



HISTORICAL BACKGROUND TO THE CURRENT REGULATION OF FIDUCIARY SUBSTITUTION IN ROMANIA

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ABSTRACT

The legal institution of fiduciary substitution has undergone significant transformations in Romanian law, reflecting changes in civil codes and legislative priorities. Initially regulated under the Calimach Code (1817–1865), fiduciary substitution was omitted from the Civil Code of 1864 and remained absent for over a century. With the enactment of the current Civil Code in 2011, this legal mechanism was reintroduced in a modernised form, addressing contemporary legal needs. This article examines the historical evolution of fiduciary substitution in Romania, analysing its origins in Roman law, its status under past civil codes, and its present-day regulation – highlighting the objectives of fiduciary substitution, including facilitating transgenerational property transmission and preserving family assets while maintaining core legal principles.

Keywords: fiduciary substitution, family law, succession planning, transgenerational transfer.

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1. INTRODUCTION

The legal concept of fiduciary substitution has a complex history in Romanian law, evolving through various civil codes and reflecting shifts in societal and legal priorities. Fiduciary substitution was initially regulated under the provisions of the Calimach Code (1817-1865).¹ However, this legal institution was not included in the Civil Code of 1864,² which remained in force until 2011. With the introduction of the current Civil Code of Romania,³ fiduciary substitution has been reintroduced and regulated in a completely new form, reflecting modern legal principles and contemporary needs. This reestablishment marks a significant evolution in Romanian inheritance law, reinstating a mechanism that had been dormant for over a century. For centuries, the Romanian legislators have lacked a lucid perspective for developing the legal mechanism of fiduciary substitution. The objectives of fiduciary substitution were the contribution to smooth transgenerational property transmission, the protection of relationships between family members, and keeping certain assets within the family. The proposed aims had to be without prejudice to the general principles of law, such as establishing by law an order of succession, ensuring full freedom of disposal by will, prohibiting covenants on future inheritance, ensuring flexible prerogatives for holders of rights subject to conditions, etc. The aim of this article is to examine the historical background of the regulation of fiduciary substitution and provide a comprehensive analysis of the evolution of this legal institution in Romania. In the first part of the article, I will investigate the origins of this legal institution in Roman law, followed by an analysis of the status of fiduciary substitution as outlined in the

- 1 The Calimach Code was a civil code of Moldavia, drawn up by Christian Flechtenmacher and Anania Cuzanos, with the help of Andronache Donici, Damaschin Bojincă and other jurists, on the initiative of the ruler Scarlat Callimachi (Calimach), who promulgated it in 1817.
- 2 The Civil Code of 1864, or Cuza's Civil Code, or Codicele Civil of 1864, was the Civil Code in force in the United Romanian Principalities and later Romania from December 1, 1865, until October 1, 2011.
- 3 Civil Code of Romania. Published in the Official Gazette No. 505 of 15 July 2011.

Calimach Code and the Civil Code of 1864. Then I will present the regulation of fiduciary substitution under the current Romanian Civil Code.

2. HISTORICAL BACKGROUND

Fiduciary substitution was permitted by the Calimach Code⁴ but was prohibited by the Civil Code of 1864. Fiduciary substitution was viewed as an outdated institution with no place at the dawn of modernity. By its very nature, it proposed measures that were sometimes too conservative in the context of the new social realities. However, almost a century and a half later, the legislator's opinion has changed with regard to this institution, regulating it in the context of the current Civil Code. After almost a century and a half, this institution has been placed under review, and with the entry into force of the new Civil Code, not only has it been removed from the sphere of prohibited institutions, but it has also been given an appropriate regulatory framework. However, in order to better see how this completely new situation came about, we need to retrace the path that this institution has followed, from the Romans, through the Romanian and European Middle Ages, to the present day.

Fiduciary substitution is a legal institution with roots in Roman law. During the Roman Classical Age, the restrictive inheritance conditions led testators to customarily leave important legacies to the emperor to ensure that the will of a person would not be annulled. This practice leveraged the emperor's presence in the will and his authority to validate and protect the testator's final wishes. Additionally, this practice was exploited by the forgers to shield their illegal actions and prevent forged wills from scrutiny. They would leave important legacies to the emperor or to persons of high standing so that the people in authority

4 Chap. X, Art. 770 Calimach Code: *“După întâia orînduire de moștenitori, poate testatorul să facă și subrînduire (substituție), adecă a doua, a treia, a patra ș.c.l. orînduire de moștenitori. Cel întâi scris moștenitoriu se numește rînduit și moștenește, trăind ori voind sau nefăcîndu-se nevrednic moștenirei; iar cel al doilea se numește subrînduit și moștenește, întîmplîndu-se a nu moșteni rînduitul, murind sau lepădîndu-se de moștenire ori făcîndu-se nevrednic, și aceasta se numește obicinuita subrînduire.”*

did not dare to attack the wills. The development of trade relations was also an impulse for the emergence of the new legal instrument. Since the dominant class of merchants relocated to distant countries, they were therefore unable to complete the forms required for the will. It was against this backdrop that the *fideicommissum* was created, an institution that allowed for the disposal of property after death on much more favourable terms than a will.⁵ The *fideicommissum* (a trust-like arrangement) was an indirect and precautionary way of bequeathing. A third person (*fiduciarius*), as the term itself indicates (usually a person from the group of friends, who was in turn gratified by testamentary legacies or by being established as testamentary successor), received from the disponor a disposition of inheritance (*hereditas fideicomissa*) relating to his entire estate, a part of it or only to a specific asset which he was to place at the disposal of a beneficiary (*fideicomissarius*). The trustee did not have a property right regarding the asset which he was obliged to return but was merely a trustee and depositary of the related estate, having no personal obligation in respect of the property administered.⁶ The absence of formal and substantive restrictions – allowing it to be established orally and permitting any beneficiary of the estate, whether an heir, legatee, trustee, or intestate heir, to serve as a fiduciary – contributed to the rapid expansion of *fideicommissum*.

Since it was used as a means of circumventing the law, trusts suffered numerous restrictions along the way. Initially it could operate even between incapable persons; then it consisted in the gratification of a person capable of receiving, with the task of transmitting the property to the incapable person, who was the true recipient. Later, it was recognised that only those capable of receiving by will could claim the execution of *fideicommissum* and that only those capable of testament could make such a donation. Jurisprudence has also applied certain substantive rules from the field of legacies to the institution of *fideicommissum*, as well as the flexibility of the form of *fideicommissum* to legacies. Thus, what was lacking in the nature of legacies was supplemented by what the nature of trusts offered and what the nature of

5 Tomulescu, 1958, pp. 446–449.

6 Alexandresco, 1900, p. 529.

legacies had in addition to the rules on fideicommissum; finally, under Justinian, they were merged and assimilated.⁷

Initially, fideicommissum was not binding, allowing the entrusted individual to betray the disponent's trust by refusing to transfer the property to the rightful beneficiary. Fideicommissum was not recognised as a source of obligations, being based solely on fides, a relationship of trust.⁸ In other words, it was not governed by civil law but only by the will of the testator and therefore, in principle, without any action. However, during the reign of the emperor Augustus, the institution of fideicommissum became *extra ordinem* legally binding.⁹ The practical utility of fideicommissum lies in its ability to exist independently of whether the inheritance was distributed under a will or, in the absence of a will, under intestate inheritance. Additionally, unlike legacies, a fiduciary – initially required to be an heir – could also be an individual with no prior connection to the estate. The evolution of fideicommissum has led to the classification of the institution into family fideicommissum and hereditary fideicommissum. As regards the first category, it referred to the transfer of assets viewed in *ut singuli*. Hereditary fideicommissum, on the other hand, was for the transmission of a share of the testator's estate or even for the transmission of the entire estate.

It should be noted that, during the reign of Emperor Justinian, they were reformed, with private trusts being assimilated to legacies. All persons who had *testamenti factio passiva* (i.e. could receive a legatee or an inheritance) could be beneficiaries of a fideicommissum (*fideicommissa dari possunt his quibus legari potest*). In mediaeval French law, the family fideicommissum mechanism led to the emergence of a new institution known as fiduciary substitution (fideicommissum).¹⁰ Alongside other legal constructs, such as the privilege of primogeniture, it played a key role in preserving assets within noble families, despite gradually

7 Hanga, 2009, p. 191.

8 Földi and Hamza, 1996, p. 659.

9 Ibid.

10 In Roman law, the fideicommissum was a precursor to fiduciary substitution. It was a legal mechanism allowing a testator to impose an obligation on an heir (fiduciary) to transfer property to a third party (substitute) after a certain event, such as the death of the fiduciary.

revealing its limitations. Over time, fiduciary substitution took shape, evolving in response to the historical and social dynamics that influenced its development for more than two millennia. Fiduciary substitution emerged as a response to the inflexibility of the legal formalism of the Roman Classical Age.¹¹ Modern Romanists recount the factors that brought *fideicommissum* into being. Thus, when a *pater familias* wished to donate, but the future beneficiary did not have the capacity to receive it, he entrusted (*fidei committo*) the property to an heir and asked him, in the future, to remit the property to the person who, for various reasons, could not receive it at that moment. Fideicommissum could be ordered without any formality: verbally or in writing (*codicillus*), or even tacitly (by a nod of the head). Through fideicommissum, a testator could create a will without formalities, even within the framework of legal succession. They could instruct a designated individual (*fideicommissarius*) to grant a specific benefit, either in writing or verbally, even without witnesses. This instruction was directed at the fiduciary, who could be the testamentary or legal heir or any other beneficiary of the estate. The fiduciary, in turn, was required to provide a benefit to another person concerning the inherited property or to grant freedom to a slave.¹²

2.1. THE FRENCH REVOLUTION OF 1789 AND THE PROHIBITION OF FIDUCIARY SUBSTITUTIONS

Fiduciary substitution had been practised in France since the 12th century but underwent reforms beginning in the 16th century. A notable consequence of the French Revolution of 1789 was the prohibition of fiduciary substitution. This decision was justified by the fact that, for centuries, the French nobility had used this mechanism to retain feudal estates and domains within their families, consolidating their social power.

On 14 November 1792, fiduciary substitutions were completely banned, and the ban had a retroactive effect, abolishing previously

11 Macovei, 2011, p. 224.

12 Földi and Hamza, 1996, p. 659.

stipulated substitutions. The French Code of 1804, the fruit of the victory of the rising bourgeoisie, prohibited fiduciary substitutions under sanction of nullity.¹³ It must be recalled that during the Napoleonic Caesarism, as during the short period of the restoration of the monarchy in France, the need to consolidate the throne through the revival of a powerful aristocracy brought about, in one form or another, fiduciary substitutions that were temporarily revived. The Napoleonic Civil Code of 1804 permitted fiduciary substitution only in two specific and narrowly defined cases, aimed at safeguarding family interests. First, it was allowed for a single degree and strictly for a noble purpose or to preserve social status. For instance, a testator (*de cuius*) could instruct his son to pass on certain documents or valuables that attested to the noble origin of the family. Second, fiduciary substitution was permitted to protect grandchildren in cases where the testator identified prodigal tendencies in their parents. If a testator observed that their son was prone to squandering his inheritance, they could impose a restriction ensuring that assets would pass directly to the grandchildren, preventing the dissipation of family wealth. These provisions reflect the Code's careful balance between inheritance flexibility and the preservation of family stability.

Fiduciary substitution was a well-established institution in Romanian law, influenced by Byzantine legal traditions and codified in local legislation. It was specifically acknowledged in Moldova under the Calimach Code (Chapter X, Article 770) and in Wallachia under the Caragea Code. However, with the advent of modern civil legislation, this legal mechanism was formally abolished. The first modern civil law codification in Romania, the Civil Code of 1864, expressly prohibited fiduciary

13 Article 896 of the old French Civil Code provided that “Substitutions are prohibited. Any provision by which a donee, heir or legatee is charged with the obligation to conserve and transmit to a third person is null and void even against the donee, heir or legatee.” The attitude of the French legislator in 1804 towards this institution is fully illustrated by the words of Jean Bigot de Préameneu, one of the drafters of the Civil Code, who stated that “in the families in which substitution ensured the preservation of the greatest wealth, each generation was stained by a shameful bankruptcy.”

substitution under Article 803,¹⁴ marking a significant departure from earlier legal traditions and aligning Romanian inheritance law with contemporary legal principles.

The restriction of fiduciary substitution was largely influenced by the French Civil Code, which served as a model for the Romanian Civil Code. The historical context of its adoption played a crucial role, as the legal reforms sought to promote the free circulation of property and prevent the long-term accumulation of wealth within certain families. By prohibiting this mechanism, legislators aimed to align inheritance laws with modern principles of equality and economic flexibility. Fiduciary substitution developed particularly widely in feudal society. The primary source of wealth in this system was the land, or estate, which the owner wanted to pass on to his descendants undivided from generation to generation. Fiduciary substitution emerged as a significant obstacle, primarily due to its restrictive effects on property ownership and economic development. One major issue was the immobilisation of landed property across generations, as it prevented alienation, directly conflicting with the principle of the free movement of goods. Additionally, since beneficiaries were required to transfer the property upon their death, they had no incentive to invest in its improvement. Instead, this often led to the excessive exploitation of the land, as owners sought to extract maximum short-term benefits without regard for long-term sustainability.

The institution of fiduciary substitution was therefore a form of landownership which hindered the growth of agricultural production at a time when, on the contrary, the birth of modern industry called for an increase in production. The prohibition of fiduciary substitution was primarily driven by its conflict with fundamental legal principles, particularly the free movement of goods. A mechanism that restricted the alienation of assets (*pactum de non alienando*) was seen as a direct

14 Article 803 of the 1864 Civil Code: “Substitutions or fideicommissums are forbidden; any disposition by which the donee, the heir or legatee is charged to preserve and remit to a third person shall be null and void, even as regards the donee, the heir or legatee.” (“Substitutiunile sau fidei’comisele sînt proibite; ori ce dispozițiune prin cari donatoariulu, eredeale instituitu sau legatariulu, va fi insarcinatu de a conserva și a remite la o a treia persona, va fi nulă, chiar în privirea donatariului, a eredelui numitu sau a legatarului.”).

violation of this principle. Although the old Civil Code eventually recognised the validity of inalienability clauses under certain conditions – namely, when justified by a serious and legitimate interest – fiduciary substitution was deemed to lack such justification and was expressly prohibited by law. Additionally, the establishment of a predetermined order of succession (*ordo successivus*) by a testator seeking to keep property within the family was viewed as an excessive restriction on individual liberty. This further reinforced the argument for its prohibition. By the early 20th century, Romanian courts, influenced by trends in French case law, ruled that fiduciary substitutions included in testaments under previous Romanian laws were invalid, as they could not be justified under the theory of acquired rights.

Consequently, starting from 1864, fiduciary substitution was considered a feudal and, as such, an anachronistic institution. However, it was established by the courts that certain legal mechanisms did not constitute genuine fiduciary substitutions and could therefore not be prohibited, even if their content was “closely related” to the content of the institution itself (moral, not legal, obligation of the institution to pass on the property received to the beneficiary).

2.2. THE FIRST MODERN LAWS AND THE NEED TO REGULATE FIDUCIARY SUBSTITUTION

In the early modern era, fiduciary substitution played a significant role in maintaining social classes, especially among the Romanian nobility. Thus, this institution appeared more as a necessity in Romania. At the beginning of the modern era, fiduciary substitution operated through two legal figures specific to the historical context in which they were regulated: substitution of heirs and the fideicommissum.

Substitution of heirs was regulated for the first time in Moldova in 1817, in the legislation of the ruler Scarlat Callimachi. The Calimach Code included provisions on testamentary matters such as inheritance upon death, the forms of wills, their revocation, and nullity. Additionally, it addressed fiduciary substitution in Articles 770–784. Article 770 stated that

*after the first appointment of heirs, the testator may also make a sub-appointment (substitution), that is to say, a second, third, fourth, etc., appointment of heirs. The first written heir is called the ordained heir and inherits by living or wishing to or by not becoming unworthy of inheriting, and the second is called the subordained heir and inherits by dying or renouncing the inheritance or by becoming unworthy of inheriting, and this is called the ordinary subordainment.*¹⁵

The Caragea legislature recognised the validity of fiduciary substitution, although it did not contain any provision concerning fiduciary substitutions.

The Callimach Code stipulated that

*the testator may oblige his heir to give either the whole inheritance or a part of it to the sub-inheritor and the first sub-inheritor to give it again to the second sub-inheritor, or at his death or for other determined events, that is, if he does not marry or if he chooses the monastic life or if he dies without children and the like.*¹⁶

Thus, the testator could pass on all or only part of the estate with the help of the subordination. The heir established during his lifetime had the rights of a trustee of the property to be passed on, called the “grantee of the estate”, until the property became the property of the

15 “După întâia orînduire de moștenitori, poate testatorul să facă și subrînduire (substituție), adică a doua, a treia, a patra ș.c.l. orînduire de moștenitori. Cel întâi scris moștenitoriu se numește rînduit și moștenește, trăind ori voind sau nefăcîndu-se nevrednic moștenirii; iar cel al doilea se numește subrînduit și moștenește, întîmplîndu-se a nu moșteni rînduitul, murind sau lepădîndu-se de moștenire ori făcîndu-se nevrednic, și aceasta se numește obicinuita subrînduire.”

16 Art. 774 of the Calimach Code: “The testator may oblige the heir to give all or part of the inheritance to the second heir, and the first heir to give it again to the second heir, either at his death or for other determined events, that is, if he will not marry or if he will choose the monastic life or if he dies childless and the like.” (“Testatorul poate îndatori pe rînduitul său moștenitoriu, ca să deae sau toată moștenirea sau o parte la subrînduitul moștenitoriu și cel întâi subrînduit să o deae iarăși la al doilea subrînduit, ori la moartea sa sau pentru alte hotărîte întîmplări, adică dacă el nu se va căsători sau dacă va alege viața monahicească ori dacă va muri fără copii și alte asemene.”).

beneficiary (subordinate), who in turn was also a trustee of the property until the next suborder acquired the property. Sub-assignment ended either when none of the designated heirs remained alive or when the purpose for which it was established was no longer applicable.

In addition to this legal figure of sub-ordainment, the Calimach Code regulated, only in the matter of estates, the fideicommissum, stipulating that

*fideicomis is the ordainment, by which the testator, leaving his family an estate over and above his lawful share, commands that he shall never alienate it or entrusts his heir to leave to another the whole or part of that estate.*¹⁷

It should be noted that the rules governing estates are much more drastic, stipulating a permanent inalienability of the specific individual asset, without providing an express indication of the beneficiary. In this specific “trust” law, a trust designated to a family member only applies to the testator’s “heirs”, meaning his descendants. If there are no descendants, the trust will be allocated to other family members. If the trust was left “unclaimed” to the family, it passed “by common consent to all”.

The trust concerning estates remained in effect until the last heir of the family had no children and no prospect of having any. At that point, the justification for preserving significant assets within the family was no longer valid. In this context, the legislators of the old Romanian legislation understood the role of certain assets kept for centuries in the family and regulated effective levers through which they could be preserved for the lineal descendants. Moreover, the existence of certain assets (in most cases, large land estates) in the patrimony of certain individuals indicated the social class to which they belonged.

17 Art. 781 of the Calimach Code: “Fideicomis is the ordainment by which the testator, leaving an estate to his family (§ 71) over and above the lawful portion, commands never to alienate it; or he binds his heir to leave to another the whole or part of that estate.” (“Fideicomis este orînduirea, prin care testatorul, lăsînd familiei sale (§ 71) o moşie peste partea legiuită, porunceşte, ca să nu o înstrăineze niciodată; sau îndatoreşte pe moştenitoriul său, ca să lase altuia moştenirea aceia întreagă sau o parte dintr-însa.”).

2.3. FIDUCIARY SUBSTITUTION UNDER THE OLD CIVIL CODE

The Civil Code (old Civil Code), which went into effect on 1 December 1865¹⁸ was Alexandru Ioan Cuza's probably greatest achievement of the legislative reform. Inspired by the modern legislation of European countries such as France, Belgium and Italy, the Romanian Civil Code to some extent retained the imprint of the old Romanian law. However, it seems that the regulation of fiduciary substitution has not considered the legislation of European states nor the historical tradition of the state. Article 803 of the old Civil Code stated that fiduciary substitutions are forbidden; any disposition by which the donee, the heir or the legatee is charged to preserve and remit to a third person shall be null and void, even as regards the donee, the heir or the legatee. The person who makes the donation, as we have seen, can dispose of both by *inter vivos* (gift) and *mortis causa* (bequeath). What characterised testamentary fiduciary substitution is therefore a manifestation of a will which involves a double disposition of the same object, implying that the object of the legacy is not transferable to the estate of the legatee during his lifetime. The prohibition of fiduciary substitution was based not only on political (suppression of nobiliary power) and legal (inability of future persons to receive free of charge) considerations but also, and above all, on economic considerations relating to the promotion of credit and the free movement of goods, which are incompatible with the inalienability implied by fiduciary substitution. To identify a legally prohibited fiduciary substitution, it was necessary to establish the presence of two successive gifts, an obligation for the initial grantee (fiduciary) to preserve and transmit the legacy to the second grantee (substitute), and the postponement of this transmission until the death of the institute.¹⁹

I believe that, under the old Civil Code, even though fiduciary substitution was prohibited, there were many situations that, even if they did not enjoy legal protection, kept this institution alive.

18 Romanian Civil Code of 1864. Published in the Official Gazette No. 271 of 4 December 1864.

19 Chirică, 2003, p. 61.

First, a moral obligation was not prohibited by law, so that, broadly speaking, substitutions operated based on the faith that the beneficiary had in the one he was instituting. Thus, where goods were of considerable value and had been handed down from generation to generation, legal texts could not break a tradition that had been perpetuated for centuries. The transfer of property based on faith and devoid of legal protection has been termed in the doctrine as fideicommissary substitution without obligation. Its validity was, however, controversial, but most of the doctrine considered that this mechanism could not fall under the prohibition stipulated for fiduciary substitutions, because the grantee could freely dispose of the asset, being limited only by a moral obligation. However, sometimes, the moral obligation was much stronger than the legal one, and those who received the assets passed them on to the family.

A second mechanism was the bequest of remainder (*legacy de residuo*), where the testator leaves certain assets to a beneficiary who possesses the right to dispose of them during their lifetime, either freely or for compensation. Upon the beneficiary's death, any remaining assets are assigned to a second person, also designated by the testator.

A third mechanism is the double conditional bequest, a testamentary transfer in which the testator granted an asset to two persons under the identical condition – resolutive for the first legatee and suspensive for the second. This arrangement was valid when the testator specified that the property would pass to one individual, with the condition that if they died without heirs, the property would then transfer to another. In this case, the individual's death without heirs acted as a resolutive condition for the first beneficiary and a suspensive condition for the second.

Such mechanisms have been used to circumvent the prohibition of fiduciary substitutions.

3. REVIVAL OF FIDUCIARY SUBSTITUTION

When the current Civil Code was being drafted, one of the legislator's major concerns was to regulate the matter of fiduciary substitutions appropriately. Among several working variants, finally the one adopted by the French legislator when amending the Napoleon Civil Code prevailed. The provisions of the Civil Code of 1864 had long become outdated, as reflected in the efforts of both legal science and case law to reinterpret unclear will provisions in a way that avoided classifying them as fiduciary substitutions. Furthermore, mechanisms such as moral obligation, bequest of remainder, and double conditional bequest were validated to narrow the scope of fiduciary substitution. With the adoption of the current Civil Code, the legislator acknowledged the obsolescence of the previous legislation, which had completely prohibited fiduciary substitution.²⁰ The need to regulate fiduciary substitution was seen when the current Civil Code entered into force, from the perspective of protecting family law relationships, more specifically, protecting the family of the fiduciary. The new rules balance the need to protect the family of the disponor against other important values such as the reserved portion of the estate or the free movement of assets. The legislator's "compromise" on this institution outlines its new architecture, which is designed to offset the disadvantages that underpinned the prohibition under the old Civil Code.

The current Civil Code defines fiduciary substitution as an act of disposition by which a person, referred to as an "institute", is entrusted with the administration of the property or items in property constituting the object of the liberality and transfers it to a third party, referred

20 Deak and Popescu, 2014, pp. 227–228.

to as a “substitute”, designated by the disponor.²¹ Further on, art. 994 of the Civil Code states that a gratuitous act may be encumbered with a charge consisting in the obligation of the institute, donee or legatee to administer the property forming the object of the liberality and to pass it on, upon their death, to the substitute appointed by the disponor. Unlike the old provisions, under which the fiduciary was obliged to preserve the assets received, the current Civil Code requires the fiduciary to administer the assets with which he has been gratified.²² The practical importance of this legal institution is given by the possibility of transferring rights to a person (the substitute) who is not yet able to make effective use of the property which is the subject of the donation/will at the time of the conclusion of the contract or at the time when it produces its effects (e.g. opening of the inheritance). A fiduciary substitution may also be used where the substitute cannot yet dispose of the subject-matter of the donation/will, even if he would be capable of receiving it (e.g. in the case when the beneficiary is a minor), or where it is not desirable for him to receive the property which is the subject-matter of the stipulation until a certain moment. In such situations, fiduciary substitution ensures that the condition and value of the donated property are preserved until the substitute is entitled to receive it or the transfer becomes appropriate.²³

Fiduciary substitution entails, thus, a dual liberality with the same object, where the fiduciary is the initial beneficiary followed by the substitute.²⁴ The two beneficiaries of the substitution are the fiduciary and the substitute. It has to be highlighted that there is a significant difference between the two dispositions: the rights of the fiduciary are

21 Art. 993 of the Romanian Civil Code: “An act of disposition by which a person, referred to as an institute, is entrusted with the administration of the property or items in property constituting the object of the liberality and transfers it to a third party, referred to as a substitute, designated by the disponor, shall have effect only if permitted by law.” (“Dispoziția prin care o persoană, denumită instituit, este însărcinată să administreze bunul sau bunurile care constituie obiectul liberalității și să le transmită unui terț, denumit substituit, desemnat de dispunător, nu produce efecte decât în cazul în care este permisă de lege.”).

22 Soeață, 2013, p. 81.

23 Veress and Székely, 2020, p. 87.

24 Ibid.

encumbered by a duty – the administration of the property and its delivery to the substitute on the death of the fiduciary – whereas the rights of the substitute are subject to the suspensive condition of his survival of the fiduciary. In addition, the performance of the two dispositions is separated by a period of time, the first – in favour of the fiduciary – being executed on the death of the fiduciary (if the substitution is contained in a legacy) or on the conclusion of the contract of donation (if the substitution is made by donation), and the second, “in favour of the substitute”, being executed on the death of the fiduciary. This legal tool aims to ensure that the property is preserved and eventually passed to the final beneficiary, maintaining the disponent’s intent beyond the lifetime of the fiduciary. It introduces a mechanism for orderly and controlled succession of property, thereby protecting the interests of the ultimate beneficiary.²⁵ The non-performance of the task by the fiduciary, consisting in the obligation to transmit the assets received from the disponent to the substitute, will entail the revocation of the donation

25 Article 994 paragraph (1) of the Romanian Civil Code: “A liberality may be encumbered with a charge consisting in the obligation of the institute, donee or legatee to administer the property forming the object of the liberality and to pass it on, upon their death, to the substitute appointed by the disponent.” (“O liberalitate poate fi grevată de o sarcină care constă în obligația instituitului, donatar sau legatar, de a administra bunurile care constituie obiectul liberalității și de a le transmite, la decesul său, substituitului desemnat de dispunător.”).

or of the legacy.²⁶ The incapacity to dispose is assessed concerning the disponor, ensuring that the person creating the fiduciary substitution has the legal capacity to do so. Similarly, the incapacity to receive is evaluated concerning the fiduciary and the substitute, ensuring that both are legally capable of accepting and managing the property. This provision ensures that all parties are legally qualified, thus maintaining the transaction's validity and protecting the interests of all parties.²⁷

26 Arts.1.027 and 1.069 of the Romanian Civil Code: “Actions in Case of Non-Execution of a Charge - (1) If a donee fails to execute the charge undertaken as such, a donor or their successors in title may request either the execution of the obligation or the revocation of the donation. (2) Where the charge has been stipulated in favour of a third party, such third party may only request the execution of the charge. (3) The right to bring an action for the execution of a charge or for the revocation of the donation shall be time-barred within 3 years as of the date on which the charge was to be executed”; “Judicial Revocation - (1) Judicial revocation of the bequest may be requested in the event of failure to execute, without justification, the charge established by the testator. Fortuitous non-execution of the charge may lead to revocation only if, according to the testator's will, the effectiveness of the bequest is conditional upon the execution of the charge. (2) Judicial revocation of the bequest may also be requested by reason of ingratitude in the following cases: a) if the legatee has made an attempt on the life of the testator or of a person close to them or, knowing that others intend to make such an attempt, has failed to notify the testator; b) if the legatee is found guilty of criminal offences, cruelty or serious insults against the testator or serious insults against the testator's memory.” (“Acțiunile în caz de neexecutare a sarcinii - (1) Dacă donatarul nu îndeplinește sarcina la care s-a obligat, donatorul sau succesorii săi în drepturi pot cere fie executarea sarcinii, fie revocarea donației. (2) În cazul în care sarcina a fost stipulată în favoarea unui terț, acesta poate cere numai executarea sarcinii. (3) Dreptul la acțiunea prin care se solicită executarea sarcinii sau revocarea donației se prescrie în termen de 3 ani de la data la care sarcina trebuia executată.”; “Revocarea judecătorească - (1) Revocarea judecătorească a legatului poate fi cerută în cazul neîndeplinirii, fără justificare, a sarcinii instituite de testator. Neîndeplinirea fortuită a sarcinii poate atrage revocarea numai dacă, potrivit voinței testatorului, eficacitatea legatului este condiționată de executarea sarcinii. (2) Revocarea judecătorească a legatului poate fi solicitată și pentru ingraturitudine în următoarele cazuri: a) dacă legatarul a atentat la viața testatorului, a unei persoane apropiate lui sau, știind că alții intenționează să atenteze, nu l-a înștiințat; b) dacă legatarul se face vinovat de fapte penale, cruzimi sau injurii grave față de testator ori de injurii grave la adresa memoriei testatorului.”).

27 Article 994 paragraph (3) of the Romanian Civil Code: “The incapacity to dispose shall be assessed in relation to the disponor, and the incapacity to receive in relation to the institute and the substitute.” (“Incapacitățile de a dispune se apreciază în raport cu dispunătorul, iar cele de a primi, în raport cu instituitul și cu substituitul.”).

To address the primary criticism of fiduciary substitution, where a single individual could organise the transfer of property *mortis causa* for multiple deceased persons, the current legislator has implemented a solution in Article 996 of the Civil Code.²⁸ This provision stipulates that the rights of the substituted person are acquired directly from the disponor. As a result, both the fiduciary and the substitute are considered successors of the disponor, meaning that property transfer can only be ordered to the disponor, not to another individual. Furthermore, by prohibiting the substitute from being bound by the same obligations as the fiduciary, the legislation effectively bans gradual substitutions, which would otherwise allow one person to control the property transfer upon the death of another.

Any kind of asset – movable or immovable, tangible or intangible, fixed or determinable – that will be identified in the fiduciary's estate at the time of his death can generally be the object of the fiduciary substitution. These assets may be fungible but non-consumable since they will be subject to retransfer so that they cannot be consumed during the administration of the substitution. This further reinforces the essence of fiduciary substitution, which is to maintain the continuity of property within the family.²⁹ Fiduciary substitution shall have effect only in respect of assets which were the subject-matter of the donation and which, at the date of death of the beneficiary, are identifiable and are part of his estate. Where the gift is in respect of transferable securities, the charge shall also have effect in respect of the securities which replace them. Where the donation relates to rights which are subject to publicity formalities, the charge shall comply with the same formalities.

28 Article 996 of the Romanian Civil Code: “Rights of the Substitute - (1) The rights of the substitute shall arise upon the death of the institute. (2) The substitute shall acquire the property which is the object of the liberality as a result of the will of the disponor. (3) The substitute may not, in turn, be subject to the obligation of administration and transfer of the property.” (“Drepturile substituitului (1) Drepturile substituitului se nasc la moartea instituitului. (2) Substituitul dobândește bunurile care constituie obiectul liberalității ca efect al voinței dispunătorului. (3) Substituitul nu poate fi, la rândul său, supus obligației de administrare și de transmitere a bunurilor.”).

29 Popa, 2016, pp. 122–123.

In the case of immovable property, the charge shall be subject to notarial entry in the land register.³⁰

Only a natural person can serve as the disponent or fiduciary, while both natural and legal persons are eligible to act as the substitute. This distinction is based on the fact that the core of a fiduciary substitution relies on the condition precedent of the beneficiary's death, which can only occur in the case of a natural person. As such, both the disponent and the fiduciary must be natural persons. However, there is no legal barrier preventing the substitute from being a legal person, who may receive the property either through a donation or a will.³¹

According to the doctrine, primary aim has been to harmonise family relationships, with at least three situations in mind. First, the fiduciary substitution has been given the role of a family strengthening tool, supporting parents who wish to provide not only their children but also their grandchildren with a certain financial security. It should be noted that the Civil Code does not allow substitution in more than one degree so that the assets which are the subject of it cannot be seized indefinitely. In this regard, Art. 996 para. (3) of the Civil Code stipulates that "the substitute may not be subject to the obligation to administer and transfer the property".³² The purpose of this provision is to prohibit the establishment of a perpetual inalienability clause in respect of certain assets and, consequently, to practically remove them from the legal circulation. However, I believe there is nothing to prevent the substitute from transferring the assets in question, on the death of the fiduciary, to another person, on his own initiative, by way of fiduciary substitution. This could happen in the case of certain movable property whose sentimental value outweighs its pecuniary value or in the case of certain property of high value, for the same reasons as those set out above. Article 996 para. (3), therefore, leaves it to the substituted party to decide whether he will transfer the assets again by way of fiduciary substitution or dispose of them in his capacity as owner. In the example given, the nephew who will be the beneficiary of the fiduciary

30 Veress and Székely, 2020, p. 88.

31 Genoiu, 2012, pp. 153–154.

32 Art. 996 para. (3) of the Romanian Civil Code.

substitution will decide whether to pass on the assets to his nephew or to dispose of them freely.

A second argument highlights the role of fiduciary substitutions in protecting descendants with certain health problems or disabilities. It has been shown that they can be set up, in respect of certain assets, to have a much easier life during their lifetime and then, on their death, pass on those assets to their other descendants. It should be mentioned, nonetheless, that these assets may not infringe the surviving spouse's or the other descendants' forced heirship of the institute. In this respect, Article 998 of the Civil Code enshrines the principle of the inviolability of the forced heirship of the institute, stipulating that the charge may not encroach on the forced heirship of the institute.

A third argument concerns the surviving spouse who comes into competition with descendants from the testator's previous marriage. Thus, by means of fiduciary substitution, the testator can dispose of certain property in favour of the surviving spouse, ensuring that he or she has the use of certain property during his or her lifetime, which the testator will pass on to the testator's children from the first marriage on his or her death. It can be seen that, at least in the last two cases, but not only in these, the institution uses the asset until it passes it on to the beneficiary. This is possible because of the way in which this institution has been rethought, precisely to protect family relationships. Thus, whereas under the old Civil Code, in matters of substitution, we were told about the preservation of the property that was the subject of the substitution, the Civil Code talks about its administration. The difference is a major one. While the purpose of acts of preservation is to preserve or conserve an asset, the purpose of acts of administration is to enhance the value of the asset. Under the power of a conservation act, the institution could only take measures for property preservation whereas, under the power of the administration act, it can exploit the property without preserving its substance by renting it out, leasing it, etc. Under the new rules both the beneficiary and the institution are adequately protected, and, as noted previously, the institute can administer the property for its own use until it transfers it to the beneficiary.

3.1. REWARDING NON-CONCEIVED PERSONS BY MEANS OF FIDUCIARY SUBSTITUTION

An interesting hypothesis, set forth in the French doctrine and subsequently taken up by the Romanian doctrine, concerns the possibility of gratification of non-conceived persons by means of fiduciary substitution. Article 999 of the Civil Code³³ stipulates that the substitute may accept the offer of donation even after the death of the donor, so the question has arisen to what extent the as yet unclaimed persons may be gratified. Some authors consider that there are no serious arguments that could invalidate this solution, pointing to the similarity between the institution of fiduciary substitution and the institution of stipulation for another.

By way of example, one can imagine the situation where the disposer, suffering from a serious illness and wishing to resort to the mechanism of fiduciary substitution in order to protect his future grandchild, realises that he will probably not live until his son marries and has a child. Meanwhile, realising his grandson might not enjoy the assets he has acquired because of his son's prodigal nature, he arranges these assets for the benefit of his first as yet unborn child. However, the strongest argument against this solution remains the genuine *intuitu personae* character of gifts. This issue was not raised before the entry into force of the current Civil Code, since fiduciary substitution was forbidden and the practical usefulness in solving it would not have existed. However, under the old Civil Code, the case law held that a testamentary stipulation requiring a person to leave property to one of his or her grandchildren on death, who will see fit, cannot be classed as a fiduciary substitution and is therefore not prohibited.

In this case, the failure to specify a potential substitute for the property arises not from the absence of a substitute idea but from the decedent's intent to keep the property within the family. The decedent,

33 Article 999 of the Romanian Civil Code: "*Acceptance of the gift after the death of the settlor: An offer of gift made to a substitute may be accepted by the substitute even after the death of the settlor.*" ("*Acceptarea donației după decesul dispunătorului - Oferta de donație făcută substituitului poate fi acceptată de acesta și după decesul dispunătorului.*").

valuing equal relationships with his grandchildren, entrusted the fiduciary with the discretion to select the grandchild deemed most deserving of receiving the property.

3.2. TRANSGENERATIONAL TRANSMISSION THROUGH DONATION

The first form of transgenerational property transmission of property through the mechanism of fiduciary substitution is donation. This donation is concluded between the disponent and the fiduciary together (or not) with the substitute, the secondary beneficiary of the donation. If the substitute does not participate in the conclusion of the contract, he may nevertheless accept the offer of donation made in his favour by a separate act, even after the death of the disponent.³⁴ Acceptance of the offer by the substitute is necessary for the success of the substitution. Any delay in accepting the offer of donation gives the disponent the possibility of revoking the offer and issuing a new offer. The first beneficiary of the gift is vested with a resolvable property. If the asset transferred to the fiduciary is proprietary or other real right in an immovable, the

34 Ibid.

deed of donation will be provisionally entered in the land register,³⁵ under a double condition: resolutive for the fiduciary and suspensive for the substitute. The provisional registration will become definitive as the substitution operates: either the property will be definitively registered in favour of the substitute, following the success of the fiduciary substitution, in which case the provisional registration in favour of the fiduciary will be cancelled by the realisation of the resolutive condition, or the property will be definitively acquired by the fiduciary, following the predecease of the substitute resulting in the non-existence of a void substitution.

The fiduciary thus acquires a resolvable property, entered as such in the land register. The fiduciary has the prerogatives of a resolutive owner in respect of this property, being able to alienate for valuable consideration or encumber the property thus acquired with charges in rem. Certainly, any acquirers will take the transferred property subject to the same resolutive condition, meaning that if the condition is realised the transferor's rights will end and, automatically, the acquirers' titles will

35 Under the conditions of Art. 898, paragraph 1 of the Romanian Civil Code: "*Provisional Registration - Except in other cases provided by law, provisional registration in the land register may be requested: 1. if the acquired real right is affected by a suspensive or resolutive condition or if it concerns or encumbers a future construction; in the case of provisional registration concerning a future construction, its justification shall be made in accordance with the law; 2. if, by virtue of a judgement which was not yet rendered enforceable, the party who is the subject of the claim has been ordered to relocate, create or extinguish a registered right, or the person administering the property of another person was ordered to give a hypothecary security; 3. if the debtor deposited the amounts for which the hypothec has been registered; 4. if a provisionally registered right is acquired; 5. if both parties consent only to a provisional registration.*" ("Înscrierea provizorie - În afara altor cazuri prevăzute de lege, înscrierea provizorie în cartea funciară se va putea cere: 1. dacă dreptul real dobândit este afectat de o condiție suspensivă ori rezolutorie sau dacă privește ori grevează o construcție viitoare; în cazul înscrierii provizorii având ca obiect o construcție viitoare, justificarea acesteia se face în condițiile legii; 2. dacă, în temeiul unei hotărâri care nu este încă definitivă, partea căzută în pretenții a fost obligată la strămutarea, constituirea sau stingerea unui drept tabular ori cel care administrează bunurile unei alte persoane a fost obligat să dea o garanție ipotecară; 3. dacă debitorul a consemnat sumele pentru care a fost înscrisă ipoteca; 4. dacă se dobândește un drept tabular înscris provizoriu; 5. dacă ambele părți consimt doar pentru efectuarea unei înscrieri provizorii.").

also end – so the loss of title cannot come as a surprise. The alienability of the assets by the fiduciary can be prevented by the disponor, who can stipulate in the donation contract an inalienability clause (especially when there are movable assets in the fideicommissary estate, with the risk for the substitute that these assets will no longer be found in the patrimony of the fiduciary when the substitution will be opened). Clearly, the inalienability clause must be supported by a serious and legitimate interest³⁶ of the disponor, but the entire mechanism of the fiduciary substitution and its purpose fully justify the inclusion of such a clause in the content of the donation.³⁷

36 In the terms of Article 627 of the Romanian Civil Code: “*Inalienability Clause. Conditions. Scope – (1) The alienation of property may be prohibited by convention or will, but only for a maximum period of 49 years and if there is a serious and legitimate interest. The term starts to run on of the date when the property was acquired. (2) The acquirer may be authorised by the court to dispose of the property if the interest that justified the inalienability clause of the property no longer exists or if a superior interest requires it. (3) The nullity of the inalienability clause stipulated in a contract entails the nullity of the entire contract if it was decisive upon the conclusion of such contract. In onerous contracts, the determining nature is presumed, until proven otherwise. (4) The inalienability clause is implicit in the conventions giving rise to the obligation to transfer the property in the future to a determined or determinable person. (5) The transfer of property by way of succession may not be prevented by stipulating the inalienability.*” (“*Clauza de inalienabilitate. Condiții. Domeniu de aplicare – (1) Prin convenție sau testament se poate interzice înstrăinarea unui bun, însă numai pentru o durată de cel mult 49 de ani și dacă există un interes serios și legitim. Termenul începe să curgă de la data dobândirii bunului. (2) Dobânditorul poate fi autorizat de către instanță să dispună de bun dacă interesul care a justificat clauza de inalienabilitate a bunului a dispărut sau dacă un interes superior o impune. (3) Nulitatea clauzei de inalienabilitate stipulate într-un contract atrage nulitatea întregului contract dacă a fost determinantă la încheierea acestuia. În contractele cu titlu oneros, caracterul determinant se prezumă, până la proba contrară. (4) Clauza de inalienabilitate este subînțeleasă în convențiile din care se naște obligația de a transmite în viitor proprietatea către o persoană determinată sau determinabilă. (5) Transmiterea bunului pe cale de succesiune nu poate fi oprită prin stipularea inalienabilității.*”).

37 Popa, 2016, p. 127.

3.3. TRANSGENERATIONAL TRANSMISSION THROUGH LAST WILL

In the case of fiduciary substitution concluded in a last will, the testator directs in the will that the assets are to be administered by the beneficiary during his lifetime, and after the death of the beneficiary, the assets are transferred to the substitute, designated by the testator in the will. The fiduciary substitution in a last will implies that the testator appoints a legatee to administer the property left by the will during his lifetime. Upon the fiduciary's death, the assets specified in the will are transferred to the substitute appointed by the testator. The testator specifies the person who will administer the property and the person who will subsequently inherit it in the will through a fiduciary substitution. Fiduciary substitution in the last will ensures continuity of property administration until the final transfer to the substitute in accordance with the testator's wishes. This form of substitution gives the testator control over how his or her assets are managed and distributed after death through a legally defined mechanism.

4. CONCLUSIONS

As my main research focus is on family businesses, I consider the current Romanian legislation as highly favourable for facilitating generational change within such entities. As evidenced, fiduciary substitutions in family companies help maintain the family's control and ownership of the business for at least two generations, thus preserving its familial nature. This legal mechanism allows family members to designate successors who must meet specific conditions before they can take over ownership or control of the company's assets. By doing so, fiduciary substitutions prevent external parties from gaining influence, helping to protect the company's familial legacy and core values. These provisions can be further formalised through family constitutions, establishing clear succession guidelines and reinforcing a moral obligation to pass the business along to future generations. Incorporating fiduciary substitution clauses into the family constitution can provide stability,

ensure a seamless leadership transition, and safeguard the long-term continuity and identity of the family business.

Fiduciary substitution was an institution considered outdated in the 19th century. It was viewed as an antithesis to the interests of the bourgeoisie, a remnant of feudalism that obstructed the free movement of goods. A complete ban followed, which was, however circumvented in some instances in the second half of the 19th and first half of the 20th centuries. The perspective on fiduciary substitutions has shifted, leading to their revival in a modern form that serves the interests of the modern middle class. This legal mechanism allows estates and businesses to remain under family control for an extended period through mandatory provisions. Furthermore, when incorporated into a family constitution, it can establish a lasting moral obligation, ensuring continuity across generations.

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