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The Proof of the Heir Quality in the New Civil Code

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Abstract: Similar to the Civil Code in force, Law no. 287/2009 regarding the Civil Code, published in the Official Gazette, but whose date of entry in force has not been established yet, regulates, as a main proof of the heir quality, the heir certificate. Like *de lege lata* the proof of the heir quality may be realised, integrated in the petition of heredity, and by other means of evidence. In the present paper we aim to analyze the problem of the heir quality’s proof, under all its aspects in the light of the Law no. 287/2009 and to reveal the novelties brought by this governmental decree in the matter subjected to our analysis and to appreciate upon its correctness. We consider our scientific approach, through which we intend to contribute to the knowledge of the new Civil Code dispositions on successional matter, until its entry in force, is current and useful.

Keywords: heir certificate; heir quality certificate; petition of heredity; civil status papers

1. General Considerations regarding the Proof of Heir Quality

The problem of the heir quality proof is asked, mainly, in the petition of inheritance content. The current Civil Code, unfortunately, does not regulate the petition of heredity, although it is widely recognized by the doctrine and by the jurisprudence. As a consequence of the legislature’s lack of interest to regulate the principal legal mean of protection of the successional rights, the term “petition of heredity” does not have a legal basis *in terminis*, although this name is regularly used.

Currently, in the absence of a legal regulations, the petition of heredity - *petitio hereditatis* - is defined by the doctrine as being the real action through which the claimant (legal heir, legatee general or with general title) asks the court to recognize his title of heir and the refund of the successional assets by the defendant, who also claims to be general heir or with general title of the deceased. (Deak, 2002; Bacaci & Comăniță, 2006; Chirică, 1996; Stănculescu, 2008; Popa, 2008; Dogaru, Stănescu & Sorață, 2009; Genoiu, 2008).

Law no. 287/2009 regarding the Civil Code² regulates the petition of heredity, in Title IV – The transmission and the partition of the inheritance, Chapter I – The transmission of the inheritance, affecting its Fifth Section (articles 1130-1131).

According to the dispositions of the article 1130 N.C.C., the heir with universal vocation or with general title can obtain at anytime the recognition of his heir’s quality against of a person who,

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² It was published in the Official Gazette of Romania no 511 from 24th of July 2009. In article 2664 paragraph (1) of this governmental decree it is foreseen that “The present Civil Code comes in force on date that will be established by the law for its appliance”. According to the dispositions of the paragraph (2) of the same law text, “In a 12 months’ term from the publishing date of the present Civil Code, the Government will submit for adoption to the Parliament the draft law for the implementation of the Civil Code”.

claiming to rely on the heir title, has all the assets from the successional patrimony or only a part of them.

Although these legal dispositions have, primarily the purpose to identify the persons who can obtain the recognition of the heir's quality, they allow us, equally, to define the heredity petition. As a consequence, in the light of the mentioned dispositions of the new Civil Code, the heredity petition may be defined as the real action through which the heir with universal vocation or with general title asks the court to recognize his quality of heir and for the restoration of the successional assets by the defendant who, claiming to rely on the heir title, has all the assets from the successional patrimony or only a part of them. (Genoiu & Mastacan, 2009)

It follows therefore clearly that the new Civil Code fully exploits the doctrinal definition of the heredity petition. We can identify no difference element between the definition given in the present to the heredity petition and the definition stated by the new Civil Code. The merit of this governmental decree undoubtedly lies in providing to the action through which the successional rights a name and a definition are protected. Moreover, we consider that the new Civil Code defines in a satisfactory and complete manner the proceedings in question.

In the heredity petition, the quality of heir can be proven, mainly, through the heir certificate or through the heir quality certificate. Equally, however, the quality of heir can be proved with other means of evidence, such as the will, the deeds of civil status, the recognition from the defendants.

2. The Proof the Heir Quality through the Heir Certificate

2.1. General Considerations Regarding the Heir Certificate

In the heredity petition, the disputed issue is represented by the quality of heir (legal heir, general legatee or legatee general title) of the parts¹. The proof of this quality is realised, mainly, through the heir certificate (regulated both by Law no. 287/2009 in articles 1132-1134, and by Law no. 36/1995) or through the heir quality certificate (regulated only by Law no. 36/1995).

The heir certificate, according to the dispositions of the article 1132 N.C.C., "is given only by the public notary and it contains findings regarding the successional patrimony, the number and the quality of the heirs and their respective quotas from this patrimony, and also other mentions foreseen by law".

In the light of these legal dispositions, the present definition for the heir certificate completely keeps its validity. Thus, the heir certificate can be defined as the document given by the public notary, from the place of the inheritance opening, within the successional non-legal procedure, which allows the proven of the heir quality and which, in the same time, represents the right to take into possession immediately the legal inheritance without a prior authorization of the justice from the heirs who don't have this right.

The heir certificate is released by the public notary, unless there are no disagreements between the heirs (art. 1144 N.C.C.), in connection with the division of the successional mass. In the absence of the consensus between the heirs their successional rights will be determined by the court, in a contentious proceeding.

The heir certificate is released, according to the dispositions of Law no. 36/1995 regarding the public notaries and the notarial activity², after the prescription term's expiration of the successional option

¹ The legatee with private title can not use the petition of inheritance since, under the dispositions of the article 1130 N.C.C., he enters in the possession of the legacy's object in the specific day when it was given voluntarily, or in his absence, the day when the request for surrender has been applied to the court.

² Published in the Official Gazette no. 92/16th May 1995. So far, this governmental decree has suffered some changes and additions. From the dispositions of the new Civil Code and of the implementing the new Civil Code Law Draft it results that Law no. 36/1995 will be applied in parallel with these governmental decrees. As a consequence, in the light of the new Civil

right (of one year¹), which starts, as a rule, at the opening date of the inheritance or even before the starting of this term, if all the heirs are not known (Mihuță, 1969).

The heir certificate, released by the qualified public notary under the final conclusion, in term of 20 days since it was emitted, includes, mainly, according to the dispositions of the article 1132 N.C.C., in principal, specifications regarding:

- the deceased;
- the successional patrimony (the assets and the liabilities of the inheritance);
- the number and the quality of the heirs;
- the quota of each general heir or with general title, and also the assets assigned for the legatees with private title;
- the payment of the stamp taxes and of the honorariums;
- the date of its release and the institution that releases it.

A copy of the heir certificate is released for each heir. Exceptionally, however, in the omission case of some assets from the successional mass, the public notary has the possibility to fix this problem, with all heirs agreement, by realising a new heir certificate [article 88 paragraph (2) from Law no. 36/1995] or a supplementary certificate [article 86 paragraph (2) from Law no. 36/1995]. (Petrescu, 1975; Pop, 1968; Genoiu & Turza, 2011) Further more, in the omission case of some successional assets from the successional mass, the heirs may address the court, requesting it to declare the omission and to include the omitted assets into the successional mass. Through such an action the annulment of the heir certificate is not required, but only its completion with the omitted assets. (Bacaci & Comăniță, 2006) A new heir certificate will also be released by the public notary in the hypothesis in which the court annuls the one released previously.

The public notary is also qualified to release (Genoiu & Turza, 2011):

- the finding certificate of the executor quality, if the testator stated in this regard [article 83 paragraph (3) from Law no. 36/1995];
- the heir quality certificate, through which it is certified only the quality of heir, without any references to the successional assets (article 84 final paragraph from Law no. 36/1995);

The heir quality certificate can be released in the hypothesis in which there are no successional assets, and also in the hypothesis in which in the deceased's patrimony are assets, but their acknowledgment requires time. The heir quality certificate precludes the release of the heir certificate, not having therefore the value of the latter one.

- successional vacation certificate, in the hypothesis in which the succession is vacant (Genoiu & Mastacan, 2010).

In conclusion, we notice the fact that the new Civil Code, unlike the Civil Code in force, is concerned with the heir certificate problem - the main mean of evidence of the heir quality in the petition of heredity - defining it, establishing its effects and regulating the possibility of finding, respectively the possibility of declaring its nullity. Still, by comparing the current definition of the heir certificate (based on the dispositions of Law no. 36/1995) with the one stated by the new Civil Code, we do not identify any difference element.

We consider the legislator's option to take over the existing definition of the heir certificate to be just, having, therefore, no innovations to bring in this regard.

Code's dispositions, we will refer to the stipulations of the public notaries and the notarial activities' Law. Between the two acts we find some overlaps, but no contradictions.

¹ Through the dispositions of the article 1103, the new Civil Code, as a novelty title, states that the length of the successional option term is one year.

2.2. The Functions of the Heir Certificate

Like *de lege lata*, and in the light of the new Civil Code dispositions, the heir certificate accomplishes the following two functions:

a) the modality to take into possession immediately the legal inheritance without a prior authorization of the justice from the heirs who don't have this right;

According to the dispositions of the article 1127 paragraph (1) N.C.C., "The legal heirs who don't have the right to take into possession immediately the legal inheritance without a prior authorization of the justice, take actually into possession of the inheritance only through the release of the heir certificate, but with a retroactive effect of the inheritance opening day".

b) mean of evidence.

The heir certificate is without a doubt the most important proof of this quality. Actually, the heir certificate does not confer to the successors the quality of heirs, but only acknowledges this quality (Genoiu & Sturza, 2011).

As a conclusion, we appreciate that the new Civil Code does not innovate, otherwise justly, under the functions' aspect of the heir certificate either.

2.3. The Proving Power of the Heir Certificate

According to the article 1133 N.C.C. dispositions, "the heir certificate makes the proof of the heir quality, and also of the quota or of the assets assigned to each heir". Thus, like *de lege lata*, the heir certificate does not proof the heirs' right of property (Popescu, 1970; Cristodulo & Vlachide, 1959; Popa, 1997; Leş, 1998), but only their quality and quota or the assets assigned to each of them.

We notice therefore that the new Civil Code takes over the dispositions of the article 88 paragraph (1) the second thesis from Law no. 36/1995 according to which: "Until the court's decision to annul it, the heir certificate is the full proof of the heir quality and of the share or of the assets that are due in part to each heir".

As a consequence, all the specifications outlined in the literature in the light of the legal dispositions in force regarding the probative value of the heir certificate shall remain valid also in the light of the new Civil Code.

As a novelty, through the dispositions of the article 1133 paragraph (2), the new Civil Code imposes the obligation of the public notary to proceed, in order to establish the composition of the successional patrimony, first at the liquidation of the matrimonial regime. We believe that the usefulness of those mentioned dispositions can not be denied and they meant to ensure a fair determination of the successional patrimony. Thus, the new Civil Code provisions incident in the matter of the matrimonial regime (articles 329-372) are correlated with those incident in the matter of the heir certificate. Therefore, in the process for determining the successional mass, the public notary must take, as a first step, the liquidation of the matrimonial regime.

We notice, therefore, the concern of the new Civil Code to regulate the probative value of the heir certificate and to ensure a full correlation between its provisions.

Heirs who consider themselves injured in their rights through the release of the heir certificate have the option, under the dispositions of 1134 NCC, to require to the court the ascertainment or, where appropriate, the declaration of its nullity and the establishment of their rights, according to the law.

According to the dispositions of the article 2502 paragraph (2) point 1 N.C.C., the action in ascertainment the absolute nullity of the heir certificate, if its object is represented either by the establishment of the successional mass, or by the successional partition, under the acceptance condition of the inheritance in the foreseen by law term, is not prescriptible from the extinctive point of view.

On the contrary, the action in declaring the nullity of the heir certificate is prescriptible in the general extinctive prescription term of 3 years (article 2517 N.C.C.). It starts, according to the dispositions of the article 2529 N.C.C., as it follows:

- in case of violence, since the day when it ceased;
- in case of fraud, since the day it has been discovered;
- in case of error or in the other cases of annulment, since the day when the legitimate one, his legal representative or the person summoned by law to approve or to authorize the acts has known the annulment cause, but no later than 18 months from the conclusion of the legal act;
- in cases in which the relative nullity may be invoked by a third person, the prescription begins, if the law does not provide otherwise, from the date when the third party knew the existence of the nullity cause for revocation.

Regarding the annulment of the heir certificate issue, it is necessary to achieve the distinction between the following two hypotheses:

a) the claimant from the action in annulment of the heir certificate is an heir who has participated in the notarial procedure and who has consented to its release, in which case he may ask the annulment of the certificate, on grounds of vitiated consent or incapacity (Eliescu, 1966; Deak, 2002; Petrescu, 1975; Spirescu & Mihalache, 1981), respectively he may request the nullity ascertainment of the certificate for reasons such as fraud to the law, an illegality and immoral cause¹ etc. (Chirică, 1996. Deak, 2002; Bacaci & Comăniță, 2006)

In such a case, the heir certificate, representing the result of the mutual recognition of the parties, of their status as heirs, has the probative force of a convention, in accordance with the dispositions of the article 1270 paragraph (2) N.C.C.

b) the claimant from the action in annulment of the heir certificate is a third party, in which case, to him, the heir certificate, being a *res inter alios acta*, is not a proof of the ownership right of the heirs, but only the proof of the quality and of the share or assets everyone are entitled at, being able to be refutable by any means of evidence.² (Eliescu, 1966; Stoica, 2007; Macovei, 1993; Deak, 2002; Bacaci & Comăniță, 2006)

Both from the analysis of the legal dispositions in force and from those of the article 1133 N.C.C. it results that the heir certificate does not represent a title of property, which can be enforced against the third parties, since the public notary from which it originates can not certify the fact that the assets owned by the deceased were his property and had been transmitted, by the inheritance's effect, into the successors' patrimony.

However, in light of the dispositions of the Civil Code in force, the literature (Deak, 2002; Chirică, 1996) appreciates that the probative force of the heir certificate in their dealings with third parties should not be underestimated, since it represents a mean of evidence to acquire the rights through the inheritance, by persons determined to be heirs of the deceased. This point of view can be equally sustained also in the light of the new Civil Code dispositions, which confers to the heir certificate the same effects like the Civil Code in force.

¹ Currently, most of the literature and also Law no. 36/1995, through the dispositions of the article 88 paragraph (1), speak only about the annulment of the heir certificate, for reasons of incapacity or vitiated consent, but not about the ascertainment of its nullity. Since the heir certificate is the result of the parties' convention, it is natural that the heir who considers himself wronged in his rights to have the opportunity to ask the court to declare its nullity on grounds of common law. As we have shown, the new Civil Code, through the dispositions of the article 1134, speaks about the ascertainment of the nullity, and also about its declaration. The mentioned law text has the following content: "Those who consider themselves injured in their rights through the release of the heir certificate may ask the court the ascertainment or, where appropriate, the declaration of its invalidity and to establish their rights according to the law".

² *De lege lata*, most of the evidence means issue is regulated by the Civil Code. But the new Civil Code does not regulate anymore this legal institution, it represents an exclusive regulation object for the new civil procedure Code. Therefore, Law no. 134/2010 regarding the civil procedure Code regulates the means of evidence in articles 243-382.

The probative force of the heir certificate can not be ignored, not even in relation with third parties, as long as, under this authentic document:

- are realised, based on the disposition of the article 888 N.C.C., the registration of the real rights, acquired through the inheritance, in the cadastral register (Dobrican, 2000);
- the amounts of money deposited by the deceased at the bank units are alleged and are valued, against the deceased debtor, the claims inherited by the successors from him.

The probative force of the heir certificate can not be neglected, at least considering that it is an authentic document, realized by a competent public notary and not a document under private signature.

According to the dispositions of the article 264 paragraph (1) from the new Code of Civil Procedure, "The authentic document is the full evidence, to any person, until it is declared as false, regarding the findings made in person by the one who authenticated the document, under the law conditions". According to the dispositions, paragraph (2) of the same law text, "the statements of the parties included in the authentic document are the proof, until the contrary, both between the parties and also to any other persons".

We see therefore that the new Code of Civil Procedure take over exactly the Civil Code provisions relating to the probative force of the authentic document.

In conclusion, the heir certificate, an authentic document, makes the full proof until its submission as false, in the hypothesis in which it contains personal observations of the public notary and until the contrary, in the hypothesis in which it contains statements of the parties.

Although the heir certificate, as we have shown before, is evidence against third parties, still they may contest some mentions of the heir certificate, claiming their own rights, such as:

- the heir quality of those registered in the certificate;
- the fact that those registered in the certificate are not the only heirs of the deceased;

In this case, the action in annulment of the heir certificate is accompanied by the heredity petition, if the successional assets are in the possession of the persons listed in the certificate, respectively by the action in finding the quality of heir, if the assets are in the possession of the complainant (Chirică, 1996).

- the fact that one (more) of the assets mentioned in the certificate are part of the successional mass.

In this case, the action in annulment of the heir certificate is doubled by the demand action (Petrescu, 1975).

It follows therefore that the action in annulment of the heir certificate does not have stand-alone character, but a complex, mixed one, which generates consequences on its prescriptible nature. Thus, to the action in annulment of the heir certificate will apply, as far as the extinctive prescription is regarded, the rules governing the actions that double it. Consequently, the action in annulment of the heir certificate for vices of consent is prescriptible in the general term of 3 years¹ (Turianu, 2001), and when the absolute nullity is invoked, finding the quality of heir, the heredity petition or the claim from the share of a third party, the actions are not prescriptible.

¹ It is considered that in the judicial practice and in the literature that the three years term starts, for the heir that has participated to the successional debate, from the date when he signed the closer given by the notary and since he was aware of the alleged irregularity. On the contrary, as the complainant who has not participated to the successional debate is regarded (especially if the heirs presented at the notary cunningly hid the existence of the others successors), the action in the ascertainment of heir certificate's nullity is indefeasible.

The Proof of the Heir Quality by Other Means of Evidence

Since the heir certificate is not a compulsory mean of evidence (Eliescu, 1966; Safta-Romano, 1995; Deak, 2002; Bacaci & Comăniță, 2006), the quality of heir can be proved, in solving the heredity petition and by other means of evidence.

For the testamentary heirs, their quality can be proven, within the heredity petition, with the will, especially in the hypothesis in which between the heirs exist misunderstandings, not being possible the release of the heir certificate. Therefore, the exercise of the heredity petition is not conditioned by the release of the heir certificate. Consequently, the successional rights of the testamentary heirs and their scope will be determined by the court.

In order to prove the quality of legal heir, there can be used as means of evidence the documents of civil status (authentic documents, which can be combated only by their false registration), from which it results the kinship with the deceased or the spouse quality.

Also, the judicial practice and the literature (Deak, 2002; Bacaci & Coman, 2006) admit the possibility of proving the quality of heir, both in front of the notary public and of the civil court, by any other means of evidence allowed by law, as witnesses or the recognition of the defendants.

3. Conclusions

From the analysis undertaken in this paper it results that the new Civil Code, unlike the Civil Code in force, is concerned to regulate the heredity petition issue and the heir certificate. The latter is, in the light of the new civil matter regulation, the primary mean of evidence of the heir quality. Law no. 287/2009, taking over the dispositions of Law no. 36/1995 regarding the public notaries and the notarial activity, defines the heir certificate, determines its legal effects and establishes the ascertainment or the declaration possibility of its nullity.

In this context, we consider that the disposition of Law no. 36/1995 shall apply alongside with those of the new Civil Code, in fact between the two governmental decrees only some overlap and not contradictions can be identified.

The new Civil Code confers to the heir certificate the same proving power as *de lege lata*. Therefore, the heir certificate, an authentic document, released by the notary public at the opening place of the inheritance, is a proof, against any person, until its declaration as false, regarding the findings made in person by the one who authenticated the document and until the contrary, regarding the statements of the parties contained in the authentic document.

And in the light of the new Civil Code dispositions we can appreciate that the heir quality proof can be realised by means of evidence, like the will, the civil status documents, witnesses or the recognition of the parties.

In the end, we appreciate that the Civil Code assures, as the proof of the heir quality is regarded, a main, coherent and just regulation.

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