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THE SUCCESSIONAL RESERVE IN THE NEW CIVIL CODE'S REGULATION. PART II

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THE SUCCESSIONAL RESERVE IN THE NEW CIVIL CODE'S REGULATION. PART II[1]

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Abstract

An important aspect in the analysis of the successional reserve problem3 is represented by the establishment of the successional reserve and of the available quota. As a consequence, in the present paper the calculation of the successional reserve and of the available quota will be analysed, also identifying the operations that must be done in order to determine the mass of calculation. Equally, there will be revealed the news brought, in this respect, by Law number 287/2009 regarding the Civil Code4 and there will be appreciations of its progressive character.

Keywords

successional reserve, available quota, mass of calculation, gross assets, net assets, gathering donations.

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1. General considerations

Achieving the liberalities in respect with the successional reserve represents one of the limitations of the right to dispose freely of the inheritance. According to the dispositions of the article 1086 NCC, "The successional reserve is the part from the inheritance's assets to which the heirs who cannot be totally disinherited[5] have the right, according to the law, even against the deceased's will, manifested through liberalities and disinheritances". As a consequence, the successional reserve operates only in the hypothesis in which *de cuius* has heirs who cannot be totally disinherited, concerns both the liberalities (donations and legacies) disposed by the deceased, and the disinheritance testamentary clause. If the deceased has only heirs who can be totally disinherited, he may exercise his right to dispose of the assets irrespective of any limitation.

The available quota represents, according to the dispositions of the article 1089 NCC, "...the part of the inheritance assets which is not reserved by law and of which the deceased may dispose unlimited, inclusively through the liberalities".

It follows therefore that, if the deceased has, on the one hand, heirs who cannot be totally disinherited and on the other hand, he has done liberalities, the deceased patrimony is divided into two parts: the legal reserve, which is, by right, of the heirs who cannot be totally disinherited, even against the will of the deceased and the available quota, of which the deceased may dispose, according to his own will, without any legal limitation.

But if through the liberalities disposed by the deceased, the successional reserve is harmed, they will be subjected to reduction. Therefore, it becomes an imperative fact the need to stabilize the successional reserve and the available quota, in order to know the limits in which the reduction of the excessive liberalities operates[6].

The new Civil Code regulates the way of calculation of the successional reserve and of the available quota, in Book IV "About inheritance and liberalities", Title III "The liberalities", Chapter IV "The

[5] There are heirs who cannot be totally disinherited, according to the dispositions of the article 1087 NCC, the surviving spouse, the privileged descendants and ascendants of the deceased.

[6] For reasons related to the length of this paper, the issue of the excessive liberalities reduction will be considered in a future paper.

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successional reserve, the available quota and the reduction of the excessive liberalities", Section 2 "the reduction of the excessive liberalities", article 1091.

2. Available quota and successional reserve calculation

As we have shown, the inheritance has two parts, in the hypothesis in which there are heirs who cannot be totally disinherited. These are:

a) the successional reserve, only for the heirs who cannot be totally disinherited and of which the deceased can not validly dispose in other people's favour;

b) the available quota, of which the deceased can dispose freely.

The successional reserve and the available quota represent percentage rates on the successional mass. So, in order to be able to calculate it, it is necessary to determine the successional mass [called also mass of calculation or virtual successional mass (Florescu, (2011): 126)], as it represents the reference basis. Besides the actual fortune left by the deceased at the inheritance opening date, the successional mass also include the donations made by him during his life. Therefore, it must not be but an equal between the successional mass and the effective inheritance left by the deceased. If, through the liberalities made by the deceased, the reserve of the heirs who cannot be totally disinherited wasn't respected, than the reduction of the excessive liberalities will be applied.

In conclusion, we point out that the establishment of board of calculation is the operation that must be performed, before the reduction of the excessive liberalities and that the mass of calculation does not represent the patrimony of the deceased, but the patrimony that the deceased would have had if he had not decided during his lifetime through liberalities.

In order to establish the mass of calculation, according to the article 1091 paragraph (1) NCC, the following operations must be done:

a) the determining of the inheritance gross assets, by adding the value of the existing assets into the successional patrimony, at the inheritance opening time;

b) the determining of the net assets, by decreasing the successional liabilities from the gross assets;

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c) the fictional reunion, of the net assets with the value of the donations made by the person who leaves the inheritance.

2.1. The determining of the inheritance gross assets

This operation involves the identification of all assets, movable and immovable ones, which belonged to the deceased at the inheritance opening date, including those left as legacies or those that represented the subject of a donation of future assets (since they are out of the successional patrimony).

Consequently, there will be considered in determining the gross assets of the inheritance all the assets existing in the deceased patrimony at the inheritance opening, namely (National Union of Public Notaries from Romania, (2011): 407-408):

- main real rights and accessories over the deceased assets[7], minus the real rights with lifelong lasting character. Therefore there will be considered in determining the gross assets of the inheritance: the ownership over movable and immovable assets of the deceased, the dismemberments of the ownership right[8] with non-lifelong character (such as the right of servitude, the right of concession etc.), the accessory real rights (such as mortgage, pledge etc.);
- the deceased rights of credence, no matter their sources (contract, unilateral legal act, legitimate legal fact , liability);
- the creation and intellectual property patrimonial rights;
- the patrimonial actions to which the deceased had the right (those still not exercised or under court) with the purpose to exploit its patrimonial rights;
- the right to use the burial places, leased for an unlimited period of time;

[7] According to the dispositions of the article 542 NCC, "Unless otherwise specified, there are subjected the rules regarding the real estates and the real rights on them". "The other patrimonial rights are subjected to the rules regarding to movable assets, with the limitations prescribed by law". As a result, the real rights over real estates are considered to be immovable assets and the real rights over the movable assets and the other patrimonial rights over real estates or movable assets are considered movable assets.

[8] These are enumerated in article 551 NCC.

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- the assets that were the object of the legacies or of the future assets donations, as they aren't still out of the deceased patrimony;
- the rights that are coming back into *de cuius* patrimony (grantor), under the dispositions of the article 1016 NCC, in the hypothesis of the pre-death of the grantor or of the pre-death of the grantor and of his descendents.

On the contrary, there will not be taken into consideration when determining the net assets of the inheritance:

- the real right with a lifelong character (like the usufruct right, the right to use, the right of occupancy);
- the credence right with a lifelong character (like the pension rights, the right to maintenance, the life annuity right etc.);
- the assets without a patrimonial value, like family memories, according to the article 1141 NCC, of correspondence between family members, the family archives, the decorations, the collection weapons, family portraits, the documents and any other assets with a special significance for the respective family. We specify that those ones can only represent the object of a successional apportionment in the absence of an agreement between co-heirs, the family memories will stay in severalty.
- insolvent or insecure claims, like the claim that can not be exploited, as its debtor is notoriously insolvent or claim under the suspensive condition[9];
- the natural or civil fruits charged or brought to the due date, after the inheritance opening date, like the additions or improvements[10] brought to some assets from the inheritance, after the date of the *de cuius* death*;*

[9] If the suspensive condition will be accomplished after the inheritance opening date, it shall be made an operation of supplementary liquidation.

[10] See also: T.S., s. civ., dec. no. 1593/1979, in R.R.D. no. 1/1980, p. 65; T.S., s. civ., dec. no. 1272/1977, in R.R.D. no. 7/1978, p. 49, according to which the additions and the improvements are not part of the inheritance gross assets, but are about to be miscalculated between heirs, if they are not considered into the group that made them.

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- the indemnity insurance for people, paid by the insurer to the insurance third party beneficiary, as it is part of the insurer patrimony and not of the deceased insured person[11];
- the demurrage right born from a rental agreement.

Regarding the right of intellectual creation, which value can not be determined in the inheritance opening moment, literature (Capatana, (1958), : 46; Eliescu, (1966), : 353-354) has appreciated that an equitable solution would be the one that allows the heir, in competition with the heir who cannot be totally disinherited, to acquire from the moment of inheritance opening, from the inheritance other assets, both the available quota from the right of intellectual creation and from the available quota from the related allowance.

2.2. The setting of the inheritance net assets

The net assets of the inheritance is calculated by subtracting the successional liabilities (of the patrimonial obligations of the deceased from the inheritance opening date), from the gross assets of the inheritance. The new Civil Code, in article 1092 paragraph (1), establishes the order of the operations for a proper determination of the successional mass. Therefore, the gross assets are calculated first and than the net assets. The fictitious gathering of the donations value made by the deceased will be made after determining the net assets.

We offer these explanations, as article 849 of the 1864 Civil Code[12] provides that the succession's debts should have been deducted, only after the fictional reunion took place in the gross asset of the donations value made by the deceased. The court practice[13] and the doctrine (Eliescu, (1966), : 355; Chirică, (1996) : 176; Deak, (2002) : 332; Bacaci, Comăniţă, (2006) : 157; Stănciulescu, (2008), : 405; Adam, Rusu, (2003) : 335) were unanimous in believing that it has to be

[11] But if the insured deceased didn't designate a third party as the beneficiary of the insurances, the insurance indemnity is paid to the heirs, being thus part of the inheritance gross assets.

[12] Article 849 from the 1864 Civil Code stated that "The available part is calculated as it follows: beside the assets left by the grantor or by the testator in the moment of his death, there are added by calculating also the assets by which he disposed as a living person through donations, in respect with their status in the moment of the donation and also in respect with their value at the death moment of the grantor. From this mass of assets, minus the debts, it is calculated the available part, in respect with the number and the quality of the eredes".

[13] T.S., s. civ., dec. no. 1272/1977, in R.R.D. no. 7/1978, p. 49.

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determined first the net assets of the inheritance and then the fictional reunion of the donations' value has to be made. If the order disposed by the legislator had been followed, two obstacles would have appeared:

- would have been diminished or even would have been abolished, but only in the insolvent inheritance cases, the reserve and the available quota;
- private creditors would have satisfied their claims in all cases (independently of the solvent or insolvent character of the inheritance) also from the value of the donations made by the deceased during his life, although they do not generally formed their pledge[14].

In this context, we reveal the novelty brought by Law no. 287/2009 in the matter subjected to our analysis and we salute the legislator availability to take the fair proposals of the doctrine and of the court practice.

Returning to the analysis of the determining operation of the inheritance net assets, we specify that, from the succession liabilities are part of the deceased patrimonial obligations existing at the inheritance opening date. As a result, parts of the successional liabilities are:

- the patrimonial obligations of the deceased to the third parties;
- the debts of the deceased to the heirs (like the funeral expenses[15], expenses incurred during the inventory and the evaluation of the assets, expenses for the conservation and the

[14] In these respect, in the literature was given the following example: The gross assets of the deceased inheritance are of 20.000 lei, and the liabilities are of 30.000 lei. During his life, the deceased disposed through liberalities with a value of 10.000 lei. According to the dispositions of the article 849 from the 1864 Civil Code, the net assets of the inheritance are of 0 lei (20.000+10.000–30.000=0 lei). In conditions in which the deceased has a descended, an heir whose reserve is ½ from the inheritance, he does receive nothing, the successional reserve and the available quota disappearing entirely (thus we meet our first difficulty). Moreover, the private creditors are satisfying their claims also from assets out of the deceased patrimony, during his life (donations that worth 10.000 lei), which is against the legal principle, stated by the 1864 Civil Code regarding the debts of these creditors (this is the second met difficulty). In the light of the above example, it is justified the inversion of the discussed operations. Therefore, first will be deducted the deceased debts and than it will be added the value of the donations made by the deceased during his life.

[15] Into the funeral expenses are also included the expenses for the Christian rituals, according to the local customs and to the welfare of the deceased (like alms, memorial services etc).

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management of the successional patrimony, taxes paid for the inherited assets etc.).

Though there are not parts of the inheritance liabilities the following classes of debts:

- the *intuitu personae* assumed obligations of the deceased, which are extinguished with his death, like the maintenance obligation or like the obligations assumed as an entrepreneur, mandatary etc.;
- imperfect civil obligations (also called natural obligations), like those extinguished through the extinctive prescription effect;
- obligations under suspensive condition, which are not born yet;
- heirs obligations.

National Union of the Public Notaries from Romania highlights the importance and the difficulty of determining the net assets of the inheritance, in the hypothesis in which the deceased acted as a fiduciary or other had administrated somebody else's assets. In such a situation *de cuius* has different patrimonies, but only the personal one is subjected to the calculation of the successional reserve and of the available quota.

2.3. Fictitious reunion of the donations value made by the deceased

To realise the calculation of the reserve and of the available quota, it is necessary to be fictitious reunited at the net assets also the value of the donations made by the deceased during his life. In this way they are protected against the *mortis causa* excessive liberalities not only the interests of the heirs who cannot be totally disinherited, but also against *inter vivos* liberalities, which are also excessive.

In order to realise a correct calculation of the available quota and of the successional reserve, it is necessary to reveal the following aspects:

The donations reunion is only fictitious (for calculation) and not real.

By fictitious reuniting the donations value to the net assets of the inheritance, it can be verified if the liberalities disposed by the deceased are within the limits of the available quota. Only if this quota is exceeded, the problem of the effective bringing to the successional mass of the donated assets is really taken into consideration.

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b) Are subjected to the fictitious reunion all the donations disposed by the deceased during his life, no matter if they are actual donations (authentically realised), indirect donations, simulated donations (Nicolae, (2010) : 401-408) or hand gifts (as long as they are not common gifts, not subjected to the reunion), no matter if they are or not with tasks, no matter if the donee is a heir of the grantor or a third party, no matter if they are or not excepted of report[16]. Equally subjected to the reunion are the donations in which was materialised the ascendant apportionment (Genoiu, (2011).

As the task donations are regarded, the fictitious reunion focus only the difference between the value of the donated assets and the task [article 1091 paragraph (2) NCC].

2.3.1. Gratuities not subjected to the reunion

Are not subjected to fictitious reunion, in accordance with article 1091 paragraph (3) NCC., as they aren't genuine liberalities, those gratuities made in order to achieve social tasks, such as:

common gifts;

- Included in this category are the gifts made to relatives or friends at anniversaries, at the baptisms of their children or even at their wedding. For them to be exempted from the reunion, it is necessary that these gifts have a common value.
- remunerative donations;

the sums spent for the maintenance or, if it's the case, for professional training of the descendants, of the parents or of the spouse, if they are not excessive;

We note that only the maintenance expenses and those for the professional training of the descendants, of the parents or of the spouse are exempt from the reunion, if they are not excessive. As a result, the fees for maintenance or training of other relatives of the deceased will be subjected to the reunion, even assuming they are not excessive.

- wedding expenses.

So we find that only the wedding expenses are not subject to the reunion, as opposed to wedding gifts. The latter, however, may be exempted from the reunion, since they have a common value.

[16] In the case of determining the special available quota of the surviving spouse, regulated by article 1090 NCC, are taken into account only the unreported liberalities.

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Nor is the value of the goods estranged for consideration subjected to fictitious reuniting, except in the event that the heirs who cannot be totally disinherited prove by any evidence, that the document for consideration disguises a donation[17]. Although the heirs who cannot be totally disinherited can use any evidence to prove the disguised character of the donation, such evidence raises, however, real difficulties.

For their eradication, the legislature imposed, expressly and exhaustively, in article 1091 paragraph (4), a relative presumption of gratuity for consideration of the act concluded with a descendant, privileged ascendant or with the surviving spouse, in exchange for the usufruct, use or the maintenance of habitation or in exchange for a life annuity.

To operate this presumption, it requires that the document signed by the deceased with an heir of the above mentioned is declared them as a consideration. If the document is free, it is presumed that it affects its liberality, the simulation must be proven[18]. Also, for the same purpose, the heirs who cannot be totally disinherited, who invoke the disguised character of the estrangement, shouldn't have consented to it, thus admitting to be for consideration. Therefore, only those heirs which didn´t consent to the estrangement can invoke the gratuity presumption.

Operating presumption of gratuity for consideration of the document signed by the deceased with mentioned heirs, the property will be reunited with the estranged net assets of the inheritance and it will be subject to reduction, as far as it affects the successional reserve (being considered as excessive).

If the available quota was not exceeded, the property remains validly alienated, not being subject to report donations. So, making a disguised donation is equivalent to a report exemption (Deak, (2002), : 336).

We specify that, in light of the Civil Code from1864, this presumption operates only in favor o the heirs in a straight line. Thus, Law no. 287/2009 innovates in this respect, ordering that the

[17] In respect with the disguised act, the heirs who can be totally disinherited have the quality of a third party, so they can use, in order to prove the disguised character of the donation, any mean of evidence. See in this regard T.S., col. civ., dec. no. 1243/1958, in C.D. 1958, p. 88.

[18] If the proven of the simulation does not succeed, in the mass of calculation shall be considered the difference between the value of the donated asset and the value of the task.

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presumption operates only in favor of the descendants, ascendants or of the surviving privileged spouse. We find, therefore, that the new Civil Code renounces the ordinary ascendants and adds the surviving spouse.

Then, in the light of the Civil Code from1864, to operate a gratuity presumption, it was necessary that the alienation be done with reservation of usufruct or of the life annuity. As noted, however, the new Civil Code extends the area of the tasks, to the use, habitation and to the maintenance.

Finally, we mention that, before 1 October 2011, the literature has pleaded for extending the gratuity presumption, on the one hand, to the surviving spouse, on the other hand, to the use, habitation and to the maintenance.

We find, therefore, that this time too, the new Civil Code takes the fair proposals of the literature and gives them legal force, regulating them.

2.3.2. Valuation of donated assets

After identifying of the donated assets by the defunct, their valuation operation must be performed. The valuation of donated assets, whether mobile, tangible or intangible or properties, is made under the provisions of article 1091 paragraph (2) NCC, taking into account their value since opening their heritage and their status since the conclusion of the donation. Thus, it is considered that the asset has remained in the patrimony of the defunct, having the value that it was given at the heritage opening. As we have already noted, the value of such donation shall be deducted from the value of the tasks undertaken by the donation contracts.

As far as the property alienated by the donatee is concerned its value on disposal will be taken into account. Money is subject to indexation against inflation index, covering the period between their date of entering in the donor's property and opening date of the inheritance [article paragraph 1091 (2) final sentence].

So, there are three crieria according to which we value the donated assets. These are the following:

- depending on the value of movable and immovable property donated, at the date of inheritance opening;
- depending on the value of the assets disposed by the donatee at the date of their disposal;

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- depending on the inflation index, where money is concerned.

Thus we find that even in terms of assessing the donated property, Law no. 287/2009 innovates, otherwise fairly, adapting to new social realities.

In this context, we underline that the old Civil Code has established the rule that, at the reunion of the donation its value at contract completion date will be considered, regardless of the inflation on the money market recorded, until the opening of the inheritance.

This rule was, in fact, an application of the principle of monetary nominalism, which does not take into account the economic instability that characterized the period following 1989. As a result, there were cases in which, at the conclusion of the donation, its value corresponded to that of an apartment, and on opening the inheritance, with that value only an air conditioner could be acquired. Both literature and judicial practice have advocated for indexing the donation value, considering that the principle of monetary nominalism was not one of public policy. This plea was, ultimately successful, the new Civil Code taking this view.

Trying to ensure a complete regulation to the problems subjected to our analysis, the new Civil Code envisages the situation where donated goods were replaced by others, as well as hypothesis where the donated goods or those that replaced them perished fortuitously.

Thus, as for the first case, the new Civil Code provides that where donated assets were replaced by others, at the date of opening of inheritance their value will be taken into account, when the property entered in the heritage and their condition at the time of acquisition.

It therefore retains the same logic as in the typical inheritance, when assets are not replaced with others from the donor's heritage. Exceptionally, however, if the devaluation of the assets entered into heritage property was inevitable at the date of acquisition by virtue of their nature, the replacement property is not considered. So, in this case the value of the donated assets at the date of opening of inheritance will be considered, taking into account their condition at the time of the donation. This provision is designed to protect, once again, the interests of heirs who cannot be totally disinherited.

As for the second situation, since the property donated or the one that replaced it (for example, the amount received from insurance) perished fortuitously, regardless of the date of destruction, the donation will not be submitted to a fictitious reunion.

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So, it is exempted from the reunion, that donation whose object (or property which has replaced the object donated) was destroyed without the donor's fault. Further more, we consider it will be exempted from the reunion the donation whose object was destroyed because of major force.

2.4. Final considerations

Finally, we mention that the calculation mass is composed of the net assets of the inheritance, calculated according to the rules above, to which is added the fictitious value of the deceased's donations made during his life.

Considering this mass, we will determine the successional reserve and the available quota. If, on this occasion, we find that the liberalities affect the successional reserve, we will proceed to their reduction, within the available quota.

Also we state that, when establishing the reserve, those who have renounced the inheritance shall be taken into account, except those required to report, even if they are apostate [article 1091 paragraph (5) NCC].

According to the provisions of article 1147 paragraph (2) NCC, "By express stipulation in the donation contract, the donor may be required to report the donation even if he renounces the inheritance. In this case, the donor will return to the legacy only the value of the donated property that extends beyond the property of the deceased that he would be entitled to as legal heir."

We find thus the novelty of the provisions of Law no. 287/2009. According to it, as a rule, the apostate is not required to report the donations received from the deceased. But if the deceased expressly stipulated in the contract of donation that the donor is obliged to report the donation, even if he gave up the inheritance, the latter will have to report only the amount exceeding the rate to which he would have been entitled as the legal heir.

We believe that such a provision is intended to keep the equality between the legal heirs of the deceased.

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Conclusions

Law no. 287/2009 on the Civil Code provides some news regarding the calculation of estate reserve and of the quota available. They are:

- Unlike the Civil Code from 1864, which provided, in article 849, that succession duties should be reduced only after fictional reunion took place on gross assets, the value of donations made by the deceased, the new Civil Code establishes a logical sequence of operations to be performed to determine mass calculation, considering that we have determined, first, the net assets of the inheritance and then be carried out the fictitious gathering of donations value.

Moreover, for such a sequence of operations, the literature and judicial practice pleaded, before 1 October 2011.

- The presumption of free documents for consideration, concluded by the deceased with a descendant, privileged ascendant or surviving spouse, in exchange for the usufruct, the use or the maintenance of habitation or in exchange for life-long maintenance of or for an annuity is, in light of the new Civil code, a larger coverage area than the old regulation, both in terms of people who can invoke it as well as the task that encumbers the liberality.

Thus, in light of the Civil Code of 1864, this presumption operated only in favor of the heirs in straight line and if the liberality was encumbered by usufruct task or by the life annuity.

Law no. 287/2009 provides in the sense that the presumption operates only in favor of descendants, privileged ascendants or surviving spouse (excludes ordinary ascendants and the surviving spouse is added) and that alienation should be made with usufruct reservation, of the use, habitation, life annuity or of the maintenance (use, habitation and maintenance are added).

- According to the new Civil Code, the amounts of money, which formed the subject of donations subject to the reunion, are subjected to indexation against inflation index, covering the period between their date on entering the donor's assets and the heritage opening date.

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- In light of the old Civil Code, at the reunion of the donation its value at contract completion date is considered, regardless of the inflation recorded on the money market, until the opening of the inheritance.

Moreover, the doctrine and the judicial practice advocated giving up the principle of monetary nominalism, which they considered not being of public policy.

- Trying to ensure full regulatory to the issues subjected to our analysis, our new Civil Code envisages the situation where donated goods were replaced by others as well as the one the donated assets or those that replaced them perished fortuitously, providing them a fair solution.
- according to the new Civil Code, when establishing the reserve account, those who have renounced the inheritance shall be taken into account, except those who required to report, even if they are waived.

In this sense, Law no. 287/2009 provides a novelty in the sense that the waiving legacy donor is required, as a result of an express stipulation in the donation contract, to report the donation received from the deceased, to the extent that it exceeds his share as the legal heir.

Finally, we consider that the new Civil Code regulates the fair calculation of an estate reserve and that of an available quota, assuming the proposals made, in light of the old Civil Code of the doctrine and jurisprudence.

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