



Special Inabilities regarding Donation - Inability to Receive

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Abstract: *The regulations of the states of the world aim to create a contractual space meant to protect the donor, his patrimony and to ensure the good faith. There are regulations around the world in the field of donation aimed at limiting the possibility of making donations to people who could influence the donor or who due to their status cannot receive donations. The purpose of this research is to present the aspects of comparative law applicable to the inability to be gratified by donation on certain categories of people and not only. According to American doctrine, undue influence is a philosophy of equity that involves a person taking advantage of a position of power over another person. This inequity of power between the parties can vitiate the consent of a party, because they are not able to freely exercise their independent will. For this, the undue influence is likely to lead to an inability to receive.*

Keywords: *inability to receive, undue influence, legal entities, doctors, teachers, guardians*

1. General Considerations

The beneficiary of liberality can, as a rule, be any person with the capacity to use. Thus, they can have this quality: the conceived child - if born alive, the born child as well as any legal person in existence.

As a rule, according to art. 35 of the Civil Code, the capacity to use a natural person is acquired at the time of his birth. However, as an exception, the person acquires the capacity to use from the moment of his conception, with the condition provided by art. 36 of the same Civil Code, that of being born alive. With regard to the legal person, it acquires the capacity to use from the moment of registration or, as the case may be, of its establishment².

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² Art. 25, Civil Code, *Subjects of civil law* (1) The subjects of civil law are natural persons and legal persons. (2) The natural person is the person, viewed individually, as the holder of civil rights and obligations. (3) The legal person is any form of organization which, meeting the conditions required by law, is the holder of civil rights and obligations.

Regarding the capacity of the parties, apart from the provisions of art.1180 of the Civil Code, which constitutes the common law regarding the capacity to contract, the Civil Code also contains a series of special provisions on liberalities, contained in art. 987-990 and art. 992 of the Civil Code, which also applies to the donation contract.

The rule in this matter, provided by art. 987 of the Civil Code, is the possibility for any person to make and receive liberalities in compliance with the rules on capacity¹.

The rule regarding the condition of the capacity of the beneficiary of the donation (the donee) must be fulfilled at the moment of accepting the donation. The donation made in favor of a natural person that does not exist or in favor of a legal person that has not met the conditions required by law for the establishment, is struck by nullity.

As an exception to the general rule, according to the provisions of the Civil Code, it cannot receive liberalities from the person lacking the capacity to exercise, with limited capacity or even with full capacity, the legal representative or guardian of such a person (tutor, curator, appointed agent), as long as he did not receive a discharge from the guardianship court. This exception does not include parents, grandparents, even if they have the capacity of legal representatives or guardians, ie privileged and ordinary ascendants. The act by which the minor disposes in favor of his legal representative or guardian, other than his privileged or ordinary ascendants, prior to the discharge, is struck by relative nullity².

2. Inability to Receive

In common law, as in the French and Romanian legal systems, the unborn child, as long as he is born alive, has capacity from the moment of conception. If, in continental European law systems, the procedure of simulated donation or the stipulation for another is used for the gratuity of the unborn child, in the common law an indirect gratification is also used -

¹ C.-M. Crăciunescu, *Contractul de donație în reglementarea Codului civil în Noul Cod Civil, Studii și Comentarii*, Volumul II, Cartea a III-a și Cartea a IV-a, de Coord. M. Uliescu,, Academia Română, Institutul De Cercetări Juridice, Departamentul De Drept Privat „Traian Ionașcu”, Ed. Universul Juridic, București, 2013, p. 720.

² Art. 988. *Lack of the full exercise capacity of the disposer* (1) The one without exercise capacity or with restricted exercise capacity cannot dispose of his goods through liberalities, except for the cases provided by law. (2) Under the sanction of relative nullity, even after acquiring the full capacity to exercise the person cannot dispose by liberalities for the benefit of the one who had the quality of his representative or legal protector, before he has received from the court of guardianship discharge for its management. The exception is the situation in which the representative or, as the case may be, the legal protector is the ascendant of the disposer.

the good is transferred in a trust that the legal representative, who is responsible for passing it on to the child at birth¹. Unborn and unconceived children can be rewarded in a similar way, acquiring a right that can be demanded to be enforced when they acquire capacity².

The incapacity of the unconceived person is applicable only in the case of liberalities made directly to such persons, not when the liberality is an indirect one. For example, a liberality with tasks is instituted in favor of a capable third person, the unconceived person being the beneficiary of the task.

The legal person that does not exist at the time of the donation, in principle, cannot be gratified. Derogating from this general rule, its indirect gratification through a liberality with tasks is allowed, in the sense of gratifying a legal person in existence or of a natural person conceived or in life, capable, with the obligation established in its task to transmit the object of liberality at the moment when this is possible.

Any legal person may receive liberalities from the date of the deed of incorporation or, in the case of testamentary foundations, from the moment of opening the testator's inheritance, even if the liberalities are not necessary for the legal person to be legally established³.

According to art. 863 lit. c) Civil Code⁴, the state may acquire a right of public property by donation or bequest, accepted under the law, if the good, by its nature or by the will of the disposer, becomes of use or public interest. The phrase "under the law" must be correlated with the provisions of art. 121 para. (3) of Law no. 215/2001, republished, applicable both to the goods belonging to the public domain of the administrative - territorial unit, and to those belonging to its private domain, text according to which donations and

¹ C. Codrea, *Donation in European law. Aspects of comparative law*, Universul Juridic Publishing House, Bucharest, 2016, p. 224.

² R. Hyland, *Gifts. A Study in Comparative Law*, Oxford University Press, New York, pp. 236 - 237.

³ Art. 208. *The capacity to receive liberalities*, By exception from the provisions of art. 205 para. (3) and unless otherwise provided by law, any legal person may receive liberalities under common law, from the date of the act of establishment or, in the case of testamentary foundations, from the moment of opening the testator's inheritance, even if the liberalities do not are necessary for the legal person to be legally established.

⁴ Art. 863. *Cases of acquiring the right of public property*, The right of public property is acquired: a) by public procurement, carried out in accordance with the law; b) by expropriation for a cause of public utility, in accordance with the law; c) by donation or bequest, accepted under the law, if the good, by its nature or by the will of the disposer, becomes of use or public interest; d) by convention for consideration, if the good, by its nature or by the will of the acquirer, becomes of use or public interest; e) by transferring a good from the private domain of the state to its public domain or from the private domain of an administrative-territorial unit in its public domain, in accordance with the law; f) by other means established by law.

bequests can be accepted only with the approval of the local council or, after case, of the county council, with the vote of the majority of the local or county councilors, as the case may be, in office.

The condition of the capacity of use is a fundamental one, its non-observance attracting the invalidity of the liberality, the absolute nullity of the disposition.

Only a determined or, at least, determinable person can be a beneficiary of liberality. The person expressly indicated in the content of the liberality (of the donation contract) is determined directly by mentioning the name, surname or by indicating the quality of the person (sister, brother, brother-in-law, nephew, my youngest daughter, etc.).

A spelling mistake, the lack of a first name, the mention of the beneficiary under the name before the marriage does not affect the validity of the designation, if the civil identity of the designated person undoubtedly results from the content¹ of the donation deed.

In the same way, a person can be indicated as a beneficiary of a liberality by indicating the nickname, the kinship, the friendship, the activity he carries out².

Special disabilities are expressly regulated by law and are strictly interpretable, and cannot be deduced by interpretation. Thus, through the text of art. 990 C. Civ.³ the categories of persons who cannot be beneficiaries of a liberality are expressly provided.

This is a doctor, pharmacist or any other person who has provided the patient with continuous, repeated specialist care. These people cannot receive donations from those they cared for during the last illness they died

¹ M. Eliescu, *Her Legacy and Devolution*, Academiei Publishing House, Bucharest, 1966, p. 252;

² C. Macovei, M.C. Dobrilă, in Fl.-A. Baias, R. Constantinovici, E. Chelaru, I. Macovei (coord.), *The New Civil Code. Commentary on articles*, Ed. C.H. Beck, Bucharest, 2012, p. 1037;

³ Art. 990. *Special incapacities* (1) The liberalities made to doctors, pharmacists or other persons may be annulled, during the period in which, directly or indirectly, they provided specialized care to the disposer for the disease that is the cause of death. (2) They are exempted from the provisions of par. (1): a) the liberalities made to the husband, to the relatives in a straight line or to the privileged collaterals; b) the liberalities made to other relatives up to the fourth degree, including, if, on the date of the liberality, the disposer has no husband and no direct or privileged collateral relatives. (3) The provisions of par. (1) and (2) are also applicable to priests or other persons who provided religious assistance during the illness that is the cause of death. (4) If the disposer died due to the disease, the limitation period of the right to the action for annulment runs from the date on which the heirs became aware of the existence of liberality. (5) In case the disposer has been re-established, the bequest becomes valid, and the action for annulment of the donation may be introduced within 3 years from the date on which the disposer has been re-established.

of, if liberality was made during the care. The way in which care is provided is irrelevant; it can be direct or indirect.

At the same time, the text refers to liberalities in general, without disregarding how they are achieved by acts between the living or by cause of death. Also irrelevant is the way in which liberality is received, which means that it can be received either directly or indirectly. An indirect donation may be a debt remission or burial in favor of a third party, such as the provision of a life annuity in favor of a third party without any consideration from him.

The pharmacist is included within the scope of this provision if he provides specialist care, recommends treatments and monitors their administration, so it is not limited to the simple release of prescribed medication¹.

Other people may include: the director of the hospital where the testator is hospitalized, the doctor's superior, the owner or administrator of the establishment where the testator is located, midwives, nurses, people who practice medicine illegally, in general anyone could influence the testator's will and could determine in his favor².

In order to operate this incapacity, certain conditions are required:

- a) at the moment of drawing up the liberality, the gratified person to be a doctor, pharmacist or other person who provides specialized care to the disposer, either directly or indirectly;
- b) the doctor, pharmacist or other persons have provided the provider with specialized care, regularly and continuously; the incapacity does not operate if, for example, the pharmacist sells only medicines to the sick disposer, on the doctor's prescription;
- c) the death was caused by the disease for which he was cared for; as such, the incapacity shall not operate when the death occurred accidentally, unrelated to the disposer's illness;
- d) the liberality was made during the illness, during the specialized care; if the liberality was made during the period when the disposer was healthy, it is valid, even if later, in the future, the doctor or pharmacist in whose favor the liberality was made will treat the disposer of the disease from which he will die³.

¹ A. - A. Stamate - Tămășan, *Comments of the Civil Code, Donation, art. 1011-1033*, Hamangiu Publishing House, Bucharest, 2013, p. 48;

² Gabriela Cristina Frentiu, *Comments on the Civil Code - Liberalities. The will. Succession reserve*, Publisher: Hamangiu, 2013, pp. 6 - 11.

³ G. C. Frentiu, *op. cit.* p. 12- 13.

This incapacity is based on an absolute presumption of capture and suggestion, which cannot be overturned by evidence to the contrary.

Therefore, these people cannot prove that liberalities are the work of a free will and that gratification is due to feelings of friendship or kinship. The sanction for non-compliance with this incapacity is relative nullity.

However, the following are exempt from this prohibition:

a) the liberalities made to the husband, to the relatives in a straight line or to the privileged collaterals; it is, for example, the hypothesis that the medical husband is the beneficiary of a liberality from his wife, which he treats of the disease from which he died;

b) the liberalities made to other relatives up to and including the fourth degree, provided that, on the date of the liberality, the disposer has no husband or direct relatives or privileged collaterals. From the point of view of the grammatical, the incapacity is one to receive through liberalities, while from the point of view of the disposer, the incapacity is one to dispose through liberalities.

The phrase "priest" includes priests of all religious denominations, ordained priests (ordinary parish priests), deacons, monks, bishops, hieromonks (monks with the function of priest).

The following requirements are required to operate this disability:

- a) at the moment of drawing up the liberality, the gratified person to have the quality of priest or other person who provides religious assistance to the disposer;
- b) the priest or other persons have provided the disposer with religious assistance, a spiritual treatment that would have been likely to influence the spirit of the patient, continuously, during his illness; the incapacity does not operate in cases where the priest has only occasionally consoled or encouraged the disposer during his illness, shared with the sick person or read only the prayers for death; the court will assess, on the basis of evidence, whether the priest or other persons were granted spiritual treatment which was likely to influence the spirit of the patient, ultimately leading him to make a liberality in their favor;
- c) the death was caused by the illness during which the religious assistance was granted; as such, the incapacity shall not operate when the death occurred accidentally, unrelated to the disposer's illness;
- d) the liberality must have been made during the illness, during the period in which the religious assistance is granted.

The sanction for non-compliance with this incapacity is relative nullity. However, the following are exempt from this prohibition:

- a) the liberalities made to the husband, to the relatives in a straight line or to the privileged collaterals;
- b) the liberalities made to other relatives up to and including the fourth degree, provided that, on the date of the liberality, the disposer has no husband or relatives in a direct line or privileged collaterals.¹

The following clarification needs to be made regarding minors and banned judges: they have the capacity to receive donations but not the full exercise. Thus, the donations made to the incapable and the forbidden judge are accepted by the legal representative, but those on the minor with limited capacity by him with the written consent of the legal representative/protector.

In the case of a deaf, dumb or deaf-mute person, he will express his consent through the interpreter, this situation does not represent an incapacity.

Special rules establish certain relative incapacities to receive. Within the Law no. 334/2006 on the financing of the activity of political parties and electoral campaigns is regulated, within art. 6, donations to parties as a private source of funding².

This article states that it is forbidden to accept in any form, direct or indirect, by political parties, donations of material goods or sums of money or the provision of free services made for the obvious purpose of obtaining an economic advantage or with breach of the provisions on the obligation of the political party to require the donor legal entity to submit a declaration on its own responsibility. The statement contains details on compliance with the ban on legal entities that, at the time of donation, have due debts older than 60 days to the state budget, social security budget or local budgets to make donations to political parties, unless they have to recovered amounts greater than its own debt³.

¹ *Idem supra*.

² *Law no. 334/2006 on the financing of the activity of political parties and electoral campaigns* published in the Official Gazette. no. 446 of June 23, 2015;

³ Art. 6, *Law no. 334/2006 on the financing of the activity of political parties and electoral campaigns*, (1) The donations received by a political party in a fiscal year may not exceed 0.025% of the revenues provided in the state budget for that year. (2) Donations received from a natural person in a year may be up to 200 gross minimum basic salaries per country, at the amount existing on January 1 of that year. (3) Donations received from a legal person in a year may be up to 500 gross minimum basic salaries per country, at the amount existing on 1 January of that year. (4) The total amount of donations made by legal entities directly or indirectly controlled by another person or by a group of natural or legal persons may not exceed the limits provided in par. (2) and (3). (5) The market value of the movable and immovable goods

Foreign citizens and stateless persons may receive donations having as object the right of ownership over the lands only under the conditions resulting from Romania's accession to the European Union and from other international treaties to which Romania is a party, on the basis of reciprocity, under the conditions provided by organic law. In order to materialize the right of foreign citizens, stateless persons and foreign legal entities to acquire, including through donations, the right of ownership over land in Romania, Law no. 312/2005^{1,2}.

Instead of concluding, we point out that special inability to receive donations are expressly provided for by regulations and are not left to chance or at the discretion of the donor.

3. References

Boroi, G. & Stănciulescu L. (2012). *Civil law institutions in the regulation of the new Civil Code*, Hamangiu Publishing House, Bucharest.

Cantacuzino, M.B. (1998). *Elements of civil law*, All Educational Publishing House, Bucharest, edited by G. Bucur, M. Florescu, Bucharest.

Chibac, Gh.; Băieșu, A.; Rotari, A. & Efrim, O. (2010). *Civil Law, Contracts and Successions*, 3rd Edition revised and completed, Vol. III, Cartier Publishing House, Chisinau.

Codrea, C. (2016). *Donation in European law. Aspects of comparative law*. Bucharest: Universul Juridic.

donated to the party, as well as of the services provided to it free of charge shall be included in the value of the donations, within the limits provided in par. (1), (2) and (3). (6) The evaluation of the goods and services provided in par. (5) shall be performed by evaluators authorized according to Government Ordinance no. 24/2011 on some measures in the field of property valuation, approved with amendments by Law no. 99/2013, with subsequent amendments and completions. (7) It is forbidden for legal entities that, at the date of the donation, have due debts older than 60 days to the state budget, social security budget or local budgets to make donations to political parties, unless they have to recover more greater than their own debt. (8) When making the donation, the political party has the obligation to request the donor legal person to submit a declaration on its own responsibility regarding the observance of the condition provided in par. (7). (9) It is forbidden to accept in any form, direct or indirect, by political parties, donations of material goods or sums of money or the provision of free services made for the obvious purpose of obtaining an economic advantage or in violation of the provisions of par. (8) .;

¹ Law no. 312 of November 10, 2005, regarding the acquisition of the right of private property over the lands by foreign citizens and stateless persons, as well as by foreign legal entities, published in the Official Gazette no. 1,008 of November 14, 2005.

² Fr. Deak, L. Mihai, R. Popescu, *Civil Law Treaty, Special Contracts*, vol. III, ed. V, updated and completed by R. Popescu, Universul Juridic Publishing House, Bucharest, 2018, p. 191.

Crăciunescu, C-M. (2013). *The donation contract in the regulation of the Civil Code in the New Civil Code, Studies and Comments*, Volume II, Book III and Book IV, of Coord. M. Uliescu, Romanian Academy, Institute of Legal Research, "Traian Ionașcu" Private Law Department. Bucharest: Universul Juridic Publishing House.

Deak, Fr.; Mihai, L. & Popescu, R. (2018). *Civil Law Treaty, Special Contracts*, vol. III, ed. V, updated and completed by R. Popescu, Bucharest: Universul Juridic Publishing House, Bucharest.

Eliescu, M. (1966). *Her Heritage and Devolution*, Bucharest: Academy Publishing House.

Frentiu, G. C. (2013). *Comments on the Civil Code - Liberalities. The will. Succession reserve*, Bucharest: Hamangiu.

Hyland, R. *Gifts. A Study in Comparative Law*, New York: Oxford University Press.

Stamate - Tămășan, A. - A. (2013). *Comments of the Civil Code, Donation, art. 1011-1033*, Bucharest: Hamangiu.

Macovei, C.; Dobrilă, M.C. in Fl.-A. Baias, R. Constantinovici, E. Chelaru, I. Macovei (coord.), *The New Civil Code. Commentary on articles*. Bucharest: C.H. Beck.

Nicolae, I. (2017). *Donation Contract (I)*, Revista Universul Juridic/Journal of Legal Universe, no. November 11/2017.

Pop, L.; Popa, I. F. & Vidu, S. I. (2012). *Elementary Civil Law Treaty. Obligations under the new Civil Code*. Bucharest: Universul Juridic.

Uliescu, M. (2011). *The New Civil Code. Comments*, 3rd Edition revised and added, Bucharest: Universul Juridic.

***Civil Code of the Republic of Moldova, published in the Official Monitor No. 82-86 art. 661 on 22.06.2002, Republished in the Official Gazette no. 66-75 of 01.03.2019.

***Law no. 1/2000 for the reconstitution of the property right over the agricultural and forest lands, requested according to the provisions of the Land Fund Law no. 18/1991 and of Law no. 169/1997, published in M. Of. no. 8 of January 12, 2000.

***Law no. 312 of November 10, 2005, regarding the acquisition of the right of private property over the lands by foreign citizens and stateless persons, as well as by foreign legal entities, published in the Official Monitor no. 1,008 of November 14, 2005.

***Law no. 334/2006 on the financing of the activity of political parties and electoral campaigns published in the Official Monitor, no. 446 of June 23, 2015.

***Law no. 287/2009, regarding the Civil Code, published in the Official Monitor no. 511 of July 24, 2009.

***Law no. 85/2014 on insolvency prevention and insolvency procedures, published in the Official Gazette no. 466 of June 25, 2014.

***French Civil Code, https://www.legi-internet.ro/civil/fra2_cap2.htm.

