

**ROZA INSHINA & LYUDMILA MURZALIMOVA****LEGAL PORTION IN RUSSIAN INHERITANCE LAW**

*Right to inherit is one of the basic human rights guaranteed by the Constitution of the Russian Federation. The state has set rules according to which after a person's death his or her property is inherited by other persons. The Russian civil legislation establishes the institution of legal portions that is meant to protect rights of poor people on the one hand, and enables forced heirs to abuse their rights derogating from rights of other heirs.*

The right to inherit guaranteed by Article 35 c. 4 of the Constitution of the Russian Federation [10] ensures transfer of a testator's property to other persons in accordance with procedure set by the legal legislation.

The Civil Code of the Russian Federation has Section V "Inheritance Law" [5] with structured legal norms regulating the institution of inheritance.

In case of inheritance the decedent's property (estate, inherited property) is transferred to other persons by way of universal succession, id est as it is, as a whole and at the same moment, unless the provisions of the RF Civil Code [5] state otherwise.

Pursuant to Article 1111 of the RF Civil Code [5] the Russian inheritance law assumes two main grounds for inheritance – under a will and under the law. In accordance with the abovementioned article inheritance under the law occurs when and to the extent it is not altered by a will, and in other cases specified in the RF Civil Code [5].

It is evident that inheritance under the law is subordinate to inheritance under a will. In the cases when the testator has clearly expressed his or her will having disposed of the property upon his or her death inheritance shall occur in accordance with the testator's will and not the rules set by the state. This principle that was characteristic of the previous legislation in the field of inheritance law was further developed in the third part of the RF Civil Code [9].

Classical definition of will in civil terms was given by O. S. Ioffe and reads as follows, "will is a unilateral formal personal deal of disposal made on the occasion of death to regulate hereditary succession" [8, p. 309].

Pursuant to Article 1118 c. 1 of the RF Civil Code [5] disposal of property on the occasion of death can be implemented only by means of a will. A will shall be drawn up in a form strictly determined by law. Rules related to will execution procedure shall be observed.

Freedom of testation is the main principle of will [15, p. 79]. Rules of Chapter 62 of the RF Civil Code [5] ensure greater freedom of testation than any previous Russian legislation, both pre-revolutionary and soviet. In particular, the principles of freedom and secrecy of will are ensured, the legal portion percentage is decreased, there is a possibility to choose the form of will execution, specific conditions of a person's testamentary capacity are provided [1].

Freedom of testation is guaranteed by Article 1119 of the RF Civil Code [5] means the following. The testator is entitled to dispose of any property, in particular

specify in the will property that he/she may buy in future. The testator is entitled to mention in the will any persons at his/her discretion, both forced heirs and persons that do not belong to this group, to determine the shares of property to be transferred to heirs and to substitute heirs in accordance with Article 1121 c. 2 of the RF Civil Code [5]. The law entitles the testator to disinherit one, several or all forced heirs without giving any reasons for such decision and to include some other orders into the will in the cases specified in the RF Civil Code [5]. Besides, the testator is entitled to cancel or to amend the will that was made, moreover the testator is not obliged to inform anyone about the contents, execution, amendment or cancellation of the will.

The principle of freedom of testation is restricted by the rules of the RF Civil Code [5] dealing with legal portions. Some authors state that provisions about the legal portion impose on the testator an obligation to provide material alimentation to certain persons [2].

O. S. Ioffe defines the main point of legal portion as a sort of minimum for forced heirs [7, p. 317].

In accordance with Article 1149 c. 1 of the RF Civil Code [5] the right for legal portion is granted to underage or disabled children of the testator, his/her disabled spouse and parents, and disabled dependents of the testator. The amount of such legal portion is no less than half of the share that would be due to them in case of inheritance under the law.

According to G. S. Limanskiy the provision on legal portion of inheritance is not mandatory any longer. In accordance with provisions of the Civil Code of the RSFSR [4] of 1964 claims of forced heirs were satisfied without taking into consideration their financial standing, need for certain property, actual capacity to work. Respective share was assigned to those who did not need specific inherited property, was well-off, and/or had a permanent source of income unlike the heir in whose favour the will was made. As a result realization of the provision regarding the right to a legal portion came into collision with the purpose of its introduction [11].

Such law enforcement practice was recognized to be unreasoned by the Constitutional Court of the Russian Federation and it was represented in its ruling № 209-O “On refusal to accept for consideration complaint of Ms. Kurkina Elena Anatolievna with respect to violation of her constitutional rights by Article 535 of the RSFSR Civil Code” dated December 9, 1999 [12]. In this ruling the Constitutional Court points out that analysis of the practice of use of Article 535 of the RSFSR Civil Code [4] shows that legal portion is treated by courts as an absolutely imperative provision without taking into account factual background of each specific case, in particular whether a disabled heir by force of law has his/her own property, whether he/she contributed to common property accumulation, duration of joint use thereof. Providing to an heir legal portion in full on all occasions and incorrect determination of persons who are entitled to get a legal portion of inheritance can result in violation of the principle of social justice and debarring people of the right for judicial defense.

Judicial evaluation of such circumstances is necessary, because judicial control is an essential guarantee of protection of people’s constitutional rights.

The RF Constitutional Court ruled that provision of Article 535 of the RSFSR Civil Code [4] on the right for legal portion did not exclude the right of other heirs to submit a claim asking to check grounds for recognition of the person's right for a legal portion and to alter its amount proceeding from the factual background of the specific case (whether the person that has right for a legal portion has his/her own property sufficient for living) on the basis of the principle of social justice and requirement to restrict the right to inherit guaranteed to people [12] in strict compliance with the purposes recognized by the Constitution.

It should be noted that the efficient civil legislation restricts the right for a legal portion by provisions about undeserving heirs: an undeserving forced heir is not invited to inheritance [11]. In Article 1117 c. 4 of the RF Civil Code [5] it is clearly stated that provisions dealing with undeserving heirs are applicable to heirs that have a right for a legal portion.

Besides, rights of forced heirs are restricted by Article 1149 c. 4 of the RF Civil Code [5]. If exercising the right for a legal portion results in impossibility to transfer to the heir specified in the will any assets that were not used by the forced heir during the testator's lifetime but were used by the heir specified in the will for residence (a dwelling house, an apartment) or as the main source of income (instruments of labour, boutique) the court, taking into account the financial standing of forced heirs, is entitled to reduce the legal portion amount or to refuse to adjudge it.

This innovation in the Russian inheritance law is aimed, first of all, at enhancing the principle of freedom of testation and protection of interests of heirs specified in the will, because persons that make a claim for a legal portion are not always poor.

In opinion of M. V. Telyukina Article 1149 c. 4 of the RF Civil Code [5] describes the situation that can be characterized as abuse of the right of a forced heir. The right abuse lies in the fact that a forced heir that is not in need uses his/her right for a legal portion to take property from an heir who needs it. On the basis of the foregoing M. V. Telyukina makes a conclusion that provisions of Article 1149 c. 4 of the RF Civil Code [5] correspond to provisions of Article 10 c. 2 of the RF Civil Code [5], which says that if a right is abused the court is entitled to refuse to protect such right. Cancellation of a legal portion can be treated as an unconditional refusal to protect the right [13].

It should be acknowledged that Russian civil legislation has set that legal portion reduction or refusal to adjudge it shall be realized in a judicial procedure.

In that case the court considers the factual circumstances and evaluates the financial standing of forced heirs and other heirs. There is another opinion, according to which the court shall not compare the financial standing of forced and other heirs, but shall compare a forced heir's financial standing with the subsistence minimum [13].

In legal literature there is a viewpoint that when a legal portion is determined, it is necessary to consider the financial standing of the heir that makes a claim for a legal portion according to the rules set in the legislation. For example, M. Yu. Barshchevskiy suggests "setting a new procedure for determination of a legal portion for certain categories of heirs with differentiation depending on the financial standing of the forced heir" [3].

The list of forced heirs specified in the civil legislation is also subject to criticism. For example, N. B. Demina points out that “inclusion of testator’s dependents into forced heirs on equal terms is unreasoned as legally these persons are not members of his/her family” [6]. In Demina’s opinion financial support of such dependents was voluntarily assumed by the testator at his/her own discretion and not on any legal ground, and therefore it is a form of the testator’s charity activities. If providing such financial support to his/her dependents the testator does not include them into the will, does not assign to them any property, such testamentary intention of the testator leads to the conclusion that the testator believes his/her voluntarily assumed obligation has been fulfilled and he/she sees no grounds to continue rendering financial support to the said persons. N. B. Demina considers it to be illogical to impose such obligation on the testator’s relatives who did not participate in selection of the dependent, choosing the type and amount of financial support due to him/her [6].

In the authors’ opinion this viewpoint is reasonable. Moreover, it is supposed that when the testator renders material support to dependents during his/her lifetime he/she has certain money amounts that he/she can spend on their alimentation and financial support. Let’s consider a particular case. The source of money amounts can be labour activities of the testator, and consequently the source of financial support rendered to dependents and alimentation to relatives is the salary regularly drawn by the testator.

In accordance with Article 83 c. 1.6 of the RF Labour Code [14] labour contract shall be terminated if the employee dies or is recognized to be dead or missing by court. Thus labour relations are terminated upon the testator’s death and the testator’s relatives lose stable financial support rendered from the testator’s salary and at the same time the burden of alimentation of the testator’s dependents is imposed on them.

Support of unemployable categories of persons is the state’s duty. The Russian Federation has undertaken this duty pursuant to Articles 7, 39 of the Constitution of the Russian Federation [10]. The right to get social allowance from the state is a directly applied right of anyone entitled to get such allowance. Taking into consideration the provisions of Article 1149 of the RF Civil Code [5] N. B. Demina draws a conclusion that in this way the state transfers the duty to provide alimentation to the testator’s relatives, thus derogating directly applied right of the testator’s relatives for getting the inheritance [6].

In the authors’ opinion if the financial standing of a forced heir makes it possible to reduce his/her share without causing substantial damage or to refuse to adjudge it, if the forced heir’s own property is sufficient for living, it shall be taken into account by court when considering reduction of the legal portion or refusal to adjudge it.

Amendments made to the civil legislation show that the testator’s free testamentary intention expressed in a will is more strictly protected by the state. Legal norms set in the efficient RF Civil Code [5] governing the institution of legal portion acknowledge priority of the will as compared with the previous legislation [4].

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