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THE CONDITIONS OF THE RIGHT TO HERITAGE. CASE.

Ilioara GENOIU[1]

The case:

M.D., as plaintiff, asked the court, in contradiction with the defendants, T.M., T.N. and T.O. – daughters of the deceased, to rule for his son, T.D., on his quality as successor of the deceased T.I.'s heritage.

De facto, T.I., domiciled in Ploiesti, deceased on 1 December 2011. He had three daughters (the oldest being convicted for having tried to murder the *de cuius*) and one grandchild from each of them.

T.I. ordered by an authentic act of last will for the house where he lived, in the favor of his brother's son (grandson from his brother), namely T.D. The latter had, when the succession was opened, according to the medical certificate submitted to the court by the plaintiff, six weeks of intrauterine life. T.D. was born alive, but shortly (after three hours from his birth) he died because was suffering of a malformation incompatible to life. This also results from the medical certificates submitted to the case file by the plaintiff.

As a consequence, M.D shows that her son has the quality as successor for the deceased's heritage. The daughters of the deceased defend themselves, showing that T.D. cannot inherit the house of *de cuius* because he died shortly after his birth. Even more, the daughters of T.I. show that T.D. is the result of the concubinage between their uncle and the plaintiff M.D. Therefore, not being resulted from a marriage, T.D. (recognized by his father), cannot inherit T.I.

Comments:

In this litigation is debated the quality as successor of T.D. We shall expand the analysis of this quality to all persons mentioned in the case.

Thus, can be successor, according to Art 1100 Para 2 of the Civil Code, the person who fulfills the conditions stated by the law to inherit, but who has not exerted his right to succession. Therefore, the successor

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must cumulatively fulfill three general conditions of the right to inheritance, namely: successive capacity, unworthiness to inherit and the concrete vocation of succession.

We state that is entitled to inherit, according to Art 957 Para 1 of the Civil Code, which states the rule, the person who is alive at the moment when the succession is opened (thus, at the moment when *de cuius* has deceased). Exceptionally, based on Art 36 of the first thesis of the Civil Code "the rights of the child are recognized from his conception, but only if he is born alive…".

As a consequence, in this case all the nominated persons fulfill the condition of the capacity to inherit, but on different legal grounds. Thus, T.D. has the right to inherit, based on the exceptional provisions of Art 36 of the Civil Code, because when the succession was opened (namely, 1 December 2011) he was conceived, having, as resulted from the medical certificate submitted to the case file, 6 months of intrauterine life. It is also fulfilled the condition, regarding T.D., to be born alive (he lived for three hours). The malformations from which he was suffering are not in nature of affecting his quality as successor, because our legislation does not connect, as already shown, the entitlement to the right to inherit to the viability of the person. The only condition which must be fulfilled for the child conceived (in this case, fulfilled) is that T.D. to be born alive. The other nominated persons (except the deceased), also have the capacity to inherit, but based on Art 957 Para 1 of the Civil Code.

Regarding the vocation to inheritance, in this case, we must distinguish between the legal and testamentary succession vocation, because, in this case, the two ways of inheritance coexist (testamentary regarding T.D., because he is named as legatee regarding the house where *de cuius* lived and legal, regarding the relatives of the deceased, nominated in the case). The legal successive vocation conditions the access to legal inheritance, and the testamentary interests the inheritance indicated by the will. The legal succession vocation belongs to the deceased's relatives, and the testamentary is owned by the person appointed as legatee, namely T.D., the grandson from the brother of the deceased. We note that the grandson of the deceased is the owner of a multiple vocation to the inheritance (stated by Art 1102 of the Civil Code), being in the same time, relative to the deceased (collateral privileged (2^{nd} class) of 3^{rd} degree) and his particular legatee.

We state that also, for collecting the legal inheritance, it is necessary the ownership of the legal concrete successive vocation, the ownership of the general legal successive vocation not being enough. The

latter type of vocation is held by any of the deceased's relatives, regardless of the proximity of blood, ascendant or descendant, or civil and independent from the membership to one or other classes of inheritors and proximities of blood. The concrete legal vocation is owned only by those relatives of the deceased located in the nearest class of inheritors and kin. Thus, in this case, fulfill the condition of the concrete legal vocation the three daughters of the deceased (first kin). The other relatives, including the legatee with particular title, are removed from the legal inheritance by the above mentioned relatives, found in a preferable class and kin. We must emphasize the fact that the plaintiff, namely the mother of T.D., does not even have the general legal vocation, because she is not relative to the deceased (she is the concubine of the deceased's brother). Much less cannot be called in question the testamentary vocation of the plaintiff; she was not nominated in the will of the deceased.

T.D also has testamentary vocation, based on the will.

Regarding the unworthiness to inherit, stated by Art 958-961 of the Civil Code, we state that only the oldest daughter of the deceased does not fulfill this condition, because she was convicted for attempt of murder against her father. Thus, T.M is aimed by Art 958 Para 1 Let a) of the Civil Code, being unworthy to inherit.

As a conclusion, fulfill the conditions to inherit, the following persons:

- T.D., regarding the house of *de cuius*, left to him by particular title of legatee;
- The middle and youngest daughter of the deceased, regarding the legal inheritance;

In this case, could also be initiated the debates regarding the quota for each inheritor, with the succesoral reserve or with the reduction of the excessive liberality. We shall not approach these aspects, because in this case, it is raised only the problem of T.D., the child born alive and deceased after three hours from birth, who can inherit the house left to him by legatee. Or, this case (and not only) was offered an affirmative answer. **T.D. cumulatively fulfills the general conditions of the right to inherit, being able to inherit the house of *de cuius*.**

As a conclusion, we state that in this case operates the retransmission of the right to successoral option, stated by Art 1105 of the Civil Code, whose case shall not be debated here.