Sole will and joint will of spouses: a comparative approach (permissible aspect)

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Abstract. The research is aimed at structuring doctrinal developments on the stated topic, comparing them with the related Russian and foreign practices and formulating their own scientific position. The subject of the research is the legal relationship arising in connection with a) the right to make a sole will and b) the determination by the spouses subject to the joint will of the corresponding rights and obligations for a heir. In the course of the study, the dialectical method, general scientific methods of analysis, synthesis, analogy as well as the systemic method were used; special legal methods were used, in particular, the comparative approach. The problem of civil law regulation of the institution of will, and in particular of the joint will of spouses, with the comparative legal method was analysed. As a result, the authors, on the basis of an analysis of the current domestic and foreign civil legislation, have developed ways to solve the identified problems by making appropriate changes to the civil legislation. In particular, the concept of a classic will has been formulated and substantiated. It was established that the mandatory provision concerning the loss of effect of a joint will in the event of a marriage being declared invalid after the death of one of the spouses violates the legitimate interests of a bona fide spouse, and therefore it was proposed to supplement the civil legislation with provisions that would allow the court to keep such a will in force. It has been substantiated that the Russian legislator needs to supplement the legal structure of the institution under research by allowing to draw up a joint will of spouses in extraordinary circumstances. The novelty of the research lies in the proposal to amend the articles of the current civil legislation in order to secure the possibility of making a sole will with electronic or any other technical aids.

Keywords: inheritance, spouse, Civil Code, will, legislation

1 Introduction

In the civil law doctrine, special focus has been on the probate inheritance in recent years [1, 2]. Inheritance by the joint will of spouses, which is widespread in the legal order of most countries of Western Europe and the United States [3-6] is a relatively new institution for Russian civil law, which determines the relevance of this research and predetermines its scientific novelty and practical interest for modern civil policy.

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The purpose of the work is to structure doctrinal developments on the stated topic, compare them with the relevant Russian and foreign legal practices, as well as formulate our own scientific position. The achievement of this goal was facilitated by formulating and tackling challenges as follows:

1. Analysis of the concept of a will, its key features, formulation of the author's definition of the concept of a classic will;
2. Research of the concept and features of the institution of joint will of spouses, establishment of its place in the system of civil law of the Russian Federation;
3. Study of the influence of the provisions of foreign civil law on understanding and formalising the institution of joint will of spouses in the domestic civil legislation;
4. Analysis of the problems of legal regulation of the institution of joint will of spouses in Russian civil law;
5. Elaboration of author's proposals for the legislator on the development of signs of the domestic model of the joint will of spouses taking into account the positive experience of foreign legal order.

A will, in particular, the joint will of the spouses, has been the subject of a series of studies. The focus in the inheritance law in general and the designated topic in particular has been put in the works of many Russian domestic civil law scholars, M.S. Abramenkova, S.S. Alekseeva, A.M. Baizigitova, M.Yu. Barshchevsky, V.A. Belova, O.E. Blinkova, I.A. Bogun, O. Yu. Vinogradova, V.P. Kamyshansky, E.A. Kirillova, N.M. Korshunov, K.V. Kravchenko, P.V. Krashennnikov, S.N. Loy, O. Yu., V.I. Serebrovsky, E.A. Sukhanov, G.F. Shershenevich and others.

The theoretical conclusions obtained in the course of the study provide an opportunity to determine the concept of a classic will and the priority areas of development of the civil law regulation of the institution of joint will of spouses taking into account the positive experience of overseas states.

2 Methods

The methodological framework of the research was generated by the dialectical-materialistic method of cognizing reality. Methods of analysis, synthesis, analogy and generalisation of scientific, regulatory and practical materials, systemic interpretation of the law, and legal modelling were used. Such methods as historical, comparative legal, formal logical and statistical were commonly used.

3 Results and discussion

The concept and signs of a will. The legislator in Art. 1118 of the Civil Code of the Russian Federation (CC RF) recognises a will as a method for disposing of property in case of death. As noted in the doctrine, it is not allowed to close any other transactions that would provide for the free transfer of property after the death of its owner [7].

In accordance with the concept formulated in the continental system of law (Germany, France), a will is a form of expression of the testator's will, the essence of which is to determine the further legal fate of the properties owned by him/her in the event of his/her death. In contrast to the civil law countries, the Anglo-Saxon legal family, on the contrary, does not have a single concept of a will and defines it as a posthumous expression of will (USA, Great Britain) [8].

In Russia, a will is a unilateral transaction that creates rights and obligations after opening of the inheritance. However, despite the legislative classification of a will as unilateral transactions, in science there is another approach to determining its legal nature.

In particular, there is an opinion that a will is not a unilateral transaction due to the fact that *at the time of its execution* no rights or obligations arise for the testator and other persons. Thus, there is no mandatory feature typical for unilateral transactions [9].

Some researchers adhere to a different position and consider these relations to be bilateral and contractual, when a will is an offer, and its acceptance of an inheritance is an acceptance [10]. However, it should be understood that the contractual relationship presupposes the presence of two legally capable parties. In the event of the death of a testator, this condition is not met. According to the figurative expression of Tolstoy, "... the dead cannot be subjects of legal relations" [11], they do not have subjective rights and obligations. At the same time, the inheritance relationship cannot be imagined without the existence of a testator.

In addition, the emergence of obligations is a secondary circumstance, since the transaction may not entail them, only rights may arise. The unilateral nature of a transaction is due to the fact that the expression of the will of one party is sufficient for its completion, which is the main sign of a unilateral transaction [12]. The validity of a will does not depend on the consent of the heir to accept the inheritance or the consent with the content of the will of any person other than the testator. In accordance with clause 2 of Art. 1119 of the CC RF, a testator is not obliged to inform anyone even about the very fact of making, changing or cancelling a will, its content.

It seems possible to formulate the concept of a classic (sole) will, which would reflect its key elements. A will is a unilateral transaction concluded in the form established by law by means of which the legal fate of property, including property rights and obligations, after the death of the testator is determined; it is personally made by a fully capable person.

In connection with the onset of the information technology century and widespread digital support, we propose to change the current part 4, clause 1 of Art. 1124 of the CC RF in order to make it possible to draw up a will with electronic or other technical means.

Joint will of the spouses. In the Russian Federation, since June 1, 2019, spouses, as parties in inheritance legal relations, have the opportunity to formalise a common will to dispose of properties after the death of one of them in a joint will. Previously, Russian citizens could dispose of their properties only by making a personal will.

As the world's practice shows, this institution has a hundred-year history [13]. The legislation of most European states (Austria, Germany, Italy, Lithuania, Lithuania, Estonia, Denmark, Sweden etc.) provides for the possibility of drawing up mutual wills the subjects of which can only be spouses who assume reciprocal obligations. In particular, § 2265 of the German Civil Code (GCC) of 1896 states that a joint will can only be drawn up by the said persons. The laws of England, the USA and Latvia establish the possibility of concluding a joint will both between spouses and between other persons [13]. However, currently in France, Bulgaria and Poland there is a ban on drawing up the joint wills [14].

In Russia, the model of the German legislator has been implemented: it provides for the possibility of drawing up a joint will only for persons who are officially married (clause 4 of Article 1118 of the CC RF). When spouses refer to a notary to draw up a joint will, they are required to provide a marriage certificate.

Dissolution of a marriage or its recognition as invalid both before and after the death of one of the spouses shall entail the invalidity of the joint will of the spouses. It seems that the mandatory provision concerning the loss of the validity of a joint will in the event of a marriage being declared invalid after the death of one of the spouses violates the rights of the bona fide spouse. It seems necessary to supplement the civil legislation with provisions that would grant permission to the court to keep such a will in force in order to comply with the legitimate interests of the bona fide spouse.

We believe that the possibility of revoking a will after the death of one spouse provided clause 2 of Art. 1131 of the CC RF does not fully guarantee the implementation of his/her

will to dispose of properties, infringes upon his/her legitimate interests. In this regard, it seems advisable to use the experience of English and German law, in which the surviving spouse becomes the preliminary heir, and in the event of a change or cancellation of the joint will, he/she refuses the share of the deceased spouse [15].

Clause 4 of Art. 1129 of the CC RF stipulates that a joint will of spouses cannot be made in extraordinary circumstances. § 2266 of the GCC presents the opposite approach. Its distinctive feature is that the testator's will recorded from his/her words by the burgomaster or one of the witnesses is nevertheless considered a testament made in a simple written form. In Russia, this will is to be declared null and void. §2252 of the GCC also regulates the validity period of a joint will made in extraordinary circumstances - it is valid for three months from the date of its actual drawing. If this period has expired, and one of the spouses survived, then the will is not considered to have been drawn up.

In our opinion, GCC presents a more progressive solution, which is quite natural, since in the practice of foreign countries, as mentioned above, joint wills are executed very often [16]. It is believed that in Art. 1129 of the CC RF, it is advisable to use the German approach, since the lack of the possibility of drawing up a joint will of the spouses in extraordinary circumstances prevents the proper exercise of the rights and legitimate interests of testators who have fallen into a life-threatening situation.

4 Conclusion

Thus, the introduction of the institution of joint will of spouses into the Russian legislation is an undeniably positive step that expands the scope of freedom in civil law. It is possible to eliminate existing gaps in the civil legal regulation by consistently making the appropriate changes to the CC RF, which, in our opinion, should be based on consolidating and implementing the related provisions in Russia and Germany (this is justified by the similarity of the legal systems of states and the progressive nature of many provisions of the GCC). In particular, since the mandatory provision on the loss of the force of a joint will in the event of a marriage being declared invalid after the death of one of the spouses violates the legitimate interests of a bona fide spouse, it is proposed to supplement the CC RF with provisions that would allow the court to keep such a will in force. The provisions on the share of obligatory heirs in the revocation of a joint will by the surviving spouse should be improved. It is necessary to provide for the permission to draw up a joint will in extraordinary circumstances, as well as to develop rules similar to § 2266 of the CCG establishing a three-month period of its validity. In general, we propose to change the current part 4, clause 1 of Art. 1124 of the CC RF in order to create the possibility of making a sole will with electronic or other technical means.

The study was carried out with the financial support of a grant from the President of the Russian Federation for state support to young Russian researchers – candidates of science in the framework of the scientific project MK-165.2021.2 on the topic Digital Challenges of Modern Inheritance Law.

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