



The End of the Civil Capacity of the Natural Person

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Abstract: The phrase “natural person” is basically a conventional name given to man as a legal entity, as an individual participant in legal relations in general. It is therefore a qualification given by law to the individual, and not a separate qualification or vocation of him. However, such a vocation must necessarily exist, because otherwise the physical person would be a form devoid of content. This necessary vocation found its expression in another concept, that of legal capacity, consecrated especially doctrinally and jurisprudentially and which designates the vocation or aptitude of the natural person to participate, in general, in legal relations and to acquire rights and obligations. When we refer to civil legal relations, to the rights and obligations included in their content, we are dealing with the civil capacity of the person, regulated in the Civil Code under the aspect of the capacity to use and the capacity to exercise. The ability to be a subject of law, respectively, the capacity to use for civil law, presupposes, as I mentioned before, an existing human being, conceived or born, alive, which precisely constitutes the human support of the capacity. Consequently, knowing the date of the end of the physical person's capacity to use means establishing the date of his/her death. Through this article, we will analyze the two hypotheses regulated by the civil law by which this date is established. The first hypothesis is the one in which the death of the person is ascertained directly, through the examination of the human corpse, which constitutes the “physically ascertained death” hypothesis. The second hypothesis is that in which the examination of the body is not possible (because it cannot be found), although the death of the person is certain, or almost certain, which constitutes the hypothesis of “legally declared death”.

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1. Introductory Considerations. Cases of Termination of the Civil Capacity of Use of the Natural Person

Legal personality, i.e., the capacity of a person as a subject of civil law, ceases through the physically ascertained death. The deceased person is no longer a person and therefore can no longer be a subject of civil law.

The end of the capacity of use of the natural person is fixed now of death. Death is a material fact, which, in general, is easily recognized by stopping breathing and circulation. This material fact is a legal fact.

The termination of the capacity of use of the natural person is expressly regulated in art. 35 of the NCC¹. This is the rule when we talk about physically ascertained death. There is also an exceptional situation when, under the given circumstances, death cannot be physically ascertained; this is the hypothesis of the judicial declaration of death.

1.1. Physically Ascertained Death

This end of the civil capacity of the natural person coincides with the moment of death. In our law, there is a sure means of proof regarding the termination of human life. These are authentic documents, the preparation of which is entrusted to the competent civil status officer.

In principle, the proof of the end of the civil capacity for use, i.e., the death of the natural person, falls to the one who claims for himself any right or formulates any claim, i.e., the one who affirms the fact of the death of another person.

And if it is claimed that a natural person died on a certain date, he will have to prove this date, whenever the acceptance of his claim depends on its proof. In other words, the living must be presumed if death is not proven. Death is not assumed.

Physically ascertained death is therefore the natural, common way of ending the civil capacity of the natural person. Given the inseparable connection between death, as a legal fact, and the end of the civil capacity of the natural person, i.e., the quality of the individual as a subject of civil law, from a legal point of view it is particularly important to know the exact date of death.

The death of a natural person is determined by a doctor or, in his absence, by a health professional. The declaration of death is made verbally at the town hall of the locality in whose territorial radius the death occurred. The legal act of death is drawn up at

¹ The Civil Code adopted by Law no. 287/2009, published in the Official Gazette of Romania, Part I, no. 511 of 24.07.2009, with subsequent amendments and additions.

the respective town hall based on the declaration of death, the declarant having to submit, among other things, the medical certificate confirming the death.

The day on which the death occurred is entered in this death certificate. After drawing up the death certificate, the civil status officer issues the declarant the death certificate, which serves as proof in this regard, and a certificate of burial or cremation of the body.

As can be seen, in the case of physically ascertained death, the exact establishment of the date of death is relatively simple by ascertaining the cessation of breathing and blood circulation. Death produces numerous legal effects:

- a subject of civil law ceases to exist;
- at this moment the sequence opens;
- there is a right of concession on the place of residence, with the holder not being the person of the deceased, but the respective family;
- rights may arise over the inanimate body in connection with the sampling and transplantation of tissues and organs;
- *post mortem* litigation may arise regarding conflicts between the will of the deceased and the will of the living regarding inheritance, etc.

The moment of death marks the transition of the subject of civil law from the state of person to that of work. The inanimate human body thus becomes, from a legal point of view, a thing, without being an asset, enjoying a certain legal protection. It should also be mentioned that death that can be physically detected occurs progressively, it consists in the cessation of vital functions, i.e., those of the respiratory, circulatory, and central nervous system, with the consequent cessation of cellular metabolism.

1.2. Judicial Declaration of Death

There are situations when death cannot be physically ascertained and, therefore, determining the date of the end of civil service capacity on this basis is impossible.

Indeed, the physical finding of death presupposes the existence of the body identified (medically and, if necessary, forensically) of the person and the medical finding of the place of death.

If these conditions are not met, instead of the medical bodies, which cannot fulfill their functions, the law will have to intervene to establish the end date of the physical person's ability to use according to the legal regulations in force in the matter.

In such situations, the judicial declaration of death takes place.

The fact that a natural person is absent for a longer time from his domicile or residence does not in itself produce any legal effect, if his being alive is unquestionable. In other words, the absence from home does not influence the legal situation of the natural person, affecting either his non-patrimonial or patrimonial relationships.

However, positive law gives absence a special technical meaning when the person is absent from his home and for a longer or shorter period there is doubt about his being alive. We could call such situations qualified absence when there is a need to take measures to protect the interests of the absentee and those with whom he is in legal relations.

Recourse to this legal means is a social necessity to be able to solve the problems raised by the uncertainty of the existence in life, as well as of the death of the respective natural person. This is the justification of the institution of the judicial declaration of death, even if the date of the end of civil capacity for use is uncertain, uncertain, and relative, the person thus declared dead being able to reappear.

2. The Notion of Judicial Declaration of Death. General Case and Special Cases

Judicially declared death is a presumed death, which is declared by court decision and refers to natural persons who have disappeared under circumstances that make the idea that their disappearance is the result of death credible. Under the empire of the old legislation, two judicial declaration of death procedures were regulated: the judicial declaration of death preceded by the judicial declaration of disappearance and the judicial declaration of death not preceded by the judicial declaration of disappearance. The new Civil Code no longer regulates the judicial declaration of disappearance. However, it also regulates two categories of cases of judicial declaration of death: the general case and the special cases.

2.1. The General Case of Judicial Declaration of Death

The general case, regulated by art. 49 NCC, refers to the missing person for whom there are indications that he has passed away. It is therefore not enough for the person to be absent from home for a long time, but the existence of some indications that make his death plausible is also necessary. On the other hand, it is necessary to have passed at least 2 years from the date of receiving the last information or indications from which it follows that the person in question was alive.

The 2-year period begins to run either from the date of receipt of the last information or clues about the missing person, or, if this date cannot be established precisely,

from the end of the month in which they were received. If even the month cannot be determined, the 2-year term will be calculated from the end of the calendar year in which the last information or clues about the missing person were received. The application requesting the judicial declaration of death can be made by any interested person.

2.2. Special Cases of Judicial Declaration of Death

1. The first special case of judicial declaration of death is regulated by art. 50 para. (1) NCC and he refers to the person who disappeared in special circumstances, which make the conclusion that he could not survive them credible, respectively: floods, earthquake, railway or air disaster, shipwreck, acts of war or others similar. The enumeration of the circumstances in which the disappearance could take place is therefore not limiting. Even if the person has disappeared in such circumstances, it is necessary to wait for a period of 6 months from the date of disappearance, before pronouncing the court decision declaring death. The 6-month term is considered sufficient either for the missing person to reappear (possibly during rescue operations) or for the search for his body.

2. Paragraph (3) of art. 50 NCC regulates a second special case of judicial declaration of death. The disappearance of the person is considered in circumstances that confer a high degree of certainty regarding the occurrence of death, which is why the action requesting the judicial declaration of death can be formulated without waiting for a deadline to be fulfilled since the disappearance.

Unlike the case regulated by the first paragraph, the legislator does not indicate this time, even by way of example, the scenarios in which the person in question could have disappeared. This does not mean that, for example, the disappearance of a person during a shipwreck could not fall within the hypothesis regulated by paragraph. (3) of art. 50 NCC, if there is direct evidence regarding the occurrence of death in this circumstance (Baías, et.all., 2021, p. 56).

It remains for the court referred to assess, depending on the circumstances in which the disappearance took place, whether the reason cited in the application can be included in the provisions of art. 50 para. (3) NCC.

To pronounce an admission decision in this case, it is necessary that the evidence clearly shows that the death occurred in that circumstance. The provisions of the text of art. 50 NCC will be applicable both in the hypothesis in which the body was not found, and in that in which the body was found, but there is no certainty that it belongs to the one whose death is requested to be ascertained, due to the impossibility of his identification.

3. Procedure for Declaration of Death

The judicial declaration of death constitutes a legal institution, which groups together the set of legal norms that precisely pursue this purpose. At the same time, the judicial declaration of death is also a legal means of determining the moment of the end of the capacity for use.

Competent to judge such a request is the court at the last domicile of the person to whom the judicial declaration of death is requested. The application can be submitted by any interested person and the prosecutor. After notifying the court, the president will ask the mayor's office of the commune, the city, the municipality, or the sector of the municipality of Bucharest, as well as the police bodies in whose territorial radius the last known domicile of the missing person was, to gather information about it.

At the same time, the president will order the posting of the request at the last known address of the missing person, at the town hall of the commune, city, municipality or sector of the municipality of Bucharest and at the court, as well as the publication in a widely circulated newspaper of an announcement about the opening the procedure for declaring death, with the invitation for any person to communicate the data they know about the missing person.

According to art. 945 of the Civil Procedure Code, "After the passage of two months from the date of publication and after receiving the results of the investigations, a court date will be set." The person whose death is requested to be declared is cited at the last known address and published in a widely circulated newspaper. If the person in question had an attorney, he would also be summoned to give clarifications to the court. The curator, if appointed, will also be cited.

The judgment will be made with the participation of the prosecutor.

The main effect of death is the termination of the physical person's capacity to use. At the same time, its sequence opens. Establishing the date of death is thus of particular importance, regardless of whether it is a physically ascertained death or a judicially declared death. For example, only the one who exists at the time of a person's death can inherit it.

The court decision pronounced in the case will have to contain this date, which will be the date of death of the person in question and which will mark the moment from which all the effects that the law relates to the occurrence of this event will begin to occur. The decision must contain not only the day, but also the time when the presumed death occurred.

In the absence of sufficient evidence, it will be established that the person declared dead died in the last hour of the last day of the term provided by art. 49 Civil Code

(at least 2 years from the date of receipt of the last information or indications from which it results that the person was alive) or art. 50 Civil Code (if at least 6 months have passed since the date of the circumstance in which the disappearance occurred), as the case may be. Only the court decision that remains final will produce the effects provided by law.

After the decision becomes final and irrevocable, by the care of the court, it will be displayed for two months at the door of the court of first instance and the town hall. Also, the decision will be communicated to the local community public service for records of persons from the last known domicile of the person in question, as the case may be, and to the guardianship court, or it will be noted in the Land Register and registered in the Trade Register.

3.1. Rectification of the Presumed Date of Death

Regardless of the situation that led to the judicial declaration of the person's death, including when the provisions of art. 50 para. (3) NCC, there is some degree of uncertainty regarding the exact date of death of the person to whom the court decision refers. According to art. 52 para. (3) sentence II N.C..C, the court can rectify the date of death "if it is proven that it was not possible for the person declared dead to have died on that date". The competence to correct the date of death also belongs to the court that pronounced the death declaration. The date of death will be considered the one established by the rectification decision.

4. Effects of the Court Decision Declaring Death

According to art. 52 para. 1 Civil Code, "The person declared dead is considered to have passed away on the date that the remaining definitive judgment established as that of death". The main effect of the judgment is the termination of the capacity to use, i.e., the termination of the legal subject quality of the person declared dead.

The declaratory judgment of death establishes two presumptions:

- that the person died on the date established in the decision as the date of death;
- the person was alive until that date.

Border the declaration of death has constitutive nature of rights; it produces effects not only for the future (*ex nunc*), but also for the past (*ex tunc*), starting from the date established in the decision.

Because presumed death by judgment is assimilated to natural death, it produces the effects of the latter. Thus, when the capacity for use ends, the marriage also ends,

the life rights (life annuity, usufruct) end, succession opens, etc. On the other hand, in matters of filiation, the presumption of paternity established by art. 414 of the Civil Code will be retroactively removed on the date established in the judgment as the date of death. The presumption established by the judgment that the person declared dead died on a certain date can be overturned at any time by proving that the person is alive.

5. Annulment of the Decision Declaring Death

As I mentioned, the death judgment is based on a presumption of the death of the natural person, a presumption that may prove to be inconsistent with reality. That is why the legislator has regulated the possibility of canceling this decision if it is proven that the person whose death was declared is alive.

The action to annul the decision declaring death is imprescriptible, so it can be brought at any time and is under the jurisdiction of the court that pronounced the decision by which death was decreed. This action may be brought by any interested person. The judgment is made as a matter of urgency with the summons of the persons who were parties to the procedure by which the death was pronounced and with the mandatory participation of the prosecutor; the disposition of the decision establishing the nullity of the declaratory death decision is communicated to the civil status service for the cancellation of the registration.

6. The Effects of Canceling the Death Declaration Decision

By canceling the declaratory judgment of death, the termination of the person's capacity to use is removed. Being void (which operates retroactively), such a decision produces retroactive effects so that the person will be considered to have been alive all along. That being the case, all the rights and obligations that were put an end to by the declaratory judgment of death will be reborn, that is, his succession will be considered not to have opened, and his marriage will be considered not to have ended.

However, there is an exception regarding the consideration as valid of the marriage of the one declared dead: according to art. 293 para. (2) NCC, "if the husband of a person declared dead has remarried and, after this, the decision declaring death is annulled, the new marriage remains valid, if the husband of the person declared dead was in good faith. The first marriage is considered to have taken place on the date of the conclusion of the new marriage".

Art. 54 of the Civil Code, under the patrimonial aspect, provides that, "The person who has been declared dead can request, after the annulment of the decision

declaring death, the return of his goods in kind, and if this is not possible, their restitution by equivalent. However, the acquirer with onerous title is not obliged to return them unless, subject to the provisions of the Land Deed, it is proved that at the time of acquisition he knew or should have known that the person declared dead was alive”.

The person who reappeared will be able to request the return of the assets from the presumptive heirs to whom the assets of the estate were handed over, because by canceling the declaratory judgment of death, the title of heir of those who collected the inheritance is abolished, so they are obliged to return the assets that they received them in this capacity.

The restitution of the assets will be differentiated, according to whether the heirs were in good or bad faith.

1. the heir in good faith - that is, the one who believed that the person declared dead is no longer alive and that he is entitled to inherit him, is obliged to the reappeared one:

- to return the goods in kind, if possible.
- to return them by equivalent, i.e., to return the price received by selling those goods to a third party; as to the fruits of those goods (including interest), he shall retain them. Good faith is presumed, so the burden of proof of the heir's bad faith rests with the re-emergent.

2. the heir in bad faith – i.e., the one who knew that the one declared dead is alive, is obliged:

- to return the goods in kind, if possible;
- to return either the price obtained if he disposed of them, or their current value if this is higher than the price received.
- to return all the fruits produced by goods (natural, industrial, and civil) that he has harvested and those that he has omitted to harvest.

According to art. 57 Civil Code, “The apparent heir who learns that the person who was declared deceased by a court decision is alive, retains possession of the goods and acquires their fruits, while the does not request their return.”

If the title of heir has been abolished, based on the principle of *resoluto jure dantis, resolvitur jus accipientis*, the alienations made by the presumptive heirs to third parties are also to be abolished.

Therefore, the one who has reappeared in life can demand the return of the goods directly from the sub-acquiring third parties as an effect of the annulment of the presumed death. However, art. 54 para. 2 Civil Code establishes an exception, thus,

"the acquirer with onerous title is not obliged to return them unless, subject to the provisions of the Land Deed, it is proved that at the time of acquisition he knew or should have known that the person declared dead is in life."

The exception will not operate, and the acts of alienation will be abolished and the sub-acquiring third party would have to return the goods in kind if he received them free of charge (regardless of his good or bad faith), as well as when he received them with onerous title, but it was in bad faith. According to art. 56 Civil Code, "The payment made to the legal heirs or legatees of a person, which reappears after the decision declaring death, is valid and exculpatory, if it was made before the deletion of the mention of death from the register of civil status, unless the person who made the payment knew that the person declared dead was alive".

7. Conclusions

Civil law has a very important role in the Romanian legal system because, through its rules, it contributes to the protection of subjective patrimonial and personal non-patrimonial rights of natural and legal persons, representing, at the same time, the guarantee of the formation of a correct legal conscience as well as the respect and strengthening of morals. The recognized capacity of human beings to become holders of rights and obligations is legal personality. This also implies the civil capacity, which includes the capacity to use and the capacity to exercise. The precise knowledge of the moment from which the natural person's ability to use begins and implicitly the moment at which it ends is of particular importance in terms of civil law, considering the effects produced from a legal point of view both for the natural person in question and in its legal relations with other legal subjects.

8. Bibliography

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