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# НАПРЯМКИ ОНОВЛЕННЯ СПАДКОВОГО ЗАКОНОДАВСТВА УКРАЇНИ

**Анотація.** *Стаття присвячена проблемам оновлення спадкового законодавства. Метою роботи є обґрунтування перших кроків на шляху створення наукової концепції реформування спадкового права. Необхідність вдосконалення спадкового законодавства зумовлена низкою обставин: новими напрацюваннями доктрини спадкового права; правозастосовною практикою і проблемами, які виникають у судах при розгляді спадкових спорів; потребою адаптації вітчизняного законодавства до законодавства країн ЄС; врахуванням прагнень України до європейської спільноти. Домінуючими методами дослідження є компаративістський метод і метод моделювання, використання яких дозволило здійснити порівняльно-правовий аналіз спадкового законодавства зарубіжних країн і України та з'ясувати тенденції розвитку спадкового права, осмислити методи подолання проблем, які виникають. Виявлені особливості заповідальної дієздатності неповнолітніх. Висловлена думка, що правове регулювання відносин за участі постмортальних дітей та дітей, народжених за допомогою репродуктивних технологій, може вийти за межі спадкових. З урахуванням історичного досвіду визначено місце спадкового права в системі цивільного права. Обґрунтовано висновок про необхідність розширення свободи заповіту шляхом впровадження спрощених його форм: легалізації простої письмової форми заповіту, а за надзвичайних обставин – допустимість оголошення заповідального розпорядження в усній формі. З'ясовано правову природу секретного заповіту; змодельована норма заповіту з умовою. Запропоновано додаткові способи захисту прав заповідача, серед яких і звернення з позовом до суду про усунення від спадкування особи, яка має право на обов'язкову частку спадщини. Аргументовано положення, що підстави зменшення розміру обов'язкової частки спадкоємця необхідно конкретизувати в законі. Прийняття пропозицій, спрямованих на вдосконалення законодавства, сприятиме здійсненню та захисту спадкових прав. Загальний підсумок дослідження полягає у необхідності рекодифікації спадкового законодавства України з урахування позитивного досвіду країн континентальної Європи.*

**Ключові слова:** система цивільного права, заповідальна дієздатність, форма заповіту, свобода заповіту, секретний заповіт, заповіт з умовою.

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# DIRECTIONS OF UPDATING THE INHERITANCE LEGISLATION OF UKRAINE

**Abstract.** *The paper investigates the issues of updating the inheritance legislation. The purpose of this paper is to substantiate the first steps towards the creation of a scientific concept for the reform of inheritance law. The need to improve inheritance legislation is conditioned by a number of circumstances: new developments in the doctrine of inheritance law; law enforcement practices and problems that arise in courts upon considering hereditary disputes; the need to adapt domestic legislation to that of EU countries; consideration of Ukraine's aspirations for the European community. The dominant research methods are the comparative method and the modeling method, the use of which allowed to carry out comparative law analysis of the hereditary legislation of foreign countries and Ukraine and to identify the tendencies of development of the inheritance law, to understand the methods of overcoming the arising issues. Features of testamentary capacity of minors are revealed. An opinion was expressed that the legal regulation of relations involving post-mortem children and children born with the help of reproductive technologies may go beyond hereditary. Given the historical experience, the place of inheritance law in the civil law system was determined. The conclusion on the necessity of extending the freedom of testation by introducing simplified forms of it is justified: legalization of a simple written form of thetestament, and in extraordinary circumstances – the admissibility of announcement of the testamentary disposition in oral form. The legal nature of the secret covenant was identified; the norm of the testament with condition was modelled. Supplementary ways of protecting the rights of the testator are proposed, including appeal to the court for the removal of a person entitled to a compulsory share of inheritance from succession. The provision that the grounds for reducing the size of the obligatory share of the heir should be specified in the law is substantiated. Adoption of proposals aimed at improving legislation will facilitate the implementation and protection of inheritance rights. The overall result of the study lies in the need to recodify the inheritance legislation of Ukraine with consideration of the positive experience of continental Europe.*

**Keywords:** civil law system, testamentary capacity, form of testament, freedom of testation, secret testament, testament with condition.

## INTRODUCTION

Inheritance law has a special place in the civil law system. The ability to determine the fate of property acquired during a person's life is one of the most important guarantees for the stability of property relations in any society. Analysing the earlier codification experience,

it should be emphasized that the systematic improvement of legislation, including civil, was conducted based on wide discussions, which were the subject of both general directions of codification and discussion of the content of individual civil law institutions [1; 2]. Inheritance law is one of the most popular practices of the branches of civil law and is the most conservative. The reform of domestic civil legislation in 2003[1] took its toll on almost all institutions of inheritance law (inheritance by testament, inheritance by law, acceptance of inheritance, etc.); however, the revision of the economic foundations of the state, close cooperation with the European Union and Ukraine's aspiration to become a member of the EU, as well as the study of the civil legislation of the continental European countries, necessitate the reform of certain institutions of the inherintance legislation of Ukraine.

Among the general reasons that necessitate the recodification of inheritance legislation in Ukraine are the socio-economic transformations in society, the emergence of new property rights and, accordingly, the objects of hereditary succession [3], the unjustified static nature of certain conventional legislative provisions. In the modern era, the rules of inheritance law lose their dogmatic content, must become mobile, respond to economic changes in the state and in society at large. A number of problems that arise both in theory and in practice require solving, namely: determinatino of the circle of heirs by law and by testament; establishment of the composition of hereditary property; the procedure for exercising inheritance rights, their protection and security; recognition of the testament as invalid or partially invalid because the testator has deprived the heir of a compulsory share of the inheritance; division of hereditary property; inheritance of property undergoing privatization; recognition of ownership of part of the property which the testator has left as theirs; establishment of legal facts (being in family relations with the testator, residing with them as one family, being supported by testator, permanence of residence with the testator); the recognition of the inheritance certificate as invalid and the extension of the inheritance period; invalidation of mutually exclusive testaments; execution and termination of the hereditary agreement, etc.

Legislation modernization should consider the following: the development of the doctrine of inheritance law in recent years; law enforcement practices and problems that arise in courts when considering hereditary disputes; the pursuit of the implementation in the national private law system of European standards enshrined in the civil codes of continental Europe; the need for further development of private law principles of civil law regulation. At the same time, it should be borne in mind that national legislation at the conceptual level reflects the national mentality, legal awareness, legal understanding, etc. and the adaptation of national legislation to EU legislation is notably resisted [4]. The recodification results should reflect new tendencies that exist in regulation of hereditary relations. Despite attempts to develop a new concept of inheritance law, some of its provisions are ambiguous and remain quite vulnerable (category of subjects of inheritance law, grounds for removal from inheritance, inheritance priorities, heritage objects, form of will and its types, right to an obligatory share of inheritance, will of spouses, secret will, testament with condition, institution of inheritance agreement, etc.). This creates certain obstacles for the choice of ways of translating the concept into practice and is the subject

[1] The Civil Code of Ukraine. (2003, January). Retrieved from http://zakon0.rada.gov.ua/laws/show/435-15.

of lively scientific discussions, in the process of which sometimes different opinions are expressed. The purpose of the paper is to investigate individual institutions of inheritance law and to provide proposals aimed at updating inheritance legislation.

## 1. MATERIALS AND METHODS

To analyze the prospects of further development of the inheritance legislation, the latest developments of the national doctrine of inheritance law were studied, the hereditary legislation of Ukraine and of the countries of the European Union was investigated, the main tendencies of its development were observed, the judicial practice related to the exercise and protection of inheritance rights was investigated, which allows to identify practical issues. The steps taken by Ukraine towards adapting domestic civil legislation to the civil legislation of the EU countries were considered. The structure of scientific research in the field of inheritance law contains the conventional elements: formulation of the problem, proposing baselines and their theoretical development, collection and analysis of empirical data, substantiation of the conclusion, formulation of issues that need to be resolved in the future [5]. Currently, the main tasks in the study of hereditary relations are as follows: to find out the concept and place of hereditary law in the system of Ukrainian law; identification of attributes and features of social relations that arise in inheritance, as well as structural elements of hereditary relations; determination of the optimal ratio of public and private regulatory frameworks in the field of inheritance; investigation of the subjective composition of hereditary legal relations, the grounds for their occurrence, dynamics, and termination; the study of the object of hereditary succession, anomalous types of inheritance, the procedure and conditions of exercise and protection of hereditary rights. Such sequence of research facilitates a comprehensive analysis of the legal categories and phenomena, allowing to achieve the purpose of the study.

Inheritance law is the most conservative branch of civil law, since it is based on the national traditions of the country, a special mentality of society that has been formed for centuries, which necessitates the study of the history of the development of individual institutions of inheritance law and the specifics of methodological approach and methods of researching problems. World experience testifies to the objective nature of the unity of the optimum balance of private and public interests, which is why the main institutions of inheritance law were considered in this aspect. At the same time, the legal regulation of hereditary relations is carried out not only from the standpoint of the interests of the subjects of these legal relations, but also from the standpoint of how these legal relations affect the interests of the subjects of the adjacent legal relations.

Scientific knowledge of legal phenomena should be based on the principles of scientific objectivity, unity of theory and practice, which excludes the bias of the conclusions and results of the study, their dependence on ideology or politics, temporal situationality, and other subjective factors. Since the science of inheritance law does not have its own methods, the methods of formal logic are used in the study. One of the dominant methodological approaches is the comparative law approach, which formed the basis for determining the content of such legal categories as "testament", "private testament", "secret testament", "testament with condition" and allowed to identify their specific features and differences. The normative-dogmatic method is applied for the analysis of the content of the provisions of the current domestic inheritance legislation, and

the system-structural analysis method – for determining the place of the inheritance law in the civil law system. The deep historical roots of inheritance led to the use of the historical method for revealing the evolutionary patterns of the development of legal relations in the field of inheritance, in particular, upon the analysis of the norms of historical monuments of Ukrainian law and the creation of a general theoretical base of problematics and scientific approaches to their study. The comparative method allowed to carry out a comparative-analytical review of the rules of the Civil Code of Ukraine (hereinafter referred to as the CC) governing hereditary relations, and the rules of the civil legislation of the countries of the continental system of law (Germany, France, Switzerland) and of individual post-Soviet countries (Georgia), to identify existing conflicts and identify the most optimal ways of attracting foreign experience to improve the legal regulation of public relations in the said branch.

The method of legal forecasting allowed to identify possible directions for the harmonization of national inheritance legislation with that of the European Union. Modelling method allowed to design the future structure of the object in the development of proposals and recommendations aimed at improving the civil legislation and practice of its application in the field of hereditary succession.

## 2. RESULTS AND DISCUSSION

### *2.1 The place of inheritance law in the civil law system*

The system of law must act as a consequence of legal realities, reflecting the logical unity of the elements that make up its constitution, their hierarchy and interconnection. The system of law that is built on the subject of legal regulation, fulfils its purpose and acts as a source of knowledge of the law itself. The civil law system aims at knowing the rules of the law and serving the needs of practice, it is based on the uniformity of the content of legal rules, their unity and coherence, as well as on the objective division of legal rules into sub-sectors and institutions, depending on the purpose and objectives. The purpose of legal provisions is to consolidate and preserve the relations that arise in society. Inheritance law, including property law, mediates the dynamics of property relations and primarily includes the elements of property law. The phenomenon of inheritance lies in its dual nature. Inheritance is an independent property right that takes its place along with property, obligations, and other property rights. On the other hand, the inheritance right serves to acquire each of these rights [6].

The analysis of the sources of the formation of civil legislation in the territory of modern Ukraine allows to conclude that there are systems of civil law that are different from the modern ones. Thus, in the Civil Code of Galicia of 1797, built on the institutional principle, the second part covered legal relations in the field of real rights. This part included rules regarding things and their legal classification, ownership, property rights, liens, easements, and the right to use other people's things. The final sections of this part were the sections on inheritance law (the last will and succession agreements, the legates and commissures, the inheritance, and mandatory shares) [7].

Against this background, in the early 1960s, some domestic scholars attempted to structure civil law somewhat differently from what was envisaged by the legislation in force at the time. Thus, on the eve of the second codification of civil legislation, S.N.

Landkoff suggested that the institution of inheritance of personal property of citizens should be placed directly after the section "The right of personal private property" [8]. Other researchers have supported this idea [9]. A similar scientific position is shared among researchers of the V.M. Koretskyi Institute of State and Law of the National Academy of Sciences of Ukraine who, in the textbook "Civil Law of Ukraine", placed section IV "Inheritance law" immediately after section III "Real rights and ownership" [10]. The composition of the inheritance, its core, above all, underlie the real rights of the testator. At the same time, inheritance law is not, by its nature, an independent branch of law. It acts as a kind of intermediary, a necessary prerequisite and legal basis for the acquisition of absolute ownership by the heirs. Property relations and hereditary relations are one and indivisible. In the Civil Code of Ukraine, it is more natural to place the book "Inheritance Law" after the book "Ownership".

The structure of the book "Inheritance Law" also needs changes. It is controversial to place the institution of the inheritance agreement here since the legislator defines only inheritance by testament and inheritance by law as the types of inheritance. The chapter "Inheritance Agreement" uses the terms "acquirer" and "alienator", that is, the terminology of agreements for the transfer of property into ownership. The content of the inheritance agreement provides for the acquisition of certain rights and obligations during the life of the alienator, which is contrary to the legal nature of inheritance, since the acquisition and exercise of inheritance rights is possible only under the indispensable condition – the death of the antecessor. Legal regulation of the relations between the owner of the property and their successor on a binding basis, the occurrence of negative consequences for counterparties in case of non-performance of obligations, goes beyond inheritance relations, which eliminates the possibility of considering the institution of inheritance agreement as an institution of inheritance law. The subject of the inheritance agreement, "alienator's property", does not correspond to the concept of "composition of inheritance". Since the inheritance agreement is not about the inheritance, but about the property of the counterparty under the agreement, in view of statutory regulation, it is advisable to place this agreement structurally after the life care contract in Section III of the CC of Ukraine "Certain types of obligations".

*2.2 Testamentary capacity and freedom of testation*

A key component of inheritance law is a testament, which is a legal instrument by which a person can determine the fate of their property in the event of death. Full legal capacity under Ukrainian law is granted to a person from the age of 18. Age, as an objective stage in the process of physical and psychological development of a person, exists as an absolute quantitative category, with which is connected the possibility of conscious acquisition of civil rights and performance of obligations. In determining the scope of the capacity, the legislator considers the intellectual and mental abilities of the person. Inheritance capacity is one of the constituent elements of civil capacity. The granting of a legal capacity to a minor in the presence of the grounds established in the legislation is conditioned by the need to exercise and protect its civil rights. The concepts of "disposal of property" and "disposal of property in case of death", despite some similarity, do not coincide in content. Regulation, as one of the constituent elements of the content of property rights, provides the opportunity to determine the legal or factual fate of things. The disposition "in case of

death" is not a disposition in itself, because it does not oblige the owner and does not prevent them from using whatever property owed to them, despite the existence of a testament.

*Testamentary capacity* is special and constitutes a legally defined opportunity for an individual to express their will to dispose of property owned by them in case of death. The testamentary capacity of a person does not create rights, therefore, with consideration of the specifics of their legal nature, it must be related solely to the age of majority. Testament is a special transaction and its conclusion requires a certain social maturity. D.I. Meyer, who first began to systematically teach the course of civil law in Russia, commenting on the legislation in force at the time, noted that the testator must be in a "normal state of intellectual power", so the minor cannot be ready to make a testament [11]. A similar position was defended in due time by O.V. Kunitsyn, who emphasized that a law that defers the right to testify to legal maturity may appear unfair in some exceptional cases, but that exclusivity only requires an exception to the general rule, not the destruction of the latter, which contains reasonable prohibitions on making a testament in age, in which the law recognizes a minor as incapable of independent disposal of their property [12-13].

The minor has not yet acquired the life experience and maturity that would allow them to determine the fate of their property in the event of death. It is no coincidence that there is no known notarial practice of making testaments by minors. Precisely this position is reflected in the legislation of individual countries. Thus, Art. 1345 of the Civil Code of the Republic of Georgia stipulates that the testator can be an adult, capable person who at the time of making the testament could reasonably judge their actions and clearly express their will[1]. Of course, a single universal formula cannot solve all the circumstances of life that may arise in different cases, and here, in our view, the opinion of Z.V. Romovska makes sense, who believes that in an exceptional situation where, for example, a minor does not have heirs by law, it is possible to go to court with a claim for granting the right to a testament [14]. When recoding Ukraine's legislation, it is necessary to avoid the "inferiority complex", as some national institutions are also entitled to exist, including those concerning the testamentary capacity of minors. As for the right of testation of persons with disabilities, the following should be noted. The opinion according to which the exercise of such a right is possible subject to the consent of the curator [15] requires additional argumentation. The specifics of the testament as a transaction is that it is so closely connected with the personality of the testator that its drawing up with the involvement of a representative or a curator is excluded, as is the agreement of conditions of the testament with the testator's curator. This would violate the testator's right to secrecy and would contravene such principle of inheritance law as the freedom of testation.

The advances in modern medicine, the ability to use reproductive technologies at birth, necessitate the resolution of problems concerning the establishment of the legal origin of a child born long after the death of the antecessor by in vitro fertilization. The current legislation of Ukraine does not envisage such cases, since the presumption of paternity is valid only for ten months after the death of the husband, so the fact that there are family ties between such a child and its father must be established in court. Contemporary researchers have reasoned fears that reproductive technologies, going

[1] Civil Code of Georgia. Retrieved from https://matsne.gov.ge/ru/document/view/31702?publication=105.

beyond the strict canons of civilization, can give rise to several issues, including the determination of the circle of heirs under a testament. Proposals to grant special status to so-called *post-mortem* children and children born with the help of reproductive technologies should be treated especially carefully, since the legal regulation of such relations may go beyond hereditary, as the acquisition of property rights by such persons will not be directly related to the day of inheritance release. Perhaps this issue can be partly solved by legalizing specially created *inheritance trust funds*, which would be used to manage the assets of a person after their death. With the help of such a fund, the testator could provide financial assistance to a certain number of people after his or hers death or do charity, but such relations should no longer be considered hereditary. A relevant example here is the creation of the Alfred Nobel Foundation, from which the Nobel Prizes are paid annually, as well as the fund of the German math enthusiast Wolfskel, created to reward the person who will prove the Fermat theorem [16].

Insufficiency of legal regulation, a certain ambiguity of the legal regime of hereditary property and the need to protect it from the moment of inheritance release to its transition to heirs necessitate creation of a special section in the CC of Ukraine, the rules of which would regulate the specific features of *inheritance of certain objects of hereditary property* (enterprises, land plots, intellectual property objects, etc.), which are currently "scattered" across separate laws and sub-legislative regulations. It is advisable to discuss the *empowerment* of the heir *to sell* the heritage, which has not yet been registered in accordance with the established procedure, at the doctrinal level. Legal regulation of such relations could be carried out according to a kind of assignment of the right of claim.

Freedom of testation envisages the right of the person to draw up a testament for all property or for a certain part of it at any time, to change, cancel, or not to draw up a testament at all, and to appoint any person as heir. However, the principle of freedom of testation is limited by the right of individuals to have a compulsory inheritance. The law stipulates that the size of the compulsory share in the inheritance may be reduced by the court, with consideration of the relationship between the heirs and the testator, including other significant circumstances. The circumstances that may form the basis for reducing the size of the mandatory share must be specified in the law. This could be, for example, deliberately false testimony in court against the testator; false accusation of testator committing a crime; failure to report that an attempt on the life of the testator is being prepared; failure to provide assistance in the case of a real threat to testator's life, etc. Restriction of freedom of testation should not restrict the right of a person to dispose of their property, but act as an objective necessity to protect the interests of the closest incapacitated relatives and incapable spouses whom the testator is legally obliged to support. The testator must be able to defend their subjective right to dispose of property until death. It is proposed to give the testator, as the most interested person, *the right* to request, through a court procedure, the reduction of the size of a mandatory share of a certain heir *while alive*, and in the circumstances stipulated by law, to demand the removal of the heir from succession.

*2.3 Form of testamentary disposition*

The next step in the reform of the hereditary legislation should be the legalization of simple written testaments (the so-called, *home-made testaments*) and oral testamentary

dispositions made in extraordinary circumstances. In accordance with the current civil legislation, the testament must be certified by a notary or other officials to whom such a right is granted. The imperative nature of the testament is conditioned by the need to secure the testator's right to the last will and to exclude the possibility of challenging this transaction in court by interested persons.

*The home-made* testaments are made by the testator on their own, and if the text is typed or made by another person on behalf of the testator, each sheet of testament shall be signed separately, stating the date. The legislation of Italy, France, and Spain permit the drafting of such testaments [17]. The *olographic will* has several practical advantages. The last will of the individual is expressed in the simplest, most formal, cheapest legally permissible way. The simplified form of the testament will allow citizens to actually exercise their right to make it, since the considerable material costs associated with its notarization are one of the obstacles to the spread of this institution. And it is no coincidence that, for example, in Hungary, a member state of the European Union, the share of such testaments is about 30% [18]. Of course, the legalization of "home-made" testaments also entails certain dangers related to both the unawareness of citizens on the requirements for the contents of the will and the conditions of its storage, and just fraudulent forgeries of the testament. The former of the named threats can be avoided by developing a sample "home-made" testament with all the necessary details and placing it on the website of the Ministry of Justice of Ukraine. As for other issues, according to foreign researchers, examinations using modern technologies in most cases can confirm whether the testator actually wrote the testament [19].

Legislation of several European countries supports the possibility of making an oral will. The oral form of the testament is admitted as an exception in the circumstances when, for objective reasons, the testator is unable to notarize their will. For example, the preparation of an oral testation in extraordinary circumstances in the presence of two witnesses is allowed by the laws of Austria, Israel, Norway, Hungary, Croatia, Switzerland, Sweden [18]. The validity period of such a testament differs. Thus, according to the laws of Austria, Denmark, Norway, Hungary, Sweden, if the special circumstances when the will was announced verbally disappeared, it will expire within three months provided that the testator stays alive [20; 21]. The legislation of Switzerland establishes the validity of such a will within 14 days from the moment when the testator has the opportunity to complete all the usual formalities[1].

It makes sense to use both the experience of foreign countries and historical domestic experience (the Civil Code of Galicia) and to enshrine in the legislation both a simple written form of a testament and the possibility to declare the last will in oral form in extraordinary circumstances. In case of extraordinary, exceptional circumstances, when the citizen is in such a state that threatens their life and is deprived of the opportunity to make and certify the testament in accordance with the established requirements, such person should be empowered to express their last will orally in the presence of two witnesses. The legal consequences of such a testamentary disposition will depend on the fate of the testator himself. If the person is still alive, such a disposition shall be forfeited

[1] Civil Code of Switzerland. (2017, September). Retrieved from https://www.admin.ch/opc/en/classified-compilation/19070042/201709010000/210.pdf

if, within seven days, circumstances, which prevented its drafting and certification in accordance with the established procedure, have ceased. The three-month statutory period of validity of such a disposition appears unjustified, in our opinion. If the testator dies as a result of extraordinary circumstances, the testament made by them can serve as the basis of inheritance, provided that the court, at the request of the person concerned, recognizes the fact of creating such a testament. The court must establish the existence of extraordinary circumstances, the inability of the testator to properly certify the testament, the presence of impartial witnesses who can certify the free expression of the testator's will and the contents of his or hers disposition.

The benefit of the relevance of the simplified form of the testament is also evidenced by the experience of those countries whose courts have validated the oral wills concluded with the use of modern electronic equipment. The judgment of the Supreme Court of New South Wales (Australia) is noteworthy. The testator decided to make changes to the testament, but for reasons of ill health he was unable to contact the lawyer's office and therefore recorded his will on video in the presence of his wife and witnesses. The video was accompanied by a transcription in Chinese and an English translation by a translator certified in accordance with the established procedure. The court ruled that the deceased person made the video voluntarily and knowingly, the statement made by him was well thought out, calm, clear, and the intentions were not in doubt and supported by external evidence of the circumstances and the absence of objections in any other persons. Although the video does not meet the requirements of the formality of the testament, it falls within the legal definition of the term "document" and can therefore be recognized as an informal testament [22].

*2.4 Secret (closed) testament*

A secret testament is a testament that is notarized without reading its contents. The specific feature of such a testament lies in the procedure of its certification and disclosure. The legislation does not prohibit the preparation of a common secret testament of spouses. Thus, in a Supreme Court ruling dated April 12, 2018, it was stated that "the content of the principle of the permissive orientation of civil law regulation derives from the general principle of private law: "everything which is not explicitly forbidden by law is allowed" [23]. However, the procedure for concluding a *secret testament* does not meet the legal requirements for its notarial form, since the notary certifies not the fact of entering into a transaction, but the fact of the person storing the envelope, which allegedly contains their written disposition in case of death. Preservation of "secret testaments" in the legislation necessitates the legalization of so-called *"home-made" testaments* as well, since it is essentially a matter of making a testament in a simple written form and transferring it to a notary. There are no known cases of domestic judicial practice, where an interested person would apply to a notary to disclose the secret of the testament, therefore it is not necessary to overestimate the importance of "secret testaments". Witnesses present at the transfer of a “secret testament” to the notary certify only the fact that the testator truly transferred a closed envelope to the notary on a certain date, which possibly contained a testament.

Testament is a transaction that requires a binding notarial form under threat of invalidity. The notary must ascertain whether:

–the person truly wants to draw up a disposition in case of their death, rather than, for example, concluding a life care agreement or a deed of gift;

–this personal disposition can be considered a testament and not, for example, an assignment agreement;

– persons who are heirs and property that they must inherit are unambiguously identified;

– the rights of the compulsory heirs, which are entitled to a compulsory share of inheritance, regardless of the will of the testator, are limited;

– the testamentary disposition does not contain such conditions for the acceptance of an inheritance, which in essence are unlawful or immoral;

–the terms of the will are feasible;

– the testator signed the testament at all.

Notary's signature on the envelope does not constitute a certification of the transaction. The notary has no idea in which language the testator wrote the secret testament, since there is not legislative requirement to use the state language upon creating the secret testament. In our opinion, this case refers to committing such a notarial act as receiving documents for storage. As for the form of the will, it would be concluded in a simple written form, since the testator himself made it and personally signed it. Thus, the legislator simplifies the process of certifying a testament by essentially legalizing its simple written form.

The imperfect wording of the article that stipulates the creation of a "secret" testament, will result in a variety of notarial practices, "programmability" for copious court disputes, and most importantly, it will not reach the purpose set by the legislator: to exclude possible abuse by the persons who certify the testament. There should be a careful treatment of proposal to consider a text variant of the testament or a video of a testamentary disposition posted on the website or the web page of the testator as a secret testament and the possibility to make changes and cancel them without undue appeal to a notary [24]. The uncertainty of the term of making such a testament may create certain obstacles to the exercise of the rights by the heirs, does not exclude the existence of several wills, raises the question as to the capacity of the testator at the time of introducing changes. A testament is a special transaction, the legal consequences of which can ensue only after many years. In the digital age, it is important to be cautious about implementation of an *electronic form of testament*. It is necessary not only to record the commission of the transaction, but also to make sure that the testator's will was real and freely expressed.

*2.5 Testament with condition*

An individual may exercise their right to dispose of property in case of death by making a testament only if their will is minimally restricted by the legislator. Freedom of testation includes not only the right of the testator to make a testament at any time, to determine the objects of hereditary succession, to appoint any person as heir, etc., but also to define the conditions of succession by heirs, which is justified and fair, since after the inheritance release the testator, by virtue of natural causes, will no longer be able to adjust their last will. According to Art. 1242 of the CC of Ukraine "Testament with condition", the testator may cause the right of inheritance of the person appointed in the testament to emerge under a certain condition, both related and unrelated to their behaviour (presence of other heirs,

residence in a certain place, child birth, education, etc.)[1]. The condition in the testament is a legal fact, an element of the set of facts, which, together with other legal facts, gives rise to the legal relations of inheritance under the testament [25].

The testament with condition is well-known in the legislation of continental European countries [26; 27]. Thus, allowing the creation of a testament with condition, the French legislator in Art. 899 of the Civil Code states that testamentary conditions that cannot be performed because they contradict the laws or good practice shall be rendered null and void[2]. In Spain, testamentary dispositions can be made conditional irrespectively of their universal or particular nature, that is, whether they are made with respect to all hereditary property or concern only part of the inheritance. Conditions of a testament that contradict the law or good practices are considered to be unwritten, so that they cannot harm the heirs[3]. Paragraph 2075 of the German Civil Code states that if the testator provided for the inheritance in the testament under the condition that a person is required to perform a certain action or to refrain from performing such action for a certain period, then in case the non-performance or performance depends solely on the will of the specified person, it must be considered that inheritance will depend solely on the resolutory condition associated with the performance or non-performance of the action by this person [28]. That is, this innovation contains an important rule: if the heir does everything on their part, then the condition of the will shall be considered as such that was performed.

In all domestic codifications, the general provisions on transactions contained rules that allowed the parties to conclude them on condition. The specific feature of the will lies in that it is a unilateral transaction, and therefore the provisions of the General part of the CC of Ukraine, the rules of which regulate the procedure for concluding bilateral transactions, do not apply to it. The condition in the will differs in its essence from the condition in the bilateral transaction. If the fact that is stipulated in the transaction with condition may or may not occur in the future, then the fact that allows to acquire the inheritance by testament with the condition must exist at the time of opening the inheritance, and the occurrence of such a legal fact may not only not depend on the will of any person, but also be objectively inevitable.

The legislator not only explicitly stipulated that the testator could cause the right to inherit in a person subject to the existence of a certain condition, but also provided an indicative list of such conditions. The condition must exist at the time of inheritance release. The necessity of imperative provisions of Art. 1242 of the CC of Ukraine raises no doubt among researchers who consider it as the evidence of the extension of freedom of testation. We cannot unconditionally agree with the conclusion on the extension of the freedom of testation, provided the mandatory existence of condition at the time of inheritance release. The heir, in accordance with the last will of the testator, can conscientiously begin to perform their obligations, but, being limited in time, may not achieve the result determined by the testator (get a higher education, build a house, etc.). In such circumstances, the heir does not acquire a testamentary inheritance. Such certainty

[1] The Civil Code of Ukraine. (2003, January). Retrieved from http://zakon0.rada.gov.ua/laws/show/435-15.
[2] Civil Code of France (2013, July). Retrieved from http:// www.wipo. int/wipolex /ru/text. jsp?file_id=450531
[3] Civil Code of Spain. (1889, July). Retrieved from http://derechocivil-ugr.es/attachments/article/45/spanish-civil-code.pdf

of the existence of condition in time testifies not to the extension of the freedom of testation, but to the contrary, to its restriction, to the possibility of distortion of the actual testator's will, who did not wish to deprive the heir of the inheritance, and whose purpose was to induce the latter to take actions that are useful for the heir in the first place. To protect the interests of the heir in such cases, it is proposed not to limit the testament to the requirement to the heir – "to have a diploma of graduation", but to allow as a condition – "to be a student of a higher education institution" at the moment of the testator's death [29].

Citizens are granted the right to dispose of their property not only while alive, but also in case of death. The testator wishes their successors only good. The fulfilment of the testamentary conditions may be connected with the actions committed in favour of the public associations, the territorial community, and the entire society at large. The legislator shall be guided by this presumption. The condition cannot limit a person's legal capacity, but in some cases it will not satisfy their desires. For example, they may not "welcome" the condition of obtaining higher education in a specific, one-of-a-kind institution. The heirs always have the right to choose: to perform the condition of the will, if it does not contradict the requirements of the legislation, or not to accept inheritance. Making a testament with condition in the current wording assigns the heir the role of a passive observer. If the actions taken by him are not related to the achievement of the result specified in the testament, they have no legal value. The testamentary conditions which enable the heirs to inherit should not be limited to the day of inheritance release. They must be allowed to run within a certain period. In this case, the will must determine the fate of the property during the time when the condition of inheritance may occur (period of study, pregnancy, military service, etc.), the procedure for storage of hereditary property, the possibility of signing a contract of notary management or appointment of persons who should care for it during this period. The legal fate of the hereditary property will depend on the heir's performance of the conditions of the testament within a specified or reasonable time. The legal regime of hereditary property will, to some extent, resemble the legal regime of discovery, since its fate also depends on whether the person will take certain actions or not.

The testator cannot oblige the heirs not only to commit acts that are unlawful or restrictive of their rights, but also to acts, the commission of which is contrary to universal human rules of conduct or established customs. For example, it would be immoral require terminating any relationship with certain relatives, restrict aid and care, and so on. The very condition of the testament must not contradict the current legislation, the rules of public morality and should not limit the legal capacity of the heir. The condition must be determined by the content, determined in time or such, the performance of which requires the reasonable period. The performance of the condition must be related only to those benefits which the heir can dispose of on their own. Finally, the condition must be factually and legally enforceable [30], which will protect the heir's interests against the possible arbitrariness of the testator. The above criteria are a matter of judgement and in each individual case in the event of a dispute between the heirs, it is the prerogative of the court to interpret them. First of all, the literal meaning of the words and concepts and the essence of the testator's intentions are considered. If, however, the interpretation does not allow to figure out what the condition of the testament is and how it should be performed, then the condition is declared null and void.

## CONCLUSIONS

1. The civil law system aims to understand civil law provisions and serve the pragmatic needs; it must be based on homogeneity of the content of the legal provisions, their unity and coherence, as well as on the principle of an objective separation of legal provisions into sub-branches and institutions, depending on the purpose and tasks set before them. Therefore, the placement of legal provisions governing the grounds and procedure for inheritance in the Civil Code of Ukraine after the institution of real rights appears quite natural.

2. The full provision of legal capacity to a minor person, subject to the grounds established in legislation, is determined by the need to exercise and protect their civil rights. The concepts of "disposal of property" and "disposal of property in case of death", despite their similarity, have different meanings. Disposition, as one of the constituent elements of the content of property rights, provides the opportunity to determine the legal or factual fate of things. The disposition "in case of death" is not a disposition in itself, because it does not oblige the owner and does not prevent them from using their property in any way, despite having a drawn up testament. *Testamentary capacity* is special and constitutes a statutory opportunity for an individual to express their will to dispose of property owned by them in case of death. The testamentary capacity of the person does not create rights, therefore, with consideration of the specific features of its legal nature, it must be linked to the coming of age.

3. The testator must be able to protect their subjective right to dispose of property before death. It is proposed to empower the testator, as the most interested person, with the *right* to demand, *while alive*, a reduction in the size of a mandatory share of a certain heir through a court procedure, and in the circumstances provided for by law, to require the removal of the heir from succession.

4. Considering the experience of foreign countries and historical domestic experience, there are grounds for enshrining in the legislation both the possibility of making a testament in a simple written form and to orally pronounce testamentary disposition in exceptional cases.

5. The current procedure for concluding a *secret testament* does not meet the legal requirements for the notarial form of the testament, since the notary certifies not the fact of making a testament, but the fact of the person depositing the envelope, which contains their written disposition in case of death.

6. Making a *testament with condition* that must exist at the time of inheritance release limits the right of the testator to the free disposal of property in case of death and the principle of freedom of testation. The testamentary condition may exist not only *at the time of inheritance release*, but also ensue *within a certain period* or during the usual period necessary for the heir to perform the testamentary condition. During this time, the testamentary executor or the notary must take measures necessary to protect the hereditary property.

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