass on which the claim arose: common/own spousal mass goods, assets for exercising a profession, mass goods entrusted to a third part (fiduciary masses), etc.

It is established an order for tracking the debtor's assets. First will be pursued those goods that form the patrimony and if they prove insufficient, alternatively will be pursued other assets from the debtor's patrimony. These goods can be found in other patrimonies of affectation included in the debtor's property, or free without being incorporated in another patrimonial mass (M., Dumitru, (2011):46)

Also, in case of competition between creditors, will be preferred the one whose claim appeared in connection with mass asset subject to prosecution. Exercising the right to follow and preference right will lead to difficulties due to insufficient regulation.

To the limits of liability, there is no limitation of the natural person responsibility. The person will be responsible for obligations not only within the heritage mass on which the claim arose, but will respond in addition, with the whole patrimony.

However art. 2324 of the Civil Code paragraph 4 establishes an exception from the above regulation, legitimating a limitation of the liability of a natural person, for obligations under exercising a profession (trade). Therefore, goods that are subject to a patrimonial separation affected by exercising an authorized profession can be pursued only by creditors whose claims arose in connection with the occupation. These creditors will not pursue other assets of the debtor (M., Dumitru, (2012)).

Goods that are used by a professional to his business are goods that cannot be pursued by the personal creditors of such professional. The text of the Civil Code relies clearly that goods subject to a division of

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property affected by the exercise of a profession authorized by law may be pursued only by creditors whose claims occurred about the occupation. As a consequence, any other creditor of the property owner, other than one whose claims are related to work, will not ever pursue professional heritage assets (M., Dumitru, (2011):46-47). These goods are removed so off the right to pursue of the other creditors. No warranty is subject to the common law of the creditor and may be subject to the prosecution. Those assets become blurred through the unilateral act of will of the settlor of the patrimony of affectation. However, these creditors will not pursue the other debtor's goods unless the sale of goods and right of the professional patrimony is able to achieve the claim. In other words, the liability of the natural person for his professional obligations is within his professional patrimony. Creditors targeted by art. 2324 paragraph 4 of the Civil Code, include state and tax authority.

Because of that separation of patrimonies, professional personal creditors cannot seize goods from the personal patrimony of affectation.

From the debtor's point of view, the limitation of law tracking imposed to the creditor is a measure of protection, a limitation of the liability of the natural person who is authorized to exercise individually an economic activity for the assumed obligations, while trading only to a certain part of his patrimony. The assumed obligations while exercising professional activity are only guaranteed with the mass of goods affected to the occupation, if such mass was formed.

If professional development is not authorized by law, in the sense that the profession is carried clandestinely, the illegal professional will not benefit from this measure of protection that limits the liability only to those goods affected by exercising an occupation.

Conclusions

The provisions of art.2324 paragraph 4 of the Civil Code apply if professional divided his patrimony after the present Civil Code became operational. If the patrimony of affectation was formed before October 1, 2011, creditors whose claim occurs from occupation will be able to pursue the goods found in the person's patrimony whether they are included or not in the mass of assets affected to the profession. It is true that the goods of this category will have priority. But the person's liability for the obligations arising out of the profession will not be limited to a part of his

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patrimony; professional obligations will be guaranteed by the entire patrimony of that person.

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