UDC 347.65/.68

M.Yu. Prudnikova

Ye.A. Buketov Karaganda State University
(E-mail: marishakrg@mail.ru)

Legal problems of inheritance

The article is devoted to the legal problems of inheritance. Legal regulation of inheritance is relevant to the current stage of development of civil law and issues, considered by the author, require special attention. The correct understanding of content of civil legislation standards promotes their exact practical application, especially now when the number of hereditary disputes grows. Therefore research of the legal nature of inheritance as act of universal succession, identification of the problems arising at registration of rights of succession, the analysis of the relevant provisions regulating an order of acceptance of inheritance are not only demanded, but also necessary. In contents of article the author proposes the solution of some problems arising in the considered sphere.

Key words: inheritance, heirs, succession, will, hereditary share, heritage section.

The highest value of the society, which we are building, is a person for the sake and benefits of which the transformation has started. The Constitution of the Republic of Kazakhstan fixed among the other rights such rights of citizens, as the right to private property and inheritance right [1]. With growing prosperity of population of the Republic of Kazakhstan the provision and protection of those rights is becoming increasingly important.

The complexity of inheritance relationships from the viewpoint of their legal content, is of apparent, at first sight, simplicity. Indeed, when the probate is opened, the main goal is its transition to heirs by law or by testament. And it seems, that it is easy to do this, when there are norms of the civil law, which regulate the procedure of such transition, the norms of notary legislation, which clearly describe the process of registration of inheritance rights while the implementation of them by heirs and norms of civil procedure legislation, which regulates the protection of the heirs in the event of disputes and the need to confirm the existence of any legal fact, relevant for the exercise of rights. But often, in applying of these norms, interested subjects face problems in understanding of their content, imperfections, mishaps, absence of a single practices in their interpretation and application.

It should be noted that the norms of the modern inheritance law, which became part of the adoppted Special Part of the Civil Code, entered into force on 1 July 1999 [2], have appeared not spontaneously, responded the realities of the time, were aimed at ensuring property rights of the testator and heirs and are still relevant. However, these norms have radically changed the procedure of acceptance of the inheritance (the Roman system of acceptance of the inheritance has been replaced by the German system of renunciation or direct hereditary succession), which existed prior to July 1st, 1999, and after some time in the course of their application legal problems were revealed, which have shown that they do not contribute to the stability of civil turnover, and can not provide the action of the basic principle of the inheritance law — the most complete ensuring the rights and interests of heirs, but were aimed to do so.

Therefore, amendments made to the civil legislation February 3rd 2007 that returned the old system of inheritance acceptance, became conforming to the laws of nature. However, after their entry into force arose another complexity — now i solved the question of the action of legislation, which should be guided in the case of inheritance. When considering cases and disputes about inheritance the circle of heirs, the order, the timing of inheritance acceptance and composition of inherited property is determined on the basis of norms of the law, which was in force on the date of opening of the inheritance. (Before July 1st, 1999, since July 1st, 1999 to February 3rd, 2007 and after February 7th, 2007) [3].

All these factors create certain difficulties for the subjects of hereditary relations, notaries, judges. Nevertheless, analysis of Kazakhstan legislation on inheritance shows that its change is dictated not only by changes in the content of property relations, the improvement of the institution of property, updating of family legislation. First of all, it is caused by the large number of unresolved issues on the legislative level relating to the right of inheritance, the need in many cases to confirm the obvious in the court because of in the absence of relevant norms of law. All of this leads to the urgent need to update the legislation, regulating inheritance relationship. In these circumstances the main task of the state is the creation of effective

norms to ensure the realization of the right to inheritance and to ensure the unification of practice of their application.

In this article we would like to pay attention to certain problems of legal regulation of inheritance relationships, that often arise due to misunderstanding of the content of existing norms and the incorrect use of them in practice.

So, in the connection with the opening of the probate, there are inheritance relations. The subjects of inheritance legal relations are the testator and the heir.

The testator is a person, after the death of which the hereditary legal succession is executed. The testators may be any citizens of the Republic of Kazakhstan, as well as stateless persons and foreign citizens living in the territory of the Republic of Kazakhstan. Inheritance after the legal entity is impossible, as legal entities do not die, but stopped.

For the testator the active legal capacity does not matter if it's the inheritance by law. The situation is different in the case of the inheritance by testament. The testator must have full legal capacity.

The heir is the person, encouraged to inherit due to the death of a citizen (of the testator). Heirs can be all subjects of civil law. If the state of active legal capacity has large meaning for the testator, the active legal capacity for the heir does not matter.

In order to become an heir, it is enough to have general civil legal capacity. According to para. 1 of the Article 1044 of the Civil Code of the Republic of Kazakhstan (hereinafter — the CC of the RK) heirs by testament and by law can be the citizens who are alive at the time of opening the probate, as well as conceived during the testator's lifetime and born alive after the opening of the probate.

Heirs by law can only be natural persons and citizens of the Republic of Kazakhstan, foreign citizens and stateless persons. Circle of heirs by law and the order of their calling to inheritance is clearly defined by law. The norms of the Civil Code provide basic and additional stage of heirs by law, including the relatives up to the fifth degree of kinship.

A particular subject of the inheritance relationship is the state. The state can be an heir both by testament and by law.

Under the inheritance should be understood that after the death of the testator it's transferred to his heirs in the order of hereditary succession. In theory, the inheritance of the civil law is not uniquely determined. The most common point of view, according to which the inheritance or inheritance property is the unity of the rights (assets) and obligations (debts (liabilities) owned by the testator at the time of opening the inheritance. Understanding of heritage as a set of rights and obligations of the testator supported I.S. Peretersky, G.N. Amphitheatrov, I.L. Braude and many other lawyers. Supporters of this approach are also E.B. Eydinova and N.I. Bondarev, V.C. Makarova, A.A. Rubanov V.A. Ryasentsev, M.Y. Barschevsky, E.V. Kulagina [4; 23].

The article 1040 of the CC of the RK has defined the composition of the inheritance as «the testator's property as well as rights and obligations, whose existence does not end with his death».

Specifying the concept of inheritance, the following circumstances must be distinguished:

1) the rights and obligations of the testator are passed to the heirs by way of universal legal succession, that is unchanged as a whole and in the same time, if the norms of the CC of the RK do not provide otherwise (paragraph 2 the Article 1038 of the CC of the RK);

2) the rights and obligations of the testator are passed to the heirs, except those, whose transition in the the order of succession is not allowed under the civil legislation or is contrary to the very nature of these rights and responsibilities.

When determining the property, which is included in the succession mass, following should be considered.

Firstly, non-property rights and other non-material benefits are not included in the inheritance. It should be properly understood that this provision of the CC of the RK, avoid improper use of the existing norm. Such moral rights are included in the inheritance and inherited, which are necessary for the implementation of the related property rights (e.g. right to the joint stock company management in the case of inheritance of shares).

Second, only those property rights pass by inheritance, that lawfully belonged to dead during his lifetime. Therefore, the rights are not belonged the testator during his lifetime, and arose for his successors, precisely because of his death, are not included in the inheritance. A typical example in this respect is the life insurance contract concluded by the insurer in the event of his death for the benefit of any of the members of his family (wife, children — beneficiaries).

Thirdly, the inherited property does not include those rights and responsibilities, which, although they are proprietary, are personal. First of all, alimony rights and obligations, the right to compensation for harm caused to life and health of of the testator.

It should be kept in mind that in this case we are talking about the rights and obligations themselves, that are terminated with the opening of the probate for the future. However monetary amounts awarded or due under alimony agreement are not paid and not received during the lifetime of the testator, testator awarded monetary compensation for non-material and material damage is included in the inheritance. In our opinion, the absence of civil legislation of specific provisions clarifying this issue, is an absolute loophole. For proper understanding of the nature of monetary amounts mentioned above, included in the succession mass, it is necessary to do the analysis of the norms on obligations, which, in our opinion, makes it difficult to practice of law enforcement and often leads to a misunderstanding of the contents of the provisions of the CC of the RK.

Fourthly, it's necessary to note that by inheritance pass not only existing rights and obligations, but in the cases directly provided by law, the rights, which the testator, during his lifetime, did not manage to legalize, but has taken necessary attempts to obtain them (rights of intermediate position) — the right for access to the registration authority for registration of property rights, the right for commissioning of buildings, the right to appeal to the authorities for a duplicate title documents, the state act on land.

Next, referring to the part of the inheritance it should be mentioned that in many cases the content of the rights and responsibilities that are transferred to the heirs, determined not only by the general provisions of the inheritance, but also by special rules for certain types of hereditary succession. These rules are found in the legislation on economic partnerships, joint stock companies and other legal acts.

And finally, it should be noted that the inheritance of property, located on the right of joint ownership of spouses, there should be determined the share of the surviving spouse, since the share of the inheritance did not open.

The order of succession of the property, which was on the right of ownership and was acquired in the privatization procedure causes many questions.

It must be noted that if multiple tenants privatize the apartment, they have a right to joint (not shared) property. According to the article 1041 of Civil Code of RK death of member of joint ownership is the basis for determining his share in the ownership and division of common property or allocation of his share of a deceased member in the order prescribed by Article 218 of the Civil Code. In this case, the inheritance shall be opened on the share of the deceased party of the common property, and at impossibility of division of property actually — for the value of the share. And, then, a share in the common property can only be inherited after its allocation.

This problem may occur during the inheritance of pension savings. In accordance with Articles 23, 23–1, 23–2 of the Law of the Republic of Kazakhstan «On pension provision in the Republic of Kazakhstan» in case of death of the person having pension savings in accumulative pension fund at the expense of compulsory, voluntary and voluntary professional contributions, they are inherited in order established by the legislation of the Republic of Kazakhstan. It is included in the succession mass. Is the share of the surviving spouse's pension allocated?

According to Article 33 of the Marriage (Matrimony) and family code the sum of income of each spouse from employment, business activity and the results of intellectual activity, the amount of income to the common property of spouses and separate property of each spouse received their pensions, benefits, pensions and other cash benefits, with no special purpose (the amount of material aid, the amount paid in compensation in connection with disability due to injury or other harm to health , and others) relate to the property acquired by the spouses during the marriage (matrimony) (joint property of spouses).

However, the Normative Resolution of the Supreme Court dated 29.06.2009 No. 5 «On some questions of application by courts of inheritance legislation» contains a provision that pension savings in accumulative pension fund is not received during the lifetime of the testator, do not relate to joint property of spouses, and hence the proportion of surviving the spouse in this case is not allocated and inheritance is opened for the full amount of such savings.

It is a kind of casus, which can lead to the wrong practice of applying the rules of inheritance and family law. In addition, pension payments — deductions from salaries and wages is also jointly acquired property (income from employment).

The time of opening of the inheritance is the day of death of the testator or the day of coming of the court decision declaring him dead in force (Art. 1042 Civil Code of the Republic of Kazakhstan). It should

be borne in mind that the legislator mentions the day, which is important for the application of the rules on commorientes — the people who died at the same time (i.e. citizens who died in the one and the same day).

It is rare, but hour of opening of the inheritance can have legal significance when on the same day, before or after the time of death ceases siblings or family connection, which is the basis for calling to inheritance (adoption, divorce).

The place of opening of the inheritance is the last place of residence of the testator, and if it is not known — the location of the property or its main part (Article 1043). According to the normative decree «On some questions of application by courts of inheritance legislation» — if the last place of residence of the testator, who had an estate in the territory of the Republic of Kazakhstan, is unknown or is abroad, the place of opening the inheritance in the Republic of Kazakhstan recognizes the location of the inherited property (the place of real location of the property, place of registration of movable property, the location of the bank, where the account of the testator, etc. If the inherited property is located in different places, the place of opening the inheritance is the location being a part of real estate, and in the absence of real estate — location of movable property or its most valuable part. The value of property is determined on the basis if its market value.

From here — in all circumstances crucial to the determination of the place of residence of the testator has a substantive criterion, definitely the establishment of the testator or the location, or the location of the property or its most valuable part.

In cases where the place of residence of the testator is known to the heirs, but they can not, for any reasons, to confirm it documentary, at the request of the heir, the place of opening of inheritance can be set by legal fact of the court within the special proceedings.

Heirs are encouraged to inherit in order of priority established by law or according to the last will of the deceased.

It should be noted that according to Art. 1077 Civil Code of the Republic of Kazakhstan, if among the heirs is the person, the location of which is unknown, the remaining heirs, executor (inheritance manager) and the notary are obliged to take reasonable measures to establish their location and calling them to inherit. Such measures within the meaning of the civil law performs notary also. Such a measure can be the publication of information on missing heirs.

It should be noted that the law protects the rights of the missing heirs, deadlines and special order of inheritance division. This period varies from 6 months to 1 year. This is long period of time. However, the establishment of the terms and procedures in this section taking into account the share allotment of missing heir necessarily in the interests of the heirs, and in the interests of the notary.

In order to ensure the legality of the registration of inheritance rights in the case that the heirs argue that in addition to their inheritance, no one will claim, it is advisable to use the practice of so-called receipts. When the heir gives subscription that at the time of opening the inheritance there is no other heirs, or signed by a notary document in which undertakes to pay the amount corresponding to the size of the hereditary share in the case of the appearance of any of the missing heirs. We believe this approach provides the legality of inheritance proceedings by the notary, and protects the heir who did not show up because he did not know that the inheritance was opened.

In addition to the heirs, who are called to inherit from the moment of opening the inheritance (eg. legal heirs of the first stage, if such an order of succession is not canceled or changed his will), the heirs may be called to inherit later. In particular, this can occur when the heir to the law of the first stage refused the inheritance if there is at the same testator's heirs at law of the second stage, or when the main heir refused the inheritance in presence of preappointed heir or when called to inheritance heir died without acceptance of the inheritance, and he has no successors. In all these cases to inheritance after the death of the same testator the another heir is called. He can accept the inheritance within the part of the six-month period that has not expired at the time when the first heir dropped out. If this part is less than three months, it is extended to three months.

To get an inheritance the heir must accept it. The adoption of the inheritance is exercised by application at the place of opening the inheritance or notary authorized by law to issue the certificate of inheritance, the official which accepts heir's application of acceptance of inheritance or heir application for a certificate of inheritance (Art. 1072-1 of the Civil Code of RK).

It is recognized, until proven otherwise, that the heir accepted the inheritance, if he has committed actions evidencing the actual acceptance of the inheritance, in particular, if the heir:

– Entered into possession or control hereditary property;
– Took measures to preserve the hereditary property, to protect it from encroachments or claims of third parties;
– Made its own costs for the maintenance of inherited property;
– At their own expense paid debts of the testator or received from third parties owed money to the testator.

What does «actual taking of possession of the estate» mean? Under this concept should be understood the actions of the management, disposal and use of the property, keeping it in good condition, payment of taxes, the introduction of utility bills and so on. This conclusive action can be expressed in actions when heir after the opening of the inheritance continues to own and use the same property, which during the life of the testator possessed, and used in conjunction with them. First of all — the physical possession of the thing, dominion over it (the heir of the house takes the testator specific things and holds them by his side).

It should be borne in mind that living heirs after the death of the testator in the same living place, where the testator lived, should be considered as acceptance of the inheritance (except the cases of refusal of an inheritance), as the heirs actually take possession of the things belonging to the deceased. The duration of the stay after the testator's death is not important. It is enough that the heir at least one day survived the testator.

But can we talk about the actual acceptance of the inheritance by the participant in joint ownership on the basis of the act of privatization, if this person is inscribed in the act, but does not live in an apartment and does not bear the burden of its maintenance? In our opinion, the answer should be negative. The actual adoption of the inheritance refers to the activities of the heir, which indicate its entry into possession and use after the testator's death, the implementation of actions for the maintenance and protection of its assets, paying the production of its debts and taxes on inherited property or receiving owed to the testator payments values of material nature to be included in the succession mass.

As the actual adoption of the inheritance means certain acts in relation to inheritance within 6 months from the date of opening of the inheritance, in case of their absence at the end of this period, missing period for inheritance acceptance can be restored by the courts. The presence of a person only on the rights of co-owner in privatized property is not enough to actually confirm the heir accepted the inheritance. Obviously, the heirs should begin to exercise their powers. It is important to consider the issuance of a certificate of inheritance.

There is a casus when some notaries issue the certificate of inheritance in the case where the period is omitted, considering such heirs in fact accepted the inheritance, even if they lived in another city and had no relation to the hereditary property, which co-owners of which they used to be. They believe that the actual decision has taken place since ownership (including joint) and defined as the ability to possess, use and dispose the property. And if this right belongs to such co-owners, it automatically confirms that heirs actually accepted the inheritance. This approach is not legally correct and not right because the actual acceptance relates not only to the rights but to their actual implementation. So, in addition to the heir of the privatization contract must submit other documents showing the actual entry into inheritance.

Division of hereditary property shall be done in agreement with the heirs in accordance with the shares belonging to them and first of all in nature, only in exceptional cases, monetary compensation shall be recovered at the prices at the time of the decision.

In particular, producing a division of house (apartment) between the heirs, the court may order the other heirs to pay the monetary compensation for the share, if the share of released heir to the house is a minor and can not really be separated, and the heir of the house is provided by other living area. With the receipt of monetary compensation the heir loses the right to share of the home.

In case of failure of heirs in obtaining monetary compensation in case of equality of their shares, the court refuses to divide house (apartment), leaving it in the common ownership of heirs.

It should be noted that in the division of the inheritance the proportion of hereditary heirs at law is equal, except the cases provided by the law; ordinary items of home furnishings and appliances are transferred to heirs who lived together with the testator at least a year, regardless the order of their calling to inheritance and beyond hereditary share; in determining the fate of those or other objects belonging to the inheritance, not only the cost but also the purpose, whether they belong to the divisible and indivisible should be taken into account.

Division of inheritance is made on accordance with agreement of accepted the inheritance heirs according to their shares. If no agreement is achieved, the court divides the hereditary property (Art. 1076 CC RK).

At the same time the rules governing the common ownership are applied. In hereditary mass can be included only the property, which belonged to the testator legal basis. Therefore, the court may not meet the requirements of the heirs of the recognition of their ownership to the illegally constructed buildings of testator.

In cases where the division of inheritance in strict accordance with the shares is not possible, by mutual agreement between the heirs, and if it is not achieved — by decision of the court the heirs make mutual payments. Heir who gets less out of the inheritance share gets from other heirs the benefits which are not included to hereditary mass.

Notary at the place of opening the inheritance, and in areas where there is no notaries — the officials of executive bodies, authorized to perform notarial action, according to the citizens application or other persons, or on its own initiative take measures to protect the inheritance, when it is required in accordance with the best interests of heir (including the state), legatees or creditors of the testator.

Protection of hereditary property extends to the moment of acceptance of inheritance by the heirs, and if it is accepted — before the deadline for acceptance of the inheritance.

In the case the property of the testator, or a part thereof is not in the place of opening of inheritance, notary or an official of the local executive body, performing notarial acts in the place of opening the inheritance, sends the order on adoption of measures to protect the property to notary or person performing consular functions on behalf of the Republic of Kazakhstan, or officer of the local executive body, perform notarial acts at the location of inherited property.

Today, the main way to protect the rights of heirs and inherited property is the purpose of trust management. The Trust manager is appointed 1) on the basis of an application of heirs 2) the decision of the notary 3) with the consent of the person who has assumed such powers. Any person can be a trust manager — or some of the heirs. Trust manager must be clarified on all its rights and obligations (Art. 883, 895 of the Civil Code of RK).

In conclusion I would like to note that the problems we have discussed in this article are not exhaustive. Relatively novelty of certain provisions, introduced by the CC of the RK of inheritance law, the lack of development of many controversial issues, problems in the judicial and notarial practice in cases of inheritance determine the need for theoretical and practical understanding of the modern concept of the institution and makes it relevant to the development of specific proposals on improvement the Kazakhstan legislation regulating relations in this sphere.

References

1 Конституция Республики Казахстан (принята на республиканском референдуме 30 августа 1995 года) (с изменениями и дополнениями по состоянию на 02.02.2011 г. — [ЭР]. Режим доступа: ttp://online.zakon.kz/Document/?doc_id=1005029

2 Гражданский кодекс Республики Казахстан от 1 июля 1999 года № 409-I (Особенная часть) (с изменениями и дополнениями по состоянию на 09.04.2016 г.). — [ЭР]. Режим доступа: http://online.zakon.kz/Document/?doc_id=1013880

3 Нормативное постановление Верховного суда от 29.06.2009 N 5 «О некоторых вопросах применения судами законодательства о наследовании». — [ЭР]. Режим доступа: http://online.zakon.kz/document/?doc_id=30425715

4 *Барщевский М.Ю.* Наследственное право: учеб. пособие. — М.: Белые альвы, 2000. — 234 с.

М.Ю. Прудникова

Мұрагерліктің құқықтық мәселелері

Мақала мұрагерліктің құқықтық мәселелеріне арналған. Мұрагерлікті құқықтық реттеу азаматтық заңнаманың қазіргі даму кезеңінде өзекті, ал автормен қарастырылып отырған мәселелер ерекше көңіл бөлуді талап етеді. Азаматтық заңнаманың нормаларын дұрыс түсіну оны тәжірибеде тікелей қолданылуына септігін тигізеді, себебі қазіргі таңда мұрагерлік туралы даулардың саны артуда. Сондықтан әмбебап құқық мирасқорлығы актісі ретінде мұрагерліктің құқықтық табиғатын зерттеу, мұрагерлік құқықты рәсімдеу барысында пайда болатын мәселелерді айқындау, мұраны қабылдау тәртібін реттейтін әрекет етуші заңнаманы талдау қажеттігі туындап отыр. Мақала көлемі аясында автор қарастырылып отырған салада пайда болатын бірқатар мәселелердің шешімін ұсынды.

М.Ю. Прудникова

Правовые проблемы наследования

Статья посвящена правовым проблемам наследования. Отмечено, что задача правового регулирования наследования является актуальной на современном этапе развития гражданского законодательства. Вопросы, рассмотренные автором, требуют особого внимания. Определено, что правильное понимание содержания норм гражданского законодательства способствует точному их применению на практике, особенно в настоящее время, когда количество наследственных споров растет. Поэтому, подчеркнуто автором, исследование правовой природы наследования как акта универсального правопреемства, выявление проблем, возникающих при оформлении наследственных прав, анализ действующих положений, регламентирующих порядок принятия наследства, являются не только востребованными, но и необходимыми. В статье предложено решение некоторых проблем, возникающих в рассматриваемой сфере.

References

1 The Constitution of the Republic of Kazakhstan (adopted at the national referendum on August 30, 1995) (with ammendments 02.02.2011, [ER]. Access mode: http://online.zakon.kz/Document/?doc_id=1005029

2 The Civil Code of the Republic of Kazakhstan from July 1st, 1999 № 409-I (Special Part) (with ammendments 04.09.2016), [ER]. Access mode: http://online.zakon.kz/Document/?doc_id=1013880

3 Normative Resolution of the Supreme Court dated 29.06.2009 N 5 «On some issues of application by the courts of inheritance», [ER]. Access mode: http://online.zakon.kz/document/?doc_id=30425715

4 Barschevsky M.Yu. *Inheritance Law*: tutorial, Moscow: White Alva, 2000, 234 p.