Inheritance invoking bases

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Abstract

As it was in the past, also nowadays, the right of inheritance is recognized both by law and by will. So, inheritance invoking basis is the law and the will. The Kosovo Law on Inheritance in Kosovo (LIK) also recognizes the right to inheritance through law and will.
Inheritance is the transfer by law or on the basis of a will of the estate (inheritance) of the testator (deceased person) to one or more persons (heirs or legatees), according to the rules set by law.
The Law regulates the procedures according to which the court, other bodies and other authorized persons must act in inheritance cases. Items and rights that belong to individuals can be inherited. All natural persons under the same conditions are equal in inheritance.
Children born out of wedlock, when paternity has been duly recognized or confirmed by a decision of the court or competent body as well as adopted children are equated with legitimate children. Inheritance can be due to death and at the time of death of the natural person. The testator is inherited by the one who at the moment of his death has acquired the inheritance right (heir).
Children born in wedlock, out of wedlock, when paternity has been duly recognized or confirmed by a decision of a court or competent authority, as well as those adopted and their descendants have equal rights to inheritance.

Keywords: Inheritance, law, basis.

Introduction

The right to inheritance is acquired at the moment of death of the testator. The acquirer of the right to inheritance may waive this right according to the provisions of the law on inheritance, in which case it will be assumed that he has never acquired this right. A person who at the time of the opening of the inheritance is alive, or was conceived before the death of the testator and was born alive, has the capacity to inherit.
Inheritance is acquired by law or will.

Inheritance by law applies when:

- the testator has not left a will, or
- has left a will only for a part of his property, or
- when the will is completely or partially invalid.

Legal heirs are:

- children of the testator, his adopted ones and their descendants,
- spouse,
- parents, brothers and sisters and their descendants,
- grandparents and their descendants.

By law, the testator is also inherited by his extramarital spouse, who is equated with the marital spouse. Extramarital union within the meaning of this Law is considered the life community of the unmarried woman and the unmarried man which has

lasted a long time and which has ceased with the death of the testator, provided that the presumptions for the validity of the marriage have been met. The estate of the testator who has left no descendants is inherited by his parents and his spouse. The parents of the testator inherit half of the property in equal parts, while the other half of the property is inherited by the testator's spouse.

If one of the testator's parents has died before the testator, the part of the inherited property that would have belonged to him/her if he had lived after the testator is inherited by his children (testator brothers and sisters), his grandchildren and great-grandchildren and his further descendants, according to the provisions of the Law that apply to the case when the testator is inherited by his children and other descendants.

In all cases the brothers and sisters of the testator inherit in equal parts only from the father the share of the inherited property of the father, the brothers and sisters only from the mother inherit in equal parts only the part of the mother, and the brothers and sisters of the same mother and the same father inherit in equal parts with the brothers and sisters on the part of the father the share of the father, and with the brothers and sisters on the part of the mother the share of the mother.

If the testator leaves neither legal heirs nor a will, it is considered that the inheritance belongs to the municipality where the testator had his last residence or domicile. When the testator does not have an heir, the right to inherit passes to the municipality, which acquires the same position as if it were the testator's heir, and cannot give up the right to inheritance (violent heir)[1].

2. Inheritance by will

The term "Testament (will)" comes from the Latin word *testamentum*. Initially, it was encountered in Ancient Rome and meant "the declaration of the transfer of property from one person to one or more heirs, proving that the declaration contained the last will and therefore sought the approval of those present who appeared as witnesses to the summons addressed". Exactly the summoning of the attendees and the declaration of the person, in Latin the testator, gave the name of the action *testament.*[2] So, a will is a unilateral legal act or action performed by the testator himself through which he disposes of the property for the time after death. Through the will, the testator transfers his property mass to the testator heir.

A will in the legal sense gives rise to certain rights and obligations towards certain persons and these rights and obligations always have a property character. In the formal aspect, by will we mean any statement of expression of free will oriented towards the achievement of any hereditary effect in a certain form within the legal framework.

A will is the last unilateral, rigorously personal declaration of will of a person with testamentary capacity, regulated by law with which he disposes of the property after his death. The declaration of will which is not related to what should be in the content of the will cannot be considered a will in the formal aspect. In material terms, the

[1] Law on Inheritance in Kosovo, no. 2004/26.

[2] Arben H. Hakani, Testamentary Inheritance, Tirana 2010, page 27.

testator can leave behind only a will which contains his last will.[3]
The testator freely disposes of his property after death in the manner and under the conditions provided by legal norms but without violating the right to necessary inheritance to the necessary heirs. The testator in the will appoints the heirs and parts of the inherited property.
The testator in the will can also set a burden for the heirs, such as the payment of the debt, in the manner and under the conditions provided by the legal provisions. Freedom of will is limited to the institute of necessary inheritance. This restriction is provided by legal provisions as a limit to which the holder of the inherited property can dispose of the inherited property even against his will, because this part of the property belongs to the close family members of the testator, i.e. the necessary legal heirs determined on the basis of law.
The document that contains the last will of the testator, i.e. the testamentary disposition of the testator is a source testament in the objective sense. The testator can leave many wills, but as far as the disposition of the property or a part of it is concerned, they must contain only one last will of the testator.
A will is a legal work mortis causa that produces legal effects only at the moment of death of the testator.[4] A will is a unilateral act, performed by a living person in order that after his death this act brings consequences to a certain category of persons, called heirs.[5]

2.1. Contents of the Will

According to the Romans the basic content of the will was the appointment of the heir. They considered that the will takes power due to the appointment of the heir. His name was required to be written at the beginning of each will. All provisions expressed or written before the name of the testator were invalid except for the name of the tutor. Without the name of the heir, the will did not produce legal effects. The Romans attached great importance to determining the name of the heir for the validity of the will.
The content of the will consists of:
a) The appointment of heirs, the persons to whom the property will pass after death or the appointment of persons excluded from the inheritance.
b) The determination of the property that will be passed to the heir or heirs by will, this may be all the property of the testator or a part of it.
c) Obligations assigned to testamentary or legal heirs to hand over a part of the property to the heirs, other persons (LEGUT), appointment of the executor of the will.[6]
While according to the provisions of article 87.1 of the LIK, the testator may appoint, by will, one or several heirs who will inherit all his property or part of the property, a person to whom the testator has left one or several specific things or rights shall be

[3] Prof. Doc. Abdulla Aliu, Contemporary Civil Law General Part - Prishtina 2010, p. 29.
[4] Dr.Sc. HamdiPodvorica, Inheritance Law - Prishtina 2006, p. 99.
[5] Juliana Latifi, "Civil Law", General Part, Grafon, Tirana, 2005, p. 209.
[6] Dr.Sc. HamdiPodvorica, Inheritance Law, Prishtina 2006, page 102.

considered an heir if it can be ascertained that this was the intention of the testator. Thus, without the appointment of the heir and without the appointment of the hereditary property or part of it with the last free will of the testator, there can be no final will, even according to the legal norms of LIK[7] .

However, the will may remain valid even when the testator does not write the name of the heir, because in the circumstances of the case or the expressions used in the will (son, daughter, wife, etc.) or any other expression based on which the identity or hereditary person whom the testator has appointed heir to the estate after his death can be understood.

In such cases when neither the name nor the surname of the heir is mentioned in the will, then we are dealing with the indirect appointment of the heir. Whereas when the heir is appointed by name and surname recorded in the will, then we are dealing with the appointed heir directly.

The provisions contained in the will are various, but according to legal theory they can be divided into material and formal provisions, the will also contains other provisions on the issue such as remission of unworthiness, debt, etc. The provisions of the will are divided into property provisions and non-property provisions. Property provisions relate to the legacies that the testator has in his will. The will may contain the disposition of all or part of the testator's goods. The universal successor inherits the entire testator's property, both movable and immovable, which may be the object of inheritance.

Universal legatees are legally bound to contribute to the settlement of inheritance debt and encumbrances in proportion to their inherited property. While non-property provisions refer to relationships such as recognizing the paternity or maternity of a child born out of wedlock, the recommendations left to the custodial body when the testator leaves behind other minor children. The formal content of the will refers to the appointment of any executor of the will or the appointment of the so-called concretizer of the will of the testator only in relation to a specific norm in the will, for example: (to take care only of the content of the order).

The testator in the will can appoint the replacement of the heir; the appointment of the replacement is possible with rights belonging to the inheritance system ipso jure according to which the inherited property cannot at any time remain without a holder. Regarding the appointment of heirs in the will, the institute of the substitute is also known. By substitute we mean the appointment of the representative (substitute) of the heir in cases when he cannot or will not inherit the testator.

2.2. Will is a rigorous personal act

Will is a rigorous personal act where the testator personally shows the last will by clearly defining the content of the will. Persons incompetent to express their last will cannot leave a will in no way.[8]

The will is a rigorous personal act and for this reason it is required that the last will be expressed personally by the testator in the manner prescribed by the legal norm

[7] Law on Inheritance in Kosovo, no. 2004/26.

[8] Dr.Sc. HamdiPodvorica - Inheritance Law, Prishtina 2006, page 104.

regardless of what type it is, for the will to be final. A will is, above all, a unilateral legal act which consists in the declaration of the will of the testator, which is destined to produce effects, after his death as his individual declaration of the will invoked. In the inheritance become heirs only if they accept it. But the will and the acceptance remain unilateral acts that are distinguished between them.
When making a will, any possibility of voluntary or legal representation for the appointment of heirs as well as the size of the inheritance quota or other inherited legal elements is excluded. However, even with special authorizations in which are defined all the elements that a will must have, the lawyer cannot compile on behalf of his client when the heir has not personally expressed the last will. In this case, a distinction must be made between the free expression of the last will and the formation of the last will and its transformation into written form.
The formulation of the will of the testator in the minutes can be done by another person, such as: the judge in the case of drafting the court will or the lawyer in the case of drafting the oleographic will. This formulation of the testator's will must always contain the substance of the testator's last will and testament expressed by the testator personally. However, in such cases before signing or before placing the fingers of the hand, the testator must expressly accept for himself the will formulated in such a way, the text to which he is given to read or when he does not know how to read and write, in his presence, the judge himself reads it and signs it.[9]

2.3. Will is a legal mortis causa work

A will is a legal work that produces effects only at the moment of death of the testator, when the inherited property by the force of law passes to the heir.
The death of a certain person is an essential element for gaining the production of legal effects, of legal mortis causa work e.g.: (will, inheritance contract).[10] The cause of death does not only express the concept according to which a will is an act that produces effects only from the moment of death, by means of a will the subject disposes of his property for a time in which he will have ceased to live.
The will has the function to regulate the testator's inheritance, contrary to the norms of legal inheritance, but within the limits of the necessary inheritance, however the violation of the necessary inheritance does not influence the validity of the will, but makes it subject to reduction, at the request of the rightful heirs or of their heirs or of those whose rightful heir has violated this right.
In other words, as long as the testator is alive, the heir cannot inherit the inherited property specified in the will and there can be no benefit from the heir to the heir. Precisely for this reason the legal effect of the will is directly related to the fact of the death of the testator and therefore it is called legal work due to death.[11]

2.4. Will is a charitable legal work

Will is a charitable legal work without compensation because even when the heirs

[9] Dr.Sc. HamdiPodvorica - Inheritance Law, Prishtina 2006, page 104.
[10] Ibid.,p. 105.
[11] Ibid.,p. 105.

are charged with debts, the value of the debt must at least be in proportion to the inherited value.[12]

Through the will, all the property or a part of it is disposed of, while through the donation, someone is enriched as a result of the spirit of generosity of the donor. With regard to donation, the will differs from the fact that death is destined to open the inheritance, the donor can decide whether he wants to donate or not to donate and to whom he wants to donate. The testator manifests his generosity only because he deviates by will from the order of legal inheritance and within the limits of the available quota, decides to whom his material goods will pass. The cause of generosity is common to both the donation and the will making many norms common to both.

Whereas according to article 33 of the LIK, gift is considered any waiver of a right, forgiveness of debt, any transfer of property in the interest of an heir on behalf of the hereditary share or to establish or expand the family, or to exercise mastery, as well as any other disposition without reward. For the evaluation of the donation, the value of the donated item is taken at the moment of death of the testator according to his condition at the time of the gift. Gift in the form of insurance according to Article 35 of the LIK is made when the donation consists of insurance for the benefit of the recipient, as the value of the donation is taken the amount of premiums paid by the testator, if this amount is equal to or less than the insured amount, and if the amount of premiums is greater than the sum insured as the value of the donation the sum insured is taken.[13]

2.5. Will is a one-sided legal work

Will is a one-sided legal act because it is created and produces legal effects only with the declaration of a last will. The last will formulated in the will must be a real, real will, freely expressed by the testator.[14]

Any defect in the expressed will of the testator causes the will to be invalid so according to the provisions of Article 71 paragraph 1 of the LIK the will is invalid if it was made by threat by coercion or fraud. In order to make a will, it is necessary for the person to have general ability to act. A minor under the age of 18 and persons who have been deprived of the ability to act cannot make a will.

If the testator is misled at the moment of declaring the will, so that his will is not declared in accordance with the provisions of the law and contains defects because it is not a real will and expressed by the testator, the will cannot be valid according to the provision of article 71 paragraph 2 of the LIK and the dispositions in the will are invalid even when there is an error for reasons which have pushed the testator to make these dispositions.

A will may be invalid when all its provisions have been made by intimidation, fraud, coercion or misleading, while the will is partially invalid when part of its provisions are invalid because they were made by intimidation, coercion with fraud while the rest of the provisions remain in force because in this part there are no flaws in the free

[12] Dr.Sc. HamdiPodvorica - Inheritance Law, Prishtina 2006, p. 105.
[13] Law on Inheritance in Kosovo - no. 204/26, Article 35.
[14] Dr.Sc. HamdiPodvorica - Inheritance Law, Prishtina 2006, p. 106.

will expressed by the testators.

2.6. Will is a formal legal act

The will is a formal act, its form is strictly defined in legal norms, based on this fact it can be concluded that the will is part of the formal legal affairs, for the validity of which is required the form provided by law (solemnation form). There are different types of wills and for each type of will the declaration of will must be made in the form that by law is provided as one of the conditions that must be met to produce legal effects.

A will is valid only if it is made in the form provided by legal provisions and based on the conditions set out in legal provisions.[15] The will is formal, the special formalism that characterizes it is the guarantee of the effective will of the testator, in order to be valid, the will must be reduced to one of the forms such as:

- Oleographic will - this will is written, dated and signed in its entirety by the testator and later additions may be made to it.
- Notarial will - is compiled by the notary after the testator has expressed his last will in the presence of both witnesses, the notary rereads the will and writes the place and date of its making. The will is signed by the testator, witnesses and the notary who also indicates the time of signing.
- Secret will - is written on any type of sheet and by a person other than the testator, personally in the presence of 2 witnesses delivers the sheet in a closed envelope to a notary, sets the date and signs together with the testator and witness.

According to the provision of Article 85 of the LIK, after the opening of the inheritance, the annulment of the will due to the lack of the required legal form can be requested only by the person who has a legal interest within 1 year from the day the will was made known, latest ten years after the will is announced. The term of one year, according to Article 85 paragraph 2 of the same law, begins with the announcement

Conclusions

One of the basic principles of legal regulation is the freedom of disposition by will. Everyone is free to voluntarily, in the form of a will, determine who will inherit and determine the ways of this inheritance. The testator divides his property in case of death.

This paper includes the history of the will during the Roman Empire, then there was a short discussion about the testamentary inheritance according to the Albanian Civil Code of 1929 and other legislation that regulates the testamentary inheritance in Albania.

Furthermore, according to our positive law the testamentary inheritance is analysed. According to LIK, the main features of a will as a legal act are: A will is a unilateral expression of will, a will is a personal act, a will is a strictly formal legal act, a will is a unilateral expression of will, and a will is a revocable legal act.

15 Dr.Sc. Hamdi Podvorica - Inheritance Law, Prishtina 2006, p. 107.

The will can then be interpreted according to the rules for the interpretation of legal actions in general. Interpretation should be done according to the purpose of the testator i.e. according to the presented will of the testator. The testator can dispose of all his property or even a part of the property.
The legal action of the will can be performed by any person who has reached the age of 18 years. But, a will can also be made by a person aged 16 but who has been married in advance, i.e. has acquired the ability to act (with emancipation).
In this paper I have included all types of wills which are also included according to LIK such as public and private, oral and written will as well as other types of the will, ordinary or regular and extraordinary will.
The provisions on inheritance stipulate in what form the last will of the testator must be expressed, in order for the will to be considered valid.
Finally, I hope that with this paper I have contributed at least to the reflection of the importance of the will as an institute of inheritance law.

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