QUALIFYING LEGACY BY PARTICULAR TITLE – A DIFFICULT TASK

Ilioara GENOIU*

Abstract

The current Civil Code in force, unlike the previous one, succeeds into making a clear and natural distinction between will – as a whole – and legacy – as the main testamentary provision. Unfortunately, it does not also provide flawless regulations in terms of the categories of legacies, which are classified according to their object (universal legacies, legacies by universal title, legacies by particular title). In what the legacy by universal title is concerned, the Civil Code in force contains some controversial provisions at article 1056 paragraph (2) letter c), which interfere also with the correct qualification of legacy by particular title. Then, the regulations of the legal regime applicable to the legatee by particular title also evince flaws, for instance at article 1114 article (3) letter b) of the Civil Code, so that it becomes more and more difficult to qualify certain legacies, as being by particular or by universal title. The current work aims to point out the provisions of the Civil Code mentioned before, which generate or can generate potential controversies, but also to propose certain remedies.

Keywords: *universal legacy, legacy by universal title, assets determined according to their nature and origin, legatee by particular title, legacy upon an inheritance collected and not liquidated yet.*

1. Introduction

1.1. The field covered by the theme of the study

The present work will discuss a topic of interest for hereditary law, more exactly for the transmission of an inheritance by will. Traditionally, the issue regarding the legacy by particular title, which constitutes the theme of this study, is approached within the context of the main testamentary provisions.

1.2. The importance of the study proposed and the objectives targeted

Legacy represents one of the provisions which a will can contain, actually the main testamentary provision. Its qualification as being universal, by universal title or by particular title is, in our opinion, a difficult task, because the Civil Code currently in force contains some contradictory provisions on this matter. These are the provisions of article 1056 paragraph (2) letter c) of the Civil Code and of article 1114 paragraph (3) letter b) of the Civil Code. Considering that a legacy can be classified, according to its object, within one or another category from the ones mentioned above, has both a theoretical and practical advantage. After a legacy is included in the category of universal legacies, legacies by universal or particular title, it will become subject to the legal regime applying to the category to which it belongs.

* Lecturer PhD, Faculty of Law and Administrative Sciences, „Valahia" University of Târgoviște (ilioaragenoiu20@yahoo.fr).

The present study aims to point out the specific features of the legacy by particular title, but also its characteristic elements, so as to correctly classify it and, in consequence, establish the legal regime which is applicable to it. Moreover, the main legacies by particular title will be listed and followed by some proposals *de lege ferenda*, so as to remove the contradictions existing at the moment within the current Civil Code, which make the classification of a legacy a difficult task.

1.3. How the author will be responsible for the objectives taken upon

Given the provisions of the Civil Code in force, having incidence in the field of legacy, and the few opinions expressed within legal literature up to this moment, in relation to the topic herein analysed, there will be subsequently identified the specific elements of the legacy by particular title. In this context, we express our conviction that all these elements should guide us in our attempt to classify a legacy, according to the criterion of its object, even in the case when (and unfortunately, we are in this situation) the incident legislation has rather the role to confuse us, than to shed light upon the issue. On this ground, we will continue by enumerating the legacies which we consider to be by particular title. We will also try to propose some remedies, which we consider fit for the issue discussed and which should maybe be considered by the lawmaker, on the occasion of a future republication of the Civil Code.

1.4. How much the topic discussed is known, by referring to the contributions already existing within specialized literature

Specialized literature[1], has pointed out the contradiction between the provisions of the Civil Code regarding legacy (by universal and by particular title), but this issue has not been very much looked into and, consequently, no solution for its resolution has been proposed. This is in fact understandable, as from the entry in force of the current Civil Code only two years have passed, in which the experts could not identify all the controversies contained by this complex normative act and, consequently, propose the most appropriate remedies. We ourselves have dealt with this topic in a restrictive manner, in two previous works[2] (as their nature was demanding). Now we aim to provide a greater extension to the issue on the qualification of the legacy by particular title and to prove both the controversial character of the provisions of the Civil Code, already discussed, and the justness of the suggestions we will make in this context.

2. Content

2.1. Introductive considerations

According to the provisions of article 986 of the Civil Code, "Legacy constitutes the testamentary provision by means of which the testator states that, upon his death, one or several legatees shall acquire his entire patrimony, o portion of it or certain determined assets".

It can be thus noticed that the lawmaker has resolved several of the issues raised by legacy, through the legal text mentioned above. He consequently defined legacy, by

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[1] Codrin Macovei and Mirela Carmen Dobrilă, "Cartea a IV-a, Despre moştenire şi liberalităţi", in *Noul Cod civil. Comentariu pe articole,* ed. Flavius Antonius Baias et al. (Bucharest: C.H. Beck Publ. House, 2012), 1092.

[2] Bogdan Pătraşcu and Ilioara Genoiu, "Despre noţiunea şi felurile legatului", in *Noul Cod civil. Studii şi comentarii,* ed. Marilena Uliescu (Bucharest: C.H. Beck Publ. House, 2013), 807-832 and Ilioara Genoiu, *Dreptul la moştenire în Codul civil* (Bucharest: C.H. Beck Publ. House, 2013), 157-159.

describing its essence (testamentary provision regarding the deceased's patrimony), he correctly established the relation between legacy and will (legacy is a testamentary provision) and he also indicated the core of the main types of legacies, in connection to their object (the universal legacy entitles the inheritance of the whole patrimony, the legacy by universal title entitles the inheritance of only a portion from the patrimony, whereas the legacy by particular title entitles to the inheritance of certain determined assets).

In our opinion, legacy benefits from an accurate definition coming from the Civil Code currently in force, which makes amends for a great flaw of the former Civil Code which, at article 887, was making a confusion between the will, as a whole, and legacy, which is the main provision of the will. The former Civil Code was stating the following: *"The will can be used to make provisions for the whole or only a part of someone's patrimony, or for one or several determined objects"*. In fact, the former Civil Code was regulating legacy and not will on that occasion. But legacy represents only one of the testamentary provisions, admittedly the most frequent one (and, consequently the main one). Still, the legal literature of those times, by acknowledging the flaw of the legal text mentioned above, has defined legacy in a particular accurate manner. Therefore, according to specialized doctrine before October 1st 2011, legacy represented the testamentary provision by means of which a testator nominated one or several persons who, upon his death, were to acquire, by free title his entire patrimony, a portion of them or certain determined assets[3]. Thus, the current Civil Code takes up the former and correct definition existing within legal doctrine, at article 986.

When defining the will, the Civil Code currently in force does not bring into discussion the confusion made by the previous Civil Code (although a certain discussion could also be raised about how this normative act defines will) and, moreover, at article 1035, which is called "The content of the will", it clearly shows that legacy is the only one (but the main) provision of the last will act and enumerates, as an example, some other provisions which a will can comprise[4]. This represents a strong point of the current way in which legacy is regulated. Unfortunately, we won't be subsequently able to make such appreciations, but on the contrary, we shall put under question the controversial provisions of the Civil Code in force.

2.2. The contradictory legal regulation of the legacy by universal title – a cause for the difficulty and unjustness of qualifying the legacy by particular title

In our opinion, the correct qualification of the legacy by particular title depends, in a considerable manner, from the way the lawmaker has regulated the other two categories of legacies, resulting by considering their object: the universal legacy and the legacy by universal title. This happens due to article 1057 of the Civil Code, stating that: "*Any legacy which is not universal or by universal title is a legacy by particular title".* Thus, the legacy by particular title represents the result (the difference) of a subtraction operation in which the subtrahend (multiple, in this case) is represented by the universal legacy and by the legacy by universal title, whereas the minuend is represented by the totality of legacies, considered according to their object. Thus, the justness and correctness with which the other types of legacies are regulated determines the quality of regulating the legacy by particular title.

In our opinion, the regulation of universal legacy is just, so that it does not interfere at all with the correct qualification of some legacies as being by particular title. Not the same applies for the way in which the lawmaker has regulated the legacy by universal title. In fact,

[3] Francisc Deak, *Tratat de drept succesoral*, II edition, updated and completed (Bucharest: Universul Juridic Publ. House, 2002), 208.
[4] On the new definition of legacy, see also Mircea Dan Bob, *Probleme de moşteniri în vechiul şi în noul Cod civil* (Bucharest: Universul Juridic Publ. House, 2012), 120-126.

it is precisely the improper regulation of the latter which produces negative consequences in terms of qualifying the legacy by particular title, making this task difficult.

For the reasons mentioned above, it is useful to bring into discussion the provisions of article 1056 of the Civil Code, meant to insure the legislative background applicable to legacy by universal title. According to them, *"The legacy by universal title is the testamentary provision which provides vocation to a portion from inheritance to one or more persons"*. "Portion from inheritance" signifies, according to article 1056 paragraph 2 of the Civil Code, the following:

- either the property upon a share from the inheritance;
- either a right of property upon all or a share from the inheritance;
- or the property or a right of property upon a share from the universality of assets determined according to their nature or origin.

We would like to mention that we have no comments regarding the provisions of article 1056 paragraphs (1) and (2) letters a) and b), as we consider them appropriate. Moreover, by containing these provisions, the Civil Code currently in force resolves the issue (which was controversial in the context of the former Civil Code) of the legacy involving a right of property on the whole inheritance or only a share of the latter, including this type of legacy in the category of legacies by universal title.

Still, we will provide some considerations on the legacy having as object the property or a right of property upon the whole or a share from the universality of assets determined according to their nature and origin [regulated by article 1056 paragraph (2) letter c) of the Civil Code]; according to the Civil Code currently in force, this kind of legacy is a legacy by universal title. It seems that we encounter here, at least partially (in relation to the legacy having as object the property or a right of property upon the whole or a share from the universality of assets determined according to their *nature*) the equivalent of article 894 of the former Civil Code, according to which the legacy by universal title is the one having as object all the movable or immovable assets of the deceased, or a portion of the movable or immovable assets of the inheritance. Consequently, the lawmaker has not taken over the opinion expressed within legal doctrine before the current Civil Code entered in force, namely that all (or only a part) of the deceased's movable or immovable assets should constitute the object of a legacy by particular title on the occasion of a future regulation, as they do not constitute a legal universality (but only a universality de facto), missing liabilities.

Since the Civil Code in force contains such provisions as those mentioned above, it should be pointed out what "universality of assets determined according to their nature and origin" means. Thus, it is obvious that the term "universality" used by the Civil Code, at article 1056 paragraph 2 letter c) is different by that of "legal universality", of patrimony, the latter representing all the rights and duties with a patrimonial character belonging to a person. The text under discussion involves a universality de facto, which, unlike, the legal one, does not presuppose the existence of liabilities. But the legacy by universal title means precisely that the beneficiary of a liberality bears also the liabilities of the inheritance, within the limits of the share received from the inheritance. So how could the two aspects be reconciled?

Recent specialized literature[5], has pointed out that, in the context subject to our analysis, the term of "universality" must be perceived in a broad meaning, so that is considered legacy by universal title also the legacy upon all (or a share of) movable or immovable assets from inheritance, the legacy upon a fraction of the surplus or the share available or the legacy of all (or a share from) the movable or immovable assets from inheritance, situated in a certain place.

[5] Macovei and Dobrilă, "Cartea a IV-a", 1092.

Continuing our analysis, we believe that is useful to quote also the text of article 541 of the Civil Code, having the indicative title of "Universality de facto", according to which "*(1) A universality de facto is represented by all the assets belonging to the same person and having a common destination, established through that person's will or by law. (2) The assets composing the universality de facto can, together or separately, be the object of some acts or distinct legal relations".*

According to specialized literature[6], universalities de facto can be represented by the books reunited in a library, by art or numismatic collections, by herds of animals, commerce fund, and so on. Thus, in order to speak about universality de facto, the following conditions must be met:

- the assets reunited to belong to one and the same person;

- all the assets mentioned above must have a common destination, determined by the person's will or by law.

In respect to what has been mentioned before, we consider that the term "universality" can have a broad meaning, to include both universality by law and universality de facto, but this does not mean that the two types of universality have the same legal regime.

Continuing to analyse the text of article 1056 paragraph (2) letter c) of the Civil Code, we mention that, *according to their nature*, assets can be movable or immovable[7]. It would therefore emerge that all the movable assets of the deceased or, according to the case, all the immovable assets of the deceased can be qualified as the universality of assets of *de cuius*, determined according to their nature, and that they constitute the object of a legacy, qualified by the lawmaker as a legacy by universal title.

Then, according to recent specialized literature[8], the term of assets *origin* should mean, for instance, that these assets belong to the deceased's own assets (being those which he obtained before marriage or which he obtained during marriage with this legal regime, and, consequently, others than those resulting from liquidating the community of assets) or that the same assets come from an open inheritance, not liquidated yet.

Regarding the second variant of what has been stated above, there can be invoked the provisions of article 1114 paragraph (3) letter b) of the Civil Code, according to which the *legatee by particular title* "*…is, by exception…accountable for the liabilities of the inheritance, but only in relation to the asset or the assets constituting the object of the legacy, if:…the right bequeathed by legacy has universality as object, such as an inheritance obtained by the testator and not liquidated yet…*". It consequently results that the legacy upon an inheritance obtained by the testator and not liquidated yet, but not only (as the legal text in question does not contain a limitative enumeration, but only an exemplificative one) evinces a particular character[9]. So should it be understood that the legacy upon an inheritance obtained but not debated is a legacy by particular title? If so, what could then mean "universalities of assets determined according to their *nature*", which constitute the object of a legacy by universal title? Which should be the criteria on the basis of which the legacy upon an inheritance obtained and not liquidated is qualified as legacy by particular title, whereas the legacy upon a universality of assets determined according to their nature or origin is a legacy by universal title? The lawmaker himself, at article 1114 of the Civil Code, shows *in terminis* that the inheritance which is obtained by the testator but not liquidated has a universal character. So what does it mean the universality referred to by article 1056 of the Civil Code?

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[6] Eugen Chelaru, "Cartea a III-a. Despre bunuri, Titlul I. Bunurile şi drepturile reale în general", in *Noul Cod civil. Comentariu pe articole*, ed. Flavius Antonius Baias et al. (Bucharest: C.H. Beck Publ. House, 2012), 587.

[7] Gabriel Boroi and Carla Alexandra Anghelescu, *Curs de drept civil. Partea generală* (Bucharest: Hamangiu Publ. House, 2012), 75 and the following.

[8] Macovei and Dobrilă, "Cartea a IV-a", 1092.

[9] See for that matter also Dumitru C. Florescu, *Dreptul succesoral* (Bucharest: Universul Juridic Publ. House, 2011), 89.

Alternatively, we ask ourselves the following question: if we take into account an additional consideration of the universality of assets (other than the nature of assets and their origin, considered by law), such as all (or half and so on) of the movable assets of the deceased from the apartment owned in place "X" or all (half, and so on) the immovable assets of the deceased from the country "Y", would that legacy still be by universal title? Since an additional element to particularize assets interferes here, namely the place where they are situated, wouldn't perhaps be more just to qualify that legacy as a legacy by particular title?[10]? As pointed out before, the lawmaker refers at article 1056 paragraph (2) letter c) of the Civil Code to the criteria regarding the nature and origin of assets. But in the example provided above, the second individualization criterion regards the place where assets are situated and, together with it, assets are individualized in an additional way in our opinion and could constitute the object of a legacy by particular title.

Comparing the text of article 1056 paragraph (2) letter c) of the Civil Code currently in force with that of article 894 of the 1864 Civil Code, which seem to have the same finality overall, namely that of considering that the totality of movable or immovable assets of the deceased can constitute the object of a legacy by universal title, we consider that the second legal text mentioned above has been more advisedly drafted. This statement continues to be valid only if the current lawmaker intended to establish, by means of the expression "universality of assets determined according to their nature or origin" the totality of movable or immovable assets of the deceased, at least in part. And it seems that this exactly what the lawmaker mainly wanted to consider. Consequently, we ask ourselves whether it wouldn't have been more appropriate for the current Civil Code to maintain the expression used by the former Civil Code. It is true that, if that had been the case, the criterion regarding the origin of assets would not have been taken into account by the civil legislation currently in force, within the context subject to our analysis.

Finally, we consider that the issue subject to discussion is difficult to be handled, as the texts of the Civil Code, previously mentioned, are obviously contradictory. On the other hand, we consider that it can continue to be upheld the opinion within legal literature, according to which the totality (or a fraction) of the movable or immovable assets of the deceased should constitute the object of a legacy by particular title, being individualized and not constituting legal universalities.

The correct solution seems to be the correct qualification of the categories of legacies considered, according to the acknowledged definitions of legal universality and universality de facto. We can't see the use in not stating the type of universality and only consider the notion of universality in a generic way. This is also due to the fact that, even when is generically expressed, the term of universality cannot eliminate the different legal nature of the two categories to which is subject, nor the consequences related to the legal regime which emerge from here. Thus, legal universality, by law, constitutes all the rights and duties on the whole, whereas the universality de facto represents only a group of assets, lacking the liabilities side. Without doubt, the notion of universality de facto is useful within the legal field, but not for characterizing the object of a legacy by universal title. The latter has to involve a fraction from a legal universality, and to be correlated with some liabilities for which the legatee by universal title is accountable in a proportional way. If these liability items are absent, the solution is, in the case of a wrong legal qualification, to make o proposal *by lege ferenda* capable to insure a correct legal nature, according to which, in the case discussed, the legacy having as object the property or a right of property upon all or a share of the assets determined according to their nature or origin should be considered a legacy by particular title[11].

[10] For the contrary opinion, see Macovei and Dobrilă, "Cartea a IV-a", 1092.
[11] Pătraşcu and Genoiu, "Despre noţiunea şi felurile legatului", 891.

2.3. The current regulation of the legacy by particular title – the difference (result) of a subtraction operation, in which the subtrahend has a wrong value

As pointed out before, according to article 1057 of the Civil Code, any legacy which is not universal or by universal title is a legacy by particular title. Thus, out of all legacies (which in mathematic terms represent the minuend of our subtraction operation), we remove the legacies which are universal and by universal title (which constitute, as pointed before, the subtrahend) and we obtain the legacies by particular title (that is the difference). Yet, as we have tried to prove up to this point, this difference does not represent the correct result of the operation in question, because one of its components – the subtrahend (more precisely legacies by universal title, given that the regulation of the universal ones is exempted from criticism) is erroneous, as according to law, are considered legacies by universal title also some legacies which, through their specific elements, would rather fit in the categories of legacies by particular title. As pointed before, we are taking into account at this point the legacies concerning the property or a right of property upon all or a share of the assets determined according to their nature or origin.

We will continue by pointing out the specific features of the legacy by particular title and making a list of the legacies belonging to this category.

Thus, the legacy by particular title is that legacy which provides the right to inherit one or several determined assets, unlike the universal legacy and the legacy by universal title, which provide the right to inherit a universality or a fraction from a universality. Moreover, unlike the universal legatee and the legatee by universal title, the legatee by particular title is not accountable, in principle, for the liabilities of the inheritance [article 1114 paragraph (3) of the Civil Code]. In consequence, the difference between the legacy by particular title, on the one hand, and the universal legacy and legacy by universal title, on the other hand, is a qualitative one. The element of interest in this case too is the vocation to the inheritance and not the actual emolument obtained, as the value of the asset or of the assets constituting the object of the legacy by particular title can be bigger than the value of those constituting the object of the universal legacy or of the legacy by universal title.

Taking into account the provisions of the Civil Code currently in force, we consider the following legacies to be legacies by particular title[12]:

a) the legacy having as object movable or immovable assets, tangible assets, determined individually or according to their type;

By means of a legacy by particular title, it can be bequeathed the right of exclusive or common property (ideally only one share), the bare ownership or some rights of property (such as usufruct or homestead right).

b) the legacy having as object intangible movable assets, such as debt title (*legatum nominis*);

The testator can reward the legatee by particular title with a debt title, which has against a third person, or with other patrimonial rights, such as intellectual property rights or rights upon dividends or benefits.

c) the legacy by means of which the testator-creditor forgives the legatee-debtor of debts (*legatum liberationis*);

In this case, the debt of the legatee is extinguished from the moment the inheritance is opened.

d) the legacy upon a fact (possible and licit), by means of which the universal heir or the heir with universal title is bound to do or not to do something, on behalf of the legatee by

[12] The list does not include all the types of legacies by particular title encountered in practice and only aims to identify the main varieties of this type of legacy.

particular title (for instance the universal legatee is bound to pay the debt of the legatee by particular, in respect to a third party).

e) the legacy having as object the inheritance obtained by the testator, as universal successor or successor by universal title, not liquidated until his death (article 1114 of the Civil Code);

We mention that the inheritance obtained by the testator has a universal character only within the relation between him and the one leaving the inheritance. After receiving the inheritance, the latter can be transferred to someone else, even by means of acts *mortis causa*, representing only a particular group of assets[13], such as real rights, and not something universal. Thus, *de lege lata*, an inheritance obtained by the testator and not liquidated yet can constitute the object of a legacy by particular title.

f) the legacy of bare property upon one or several assets individually determined;

g) the legacy upon a property right involving one or several assets individually determined. *De lege lata*, qualifying the legacy upon bare ownership and usufruct is no longer controversial issue.

In conclusion, the legacy upon bare property shall be qualified as universal legacy, legacy by universal title or legacy by particular title, according to its object: the whole hereditary patrimony, only a part of the latter or only an asset or several singular assets. The legacy upon an usufruct (to which we assimilate the legacy upon any other property right), having as object all the hereditary assets, a share from the inheritance, all or a share from the universality of assets determined according to their nature or origin represents a legacy by universal title, whereas the legacy involving assets individually determined represents a legacy by particular title. Thus, the legacy upon a property right can only be by universal title or by particular title. This is the conclusion to which leads the interpretation of the provisions of article 1056 paragraph (2) letters b) and c) of the Civil Code.

We mention that the current Civil Code regulates (in some cases, even as novelty elements) some types of legacies by particular title, which evince certain specific elements. Such legacies are represented by: the legacy upon a life annuity or a maintenance debt title; the alternative legacy; the legacy upon someone else's asset; the conjunctive legacy[14].

Finally, we consider that, for the reasons expressed within the current study, the following types of legacy should also be considered legacies by particular title:

- the legacy upon all the immovable assets from a certain country or locality;
- the legacy upon all the movable assets from a certain place;
- the legacy upon a fraction from all the immovable assets within a certain country or locality;
- the legacy upon a fraction of all the movable assets from a certain place.

Then, we hope that some future civil regulations will qualify as legacy by particular title (and not by universal title, as it currently is) the legacy involving all (or a share of) the movable assets or immovable assets, as the case may be, of the deceased.

3. Conclusions

Our present study has dealt with the issue of qualifying the legacy by particular title (belonging to hereditary law), which we see as a task, a mission, an initiative evincing a certain degree of difficulty, particularly due to the fact the current Civil Code does not regulate another type of legacy appropriately, as it should, namely the legacy by universal title. As pointed before, the way that a legacy by universal title is regulated influences decisively the correct qualification of a legacy, as being one by particular title. But it is

[13] Constantin Hamangiu, Ioan Rosetti-Bălănescu and Alexandru Băicoianu, *Tratat de drept civil român* (Bucharest: 1929), 949.

[14] For more details regarding these types of legacies, see Genoiu, *Dreptul la moştenire în Codul civil,* 159-161.

precisely this aspect (regulating legacy by universal title) which the lawmaker fails to accomplish accurately. Consequently, unfairly in our opinion, some legacies are qualified, *de lege lata*, as being by universal title and not by particular title (the legacies having as object all the deceased's movable or immovable assets and, respectively, a fraction of the deceased's movable or immovable assets); in regard to the classification of other legacies (for instance the legacy upon all or a fraction of all the deceased's movable or immovable assets, from a certain country or locality or the legacy upon a universality, such an inheritance obtained by the testator and not liquidated yet), there are at least some shadows of doubt.

In conclusion, the present work has pointed out the features of the legacy by particular title, so that, guided by what it has been presented, we could make a correct qualification of a testamentary provision regarding the deceased's patrimony or assets, make a list of the main legacies belonging to this category and indicate and appreciate in a critical manner those texts of the Civil Code with incidence in the field of legacies, which evince a contradictory character or, at least, could generate controversies. We have included also some proposals *de lege ferenda* in our work (mainly that the legacies having a universality *de facto* as object are considered legacies by particular title), aimed to represent viable solutions for the issue regarding the legacy by particular title and, implicitly, the legacy by universal title, hoping that they will be taken into account by the lawmaker on the occasion of modifying the Civil Code.

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