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Subjects of hereditary legal relations

The Civil Code of the Republic of Kazakhstan as participants in hereditary legal relations indicates the testator and heir. However, in the legal literature there are no clear positions on the issue of determining the range of persons who are subjects of inherited legal relations. In this article, in order to determine the subject composition of inheritance, the views of a number of scientists are studied, on the basis of which later definitions of such concepts as the testator and heir are given. An attempt is made to identify a specific circle of persons who are subjects of hereditary legal relationships. In addition, a comparative legal analysis of the norms governing relations in the sphere of inheritance in Kazakhstan and abroad was conducted. In accordance with civil law, the peculiarities of the right to inherit state legal entities as subjects of hereditary legal relations are examined, and the problem of unworthy heirs is also considered. The novelty of the work is determined by the fact that on the basis of studying and comparing the notions of inheritance, given in the Civil Code of the Republic of Kazakhstan in Kazakh and Russian, a proposal is made to amend the Civil Code in the Kazakh language. The definition of the right of inheritance, set out in paragraph 1 of Article 1038 of the Civil Code of the Republic of Kazakhstan in the Kazakh language, differs significantly in meaning from the Russian edition of this article. Since, Article 1038 of the Civil Code of the Republic of Kazakhstan is fundamental and determining the whole essence of hereditary legal relations, the inconsistency of the meaning of this article in the Russian and Kazakh versions of the code may lead to disputes and misunderstandings in the future.

Keywords: heir, testator, inheritance law, subjects, unworthy heirs, entity, state,legalrelations, legal capacity, will.

Structural elements of hereditary legal relations are the object, the subject and the content. As a rule, the subject of legal relations are called participants oflegal relationship.

As they say in the Civil Code of the Republic of Kazakhstan in the 1038 article, inheritance is the transfer of the property of a deceased citizen (testator) to another person (people) - heir (heirs) [1]. The inheritance of the deceased citizen passes to other persons on the terms of universal succession as a single whole and at the same time, unless otherwise follows from the rules of this section. Inheritance is regulated by this Code, and in cases directly established by it, and other legislative acts.

The content of the inheritance right is closely related to two members of the groups, the members of the first group are the owners of the property left in the inheritance, that is, the estate-leavers, the second group are therecipients of an inheritance. Accordingly, the members of the first group are called testators, and the second members of the group are called heirs. Thus, the legislation clearly defines subject's limits of the right to inherit, but in the legal literature there is actually no single point of view on this issue.

One of the authors indicates that the heir and the testator as the subject of hereditary legal relations, the second group is of the opinion that the testator can not be the subject of hereditary legal relations.

For example, in the opinion of A.K. Zhunusova, the testator is a person when after his death the property passes to another person, that is a person, transferred to the inheritance,so to speak. And he believes that the testator is not a party to the hereditary relationship [2; 35].

In the opinion of V.N.Gavrilov, the heir is a person specified in a will or in law. A. Zhanabilova believes that the testator is a succession arising after his death, but also a person who is not a subject of the hereditary legal relationship. And the role of the heir, A. Zhanabilova, indicates as «a person after the death of the testator, called for inheritance» [3; 104]. E.A. Sukhanov believes that the testator and inheritor of inheritance are subjects of the legal relations [4; 145]. And some authors, on the contrary, consider that the subject of the right of inheritance is only the heirs [5; 39].

Another new idea suggested by lawyer A.N. Grishko. He conditionally divided the participants of the inheritance relations into three groups:

1) the testator(estate-leaver)

2) a notary public, witness, executor of a will, a person who has the right to certify a will instead of a notary, a person who has the rights to sign for the testator etc.

3) Heir and persons who refuse to inherit [6].

A.P. Sergeev and Yu.K. Tolstoy hold a different opinion, they are sure that the testator is not a subject of hereditary rights, since «dead people - can not be the subject of legal relations» [7; 152]. B.B. Cherepakhin also adhering to this opinion, said that the main cause of the emergence of hereditary legal relations is the death of a citizen. In our opinion, the opinions of the last authors are as close as possible to the truth. Because, in accordance with the second paragraph of article 13 of the Civil Code of the Republic of Kazakhstan, the legal capacity of a citizen begins from the moment of his birth and ceases after death, respectively, a person who does not have the legal capacity of civil law relations, including, can not be a subject of hereditary rights.

The main basis for the emergence of hereditary legal relations is the death of the testator. In addition, for the emergence of hereditary relations, the heritage holder should have a mortgage (in most cases property)which he will leave to his heirs. We believe that for the emergence of inheritance relations, in addition to the fact of his death, the testator must have property. Only then relations of inheritance arise, by law or by will. Otherwise, the death of the testator is not enough, and legal relations arise.

Summarizing the analysis of the contents of the above definitions and civil legislation, we draw our conclusions about the subject of civil-law relations:

A testator is a person who is not a party to legal relations after his death ordeclaration to be deceased. So, the testator is a person who has written and executed a last will and testament that is in effect at the time of his/her death.

Because, if it happens that a testator dies in the event of hereditary legal relations, not only the property rights of the testator, but by virtue of his will (inheritance under the will) or if he does not express it by his own will, the fate of the remaining property, can be solved only on the basis of the norms of law (succession on intestacy). This only applies to the property rights of a testator. If we are talking about protecting the non-property rights of a testator, we are working to protect the rights and rights of the testator's heirs.

Analyzing the civil legislation, we came to the conclusion that a testator can be a person who is a citizen of the Republic of Kazakhstan, a foreign citizen, a stateless person, and in the manner prescribed by law, a person recognized legally incapable or limited in capacity.

In addition, a person recognized legally incapable or limited in the capacity of the testator, only on the basis of legal inheritance may be the testator. In accordance with paragraph 1-1 of an article 1046 of the Civil Code of the Republic of Kazakhstan, the will is committed by a citizen who has full legal capacity at the time of his commission.

However, despite the limitation of the capacity of a citizen of foreign states in the legislation, there are norms asserting the right to write a will of his property. For example, in France, who have not reached the age of 16 in the future on reaching adulthood, have the right to leave a will for half of his property (art. 904 CC of France.).

If in the case of the appointment of an adult citizen as a guardian, in spite of the guardianship, he has the right to bequeath his property (513 CC France). The actions are not recognized as legally incompetent, for health reasons in accordance with the Civil Code of Hungary, persons who have reached the age of 14 years and who have reached the age of 18 and whose actions are limited, but persons appointed by the court have the right to leave their wills, but this must be done publicly (§ 624, paragraph 2).

To write a will at the age of 16 in the Civil Law of Germany, this does not require the consent of legal representatives. In Kazakh Civil Law there is no such norm in the code. And also, in accordance with an article 708 of the Civil Code of Canada, minors can leave a will for their valuable property. In the USA, in the state of Georgia, from the moment of reaching the age of 16, they have the right to leave a will. In accordance with the Civil Code the full right to write a will belongs only to a capable person.

As in most cases domestic legislation takes the Russian legislation as a basis, it is not surprising that the opinions of Russia and Kazakhstan on this issue are the same.

According to article 1044 of the Civil Code of the Republic of Kazakhstan, those who are alive at the time of opening the inheritance, as well as citizens who were born after the opening of the inheritance, may be heirs in accordance with the law. Legal entities those who were before the opening of the inheritance and during the opening of the inheritance, as well as the state can be heirs by will.

Consequently, heirs are classified into two groups: heirs by law and heirs by testament. Among the above subjects, inheritance under the will of the heir can only be a legal entity. And the state can be both a legal and testamentary heir.

The possibility of inheritance does not depend on the capacity of a citizen to become an heir just enough to have common civil law. Therefore, as an heir there may be minors, incompetent persons or persons with limited actions. In this case, instead of them, transactions are performed by their legal representatives, adoptive parents, guardians and trustees. The main requirement for heirs when inheriting by law is to be in kinship with the testator.

In accordance with the Civil Code of the Republic of Kazakhstan, during the lifetime of the testator, his unborn or citizens who born alive after the opening of the inheritance, may be heirs by will or under the law (art. 1044-1). This means that not only unborn children, but during the life of the testator in accordance with these rules, if he considers it necessary, on the basis of a will or in the absence of a will, other persons, on the basis of his inheritance by law, the heir may be other living relatives.

This situation was applied in France, Germany and in the countries of Great Britain, the main condition for its realization is the birth of a living child in the womb. Only a child born alive has the right to inheritance.

However, some foreign regulatory and legal acts offer other solutions to this issue. For example, in accordance with the Civil Code of Hungary in 1977, if a person is born alive, then his civil capacity begins at the moment of his appearance in the womb. In accordance with the Civil Code of 1889 in Spain, the civil legal capacity of an individual starts from the moment of the birth of a person, and also, the fetus must be born alive, has the image of a person and must live 24 hours after his birth.

As mentioned above, a legal entity can act as an heir, in accordance with the legislation of the Republic of Kazakhstan. According to article 1044 of the second part of the Civil Code, legal entities who were before the opening of the inheritance and during the opening of the inheritance, as well as the state can be heirs by will.

Unlike other entities, a legal entity can be heir only on the basis of a will. In case of inheritance under the law, legal entities can not be heirs. The legal persons indicated in the will and during the opening of the inheritance may be heirs by will. The main requirement is a legal entity, continues its work and operates at the time of opening the inheritance during the life of the testator. However, the heir can not be their successors. That is, in accordance with the Civil Code of the Republic of Kazakhstan, legal entities formed as a result of reorganization, despite the ownership of the rights and obligations of the initial legal entity, lose their hereditary rights. But in relation to this issue, there are also other opinions in the legal literature. B.A. Bulaevsky considers hereditary law as an aggregate of civil law norms that establish the conditions, procedure and limits of the transfer of the property of the deceased citizen to other persons. And if a legal entity is organized by merger, division, transformation or reorganization, it loses the right to receive an inheritance [5; 63].

It is difficult to disagree with this point of view, because in accordance with article 46 of the Civil Code of the Republic of Kazakhstan, since the rights and obligations of the reorganized legal entity are transferred to a newly formed legal entity in accordance with the transfer or separation balance sheet. However, the domestic legislation does not provide for the transfer of rights to inheritance of a legal entity. Consequently, depending on the way in which the inheritance rights arise, the reorganization of a legal entity whichcan not be considered.

As noted above, separately from a legal entity, a state may be a subject of hereditary legal relations. Some authors, in addition to the state, indicate the administrative-territorial units as the subject of the right of inheritance, but in our opinion, the administrative-territorial division is ultimately acting on behalf of the state, including representing their interests. When the property passes through inheritance, it does not go over to the administrative-territorial division, but passes to the name of the state, and the Government of the Republic of Kazakhstan deals with issues of escheat. Therefore, the division of an administrative-territorial unit as a subject of inheritance law is considered to be unfounded.

And in the Russian legislation, foreign states and international organizations can be a subject of the right to inherit by will. Since a foreign state is not among the subjects of civil law in general, a foreign state is approved as a subject of inheritance law. There are two groups of international organizations: intergovernmental and non-governmental. In our opinion, the legislator has taken as a basis as international organizations non-profit organizations, organizations financed mainly by individuals, for example, the Red Cross, Greenpeace and others.

One of the most important issues are the state's ownership by inheritance of escheat. V.I. Serebrovsky identifies two groups of states associated with passing classifications of property to the state. The first group of territorial supremacy of states understands that in this way the transfer of property to the state is the exercise of their state rights (for example, article 768 of the French Civil Code). From this point of view, since the property is ownerless, it is transferred to state ownership, exercising its sovereignty throughout the territory [8; 230].

In most continental states, the transfer of property to the state in accordance with the law is based on this basis. In the Anglo-Saxon system of law, similar concepts are applied in the states, the last owner of any property, especially real estate is a government. In these countries, if the heirs under the will are not found on the property left without a will, the property is returned to the state (escheat). Legislative system of the second group (Germany, Italy, Spain and others) mastery of the state escheat property is not by inheritance, it is considered not as a primary, but a derivative possession.

In the legal literature there are two conflicting points of view on the recognition of only one part of escheat.

In agreement with the first opinion, representatives B.S. Antimonov, K.A. Grave and B.B. Cherepakhin, noted that only the state can generally accept the inheritance as an heir, and only one part of the property will be accepted as escheat, considers that consideration of the state as an heir is wrong. The transfer of hereditary property to the state in the person of its bodies or to public organizations takes place in the presence of a will made in favor of state bodies or public organizations, and also when there is an escheat. In both cases, inheritance of the state or public organizations takes place. Undoubtedly, there is a certain similarity in the transition of escheat property with the transfer to ownerless property of the statethat isa property, the owner of which is unknown or which has no owner. In the same cases where there are no heirs or they are deprived of inheritance in the will of the testator, or when the heirs did not accept the inheritance or refused it, the ownerlessness of the hereditary property is liquidated by the transfer of hereditary property to the state as the escheat [9; 240].

It is precisely in the elimination of the uselessness of the inheritance and its undesirable consequences, and not in the acquisition of property by the state, that is, as B.S. Antimonov and K.A. Grave, the main service role of the institution of transition of escheat into state ownership. Therefore, the rules on escheat retreat whenever possible and the legal basis for the transfer of hereditary property to heirs under the law of the first three queues conscripted or to heirs by will. The rules on escheat are the norms of exceptional.

In our opinion, the understanding of one part of the property ownerless does not contradict the legal factors of the position of this institution, we believe that the latter point of view is correct.

The Civil Code of the Republic of Kazakhstan provides grounds for excluding a certain number of people from the inheritance:

1. Citizens who by their actions directed against the testator (deceased) contributed to the call of their own or other persons to inheritance or contributed to the increase of the inheritance due to them or to others. Such actions may be the coercion of the testator to make or cancel the will, forgery, destruction or theft of the will, attempted murder, beatings, etc. Often actions can be directed to other heirs: for example, forcing them to renounce the inheritance in their favor by threats or psychological pressure.

2. Citizens whoby their actions directed against the implementation of the last will of the testator expressed in the will, contributed to the call of their own or others to inherit or contributed to or attempted to contribute to the increase of the inheritance due to them or to others.

3. Unworthy heirs also include parents deprived of parental rights and not restored in these rights at the time of opening the inheritance. They can inherit only by will. Citizens who have maliciously evaded fulfillment of alimony obligations on the content of the testator may be barred from inheritance by the court.

So unworthy heirs are citizens who can not claim an inheritance after the death of the testator. According to A. Zhanabilova, unworthy heirs lose the right to inherit and do not inherit either by law or by will. Those who recognize this as those who by their actions contributed to the death of the testator. She also noted that among the people who do not have the right to inherit are citizens who committed unlawful acts

directed against the testator, one of the heirs or the implementation of the last will of the testator, expressed in the will [3; 106].

And according to another author E.B. Babykova referring to the Civil Code of the RK article 1045, she adheres to the fact that the circumstances that serve as the basis for removing from inheritance of unworthy heirs are established by the court. And also a person who does not have the right to inherit or remove from inheritance on the basis of this article (an unworthy heir) is obliged to return all property unreasonably received from the inheritance [10; 77].

From the point of view of Russian authors in relation to this issue were divided into two groups. The first group of authors do not consider unlawful actions of the heir as important reasons. The main thing is that unlawful acts designed to inherit or increase the share in the inheritance should contribute, directly or indirectly.

Supporters of the second approach, believe that the wrongful intent of the developers' intent is directly reflected in the legislation.

According to Article 727 of the Civil Code of France, unworthy to inherit and, as such, are removed from inheritance:

1) the one who will be convicted of causing death or attempting to cause death to the deceased (testator);

2) the one who brought a criminal charge against the deceased, recognized as libelous;

3) an adult heir who, having received information about the murder of the deceased (testator), did not inform the judicial authorities about this.

The heir, suspended from inheritance, as unworthy, is obliged to return all the fruits and incomes that he used since the opening of the inheritance (Art. 729).

In accordance with the civil law of Poland, recognized by the court from among the heirs to receive inheritance, unworthy heirs are not called upon to receive an inheritance.

However, in the sense of Art. 798of the Civil Code of Poland, to unworthy heirs include not only persons who have committed criminal acts, contributing to calling them to inherit and increase their share in the inheritance, but also persons who have committed unlawful acts (obstruction of the drafting of a will, drafting a fictitious will, compulsion to draft a will, Coercion of any of the heirs to renounce the inheritance, etc.) or inaction (concealment of a new will, concealment from the notary of the fact of the presence of other heirs).

According to the German Civil Code, article 2339 removes from inheritance those who deliberately and illegally stripped the testator's life, or committed an attempt on his life, or placed him in such a position that the testator, until his death, lost the opportunity to make or cancel the testamentary order. And also those who through deception or illegal threats, induced the testator to make up or cancel the testamentary order.

In accordance with the Civil Code of the Russian Federation by paragraph 4 of article 1117, undue heirs do not inherit by law or by testament, citizens, whose actions were deliberately illegal and directed against the testator. The rules of this article apply to heirs who are entitled to an obligatory share in the inheritance.

As we see, in the civil legislation of different states there are various grounds for recognizing the improper successor, however this norm is reflected in all laws of civilized states.

According to the Civil Code of the Republic of Kazakhstan Circumstances that serve as grounds for removing unworthy heirs from inheritance are established by the court. A person who does not have the right to inherit or remove from inheritance on the basis of this article (an unworthy heir) is obliged to return all property unreasonably received from the inheritance.

In our opinion, statutory unworthy heirs can be classified into the following groups:

1) persons who deliberately deprived the testator or any of the possible heirs of life or committed an attempt on their life;

2) persons who deliberately prevented the testator from exercising his last will and thereby encouraged the callers themselves or their close associates to inherit or increase the share of the inheritance due to them;

3) persons who are deprived of parental rights, as well as parents who evade fulfillment of the duties imposed on them by law, and payment of alimony for the content of the testator.

Regardless of which of the listed grounds will be presented, all the above-mentioned circumstances serve as a basis for eliminating unworthy heirs from inheritance, and are also established only by court.

Based on the foregoing we came to the following conclusion.

The testator is always an individual with a certain status. The deceased citizen is a testator, who has lifetime obligations and rights with respect to property. It will be transferred to his heirs after his death.

As the testator, there can be both a citizen of the Republic of Kazakhstan and a foreign citizen, a stateless person, also a person recognized incompetent or limited in the actions prescribed by law.

In addition, a person recognized as legally incompetent or limited in actions may be an inheritor only on the basis of legal inheritance.

We believe that only heirs can be the subject of relations. The testator can not be the subject of hereditary legal relations, since the testator at the time of the relationship is deemed dead. Accordingly, the deceased can not be a party to legal relations (subject). But, the basis for the emergence of hereditary legal relations is the death of the testator. Consequently, the main indicator is not the testator himself, but his death and property. Only in the event that the property exists, the deceased person has a hereditary relationship.

In the first paragraph of Article 1038 of the Civil Code of the Republic of Kazakhstan, a definition is given of the concepts of inheritance. However, within the meaning of this article, in Russian and in Kazakh, the options do not correspond to each other.

In the next version, the following definition of inheritance is given in the Kazakh language: «Inheritance - in case of death of a citizen (testator), his property passes to another person (persons) - heir (heirs)» (article 1038 of the Civil Code of the Republic of Kazakhstan).

The same definition of the Civil Code in the Russian version is written as follows:

«Inheritance is the transfer of the property of the deceased citizen (testator) to another person (s) - the heir (heirs)».

The heirs in Russian are called «person», as the heir can be called not only a person, but also a legal entity and the state. And in the definition in the Kazakh language the word «person» (people) does not include the concept as a state and a legal entity.

If we rely on the Kazakh version of the Civil Code of Article 1038-1 only people can be heirs. Of coursethis is wrong. In our opinion, this is not a legal confusion, but it is the mistake of translators.

In order to prevent misunderstandings, the Civil Code of the Republic of Kazakhstan in the first paragraph of article 1038 should be replaced by the word «person», «people» with «person», «persons».We recommend writing in the next edition: «Inheritance is the transfer of the property of the deceased citizen (testator) to another person (s) - the heir (heirs)».

Otherwise the most important meaning of managing the institution of inheritance of the variant in the Kazakh language contradicts other norms of the civil code.

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Мұрагерлік құқықтық қатынастардың субъектілері

Қазақстан Республикасының Азаматтық кодексі мұрагерлік қатынастарының қатысушылары ретінде мұра қалдырушы және мұрагерді атап көрсететіндігі туралы айтылған. Алайда заң әдебиеттерінде мұрагерлік қатынастардың субъектілеріне қатысты түрлі көзқарастар кездеседі. Мақаланың өзектілігі — азаматтық заңнамаға сәйкес мұрагерлік субъектілерін айқындауға бағытталғандығында. Авторлар мұрагерлік қатынастардың субъектілік құрамына қатысты бірқатар зерттеушілердің көзқарастары негізінде аталмыш құқықтық қатынастардың субъектілері шегін нақты айқындауға ұмтылыс жасады. Сонымен қатар Қазақстан Республикасының мұрагерлікке қатысты қолданыстағы заңнамаларына өзге мемлекеттер заңнамаларымен салыстырмалы түрде талдаулар жүргізілді. Азаматтық заңнамаға сәйкес мұрагерлік субъектілері ретінде мемлекеттің, заңды тұлғаның мұра алу құқығы ерекшеліктерімен қатар, лайықсыз мұрагерлер мәселесі қарастырылды. Мұра қалдырушы, мұрагер және мұрагерлік ұғымдарына анықтама берілген және ҚР Азаматтық кодексінің қазақша нұсқасында көрсетілген мұрагерлік ұғымының анықтамасына өзгерту енгізу жөнінде ұсыныс жасаған. Бұл, өз кезегінде, жұмыстың жаңашылдық негізін құрайды. Себебі мұрагерлік құқығының негізгі бастауы болып табылатын 1038-б. 1-т. қазақша нұсқасы мен орысша нұсқасының бір-бірімен мағынасы бойынша сәйкес келмеуі келешекте қарама-қайшылықтар тудыруы мүмкін.

Кілт сөздер: мұрагер, мұра қалдырушы, мұра алу құқығы, субъектілер, лайықсыз мұрагерлер, заңды тұлға, мемлекет, құқықтық қатынастар, құқық қабілеттілік, өсиет.

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Субъекты наследственных правоотношений

В статье показано, что Гражданский кодекс Республики Казахстан в качестве участников наследственных правоотношений указывает наследодателя и наследника. Однако в юридической литературе нет четких позиций по вопросу определения круга лиц, являющихся субъектами наследственных правоотношений. В данной статье с целью определения субъектного состава наследования изучено мнение ряда ученых, на основе чего даны определения таких понятий, как «наследодатель» и «наследник». Сделана попытка определить конкретный круг лиц, которые являются субъектами наследственных правоотношений. Кроме того, проведен сравнительный правовой анализ норм, регулирующих правоотношения в сфере наследования в Казахстане и зарубежом. В соответствии с гражданским законодательством рассмотрены особенности права наследования государственных юридических лиц как субъектов наследственных правоотношений, а также проблема недостойных наследников. Новизна работы определяется тем, что на основе изучения и сравнения понятий наследования, приведенных в Гражданском кодексе РК на казахском и русском языках, сделано предложение по поводу внесения поправок в Гражданский кодекс на казахском языке. Определение права наследования, изложенное в пункте 1 ст. 1038 ГК РК на казахском языке, существенно отличается по смыслу от русской редакции данной статьи. Подчеркнуто, что поскольку ст. 1038 ГК РК является основополагающей и определяющей всю суть наследственных правоотношений, несоответствие смысла данной статьи в русской и казахской редакции кодекса может привести к спорам и недопониманию в будущем.

Ключевые слова: наследник, наследодатель, право наследования, субъекты, недостойные наследники, юридическое лицо, государство, правоотношения, правоспособность, завещание.

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