**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE PLENUM OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Article 1203.1 of the Civil Code of the Republic of Azerbaijan*

# 13 December 2011 Baku city

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Fargad Abdullayev (Chairman), Sona Salmanova, Rovshan Ismaylov, Jeyhun Garajayev (Reporter Judge), Rafael Gvaladze and Isa Najafov;

attended by the Court Clerk Ismail Ismaylov,

the legal representative of the subject interested in special constitutional proceedings: Ahram Gahramanov, Judge of the Hazar District Court, Fuad Mamadov, Senior adviser of the Administrative and Military Legislation Department of Milli Mejlis of the Republic of Azerbaijan;

the expert: Ph.Rufat Geyushov, Acting Head of Civil Law Chair of the Baku State University;

based on Article 130.6 of the Constitution of the Republic of Azerbaijan has examined in open court session via procedure of special constitutional proceedings the constitutional case on inquiry of Hazar District Court;

having heard the report of Judge Jeyhun Garajayev, the reports of the legal representatives of the subjects interested in special constitutional proceedings and conclusions of expert, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

 The Hazar District Court having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) in connection with interpretation of Article 1203.1 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as Civil Code)in connection with Articles 1137, 1139 and 1176 of the given Code.

In the inquiry it is specified that Farida Azimova having appealed to Hazar district court with the statement of claim against Esmira Azimova and others asked to adopt decision on deprivation of the following persons of right to have obligatory share from property which in the future remains after her in form of inheritance: son Takhir Azimov (died on October 10, 2008), and his successors - son Vahid Azimov (died on February 5, 2009) and his successors, and the daughter Reykhan Azimova (born in 1966).

F.Azimova's representative Zemfira Askerova (Azimova) in court session having submitted the petition, asked Hazar district court of the Baku city to make a definition concerning the appeal to the Constitutional Court with the purpose of interpretation of the Article 1203.1 of the Civil Code in connection with Articles 1137, 1139 and 1176 of this Code. The petition was satisfied with definition of Hazar district court as of June 14, 2011, the proceeding is suspended and made the decision on the appeal to the Constitutional Court.

In the address it is noted that in spite of the fact that respondents in case are her successors under the law, according to opinion of F.Azimova her relation with them not sincere, respondents offend her, file to law enforcement agencies an unreasonable actions and complaints against her. F.Azimova considers that successors have intention to appropriate the property that is in her property. Therefore, in the future the respondents have to be deprived of the right to obligatory share from property which remains from her as inheritance. F.Azimova proved the claim by requirement of Articles 1193, 1203.1 and 1203.2 of the Civil Code.

Thus the Hazar district court notes that according to the requirement of Article 1193 of the Civil Code children, parents and wife (husband) of a testator irrespective of contents of will have obligatory share of inheritance. This share has to make a half of that share which would be due to them at inheritance under the law (an obligatory share). However, obligatory share has no absolute character. According to the Article 1203.2 of the Civil Code deprivation of an obligatory share acquiring right may be implemented by testator during his (her) lifetime through applying to Court. According to the requirement of the Article 1203.1 of this Code, deprivation of the right of acquiring of obligatory share in general is possible in the presence of the circumstances that are the reason of deprivation of a right of succession.

In the inquiry it is noted that by the “the circumstances which are the reason of deprivation of a right of succession” is understood the fact of confirmation in the capacity of unworthy successor by judicial procedure, specified in Article 1137 of the Civil Code. However, the Hazar district court considers that in view of the indistinct indication of this requirement in Article 1201.1 of the Civil Code, there is a need for interpretation of this article in connection with Articles 1137, 1139 and 1176 of the Code by the Constitutional Court.

In connection with issue that is raised in the inquiry, Plenum of the Constitutional Court considers necessary to note the following.

The issue of solving of a fate of the property that remained in inheritance has important personal and public value. Article 29.5 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution) proclaims the constitutional guarantee on providing the right of succession. This article of the Constitution, proclaiming the right for the will in broad understanding, provides providing the law of succession, leaving of inheritance that is the right of the will on the one hand, acceptance of inheritance as the successor and the law of possession of it on the other hand.

The institution of the law of succession governs the civil relations existing between a family and group of norms of a right of property. The institution of inheritance in a certain degree reflects in itself specific features of norms of both groups (family and property). So, this feature of institution of the law of succession is expressed, as in a binding character of the most part of the rules relating to it, and in restriction with special conditions of freedom of the contract.

The way of development of institution of the law of succession reflecting features of norms of the family and property laws, originate from the Roman law. Thus, the Roman law did not recognize the property right of an individual to the plot of land. The plot of land was considered as the property belonging to any family or kin and death of the head of the family did not mean that this plot of land remained without owner, the cultivators of the plot of land only changed.

Along with it, the property which remained without owner and belonging to the dead person can become one of factors having negative effect on development of society and the economic relations. Position of participants of the economic relations is defined by solvency and for this reason stability of solvency should not depend on case of emergency, and death of the person. From this point of view development of society and the economic relations led to association of a debt of the died person with his property. Thus, the person that accepted property by inheritance had to bear responsibility for debts of the deceased person. Based on this principle the order of transition of property to successors according to the will, assumed the universal character, and the property passed not to the random persons, but to just known beforehand close relatives or the person identified by the testator.

During the first periods of formation of institution of the law of succession only one type of the law of succession – inheritance under the law was known. Successor ship of property of died person not could be changed at the will of this person. In the Roman law this rule was expressed as “solus deus heredem facere potest, non homo” (only god can create the successor but not the human).

In process of weakening of the patrimonial and tribal relations, the hereditary relations also started being individualized. The first forms of this process shown oneself in the division of hereditary property by the father between the sons and emergence of testamentary arrangements (legatary) (the will with charitable purposes) concerning property that has to get to successors.

All these factors had the impact on formation of modern institution of inheritance. Thus, along with restrictions on the basis of the law, existed at institution of the law of succession, freedom of the will developed on an equal basis with freedom of the order of property and freedom of the contract.

In the countries giving preference to the Romano-German legal system the institution of the law of succession developed under the influence of these traditions. At the same time the right of acquiring of an obligatory share limiting freedom of the will found the place in legal system of the majority of the states.

In spite of the fact that in the majority of the countries relating to this legal system the size of an obligatory share for all successors it is established in identical volume, in the legislation of some countries the size of this share is established differently. Thus, according to the legislation of Germany the an obligatory share in inheritance is identical to all (a half of a an obligatory share), and in the legislation of Switzerland the volume of an obligatory share is established on the descending line and makes for relatives ¾, for parents ½, for brothers and sisters ¼ from a share which has to get to them under the law. According to the civil legislation of France the property which can be freely bequeathed by testator makes a half of property if the person has one child, 1/3 if has two children, ¼ if has three and more children.

On the basis of the principles of the Roman law in legislations of the majority of the European countries in the presence of legitimate reasons the order of deprivation of the right of an obligatory share in inheritance at the request of the testator is established. If in some countries existence of the serious bases for deprivation is also required (for example Germany and Switzerland), in others (for example Russia and Kazakhstan) the legislation did not define the need of its justification.

Thus, according to the order established by § 2333 of the Civil Code of Germane testator may deprive a successor of his compulsory share if the successor makes an attempt on the life of the testator, of the spouse of the testator, or of another successor or of a person similarly close to the testator; is guilty of a major offence or of a serious intentional minor offence against one of the persons designated above; willfully violates the an obligatory obligation to the testator incumbent upon him to maintain the testator; the successor is guilty of a crime or of any other illegal action made against the testator or his spouse; the successor roughly broke the duty assigned to him by the law to support the testator; the successor against the will of the testator leads a disgraceful or immoral life.

According to Article 1119 of the Civil Code of the Russian Federation the deceased is entitled to leave by will at his/her discretion property to any persons, to set heirs' shares in the estate in any way, to deprive one, several or all legal heirs of inheritance without indicating reasons for such a deprivation and also to include other dispositions in the will in compliance with the rules of the Civil Code concerning succession, to revoke or alter his/her created will. At the same time, the Russian civil legislation limits freedom of the will of the testator to the right of acquiring an obligatory share in inheritance by his minor children, disabled close relatives and other persons. In the legislation of the Republic of Azerbaijan the institution of the law of succession and, being its integral part the right of an obligatory share in inheritance was found by the permission as it should be similar to the legislation of the countries belonging to the Romano-German legal system.

Thus, according to Article 1133.1 of the Civil Code of the Republic of Azerbaijan property of the deceased (testator (testatrix) is devolved to other persons (heirs) according to law or testament or on both grounds. Intestate succession (devolution of decedent’s property to persons indicated in law) is effective in case of an intestacy or if testament is declared invalid entirely or partly (Article 1133.2 of the Civil Code).

According to legal position in connection with “obligatory share in inheritance” formed in the decision of the Plenum of Constitutional Court as of October 20, 2011 “On verification of conformity of Article 1193 of the Civil Code of the Republic of Azerbaijan to parts I and II of Article 13 and parts I, II of Article 29of the Constitution of the Republic of Azerbaijan” an obligatory share in inheritance is the traditional part of the law of succession possessing a social and economic and moral component. The right of obligatory share plays a role of a social guarantee concerning a certain category of relatives (that is an obligatory successors) of deceased person. Civil legislation of the Republic of Azerbaijan proceeding from a principle of social justice in the law of succession, counterbalancing the relations between an individual and the state, the gender relations, the relations young with elderly, a stable family and other relations, creates equal legal opportunities for a certain category of privileged persons (children, women, people with physical deviations) in comparison with others.

The circle of people having the right for an obligatory share in inheritance in Article 1193 of the Civil Code is limited. According to this article, children, parents and spouse (spouse) of testator have obligatory share in inheritance, irrespective of contents of the will. Obligatory share makes a half of the share which is due to them at inheritance under the law.

According to the civil legislation of the Republic of Azerbaijan each person can disinherit the successors on the basis of the will. According to the order established in Article 1176 of the Civil Code the testator (testatrix) may disinherit with his (her) testament any or all of his (her) heirs at law without proving his (her) decision.

 It should be noted that possibility of deprivation of one, several or all successors by the testator of inheritance under the law without substantiation of the decision relies on the principle of freedom of the will. Drawing up the will by the owner within the lifetime in accordance with legislation and possibility of deprivation of inheritance of one, several or all successors, is one of the factors providing the right of disposal by testator of his/her property.

However, deprivation of inheritance by will does not concern persons having rights of obligatory share. Thus, civil legislation provides implementation of deprivation of right of acquiring of obligatory share only on basis of the judgment.

On the basis of the specified norm the giving by the legislator to the testator of possibility of deprivation of the persons having rights of acquiring an obligatory share by an appeal to the court within the lifetime serves for creation of balance between the right of the testator of disposal of property and a principle of social justice in the law of succession.

According to Article 1203.1 of Civil Code deprivation of an obligatory share, acquiring right is possible in cases causing deprivation of succession. As evident, deprivation of the right of acquiring an obligatory share can be carried out under the circumstances which are the reason of deprivation of a right of succession according to the standard procedure.

The circumstances which are the reason of deprivation of a right of succession found the reflection in Article 1137 of Civil Code. According to given article the person (unworthy heir) who purposely hinders in realization of testator (testatrix)’s last will and thus assists to call himself (herself) or his (her) relatives to inheritance or increase inheritance shares, or person that committed intentional crime or other immoral acts against testator (testatrix)‘s last will, provided that such circumstances are judicially confirmed, can not inherit neither at law nor at testament.

The legislator specifically established by Article 1139 of Civil Code a circle of the subjects having the right of an appeal to the court concerning recognition of the person by the unworthy successor with the subsequent deprivation of its right of succession and the right of receiving an obligatory share. Thus, according to given article the circumstance of unworthy heir’s succession deprivation are defined by court based on a claim of a person who has respective property consequences of such succession deprivation of unworthy heir. According to Article 1203.2 of Civil Code deprivation of obligatory share acquiring right may be implemented by testator (testatrix) during his (her) lifetime through applying to Court.

It is necessary to consider that Article 1137 of Civil Code establishes loss of a right of succession under the law, according to the will in case the court confirmed fault of the person which is deliberately interfering implementation of the last will of the testator, the committed intentional crime or other immoral acts against testator (testatrix)‘s last will, but not in cases of commission of any illegal actions against the identity of the testator or his relatives.

 Recognition of the person who is deliberately interfering implementation of the last will of the testator who committed an intentional crime or other immoral acts against testator (testatrix)‘s last will, the unworthy successor can be carried out only by an appeal to the court of one or several successors.

 However, at the appeal of the testator to court in connection with deprivation of the right to an obligatory share by any of successors the substantiation of deliberate preventing of implementation of his last will, commission of a intentional crime or other immoral acts against his last will in the will by these persons from the point of view of Article 1137 of Civil Code is impossible. Recognition as the unworthy of successor on the basis of Article 1137 of the Civil Code is challenged after death of the testator.

 The notion of action of the person which committed an intentional crime or other immoral acts against the last will of the testator specified in Article 1137 of Civil Code not completely covers the provision “deprivation of the right of receiving an obligatory share possibly in the presence of the circumstances which are the reason of deprivation of a right of succession” of Article 1203.1 of this Code. Though the intentional crime or other immoral acts are also specified as the reasons for deprivation of obligatory share, but are provided in case if these crimes are directed only against the last will of the testator.

 Along with that, in Article 1138 of Civil Code the legislator set one more restriction concerning acquiring an obligatory share. According to given article those parents who were deprived of parental rights and did not restore them up until the day of inheritance commencement can not be lawful heirs of their children. Those persons who fraudulently evaded to perform obligations they were entrusted with in respect of inherited person’s maintenance can not be heirs, provided that this case is judicially confirmed.

From the point of view of Article 1203 of Civil Code the circumstance specified in Articles 1137 and 1138 of this Code are the reason of loss of a right of succession under the law, and also of deprivation of the right of acquiring an obligatory share of the persons having this right by an appeal to the court during lifetime of the testator.

According to the above stated, Plenum of the Constitutional Court comes to the following conclusions:

The provision of the Article 1203.1 of the Civil Code "the circumstances which are the reason of deprivation of succession right" covering the circumstances specified in the Articles 1137 and 1138 of this Code means not only the last will of the testator but also the circumstances directed against the testator.

Being guided by the Article 130.6 of the Constitution of the Republic of Azerbaijan and Articles 60, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. The provision of the Article 1203.1 of the Civil Code "the circumstances which are the reason of deprivation of a right of succession" covering the circumstances specified in Articles 1137 and 1138 of this Code means not only the last will of the testator but also the circumstances directed against the testator.

2. The decision shall come into force from the date of its publication.

3. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

4. The decision is final and can not be cancelled, changed or officially interpreted by any body or official.