SECTION 8
CIVIL LAW AND PROCESS; FAMILY LAW; INTELLECTUAL PROPERTY RIGHT

СЕКЦІЯ 8
ЦИВІЛЬНЕ ПРАВО І ПРОЦЕС; СІМЕЙНЕ ПРАВО; ПРАВО ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ

УДК 347.65/.68

MAIN PROBLEMS OF MODERN INHERITANCE LAW

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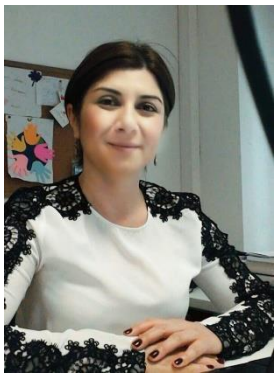

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Гончарова А. В., Ульвія Айден. Основні проблеми сучасного спадкового права. Було проаналізовано, останні напрацювання інститутів спадкування. Юридичні конструкції спадкового права стали предметом активних досліджень, дискусій в галузі цивілістичної науки і практики, що сприяє вирішенню виникаючих проблем правозастосування, що виникають, однак вимагає узгодженості пропонованих рішень, наступності у системі відносин власності та всіх інших майнових відносин. Слід констатувати той факт, що ця досить цікава правова конструкція (маємо на увазі спадкову трансмісію та спадкове представлення) традиційно розглядається в доктрині спадкового права фрагментарно і лише в контексті більш загальних досліджень. Цивільний кодекс України, який, зазначаючи підстави спадкування, першим називає спадкування за заповітом, а другим - за законом. Тим самим на перше місце закон ставить волю спадкодавця, а не прагнення зміцнити родинні стосунки. Нові правила про обов'язкову частку у спадщині, що звужують коло обов'язкових спадкоємців і скорочують розмір обов'язкової частки у спадщині, також свідчать про зниження ролі сімейно – забезпечувальної функції. За останні десять років спостерігається тенденція зростання кількості "спадкових справ", особливо щодо спростування заповітів та визначення черговості закликання до спадкування за спадковою трансмісією та спадковим представленням. При цьому найчастіше справи набувають затяжного характеру і розглядаються протягом декількох років. Спадкоємці, які претендують на отримання спадщини, будучи, як правило, родичами по відношенню один до одного і знаходилися в дружніх відносинах до відкриття спадщини, стають ворогами.

Ключові слова : цивільне право, спадкове право, правова структура, цивільний кодекс, спадкування за законом.

It was analyzed that recent developments concerning the institution of inheritance (hereditary ransmission and hereditary presentation). Legal structures of inheritance law have become the subject of active research, discussions in civil jurisprudence and practice which helps resolve the emerging issues in law, but requires consistency of the proposed solutions, continuity in the system of property relations and all other property relations. It should be stated that this very interesting legal structure (meaning hereditary transmission and hereditary representation) is traditionally considered in doctrine of inheritance law fragmentarily and only in the context of more general research. The Civil Code of Ukraine indicates the reasons of succession, firstly calls testamentary succession, and secondly - legal succession. Thus, in the first place the law puts the will of the testator, and not the desire to strengthen the relationship. New rules on compulsory share of inheritance that narrow the range of compulsory heirs and reduce the size of compulsory share in inheritance also suggest reducing of the role of the family - securing function. Over the past decade the number of "hereditary cases" tends to increase, especially the ones regarding refutation of wills and determining priority of invocation to inheritance by hereditary transmission and hereditary representation. Then the cases often become protracted and can be under consideration for several years. Heirs who apply for inheritance, being usually relatives to each other and being on friendly terms before the opening of the inheritance case, often become enemies.

Keywords : civil law, inheritance law, legal structure, Civil Code, hereditary succession.

In Civil Law system the most controversial and contentious is Inheritance Law. When the civil activities of a person stop, the question as to the fate of property and property rights and obligations arises. The institution of inheritance law is one of the oldest institutions of law in Ukraine [1, p. 59].

It is then that the norms of inheritance law begin to work - they determine "the fate of the legal relations experiencing their party, establish who has the right to enter into these relations" [2, p. 409]. The legal aspect of the ideology of reforming inheritance law found its use in both known and new theoretical constructions related to inheritance law of succession and implement the legal doctrine of law of succession, considering the death of the right holder. Quite a number of notable structures received legalization of the norms of inheritance law.

Modern institutution of inheritance law is being under reconstruction and improvements. Consistent, comprehensive, systemic reformation of the legal system and its improvement are being implemented [3, p. 6].

In the objective sense inheritance law is a system of law norms that determine the transfer of property left after the deceased to other persons. In legal literature a number of definitions of inheritance law can be found. Such diversity is primarily associated with civilists' different understanding of the subject of inheritance law. Thus, according to U.A. Omarova, inheritance law is a set of legal norms that regulate social relations in cases caused by the death of the testator and ones associated with the emergence of successors' civil rights and duties, identical or similar to those the subject of which was the testator at the time of his death [4, p. 25].

The increase in the number of priority of heirs at law is not the evidence of the desire of the states to ensure the testator's family members interests during inheritance, as most commentators of the Civil Code of Ukraine fairly state, this innovation contributes to keeping the inherited property in private ownership. Infinity of expansion of the heirs at law may lead to the result that the property may be inherited by the people who even had no idea about the existence of the testator; A.A. Buhaievskyi ironically called such people "laughing heirs" [5, p. 28].

They must be laughing at the legislator who allows them to take possession of the property of a person they have never heard of.

The Civil Code of Ukraine has significantly expanded the circle of heirs who inherit by right of representation, in accordance with paragraphs 1-4 Art. 1266 of the Civil Code of Ukraine:

– grandsons and granddaughters and great-grandsons and great-granddaughter of the testator inherit that part of his property that would have belonged to the law according to their mother or father or grandmother or grandfather, had the latter been alive at the time of opening of inheritance;

– great-grandmother and great-grandfather of the testator inherit the part of the property which would have belonged at law according to their children (grandmother or grandfather of the testator) had they been alive at the time of opening of inheritance;

– nephews and nieces of the testator inherit the part of the property which would have belonged at law according to their mother or father (brother or sister of the testator), had they been alive at the time of opening of inheritance;

– cousins of the testator inherit the part of the property which would have belonged at law to their mother or father had they been alive at the time of opening of inheritance.

Inheritance by the right of representation is provided under condition that the testator did not draw up the will, which would determine the fate of the inheritable property.

If the inheritance by the right of representation is carried out simultaneously by several persons, the share of their deceased relative is divided between them. During inheritance by direct descendants, the right of representation is in force without limitation in the degree of kinship. For example, inheriting by the right of representation, grandchildren (great-grandchildren) are encouraged to inherit together with the heirs of the first priority. During distribution of inherited property they represent their father and (or) mother, who died earlier. In this case, they are direct heirs of the testator, and not heirs of those whom they "represent." This means that the grandchildren (grandchildren) are responsible for the debts of the testator, but not responsible for the debts of their parents, who died before the opening of heritage. In other words, they are responsible within the heritage which they have received. They will be responsible for their parents' debts in case they are heirs of the latter.

The legislator has significantly expanded the list of heirs compared to the Civil Code of USSR in 1963, which, in our opinion, is inappropriate, since there are disputes as to the priority to the inheritance. Analyzing the law in European countries, we have concluded that the priority of invocation to inherit by the right of representation may be limited to grandchildren and great-grandchildren.

We note that these problems cannot be the grounds for denial of inheritance as there are much more socially useful functions, which explains and determines further development of inheritance law and heritage legislation.

Considering inheritance functions, some researchers fairly point out possible negative moments of inheritance. In particular, the possibility of parasitic existence of the heirs who have inherited an expensive property, and, their degradation as a result.

Hereditary succession with foreign elements can be defined as the transfer of heritage as rights and obligations of the testator - individual citizen of Ukraine, foreigner and person without citizenship who are in Ukraine on legal grounds), who died, to their heirs [6, p. 234].

Statistics in democratic countries with developed market economy unequivocally demonstrates the unwillingness of the majority of citizens to exercise their right to draw up a will. The issue of the criteria which a legislator should guide while determining the circle of heirs is one of the most important ones in civil literature. Traditional features of heirs at law are: kinship, adoption relationships, marital or family relationships, staying on hold. The legislator has established five priorities of heirs who are consistently encouraged to acquire the heritage and get the right to an equal share of the inheritance, except the heirs who inherit in the order of presentation.

The existence of conflicts in international inheritance law is due to the presence of foreign elements, differences between national legal order [7, p. 11].

It is no coincidence that comparativists refer to the point of view of the Master Aldryk (XII century) who argued that the judge should apply the conflicting law, which, in his opinion, would be more useful and appropriate [8, p. 68].

The main reason for the existence of conflicts in legal systems is that all states have many differences in their domestic law, because, according to L. Lunts, if there are no differences in the sphere of regulation of a particular type of relationship between the laws of certain countries, then there is no need for conflict norms [9, p. 300].

The Civil Code has actually removed dependants from the succession, i.e. disabled persons who had been dependants of the testator for at least five years. Dependants are qualified as to the fifth priority, which deprives them of the hope of getting inheritance by law. Although the testator expressed his attitude to the dependants during the life: he had been supporting these unsecured and disabled people for a long time.

The legislator decided to interpret the relationship between the testator and dependants after his death in a different way. However to deny the dependents means of living after the testator's death means to distort his will. It would be much more humanitarian to oblige the heirs who accepted the inheritance, to aliment the dependants, defining the size and duration of such detention.

The changes that occurred in the inheritance law were related primarily to the expansion of freedom of testamentary dispositions and the growing role of family - legal relations, as well as with the decrease of the value of inheritance as a form of material support of disabled relatives and dependants.

Problematic in the doctrine of inheritance law is the question of hereditary transmission. In the notary

practice a lot of questions about its application in practice arise. The right of the deceased heir to accept the inheritance in the order of hereditary transmission can be accomplished by his heirs (by law or by will) on a common basis during six months to get the inheritance.

Transfer of the right for inheritance by hereditary transmission was regulated in Art. 1276 of the Civil Code of Ukraine and can actually relate to two types of inheritance; by will or by law, because by analyzing Art. 1217 of the Civil Code of Ukraine, one can conclude that there are no other types of inheritance. This regulation emerges from the fact that Art. 1217 allocates only two types of inheritance, and the right to a compulsory share and the right of inheritance of household goods are governed by specific rules that indicate an exception to the general rule. Therefore, the issue of transfer of the right to inherit household goods (Art. 1279 of the Civil Code) and the right to a compulsory share of inheritance (Art. 1241 of the Civil Code) from the deceased heir who had not accepted it in time, to his own heirs, is also noteworthy.

In this regard, it is advisable to analyze part. 1 of Art. 1276 of the Civil Code, which states that in case heir by will or by law died after the inheritance was opened and had not accepted it in time, the right to get the proper share of the inheritance passes to his heirs. The same part of the norm has a warning which gives us a definite answer to the question as to what was put prior to the possibility of transfer of a compulsory share in the order of hereditary transmission. The essence of the clause is expressed in the Civil Code in a following way: "except for the right to adopt a compulsory share of inheritance."

We believe that the term "transmission" is purely technical and one that does not reflect the essence of the phenomenon itself, so we offer the legislator that the transfer of the right for inheritance should be called "hereditary transfer."

In determining the persons belonging to the children of spouses, parents and the child of the deceased born after his death, it should be guided by the norms of family law. The legislator uses the term "child" as a fact of an individual's origin from certain parents and the presence of the first degree relationship among them.

Today particularly more relevant becomes the issue of paternity and maternity in case of artificial origin of the child. In course of time, cases of children born under such circumstances will not be isolated, so the following question arises: are the concepts of "biological child" and "heir" identical?

Similar to children of the decedant, adopted children get inheritance after their adopter and are not considered legal heirs of their own parents. However, some experts believe that adopted children cannot become heirs of their brothers and sisters, grandfather and grandmother on their adopter's side under any circumstances [10, p. 14].

Another controversy is the fact that no rights and duties occur between adopted children and other children of the adopter, so adopter's child and the adopted child are not in legal relations of brother or sister. Adoption is a legal fact, as a result of which the child and the adoptive parent have the same legal relationship as blood parents and children.

Adopted children lose their personal and property rights and duties as to their own parents and blood relatives and take them as to adoptive parents and their relatives.

Article 1260 of the Civil Code of Ukraine stipulates that the adopted child and his descendants do not inherit after the death of their blood parents, his other relatives by birth in the line of ascent. Considering that the child can be adopted by one person (woman or man) preserving the rights by one of blood parents, depending on this, such inheritance rules are efficient. Thus, in case the child was adopted by a man, but keeps blood relationship with his mother, the child will inherit after both mother and adopter. The same consequences will be in case the child is adopted by only one of the spouses. The child will be the heir only of the spouse who has agreed on his adoption.

The same applies to adopters and their relatives. After the death of the adoptee, only the one who has agreed on adoption will get inheritance.

The law does not provide for mandatory indication in the record of the child's birth as her adopters' parents. In their request, they can be written in the books of births records as parents of adopters or they may be referred to as blood parents. But emergence of the right to inherit does not depend on these circumstances, as legal effect has the fact of adoption.

The court of adoption may keep stored legal relationship between the adopted and his grandmother, grandfather, brother and sister by birth. Then in case of his birth grandmother's or grandfather's death, adopted child has the right for inheritance by right of representation, i.e. he should inherit the share of the inheritance, which would have belonged by law to his mother, father by birth, had they been alive at the time of opening the inheritance. For example, grandfather died, and his granddaughter, whose mother died one year before her own father (the testator) inherits after him. In this case, inherited can be the share that would have belonged to both deceased parents if any of them would be addressed for inheritance. As adopted children are equal to the blood children of the testator,

when establishing the legal relationship between other relatives, the specified rules relate to them.

In case of death of the adoptee's brother or sister by birth, he can be called to inherit as the successor of the second stage by law.

Inheritance law needs further improvement. Modern Ukrainian inheritance iaw in its reform and development keeps certain traditions and historical heritage, but like any other modern legal system, it cannot be isolated from international experience, international unification and trends to convergence of national legal systems..

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