

# THE RIGHTS OF THE PERSONAL CREDITORS OF THE HEIRS IN THE INHERITANCE DIVISION

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## Abstract

*As opposed to the situation of an asset that is in co-owner-ship, in the case of an inheritance the fraud of the personal creditors of an heir may occur more easily. That's why article 1156 of the Romanian Civil code regulates the rights of the personal (unsecured) creditors of the heirs regarding the inheritance partition.*

*The personal creditors of the heirs may request the partition of the inheritance on behalf of their debtor when the debtor, in the prejudice of the creditor, refuses or neglects to demand the partition. They may claim to be present at the voluntary partition or may intervene in the judicial partition in order to supervise that the partition is carried out correctly in accordance with the legal provisions. Also, creditors can request even the revocation of the partition either without being obliged to prove the fraud of the co-owners, when they requested to be present but the partition was done in their absence, either under the conditions of general law, situation in which the fraud of the heirs is no longer presumed, but they will have to prove it.*

*For a better understanding of their rights in the inheritance partition, this short overview presents, on the one hand, the means available to creditors to avert a possible fraud, and, on the other hand, how can they remove a fraud committed by the debtor against their interests within the inheritance partition.*

**Keywords:** inheritance partition (division), heirs, personal (unsecured) creditors, opposition to partition, revocation of the inheritance division.

## 1. Introduction

Following the opening of the inheritance, when we have a plurality of heirs the *co-owned succession is born*, each co-heir receiving an ideal quota in the inheritance, none of them being the exclusive holder of an asset or of a material fraction of an asset.

In order to put an end to this state of co-ownership between co-heirs, in the sense that the inherited assets mutually owned are divided, in their materiality, among the heirs who thus become exclusive owners of their respective assets<sup>1</sup>, the inheritance partition must intervene. As a result, the ideal undivided quota on the inherited assets is replaced, with exclusive rights of each of the co-heirs on some assets (values) determined in their individuality<sup>2</sup>.

The end to this state of co-ownership between co-heirs is necessary because, according to art. 1156 paragraph (1) from the Civil Code<sup>3</sup>, the personal creditors of an heir can not track the heir's part from the assets of the inheritance *before* the inheritance partition. In this context, the Romanian legislator regulated several rights for the benefit of the personal creditors of the heirs so that they could make their claims. Thus, the personal creditors of the heirs may request the partition of the inheritance on behalf of their debtor, they may claim to be present at the voluntary

partition or may intervene in the judicial partition. Also, creditors can request even the revocation of the partition in case it was done in fraud of their rights.

Taking into account the above, for a better understanding of their rights in the inheritance partition, this short article presents, on the one hand, the means available to creditors in order to avert a possible fraud, and, on the other hand, how can they remove a fraud already committed by the debtor (heir) against their interests within the inheritance partition.

## 2. The purpose of regulating the rights of the personal (unsecured) creditors of the heirs in the inheritance partition

As opposed to the situation of an asset that is in co-owner-ship, in the case of an inheritance the fraud of the personal creditors of an heir may occur more easily by the fact that the co-owners may understand to one another that the part of the indebted heir should be less than it must actually be, for example, by assigning over-valued assets (with the occult payment of a balancing payment), so that his/her creditors will not be able to cover the debt, they may sustain that the debtor-heir must report a fictitious donation, which implicitly would diminish the heir's part from the succession assets, that another co-heir or a third part is the creditor of the inheritance or that certain movables are not part

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<sup>1</sup> See Gabriel Boroș, Carla-Alexandra Anghelescu, Bogdan Nazat, *Curs de drept civil: drepturile reale principale (Course of Civil law: Main Real Rights)* (București: Hamangiu, 2013), 115.

<sup>2</sup> See Francisc Deak, Romeo Popescu, *Tratat de drept succesoral. Transmisiunea și partajul moștenirii (Treatise on Succession law. The Transmission and the inheritance's partition)*, vol. III (București: Universul Juridic, 2014), 178.

<sup>3</sup> Law no. 287 from 17th July 2009 on the Civil Code, republished in the Official Journal of Romania, Part I, no. 505 from 15th July 2011.

of the succession. Likewise, there could be included easy-to-hide assets, including money, or unsaleables, in the debtor-co-heir lot, rendering a forced execution ineffective.

Due to these possibilities of fraud of the creditors' interests, so that their rights will not remain ineffective, paragraphs (2) and (4) of the art. 1156 from the Civil Code provide several rights for the benefit of the personal creditors of the heirs.

### 3. The rights of the personal (unsecured) creditors of the heirs in the inheritance partition

First of all, according to art. 1156 paragraph (2) from the Civil Code, „the personal creditors of the heirs [...] may request the partition in the name of their debtor”. Second of all, according to the same paragraph, they „may pretend to be present at the voluntary partition or they may intervene in the judicial partition”. Third of all, according to paragraph (4), they „may request the revocation of the partition without being forced to prove the co-owners' fraud only if, although they had requested to be present, the partition was done in their absence and without being summoned”.

Thus, the creditors of the heirs can get involved in the partition of the inheritance, either by provoking it or by intervening in the voluntary or judicial partition already started, the intervening creditors being able to prevent the possible fraud by their presence, or by requesting the revocation after the partition took place in order to remove a fraud committed by the debtor against their interests within the inheritance partition.

### 4. The right to provoke the inheritance partition (oblique action)

According to art. 1560 paragraph (1) from the Civil Code regarding the oblique action, the creditor whose debt is certain and exigible can exercise the rights and the actions of the debtor when the debtor, in the prejudice of the creditor, refuses or neglects to exercise them. As an exception, the creditor will not be able to exercise the rights and the actions which are closely connected to the creditor's person. Since the right to introduce the action for the inheritance partition is not a strictly personal right, as a particular application of the oblique action, the Civil Code provides, in paragraph (2) of art. 1156, that the personal creditors of the heirs may request the partition on behalf of the debtor.

The existence of a right of the creditors to provoke the partition is required especially as, according to art. 1156 paragraph (1) from the Civil Code, the personal creditors of a heir can not track the heir's part from the assets of the inheritance *before* the succession partition. Consequently, if the debtor heir refuses or neglects to exercise the right to partition the inheritance, the creditors, by means of oblique action, could require the partition so that, subsequently, they would be able to make their claims. However, the other heirs may obtain the rejection of the partition introduced by the creditor by paying the debt in the name and on behalf of the debtor heir.

In the hypothesis in which the creditors could make their claims through direct actions resulted from their legal relationships with the debtors, the inheritance partition introduced by means of oblique action will be rejected if it turns out that the creditor only pursued an abuse of law, a vexatory purpose<sup>4</sup>. If the partition was already requested by the heirs, then the action of the creditors would lack the interest, leaving them only the right to intervene<sup>5</sup>.

### 5. The right to participate in the inheritance partition (right of intervention and opposition)

The right of the personal creditors to participate in the inheritance partition used to be named in the doctrine „*the right of opposition<sup>6</sup> (of intervention)*”, name that was taken in the marginal name of the art. 894 of the 2004 Draft of the new Civil code<sup>7</sup>. However, the Amending Commission of the 2004 Draft of the new Civil code mentioned that the name „*opposition to partition*” is *improper* because the creditors do not oppose to partition, but they demand a certain way of realizing it. For reasons related to getting accustomed with the name we prefer to continue to use it, obviously with the limitations expressed by the Amending Commission.

As we have seen, the opposition to partition has the purpose to avoid the fraud of the interests of the creditors by the heirs. Thus, according to paragraph (2) of the art. 1156 from the Civil Code, the personal creditors of the heirs may pretend to be present at the voluntary partition or they may intervene in the judicial partition.

As the Civil Code specifies in art. 1409 that the creditor could, even before meeting the condition, do acts to conserve his or her right, and the opposition or the intervention to the partition is an act of conservation, this also gives benefits to the creditors

<sup>4</sup> See Valerius M. Ciucă, Procedura partajului succesoral (The Procedure of inheritance partition) (Iași: Polirom, 1997), 184, n. 431.

<sup>5</sup> See Dimitrie Alexandrescu, Explicațiunea teoretică și practică a dreptului civil român în comparațiune cu legile vechi și cu principalele legislațiuni străine: Succesiunile ab intestat (Theoretical and Practical Explanations on Romanian Civil Law as Compared to the Old Laws and to the Main Foreign Laws), vol. III - part II, (București: Atelierele Grafice Socec & Co., 1912), 766.

<sup>6</sup> See Francisc Deak, *Tratat de drept succesoral (Treatise on Succession Law)*, (București: Universul Juridic, 2002), 515.

<sup>7</sup> See Proiectul Noului Cod Civil (The Draft of the New Civil Code) (Bucharest: C.H. Beck, 2006), 183.

whose debts are affected by a condition or a term<sup>8</sup>. In the case of a plurality of creditors, the opposition exercised only by one of them produces effects only in favour of the opposing creditor, excepting the situation in which the debt is joint, that is in the case of an active solidarity when the opposing creditor represents the other joint creditors, or in the situation when the claim is indivisible and the creditor is deceased but he/she has more heirs but only one of the heir of the creditor made opposition<sup>9</sup>.

The law does not provide a certain way in which the opposition must be made, so that the jurisprudence considered that to be valid *any act from which would clearly result the intention of the creditors to oppose the partition* (e.g. notification to co-owners through court bailiffs or by simple or recommended letter, the fulfillment of an act from which results the intention of the creditor to take part in the partition, as in the case of a request of partition made by the creditor by means of an oblique action etc.) For the opposition to take effect it is enough that all the co-heirs get acquainted with it. The opposition can be made until the partition becomes final (until the date of the settlement of the judicial partition by the court or until the conclusion of the partition convention by the co-heirs in the case of the voluntary partition), that is, as long as the partition operations are in progress<sup>10</sup>.

If the creditors asked to be present at the voluntary partition or to intervene in the judicial partition process, the co-heirs are obliged to call them to all the partition operations, and the creditors have the right to supervise the partition being able to oppose to the acts that would be done in their fraud, without being able to interfere in the partition operations. So the rights of the creditors are limited to the faculty to control the partition, to be carried out correctly in accordance with the legal provisions.

Consequently, the opposition produces a number of legal effects. First of all, the creditor who exercised the right of opposition must be called to participate in the partition operations, no matter if the partition is voluntary or judicial. If the creditor was not subpoenaed, the creditor would be able to attack the partition by means of revocative action (Paulian), in this case the fraud of the heirs being presumed.

Second of all, the creditor has the right to supervise the regularity of the partition, especially in

what concerns the evaluation of the assets, the composition of the lots (forming the lots equal in value) and their assignment, but the creditor cannot claim that the partition should be done in accordance with his interests (e.g. he cannot claim that a certain asset should be assigned to his debtor). Likewise, the creditor can not claim that the partition should be done by means of a trial when the co-heirs agree to do it by private agreement, and nor can it prevent the making of a donation report when proven that the conditions for its realization regarding its debtor are fulfilled.

Third of all, opposition values deduction (seizure), solution admitted under the old Civil Code by the judicial practice and by the doctrine<sup>11</sup>, in the sense that the succession assets that fall into the heir's lot become unavailable, that is the debtor can not alienate them, because otherwise the opposition would be devoid of the purpose for which it was conceived<sup>12</sup>. Likewise, nor can he recover the sums that are due to him from inheritance<sup>13</sup>.

No least, the creditor who did not oppose the partition may require its revocation only under the conditions of general law (art. 1562 Civil Code), situation in which the fraud of the heirs is no longer presumed, but he will have to prove it.

## 6. The right to request the revocation of the inheritance partition (Paulian action)

Regarding the right to request the revocation of the inheritance partition, the Civil Code dispenses in art. 1156 paragraph (4) that „The creditors may request the revocation of the partition without being obliged to prove the fraud of the co-owners only if, even though they requested to be present, that partition was done in their absence and without being summoned. In all the other cases, the action in the revocation of the partition remains subject to the provisions of the art. 1562.” According to paragraph (1) of the art. 1562 from the Civil Code regarding the *revocative action*, the creditor, if he proves a prejudice, may request that the legal acts concluded by the debtor in breach of his or her rights be declared unenforceable, like the ones through which the debtor creates or increases his state of insolvency.

<sup>8</sup> See Alexandresco, Explicațiunea teoretică și practică a dreptului civil român în comparațiune cu legile vechi și cu principalele legislațiuni străine: Succesiunile ab intestat (Theoretical and Practical Explanations on Romanian Civil Law as Compared to the Old Laws and to the Main Foreign Laws), 768.

<sup>9</sup> See Francisc Deak, Romeo Popescu, *Tratat de drept succesoral. Transmisiunea și partajul moștenirii* (Treatise on Succession law. The Transmission and the inheritance's partition), vol. III, 208.

<sup>10</sup> I. Rosetti-Bălănescu, Ovid Sachelarie, Nic. G. Nedelcu, *Principiile dreptului civil român (The Principles of Romanian Civil Law)* (București: Editura de Stat, 1947), 588-589.

<sup>11</sup> See Dan Chirică, *Tratat de drept civil: succesiunile și liberalitățile* (Treatise on Civil Law: Successions and liberalities) (Bucharest: Hamangiu, 2017), 489.

<sup>12</sup> See Doina Anghel, *Partajul judiciar în reglementarea noilor coduri* (The Judicial Partition in the New Codes), (București: Hamangiu, 2015), 339. For the contrary opinion, see Alexandresco, Explicațiunea teoretică și practică a dreptului civil român în comparațiune cu legile vechi și cu principalele legislațiuni străine: Succesiunile ab intestat (Theoretical and Practical Explanations on Romanian Civil Law as Compared to the Old Laws and to the Main Foreign Laws), 774-775.

<sup>13</sup> See Mihail Eliescu, *Transmisiunea și împărțea moștenirii în dreptul R.S.R.* (The Transmission and Partition of Inheritance under the S.R.R. Law) (București: Editura Academiei R.S.R., 1966), 281.

From the above-mentioned results that, in the case that, although the personal creditors of the heirs asked to be present, the partition was done in their absence and without being summoned, these, being exempt from proving the fraud of the copartner heirs, could request the revocation of the partition under conditions lighter than the ones of the creditors who had not exercised their right of opposition.

If the creditor, although *he exercised his right of opposition*, was not summoned, he may attack the partition act by means of a revocative action (Paulian) simplified in the sense that *the fraud of the heirs is presumed*. The partition in the absence of the opposing creditors determines the overturning of the presumption of good faith, transforming it into a presumption of fraud<sup>14</sup>. The creditor who *did not* oppose could request the revocation of the partition only under the conditions of the general law, situation in which the fraud of the heirs will no longer be presumed, but it should be proved.

In the end, we specify that the period of prescription in the case of the Paulian action is of one year and it starts, according art. 1564 from the Civil Code, from the date in which the creditor of the heir knew or was supposed to know the prejudice resulted from the succession partition.

## 7. Conclusions

The Romanian legislator, separately from the rights of the personal creditors of the co-owner regulated in the art. 679 from the Civil Code, stipulated

a special norm regarding the situation of the personal creditors of the heirs just because of the particularities of the inheritance partition, as opposed to the usual partition of an asset. Thus in the art. 1156 from the Civil Code were regulated both the means available to creditors to avert a possible fraud, and the possibility to remove a fraud committed by the debtor against their interests within the inheritance partition.

The means available to creditors to avert a possible fraud include the right to provoke the inheritance partition (oblique action), in the absence of the partition the personal creditors of a heir not being able to track his part in the assets of the inheritance to make the claims, and the right to participate in the inheritance partition (right of intervention and opposition), which allows the creditors to control the partition so that this should be exercised correctly respecting the legal dispositions. We also have to mention that, *de lege ferenda*, it would be necessary to clarify the effects of the right to participate in the inheritance partition (right of intervention and opposition) in the sense of the express regulation of freezing the succession assets that fall into the lot of the debtor heir, in the limit necessary to the providing of the creditor who opposed, thus ensuring the claim of the latter.

Subsequent to the partition, the removal of a fraud committed by the debtor against their interests within the inheritance partition could be done due to the Paulian action which allows the creditors of the heirs to revoke the partition done with the fraud of their interests.

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<sup>14</sup> See Ciucă, Procedura partajului succesoral (The Procedure of inheritance partition), 185.