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Preciput Clause between Donation and Bequest

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Abstract: We know that, following the conclusion of the marriage, a series of effects occur regarding the patrimonial or non-patrimonial relations between the spouses. With regard to personal non-patrimonial relationships, marriage involves a series of mutual obligations of the spouses that limit the individual freedom of each spouse. Marriage also has a number of effects in terms of property relations between spouses. The patrimonial relations between the spouses concern the matrimonial regimes but also other aspects with patrimonial content. For example, it is natural for spouses to dispose of their property through liberalities, in favour of one another or in favour of third parties, or for one spouse to survive the other, and then the question arises as to the extent to which spouses can dispose of liberalities and which it is the fate of property acquired during marriage? We will try to answer this last question by analysing the legal nature of the preciput clause, between donation and bequest. We can also consider it as a bridge between family law and inheritance law, in the sense that it is a convention of the spouses concluded during life which regulates a legal situation born after the death of one of them.

Keywords: mortis causa; ut singuli, a fortiori

1. The Reason for the Preciput Clause

Based on the definition set out in Article 333 of the Civil Code, which provides in paragraph 1 that "by matrimonial agreement it may be stipulated that the surviving spouse shall take over free of charge, before the division of the inheritance, one or more of the common property, held in inheritance or co-ownership" we can claim that this institution is the result of transformations at the level of society and morals, which determined a change in the structure of the family patrimony; practically the family fortune no longer consists mainly of goods acquired by inheritance from the parents, but at present it is represented by goods acquired jointly by the spouses, during the marriage.

In this sense, the precipt clause appears as a guarantee in the sense of continuing to ensure a minimum of comfort to the spouse who throughout his life has contributed to the acquisition of the common goods that are the object of the clause. From this point of view, it is a recognition of the effort made by each spouse to ensure the prosperity of the family in society, by stipulating it, the surviving spouse acquiring full ownership, but only *mortis causa*, the goods for which he worked and sacrificed on during the marriage. By inserting the preciput clause in a matrimonial agreement, not only is there a replacement of the legal matrimonial regime with a conventional one, but it is also prevented the collection of

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common goods in inheritance or co-ownership by persons foreign to the conjugal home, but who are called to inheritance under the law.

The object of the preciput clause consists "in one or more common goods, goods that are required to be individualized within the matrimonial convention or in other words goods seen *ut singuli*. Usually, the object of the preciput clause is the house, through this disposition avoiding the possibility of its entry in the succession mass and the division between the co-heirs of the deceased. With regard to the dwelling house, it should be noted that the right arising from the stipulation of a preciput clause is not to be confused with the right of residence of the surviving spouse. If the object of the preciput clause is the furniture or household objects, the right arising from the preciput clause should not be confused with the special right of the surviving spouse over the furniture and household objects.

Paragraph 1, second thesis, article 333 of the Civil Code gives the preciput clause both unilateral and bilateral character, so it can be stipulated for the benefit of each of the spouses or only for the benefit of one of them.

It is important to mention that by establishing the preciput clause the rights of the common creditors of the spouses cannot be infringed, the goods object of the clause not being imperceptible, namely they can be pursued and enforced by them.

The current Civil Code establishes in article 333 paragraph (4) a series of cases that attract the expiration of the preciput clause, namely when the community ends during the life of the spouses through divorce, annulment or annulment of the marriage. Another case of expiration is the predecessor of the beneficiary spouse or when they are treasurers or co-deceased, but also in the situation of the satisfaction of the claims of the common creditors by selling the goods that are the object of the preciput clause.

Another aspect regulated by the Civil Code concerns the execution of the preciput clause, establishing that it is done in kind, as a rule, and when this is not possible the execution is done by equivalent.

2. The Legal Characteristics of the Preciput Clause

Being a convention of the spouses or future spouses, the preciput clause must be subject to the general rules of validity of the contracts;

In terms of capacity rules to be met at the time of the agreement, the parts of the preciput clause may be spouses or future spouses who have reached the age of 18, minors who have reached the age of 16, but with the consent of the legal guardian and authorization the guardianship court, as well as the minors who have acquired full exercise capacity as a result of concluding a previous marriage, insofar as they have retained their full exercise capacity. Consent to the conclusion of the preciput clause must be to be serious, freely expressed and informed by both parties, in person or by proxy with an authentic, special power of attorney and with a predetermined content.

The object of the preciput clause is represented by one or more of the common goods of the spouses, held in inheritance or in co-ownership. The cause of the preciput clause consists in the intention of the spouses to gratify one of them or the one who will survive. This intention is doubled, however, by various emotional reasons. As regards the form which the expression of the will must take, the agreement of the parties on the preciput clause must take the authentic form under the sanction of absolute nullity.

The preciput clause is essentially a bilateral legal act, and can be stipulated either bilaterally, in favour of both spouses, or unilaterally, in favour of one of the spouses. Since, in the case of the clause stipulated in favour of either spouse, at the date of the stipulation in the content of a matrimonial agreement it is

not known which of the spouses will survive the other, this clause is random. Also, from the condition related to the predecessor of one of the spouses results another legal character of the preciput clause, respectively that of legal act affected by modalities. Since it cannot exist outside the matrimonial convention, the preciput clause cannot be regarded as a principal act, but only as an act ancillary to the convention in which it is inserted.

Being an accessory act to the matrimonial agreement, by reference to the provisions of article 330 paragraph 1 of the New Civil Code, the preciput clause must respect the form required by law *ad validitatem*; therefore, the preciput clause is a solemn legal act that can be concluded personally by the two spouses, but also by representation by proxy with special, authentic power of attorney and with predetermined content. The possibility of concluding the matrimonial agreement by representation does not affect its intuituu personae character and implicitly the preciput clause.

Being therefore a legal act regarding patrimonial rights that are transmitted to the surviving spouse, the preciput clause must be considered as a patrimonial and translational property legal act. However, this transfer of goods is free of charge. The act of disposition of the spouses, although concluded during life, produces effects after death. In this respect, the preciput clause must be qualified as a legal act mortis causa. Compared to the role played by the will of the spouses in establishing its content, the preciput clause is a subjective legal act whose content is determined by the sole and independent will of the parties, without derogating from the legal provisions. Because it has a special regulation in the Civil Code, we appreciate that the preciput clause is a legal act called, only its legal nature being unclear and unstable.

3. The Legal Nature of the Preciput Clause - between Donation and Bequest

From the legal characteristics of the preciput clause, it results that this institution borrows elements from both the donation and the bequest.

In this context, the question arises: what is the title by which the surviving spouse takes over the goods expressly stipulated in the content of the convention? In other words, what is the legal nature of the preciput clause? Disputes may arise even from the location of the preciput clause, an institution of succession law as it concerns issues related to the inheritance of one of the spouses, in the chapter dedicated to property relations between spouses, but also the superficial regulation of the institution.

Compared to the way of expressing the legislator in the content of article 333 of the New Civil Code, the biggest temptation would be to qualify the preciput clause as a liberality. The first argument invoked was that, similar to the donation, the stipulation of a preciput clause implies an impoverishment of the dispositive correlative with a gratuitous increase of the gratified patrimony. We therefore find the objective criterion according to which a liberality can be defined and qualified. There is also the subjective element that characterizes a liberality, respectively the desire to ensure the surviving spouse a patrimonial comfort similar to the one he had during the marriage. The support must not be received as such and its legal justification is required.

Thus, regarding the similarities between the preciput clause and the donation, it can be seen that both have as their source the agreement of the parties.

Another common aspect is represented by the fact that both the preciput clause and the donation represent bilateral acts subject to the authentic form, under the sanction of absolute nullity. *A fortiori*, both are entered in the Registers for the purpose of opposability to third parties, but while the donation

is to be entered in the R.N.N.E.L[1], the preciput clause being an accessory of the matrimonial convention will be inscribed in the R.N.N.R.M[2]. Thus, a first distinction is observed between the two legal acts, the preciput clause derogating from the rules of the legal regime of the donation in terms of opposability to third parties.

It is also possible to observe the accessory character of the preciput clause, unlike the donation which enjoys an independent regime. According to the main adage *accessorium sequitur principale*, the preciput clause cannot "evade" the authentic form, unlike donation, which can exist independently of these formalities, indirect donation, disguised and manual gifts, being real exceptions.

Apparent similarities can also be identified in terms of the *intuitu personae* character, which, although governing both legal acts, differs from the person's determination at the time of concluding the act. As the donation is a unilateral contract, the subjects of the legal relationship are determined at the time of concluding the donation, unlike the preciput clause, whose validity depends on one *alea* element, reason for which the person of the beneficiary is determinable. Moreover, the donor's predecessor attracts the expiration of the donation, as opposed to a clause whose effectiveness is affected by the death of the beneficiary spouse before the other.

Another issue discussed in the doctrine (Bodoașcă & Drăghici, 2013, p. 34) is the question of whether the rule in the matter of the preciput clause is **irrevocability**, similar to donation?

The main argument brought by the specialty literature[3] is represented by the possibility of amending or dissolving the matrimonial agreement, according to the provisions of article 369 of the current Civil Code, contrary to the irrevocability of the donation, whose revocation is expressly and limitingly provided by law (article 1020-1027 Civil Code).

The distinction is also noticeable in terms of their object, the preciput clause having a complex object (common goods, owned in co-ownership or inheritance), the object of the donation being strictly limited to own property. Thus, by inserting a preciput clause in a matrimonial agreement, the patrimony of the disposer is not reduced, but of the succession mass.

Regarding the moment of occurrence of the effects, the donation is not affected by the condition of the death of one of the spouses, once the donation contract is concluded it validly produces its effects, unlike the preciput clause affected by a suspensive condition, we could say, the effects are postponed until the death of one of the spouses.

It is thus observed that, despite some common features with the donation, however, the preciput clause cannot be confused with the donation in terms of the geometric place where the institution is located, the accessory character to the matrimonial agreement, the specific form conditions, the object, the moment the effects of the revocation and expiration clause and causes occur.

Being a *mortis causa* legal act, there is also the temptation to associate the preciput clause to the bequest in a private capacity. The possibility of assimilating the preciput clause to a particular bequest would be questionable mainly due to the conventional nature of the preciput clause, but there are other considerations that could be taken into account and that the transfer of ownership operates from the date of opening the inheritance, but not as a succession law, but *ex contractu*, with all the consequences

[1] National Notarial Register of Evidence of Liberalities.
[2] National Notarial Register of Matrimonial Regimes.
[3] Idem.

arising from this fact, consequences related to the possibility of conclusion by proxy, revocation *mutuus dissensus*, expiration.

Thus, following the formation, we note that the bequest is a unilateral legal act, producing effects regardless of the acceptance or non-acceptance of the legatee, while the preciput clause is an essentially bilateral legal act involving the agreement of both spouses, *mutuus consensus*, manifested at the time of conclusion the matrimonial convention in which the preciput clause is included.

Also, regarding the formation, we mention that unlike a will that cannot be concluded by representation, the matrimonial agreement in which the preciput clause is inserted can be concluded by proxy with authentic power of attorney,

Another distinction between the two institutions concerns their object, so that "things on which the testator exercises patrimonial rights exclusively may be the object of the bequest. Instead, the preciput clause can have as object only things over which the spouses exercise common rights" (Bodoașcă & Drăghici, 2013, p. 35). We also note that the bequest can be universal, universal or private, while the preciput clause can only be private.

Reaching the effects of the two institutions, we note that this preciput clause is subject to the causes of nullity and expiration that actually sanction the matrimonial agreement in which the clause is provided, while the bequest presents, as causes of ineffectiveness, voluntary or judicial revocation and expiration.

Thus, in the situation of the preciput clause we cannot speak about the tacit or unilateral revocation, as we encounter in the case of the bequest prefigured in the will, but only about a possible revocation exclusively *mutuus dissensus*, with the consent of the spouses.

Therefore, we notice that the differences between the two institutions are major and range from the way of training to the effects. In such a situation, the reluctance to consider the preciput clause as a legacy is obvious. In these conditions, we speak of the preciput clause as a hybrid institution that borrows features both from the donation, but also from the bequest?

Conclusions

And yet the question remains: what is the preciput clause? Considering the mentioned aspects, we appreciate that the solution of the problem related to the legal nature of the precipitate lies in the way of approaching the problem, respectively in finding the cause underlying the legal act. In this sense, if we start from the premise that it consists in the liberal intention of the spouses, then it is obvious that the precipice represents a liberality. If, however, there was no liberal intention but only the desire to share one or more common goods in advance, then the precipitate is a matrimonial advantage or an unequal sharing clause. Noting that the problems of the preciput clause are related to its legal nature, I would suggest that the legislator expressly provide in the legal norm what its legal nature is.

References

Bodoașcă, T., & Drăghici, A. (2013). Discussions regarding the precipitous clause in the regulation of the new Romanian Civil Code. *Law no. 10*, p. 34.

*** National Notarial Register of Matrimonial Regimes.