Law Review ● special issue, Decembre 2019, pp. 194-201

PRIVATE LAW

ABOUT VACANT INHERITANCE*

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Abstract: *An inheritance is considered to be vacant when there are no legal or testamentary heirs or, in case such heirs exist, they are not entitled to inherit the entire successor mass. Vacant inheritances become the property of the village or county where the goods are located at the time of the inheritance and become part of the county's private property. The procedure by which an inheritance becomes vacant begins by request of any interested party and is finalized once the public notary issues a certificate of vacant inheritance. In case of international inheritances, within the limits of the law which applies, if there is no legal heir for the goods of the successor mass and no legal heirs, the law which applies must not impair on the law of another member state or an entity which is entitled to inherit those goods, provided the creditors are still able to request the payment of their debts from the successor mass. The current paper aims to discuss theoretical and practical aspects regarding vacant inheritances in the context of the unification of European law. From a theoretical point of view, we believe it is necessary for the lawmaker to intervene in order to regulate the title by which the state inherits, because it entails significant procedural meanings, as previously shown. From a practical point of view, the solution to a vacant inheritance is a difficult and expensive procedure. It entails attention and responsibility from the public notary, as, by issuing a certificate of vacant inheritance, certain heirs can be abusively removed from succession, thus being forced to file a complaint in court in order to valorize their rights.*

Key words: *Private Law, Civil Law, vacant inheritance, theoretical aspects, procedure.*

Introduction

According to article 953 of the Civil Code[1] "inheritance is the transfer of a deceased person's patrimony to one or more living individuals".

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* The article was prepared for the International Law Conference, "*Current Issues within EU and EU Member States: Converging and Diverging Legal Trends*", 3rd edition, organized by the Faculty of Law – Transilvania University of Braşov on the 29th-30th of November 2019. All links were last accessed on 4 November 2019.

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[1] *Law no. 287 from 17 July 2009* regarding the Civil Code, republished in the Official Journal of Romania, Part I, no. 505 from 15th of July 2011.

This definition entails the fact that inheritance requires a deceased person, the *defunct,* and the living individuals which acquire the defunct patrimony, *legal or testamentary heirs.*

Legal heirs are those who acquire the defunct's patrimony (or a part of it) based on law, in order of kinship and in the amount established by law.

Testamentary heirs or legatees are those who acquire a patrimony or a part of it as a result of the defunct's will expressed within a testament.

Article 1135 of the Civil Code regulates that if there are no legal or testamentary heirs, the inheritance is considered to be vacant. If only a part of the successor mass is inherited by will or there are no legal heirs or their vocation was reduced as a result of the will, the part of the successor mass which is not inherited is considered to be vacant.

In regard to the legal provisions, an inheritance can be declared as vacant in the following situations: *a)* there are no legal or testamentary heirs; *b)* the testamentary heirs are entitled to a part of the succesor mass and the rest remains vacant, as there are no more legal heirs; the testamentary heirs are entitled to a part of the succesor mass and the rest remains vacant, as there the legal heirs were disowned; *c)* there are testamentary heirs, but as a result of a legate, only a certain part of the successor mass can be inherited and the legal heirs, have renounced the inheritance; *d)* there are testamentary heirs, but they have renounced the inheritance; as a result, the successor mass can't be inherited by legal heirs for lack of or they have been disowned or renounced the inheritance; *e)* there are only particular legatees for the entire inheritance and there are no legal heirs or universal legatees to demand the transfer of the inheritance; *f)* certain legates exist but they were revoked or became ineffective and the legal heirs can't or are unable to inherit.

The French Civil Code[2] regulates similar provisions in article 809, by stating that an inheritance is vacant when there are no known heirs or when all known heirs have renounced the inheritance or in case more than 6 months have passed and the heirs did not expressly or tacitly accept the inheritance.

Thus, the first condition of a vacant inheritance is the physical or legal lack of legal or testamentary heirs.

The second condition in order to declare a vacant inheritance is the existence of a successor mass, namely goods of patrimonial value which can be transferred by succession. If there is no successor mass, the procedure will be finalized as it has no object and there is no possibility to inherit.

[2] https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721&dateTexte=20191114.

Theoretical aspects regarding the vacant inheritance

The beneficiaries of a vacant inheritance are, according to the provisions of article 963 third alignment of the Civil Code, the city, county or village where the goods are located at the time the inheritance procedure begins.

In case the successor mass contains goods which are located across several counties, all these goods will become vacant.

The goods will be transferred to the private property of the county; this is an extremely important aspect to be considered, as goods of private property are subject to sale or foreclosure as opposed to public property goods which can't be sold, transferred of foreclosed.

This rule only applies to inheritances which occurred after October 1st, 2011, as the previous ones became the property of the Romanian state. As opposed to these provisions of the Civil Code, article 26 of Law no 18/1991 of land fund[3], republished, regulated that all lands located within the territory of counties, property of deceased people who have no heirs, are transferred to the public property of those counties and to the administration of the local council, based on the certificate of vacant inheritance issued by the public notary.

The change of legal regime of these lands from public property to private property is forbidden and is sanctioned with absolute annulment. This legal inconsistency was noted by doctrine[4] and legal practice, thus the High Court of Justice ruled in 2016[5] that the coming in to force of the Civil Code partially rescinded the provisions of article 26 of Law no 18/1991 regarding the transfer of goods to the public domain of counties. "The before mentioned effect is produced only in regard to inheritances which occurre after the coming into force of the Civil Code, as is expressly regulated in article 55 of Law no 71/2011, with subsequent changes. For inheritances which occurred previous to this date, article 26 of Law no 18/1991, republished, in the form changed by Law no 158/2010 continues to be in effect, based on the principle tempus regit actum, given that the new law can't be enforced for the past".

As a consequence, lands located within the territory of counties which are the property of local administration authoritites, left from deceased people with no heirs, are transferred to the public property of counties and the administration of local counties, based on the certificate of vacant inheritance issued by the public notary, provided the inheritance occurred before the coming into force of the Civil Code.

In case of inheritances which occur after this date, these immobile goods will become part of their private domain, according to the provisions of the Civil Code.

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[3] Published in the Official Bulletin of Romania no 37 of February 20th, 1991.

[4] See C. G. Dinu, *The franchise contract*, C.H. Beck, Bucharest, 2016, pages 77-78.

[5] High Court of Justice, *Decision no 22 of September 26th*, 2016 in file no 1708/1/2016, published in the Official Bulletin, part I, no 947 of 24.11.2016.

The provisions of article 33 of UE Regulation no 650/2012 of the European Parliament and the Council of June 4th, 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession[6] states that "To the extent that, under the law applicable to the succession pursuant to this Regulation, there is no heir or legatee for any assets under a disposition of property upon death and no natural person is an heir by operation of law, the application of the law so determined shall not preclude the right of a Member State or of an entity appointed for that purpose by that Member State to appropriate under its own law the assets of the estate located on its territory, provided that the creditors are entitled to seek satisfaction of their claims out of the assets of the estate as a whole". Thus, the legal text states the rule according to which the goods which are a part of a vacant inheritance can become the property of the state where they are located.

On the other hand, according to article 2636 second alignment of the Civil Code "in case the inheritance is vacant, according to the law which applies and the goods are located on Romanian territory, they become the property of the Romanian state, based on the provisions of Romanian law regarding the transfer of goods which are part of a vacant inheritance".

According to article 553 third alignment of the Civil Code, vacant inheritances which are located abroad, are the property of the Romanian state.

In the light of internal provisions, the goods which are part of a vacant inheritance and are located on the territory of another state become the property of the Romanian state.

Thus, we believe that there is a contradiction between the legal texts in regard to the beneficiary of the vacant inheritance, in case there is an international element.

In solving this contradiction, we appreciate that we must first establish the title according to which the state inherits.

One opinion claims that the state inherits based on its right to sovereignty (the theory of countryman.)[7].

The following arguments were stated in favor of the thesis of sovereignity:

a) article 1138 of the Civil Code states that all vacant inheritance becomes the property of the county or village "where the goods were located at the time of death and become the private property of the county or village";

b) article 553 second alignment assimilates immobile goods for which no individual holds the property right to vacant inheritances;

c) that lack of successor option of the acquireres;

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[6] Published in the Official Journal of the European Union L 201 from 27.7.2012.

[7] D. Chirică, *Civil law treaty, Succession and liberality*, C.H. Beck, Bucharest, 2014, page 79.

d) the provisions of the Civil Code, which regulate vacant inheritances, are not listed in the section regarding legal inheritance.[8]

Another opinion[9], stated that the state acquires the vacant inheritance as a legal heir (the theory of the right to inherit), thus appreciating that is is preferable to the thesis of the inheriting state, as in entails the positive interest of the state to inherit the vacant goods left by its citizens aboard, thus being more significant than the negative interest of another state which can't inherit the "goods of foreign deceased citizens who owned goods on our territory and had no heirs"[10].

However, we must note that the European Regulation seems to encourage the theory of countryman.

The procedure of determining a vacant inheritance

According to article 101 of Law no 36/1995 of public notaries and notary activity, republished, the inheritance procedure begins upon request of any interested party.

In case of a vacant inheritance, the interest might belong to the county where the goods are located, the legatees or the creditors of the inheritance.

According to article 15 of Law no 36/1995 of public notaries and notary activity, republished, the notary inheritance procedure is in the competence of the public notary from the notary office located where the defunct had its last domicile, regardless of where the goods are located.

In regard to the time when the claim for the inheritance procedure can be filed, this can occur at any time after the death of the defunct. The term of one year and 6 months stated in article 1137 of the Civil Code considers the time from which an inheritance can be considered vacant, but nothing prevents the interested party from requesting the beginning of the inheritance procedure, especially when certain measures to preserve or administrate the successor goods are required.

The request will be registered with the notary office and will be filed in the Succession Register, the Succession Register List of Documents and the Successor Terms Register.

According to article 1136 first alignment of the Civil Code, as long as the inheritance was not accepted or in case the heirs are not known, the competent public notary can name a special curator of the inheritance, in order to protect the interests of potential heirs.

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[8] L. Stănciulescu, *Inheritance. Doctrine and jurisprudence*, Hamangiu, Bucharest, 2017, pages 162-163.

[9] L. Stănciulescu, *op. cit.*, pages. 163-164; Fr. Deak, *Treaty on succession law*, Universul Juridic, Bucharest, 2002, page 161; I.E. Cadariu-Lungu, *The right to inherit in the new Civil Code*, Hamangiu, Bucharest, 2012, page. 91.

[10] See Fr. Deak, *op cit.*, page 161; I.E. Cadariu-Lungu, *op cit.*, 2012, page 91.

Naming a special curator of the inheritance is a temporary measure which is in effect until the inheritance is accepted or until the certificate of vacant inheritance is issued. This measure is optional and its necessity is decided upon by the public notary; however it can't be abusive and must be decided upon based on the provisions of article 1117 first alignment of the Civil Code, namely when there is a reasonable reason to believe the goods of the inheritance might be sold, lost, replaced or destroyed or in case it is considered necessary in order to protect the interesta of potential heirs.

By exception, when there is a complaint filed against the inheritance, naming a curator is mandatory.

In French law, naming a curator is mandatory in all cases.

The public notary can name a curator at any time, without having to wait for the term of successor option to expire, as the reason for naming a curator is that of protecting the successor goods and interests of potential heirs.

One of the heirs can be named a curator, based on agreement of all other heirs, or any other person chosen by the public notary. Depending on the complexity of the inheritance procedure, the notary can appoint one or more curators. The appointed curator must have full exercise capacity and must expressly accept the appointment as curator.

Naming the curator is achieved by notary decision, which will mention: the agreement of all other heirs or the lack of any heirs, the reason the curator was appointed, the limits of his duties and his due payment.

After he is appointed, the special curator must identify the heirs and the successor goods. In regard to successor goods, they must be identified and listed in an inventory which must contain all goods and debts of the defunct.

The curator must also preserve and administer the successor goods. Acts of conservation are those by which the loss of a subjective right is prevented. Doctrine considers to be conservation acts: the interruption of a statute of limitation, formal notice, applying a seal.[11] In case the preservation of successor goods entails certain expenses, they will be made by the curator with the permission of the public notary. Acts of administration are those acts which valorize a good or a patrimony[12]. In regard to the duties of the curator, we believe the provisions regarding simple administration apply, thus the curator will be able to administer the goods, accept payment of debt, issue payment documents, exercise the voting and conversion rights in regard to the administered goods; he will also be able to modify previous investments in the goods; when the object of administration is a single determined good, the curator will be able to sell it or use it as a guarantee when it is necessary in order to preserve the good, he can pay debt in regard to the

[11] G Boroi., C.A. Anghelescu, *Civil law course. The general part*, Hamangiu, Bucharest, 2011, page 112.

[12] *Ibidem*.

good or change its destination only with the beneficiary's approval; in case the good was not yet determined, court approval is required; he can ensure the goods against usual risks as is theft or arson at the expense of the beneficiary, he can file complaints in court in regard to the administration of goods and can intervene in any trial which regards the administered goods.

The curator will also hold the obligations of the administrator of another person's goods, such as: he will not be able to donate the good, except in case the interest of good administration requires such a measure; he must act impartially; he must return the goods and justify all preservation and administration expenses when the successor procedure is finished or when the public notary deems it necessary to do so.

Any person who is aggrieved by the inventory or by the measures of conservation or administration of the public notary can file a complaint before the competent court of law.

The curator only acts within the limits of his powers. He will not be held accountable for the loss of goods as a result of cases of emergency, the perishable nature of goods or their usual use.

The administered goods are turned over by a document signed by both the notary and the curator. If this occurs at the same time as the inventory of goods, this will be mentioned in the drafted document.

After receiving the request to begin the inheritance procedure, the public notary will quote all potential heirs, at the last domicile of the defunct, by listing the citation at the notary office, at the City Hall located at the last known domicile of the defunct, on the official website of the Romanian Union of Public Notaries and at the location of the goods. In case no heirs turn up, the citation procedure will be repeated until the term of one year and 6 months stated in article 1137 of the Civil Code expires.

After this term expires, the public notary will collectively quote the successors at the place where the goods are located or if there are no immobile goods, in a national newspaper, thus requesting their presence. The term must be of at least two months.

At the same time, the representative of the county or city where the goods are located will be notified. His absence does not prevent the issuing of the inheritance certificate.

It is worth mentioning that the state or the county does not have the right to opt whether to accept the inheritance or not; an interesting case in notary practice is the situation in which the county, along with another person, a universal legatee, must inherit, but that person renounces the inheritance. In this case, as the accepting universal legatee is not able to inherit the entire successor mass, the renouncing of the county is practically ineffective as there are no other heirs, thus the inheritance becomes partly vacant, thus leading to the loss of the right to opt whether to accept or refuse succession.

The only difference in this case will be determined by the title in which the county inherits, thus causing the rightful consequences.

The certificate of vacant inheritance is issued in this case, after fulfilling the procedures required by law, provided there are no legal or testamentary heirs who are able to inherit the entire successor mass.

This will cause retroactive effects, thus the state or county will become heirs from the time the inheritance procedure began. As a conclusion, the certificate of vacant inheritance is of a declarative character, as it is proof of the state's quality of heir and it describes the goods which from the decujus successor mass.

If, after the certificate is issued, the notary acknowledges that entitled heirs exist, as opposed to common law, the annulment of the act is not possible. A new heir certificate can't be issued by the public notary. The heirs can only file a complaint before the court to have the certificate of vacant inheritance annulled and to establish their rights. Within this action, the public notary who issued the certificate of vacant inheritance can he held accountable, provided the conditions of civil liability are fulfilled.

Conclusions

The issue of the vacant inheritance certificate is an extremely complex procedure, from both a theoretical and practical point of view.

From a theoretical point of view, we believe it is necessary for the lawmaker to intervene in order to regulate the title by which the state inherits, because it entails significant procedural meanings, as previously shown.

From a practical point of view, the solution to a vacant inheritance is a difficult and expensive procedure. It entails attention and responsibility from the public notary, as, by issuing a certificate of vacant inheritance, certain heirs can be abusively removed from succession, thus being forced to file a complaint in court in order to valorize their rights.