CONSIDERATIONS ON THE HOLOGRAPHIC TESTAMENT IN COURT PRACTICE

Speranţa Daniela Maria GEORGESCU BONA
„Drăgan" European University in Lugoj
Faculty of Law
Lugoj, Romania
sper_bona@yahoo.com

Abstract: *Although it represents the testator's exclusive and personal creation, the holographic testament is a solemn cat which, under the sanction of absolute nullity, must cumulatively fulfill the condition of being written in its entirety, dated and signed by him/her, being his/her free and conscious expression. We will not make a theoretical analysis of the three conditions that holographic testament must fulfill cumulatively ad validitatem, since we can find this analysis in all the succession law books, so we will make a couple of theoretical commentaries regarding the case we are presenting. In the action brought before the court, the appelant applied for the partial absolute nullity of the certificate of inheritance issued by the notary public, for fraud. She also claimed the opening of the succession debate after the deceased A.L, who had died on May, 13th, 2014, as well as the composition of the succession mass. She also claimed to be declared sole heir at law after A.L.'death., legatee with particular title, on the basis of the holographic testament drawn up by him (in the "Letter of Farewell" he had left) and to have the title of the property acquired as a testamentary inheritance included in the land book. The defendant requested the action to be dismissed and argued that this was a simple letter of convenience, not a holographic testament, and even if there was a testament, the person who had signed it had not been identified, an aspect which may bring into doubt the person signing the document. She also requested a graphological expertise and an expertise regarding the deceased's discernment at the date when the letter was written, considering the circumstances of A.L.'s death. On the basis of the scientific evidence in conjunction with the other evidence, the court upheld the applicant's action by finding that the certificate of inheritance was partially hit by absolute nullity.*
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The human being is the entity which represents the main and ultimate purpose of the law. The civil law is regulating almost the whole life of a person in its most important issues concerning the individual as the subject of civil rights, even before birth until death, and even about the consequences of this event. The transmission of the succession is one of the most important legal consequences of this last legal event. People try to make a patrimony (estate) throughout their entire life. This patrimony will be sent to those entitled to receive it through the legal inheritance or testamentary. It is somehow natural that we humans perceive the testament as a gloomy legal act that we have to make, unfortunately, during our lifetime, fully informed. We should be conscious that, when making a testament, all aspects of property issues must be well adjusted in order to prevent polemics and disputes between legal heirs.

To protect the independence of the testator and to assign undoubted character to the final declaration, legislature does not allow testamentary dispositions to generate effects unless they were made in the forms provided by law. The holographic testament is one of the ordinary testaments and it is expressly regulated in a text that we find almost unchanged in the civil code in force from the content contained in Civil Code of 1864: " The holographic testament is invalid

unless it is written entirely, dated and signed by the testator", "Under the sanction of absolute nullity, the holographic testament should be written entirely, dated and signed by the testator in his own handwriting"(Art.1041 Civil Code in force). The same civil code regulates in the article 1042, in accordance with current requirements, the testament forms, thus speaking in the matter of the holographic testament of provisions designed in a unitary and not disparate manner, as they were in the civil code of 1864, the provisions relating to the holographic testament were contained in the content of several articles not consecutively. More, this code regulates the sanction for non compliance with the formal conditions of the holographic testament, namely express absolute nullity, by an imperative norm.

This ordinary testamentary form did not originate from the Roman law, as private testaments were prohinited by Justinian, with the sole exception of the provisions made for descendants. The holographic testament represents a creation of the French customary law, which was accepted in the lands of written law only when the Civil Code came into effect. Even though it represents the exclusive and personal creation of the testator, the holographic testament is a solemn act, which, under the sanction of absolute nullity, has to be written entirely, dated and signed by the testator, being his/her free and conscious expression.

Although it presents some important advantages (namely: it is very easy to make a testament, it does not involve any cost, it ensures full secrecy provisions of last will, it may be revoked at any time), at the moment, in our country, this testamentary form is unfortunately the most rarely used in practice.

Our opinion is that besides its inconveniences, namely: it can be easily lost or stolen, the lack of protection of the testator against the suggestion or captation of those who are interested in his wealth, another reason why the option to prepare a holographic testament occurs so rarely is the fact that, in inheritance proceedings, the notary public calls necessarily an expert handwriting to ensure that the writing and signature on the document presented before him emanates from the testator. Obviously this expertise involves additional costs for the legatee availing themselves of the testament.

Thus, for now, the authentic testament remains the testamentary form which provides the highest safety to the testator regarding his/her last will, limiting the possibilities of a possible challenge of its provisions. Considering that holographic testament is very rare in notarial and judicial practice, the idea of our study comes from a civil case tried in Lugoj Court with the civil sentence no.2673/27.11.2015, definitive, unpublished. The case involved the existence of a holographic testament whose particularities aroused our interest. We will not make a theoretical analysis of the three conditions that holographic testament must fulfill cumulatively ad validitatem, as we can find this analysis in all the succession law books, so we will make a couple of theoretical commentaries regarding the case we are presenting.

1. ASPECTS BEFORE THE INTRODUCTION OF THE ACTION

On 05/13/2014 A.L. committed suicide by leaving a letter titled "Letter of Farewell", written signed and dated by him, in which he also formulates a handwritten provision of ultimate will, by which it establishes a private legatee on A.E. (aunt by marriage), stating in very clear and firm terms the goods to which he refers in the testament: „...I say goodbye to my aunt A.E., who, after my mother's death, was with me with much love and dedication. If it weren't for her, I

would have ended my life a long time ago, shortly after my mother's death. That is why I want A.E. to inherit 1/2 of the house I live at the address xxx where the owner is my father A.P., currently deceased, and my xxx registered car that I ask you to sell and with the money you get to do your cataract surgery on the other eye and to take care of your health."

The document was found near the place of suicide. The deceased was single, unmarried, had no reserved heirs, but only one legal heir of the fourth grade of ordinary collateral M.R. The legatee A.E. asked the Prosecutor's Office attached to the Lugoj Court a copy of the farewell letter and presented it to a notary public who confirmed her it was about a holographic testament, and informed her that, after the criminal investigation of the deceased's suspect death, she would have to make a graphological expertise of the script titled "Farewell Letter", to ensure that the holographic testament by which the deceased A.L. had established her a private legatee was written, signed and dated by him, and if it was confirmed, she would be able to open a succession debate. Four months after the death of A.L., M.R., the legal heir, although she knew the contents of the farewell letter left by the deceased as she was present at the place of the suicide in order to recognize him, asked the Prosecutor's Office attached to the Lugoj Court where the suspected death of A.L. was investigated, a copy of the letter, after she had secretly presented herself to the public notary in order to open the succession debate, without informing the notary about the existence of the farewell letter and the provisions regarding the legatee A.E., declaring that she was the sole heir of A.L. The notary public, although he had questioned two witnesses in this inheritance case, did not ask the solicitor of the succession debate nor the witnesses if they knew that there was a testament, proceeding directly to the succession debate. The notary issued the certificate of inheritance to M.R. who immediately registered her property rights acquired as succession in the Land Book. According to the public notary law, after the notary public finds that he is legally notified, he registers the cause and orders the quote of those who have the vocation to inheritance, and if there is a testament, he cites the legatees and the appointed executor. He determines the quality of the heirs and legatees, the extent of their rights as well as the composition of the succession mass.

In this case, the applicant rightly appealed to the court for the annulment of the heirloom certificate in which the defendant was found, in order to remedy the harm caused to her by its issuance.

2. INTRODUCTION OF THE ACTION. THE SUBJECT MATTER OF DISPUTE. THE LEGAL BASIS.

We mention that at the date of introduction of the action, A.E. was in possession of the goods of the succession mass. Under these circumstances, on 10/21/.2014 A.E. filed a legal action against the defendant M.R. in order that the certificate of inheritance could be partially declared absolutely null, for fraud. Only partially and not totally, since in the contents of the certificate of inheritance which is contested, the successions of the deceased's parents are also debated and they do not affect the successoral rights claimed by the applicant. She claimed the opening of the succession debate after the deceased A.L, who had died on May, 13th, 2014, as well as the composition of the succession mass. She also claimed to be declared sole heir at law after A.L'death., the legatee with particular title, on the basis of the holographic testament

drawn up by him (in the "Letter of Farewell") and to have the title of the property acquired as a testamentary inheritance included in the land book.

A legal act is considered an act of fraud when certain legal norms are used not for the purpose for which they were enacted but for circumventing other imperative legal norms. Being an attempt to deviate the law from its purpose, fraud in the law is an abuse of law, sanctioned (explicitly or implicitly) by a series of legal provisions.

Fraud can also be defined in the law as an intentional violation by the parties, often by using certain cunning means, of the mandatory provisions of the legislation, once a legal act is concluded or executed. The fraud is sanctioned by the nullity of the legal act concluded or executed this way. Fraud can also be regarded in the law as a particular case of unlawful cause (in the sense of purpose mediated contrary to imperative legal norms).

We consider the reasons put forward by the applicant in the application are circumscribed on this ground of absolute nullity, being obvious that the defendant, of bad faith, had voluntarily obtained the issue of the heir certificate, namely a legal situation which resulted in more favorable inheritance rights than it would have obtained if she had informed the notary about the existence of the holographic testament, which conferred quality of legatee to the applicant, aspects that the defendant knew, and thus could have provided the premises for the provisions governing the notarial succession procedure to be enforced in accordance with the law.

Applying the law in its letter and spirit, is a necessity of public interest, that is why the fraudulent acts are sanctioned with absolute nullity. In defense, the defendant M.R. argued that this was a simple letter of convenience, not a holographic testament, and even if there was a testament, the person who had signed it had not been identified, an aspect which may bring into doubt the person signing the document. It is also shown that the judicial practice has constantly and unanimously stated that, without any identification beyond the doubt, of the testator's person, a validation of the holographic testament can not be accepted, thus a graphological expertise was requested.

It was also claimed that the suicide in such a tough way that the deceased had chosen, after long sufferance, as shown in the letter, could be the evidence of a serious depression which may affect discernment. As there were doubts about the deceased's discernment at the date of writing of the document, the defendant asked the opinion of psychologists or psychiatrists in this regard. More, the share of the property that the deceased ordered by the final act was contested, even the expression used: *„...I want her to inherit...*" It is shown that this mode of expression indicates an action, an incident, or a hypothetical state whose accomplishment in the present or future depends on the realization of another action, occurrence or state, or an hypothesis unaccomplished in the past. In practice, „I want X to inherit" is the most commonly used mode of clear and unambiguous expression in the case of a testament.

In order to be valid, the will does not necessarily have to be called "testament". A testament can be written on several separate sheets provided that there is an intellectual link between them, or contained in a separate act, but also in an act with a wider content in which the provisions of last will represent only a part, such as a letter. In order to remove any doubt about the identity of the deceased person and the fact that the document named "Farewell letter" was written, dated and signed by him, the court ordered a specialist opinion to be given, with the value of a graphological expertise, from the Inter-county Forensic Expertise Laboratory of Timisoara, by comparing several original writings of the deceased.

The result of the expertise was that the "farewell letter" written on May, 13th, 2014, had been written, dated and signed by the deceased, as the applicant had always claimed, a conclusion which the defendant did not contest. Concerning the contestation of the deceased's discernment at the time of the farewell letter, the court ordered a psychiatric forensic examination report by a commission of the Institute of Forensic Medicine of Timisoara, which the applicant did not object to.

It is without doubt that the question of the existence of discernment in the matter of the testament is of great importance. The person who makes a legatee must have the capacity to dispose by will, thus it is necessary to establish whether the testator had discernment when he drew up the ultimate legal act. Without the existence of medical records stating that the deceased was in medical records with mental illness, based on the entire evidence in the file, interrogation of parties, witness testimony, documents, the commission had to establish if the deceased had discernment when he drew up the testament, in other words if he had psychic competence on May, 13th 2014.

In the conclusions it was also pointed out that, despite the fact that the suicide is more often the result of psychic illness or depression, in the case of A.L. the risk of suicide was not generated by a depression, it was about a social risk. The deceased A.L had a depressive disorder after his mother's death, but he had a normal behaviour until the end of his life, aspect revealed by the farewell letter. He thought at the last moment to people who stayed close to him, namely his aunt by marriage who had lived with him in the same house and took care of him after his mother had died. The moment of his discernment when he committed suicide and the moment of the decision to make his aunt his legatee, are two different moments. The moment of the suicide is about his decision to end his life as he had "no family, no job, no money, no future". The moment when he decides about the provisions of his goods, refers to the person who deserves to get the goods he owned.

We can not appreciate that a person who chose to end his life had no discernment at the time. The specialists who established that the deceased had discernment when he drew up his testament and committed suicide, found the opposite of the defendant's claims.

With an elegant motivation and at the same time accompanied by specialized arguments, the commission of the Institute of Forensic Medicine of Timisoara convinced the court that the deceased had written the holographic testament with discernment. As a consequence, the court upheld the applicant's action by finding that the certificate of inheritance was partially hit by absolute nullity. When the court gave the sentence, they held essentially that the testament fulfilled the formal and substantive conditions required by law, considering that the deceased drew it up with discernment, and because he did not have reserved heirs, the transmission of the succession heritage could not take place through legal devolution, which intervenes only if he had not disposed by his will of his patrimony for the cause of death or the manifestation of his will could not have effect.

We appreciate the court's decision is correct because in this case we are in the presence of a perfectly valid holographic testament prepared under the conditions of art.1041 Civil Code and drawn up by a person who had discernment when he wrote it. We consider that the solution was also accepted as correct by the defendant who did not file appeal.

CONCLUSIONS

Although this type of testament raises a number of issues in court as testators most often have no legal knowledge on the way it is written and poses problems of interpretation, our opinion is that the holographic testament is the simplest way for everybody to transmit his/her assets. People should use more often this testamentary form. Concerning the risk of destruction, evasion, loss of the holographic testament, we think that nothing stops the testator to draw up several copies and to ask a trusted person to keep one of them or even request that it be stored in a notary office, so that it may be released to the person indicated by him/her at his/her death.
In conclusion to this case, it is easy to notice that the death of a close relative may often cause the successor not to have compassion for the loss of a loved, to ignore the human side and to manifest only the material side.

This was unfortunately also the defendant's conduct, which only hurt the memory of her nephew (son of her sister), and taking advantage of his depression, she desperately tried to urge the court to think he was insane. In reality, she knew that the farewell letter had been written with discernment , signed and dated by the deceased, and especially that he had wanted to leave all his possessions to the applicant. Unfortunately, in practice, in many cases, the desire for enrichment prevails among people who unashamedly violate any ethical and moral principle.

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