
АЗАМАТТЫҚ ҚҰҚЫҚ ЖӘНЕ АЗАМАТТЫҚ ПРОЦЕСС ГРАЖДАНСКОЕ ПРАВО И ГРАЖДАНСКИЙ ПРОЦЕСС CIVIL LAW AND CIVIL PROCEDURE

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Elimination of inheritance of unfortable heirs in the Republic of Kazakhstan

This article considers the grounds for eliminating unworthy heirs from inheritance under the laws of the Republic of Kazakhstan. The aim of the study is to carry out a comprehensive analysis of theoretical positions and problems of law enforcement practice of the institution of unworthy heirs, the development of proposals aimed at improving the national legislation in the field of inheritance. The work is based on the general scientific and special research methods: analysis, synthesis, abstraction, induction, deduction, logical and comparative legal method. The provisions of Art. 1045 of the Civil Code of the Republic of Kazakhstan providing for an exhaustive list of categories of persons not entitled to inherit, both under the will and under the law, circumstances for elimination of inheritance regulated by law, theoretical provisions, practical materials from judicial practice are analyzed. The rules in the civil legislation of the CIS countries, which provide for the elimination of unworthy heirs from inheritance in the interests of bona fide heirs, are also considered. Conducted research came to conclusions aimed at improving the mechanism for protecting the rights of the testator by eliminating unworthy heirs from inheritance.

Keywords: succession law, the subjects of hereditary legal heir, an unworthy heir, the elimination of the inheritance, inheritance under a will, inheritance by law.

Analysis of the current civil legislation on inheritance of the Republic of Kazakhstan allocates a category th heir as unworthy heirs. Elimination of unworthy heirs from inheritance are devoted to Art. 1045 and p. 2 of Art. 1070 of the Civil Code (CC) of the Republic of Kazakhstan (hereinafter - the Civil Code of the Republic of Kazakhstan) [1].

The provisions of Art. 1045 CC RK provide an exhaustive list of categories of persons who do not have the right to inherit both under the will and under the law:

1. Neither have the right to inherit, either under a will or under the law, persons who intentionally killed the testator or any of the possible heirs who attempted to kill them. The exception is made by persons in respect of whom the testator made a will after the commission of an attempt on his life (clause 1 of Article 1045 of the Civil Code of the Republic of Kazakhstan);

2. The persons who deliberately prevented the testator from exercising his last will were not entitled to inherit either by the will or by law, thereby contributing to the fact that they or their close friends were called to inherit or increase the inheritance share due to them (clause 2 of Article 1045 of the Civil Code of the Republic of Kazakhstan);

3. Parents cannot legally inherit after children whom they have been deprived of parental rights and have not been restored to these rights by the time of the opening of the inheritance, as well as parents (adoptive parents) and adult children (adopted children) who evade fulfillment of their obligations, the rights or duties on the maintenance of the testator (clause 3 of article 1045 of the Civil Code of the Republic of Kazakhstan).

The circumstances to eliminate the inheritance belonging to the first category clearly indicating the intent on acts that should be directed precisely at taking the life or the attempt on the life of the testator or one

of the possible heirs, and not just at the commission of other intentional actions that caused his death. So, according to Art. 20 of the Criminal Code of the Republic of Kazakhstan, a criminal offense committed intentionally is recognized as an act committed with direct or indirect intent [2]. The object of an intentional crime must be the life of the testator or one of the possible heirs. Such circumstances may be established only in the order of criminal proceedings on the basis of a court judgment that has entered into legal force.

In the commentary to article 1117 the Civil Code of the Russian Federation rightly draws attention to the fact that this rule does not apply for those convicted of committing a crime by negligence. Moreover, the persons who committed socially dangerous acts in a state of insanity are not recognized as unworthy heirs, since they were deprived of the opportunity to realize their own actions or to manage them. In this case, the court imposes not a sentence, but a decision to exempt a person from criminal responsibility [3].

Being under insanity stands for a state when a person during a socially dangerous act could not be aware of the actual nature and social danger of his actions (inaction) or direct them as a result of chronic mental illness, temporary mental disorder, dementia or other morbid mental state (Art. 16 of the Criminal Code of the Republic of Kazakhstan) [2].

A person who has committed a crime being intoxicated with alcohol, narcotic drugs or other intoxicating substances is subject to criminal liability (Article 18 of the Criminal Code of the Republic of Kazakhstan), therefore, he may be considered an unworthy heir [2].

As for the exclusion specified in paragraph 1 of Art. 1045 where the legislator directly specifies in the law an exception for persons in respect of whom the testator made a will after committing an attempt on his life, as the testamentary order is based on the will of the testator, and if the testator left a will in favor of such an heir, it means he has forgiven the heir.

The second group includes persons who deliberately prevented the testator from carrying out the last will, and thus contributed to calling themselves or their close friends to inherit or increase the portion of the inheritance due to them (clause 2 of Article 1045 of the Civil Code). The grounds for eliminating an unworthy heir can be established both in criminal proceedings and by a court decision in a civil case on the elimination of the unworthy heir from inheritance. This is due to the fact that the decrees in paragraph 2 of Art. 1045 of Civil Code of RK, illegal actions can be expressed in threats, deception, violence in order to force the testator to make a will or prevent the preparation of a will or to confess a will, force any of the heirs to abandon the inheritance, increase their own or their loved ones shares in the inheritance and the like which can be covered but the standards of the Criminal Code, and may not constitute a criminal offense.

The literature suggests that the purpose of the crime in this case does not matter [4; 32]. By committing a deliberate wrong, a citizen should help his or other persons to be called upon to inherit or increase the portion of the inheritance due to him or others [5; 21]. This means that the killing of a potential testator, for example, from jealousy, as a result of a quarrel, etc. It cannot serve as a basis for recognizing a possible heir as unworthy. It does not matter whether the intentional illegal action of the pursued goal has reached or not [6; 400].

This interpretation does not match the Civil Code of the Republic of Kazakhstan, which established that, by committing an intentional unlawful act, a person must promote the vocation of his or other persons to inherit or increase the share of the inheritance due to him or to others. Based on the analysis of 1-2 subparagraphs of Art. 1045 deliberate killing or attempted murder, deliberate obstruction of the last will by the testator in any case should be the grounds for recognizing such an eventual heir unworthy.

Current legislation of the Republic of Kazakhstan takes into account not only the situation when the intentional wrongful act reached the goal pursued, but also when there was an attempt to reach the goal, but it failed, that is, the plan was not implemented. Intentional unlawful actions are actions that are directed against the exercise of the will of a possible testator, expressed in a will. For example, having learned about a perfect will, a potential heir, using violence or a threat against a testator, may force or try to force him to change or revoke a will. At the same time, it will be necessary to prove that the beatings, tortures, threats were committed in order to compel the testator to revoke or change the will.

In the literature, there are disagreements regarding the consequences of a will in favor of an unworthy heir made by a testator who is not aware of the willful unlawful action of the heir. According to Y.K. Tolstoy, «if the testator did not know the heir about such an action and made a testament based on his integrity, then the interested parties after the discovery inheritances may require the recognition of a will to be invalid» [7; 23].

M.V. Telyukina believes that this problem can be solved only by logical and systematic interpretation, in order to confirm that the testament was made by the testator who is aware of the loss by the heir of the legal inheritance [8; 25].

In our opinion, the theory of ignorance by the victim of a possible testator of the deliberate actions committed against him by a possible heir can be modeled only theoretically. The commission of a crime against the life of a potential testator must be confirmed by a court verdict, so the potential testator who survived always knows about this, as he participates in the criminal trial as a victim.

Elimination of unworthy heirs from inheritance is also realized in the civil norms of the countries of the former Soviet Union.

Thus, according to the claim 1 -2 of Art. 1117 of the Civil Code of the Russian Federation neither law nor will probates citizens who, by their deliberate unlawful actions directed against the testator, one of his heirs or against the implementation of the last will of the testator expressed in the will, contributed to or tried to encourage their own or others persons to inherit, or contributed to or attempted to increase the share of inheritance due to them or other persons, if these circumstances are confirmed in court. However, citizens to whom the testator, after losing their inheritance rights, bequeathed the property, shall have the right to inherit this property. Parents do not inherit by law after children in respect of whom parents were judicially deprived of parental rights and not restored in these rights by the day of opening the inheritance. At the request of the interested person, the court excludes from inheritance, by law, citizens who have maliciously avoided performing the duties of the testator, which were imposed on them by virtue of the law [3]. According to paragraph 1 of Art. 1224 of the Civil Code of Ukraine, a person does not have the right to inherit if he intentionally killed the testator or any of the possible heirs or threatened their lives. Persons who intentionally prevented the testator from drawing up a will, making changes or revoking a will, and thereby facilitating the right to inheritance from themselves or from other persons or contributing to an increase in their share in the inheritance, have no right to inheritance. Parents are not entitled to inherit under the law after a child in respect of whom they were deprived of parental rights and their rights were not renewed at the time of opening the inheritance. Parents (adoptive parents) and adult children (adopted children), as well as other persons who evaded from the obligation to maintain the testator, are not entitled to inheritance by law, if this is established by the court. They are not entitled to inherit under the law one after another, the marriage between which is invalid or recognized by court decision [9]. According to pp. 1-2 Art. 1434 of the Civil Code of Moldova, a person who: a) intentionally committed a crime or other immoral act against the last will of the testator, expressed in his will, if these circumstances are established by the court, cannot be an heir under the will or the law; b) deliberately prevented the testator from exercising his last will, and thereby contributed to his own or his close relatives being called to inherit or increase their inheritance shares. Parents are not entitled to inherit after the children after children for whom they were deprived of parental rights and not restored to these rights at the time of opening the inheritance, as well as parents (adoptive parents) and adult children (including adopted children) who in bad faith evade fulfillment they are responsible for the maintenance of the testator, if these circumstances are established by the court [10].

Thus, we see similar norms in the civil legislation of the CIS countries providing for the elimination from inheritance of unworthy heirs in the interests of bona fide heirs.

In the practice of the courts there are claims to eliminate the inheritance of unworthy heirs [11]. The courts in the consideration of this category of cases apply the rules of Art. 1045 of the Civil Code regulating the elimination of inheritance from unworthy heirs.

The Oktyabrsky District Court of Karaganda considered a civil case on the basis of a statement of claim by A. and B. to M. on the elimination of the inheritance of an unworthy heir, the recovery of non-pecuniary damage and court costs. The plaintiffs asked the court to recognize M. as an unworthy heir after the death of the testator N., who died on June 9, 2012, to recover from the defendant in favor of B. the amount of non-pecuniary damage and court costs, to recover from the defendant in favor of the plaintiff A. non-pecuniary damage and court costs incurred.

The plaintiffs motivated their position by the circumstances that they, their mother V. and N.'s father are the owners of the apartment on the basis of the privatization agreement of December 10, 1993. By the sentence of the Karaganda Kazybek-bi district court of April 26, 2013, which entered into force on 14 May 2013, defendant M. was found guilty of committing crimes under Part 5 of Art. 28, Part 2 of Art. 325, part 3, paragraph «b» of Art. 177 of the Criminal Code of the Republic of Kazakhstan. A court sentence established that M. had cohabited since 1999, and since June 3, 2006 she was married to the latter, living in this apartment. M., having received a certificate of registered rights and encumbrances on this apartment, found that

the right of ownership of real estate, in which they lived together with N., in the manner prescribed by law, is registered in equal shares for N., A., B. and B. on the basis of a privatization agreement. At the same time, defendant M. and N., reliably knowing that the former spouse and children of N. had left for permanent residence from the borders of the Republic of Kazakhstan since the 1990s, decided to take advantage of this circumstance for mercenary motives, for the purpose of unlawful gratuitous treatment not belonging to them share ownership of the said apartment in favor of M. and to steal the right of ownership of the co-owners to the specified housing with the simultaneous transfer of the sole right of ownership to the specified housing. M. and N., knowing that in the case of the death of N. himself, as the spouse of the latter can claim only $\frac{1}{12}$ the share of this apartment, reliably knowing the state of the housing market in Karaganda, knowing the high level of market prices for apartments, as well as knowing the well-known statutory rules related to registration of real estate and its implementation and the necessary documents for this, decided to use this information in for the purpose of personal material enrichment in an unlawful manner and under circumstances not established by the investigation, they took active steps to seize the right of ownership to the above The object property.

As a result of criminal actions, M. single-handedly took possession of the right of ownership to the given property. Later, on June 9, 2012, on the day of the death of the plaintiffs' father and her husband N., M. sold this apartment to her daughter-in-law S., in connection with which the plaintiffs were forced to file a claim with court on the recognition of the purchase agreement sales invalid.

By a decision of the Oktyabrsky District Court of Karaganda dated July 18, 2013, the claims of A. and B. against M., R. and S. on the recognition of the purchase and sale contracts were void. The apartment sale agreement concluded between M. and R., and the apartment sale agreement concluded between R. and S., was declared invalid.

As a result of criminal, unlawful and willful acts committed by M., the plaintiffs lost not only their property rights, but they were actually deprived of their right to be called to inherit after the death of their father N. At the same time, M., being heir to the law of the first queue, committed a crime not only against them, but also committed a crime against her husband, the testator N.

By a court decision, the claims of A. and B. to M. to remove from the inheritance of an unworthy heir, to recover compensation for moral harm were partially satisfied. The claim A. and B. to M. was satisfied with the claim. About the elimination of the unworthy heir was refused. The claims of A. and B. to M. on the recovery of compensation for non-pecuniary damage were partially satisfied.

In making the decision, the court was guided by the following. According to Part 2, 3, Art. 71 of the Code of Civil Procedure, the circumstances established by a court decision that had entered into legal force in a previously considered civil case are mandatory for the court and are not proven again in the proceedings of other civil cases in which the same persons are involved. A verdict of a court that entered into legal force is mandatory for the court considering the civil case, also on the questions, whether these acts were committed and committed by this person, and also in relation to other circumstances established by the verdict and their legal assessment.

By the verdict of the Kazybek bi district court of Karaganda city dated April 26, 2013, Mr M. was found guilty under 28, Part 5, 325, Part 2, 177, Part 3, Section «b» of the Criminal Code. The court established that M., having mercenary motives and direct intent to take possession of a real estate object owned in equal shares by the victims and A., B. and B., as well as to the deceased spouse N., of what she was reliably known in acting in persons by providing information about themselves and the owners of the apartment, facilitated the commission of a crime by forging an official document that granted M. sole ownership to a disputed apartment, and then by using a counterfeit judgment of the Oktyabrsky district court in Karaganda from August 18 that 2008 in the registering body registered the right of ownership, thereby committed fraud.

The court verdict established that M. acted in a group of persons and contributed to the commission of a crime by forging an official document that granted her sole ownership rights to a disputed apartment. The parties to the plaintiffs did not refute the respondent's arguments about the fact that the defendant's spouse N. also took part in aiding in the forgery of the court decision.

The requirements of Art. 1045 Civil Code provides for circumstances where heirs are not allowed to inherit. In particular, parts 2 and 4 of this article are determined that they are not entitled to inherit either by will or by law also by persons who intentionally prevented the testator from exercising his last will and by this contributed to calling themselves or their close friends to inherit inheritance shares. Circumstances that serve as the basis for eliminating inheritance of unworthy heirs are established by the court.

From the literal interpretation of the provisions of this norm it follows that for its application it is necessary that the unlawful actions of a person must be intentional. The result of such illegal actions should be a call to inheritance or an increase in the proportion in the inheritance. These illegal actions can be expressed in forcing the testator to make a will, or to prevent the drafting of a will, or to conceal a will, etc. However, the court was not given evidence that such actions of M. against N. were carried out.

Due to the fact that the party of the plaintiffs did not provide evidence to the court as grounds for eliminating M. as an unworthy heir from inheritance after the death of spouse N., the court refused the plaintiffs to satisfy the requirement for M. about elimination from the inheritance of an unworthy heir.

This decision appealed by the plaintiffs, was considered in the Appeals Chamber for Civil and Administrative Cases of the Karaganda Regional Court. By a decree of the collegium, this decision of the first-instance court was left unchanged [11].

The third group of «unworthy heirs» is made up of parents after children in respect of whom they are deprived of parental rights and were not restored in these rights by the time of opening the inheritance, as well as parents (adoptive parents) and adult children (adopted) who evade from force of law of duty of maintenance of the testator.

The alimony obligations of parents and children are governed by the Code of the Republic of Kazakhstan dated December 26, 2011 No. 518-IV «On Marriage (Matrimony) and Family» (hereinafter referred to CMF RK) [12].

According to paragraph 1-2 of Art. 138, Clause 1, Article. 139 of the Code of RK parents are obliged to maintain their minor children. If the parents voluntarily do not provide funds for the maintenance of their minor children, as well as adult children studying in the system of general secondary, technical and vocational, post-secondary education, in the system of higher education in full-time education at the age of twenty-one, these funds are collected in court. In the absence of an agreement on the payment of alimony, child support for minor children is collected by the court from their parents on a monthly basis in the amount of [12].

Adult able-bodied children are also required to maintain their parents who are unable to work and need care and take care of them (Clause 1, Article 145 of the CMF RK) [12]. In the absence of an agreement on the payment of alimony, alimony for disabled parents in need of assistance shall be recovered from adult able-bodied children in a judicial proceeding (paragraph 2 of Article 145 of the CMF RK) [12].

Note that this rule applies only to inheritance by law. Due to the fact that a testamentary decree reflects the will of the testator, it is impossible not to recognize the right of inheritance for unworthy parents and unworthy children, if the testator, having forgiven them their guilt, left the «unworthy heirs» all of their property or part of it.

In addition to unworthy heirs, spouses can be legally excluded from inheritance if it is proved that the marriage with the testator actually ceased before the opening of the inheritance and the spouses lived for not less than five years before the opening of the inheritance (clause 2 of Article 1070 of the Civil Code of the Republic of Kazakhstan) [1].

The basis for elimination from the inheritance of a spouse can be established in a judicial procedure only.

To eliminate the inheritance of the spouse, the following circumstances are necessary:

- the actual termination of marriage with the testator before the opening of the inheritance and
- separate living of spouses for at least five years.

According to paragraph 26 of Art. 1 CMF of the RK, marriage is an equal union between a man and a woman, concluded with free and full consent of the parties in the order established by the law of the Republic of Kazakhstan, with the purpose of creating a family that generates property and personal non-property rights and obligations between spouses [12].

Separate residence of spouses can be confirmed by the presence of spouses of different addresses of residence, long-term residence of the spouse in the places of deprivation of liberty, residing of the spouse with another person, etc.

For analysis of interest is the following court decision on the elimination of the spouse from inheritance.

The plaintiffs T. and M. appealed to the court to Sh. for the elimination of inheritance by law, stating that on 16.09.2015 of the year the sister of the plaintiffs A., the former spouse of the defendant. A. left a will in the name of her sisters. The defendant submitted to the notary a statement of acceptance of the inheritance under the law, having the property specified in the will as the inheritance considering the claims of the defendant illegal. The defendant and their sister do not actually live together since 1996, when the marriage was dissolved by the court. Their sister and the respondent lived separately. The defendant disposed of his

own single-handedly, indicating in numerous transactions that he is not married. There are reasonable grounds for asserting that the marriage with the testator actually ceased more than five years before the opening of the inheritance. The defendant A. did not participate in the funeral, he neglected the relationship with his wife and had connections on the side, he had a son from another woman beyond his marriage. A. had lived with her sister since 2013 due to her illness.

The defendant did not recognize the lawsuit, decreed that neither he nor the spouse actually terminated the marriage relationship; they lived in the same family, in the same house, and managed the joint economy. They did not apply after divorce for registration of divorce. In 2013, A.'s spouse became ill with diabetes, after which, due to the agreement between the parties, her sister M. moved in and looked after her.

The court rejected the claim. At the same time, among the established circumstances, on the basis of which the court made its conclusions, the following facts are indicated.

1) The court found that after the dissolution of the marriage in court, A. and Sh. did not apply to the Court. In accordance with the legislation in effect for that period, marriage is considered to be terminated from the moment of registration of the divorce. Consequently, the argument of the plaintiffs that the marriage between A. and S. was terminated was not substantiated.

2) The court found that the defendant in 2010 and in 2012 was a will, which bequeathed the house acquired during the marriage, in favor of the wife A. and his son.

3) The court found that the spouses A. and Sh. lived for a long time together in the same house and conducted a joint household [13; 84, 85].

All circumstances, according to which the heirs are excluded from the inheritance as unworthy, are established by the court (paragraph 4 of article 1045 of the Civil Code of the Republic of Kazakhstan). In this case, it does not matter in what legal procedure a citizen is considered an unworthy heir. Circumstances of unworthiness can be established in the course of criminal proceedings, as well as in civil litigation.

An important fact is that an unworthy heir is obliged to return all property unjustifiably received by him from the inheritance, and if it is impossible to return the hereditary property, the unworthy heir is obliged to reimburse his market value (item 4-1 of Article 1045 of the Civil Code of the Republic of Kazakhstan).

The rules on unworthy heirs are applied to a testamentary refusal and to heirs who have the right to an obligatory share (clause 5-6 of article 1045 of the Civil Code of the Republic of Kazakhstan).

Thus, the elimination from inheritance of unworthy heirs is one of the measures of restriction of inheritance rights on the grounds expressly established by law.

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Қазақстан Республикасында лайықсыз мұрагерлерді мұрадан шеттету

Зерттеудің мақсаты лайықсыз мұрагерлер институты туралы теоретикалық тұжырымдар мен құқыққолдану тәжірибесінің мәселелеріне кешенді талдау жүргізу, мұрагерлік саласындағы ұлттық заңнаманы жетілдіруге бағытталған ұсыныстар әзірлеу болып табылады. Жұмыста зерттеудің жалпы ғылыми және арнайы әдістері қолданылды: талдау, синтездеу, абстракция, индукция, дедукция, логикалық және салыстырмалы-құқықтық талдау жүргізу. ҚР АҚ-нің 1045-бабында қарастырылған өсиет бойынша да, заң бойынша да мұра алуға құқығы жоқ тұлғалардың тізімін қарастыратын ережелері, заңнамамен реттелген мұрадан шеттетудің мән-жайлары, теориялық тұжырымдар жан-жақты талдауға алынып, сот тәжірибесінен алынған тәжірибелік материалдарға талдау жүргізілген. Сондай-ақ адал ниетті мұрагерлердің құқықтарын қорғау мақсатында мұрадан лайықсыз мұрагерлерді шеттетудің негіздерін орнататын ТМД елдерінің азаматтық заңнамаларындағы нормалар қарастырылған. Жүргізілген зерттеулердің негізінде мұрадан лайықсыз мұрагерлерді шеттету жолымен мұра қалдырушының құқықтарын қорғау тетігін жетілдіруге бағытталған қорытындылар жасалған.

Кілт сөздер: мұрагерлік құқық, мұрагерлік қатынастың субъектілері, мұрагер, лайықсыз мұрагер, мұрадан шеттету, өсиет бойынша мұрагерлік, заң бойынша мұрагерлік.

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Устранение от наследования недостойных наследников в Республике Казахстан

Целью исследования является комплексный анализ теоретических положений и проблем правоприменительной практики института недостойных наследников, выработка предложений, направленных на совершенствование национального законодательства в области наследования. В работе используются общенаучные и специальные методы исследования: анализа, синтеза, абстракции, индукции, дедукции, логического и сравнительно-правового анализа. Тщательному анализу подвергнуты положения ст. 1045 ГК РК, предусматривающие исчерпывающий перечень категорий лиц, не имеющих право наследовать как по завещанию, так и по закону, обстоятельства для устранения от наследства, регламентированные законодательством, теоретические положения. Проанализированы практические материалы из судебной практики. Также рассмотрены нормы в гражданском законодательстве стран СНГ, устанавливающие основания устранения от наследования недостойных наследников в интересах добросовестных наследников. На основании проведенного исследования сделаны выводы, направленные на совершенствование механизма защиты прав наследодателя путем устранения от наследования недостойных наследников.

Ключевые слова: наследственное право, субъекты наследственного правоотношения, наследник, недостойный наследник, устранение от наследования, наследование по завещанию, наследование по закону.

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