

## CONSIDERATIONS REGARDING THE SITUATION IN WHICH A SURVIVING SPOUSE DISCLAIMS THE INHERITANCE

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### ABSTRACT

*Disclaiming an inheritance is a solemn and express legal process by which the surviving spouse is entitled to renounce the rights and obligations that would become theirs by law or last will resulting in the retroactive revocation of the right to inherit. The reasoning behind such a decision may vary immensely from person to person yet in most cases the drive behind such a choice is reduced to the obligations bound to any inheritance outweighing the advantages it may bring<sup>1</sup>.*

**KEYWORDS:** inheritance, process, surviving spouse, juridical effects, law.

### INTRODUCTION

For a disclaimer of inheritance to produce juridical effects it must fulfil the specific conditions required of any legal act to produce effects but it must also respect some specific criteria.

*Fundamental conditions for validity:*

1. Generally, a disclaimer of inheritance has to be an explicit action; it cannot be implicit or deduced by observing a subject's actions or via connected legal acts like in the case of accepting an inheritance. Art. 1120 paragraph (1) of the Civil Code imposes that "A disclaimer of inheritance cannot be presupposed except for the situations presented at art. 1112 and art. 1113 paragraph (2)."

As it can be observed, a disclaimer of inheritance cannot be presupposed, it must be expressed in most cases. However, the Civil Code does present some possible exceptions to the rule. Art. 1112 defines the concept of a presumed disclaimer of inheritance as such: "It is presumed that an individual has disclaimed its inheritance, until it is proven otherwise, when they have the knowledge of their right to inherit and that the division of the inheritance has taken place but they have not accepted the inheritance explicitly as stated in art. 1103. The knowledge regarding the inheritance has to be conveyed through a citation. The citation must contain the elements imposed by the Civil Procedure Code and the mention that if the inheritor does not comply with the time limit imposed in art. 1103 of the Civil Code in regards to accepting the inheritance he will be presumed to have renounced the right to inherit. If the citation does not meet the required criteria for validity it will be rendered void. The presumption of disclaimed inheritance is valid only if the citation was communicated to the inheritor at least 30 days before the time limit for them to accept the inheritance."

The presumption of a disclaimed inheritance operates as an exception under the following conditions: after the surviving spouse has been cited under legal conditions, they acknowledged the division of the inheritance and their right to inherit, the citation does fulfil all the conditions specified by the Civil Procedure Code with the mention that they will be

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<sup>1</sup>B. Pătrașcu, *Continuitate și discontinuitate în reglementarea opțiunii succesoriale*, vol. *Noul Cod civil. Comentarii* (coord. Marilena Uliescu), Ed. Universul Juridic, București, 2010, pp. 271-272.

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presumed to have disclaimed the inheritance if they don't respect the legal term to accept the inheritance. The citation must be delivered at least 30 days before the legal term for acceptance expires, if the surviving spouse does not exercise the right to accept set inheritance they shall lose it<sup>2</sup>.

In the case that the surviving spouse does exercise the right to disclaim set inheritance after the legal term has expired it only reinforces the presumption that they have renounced their right to accept, according to art. 1112 paragraph (1) has a relative nature.

The information necessary for the citation to be sent to the right address will be provided by the other persons that hold the right to accept set inheritance. In the situation where no other inheritor knows the place of domicile of the surviving husband or the address at which they reside they are forbidden from using public means of communication, such means may only be used in the case of an estate that has no known inheritors.

Art. 1113 paragraph (2) of the Civil Code presents yet another exception in regards to the rule. If a surviving spouse does not exercise the right to disclaim the inheritance as it is shortened by a court of law it is presumed that they have renounced their right to inherit. This presumption is considered absolute, making it unique from the previously presented exception.

Another crucial aspect is the invalidity of any convention between the surviving spouse and the other inheritors by which the spouse accepts to disclaim the inheritance. The same treatment is to be given to such conventions even if they were done prior to the deceased passing away. Such a convention would be null and void if agreed upon before the death of the testator being a legal action that relies on an undivided estate and in the case of such a convention after the testator's death there would be no legal effect unless the surviving spouse would go through the process of disclaiming the inheritance.

There will be legal consequences only if the surviving spouse disclaims the inheritance, hence, there is no legal effect produced by disclaiming an inheritance if the inheritance was previously accepted. Generally, the right to accept or rebuke an inheritance is non-revocable.

A similarity appears in the process of accepting an inheritance; the surviving spouse cannot accept a part of the inheritance considering the indivisible character act of disclaiming an inheritance.

Another aspect regarding the nature of the act of disclaiming an inheritance is the non-pecuniary and impersonal nature of the act itself. If the inheritance is given to one of the inheritors specifically it would constitute an act of silent acceptance on the part of the surviving husband followed by an act of donation towards one of the other inheritors. Disclaiming an inheritance must be an act of abdication by which the share of the estate<sup>3</sup> that's rightfully deserved by the spouse is turned back to it in the benefit of the other inheritors.

### *Formal Conditions*

A disclaimer of inheritance cannot be presumed in a general sense except for the situations aforementioned, art. 1112 and art 1113 paragraph (2).

According to art. 1120, paragraph (2) of the Civil Code, a disclaimer of inheritance is a solemn act that must fulfil 2 formal conditions. One serves to prove the validity of the act and the other is needed for the act to be opposed in a court of law.

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<sup>2</sup> Case nr. 1115/2020, Costești, Inheritance court, The late disclaimer of inheritance passed the legal term, <http://www.rolii.ro/hotarari/5fcc465fe490090c08000029> , Case nr. 12164/2014, Bucharest, Sector 2, Succession court, The late disclaimer of inheritance passed the legal term ,

<http://www.rolii.ro/hotarari/58a12077e49009d03c001a67> .

<sup>3</sup>Art. 1110 para. (1) let. b) și c) Cod civil.

And so:

1. A disclaimer of inheritance must be given to a public notary or to a diplomatic mission or consulate outside the territory of Romania, as it is the case.

It is understood that the surviving spouse can present a disclaimer of inheritance to any public notary, not only to the notary that has territorial competence or the notary that is in charge of dividing the estate in a non-contentious manner. In legal literature<sup>4</sup> we discover that a disclaimer of inheritance can be done in person or through a special mandate. A disclaimer of inheritance will be valid only if it is materialised in an authentic written document, this will provide the document the value of proof in a court of law. If a disclaimer of inheritance is complete under private signature or as an oral agreement it will be considered null and void, hence, the surviving spouse retains the right to accept or disclaim an inheritance as long as the legal conditions for either action to have effects are respected. The nullity of a disclaimer<sup>5</sup> does not imply or presume the acceptance of an inheritance<sup>6</sup>.

2. The disclaimer of inheritance must be added to the national notary register and kept in electronic format.

Art.1120, paragraph (3) of the Civil Code imposes that any disclaimer of inheritance must be kept in the notary register. This condition doesn't assure the validity of the act but it has the purpose of informing third parties in regards to the estate and the share rightfully given to the surviving spouse. The validity of the act cannot be questioned in the case that this rule is not respected<sup>7</sup>.

The registration of the disclaimer is done at the expense of the surviving spouse. Considering that the disclaimer is recorded in the national registry it can be used in a court of law by the other inheritors. The omission of this rule cannot be used by the surviving spouse in order to invalidate the disclaimer. If the surviving spouse wishes to cancel their disclaimer of inheritance they can do so by following the legal procedures necessary.

The absence of the disclaimer from the national registry cannot be opposed to a good faith third party with whom the surviving spouse has arranged a contract, moreover, if any share or part of the estate is the subject of the contract it is considered a tacit form of acceptance as it is stated in art. 1110 paragraph (1) of the Civil Code.

If the validity conditions will not be respected by the spouse in the process of disclaiming an inheritance the act will be null and void or partially annulled. The legislation offers a special 6-month term for the spouse to cancel the disclaimer of inheritance. According to art. 1124 of the Civil Code the right to renounce a disclaimer of inheritance will expire, in the case of duress, 6 months from the last recorded day of the violence inflicted upon them, in all other cases the term will be calculated from the day that the relative nullity of the act is known by the spouse.

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<sup>4</sup>IlioraGenoiu, Iliora Genoiu, *Ce drepturi are soțul supraviețuitor la moștenirea soțului decedat?*, Ed. C.H.Beck, București, 2013, p. 145.

<sup>5</sup>DoinaRotaru, *Opinie privind posibilitatea invocării inulității renunțării la succesiune aparținând descendentului de către creditorii moștenitorii sau eventuali succesori*, UNNPR Activitatea Uniunii, Supliment al Buletinului Notarilor Publici, nr. 1/2022, pp. 43-44. This article presents the response to a notary public that filed a dossier to the UNNPR on the date of 09.02.2022 in regards to the possibility of a creditor to use the invalid disclaimer of inheritance in court. In the specific dossier was attached a case in which a debtor has filed 2 separate disclaimers of inheritance, one for the mother which was invalid and one for the father which was valid. The dossier tries to show that the invalid disclaimer of inheritance in reality serves as a form of disclaimer even though it isn't formally functional it's still proof that the inheritor did not wish to have any part of the estate.

<sup>6</sup>C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, Ed. Națională, București, p. 476; I. Adam, A. Rusu, *Drept civil. Succesiuni*, Ed. All Beck, București, 2003, p. 422; Al.Bacaci, Gh. Comăniță, *Drept civil. Succesiunile*, Ed. C.H.Beck, București, 2006, p. 210.

<sup>7</sup>D. Chirică, *Tratat de drept civil. Succesiunile și liberalitățile*, Ed. C.H.Beck, București, 2014, p. 236; Fr. Deack, *Tratat de drept succesoral*, Ed. Actami, București, 1999, p. 434.

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A disclaimer of inheritance will have no legal effects if the surviving spouse if they have accepted the inheritance in an express or tacit manner as it can be understood from art. 1109, 1110 paragraph (1) section a), 1111, 1114 paragraph (1), 1123 and 1326<sup>8</sup>.

Disclaiming an inheritance that was previously accepted can be seen as an act of disposition with a gratuitous title done by the so-called renouncing spouse. For example, the intention of the surviving spouse to renounce the inheritance even though a certificate of inheritance was issued in her name in order to satisfy the surviving daughter's needs. In order for the "disclaimer" to be valid it must be modified in order to fulfil the necessary conditions to become an indirect donation and as a necessary prerequisite the beneficiary must accept the donation<sup>9</sup>. (art.676, 1268 p (3), 1754, 1747, 2274 of the Civil Code)

### *The effects of disclaiming an inheritance.*

According to art. 1121 p (1) of the Civil Code, the inheritors that disclaim an inheritance, in our case, the surviving spouse that disclaims an inheritance shall be considered to have never been an inheritor, by this logic the disclaimer of inheritance shall have retroactive effects and shall have erga omnes application if it is registered in the public notary registry. And so, the renouncing surviving spouse will not have any of the pecuniary benefits linked to the right to inherit, meaning that they will not be liable for any of the debts or duties that bind the estate. Of course, the blood bound of the spouse shall remain intact.

The consequences of the disclaimer:

1. The share belonging to the surviving spouse, both passive and active assets, will bring profit to the inheritors that were eliminated from the hierarchy of inheritance or the once that would have been entitled to a smaller share under normal circumstances regardless of the independent will of any other inheritor. In the situation that the surviving spouse would participate in the division of the inheritance with the other 4 classes of inheritors the share disclaimed by the spouse shall benefit the relatives of

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<sup>8</sup>*Culegere de practică notarială. Spețe comentate*, vol. V, București, 2018, pp. 105-109. After the legal inheritor has accepted the share of the estate bound to them they can't go back on the decision and forward a disclaimer of inheritance. A successor accepts the share of the estate through a legal document forwarded towards the notary public then wants to disclaim the previously accepted arguing that the legal term for acceptance or refusal of the inheritance has not expired and that other inheritors are present and willing to divide the share. Being a unilateral act, the acceptance of the inheritance becomes an irrevocable legal act, it will become public at the moment of registration in the Notary Public Registry (RNNEOS) held by CNARNN-Infonot. The acceptance of the inheritance consolidates the right gained by the inheritor at the death of the testator, more so, according to art. 1114 para (1) of the Civil Code if a silent act that would result in tacit acceptance there is no possibility of disclaiming the inheritance. In an exceptional manner the old Civil Code of 1864 allowed the annulment of the acceptance on the condition that it was influenced by trickery. With all the aforementioned there is an exceptional situation in which the estate would enter *bona vacantia* the disclaimer of inheritance can be retracted

<sup>9</sup>*Ibidem*, pp. 100-104. The notary public has established, through an inheritance certificate that in a specific case the daughter and mother have the quality of inheritors. After the certificate of inheritance was in effect the surviving spouse handed the disclaimer of inheritance to the notary public and it was integrated in the registry. Ulterior to the disclaimer, the widow asked the notary public to issue a certificate of acceptance encompassing mobile goods, sums of money in a crediting institution, 2 auto-vehicles and a part of an apartment. The public notary has already that the widow did wish to renounce her share in favour of the daughter. More than that, the notary has found a separation paper for the property that the married couple owned in order to give the daughter the entirety of the apartment. Through the separation paper the daughter is the only inheritor of the estate. Due to principle the estate shares already accepted cannot be disclaimed. Based on all the evidence the wife originally has accepted the inheritance and her disclaimer was null. The question at hand that still lingers is if the disclaimer still has any legal effects. It can be considered that a disclaimer affecting an accepted share is realistically an act of disposing of the obtained share to reinforce the share of the other inheritor. The rules specific to the sale of the inherited share apply to other possible actions similar to that in accordance to the Civil Code art.1747, in principle art. 1754 is used to regulate both pecuniary and free of charge transactions in regards to the inheritance, specifically it is considered an indirect donation.

the deceased under the legal conditions in the order of the classes and degree of separation. In the situation that the surviving spouse is the sole inheritor of the estate the inheritance shall be beneficial to the commune, city, municipality and the state under the title of vacant inheritance.

The mentioned potential inheritors shall receive the inheritance at the date that the division will be concluded not from the surviving spouse but directly from the estate of the deceased.

2. The surviving spouse that disclaimed its share that died at a later date cannot be represented by their descendants. They will inherit in their own name in accordance to art. 967 of the Civil Code.
3. If the surviving spouse was given a donation from the deceased they will not be required to disclose it at the moment of division. If it is a gift in excess of the freely disposable portion of the estate the spouse shall be able to keep a part of the gift under legal conditions as long as it does not affect the estate in excessive manner, if it does affect the estate excessively reduction will be used.
4. The reciprocal rights and obligations of the defunct and surviving husband that stopped opelegis through consolidation or confusion will be reborn at the date of division.
5. The surviving spouse shall lose the right to manage the estate or the part rightfully belonging to them. However, the acts of preservation, surveillance and administration that were done prior to the disclaimer of the inheritance will be maintained under the condition that based on the circumstances they do not constitute an act of silent acceptance of the inheritance. If the acts aforementioned were done by the surviving spouse and it indirectly but undoubtedly proves that the spouse had the intention of accepting the inheritance they will not be able to renounce the share according to art. 1110 p (2) and (3) of the Civil Code.
6. The personal creditors of the surviving spouse don't have the right to seek repayment from the estate. Although, if the spouse is exercising the right to dismiss the inheritance in order to defraud the creditors the law gives them the right to ask for the annulment of the dismissal in order to recover their losses. The revocation of a fraudulent dismissal is permitted due to the fact that the share of the estate enters in the possession of the spouse at the moment of the division not at the death of the testator. The creditors have a 3-month term to ask a court to revoke the dismissal from the date that they acknowledged the decision of the inheritor. The term given to the creditors is connected to the term given to an inheritor to disclaim or accept an inheritance<sup>10</sup>, a year from the day the testator has perished. Such an action will only affect the debtor-inheritor and only to the extent of satisfying the debt as imposed by article 1122 of the Civil Code. The fraud enacted by the surviving spouse must be proven by the creditor, they must prove that by disclaiming the inheritance the spouse has intentionally made themselves insolvent. Even though the creditor is entitled to request the opening of the succession only the debtor inheritor can be bequeathed with the quality of inheritor or with an inheritance certificate, more precisely, by participating at the division council the debtor gains the benefits of inheritance. The civil law allows the creditor to participate in the case of a notarial action for the division of the estate, it also allows the creditors to engage in some legal procedures such as creating an inventory for the estate and naming a curator<sup>11</sup> for set inventory. Even if the creditor can request the division of the inheritance they don't have the

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<sup>10</sup>D. Chirică, *Succesiuni*, p. 383.

<sup>11</sup>Case nr. 1421/2020, Tribunal of Vaslui, Legal Guardian  
<http://www.rolii.ro/hotarari/5fbf1888e49009480f00002a>.

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certainty of it happening as the other inheritors must concur to start the procedure<sup>12</sup>. The creditor can obtain information in regards to the negotiations related to the estate from the notary public without infringing upon the oath of confidentiality<sup>13</sup>. In order to formulate a request for the division of the estate the creditor must solicit a public notary in the area that the deceased last inhabited in order to obtain a verified gathering of proof. A simple example is the energy company searching for a debtor's living relatives<sup>14</sup>.

*Conditions which allow the revocation of a disclaimer.*

Art.1123 of the Civil Code offers the possibility to the surviving spouse to revoke a disclaimer of inheritance mainly in order to avoid the estate to enter in *bona vacantia* even though disclaiming an inheritance is mainly an irrevocable legal action.

The conditions for revoking a disclaimer are as follows:

1. The period given to the successor in order for them to decide if they disclaim or receive the inheritance has not expired according to art.1123 of the Civil Code. In practice the expiration of the one-year term is not an automatic end to the right to option. The real term must be analysed concretely and individually in regards to the surviving spouse disclaiming the inheritance and all the rules that govern the option to inherit<sup>15</sup>.
2. There is no other inheritors that accepted the share of inheritance that would have been owed to the surviving spouse while they were indecisive. If the other inheritors have accepted the share in question the disclaimer becomes irreversible. The time, form or origin<sup>16</sup> of the inheritance is unimportant<sup>17</sup>.

With all the above stated the disclaimer of inheritance is still possible even in the situation where another inheritor has accepted the share owed to the surviving spouse. In regards to the other inheritors their shares must not be affected, the only share a surviving spouse is entitled to is a share which would have remained vacant<sup>18</sup>.

If the estate has no more vacant shares the disclaimer becomes impossible to revoke as it was accepted by other inheritors. The surviving husband can revoke the disclaimer in the case that the property would enter in *bona vacantia* even if there are measures that have been taken in order to preserve set estate<sup>19</sup>.

The revocation of the disclaimer can only be explicit. It must be materialised in a declaration in front of a notary public or a Romanian consulate and in order to inform third parties it must be recorded in the notarial register, for this operation the spouse shall support the costs. It worth pointing out that a retraction must be always expressed but a disclaimer can be implied.

Under the above stated conditions, the spouse becomes an accepting inheritor. Paragraph 2 of art. 1123 Civil Code states that: "The revocation of the disclaimer is considered acceptance; the goods of the estate shall be given in the state they have been found and under the limitations of the rights that other parties have gained in regards to the estate."

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<sup>12</sup>Culegere de practică notarială, Spețe comentate, vol. IX, 2022, pp. 265-266.

<sup>13</sup>Art. 193, art 687 and next, Civil Procedure Code; art. 1282 Civil Code; art. 31 Normele metodologice și instrucțiunile privind registrele unice ținute de Uniunea Națională a Notarilor Publici din România.

<sup>14</sup>Art. 52 para (1) Law nr. 123/2012 For energy and natural gas distribution.

<sup>15</sup>Fr. Deak, *op. cit.*, p. 436.

<sup>16</sup> Testamentary or legal right.

<sup>17</sup>M. Eliescu, *Transmiterea și împărșeala moștenirii în dreptul Republicii Socialiste România*, Ed. Academiei, București, 1966, pp. 136-137; D. Chirică, *op. cit.* p. 238.

<sup>18</sup>D. Chirică, *op. cit.*, pp. 238-239.

<sup>19</sup>Fr. Deak, *op. cit.*, p. 436.

## **CONCLUSIONS**

Inheritance is a complicated issue to be solved both in legal terms and in personal terms. The death of a loved one hits like a dagger in the cold moonless night even when it may be a predictable event. Such is the way of all living things but in the consciousness of humans many factors are at play as we choose what we keep and what we leave behind from the cross roads of the time shared with people that are no longer among us be it assets in an estate or memories fabled or haunted. At first glance the legal procedures presented in this article may seem cold and robotic and yet the role of all laws regulating inheritance is to offer a semblance of order in a chaos given by faith to a group of people bound through a fulcrum that is no more.