

JUDICIAL DECLARATION OF DEATH

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ABSTRACT: *THE PASSIVE LEGAL CAPACITY OF THE NATURAL PERSON CEASES BY HIS/HER DEATH, PHYSICALLY ASCERTAINED OR DECLARED BY THE COURT OF LAW.²*

THE CIVIL CODE REGULATES A GENERAL CASE AND TWO SPECIAL CASES IN WHICH DEATH CAN BE DECLARED IN COURT.

THE GENERAL CASE IS PROVIDED BY ART. 49 CIVIL CODE ACCORDING TO WHICH, IF A PERSON IS MISSING AND THERE ARE INDICATIONS THAT HE/SHE HAS DIED, HE/SHE MAY BE DECLARED DEAD BY COURT DECISION, AT THE REQUEST OF ANY INTERESTED PERSON, IF AT LEAST 2 YEARS HAVE PASSED SINCE THE DATE OF RECEIPT OF THE LAST INFORMATION OR INDICATIONS THAT HE/SHE WAS ALIVE.

THE FIRST SPECIAL CASE IS REGULATED IN ART. 50 PARA. (1) CIVIL CODE WHICH PROVIDES THAT THE PERSON MISSING IN SPECIAL CIRCUMSTANCES, SUCH AS FLOODS, EARTHQUAKES, RAILWAY OR AIR CATASTROPHES, SHIPWRECKS, DURING ACTS OF WAR OR IN ANOTHER SIMILAR CIRCUMSTANCE, WHICH ENTITLES THE PRESUMED DEATH, MAY BE DECLARED DEAD IF AT LEAST 6 MONTHS HAVE ELAPSED SINCE THE DATE OF THE DISAPPEARANCE. THE SECOND SPECIAL CASE IS REGULATED IN ART. 50 PARA. (2) CIVIL CODE ACCORDING TO WHICH, WHEN IT IS CERTAIN THAT DEATH OCCURRED, ALTHOUGH THE BODY CANNOT BE FOUND OR IDENTIFIED, THE DEATH MAY BE DECLARED BY COURT DECISION, WITHOUT WAITING FOR THE FULFILLMENT OF ANY TERM FROM DISAPPEARANCE.

KEYWORDS: *JUDICIAL DECLARATION OF DEATH, PASSIVE LEGAL CAPACITY, GENERAL CASE, SPECIAL CASES.*

Cessation of the passive legal capacity of the natural person. The passive legal capacity of the natural person ceases by his/her death, ascertained physically or declared in court.³

The physically observed death is that which is established on the basis of the examination of the corpse.⁴

If the death cannot be physically ascertained, because it is not possible to examine the corpse, the solution is to declare the death in court. The judicial declaration of death occurs either when the natural person has disappeared for a long time, without anyone knowing where he/she is and there are indications that he/she has died, or when the natural person has disappeared in exceptional circumstances, which justify the assumption of death or it is certain that he/she died, although the body cannot be found or identified.⁵

Cases of judicial declaration of death. The Civil Code regulates a general case and two special cases in which death can be declared in court.

The general case. This case is regulated in art. 49 Civil Code.

According to the text of art. 49 Civil Code, if a person is missing and there are indications that he or she has died, he or she may be declared dead by court order, at the request

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² Iliora Genoiu, *Drept civil. Partea generală. Persoanele*, 3rd edition, revised and extended, C.H. Beck Publishing House, Bucharest, 2019, p. 299.

³ *Ibidem.*

⁴ See Eugen Chelaru, *Drept civil. Persoanele în reglementarea noului Cod civil*, 3rd edition, C.H. Beck Publishing House, Bucharest, 2012, p. 54.

⁵ See Carmen Tamara Ungureanu, Ionuț-Alexandru Toader, *Drept civil. Partea generală. Persoanele*, 4th edition, revised and extended, Hamangiu Publishing House, Bucharest, 2019, p. 86; Carmen Tamara Ungureanu, *Încetarea existenței persoanei fizice și efectele acesteia în Codul civil (Legea nr. 287/2009)*, in the “Dreptul” Magazine no. 6/2012, p. 14.

of any interested person, if at least 2 years have elapsed since the last information was received or indications that he or she was alive [para. (1)]. If the date of receipt of the latest information or indications about the missing person cannot be established exactly, the term provided in par. (1) shall be counted from the end of the month in which the last information or indications were received, and if the month cannot be established, from the end of the calendar year [para. (2)].

The legal provisions mentioned above refer to the missing person for whom there are indications that he or she has died. The conditions required by law in order to be able to declare the death of a person judicially, provided by art. 49 Civil Code are the following:⁶

- a) the person has disappeared, not being sufficient only a long absence from home;
- b) there are indications that the missing person has died;
- c) at least 2 years have elapsed since the date of receipt of the last information or indications showing that the person concerned was alive.

The 2-year period starts to run either from the date of receipt of the latest information or indications about the missing person, or, if this date cannot be established exactly, from the end of the month in which these were received. If the month cannot be established either, the 2-year term will be calculated from the end of the calendar year in which the last information or indications about the missing person were received.⁷

The request for the judicial declaration of death may be made by any interested person.

Special cases of judicial declaration of death. The special cases of judicial declaration of death are regulated by art. 50 para. (1) and (3) Civil Code.

According to art. 50 Civil Code, the person gone missing in special circumstances, such as floods, earthquakes, railway or air catastrophes, shipwrecks, during acts of war or in another similar circumstance, which justifies the presumed death, may be declared dead, if at least 6 months have elapsed from the date of the circumstance in which the disappearance occurred [para. (1)]. If the day in which the circumstance occurred when the disappearance took place cannot be established, the provisions of art. 49 para. (2) [para. (2)] apply. When it is certain that the death occurred, although the body cannot be found or identified, the death may be declared by court decision, without waiting for the fulfilment of any term from the disappearance [para. (3)].

The provisions of art. 50 of the Civil Code regulates two cases of judicial declaration of death of persons who disappeared during special circumstances, such as those mentioned in the first paragraph of this text of law: the case of those who are presumed to have died and the case of those known to have died in such a circumstance.⁸

In the first case, since there is only the presumption that the person in question could not have survived the circumstance in which the disappearance occurred, the legislator imposed the condition of passing a period of at least 6 months from the date when it occurred. For the calculation method of the term of 6 months, reference is made to the provisions of art. 49 para. (2) Civil Code. As a result, the 6-month period will start to run either from the date of receipt of the latest information or indications about the missing person, or, if this date cannot be established exactly, from the end of the month in which they were received. If the month cannot be established either, the term of 6 months will be calculated from the end of the calendar year in which the last information or indications about the missing person were received.⁹

The provisions of art. 50 para. (3) of the Civil Code envisage the disappearance of the person in circumstances that confer a high degree of certainty regarding the occurrence of death,

⁶ Eugen Chelaru, *op. cit.*, p. 55.

⁷ *Ibidem.*

⁸ *Ibidem.*

⁹ *Idem*, p. 56.

reason for which the action by which the judicial declaration of death is requested can be formulated without waiting for the fulfilment of a term of disappearance.¹⁰

Procedure of judicial declaration of death. The Civil Code does not regulate the procedure of judicial declaration of death but, through art. 51, it stipulates that the settlement of the request that has such an object is made according to the provisions of the Code of Civil Procedure. In the code of civil procedure, the procedure for declaring death is regulated in art. 944 et seq.

According to art. 944 of the Code of Civil Procedure, the request to declare the death of a person is submitted to the competent court in whose district that person had his/her last known domicile.

According to art. 945 para. (1) Code of Civil Procedure, after notifying the court, the president shall ask the mayor's office of the village, city, municipality or district of Bucharest, as well as police bodies in whose territorial area was the last known address of the missing person to gather information about him/her. At the same time, the president will order the application to be displayed at the last known address of the missing person, at the mayor's office of the village, city, municipality or district of Bucharest and at the court, as well as the publication in a widely circulated newspaper of an announcement about opening the procedure for declaring death, with the invitation for any person to communicate the information they know in connection with the missing person [art. 945 para. (2) Code of Civil Procedure]. The president will notify the court of guardianship from the last known domicile of the one whose death is requested to be declared, in order to appoint, if necessary, a curator, under the conditions provided by the Civil Code [art. 945 para. (3) Code of Civil Procedure]. If there is real estate in the patrimony of the person whose death is requested to be declared, the president will request, ex officio, the notation of the application in the land book, as well as its registration in the trade register, if he/she is a professional [art. 945 para. (4) Code of Civil Procedure].

According to art. 946 para. (1) Code of Civil Procedure, the fixing of the trial term is made after the passage of two months from the date of the publications and after the receipt of the research results.

The person whose death is requested to be declared is subpoenaed at the last known address; the subpoena is published in a widely circulated newspaper. If the person in question had an agent, he/she will also be summoned, in order to give explanations to the court. The curator will also be summoned, if he/she has been appointed [art. 946 para. (2) and (3) Code of Civil Procedure]. The trial will be made with the participation of the prosecutor [art. 946 para. (4) Code of Civil Procedure].

According to art. 947 of the Code of Civil Procedure, by the care of the court that judged the request, the operative part of the final decision declaring the death will be displayed for two months at the headquarters of that court and of the mayor's office of the village, city, municipality or district of Bucharest, in whose territorial area the person declared dead had the last known domicile, as well as at the person's domicile [para. (1)]. The operative part of the decision will be communicated to the court of guardianship from the last known domicile of the person declared dead, in order to appoint a curator, if necessary [para. (2)]. Also, the operative part of the decision declaring death, with the mention that the decision remained final, will be communicated to the local community public service for the registration of persons from the last known domicile of the person declared dead, in order to register the death [para. (3)]. Where applicable, the operative part of the decision declaring death shall be noted in the land register and shall be recorded in the trade register, in the succession register, as well as in other public registers [para. (4)].

¹⁰ *Ibidem.*

We note that, according to art. 948 of the Code of Civil Procedure, the request to declare the death of a person whose cessation of life is certain, but the body cannot be found or identified, may be introduced in the court in whose constituency that person died [para. (1)] The application may be submitted as soon as the fact of death has been known, on the basis of research carried out by the competent bodies. The court may also order the administration of other evidence. The provisions of art. 945 para. (1) and (2) and art. 946 para. (1) are not applicable [para. (2)].

The presumed date of death of the missing person. The date of death is an essential and binding element of the judicial decision declaring death. The rules for establishing the date of death, regulated by art. 52 para. (1) and (2), are the following:

a) the date resulting from the administered evidence is considered the date of death as the probable day of the legal event; the time of death, if it cannot be determined, will be considered to be the last hour of this day;

b) when such a day cannot be established from the administered evidence, the date of death will be considered the last day of the term of 2 years or, as the case may be, of 6 months;

c) the time of death will be considered the last hour of the last day of the term of 2 years from the disappearance (for the general case regulated by art. 49 Civil Code), the last hour of the last day of the term of 6 months from the disappearance [for the special case regulated by art. 50 para. (1) Civil Code], respectively the last hour of the day in which the circumstance took place in which the person disappeared [for the special case regulated by art. 50 para. (3) Civil Code].¹¹

It should be noted that the date of death is never that of the pronouncement of the declaration of death nor that of the finality of this decision, and it is always an earlier date, established by the court decision declaring death. The declaratory decision of death produces retroactive effect, in the sense that the person is considered dead starting with the date and time of death established by the court decision.¹² The missing person is *presumed* to be alive, unless a final death declaration has been made (art. 53 Civil Code).

Rectification of the date of death. Pursuant to art. 52 para. (3) Civil Code, the court may rectify the date of death, established in accordance with the law, if it is proved that it was not possible for the person declared dead to have died on that date. In this case, the date of death is that established by the rectification decision.

The effects of the death declaration. The judicial death declaration has, in principle, the same legal effects as a physical death, namely:¹³

- the cessation of the natural person's passive legal capacity, from the date established by the decision as that of death;

- opening the succession procedure of the person concerned and extinguishing his/her life rights; the term of one-year succession option begins to run from the date of registration of the death in the civil status register, unless the successor has known the fact of death or the decision to declare death at an earlier date, in which case the said term runs from this earlier date [art. 1103 para. (2) lit. b) Civil Code];

- termination of the marriage of the person declared dead.

Annulment of the death declaration. If the person declared dead is alive or if the death certificate, issued on the basis of the physically found death, is discovered, the annulment of the decision declaring death may be requested at any time.¹⁴

¹¹ Ilioara Genoiu, *op. cit.*, p. 302.

¹² Carmen Tamara Ungureanu, Ionuț-Alexandru Toader, *op. cit.*, p. 90.

¹³ Ilioara Genoiu, *op. cit.*, p. 302-303.

¹⁴ Carmen Tamara Ungureanu, Ionuț-Alexandru Toader, *op. cit.*, p. 92. According to art. 54 para. (1) Civil Code, *if the person declared dead is alive, the annulment of the decision declaring death may be requested at any time.*

According to art. 949 of the Code of Civil Procedure, the request for finding the nullity of the declaratory death decision in case the person is alive is made to the court that pronounced the decision. The same will be done when the civil status certificate is presented, which confirms the death of the person declared dead [para. (1)]. The judgment of the request is made with the summoning of the persons who were parties in the process of declaring the death and with the participation of the prosecutor [para. (2)]. The operative part of the decision finding the nullity of the decision, with the mention that it remained final, is communicated to the local community public service for the registration of persons for the annulment of the registration [para. (3)].

Following the annulment of the death declaration, the property of the person declared dead must be returned, in kind or by equivalent. The acquirer via onerous transaction is not obliged to return them, unless, subject to the provisions on the land book, it is proved that, at the date of acquisition, he/she knew or should have known that the person declared dead is alive [art. 54 para. (2) Civil Code].¹⁵

Therefore, the causes that can lead to the annulment of the death sentence are the following:

- a) the fact that the person declared dead is alive;
- b) the discovery of the death certificate of the person declared dead.¹⁶

The annulment of the death declaration produces two categories of effects:¹⁷

a) non-patrimonial effects, consisting in removing the cessation of the passive legal capacity of the person judicially declared dead; in other words, the reappeared person is a subject of law and has passive legal capacity;

It follows, therefore, that the removal of the cessation of the passive legal capacity of the person declared dead by the court produces, in principle, retroactive effects.¹⁸

However, the law provides for some exceptions to the retroactive effect of removing the termination of the passive legal capacity of the natural person.¹⁹ Thus, according to art. 293 para. (2) Civil Code, if the spouse of a person declared dead has remarried and, after that, the decision declaring death is annulled, the new marriage remains valid, if the spouse of the person declared dead was acting in good faith. The first marriage is considered dissolved on the date of the conclusion of the new marriage.

As can be seen, the legal provisions are applicable only in the case of a bona fide spouse who remarries.

b) patrimonial effects, consisting in the return of the goods of the person declared dead by the court of law.

In case of annulment of the court decision declaring death, two categories of legal relations are established:

- relations between the person declared dead (who later appeared) and his/her heirs apparent, who acquired the assets of the estate, differently depending on whether the latter are in good faith or in bad faith;

- relations between the person declared dead and the sub-acquirers of his/her property in good or bad faith.²⁰

In accordance with art. 55 of the Civil Code, *any interested person may at any time request the annulment of the decision declaring death, if the death certificate of the person declared dead is discovered.*

¹⁵ Iliora Genoiu, *op. cit.*, p. 303.

¹⁶ *Ibidem.*

¹⁷ *Ibidem.*

¹⁸ *Ibidem.*

¹⁹ Eugen Chelaru, *op. cit.*, p. 59.

²⁰ Iliora Genoiu, *op. cit.*, p. 304.

a) The heirs apparent (in good faith) will keep, pursuant to art. 57 Civil Code, possession of goods and will acquire their fruits, as long as the reappeared person does not request their restitution.

From the heirs of bad faith (considered possessors in bad faith) the reappeared person will be able to request:

- the restitution of his or her goods in kind or, if this is no longer possible, the payment of the value of these goods;
- remittance of the price of the goods alienated onerously to bona fide third parties or the value of these goods from the moment of formulating the request;
- the delivery of the fruits produced by the successor goods or, as the case may be, their value, including those which have not been negligently harvested.²¹

On the contrary, the heirs in good faith will not be bound by the restitution of the fruits produced by the successor goods, being considered possessors in good faith, but the reappeared person can claim from them:

- the restitution in kind of goods or payment of their value, if their restitution is no longer possible;
- the remittance of the price of goods alienated onerously to bona fide third parties.²²

It should be noted that good faith is presumed, proof of the contrary must be provided by the reappeared person. The heirs apparent will be able to invoke the acquisition of the property right by usufruct over the real estate assets that belonged to the person declared dead by the court, if the conditions provided by law in this respect are fulfilled. The payment made to the heirs apparent of the person declared dead and reappeared is also valid and discharges of all obligations, if it is made in good faith and before the deletion from the civil status register of the mention referring to death.²³

b) the acquirer via onerous transaction of the goods of the person declared dead and reappeared must return them in kind or, if this is no longer possible, by equivalent, only if he/she was in bad faith, i.e. if, at the date of their acquisition, he/she knew or should have known that the person declared dead is alive.²⁴

Per a contrario, it follows that:

- the acquirer in good faith via onerous transaction of the property of the person declared dead and reappeared is not bound by the restitution, the reappeared person being solely able to claim compensations from the alienating heir;
- the acquirer for free of the goods of the person declared dead and reappeared is obliged to return them, regardless of whether he/she is in good faith or in bad faith.²⁵

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²¹ *Ibidem*.

²² *Ibidem*.

²³ *Ibidem*.

²⁴ *Ibidem*.

²⁵ *Ibidem*.