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A Gloss to the Judgment of the Appellate Court in Warsaw of 28 May 2013 (VI Aca 785/13)

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Abstract: In the glossed judgement, the Appellate Court examined the possibility of declaring the respondent unworthy of succession should he have committed the offence of avoidance of the duty of maintenance of the testator (Article 209 PC) or the offence of abandonment of the testator (Article 210 PC). The court's considerations were purely hypothetical, as in the course of the proceedings, it was not proven whether the heir had actually committed these offences. The court allowed the recognition of the heir as unworthy if he had committed the offence of persistent avoidance of the duty of maintenance, but only if it could be proven. The court's position raises certain doubts. Any conduct that violates familial nexus, in particular, should be verified for the existence of grounds for exclusion from succession, since this bond, in the legal sense, has its source in the relationship of marriage, consanguinity, and affinity, and these determine the legal title to inheritance. In particular, it is not understandable why persistent failure to fulfil family obligations, even if it is not an offence that a civil tribunal could additionally qualify as serious, does not actually produce legal consequences for the parent if the other party to the family relationship is a minor. It seems that wherever we are confronted with malicious and intentional failure to perform family duties, it should be assumed, provided that the statutory criteria of this specific type of offence are met, that *in abstracto* a serious offence has taken place.

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The reviewed judgement of the Appellate Court in Warsaw was delivered in a case concerning unworthiness to inherit. The female testator's mother brought an action for declaring her father unworthy to succeed. The regional court of the first instance dismissed it. The claimant appealed against the judgement. The appeal was also dismissed. The circumstances of the case were as follows.

The testator was a daughter of the parties to the proceedings. After her birth, the parents got divorced. The claimant took care of the minor, and the respondent was ordered to pay maintenance allowance. For several years, the father did not maintain any contact with his daughter, nor did he provide a livelihood for her on a regular basis. The minor's mother never decided to claim maintenance due to her daughter through enforcement. However, when the testator grew older, she voluntarily decided to re-establish contact with her father. She would pay him regular visits. She had her own room in the respondent's house; she would overnight there at times. She was often invited to family reunions at the defendant's house, including Christmas and Easter. She celebrated the respondent's 80th birthday and gave him a very thoughtful gift. The defendant also visited his daughter. The father offered the testator an amount of money equivalent to the maintenance due for a period of almost four years; after that, she released him from the obligation to incur further provision payments.

The decision of the Appellate Court in Warsaw, just like the facts that the decision was rested upon, deserve special attention for several reasons. Certainly, they pertain to the key question of legal succession in the event of death. This is of key importance because it determines whether potential heirs will become the actual successors. In the discussed case, this is the testator's father, who holds a legal title to acquire an inheritance. Of crucial importance are also the reasons that could deny the respondent the right to succeed, namely his failure to perform his obligations arising from the blood relationship. This problem needs to be carefully examined also because the legal provisions governing such cases are likely to be amended soon. Amendments to the Civil Code being drafted by the Ministry of Justice[1] broaden the list of grounds for unworthiness to inherit and include such heir's conduct that meets the criteria of persistent failure to

[1] Draft law of 15 December 2021 amending the Civil Code and some other acts (UD 222).

perform maintenance obligations towards the testator or persistent evasion of the obligation to exercise guardianship over the testator. *De lege lata* failure to perform the aforesaid obligations may lead to the obligated person's exclusion from succession but only if their conduct, usually taking the form of omission, meets the statutory criteria of a specific type of crime defined in the Penal Code (Article 928§1(1) of the Civil Code; "CC").

The legal effects of remaining in a specific type of relationship governed by the Family and Guardianship Code ("FGC"), i.e. marriage (Article 1 FGC), consanguinity (Article 61[7] FGC), and affinity (Article 61[8] FGC) do not refer to its duration only. In property terms, the legal status of a party to such a relationship is also relevant after this status has been discontinued, i.e. after the death of one of the parties. For it is decisive for the legal title to inherit.[2] The mere holding of the legal title to succession, ranked among the positive grounds for the acquisition of an estate, is assessed only based on a formal criterion. Such a criterion seems to be legitimate, as it takes account of the familial nexus manifesting itself, in this case, in consanguinity,[3] and easily verifiable. However, the special status of the parties to a relationship under family law has evolved based on the legislator's assumption of a certain model of such a relationship, where the legal bond corresponds to the actual one based on intimacy, mutual support, and care for one another. Unfortunately, circumstances in which there is a discrepancy between the legal status, meaning the formal existence of a specific legal bond between parties, and the facts whereby the real bond is not only significantly loosened or even severed, but the conduct of one party towards the other is socially intolerable or even deserves a penal sanction. Sometimes such a bond has actually never been established. In the

[2] For more, see Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (LexisNexis: Warszawa, 2013): 45–51. See also Hanna Witczak, Agnieszka Kawałko," Obowiązek alimentacyjny," in *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. Magdalena Habdas and Mariusz Fras (Wolters Kluwer: Warszawa, 2021): 657–671. In the law of succession, the benefits of maintaining in a specific relationship under family law can be seen primarily in the sphere of inheritance. For example, it is demonstrable that a marriage relationship and consanguinity in a specific line and degree also determines the group of individuals entitled to a reserved portion (Article 991§1 CC). The latter can also underlie quasi-maintenance claims (Articles 938 and 966 CC).

[3] Jacek Wierciński, "Uwagi o teoretycznych założeniach dziedziczenia ustawowego," *Studia Prawa Prywatnego*, no. 2(2009): 84.

discussed circumstances, the legal status of the party should be adjusted after the "model" or "pattern" adopted by the legislator by depriving that party to the relationship under family law of certain benefits because these benefits should stem not only from the mere formal and legal existence but also from the maintenance by the parties of a specific and real relationship under family law. Otherwise, the effects related to being a party to a relationship under family law, including with regard to succession, would be unfair.[4] This unfairness is to be counterbalanced by institutions known as negative grounds for the acquisition of an inheritance. They are a list of events under civil law that result in exclusion from succession.[5] Certainly, these institutions have their ethical justification and are intended to prevent situations in which the heir, who persistently and deliberately fails to meet their family obligations towards the testator or committing a crime against him or her, would benefit either from succession or as a result of the testator's death.[6] Consequently, it helps avoid situations in which the general sense of justice would be denied due to the established order of succession.[7] In Polish law, the effect of exclusion from succession to the estate of a deceased person for the above-mentioned reasons may result, first, from a constitutive court's decision and, second, from the testator's will. The constitutive judgements denying an inheritance to an heir include a judgement on unworthiness to succeed (Article 928§2 CC) and a judgement passed under Article 940 CC, excluding the testator's spouse from

4 Cf. Hanna Witczak, "The legal status of minor testator´s parents deprived of parental authority in intestate succession. Some remarks on the solutions in Polish, Russian, and Italian law," *Review of European and Comparative Law*, no. 4(2021): 108-110 and Jacek Wierciński, "Uwagi o teoretycznych założeniach dziedziczenia ustawowego," *Studia Prawa Prywatnego*, no. 2(2009): 84.

5 Hanna Witczak, "Skutki wyłączenia od dziedziczenia," *Rejent*, no. 3(2009): 73–75.

6 Such a distinction, i.e. the acquisition of a certain benefit from an estate or as a result of the testator's death, is necessary, in particular because, for example, the acquisition of the object of a specific bequest is not tantamount to the acquisition of a benefit from an estate, and often, taking into account the objective scope of the institution in question, it is can be a considerable pecuniary benefit. The law explicitly provides that the provisions on unworthiness to inherit be applied *mutatis mutandis* to the provisions on specific bequest (Article 981^5 CC).

7 Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (LexisNexis: Warszawa, 2013), 16.

intestate succession. On the other hand, the testator may draw up a will that provides for disinheritance (Article 1008 CC), thus depriving the entitled persons of the right to a reserved portion of the estate.

Although the institutions outlined above differ in many respects (in particular regarding the subjective aspect), discussing these discrepancies at this point seems inadvisable because in the state of affairs subject to analysis only one of them was considered implementable. It is understandable because the testator did not draft a will where (and only where) she could have disinherited her father. Moreover, during the proceedings to establish unworthiness to succeed, the testator and the respondent were no longer married. These two circumstances significantly limit the option of resorting to the institutions falling within the group of negative grounds for the acquisition of an estate, where ethical considerations preclude certain individuals from succeeding to the testator.

Grounds for unworthiness to inherit are included in a closed list contained in Article 928§1 CC. There can be no doubt that in the analysed circumstances, where no will has been drawn up or contested, the reasons behind the violation of the testamentary freedom do not apply. The testator's conduct may, however, be assessed from the viewpoint of a wilful and serious offence against the testator (Article 928§1(1) CC). This was actually the claim filed in the lawsuit: to declare the deceased's father unworthy to inherit under Article 928§1(1) CC.

Given that the case sought to examine the viability of two reasons for unworthiness to inherit, each of them should be addressed separately: one being the father's (the father acting as the respondent in the proceedings to establish unworthiness) failure to fulfil his maintenance obligation towards the testator until she reached the age of majority and the other being her abandonment also in the age of minority. The plea of non-payment of maintenance to the daughter was examined against Article 209 of the Penal Code ("PC") and the plea of her abandonment against Article 210 PC.

The grounds for the occurrence of unworthiness to succeed indicated in Article 928§1(1) CC demand a specific sequence of actions to take place: first, the fact of the potential heir committing an offence should be established, followed by the determination of his wilful fault, and finally the offence should be assessed for the degree of gravity. Due to the fact that the testator's father was not convicted of any offences under Articles 209

or 210 PC (and no criminal action was brought against him in connection with the inheritance proceedings), the civil court was forced to make its own findings as to whether the respondent had committed an offence under Article 209 PC or Article 210 PC and with regard to his wilful fault.[8] If the court's findings had not been in favour of the respondent, it would have been necessary to assess whether the offences attributed to the respondent in the unworthiness proceedings were "serious" within the meaning of Article 928§1(1) CC, because only then, the court would have been capable of excluding him from succession.

Referring to the plea of the respondent committing the offence of persistent avoidance of the duty of maintenance of the testator, it should be noted that before the deceased had reached the age of majority, the defendant did not regularly pay for her maintenance, despite being obliged by force of a judicial judgement to pay her PLN 900 a month. Only this period can be subject to assessment in the context of the claimant's claim because, after the testator's coming of age, the parties reached an agreement on any outstanding and possible future maintenance allowances.

The court assessed the testator's father's conduct in the period until the girl reached the age of majority for whether the conduct met the statutory criteria of the offence under Article 209 PC. The court was right to rely on the provisions of the Penal Code in force at the time of making the judgement, i.e. the Act of 6 June 1997 the Penal Code.[9] Clearly, the respondent's actions examined in the unworthiness proceedings occurred when the Penal Code of 1932[10] and the Penal Code of 1969 were still effective.[11] However, in accordance with the binding Article 4§1 PC, if a different law is in force at the moment of sentencing than that which was in force during the perpetration, the new should be applied. The previous law should only be applied if it is more favourable to the perpetrator. It is also obvious that the provisions of Articles 209 and 210 PC 1997 were used

8 Cf. Article 11 CCP. See, for example, Judgement of the Court Appeal in Białystok of 10 April, file ref. I ACa 2013 r., *LEX*, no. 1307390 and Judgement of the Court Appeal in Warsaw of 11 August 2017, file ref. VI ACa 1914/16, *LEX*, no. 2490254.

9 Journal of Laws No. 88, item 553 as amended.

10 Ordinance of the President of the Republic of Poland of 11 July 1932 the Penal Code (Journal of Laws No. 60, item 571 as amended).

11 Act of 19 April 1969 the Penal Code (Journal of Laws No. 13, item 94 as amended).

by the court as a benchmark in the form in force at the time of sentencing. This observation is relevant due to the fact that the Act of 23 March 2017 amending the Penal Code and the Act on Assistance to Maintenance Creditors[12] amended the provisions of the Penal Code also in the area concerning the offence of avoidance of the duty of maintenance. Therefore, the statutory elements of this offence should be assessed against the legal circumstances in force before the amendment of the 2017 PC. The normative framework of the offence in question changed as a result of the amendment to the Penal Code,[13] and *de lege lata* its statutory constituent elements do not overlap with those examined by the court in the analysed case.

In the legal circumstances in force at the time of sentencing, the actual offence of avoiding the duty of maintenance consisted in persistent avoidance of the duty of care charged to the person by force of law or of a judicial judgement by failure to maintain the next of kin or another person and thus exposing them to the inability to satisfy their basic needs.[14] In line with the interpretation of the criterion of persistence, which prevails in the literature and case-law and focused on the objective and subjective aspects, two elements can be highlighted. The first one is the subjective conduct of the perpetrator, which is marked by a specific mental attitude that manifests itself in tenacity, ill will, and deliberate avoidance of the duty

12 Journal of Laws, item 952.

13 *De lege lata* the Penal Code provides for the common form (Article 209§1 PC) and the aggravated form of the offence of avoidance of the duty of care (Article 209§1a PC). The common type of the offence is of formal character and covers (i) non-payment of the maintenance allowance whose amount has been determined a judicial judgement, a settlement agreed before a court or another body or by another agreement, as the equivalent of at least three allowances or (ii), if the allowance is other than periodic, a delay in payment of the allowance for at least three months. The aggravated form of the offence is of consequential nature, namely as a result of delays in fulfilling the maintenance obligation, the delay exposes the entitled person to the inability to meet their basic needs.

14 Judgement of the Supreme Court of 11 July 2012, file ref. II KK 179/12, *LEX*, no. 1219289; Judgement of the Supreme Court of 4 September 2008, file ref. II KK 221/08, *LEX*, no. 449029 and Judgement of the Supreme Court of 29 May 2012, file ref. II KK 106/12, *LEX*, no. 1223801. As already pointed out elsewhere, *de lege lata* the constituent element of exposure of the person to the inability to meet their basic needs is not one that belongs to the elements of the common form of the offence of avoidance of the duty of maintenance (Article 209§1 PC).

of maintenance despite being offered the possibility of performing it,[15] the desire to get your own way (for whatever reasons), refusal to change your mind in spite of attempts to change the perpetrator's position (e.g. initiation of enforcement proceedings under civil law).[16]

As for the criterion of exposing the entitled person to the inability to satisfy their basic needs, it was assumed that there were no grounds to penalize the perpetrator's conduct when, despite his persistent avoidance of the duty of maintenance, the wronged person's needs were satisfied in a different manner.[17] So, whenever the child's needs are fully satisfied by one of the parents, who enjoys such a good financial position that any maintenance allowances from the other would not significantly improve the entitled person's life quality, the mere persistent avoidance of the duty of maintenance does not meet all the criteria of the offence under Article 209§1 PC because of the absence of the element of exposing the child to the inability to meet their basic needs.[18] On the one hand, given the criteria of the prohibited act so defined, the conclusion is justified. On the other, it is difficult to reconcile it with the objective that the norm contained in Article 209§1 PC should counteract attempts to ignore the maintenance obligation. For it is the debtor's conduct that should be penalized and not the effect since a third party could have prevented this effect; therefore, non-occurrence of the effect of exposing the entitled person to the inability to meet their basic needs would have been independent of the maintenance

15 Judgement of the Supreme Court of 3 July 2003, file ref. II KK 125/03, *LEX,* no. 151989. For more, see: Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (LexisNexis: Warszawa, 2013), 257-258 and the case-law and literature referenced therein.

16 See, in particular, Decision of the Supreme Court of 9 June 1976, file ref. VI KZP 13/75, *LEX,* no. 19141: 11. See also Judgement of the Supreme Court of 3 July 2003, file ref. II KK 125/03, *LEX,* no. 151989. More about the criterion of persistence in Danuta J. Sosnowska, *Alimenty a prawo karne. Praktyka wymiaru sprawiedliwości* (LexisNexis: Warszawa, 2012), 121-143 with the literature referenced therein.

17 So in, for example, Decision of the Court Appeal in Katowice of 12 January 2005, file ref. II AKo 1/05, *LEX*, no. 147197.

18 Cf. Andrzej Wąsek, Jarosław Warylewski, "Komentarz do artykułów 117–22," in: *Kodeks karny. Część szczególna. Tom I*, ed. Andrzej Wąsek, Robert Zawłocki (C.H. Beck: Warszawa, 2010), 1251, Nb. 60; Aleksander Rypiński, "Przestępstwo uchylania się od obowiązku alimentacyjnego (art. 186 k.k.)," *Nowe Prawo*, no. 3(1972): 463 and Resolution of the Supreme Court of 9 June 1976, file ref. VI KZP 13/75, *LEX*, no. 19141: 11.

debtor's conduct. The discussed example clearly demonstrates that reference to the institutions and provisions of penal law may, oddly enough, remove the option of applying a private penalty, i.e. recognizing one of the parties of the family relationship unworthy to inherit as a consequence of their persistent and malicious failure to fulfil obligations falling under such a relationship. Meanwhile, this type of sanction should be a standard in the circumstances in question.

The answer to the question of whether it is possible to recognize the offence of persistent avoidance of the duty of maintenance as grounds for unworthiness to inherit in the legal setting existing at the moment of sentencing is far from straightforward. As noted above, the finding of the offence of avoidance of the duty of maintenance proven will take place only in the case of the occurrence of all the statutory constituent elements of the act prohibited under Article 209 PC. The mere reprehensible and intentional conduct of the heir will not suffice if it does not expose the testator to the inability to meet their basic needs. And these needs can be satisfied by another entity on the daily basis. Indeed, this does not exclude the negative assessment of the heir's conduct; still, it does not lead to the determination of the cause of unworthiness to inherit, i.e. committing a specific type of offence.[19] Moreover, even if this conduct meets the statutory criteria of the offence under Article 209 PC, the question of its "seriousness" within Article 928§1(1) CC remains debatable. It is worth noting that the existing case-law in this area is very scarce. It is yet another reason why the glossed judgement deserves attention. In fact, the only discussed court's decision was the judgement of the Appellate Court in Gdańsk of 14 June 2000 (I ACa 262/00).[20] The judgement was passed on the basis of specific facts. The debtor's avoidance of the duty of maintenance occurred underf special and additionally aggravating circumstances. The minor testator's mother brought an action for declaring the father unworthy to inherit. Two years before his death, the minor testator was involved in a car accident in which he sustained a spinal trunk injury. After that, he was unable to perform

[19] Cf. in particular, Judgement of the Supreme Court of 10 December 1999, file ref. II CKN 627/98, *LEX*, no. 1231370 and Judgement of the Court Appeal in Katowice of 16 June 2016, file ref. I ACa 139/16, *LEX*, no. 2115433, thesis 1.

[20] *Legalis,* no. 52667.

regular vital functions independently and required permanent assistance. Not only did the minor's father help the plaintiff with taking care of his son, but he refused to pay for his maintenance, too. It should be noted that the respondent had also failed to provide for his son before the accident. The father was sentenced by a criminal court to the penalty of one year and six months' imprisonment, with a conditional suspension of execution for a probation period of three years, for persistent avoidance of the duty of maintenance for his son. In the same judgement, he was obliged to settle the maintenance debt within two years and to fulfil his maintenance obligation towards the minor regularly. Because the defendant continued to refuse to pay for his son's maintenance, the court ordered that the sentence be carried out. The openly negative assessment of the minor's father's conduct by the civil court was attributed not only to its disapproval of the father's persistent failure to discharge his maintenance duty, but also, and perhaps in particular, to the fact that the father refused to change his attitude and conduct also after the minor's accident, after which he required constant care. The court clearly underlined that the defendant's misdemeanour following the accident, i.e. when the minor required particular care, had been particularly reprehensible. The degree of culpability in the defendant's conduct clearly determines the reason for unworthiness to inherit, i.e. a wilful and serious offence against the testator. Any other assessment of the defendant's acts would have produced effects contrary to the elementary sense of justice. Meanwhile, doubts raised in the doctrine as to the recognition of the offence of avoidance of the duty of maintenance as a reason for unworthiness to inherit revolved around the gravity element. At that time, some authors expressed the view that the court "might have apparently and *de lege lata* extended the content of Article 928§1(1) of the Civil Code."[21] For a serious offence within Article 928§1(1) CC cannot be one with such a low level of statutory penalty.[22] Meanwhile, the opposite conclusion seems almost obvious based on the facts. First of all, it should be

[21] Jacek Wierciński, "O przestępstwie jako przyczynie niegodności dziedziczenia," *Kwartalnik Prawa Prywatnego*, no. 2(2010): 568.

[22] Ibidem. Cf. Hanna Witczak, "Komentarz do art. 928," in *Kodeks cywilny. Komentarz. Tom IV. Spadki (art. 922–1087)*, ed. Magdalena Habdas, Mariusz Fras (Wolters Kluwer: Warszawa, 2019), thesis 21.

emphasized once again that the source of the maintenance obligation is a relationship under family law; in the discussed case, it is based on consanguinity. As mentioned earlier, although this relationship determines the statutory title to succeed, the effective acquisition of an estate is contingent not only upon the positive grounds for succession, such as proof of the title to inheritance, but also upon the absence of negative grounds on the part of the potential heir. Failure to perform the obligations resulting from this relationship may effectively eliminate the acquisition of an estate in a situation where, in specific circumstances, it can be deemed justifying negative grounds for succession. It has already been mentioned elsewhere that considering only the formal criterion may prove unfair; equally unfair is to assume that the legal position of the parties to the given legal relationship should be the same, regardless of whether they fulfil the obligations intrinsically linked to that relationship (in other words, the rights embedded in the content of consanguinity should be exercised by the parties regardless of whether and how they perform their obligations imposed by the law in a relationship between the next of kin related along a specific line and to a certain degree). Besides, the issue of performance, or rather non-performance, of the duty of maintenance should produce consequences in the area of the law of succession. Clearly, the assessment covers the period from before the opening of the succession. *De lege lata* the legislator does not refer to the duty of maintenance in any of the provisions of Book IV of the Civil Code;[23] nor does it mention the possible consequences of its non-performance for the benefits that are available to parties in a conjugal relationship, consanguinity in a specific line and degree, or affinity in a specific line and degree under the law of succession. There is no doubt, however, that intentional avoidance of the duty of maintenance may be penalized not only under the provisions governing unworthiness to inherit but also under those concerning disinheritance. Moreover, as already noted, the statutory penalty for a given type of offence is only one of

[23] But cf. Article 938 and 966 CC. For more, see Józef S. Piątowski, Hanna Witczak. Agnieszka Kawałko, "Dziedziczenie ustawowe," in *System Prawa Prywatnego. Tom 10. Prawo spadkowe*, ed. Bogudar Kordasiewicz (C.H. Beck: Warszawa, 2015), 179, especially footnote 528.

the circumstances (and not a decisive one) taken into account by the court when assessing the gravity of the offence.[24]

Going back to the facts of the analysed case, the defendant in the unworthiness proceedings, i.e. the testator's father, failed to maintain her until she reached the age of majority, despite she had been awarded maintenance. However, the claimant (the mother) did not manage to demonstrate that the respondent's conduct had been persistent, i.e. that he was capable of paying maintenance, but he refused to perform as determined in the judicial judgement, wilfully, maliciously, and with the intent of exposing his daughter to the inability to satisfy her basic needs. The mere fact of irregular maintenance payments is not enough to conclude that the father committed an offence against his daughter. In this respect, there are no grounds to challenge the decision of the court. In contrast, the position expressed in the justification of the judgement is by far debatable, namely even if it were recognized that "the defendant committed a wilful offence under Article 209 of the Penal Code, ..., then...there are no grounds to assume that it was a serious offence. When assessing whether the offence meets the criteria of a serious one within Article 928§1(1) of the Civil Code, ...the civil court should take account of not only the type of the committed offence but also the circumstances of the case, e.g. the degree of heir's ill will, cruelty, willingness to humiliate or embarrass the testator in a way that was particularly poignant for her."[25]

It is appropriate to find that to assess whether the offence committed by the heir is "serious" within the meaning of Article 928§1(1) CC it is necessary to consider not only the type of the offence assessed from the point of view of the limits of statutory penalties (crime or misdemeanour)[26] but

[24] Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (LexisNexis: Warszawa, 2013), 178–206.

[25] Justification of the glossed judgement

[26] Certainly, it can be assumed that offences with a severe statutory penalty, i.e. those which penal law regards as crimes *in abstracto*, constitute grave offences, but this is only a preliminary assessment in the context of the provision of Article 928 § 1(1) CC. The circumstances of the case discussed in the article may cause that an act qualified as a crime within the meaning of the provisions of penal law will not be regarded as a serious offence for the purposes of the aforesaid provision and cannot therefore constitute grounds of adjudging unworthiness to inherit. Also, a reverse situation can take place, namely that under certain circumstances, a misdemeanour may also become a serious offence. See Judgement of

also the circumstances of the offence, including, in particular, the perpetrator's motives and how he acted. And yet, when making an independent assessment of whether the offence committed by the heir against the testator in this specific case has the qualities of "gravity," the civil court takes into account the perpetrator's motives (the intent to humiliate or embarrass the testator in a way that is particularly poignant for her) and the manner of committing the offence (cruelty, a particular level of ill will). However, the criteria for assessing the gravity of the offence are not limited to those listed in the justification of the judgement. In my opinion, the object of executive action and the extent of the wrong should be stressed.[27] I am convinced that in cases where the object of executive action is a minor, especially if in a specific relationship under family law, the offence should be ranked as serious within Article 928§1(1) CC because it is committed against the minor and is linked to failure to perform family obligations under this relationship by the closest relative of the wronged person. Children suffer differently (and certainly more) when being wronged, especially by parents, which should not be ignored when assessing the gravity of an offence in a specific case. The intentional and deliberate conduct of a person obligated to provide maintenance, especially when the entitled person is unable to maintain him or herself, also deserves a private penalty. And due to the fact that disinheritance due to persistent failure to fulfil family obligations is out of question if the testator does not have the testamentary capacity (Article 944§1 CC), e.g. due to being under the age of majority, the capability of denying succession should be guaranteed by the institution of unworthiness to inherit. *De lege lata* the options of penalizing failure

the Administrative Court in Gdańsk of 14 June 2000, file ref. I ACa 262/00, *LEX* no. 51706 with the glosses of Czesław Paweł Kłak, *Orzecznictwo Sądów Apelacyjnych,* no. 9(2005): 81–90 and Michał Niedośpiał, *Orzecznictwo Sądów Apelacyjnych,* no. 6(2006): 76–88. See also Jacek Wierciński, "O przestępstwie jako przyczynie niegodności dziedziczenia," *Kwartalnik Prawa Prywatnego,* no. 2(2010); for more, see Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (LexisNexis: Warszawa, 2013), 213–215.

27 See, in particular Elżbieta Skowrońska, "Przegląd orzecznictwa z zakresu prawa spadkowego (za lata 1989–1990)," *Przegląd Sądowy*, no. 9(1992): 43; Maksymilian Pazdan, "Komentarz do art. 928," in: *Kodeks cywilny. Tom II. Komentarz. Art. 450–1088. Przepisy wprowadzające*, ed. Krzysztof Pietrzykowski (C.H. Beck: Warszawa, 2021), *Legalis*, Nb 14 and Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (LexisNexis: Warszawa, 2013), 178–206.

to fulfil parental obligations towards a minor under the law of succession are limited, especially in the case of persistent and culpable conduct. This state of affairs is far from satisfactory.[28] Especially in the case of minor individuals, this type of behaviour should be particularly condemned, not only in moral terms but also, and perhaps above all, legally, and should produce pecuniary consequences as well as depriving the offenders of protection of their financial interests both while the injured party is alive and after their death.[29] Hence, it would seem that offences against minors should deserve a special place among serious offences. Harming the life or health of children, both physical and mental, is extremely abhorrent. Therefore, in those cases where the wronged person is a minor, the character of the type of offence in terms of gravity should not raise interpretation doubts.

In addition, as noted above, because the criteria of the offence under Article 209§1 PC, i.e. persistent avoidance of the duty of maintenance "have a pejorative overtone and prove a clearly ill will of the alleged perpetrator, who persistently ignores the maintenance obligation,"[30] this offence should be one of the reasons for unworthiness to inherit as a serious one. Notably, the criterion of the offence of failure to fulfil parental obligations in the form of "avoidance" is construed as "a negative mental attitude of the person obliged to provide maintenance, causing that he or she fails to

[28] For more, see Hanna Witczak, "The legal status of minor testator´s parents deprived of parental authority in intestate succession. Some remarks on the solutions in Polish, Russian, and Italian law," *Review of European and Comparative Law,* no. 4(2021): 107–134.

[29] Undoubtedly, the argument that the daughter cannot disinherit her father based on his persistent failure to perform family duties towards her is less compelling in the analysed case. The testator was able to do so after reaching the age of majority. However, she did not. In contrast, and this will be further discussed below, the relationship that she established with her father after reaching the age of majority and how this relationship developed proves that the testator had forgotten the harm suffered as a result of her father's conduct and attitude when she was a child, even though she might have still experienced a sense of it. In the legal sense, such behaviours are tantamount to pardon, which obviously makes any action for unworthiness to inherit inadmissible (Article 930§1 CC).

[30] Judgement of the Supreme Court of 27 February 1996, file ref. II KRN 200/95, *LEX* (25594) and Judgement of the Supreme Court of 3 July 2003, file ref. II KK 125/03, *LEX* (371270).

fulfil the obligation imposed on them, despite being objectively capable of fulfilling it."[31]

A comparative analysis of several legal systems shows that some of them directly refer to the non-performance of the maintenance obligation in the provisions on unworthiness to inherit or disinheritance.

Russian law offers the option of penalizing the conduct of heirs who maliciously avoid the statutory[32] obligation to maintain the testator. Pursuant to Article 1117(2) of the Russian Civil Code ("RCC"), the court may find such individuals unworthy of succession.[33] Interestingly, the literature on the subject points out that courts follow a broad understanding of the term "avoidance of the duty of maintenance." Not only does it cover an unjustified refusal to pay maintenance allowances but also (i) concealment by the debtor of their actual income, (ii) changing jobs or place of residence in order to avoid deductions through enforcement, (iii) avoiding profit-making activities to reduce the amount of maintenance, as well as (iv) any conduct that would indicate the party's ill will with regard to securing the means of subsistence. Undoubtedly, the very malicious intent to

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31 Decision of the Supreme Court of 17 April 1996, file ref. II KRN 204/96, *Prokuratura i Prawo,* no. 11(1996), item 4.

32 The maintenance obligation exists in the relationship between parents and children (Article 80, 88 of the Russian Family and Guardianship Code); spouses (Article 89 of the Russian Family and Guardianship Code); siblings (Article 93 Russian Family and Guardianship Code); grandparents and grandchildren (Articles 94 and 95 of the Russian Family and Guardianship Code) and between stepchildren and stepfather or stepmother (Article 97 of the Russian Family and Guardianship Code), who are heirs at law. Regarding the source of the maintenance obligation in Russian law, see more in Алла В. Вишнякова, *Семейное и наследственное право* (Москва 2010); Анатолий П. Горелик, Наследственное право (Москва – Воронеж 2011): 91–92 and Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (LexisNexis: Warszawa, 2013), 305–307. See also Радик Юрьевич Закиров, Яна Сергеевна Гришина, Минзия Миннахметовна Махмутова, *Наследственное право* (Москва 2012), 23; Павел Владимирович Крашенинников, в: *Постатейный комментарий. Гражданский кодекс Российской Федерации*. Часть 3, ред. Павел Владимирович Крашенинников, Издательство Статут, (Москва 2011), 26-30 oraz Марина Викторовна Телюкина, *Наследственное право. Комментарий Гражданского кодекса Российской Федерации*. Издательство дело (Москва 2002), 22–26.

33 See, for example, Алексей Н. Гуев, *Постатейный комментарий к части третьей Гражданского кодекса* (Москва 2006): 33–34; Инна Л. Корнеева, *Наследственное право Российской Федерации* (Москва 2011), 332.

avoid the duty of maintenance is a concept subject to separate assessment. The assessment covers, in particular, the duration of the heir's avoidance of the duty of maintenance imposed by the law, the reasons for non-payment of maintenance, and the financial position of the parties. The malicious avoidance of payment of maintenance may be evidenced by, but not only: failure to pay maintenance despite relevant reminders; the need to search for the debtor who hides their place of residence; re-offending against the person entitled to receive maintenance as provided for in Article 157 of the Russian Penal Code ("RPC").[34]

In order for the heirs' malicious avoidance of the duty of maintenance of the testator to underlie exclusion from succession, the case must be resolved in court proceedings. The occurrence of malicious avoidance by the heir of their maintenance obligation may be confirmed by a sentence of a criminal court (Article 157 RPC); a court judgement acknowledging liability for delayed payment of maintenance (Article115 RPC) and other evidence.[35]

All in all, it should be noted, as pointed out elsewhere, that legislative work is underway at the Ministry of Justice that is very likely to result in a modification to the list of grounds for unworthiness to inherit, namely persistent avoidance of the duty of maintenance of the testator or persistent avoidance of the duty of care for the testator will be added. In the justification to the draft, the drafters pointed out that "the proposed new reason for unworthiness to inherit will be complementary to the one provided in Article 928§1(1) CC, and it will ensure that in order to find a person unworthy of succession the fact that they have not maintained for testator will not be required to be confirmed by a final court's judgement." This approach is by far debatable given that *de lege lata* confirmation by the court of the commitment a specific type of offence is not a necessary criterion for recognizing the defendant as unworthy of succession. On the other hand,

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[34] Борис А. Булаевский, "Комментарий к статье 1117," in *Комментарий к Гражданскому Кодексу Российской Федерации части третьей*, eds. К. Б. Ярошенко, Н. И. Марышева (Москва 2011), thesis 5. Cf. Алексей Н. Гуев, *Постатейный комментарий к части третьей Гражданского кодекса* (Москва 2006), 34.

[35] Клавдия Б. Ярошенко, в: "Комментарий к статье 1117," в: *Комментарий к Гражданскому Кодексу Российской Федерации части третьей*, ред. Н. И. Марышева, К. Б. Ярошенко (Москва 2001), thesis 5.

the statement about the complementary nature of this reason for unworthiness is right as the new wording of the provision clearly determines that persistent avoidance of the duty of maintenance is equivalent in its effects to the commission of a wilful and serious offence against the testator. If the drafted changes become law, there will be no more doubt as to whether an individual persistently ignoring the obligation to provide for a child may be declared unworthy to inherit. It seems that the amendment proposed by the Ministry of Justice deserves a positive assessment. It will allow for penalizing under the law of succession of such heir's conduct that, after the amendment of the Penal Code, would not fulfil the statutory criteria of the prohibited act under Article 209 PC, however, they could not be denied the attribute of reprehensibility and general unacceptability from the public point of view.

Going back on the main track of the discussion, the plea of the testator's father offence of abandonment of the testator (Article 210 PC) was also completely misguided given the facts. Although the testator's father decision to abandon her shortly after birth and cease to maintain and care for her is morally reprehensible, still it does not meet the statutory criteria of an offence and cannot provide grounds for unworthiness to inherit.[36] Representatives of the doctrine emphasize that abandonment should be understood as in common parlance, i.e. "a withdrawal from the life of a person who requires care, unjustified by the existing circumstances and without providing him or her with assistance from other individuals or institutions."[37] The Supreme Court found that abandonment meant "leaving a person who should be cared for on their own; it is not only about withdrawal from taking care of a minor or a person rendered helpless but also about preventing such a person from accessing immediate support."[38] Leaving someone under guardianship of another person is not the offence of abandonment.[39] The respondent's decision to divorce his first wife and

36 See note 20.

37 Lech Gardocki, *Prawo karne* (C.H.Beck: Warszawa, 2021), 291. Cf. Julia Kosonoga, "Komentarz do art. 210," in: *Kodeks karny. Komentarz*, ed. Ryszard A. Stefański (C. H. Beck, Legalis 2021), theses 3–4 and Agnieszka Kilińska-Pękacz, "Przestępstwo porzucenia dziecka," *Prokuratura i Prawo*, no. 4(2016): 25–26 with the literature referenced therein.

38 So the Supreme Court in Resolution of 4 June 2001, file ref. V KKN 94/99, *Legalis,* no. 51270.

39 Cf. Judgement of the Court Appeal in Białystok of 11 July 2014, file ref. I Aca 206/14, *Legalis*.

leave their child under her care certainly does not constitute the offence of abandonment (Article 210 PC).

Given the facts subject to analysis, one more issue needs to be addressed (hypothetically). Even if the proceedings demonstrated that the respondent's conduct could be regarded as containing grounds for unworthiness to inherit under Article 928§1(1) CC, and even if we assumed that the heir had committed a serious and wilful offence against his daughter, the legitimacy of upholding the claim would have raised obvious doubts as to the existence in this case of negative grounds for unworthiness of succession. Pursuant to Article 930§1 CC, the heir cannot be considered unworthy if the testator has pardoned them. It should be kept in mind that the testator voluntarily, as an adult woman, re-established contact with her father and was eager to maintain it. This cordial and regular contact between the testator and her father continued until her death. Based on the testator's behaviour and her improving relations with the father, there is no doubt that an effective pardon was granted in the analysed circumstances.[40] They show that the testator did not harbour resentment towards her father, she pardoned him for his indifference and leaving her under the mother's care as a child.

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[40] For more, see Hanna Witczak, "Komentarz do art. 930," in *Kodeks cywilny. Komentarz. Tom IV. Spadki (art. 922–1087)*, ed. Magdalena Habdas, Mariusz Fras (Wolters Kluwer: Warszawa, 2019), theses 1–8.

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