

# REGULATIONS ON THE OCCUPATIONAL RIGHT OF THE SURVIVING SPOUSE IN THE NEW ROMANIAN CIVIL CODE

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## Abstract

*The surviving spouse, who does not have another place to live, shall have, until the termination of joint possession and for at least one year since the decease of the spouse. He/she used to be eligible for this right since the day of partition, regardless of the heirs/successors he/she had to compete with, provided the surviving spouse did not have a place of his own to live. As a consequence, the surviving spouse must accept the inheritance of de cuius; should he/she give it up, he/she loses his/her capacity of legal successor and, implicitly, the right of occupation.*

Key Words: *inheritance, surviving spouse, right of occupation, capacity of legal successor.*

## 1. Concept.

The right of occupation of the surviving spouse was initially regulated under Article 4 of Act 319/1944<sup>1</sup>. In compliance with this law, "the surviving spouse, who does not have another place to live, shall have, until the termination of joint possession and for at least one year since the decease of the spouse, not only the right to inherit according to the above provisions, but also the right to occupy the property in which he/she has lived, provided the property is part of the succession".

The surviving spouse used to be eligible for this right since the day of partition, regardless of the heirs/successors he/she had to compete with, provided the surviving spouse did not have a place of his own to live<sup>2</sup>. This was a *real right* upon another person's asset, allowing him/her to exclusively use as his own that property, and not just a mere right to claim (habitation)<sup>3</sup>. The surviving spouse was unable to transfer or let to somebody else the property which was the object to his/her right of occupation.

These previous regulations on the right of occupation of the surviving spouse were deemed to be unsuitable as they were contradictory<sup>4</sup> and failed to ensure the best

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<sup>1</sup> Act 319/1944 on the right of occupation of the surviving spouse, published in the Official Gazette no. 133 / 10.06.1944.

<sup>2</sup> See F. Deak, *Treaty on the law of succession, 2<sup>nd</sup> edition updated and completed*, Universul Juridic Publishing House, Bucharest, 2002, pp. 136.

<sup>3</sup> See D. Chirică, *Civil law. Successions and wills*, Rosetti Publishing House, Bucharest, 2003, pp. 104; also see M. Mureșan, I. Urs, *Civil law. Successions*, Cordial Lex Publishing House, Cluj-Napoca, 2006, p. 36-37.

<sup>4</sup> In this regard, see Trib. jud. Satu Mare, no. 249/1968 of December, Note by C. Bîrsan, in R.R.D. No. 9/1969, pp. 133-137. The question whether the right of occupation of the surviving spouse

protection for the surviving spouse.

When the new Civil Code came into force, Act 319/194 on the right to inherit of the surviving spouse was repealed in its entirety, still the right of occupation was preserved, with some necessary modifications meant to eliminate the previous contradictions and, at the same time, to ensure the surviving spouse shall be adequately protected. Consequently, within the meaning of Article 973 (1) of the Civil Code, "*the surviving spouse, who does not hold any other real right to use another property appropriate to his/her needs, is entitled to occupy the property in which he/she has lived until the date of partition, provided this property is part of the succession*".

Just like according to the previous regulation, the right of occupation of the surviving spouse comes into being on the day of partition and is his/her legal right, regardless of the group of successors he/she must compete with. It is a *right of succession* because, even though it is legally applicable in the person of the surviving spouse on the day of partition, the law assigns it to him/her in his/her *capacity of legal successor*<sup>5</sup>. As a consequence, the surviving spouse must accept the inheritance of *de cujus*; should he/she give it up, he/she loses his/her capacity of legal successor and, implicitly, the right of occupation.

## 2. Requirements on the right of occupation.

The surviving spouse has the right of occupation independently and above the legal succession quota established under Article 972 (1) of the Civil code, under the following conditions:

- a) *it is a must that the surviving spouse has been living in the house or flat in question on the day of partition*; in the legal literature, authors agree that, according to this requirement, the surviving spouse should have lived in that house (flat) *permanently*, (he/she had his address there)<sup>6</sup>; it is not compulsory that the surviving spouse lived (co-lived) with the deceased in that property, on the day of partition<sup>7</sup>;
- b) *the surviving spouse does not hold any other real right* (for instance, property, usufruct, occupation right etc.) *to use another property appropriate to his/her needs*; consequently, should the surviving spouse be the holder of a real right to use an adequate property, then he is denied the right of occupation; nevertheless, should the surviving spouse have a right to use another property, for instance he/she uses it under

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was or not free of charge was very controversial at the time; some authors claim that the surviving spouse is liable to pay the other successors, at their request (D. Chirică, *Civil law. Successions and wills, op. cit.*, p. 106).

<sup>5</sup> See C. Macovei, M. C. Dobrilă, *The new Civil Code. Comments on articles. Article 1-2664*, C. H. Beck Publishing House, Bucharest, 2012, p. 1026.

<sup>6</sup> See F. Deak, R. Popescu, *Treaty on the law of succession, Vol. 1. Legal succession, 3<sup>rd</sup> edition updated and completed*, Universul Juridic Publishing House, Bucharest, p. 270 ; D. Chirică, *Civil law treaty. Successions and liberties*, Ed. C. H. Beck, Bucharest, 2014, p. 72; Al. Bacaci, Ghe. Comăniță, *Civil law. Successions*, Universul Juridic Publishing House, Bucharest, 2013, p. 65; D. C. Florescu, *Succession law in the new Civil Code, 2<sup>nd</sup> edition revised and added*, Universul Juridic Publishing House, Bucharest, pp. 46-47; I. Genoiu, *The right to inherit in the new Civil Code*, Ed. C. H. Beck, Bucharest, 2012, p. 88.

<sup>7</sup> See M. Eliescu, *Succession and transfer in the law of the SRR, the Publishing House of the Academy*, Bucharest, 1966, p. 142.

a contract of habitation or under a rental contract, then he/she is the beneficiary of the right of occupation, within the meaning of Article 973 (1) of the Civil Code<sup>8</sup>; furthermore, even though, let's say, the surviving spouse would be the holder of a real right to use another property, he/she shall not be deprived of the right of occupation if that property is not adequate for his/her needs<sup>9</sup>; the term "appropriate/adequate property" must be considered in practice, according to such elements: surface, area, exposure, age, the profession and health of the surviving spouse; however, as shown in the specialized literature, it is vital that the decease of *de cuius* should not bring about a radical change in the living conditions of the surviving spouse<sup>10</sup>

c) *the property must be an asset in the succession – in its entirety or in part – being the exclusive property of the deceased, the joint property of the deceased with the surviving spouse or the joint property of the deceased with other individuals*<sup>11</sup>; should there be a joint property divided into different parts, the occupational right only covers the property share which belonged to the deceased, and not the share belonging to the surviving spouse, neither to somebody else<sup>12</sup>;

d) *the surviving spouse must not become, by succession, the exclusive owner of the entire property* (for instance, as sole heir)<sup>13</sup>; in such a case, the surviving spouse cannot be the holder of the occupational right, because an owner cannot simultaneously have a sub-branch of the property right upon an asset belonging to him/her; if the surviving spouse is only co-successor together with other persons, the right of occupation will allow him/her to use the property according to his/her needs, not only according to the share provided for in the property right acquired via succession<sup>14</sup>;

e) *the deceased did not stipulate otherwise/differently*; for instance, the deceased did not stipulate by will the division of the property, assigning an occupational or usufruct right to a third party<sup>15</sup>; it is acceptable for the deceased to withdraw the occupational right of the surviving spouse, because he/she is not a forced heir in relation to the house/apartment<sup>16</sup>.

### 3. Legal aspects.

The occupational right of the surviving spouse has the following legal aspects:

- it is a *real right* upon the property (used for living); the surviving spouse is entitled

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<sup>8</sup> See F. Deak, R. Popescu, *op. cit.*, p. 270.

<sup>9</sup> See D. Chirică, *Treaty*, 2014, *op. cit.*, p. 71.

<sup>10</sup> See C. Macovei, M. C. Dobrilă, *op. cit.*, pp. 1026; F. Deak, R. Popescu, *op. cit.*, pp. 270-271.

<sup>11</sup> See F. Deak, *op. cit.*, pp. 136; D. Chirică, *Civil law. Successions and wills, op. cit.*, pp. 104; Of course, provided the property was used by the two partners as tenants, no occupational right arises from it, as the property is not part of the succession, whereas the surviving spouse shall preserve his/her capacity as tenant, under the provisions of Article 323 of the Civil Code.

<sup>12</sup> See F. Deak, R. Popescu, *op. cit.*, p. 271;

<sup>13</sup> Also see M. Mureșan, I. Urs, *op. cit.*, p. 36; Al. Bacaci, Ghe. Comăniță, *op. cit.*, p. 65;

<sup>14</sup> See, for some details, F. Deak, *op. cit.*, p. 137.

<sup>15</sup> See D. Chirică, *Treaty*, 2014, *op. cit.*, p. 72.

<sup>16</sup> Also see F. Deak, R. Popescu, *op. cit.*, pp. 261; Al. Bacaci, Ghe. Comăniță, *op. cit.*, p. 65; C. Macovei, M. C. Dobrilă, *op. cit.*, p. 1026; I. Genoiu, *op. cit.*, p. 90.

to use the house/flat, the outbuildings, the shared parts of the building consisting of several edifices, including the existing land;

- it is a *temporary right*, which becomes extinct on partition, but not sooner than one year since the succession; the occupational right becomes extinct even sooner than one year, if the surviving spouse gets married again (Article 973 (4) of the Civil Code)<sup>17</sup>;

- it is *strictly personal*, which means that the surviving spouse cannot transfer it to a third party; the only ones who can benefit from this right are the children under the age of 18 of the surviving spouse, who live with him/her, as well as other persons whom the surviving spouse looks after<sup>18</sup>; if the property is not entirely necessary for the surviving spouse, then any one of the heirs/successors may request one of the following: the limitation of the occupational right or the replacement of the occupational asset, in case that person offers the surviving spouse another adequate property (Article 973 (3) of the Civil Code); different authors have said that heirs are entitled to provide the surviving spouse with another adequate property provided that they offer him/her an occupational right, and not a mere right to use it (for instance, rental)<sup>19</sup>; all among the parties generated conflicts, all law suits in relation to the occupational right of the surviving spouse shall be settled by the competent courts in charge to decide upon the partition; the court will *make an urgent decision in the Council* (Article 973 (5) of the Civil Code);

- it is an *inalienable and impalpable* right, which derives from the fact that it is strictly personal (Article 973 (2) of the Civil Code); consequently, the creditors of the surviving spouse cannot attack this right;

- it is a *voluntary/free of charge* right legally assigned to the surviving spouse (Article 973 (2) of the Civil Code); as a consequence, during the applicability of the occupational right, the surviving spouse shall not pay any rent to use the property to the rest of the heirs.

4) *Termination of the occupational right.* The occupational right of the surviving spouse becomes extinct on partition but not sooner than one year since the inheritance has been opened (Article 973 (4), first thesis of the Civil Code). Nevertheless, if the partition among heirs has been completed within one year since the inheritance has been opened, and the property was entirely assigned to the surviving spouse, the right of occupation becomes extinct because the surviving spouse is now the sole owner of the property. When the surviving spouse gets married again, the occupational right becomes extinct no matter when this happens, even if that is within one year since the opening of the inheritance (Article 973 (4), second thesis of the Civil Code).

Also, the right of occupation becomes extinct if the surviving spouse dies or the property has been entirely destroyed, be that event an accident or voluntarily generated by somebody.

At last, if the surviving spouse abusively uses the property, the right of occupation becomes extinct by court order, at the request of the interested persons, according to the relevant regulations (Article 748 and 754 of the Civil Code)<sup>20</sup>.

<sup>17</sup> See F. Deak, R. Popescu, *op. cit.*, p. 272; D. Chirică, Treaty, 2014, *op. cit.*, p. 72.

<sup>18</sup> See D. Chirică, Treaty, 2014, *op. cit.*, p. 72.

<sup>19</sup> See F. Deak, R. Popescu, *op. cit.*, p. 272; C. Macovei, M. C. Dobrilă, *op. cit.*, p. 1027.

<sup>20</sup> See D. Chirică, Treaty, 2014, *op. cit.*, p. 74; C. Macovei, M. C. Dobrilă, *op. cit.*, p. 1027.

After termination of the occupational right, the surviving spouse will be able to use the property either as sole owner (considering this has been assigned to him/her in its entirety, on partition), or as co-owner (if the occupational right has ceased following his/her marriage and the partition has not yet been completed). In this last case, he/she must pay rent to the other heirs in case he/she uses more than his/her share in the property<sup>21</sup>.

### References

1. F. Deak, *Treaty on the law of succession, 2<sup>nd</sup> edition updated and completed*, Universul Juridic Publishing House, Bucharest, 2002, pp. 136;
2. D. Chirică, *Civil law. Successions and wills*, Rosetti Publishing House, Bucharest, 2003, pp. 104;
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10. See M. Eliescu, *Succession and transfer in the law of the SRR*, the Publishing House of the Academy, Bucharest, 1966, pp. 142.

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<sup>21</sup>See F. Deak, R. Popescu, *op. cit.*, p. 275.