TESTAMENT AS AN INSTITUTIONALIZED WILL: PHILOSOPHICAL AND LEGAL ANALYSIS

Shestakova Ekaterina Sergeevna
Postgraduate
Kutafin Moscow State Law University

Abstract. The aim of this study is to examine such a notion as will based on philosophical and legal approach and its institutionalization as a testament. Particular care is devoted to the analysis of free will and the difference between the internal will and a declaration of will and to the analysis of their influence on the consequences of transactions. The author also discusses the introduction of a new ground for inheritance such as mutual wills of spouses in the context of institutionalized will. The results of the consideration of the will show that the essential feature of such a kind of testaments is the interdependent declarations of will of each of the spouses that does not change legal nature of a testament as a transaction.

Keywords: will, inheritance, mutual wills, spouses, testament, testator

Such a complex and multifaceted category as will has been and still remains an important legal notion that requires careful consideration in the context of the analysis of a testament as one of the grounds for inheritance, expanded in recent years by the legislator through the introduction of provisions on mutual wills of spouses (Federal Law from 19.07.19 №217-FZ "On Amendments to Article 256 of Part One and Part Three of the Civil Code of the Russian Federation") (1). A testament, in fact, is a legally institutionalized will of the testator or testator-spouses, the posthumous implementation of which must be ensured. However, the expression "will", to a greater extent, is a universal category, is often used in legislation, legal literature, court decisions, and it cannot be called only legal. Consideration of this issue at the junction of such sciences as psychology, philosophy, jurisprudence is very important for identifying new opportunities and fruitful research on this issue.

Theorists hold quite various doctrines about will (2) that is explained by the uncertainty, confusion, as well as the depth of the essence of this notion, which is an indivisible single mental process that includes certain mental components.

In meeting the objectives, a person goes through different stages of this process. Human behavior is a continuous chain of interrelated processes where goals are formed, a choice is made between them. It is impossible to exclude from it such components as memory and attitude, analysis

of the situation, elaboration considering them and considering the cause of the program invariant (3).

The most significant in this chain is the traditional question of free will, which, with the term itself, was borrowed from doctrines that are not strictly legal, but was not perceived as a necessary for cognition of law.

An analysis of all points of view allows to conclude that the freedom of individuals and the freedom of their will are identic notions. Freedom draws the substance and the basic definition of will: a free is the will. Freedom is as sure as a will, as a subject. Will in law is a free will that corresponds to all the essential features of law and thus it is different from arbitrary will and opposes arbitrary behavior. The volitional nature of law is specifically due to the fact that law is a form of people's freedom, that is, the freedom of their will (4).

The problem of constitution and declaration of will for law as well as for philosophy is of great interest. Will is the main element of such a legal fact as a transaction, which gives rise to legal relationships, changes and terminates civil law relations.

The strong-willed nature of legal relations means not only their continuity with will and consciousness, the ability to respond to legal effect, but primarily the fact that these relations arise from the state will, expressed in legislation (3, p. 93). By means of will, within the legal provisions, relationships become legal relations.

The process of the constitution of a man's will aimed at making a deal (declaration of will) is a complex, multifaceted, unconventional psychological process that goes through the following stages: the emergence of a need and awareness of ways to satisfy it, method choice of satisfaction and a decision to effect a deal (5).

In the legal definition of the notion of a transaction, there is no indication of the volitional action of the participants in these legal relations, however, analyzing the legislation, we can say that the notion of will plays an important role.

A transaction as a strong-willed legal act is based not only on the desire to make a transaction, on informing all the participants about it, that is, consolidation, crystallization of this expression in the appropriate form (otherwise it will not determine consistency and have legal consequences), but also on the full compliance of the internal will and declaration of will.

Therefore, it is so important to distinguish between these two notions, where will is a subjective moment, and declaration of will is an objective one. This distinction is very important for the further resolution of disputes and contradictions between will and declaration of will. Declaration of will is a recording of the psychological process, which makes it possible to understand the real desire, the choice of the subject's decision to conclude a transaction.

In the legal sense, the will and the declaration of will act as one, namely, if there is will, that is, the declaration of will, if there is no will, then there is no declaration of will: otherwise has no effect. They are essential elements for any civil transaction.

Even with a unilaterally authorizing or unilaterally binding transaction, which a testament is, there must be joining the will of another person for its realization, which, among other things, is reflected in the legislator's assumption of mutual wills of the spouses.

The testament is raised by the will of the testator. Without will, there is no declaration of will, and therefore, there is no testament. Even G.F. Shershenevich noted, analyzing inheritance law, that “the grounds for the devolution of property from one person to another can be: 1) a testament, 2) an agreement, 3) a law. In the first two cases, the inheritance is based on the will of the testator” (6).

In the Code of Laws of the Russian Empire, as well as in the current Civil Code of the Russian Federation, the chapter on inheritance by the testament is placed before the chapter on inheritance by law. This highlights that the legislator gives priority to the will of the testator and aims all efforts at protecting it after the death of the testator.

The Civil Code presumes conformity of will and declaration of will, but in some cases they may not coincide, and actions are performed not of their own free will, but under the influence of deception, coercion, or under threat. Accordingly, not every declaration of will can be made by a person of his own free will, and the true will will not correspond to the content of the testament due to the reasons mentioned above.

The inability of the person who made the testament to understand the meaning of his actions and to control them, which, at the same time, at the moment of the execution was considered legally capable, may also be associated with the defect of will while drawing it up.

It should be pointed out that the basis of a legally significant will is the possession of not only will in the actual sense, but also consciousness - "will in the psychological sense". In this case, we are talking about the intellectual moment of legal capacity, which is not only the management of one's actions, but also the ability to be aware of their consequences, the result. Only having mental capacity of the subject we can equate volition with capacity. Hence the term "mature will", which means that the subject is ripe to understand and control his behavior. Here, we cannot talk about capacity without volition. In most cases, it goes beyond it, and a capable person may turn out to have a lack of will ability (3, p. 97-98).

Thus, once drawing up a testament, the intellectual capacity and volition of a person must coincide and act together. The will and desire should be emerged among the participating parties in normal conditions and coincide with the declaration of will.

Russian civilians have always stressed that a testament is a unilateral transaction involved the declaration of will of only one person (7).

A recent introduction into civil legislation of a new type of testaments, namely mutual wills of spouses, expanded the testator's ability of disposal of his property. It has to be emphasized that this kind of testaments have been successfully implemented for a long time in most countries worldwide. It has deep roots in the late 18th in common law, when it was established in Dufour v Pereira case. And now mutual wills is one of a range solution providing for a form of family property in common law jurisprudence (8).

In mutual wills, despite the appearance on the side of the testator of two persons - spouses, the legal nature of it as a transaction does not change, it remains a unilateral transaction that contains the interdependent declarations of will of each of the spouses.

This is the peculiarity of such testaments, without which it loses its essence. The problem of such testaments can be, as in other transactions, the dependence of the will of one person on another and thereby limiting the ability to the will declaration.

However, it can be assumed that the legislator had in mind that each of the spouses personally expresses his will, making a decision on the devolution of his property. Moreover, such a decision is mutual between the spouses (9).

Consequently, we can make a conclusion that a mutual will of the spouses is the result of an agreement between both spouses (common declaration of will), expressed in the determination of the conditions of the testament, which in this case is of the interdependent nature of instructions.

Examining the legislation in the area of inheritance, we can say that there is a clear regulation of the recording of the expression of will in the transaction grounds of inheritance, the consequences of the discrepancy between will and declaration of will, as well as the consequences of the generating of will among the participating parties in unnatural conditions.

Such close attention of the legislator to hereditary relations, to their definition, is related with a large number of court proceedings in this area. The institution of the testament has become an urgent priority for the legislator also due to the fact that the state respects private will of the testator and its protection after his death. It is the institutionalization of the will of citizens, its regulation in the legal process for hereditary legal relations that plays an important role: it helps to implement the last will of a citizen or spouses and protect their rights.

References

1. Federal Law of July 19, 2018 № 217-FZ "On Amendments to Article 256 and Part Three of the Civil Code of the Russian Federation" // SZ RF. 2018. №30. Art. 4552

2. Kerimov D.A. Philosophical problems of law. M.: Misl, 1972; Kovalev A. Will and its upbringing. Simferopol: Krymizdat, 1949. Selivanov V.I. Strength of need and volitional effort. Tbilisi, 1974; Dodonov B.I. Needs, emotions and interests. Problems of the formation of sociogenic needs. Tbilisi, 1974

3. Oygenzikht V.A. Will and expression of will. Dushanbe: Donish, 1983. p. 47

4. Nersesyants V.S. Philosophy of law: Textbook for universities. M., 2005. p. 22

5. Tolstoy V.S. The concept and meaning of unilateral transactions in civil law. M., 1996. p. 3

6. Shershenevich G.F. Textbook of Russian civil law. M., 1912. p. 784

7. Serebrovsky V.I. Selected works on inheritance and insurance law. M., 2003; Sukhanov E.A. Civil law: textbook: in 4 volumes - 2nd ed., Revised. and add. - Moscow: Statute, 2019; Krasheninnikov P.V. Inheritance law. 3-e ed. Moscow: Statut, 2018.

8. Croucher, Rosalind. Melbourne University Law Review, August 2005, Vol. 29 Issue 2, p. 390-411