CONSIDERATIONS ON THE GENERAL PROVISIONS OF THE NEW CIVIL CODE IN THE FIELD OF WILL*

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Abstract
Generally speaking, the will institution has been reconfigured by the new Civil Code. Even through its general provisions which have been consecrated to will, Law No. 287/2009 brings a few novelty elements. The present work is aimed to analyze the general aspects which characterize will (definition and legal features of will, contents of will, mutual will, proof of will, testator's consent and interpretation of will), in a comparative manner, both in relation to the provisions of the 1864 Civil Code and the provisions of the new Civil Code. Thus, this will allow us to point out the novelty elements brought within the field subject to our analysis by the new Civil Code and to assess their justness and appropriateness.

Keywords: *testamentary provisions, mutual will, proof of will, testator's consent, interpretation of will.*

1. Introduction

Law No. 287/2009[1] reconfigures the field of successions in general, preserving from the former regulations only those provisions characterized by a justness and actuality which were never doubted throughout time.

The present work aims to analyze the general provisions of the new Civil Code regarding will. They are included in Book IV "On inheritance and liberalities", Title III "Liberalities", Chapter III "Will", Section 1 "General provisions", art. 1034-1039. In relation to these, the new Civil Code regulates the following aspects: definition and legal features of will, contents of the will, mutual will, proof of will, testator's consent and interpretation of will.

In the actual context, the objective of the present work is to analyze the legal provisions mentioned above in a comparative manner, so as to point out the elements which the new Civil Code has preserved from the former civil regulations (the 1864 Civil Code), but also the novelty elements consecrated by the new Civil Code. Moreover, the present work will also make an assessment on the justness and the appropriateness of the novelty elements consecrated by Law No. 287/2009.

Under the circumstances in which, after the new Civil Code entered into force, on October 1st 2011, it has been published only a specialized work relating to successions[2], we consider that our scientific initiative is both actual and useful. We also want to popularize this way the novelties consecrated by law No. 287/2009 in the field of will, so as to contribute, hopefully, to the good enforcement of the justice act. Moreover, we consider that the results of our current analysis can be of interest for notaries public and Romanian diplomatic representatives abroad, judges, lawyers, Law students and any other law subject intending to express his will according to legal conditions.

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[1] Law no. 287/2009 on Civil Code was republished in the Romanian Official Gazette, Part I, No. 505 from July 15th 2011.

[2] The work in question was written by professor Dumitru C. Florescu and is called *Dreptul succesoral,* (Bucharest: Universul Juridic Publ. House, 2011).

2. Contents

2.1. Definition of will

According to the provisions of article 955 of the new Civil Code, "The deceased's estate is passed on by legal inheritance if the person leaving that inheritance did not leave any contrary provision in his will. A part of the deceased's estate may be transmitted through testamentary inheritance, while the other part through legal inheritance". Thus, the Romanian legal system admits the coexistence of legal inheritance and testamentary inheritance, the former representing the rule and constituting the common law when it comes to the transmission of inheritance estate. The rules instituted by the lawmaker in the field of legal inheritance can be removed, totally or in part, through the deceased's will, expressed in his will. Given that the Romanian legislation has acknowledged the principle of testamentary freedom, any capable person can decide the way his estate will be used after his death by means of a last will act.

According to provisions of article 1034 of the new Civil Code "A will represents a unilateral, personal and revocable act, by means of which a person, called testator, leaves dispositions in one of the forms requested by law, for the time when he will no longer be alive".

Therefore, the new Civil Code, taking into account the criticism stated by the doctrine in relation to the definition of will in the light of the 1864 Civil Code[3], defines in an appropriate manner the last will act, by consecrating its contents not only to legacy (that testamentary provision regarding the inheritance estate or the assets which compose it), but also to other provisions, such as those regarding the establishment of a legatee, partition, rescission of former testamentary provisions, disinheritance, institution of testamentary executors, duties imposed on legatees or legal heirs, other provisions having effect after the deceased's death (art. 1035 of the New Civil Code).

Specialized literature[4] has defined will as a pattern, as a form comprising various freestanding legal acts, with a different legal regime. In order to support the thesis according to which the several legal acts which can take the form of a will do not have the same legal character, by evincing different legal characters, are invoked the provisions of article 416 paragraph (3) of the new Civil Code, which state that the acknowledgement of an outside marriage child's paternity through a will is irrevocable, under the circumstances in which a will is an essentially revocable act. Thus, we are not in front of an exception from the principle on revocable character of the will, but on the presence of the proof that, within will, several freestanding documents can coexist[5].

From the theory according to which a will can comprise several freestanding legal acts, it also results the consequence that the validity of such acts is analyzed separately, so that the nullity of an act does not also trigger the nullity of other acts as well.

In turn, the form flaws of only one testamentary provision trigger the absolute nullity of the will, because the testamentary form is common.

2.2. Legal features of a will

From the definition of will also result the latter's legal features. Thus, the last will act is a legal unilateral act, evincing a personal, revocable, solemn and *mortis causa* character. Therefore, when it comes to the legal features of a will, the new regulations in the civil field do not innovate, as it was in fact naturally to happen.

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[3] According to provisions of article 802 of the 1864 Civil Code, "A will is a revocable act by means of which a testator orders the way a part or his whole estate shall be administered after his death".

[4] See: Constantin Hamangiu and others, *Tratat de drept civil român,* (Bucharest: 1929), 826; Mihail Eliescu, *Moştenirea şi devoluţiunea ei în dreptul Republicii Socialiste România,* (Bucharest: Academiei Publ. House, 1966), 199-205; Constantin Stătescu, *Drept civil. Contractul de transport. Drepturile de creaţie intelectuală. Succesiunile,* (Bucharest: Didactică şi Pedagogică Publ. House, 1967), 156-8; Dumitru Macovei, *Drept civil. Succesiuni*, (Iaşi: „Chemarea" Publ. House, 1993), 69-70. In fact, the same terms are used unanimously by specialized literature.

[5] See Emil Poenaru, „Recunoaşterea prin testament a copilului din afara căsătoriei", in *„Justiţia nouă" Magazine* (3/1956): 463 şi urm.

a) Will – a legal unilateral act

From the perspective of its constitution, a will is a legal unilateral act, which expresses only the testator's will. In order for a will to be constituted, it is not necessary for the testamentary disposition to be accepted by the legatee. Only through testator's exclusive will, a will can produce legal effects, so that legacy is passed on to the legatee from the moment inheritance is opened, on the condition that the legatee does not reject legacy. The acceptance of legacy constitutes a unilateral act (the inheritance option act), different from will and generating particular legal effects. Thus, the acceptance of legacy must not be confounded with the acceptance necessary for concluding a contract (bilateral legal act).

b) A will is a legal act essentially personal, so that it cannot be concluded through representation or with the legal tutor's consent.

The personal character of a will is not removed if the testator requests and receives specialized advice for drafting his last will act, if such act expresses exclusively its author's personal will.

From the personal character of will (and, equally, from the unilateral and revocable character), it also results the individual character of will, lawmaker[6] clearly forbidding mutual will (by means of which two or more persons leave testamentary provisions within the same act either on each other's behalf or on behalf of a third party).

c) A will is a legal solemn act which, in order to be valid, it has to have the form requested by law, otherwise is declared absolutely null.

A testator has the possibility to choose one of the forms regulated by law[7]. Thus, testator's freedom is restricted by the lawmaker.

d) A will is a *mortis causa* legal act, since it produces effects only after testator's death.

As a consequence, a legatee receives no right while the testator is still alive, the latter having the right to decide on the assets which make the object of the will. Although a will start to generate effects on the moment testator's inheritance is opened, the conditions in which that will is valid are assessed in relation to the moment when it was drafted.

d) A will is legal act essentially revocable

At any time (until he dies) and in an absolute manner, a testator, through his unilateral will, can revoke or modify his testamentary provisions. A testator cannot give up at his right to revoke his will, since he would perform a legal act upon an inheritance not opened, which is clearly forbidden by law[8].

Thus, from the perspective of its legal features, a will takes the form of an exception from common law, being governed by special background and form rules.

2.3. Contents of will

According to the provisions of article 1035 of the New Civil Code, "A will contains provisions regarding the inheritance estate or the assets which compose it, but also the direct or indirect establishment of a legatee. Together with such provisions or even in their absence, a will may contain provisions regarding partition, revocation of previous testamentary provisions, disinheritance, appointment of testamentary executors, duties imposed on legatees or legal heirs, but also other provisions producing effects after a testator's death".

Thus, a will may comprise[9]:

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[6] Article 1036 of the new Civil Code.

[7] In relation to testamentary forms, see Ilioara Genoiu, „Formele testamentului în noul Cod civil", in *„Dreptul" Magazine* (12/2011).

[8] Article 956 of the new Civil Code.

[9] See also the National Union of Notaries Public, *Codul civil al României. Îndrumar notarial,* vol. I, (Bucharest: Monitorul Oficial Publ. House, 2011), 374-5.

a) legacies (universal, by universal or particular title), which constitute, according to article 986 of the New Civil Code, those testamentary provisions "(…) by means of which a testator stipulates that, at his death, one or more legatees shall receive all his estate, a part of it, or certain determined goods".

As it results from the provisions of article 1035 of the new Civil Code, legacies represent the main object of a will.

b) disinheritances – represent those legal provisions according to which some legal heirs are removed from inheritance, within the limits provided for by law;

c) an appointment of one/or more testamentary executors to insure the enforcement of testamentary provisions;

d) duties (obligations) imposed on the legatee or legal heirs, either of a patrimonial nature, or of another nature;

e) a revocation, total or partial, of a previous will or only of a previous testamentary provision, or withdrawal of the previous revocation;

f) an ascendant partition - represents the partition performed by the ascendant testator among his descendants, regarding all his inheritance assets or only a part of them;

g) the acknowledgement, by the mother, of a child born from unknown parents, or by the father of a child outside marriage;

h) provisions regarding funerals and burial or testator's body after his death (art. 80 of the new Civil Code);

i) the establishment of the person who is to be appointed tutor of testator's children (art. 114 of the new Civil Code) or removal of the possibility for a person to be a tutor (art. 113 of the new Civil Code);

j) provisions regarding that part of assets to which testator's spouse would be entitled at the marriage termination (art. 350 of the new Civil Code);

k) a testator may agree to or forbid the use, after his death, of organs, tissues and human cells sampled from him, for therapeutic or scientific purposes (art. 81 of the new Civil Code);

l) provisions regarding the creation of a foundation;

m) an interdiction on the alienation of an asset, for a period longer than 49 years, on condition that there is a serious and legitimate interest for that matter (art. 627 of the new Civil Code);

n) the empowerment of a person to administer one of several assets or an estate which does not belong to him (art. 792 of the new Civil Code);

o) the choice of the law applicable to one's own inheritance (art. 2634 of the new Civil Code);

p) also other provisions regarding testator's last will, if they do not transgress public order.

2.4. Mutual will

Similar to the 1864 Civil Code, the new Civil Code consecrates two form conditions, which are common to all wills.

a) written form;

b) forbiddance of mutual will

According to provisions of article 1036 of the new Civil Code, "Under the sanction of absolute nullity, two or more persons cannot make provisions, by means of the same will, on behalf of each other's or on behalf of a third party". The aim of the interdiction mentioned above is to guarantee the personal, unilateral and revocable character of a will.

It can be thus noticed the fact that the new Civil Code calls "mutual will" that will by means of which two or more persons make provisions on behalf of each other's or on behalf of a third party. Therefore, Law No. 287/2009 abandons the notion of "conjunctive will", which has been used by the 1864 Civil Code.

As to us, we consider that neither of the two denominations (conjunctive will and mutual will) cover the contents of the will in question. Thus, mutual will covers only that hypothesis in which two persons make provisions, by means of the same act, on behalf of each other, whereas conjunctive will[10] covers that hypothesis in which two persons make provisions, by means of the same act, on behalf of a third party. In our opinion, it would have been more appropriate for the lawmaker to call the second general form condition of a will "separate act interdiction".

Also in the light of the new Civil Code, it can be considered that a will is not mutual if two or more persons make provisions on the same sheet of paper, if the manifestations of their will are distinct, valid per se and separately signed, each of them expressing the will of one person. Thus, a will is mutual only if it represents the common work of two or more persons and if its provisions merge in the same context. There are valid, nonetheless, the separate wills which contain mutual and interdependent provisions. At the same time, one of the spouse's will is valid even if it was signed by the other spouse as well[11].

The transgression of the interdiction on mutual will triggers the sanction of absolute nullity of that will. Still, in some circumstances, the rigour of such a sanction is attenuated or even removed. Thus:

a) the confirmation of a will by a testator's universal heirs or by universal title triggers the fact of giving up to the right of contrary invoking form flaws or any nullity reasons, without prejudicing the rights of third parties (art. 1010 of the new Civil Code)[12].

Thus, the will which does not abide by the essential validity conditions creates a natural obligation for the heir involved, which cannot be imposed by means of any constriction, but which can be executed or confirmed out of good will and full awareness, constituting a valid payment, which is nonetheless not subject to indemnification.

b) The sanction of nullity for form flaws does not concern those testamentary provisions which can be accomplished also in another form. For instance, the recognition of a child outside marriage, by means of an authentic will, but mutual, produces legal effects. According to provisions of article 416 of the new Civil Code, the recognition of a child may be carried out by means of a statement at the Register Office, by means of an authentic document or by means of a will. Thus, if the recognition of the child was performed by means of an authentic but mutual will, the latter has legal effects as a result of the fact that the same recognition could have also been carried out by means of an authentic document. Therefore, when it comes to the recognition of a child, it operates the conversion of an authentic will, which is null as a result of not abiding by the interdiction on mutual will, in an authentic document acknowledging filiation.

At the same time, the revocation of a will through a subsequently authentic one, but which is null for not observing the form of a separate act, produces legal effects (article 1051 of the new Civil Code which refers only to the authentic character of the revocation act).

c) the authentic will, which is null as a result of form flaws (for instance, it was authenticated by an incompetent civil servant), is valid as other testamentary form, if it abides by the conditions provided for by law in what that form is concerned (article 1050 of the new Civil Code).

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[10] We mention nonetheless that the new Civil Code regulates conjunctive legacy at article 1065, by referring through this type of legacy to that testamentary provision by means of which a testator leaves an asset to more legatees by particular title in the same will, without mentioning the part to each of them is entitled.

[11] Francisc Deak, *Tratat de drept succesoral,* II edition, updated and completed (Bucharest: Universul Juridic Publ. House, 2002), 176-7.

[12] This provision was taken over from the French Civil Code (art. 1339-1340) and is explained by the fact that the act confirming an inform donation made by a testator while he was alive is sanctioned with absolute nullity, since that testator has the possibility to make again that donation in the form provided for by law. Once the testator dies, since such a thing is no longer possible, his heirs have the right to "repair" the donation flaw by confirmation. See the National Union of Notaries Public from Romania, *quoted works*, 364.

d) absolute nullity intervenes in the case of wills which do not observe the form requisites regulated by *lege lata* and which were drafted by the Romanian citizens on the Romanian territory. On the contrary, if wills are drafted by Romanian citizens according to other laws or outside Romania, their form rules will be differently assessed. Thus:

- from a temporal point of view, within internal law is applicable the principle *tempus regit actum,* according to which the validity of a will (also under a formal aspect) is assessed according to the laws in force at the moment the will was drafted.

- from a spatial point of view, the will which was drafted, modified or revoked by a Romanian citizen abroad is valid only if it abides by the form conditions applicable either at the moment when it was drafted, modified or revoked, or at the moment when the testator died, and such conditions were consecrated by one of the following laws (art. 2635 NCC):

- national law on testator;
- law on testator's residence;
- law on the place where the act was drafted, modified or revoked;
- law on the situation of the premises constituting the object of the will;
- law on the court or institution complying with the procedure regarding the transmission of inherited goods;

e) in what the classification of the separate act condition is concerned, specialized literature contains two theories.

According to one of the two, to which we also agree, the interdiction of mutual will constitutes a form condition, its transgression triggering the application of absolute nullity sanction[13]. Such sanction becomes inapplicable in the case of a will drafted by a Romanian citizen in a country having a legislation which does not forbid common will.

There has also been stated the opinion according to which the interdiction of mutual will constitutes a form condition, so that a common will cannot generate effects, not even if it was drafted by a Romanian citizen in a country having a legislation which does not forbid this kind of will[14].

2.5. Proof of will

The new Civil Code regulates the proof of will at article 1037. Thus: "Any person claiming a right founded on a will must prove its existence and contents in one of the forms provided for by law" [article 1037 paragraph (1) of the new Cicil Code]. Consequently, the duty to prove the existence and contents of the will belongs to the interested person, according to the rules of common law within the field.

Currently, the common law within the field is represented by the provisions of articles 1169-1206 of the 1864 Civil Code, which constitute the only provisions of the normative act in question which were not abrogated by the entry in force of the new Civil Code. Nonetheless, such provisions regulating the field of proofs will be abrogated at the date when Law No. 134/2010 on the Civil Procedure Code[15] enters in force.

We also mention that the new Civil Code does not contain any provision regarding evidence, such provisions being naturally included in the new Civil Procedure Code.

As a consequence, any interested person can prove the existence and contents of a will, in one of the forms provided for by law, according to the rules contained by articles 1169-1206 of the 1864 Civil Code. Given that the written form of the will constitutes a condition for the latter to be valid,

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[13] Matei B. Cantacuzino, *Elementele dreptului civil,* (Bucharest: All Educational Publ. House, 1998), 364; Mihail Eliescu, *quoted works,* 432; Dumitru Macovei, *quoted works.,* 74; Eugeniu Safta-Romano, *Dreptul de moştenire,* (Iaşi: Grafix Publ. House, 1995), 180-2.

[14] Constantin Hamangiu and others, *quoted works,* 822-3.

[15] Law No. 134/2010 on Civil Procedure Code was published in Romania's Official Gazette, Part I. No. 485, from July 15th 2010, but the date when it will enter in force was not yet established.

while its absence triggers the absolute nullity of the last will act, the interested person can prove, as a rule, the existence or contents of the will only by means of a document which observes, as the case may be, the conditions of authentic, holograph, privileged will or of the will regarding deposited amounts of money and values.

Nonetheless, by exception, "If a will disappears as a result of an unpredictable or force majeure case or of a third party's deed, either after testator's death or during his life, but without testator knowing that his will disappeared, it will be possible to prove the validity and contents of the will by using any means of proof" [art. 1037 paragraph (2) of the new Civil Code].

Therefore, only if a will disappears as a result of an unpredictable or force majeure case or of a third party's deed, its validity of form and contents can be proven by using any means of proof. We mention that it can be used any means of poof to prove the validity of the form and contents of the will, even when that will disappeared as a result of an unpredictable or force majeure case or of a third party's deed, during testator's life, if the testator under scrutiny did not know about the disappearance of his last will act.

The provision contained by article 1037 of paragraph (2) of the new Civil Code rests with the exclusive competence of the court.

2.6. Testator's consent[16]

Although the new Civil Code, when regulating the issue of will, refers only to testator's consent, the last will act must nonetheless abide by all the conditions essential for the validity of a contract, which constitute the common law within field. Thus, a will must observe the essential validity conditions provided for by article 1179 of the new Civil Code and regarding capacity, consent, object and cause. Moreover, a will – by being a legal solemn act – must take a solemn form.

We will continue by pointing out only the features which a testator's consent evinces in relation to the field of will.

Thus, according to provisions of article 1038 paragraph (1) of the new Civil Code, "A will is valid only if the person who ordered it had discernment and his contents were not corrupted"

Still, the legal provisions mentioned above must be corroborated with those of articles 1204-1224, which regulate the validity of consent in the field of contract.

Consequently, testator's consent must be serious, free and expressed with full awareness.

In principle, in the field of will, a testator's consent can be vitiated by error, malice (Latin: dolus) or violence, while lesion cannot be encountered in this field.

An error can trigger the vitiation of consent and the annulment of a will only if that will was drafted at a moment when the testator could be found committing an essential error [art. 1207 paragraph (1) of the New Civil Code]. An error is essential and can trigger the annulment of a will only in the following hypotheses:

- regards the identity of a legatee or his essential qualities, in the absence of which a testator would have never bequeathed anything to that legatee (the testator thought that the legatee was his child outside marriage);

- regards the determinant reason of the will (the testator did not know he had blood relatives; if the testator had known he had blood relatives, he would have not instituted legatees);

Similar to the former regulation in the civil field, the new Civil Code does not provide that for the second cause mentioned above intervenes the nullity of the contract. But in the case of will,

[16] See also Ilioara Genoiu, **„**Condiţiile de validitate ale testamentului în noul Cod civil român şi în dreptul francez", in *Lumen International Scientific Conference 2011 Volume, „Logos, universalitate, mentalitate, educaţie, noutate", Section Law*, (Iaşi: Lumen Publ. House, 2011), 87-106.b. For analyzing the issues in question in the light of the former Civil Code, see, among others, also Dumitru Văduva, *Succesiuni. Devoluţiunea succesorală*, (Bucharest: Universul Juridic Publ. House, 2011), 65-105.

which is a legal unilateral act, it is necessary for the nullity of that will to be instituted, for such a reason[17].

In theory, a will can be annulled as a result of testator's consent being vitiated by physical or moral violence. But in practice such a hypothesis is not encountered, given that the testator whose consent was vitiated by violence has the possibility to subsequently revoke such a will.

In the field of will, malice is most frequently encountered. Article 1038 paragraph (2) of the new Civil Code points out that "Malice can trigger the annulment of a will, even if the malice practices were not used by the beneficiary of testamentary provisions and he was not familiar with them"

Also in the light of the new Civil Code, we can say that malice evinces some features in the field of will, represented by trapping and suggestion. The vitiation of consent by malice consists in the use, by the legatee (or by a representative, delegate or guarantor of his business) of some devious tactics, in order to gain testator's confidence and determine him to make provisions on favour of that person, under the circumstances in which he would have never done that out of his own initiative[18].

It is difficult to make a clear distinction between the two forms of malice, in the field of will, since they are interconnected from the perspective of the activities used and the goal pursued.

In essence, trapping consists in the use, by a person, of some deceiving methods and direct brutal illegal means (such as sequestrating the testator, violating testator's mail, keeping testator's friends and relatives away from him), with the view to gain testator's confidence, by deceiving his good faith and determining him to make provisions on favour of that person in his will.

Suggestion consists instead the use of indirect means, with a hidden, insidious, refined character (such as: tricks, false statements regarding legal heirs, speculating certain conceptions or feelings of the testator), so as to induce to the testator the idea to create a liberality which otherwise would have not made.

Suggestion and trapping trigger the annulment of will only if they altered testator's consent, that is, if in their absence, the testator would have never made that liberality. Thus, trapping and suggestion do not constitute per se causes for annulling a will. Simulated affection shown to a testator or the fact of providing certain services or cures to him do not determine the nullity of a will. The tactics which are typical to malice must not be confounded with the true, natural manifestations of compassion and help between people, which do not constitute the result of a fraudulent intention of trapping and suggestion.

In conclusion, in order to speak of malice in the field of will, the following conditions must be met altogether[19]:

a) the use of some devious, fraudulent tactics and methods;

b) the intent to mislead the testator in bad faith;

c) the use of some fraudulent tactics resulting in altering testator's will, the latter making provisions under the circumstances he would have never done it out of his own initiative.

Taken into account the fact that a will is a unilateral act, it must not be observed for that matter the condition requiring for malice to come from the other party, so that malice can come from any person.

The notary public's assessment, according to which testator's consent was not vitiated at the moment his last will act was drafted, it is considered proof until contrary evidence, being possible to be challenged by any means of proof.

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[17] Ioan Adam and Adrian Rusu, *Drept civil. Succesiuni*, (Bucharest: All Beck Publ. House, 2003), 163.

[18] Mihail Eliescu, *quoted works*, 178-9; Stanciu Cărpenaru, „Dreptul de moştenire" in *Drept civil. Contracte speciale. Dreptul de autor. Dreptul de moştenire,* Francisc Deak and Stanciu Cărpenaru (Bucharest: Bucharest University, 1983), 430; Francisc Deak*, quoted works,* 171.

[19] Francisc Deak, *quoted works,* 171; Ioan Adam and Adrian Rusu, *quoted works,* 165.

In the field of wills with complex contents, comprising several legal freestanding acts, it can be encountered a consent vitiated only partially, so that some testamentary provisions can be annulled as a result of consent being vitiated, while others can stay perfectly valid. Unlike the vitiation of consent, the absence of consent triggers the complete nullity of a will, since it is not conceivable for discernment to exist only in relation to certain testamentary provisions and be absent in relation to others.

Therefore, in the field of wills with complex contents, the court must carry out a very complicated operation, consisting in the establishing, along with the vitiation of consent, also the influence of such vice upon the contents of last will act.

If testator's consent was vitiated, the sanction of relative nullity intervenes. The legal action for establishing relative nullity must be taken by observing the general statute of limitations term.

2.7. Interpretation of will

Although a will is a solemn act, it is drafted by a competent public servant only when it comes to authentic will. Moreover, under no circumstance must a testator's will be expressed in sacramental terms. Thus, will (particularly holograph will) may contain doubtable, ambiguous clauses which must be interpreted. The entity which is competent to perform such a legal operation is the court, the judge not being guided, in principle, in his legal action, by special legal provisions.

Thus, according to provisions of article 1039 of the new Civil Code, "The rules for interpreting contracts are also applicable to will, if they are compatible with the latter's legal features". According to the provisions of paragraphs (2) and (3) of the same legal text, constitute special rules for interpreting a will the following:

- the elements which are extrinsic to a testamentary document can be used only if they are based on the intrinsic ones;
- the legacy in favour of a creditor is not presumed to be made so as to compensate his debt title

Consequently, when it comes to interpreting testamentary clauses lacking clarity, the following rules must be observed[20]:

a) when interpreting testamentary provisions, it must be taken into account the real will of a testator, and not the literal meaning of terms (art. 1266 of the new Civil Code), since *in conditionibus (testamenti) primum locum voluntas defuncti obtinet;*

b) testator's intent will be sought, first of all, in the contents of the will and only afterwards in exterior deeds and circumstances[21], whereas the extrinsic elements of the testamentary document can be used only if they are based on the intrinsic ones;

c) in case of doubt, a clause is interpreted in favor of legal heirs and not of legatees;

d) a testamentary clause is interpreted as having an effect, and not as not having any [article 1268 paragraph (3) of the new Civil Code];

e) testamentary clauses are interpreted through each others, by providing to each of them the meaning resulting from the whole act (article 1267 of the new Civil Code)

f) the legacy in favour of a creditor is not presumed to be made so as to compensate his debt title.

3. Conclusions

At the end of our analysis, we are listing the novelty elements consecrated by Law No. 287/2009 and regarding the general aspects of a will. Thus:

- unlike the Civil Code in force, the new Civil Code defines will in a complete adequate manner, by referring to its main legal features and by assigning its contents properly;

[20] Francisc Deak, *quoted works,* 160-1.

[21] Constantin Hamangiu and others, *quoted works,* 874.

- according to the new Civil Code, the contents of a will can be completed also by other provisions, such as: establishment of the person who is to be appointed tutor of testator's children or the removal of the possibility for a person to become tutor; provisions regarding the part to which testator's spouse would be entitled from his estate, at the end of matrimony; a testator may agree to or forbid the use, after his death, of his sampled organs, tissues and human cells, for therapeutic or scientific purposes; provisions on the creation of a foundation; an interdiction relating to the alienation of a good, for a period of at most 49 years, on the condition that there is a serious legitimate interest for that matter; the empowerment of a person to administer one or several assets or an estate which does not belong to him; the choice of the law applicable to one's own succession;

- in what the form of will is concerned, the new Civil Code regulates mutual will as equivalent of the conjunctive will from the former regulation;

- contains special provisions regarding the proof of will, under the circumstances in which the new Civil Code no longer regulates the issue on evidence, the latter constituting the monopoly of the new Civil Procedure Code;

- states the fact that malice (dolus) triggers the annulment of a will, even if the malice tactics were not carried out by the beneficiary of testamentary provisions or were not familiar to him;

- consecrates two special rules for interpreting a will.

As to us, we consider that new Civil Code, by using an actual specialized language, provides a modern, just and flexible regulation of the general aspects typical to will.

References:

Books:

- Adam, Ioan and Adrian Rusu. *Drept civil. Succesiuni*. Bucharest: All Beck Publ. House, 2003.
- Cantacuzino, Matei. *Elementele dreptului civil.* Bucharest: All Educational Publ. House, 1998.
- Cărpenaru, Stanciu. „Dreptul de moştenire" in *Drept civil. Contracte speciale. Dreptul de autor. Dreptul de moştenire,* Deak, Francisc and Cărpenaru, Stanciu. Bucharest: Bucharest University, 1983.
- Deak, Francisc. *Tratat de drept succesoral,* II edition, updated and completed, Bucharest: Universul Juridic Publ. House, 2002.
- Eliescu, Mihail. *Moştenirea şi devoluţiunea ei în dreptul Republicii Socialiste România.* Bucharest: Academiei Publ. House, 1966.
- Florescu, Dumitru. *Dreptul succesoral.* Bucharest: Universul Juridic Publ. House, 2011.
- Hamangiu, Constantin and others. *Tratat de drept civil român.* Bucharest: 1929.
- Macovei, Dumitru. *Drept civil. Succesiuni*. Iaşi: „Chemarea" Publ. House, 1993.
- Safta-Romano, Eugeniu. *Dreptul de moştenire.* Iaşi: Grafix Publ. House, 1995.
- Stătescu, Constantin. *Drept civil. Contractul de transport. Drepturile de creaţie intelectuală. Succesiunile.* Bucharest: Editura Didactică şi Pedagogică Publ. House, 1967.
- National Union of Notaries Public. *Codul civil al României. Îndrumar notarial.* vol. I. Bucharest: Monitorul Oficial Publ. House, 2011.
- Văduva, Dumitru. *Succesiuni. Devoluţiunea succesorală*. Bucharest: Universul Juridic Publ. House, 2011.

Articles:

- Genoiu, Ilioara. „Formele testamentului în noul Cod civil". *„Law" Magazine* (12/2011).
- Genoiu, Ilioara. **„**Condiţiile de validitate ale testamentului în noul Cod civil român şi în dreptul francez". *Lumen International Scientific Conference 2011 Volume, „Logos, universalitate, mentalitate, educaţie, noutate", Section Law*, (Iaşi: Lumen Publ. House, 2011), 87-106.
- Poenaru, Emil. „Recunoaşterea prin testament a copilului din afara căsătoriei". *„Justiţia nouă"* Magazine (3/1956): 463 and the following.