The American Journal of Political Science Law and Criminology
(ISSN – 2693-0803)
Published: December 27, 2020 | **Pages:** 100-107
Doi: https://doi.org/10.37547/tajpslc/Volume02Issue12-16

IMPACT FACTOR
2020: 5. 453

The Right Of A Husband (Wife) To Inherit At The Factual Dissolution Of Marriage

Yusupova Oysha Matnazarova
PhD Student Of Tashkent State University Of Law, Uzbekistan

ABSTRACT

In many foreign countries today, the development trends of marriage and family show that along with the officially strengthened relationship between husband and wife, the factual relationship is also becoming more important. This in turn affects the couple's right to inherit. The rapidly evolving processes of interstate integration and globalization make it necessary to improve the inheritance rights of couples in the law of succession, which is relatively conservative in nature. The aim of this research is to improve the existing inheritance law of the Republic of Uzbekistan by defining the criteria for declaring a marriage relationship between the spouses in practice and studying the scope of the spouses' legal rights to inherit in the event of the actual dissolution of the marriage. To achieve this goal, the following tasks have been identified: to clarify the status of the couple, to analyze the actual dissolution of the marriage as an obstacle to the exercise of the right of inheritance, development of proposals to improve national legislation on the rights of spouses to inheritance through the study of foreign experience.

KEYWORDS

Legal succession, spouse (widow), dissolution of marriage, spouses' rights to inheritance, actual dissolution of marriage.

INTRODUCTION

Marriage, as a legal category, gives a man and a woman the status of a couple and creates rights and obligations between them established by family legislature. The structure of a marriage can, economically, be seen as the beginning of a specific financial partnership between husband and wife. The purpose of marriage is to start a family. In this sense, if we think of the **family** and **marriage** as a **mutual whole**, then the necessary and primary **part** of

The American Journal of Political Science Law and Criminology
(ISSN – 2693-0803)
Published: December 27, 2020 | **Pages:** 100-107
Doi: https://doi.org/10.37547/tajpslc/Volume02Issue12-16

IMPACT FACTOR
2020: 5. 453

this whole is marriage. The purpose of marriage is to ensure the survival of generations, to live together on the basis of mutual care, to grow old by lifelong bond of respect and love for each other. Based on the common goals and interests of the couple, the circumstances of cohabitation, the law established a special legal regime of property acquired during their marriage, mutual rights and obligations between them.

Jurist Van Erp argues that the norms of succession law are strongly influenced by socio-cultural, socio-economic, and even religious factors, and it is still considered a local (national or regional) law, as well as religious law in some legal systems. He emphasizes that strengthening the protection of the inheritance rights of the living (widowed) husband (wife) and weakening the protection of children is one of the development trends of the right of inheritance. As people's life expectancy increases, more often than not, the testator's children are usually the ones that have grown up when the case for inheritance is opened and they are able to take care of themselves. For this reason, it is expedient to differentiate the children of the testator on the basis of age, ability to work and need for assistance [1].

The death of one' husband or wife leads to the termination of the marriage between the couple, as well as the formation of an inheritance relationship. It should be noted that the inclusion of the husband or wife in the circle of heirs by law is the result of the gradual development of the right of inheritance. Initially, the legal succession was carried out only on the basis of kinship, and the either husband or wife was not entitled to inherit because they were not related to each other. According to the sources, even in times when a living (widowed) husband or wife was entitled to a share in each other's inherited property, there was a mutual inequality in the right of inheritance between husband and wife. The wife had more limited inheritance rights than her husband. Men received a significant share of her inheritance after the death of his wife, while women, on the contrary, received a negligible share of her husband's inherited property. In the last century, due to the codification of the right of inheritance and amendments to the legislation, as well as in some cases by establishing the legal status of absolute inheritance or restriction of inheritance rights, which belong only to the couple, the rights of men and women have become practically equal [2].

The condition for the exercise of the husband's (wife's) right to inherit by inheritance under the law is that there should not be any circumstances that prevent (impede) it. Circumstances that prevent a spouse from being called as an heir by law may include:

- Declaration of marriage invalid before or after the opening of the inheritance;
- Recognition as an unworthy heir [3]
- Deprivation of inheritance by order of the testator (except for deprivation of compulsory share);
- Divorce.

It is known that a divorce is a sign that the marriage between the couple has ended. Termination of marriage as a legal fact leads to the termination of the family-legal relationship between husband and wife, the termination of the status of husband and wife. The right of the spouses to inherit does not apply to the ex-spouse [4]

The American Journal of Political Science Law and Criminology
(ISSN – 2693-0803)
Published: December 27, 2020 | **Pages:** 100-107
Doi: https://doi.org/10.37547/tajpslc/Volume02Issue12-16

IMPACT FACTOR
2020: 5. 453

According to statistics, the number of divorces in the Republic of Uzbekistan in 2019 amounted to 31,389, of which 19,475 were registered in cities and 11,914 in rural areas [5]. These figures indicate the number of divorces officially registered with the Registration of Civil Status Acts (RCSA) bodies, respectively. However, in our society, there are some cases where family relationships have practically been abolished, and for some reason, marriages are not officially annulled. This may be due to the facts such as lack of time, negligence, absence of one of the spouses due to long distance, or the fact that a divorce petition has been filed, but one of the spouses has died before the end of the process. In accordance with the current norms of the Republic of Uzbekistan on the right of inheritance, the factual termination of the marital relationship does not have legal consequences. On October 29, 1994, the Interparliamentary Assembly of the CIS member states adopted the Model Civil Code, and in its Article 1181 the following norm was proposed: "If the marriage with the testator is annulled in practice before the opening of the inheritance, and it is proved that the couple lived separately for at least five years before the opening of the inheritance, then the court can exclude the spouse from the inheritance by law, but inheritance on the basis of the mandatory share is an exception". The above norm stipulates that in order for an undead husband (wife) to be deprived of an inheritance, the following two conditions must be met:

- The actual termination of the marriage before the opening of the inheritance;
- Not living with the testator for at least five years before the opening of the inheritance.

This recommendatory norm has been used in the codification of the right of succession in most CIS countries. In particular, this rule is reflected in Article 1150 of the Civil Code of Kyrgyzstan, Article 1070 of the Civil Code of Kazakhstan, Article 1065 of the Civil Code of the Republic of Belarus. The second part of Article 1172 of the Civil Code of the Republic of Tajikistan stipulates such a period as three years. The same norm exists in the civil codes of Georgia, Azerbaijan, Turkmenistan and Moldova. However, the difference is that the three-year period is applied equally in practice to both facts of marriage being annulled and the spouses not cohabiting until the inheritance was opened [2].

The second part of the previous edition of Article 1143 of the Civil Code of the Republic of Uzbekistan contained a similar rule: "If the marriage with the testator is practically annulled before the opening of the inheritance and if it is proved that the couple lived separately for at least five years before the opening of the inheritance, the court decision may exclude the spouse from inheritance legally, but there is an exception where they can get their share in accordance with Article 1142 of the Code." However, this norm was removed in accordance with Law No. 671-II of 27 August 2004.

In practice, to what extent does the exercise of the right of the husband (wife) as an heir under the law in accordance with the principle of social justice, when the marriage with the testator is in fact terminated and the family relationship is terminated? Article 14 of the Constitution of the Republic of Uzbekistan states: "The state shall carry out its activities for the benefit of people and society, on the basis of the principles of social justice and the

The American Journal of Political Science Law and Criminology
(ISSN – 2693-0803)
Published: December 27, 2020 | **Pages:** 100-107
Doi: https://doi.org/10.37547/tajpslc/Volume02Issue12-16

IMPACT FACTOR
2020: 5. 453

rule of law." Filimonov V.D. states: "The essence of the principle of justice is to find a solution to social contradictions through law" [6].

There are different views in the legal literature on the fact that the husband (wife) should be deprived of the inheritance if marriage is in fact terminated before the opening of the inheritance. In particular, legal scholars such as Chepiga T.D. [7], Aslanyan N.P., [8] argued that the husband (wife) should be deprived of the inheritance if he was officially married before the inheritance was opened, but in practice there was no long-term family relationship, however, V.K. Dronikov [9] and E.B. Eidinova, on the other hand, looked at the issue from the opposite point of view [10].

The Family Code of the Republic of Uzbekistan stipulates that a marriage is considered dissolved from the date of registration of the divorce in the civil registry office. However, some norms of family law specify the legal consequences of the actual termination of the marriage. In particular, the fifth part of Article 27 of the Family Code stipulates that in the event of termination of family relations, the court may recognize the property acquired by the husband and wife during their separate life as his or her private property. Thus, the deprivation of a spouse's right to inherit in connection with the de facto dissolution of a marriage does not contradict the essence of the norms of family law. On the contrary, the removal of the husband (wife) from the list of heirs as a result of the de facto dissolution of the marriage is in every way consistent with the development trends of family law. To find a solution to this controversial problem, it is first necessary to proceed from the essence of the concept of family. There is no legal concept of the family, in theory, many authors point out the signs of family as cohabitation, spiritual and material support, common living, common goals of the family, rights and responsibilities of family members, the role of the state in the regulation of family relations. Without these signs, the family would not exist. For example, if the husband (wife) is in a legal marriage and at the same time is actually married to another person (actual marriage), it indicates that the family relationship has actually ended. Such cases lead to a violation of the principles of family law, as well as a decrease in the importance of marriage and the family in society. [11, pp. 135-137]

According to Article 1342 of the Civil Code of Georgia (This rule is also present in Article 1503 of the Civil Code of the Republic of Moldova and Article 1159 of the Civil Code of the Republic of Turkmenistan.), if the testator has filed a lawsuit against the heir on the grounds that the marriage was invalid, the widowed husband (wife) loses the right to inherit. In Ukrainian inheritance law, the fact that a marriage is found to be invalid, rather than the actual termination, is the basis for exclusion from inheritance. In particular, according to the fourth paragraph of Article 1224 of the Civil Code of Ukraine, persons whose marriage has been declared invalid or nullified by a court decision are not entitled to inherit one after another. If the marriage is declared invalid after the death of one of the spouses, and the widowed husband (wife) of the testator who did not know and could not have known the circumstances before the marriage was registered, that is, the rightful husband (wife) is entitled to inherit when the court finds them to be worthy to inherit. In this case, one can only receive a share of the inheritance from the

The American Journal of Political Science Law and Criminology
(ISSN – 2693-0803)
Published: December 27, 2020 | **Pages:** 100-107
Doi: https://doi.org/10.37547/tajpslc/Volume02Issue12-16

IMPACT FACTOR
2020: 5. 453

property acquired during the period of marriage with the testator. [2]

According to the Spanish Civil Code (Articles 834, 945), in order for the testator's alive spouse to be called to inherit by law, the family relationship between them must be both legally and practically valid. The legal termination of a family relationship (cohabitation) or the establishment of a separate lifestyle (Sp. Separación legal) occurs in accordance with a court decision, as well as by mutual consent of the couple, certified by a court clerk or notary. The establishment of such a separate way of life leads to the deprivation of the husband and wife of the right to inherit from each other. Family relationships (cohabitation) can be terminated in practice at the request of one of the spouses or by agreement of both without the intervention of the relevant authorities (Sp. Separación de hecho). In order to resolve the issue of the couple's succession, the actual termination of the family relationship is determined in court. Spanish law does not currently set clear criteria for establishing such a fact (but there were legal criteria for determining it until 2005) and in each case it is up to the court to determine whether there are sufficient grounds to conclude that the marriage-family relationship is practically over. At the same time, it must be proved by any legal means that the family relationship has actually ended. The fact that the couple did not live together, that a separate property regime was established in respect of the property, that they did not try to reach a agreement, and so on, may be taken as evidence by the court [4].

In France, too, the termination of a de facto common marriage between a couple and the non-cohabitation have legal consequences. This situation is the basis for the commencement of the divorce process (the period of actual separate habitation before the commencement of the divorce process should not be less than 2 years) [12].

Article 9 of the Civil Code of the Republic of Uzbekistan states: "The exercise of civil rights must not violate the rights and legally protected interests of other persons. The participants in civil legal relations are expected to act honestly, rationally and fairly.

... The actions of citizens and legal entities aimed at harming another person, abuse of rights in other forms, as well as the exercise of the law contrary to its purpose are not allowed".

The practical (actual) termination of a marital relationship based on marriage has certain family-legal and civil-legal consequences for the husband and wife. Some of the legal scholars, Tarusina N. N. and Izmaylov V. V. argues that "factual divorce" is important for three different types of legal relationships:

1) In determining the child's place of residence during the period when the couple lived separately;
2) As a substantiated motive recognized by the court in the divorce of a husband and wife; [2]
3) For the court to find the property acquired by the husband and wife during their separate life as a private property of one or another.

At this point, the question arises as to what criteria should be used to determine the actual termination of the family relationship between husband and wife.

The American Journal of Political Science Law and Criminology
(ISSN – 2693-0803)
Published: December 27, 2020 | **Pages:** 100-107
Doi: https://doi.org/10.37547/tajpslc/Volume02Issue12-16

IMPACT FACTOR
2020: 5. 453

According to Article 41 of the Family Code of the Republic of Uzbekistan, if the court finds that it is no longer possible for the husband and wife to live together and maintain the family, the court shall divorce them.

In accordance with paragraph 16 of the Resolution Number 06 of the Plenum of the Supreme Court of the Republic of Uzbekistan dated July 20, 2011 "On the practice of application of the law by courts on divorce", the courts may grant a divorce only if the couple can no longer live together and only if it is determined that it is impossible to maintain to live as a family because it is completely disoriented, and in this case the court may satisfy the request of a divorce. A couple's marital relationship can also occur when they live together under one roof. That is, the family legal relationship may be terminated while the status of husband and wife is maintained. In contrast, there are families where the couple has not lived together for a long time, but the family law and the marital relationship have been preserved. Family law does not specify the obligation of a husband and wife to live together. However, the cohabitation of a couple stems from the essence of family and marriage. Because the purpose of marriage is to build a family, to live together as a couple and to have a common household, to ensure the continuity of generations. "Factual divorce" means the end of the common management of household, which is one of the legal consequences of marriage. When considering divorce cases in court practice, in practice, the clearest evidence that a family relationship between a couple has ended is when the couple does not live together.

The fifth part of Article 27 of the Family Code of the Republic of Uzbekistan stipulates that upon the termination of family relations, the court may recognize the property acquired by the husband and wife during their separate life as private property. This norm provides for the legal consequences of the actual termination of the family relationship between the couple. In order for the legal consequences set out in it to occur, the fact that the relationship has ended in practice must be proved. Proof of this is the fact that the couple did not live together. This is because when a couple does not live together, they do not have the opportunity to jointly own, use and dispose of the property acquired at the expense of each other. When they are not living together, they even may not be aware of each other's property. Hence, the deprivation of a spouse of the right to inherit in connection with the de facto dissolution of a marriage does not contradict the essence of the norms of family law. On the contrary, the removal of the husband (wife) from the list of heirs as a result of the de facto dissolution of the marriage is in every way consistent with the development trends of family law [11].

In our view, the fact that the couple not living together cannot be a criterion in itself confirming that the marriage was practically over. Even if the imprisoned husband (or wife) has not lived together for five years, the wife (or husband) has been informed of his condition, has provided the necessary necessities, in short, has been both materially and spiritually encouraged by each other, in such a case family relationships cannot be said to be practically over. Going on a long trip to a foreign country for work or study causes the husband (wife) to live separately. However, the fact that a couple shared funds for family expenses, was aware of their family, took care of each other, and resolved family issues through consultation, and this either cannot

mean that the family relationship is actually over. Today, however, it is not uncommon for a spouse to move to a foreign country to work and marry another person, and his wife (or her husband) may be unaware of this. In such a case, if the inheritance is opened, the fact of the spouses not living together cannot be a ground for the de facto termination of the family relationship. If the family relationship between the couple was terminated for a long time (at least five years) before the opening of the inheritance, and both of them entered into an actual marriage with another person and were aware of it, it would be fair to remove them from the list of heirs at the request of the parties. However, even in such a case, the right to inherit the property acquired during the period when the family relationship between the spouses was not ended must be preserved. In this case, the court must take into account the property acquired during the period of cohabitation.

Summarizing the above, it is proposed to strengthen the second part of Article 1143 of the Civil Code of the Republic of Uzbekistan as follows:

"If it is proved that the marriage with the testator was annulled in practice as a result of the couple living separately for at least five years before the opening of the inheritance and both of them entered into a family relationship with another person, the court may exclude the spouse from the list of legal heirs."

REFERENCES

1. Afanasyeva EG 2012. 02. 031. Van Erp C. Recent changes in inheritance law. Van ERP S. new developments in succession law // Electronic J. of comparative law. - Utrecht, 2010. - Vol. 14, n 2, October. - mode of access: http: // www. Ejcl. Org / 113 / article113-5. Pdf // Social and Human Sciences. Domestic and foreign literature. Ser. 4, State and Law: Abstract Journal. 2012. No. 2. URL: https://cyberleninka.ru/article/n/2012-02-031-van-erp-c-poslednie-izmeneniya-v-nasledstvennom-prave-van-erp-s-new-developments-in-succession- law-electronic-j-of-comparative-law (date accessed: 12.12.2020).
2. Blinkov OE Inheritance rights of spouses in the member states of the Commonwealth of Independent States and the Baltic States // "Notary". 2006. No. 5. S. 34-38. - http://www.center-bereg.ru 2. [Blinkov O. E. Nasledstvennye prava suprugov v gosudarstvah - uchastnikah sodruzhestva nezavisimyh gosudarstv i Baltii // Notarius. 2006. (5) 34-38. (In Russ).]
3. Vershinina E.V., Perevoshchikova A.D. Institute of unworthy heirs in Russia, France and Spain: a comparative legal analysis // Moscow Journal of International Law. 2014. No. 4 (96). P.88-101 [Vershinina E.V., Perevoshchikova A.D. Institut nedostojnyh naslednikov v Rossi, Francii i Ispanii: sravnitel'no pravovoj analiz // Moskovskij zhurnal mezhdunarodnogo prava. 2014. (4). 88-101. (In Russ).]
4. Fokina A.D. The surviving spouse's rights under legal inheritance in Russia, France and Spain: a comparative legal analysis. // Moscow Journal of International Law. # 2. 2018.S. 138-148. [Fokina A.D. Prava perezhivshego supruga pri nasledovanii po zakonu v Rossii, Francii i Ispanii: sravnitel'no pravovoj analiz. // Moskovskij zhurnal mezhdunarodnogo prava. (2).

Published: December 27, 2020 | **Pages:** 100-107
Doi: https://doi.org/10.37547/tajpslc/Volume02Issue12-16

2018.138-148. (In Russ).] DOI: 10.24833 / 0869-0049-2018-2-138-149

5. Ochiқ malumotlar / Ўzbekiston Respubliki davlat statistics қўmitasining rasmiy site. URL: http: // www.stat.uz (Open data / Official site of the State Statistics Committee of the Republic of Uzbekistan. URL: http: // www.stat.uz)
6. Filimonov V.D. Justice as a principle of law. // State and law. 2009. No. 9. S. 6-7. [Filimonov V.D. Spravedlivost 'kak princip prava. // Gosudarstvo i pravo. 2009. (9). 6-7. (In Russ).]
7. Chepiga TD Development of the Soviet system of inheritance in a mature social society. // XXVI Congress of the CPSU and the problems of civil and labor law, civil process. M., 1982. S. 78. [Chepiga T. D. Razvitie sovetskoj sistemy nasledovanija v uslovijah zrelogo social'nogo obshhestva.// XXVI s # ezd KPSS i problemy grazhdanskogo i trudovogo prava, grazhdanskogo processa. M., 1982. 78. (In Russ).]
8. Aslanyan N. P. Inheritance of the family members of the testator under Soviet civil law. // abstract of thesis. jurid. sciences. M.: Moscow State University, 1987. S. 6. [Aslanjan N. P. Nasledovanie chlenov sem'i nasledodatelja po sovetskomu grazhdanskomu pravu.//avtoref.dis.kand. jurid. nauk. M.: MGU, 1987. S. 6. (In Russ).]
9. Dronikov VK History of codification of hereditary legislation of the Ukrainian SSR. // Essays on the history of codification of civil legislation of the Ukrainian SSR: collection of articles. Department of Civil Law, KSU P. 55. [Dronikov V. K. Istorija kodifikacii nasledstvennogo zakonodatel'stva Ukrainskoj SSR.// Ocherki istorii kodifikacii grazhdanskogo zakonodatel'stva Ukrainskoj SSR: sb. kafedry grazhdanskogo prava KGU. S. 55. (In Russ).]
10. Eidinova E.B. Joint ownership issues in notarial and judicial practice. // Sov. justice. 1977. No. 5. S. 10. [Jejdinova Je.B. Voprosy sovmestnoj sobstvennosti v notarial'noj i sudebnoj praktike. // Sov. justicija. 1977. No. 5. S. 10. (In Russ).]
11. Plekhanova OI Inheritance by the surviving spouse with the actual termination of marriage // Glagol of Justice. 2013. No. 1 (5). URL: https://cyberleninka.ru/article/n/nasledovanie-perezhivshim-suprugom-pri-fakticheskom-prekraschenii-brachnyh-otnosheniy (date of access: 12.12.2020)
12. Vershinina E.V. 2015. Grounds for divorce in Russia and France: a comparative legal analysis. // Moscow Journal of International Law. No. 2 (98). S. 140-149. [Vershinina E.V. 2015. Osnovanija rastorzhenija braka v Rossii i vo Francii: sravnitel'no-pravovoj analiz.//Moskovskij zhurnal mezhdunarodnogo prava. (2 (98). 140-149. (In Russ).]