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SUPPLEMENTARY CLAIMS CONCERNING THE PROTECTION OF INHERITANCE IN GERMAN LAW

Introduction

The inherited estate or individual items comprising the estate may, for various reasons, come into possession of unauthorised persons. This may be the case, for instance, when, following a judicial certificate of estate acquisition under the Act, a will is found in which the testator offers the estate to persons other than those included in the statutory order of intestate succession. It is also possible that following a judicial certificate of estate acquisition based on the will, another (later) last will of the testator is found. Lastly, the will constituting the basis for inheritance may also be invalidated.

In these circumstances, the true heir could claim the return of inheritance items via singular claims, or make a claim under the protection of inheritance to surrender the estate or its individual items. However, as a rule, the restitution of assets does not compensate for the entire damage suffered by the heir. The possessor of the estate could, after all, derive benefits from individual items, including natural and civil proceeds from things and rights. The inherited estate could have been subject to physical damage, or part of the things could have been lost. On the other hand, it cannot be ignored that the possessor of the estate could have made outlays on the components of the inherited estate. Therefore, it is necessary for the parties, i.e. the true and the apparent heir to make mutual complementary settlements.

The scope of and conditions for such mutual settlements are regulated specifically in different legal orders. For example, under Polish succession law, the protection of inheritance is provided for in Article 1029 § 1 of the Civil Code - Dz.U.1964.16.93 with amendments (further: the "CC"), which reads: "An heir may demand that the person who holds the estate as an heir, but is not an heir, surrender the estate to them. The same applies to individual items that make up

the estate." On the other hand, the issue of mutual settlements is referred to in § 2 of the said provision, which requires the appropriate application of the provisions on claims between the owner and the owner-like possessor of things, i.e. the regulations of Book Two of the Code: "Ownership and Other Property Rights" – Article 224–229 of the CC (Wierciński 2013).

In German law, the issue of the protection of inheritance and the related mutual settlements is subject to extensive regulations, which make both the scope and type of mutual obligations dependent on the good or bad faith of the possessor of the estate, and even on the manner in which they have come into possession of inheritance items. This paper presents normative solutions related to the protection of inheritance and related supplementary claims in German law.

Construction of the protection of inheritance in German law

The protection of inheritance (Erbschaftsanspruch) under German law is governed by § 2018 of the German Civil Code of 18.08.1896 r. – Bürgerliches Gesetzbuch (further: "BGB"). This provision establishes the restitution claim of the true heir against the apparent heir (the possessor of the estate or inheritance items) who, based on a right of succession that they do not really have, acquired something from the estate. A person who has acquired the estate from the possessor of the estate bears the same responsibility as the possessor of the estate, and this results from § 2030 of BGB.

Undoubtedly, the German regulation concerning the protection of inheritance is modelled on the Roman construction of a special singular claim, *hereditatis petitio*. The literature on the subject emphasizes the similarity of both claims in terms of both the structure and content. In particular, the following criteria concerning the facts coincide here: the inheritance has occurred; the heir is the creditor of a claim to surrender the estate, whereas the debtor of the claim concerned is a person who has acquired something from the estate based on a right of succession that they do not really have (Muscheler 2009).

Therefore, the primary purpose of § 2018 et seq. of BGB is to make it easier for the true heir to lodge a claim to surrender the estate against the possessor of the estate or its individual items who has acquired something from the estate based on a right of succession that they do not really have. This claim is a total claim to surrender all items that make up the inherited estate (Staake 2014). The obligation to surrender extends not only over items included in the estate, but also, pursuant to § 2019 of BGB, applies to all ersatz goods that have been acquired in a legal transaction with means from the inherited estate (Gsell, Krüger, Lorenz, Reymann 2019).

It should be noted that in a situation where a third party comes into possession of inheritance items while not deriving their rights from the alleged right of succession, the true heir will not have a claim to surrender the estate based on § 2018 of BGB, but rather a claim under § 1007 of BGB regarding the

possessor's obligation to return a thing if the possessor was not in good faith when he acquired it. In addition, the owner is also entitled to claims for damages against the possessor, as referred to in § 823 et seq. of BGB, 249(1) of BGB, or a claim for restitution related to unjust enrichment under § 812(1) clause 1 of BGB (Gsell, Krüger, Lorenz, Reymann 2019).

The doctrine emphasizes that the regulation of Article 2018 of BGB regarding the protection of inheritance in German law also aims to protect the possessor of the estate in good faith. According to this approach, R. Magnus has noticed that the relation between the true and the apparent heir within the framework of mutual settlements should be classified based on the owner–possessor relationship (EBV, Eigentümer-Besitzer-Verhältnisses), which privileges the possessor in good faith or the possessor against whom no action has been brought so far to surrender a thing (Magnus 2017).

The right of action as regards the claim lodged under § 2018 of BGB is vested in both the true heir and the joint heir. This claim is transferable and hereditary, so it may also be vested in a legal successor of the heir, as well as a person acquiring the share in the estate (Hoeren 2019). In the literature on the subject, the right to bring an action provided for in § 2018 of BGB is also granted to the executor of the will, the general receiver of the estate, the estate administrator and the estate trustee (Hoeren 2019). The claim concerned may also be made by a person who has been wrongly assumed dead (§ 2031 of BGB).

The defendant under § 2018 of BGB may be the apparent heir (known as the possessor of the estate). This is a person who had no right of succession whatsoever or a person appointed to inheritance, but to a lesser extent than that expressed by their possession. If there are several defendants who are in possession of the estate, their liability will be joint and several (Gsell, Krüger, Lorenz, Reymann 2019). Pursuant to § 2030 of BGB, a person who has acquired the estate from its possessor by contract can also be a party in a lawsuit.

It should be emphasized that the provisions of the German Code of Civil Procedure of 30.01.1877 (Zivilprozeßordung, ZPO) require the claimant to designate in their statement of claim to surrender the estate under § 2018 of BGB all items the surrender of which they demand. This can be concluded from the content of § 253(2) of ZPO and § 883 of ZPO. The purpose of these regulations is to enable the enforcement procedure (if any) as regards inheritance items. The implementation of this obligation is supported by the right to information, which includes the heir's right to receive information about the status of the estate and the whereabouts of inheritance items. Pursuant to § 2027–2028 of BGB, information in this respect must be provided by the possessor of the estate or any other person who does not claim the estate but is in possession of inheritance items. Similarly, a person who, at the time of opening the inheritance, shared a household with the heir, is required, if requested, to provide information on the status of successions and the whereabouts of inheritance items. The obligation to

provide information is also imposed on the acquirer of the estate (pursuant to § 2030 of BGB) and, pursuant to § 2362 of BGB – the person to whom an incorrect judicial certificate of estate acquisition has been issued (Keim 2018).

Rules for settling proceeds and fruit obtained from the estate between the heir and the possessor of the estate in good faith

Pursuant to § 2020 of BGB, the possessor of the estate should also surrender to the heir all proceeds and fruit that they have acquired. In principle, the regulation implies that such proceeds should be surrendered in kind, and if this proves impossible, claims for damages will come into play. The German Civil Code, namely § 99 of BGB, defines the fruit of a thing as the products of the thing, as well as all other benefits (yield) derived from the thing in accordance with its intended use. On the other hand, the fruit of a right should be understood as revenues that the right produces in accordance with its intended use; in the case of a right to extract component parts of the soil – the proceeds will be the parts extracted. The fruit will include the revenues that the thing or the right produces under a legal relationship. The proceeds include the fruit of a thing or of a right, as well as the benefits that the use of the thing or the right affords (§ 100 of BGB). It should be added that according to § 955(1) and § 956 of BGB the possessor will acquire the ownership of the fruit if they are a good faith possessor on the separation (Gsell, Krüger, Lorenz, Reymann 2019).

If the possessor in good faith is not able to surrender the estate or inheritance items in accordance with the provisions of §2018–2020 of BGB, their obligation is determined according to the provisions on the duty of surrender under principles of unjust enrichment (§ 2021 of BGB). § 818(2) of BGB specifies that, if this is the case, an obligation to compensate for the property value shall originate. However, this obligation will expire when the apparent heir in good faith is no longer enriched. In the doctrine, the reasons for this state of affairs include wear and tear, destruction or mixing of inheritance items or corresponding ersatz goods (Stürner 2018). It should also be emphasized that from the time when a dispute to surrender the estate is pending onwards, the possessor will be liable under the general provisions of law.

Rules for settlements between the heir and the possessor of the estate in bad faith or after the possessor becomes aware that an action has been brought against them

The liability of the apparent heir in bad faith and from the moment when they become aware that an action has been brought against them, as well as the possessor in bad faith is stricter than that of the possessor in good faith.

The apparent heir, starting from the date when a claim to surrender the estate has been lodged, must take into account that they may have to surrender the inherited estate to the claimant (Gsell, Krüger, Lorenz, Reymann 2019). They

should, therefore, take due care of inheritance items that remain in their possession, bearing in mind that such items may not actually belong to them. The liability of the possessor of the estate for damage, deterioration or inability to surrender a thing is governed by the provisions on the relationship between the owner and the possessor of a thing in ownership disputes. Consequently, the possessor is liable for the shortage or destruction of a thing, caused by their culpable behaviour (§ 989 in connection with § 2023(1) of BGB). The possessor is obliged to reimburse the owner for the value of proceeds that they have not collected through their own fault, and which they could have collected if they had managed the estate in a correct way – § 987(2) in connection with § 2023(2) of BGB (Schmidt 2019).

If the possessor was in bad faith when the estate came into their possession, then their liability is governed by the same rules that apply to the possessor of the estate starting from the time when a dispute to surrender the estate is pending onwards. If the possessor of the estate discovers that they are not an heir at a later date, they will become strictly liable from that date (§ 2024 of BGB).

Liability of the possessor of the estate if the estate has been acquired through tort

The liability of the possessor of the estate becomes even stricter if they have come into possession of inheritance items as a result of tort (§ 2025 of BGB). They are liable according to the rules governing the liability for damage caused by tort (§ 823 et seq., § 249 et seq. of BGB). In the literature, examples of tort that may result in the acquisition of the estate include: fraud, extortion, theft, falsification of documents and making false statements in proceedings for confirmation of the acquisition of the estate (Müller-Christmann 2019). The possessor of the estate who has committed any of the prohibited acts referred to above will always be considered the possessor in bad faith.

The tort liability of the possessor of the estate is based on the principle of guilt. Pursuant to § 848 of BGB, the possessor is liable for accidental loss or deterioration of a thing, as well as for an accidental inability to return it caused by another reason, unless the above-mentioned circumstances would have occurred even if the thing had not been unlawfully appropriated. If this is the case, the compensation due bears interest pursuant to § 849 of BGB (Stürner 2019).

Rules for the settlement of outlays between the possessor of the estate and the true heir

The possessor of the estate in good faith may counter the true heir's claim for reimbursement of outlays. Indeed, pursuant to the regulation expressed in § 2022 of BGB, a person who is in possession of the estate is obliged to surrender inheritance items only in return for reimbursement of all outlays, but only to the extent that the outlays are not covered by claims under unjust enrichment, which

should be returned pursuant to § 2021 of BGB. It is noted in the literature on the subject that the regulation in question privileges the possessor of the estate in good faith over the possessor of the estate in bad faith and after an action to surrender the estate has been brought against them. The privilege is that the possessor in good faith can claim the reimbursement of all outlays that they have made on the estate items (Gierl 2019). More specifically, they may demand that the estate should be surrendered not only with the necessary, useful outlays, but also extravagant or unprofitable outlays, even those that have been made on an inheritance item other than covered by the claim. Until such claims for reimbursement of the outlays are satisfied, the possessor has the right to retain all estate items.

Within the meaning of § 2022 of BGB, outlays should be understood as all expenses incurred voluntarily by the possessor of the estate with the use of the possessor's own means: on the estate as a whole or on individual inheritance items. The burden of proof as regards such outlays and the origin of the funds from which they have been made rests with the possessor of the estate. In the case of settlements of the true heir with the possessor of the estate in good faith, the type of outlays is irrelevant, since mutual settlements cover all such outlays. It is even pointed out that the settlement is still necessary even if a specific item on which the outlays have been made does not longer exist. Outlays may also include own work of the possessor of the estate, if its value can be determined or if it results in the loss of other earnings. Outlays also include any expenses on burdens and debt related to the estate.

The settlement of the outlays made by the possessor of the estate after they become aware than an action has been brought against them is governed by the provisions on a voluntary agency without the principal's prior consent. The possessor of the estate may therefore only demand the reimbursement of the necessary outlays which correspond to the interests and the actual or presumed will of the heir (§ 2023(2) in connection with § 994(2), § 683 and § 684, clause 2 of BGB). With respect to all other outlays that are made after the possessor of the estate has become aware that an action is pending against them, the possessor of the estate cannot claim their reimbursement even if they actually increase the value of the inherited estate (Gsell, Krüger, Lorenz, Reymann 2019).

Limitation period for a claim to surrender the estate

The limitation period for a claim to surrender the estate is governed by § 197(1)(2) of BGB. Pursuant to the provision, the claim becomes time-barred after 30 years. The limitation period starts running when the possessor of the estate comes into possession of any item belonging to the estate based on a right of succession that they do not really have. Pursuant to § 2026 of BGB, as long as a claim to surrender the estate is not time-barred, the possessor of the estate cannot invoke acquisitive prescription of any item of the estate against the true heir. It is

argued in the literature that the above provision protects the true heir against the inability to recover the movable property belonging to the estate and that could become the property of the possessor based on acquisitive prescription. Pursuant to § 937(1) of BGB, the acquisitive prescription for movable property under German law applies as soon as after 10 years. On the other hand, with respect to real property, for which acquisitive prescription applies after 30 years (§ 900(1) of BGB), the regulation discussed here has little practical significance (Gierl 2019).

Summary

As part of the protection of inheritance, German succession law provides for the possibility of recovering the estate or even individual inheritance items by way of a comprehensive and exhaustive action. Such a claim to surrender the estate is convenient for the injured heir who does not have to submit individual claims regarding specific inheritance items or rights to the courts with relevant territorial jurisdiction. Jurisdiction of the court competent for the estate in the case of claims filed under § 2018 of BGB is determined on the basis of general provisions of law, taking into account the defendant's place of residence (§ 12 et seq. of ZPO) and the whereabouts of the inherited estate (§ 27(1) of ZPO).

However, the possibility of recovering the estate through an action pursuant to § 2018 of BGB does not provide a sufficient protection for the interests of the true heir or the possessor of the estate. Therefore, the German legislator has extensively regulated the issue of mutual settlements between such parties, depending on the good or bad faith of the possessor, as well as the way in which they have come into possession of the estate. The provisions of German law regarding supplementary claims increase the level of protection of the parties' interests in a manner that actually implements the principles of justice.

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ROSZCZENIA UZUPEŁNIAJĄCE DOTYCZĄCE OCHRONY DZIEDZICZENIA W PRAWIE NIEMIECKIM

Streszczenie

Majątek spadkowy, lub poszczególne przedmioty ze spadku z różnych powodów mogą znaleźć się w posiadaniu osób nieuprawnionych. Gdy do tego dojdzie, rzeczywisty spadkobierca może domagać się zwrotu przedmiotów spadkowych w drodze pojedynczych roszczeń, bądź wystąpić z roszczeniem przewidzianym w ramach ochrony dziedziczenia – o wydanie spadku, czy też poszczególnych przedmiotów spadkowych. Restytucja majątku z reguły nie rekompensuje jednak całości uszczerbku poniesionego przez spadkobiercę. Zachodzi więc konieczność dokonania wzajemnych uzupełniających rozliczeń pomiędzy rzeczywistym a pozornym spadkobiercą.

Zakres i warunki dokonywania wzajemnych rozliczeń uregulowane są swoiście w różnych porządkach prawnych. W prawie niemieckim zagadnienie ochrony dziedziczenia i związanych z tym wzajemnych rozliczeń poddane zostało rozbudowanej regulacji, która uzależnia zarówno zakres jak i rodzaj wzajemnych zobowiązań od dobrej i złej wiary posiadacza spadku, a nawet od sposobu, w jaki objął on przedmioty spadkowe w posiadanie. W niniejszym artykule przedstawione zostały

rozwiązania normatywne odnoszące się do ochrony dziedziczenia oraz związanych z tym roszczeń uzupełniających w prawie niemieckim.
Słowa kluczowe: dziedziczenie, ochrona, spadkobierca, posiadacz, rozliczenie

Summary:

The inherited estate or individual items comprising the estate may, for various reasons, come into possession of unauthorised persons. In such circumstances, the true heir could claim the return of inheritance items via singular claims, or make a claim under the protection of inheritance to surrender the estate or its individual items. However, as a rule, the restitution of assets does not compensate for the entire damage suffered by the heir.

The scope of and conditions for such mutual settlements are regulated specifically in different legal orders. In German law, the issue of the protection of inheritance and the related mutual settlements is subject to extensive regulations, which make both the scope and type of mutual obligations dependent on the good or bad faith of the possessor of the estate, and even on the manner in which they have come into possession of inheritance items. This paper presents normative solutions related to the protection of inheritance and related supplementary claims in German law.
Keywords: inheritance, protection, heir, possessor, settlement

JEL Classification K10, K11, K13, K15