THE PRACTICING OF A SUIT CONCERNING THE NULLITY OF THE WILL AND THE ELIMINATION OF THE NEGATIVE EFFECTS OF THIS SANCTION

EXERCITAREA ACȚIUNII ÎN NULITATEA TESTAMENTULUI ȘI ÎNLĂTURAREA EFECTELOR NEGATIVE ALE ACESTEI SANCȚIUNI

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Abstract. *The nullity causes of the legacy are those from the common right and some that are specific to the testamentary matter. Concerning the legacy we exceptionaly find here the application of the art.1167 Civil Code from the donation contract, that allows the confirmation, the ratification and the voluntary performing from the heirs of a will that is null because of some form vices. We can see that in this cases the wish of the testator and the heirs is even above the legal provisions.*

The juridical system of relative and absolute nullity of the legacy is the one from the common right. If the will contains more disposals and if one or only few of them are null, then the rest of the will is considered valid and will be carried out as it is.

After testator's death the nullity of the legacy can be covered through confirmation, ratification or voluntary implementation, made with self knowing (according to art 1190 Civil Code), by those who might get some benefit through the inefficacy of the legacy (legal heirs, universal heirs and heirs with universal title).For legacies are also applied the provisions of art. 1167 Civil Code concerning donations which sais: "the confirmation or the ratification or the voluntary implementation of a donation, made by the heirs or the people representing the donor, after his death, takes place for the renunciation concerning the form vices, as well as for any other exceptions".

The heirs can carry out the legacy from a null will for form vices, verbally worked out or by conjunctive will. If there are more heirs, the act confirming the nullity of a legacy will affect only those who have consent the confirmation, and the person benefiting from the confirmation will capitalize only the right that the heir who confirmed the legacy has.

The heirs can confirm through exception a null will for the lack of form in two cases: when they know the nullity, the deficiencies of a will, but they let it be carried out, and when by ignorance they do not know the deficiencies of the will, and this is being carried out.

They can not attach the imperfect will if they have allready carried it out, or they have expressly or unspoken approved it and they have known the deficiency which would have motivated its repealing. As we can see in this situation the acts and the will of a person are in some cases stronger then the rules and the provisions of law. In spite of this, the ratification or the confirmation of a will doesn't cover the nullity that derives from the inclusion of a prohibit part in that will.

Considering the possibility of confirmation or ratification of a will that is considered null we believe that the act of confirmation from the heirs who are justified to carry out the nullity looks more like an act born into their own person and not a benefit from the testator himself, which has not followed the validity provisions required by the valid existence of the will.

There is another problem to solve: which is the time limit of silence or lack of action from the heirs that equals to the free willingly and unspoken renunciation? When the heir alone carries out the will, this is equl with renunciation. If the legacy is owned by the heir, some authors apply the general prescription term of 30 years related to the confirmation from the legal heirs.

But as the legacies are creating an effect starting the moment of opening the inheritance, the limitation 18 months term, stipulated in art.9(2) from The Decree nr.167/1958 concerning the extinctive limitation, will begin since the opening of the inheritance and not since the will was worked out.

The testator himself can not confirm a will that is considered null. An eventual confirmation from his part does not equals with the validity of the will but with a new will. From this we understand that the testator can avoid the nullity of the first will just by remaking it and this time by following all the validity prescriptions. We can not apply to it by resemblance the stipulations of art 1167 Civil Code.

According to the common right, concerning the prove in this matter, the one who sues the nullity will have to prove a current and inborn interest. For example it will not be accepted the law suit of the legal heir or of the universal heir or of the one with universal title, if by repealing the legacy they will not receive more anyway.

Those who have been excluded from the will, or those who can ask the recognition of the legacy's caducity may be interested by the nullity law suit. But if there are two wills by which the heirs are removed from the inheritance, in a case of the nullity law suit, this could be rejected by the instance for lack of interest, because the testator has proven by the two wills that he does not want them to benefit from his goods.

We can also ask ourselves if concerning the nullity of the will the testamentary heir can invoke any interest. Generally, he is the one benefiting from the will and has a pure passive defensive position. His interest is to obtain the goods left to him by the testator in his favor, not to invoke the lack of validity of the will. But there are cases, when the testamentary heir can be troubled in the use of the goods he received from the testator, and this situation must be changed, usually by using the possessory actions. This way the legal heirs are forced to pronounce themselves over the validity of the will.

CONCLUSIONS

In the testamentary matter the cases of nullity are those from the common right, but there are some specific for the will, which must be made according to his nature and form, like: the lack of the form, the incapacity to make a will or to receive the goods from the inheritance, the conjunctive will, and so on.

There are cases when the law suit concerning the nullity of the will can remain without any effect, when the legislator allows the wish of the testator and his heirs to be above any legal stipulations in the testamentary matter. The legislator can not be more cautious then the heirs themselves; if they want to respect the will of the testator although it didn't follow all the legal rules to express it, then the law can not do anything about it.

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