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BRIEF CONSIDERATION ON THE CONCEPT OF TESTAMENT IN ROMANIAN CIVIL LAW

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Abstract: *The New Civil Code meets the requirements of legal professionals and improves the legal definition from the previous regulation. Although the New Civil Code retains the general background legalized by the old Civil Code, a welcome, pertinent, necessary and important evolution is to be noticed. There are certainly novelty elements in the content of the New Civil Code and a clear differentiation is drawn between testament and legacy, the two of them benefitting from dedicated texts within the New Civil Code. It is to be noticed that this new definition, filtering judiciously the criticisms and the previous doctrinary construction, succeeds in saving itself of criticism or necessary doctrinary addenda as it manages to comprise the essential.*

Key words: *testament, definition, legal characters, doctrine, legacy, differences.*

1. Introduction

In accordance with article 1034 of the Romanian Civil Code starting 1st October 2011, *„The will is the unilateral, personal and reversible act through which a person, called testator rules in one of the forms required by the law, for the time when he/she is no longer alive."*

In general, the new Civil Code keeps the previously framework set up by the 1864 Civil Code when it comes to matters concerning the will. The alterations made to it can be qualified without exaggeration as being relevant, necessary and important.

An evolution compared to the legal definition in the Civil Code which came into force at 1st December 1865 can be easily traced, as the mentioned code defined the will as being a „...reversible act through which the testator rules for the time when he/she is no longer alive concerning his/her whole fortune or only part of it."

Doctrinary opinions were constructed around this last legal definition, which had to be and was associated with other legal provisions, which, as a rule, converged towards the same conclusion, as a matter of fact a natural one, that the will is a unilateral, solemn legal document, essentially personal and reversible.

These legal provisions which were missing (with the exception of reversibility) from the legal definition in the old Civil Code have been judiciously and correctly taken over from the doctrine

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by the lawmaker of the new Civil code, who inserted in an unmediated way the provisions in the legal definition of the will, as it can easily be noticed from the very text of article 1034 in the Civil Code.

We consider that this text is a positive reformation, somehow natural, the lawmaker having succeeded in giving a more rigorous definition of the will.

The perfection of the legal definition of the will also results from the avoidance of an unfortunate formulation, respectively in the sense of restricting the testamentary provisions by strictly referring to the inheritance or goods – „the fortune", situation present in the old legal definition of the will (we think that this is the shortcoming which would qualify the old legal definition as being appropriate for legacy, and not for will) [3].

However, although the main aims of the will are or should be the legacies (universal, with universal title and/or with particular title), the testament can also comprise other manifestations of last will without their being legacies or being linked to legacies.

We consider that the legal definition of will in the old Civil Code is partly lacking rigour, especially because this is not in accordance with the legal provisions contained in the same code, for the subsequent articles, as well as the one relating to the appointment of one or more executors or when admission of parentage.

Article 1034 offered by the new Civil Code presents an adequate wording, wisely avoiding confusions and/or unjustified limitations (even from the definition stage) in the domain of testamentary provisions, thus „avoiding" the subsequent contradictions.

More than that, at article 1035, the new Civil Code enumerates restrictively certain provisions that can be part of the will.

As a novelty, the new Civil Code distinguishes between the institution of the testament and the one of the legacy in terms of liberality. Thus, the legacy must meet requirements like the appointment of the legatee, which must be performed through the will in such a way that the designation of the legatee to be possible at the date of the execution.

According to article 986 from the new Civil Code, the legacy is a legal document comprised in a will through which the testator appoints one or more people who, when his/her demise occurs, will receive his/her entire inheritance, a part of it or certain goods from the entire inheritance.

Based on the above-mentioned distinction, the new Civil Code has provisions dispersed in its entire content, without their being in contradiction with the legal definition of the will, which strengthen the idea that the document as the last wish can contain other clauses such as :the testator will be able to admit parentage, the admission done in this way being unrepealable (article 416); the parent can designate the person who will be the custodian of his/her children (article 114), or can expressly provide that he/she eliminates the possibility that a certain person is designated custodian (article 113); each spouse can decide through the will the amount he/she is entitled to upon termination of marriage (article 350); the testator can agree with or forbid after his/her demise the donation of organs, tissues or human cells for therapeutic or scientific purpose (article 81); the testator can decide on the way his/her funeral will be conducted and can give dispositions concerning his/her body after death (article 80); the executor is appointed and the limits of his/her power; a foundation can be set up, and its aim and heritage are to be

determined by the testator (see article 15 from Ordinance 26/2000 regarding associations and foundations: the foundation is the legal entity established by one or more persons on the basis of a legal act inter vivos or upon death, is a heritage affected permanently and irrevocably to achieve a goal of general interest the alienation of a right can be forbidden through will (but also through convention but only for a period of maximum 49 years and on condition of the existence of a serious and legitimate interest.

The period begins to run from the date when the asset was acquired (article 627); through legacy (but also through convention), a person can be authorised to administrate one or more assets, of a patrimonial amount or a heritage that he/she does not own.

The empowerment through legacy produces effects only if it is accepted by the administrator appointed by the testator (see article 792 – As manager of the property of another), by will, the testator may choose the law applicable to his own inheritance (article 2634) [5].

And so it is that a legal definition (that of the old Civil Code), we dare to say clearly imperfect, was certainly in need of corrections as additions and specifications from the doctrinal background to fill in the gaps.

2. Conclusions

We consider that the lawmaker of the new Civil Code was extremely inspired in catching up and filtering the doctrinary criticisms and adapting them in a definition of the will which evolved towards what we think is a correct, clear and concise but at the same time comprehensive, a sense in which we state that this does not need any „adjustments" or additional laborious explanations.

The wording of the lawmaker of the new Civil code is to be appreciated from the point of view that it managed to discern between doctrinary definitions issued by prestigious authors, definitions whose content was also incomplete or lacking enough accuracy.

An example in this sense is the definition proposed by prestigious authors, who consider that the complete definition of the will is the following: „The will is a solemn, unilateral, reversible and personal document through which the testator provides after his/her demise of all or part of the heritage that he/she leaves after his/hear death." [2] – or from this definition, although it adds the characteristics of solemn, unilateral and personal of the will, the result is again the incorrect limitation to provisions of the will which concern only the inheritance or the assets resulting from it. [1].

In these conditions, the provisions which do not refer to the inheritance or to the assets which are part of it or to the direct or indirect designation of the legatee must comply with the special rules, applicable to the will on condition that these can be qualified as being the last wishes of the testator. [4]

In conclusion, we consider that there would be testament that legal act which does not contain provisions on the patrimony of the person whose legacy is in question but only provisions of the last will of a non patrimonial nature.

Both the wisdom and the capacity of synthesis and of concision that the lawmaker showed in drawing the chapter regarding the will are to be appreciated.

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