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LIFE INSURANCE IN A TESTAMENTARY CLAUSE

SEGURO DE VIDA EM CLÁUSULA TESTAMENTÁRIA

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ABSTRACT

This article addresses the issue arising from the modification of life insurance beneficiaries by final will dispositions and the validity of a testamentary clause that determines, by the will of the testator, that the entire capital to be received upon redemption of the life insurance or personal accidents, be used to pay debts and taxes such as IR (income tax), IPTU (real estate tax), IPVA (vehicles tax), social security contributions, private sector debts, among other liabilities. By doing so, wouldn't the insured party be entitled to future funds that won't be part of his/her assets (estate) at the time of death, and that were not inventoried at the time? Ultimately, would a testamentary clause that "empties" the value of the capital stipulated by the testator upon his/her death to settle debts with creditors beyond the inheritance's resources? What would be the limits of dispositions, of last will, imposed by the insured married spouse under partial property regime, taking into account the community property of the surviving spouse, as well as the legitimate status of the necessary heirs in their responsibilities for the debts of the deceased? This research employs descriptive and deductive methodologies, grounded in a doctrinal, legislative, and judicial bibliographical review. In order to achieve this, the fundamental concepts of institutions such as inheritance and community property, as well as the legal nature and purpose of the life insurance contract, will be elucidated. Subsequently, the rights of widow/widower as a surviving spouse entitled to half of the marital assets shall be assessed, and the

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responsibilities of the widower/widow and heirs for the debts of the deceased will then be discussed. Finally, the relationship between the principle of respect for human dignity, the right to life, and the right to housing will be addressed in order to conclude that such testamentary clauses are invalid for violating article 794 of the Civil Code and for failing to meet the socioeconomic and axiological purposes of the law.

Keywords: Life insurance; Capital allocation; Testamentary clause; Estate; Heirs; Debt liabilities.

RESUMO

Este artigo aborda a questão decorrente da modificação de beneficiários de seguro de vida por disposições testamentárias e a validade de uma cláusula testamentária que determina, por vontade do testador, que todo o capital a ser recebido na ocasião do resgate do seguro de vida ou acidentes pessoais seja utilizado para pagar dívidas e impostos como IR (imposto de renda), IPTU (imposto sobre propriedade predial e territorial urbana), IPVA (imposto sobre veículos automotores), contribuições previdenciárias, dívidas do setor privado, entre outros passivos. Ao fazer isso, não estaria o segurado dispondo de fundos futuros que não farão parte de seu patrimônio (espólio) no momento da morte, e que não foram inventariados na época? Em última análise, seria válida uma cláusula testamentária que "esvazia" o valor do capital estipulado pelo testador após sua morte para quitar dívidas com credores além dos recursos da herança? Quais seriam os limites das disposições, de última vontade, impostas pelo cônjuge segurado casado sob regime de comunhão parcial de bens, considerando os bens comuns do cônjuge sobrevivente, bem como a condição legítima dos herdeiros necessários em suas responsabilidades pelas dívidas do falecido? Esta pesquisa emprega metodologias descritiva e dedutiva, fundamentada em revisão bibliográfica doutrinária, legislativa e judicial. Para tanto, serão elucidados os conceitos fundamentais de instituições como herança e bens comuns, bem como a natureza jurídica e a finalidade do contrato de seguro de vida. Posteriormente, os direitos do viúvo/viúva como cônjuge sobrevivente com direito à metade dos bens do casal serão avaliados, e as responsabilidades do viúvo/viúva e herdeiros pelas dívidas do falecido serão então discutidas. Finalmente, será abordada a relação entre o princípio do respeito à dignidade humana, o direito à vida e o direito à moradia para concluir que tais cláusulas testamentárias são inválidas por violarem o artigo 794 do Código Civil e por não atenderem às finalidades socioeconômicas e axiológicas da lei.

Palavras-chave: Seguro de vida; Alocação de capital; Cláusula testamentária; Espólio; Herdeiros; Responsabilidades por dívidas.

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PRELIMINARY CONSIDERATIONS

This article addresses the issue arising from the modification of life insurance beneficiaries by final will disposition and the validity of a testamentary clause that determines, by the will of the testator, that the entire capital to be received upon redemption of the life insurance or personal accidents, be used to pay debts and taxes such as IR (income tax), IPTU (real estate tax), IPVA (vehicles tax), social security contributions, private debts, among other liabilities.

The object of research focuses on the interpretation of article 794 of the Civil Code, making a prior and necessary incursion into the basic notions of institutes such as inheritance and community property, and the legal nature and purpose of the life insurance contract to conclude that it is not possible to confuse a relationship of succession law with a relationship of obligation law.

The issues to be addressed in this article can be summarized in three: 1. By doing so, wouldn't the insured party be entitled to future funds that won't be part of his/her assets (estate) at the time of the accident (death), and that were not inventoried at the time? 2. Ultimately, would a testamentary clause that "*empties*" the value of the capital stipulated by the testator upon his/her death to settle debts with creditors beyond the inheritance's resources? What would be the limits of the disposition, of last will, imposed by the insured married spouse under partial property regime, taking into account the community property of the surviving spouse, as well as the legitimate status of the necessary heirs in their responsibilities for the debts of the deceased?

Thus, starting from the premise that the capital of life and personal accident insurance cannot be used to pay the deceased's debt, the liability of the surviving spouse, when the surviving spouse entitled to half of the marital assets, and the heirs for the debts of the *deceased will be discussed* in the interpretation of articles 792, 794 and 1792 of the Civil Code.

Finally, it is equally important to address the relationship between the principle of respect for human dignity, the rights to life and housing in order to conclude that such

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testamentary clauses are deemed invalid for violating article 794 of the Civil Code and for not meeting the socioeconomic and axiological purposes of the Law.

1. INHERITANCE AND COMMUNITY PROPERTY

The moment of inheritance transmission occurs upon the death of the deceased. Upon death, the inheritance is offered to the heirs who may acquire it legally or through the Will dispositions.

Therefore, the ownership of the assets of the inheritance is automatically transferred to the heirs of the deceased at the time of passing, as they have the right to the inheritance (Federal Constitution, article. 5, XXX). This transfer of ownership involves the deceased's estate being transferred to his/her heirs. However, it is necessary to legally formalize the availability of the inheritance so that the heirs can alienate or encumber the assets that constitute the hereditary estate. This legalization is accomplished by the judiciary, which inventorys the assets of the deceased so that they can be divided among the heirs. With the registration of the formal partition in the Real Estate Registry, the name of the deceased is changed to that of the heirs, although they already possessed the domain from the moment of the deceased's death.

The objective of succession *causa mortis*, therefore, is the inheritance, as it entails a subjective mutation of the deceased's assets, which is transmitted to his/her heirs. These heirs become subrogated in the legal relations of the deceased, both in assets and liabilities up to the limits of the inheritance (Civil Code, articles 1.792 and 1.997).

Therefore, the inheritance is the deceased's estate, which comprises the set of material assets, rights, and obligations (as per articles 91 and 943 of the civil code) as long as they are not excessively personal. These assets are transmitted to the legitimate or testamentary heirs who are not representatives of the deceased. They inherit the assets, not the person who is the author of the inheritance. Consequently, they only assume ownership of the deceased's patrimonial relations.

For all legal purposes, open succession is considered immovable (as per article 80, II of the Civil Code). Inheritance, according to article 91 of the civil code, is an indivisible

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juris universal until it is finally shared. Therefore, if there are multiple heirs, the right of each one, pertaining to the possession and ownership of the hereditary estate, remains indivisible until the momento of partition. Consequently, the creditor's action to claim his credit must be filed against all heirs (BAASP, 2665-1794-06). The inheritance is deferred as a unitary whole even in the presence of multiple heirs (Civil Code, article 1.791). Each co-heir will have the right of possession and ownership over the inheritance prior to the division, which will be governed by the rules applicable to co-ownership.

Brazilian legislation establishes the principle of indivisibility of inheritance until partition. During the period of undivision, the coheirs are subject to a *forced co-ownership regime*, wherein each individual possesses an ideal portion of the inheritance. Consequently, the coheir is prohibited from selling or mortgaging a specific part of the common property or co-ownership of the estate. However, they are permitted to assign hereditary rights pertaining to the ideal portion, subject to the provisions of articles 1,794 and 1,795 of the Civil Code and the sole paragraph thereof. The sale of the undivided portion of each co-ownership or part of the estate is only feasible after the formal registration of the partition, adhering to the preferential right recognized to the other spouses (as per article 1,341, 504 § sole paragraph and 1,322 and § sole). For this sale to transpire, the consent of only one of the spouses is sufficient, as the consensus of all is essential to prevent the sale (as per articles 1.325 and 1.323, RT; 112:1364; RT, 572:147 of the civil code). The proceeds of the sale will be distributed among the remaining co-owned assets, after covering expenses and debts.

It is crucial to distinguish the right to inheritance from the right of the surviving spouse who is legally entitled to half of assets. The division of property is a consequence of the community property regime, originating from marriage, and is governed by family law regulations and estatutes. In general, inheritance law is independent of the matrimonial regime. The division of property constitutes the share of the total assets of the couple to which the spouse is entitled to half of all assets by their own right, so that this division of the surviving spouse is intangible.

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In testamentary succession, the freedom to write a will is not fully open as per Brazilian law, this is because the legislation only allows the deceased to dispose of half of his/her hereditary estate in a will, with the other half, called legitimate inheritance, being destined to the natural and legal heirs, if any (article 1847, of the Civil Code). [3]The dispositions of the last will must respect the reserved portion, that is, if it is exceeded, there must be a reduction in the testamentary disposition, to ensure the intangibility of the legitimate share of the natural and legal heirs. There will be, therefore, *a pro rata reduction* of the testamentary disposition when the will disposition exceeds the testator's available share (CC, art. 1967) until a balance is obtained between the reserved portion and the available portion. The action for reduction must be brought by the natural and legal heirs or by the creditors of the wronged and prejudiced heirs[4].

In Brazilian law, therefore, the acceptance of the inheritance cannot prejudice or harm the heir, transmitting to him/her/they a burden greater than the assets. This is the so-called benefit of probate as established in article 1587 of and 1792 of the Civil Code/02.[5]

2. LEGAL NATURE OF LIFE INSURANCE

The insurance contract, as provided for in article 757 of the Civil Code, is the agreement by which the insurer undertakes, through the payment of the premium, to guarantee the legitimate interest of the insured, related to a person or thing, against predetermined risks. It is a *contract*: a) *bilateral*, as it generates obligations for the insured and insurer, who must pay the indemnity, if the insurance event occurs, and the insured party must pay the premium, under penalty of the insurance lapsing. The insurer pays the claim, provided that the premiums is paid by the insured. For this reason, article 764 of the Civil Code provides for the non-refund of premiums to the insured, in the case of an

[3] Anderson Schreiber *Manual de direito civil contemporâneo*. 2nd ed. São Paulo: Saraiva Educação, 2019. Electronic book

[4] Maria Helena Diniz, *Curso*, cit. v. 6, p. 293, 294 and 297; Clóvis Bevilaqua, *Commentaries*, op. cit. v. 6, p. 200-1.

[5] Anderson Schreiber, *Manual,* cit. E-book

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insurance event. This is the "mutualism" on which the insurance operation is based, enabling the creation of a specific fund, through a contribution, from the insured (lender of the loan) so that the insurer (fund manager) pays the risk; b) *onerous*, since it establishes conditions and obligations ; c) *random,* because there is no equivalence between the benefits; d) *formal*, since it must be written and the contract becomes perfect when the policy is sent to the insured (CC, articles 758 and 759); e) continuous *execution*, intended to subsist for a period of time, as it aims at the protection of a thing or person; f) *by adhesion*, formed with the acceptance by the insured, without any argument, of the clauses imposed or previously established by the insurer in the printed policy, with the exception of life insurance (CC, art. 789), which, as it is an invaluable asset, will allow the free agreement to set the value and take out more than one insurance, with the same or several insurers; g) *in good faith* (CC, articles 765 and 766 and sole paragraph) by requiring a quick conclusion, requires the insured party to have sincere and loyal conduct in his/her statements, thus not omitting facts that may influence the acceptance of the insurance.

Life insurance can be contracted by any person, with the intention of financial protection in general of their family or people to whom they have affection and, in any amount, in person or through a representative. The social purpose of life insurance is to ensure the survival of the beneficiary.

However, not everyone may be a beneficiary. In life insurance policies, it is not possible, for the protection of the family assets and the legitimate share of the natural and legal heir, to institute a beneficiary a person who is legally inhibited from receiving a donation from the insured (such as the concubine of an adulterous spouse (Civil Code, article 550 and 1,801, III). This is because:

> In life insurance, in the absence of indication of a person or beneficiary, the insured capital must be paid half to the heirs of the insured, according to the order of hereditary vocation, and the other half to the spouse who is not legally separated and/or to the

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partner, provided that, in the latter case, the stable union is proven. [6]

An analogous decision also adds that "*such indemnity does not constitute an inheritance of the insured party*" [7]

Life insurance is not considered an inheritance, so it should not be included in the inventory or in a testamentary clause, thus, with the death of the insured, the beneficiary freely indicated by him should receive the net indemnity, since there is an exemption from Income Tax (Law No. 7,713/88, art. 6, XIII) and ITCMD. Article 794 of the Civil Code, in turn, provides that "in life or personal accident insurance in the event of death, the stipulated capital is not subject to the debts of the insured, nor is it considered an inheritance for all legal purposes"

Jurisprudence has been establishing that, for example, the VGBL *("Free Benefit-Generating Life.")* is not an inheritance therefore excluded from the ITCMD (*"Donation and Death transmission and assignment tax")* calculation basis.[8]

Life insurance may be freely contracted, and the insured may replace the beneficiary *ad nutum* by an *inter vivos act* or *causa mortis*, if he does not waive this option, or if the insurance is not based on the guarantee of an obligation. But, for that, the insurer will need to be made aware of the substitution; if it is not, it will be released if it pays the insured capital to the former beneficiary (Civil Code, article 791, sole paragraph). There may be an understanding that, according to the law, in the event of the non-designation of a beneficiary in the will, the insurer must pay half to the spouse and half to the descendants of the insured (Civil Code, articles, 792, 1,829 and 1,852).

If the insured party does not indicate a new beneficiary, but only intends to allocate the capital, contractually fixed in the policy, to the payment of personal debts, tax debts,

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[6] STJ Resp 1767972 RJ 2018/0242228-8. Rel. Paulo de Tarso Sanseverino. Date j. 24/11/2020 T3, Date of publication DJe 27/11/2020
Original: No seguro de vida, na falta de indicação de pessoa ou beneficiário, o capital segurado deverá ser pago metade aos herdeiros do segurado, segundo a ordem de vocação hereditária, e a outra metade ao cônjuge não separado judicialmente e/ou ao companheiro, desde que comprovada, nessa última hipótese, a união estável

[7] TJMG AC 1072014006430700-1 MG Rel. Marco Amélio Ferenzi DJ 3/11/2018 DJe 12/11/2018

[8] STJ Resp 1.961.488/RS. 2nd T. Rel. Min. Assusete Magalhães. DJe of 17.11.2021.

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labor debts, traffic fines, taxes, etc., it is prohibited in article 794 of the Civil Code, by which the sum stipulated in a life insurance policy will not be subject to the insured's debts nor will it be considered inheritance, since it will revert to the beneficiary, and therefore will not be integrated into the estate, nor can it be seized (Civil Code, article 833, VI). As a result, such testamentary clause is tainted with nullity, in addition to distorting the social purpose of life insurance, which is to ensure the survival of the beneficiary, prevailing the life insurance previously taken, granting the insurance value to the contractually indicated person.

The will is considered a unilateral and free of constraint legal transaction, of a very personal nature and revocable at any time. The testator can dispose of his/her assets after his/her death, however, as already mentioned, such freedom of writing a will is limited by law.

As Edson Fachin assures, "the volitional subject draws, to a large extent, what will happen, in the patrimonial destination (and sometimes under certain personal aspects) post death, nevertheless, there are limits imposed."[9]

Indeed, it is inconsistent with the national legal system to allocate capital to pay debts of all kinds. As it is not considered an inheritance, not being part of the estate, therefore, it is not subject to debts of the insured (Civil Code, articles 792, 794). [10]

Therefore, it is not possible to change the beneficiary of the life insurance, by means of a testamentary disposition, establishing that the entire premium is intended for the payment of tax debts, private social security, etc. It should be emphasized that such a clause is subject to nullity, in view of the provisions of article 794 of the Civil Code.

The existence of a life insurance policy cannot be described in the initial declaration of assets of the probate process, as it is not subject to division. It is not subject to causa

[9] Original: “o sujeito volitivo desenha, em boa medida o que dar-se-á, no destino patrimonial (e às vezes sob certos aspectos pessoais) para depois da morte. Há, porém, limites”.
FACHIN, Luiz Edson.Teoria crítica do Direito Civil. Rio de Janeiro: Renovar, 2012. p. 61

[10] TJRS AI 70030672513 São Borja. 7ª C Rel Des Ricardo Raupp Ruschel Data julgamento 18/6/2009 Data publicação 25/6/2009.

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mortis transfer tax, nor other debts, unless there is no indication of the beneficiary (Civil Code, articles. 792, 1,829 and 1,852).

When contracting life insurance, there is a differential: the *amount* that is in the policy is not included in the inventory, nor can it be disposed of at the testator's wish, through testamentary means, as it is a contracted service. It is a contract between the insured and the insurer, and therefore it is not subject to the rules on succession of assets, if so, the amount must be passed on to the only beneficiary indicated by the insured. It is important to emphasize that capital stipulated in the life insurance contract is not to be confused with inheritance, nor does it constitute the *deceased's* assets, as it is owned by the beneficiary.

Life insurance, in addition to being exempt from taxation, is exempt from seizure (Civil Code, article 833, IV) and is not subject to the payment of debts of the insured, for all legal purposes, nor is it part of the hereditary estate[11].

3. RIGHTS OF WIDOWED SPOUSE – SURVIVING SPOUSE ENTITLED TO HALF OF THE MARITAL ASSETS

If the testator is married under the property regime of universal or partial communion, the surviving spouse shall be entitled to half of the couple's assets as a "*surviving spouse who is entitled to half of the marital assets".* Such *share* is intangible because it is owned by the widower, although it may be liable for taxes and IPTU (property taxes) until the date of partition (National Tax Code, 131, II, Civil Code, 1.792). The indemnity capital provided for in the life insurance contract, which is not even part of the hereditary estate because it is *a subjective right* of the surviving spouse who is entitled to half of the marital assets, if elected beneficiary, is not part of the insured's assets, nor is it subject to the deceased's debts .

In addition, the surviving spouse entitled to half of the marital assets has a lawful "*ex lege right*" of succession in the *real right of housing* (Civiol Code, article 1.831) for life

[11] Source: Maria Helena Diniz, *Curso*, cit. Vol. 3, p. 532 a 578, Tratado teórico e prático dos contratos, vol 4 São Paulo: Saraiva, 2013, p. 651 e segts.

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in relation to the residential property, if this is the only one of its kind to be inventoried, regardless of the property regime. The surviving spouse is granted a limited right in rem of housing as long as it is requested during the probate proceedings.

The heirs will not be able to collect the rent from the widower for the exercise of the real right of housing nor will they be able to sell the property. The property has, therefore, as a specific destination, to serve as a home for the surviving spouse who must reside there, free of charge (Civil Code, article 1.414), and cannot rent or assign it on loan. It guarantees the quality of life of the surviving spouse.

The real right of housing aims to protect those who have lost their spouse, guaranteeing them the right to continue living in the property that was the residence of the couple or family. It only acquires this right after expressly registering the property at the time of the registration of the formal partition in the Real Estate Registry, materializing the constitutional right to housing and meeting the humanitarian issue.

It is a concession of use, limited to the dwelling of a property enjoyed by the widower together, or not, with a family member, enshrining the principle of family solidarity, supporting him after the death of his/her spouse. It does not change the co-ownership of the other heirs. The voluntary departure of the property by the surviving spouse in which he lived with the deceased extinguishes the real right of housing due to non-use (Civil Code, articles 1.410 and 1.416).

The heirs are not legally authorized to demand the extinction of the co-ownership arising from the division made in the inventory and the sale of the common real estate while the real right of habitation is pending, unless its holder expressly renounces it in the inventory records or by public deed, or if he/she no longer resides in the property of his/her own free will.

The right in rem of housing does not prejudice the surviving spouse in what is his/her due, as a surviving spouse entitled to half of the assets or beneficiary the holder

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of a life insurance policy. There will only be no real right to housing if there was a co-owenership prior to the death[12].

4. LIABILITY OF THE ESTATE, HEIRS AND WIDOWER – SURVIVING SPOUSE ENTITLED TO HALF OF THE MARITAL ASSETS FOR THE DEBTS OF THE *DECEASED*

The estate is responsible for the probate expenses, the debts of the deceased and the taxes existing until the opening of the succession (National Tax Code, 131, III). By articles. 1,792 and 1,997 of the Civil Code and by article 131, II of the National Tax Code, there is a legal privilege granted to the heirs to be admitted to the inheritance of the *deceased*, without obliging them to being liable for the charges beyond the strength of the hereditary estate. Heirs only have *intra* vires hereditatis liability, that is, heirs only need to pay debts with assets left by the deceased and not with their own assets. Therefore, with the partition, each heir is responsible for them, for the taxes due until the partition within the forces of inheritance and proportionally to their share of assets.

The surviving spouse, holder of the real right of housing, will be responsible for paying the IPTU (real estate tax) on the property and must reimburse heirs who pay this tax. If he/she has renounced this right, he/she will only pay, if he/she is the spouse entitled to half of the asset , half of the value of the IPTU (real estate tax).

If an individual intends to relinquish their inheritance, he/she will be renouncing, in addition to his/her share of the inheritance, the debts left by the deceased. Such waiver entails non-liability for outstanding debts. There is also nothing to prevent that, after the partition, the joint-heir owner is exempt from paying expenses and debts, provided that he/she expressly renounces his/her ideal share of assets.

The co-ownership then, will be in force only between the remaining co-heirs (Civil Code, articles 1,316, §§ 1 and 3, 1,317 and 1,320), if the inherited property is indivisible. After the partition, there is no joint and several liability among the heirs of divisible debts,

[12] Vide: STJ REsp 1184491/SE, Rel. Min. Nancy Andrighi, 3ªT, j. 01/04/2014; Maria Helena Diniz, *Curso*, cit. Vol. 6, p. 153; Carolina Ramires de Oliveira, Direito real de habitação do cônjuge supérstite, https://www.conjur.com.br/2020-mar-09/direito-real-habitacao-conjuge-superstite-possibilidade-limita-lo/ 9/3/2020

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so it will be up to the creditor to enforce the heir's *pro rata* in the proportion that is due to him/her in the hereditary estate.

The surviving spouse who is the beneficiary of a life insurance is not liable for the deceased's debts, with the money received.

The deceased's assets (inheritance) will be used to settle outstanding debts. If the amount of the debt exceeds the estate of the *deceased,* the remainder will not be paid and cannot be collected from the heirs, who are only responsible up to the financial limit of the inheritance[13]. This is because, in Brazilian law, the acceptance of the inheritance cannot harm or prejudice the heirs, transmitting to them burdens greater than the assets (benefit of inventory, article. 1892, Civil Code).

5. FAMILY ESTATE PROTECTED BY LAW

The involuntary (legal) family estate is protected by law (Law No. 8,009/1990; Civil Code, article 833) because it is the only residential property owned by the couple, due to the preservation of the existential minimum, the protection of the family, the right to housing and respect for human dignity (art. 1, III, Federal Constitution). It generates the immunity from seizure of the property, except in the exceptional cases pointed out in article 3 º of Law No. 8,009/1990.

Legal family property that is unseizable may not be subject to seizure for payment of the deceased's debts, except for the exceptions of article 3 of Law No. 8,009/90, (Articles 1 and 3 of Law No. 8,009/1990). As per article 3, IV of referred law, immunity from seizure is enforceable in any civil, tax, social security or other enforcement proceeding, except for the collection of taxes, property or territorial, fees and contributions that are due and belong to the family estate. Such debts may be charged to those who live in, proportionally to the inherited share of assets.

[13]O herdeiro é obrigado a pagar a dívida do falecido? https://www.serasa.com.br.blog 31/01/2022
Is the heir obliged to pay the deceased's debt? https://www.serasa.com.br.blog 31/01/2022

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6. RELATIONSHIP BETWEEN THE PRINCIPLE OF RESPECT FOR HUMAN DIGNITY AND RIGHTS TO LIFE AND HOUSING

The dignity of the human being[14] depends on the protection of fundamental rights of personality, because without the guarantee of such rights, the human being loses the quality of a person, there will be the objectification of a person, which is why it is the center of the legal order because it is essential for the existential minimum for a human being to exist.

Dignity is a supreme value of the person, because it is, as Malato has written, the *"intrinsic and distinctive quality of each being that makes him or her deserving of the same respect and consideration by the State and the Community, implying, in this sense, a complex set of fundamental rights and duties that ensure the person fair existential conditions".* Human dignity is a value inherent to the nature of man and the constitutional norm (art. 1, III) became aware of this, and, consequently, made it the epicenter of all fundamental rights and personality rights, which includes the right to housing, thus guaranteeing human survival and dignity.

The legal order categorizes respect for the dignity of the human being as a supra-constitutional value and as the end of the Democratic Rule of Law. Hence the accurate words of Célia R. Zisman: "fundamental rights increasingly tend to be personality rights, because the conception of the general right of personality is formulated, such as, for example, the right to have certain *rights*, such as the right to life, the right to housing, etc. Dignity will only be effective if fundamental rights and personality rights are preserved, which are basic to it to safeguard equality, liberty, fraternity, etc.

Human dignity is a supreme value that should guide the hermeneutic and the applicator so that they walk the path of the right, when solving problems involving fundamental rights and personality rights.

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[14] Ingo Sarlet, *Dignity of the human person and fundamental rights in CF/88*, Porto Alegre: Livraria do Advogado, 2006, p. 65-66; Ernane Malato, Constitutional human dignity, Newspaper. *O liberal* atualidade 3/2/2018, p. 2; Célia Zisman, *The extraterritoriality of the principle of the dignity of the human person and the right of action of the international community: a limit to freedom of expression* – doctoral thesis presented at PUCSP in 2023, p. 59; Pérez Luño, *Human Right. Estado de Derecho y constitución*, Madrid: Tecnos 1995, p. 319-320.

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Thus, the fundamental social right to housing (Federal Constitution, article. 6) is linked to the right to life (Federal Constitution, article. 5) because it is essential for survival. For this reason, these are inescapable criteria for interpreting the rules applicable to the case *herein under examination*, together with the principle of respect for human dignity (Federal Constitution, article 1, III). The same can be said of the right to food (Federal Constitution, article. 6 with the wording of EC n. 64), hence it is fair, according to the law (LINDB - Law of Introduction to the Rules of Brazilian Law, article. 5), that the widow obtains the right to the amount stipulated in the life insurance of the *deceased*, since she/he is the only beneficiary, in addition to being elderly and not having the income to acquire means for her/his survival.

Such rights, in addition to being personality rights, are fundamental social rights and human rights, hence their strength in legal application.

It should not be forgotten that, for a correct interpretation, one should prefer the one that, due to its best result, corresponds to the circumstances, the norms, the social purpose and the criterion of *justum* (LINDB- Law of Introduction to the Rules of Brazilian Law, article. 5)[15].

FINAL CONSIDERATIONS

In view of the foregoing, it can be stated that the testamentary clause to life insurance that allocates all the capital contracted by the proponent (insured party) in disposition of last will is invalid. The testator cannot dispose of the payment of debts existing up to the date of death and partition or arising *after death.* This is because the payment of personal debts, tax debts, etc., is governed by law (Civil Code, 2.792, National Tax Code, 131, Law n. 8.009/90), so there is no way to change the destination of the value of the life insurance, as this is a contractual obligation previously assumed, which aims at the survival of the beneficiary (or beneficiaries) and because the amount to be paid is no longer part of their assets.

[15] Dernburg, *Das Bürgerliche Recht*, I, § 150, II; von Tuhr, *Der Allgemeine Teil*, III, p. 274.

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In addition, the heir is not liable for charges exceeding the inheritance assets, as per article 1,792 of the civil code the debts shall be paid for by the deceased's estate. If they are greater than the assets left by the deceased, the heirs will not receive their share of the inheritance nor will they be held responsible for paying unpaid debts, as they are not obliged to pay debts that exceed the inheritance received. Heirs are not personally responsible for the debts left by the deceased. Heirs do not have the duty to settle such debts with their own resources, but they may not receive the inheritance if it is intended to pay existing debts.

Before the partition, the estate assumes the debts of the *deceased*. Once the division is made, the heirs will only be liable in proportion to the share that fell to them in the inheritance (Civil Code, 1.997), so they are not legitimate parties to appear in the passive pole of the enforcement process, but the assets achieved are limited to those received at the time of the division of assets. The estate is responsible for the taxes, including IPTU (property taxes) due by *the deceased* until the date of the opening of the succession (National Tax Code, art. 131, III). The successors and the surviving spouse entitled to half of the marital assets are responsible for the taxes due by *the deceased*, up to the date of the partition, but such responsibility is limited to the amount of the inherited share and the share (National Tax Code, art. 131, II, Civil Code, 1.792). The IPTU (real estate tax), as it is a "*proter rem tax obligation*", it depends on the relationship between the debtor and the property and/or object of the debt, so the surviving spouse entitled to half of the marital assets will be responsible for half of its value, but will have the duty if he/she is the holder of the real right of housing to pay it in full, regardless of whether the property is a legal family asset (Law No. 8,009/1990, arts. 1 and 3, IV).

In short, it is concluded that the testamentary clause that intends to allocate the value of the life insurance to the payment of debts of the deceased, (personal, tax, etc.), is null and ineffective, since it aims at the financial protection and maintenance of the beneficiary of the insurance quantum, since it would only be lawful to replace the beneficiary (Civil Code, article 791, sole paragraph) by an act of last will and not the destination of the insured's value and, in addition, stipulated capital, in life insurance is

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not an inheritance for all legal purposes, since it will revert to the beneficiary, and cannot be the object of a will, nor intended to settle the testator's debts, since the payment of these is governed by law (Civil Code, 792 § sole, 794, National Tax Code, art. 131, II, III, Law n. 8.009/1990, arts. 1 and 3, IV). The insurance value stipulated in the policy, in the case in question, is the subjective right of the beneficiary (CC, art. 794). It is not the insured party assets, and therefore not part of the estate. The contracted capital is unseizable and must be paid, upon the death of the insured party, directly to the beneficiary of the policy, guaranteeing her financial protection.

Contrary to the principle of human dignity and personality rights and ethically repugnant would be to deny the subjective right of the surviving spouse and heirs (when designated beneficiaries of the contractor) to the insurance value and the invalidation of a testamentary clause contrary to the law.

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