Institution of Hereditary Substitution in the Inheritance Law: A Rather-Legal Analysis

Yelena Anatolyevna Kirillova and Varvara Vladimirovna Bogdan

South-West State University Kursk, Kursk, Russia

Abstract: This article provides a rather-legal analysis of the substitutional bequest institution in legislation of Russia and western European countries. The gist of substitutional bequest (substitution) in the current law is not changed and concludes in fact that besides the principal heir or principal heirs there are appointed reserve (substituted) heir or heirs. At the ordinary course of events, the principle heir enters upon an inheritance; if the principle heir, for any reason, cannot or does not want to accept the inheritance, then the inheritance rights are transferred to substitutional bequest. The article discusses peculiarities of hereditary substitution and some practical issues. In this case, the substitutional bequest becomes the subject of a conditional juristic act, rather than the principle heir. This is explained by the fact that the right of substitutional bequest to accept the inheritance vests under circumstances that do not depend upon him; their approach is probabilistic in nature and relates to the future.

Key words: Testament • Freedom of the will • The appointment of an heir • Substitution of a bequest • Disheritance

INTRODUCTION

One of the manifestations of freedom in testamentary dispositions is that the testator is entitled not only to name heirs and assign in the testament, but to substitute a bequest to the case, if the primary heir for whatever reason would not be able or willing to become the heir to the deceased's estate. This procedure is called substitution (from Latin substitutio). This institution is not new and is well familiar to national inheritance law. Moreover, it can be argued that the substitutional bequest institution is traditional for the national civil law. Substitutional bequest is the basic issue among other known types of testator’s special disposition, familiar in modern inheritance law; it is the result of the law development by Roman lawyers.

Initially, the institution of substitutional bequest was founded in the Roman private law. The Roman law accepted as a general rule a substitution as the appointment of additional (reserve) heir in the testament in case the principle heir, for any reason, would not be able to become a heir according to the Roman law.

According to Palshkova A.M., when the condition, specified in the testament, would come into effect, the additional heir was entering into the right to inherit. At that, direct unmediated succession of assets and liabilities of the inheritance were effectuated by reserve heir to the fullest extent [1].

In the later period in Rome, two types of hereditary substitution were distinguished: ordinary substitution (substitutio vulgaris) and a minor substitution (substitutio pupillaris) [2].

The gist of the ordinary substitution concluded in the fact that in addition to the principle heir, second heir was appointed against the possibility that the first designated heir (institutus) did not want or could not accept the inheritance. Substitutional bequest was named deputy (substitutes). Substitution for minor took place when the testator had appointed a minor as an heir and substituted to him another heir to the case, if the heir dies before reaching the age of majority [3].

Methodology. Methodological framework of the conducted study concludes in collection of general and individual scientific methods. Author has used the comparative analysis technique using the foreign experience in hereditary legal regulation; inductive-deductive method allowed author to reveal specific problems by identifying common trends and to reveal common problems by identifying particular situations; the use of the functional method allowed...
author to has predict certain trends in the development of the succession law and has developed a number of scientifically grounded recommendations.

The main part. National legislation has used the reception of Roman law on ordinary substitution (substitutio vulgaris), which has reached our days, consistently mutating at different stages of hereditary legislation development.

The goal of substitution is to prevent the transfer of property to the heirs of the principle heir, who has not accepted the inheritance. The gist of this kind of order is to appoint a dummy heir in case the first heir is unable or unwilling to accept the inheritance.

In this case, the heirs of principal heir have no right to inherit neither by right of representation (in the case of his death before the commencement of the inheritance or at the time of commencement of the inheritance), nor in the course of hereditary transmission (if the designated heir dies after commencement of the inheritance, failing to accept the inheritance), nor in case of non-acceptance of the inheritance for other reasons, or renunciation of a succession by an heir. As is exactly mentioned by Sannikova L.V., renunciation of a succession by a principle heir to the benefit of other persons is not permitted (Art. 1158 of the Civil Code of the Russian Federation), as this would violate the will of the testator [4].

It should be noted that the Roman law did not permit the "mixing" or a combination of the two bases of inheritance. As a feature, Roman inheritance has used the rule: "testamentary inheritance is inconsistent with the hereditary succession in the property of the same person (nemo pro parte testatus, pro parte intestatus decedere potest)" [5].

At the conventional course of events, the principle heir (principle heirs) enters upon an inheritance; if the principle heir cannot or does not want to accept the inheritance for any reason, then the inheritance rights are transferred to substitutional bequest. According to Art. 121 of the Civil Code of the Russian Federation, the testator may appoint in his testament another heir in case if the heir, assigned by him, or the heir under the law of the testator:

- Dies before the commencement of the inheritance;
- Dies simultaneously with the testator;
- Dies after commencement of the inheritance, failing to accept the inheritance;

- Does not accept an inheritance for other reasons;
- Refuses to accept the inheritance;
- Has no right to inherit or is removed from the inheritance as unworthy heir.

Modern inheritance law allows one to substitute a bequest both by will and by the law. The latter is a rule of principle, because the testator actually replaces the will of the legislator on the distribution of order of succession. This fact testifies that testator’s will is unprecedented and is fully implemented in the possibility of a transition of hereditary property to a particular heir at law. Legislative consolidation of such a rule actually makes administration of heritage unlimited.

Substitutional bequest as an institution of inheritance law is peculiar not only to the Russian Federation law, but for the legislation of foreign countries as well. A similar rule is provided in in §2096 of the German Civil Code [6]. However, besides this kind of substitution, in Germany there is another variety of substitution - the so-called appointment of “subsequent heir” (Nacherbe, §2100-2146 of the German Civil Code). According to §2100 of the German Civil Code, testator may appoint an heir to the extent that he would become an heir only subsequent to another person, who was an original heir. In other words, subsequent heir may become an heir only after the death of the original heir. Thanks to this institution, the testator may determine the sequence of the property transition from one heir to another; this may be relevant in the following case, which is given by German lawyers as an example.

Childless ancestor desires that his property would certainly be inherited by his blood relation. Therefore he appoints his spouse as an original heiress (Vorerbin) and his relative - as a reversionary heir (Nacherbin). Thus, he eliminates the possibility that his property will pass after the death of his wife, under the law or the will, to her relatives or her new husband [7].

According to the force of a clause 2106 of the German Civil Code, it follows that the inheritance may be transferred to subsequent heir not only in the case of death of the original heir, but at maturity or occurrence of an event, specified in the testament.

The property, which was transferred to the original heir, forms a separate mass of the succession, for which the original heir cannot make an order in case of death. Rights of the original heir on voluntary conveyance of this property are also restricted by law. According to
§2113 of the German Civil Code, the order of original heir is invalid in case it involves the land, or the inheritance of land rights, or registered vessel, or vessel under construction at the subsequent inheritance to the extent, at which subsequent heir’s right would be destroyed or impaired.

The same rule applies to gratuitous alienation of any item from the inheritance. However, this provision is peremptory and can be changed by the testator, who may provide the original heir the right to dispose of the property independently, or to allow him to choose the subsequent heir out of several candidates, set out in the testament, or independently distribute property between successive heirs, set out in the testament [8].

As for the French legislation, the substitution per standard procedure is prohibited (Art. 896 of the French Civil Code). Nevertheless, at the same time there is a rule that when making a will in favor of children, brothers and sisters, the testator has the right to impose on them the obligation to transfer an estate to their children-testator’s grandchildren and nephews. To enforce this order, one can apply measures, such as property inventory or initiation of administration and so on. (Articles 1048-1074 of the French Civil Code) [9].

Thus, in the field of inheritance law, the Civil Code of Lower Canada retained such an institution as fiduciary substitution (substitution fideicommissaire - French). Article 925 of the Civil Code of Lower Canada defines two types of substitutions: ordinary substitution and fiduciary substitution. Ordinary substitution takes place when the donee or heir do not accept property and, according to the order of the processor of a right, entry into the right on this property is transferred to a third party (paragraph 2 of Art. 925) [10].

NIS countries perceived current experience in the field of substitution, considering existent hereditary traditions.

Under Lithuanian hereditary law, testator may appoint another heir in case the original heir, appointed by the testator, dies before the opening of the inheritance, or renounces succession as heir. At that, the number of substitutions is not limited (Art. 5.21 of the Civil Code of the Republic of Lithuania) [11].

Part of the testator’s property, not included in the testament, is inherited in equal shares by his heirs at law, including those specified in the testament, who inherit any property, unless otherwise specifically implies from the testament (Art. 5.22 of the Civil Code of the Republic of Lithuania) [11].

Estonian hereditary rule of law does not limit the number of substitutions, though limits the sequence of calling substitutes for inheritance determined by the testator.

The second and the following substitutes do not lose the right of inheritance if the substitute, who preceded them, dies before the heir or the substitute, who was before them in order of priority of statutory heirs (clause 2 of Art. 41 of the Act).

At the same time, Estonian ancestral law distinguishes "substitution" and "subsuccession". The gist of subsuccession is that the testator is entitled to determine in his testament that upon the occurrence of a certain date or condition precedent, all inheritance or its part passes from heir to subsequent heir (reversionary heir).

Reversionary heir is also considered a natural person, conceived and born after the commencement of the inheritance, or a legal entity, established after the commencement of the inheritance, unless otherwise follows from the testament (clause 4, Art. 43 of the Act). It should be noted that the reversionary heir is also considered as a substitute, unless otherwise is provided in the testament; and if is not clear out from the testament, whether the person was appointed as substitute or reversionary heir, it is considered a substitute heir (Art. 42 of the Act) [12].

A special kind of substitution is a fiduciarius substitution, in which the testator not just designates a person, forced to replace the original heir due to certain circumstances, but indicates that this person will inherit him. In other words, the gist of this type of substitution is that the testator shall designate the heir to heir [13].

Researchers, when giving a different standpoints on fiduciarius substitution (Kirillovykh A.A., etc.), indicated that the Civil Code of the Russian Federation did not recognize fiduciarius substitution and commented that the enforcement powers of the general owner, who will accept the inheritance, in this case will be significantly limited [14]. Such testamentary dispositions were proposed to be considered as invalid. Other researchers, such as in particular Abramenkov M.S., considered it possible to give them a judicial interpretation and recognize as a testamentary renunciation, taking into account the specific circumstances of each case [15].

Current Russian legislation contradicts with the institution of fiduciarius substitution, as it substantially restricts the rights of an owner, who cannot dispose of the estate at his discretion, even though being the
property holder. "Civil rights may only be restricted by federal law and only within the limits set by the Constitution of the Russian Federation (Art.1 of the Civil Code of the Russian Federation)".

**CONCLUSIONS**

Analysis of features of hereditary relationships, arising from substitution of a bequest in a testament, allows us to conclude that the hereditary substitution is a self-consistent kind of inheritance. Hereditary relationships in this case arise not only in connection with death of the testator, but in connection with the death of the principal heir, or for reasons, set forth in Art. 1121 of the Civil Code of the Russian Federation, allowing reserve heir bring for inheritance.

The main feature of the hereditary legal relationship, arising at substitution of a bequest, is that it always arises in full only upon availability of the following legal facts: execution of a testament, which contains an order for substitution of a bequest; the testator's death; the death of the principle heir, or other reasons specified in paragraph 2 of Article 1121 of the Civil Code of the Russian Federation, providing that the inheritance goes to the reserve heir, as well as the acceptance of the inheritance by the reserve heir.

From the analysis of the current legislation we can conclude that the number of substitutions is not limited, therefore the testator may specify an unlimited number of persons, acting as substitutional bequests to the reserve heir (substitutional bequest). However, it should be noted that in practice position of the legislator may lead to disinheritance of certain heirs. Accordingly, the absence of any statutory restrictions on the number of substitutions allows us to fully extend this conclusion on a number of substituted legatees, which is not limited.

From this attitude, the judicial possibility of reserve heir to inherit the property in case when the principle heir is unworthy should be considered a legitimate (Art. 1117 Civil Code). It seems that such a rule in no way will impair the rights of other heirs, or distort the will of the testator. In concerned situation, the inheritance rights of substitutional person cannot be made dependent on the moral and ethical principles and decent behavior of the principle heir. In fact, substitutional person is an independent heir, though he can exercise his right only upon the occurrence of a specific legal fact. To some extent, substitutional person can be considered "conditional heir", whose inheritance rights are, as it were, "under condition".

Hereditary substitution (substitution of a bequest) does not allow renunciation of a succession by an heir in favor of other heirs. Such a requirement is fully justified in terms of the implementation of the testator’s last will, which would have been distorted if legislator would retreat right on substitution.

It is also quite logical that the will in the disposal of hereditary rights, in case of a substitution, should be dictated by the ancestor, rather than the heir.

**REFERENCES**

