Constitutional judgment 3-2-1-73-04

JUDGMENT
OF THE GENERAL ASSEMBLY
OF THE SUPREME COURT

No. of the case	3-2-1-73-04
Date of judgment	22 February 2005
Composition of court	Chairman Märt Rask and members Tõnu Anton, Jüri Ilvest, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Julia Laffranque, Jaak Luik, Harri Salmann, Tam Tampuu and Peeter Vaher
Court Case	Action of Viiu Nurmela and Maie Kriis against Tambet Kib for termination of common ownership and division of comm ownership into physical shares, and counterclaim of Tambe Kibal against Viiu Nurmela and Maie Kiis for the recogniti of partial invalidation of application for the acceptance of succession and succession certificate, for recognition of the right of ownership and deletion of land register entries
Disputed judgment	Judgment of Tartu Circuit Court of 11 February 2004 in civ matter No 2-2-23/2004
Complainant and type of appeal	Appeal in cassation of Tambet Kibal
Date of hearing	1 December 2004

Persons participating in the hearing	Plaintiffs V. Nurmela and M. Kriis, defendant T. Kibal and contractual representative sworn advocate R. Antsmäe, and representative of the Ministry of Justice K. Paal

DECISION

1. To satisfy the appeal in cassation of T. Kibal partly.

2. To annul the judgment of the civil chamber of Tartu Circuit Court of 11 February 2004 in civil matter No 2-2-23/2004 and the judgment of Tartu County Court of 4 July 2003 in civil matter No 2-1743/02.

3. To refer the matter back to Tartu County Court for a new hearing.

4. To return to T. Kibal the security of 1250 (one thousand two hundred and fifty) kroons, paid upon filing the appeal in cassation.

FACTS AND COURSE OF PROCEEDING

1. Erna Kibal owned a registered immovable of Uus-Ratasepa, located in Tõrvandi village, Ülenurme rural municipality, Tartu County. E. Kibal passed away on 7 October 2001. By her will she bequeathed all her property to her son Tambet Kibal. T. Kibal and the daughters of E. Kibal - Malle Kriis and Viiu Nurmela - filed applications to a notary for the acceptance of succession. M. Kriis and V. Nurmela submitted to the notary their pension certificates, according to which life-long old-age pension was granted to M. Kriis as of 7 May 1993 and to V. Nurmela as of 15 July 2000. On 20 June 2002 the notary issued a succession certificate, pursuant to which the successors of the property of E. Kibal were T. Kibal in the amount of 2/3 of legal share, and under § 104 of Law of Succession Act (hereinafter ‘LSA'), M. Kriis and V. Nurmela as her daughters, incapacitated for work because of their age, each in the amount of 1/6 of legal share.

2. On 19 July 2002 and 26 August 2002 the plaintiffs informed the defendant of their wish to terminate the common ownership, but according to the defendant's reply he did not wish to terminate the common ownership. Thereupon, M. Kriis and V. Nurmela filed an action against T. Kibal, requesting the termination of the common ownership of the registered immovable of Uus-Ratasepa and the division of the registered immovable in physical shares.

3. In his reply to the statement of claim T. Kibal did not admit the claim. The defendant filed a counterclaim for the recognition of partial invalidity of the application to accept the succession and of succession certificate, the recognition of the right of ownership and for the deletion of entries in the land register. According to the counterclaim the plaintiffs had no legal ground to succeed to the compulsory portion, because on the date of opening of a succession they were not incapacitated for work. Thus, the notary has issued the succession certificate of the compulsory portion without a legal ground and both, the application to succeed and succession certificate were, under §§ 66 and 68 of the General Part of Civil Code Act, partly invalid at the time the transactions were carried out.

4. By its judgment of 4 July 2003 Tartu County Court dismissed the action and partly satisfied the counterclaim of the defendant, recognising his right of ownership of the legal share of the registered immovable under dispute, which so far had belonged to the plaintiffs as co-owners. The County Court argued that as it had partly satisfied the counterclaim, which excluded the satisfaction of the main action, it can not legally assess the main action.

According to the reasons of the judgment of the county court the fact that a person is retired or receives a pension does not mean that the person is incapacitated for work. The procedure for performance of notarial

acts, proceeding from Law of Succession Act and other Acts, does not provide for the definition of incapacity for work, and at the material time of opening of a succession and issuing of succession certificate it did not proceed from any legislation that attainment of pensionable age would automatically result in a person's incapacity for fork. According to § 11 of State Pension Insurance Act (hereinafter 'SPIA'), in force at the time of opening of a succession, a person is incapacitated for work if he or she has a functional impairment caused by an illness or injury due to which he or she is not able to work in order to support himself or herself or is not able to perform work in the amount corresponding to the general national standard for working time. Thus, a factual condition of a concrete person can be regarded as incapacity for work. The plaintiffs have not proved that at the time of opening of a succession they had been incapacitated for work due to a functional condition caused by an illness or injury. Persons who are incapacitated fork, who have the right to receive maintenance from bequeather under Family Law Act, should be entitled to succeed to compulsory portion. The plaintiffs did not have the right to receive maintenance from their mother (bequeather). The practice of notaries upon performing notarial acts to automatically treat old-age pensioners as persons incapacitated for work is not in conformity with the principle of the right to bequeath and is not in conformity with the valid law, either.

5. By its judgment of 11 February 2004 Tartu Circuit Court annulled the judgment of the county court and rendered a new judgment in regard to T. Kibal's counterclaim, by which it dismissed the latter. The circuit court referred the matter back to the same county court for a new hearing concerning the action of V. Nurmela and M. Kriis.

The circuit court found that the county court had erroneously interpreted § 104 of LSA. The referred section establishes that if a bequeather has by a will or succession contract disinherited an ascendant, descendant or his or her spouse who are incapacitated for work and are entitled to succeed in intestacy, or has reduced their shares of the estate as compared to their shares according to intestate succession, the relatives and spouse have the right to succeed to the compulsory portion. For the purposes of Law of Succession Act also a person, who has attained pensionable age by the time of opening of a succession irrespective of whether he or she still works or not, should also be regarded an ascendant, descendant or his or her spouse entitled to succeed in intestacy. At the time of death of the bequeather the plaintiffs had attained pensionable age and they were entitled to receive a compulsory portion. The objective of the institute of compulsory portion is to guarantee the receipt of a part of estate to those disinherited persons who are entitled to succeed in intestacy, who have limited means to cope because of incapacity for work, as it is in the case of persons who have attained pensionable age.

6. The defendant filed an appeal in cassation against the judgment of Tartu Circuit Court, requesting that the referred judgment be annulled in its entirety and a new judgment, dismissing the action and satisfying the counterclaim, be rendered.

7. By its ruling of 4 June 2004 the Civil Chamber of the Supreme Court referred the matter to the full composition of the Chamber for a hearing. The full Chamber found in its ruling of 19 October 2004 that § 104 of LSA should be interpreted to mean that all persons enumerated in § 104 of LSA, irrespective of factual capacity for work, shall have the right to succeed to a compulsory portion. The Civil Chamber is of the opinion that for the adjudication of the matter it is necessary to assess whether § 104 of LSA is in conformity with §§ 32 and 11 of the Constitution in their conjunction, and to answer the question of whether the right to succeed to the compulsory portion of persons enumerated in § 104 of LSA, who are not needy and have in fact capacity for work, is in conformity with the principle proceeding from § 32(4) of the Constitution, pursuant to which the right of succession is guaranteed. Under § 358 of the Code of Civil procedure and § 3(3) of the Constitutional Review Court Procedure Act the full composition of the Civil Chamber referred to matter to the general assembly of the Supreme Court for a hearing.

JUSTIFICATIONS OF THE PARTICIPANTS IN THE PROCEEDING IN THE SUPREME COURT

8. According to the arguments of the defendant's appeal in cassation the circuit court had erroneously interpreted § 104 of LSA. T. Kibal is of the opinion that the circuit court has erroneously found that persons

who have attained pensionable age by the time of opening of the succession are also persons incapacitated for work, entitled to succeed to compulsory portion, irrespective of the fact whether they work at the moment of opening of a succession.

The defendant is of the opinion that in its presently valid wording § 104 of LSA is not in conformity with §§ 32 and 11 of the Constitution in their conjunction. The defendant argues that proceeding from § 32(4) the right of succession is a fundamental right not subject to reservations by law. According to § 11 of the Constitution rights and freedoms may be restricted only in accordance with the Constitution, whereas the restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted. § 104 of Law of Succession Act restricts the principle of private autonomy, important in private law, which in law of succession is manifested in the freedom to bequeath. As the Constitution establishes the right of succession without reservations, § 104 of LSA is unconstitutional. By way of comparison the defendant refers to § 14(1) of the Basic Law of the Federal Republic of Germany, the second sentence of which directly provides for a reservation by law of the right of succession.

The defendant is of the opinion that even if § 27(1) of the Constitution, which protects the family as being fundamental to the preservation and growth of the nation and as the basis of society, serves as a basis for restricting the right to bequeath, the institute of compulsory portion of § 104 of LSA disproportionately restricts the right to succeed, which proceeds from § 32(4) of the Constitution. This is due to the fact that no legislation defines the concept of incapacity for work, employed in § 104 of LSA. As a result of interpretation of the Act the circle of ascendant and descendant relatives, incapacitated for work, may prove disproportionately wide. Even if one argues that the fundamental right included in § 32(4) of the Constitution may be restricted with the fundamental right proceeding from § 27 of the Constitution, only those persons who could be entitled to receive maintenance from the bequeather for the purposes of family law, should be regarded as persons entitled to succeed to compulsory portion. The objective of the institute of compulsory portion is to help to fulfil the valid obligation of a bequeather to provide maintenance, considering the needs of those closest to him or her, also after the bequeather's death. Compulsory part as a restriction of the right to bequeath is justified only in the cases when a person who is entitled to intestate succession has, due to his or her factual condition, a special need for assistance, because of which his or her ability to support himself or herself is restricted. The defendant is of the opinion that the view of Tartu Circuit Court and the practice of notaries pursuant to which a person who has attained pensionable age, irrespective of his or her factual need for assistance, is regarded as a person entitled to succeed to compulsory portion, is unjustified. The defendant argues that such an approach is not in conformity with the regulation of incapacity for work, and is not in conformity with § 32(4) and § 27 of the Constitution.

9. The plaintiffs argue that the appeal in cassation is unfounded. § 104 of Law of Succession Act is not in conflict with § 11 of the Constitution, because this amounts to restriction of the freedom to bequeath by compulsory portion in favour of those persons who have a special need for that. This is a restriction necessary in a democratic society and does not distort the nature the restricted right. The plaintiffs argue that § 27 of the Constitution, obligating the family to care for its needy members, is a separate norm in regard to § 32 of the Constitution, which is to guarantee, *inter alia*, the right of succession. The argument of the defendant that the right to succeed to compulsory portion should be worded on the basis of § 27 of the Constitution and the maintenance obligation established in the Family Law Act, is not correct. The plaintiffs are of the opinion that the right to succeed to compulsory part of the persons enumerated in § 104 of LSA is in conformity with § 32 of the Constitution. Furthermore, the plaintiffs argue that T. Kibal has mislead the court and has been trying to delay the proceedings, thus abusing the rights of a participant in a proceeding, established in §§ 68 and 69 of the Code of Civil Procedure.

10. The Legal Affairs Committee of the Riigikogu is of the opinion that § 104 of LSA is not in conflict with §§ 32 and 11 of the Constitution in their conjunction. The restriction has been established by an Act in conformity with the Constitution and is necessary in a democratic society. The last will of a bequeather is being realised, whereas the interests of the persons, incapacitated for work, closest to the bequeather, are proportionally protected. Such protection is in conformity with § 27(5) of the Constitution, which establishes that the family has a duty to care for its needy members. The objective of the institute of compulsory portion

is to consider the interests of needy family members of a bequeather also after his or her death. The Legal Affairs Committee of the Riigikogu argues that § 104 of LSA is a measure suitable for the achievement of the referred aim. As there is no other measure, less encumbering on a person yet at least as affective as this one, § 104 of LSA is necessary. The institute of compulsory portion is proportional, because it gives equal consideration to the last will of a bequeather and the interests of his or her family members, who are incapacitated for work. The concept of incapacity for work should be substantiated on the basis of legal practice, pursuant to which minors, old-age pensioners and persons, who have lost capacity for work because they have become disabled, are considered as persons incapacitated for work. If the concept of incapacity for work should be substantiated differently, a mechanism should be set up for ascertaining the incapacity in each concrete case, and the Legal Affairs Committee does not find this to be expedient.

11. The Minister of Justice is of the opinion that § 104 of LSA should be interpreted to the effect that only a person who is factually incapacitated for work shall have the right to succeed to compulsory portion. This interpretation is supported by the grammatical wording of the provision. Although the valid private law does not define the concept of incapacity for work more precisely, a person should be regarded as incapacitated for work if he or she is not able to earn his or her own living. If the legislator had wanted to make the receipt of compulsory portion dependent on age, it should have stated so clearly. The objective of § 104 of Law of Succession Act is the protection of the rights of closest relatives and spouses. It appears from the wording of the provision that the legislator only wanted to protect persons who meet the criteria established in the norm. Interference into private autonomy is justified for the protection of persons who need protection. Also, the constitution-conforming interpretation of § 104 of Law of Succession Act supports the interference into private autonomy only for the protection of persons incapacitated for work. A person who has formally attained pensionable age is not automatically incapacitated for work for the purposes of § 104 of LSA. The practice of notaries can not be of decisive importance upon interpreting the regulation of compulsory portion.

If § 104 of LSA were to be interpreted to the effect that the compulsory portion is extended to all persons who have attained pensionable age, the matter would amount to a restriction of a fundamental right. The aim of the restriction is to create the feeling of security for the needy persons closely related to a bequeather for the case the latter should exclude them from the circle of successors or restrict their portions. In case of persons who are in fact incapacitated for work this measure is aimed at creating economic security. § 104 of Law of Succession Act is a necessary measure, as it is difficult to find other measures less encumbering in the context of law of succession. As the persons who are capable of earning their own living can not be regarded as persons who in fact need assistance, § 104 of LSA - if interpreted broadly - would be in conflict with the principle of proportionality, as regards the referred persons. § 104 of Law of Succession Act amounts to an extensive infringement of a fundamental right, as the application of the regulation is highly probable in the majority of succession proceedings. Also, the regulation pertains to each person contemplating about drawing up a last will. Thus, § 104 of LSA would be in conflict with § 32(4) and § 11 of the Constitution in their conjunction, to the extent that they guarantee the right of succession to compulsory portion to those persons who are not in fact incapacitated for work. There will be no conflict if § 104 of LSA is interpreted to the effect that only those persons who are actually incapacitated for work shall be entitled to succeed to compulsory portion.

12. The Chancellor of Justice is of the opinion that the Civil Chamber of the Supreme Court has erroneously interpreted § 104 of LSA. On the basis of § 27(5) and § 28(2) of the Constitution the actual need for assistance should be taken into consideration upon applying § 104 of LSA. Considering that the Constitution gives rise to the duty of the family to care for its needy members, the right to bequeath can also be restricted only in the interests of needy members of the family. At the same time § 104 of LSA restricts the right of every member of the family to succession (principle of family succession), proceeding from § 32(4) of the Constitution. The Chancellor of Justice argues that § 104 of LSA makes the right to succeed to compulsory portion dependent on the successor's incapacity for work, and does it disproportionately and in conflict with the principle of equal treatment.

13. The Supreme Court also asked for the opinion of the Chamber of Notaries and Estonian Bar Association concerning this constitutional matter.

The Chamber of Notaries is of the opinion that § 104 of LSA should be interpreted to the effect that the right to receive compulsory portion shall be extended to all persons who have attained the age of old-age retirement. Taking into account other criteria and proving of actual incapacity for work would create even greater problems, because persons would incur additional costs. The Chamber of Notaries is of the opinion that § 104 of LSA is in conformity with § 27(5) of the Constitution, pursuant to which the family has a duty to care for its needy members.

Estonian Bar Association is of the opinion that § 104 of LSA is not unconstitutional in regard to establishing the compulsory portion. § 104 LSA constitutes a restriction of fundamental rights established in § 32(4) of the Constitution, yet the restrictions may be justified. The Bar Association is of the opinion that the institute of compulsory portion serves the continuity of generations, including the proprietary continuity. The Constitution protects the family as being fundamental to the preservation and growth of the Estonian nation and culture. As the institute of compulsory portion serves the principle of protection of family, and it is an expedient and proportional measure, there is no conflict with the Constitution.

14. At the hearing in the Supreme Court the participants in the proceeding persevered with their opinions submitted in writing.

The plaintiffs and the defendant have submitted to the Supreme Court a list of legal costs and have reciprocally requested that the court order that the legal costs be paid by the other party.

PERTINENT PROVISION

15. § 104 of Law of Succession Act (RT I 1996, 38, 752 ... RT I 2002, 53, 336) provides as follows:

"If a bequeather has by a will or succession contract disinherited an ascendant, descendant or his or her spouse who are incapacitated for work and are entitled to succeed in intestacy, or has reduced their shares of the estate as compared to their shares according to intestate succession, the relatives and spouse have the right to succeed to the compulsory portion."

OPINION OF THE GENERAL ASSEMBLY

16. For the adjudication of the present matter the general assembly considers it necessary firstly to explain the content of § 32 of the Constitution from the point of view of the right to bequeath (I). Then, the general assembly shall form its opinion on the interpretation of § 104 of LSA (II), and shall adjudicate the civil matter (III).

I.

17. § 32(4) of the Constitution establishes: "The right of succession is guaranteed." This norm must be interpreted in conformity with the entirety of § 32, which establishes the guarantee of the right of ownership and the right of every person to freely possess, use, and dispose of his or her property. The right to transfer one's property to other persons by a will is an essential part of the freedom that a person has in relation to his or her property. Also, the international human rights norms recognise the freedom to bequeath as a part of freedom to own. For example, the Charter of Fundamental Rights of the European Union includes an explicit right to bequeath one's property (Article 17). Although the European Convention for the Protection of Human Rights and Fundamental Freedoms does not contain a right explicitly related to the right of succession, the European Court of Human rights has, nevertheless, referred to the right to bequeath in relation to inviolability of property (*e.g. Marckx v. Belgium judgment of 13 June 1979, Papamichalopoulos et all v. Greece judgment of 24 June 1993, § 43*). Bearing in mind the aforesaid the general assembly is of the opinion that § 32(4) of the Constitution protects, *inter alia,* the freedom of a bequeather to bequeath his or her property to the persons he wishes.

18. The right to bequeath, just like the inviolability of property, is not an absolute fundamental right. Pursuant to § 32(2) the right to freely possess, use, and dispose of one's property may be restricted by law. As the freedom to bequeath is one of the manifestations of the freedom to dispose of one's property, it may be restricted by law, i.e. this is a fundamental right subject to simple reservation by law. Thus, the legislator is entitled to restrict the freedom to bequeath in general interests and for purposes, which are not in conflict with the Constitution.

19. The institute of compulsory portion is one of the possible restrictions of the freedom to bequeath, as the compulsory portion restricts the freedom of a bequeather to leave his or her property to the successors who are agreeable to him or her. That is why the compulsory portion must serve a legitimate aim, and the referred aim as a restriction of the freedom to bequeath must be necessary in a democratic society. Thus, it will be necessary to check whether the institute of compulsory portion, established by the legislator, is a suitable, necessary and proportional (in the narrow sense) restriction of the right to bequeath.

II.

20. Before assessing the constitutionality of § 104 of LSA it will be necessary to interpret the concept of ‘incapacity for work', employed in the norm. The courts have interpreted § 104 of LSA differently. Tartu County Court is of the opinion that attaining pensionable age does not automatically result in a person's incapacity for work for the purposes of § 104 of LSA. The county court argues that only a person who, due to his or her actual condition, is not able to earn his or her own living, is entitled to receive the compulsory portion. Tartu Circuit Court is of the opinion that all persons who have attained pensionable age should be regarded as persons incapacitated for work. In essence, the Civil Chamber of the Supreme Court agreed to this reasoning, when it pointed out in its ruling of 19 October 2004 in this civil matter, that "all persons enumerated in § 104 of LSA, irrespective of their actual capacity for work, are entitled to succeed to the compulsory portion."

21. Grammatical interpretation does not allow to form an unambiguous opinion on the interpretation of § 104 of LSA. For example, "*Eesti keele sõnaraamat* ÕS 1999" [The Estonian Language Dictionary of 1999] uses the phrases "*töövõimetu invaliid*" [disabled person incapacitated for work], "*püsiv töövõimetus*" [permanent incapacity for work], and "*töövõimetusleht*" [certificate of incapacity for work], to describe the incapacity for work. These explanations are not sufficient to answer the question concerning the circle of persons entitled to receive the compulsory portion under § 104 of LSA.

22. The history of formation of the provision does not help to achieve clarity in regard to interpretation of § 104 of LSA, either. The Riigikogu passed the Law of Succession Act on 15 May 1996, and the Act took effect on 1 January 1997. The presently valid wording of § 104 of LSA was in fact already included in the initial text of the draft Law of Succession Act (13 SE; initially § 106 of the draft), and was not changed during the legislative proceedings in the Riigikogu. The explanatory letter to the draft does not specify the term ‘incapacity for work'. It is only pointed out in the explanatory letter, that "the application of the compulsory portion to the extent as great as provided for in the draft of 1940 is not justified today", and that "only the direct blood relatives of the bequeather, who are incapacitated for work, and a spouse who is incapacitated for work, have retained the right to succeed to the compulsory portion". Neither do the stenographs of the Riigikogu provide more specific guidelines for the interpretation of ‘incapacity for work'.

23. Up to the entry into force of the Law of Succession Act the compulsory portion was regulated by § 540 of the Civil Code of the Estonian SSR, pursuant to which the following had the right to succeed to the compulsory portion of the estate: bequeather's minor children or children incapacitated for work (including adoptive children), the spouse who was incapacitated for work, parents who were incapacitated for work (adoptive parents) and the dependants of the bequeather. The civil code did not specify, either, what should be understood under ‘incapacity for work'. In the Civil Code of Estonian SSR with Commentaries (*Eesti NSV tsiviilkoodeksi kommenteeritud väljaanne*, J. Ananjeva, P. Kask, E. Laasik, Tallinn, 1969) it has been pointed out in relation to § 540 of the code that "the provision contains the only restriction of the

freedom to bequeath through the compulsory portion in favour of those persons who are in special need of this" (p 576). In addition, it has been underlined that "... bequeather must not influence the right of succession of minors and other successors who are incapacitated for work...". At the same time the concept of incapacity for work was in more detail commented upon in relation to § 536(3), pursuant to which intestate successors included, in addition to general intestate successors, also such persons, incapacitated for work, who had received maintenance form the bequeather until the latter's death during at least one year. It has been pointed out in a comment to § 536(3) (p 573) that the bequeather's dependant persons, incapacitated for work, include category I, II and III disabled persons (irrespective of whether they receive pension), persons advanced in age (men over 60 and women over 55 years of age), as well as persons under the age of 16 (students until they attain the age of 18 years).

24. In practice, when applying § 536(3) and thus, also, § 540, all old-age pensioners were regarded as persons incapacitated for work. For example, § 144(1) of the procedure for performing notarised acts, approved by regulation No 6 of the Minister of Justice of 3 November 1993 (valid until 1 May 2000) provided for a guideline for the application of § 536(3) of the Civil Code as follows: "Persons who have attained pensionable age, category I, II and III disabled persons shall be regarded as persons incapacitated for work irrespective of whether old-age pension or disability pension has been granted, and also persons who have not attained the age of 16 years, and students who have not attained the age of 18 years." § 144(3) of the same regulation established that "the incapacity for work of a dependant person due to his or her age, shall be verified on the basis of his or her passport or certificate of birth; incapacity for work due to health condition shall be verified on the basis of a pension certificate or a certificate issued by a medical institution." Subsequent regulations of the Minister of Justice, passed to regulate notarised acts to be performed under Law of Succession Act, including the presently valid procedure for performing notarised acts, approved by regulation No 4 of the Minister of Justice of 25 January 2002, nor the Notaries Act or Notarisation Act contain provisions explaining what should be born in mind under incapacity for work.

25. The Supreme Court has not previously formed an opinion on the interpretation and application of § 104 of LSA, neither has it substantiated the concept of incapacity for work for the purposes of Law of Succession Act. According to the explanations of the participants in the proceeding and Tartu Circuit Court contemporarily, upon implementing § 104 of LSA, all old-age pensioners are regarded as persons incapacitated for work, similarly with the implementation practice of § 540 of the Civil Code of the Estonian SSR. The general assembly has no reason to doubt these explanations. Nevertheless, the general assembly is of the opinion that the implementation practice of a provision can not serve as a decisive criteria upon implementing the provision. Otherwise, the Supreme Court would be bound by the judgments of lower courts and the practice of notaries, which - in the present matter - is based on the implementation practice of § 540 of the Civil Code of the Estonian SSR, which started and was established before Estonia regained its independence. The Supreme Court has a duty to furnish an applicable norm with its own interpretation, taking into consideration, *inter alia*, the aim of the provision in modern society, the position of the provision in the hierarchy on legal acts, as well as the constitutional requirements for the formation of the institute of right of succession. Also, under § 3 of the General Part of the Civil Code Act, a provision of an Act shall be interpreted together with the other provisions of the Act pursuant to the wording, spirit and purpose of the Act. For this purpose the general assembly shall analyse the use of the concept of incapacity for work in the Law of Succession Act and other legislation.

26. The concept of incapacity for work has been used in the Law of Succession Act only for the determination of the circle of persons entitled to succeed to the compulsory portion. The circle of persons entitled to succeed to the compulsory portion has not been specified in other valid legal acts regulating succession. The regulation of the compulsory portion of the Law of Succession Act (§§ 104-109) is a comparatively autonomous one within the framework of the Act. The other provisions of the Law of Succession Acts do not reveal the aim of the compulsory portion, nor do even the provisions regulating succession proceedings specify the circle of persons entitled to succeed to the compulsory portion. Thus, systematic interpretation does not allow to unambiguously conclude from the Law of Succession Act the exact meaning of the concept of incapacity for work, employed in § 104 of the Act.

27. In addition to Law of Succession Act, the criterion of incapacity for work is being used in several other legal acts. For example, the reciprocal maintenance obligations of spouses and close relatives, established in the Family Law Act, depend, as a rule, on the criteria of incapacity for work and need for assistance. At the same time the provisions of Family Law Act, regulating maintenance obligation, do not define the concept of incapacity for work in more detail (see § 60(1), 64(1), 65, 66 and 67 of the Family Law Act). The only provision referring to more precise meaning of the criterion of incapacity for work is § 22(1) of the Family Law Act, pursuant to which a divorced spouse who needs assistance and is incapacitated for work has the right to receive maintenance from his or her former spouse if the divorced spouse became disabled or attained pensionable age during the marriage and if the financial situation of the obligated divorced spouse allows for provision of maintenance. Yet, the aim of the provision is not to define the concept of incapacity for work in general and it does not include, for example, minors. It has also to be taken into account that in Family Law Act the idea of need for assistance as a basis for the maintenance obligation is more clearly expressed than the incapacity for work.

28. In several public-law legal acts regulating pension insurance and health insurance incapacity for work has been defined as inability to work in order to support oneself due to a functional impairment caused by an illness or injury. Thus, according to § 14(1) of State Pension Insurance Act the incapacity for work is a prerequisite for receiving pension for incapacity for work. Persons between the age of 16 and pensionable age, who are declared permanently incapacitated for work with the 40 to 100 per cent loss of the capacity for work pursuant to the procedure established by the Government of the Republic and who have earned the pension qualifying period required for grant of a pension for incapacity for work, are regarded as persons incapacitated for work. According to § 16(1) of State Pension Insurance Act the incapacity for work is either total or partial. According to § 16(2) of the Act a person with a serious functional impairment caused by an illness or injury due to which he or she is not able to work in order to support himself or herself, is totally incapacitated for work. According to § 16(3) of the Act a person who is able to work in order to support himself or herself but who due to a functional impairment caused by an illness or injury is not able to perform work suitable for him or her in the amount corresponding to the general national standard for working time is partially incapacitated for work. According to § 16(9) of the Act permanent incapacity for work, the time at which permanent incapacity for work arises, and the reason for and duration of permanent incapacity for work, shall be established by a medical examination for incapacity for work pursuant to the procedure established by the Government of the Republic. The State Pension Insurance Act clearly differentiates persons incapacitated for work from persons who have attained the pensionable age. For example, under § 16(7) of the Act a person may be declared permanently incapacitated for work until attaining a pensionable age. The provisions regulating survivor's pension refer to a person "who is of pensionable age or permanently incapacitated for work" (§ 20(2)2) of State Pension Insurance Act). According to § 22 of State Pension Insurance Act several persons who have attained 63 years of age and who do not have the right to receive old-age pension (subsection (1)1)) and persons who are declared permanently incapacitated for work (subsection (1)2)) have the right to receive national pension.

Similar regulations, making incapacity for work dependent on total or partial loss of actual capacity for work, were included in the Republic of Estonia Pension Act, which was in force from 1 May 1991 until 1 April 2000. Funded Pensions Act also recognises incapacity for work, whereas, once again, incapacity for work is differentiated from the pensionable age (e.g. § 61(3), 63(3) or 64(2) of Funded Pensions Act). According to Article 14 of European Social Insurance Code, ratified by the Riigikogu by an Act of 10 March 2004, incapacity for work is related to a morbid condition, involving suspension of earnings. § 51(1) of Health Insurance Act enumerates insured events of temporary incapacity for work, which are, first and foremost, a disease or injury of the insured person in respect of which the doctor or dentist treating the person has diagnosed that the person is temporarily unable to work in his or her position or continue to perform his or her duties or his or her economic or professional activity due to the disease or injury.

29. Labour law, too, recognises incapacity for work as a condition related to health impairment, not age. Thus, the Republic of Estonia Employment Contracts Act (hereinafter ‘ECA') does not regard minors as persons incapacitated for work. Nevertheless, certain restrictions on the work of minors have been provided

for in § 2^1 of ECA (formerly in § 2). According to § 55(4) of ECA temporary incapacity for work is a basis for suspension of employment contract. Under § 107 of ECA an employer has the right to terminate an employment contract if an employee is incapacitated for work (apparently for health reasons) for a longer period. This is clearly different form termination of an employment contract due to age of employee (§ 108 of ECA), which is a basis different from incapacity for work. According to § 17(1)1) of Holidays Act temporary incapacity for work of an employee (e.g. illness) is one of the circumstances preventing employee from taking holiday.

30. In the practice of awarding compensation for health damage the "Temporal procedure for compensation to employees of enterprises, institutions and organisations for damage caused by injuries upon performing duties or caused by other health damage", established by regulation No 172 of the Government of the Republic of 10 June 1992, has been important. According to section 5 of this procedure, upon the death of a victim, among other persons also those, who are incapacitated for work and who had received maintenance from the deceased or who, by the day of his or her death, were entitled to receive maintenance, are entitled to receive compensation for damage. According to section 6 of the procedure the Impairment Assessment Committee (IAC) shall ascertain the degree of loss of capacity for work in per cents, based on the loss of capacity for professional work as a result of a work injury. In its judgment of 7 November 2002 in civil matter No 3-2-1-107-02 (RT III 2002, 31, 342) the Civil Chamber of the Supreme Court has assessed the rights of an old-age pensioner to receive compensation for health damage. The Chamber found that "in relation to causing of health damage § 463(1) of Civil Code [now repealed] defines as material damage the loss of income due to loss or decrease of capacity for work, also additional expenses caused by health damage. The Chamber is of the opinion that in the changed economic situation the referred provisions should be interpreted to the effect that material damage is loss of income due to health damage. For a person who has attained pensionable age material damage due to health damage is the part of income that he or she will not receive due to health damage. Thus, it has to be ascertained first, in what amount the plaintiff has lost income due to the decrease of capacity for work because of health damage." This leads to a conclusion that for the implementation of the referred procedure the incapacity for work of an old-age pensioner can be ascertained in each case.

31. The general assembly is of the opinion that the legal acts referred to above can not be regarded as an unambiguous basis for interpreting § 104 of LSA, because different norms define the incapacity for work differently. The Family Law Act does not unambiguously define incapacity for work. When substantiating the concept of incapacity for work it is not correct to only be confined to the concept of disability based on health condition, included in public-law Acts and labour law, because in the referred Acts the meaning of incapacity for work and the object of regulation are essentially different from those in the Law of Succession Act. When interpreting § 104 of LSA, the general assembly can not prefer the interpretation, which is a basis for one legal Act, to other interpretations. That is why the regulation of Law of Succession Act is to be assessed proceeding from the objectives of the institute of compulsory portion and constitutional principles, departing from the view that in § 104 of LSA the concept of incapacity for work has an autonomous meaning.

32. The institute of compulsory portion may have different objectives, justifying the restriction of the freedom to bequeath. When analysing the practice of other countries it appears that there is no clear-cut and uniform opinion concerning the objectives that the institute of compulsory portion does and can fulfil. Although the institute of compulsory portion is widely known, the content thereof differs. One of the aims of the institute of compulsory part is the guarantee of the principle of family succession, allowing those closest to the bequeather (usually close relatives and spouse) to receive at least a certain part of an estate, irrespective of their need for assistance, incapacity for work or other similar criteria. Another widespread objective of the institute of compulsory portion is to guarantee a sufficient income to persons, who were closely related to a bequeather, also after the latter's death, if total disinheritance would be unjust or result in the impoverishment of those persons. The actual incapacity for work alone is not of decisive importance when allocating a compulsory portion.

33. The Constitution does not exclude the possibility for the legislator to proceed from different objectives

when forming the institute of compulsory portion. Law of succession itself, as a branch of law, has been and is being moulded by legislation to a material extent. It would be impossible to exercise this right without legal regulation, guaranteeing the right to succeed (especially intestate succession) to persons. Issues related to will (e.g. grounds of validity of a will) also require legal regulation. Thus, the legislator is quite free to impose rules concerning both intestate and testate succession, without the rules being in conflict with the Constitution *per se*. Nevertheless, the legislator is not totally free in moulding the rules of law of succession. The legislator, too, must adhere to the constitutional principles of law of succession, and the restrictions concerning a bequeather must be justified in the light of the Constitution.

34. The general assembly is of the opinion that in principle the imposition of a compulsory portion could be justified by guarantee of the principle of family succession, as well as by meeting the need for assistance of the members of the family. The principle of family succession is manifested, *inter alia*, in § 27(1) of the Constitution, pursuant to which the family, being fundamental to the preservation and growth of the nation and as the basis of society, shall be protected by the state. The close family members of a person have an interest to receive a share of a bequeather's estate. The principle of family succession is most clearly manifested in intestacy, where the state has no right to disinherit close relatives. The legislator can protect the interest in succeeding also in the case of testate succession, as it has been done in several countries. The need for assistance of family members as a restriction of the right to bequeath is based on § 27(3) of the Constitution, which gives the parents the right and imposes on them the duty to raise and care for their children, and also on § 27(5), which imposes on the family a duty to care for its needy members.

35. Bearing in mind the wording and the origination of § 104 of Law of Succession Act, the objective thereof is not to guarantee a certain portion of an estate to all members of family. The legislator has not wanted to guarantee a compulsory portion to all those persons close to the deceased, who would succeed in intestacy. That is why the general assembly is of the opinion that the objective of § 104 of LSA should first and foremost be found in the necessity to guarantee maintenance to needy members of family. This aim is in conformity with the objective of regulations established in several other Acts of private law. For example, a regulation for the protection of those closest to the deceased, similar to that of Law of Succession Act, is provided for in the regulation of Law of Obligations Act (LOA), concerning compensation for damage upon causing death. Thus, § 129(3) of LOA establishes that the person who caused the death has a duty to pay the sum presumably necessary for the maintenance to the person in regard to whom the victim had had a maintenance obligation arising from law. § 129(4) of LOA extends this obligation to persons in regard of whom the obligation to maintain them would have arisen pursuant to law in the future and during the presumed life-span of the deceased, and § 129(6) of LOA also to persons who had actually been maintained by the victim. The similar idea of supporting close persons who have a need for assistance is manifested in different maintenance obligations established in the Family Law Act (FLA). For example, under § 60(1) of FLA a parent is required to maintain his or her child who has become an adult, needs assistance and is incapacitated for work, and according to § 64(1) a child who has become an adult is required to maintain his or her parent who needs assistance and is incapacitated for work.

36. Due to the fact that § 104 of LSA can be interpreted in various ways, the general assembly shall assess the constitutionality of different possible interpretations thereof. If there are many possibilities of interpretation, the constitution-conforming interpretation should be preferred to those interpretations that are not in conformity with the Constitution. The Supreme Court has no ground to declare a norm invalid because of the unconstitutionality thereof, if it is possible to interpret the norm in a manner conforming to the Constitution. Also, such interpretation should be preferred, which would guarantee the best protection to different constitutional values.

37. If all descendant and ascendant relatives and a spouse, who have attained pensionable age, were entitled to a compulsory portion under § 104 of LSA, it would be difficult to find a constitutional justification to the norm. The plaintiffs, the Legal Affairs Committee of the Riigikogu, and the Chamber of Notaries justify such interpretation solely by the necessity to guarantee assistance to those persons who are in special need for assistance. The general assembly does not think this presumption is necessarily valid, because a person who has attained pensionable age need not necessarily be a person who needs assistance. Neither does the

giving of a compulsory portion to all old-age pensioners serve the aim of guaranteeing the principle of family succession - not all close relatives are entitled to succeed to a compulsory portion pursuant to such interpretation. Association of receipt of compulsory portion with the attainment of pensionable age causes a number of practical problems, too. The pensionable age has changed through years, presently it is 63 years under § 7(1)1) of National Pension Insurance Act, whereas in regard to pensionable age of women we are in a transition period (§ 7(2) of National Pension Insurance Act). Furthermore, the National Pension Insurance Act offers a number of possibilities for retiring before the attainment of general pensionable age (§§ 9(1), 10 of National Pension Insurance Act). This raises an issue of possible unjustified unequal treatment of persons on the basis of different pensionable age.

38. A presumption that old-age pensioners are automatically incapacitated for work or need assistance would not be correct upon applying § 104 of AS, either. The presumption could have been correct before Estonia regained independence, under general duty to work, of which a person was relieved only when attaining pensionable age. The general assembly does not think that attainment of a certain age means that a person no longer has capacity for work and therefore would need assistance. That is why the general assembly argues that an interpretation of § 104 of LSA to the effect that all old-age pensioners are entitled to receive a compulsory portion without weighing their need for assistance would not be a restriction of the right to bequeath sufficiently justified to serve the aim of supporting needy members of the family.

39. The Minister of Justice supports the interpretation of § 104 of LSA, pursuant to which in each concrete case the incapacity for work of a person applying for a compulsory portion should be ascertained. The Minister of Justice is of the opinion that under such interpretation the objective of § 104 of LSA would be to support the persons who have special need for assistance. Yet, the presumption that each person who is actually incapacitated for work would need special assistance may not prove to be correct, because in addition to work income could be earned through other means. Assuming actual incapacity for work as a ground would not be justified even if the majority of persons actually incapacitated for work would need special assistance, because in a concrete case, enabling a person, who is incapacitated for work but has a high standard of living, to receive a compulsory portion would result in a disproportionate restriction of the freedom to bequeath. The general assembly can not see the objectives in the name of which such disproportionate restriction would be justified in individual cases.

40. The general assembly is of the opinion that the constitutional interpretation of § 104 of LSA would be the one pursuant to which the right to succeed to a compulsory portion is dependent on the need for assistance of an intestate successor who is actually incapacitated for work. State measures to guarantee the parents' duty to financially care for their children and vice versa, and the reciprocal duty of spouses to financially care for each other, are first and foremost related to whether there exists or does not exist an actual need for assistance. Different maintenance obligations in the Family Law Act have been established on the basis of the same principle (§ 60(1), 64(1)). These provisions manifest the idea of the mutual care and maintenance obligation in a family, if there is need for that. The idea, which is the foundation for both provisions, is based on § 27(5) of the Constitution, which delimits the duty to care to needy family members. The institute of compulsory portion proceeding from the need for assistance of a successor incapacitated for work is a measure suitable, necessary and proportional in the narrower sense for the restriction of the freedom to bequeath, to guarantee the coping of the members of the family. There are no other measures, less encumbering on a bequeather and as effective as this one, to help to alleviate a successor's need for assistance. The freedom to bequeath is not a right so weighty as to overweigh the necessity and the duty to care for the closest relatives of a bequeather who are incapacitated for work and in need for assistance. On the basis of the aforesaid the general assembly concludes that it would be right to interpret § 104 of LSA to the effect that persons entitled to a compulsory portion are only those persons referred to in the provision who, due to incapacity for work, have limited possibilities to support themselves and are therefore in need for special assistance.

41. Upon application of § 104 of LSA the grounds for incapacity for work could primarily be age, health damage or disability, due to which a person is not yet or no longer able to support himself or herself. When defining one group of persons included in § 104 of LSA - persons incapable of supporting themselves due to

disability - it is possible to proceed from the National Pension Insurance Act to certain extent. At the same time the criterion of a need for assistance should serve as a basis, too, because one prerequisite for applying § 104 of LSA, in addition to incapability to earn one's living, is the fact that a person lacks sufficient means to support himself or herself in some other way. The general assembly is of the opinion that when ascertaining the need for help it is necessary to assess whether the person entitled to succeed to a compulsory portion was receiving support from the bequeather at the time of the latter's death or was entitled to receive such support because of his or her need for assistance. The general assembly considers it reasonable, upon interpreting the provision, to presume that the descendant minor relatives of a bequeather are included in the scope of application of the provision. In relation to the latter the need for assistance should be assumed, that is when other successors wish to exclude the right thereof to compulsory portion they shall prove, if there is a dispute, their lack of need for assistance. In other cases a person applying for the compulsory portion shall prove himself or herself that he or she is incapacitated for work for the purposes of § 104 of LSA, i.e. that he or she cannot support himself or herself and that he or she lacks other sufficient means to support himself or herself.

42. The possible implementation problems that may arise from the interpretation given to § 104 of LSA by the general assembly, that the Legal affairs Committee of the Riigikogu and the Chamber of Notaries referred to, are not insurmountable. Upon taking the criterion of a need for assistance as a basis for the right to succeed to the compulsory portion it is possible to proceed from the concept used in Family Law Act, which enables to define the circle of persons entitled to succeed to the compulsory part. In case of a dispute the final decision on the existence of a need for assistance and incapacity for work shall be taken by a court, proceeding from the division of the burden of proof, referred to above (see § 41 of the judgment).

43. Delimitation of the circle of persons entitled to succeed to compulsory part only to close relatives, who are in fact incapacitated for work and a spouse, is not in conflict with the principle of family succession. The principle of family succession does not give rise to a constitutional requirement that in case of testate succession all persons closest to a bequeather should have a right to receive a share of the estate. The legislator may take the principle of family succession into consideration as an aim of restricting the freedom to bequeath, but it is not obliged to do so. The principle of family succession must be taken into greater consideration upon intestacy. This is, in fact, what the legislator has done by guaranteeing the transfer of estate not to the state or to third persons but to persons closest to the deceased. The legislator has no constitutional obligation to protect the interests of close persons against the realisation of a bequeather's freedom to bequeath.

III.

44. As the general assembly is of the opinion that it is possible to interpret § 104 of LSA in a constitution-conforming manner, there is no need to declare the provision unconstitutional or invalid. For the adjudication of the present matter it is necessary to ascertain whether the plaintiffs are persons who have a need for assistance for the purposes of § 104 of LSA. This requires ascertainment of facts, for what the Supreme Court has no possibility; and in order to guarantee to the parties a possibility to appeal against ascertainment of facts and assessment of evidence in a civil matter, and adhering to § 3 and § 362(5) of the Code of Civil Procedure, the judgments of Tartu Circuit Court and Tartu County Court shall be annulled and the matter referred back to Tartu County Court for a new hearing. The issue of payment of legal costs shall be decided by the court upon new hearing, depending on the outcome of the case.

Märt Rask, Tõnu Anton, Jüri Ilvest, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Julia Laffranque, Jaak Luik, Harri Salmann, Tambet Tampuu, Peeter Vaher

---