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Alexandra Löwy
Comenius University, Bratislava, Slovakia
Faculty of Law
Alexandra.lowy@flaw.uniba.sk
ORCID ID: 0009-0003-3403-4794

Karin Rakova
Comenius University, Bratislava, Slovakia
Faculty of Law
karin.rakova@flaw.uniba.sk
ORCID ID: 0000-0001-9227-7864

SUBSTANTIVE AND PROCEDURAL ASPECTS OF DISINHERITANCE UNDER THE SLOVAK LAW

Abstract: *The subject of this paper is to provide with the analysis of the substantial and procedural aspects of disinheritance under the Slovak law, based on the revision of the Slovak Civil Code and certain selected court decisions. The paper also analyses the procedural aspects of disinheritance disputes, which mostly results in the proceedings before the court and emphasises the different approach of the courts in assessing the various grounds for extradition.*

Keywords*: succession, disinheritance, deceased, testator, heir, disputes.*

1. INTRODUCTORY CONSIDERATIONS

The basic principle of the Slovak succession law is based on the autonomy of the will of the testator to decide about the distribution of the whole assets or its part to a certain person after his death. The testator is practically free in this decision, as the testamentary freedom is one of the most fundamental principles of the Slovak succession law. However, this freedom is limited by the right to a claim a compulsory portion by forced heirs, in Slovakia they are only deceased descendants.

The Slovak law recognizes the testators right to deprive his descendants of their compulsory portion based on the disinheritance, which is considered to be a strictly formal legal act of the testator, excluding testator's descendant from his right to inherit a cpmpulsory portion based on the statutory grounds of disinheritance. To achieve the effect of disinheritance, the legal act must meet the formal and substantive grounds prescribed by the law.

The Slovak Civil Code[l] recognizes the right for the compulsory portion only for the descendants of the testator, which means that only the children of the testator are entitled to compulusory portion in case they were omitted by the testator in his will.[2] With respect to the compulsory portion, extra marital children have the same rights as the children born in marreage, the same applies to the adopted children, who have the same rights as biological children. The descendant becomes the legal successor of the testator provided the he has exluded him in his will and at the same time he claimed his right at the court. In such a case omitted descendant becomes intestate heir and receives a real right (*ius in re).* This means that as compulsory portion arises without reference to testator's wishes, it cannot be normally excluded by the testator in his will other then by act of disinheritance. The testator can exclude from the succession line his descendant otherwise entitled to a compulsory portion only by a will where expression of disheritance is included or by a separate disinheritance deed whereby the reasons given by the law for dishinheritance are stated.[3]

The grounds for disinheritance are defined in Article 469a Sect. 1a) – d) of the Civil Code (hereinafter the "CC" or „Civil Code") and reflect the social and moral views of the society.

Acdcording to the Civil Code, the reasons for disinheritance are: a) a contrary to good morals, failure of descendant to provide the testator with necessary assistance in sickness, old age or other serious cases, b) permanent demonstration of no real interest in the testator which should have to, as a descendant, c) conviction of a deliberate criminal offence and sentenced to a term of imprisonment of at least one year, d) the persistent disorderly life.

Disinheritance is valid if the deed of disheritance preciselly states the reason however the grounds for disheritance are formulated broadly and hence are opened to judical interpretation. A valid disinheritance has the effect both that a person otherwise entitled as the intestate successor will not inherit anything and at the same time will not be entitled to a compulsory portion.

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[1] Act No. 40/1964 Call. Civil Code, as amended

[2] §479 of the Civil Code

[3] Borkowski, A. Textbook on Succession, Second edition. Oxford: Oxford University Press, p. 185.

2. SUBSTANTIVE CONDITIONS FOR DISINHERITANCE

As mentioned above, disinheritance is an unilateral legal act of the testator by which he deprives his descendant from the right of intestate succession that would otherwise his by law. For such an act to be valid, the law requires that formal and substantive requirements must be met.

The provisions governing the formalities of a will apply similarly to the formalities of a deed of disinheritance, with reference to Article 469a Sect. 3 of the Civil Code[4].

Formal defects of disinheritance may be, for example, the absence of a signature on the deed of disinheritance, the absence of two witnesses, the absence of the date of the signature of disinheritance.

The **substantive elements** of the disinheritance we include the definition of one of the grounds for disinheritance set out in the law. As mentioned above, these grounds are specifically enumerated in the Civil Code, but it should be noted that the way they are formulated leave the courts sufficient room their own interpretation.

The assessment of the fulfilment and existence of the material and formal requirements of the disinheritance may subsequently be the subject of a specific dispute which may arise in the succession proceedings. In practice, it is possible to identify cases where the testator, in the deed of disinheritance, states a reason for disinheriting a descendant which the descendant did not commit, or states a reason for disinheritance which is not recognised by the law. Such disinheritance will be null and void under the law[5]. In practice, there may also be a situation where the testator does not state any reason in the deed of disinheritance, in which case the disinheritance will again be void.

The main requirement for disinheritance is the existence of a ground for disinheritance, which must exist at the time the deed of disinheritance is executed (i.e. not at the time of the death of the testator)[6]. The specification of other grounds for disinheritance results in the nullity of the deed of disinheritance[7].

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[4] Art. 469a Sect. 3 of the CC: *„The provisions of Sections 476 and 480 shall apply mutatis mutandis to the particulars of the instrument of disinheritance and to its revocation; however, the instrument must state the reason for the disinheritance"*.

[5] Švestka, J., Dvořák, J., Fiala, J. a kol. *Civil Code. Commentary. Vol. IV.* 2. edition, Prague : Wolters Kluwer ČR, 2019. s. 393.

[6] Decision of the Supreme Court dated 24. June, 2020, sp. zn. 6 Cdo 98/2018

[7] R 50/1985

3. DISSINHERITANCE ACCORDING TO THE ART. 469A SECT. 1 LETTER A)

According to the Article 469a Sect. 1 letetter a), the testator is entitled to disinherit a descendant "*if, contrary to good morals, he has failed to provide the testator with the necessary support in sickness, old age or in other serious cases".*

Under the above provision, the testator may disinherit a descendant providing the descendant has failed to provide testator with necessary assistance in sickness, old age or other serious cases, provided that such conduct by the descendant is contrary to good morals.

There is extensive case law interpreting this provision in practice. First of all, in relation to the failure to provide the necessary assistance in sickness, old age or other serious cases, the courts address the question of the testator's reliance on the descendant for such support. In respect of failure to provide assistance, this is particularly the case where the heir has failed to provide the necessary assistance to the testator who is dependent on assistance in sickness and old age, even though he was aware of the testator's dependence and, having regard to his objective capacities and abilities, could have provided him with such assistance.

According to this rcondition of disinheritance, the testator is dependent or in need of assistance in old age, sickness or other serious case (e.g. financial need, accident, immobility) and the descendant has not provided assistance contrary to good morals must be fulfilled.

The need for assistance on the part of the testator and the objective possibility for the descendant to provide assistance to the testator must be assessed on a separate and individual case-by-case basis.

The failure to provide assistance must be assessed in the light of whether the heir's behaviour was contrary to good morals. The term good morals represents certain rules of behaviour that are largely accepted in society and form the basis of a fundamental values[8].

According to the case-law of the courts, when assessing whether the behaviour of the descendant can be regarded as contrary to good morals, must be taking into account the testator's behaviour towards the descendant. It will not be regarded as contrary to good morals if the failure to provide the necessary assistance in sickness or old age was caused by objective reasons such as the fact that the descendant lives abroad or is ill himself, or at the same time has a responsibility to care for his minor children. A contrary to a good morals will not be also considered the failure to take an appropriate interest where that failure has been provoked to

[8] Decision of the Constitutional Court of the Slovak republic, dated 24.2.2011, No. IV.ÚS 55/2011-19

a large extent by the testator himself.[9] Making reference and condition to the good morals when assessing the fulfillment of these criterias is, according to our opinion, redundant argument of the legislator. Not to mention the problems associated with the interpretation of the content of good morals, with which the court practice has been "struggling" for a long time, the term itself is not defined by any law and is part of the different interpretation.

When assessing the above mentioned grounds for disinheritance, the courts do not focus on the reasons for the testator's difficult life situation, but on the testator's dependence on the assistance of his or her descendants. According to the Court of Appeal, it must also be a situation where the testator's basic necessities of life are not otherwise taken care of, which is closely related to the question of the testator's dependence on anyone, including a third person, to provide assistance. In such cases, it is necessary to assess and consider the objective possibility of the descendant to provide such an assistance as well as the necessity of the descendant providing assistance to the testator. On the part of the descendant, there may be objective obstacles which prevent him or her from providing assistance to the testator (stay abroad, illness of the descendant himself or herself, other impossibility). On the part of the testator, there may be a fundamental refusal towards descendant. In such a cases, it is necessary to assess and consider the objective possibility of the descendant providing assistance as well as the necessity of the descendant providing assistance to the testator.

4. DISINHERITANCE ACCORDING TO THE ART. 469A SECT. 1 LETTER B)

Article 469a Sect.1 letter b) Civil Code requires, as a ground for disinheritance, that *"the descendant has not permanently shown the true interest in the testator which he should have shown as a descendant"*.

It is clear from the provision of the Article 469a Sect. 1 letter b) CC that this is a very general provision and that its content is determined by the case-law, which, inter alia, repeatedly emphasises the specific circumstances of the case. Thus, in the event of a dispute, space is left to the assessment of the specific situation, and the case-law has been quite clearly inclined (in our opinion, not always reasonably) towards the protection of the interest of the disinherited descendant when, in several decisions, it emphasises the conditionality of the descendant's failure to show interest in the testator, depending on the fact that the testator himself was not interested in such contact or even refused it. In our opinion it is questionable whether the conditionality of a descendant's lack of interest in the

[9] Decision of the Supreme Courte of the Czech Republic, No. 21 Cdo 3772/200

testator by the testator's lack of interest in the descendant is a legitimate reason to be emphasised by the courts on a case-by-case basis. Disinheritance is a legal act of the testator by which he himself decides about his property and who will inherit it from him or, in the case of disinheritance, not to inherit it.

The testator is the one who has the only authority to make this decision and who assesses this decision depending on how the descendant has behaved towards him or her. We therefore perceive no legal reason which would admit of an interpretation according to which, unless the testator shows a continuing interest in the issue, the testator cannot require the descendant to do so, and, as a consequence of his absence, use such an absence as a ground of disinheritance. That interpretation is based on the case-law of the courts, which is more or less consistent in emphasising the conditional nature of the descendant's failure to show a true interest in the testator on the testator's own failure to show such an interest in the descendant.

In one of the first Supreme Court decisions related to this topis the Supreme Court stated, that the reason for disinheritance in this case must be assessed objectively, whether it was such a lack of interest that was continuous, contrary to good morals, as a result of which the descendant did not show even a minimum interest in the testator's life and health, etc[10]. In this decision, the court considered it relevant in assessing the validity of the disinheritance if the descendant had any real opportunity to express a real interest towards the testator, i.e. whether the testator was at any point interested in meeting the deceased and in maintaining normal family relations with the children. In the court's view, disinheritance is only applicable where it is apparent from the testator's conduct that the testator does not care about this close relationship, is not personally concerned by the descendants' lack of interest, is indifferent to this situation, or has himself contributed to such a situation. A certain defect of this decision is that the court did not deal with what can be considered as normal family relations, and although in this decision it also emphasises other circumstances, subsequent court decisions refer in most cases only to the fact that for the assessment of the grounds for disinheritance it is essential whether the testator was interested in maintaining the family relationship or whether the descendant was interested in showing an interest in maintaining it.

The other Supreme Court decision in its judgment dealt similarly with the above arguments[11], according to which the question of assessing whether a descendant has shown a real interest in the testator must be considered in the light of all the circumstances of the case and within the scope of good morals established

[10] The first interpretation of these grounds for disinheritance can be found in the Supreme Court decision decision of the Regional Court in České Budějovice of 9 August 1996, published by the Supreme Court of the Czech Republic in the Collection of Judicial Decisions under R 23/1998.

[11] Decision of the Supreme Court of the Czech Republic, No. 21 Cdo 48/2000

in society. According to the court's reasoning, one of the aspects to be examined in the assessment of the validity of the disinheritance under Article 469a Sect. 1 letter b) of the Civil Code is always whether the descendant had a real possibility of expressing a real interest in the testator, i.e. whether the testator himself had an interest in maintaining normal relationships with the descendant. According to the court's opinion, disinheritance is only considered where the testator is interested in such a relationship, where he is personally emotionally affected by the disinterest of the descendant, this disinterest upsets him and it is not a situation in which he is indifferent to this situation, or he himself has caused such a situation by himself. This Decision was followed by another decision of the Regional Court, which rejected the claim on the ground that the plaintiff (a descendant of the testator) had failed to prove that he was interested in the testator and assumed that the plaintiff's lack of interest in the testator pursuant to Article 469a(1)(b) CC was present.

The Supreme Court of the Czech Republic in its further decision[12] in the assessment of the existence of grounds for disinheritance under Article 469a(1)(b) of the Civil Code stated that a testator cannot validly disinherit his or her descendant if the absence of a real interest resulted from the testator's lack of interest in the descendant. According to the reasoning of the Court, the disinheritance legal provision cannot be applied to a case where the testator does not even seek the interest of a direct descendant, which results from his demonstrated lack of interest in the descendant. It can be positively evaluated that the Court in this decision did not limit itself to a simple interpretation of the reasons given in the aforementioned decision of the Court, but also gave examples of the descendant's behaviour which fulfils the legal essence of disinheritance, such as being passive, as well as behaviour in which the descendant shows interest in the testator, but in a manner that does not correspond to the proper behaviour of the descendant towards the parents, i.e. in a manner that permanently exceeds the principles of social politeness, for example. In this case too, however, the Court did not complete the aforesaid by leaving open to interpretation what can be understood by such principles of social politeness.

The Supreme Court of the Slovak Republic commented the existence of grounds for disinheritance under the Article 469a Sect. 1 letter b) of the Civil Code in one of its first published decisions of 24 February 2010, Case No. 5 Cdo 239/2009[13], in which stated that when assessing the grounds for disinheritance, it is significant to consider the relationship between the testator and the descendant, particularly whether that relationship was a true relationship and not merely a

[12] Decision of the Supreme Court of the Czech Republic, dated 15. May 2007, No. 21 Cdo 688/2006.

[13] Decision of the Supreme Court of the Slovak Republic, dated 24. February 2010, No. 5 Cdo 239/2009.

pretended, formal one. According to the reasoning, when assessing whether there is a ground for disinheritance due to the Article 469a Sect. 1 letter b) of the Civil Code, the real possibilities of the heir to show such interest cannot be excluded, as well as the circumstances under which the disinheritance took place, in particular whether the descendant was not prevented from showing a genuine interest in the testator by objective circumstances, or whether the descendant's failure to show such a real interest was not due to fault on his or her part. Again in the context of the decision of the Regional Court in České Budějovice, the Supreme Court of the Slovak Republic repeated that if the fact that a descendant does not permanently show a real interest in the testator is a consequence of the fact that the testator does not show an interest in the descendant, it cannot be further justified that the descendant's failure to show this interest could be a reason for his or her disinheritance.

Similarly, the Supreme Court of the Slovak Republic has adopted in several decisions the reasoning set out in the aforementioned decisions of the Courts in Czech Republic, despite the fact that in its reasoning it states the need to take into account the objective possibilities of the descendant to show interest in the testator, according to which the lack of interest of the descendant towards the testator cannot be a reason for the disinheritance of the descendant by the testator, if such consequence is the fact that the testator does not show interest in the descendant himself.

A certain uniqueness that has emerged in the interpretation of the given ground of disinheritance, which also has an impact on the question of proving the relevant facts, was brought by the decision of the Supreme Court of the Slovak Republic[14], in which the court dealt with interpretation of the term ***"failure to show real interest in the testator"*** pursuant to the provision of Article 469a Sect. 1, letter b) of the Civil Code.

The Supreme Court of the Slovak Republic has also stated in relation to the resolution of this legal question that when assessing whether there is a ground for disinheritance under Article 469a(b) CC, the capacity of the heir to exercise such an interest and the circumstances under which the disinheritance occurred must be considered, particularly whether the descendant was not prevented from exercising a real interest in the testator by objective circumstances, or whether the descendant's failure to exercise such a real interest was not due to his/her negligence. It may therefore be concluded that, in the light of the above interpretation, the disinherited heir is free to focus his evidence on proving that he was interested in the testator, but may also direct his evidence on the fact that it was the testator himself who, by his conduct, caused the disinterest, and it is therefore not appropriate for the disinherited to suffer the consequences of disinheritance. This interpretation significantly denies the recent trend in the decision-making practice

[14] Decision of the Supreme Court of the Slovak Republic, No. 1 Cdo/173/1996, ZSP 61/1997.

of the highest judicial authorities in the Slovak Republic, namely the desire to respect and preserve the will of the testator.

The Supreme Court in its other decision[15], in line with previous decisions stressed the need to assess objectively whether the descendant's lack of interest in the testator was such as to be permanent, contrary to good morals, with the result that the descendant did not show even a minimum of interest towards the testator. In its reasoning, the Court uses the concept of a 'standard relationship between the testator and the descendant', the existence of which is sufficient to prevent the testator from validly disinheriting the descendant under Article 469a Sect. 1 letter b) of the CC. As in previous cases, this decision can be criticised for the ambiguity of the meaning of "standard relationship between testator and descendant", which again leads to inconsistent interpretation and application in the courts' decision-making.

As can be seen from the above analysis of the court decisions, the vague formulation of the ground of disinheritance, which is given too broadly, leads the courts to their own interpretation and orientation to decide in favour of the protection of disinherited descendants, when the courts more or less interpret this ground of disinheritance in a similar way in the interest of the protection of the disinherited descendant.

5. DISINHERITANCE ACCORDING TO THE ART. 469A SECT. 1 LETTER C) AND D)

For the ground of disinheritance of a descendant under Art.469a Sect. 1 letter c) of the Civil Code it is necessary that there is a final conviction for a deliberate criminal offence of the descendant and at the same time a sentence of imprisonment of at least 1 year has been imposed on the descendant, again this ground must exist at the time the deed of disinheritance is issued. If the descendant had been sentenced to a penalty other than that required by law for the offence or if the offence was negligent, this ground would not be satisfied. It cannot be inferred from the statute that this ground of extradition must involve the imposition of an unconditional sentence. It is also irrelevant whether or not the sentence has already been served, obliterated or not. Justification for the ground of disinheritance under section 469a(1)(d) will be given if the descendant leads a disorderly life for a long time, i.e. does not live in an ordinary way. Above all, it must be a permanent condition, not of a temporary nature. A disorderly way of life may be regarded as one which is abnormal and objectionable because it is generally

[15] Decision of the Supreme Court of the Slovak Republic, dated 27th May 2014, No. 4 Cdo 59/2012

dangerous to the descendant himself or to persons close to him, and in particular to his family. Alcoholism, drug use, gambling, indebtedness and non-payment of debts, deliberate unemployment, vagrancy, prodigality and neglect of the family may be included here. All of these manifestations of disordered living have a common feature – the fear that the descendant, as a result of his or her disordered life, will not preserve the inheritance for his or her descendants.

6. PROCEDURAL ASPECTS OF DISINHERITANCE

It is not unlikely that the deed of disinheritance is an unexpected expression of the testator's will, or one whose conclusions are difficult or totally unacceptable to the testator[16]. This creates a platform for the creation of a so-called succession dispute, which is linked to the need to examine the material prerequisites for disinheritance. The lack of acceptability of such an expression of the testator's will is mainly linked to the consequence of disinheritance, which is the partial or total exclusion of the intestate heir from the succession.[17]

Section 193 of the CMP assumes the existence of facts which are not in dispute between the parties. Therefore, the question would arise whether, for example, an intestate heir objects the absence, i.e. the existence of a ground for disinheritance, and the other heirs state that they agree with the objection in question, the notary could proceed further with the disinherited, due to the absence of material requirements for disinheritance and the absence of his exclusion from inheritance. In the past, the identical will of the heirs could not negate the will of the testator, i.e. they could not have stated in agreement that the grounds for disinheritance, which are set out in the deed of disinheritance, are not given and that the disinherited heir is to be called in the course of the succession proceedings and his right to inherit is established. However, the current legislation provides directly for that alternative. Based on these essential considerations, we can conclude that a dispute over the right of inheritance will most often result in the need for its direct resolution in court proceedings.

In the succession proceedings, the burden of factual evidence is transferred from the plaintiff to the notary, with reference to the provision of Section 194 of the CMP.

The notary's ruling, within the meaning of Article 194(1) CMP, constitutes a condicio sine qua non, without the issuance of which the heir does not have active capacity to bring an action for the establishment of the right of succession for the purposes of the pending succession proceedings.

[16] Lattal, F.A. Contracts Not to Revoke Joint or Mutual Wills e Joint or Mutual Wills. William and Marry Law Review, 1973.

[17] R 67/1997.

According to Article 194(1) of the CMP, *'where the resolution of the right of succession depends on the determination of disputed facts, the court shall refer by order, after a failure to attempt settlement, the heir whose right of succession appears less likely to be established to bring an action for the resolution of the disputed fact. It shall determine the time-limit for bringing the action, which shall not be less than one month.'.*

Thus, the one who is referred by the court to bring an action in the context of the disputed facts relating to the deed of disinheritance will be actively legitimated.

If several persons have been named in the deed of disinheritance and all of them are challenging the deed of disinheritance, either formally or substantively, the court will refer each one of them to bring the action as such. It is not likely that in such cases, assuming that an action against the disinheritance has been brought (whether for defects in form or substance), the court will combine the trial of the two heirs as plaintiffs in a single action. The subject-matter of the proving is the different factual circumstances relating to the grounds of the disinheritance. Even if the case were joined, the plaintiffs would form a separate procedural community.[18]

While active legal capacity will result from the court's decision referring a particular heir to bring an action before the court in the context of an inheritance dispute, passive legal capacity will be correlated to the circle of heirs who come into consideration in the context of the inheritance proceedings, whether by virtue of a legal or testamentary succession.

The parties to the litigation on the part of the defendants include all the heirs who form the forced community. In the absence of any of the heirs on the defendant's side, the deficiency in question will lead to the dismissal of the action as such.[19]

While compulsory community reflects substantive grounds, it does not in itself express the effects of the procedural status of the heirs on the part of the defendants. In order to answer the question at issue, it is necessary to resolve whether the heirs on the defendants' side will form a separate or an inseparable community. This has implications for the acquisition of legal validity, the effects of procedural defences and so on. In this case, we consider that the parties to the litigation on the defendants' side form a so-called separate community, i.e. the individual procedural acts do not affect the other entities acting in the community. The decision itself may thus also become final individually and progressively in relation to the remedies applied or not applied.

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[18] Ficová, S., Križan, M., Fekete, Im., Hamřík, M., Ivančo, M., Klincová, Z., Raková, K. Fundamental reform of inheritance law – necessity or irrelevance, Prague : Wolters Kluwer ČR, 2023. s. 392.

[19] R 65/2003.

However, in the academic literature we also find the interpretation that a forced community is not formed by an heir whose right of succession is not affected by how the disputed question of fact is resolved.[20]

Therefore, we can conclude that the scope of actively and passively legitimated subjects is declared in the decision of the competent court (notary), which is authorized to hear the inheritance and which, due to the impossibility to resolve such a disputed issue in the inheritance proceedings, in principle determines the scope of the parties to the dispute by its own decision.

It is stated in the academic literature that a dispute over the right of succession does not have the character of a dispute within the meaning of Section 137(c) of the CCP as a dispute over the determination of a right, but is governed by the provisions of Section 192 of the CMP, which distinguishes between two types of disputes. It then indicates that the deceased party must carefully identify the legally relevant disputed fact and define, if possible, the factual issue (usually defined in the notary's order) so as to make the proposed petition enforceable.[21]

Prior to the enactment of the new CSP, the procedure in cases where the material prerequisites of the deed of disinheritance were challenged was that the plaintiff challenged a specific formal defect by an action for a declaration of nullity of the legal act, and thus sought a declaration that the deed of disinheritance was null and void, or that the disinheritance was void by its petition.

The court decision has agreed that an action brought within the meaning of Section 175k(2) of the Civil Procedure Code (now Section 194(1) of the CMP – author's note) is not an action for determination within the meaning of Section 80(c) of the Civil Procedure Code, but is an action for the determination of a legal fact in respect of which a compelling legal interest arises from a provision of law. Such an action cannot therefore be dismissed for lack of a compelling legitimate interest in the determination sought, but only if the procedure laid down in the above provision is applicable.[22]

When examining disputes related to disinheritance in more depth, especially with regard to the absence of material prerequisites, we see that the plaintiff's petition is formulated in such a way that the plaintiff seeks a declaration that the deed of disinheritance (with further specification of the person of the testator, date, etc.) is null and void.

However, we do not consider such a formulation of the petition to be correct, as it does not comply with the requirement under section 194 of the CMP, where the subject matter of the litigation is and must be the assessment of a particular

[20] Smyčkova, R., Števček, M., Tomašovič, M., Kotrecová, A.. *Komentár.* Civil non-dispute order. Bratislava : C. H. Beck, 2017.

[21] Kirst J.: Exheredation, In/validity. In *Studia Iuridica Cassoviensia.* Roč. 9, 2021, č. 1

[22] Decision of the Supreme Court of Slovakia, dated 29. september 2009, sp. zn. 2 Cdo 108/2008.

fact in dispute. We are of the view that the determination of the invalidity of the deed of disinheritance cannot be regarded as a disputed fact.

The disputed fact is the actual reason which is supposed to cause the nullity of the deed of disinheritance (nullity of the disinheritance), i.e., for example, the lack of the testator's will or the disputed authenticity of the signature on the disinheritance deed, i.e., a question of fact and not a question of law. The legal assessment of the matter will only be carried out by the notary in the succession proceedings, on the basis of the court's decision in the litigation proceedings. The validity or invalidity of the deed of disinheritance (disinheritance) consists of certain factual elements (hypothesis of the legal norm) and their legal assessment (disposition of the legal norm), i.e. it is not exclusively a question of legal assessment. It is therefore not for the petitioner to establish the validity or invalidity of the deed of disinheritance.

In the cases we have formulated, i.e. if the intestate heir argued that the testator suffered from a mental disorder at the time the deed of disinheritance was executed for which he was unable to assess the consequences of his conduct, the statement of claim should read as follows: The Court finds that the testator XY was suffering from a mental disorder at the time of the execution of the deed of disinheritance (further specification) for which he was incapable of assessing the consequences of his conduct. On the basis of the issue thus resolved, i.e. a final court decision, the notary will legally assess the invalidity of the deed of disinheritance and will then proceed with the succession proceedings, i.e. on the basis of the judgment on the determination of the legal fact, it will be the task of the court of succession to legally assess the matter and to evaluate that the deed of disinheritance is valid (if the court rejects the claim) or invalid (if the signature is falsified).[23]

A different case, which responds precisely to the need to establish the relevant facts, is the assessment of the validity of the individual grounds for disinheritance, i.e. the fulfilment of the individual statutory grounds.

The examination of the individual grounds for disinheritance is expressly a question of fact, in particular in cases under Article 469a(1)(a), (b) and (d). The actual procedural procedure in terms of proof and the definition of the relevant facts and the burden of proof will be discussed in the next section of the article.

In the event of an attempt to challenge the grounds for disinheritance, the disinherited heir should formulate the petition in such a way as to seek a ruling that the ground for disinheritance (specified) set out in the disinheritance deed of XY drawn up by the testator is not given. The argument that the disinheritance is null and void also appears in application practice. We consider it redundant to

[23] Fajnor, M. Action for determination that the thing belongs to the inheritance of the testator from the point of view of the subject of the proceedings. In. Private law. No.3/2018, 105-117 p.

mention the fact that the disinheritance is invalid, because, as we have already stated, it is again only a question of law and the invalidity of the disinheritance itself will be assessed by the notary in the court proceedings if the court approves the action.

If the disinherited heir wishes to challenge the validity of the ground of disinheritance, it is also not correct to formulate the claim in such a way as to combine a declaration that the deed of disinheritance is void and a declaration that the ground of disinheritance is not valid.

We have pointed out, first of all, that the determination of the invalidity of the deed of disinheritance is not a question of fact and that doubts may therefore arise as to the admissibility of such an action, in particular where the notary himself has not referred to the bringing of such an action.

We have also pointed out that the assessment of nullity is a mixed question of law, which is based primarily on an examination of the relevant facts of fact, with the legal aspect itself subsequently being dealt with only by the notary in the succession proceedings.

Lastly, we would emphasise that, in formulating the claim, it is also necessary to remain grammatically precise in relation to the claims raised; although we have indicated that we consider that it is incorrect to claim the nullity of a legal act, we consider it necessary to at least draw attention to it in this context.

The grammatical accuracy indicated then concerns the distinction between the nullity of the deed of disinheritance and the nullity of the disinheritance. Some authors have been critical of the decisions of the courts, precisely without making the differentiation referred to above.

The invalidity of the deed of disinheritance for formal or material reasons logically constitutes a total nullity of this deed, i.e. it is not taken into account as such in the succession proceedings. If it is established in the court proceedings that there is no reason for the disinheritance, the issue in question relates exclusively to the specific reason and, in any event, only to the heir who invoked that fact in the court proceedings. It would therefore mean that, if the deed of disinheritance listed several forced heirs, the determination that the specific grounds of disinheritance were not given would, even in terms of the subjective effects of the decision, apply only to the one who raised the ground in question. The other forced heirs are to be taken into account as if they had not contested the matter in question.

We may conclude that the basis for the formulation of the statement of claim is the order pursuant to section 194 of the CCP, by which the notary, as a court commissioner, refers to the filing of the statement of claim with a specific definition of the disputed fact. Consequently, the statement of claim must reflect a determination which reflects the statutory regulation under section 137 of the C.C.P., while at the same time ensuring that the outcome of the proceeding itself is a sufficient basis for the notary to make a subsequent legal assessment.

7. FINAL CONSIDERATIONS

It follows from the formulation of the reasons for disinheritance set out in Art.469a(1)(b) CC that a wide range of negative facts existing in the relationship between the testator and the descendant can be affected.

In the present article, we have emphasized the analysis of the courts' assessment of the continuous failure to show real interest, concluding that the courts, when assessing the fulfilment of the stated ground of disinheritance, place emphasis on the circumstances which caused such lack of interest on the part of the descendant. In all the judicial decisions we have reviewed, it has been taken into account that if the lack of interest on the part of the descendant was the result of the testator's lack of interest in the descendant, then such lack of interest on the part of the descendant cannot be a ground for disinheritance.

It is possible to agree with such an argument on the part of the courts, but we are of the opinion that the above should always be evaluated individually and based on the objective possibilities of the descendant, such interest in the testator should be shown.

In our opinion, it is necessary to distinguish situations where the testator disinherits a minor descendant whose he has not shown any interest, where it is beyond doubt that, even in view of the age and intellectual maturity of the minor, the minor is often not objectively capable of deciding for himself whether or not to show an interest. In the case of disinheritance of an adult descendant on the ground that he or she has not shown a real interest towards the testator, in our view, making the non-validity of the disinheritance subject to the testator's own lack of interest in the descendant is often argumentatively dubious, placing an unreasonable burden on the other heirs to sustain the testator's will in the event of a dispute.

In our opinion, when a descendant is disinherited for not showing a real interest towards the testator, it is essential to consider whether the descendant not only had the opportunity to show an interest but also wanted to show an interest in the testator.

We are of the opinion that the interpretation formulated in the decisions of the Slovak Courts, which constitutes the currently established decision-making practice and is also maintained in other decisions of the courts of the Czech Republic makes it significantly more difficult to defend the testator's last will in the form of a deed of disinheritance. It may be difficult for the defendant to clarify the subjective feelings of the testator, especially if the reason for the disinheritance is formulated only in very general terms, i.e., for example, with reference to a specific statutory provision. On the other hand, the above interpretation to some extent denies the recent trend in the decision-making practice of the highest judicial authorities in the Slovak Republic, that is the desire to respect and preserve the will of the testator.

Therefore, as the case-law of the highest judicial authorities pursues the objective of protecting and maintaining the testator's will, it may be appropriate to reconsider, in the light of and with reference to the development of social values, the established case-law in the direction of strengthening and preserving the testator's will as expressed in the instrument of disinheritance.

In addition to the substantive legal grounds for disinheritance, which indicate a high degree of contentiousness, procedural aspects and many procedural issues also come to the force.

While the question of active or of passive real legitimation is stabilized and does not show significant deficiencies, with reference to the change in legislation in § 194 CMP, as well as the concept of lawsuits according to § 137 CSP, we emphasize the necessity to waive the decision on the invalidity of disinheritance or deed of disinheritance, when the issue of invalidity itself, as a legal issue, will be assessed depending on the outcome of the court case by the notary in the inheritance proceedings. The disinherited heir must make the subject of the litigation a specific factual circumstance (fact), which the court will mark as disputed, and, following this, respond exactly with a claim petition. The correct wording of the claim petition is then a determinant of success in dispute proceedings, as well as in inheritance proceedings. Some disinheritance disputes also require linguistic exactitude, when it is decisive whether only the deed of disinheritance or the disinheritance as such is contested.

Undoubtedly, even in the area of procedural issues, there are many specific areas and determinants that could lead to the improvement of legal regulation for the future. However, procedural regulation is limited in this place by substantive regulation. Therefore, further calls for the elimination of existing deficiencies and changes in the procedural regulation will clearly depend on the eventual recodification of substantive law in the given area.

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Александра Леви
Универзитет Коменског у Братислави
Правни факултет
Alexandra.lowy@flaw.uniba.sk
ORCID ID: 0009-0003-3403-4794

Карин Ракова
Универзитет Коменског у Братислави
Правни факултет
karin.rakova@flaw.uniba.sk
ORCID ID: 0000-0001-9227-7864

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