UDC 347.661.7 Правоведение. 2022. Т. 66, № 3

Will and the legal reserve of inheritance in Korean law

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For citation: Kim, Sanghoon. 2022. Will and the legal reserve of inheritance in Korean law. *Pravovedenie* 66 (3): 301–314. https://doi.org/10.21638/spbu25.2022.305

Part V of the Korean Civil Code regulates legal relations in respect of inheritance. Of the three chapters that comprise Part V, the first Chapter stipulates general provisions, thereby governing inheritance in the absence of a will. The second Chapter lays down the legal norms regarding wills, whereas the last of the chapters is dedicated to the 'legal reserve of inheritance', the reserved portion in the inherited property of the deceased person. From a comparative law perspective the legal reserve of inheritance is far from an institution unique to Korea. On the contrary, most jurisdictions have legislation that addresses issues of disinheritance in some form or other. The trait that is relatively characteristic of Korean law is that it chooses to strongly protect the right of the legal reserve of inheritance, which in turn results in limiting the freedom of testation. This was a conscious decision made by the legislator in the late 1970s, some 17 years after the Civil Code was enacted and entered into force, when Korean lawmakers inserted a new Chapter on the legal reserve of inheritance into Part V (Inheritance) in an effort to reflect traditional family values that placed special emphasis on family ties. This objective of this paper is to offer an overview of wills and the legal reserve of inheritance in Korean inheritance law. Looking at how the inheritee voluntarily (by means of a will) and involuntarily (by means of the legal reserve of inheritance) disposes of his/her assets after passing away, will hopefully help shed light on some characteristics of Korean inheritance law.

Keywords: inheritance, will, freedom of testation, legal reserve of inheritance, Korean Civil Code.

Introduction

Korean inheritance law is not regulated by a separate legal act but constitutes an integral part of the Korean Civil Code (hereinafter 'Civil Code')[1]. With a total of five parts in the Civil Code[2] Parts I through III regulate property law, and Parts IV and V — family law[3]. Notably, Part V Inheritance is divided into three chapters [Chapter 1 General Provisions, Chapter 2 Wills, Chapter 3 'Legal reserve of inheritance (유류분)'[4]]. The Chapter on

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[1] An English translation of the provisions of the Civil Code is provided by the Korea Law Translation Center at the Korea Legislation Research Institute (under the Ministry of Justice), which is accessible at the following web page: https://elaw.klri.re.kr/kor_service/lawView.do?hseq=55222&lang=ENG (accessed: 26.05.2022).

[2] Part I General Provisions (Articles 1–184), Part II Real Rights (Articles 185–372), Part III Obligations (Articles 373–765), Part IV Relatives (Articles 766–996), Part V Inheritance (Articles 997–1118).

[3] There is a branch of legal thinking among Korean scholars that is of the opinion that inheritance law is property law, rather than family law. For a detailed analysis, see 곽윤직, 『상속법』, 박영사, 1997, 49면 이하 [*Kwak Y.-J.* Inheritance Law. Seoul: Parkyongsa, 1997. P 49 et al.].

[4] 'Legal reserve of inheritance (유류분)' is the term that refers to the reserved portion (stipulated by law) of the inherited property of the deceased person. It differs from 'statutory share in inheritance (법정상속)' in that the latter refers to inheritance in the absence of a will or when the will is null and void.

general provisions comprise norms on inheritance in the absence of a will, whereas the Chapter on wills, as the name suggests, regulates legal transactions where the deceased person has left a will. As for the Chapter on the 'legal reserve of inheritance' it regulates the legal institution which constrains the freedom of testation. This last Chapter of Part V Inheritance was the result of an amendment that took place in 1977. This means that for a period of less than two decades starting from 1960 (when the Civil Code entered into force) the freedom of testation had been absolute in Korea. Although the legal reserve of inheritance is from a comparative law perspective[5] hardly an institution unique to Korea[6], its law does place relatively greater constraint on the freedom of testation. The purpose of the current paper is to provide an overview of inheritance law in Korea by discussing in detail the relevant norms on wills and the legal reserve of inheritance. This focus on the voluntary (will) and involuntary (legal reserve of inheritance) aspects of the disposal of property by the inheritee should hopefully shed light on some of the characteristics of Korean inheritance law.

1. Will

1.1. The formality of wills and their form

1.1.1. Strict formality

A will does not take effect unless it conforms to the formality provided for in Article 1060[7] of the Civil Code[8]. Heirs presumptive, upon the commencement of inheritance, look forward to receiving their statutory share in inheritance[9]. However, a will modifies such statutory inheritance and therefore it is of great significance to the interested parties. Naturally, a will, even if it reflects the genuine intent of the testator, is deemed null and void unless it meets the legal requirements and form stipulated in the Civil Code[10]. Although some are critical of such an approach[11], the strict requirement of formality actually contributes to the realization of the intent of the testator[12]. Since the commencement

[5] For a detailed analysis of common law, see: *O'Brien R.C.* Integrating Marital Property into a Spouse's Elective Share // Catholic University Law Review. Vol. 59, iss. 3. 2010. P. 620–717. — For a comparative legal study of continental law, see: 김진우, "유류분반환청구권의 법적 성질에 관한 비교법적 고찰 — 독일법, 프랑스법 및 스위스법을 중심으로",『법학연구』제12집 제1호, 인하대학교 법학연구소, 2009, 45–84면 [*Kim J.-W.* A Comparative Study on the Legal Nature of the Right to Demand the Return of Statutory Share in Inheritance: Focusing on German, French and Swiss jurisdictions // Inha Law Review. Vol 12, No. 1. 2009. P. 45–84].

[6] Russia is no exception in this regard, as can be found in the Civil Code of the Russian Federation in Article 1149 (ГК РФ. Ст. 1149 «Право на обязательную долю в наследстве»).

[7] Article 1060 (Formality of wills) No will shall take effect unless it is in conformity with the formality stipulated by this Act.

[8] Hereinafter, all provisions of the Korean Civil Code will be referred to as simply 'Article OOO' without mention of the 'Civil Code'.

[9] Article 1009 (Statutory Share in Inheritance) (1) If there exist two or more inheritors in the same rank, their shares of the inheritance shall be equally divided.

(2) The share inherited by an inheritee's surviving spouse shall be increased by 50 percent over the inherited share of the inheritee's lineal descendant where the spouse inherits jointly with such descendants, or 50 percent over the inherited share of the inheritee's lineal ascendant where the spouse inherits jointly with such ascendants.

[10] Supreme Court 2009Da9768, May 14, 2009.

[11] See: 김영희, "현행민법상 유언의 방식에 관한 연구",『가족법연구』제20권 2호, 한국가족법학회, 2006, 122–125면 [*Kim Y.-H.* A Study on the Formality of Will in Civil Law // Journal of Family Law. Vol. 20, Is. 2. 2006. P. 122–125].

[12] 조인섭, "자필증서유언의 개선방안",『가족법연구』제30집 3호, 한국가족법학회, 2016, 238면 [*Cho I.-S.* Measures for Improving Will by Holograph Document // Journal of Family Law. Vol. 30, iss. 3. 2016. P. 238].

of inheritance is premised on the death of the testator, and as a rule there is no other way to verify his/her intent aside from authenticating the will, it is not irrational to require strict formality. Indeed, it is essential for preventing unnecessary confusion and legal conflict[13].

1.1.2. Form of will

Korean civil law recognizes five forms of wills: will by holograph document; will by sound recording; will by notarial document; will by secret document; will by instrument of dictation (Articles 1066–1070). Aside from the above five forms, no other form is permitted in making a will (Article 1065)[14]. In order to make a will by holograph document, the testator must write the whole text, date, domicile and full name with his/her own handwriting, and affix his/her seal thereto (Article 1066 paragraph 1). For wills by notarial document, sound recording and instrument of dictation, the testator must orally state the tenor of his/her will (Articles 1067, 1068, 1070). Finally, in order to make a will by a secret document, the testator must close up the document on which the writer's full name was written and affix his/her seal thereto (Article 1069 paragraph 1). Below, the two most widely used forms of will (holograph document and notarial document) are introduced in detail.

1.2. Will by holograph document

1.2.1. Form of composition

Without a concrete date (year, month, day) a will by holograph document does not take effect. Since the year, month and day of a will by holograph document is central to determining the legal capacity of the testator and deciding the order of priority between various testamentary documents, the exact date of the will must be specified. As a result, where there are only the year and month but not the day, such a will by holograph document does not take effect[15].

When a will is made by holograph document, it is an absolute requirement that the testator write the whole text, date, domicile and full name in his/her own handwriting. Therefore, writing the will by means of a word processor or creating a photocopy of the original makes the will null and void. That being said, the domicile does not necessarily have to be on the same sheet of paper as the whole text of the will and full name, which means that it can be written on an envelope, as long as that envelope can be recognized as part of the will[16]. The same can be said of wills where instead of a seal, the testator resorted to a thumbprint[17].

1.2.2. Probate of wills

The custodian of a testamentary document or a sound recording, or the person who discovered these, shall after the death of the testator, present them to the court

[13] 신영호·김상훈, 『가족법강의』 제3판, 세창출판사, 2018, 441면 [*Shin Y.-H., Kim S.-H.* Lectures on Family Law (3rd ed.). Seoul: Sechang Publication, 2018. P. 441.

[14] Article 1065 (Ordinary Form of Wills) There shall be five forms of wills as follows: holograph document, sound recording, notarial and secret documents and instrument of dictation.

[15] Supreme Court 2009Da9768, May 14, 2009.

[16] Supreme Court 97Da38510, June 12, 1998.

[17] Supreme Court 97Da38510, June 12, 1998. However, it should be noted that thumbprints can at times lead to null and void wills if the thumbprint is smudged or does not allow for the identification of the testator.

and apply for probate thereof without delay (Article 1091 paragraph 1). Where the court is to open a testamentary document closed with a seal, the inheritors or representatives of the testator or any other interested persons must be present at the opening of such document (Article 1092). Probate of testamentary documents under Article 1091 is the procedure for which the court investigates and confirms the form of testamentary documents and the will, as well as a procedural means to guarantee the preservation of the will. Importantly, therefore, the probate of a will is not a procedure for identifying the genuine intent of the testator, or its legality, nor is the probate carried out in order to determine the legal effect of the will. The procedure of opening the testamentary document as provided for in Article 1092 is literally nothing more than a procedure for (as the name suggests) the opening of the testamentary document, which is necessary when the document has been closed with a seal. This means that the legal effect of the will does not depend on the existence or lack of a probate or opening procedure, since a lawful will can take effect without the probate or opening procedure upon the death of the testator[18].

1.3. Will by notarial document

1.3.1. Form of composition

In order to make a will by a notarial document, the testator must orally state the tenor of his will before a notary, in the presence of two witnesses and the notary must write down and read it, and then the testator and each of the witness must affix their signature or names, and seals to the writing after acknowledging it to be due and correct (Article 1068).

1.3.2. Stating the tenor of will

Since the 'statement of the tenor of will' signifies the conveying of the content of the will to the other party, its interpretation must be strict, which means that there must be an oral statement of some form or other. However in practice it is difficult to establish in a fixed manner how much of a statement must be made in order to be recognized as an oral statement for the purposes of Article 1068[19]. Therefore a case-by-case approach is called for. Where a third person asks the testator questions based on the tenor of the will in a document that was written beforehand, and the testator uses simple gesture or limited words to answer in the affirmative, it can in principle hardly be recognized as a statement of the tenor of will under Article 1068. However, where the notary in accordance with the testator's own intent had written down beforehand the tenor of the will, after which it asks the testator about the content of the will, and the testator gives a positive answer, so as to make it possible for identifying his or her intent, then, given that the tenor of the will reflects the genuine intent of the testator based on his/her legal capacity and all other relevant circumstances, it is possible to say that the requirement of the 'statement of the tenor of will' has been satisfied[20].

In the case where a witness who, based on the tenor of the will in a document that was written beforehand by a third party, asks questions to the testator, and the testator uses simple gesture or limited words to answer in the affirmative, it is unlikely that the requirement of the 'statement of the tenor of will' can be seen as having been met, unless there are special circumstances that point to the reflection of the genuine intent of the testator

[18] Supreme Court 97Da38510, June 12, 1998.
[19] Supreme Court 2005Da75019, 75026, February 28, 2008.
[20] Supreme Court 2005Da75019, 75026, February 28, 2008.

in the aforementioned document. Therefore, where at the moment of making the will the testator was unable to communicate properly and merely nodded or spoke such simple words like 'yes' or 'uh-ha' in response to a lawyer's questions, the requirement of the 'statement of the tenor of will' cannot be seen as having been met[21].

In summing up, Korean case law on the matter of the requirement of the 'statement of the tenor of will' where the testator is asked questions based on the tenor of the will in a document that was written beforehand, it possible to identify the following rule and exception.

As a rule, where the testator is asked questions based on the tenor of the will in a document that was written beforehand by a third party, and the testator uses simple gesture or limited words to answer in the affirmative, the requirement of the 'statement of the tenor of will' cannot be seen as having been met.

However, there may be exceptions, where there are special circumstances such as the legal capacity of the testator, the content of the will, the backdrop of how the will was made and other factors, that confirm that the document was written according to the genuine intent of the testator, in which case the requirement of the 'statement of the tenor of will' will be deemed as having been satisfied.

1.3.3. Witness

For the will by notarial document to take effect, there must be two witnesses. The absence of two such witnesses make the whole will by notarial document null and void[22]. Minors, adult wards and limited wards, persons to be benefited by a will, the spouse or lineal blood relatives cannot serve as a witness (Article 1072). Here, a 'person to be benefited by a will' is understood as an heir of the testator or a testamentary donee, which means that the executor of the will is not ineligible[23].

1.4. Legal capacity to make a will

1.4.1. Meaning

The legal capacity to make a will is not the capacity to identify the intent of others in property dealings, but rather the capacity for a level of understanding that is necessary to grasp the content of the will and its entailing legal effect. Since a will is not a contract but a unilateral act made by a person who generally is ill or near death, the level of capacity required is lower than that of ordinary legal capacity[24]. The capacity to understand, the state of illness, the content of the will, the circumstances in which the will is made, the relationship between the testator and the testamentary donee and etc. are all factors for consideration in determining the legal capacity to make a will. The legal capacity to make a will is determined at the time of making the will. Therefore, the loss of such a capacity ex post facto does not impact the legal effect of the will[25]. This means that even if the testator is a chronic dementia patient or an alcoholic, such a person is able to make a will when he or she is temporarily in a state of sound mind.

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[21] Supreme Court 200557899, March 9, 2006.

[22] Supreme Court 2002Da35386, September 24, 2002.

[23] Supreme Court 97Da57733, November 26, 1999.

[24] Unlike a natural person, a juristic person lacks the legal capacity to make a will, although it does enjoy the capacity to receive property.

[25] *Shin Y.-H., Kim S.-H.* Lectures on Family Law… P. 440.

1.4.2. Persons who are recognized as having the legal capacity to make a will

Any person who has not attained full seventeen years of age may not make a will (Article 1061). Having said this, Articles 5[26], 10[27] and 13[28] do not apply to wills (Article 1062). This means that minors, limited wards and specific wards can make a will unilaterally. An adult ward may make a will only when he/she has recovered to the point of understanding his/her intentions (Article 1063 paragraph 1). In such a case, a medical practitioner shall add in writing the status of recovery of mental soundness on the testament, and shall affix his/her signature and seal thereto (Article 1063 paragraph 2).

1.5. Testamentary gift

1.5.1. Universal title and specific title

Testamentary gift by universal title means a testamentary gift that is executed regarding the estate of inheritance, in whole or in part (as a certain ratio), that includes both positive and negative assets. Testamentary gift by specific title, on the other hand, specifies a certain property that is subject to a gift. Whether the testamentary gift was by universal or specific title is determined by comprehensively considering the words used in the will and all relevant circumstances that point to the intent of the testator. It is generally accepted that testamentary gift as a certain portion relative to the estate of inheritance is testamentary gift by universal title, whereas all other cases are testamentary gift by specific title[29]. However it cannot be conclusively argued that a testamentary gift was executed by specific title where a particular asset was indicated in the will, since it can be a testamentary gift by universal title if there are no other assets to inherit[30].

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[26] Article 5 (Capacity of Minor) (1) A minor shall obtain the consent of his/her legal representative to perform any juristic act: Provided, that exceptions shall be made where the juristic act concerned is one merely to acquire rights or to be relieved from obligations.

(2) Any act done in violation of the provision of the preceding paragraph is voidable.

[27] Article 10 (Acts of Adult Wards and Cancellation thereof) (1) Any juristic act done by an adult ward is voidable.

(2) Notwithstanding paragraph (1), the Family Court may determine the scope of the irrevocable juristic acts of adult wards.

(3) The Family Court may change the scope decided under paragraph (2) upon the application of the principal, his/her spouse, his/her first cousin or closer relative, adult guardian, supervisor of adult guardianship, public prosecutor, or the head of a local government.

(4) Notwithstanding paragraph (1), any juristic act necessary for everyday life and the price for which is not excessive, such as the purchase of daily necessities, shall not be cancelled by an adult guardian.

[28] Article 13 (Acts of Limited Wards and Consent) (1) The Family Court may determine the scope of acts for which a limited ward shall obtain consent from his/her limited guardian.

(2) The Family Court may change the scope of acts for which a limited ward must obtain consent from his/her limited guardian under paragraph (1) upon the application of the principal, his/her spouse, his/her first cousin or closer relative, limited guardian, supervisor of limited guardianship, public prosecutor, or the head of a local government.

(3) When a limited guardian fails to give consent to any act that requires his/her consent despite the possibility of infringing upon the interest of the limited ward, the Family court may, upon the application of the limited ward, grant permission that substitutes for the consent of the limited guardian.

(4) When a limited ward has done a juristic act that requires the consent of the limited guardian without the consent of the limited guardian, the limited guardian may cancel such juristic act: Provided, That the same shall not apply to any juristic act necessary for everyday life and the price for which is not excessive, such as the purchase of daily necessities.

[29] Supreme Court 2000Da73445, May 27, 2003.

[30] Supreme Court 78Da1816, December 13, 1978.

1.5.2. The significance of differentiating between testamentary gift by universal and specific titles

A testamentary donee by universal title has the same rights and duties as an inheritor (Article 1078), as a result of which negative assets also become subject to succession. In the case of testamentary gift by universal title, Article 999 on the claim for recovery of inheritance and exclusion period is applied mutatis mutandis. Although a testamentary donee by universal title obtains ownership of the property that comprises the gift (Article 187), in the case of a testamentary gift by specific title, the object of the testamentary gift is initially attributed to the inheritor, so that the testamentary donee merely enjoys the right to demand that the obligee of the testamentary gift perform his/her obligation[31].

1.5.3. Acceptance or renunciation of testamentary gift

A testamentary donee may effect an acceptance or a renunciation of the testamentary gift at any time after the death of the testator (Article 1074 paragraph 1). Such an acceptance or renunciation shall be effective retroactively from the time of the death of the testator (Article 1074 paragraph 2). Since a testamentary donee by universal title has the same rights and obligations as the inheritor, the acceptance and renunciation of inheritance (Articles 1019 et al.) is applied mutatis mutandis on the acceptance and renunciation of testamentary gift by universal title. This means that Article 1074 and its subsequent provisions on the acceptance and renunciation of testamentary gift applies only to testamentary gift by specific title[32].

Unlike the acceptance and renunciation of inheritance, the acceptance and renunciation of testamentary gift is not limited when it comes to their duration or form. The acceptance and renunciation of testamentary gift is generally made by a declaration of intention to the obligee of the testamentary gift. Although the obligee of the testamentary gift is the executor of the will, the declaration of intention may be made to the inheritor.

The declaration of the intention of acceptance or renunciation of a testamentary gift by specific title, unlike that of inheritance, is by nature not personal. Since it is a juristic act that is purely material in nature, it is considered by mainstream legal thinking that it can be the object of an obligee's right of subrogation or revocation[33]. However, the Supreme Court took the position that the renunciation of testamentary gift cannot be the object of an obligee's right of revocation[34]. The rationale behind such a decision was that since a renunciation of a testamentary gift has retroactive effect, an insolvent obligee with excessive liabilities may freely renounce the testamentary gift, as a result of which the renunciation would directly reduce the obligee's general assets. This does not necessarily lead to a deterioration of the obligee's position, which is exactly why the Supreme Court decided against recognizing the renunciation of testamentary gift as an object of an obligee's right of revocation.

2. Legal reserve of inheritance

2.1. Meaning of legal reserve of inheritance

The legal reserve of inheritance is the part of inheritance that the inheritee cannot dispose of freely and must leave to the inheritor. It is in essence the portion of inheritance that must be 'left out'. The purpose of the legal reserve of inheritance is to avoid disinheritance, i. e., protect those who have been excluded from inheritance.

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[31] Supreme Court 2000Da73445, May 27, 2003.

[32] *Shin Y.-H., Kim S.-H.* Lectures on Family Law… P. 459.

[33] Ibid.; 윤진수 편집대표/현소혜 집필부분, 『주해상속법 제1권』, 박영사, 2019, 745면 [*Yoon J.-S. (editor in chief) / Hyun S.-H.* Commentaries on Inheritance Law. Vol. 1. Seoul: Parkyoungsa, 2019. P. 745].

[34] Supreme Court 2018Da260855, January 17, 2019.

When the Civil Code was enacted in 1958 and entered into force in 1960, the institution of the legal reserve of inheritance was absent from the Code. The legislators of that time had established the absolute freedom of testation. But due to the then prevalent phenomenon of preference for sons, especially the eldest son, the assets of the inheritee were predominantly passed on by means of a will or testamentary gift to the male members of the family, which entailed social problems. Since the co-inheritors could contribute to forming the value of the inherited property, and there was a need to financially support surviving family members, the institution of the legal reserve of inheritance was adopted through an amendment that took place in 1977.

2.2. Persons with the right to legal reserve of inheritance and the portion of legal reserve

2.2.1. Persons with the right to the legal reserve of inheritance

Persons with the right to the legal reserve of inheritance who have the right to demand the return of legal reserve are inheritors. Under the Civil Code a spouse, lineal ascendants and descendants, siblings, collateral blood relatives within the fourth degree of the inheritee can become inheritors (Article 1000[35] and 1003[36]). Among the above, persons with the right to the legal reserve of inheritance are the spouse, lineal ascendants and descendants, and siblings of the inheritee.

It must be noted that the brothers and sisters of the inheritee do not always enjoy the right to legal reserve. Unlike common belief among the general public, the siblings of the inheritee have the right to the legal reserve of inheritance only when they have the status of an inheritor. This means, only when the inheritee has no spouse, no children and parents can the sibling become an inheritor. And it is in such situations that the sibling can exercise the right to the legal reserve of inheritance. Where the inheritee has a surviving spouse, children or parents, siblings have no right to statutory share whatsoever.

2.2.2. Portion of the legal reserve of inheritance

The portion of the legal reserve of inheritance for an inheritee's spouse and lineal descendants is $^1/_2$ of the inheritance stipulated by law, and for an inheritee's lineal ascendants and siblings — $^1/_3$ of the inheritance stipulated by law (Article 1112)[37]. The reason for limiting the portion of the legal reserve of inheritance to $^1/_2$ and $^1/_3$ respectively, is to protect the conflicting interests of the inheritee and inheritor. The inheritee in principle enjoys the freedom of testation. The inheritee has the freedom to freely dispose of his/

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[35] Article 1000 (Priority of Inheritance) (1) In inheritance, persons become inheritors in the following order:

1) Lineal descendants of the inheritee;

2) Lineal ascendants of the inheritee;

3) Brothers and sisters of the inheritee;

4) Collateral blood relatives within the fourth degree of the inheritee.

[36] Article 1003 (Order of Inheritance of Spouse) (1) If there exist such inheritors as provided in Article 1000 (1) 1 and 2, the spouse of the inheritee becomes a co-inheritor, in the same order as the said inheritor. If there exists no inheritor, the spouse becomes the sole inheritor.

[37] Article 1112 (Persons with Right to Statutory share in inheritance and Statutory share in inheritance) Statutory share in inheritance for an inheritor shall be calculated according to the following subparagraphs:

1) For lineal descendants of an inheritee, one half of the inheritance stipulated by law;

2) For the spouse of an inheritee, one half of the inheritance stipulated by law;

3) For lineal ascendants of an inheritee, one third of the inheritance stipulated by law;

4) For brothers and sisters of an inheritee, one third of the inheritance stipulated by law.

her property. The institution of the legal reserve of inheritance limits this freedom to afford protection to the inheritors' livelihood. As a result, the inheritee and inheritor each makes some degree of concession.

2.3. Exercising the right to demand the return of the legal reserve of inheritance

2.3.1. Declaration of intention by means of judicial proceedings or outside the court

It is generally accepted that exercising the right to demand the return of the legal reserve of inheritance can be done both by means of a declaration of intention through judicial proceedings and outside the court. Whether there was a declaration of intention demanding the return of the legal reserve of inheritance is determined by taking into consideration all relevant factors, including the general principles of interpreting juristic acts, the rationale and manner in which the declaration was made, the objective and genuine intention of the person making the declaration, the claims and attitude of the other party, as well as the basic notions of social justice and equity. In cases where the inheritor claims that the gift or testamentary gift is null and void, and demands the return of inheritance or statutory share in inheritance, it would not be possible to recognize the exercise of the right to demand the return of the legal reserve of inheritance. However, where the inheritor demands a part of the inherited property or the return of such property, without explicitly challenging the legal effect of the gift or testamentary gift, it seems rational in most instances to recognize the existence of the declaration of intention for the exercise of the right to demand the return of the legal reserve of inheritance, despite the lack of an explicit expression[38].

2.3.2. In lieu of an explicit declaration of intention

According to Article 1117 (Extinctive prescription), the right to demand return shall be extinguished by prescription, if it is not exercised within one year from the time when the person entitled to the legal reserve of inheritance becomes aware of the fact that the inheritance has commenced and that gifts or testamentary gifts, which are to be returned, were made. Since the period of extinctive prescription is extremely short, determining whether the right to demand the return of the legal reserve of inheritance has been exercised by means of judicial proceedings or otherwise becomes critical. In respect of this matter, the Supreme Court decided "it is sufficient to make a declaration of intention for exercising the right to demand return by specifying the gift or testamentary gift that was violated, without specifying the object itself"[39]. Through this decision the Supreme Court has provided a standard against which to determine whether the right to demand the return of the legal reserve of inheritance was exercised or not in the absence of an explicit declaration of intention to that effect.

Considering that the essence of the the legal reserve of inheritance is to restore the statutory share that was infringed upon as a result of the act of gift or testamentary gift by the inheritee, exercising the right to demand the return of the legal reserve of inheritance and denying the legal effect of a testamentary gift are incompatible. Therefore, demanding a part of the inherited property without challenging the legal effect of a testamentary gift can ipso facto be recognized as the exercise of the right to demand the return of the legal reserve of inheritance.

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[38] Supreme Court 2010Da50809, May 24, 2012.

[39] Supreme Court 2011Da55092, 55108, November 12, 2015.

2.4. The extinctive prescription of the right to demand the return of statutory share in inheritance

2.4.1. The starting point of computing the period of extinctive prescription

As already mentioned above, the period of extinctive prescription is very short, and so once inheritance commences, family members do not have much time to settle the matter of division of property. The starting point in time of the extinctive prescription period is "when the person entitled to a the legal reserve of inheritance becomes aware of the fact that the inheritance has commenced and that gifts or testamentary gifts, which are to be returned, were made". The time when the inheritor 'becomes aware' should be interpreted as the time when the inheritor became aware of the act of the gift or testamentary gift *and* of the fact that it is subject to return. This means that even where the person with the right to the legal reserve of inheritance files a lawsuit in the belief that the gift or testamentary gift is null and void, it cannot be undeniably established that such a person was also aware of the fact that the gift or testamentary gift is subject to return. However, given the legislative purpose of providing for a short extinctive prescription of one year in respect of the right to demand the return of the legal reserve of inheritance in the Civil Code, filing a lawsuit based on the belief that the gift or testamentary gift is null and void, should not always block the extinctive prescription from running. Where nearly all of the assets of the inheritee were given and the person with the right to demand the return of the legal reserve of inheritance was aware of this fact, unless there is clear and convincing evidence that such a person did not exercise the right based on the understanding that the gift or testamentary gift was null and void, and that there is de facto or de jure grounds for believing that the gift or testamentary gift was null and void, it would be appropriate to recognize that the person had ratified his/her awareness of the fact that the gift or testamentary gift is subject to return[40].

2.4.2. Lawsuits designed to avoid the extinctive prescription

Currently numerous lawsuits are being filed in an attempt to avoid altogether the extinctive prescription of the right to demand the return of the legal reserve of inheritance. The objective here is obvious. The litigant starts out by claiming that the will is null and void, and if the court dismisses the case, the litigant goes on to argue that only now is he/she aware of the infringement of the right to demand the return of the legal reserve of inheritance, based on which a new lawsuit is filed namely for the return of the legal reserve of inheritance. No doubt, it is necessary to be cautious in determining whether the extinctive prescription is complete or not, given that the period is only one year, and that this could severely limit the legal remedies available to the person with the right to the legal reserve of inheritance. However, one must not forget about the policy concerns underlying the short extinctive prescription that call for the prevention of lawsuits designed to avoid the extinctive prescription. The aforementioned decision of the Supreme Court could be said to be a reflection of such a wary approach.

2.5. The calculation of the legal reserve of inheritance

2.5.1. Method of calculation

The step to be taken in determining the scope of infringement of the legal reserve of inheritance is the calculation of the amount of the legal reserve of inheritance. This is

[40] Supreme Court 2000Da66430, September 14, 2001.

computed by multiplying the ratio of the legal reserve of inheritance[41] to the assets subject to inheritance. The legal reserve of inheritance shall be calculated as the sum of the values of the inherited properties and the 'given properties' at the commencement of inheritance minus the total amount of debts of the inheritee (Article 1113).

2.5.2. Meaning of 'given property'

The term 'given property' for the purposes of Article 1113 is property that had already been transferred to the donee as a result of the performance of the contract of gift prior to the commencement of inheritance. Property that was in the possession of the inheritor upon his/her death is ipso facto property owned by the inheritor at the commencement of inheritance. Therefore, whether the donee is a co-inheritor or a third party, 'given property' constitutes property that forms the basis of calculating the legal reserve of inheritance.

2.5.3. Scope of 'given property'

Only gifts that have been given within the period of one year preceding the commencement date of the inheritance are included for the assessment of the legal reserve of inheritance (Article 1114 sentence 1). This means that any gifts made before this period are not considered. Including all gifts that were made a long time ago would inevitably harm the interests of the donee and thus the safety of transactions. However, an exception applies to the property given before the period of one year preceding, if both parties concerned recognize that the act would cause loss to a person with the right of the legal reserve of inheritance (Article 1114 sentence 2).

2.5.4. Co-inheritors and the legal reserve of inheritance

In general, the right to demand the return of the legal reserve of inheritance is exercised against other co-inheritors. In such a case, the question arises as to whether Article 1114 that limits the scope of 'given property' should apply. On this matter, the Supreme Court took the position that where there is a co-inheritor who is a special beneficiary[42], Article 1114 would not apply, and so, regardless of whether the gift was given earlier than one year before the commencement of the inheritance or whether both parties of the contract of gift were aware that the act would cause loss to a person with the right of the legal reserve of inheritance, 'given property' constitutes property that is included in calculating the amount of the legal reserve of inheritance[43]. Since Article 1008[44] is applied mutatis mutandis to the legal reserve of inheritance (Article 1118)[45], it is necessary to bring about an equitable result among the co-inheritors by including all gifts given by the inheritee to the special beneficiary[46].

Despite this, including all gifts that were made a long time before the commencement of inheritance, thereby creating unnecessary conflict among family members and

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[41] The ratio of the legal reserve of inheritance for spouses and children is 1/2.

[42] The term 'special benefit (특별수익)' in the context of Korean inheritance law is the total property including gift, testamentary gift and statutory share in inheritance that inheritor receives from the inheritee. It is treated as a prepayment of inheritance share.

[43] Supreme Court 95Da17885, February 9, 1996.

[44] Article 1008 (Shares of Inheritance for Special Beneficiary) If any one of the co-inheritors has previously received a gift or testamentary gift of property from the inheritee, and such property received is of less value than his share of the inheritance, he shall be entitled to a share of the inheritance within the limit of the difference between the said gifts and his legal share of the inheritance.

[45] The provisions of Articles 1001, 1008, and 1010 shall apply mutatis mutandis to statutory share in inheritance.

[46] Supreme Court 93Da11715, June 30, 1995.

severely limiting the freedom of testation of the inheritee, is far from desirable. Moreover, Article 1114 does not stipulate an exception for co-inheritors. The true purpose of Article 1008 is that co-inheritors who are special beneficiaries should receive less property (in the amount of the special benefit), and not that all past gifts should be returned for the sake of the legal reserve of inheritance. Given that the court will always consider whether the parties were aware that the gift would cause loss to a person with the right of the legal reserve of inheritance, there would be no additional negative consequences even if we were to apply Article 1114 to co-inheritors[47]. Considering all of the above, it would be worthwhile for the Supreme Court to heed to the voices of criticism and decide otherwise.

2.5.5. Point in time for calculating the amount of 'given property'

The amount of 'given property' that forms the basis for assessing the amount of the legal reserve of inheritance should be calculated at the moment of commencement of inheritance. If the given property is cash, then it should be converted into the monetary value of the amount at the moment inheritance commenced, in which case it would be appropriate to adjust for inflation during the period between when the gift was made and inheritance commenced[48].

2.6. Recovery of the legal reserve of inheritance

2.6.1. The principle of recovering the original object

The Civil Code does not have a special provision for the method of recovering the legal reserve of inheritance. However, based on Article 1115 paragraph 1[49], it is generally accepted that the person obliged to return must return the original object that was given as a gift or testamentary gift. Hence, Korean law in effect recognizes the 'principle of recovering the original object'. Where recovery of the original object is impossible or both parties desire the recovery of the value of the object, then the value may be returned[50].

2.6.2. Standard for calculating the amount upon recovery

In calculating the amount of the legal reserve of inheritance, the value of the property that was given to the person obliged to return is to be calculated based on its value at the moment of commencement of inheritance. After having fixed the value of the property that is subject to return, where the recovery of the original object is impossible and the court orders for the recovery of the value of the property, the value is to be assessed as the value of the property on the day of the closing of oral hearings of the fact-finding proceedings[51].

2.6.3. Transfer of the object to a third party

Where the person obliged to return the property transfers it to a third party, the recovery of the original object becomes impossible, and in such a situation the person with the right to the legal reserve of inheritance will in principle need to demand the value of the

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[47] The same approach can be found in 윤진수, 『친족상속법강의』 제2판, 박영사, 2018, 565–566면 [*Yoon J.-S.* Lectures on the Law on Relatives and the Law of Inheritance (2nd ed.). Seoul: Parkyongsa, 2018. P. 565–566].

[48] Supreme Court 2006Da28126, July 23, 2009.

[49] Article 1115 (Recovery of Statutory share in inheritance) (1) When there are shortages in the statutory share in inheritance due to gifts or testamentary gifts made by the inheritee pursuant to the provisions of Article 1114, persons with the right to statutory share in inheritance may recover the shortage.

[50] Supreme Court 2004Da51887, June 23, 2005.

[51] Supreme Court 2004Da51887, June 23, 2005.

property. However, case law has developed in such a manner as to allow for the recovery of the original object where the assignee acted in bad faith. In other words, where property was transferred to a third party that should have been recovered as a result of the exercise of the right to the legal reserve of inheritance, and the third part was aware at the moment of assignment that the act would cause loss to a person with the right of the legal reserve of inheritance, then the recovery of the object itself becomes possible.

Conclusion

The current paper has offered an overview of inheritance law in Korea regarding wills and the legal reserve of inheritance. Since legal institutions in the realm of inheritance law are mainly localized and reflect the social and economic traditions of each country, the provisions of the Civil Code on wills and the legal reserve of inheritance seem to show that the Korean society is quite family oriented. Although this was the case when the Civil Code entered into force in 1960 and when the institution of the legal reserve of inheritance was adopted in 1977, since then, rapid modernization and industrialization have completely changed the Korean landscape, resulting in the dilution of the concept of family and the modification of values related to family ties. Therefore, the rather limited freedom of testation and the relatively strong protection of the right to the legal reserve of inheritance are increasingly losing touch with the modern Korean mode of life. This is why there is an increasingly convincing call for amending the Civil Code in order to modernize inheritance law. This is in and of itself an important topic[52], albeit one that requires a whole separate study. Therefore, this paper will limit itself to the introduction of Korean inheritance law to those outside Korea. However, it should be noted that with the continuation of historically low levels of the birth rate[53] in Korea and the resulting decrease of the total Korean population, efforts to amend Part V Inheritance of the Civil Code must be made in earnest to address the new realities and challenges facing Korea in the 21st century. When such legislation is passed, it will inevitably lead to the expanding of the freedom of testation and the reduction of the level of protection of the legal reserve of inheritance.

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[52] For a detailed analysis on the matter, see 정구태, "'상속법 개정을 위한 전문가 설문조사'를 통해 살펴본 유류분제도의 개선방안", 『법학논총』 제26권 제3호, 조선대학교 법학연구원, 2019, 271–319면 [*Chung K.-T.* A Study on the Revision of Provisions on Forced Share through the Expert Survey for Revision of Inheritance Act // Chosun Law Journal. 2019. Vol. 26, no. 3. P. 271–319].

[53] As of the first quarter (January — March) of 2022, Korea's total fertility rate was a meager 0.86, which is officially the lowest figure in the country's history.

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Received: May 20, 2022
Accepted: August 5, 2022

Завещание и обязательная доля в наследстве в корейском праве

С. Ким

Для цитирования: *Kim S.* Will and the legal reserve of inheritance in Korean law // Правоведение. 2022. Т. 66, № 3. С. 301–314. https://doi.org/10.21638/spbu25.2022.305

Наследственное право, равно как и семейное право, более всего отражает особенности традиций и ценностной основы того общества, в котором функционирует данная правовая система. Отношения, возникающие при наследовании в Республике Корея, регулирует часть V Гражданского кодекса. В ней имеются три раздела, в первом из которых есть общие положения, применимые при отсутствии завещания. Во втором разделе расположены правовые нормы о завещании, а в третьем — нормы об обязательной доле в наследстве. С точки зрения сравнительного правоведения обязательная доля вовсе не является уникальным правовым институтом Республики Корея. Наоборот, в большинстве стран существуют в том или ином виде меры защиты для получения определенной законом доли в наследстве. Отличительной чертой корейского наследственного права является то, что оно по сравнению с другими правопорядками в большей степени защищает право на обязательную долю, в результате чего свобода завещания им ощутимо ограничивается. Нормы о праве на обязательную долю были введены в корейский Гражданский кодекс в 1977 г., когда законодатель вносил в него изменения, то есть спустя 17 лет после вступления этого Кодекса в силу в 1960 г. Упомянутые изменения стали результатом попытки отражения в законе традиционных ценностей корейского общества того времени, для которого были чрезвычайно важны крепкие связи между членами семьи и родственниками. Цель настоящей статьи — демонстрация соотношения институтов завещания и обязательной доли в наследстве в корейском праве, выявление их мировоззренческой основы. Анализ наследования по воле наследодателя (по завещанию) и независимо от его воли (путем обязательной доли в наследстве) дает общее представление о некоторых специфических характеристиках корейского наследственного права, которые в свою очередь обусловлены социальными процессами, происходящими в корейском обществе.

Ключевые слова: наследование, завещание, свобода завещания, право на обязательную долю в наследстве, Гражданский кодекс Республики Корея.

Статья поступила в редакцию 20 мая 2022 г.
Рекомендована к печати 5 августа 2022 г.

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