DOI: 10.47743/eufire-2024-1-18

# THE FORMS OF EXPRESSING THE INDIVIDUAL'S LAST CONSENT IN THE REPUBLIC OF MOLDOVA

**VITALII PISTRIUGA**
*Moldova State University*
*Chisinau, Republic of Moldova*
*vitalii.pistriuga@gmail.com*

**Abstract**
*The new version of the Civil code of the Republic of Moldova starting March 1st, 2019, in the part of inheritance denotes a complete revision of the transfer of rights of the natural person for the cause of death. At the same time, prima facie the legislators in the part related to wills intervention is not so obvious. In this research, it will be analyzed the forms by which a human being can dispose mortis causa of his partimony, as well as the correlation of the institution of inheritance with some new legal institutions that appeared in the Civil code (eg. fiducia). It will be analyzed the role of the will for contemporary civil society, in the light of the recent challenges faced by the Republic of Moldova as well as the effectiveness of using this legal instrument to achieve the scope pursued by a person. Finally, after a comparison with legal framwork from other states from which the authors of the „modernized" civil code were inspired, the author will try to come up with solutions that could facilitate the achievement of the aims pursued by the society, also will be tried to debureaucratize the existing notary procedure.*
**Keywords:** *notarial form; legal act; will; joint will; agreement as to succession.*
**JEL Classification:** K11, K12, K15, K36.

## 1. EVOLUTION OF THE CONCEPT OF WILL IN THE REPUBLIC OF MOLDOVA (RM)

A simple glance at Roman private law reveals the importance of the testator's will. Being derived from family relationships, inheritance relationships were intended to identify a person who would replace de cuius in relations with the family, the state, society, etc., and continue his role. With the introducing of the will, the State gave the testator the possibility of identifying a person other than the one expressly provided for by law (at the beginning, the testator was given the right to nominate as heir only one of his descendants), who would be his successor. The will was not regarded as an act of alienation of property by reason of death, but of designation of another person who would carry out the testator's duties after his death. The will was treated as a lawful fixation of the person's intention, drawn up in solemn form with a purpose to grant power after his death. The designation of the heir was the essential testamentary provision

without which the will was not valid. In this context, we note the *ad instrumentum* character of the will (Dojdev, 2000, pp. 646-647).

In ancient Romanian law, a person's will for the cause of death could be expressed in two forms of manifestation: the death language and the diata. In the form of death language, the will was verbally expounded by the testator in front of a person belonging to the clergy - an "ecclesiastical face" - whose task was to preserve the testator's will and to make this will known to the heirs (Negrilă, 2013, pp. 19-21). Probably, the name of the death language came about because the testator communicated his last will on the last communion and the celebration of the sacrament of the Holy Mass (Vasilescu, 2016, p. 77). Unlike the death language, the will in the form of diata was to be drawn up in written form, dated and signed (or the testator's handprint applied) in the presence of several witnesses. Although we now know of holographic wills, unlike the last mentioned, to be valid the will could have been written not only by the testator but also by another person. To protect against future litigations, usually the relatives disinherited by this will were called as witnesses (Negrilă, 2013, pp. 19-21).

In the history of Russia, information about the will ("official soulful act" - "duhovnaia gramota", although at the beginning it was called "official spiritual act" - "dushevnaia gramota") was known already in the 10th century. The purpose of this act was to fulfill a moral obligation - before death to take care of one's own soul, liquidating all earthly affairs. Throughout history, the content of wills has varied, and we are mostly familiar with wills which, in addition to designating the heir, had a political content of guidance for the successors in the political sphere (various indications on the completion of political affairs in relation to other states, begun by the testator), the administration of property, relations with partners (instructions to delegate powers of attorney to certain persons for unfinished actions), etc., which were drawn up by high-ranking dignitaries. In view of the legal limits on the possibility of owning property, wills mainly contained provisions that were not directly related to the transfer of property but contained non-patrimonial advice. The form likewise was a solemn one, being drawn up in the presence of witnesses by state or ecclesiastical officials, with the application of their seal (Levushkin, 2018, pp. 9-14).

Although the will is an old legal institution that has been used for hundreds of years, in recent years this institution has undergone some adjustments in the Moldovan legislation.

### 1.1 Will according to the Civil Code 1964

According to Article 568 of the Civil Code of the Moldovian S.S.S.R. of 26.12.1964 (Parliament R.S.S. Moldavian, 1964), *any citizen may bequeath all or part of his or her property (including ordinary household furnishings and household goods) to one or more persons, both to those who are part of the*

*circle of legal heirs and to those who are not, as well as to the State or to various state, cooperative and public organizations.*

From this it follows that the will was used as a legal instrument to transmit only the estate of a natural person by cause of death, being an alternative to legal succession (*ab intestat*). At the same time, the will was regarded as an act, the subject of which was not only the estate, but also certain assets falling within that estate. Therefore, any testamentary provision, whereby the will left only a certain asset out of the entire patrimony, was interpreted as designating the heir to the inheritance share equal to the value of that asset.

If a testamentary disposition was drawn up, in the notarial succession procedure to legalize the succession rights, there was no need to calculate the express size of the heir's share of the entire inheritance, which made this procedure less bureaucratic and reduced the costs for notarial registration. Other legal acts of disposition *mortis causa* were not permitted by law.

### 1.2 Will according to the Civil Code 2002 in the original version

On 12.06.2003 the Civil Code of the Republic of Moldova (CC RM) no. 1107 of 06.06.2002 (Parliament RM, 2002) entered into force. According to Art. 1449 of the Civil Code (in its original wording), *a will is a solemn, unilateral, revocable and personal legal act by which the testator disposes of all or part of his property free of charge, for the moment of his death*.

In fact, no radical reforms have been observed in the legal nature of wills, although the regulation has become much more detailed in this area. At the same time, a difference between the heir and the legatee has been uncertainly outlined. Thus, in contrast to the previous legal framework, according to art. 1486 of the Civil Code of the Republic of Moldova (in its original wording), *the testator may grant by will to a person patrimonial advantages (legatee) without designating him as heir*, and one of the objects of these patrimonial advantages in art. 1487 also related to the transfer of a property from the estate of the heir to the legatee.

Given the lack of express clarity, notarial and judicial practice in the interpretation of wills has not changed. Thus, the testation of an asset of the estate has been and still is qualified as the designation of the heir with the inheritance share in the amount constituting the value of the property tested.

At the same time, there was a change in the legislator's approach to the role of the will - the regulation of testamentary succession was placed before the rules on legal succession, unlike in previous legislation. With this step, the Parliament emphasized the priority of testamentary provisions over the provisions of legal succession in matters of inheritance. The will was regarded as a civil legal act in the sense of *negocium*, and the legal framework governing unilateral civil legal acts was developed and detailed at the same time as the legal framework in the field of inheritance.

At the same time, without expressly affecting the field of inheritance, the regulation of other institutions related to wills has undergone changes. In this context, the scope of the donation (which, in fact, does not contain an express rule that it applies only inter vivos with immediate execution, the promise of donation being also introduced) has been broadened. A little earlier, the Family Code of the RM provided for the possibility to conclude marriage contracts, the content of which, with the entry into force of the CC of the RM in its original wording, became less limited.

### 1.3 Will according to the Civil Code 2002 in its current wording

By Law No. 133/2018 (Parliament RM, 2018), the inheritance regulation in the Civil Code of the Republic of Moldova was replaced by a different concept. It should be noted that, similar as in the Soviet period, testamentary inheritance was again placed after legal inheritance, decreasing the role of the will in the distribution of the estate after the death of the testator. In its current wording, art. 2191 of the Civil Code of the Republic of Moldova states that *a will is a unilateral, personal and revocable act by which a person, called testator, disposes, in one of the forms required by law, for the time when he will no longer be alive*.

*Ab initio,* some of the legal characteristics of the will expressly indicated in its definition have been modified, namely:

- solemn nature – whereas the form requirement was maintained, under penalty of nullity - art. 2216 of the Civil Code of the RM, although the number of varieties of this form was increased;
- free of charge – given the fact that the possibility of drawing up conditional wills was introduced, where the condition may also be constituted in favor of the testator (art. 2205-2207 of the Civil Code of the RM). The widest spectrum of application of conditions (either under suspensive or resolutory condition) was allowed. At the same time, the law does not limit the circle of persons who may be beneficiaries of the conditional testamentary disposition, for which reason, we can deduce that this quality may be attributed to a third party as well as to the testator. In this connection, it should be noted that a testamentary disposition (including the testator's designation) may be made subject to a suspensive condition in favor of the testator (e.g., to make a payment to the testator, to provide for the testator's maintenance). Such an approach creates uncertainty in the correct legal characterization of legal transactions expressly named by law. Thus, e.g., if a contract for the sale of immovable property will condition the acquisition of ownership of the property by the buyer after full payment of the price during the seller's lifetime and at the time of the seller's death - then is this contract to be regarded as a sale or a testamentary disposition? Basically, the law allows both operations to be regulated in such a way, except for one fact - a will is a unilateral act, while sale-purchase is a

bilateral legal act (contract). In the specialized literature we observe a diversified attitude towards the institution of conditional wills, whether to be allowed by law, having its origin in Roman private law (Mihailova, 2016, pp. 37-44; Mitrofanova, 2019, pp. 103-108), or that it is to be expressly prohibited by law, because it entails the restriction of fundamental human rights (Ataev, 2013, pp. 20-22). Testamentary provisions subject to conditions are provided for in the legislation of other countries, such as France, Estonia, Ukraine, Spain, but their scope of application is expressly limited by law, which is not observed in the legislation of the Republic of Moldova, with some insignificant exceptions;

- limitation to goods – respectively, it may also contain any other clauses (e.g. advice, recommendations, secrets, curse, declarations);
- nature of legal act – being a simple declaration (deed) made by the testator (although, if it contains a statement of a legal act, it must comply with the conditions of validity).

In Romanian law (Parliament Romanian, 2009), which was inspired by French law, the will is regarded only as a support for patrimonial dispositions (legatee) and non-patrimonial dispositions. The legatee, being of a patrimonial nature, can be universal (designating the heir to the entire estate), with universal title (designating the heir to part of the estate), or singular naming (the legatee to a property) (Ionaș, 2020, pp. 77-79). The current definition of will in art. 1034 of the Civil Code of Romania (as being the *unilateral, personal and revocable act, by which a person, called testator, disposes, in one of the forms required by law, for the time when he will no longer be alive*) has excluded any doubts in delimiting the will from the legatee, recognizing that the legatee contained in the will represents a liberality, and the will is considered as a complex act, which may contain both legatees and any other testamentary provisions, which may be subject to different legal regimes, depending on the specifics of each provision (Negrilă, 2013, pp. 26-28).

Although the definition of the will in the CC of the RM was taken from the Romanian legislation, the detailed regulation of the will, as well as of the related legal institutions (such as liberalities, including donations) did not follow the Romanian law, being inspired by the German legislation (although the provisions of the legislation of the Canadian province of Quebec were also taken), which is based on another concept of legal acts *mortis causa*, which can be included not only in unilateral legal acts, but also in contracts and joint wills. Possibly, the desire to omit the reference to other legal institutions that can ground the succession vocation led the Moldovan legislator to take over only the definition of will from the Romanian legislation. This position destroys, as we will see *infra*, the classical system of legal acts used in the codified law.

As a consequence, the will change its role from *negocium* to *instrumentum*. For this reason, it has become only a support for the conclusion of provisions of a patrimonial nature (in which it acquires the legal nature of a civil legal act), as

well as for the expression of recommendations (opinions, thoughts, etc.) of a non-patrimonial nature (which no longer represent a civil legal act *stricto sensu*). According to some scholars, the will is always to be considered as a complex legal act (i.e., being considered both in the sense of *negocium* and in the sense of *instrumentum*), which includes both patrimonial and non-patrimonial testamentary provisions, i.e., it contains several provisions of different legal nature, independently examined in terms of legal regime and legal effects produced (Ionaș, 2020, pp. 24-26).

The change in the concept of will allows us to conclude that the support for testamentary dispositions may constitute not only a will, but also another legal act, since the RM Civil Code does not contain the limitations, which are contained in the Civil Code of Romania (art. 984 para. (2), etc.) In this way, we come to the above-mentioned statement that a provision for the cause of death may be inserted in any legal act, including a contract, if there is no express rule prohibiting such provision or when this *mortis causa* condition is foreign to the legal nature of this type of legal act.

## 2. LEGAL ACT OF DISPOSITION *MORTIS CAUSA* IN THE REPUBLIC OF MOLDOVA

*Prima facie*, the modification of the concept of the will and of the forms permitted by law in which this legal act may be concluded did not introduce any changes of concept in the part relating to the instruments given to a person to dispose of the cause of death. At the same time, no special regulations (of legal qualification) were introduced in other norms, which would expressly allow the drawing up of legal acts of disposition with conditional effects from the moment of the death of the disposer.

At the same time, a system analysis presented below allows us to reach some unexpected results and, possibly, which were not even promoted by the legislator, considering that they were not described in the informative note to the draft Law of the Republic of Moldova no. 133/2018 (Parliament of RM, 2018).

### 2.1 Condition *mortis causa* affecting the effectiveness of the civil legal act

Starting with 01.03.2019, in the Republic of Moldova was introduced the institution of effectiveness of the legal act, which encompassed legal acts affected by modalities (condition, term), as well as a part of legal acts that were previously null. Although no legal definition of an effective legal act has been introduced, art. 357 para. (1) of the CC RM we find a specification, which allows us to identify the ineffective legal act, namely: *if, according to the law, the legal act, without being null or voidable, does not produce, in whole or in part, its legal effects, it is, in this part, ineffective.*

We will not outline all the cases when this institution intervenes, especially since the law is also contradictory in some places, only the qualification of the

will as an ineffective legal act, the effectiveness of which occurs with the death of the testator, deserves special attention. Death is treated differently in legal literature. Thus, some scholars consider that death belongs to the category of suspensive conditions, while others assign death to the category of terms, because it is known with certainty that man does not live forever, i.e. it is certain that he will die, although it is not known when (the uncertain nature of the realization is not enough to be considered a condition). After all, both in one hypothesis (as a suspensive condition) and in the other hypothesis (suspensive term) we are in the presence of an ineffective act (until the ground of ineffectiveness - the testator's life) is removed.

The effectiveness of legal acts *mortis causa* originates from an assumed presumption that the testator's consent exposed during his lifetime will remain the same after his death (Dojdev, 2000, p. 167). Consequently, the will is a validly concluded legal act (the requirements as to its form and other conditions for its validity will be verified on the day of its preparation), although its legal effects will be operative upon the death of the testator. In the opinion of József Kocsis, considering that it does not produce legal effects until the death of the author of the will, the will is to be regarded as a completed fact, not existing as an act (Vasilescu, 2016, p. 80).

According to Negrilă D. (2013, pp. 40-41), the *mortis causa* character of the will does not allow the testator to condition the person's call to testamentary inheritance to the performance of certain actions until the testator's death and in his favor. This situation is described by the author as an agreement relating to an inheritance not yet opened, in which one party promises to transfer his rights (by cause of death) in exchange for a consideration, which the legatee is to realize during the testator's lifetime. Taking into account the fact that since March 1, 2019 in Moldova it is allowed to draw up conditional wills, I consider that there is no impediment to include a similar condition in the content of the will. Taking into consideration the revocable and unilateral nature of the will, to provide more guarantees for the beneficiary-successor it would be more appropriate to use the form of a contract.

### 2.2 Conditional property (under condition of *mortis causa*)

Another new legal institution implemented since March 01, 2019 is conditional property or the conditional right of the acquirer (not only the acquisition of property rights can be made conditional, but also any other right).

On the one hand, art. 512 CC RM only tells us about suspensive conditions that may affect the acquisition of property rights. On the other hand, where the right is subject to registration in a public register, article 443 of the RM CC regulates the manner of cancellation of a right acquired under both suspensive and resolutive conditions. The possibility of making a right subject to a suspensive or resolutory condition is also supported by the provisions of article

432 of the RM CC, which, *inter alia*, states that the acquisition of a right subject to a suspensive or resolutory condition is subject to provisional registration.

In specialized literature, conditional property is described as a way of private property right, which consists in the exercise of the attributes of this right by two persons, simultaneously and, at the same time, differentiated (Stoica, 2017, p. 273). In the given case, each of these persons has a right: for one of them this right is a legal reality, which is not a complete one; and for the other - it is a virtuality, which can become a legal reality in certain circumstances (and not a mere unfounded hope). After all, being the holder of the right, each of these persons may conclude legal acts in respect of the right held, which will preserve its legal nature. In this case, the rules of an ineffective legal act are applied, based on the principle nominalized in art. 358 para. (1) CC RM*: No one may transfer or constitute more rights than he has himself*. (Latin - *nemo plus iuris ad allium transfere potest, quam ipse habet*). Even art. 433 CC RM regulates the manner of registration of such deeds, concluded by any of the registered holders. Conditional property can be resolvable (under suspensive or resolutory condition) or cancelable (affected by a ground of relative nullity) (Stoica, 2017, pp. 273-276; Jora, 2019p, p. 167-173).

It does not matter which of the holders of the right concludes the legal act, because he passes on the right as he holds it. For this reason, the subject-matter of this legal act will be an uncertain right and dependent on the same affectation, and the dissolution of the right of the holder will dissolve all legal acts concluded by him subsequently. An example regulated in detail is the sale-purchase with reservation of ownership (art. art. 1191-1194 CC RM) - a legal construction, where the contract itself is an effective legal act (because it produces legal effects from the moment of conclusion) and only the moment of acquisition of the property right is conditional on the full payment of the price, in other words, there is a time difference between the moment of handing over the property and the moment of acquiring the property right over this property (Lanina, 2014, pp. 55-74).

If we attribute death to a condition, and a will to a legal act placed under that condition, we observe that the heir or legatee designated by the will acquires a right conditioned by the fact of the testator's death. Applying the provisions on conditional property, we may conclude that the heir or legatee may in fact dispose of the right to which he is entitled under the will. *De jure*, art. 1006 CC RM (Pistriuga, 2016, pp. 45-46) strikes with absolute nullity any contract regarding the inheritance of a living person, except for the one, concluded between the future legal heirs on the legal share-share. As a result, neither the testamentary heir nor the legatee may conclude legal acts the subject matter of which is an unopened inheritance.

The RM CC does not attribute to the will the character of a single act that can be concluded under *mortis causa*. Therefore, we do not identify any legal

prohibition to a legal construction, which, based on the principle of freedom of contract and the general rules on conditional legal acts, will not be able to condition the acquisition/loss of a right on condition of the death of the transferor or another person. Of course, only the rules specific to a named contract (an expressly regulated legal construction) can limit the inclusion of such a condition. The right of ownership, being a type of subjective right, may also be subject to a suspensive or resolutory condition linked to the death of the disposing party in any legal act of disposition.

### 2.3 Approach to transmission of *mortis causa*

Traditionally, from a property law perspective, a property right can be acquired and can be lost. At the same time, from the perspective of the law of obligations, a right in rem is transferred from one person to another person.

Without going into details, we can distinguish 2 situations:

a) the right arising for the acquirer previously belonged to another person (the alienor) and passes upon the occurrence of the condition; and

b) the acquisition of the right in the acquirer is not subject to any condition, but the exercise of the attributes is limited by the existence of rights in the alienor, which cease upon the death of the alienor.

This approach, together with the principle of freedom of contract, allows us to use legal constructions that establish a person's right to both a legal act that transfers rights and a legal act that is based on the loss/termination of a right.

In this case, the will is a legal act through which the successor's right to accept the inheritance arises, subject to the testator's death, and the above-mentioned processes are based on situation a). Now, upon the death of the alien (testator), on the basis of his disposition (one consent) together with the acceptance of the inheritance by the successor (second consent) in connection with the occurrence of the condition that makes the will effective (the testator's death), the transfer of the testator's rights and obligations (the estate) to his heirs takes place, on the date of the opening of the inheritance.

At the same time, the right of ownership may be acquired not only at the time of the conclusion of the legal act, but also at a future time - upon fulfillment of a condition, the expiry of a term, etc. In this case, we can see that the legal construction is basically allowed, according to which the right of the acquirer arises during the lifetime of the alienator, and the alienator reserves a conditional right, which ceases upon the death of the latter and does not pass through inheritance. As a consequence, in this case we are not dealing with a traditional legal act mortis causa (giving rise to a right), since it is not dependent on the time of the alienator's death - and the legal act itself is effective from the outset; but in the presence of a right dependent on the time of the death of the transferor - thus, those restrictions which condition the acquirer's right of ownership cease

with the death of the transferor (death in this case leads to the loss of a personal right by the transferor, which excludes that right from the estate).

*Prima facie,* any possible legal construction used for the purpose of overcoming the mandatory legal provisions concerning wills can be characterized as an abuse of rights or a legal act in breach of morality or public order. However, the introduction of the trust into the national legal framework allows it to be used in the manner described – or, the property right of the trust founder over the transferred asset can be terminated on the date of his death, and the beneficiary of the trust may acquire this right on the occurrence of the condition (death of the trust founder). At the same time, the institution of the revocable donation in the case of the donee's death was expressly introduced (in more detail - *infra)*.

Respectively, if we have at least these two examples that allow this legal construction, we can say that other legal constructions can also use similar mechanisms of transmission (loss to the alienator of the right of ownership during life with reservation of another right and certain acquisition [justification of the condition] to the acquirer of the right of ownership upon death, when the right reserved by the alienator ceases) of the right to a property, if the law does not expressly prohibit this legal act.

### 2.4 Legal acts of disposition having the effect of loss of the right to the property (patrimony) and its acquisition by another person

In support of the above approach, we note that a legal act may be concluded subject to a condition and/or a right may be placed subject to a condition. Thus, if the legal act is subject to a condition, then it does not produce legal effects (it is ineffective), and the occurrence of this condition will give rise to a legal relationship between the parties. At the same time, if only a right is conditional and the legal act is effective, then the legal relationship already exists but is awaiting the occurrence of this condition to resolve the uncertainty as to the existence of the right. The condition "occurrence of death" may affect both a legal act and a right. This condition may be both suspensive and resolutive. This condition affects a legal act, e.g. in the case of a will - it gives rise to the right of the persons named in the will to claim the execution of the will (by accepting its effects). At the same time, this condition may also affect a property right. E.g., in the case of a contract of alienation of property subject to the condition of lifetime maintenance, the death of the beneficiary of the maintenance ceases to prohibit and encumber the property.

Without going into details on the legal institutions existing in the legislation of the Republic of Moldova, as well as without claiming the exhaustiveness of these institutions, we can point out that, in connection with the modification of the concept of some related legal institutions (ineffective legal act, conditional property, etc.), the approach to their legal nature requires a revision.

Within the annuity contract (art. 1222 CC RM) for life annuity for valuable consideration, including the contract of alienation of the property with the condition of lifetime maintenance, we note the following. These contracts are unconditional legal acts, since they give rise to rights and obligations from the moment of conclusion. However, the lender and the beneficiary of maintenance are limited (art. 1227 CC RM and art. 1217 CC RM, respectively) in the full exercise of the property right under the condition of the death of the lender (the law allows another condition – art. 1223 CC RM) or the beneficiary of maintenance. Therefore, we note that the condition "*mortis causa*" exists in these contracts, but these contracts are not attributed to the category of testamentary dispositions (although they affect the composition of the person's estate after his death).

The law contains an express prohibition in the contract of donation (art. 1198 CC RM), stating clearly that *the contract which provides for the handing over of the property after the death of the donor is null and void*. *About the will expressed by the donor, the legal provisions on wills apply*. At the same time, we note that the law allows for the separate contractual regulation of the relationship between the handing over of property and the handing over of a right in that property. According to art. 511 para. (1) CC RM, *handing over of the property means the delivery of the property to the acquirer, as well as to the carrier or post office for shipment, if it is alienated without the obligation to be transported*; and according to art. 510 para. (1) CC RM, *the right of ownership is transferred to the acquirer at the time of delivery of the movable property unless otherwise provided by law or contract*. From these provisions we can deduce the following possible types of donations:

- where the death of the alienator is a suspensive condition (Copîlov, 2019, pp. 45-49) – when the handing over of the property to the donee is made at the time of the conclusion of the contract or during the lifetime of the donor, but the ownership of the property passes to the donee upon the death of the donor. In this case, the regulations on conditional property (Art. 513 CC RM) can be applied, according to which the donee will hold a property right under the suspensive condition – the death of the donor. In Roman private law, *donatio mortis causa* has been used in cases when the donor is in a life-threatening condition, expecting death within a short period of time. Respectively, if the death did not occur within a short period, the donor retained the right to revoke the donated property, since the logic of such a donation was to appoint the donee as heir/ legatee and not to pass the property to him during his lifetime (Dojdev, 2000, p. 681);
- where the death of the alienor is a resolutory condition (Copîlov, 2019, pp. 39-45) –- is expressly permitted by art. 1207 para. (2) CC RM: *In particular, the contract may provide for the right of revocation, either where the donee would predecease the donor, or where both the donee and his descendants*

*would predecease the donor*. In other words, the death of the donee will dissolve the legal relationship of donation.

In the matrimonial contract (art. 27 of the Family Code of the Republic of Moldova) the parties may stipulate the clauses that will regulate the property relations both during their marriage and in the event of its dissolution. Of course, the death of one of the parties does not lead to the dissolution of the marriage, but to its termination, which does not fall within the legal definition. However, under article 29 para. (4) of the Family Code of the RM (Parliament RM, 2000), the spouses are entitled to stipulate in the matrimonial contract the property to be transferred to each of the spouses in the event of partition. The same article allows the rights and obligations of the spouses to be made dependent on a certain condition. Partition may take place either during the lifetime of the parties (during or outside the marriage), or after the death of one or both parties, being prior to the partition of the estate (art. 2498 para. (7) of the CC RM). Therefore, the contractual clause, which would result in the acquisition of a right upon the death of the other contracting party, in other words, the introduction of property subject to the suspensive condition of the death of the other spouse, is not expressly prohibited. Being a conclusion, which radically changes the conceptual view, in the specialized literature we find the approach prior to the implementation of the Law no. 133/2018 (Parliament RM, 2018), which considers null and void any condition that links the acquisition of the right to a property to the death of one of the spouses, any provision for the case of death is null and void (Cebotari, 2021, p. 157). However, no legal norm, which would support this position is not brought.

Since March 1, 2019, the institution of trust has been regulated in a particular and very detailed manner. From the outset, the legislator has tried to avoid the possibility of setting up a trust for an unlimited term, a maximum term of 30 years (with some exceptions), which can be extended by the parties. At the same time, there are 2 distinct situations:

a) trust created upon the death of the trust founder. In this case, we are in the presence of a legal act *mortis causa*, which is ineffective being affected by the suspensive condition. This provision of the trust founder will be valid only if it has been included in a testamentary disposition (art. 2077 para. (1) CC RM);

b) a trust created during the lifetime of the trust founder, but the beneficiary acquires the right upon the founder's death. In this case, the trust deed itself is valid and effective from the moment of its conclusion, and the moment of acquisition of the property right of the beneficiary of the trust is dependent on the death of the settlor (alienator). We expressly note this possibility in art. 2085 lit. d) of the CC RM. In this case the rules on wills do not apply.

Summing up all these examples, we deduce that the Moldovan legislation distinguishes between a civil legal act under condition *mortis causa* of the

alienator and an effective legal act containing a right to be acquired/losst upon the occurrence of the condition, among which the alienator's death may be stipulated. Finally, we note the absence of a regulated delimitation of the situation when the institution of inheritance must be applied from the situation when the rules of inheritance law do not apply to these relationships, the provisions governing contractual obligations being sufficient.

### 2.5 Society's appreciation of the role of wills. Alternatives used in practice and inherent risks

From the perspective of history, we note that at the time of the appearance of the will as a form of expressing the will to dispose of one's property upon death, this act was a symbol of the author's maturity, which emphasized a high level of responsibility towards one's own estate (implicitly demonstrating that the person owns the property), towards one's own family and towards the state.

Heritage has become an indispensable part of national culture. Each state has preserved this traditional culture – which is also reflected in the acts of the European Union. For instance, according to point (20) of the Preamble to Regulation (EU) No 650/2012 (EU, 2012), the *different systems of approach to succession applied in the Member States are to be respected*.

During the Soviet period, the state paid special attention to inheritance, although there were many restrictions on property ownership. At the same time, the classes of legal heirs were determined based on promoted traditions. Both these premises were the grounds for exceptional cases of making wills, and the very fact of drawing up this act is a sign of the occurrence of problems in the testator's family. Consequently, making a will in the Soviet period was not widespread. The situation did not change suddenly with independence, as the culture remained unchanged, and morals retained the same values about property, family, economy and finances. For most citizens, the distribution of inheritance among relatives according to the rules of legal inheritance remained a correct view (in accordance with their will).

Even today, during succession proceedings, most heirs relate the reason for not making a will to either the fact that they died suddenly and failed (i.e., irresponsibility regarding the legal fate of the estate or agreement with the distribution among heirs according to the classes of legal heirs) or that they want everything to be according to the law. Ordinarily, anything that does not comply with the law is regarded as a violation. Consequently, if there is legal heirship, then any action against the application of legal heirship can be construed as a desire to violate the law. However, the purpose pursued by the legislator was to provide an alternative to legal inheritance – the freedom of the person to plan how to distribute the estate remaining after his death in a unipersonal manner. In other words, the antipode to legal inheritance is testamentary inheritance, which is also perfectly in accordance with the law. The level of legal culture does not

always allow for a correct awareness of these issues, which makes it difficult to plan an inheritance by drawing up a will or other legal documents.

The clarity of the testators will as expressed in the will is based on the legal culture of the person who drafted the will and, where appropriate, on the advice of the notary who authenticated the will. The problem with wills drawn up without the assistance of a notary lies in identifying the clear will of the testator. One mechanism for identifying the testator's will is the interpretation of the will (since the will comes into force after the testator's death - it is impossible to appeal to the testator to clarify this will). The rules of interpretation can be found in the law, in the CC RM.

A small foray into the provisions of the CC RM reveals that since 01.03.2019 the concept of inheritance has been substantially changed. This has affected both the classes of legal heirs (which already no longer correspond to the national traditions, the concept being taken over from the German legislation) and the devolution of inheritance. As regards devolution, the German concept implemented in the Republic of Moldova is based on the presumption of acceptance of the inheritance by any heir who has not renounced the inheritance within 3 months. Here it should be noted that, according to the data of the National Bureau of Statistics, the level of migration from the Republic of Moldova is constantly increasing, most citizens of which leave for work. Drawing up a act of renunciation of inheritance abroad involves expenditure of time and money, which does not offer any advantages in return. Previously, the obligation to prepare the declaration was put on the persons who wished to accept inheritance, and the concept of non-acceptance of inheritance was applied to persons who did not accept inheritance within 6 months. Finally, given the large number of people who have gone abroad and the fact that it costs money and time to draw up the act, heirs from abroad are reluctant to renounce their inheritance within the deadline, which generates the obligation of the notary to apply the procedure of restoration or setting a new deadline for renouncing the inheritance, or to apply the legal presumption of implicit acceptance of the inheritance. At the same time, in the event of renunciation of the inheritance, the representative of the succession (except for the spouse) applies. In this way, the share of the inheritance does not go to the other heirs called to inherit but calls to inherit the descendants of the successor to the will. In this way, the costs of legalizing inheritance rights increase. The other route - accepting the inheritance and disposing of the share of the estate - also generates additional costs. And if the alienation goes beyond first-degree relatives (parents-children), there is also the obligation to pay tax - an additional expense for the heir alienator plus the obligation to file a tax return.

A solution in this situation would have been the will, but the way the inheritance reserve is regulated does not allow the full use of the will. According to art. 2530 para. (2) from the CC RM, reserved heirs are the legal heirs of the

first class, the parents of the deceased, as well as the surviving spouse if, on the date of the opening of the inheritance, the deceased had a direct maintenance obligation towards the respective heir according to the Family Code. Under these conditions, objectively identifying by the notary whether the person has the capacity of a reserver or not - is not possible and requires a common understanding of the heir and some potential reservers.

Notarial inheritance procedures conducted by the author in the period 2019-2024 (approx. 800 files) demonstrated the sudden increase in the society's expenses (as a result of drawing up additional documents required by law), as well as the delay of these procedures (in case the heirs are abroad and do not want to draw up the necessary documents or their place is unknown, which makes it impossible to issue the certificate of heirship due to the impossibility to establish the circle of heirs). Obviously, this has led to dissatisfaction and the search for alternative succession procedures.

Both types of contracts result in the person losing ownership of the property while still alive, which causes subsequent risks in relations between the contracting parties. The situation worsens if the acquirer dies before the alienator, in which case the legal relationship may arise not between relatives, but with third persons or kin. The greatest risk here is the simplified impossibility of revocation of this contract (which exists in the case of wills), which is possible only in certain cases in the case of donation (inter alia, the donation contract may also provide for the donor's right to revoke the donation in the event of the predecease of the donee) and is not possible in the case of a contract for the alienation of property subject to lifetime maintenance. As a result of these contracts, the person loses the right of ownership, cannot freely dispose of the property and, at the same time, loses several social rights that the state grants to socially vulnerable persons who own a home (to compensate for payments for communal services, etc.).

In conclusion, in the author's notarial practice today, there is a noticeable increase in the number of cases of concluding a donation contract with reservation of the right of inhabitation and, less frequently, of contracts of alienation of property subject to the condition of lifetime maintenance to avoid inheritance. If the state will not intervene in this development of facts, then society, represented by everyone, will continue the gradual replacement of the way of disposing of the wealth owned after his death, avoiding the inheritance route.

## 3. LEGAL INSTITUTIONS REQUIRED BY SOCIETY BUT NOT IMPLEMENTED IN THE REPUBLIC OF MOLDOVA

Traditionally, wills are regarded as the only legal means of transmitting property, including the patrimonial rights that make it up, by reason of death.

Other legal instruments known in different countries have not been expressly permitted in the Republic of Moldova.

An attempt to bring to the attention of the legislator such expectations have been made earlier (Semionova and Pistriuga, 2016, pp. 59-62), as well as the first problems identified in the part of the new regulations in the field of inheritance at the draft stage (Pistriuga, 2016, pp. 44-47), and after implementation (Pistriuga, 2020, pp. 536-545).

### 3.1 Joint will (common)

In Moldova (Art. 2192 para. (2) of CC RM provides: *Two or more persons may not testate by the same will, one in favor of the other or in favor of a third party)*, similarly as in Romania (art. 1036 of the Romanian CC stipulates*: under penalty of absolute nullity of the will, two or more persons may not dispose, by the same will, one in favor of the other or in favor of a third party)* inspired by French law, joint wills, including joint (reciprocal) ones, are prohibited. In Regulation no. 650/2012 (EU, 2012) *joint will mean a will drawn up in one instrument by two or more persons* (art. 3).

The purpose of such a prohibition is to preserve both the good faith and the revocability of the will. Thus, for example, if one of the testators should die, what happens to the last will expressed by the second testator? If the law allows it to be revoked - then the principle of good faith has been violated, because the other testator has formulated this will with the surviving testator's will in mind. If revocation is prohibited – the nature of the will is changed, and it will no longer be a last will. However, in some countries (e.g., Germany, Norway) the law allows in a restricted way (between spouses) the right to make joint wills. The problem described is solved as follows: if the surviving testator revokes his testamentary disposition after the death of the first testator, then the whole will is canceled (considered revoked), including that the heir's certificates are annulled. The making of two separate wills does not contain this connection, and the introduction of a condition in the will – related to its validity in case another will made by the heir will remain in force – contradicts the legal nature of the will and is not possible.

Statistics show that, in Germany, out of the total number of legal acts for the cause of death, 5% are inheritance contracts and 57% are joint wills, which confirms that citizens prefer these forms of legal acts, considering them convenient, practical and effective (Gongalo *et al*, 2015, p. 61).

Traditionally, in the Republic of Moldova, children wait for both parents to die, after which they share the remaining inheritance. Quite often, if succession proceedings are opened after the death of one spouse (parent), all children renounce their inheritance (applies until 28.02.2019) or donate their shares of the estate to the second spouse (parent) (starting from 01.03.2019). In these circumstances, even if there was an agreement between the parents while they

were alive, after the death of the first parent, the second parent is entitled not to follow this agreement (which only gave rise to a natural obligation) and is entitled to revoke the will drawn up according to this agreement and to draw up another will.

As the legal framework in the field of inheritance has been largely taken over from German law, the introduction of this institution could provide a solution to these requests and additional guarantees for testators and heirs.

### 3.2 The agreement as to succession

In Regulation 650/2012 (EU, 2012), agreement as to succession is referred to as ”agreement as to succession” *means an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement*.

At present, neither the laws of the Republic of Moldova nor those of Romania contain any express provision that would allow the right to inherit based on a contract. While in Romania this question is clearly settled by the provisions of Article 962 of the Civil Code, which recognizes two calls to inheritance: law and will, in Moldova there is no express rule in this respect. However, Article 1005 of the RM CC declares null and void *a contract by which a party undertakes to transfer his future estate or a part of that estate or to encumber it with usufruct*, which prohibits the conclusion of an agreement as to succession with a traditional object (the estate or a fraction thereof). In contrast to joint wills, more countries have introduced agreement as to succession. These are known under the laws of Austria, Germany, Hungary, Latvia, Switzerland, Austria, Hungary, Latvia.

The Civil Code of Ukraine (Verkhovna Rada of Ukraine, 2003) contains the regulation of the agreement as to succession, defined in Art. 1302 (*agreement as to succession- an agreement, according to which one party (acquirer) assumes the obligation to fulfill the provisions of the second party (the alienor) and, in case of the alienor's death, acquires the right of ownership of the alienor's property*), which goes beyond the traditional subject of the agreement as to succession and more closely resembles an annuity contract, with one difference - the transfer of ownership occurs not at the conclusion of the agreement (*inter vivos*), but at the time of death (*mortis causa*).

This type of contract was introduced into the Civil Code of the Russian Federation in 2018 (State Duma of Russian Federation, 1994). According to its Article 1140.1, *the agreement as to succession is that contract, the terms of which determine the circle of heirs and the manner of transmission of the right to the estate of the person who has left the inheritance after his death to the parties to the contract who survived him or to third persons who survived him, who may be called to the inheritance*.

Even if the Moldovan legislation allows the conclusion of property transfer contracts with special guarantees for the transferor (such as annuity, alienation of the property subject to lifetime maintenance, etc.), or allows the conclusion of other contracts with reservation of limited in rem rights (such as donation with reservation of the right of inhabitation or the right of usufruct), the property right in these cases is still transferred inter vivos, although the real wish of the transferor is usually to lose the property right upon death. Notwithstanding the notary's detailed explanations, sometimes the disposing party is left with the perception of reservation of ownership on the grounds that he retains the right to use the property disposed of until death.

## 4. CONCLUSIONS

Summing up the problems stated in this paper, without repeating them, we can certainly state that the experiment in Moldova with chaotic taking over of legal norms from different countries, without having a certain idea of a legal system to be built, even in a separate branch, does not bring benefits, but creates uncertainty in the field of realization of rights and their stable civil circulation.

Essentially, at the conceptual level, in the case of a right arising from a legal act *mortis causa*, the cases in which the institution of inheritance is to intervene and the cases in which the rules governing the contract are to be applied must be precisely stipulated, so that the subject-matter of this legal act is excluded from the estate. In the absence of a register, is it not clear how the publicity of *a mortis causa* disposition provided for in a contract will be ensured? Notaries can therefore record in the register of succession files and wills provisions made in contracts of donation and other contracts, if they identify provisions which may affect the devolution of the estate.

Unintentionally and without special attention in the informative note to the CC of the RM, including publicly declared, the regulation of other legal institutions has also affected the possibility of *mortis causa* contractual conclusion. This makes it necessary to review the concept of inheritance in the current Moldovan legislation.

### References

1) Ataev, U. (2013). *Uslovnîe zaveshchania i ih nedopustimosti v rossiiskom nasledstvennom prave.* [online] Available at: https://www.gramota.net/materials/3/2013/4-2/3.html [Accessed 20.05.2024].
2) Cebotari, V. (2021). *Regimuri matrimoniale: Note de curs*. Chisinau: CEP USM.
3) Copîlov, A. (2019). *Darenie na sluchai smerti: grajdansko-pravovoe issledovanie*. Moscow: Statut.
4) Dojdev, V. (2000). *Rimskoe chastnoe pravo*, 2nd ed. Moscow: publishing house NORMA (publishing group NORMA-INFRA·M).
5) EU (2012). *Regulation (EU) No 650/2012 of the European Parliament and of the*

*Council of 4 July 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*. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0650 [Accessed 20.05.2024].

6) Gongalo, Iu., Mihalev, C., Petrov, E. and Putintseva, E. (2015). *Osnovî nasledstvennogo prava Rossii, Ghermanii, Franții.* Moscow: Statut.
7) Ionaș, D.-G. (2020). *Legatul - principala dispoziție cuprinsă în testament.* Bucharest: the legal Universe.
8) Jora, C. (2019). *Drept civil - Drepturile reale.* Bucharest: the legal Universe.
9) Lanina, O. (2014). *Ogovorka o sohranenii prava sobstvennosti v dogovornîh obeazatelistvah*. Moscow: Statut.
10) Levushkin, A. (2018). *Zaveshchanie v notarialinoi praktike*. Moscow: Infotropic Media.
11) Mihailova, I. (2016). *"Uslovnîe" zaveshchania: istoria i sovremennosti.* [online] Available at: https://cyberleninka.ru/article/n/uslovnye-zaveschaniya-istoriya-i-sovremennost/viewer [Accessed 20.05.2024].
12) Mitrofanova, I. (2019). *Uslovnoe zaveshchanie kak vid sdelki, sovershonnoi pod usloviem*. [online] Available at: https://cyberleninka.ru/article/n/uslovnoe-zaveschanie-kak-vid-sdelki-sovershennoy-pod-usloviem/viewer [Accessed 20.05.2024].
13) Negrilă, D. (2013). *Testamentul în noul Cod civil: studii teoretice și practice.* Bucharest: the legal Universe.
14) Parliament of R.S.S. Moldova (1964). Civil Code of December 26, 1964 (*abrogated*). [online] Available at: https://weblex.md/item/view/iddbtype/1/id/54114cae942662e7fde55aecf6c20cbd [Accessed 20.06.2024].
15) Parliament of RM (2000). Family Code no. 1316 din 26.10.2000 (entered into force at April 26, 2001). [online] Available at: https://weblex.md/item/view/iddbtype/1/id/e636f8e98689893d550f82aa5f25bc72 [Accessed 20.06.2024].
16) Parliament of RM (2002). Civil Code of RM no. 1107 of June 06, 2002. [online] Available at: https://weblex.md/item/view/iddbtype/1/id/5479a0609dbc5661908e5a2d6841538e [Accessed 20.06.2024].
17) Parliament of RM (2018). *Law no. 133 of November 15, 2018 privind modernizarea Codului civil şi modificarea unor acte legislative.* [online] Available at: https://weblex.md/item/view/iddbtype/1/id/a40784450865b24e19560e3a569cefb4 [Accessed 20.06.2024].
18) Parliament of Romania (2009). Civil Code of Romanian no. 287 of July 17, 2009. [online] Available at: https://portal.just.ro/300/ SiteAssets/SitePages/bine/Codul%20Civil%202009(r1).pdf [Accessed 20.06.2024].
19) Pistriuga, V. (2016). *Reformarea instituției moștenirii din Codul civil al Republicii Moldova: intenții pozitive cu efect contrar.* [online] Available at: https://ibn.idsi.md/ro/vizualizare_articol/75976 [Accessed 20.06.2024].
20) Pistriuga, V. (2020). *Procedura de autentificare a testamentului: între tradiție și modernizare.* [online] Available at: https://ibn.idsi.md/ro/vizualizare_articol/119593 [Accessed 20.06.2024].

21) Semionova, R. and Pistriuga, V. (2016). *Aşteptările societăţii privind reformarea dreptului succesoral.* [online] Available at: https://ibn.idsi.md/ro/vizualizare_articol/75983 [Accessed 20.06.2024].
22) State Duma of Russian Federation (1994). *Civil Code of Russian Federation no. 51 of November 30, 1994.* [online] Available at: https://www.consultant.ru/document/cons_doc_LAW_5142/ [Accessed 20.06.2024].
23) Stoica, V. (2017). *Drept civil: drepturile reale principale.* Bucharest: C. H. Beck Publishing House.
24) Vasilescu, P. (2016). *Drept civil-succesiuni.* Bucharest: Hamangiu Publishing House.
25) Verkhovna Rada of Ukraine (2003). *Civil Code of Ukraine no. 435 of January 16, 2003.* [online] Available at: https://kodeksy.com.ua/tsivil_nij_kodeks_ukraini.htm [Accessed 20.06.2024].