Towards the legates and testamentary burden as specific testamentary dispositions

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Abstract. This article examines the legal nature and content of some special testamentary dispositions, which assign to the heirs certain duties, entailing change in the total value of inherited property, or non-property obligations (testamentary renunciation or testamentary burden). The authors identify the distinctive features of a testamentary disposition and testamentary burden, and make well-founded conclusion concerning the necessity to limit the amount of the legate.

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Introduction

Among the variety of relations in the field of testamentary succession, there are a number of special relations (special testamentary dispositions), unrelated or related indirectly to the distribution of inheritance property and consisting in assigning to the heirs or other persons of certain duties.

Legate (testamentary renunciation) is a kind of special testamentary dispositions. Institution of the testamentary renunciation was yet developed by Roman jurists and embodied later into the civil codes of several countries of the Roman-Germanic legal system.

The term testamentary renunciation or legate comes from the Latin word «Legatum», which means testament assignation purpose. Though, both the literature and the law use the term "bequest". In our opinion, this term is not entirely successful, as it misleads the reader. As is mentioned by M.V. Gordon, "... by testamentary renunciation nobody is denied anything. On the contrary, the heir is given mandate to execute something to the advantage of another person ... "[1].

Four types (genera) of testamentary renunciations are known in Classical Roman law (Gai., 2,192):

- legatum per vindicationem (by vindication);
- legatum per damnationem (by judgment of court or spell);
- legatum sinendi modo (by consent);
- legatum per praeceptionem (by apportionment) [2].

The modern form of the testamentary renunciation (legate) is based on two types of denials: *per damnationem* and *sinendi modo*, «because according to the given Roman forms of testamentary renunciation, legatee was obtaining subject of refusal not directly but through the heir» [3].

Article 1057 of the Civil Code of the Russian Federation (CC RF) provides that the testator has the right to entrust testamentary heir to execute through the inheritance an obligation in favor of one or more persons (legatees), who obtain a right to claim execution of the testamentary renunciation.

Such a procedure is still used in a number of countries, which are members of the Commonwealth of Independent States (Art. 1213 of the Civil Code of Armenia, Art. 1054 of the Civil Code of the Republic of Belarus, Art. 1139 of the Civil Code of the Kyrgyz Republic, and Art. 1152 of the Civil Code of the Republic of Tajikistan).

Civil legislation of other post-Soviet countries includes encumbrance of not only testamentary heir, but also legal heir (Art. 1205 of the Civil Code of the Azerbaijan Republic, Art. 1487 of the Civil Code of Republic of Moldova, Art. 1137 of the Civil Code of the Russian Federation, Art. 1238 of the Civil Code of Ukraine and Art. 1200 of the Civil Code of Turkmenistan).

Legal nature of the testamentary renunciation is that based on the testamentary renunciation, legatee (legatary) becomes a creditor of the testamentary heir and has the right to demand from him the execution of the obligations set in the testament. Among the whole aggregation of legal relations that make up the inheritance, legatee is provided only a certain right, not an obligation. It is remarkable to note that in France this is allowed only just as an exception in some cases, in particular, between the spouses [4].

Thus, in concerned legal relations the heir (debtor) and the legatee (the lender) are specific subjects.

According to a general rule, the legatee is not a successor and is not liable for the debts of the testator, as well as does not pay a state fee upon receiving the waiver. This provision serves a basis of the legal precedents and is shared by vast majority of authors.

Similar approach is seen in the legislation of Germany [5] and Switzerland. Though, here different terminology is used to designate heirs and legatees. In France, both of them are called legataries, though one distinguishes universal legataries (legataries under the universal title) and singular legataries (Art. 1002 of the French Civil Code) [6]. At that, only the singular legataries have certain individual property rights, i.e. are the legates in the narrow sense of the word.

In the countries of the Anglo-American law due to the different inheritance distribution procedure, where the testator's estate goes first to the executor, specified in the testament, or the administrator, appointed by the court, the heirs are not considered as universal successors. In this regard, no difference is made between the heirs and the legataries.

Article 1057 of the Civil Code of the Republic of Kazakhstan (CC RK) defines the possible content of the legate, where the testator may choose, as such, any of noted actions, their combination, or set another legate subject at its discretion:

- transfer to the legatee's ownership of a thing that is part of the inheritance;
- assignment for legatee's use of a thing that is part of the inheritance;
- transfer to legatee a thing, in terms of other proprietary right, that is part of the inheritance;
- the acquisition and transfer to legatee of the property that is not included into the inheritance;
- performance of a certain work for the legatee;
- provision of a certain services to the legatee, etc.

However, it should be noted that the list of what may be the subject of a bequest (legate) specified in Art. 1057 of CC RK is not of entire nature.

The legate, specified in the testament, is a kind of encumbrance of that part of hereditary property, from which it must be executed.

According to the Paragraph 3 of the Art. 1057 of CC RK, the heir to whom the testator has entrusted testamentary renunciation, must execute it to the value of the inheritance passed to him, excluding the testator's debts, incident on his part. This provision serves to protect heir's property interests. The heir, who is responsible for the execution of the testamentary renunciation, and is entitled to a compulsory share, can fulfill testamentary renunciation to the value of the lapsed inheritance, exceeding the value of its obligatory share. Testamentary renunciation, entrusted to all or several heirs, encumbers each of them in proportion of proper share, unless otherwise is provided by the testament.

In our opinion, the rules of Roman private law in respect of testamentary renunciation were more reasonable due to allocation of the part of the property, on which the legate had no rights, in order to avoid absorption of the whole inherited property by the legate. Simply in fact, if testamentary renunciation covers all the inherited property or its value, then the reason to leave a testament in one's favor disappears, since the heir will not be able to get any benefits.

In accordance with the Paragraph 5 of the Art. 1057 of CC RK, in the event of the death of the heir, who is responsible for the execution of the legate or his refusal of an inheritance, the obligation to execute legate goes to other heirs, who have received his share, or to the state. And if before opening the inheritance dies legate, then the testamentary renunciation is voided. However, Civil Code says nothing about the cases, where legate dies after opening of inheritance, when the heir was able to accept it. Who in this case has the right to demand fulfillment of the legate?

We believe that in this case the fate of the legate will depend on content of the rights, owned by the legate, as well as to whether the relationship between the heir and the legatee on the execution of legate has continuing character or not.

If, say, an heir, accepting the house under an inheritance, is entrusted by the testator the obligation to provide legatee lifetime use of this house or part thereof, then the death of the legatee after the opening of the inheritance will cause termination of a testamentary renunciation. In this case, the servitude, which emerged on the side of the legatee, is personal and ceases with the death of the legatee.

But if the testator entrusted heir an obligation to transfer to the legatee the ownership of certain thing, then in the case of legatee's death after the opening of the inheritance, heirs of the legatee may demand from the heir, burdened by legate, its execution, i.e. transfer of this thing into their ownership [7].

It should be noted that the very objective right of the legatee arises from the moment of opening the inheritance, though to ensure the origin

of this right with respect to a particular subject of law, one must have his will.

It is also important to emphasize that legatees are given the opportunity to ask categorically the heir to fulfill a specific obligation, which is assigned to the heir according to the instructions in the testament, or abandon it. On behalf of the minor legatees, as well as persons declared incompetent, such a requirement can be claimed by their legal representatives. However, unlike the heirs, legatee cannot claim the issuance of the property right out of hereditary property that is to participate in the adoption and distribution of inheritance along with the heirs; he may submit his claims only to a certain heir, named in the testament.

Unlike the CC RK, the CC RF provides that the right to receive the testamentary renunciation is valid for three years from the date of opening the inheritance. If within this period the legatee will not demand from obligated heir execution of testamentary renunciation, then to the expiration of three years from the date of opening the inheritance this heir is exempt from his obligation.

Besides, the following grounds are pursuant to an exemption of the heir in performing testamentary renunciation: a) the death of the legatee before the opening of the inheritance or simultaneously with the testator; b) the death of the legatee after the opening of the inheritance, if the legate is personal; c) cases established by the Art. 1045 of the CC RK, where a person is disqualified from receiving a testamentary renunciation as unworthy legatee.

Until the present in the legal literature and practice still there are a number of contentious issues related to testamentary renunciation.

Thus, some authors believe that the subject of the testamentary renunciation may also be laying on heir the obligation to provide to legatee permanent alimony [8]. This assertion is debatable. The fact is that in this case it will be necessary to determine the amount of the monthly elimination, because otherwise it is possible that testamentary renunciation will be executed in an amount, exceeding the hereditary share of encumbered heir.

Since the final value of inherited property is known and the average amount of monthly elimination is also defined, then by simply dividing the first amount to the second amount, one can calculate the number of calendar months during which the legatee should receive material assistance. Thus, in this case there is a transfer of a certain amount of money (or assets in the form of food, clothing, etc.) in installments over a certain period of time, albeit a very long one, rather than permanent alimony.

Until the present in the literature there are opposing views on the possibility of substitution of the legatee. Several authors [9], making comparison with substitutional bequest, also raise the question about the possibility of substitution of legatees. Supporters of the opposite view argue that the testament cannot specify a person, to whom the right to demand the execution of the obligation should be passed in the event of legatee's refusal or his death before opening the inheritance [8].

It seems that based on the principle of freedom of the will, in the absence of an explicit prohibition of the law, the purpose of the right to substitute the legatee would not conflict with neither rule of law nor its spirit.

Generalizing the content of the above provisions, it can be concluded that the nature of the testamentary renunciation is expressed in the provision to the legatee of property right, uniquely determined in the testament. Specificity of legal relations, arising during the implementation of the testamentary renunciation, expressed in providing property right to legatee, is the acquisition of a noted property right by legatee not directly from the testator, but through the heir, obliged by testator to commit the appropriate action in favor of the legatee. This type of property rights acquisition is called in the theory of civil law *singular* (*partial)* legal succession, which is widely known to the German civil law [10], in contrast to the *universal succession,* i.e. acquisition of property rights by inheritance [11]. Thus, the opening of the inheritance between the heir, who is responsible for the execution of the testamentary renunciation, and the legatee, results in arising the creditor-debtor relationship, in which the heir acts as the debtor and the legatee – as the creditor.

The Article 1058 of the CC RK contains rules on testamentary burden. This institution existed as early as the Civil Code of the Kazakh SSR and provided that the testator, along with the establishment of testamentary renunciation, had the right to entrust the heir or several heirs the duty to execute any actions, aimed at the achievement of generally useful purpose.

In today's edition the article on substitution sounds as follows: testator has the right to entrust the heir with obligation to execute any action or refrain from doing it, not giving anyone the right to claim as a creditor the execution of this duty. For the execution of generally useful goal, the same duty may be imposed on the executor of the testament, when allocating part of the property by testator in order to fulfill testamentary burden (Paragraph 1, Art. 1058 of the CC RK). In other words testamentary burden represents a commitment of one or more heirs

to execute in accordance with the will of the testator an action of property or non-property nature, aimed at the implementation of generally useful purpose.

If advancement of inheritance is the only subject of testamentary renunciation, than action property may be the object of testamentary burden.

In addition, the testamentary burden differs from testamentary renunciation by the fact that having the property nature it does not specify a certain beneficiary. For example, a testator imposes an obligation to build through inheritance kindergarten or split garden on a waste ground. The execution of the testamentary burden may be demanded by greater number of persons than in case of testamentary renunciation. These may be interested state and public organizations, public prosecution office, testament executor, as well as other heirs or relatives of the deceased person.

Testamentary burden, as testamentary renunciation is hereditary share encumbrance of the heir according to the testament. It is executed through the part of the inheritance, remaining after satisfaction of the demands of creditors of the testator and the granting of compulsory shares to essential heirs.

Testamentary burden is executed by obligated heir only upon acceptance of inheritance. Therefore, in case of his death before the opening of the inheritance or simultaneously with the testator, or in the case of rejection of the inheritance**,** the obligation to perform a testamentary burden, insofar the otherwise does not follow from the law or testament, goes to other persons, who have received his share, for example, as accession of the shares or substitutional bequest. If obliged heir dies after opening the inheritance, without having to take share due to him, the testamentary burden is done yet by his heirs [11].

In the case where a testamentary burden must be fulfilled by executor of the testament, the latter is considered to be obliged to execute the actions, prescribed by testator, only if the testator agrees to be the testamentary executor.

Committing the non-property activities by obligated persons in accordance with testamentary burden is not specially regulated by norms of the CC RK. Their implementation is not due to a limitation of property rights of heirs. The testator may oblige the heir to provide everyone the opportunity to acquaint with accepted by inheritance different kind of collections, library, garden cultivated by the testator, or to oblige the heir to keep the testator's pets, providing necessary care and supervision.

A citizen, when making testamentary burden, suggests that obliged heir or executor of the testament will voluntarily and conscientiously implement the actions assigned to him, which are the subject of a testamentary burden. Otherwise, any interested person or any other heir will have a right to demand from obliged heir through legal proceedings to execute the testamentary burden.

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