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EFFECTUATION AND PROTECTION OF THE RIGHTS TO A FORCED PORTION IN CONTEMPORARY SERBIAN LAW[2]

Abstract

In this paper, the author focuses on the legal mechanisms for effectuation and protection of the right to a forced portion in contemporary Serbian law. Comprehensively, through a prism of legal solutions, theory and judicial practice, the author considers the following: disqualification objections, contesting a will, as causa mortis, by reason of nullity or rescindability; bringing gifts and legacies to collation for allocating the legitime and the forced portion; modification of testamentary dispositions; objections to an ungrounded exclusion from the heirship or to the deprivation of a forced portion and the settlement of a forced portion violated with excessive testamentary dispositions and gifts. In the paper, the author makes an attempt to answer numerous disputable issues or those insufficiently resolved, to "fill in" the blanks in the statutory text, and proposes adequate alterations and amendments to certain individual solutions.

Key words: right to a forced portion, disqualification objections, contesting a will, collatio bonorum, modification of testamentary dispositions, objections to ungrounded disinheritance, violation of a forced portion, excessive testamentary dispositions and lifetime gifts.

Introductory Notes

The right to a forced portion represents the entitlement of a legal heir, who is particularly protected by the law, to inherit - irrespective of the testator's will, even against his will - a part of the estate, if he is seeking that.

Forced heirs are a specially privileged category of statutory heirs whose inheritance-law entitlement directly arises from the imperative provisions of the Law on Inheritance of the Republic of Serbia.[3] That entitlement may be disputed or violated in more than one

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[3]See Article 39-60 of the Law on Inheritance of the Republic of Serbia (*Official Gazette of the Republic of Serbia (RS),* no. 46/1995 and 101/2003). Hereinafter, the following abbreviation will be used: The LIRS (orig. ZNRS).

way (e.g., ungrounded disinheritance, excessive testator's disposables *inter vivos* or *mortis causa*, privileging some forced heirs in regard to non-chargeable givings). Thereupon, depending on the circumstances of a particular case and for the purpose of effectuating his right, a forced heir needs to apply adequate legal protection mechanism, which can be: raising the so-called disqualification objections against certain universal or singular inheritors *causa mortis*; contesting a will, as a unilateral *causa mortis*, by reason of nullity or rescindability; claiming collation of non-chargeable givings for allocating the legitime or the forced portion; contesting the clause on ungrounded exclusion or deprivation of heirship, modification of testamentary dispositions and filing a claim for the settlement of a forced portion violated by excessive testamentary dispositions or lifetime gifts.

Exactly these legal mechanisms are in the focus of our attention aimed to examine how they function and to what extent they are in the service of forced heirs' interest protection.

1. Basic Characteristics of Forced Heirship in the Republic of Serbia

In Serbian law, a circle of forced heirs includes the testator's biological descendants, adopted children and their descendants, spouse, parents, adopter, brothers and sisters, grandparents and other ascendants (Article 39 of the LIRS). [4]

In principle, the circle of forced heirs is designed following the model of a circle of subjects, potential creditors and debtors of statutory alimony.[5] Therefore, all persons who may be in a creditor-debtor relationship in a legal support provision sphere may also be forced heirs. There are discrepancies in regard of in-laws (stepfather and stepmother, on one hand, and stepchildren, on the other hand) and non-marital partners, since although they have the right and duty to support each other under specific circumstances, they cannot be statutory heirs, hence forced heirs either.[6]

To be a forced heir must, a person must first fulfil all the conditions required for any statutory heir. Thus, at the time of opening the estate of the testator, a forced heir must be at least conceived, must be capable and worthy of inheriting and called upon to inherit. In

[4]In succession law theory, there are opinions that the circle of forced heirs established in this manner is too broad and it should be much narrower, meaning thereof: minor or incapable descendants of the testator's spouse and parents who are without the necessary means of subsistence. See in more detail: S. Marković, 'Zakonski naslednici', *Zbornik radova Pravnog fakulteta u Nišu* /Statutory Heirs*, A Collection of Works of the Faculty of Law of Niš,* no. 17 Niš, 1977, p. 196–197.

[5]Compare Articles 151-159 of the Law on Inheritance of the Republic of Serbia (*Official Gazette of the RS,* no. 18/2005 and 72/2011 – another law), with Article 39 of the LIRS.

[6]On the legal alimony and statutory inheritance relationship, see in more detail: N. Stojanović, 'Osvrt na pojedina rešenja sadržana u Porodičnom zakonu i Zakonu o nasleđivanju Republike Srbije', *Zbornik radova "Novine u porodičnom zakonodavstvu"*/'Review on Individual Solutions Contained in the Family Law and the Law on Inheritance of the Republic of Serbia'*, A Collection of Works: "Novelties in Family Legislation",* Niš, 2006, p. 13-15.

regard to inheriting the spouse, as a possible forced heir, an additional condition is required - the existence of marriage legally valid at the time of the spouse's death. Hence, if there are reasons for losing the right to inherit the spouse, pursuant to the content of Article 23 of the Law on Inheritance, this one cannot inherit at the capacity of a forced heir either.

The circle of the so-called forced heirs, who are to meet the stated objective conditions only, consists of: descendants of the testator, both biological and adoptive without limitation, spouse, parents and adopter in absolute adoption.

For certain forced heirs, however, it is required to fulfil additional terms. So, the Serbian legislator stipulates that siblings, adopter in incomplete adoption and other predecessors of the testator, can only be forced heirs if they are permanently incapable to earn for living and are without the necessary means of subsistence. The terms "permanent incapability to earn for living" and the lack of "necessary means of subsistence" are legal standards the contents of which are "filled in", according to the circumstances of a concrete case, by the court that conducts the heirship proceeding. The existence of permanent incapability to earn for living is regularly proved by a physician's certificate, i.e. findings of a commission of medical doctors.[7] The lack of the necessary means of subsistence, according to long-term judicial practice, exists even if the forced heir has a kin or spouse who can provide for him/her.[8]

The subjects who fulfil the conditions (objective or objective-subjective) to be forced heirs will not attain the forced portion if their legitime is fully annulled by the increase of the other heirs' legitime or if the testator has apportioned his entire estate by the testament or by gifts donated in charity or other generally useful purposes.[9]

In Serbian law, the forced portion of a forced heir is not determined in relation to the entire estate, but only in relation to the legitime appertaining to him. The size of the forced portion depends on the forced succession degree a forced heir belongs to. If forced heirs belong to the first forced succession degree, meaning all

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[7]See in more detail: S. Marković, *Nasledno pravo,* Službeni list SFRJ/*Succession Law,* Official Gazette of the Socialist Federative Republic of Yugoslavia (SFRY), Belgrade, 1981, p. 193.

[8]In this regard, see the Decision of the Supreme Court of Croatia, Rev. 476/58. Quoted as per: S. Vuković, *Komentar Zakona o nasleđivanju i Zakon o vanparničnom postupku (deo o ostavinskom postupku), sa sudskom praksom, registrom pojmova i obrascima*/*Commentary of the Law on Inheritance and the Law on Extrajudicial Proceedings (the part on handling the probate proceedings), with judicial practice, registry of terms and forms*, Poslovni biro D.O.O, Belgrade, 2003, p. 71.

[9]Also: O. Antić – Z. Balinovac, *Komentar Zakona o nasleđivanju/Commentary on the Law on Inheritance*, NOMOS, Belgrade, 1996, p. 214-215. However, there are opinions in legal literature that forced heirs can be settled out of testamentary dispositions left for socially useful purposes, since there is no explicit order, as there is for gifts in the statutory text. See: B. Blagojević, 'Nužno nasleđivanje', *Enciklopedija, imovinskog prava i prava udruženog rada*, *tom II,* Službeni list/'Forced Heirship', *Encyclopaedia of Property Law and the Law on Associated Labour, Volume II*, Official Gazette, Belgrade, 1978, p. 487.

biological and adoptive descendants of the testator and the spouse, the forced portion is 1/2 of legitime. However, if parents, adopters, brothers and sisters and other ascendants of the testator are called upon to the estate, their forced portion is 1/3 of legitime. Regardless if the spouse of the testator is an heir of the first or the second succession degree, his/her forced portion is still 1/2 of legitime.[10]

The size of a forced portion is determined in each concrete case first by establishing the legitime of all the heirs called upon to inherit according to the rules of regular statutory heirship, no matter whether they all can also be forced heirs and whether they claim their forced portion or not. Therefore, on the basis of the size and expressed by a fraction, an individual forced portion is determined (1/2 or 1/3 of legitime).

The size of a forced portion can significantly be affected by an increase or decrease of the legitime of heirs of the first and the second statutory succession degree.

If any of the forced heirs does not want or cannot inherit the testator, his forced portion, by law, does not pass to the other forced heirs (Article 40 paragraph 3 of the LIRS), but the forced portion and the disposable portion of the estate are re-calculated resulting in various situations, as follows: the free forced portion passes to the disposable portion of the estate; one part goes to forced heirs and the remaining part goes to the disposable part of the estate; the forced portion of the remaining forced heirs is increased, or of only one of them (if a heir has renounced his inheritance in favour of a certain forced heir). In a situation where a forced heir does not request his forced portion and does not renounce his legitime, his forced portion, as per usual, passes to the disposable portion of the estate.[11]

The current inheritance-law legislation, contrary to the Law on Inheritance 1974,[12] changes the legal nature of the right to a forced portion, establishing that now, in principle, it belongs to the law of obligations by its nature,[13] meaning that a forced heir is a creditor of a special kind and the forced portion's pecuniary counter value belongs to him.[14] This rule may be corrected, both with the testator's own will

[10]See in more detail: J. Vidić, 'Nužni deo u srpskom i evropskom pravu', *Pravni život, tematski broj "Pravo i humana budućnost"*, t*om II*/'Forced Portion in Serbian and European Law', *Legal Life, Thematic Issue: "Law and Humane Future", Volume II*, no. 10, Belgrade, 2006, p. 797-800.

[11]See in more detail: O. Antić – Z- Balinovac, op. cit, p. 221- 224.

[12]*Official Gazette of the RS,* no. 52/1974, 1/1980, 25/1982 and 48/1988.

[13]Compare Article 27 of the former valid Law on Inheritance and Article 43 paragraph 1 of the Law on Inheritance of the Republic of Serbia that is being applied.

[14]On the advantages of the right to a forced portion having the legal nature of the law of obligations, see in more detail: O. Antić – Z. Balinovac, op. cit, p. 231–232; I. Babić, 'Pravna priroda prava na nužni deo – Glosa povodom rešenja Zakona o nasleđivanju', *Zbornik radova "Novine Zakona o nasleđivanju Srbije"*/'Legal Nature of the Right to a Forced Portion: A Gloss about the Decision on the Law on Inheritance'*, A Collection of Works: "Novelties in the Serbian Law on Inheritance"*, Kragujevac, 1998, p. 45–47; R. Račić, 'Pravna priroda prava na nužni deo', *Zbornik radova "Novine Zakona o nasleđivanju Srbije"*/'Legal Nature of the Right to a Forced

expressed in the testament and with the court's decision, at the request of a forced heir; thus, instead of the receivables, the forced heir acquires the right to the forced portion having inheritance-law character (Article 43 paragraph 2 and 3 of the LIRS), which enables him to acquire the real portion of the estate, as well as any universal successor *causa mortis*.

In order to determine how much belongs to a forced heir in a concrete case in the name of the forced portion settlement, as well as whether it is violated or not, it is necessary to determine the accounting value of the estate.

This calculation category is obtained by making the inventory first and the estimate of the entire testator's property, which exists at the moment of his death, including all testamentary dispositions compulsory, as well as the receivables the testator had to third persons, besides those that are obviously unpayable (the so-called assets of the estate). From the value of the testator's property determined in such manner, the value of his debts, the usual costs of the funeral and the costs of the inventory and the estimate of the estate (the so-called liabilities of the estate) are deducted. The result obtained, as the difference between the assets and the liabilities of the estate is the net (pure) value of the estate (Article 48 paragraph 1 and 2 of the LIRS).

Then, to this value of the estate, the gifts that the testator made to his/her legal heirs are added afterwards, irrespective of what legitime degree they belong to and whether they want to and can inherit, as well as the value of those gifts that the testator ordered not to be the subject of collation (Article 48 paragraph 3 of the LIRS). With this legal solution, the Serbian legislator practically enables the protection of the right to a forced portion of forced heirs to a substantial extent, as it prevents every aspect of favouring individual statutory heirs and, consequently, forced heirs. What can represent a stumbling block here for the courts of law in their work is the provision of the Law on Inheritance that refers to gifts that enter the accounting value of the estate which can be interpreted by the courts in a broader sense that these gifts are made to all statutory heirs, regardless if they are called upon to inherit or not, and, in a narrower sense, that these gifts are made to the statutory heirs who concretely inherit them. Clearly, at first sight, both interpretations of the wording of the law can consequently have a different circle of subjects, who are affected by the settlement of a forced heir's forced portion, which again can have a substantial influence on the legal volume of the estate's accounting value and, thereby, on the value of individual forced portions. Exactly because of this, the Serbian legislator must clearly and precisely specify what gifts are in question here.

Besides these gifts, the gifts given to persons who do not belong to the circle of statutory heirs in the last year of his life are added to the pure value of the estate (Article 48 paragraph 4 of the LIRS). Although this rule contributes to a more complete protection of forced heirs in the forced portion settlement, a higher level of efficiency would certainly be achieved by taking into consideration

Portion', *A Collection of Works: "Novelties in the Serbian Law on Inheritance"*, Kragujevac, 1998, p. 107-114.

the gifts given to third persons for a longer period of time, looking back from the moment of the opening of a will (e.g. three, five years).

All these gifts enter the accounting value of the estate on the basis of the imperative character of the norm that regulates this accounting category, hence the initiative of the forced heir is not necessary as it is in the event of bringing gifts and legacies to collation for allocating the legitime and the forced portion.

The current inheritance-law legislation determines the term "gifts" in a broad manner, implying renouncing of the right, pardoning of a debt, renouncing the heirship in favour of certain heirs, which the testator gave to a heir in the name of the legitime for the purpose of establishing or expanding his household, as well as any other disposition without charge (Article 50 of the LIRS).

In the Law on Inheritance, the criteria for establishing the gifts‘ state and value are clearly set out. Namely, the state of gifts is established according to the moment of giving a gift, and the value of a gift is established according to the moment of calculating the accounting value of the estate (Article 51 of the LIRS). All the changes on a donated item, regardless if its value is increased or decreased by them, made from the moment of making a gift until the moment of establishing the accounting value of the estate, irrespective of who has undertaken them, the donee or some third person, are not taken into account. Only the state of the donated good at the time of making donation is relevant.[15]

Pecuniary counter value of goods is regularly established by expertise in probate or litigation procedures, unless a consensus has been reached thereof between the claimants to the estate.[16] Whereby, if a gift consists of money (national currency), its buying power (real, not the face value) is taken at the time of making the donation, expressed in pecuniary denominations that exist on Serbian market at the time of calculation thereof. If a gift is expressed in a foreign currency, it is converted into the national means of payment as per the exchange rate valid at the time of determining the accounting value of the estate. [17]

Since a gift can consists of insurance policy in favour of the heir, its value is established by the application of one of the two measures provided for by inheritance-law legislation (Article 52 of the LIRS). If the total of the paid premium is lower than the insured amount, the total of the premium payments is taken as the gift’s value. This solution is justified with the fact that only the paid premium payments represent a benefit for the statutory heir that originates from the testator. The surplus over the paid premium payments to the insured total sum, although it belongs to the heir, is not the value by which the estate of the testator is decreased. If the total of the paid premium payments is higher than the insured sum though, the amount of the insured sum is taken as the gift’s value. This is so because only the insured sum represents a benefit for the statutory heir. The surplus above the insured amount, by the amount of the paid premium

[15]See in more detail: B. Blagojević, op. cit, p. 487-488.
[16]See: I. Babić, *Komentar/*Commentary ...., p. 116.
[17]See: O. Antić – Z. Balinovac, op. cit, p. 297.

payments, always remains with the insurance company, although the value is not an integral part of the estate any longer.[18]

The following non-chargeable givings made by the testator are never included in the accounting value of the estate: usual smaller gifts, gifts donated in charity and other generally beneficial purposes, whatever the deceased spent to support[19] and provide for the education [20] of statutory heirs, irrespective of the succession degree they belong to, whether they want to and can inherit and whether they are called upon to inherit in a concrete case, as well as those property rights of the deceased which were the subject of agreement on cession and distribution of property *inter vivos*, since it is, as a rule, a non-chargeable legal affair (Article 49 of the LIRS).

Regarding the education costs, it is unclear why Serbian legislator exercises different measures for them when applying collation bonorum institute and when establishing the estate accounting value. In the first case, only the costs intended for mandatory education are not the subject of collation. In the second case, as we have seen, all education costs are eliminated from the estate accounting value, thereby impairing, to a certain extent, the possibility of effectuation and protection of the right to a forced portion of individual forced heirs.

2. Possible Modes of the Effectuation and Protection of the Right to a Forced Portion

a) Effectuation and Protection of the Right to a Forced Portion by Raising Disqualification Objection

Since a forced heir is a particularly privileged category of a statutory heir, he may - as any universal successor who is called upon to inherit on the basis of the law - raise the so-called disqualification objections on the basis of which he prevents other heirs or singular successors *causa mortis* to acquire anything on inheritance-law basis.

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[18]See: N. Stojanović, 'Uračunavanje poklona i legata u nasledni deo i novi Zakon o nasleđivanju Republike Srbije', *Zbornik radova "Novine u Zakonu o nasleđivanju Republike Srbije iz 1995. godine"*/'Bringing Gifts and Legacies to Collation for Allocating the Legitime and the New Law on Inheritance of the Republic of Serbia', *A Collection of Works: "Novelties in the Law on Inheritance of the Republic of Serbia 1995"*, Kragujevac, 1998, p. 141 and the literature listed therein.

[19]With this formulation, the Serbian legislator expressed a legal and technical inaccuracy since only the costs of support that were a reflection of the real needs of a statutory heir and in the scope corresponding to those needs will not enter into the accounting value of the estate, regardless of where the support comes from.

[20]In Serbian legal literature, there is no consensus whether the used term "education" only implies elementary education (eight-year education) or education that lasts by 26 year of age. Regarding this see: O. Antić – Z. Balinovac, op. cit, p. 254; S. Svorcan, *Komentar Zakona o nasleđivanju sa sudskom praksom,* Pravni fakultet u Kragujevcu/*Commentary of the Law on Inheritance with Judicial Practice,* Faculty of Law in Kragujevac, Kragujevac, 2004, p. 142.

Thereby, it is only important that he has inheritance-law interest, i.e. thanks to disqualification of individual heirs or singular successors *causa mortis* he acquires a forced portion, the entire legitime or the value of the legitime increases.

For example, disqualification objections are: there is no heir at the time of the opening of a will; incompetency to inherit or unworthiness of individual heirs to inherit; there are reasons related to the testator's spouse for losing the right to inherit; the fulfilment of terms for the exclusion from heirship or the deprivation of a forced portion.

b) Effectuation and Protection of the Right to a Forced Portion by Contesting a Will as Unilateral *Causa Mortis*

A forced heir may, assuming that he has inheritance-law interest, contest a will, entirely or partially.

Serbian Law on Inheritance differentiates null testaments from rescindable ones. According to the law, every testament the content of which is contrary to the enforceable regulations, the public order or good customs is null (Article 155 of the LIRS). A testament written by a person younger than 15 years of age or by someone who is deprived of business competence because of his incapability for reasoning also belongs to null testaments (Article 156 of the LIRS). In addition, a forged testament is considered null (Article 157 of the LIRS).

Certain provisions in a will are null if the testator specifies a heir to his own heir, if the testator bans his own heir to alienate property he is entitled to on inheritance-law basis, or if he bans or limits the division of inheritance (Article 159 of the LIRS). Also, the provisions of a legacy will be null, on the basis of which, with public forms of legacy, something is left to an entitled person, who has written such a legacy, as well as to his spouse, his descendants, predecessors and brothers and sisters. Then, the provision in a will is null, on the basis of which testamentary witnesses (in front of witnesses with written legacy, judicial, consular, international, ship and military legacies), as well as their spouses, descendants, predecessors and siblings are appointed universal or singular successors *mortis causa*. Also, the provision in oral legacy is considered null, on the basis of which the testator leaves something to the testamentary witnesses, their spouses, descendants, predecessors and lateral kin, conclusively with the fourth degree of lateral kinship, as well as the spouses of those persons (Article 160 of the LIRS).

As stipulated by the current inheritance-law legislation, a rescindable testament is considered to be any testament written by a person who was not testamentary capable, if it was drawn up under the impact of deficiencies of will (threat, coercion, fraud or fallacy) and if the formal conditions are not complied with (Article 164 of the LIRS).

Contrary to null testaments, in rescindable testaments, time limits within which a forced heir may request annulment of testament are precisely determined. In regard to testamentary incapability and deficiencies of will, the subjective time limit is one year, which

commences on the day of learning the reason for rescindability, and the objective ten-year time limit, from the day of declaring the testament. Whereby, the subjective time limit cannot commence before the testament is declared. Concerning unconscientious persons, the annulment of testament may be requested within 20 year time limit from the declaration of testament. In the event that the annulment of testament is requested due to formal deficiencies, the subjective time limit for annulment of such a testament is one year from the day of learning about the existence of testament and the objective 10 year time limit from the declaration of the testament.[21]

c) Effectuation and Protection of the Right to a Forced Portion by Bringing Gifts and Legacies to Collation for Allocating the Legitime

A forced heir can often, thanks to the application of the collation of gifts and legacies (collation bonorum), ensure a forced portion for himself.

The application of this institute enables a reduced participation of individual statutory heirs in the estate of a certain testator in the value of a received gift or legacy and, simultaneously, an increase of a portion of the estate that may really be inherited by testamentary heirs. The purpose of bringing of gifts and legacies to collation for allocating the legitime is to ensure the equality of universal successors in non-chargeable givings made by a specific testator.

Serbian law orders the application of collation bonorum in relation to statutory heirship only. In testamentary heirship, collation is only possible if explicitly designated by the testator in his last will.

The collation of gifts and legacies may only be claimed by entitled persons. They are all co-heirs of the statutory heir (regardless of the legal ground for calling upon to inherit) for whom the collation is performed.

The current inheritance-law regulations in the Republic of Serbia do not determine the time limit in filing a claim for collation. Since the collation institute is in an unbreakable relationship with the distribution of inheritance and that the right to distribution is imprescriptible in terms of Article 228 paragraph 2 of the Law on Inheritance, it emanates that the right to effectuate collation is possible until the division of inheritance is performed.[22]

The rights and duties of bringing gifts and legacies to collation for allocating the legitime of statutory heirs is based upon the assumption that universal statutory heirs, who belong to the same succession degree and the same degree of kinship, i.e. rank, are equally dear to the testator, and that the gifts made are only the "advancement" of the future inheritance.

In Serbian law, the collation of gifts and legacies is only possible to those heirs who inherit the estate of a certain testator in

[21]See: Art. 169–170 of the LIRS.

[22]Also: O. Antić – Z. Balinovac, op. cit, p. 301; V. Đorđević – S. Svorcan, *Nasledno pravo*, Pravni fakultet u Kragujevcu/*Succession Law,* Faculty of Law in Kragujevac, Kragujevac, 1997, p. 330-331.

concreto, regardless of the succession degree they belong to (Article 66 paragraph 1 of the LIRS). Heirs who cannot (due to their incapability to inherit, unworthiness to inherit, the exclusion from inheritance and deprivation of the right to the forced portion) inherit or do not want to inherit are relieved of the collation duty. Gifts made and legacies left, however, are collated for those heirs who inherit in their stead (Article 71 of the LIRS.)

The current inheritance-law legislation in the Republic of Serbia stipulate that gifts, legacies and debts of heirs towards the testator can be collated.[23]

Certain free dispositions of the testator, however, cannot be the subject of collation. Here, gifts and legacies, which are not collated by the testator's will, on one hand, and gifts, other donations, fruits and benefits from a donated item that, by the law, are not taken into consideration for the collation, on the other hand, should be differentiated.

The testator may eliminate the application of the collation institute if he specified so at the time of making gifts or later or in the testament, or if it can be concluded that it is his intention on the basis of certain circumstances (Article 67 of the LIRS).

A left legacy will also not be collated if the testator explicitly ordered that in the testament or such an intention can be perceived from the content of the testament (Article 68 of the LIRS).

Will of the testator related to not bringing of gifts and legacies to collation for allocating the legitime will only be obeyed if those non-chargeable dispositions do not offend the forced portion of forced heirs.

The subject of collation, by the law, cannot be customary smaller gifts, the so-called gifts of duty (Article 75 of the LIRS). Since the legal and technical term "lesser value gift" is differently comprehended in theory,[24] it would be useful, in order to avoid diversity in practice, if Serbian legislator clarified it.

Besides, expenses made by the testator during the support and mandatory schooling of the heir cannot be collated (Article 76 paragraph 1 of the LIRS). Not defining precisely what type of support

[23] See: Article 66 paragraph 1 and Article 68 and Article 74 of the LIRS.

[24] So, some authors believe that the issue of lesser value gifts must be viewed through a prism of the following: the customs of the community where the donor and the donee live, their living and property circumstances, the ratio of the value of gift and the entire estate of the testator and the occasion of making a gift (M. Kreč – Đ. Pavić, *Komentar Zakona o nasljeđivanju sa sudskom praksom*/*A Commentary on the Law on Inheritance with Judicial Practice*, Narodne novine, Zagreb, 1964, p. 177; A. Finžgar, Nasleđivanje, *Enciklopedija, imovinskog prava i prava udruženog rada, Volume II*, Službeni list/Heirship, *Encyclopaedia of Property Law and the Law on Associated Labour,* Official Gazette, p. 369; I. Babić, *Komentar/Commentary* ...., p. 147). There are opinions that the legal standard "lesser gift" must exclusively be viewed through the value of the gift itself on the market and not in any way by the status of the testator and the heir-donee (S. Svorcan, *Komentar/Commentary* …., p. 143). Other authors deem that, when evaluating whether a specific gift is of lesser value, all the circumstances of the case and the value ratio between the gift and the testator's property must be taken into consideration (O. Antić – Z. Balinovac, op. cit, p. 299).

is implied can be considered the major deficiency of this formulation, and not clearly defining whether all givings, in the name of support for a certain heir, are "collation-free". Therefore, we propose that the existing provision on not including the support costs should be corrected in the direction of defining precisely that the costs of needed support, regardless of the basis it arises from, are not collated, and that the granted support that did not reflect the real needs of heirs or that the scope of the granted support does not correspond to those needs, is treated as a gift and thereby is a subject of collation.

The subject of collation also cannot be fruits and other benefits from the donated item or the right that an heir enjoyed being entitled to it by the testator's death (Article 66 paragraph 3 of the LIRS). Serbian legislator, however, says nothing whether those benefits from the donated good, which occurred after opening the testator's will, are the subject of collation. Since their value can substantially surpass the value of the gift itself, we believe that such realistically possible situation must be regulated in order to avoid different actions of courts in identical procedural situations. We propose, with the purpose of a more complete protection of the heirs' interests that are "burdened" with the collation obligation, to "expand" the solution on not having collation for fruits and benefits from the donated item from the moment of opening the will, to all the fruits and benefits that have occurred until the moment of collation. [25]

Serbian legislator only provides for the collation of the value of gifts and legacies, the so-called ideal collation, and it commences from the value that a donated good had at the time of collation and according to its state at the time it was donated. [26]

The procedure itself for the collation of non-chargeable givings, in the manner it is regulated by the current inheritance-law legislation in the Republic of Serbia, one may object that it does not define precisely the order of collation, when many gifts, legacies and other non-chargeable givings have been made. We believe that the Serbian legislator can fill in this blank with the solution, which was crystallized in legal theory quite a long time ago,[27] that the procedure of bringing gifts into collation is implemented in the manner where co-heirs are gradually equalized out of the undivided legitime, starting from a heir who received nothing or was made a gift of the lowest value (the heir whom the testator excluded from obligation to collate is in the same position with him), to the one who received a gift of directly greater value, and so forth, until the heir who received the highest value gift.. Full equality of co-heirs in collation procedure is only possible if the estate value allows it. The remaining portion of the estate, following a successfully implemented collation, is distributed to all co-heirs, commensurately to the size of their heirship portion.

If the value of the estate is insufficient for a full equality of co-heirs in regard to the testator's non-chargeable givings, a

[25]Regarding this see: O. Antić – Z. Balinovac, op. cit, p. 289; S. Svorcan, op. cit, p. 176.
[26]See Article 69 and Article 72 of the LIRS.
[27]See for example: M. Kreč – Đ. Pavić, op. cit, p.159; N. Gavella, *Pravni položaj nasljednika*/*Legal Heir Status*, Čakovec, Zagreb, 1981, p. 83; O. Antić – Z. Balinovac, op. cit. p. 292-295.

discrepancy is allowed, under the condition that the forced portion of the heir who has received least is not offended.[28]

For a legacy, in regard to collation, in principle, the same rules apply as with bringing gifts to collation. However, there are certain differences. When bringing legacy into collation, taking into consideration they are an integral part of the estate, there is no actual increase of the estate value, which is the case with collation. Besides, the type of legacy included has also impact on collation procedure.

If the legacy in question is paid directly from the estate or charging all statutory and testamentary heirs (the so-called direct legacy), the collation procedure runs as follows: after establishing heirship portions of statutory heirs who concretely inherit, the value of legacy is deducted from the net value of the estate, and the heirs who have not been left the legacy are settled from the remaining portion of the estate in the amount corresponding to its value. If after the conducted equalization there is a remainder, it is distributed among co-heirs commensurately to their heirship portions.

If the legacy performed is charged to the heirship portion of only one heir (the so-called indirect legacy), the collation procedure runs as follows: after establishing the hereditary portions of statutory heirs who inherit in the concrete case, the legacy value is brought to collation for the legitime of a heir meant to inherit it, and simultaneously, the heirship portion of a heir-legacy debtor is reduced. Thus, there is a surplus in the estate distributed to heirs commensurately to their heirship portions. [29]

d) Effectuation and Protection of the Right to a Forced Portion by Bringing Gifts and Legacies to Collation for Allocating a Forced Portion

How does function the mechanism of this sub-form of collation? In the Law on Inheritance of the Republic of Serbia, there is no - as in Austrian[30] and German laws [31] - a direct answer to the

[28]See in more detail: N. Stojanović, 'Uračunavanje poklona i isporuka ....'/'*Bringing Gifts and Legacies to Collation ....*', p. 141-143.

[29]See in more detail: O. Antić – Z. Balinovac, op. cit, p. 291-292.

[30]On the basis of the established estate value and the value of all non-chargeable givings, listed in Article 757 paragraph 2, Article 788 and Article 789 of Austrian Civil Code (Allgemeines Vürgerliches Gesetzbuch (JGS Nr. 946/1811 idF BGB1 I 58/2004, 77/2004, 43/2005, 51/2005 and 113/2006) the forced portion of the estate is determined, the so-called general forced portion, and then the value of all what was the subject of collation is deducted from its amount. Then, the so-called donated forced portion is calculated from the value of the donation, out of which the value of the gift received by the forced heir is deducted. The sum of the general forced portion and donated forced portion makes the so-called increased forced portion. About the forced portion collation procedure in Austrian law, see in more detail in: B. Eccher, *Bürgerliches Recht,* Band VI, *Erbrecht*, Springer–Verlag Wien, New York, Wien, 2002, p. 110-111 and 120-122); R. Welser – H. Koziol, *Grundriss der bürgerlichen Recht, Band II, Schuldenrecht Allgemeiner Teil, Schuderecht Besonderer Teil, Erbrecht*, Manzsche Verlags und Universitätsbuchhandlung, Wien, 2007, p. 553-555.

question posed. If we start from the point that the purpose of the procedure of bringing gifts and legacies to collation for allocating a forced portion is identical to the procedure for bringing non-chargeable givings to collation for allocating the legitime, that can be concluded on the basis of inheritance-law regulations, we would encounter an insurmountable obstacle in reaching that goal if a minor portion of the estate has been left undistributed and non-chargeable dispositions were made by the testator previously, of a more substantial value, in favour of certain forced heirs, and will not be the subject of collation as stated thereof. On the basis of the solution, contained in Article 67 paragraph 2 of the Law on Inheritance of the Republic of Serbia, it can be concluded that the intention of the legislator, when bringing non-chargeable givings to collation for the forced portion, it is only to provide the forced portion of heirs out of the conducted non-chargeable dispositions of the testator, in favour of individual forced heirs from the undistributed portion of the estate, and that the equalisation of forced heirs in non-chargeable receivables is only enabled through the collation procedure for the statutory legitime, as forced heirs are also a privileged category of statutory heirs at the same time.

We believe that the introduction of a rule on this type of collation into the text of the Law on Inheritance is useful and justifiable as the right to a forced portion of forced heirs can be effectuated with it, without any alterations in already based legal relationships.

For a closer clarification of this sub-form of forced portion collation, it is enough if Serbian legislator includes those non-chargeable givings into the forced portion collation that the testator excluded from the obligation to be collated. If what a forced heir has received from the testator, through gifts, legacies or other dispositions without charge is insufficient for the forced portion settlement, the remainder is settled from the undistributed portion of the estate. If, however, a forced heir has not received anything non-chargeable from the testator, the forced portion is paid entirely from the remaining portion of the estate.[32] The remainder of the estate, if there is one after the forced portion settlement, should be distributed to those forced heirs who were "affected" by the forced portion collation, commensurately to the size of their forced portions.

If there is no undistributed portion of the estate or it is insufficient for the settlement of forced heirs, there is a violation of the forced portion and then testamentary dispositions are reduced and

[31]In German law, the collation procedure for the forced portion runs as follows: first the pure estate value is established, to which the testator's unchargeable dispositions are added, and then the forced portion amount is determined on the basis of that amount, which is decreased by the amount of non-chargeable receivables of a forced heir. If collation has already been conducted in the sphere of statutory succession, the forced portion value after the conducted collation will exactly serve as the basis for calculating the forced portion. About the forced portion collation procedure in Austrian law, see in more detail in: D. Leipold, *Erbrecht*, Mohr Siebeck, Tübingen, 2002, p. 279-280.

[32]About the forced portion collation procedure in Serbian law, see in more detail: S. Marković, *Nasledno pravo*/*Succession Law*, ..., p. 212.

gifts returned, if the right to a forced portion is violated as succession law, i.e. the payment of pecuniary counter value by testamentary heirs and legatees, and if needed donees also, if the right to a forced portion is violated as obligation law.

e) Modification of Testamentary Dispositions as a Mode of the Effectuation and Protection of the Right to a Forced Portion

The Law on Inheritance of the Republic of Serbia permits a modification of testamentary dispositions, as a possible manner of the settlement of a forced portion (Article 47 paragraph 1 of the LIRS). The wording of the Law clearly says that a forced heir must receive a pure forced portion without limitation by a condition, term or charge by a legacy or by an order. Only what exceeds a forced portion by value can be limited or encumbered in one of the aforementioned manners.

Besides, the Serbian law permits the application of *cautele socini*, which implies the possibility of option for a forced heir: an increased inheritance portion with encumbrances and limitations or a pure forced portion (Article 47 paragraph 2 of the LIRS).

f) Effectuation and Protection of the Right to a Forced Portion in Case of the Exclusion from Inheritance

If a forced heir is excluded from inheritance by the testator, undoubtedly by the testament, he may, with the aim of protecting his right to a forced portion, raise an objection against the ungrounded exclusion from the estate or contest the testament entirely or only the provision on the exclusion from succession.

If he opts for the first legal means, a forced heir should, having participated in probate proceedings, declare that there is no reason for the exclusion, therefore it is ungrounded. On the basis of the objection of an ungrounded exclusion from succession, two procedural situations may arise thereof.

If the other participants in the probate proceedings agree that there is no room for the exclusion, the probate court must recognise the right of succession to the forced heir notwithstanding the exclusion clause.

If, however, some of the participants of the probate proceedings oppose the objection of an ungrounded exclusion from succession, there is a dispute on the grounds of the exclusion and the burden of proof (onus probandi), according to the Law, falls on the testamentary or statutory heir who calls upon the exclusion and who benefits from the exclusion of the forced heir, in the direction of improving inheritance-law position (Article 62 paragraph 2 of the LIRS).

What is the time limit for a forced heir to raise an objection to an ungrounded exclusion from succession? Serbian legislator does not answer the question posed. We opine that a forced heir could declare this objection until the moment the probate procedure becomes final. After that moment, since he is bound with the content of the final decision on succession, there is no possibility for declaring this legal

means, except if there are no reasons to repeat the probate procedure according to the rules of litigation proceedings.[33]

Although, the Law on Inheritance of the Republic of Serbia does not mention a possibility of raising an objection to an ungrounded deprivation of the right to a forced portion, there is a generally accepted opinion, in Serbian literature, on the justification of this legal means, in order to protect the interest of a forced heir.[34]

As already said, a forced heir, even if there is a cause for the exclusion from succession, may contest the testament in the part referring to the exclusion from succession. He may call upon the conditions for the testament to enter into force have been disobeyed, i.e. that this legal matter is null or void on the basis of reasons provided for by the Law on Inheritance of the Republic of Serbia.

g) Effectuation and Protection of the Right to a Forced Portion in the Event of Violation of the Forced Portion by Excessive Testamentary Dispositions and Gifts Made

1) Violation of the Right to a Forced Portion

When is the right to a force portion violated? Serbian legislator stipulates that there is such a possibility when the total value of testamentary dispositions and gifts, made to a forced heir or a person he inherits, is lower than the forced portion value (Article 42 of the LIRS).

Such construed legal solution does not cover all realistically possible cases of a forced portion violation, since a force heir is not necessarily left with non-chargeable legal affairs *inter vivos* or *mortis causa*. Thereafter, the right to a forced portion can be violated entirely or partly.

The right to a forced portion can only be violated by testamentary dispositions or exclusively with gifts made or in combination of the testament and non-chargeable legal affair *inter vivos*.

2) Persons Who May Claim the Protection of the Right to a Forced Portion

Besides a forced heir, whose right to his forced portion is violated by excessive non-chargeable givings of the testator, other persons may also claim the effectuation and protection of the right to their forced portion. In Serbian law, that privilege only refers to heirs

[33]See: Art. 131 of the Law on Extrajudicial Proceedings of the Republic of Serbia (*Official Gazette of the RS,* no. 24/1982 and 48/1987; *Official Gazette of the RS,* no. 46/1995, another law, 18/2005 –another law, 85/2012 i 45/2013 – another law). Hereinafter, the following abbreviation will be used: The LEPRS (orig. ZVPRS).

[34]See: S. Marković, *Nasledno pravo*/*Succession Law*, ..., p. 208–209; S. Svorcan, *Nasledno pravo*/*Succession Law*,..., p. 193; O. Antić, *Nasledno pravo*, Pravni fakultet u Beogradu/*Inheritance Law,* Faculty of Law in Belgrade, Belgrade, 2007, p. 193.

of a descendant or adopted person, who has not claimed the settlement of the succession right.[35] However, a dilemma remains whether this entitlement passes to heirs of any forced heir who claimed the forced portion prior to his death. Domestic judicial practice declares against such possibility, asserting that it is the personal right of a forced heir who has claimed the settlement of the forced portion.[36] We believe that this stand of courts of law is unacceptable. The right to a forced portion is a property entitlement, therefore it is eligible to be an object of inheritance-law succession if all requirements for its attainment laid down by the law are fulfilled The right to claim the settlement of a forced portion, as an accessory right which follows right after the right to a forced portion, is per its legal nature a potestative right, and it is, as such, inheritable.[37]

3) Violation of the Right to a Forced Portion as an Obligations-law Entitlement

When the violated right to a forced portion has a character of obligations, the pecuniary counter value, as a rule, is owed jointly and severally by all testamentary heirs and legatees, commensurately to the value acquired on hereditary and legal basis (Article 44 paragraph 1 of the LIRS.)

When speaking about the circle of debtors of the forced portion settlement, in principle, all testamentary heirs and direct legatees are borne in mind herein. However, they are entitled by the law to distribute the burden of the forced portion settlement to direct legatee, i.e. sub-legatee, by filing a claim to decrease legacy, i.e. sub-legacy, and its adoption by the court-of-law accordingly.

The manner of regulating the liability issue for the forced portion settlement by entitled subjects leads to a dilemma whether they are held liable jointly and severally or separately. In legal literature, there is no unanimous opinion thereof; we believe that will additionally contribute to different conduct of courts in identical procedural situations.[38] Individual legal writers observe that if the legislator had really wanted to protect the interest of forced heirs, he should have applied the rule on joint and several liability, which implies that each debtor is liable to the creditor for the realisation of

[35]See: Art. 60 paragraph 2 of the LIRS. On positive and negative sides of this solution, see more in: N. Stojanović – N. Krstić, 'Neka zapažanja o zakonskom i nužnom nasleđivanju u pravu Republike Srbije de lege lata i de lege ferenda', *Zbornik radova "Aktuelna pitanja građanske kodifikacije"*/'Some Observations on Statutory and Forced Heirship in the Law of the Republic of Serbia De Lege Lata and De Lege Ferenda', *A Collection of Works "Actual Issues of Civil Codification"*, Niš, 2008, p. 227-228.

[36]See, for example: The Decision of the Supreme Court of Yugoslavia, Rev-1387/65 and the Decision of the Supreme Court of Serbia, Rev. 465/86. Quoted as per: S. Vuković, op. cit, p. 96-97.

[37]Croatian legislator speaks in that direction. See: Art. 83 paragraph 2 of the Law on Inheritance of the Republic of Croatia (*Official Gazette,* no. 48/2003, 163/2003 and 35/2005.

[38]See for example: O. Antić – Z. Balinovac, op. cit, p. 238; I. Babić, *Komentar/Commentary ....,* p. 104-105.

entire liability, without restriction, and the creditor may address any debtor for the settlement of their receivables, pursuant to the content of Article 414 paragraph of the Law of Contracts and Torts.[39] In future editing of the text of the Law on Inheritance, Serbian legislator should re-examine once again the meaning and outreach of this solution, which as we have seen may be a "solid" base for an unequal treatment of parties in judicial procedures.

The rule on a circle of subjects-debtors in the forced portion settlement may be corrected with the testator's will by privileging explicitly or implicitly individual testamentary heirs or legatees. It will be explicit when the testator in the declaration of his last will determines that a specific testamentary heir or a direct legatee will only be held liable for the forced portion settlement when the forced portion cannot be settled out of the remaining portion of estate distributed by the testament. Serbian legislator implicitly permits privileging of legatees only, with a provision that the testator may determine payment of a specific legacy before other legacies (Article 45 of the LIRS.)

When what is left with the testament is insufficient for the forced portion settlement of forced heirs, the remaining portion is owed by donees, as per the order established (Article 44 paragraph 2 of the LIRS.) Namely, the payment of the forced portion is owed by donees in reverse order of the gifts donation. Hence, the donee who received a gift cause mortis will owe first, since it prompts an action the moment the testament is opened, and so forth, if needed all the way to the donee who had received gift before all the other donees. If simultaneously the testator bestowed several donees, all of them owe the payment in pecuniary counter value of the forced portion commensurately to the forced portion value (analogous to the content of Article 56 of the LIRS).

If the right to a forced portion as obligations-law entitlement is violated both by testamentary dispositions and the gifts made, then the sequence principle is applied there, implying that, firstly, testamentary heirs and direct legatees are liable for the settlement, then privileged testamentary heirs and direct legatees, and, finally, donees.

4) Violation of the Right to a Forced Portion as Inheritance-law Entitlement

In the event of violation of the right to a forced portion as an inheritance-law entitlement, the Law on Inheritance of the Republic of Serbia provides for somewhat different solutions in regard to their settlement.

In priority, all testamentary dispositions are reduced, irrespective of their nature, scope and regardless if they are in one or several testaments. All testamentary dispositions are reduced commensurately to their value, unless the testator specifically privileged some of testamentary dispositions (Article 54 of the LIRS), by privileging them from the reduction process, until he has other testamentary dispositions, which can settle the forced portion, or that

[39]See: R. Račić, op. cit, p. 110–111; G. Tišić, op. cit, p. 170-171.

he envisaged a different scope of the reduction of individual testamentary dispositions.

As in the event of violation of the right to a forced portion as an obligations-law entitlement, testamentary heirs and direct legatees are guaranteed the possibility to request reduction of indirect legacies and sub-legacies, because of the reduction of legitime, i.e. legacies, for complementing the forced portion 55 of the LIRS).

If the testator did not distribute his estate by testament or the value of testamentary dispositions is insufficient for the settlement of the forced portion, the restitution of gifts is performed. Gifts are returned following the order they were made. Thus, the first ones to suffer the forced portion settlement are the donees who were bestowed last, and in that order to the donee who was bestowed earliest. Multiple simultaneously made gifts are returned commensurately to their value respectively (Article 56 of the LIRS). Like with the reduction of testamentary dispositions, a forced heir must strictly comply with the determined order related to returning gifts. Contrary behaviour, that would be manifested in a form of a forced heir's claim for reduction of individual testamentary dispositions only, or a claim for the return of gifts, although the reduction of testamentary dispositions has not been claimed beforehand, or a claim for the restitution of older gifts, although there are more recent gifts, as per the time of donation, to the moment of opening of heirship, would not result in an expected legal effect, since the objection of an entitled person that the wording of the law was not obeyed in regard to the order of operations, through which the forced portion is settled, would stand in his way. [40]

These rules also find their analogous application in the situation that the testamentary heir and the donee are united in one person.[41]

In regard to the donated thing, a donee is considered a conscientious holder until he learns about the claim for the return of gift (Article 57 of the LIRS). The donee, as a rule, learns about the return of gift in a probate procedure, under the assumption that the gift is made to some of statutory or testamentary heirs. If this is not the case, the donee learns about the claim for the return of gift when the charges are delivered to the donee as the defendant thereof. In legal literature, there is an accepted opinion, although Serbian legislator does not declare in this direction, that a forced heir can prove that the donee had become unconscientious before that moment, if he had known that the donor donated the gift with an intention to foil the right to a forced portion. [42]

[40]The forced heir could only claim restitution of a gift made earlier in two cases: when a gift made later is insufficient by its value for the forced portion settlement and when the claim for the return of a specific gift could not be successfully effectuated (for example, the good donated is ruined, or the donee is insolvent).

[41] Also: N. Gavella – V. Belaj, *Nasljedno pravo,* Narodne novine/*Succession Law,* Official Gazette, Zagreb, 2008, p. 234, remark. no. 53.

[42]See: B. Blagojević, op.cit. p. 490; O. Antić – Z. Balinovac, op.cit. p. 267; I. Babić, *Komentar*/ *Commentary ....,* p. 122.

Legal status of a conscientious/unconscientious holder of a possession is regulated by the Law on Basis of Ownership and Proprietary Relations of the Republic of Serbia. [43]

A conscientious donee is obliged to hand over the donated goods to a forced heir in the state it was at the moment he learnt about the claim for the return of gift.[44] A conscientious holder is not liable for destruction or impairment of an item and he is not obliged to compensate for the use of the item either. He is only obliged to return to the owner the fruits he has not collected (Article 38 paragraph 1 and 2 of the LBOPRRS). To the contrary, an unconscientious holder is held liable for damage caused by destruction and impairment of an item, unless he proves that the damage would have occurred even if the item had been with the owner. An unconscientious holder ought to handover the owner all the fruits of an item, as well as to compensate for the fruits of the item that have been spent, alienated, destroyed or that he missed to collect (Article 39 paragraph 1, 2 and 3 of the LBOPRRS).

A conscientious donee, who has returned a gift to a forced heir is entitled to claim the compensation of forced costs and useful costs, in the amount it has increased the value of the donated good. A conscientious donee is only entitled to other costs if they are not included in the proceeds that the donated good gave. A conscientious donee is entitled to compensation of the so-called luxury costs, if the value of items has increased, or to claim, if anyhow possible without damage, the separation of everything installed, for pleasure or decoration, on the donated good (Article 38 paragraph 3–6 of the LBOPRRS).

An unconscientious donee is, however, entitled to claim compensation of forced costs and useful costs, only if these expenses were personally useful to the forced heir. An unconscientious donee is not entitled to compensation of those expenses spent for pleasure or decoration of the donated good, but he is entitled to *ius tollendi* (Article 39 paragraph 4–6 of the LBOPRRS).

How to return the donated good? If it is a divisible item, naturally, the part needed for the settlement of a forced heir is returned to the estate. When donated items are defined by gender, the same quantity of the same quality of these items is returned. If an indivisible item is in question, the donee and the forced heir may become co-owners of that item, but there may also be another solution: the donee pays to the forced heir the part of the item which violates the forced portion or vice versa, the forced heir pays the part which exceeds the value of the forced portion in the donated good to the donee. [45]

What if a donee has alienated the donated good? In the Law of Inheritance of the Republic of Serbia there is no answer to the question posed. If the solution contained in the Law on Basis of

[43] *Official Gazette of the Socialist Federative Republic of Yugoslavia,* no. 6/1980 and the *Official Gazette of Serbia and Montenegro (SaM),* no. 29/1996, *Official Gazette of the RS.* no. 115/2005 – another law. Hereinafter, the following abbreviation will be used: The LBOPRRS (orig. ZOSPORS).

[44] See: M. Kreč – Đ. Pavić, op. cit, p. 121; B. Bazala, 'Nužno nasljedstvo', *Naša zakonitost*/'Forced Heirship'*, Our Legality*, no. 3–4/1957, p. 154.

[45] See in more detail: O. Antić – Z. Balinovac, op. cit, p. 267.

Ownership and Proprietary Relations on the legal status of a conscientious holder is applied in an analogous manner, in the event of destruction or consumption of an item, it turns out that the donee is not obliged to compensate the value of the alienated gift. There is a clash of opinions about it. A group of theoreticians deem that for the sake of protecting a forced heir, in such a situation, he would be entitled to, by the principle of real subrogation, the item acquired instead of the donated good.[46] To some others, however, the donee is not obliged to compensate for the counter value of the donated good that has been at his disposal.[47] If the purpose of these provisions, committed to the forced portion, is the protection of forced heirs' interest, it seems that there must be no dilemma in regard to the liability of the donee, who has alienated the gift, for the settlement of the forced portion, even if he was conscientious.

Is the testator entitled to determine a different order of the settlement of a forced heir, thereby placing the donee before the testamentary heirs and legatees, or ordering the settlement of the forced portion to the donee who was donated first, and following that order, to the donee who was donated last? Although there is a concept in legal literature that the testator's will is decisive not only in regard to the settlement of the forced portion from testamentary dispositions, but also in regard to the gifts made, [48] which is not covered by the text of the law. Serbian legislator does not entitle the testator, as it does with testamentary dispositions, to change the order in the settlement of a forced heir in regard to gifts or in the relation to gifts and testamentary dispositions. Different viewpoint would lead to disrespect of the imperative character of the provisions that regulate the issue of the order of returning gifts in the event of the forced portion violation, which the donees counts on, as well as to disrespect of the contractual law rule *pacta sunt servanda*, save for those limitations which directly emanate from the law, that would, finally, result in legal insecurity.[49]

5) Valid Common Rules Regardless if the Right to a Forced Portion is Violated as Obligations or Succession Entitlement

Every forced heir, who is inheriting in a concrete case, is entitled to a forced portion, which can be expressed as a value. That value results when the accounting value of the estate is divided with its forced portion quota.

In order to determine whether and how much is the forced portion of a forced heir violated, regardless of its legal nature, the accounting value of the estate must be calculated.

If a forced heir received more than the forced portion's value with the testament or with a gift, that surplus goes to the disposable

[46]Ibidem.
[47]See: Č. Rajačić, *Stvarno pravo, I dio*/*Property Law, Vol. I*, Zagreb, 1956, p. 15.
[48]S. Svorcan, Commentary …., p. 129.
[49]See in more detail: B. Blagojević – O. Antić, *Nasledno pravo*/*Succession Law*, NOMOS, Belgrade, 1991, p. 481.

portion of the estate, out of which the remaining forced heirs can be settled.

If the testator disposed with the testament or gifts in favour of third persons in the last year of his life, they belong to the disposable portion of the estate and serve for the settlement of forced heirs.

The undistributed portion of the estate is used for the settlement of forced heirs.[50]

Serbian legislator stipulates, independently if the right to a forced portion is violated as obligations- or succession-law, that the same time limits within which the forced portion settlement can be claimed.[51]

If the right to a forced portion is violated with testamentary dispositions, the payment of the forced portion' pecuniary counter value, when the right to the forced portion is violated as obligations entitlement, i.e. the reduction of testamentary dispositions, when the right to a forced portion is violated as succession-law, can be claimed within a 3 year period form the proclamation of a testament.

If the right to a forced portion is violated with the gifts made, the payment of the forced portion' pecuniary counter value – when the right to a forced portion has obligations character, i.e. the return of gifts – when the right to a forced portion has succession character, can be claimed within a three year period from the date of the opening of the estate of the testator-donee.

Since these are objective time limits, which start on the date of the proclamation of a testament, i.e. the opening of the testament of the testator, it is evident that a forced heir can miss them being unaware of the occurrence of these facts, and thereby he can lose the possibility to effectuate and protect its inheritance and legal entitlement. Although, from the aspect of statutory safety, this solution on shorter, objective time limits is more effective, it is not fully compliant with a forced heir's interest. Therefore we believe that Serbian legislator should consider highly attentively the solution contained in the Code Civil,[52] which provides for a two-fold possibility, a five year time limit, starting from the moment of the opening of a testament, or a two year time limit, starting from the moment the heirs learnt there had been a violation of their forced portion and an objective time limit that cannot exceed ten years, starting from the moment of the testator's death (Article 921 paragraph 2 Code Civil).

According to the dominant opinion of judicial practice[53] and theory[54] the relevant time limits are statutes of limitations and not

[50]See in more detail: S. Marković, *Nasledno pravo*/*Succession Law*, ..., p. 214.

[51]See: Article 58-59 of the LIRS.

[52]For the needs of this paper, the Code Civil, with alterations and amendments is used, 2006 (La loi No 2006-728 du Juin 2006). The integral text of this Law can be found in: A. Delfosse – J. F. Peniguel, *La réforme des successions et des libéralités,* Lexis Nexis SA, Paris, 2006, p. 329-389.

[53]However, there have been opposed stands in domestic judicial practice. In this regard, see the Decision of the Supreme Court of Serbia, Gzz-115/94 Quoted as per: S. Vuković, op. cit, p. 93-94.

[54]See for example: O. Antić – Z. Balinovac, op. cit,p. 268; S. Svorcan, *Komentar/Commentary* ..., p. 153–154; V. Djordjević, *Nasledno pravo,*

statutes of repose, although the latter assertion would be more justifiable since it is dictated by the nature of the right referred to in Article 58 and 59 of the Law on Inheritance of the Republic of Serbia (legal power, the so-called potestative right).[55]

Since statutes of limitations are in question, the rules on ceasing and interruption of unenforceability period are applied in an analogous manner, which are contained in Articles 381–392 of the Law on Contracts and Torts of the Republic of Serbia.[56]

Unenforceability period is regularly interrupted with a claim for the forced portion settlement by a forced heir in a probate procedure, and it begins to run at the moment the decision on inheritance enters into force. According to the stand of judicial practice, unenforceability period is also interrupted when a forced heir claims a will contest as *mortis causa*,[57] and it begins to run when the decision that establishes full validity of the testament enters into force.

Unenforceability period ceasing occurs in a series of cases provided for in the Law on Contract and Torts (e.g. unenforceability period does not run if the forced heir and the person who owes him the forced portion settlement are spouses or cohabitees or in the relationship between parents and children while parental right is in effect).

Since unenforceability periods begins to run at different moments in time, when the right to forced portion is violated by testamentary dispositions and gifts made, there is no answer to the question what if a forced heir settled his right to the forced portion with a gift and the testament has been proclaimed meanwhile. In legal literature, the stand is taken that in such an event the donee is entitled to claim the return of the gift from the forced heir, since - by the law, he is not the one who first owes the forced portion settlement.[58]

6) Procedural Aspect of the Effectuation of the Right to a Forced Portion

Since a forced heir is regularly a participant in the probate procedure, he can start the mechanism that establishes any eventual violation of his entitlement by giving a statement on the reception of the forced portion. If the violation of a forced heir's forced portion is confirmed after calculating the accounting value of the estate, it is up to the probate court to state who owes and how much is owed in the name of the forced heir settlement in the decision on inheritance.

By giving the heirship statement on the acceptance of a forced portion, a forced heir clearly expresses his will that his inheritance-law entitlement is established with the decision on inheritance and that

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Pravni fakultet u Beogradu/*Succession Law,* Faculty of Law in Niš, Niš, 1997, p. 307.

[55]Also: I. Babić, *Komentar/Commentary* ...., p. 123-124.

[56]*Official Gazette of the SFRY,* no. 29/1978, 39/1985, 45/1989, and, 57/1989; and the *Official Gazette of the Federal Republic of Yugoslavia (FRY),* no. 31/1993 and the *Official Gazette of SaM,* no. 1/2003.

[57]See the Decision of the Supreme Court in Serbia, Rev. 803/87, Gž. 7091/86-V, Newsletter of the District Court in Belgrade, no. 29-30, Belgrade, 1988, p. 67.

[58]O. Antić – Z. Balinovac, op. cit, p. 274.

an appropriate pecuniary amount is paid, if the right to the forced portion has obligations character, i.e. to reduce the testamentary dispositions and, if necessary, to return gifts if the forced portion is violated therewith.[59] To the contrary, his silence during the probate hearing will result, as a rule, in the impossibility of a subsequent – after the decision on inheritance enters into force – claim for effectuation his inheritance-law entitlement, being bound by the content of that decision.[60]

If there is consent between the participants of the probate procedure in all of this, the violated right to the forced portion can be effectuated in the course of this procedure. In the event of a dispute on the facts that the right to the forced portion depends on, the probate procedure is regularly interrupted and the one who disputes the forced heir's forced portion is referred to litigation in the role of a claimant.[61]

A force heir may also give a statement on the reception of the statutory forced portion or testamentary forced portion during the probate procedure. In such an event, he may receive the forced portion entirely or can just partly satisfy his right, thereby further opening room for complementing the forced portion, calling upon that the statutory or testamentary heir gave the declaration on the reception in fallacy.

A forced heir, besides, does not have to state his right until the probate procedure becomes final. In this way, he receives, as any heir, on the basis of the law or on the basis of the testament, a part of the estate, which may but does not have to correspond to the forced portion value.

A decision on inheritance as a final, meritorious and declarative decision of the probate court is not eligible for enforcement procedure, thereby for the effectuation of a forced portion. *Actio Supletoria* is needed for that, a lawsuit wherein the effectuation of the right to a forced portion that has inheritance-law character is claimed in litigation and a lawsuit wherein the fulfilment of the right to a forced portion of obligations character is claimed.

Actio Supletoria is a condemnation lawsuit claiming the reduction of testamentary dispositions and the return of gifts for the purpose of the settlement of the right to a forced portion. The statement of claim is directed to establishing that the right to a forced portion of a claimant-forced heir is violated with testamentary dispositions and donated gifts, that the claimant is established to be the owner or co-owner of a specific movable or immovable item, which was the subject of the testator's dispositions *inter vivos* or *mortis causa* and that the defendant is obliged to acknowledge and suffer the entering of proprietary entitlement into the public books, as well as the physical and civil division of the same goods.

Actio Supletoria can be filed by a forced heir who did not participate the probation procedure within a three year period from the final completion of the probate procedure. A forced heir who did not

[59]Similar observation see in: M. Kreč – Đ. Pavić, op. cit, p. 127; N. Gavella – V. Belaj, op. cit, 238–239.
[60]Also: M. Kreč – Đ. Pavić, ibidem, p. 126; N. Gavella – V. Belaj, ibidem, p. 232, remark. no. 47.
[61]See: Art. 119 paragraph 2 of the LEPRS.

participate the probation procedure can file this lawsuit within a three year period from the proclamation of the testament, i.e. from the testator's death. If the right to a forced portion is not settled for a forced heir even after the final completion of the probate procedure, there is nothing else left but to claim an enforceable exercise of his right by instigating an enforcement procedure within a ten-year period from the date of the condemnatory judicial decision (pursuant to the content of Article 379 of the Law on Contracts and Torts of the Republic of Serbia.) [62].

In principle, the same rules also apply when the right to a forced portion is violated as obligations-law entitlement, only the statement of claim is directed to the performance the subject of which is payment of a specified pecuniary amount.

A forced heir will not always be obliged to effectuate and protect his inheritance-law entitlement in this manner. In the event that a donee is not also a participant of a probationary procedure or that the probationary procedure is discontinued due to non-existence of the estate, or because the heir does not want to continue the already initiated procedure, when only movables are found in the probate mass, the forced heir can only effectuate his right to the forced portion in a litigation.[63]

The violated right to a forced portion can only be protected in a litigation by a forced heir, who participated the probate procedure, if it is established, after the decision on inheritance becomes final, that the conditions are fulfilled, on the basis of which the repetition of the procedure may be requested, or if the court, during the probate procedure, referred, or should have referred, the participants of the probate procedure, because of a disputable decisive fact, to a litigation; therefore, it has not been decided upon before the decision on inheritance enters into force.

If it is absolutely certain, on the basis of the assessment of the estate's value, the forced portion's value and the non-chargeable givings' value *inter vivos* or *causa mortis*, that the value of testamentary dispositions is not sufficient for the forced portion's settlement, he can simultaneously effectuate and protect his inheritance-law entitlement in a probate procedure and litigation.[64] Such a procedural situation, *inter alia*, is dictated by the brevity of deadlines, during which the settlement of a forced portion may be claimed.

Independently, whether a forced heir effectuates and protects the violated right in a probate procedure or litigation, he must comply with imperative provisions of the Law on Inheritance, which refer to the order of the subjects that he may claim the forced portion's settlement from and in regard to the objects that the forced portion can be settled with.[65]

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[62] *Official Gazette of the SFRY,* no. 29/1978, 39/1985, 45/1989, and, 57/1989; and the *Official Gazette of the FRY,* no. 31/1993 and the *Official Gazette of SaM,* no. 1/2003.

[63] See in more detail: O. Antić – Z. Balinovac, op. cit, p. 273-274.

[64] Also: M. Kreč – Đ. Pavić, op. cit, p. 128.

[65] An opposed opinion, when a forced portion is effectuated and protected in a litigation, see in: M. Kreč – Đ. Pavić, ibidem, p. 129.

Concluding Considerations

Whenever a forced heir's right to the forced portion is violated or there is a threat of violation thereof, he is entitled to protect its legal position by the application of adequate legal means, adapted to the legal nature of his entitlement.

Taking into consideration, when establishing the accounting value of the estate, gifts made to third persons in a time period longer than the stipulated and what is given in the name of further education of statutory heirs could certainly contribute to a more complete protection of the forced heirs' interest, as well as bringing what is provided for support into collation, and what was not a reflection of the real needs of a heir.

Although the Serbian legislator gives an indication in favour of the existence of collating non-chargeable givings into a forced portion, it does not clarify it more closely, thereby leaving room for various interpretations of the wording of the Law by domestic courts. In order to avoid such realistically possible situations, we propose to install a solution to take into account those non-chargeable givings that the testator ordered not to be the subject of collation when performing the collation in the text of the Law on Inheritance of the Republic of Serbia. If what a forced heir received without compensation from the testator is insufficient for the forced portion settlement, the remainder is settled from the undistributed portion of the estate. It is the same when a forced heir received nothing unchargeable from the deceased. If after the forced portion settlement there is a remaining portion of the estate, it is distributed to those forced heirs who "suffered" the application of this institute, commensurately to the size of what they have received in the name of the forced portion.

The understatedness of Serbian legislator whether the right to claim the forced portion settlement passes to the successors of that heir who had claimed the forced portion prior to his own death, may give rise to various acting of the courts in the same procedural situations and result in a various treatment of parties in judicial proceedings. Thereafter, we propose that such a situation is legally regulated with an amendment to the Law on Inheritance so that the right to claim the forced portion settlement is inheritable in such a case.

The right to a forced portion violated with excessive testamentary dispositions and gifts made may be substantially protected if: a "full" joint and several liability is introduced for the forced portion debtors for the settlement thereof; gifts made to all statutory heirs are taken into account, whether they are to be inherited or not in a concrete case; a conscientious donee is bound to settle the forced portion, even if he has alienated the donated good and if the deadline is extended, as in French law, whereby the forced portion settlement may be claimed.

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