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GENERAL PROCEDURE FOR CERTIFYING A WILL UNDER NOTARIAL LEGISLATION OF UKRAINE: JUDICIAL AND NOTARIAL PRACTICE

Abstract. ***Purpose***. The purpose of the article is to disclose the procedure for certifying wills under the notarial legislation of Ukraine. ***Results***. The scientific article considers thoroughly the procedure for certifying wills in the notarial procedure of Ukraine. In particular, the key actors involved in the will certification procedure are identified: a testator, a notary or other persons authorised to certify a will in accordance with the current legislation of Ukraine. The author emphasises that the procedure for certifying a will in Ukraine is regulated by domestic legislation, including the Civil Code of Ukraine, the Law of Ukraine 'On Notaries' and other specialised legal regulations. In case of presence of a foreign element in inheritance relations, the Law of Ukraine 'On International Private Law,' as well as international treaties of Ukraine regulating inheritance issues, shall be applied. The article focuses on the procedure for certifying the wills of Ukrainian citizens residing in the temporarily occupied territories. It is noted that such wills may be certified exclusively by public or private notaries, as well as other persons authorised by law, only in the territory controlled by the Government of Ukraine. The author emphasises that it is inadmissible to certify wills by bodies or persons whose activities are contrary to Ukrainian legislation. Wills certified by such entities are declared invalid from the moment of their conclusion, and the legal effects arising from such invalidity are clearly defined by law, in particular, they are not recognised as valid and do not create relevant legal effects for the persons specified in such wills. ***Conclusions.*** It is concluded that in the course of implementation of these rights, the inheritance legislation of Ukraine has specific features which distinguish the relations on making and certifying a will, amending or cancelling a will, from the relations which arise after the death of a testator and are inheritance relations. The author emphasises the importance of compliance with the legal requirements to the procedure of will certification to ensure their legal validity, as well as to guarantee proper protection of inheritance rights of citizens both in peacetime and in conflict or occupation situations which create additional legal challenges for the exercise of inheritance rights.

Key words: notarial procedure, protection of human rights, inheritance, inheritance relations, will, notary.

1. Introduction

During life, a person, a citizen, is granted a number of rights in the field of civil law. One of these rights is the right to make and certify a will, as well as the right to amend or cancel a will. According to legal literature, the exercise of the right to make a will is not as widespread in Ukraine as it is abroad (Karmaza, 2007). In addition, it suggests that the very procedure for making a will, its form, and the procedure for calling heirs to inheritance by law differ significantly in the states (Pitsyk, 2020).

The topic of inheritance or certification of legal deeds – wills – is not new to jurisprudence. It has been the subject of research by many scholars, such as: V. Barankova, M. Bondarieva, M. Diakovych, Y. Zaika, O. Karmaza, V. Kysil, O. Kukharev, H. Lutska, M. Mykhailiv, O. Pechenyi, Kh. Pitsyk, S. Rabovska, Z. Romovska, I. Spaso- Fatieieva, Ye. Kharytonov, T. Fedorenko, S. Fursa, Ye. Fursa and other Ukrainian scholars. In addition, due to the occupation of the territories of Ukraine, the issue of protection of Ukrainian citizens living in the temporarily occupied territories who wish to certify a will, etc. is not sufficiently covered.

The purpose of the article is to disclose the procedure for certifying wills under the notarial legislation of Ukraine.

2. Certification of a will under the notarial legislation of Ukraine

Pursuant to Article 1233 of the Civil Code of Ukraine (hereinafter - the Civil Code), a will is a personal order of an individual in the event

of his or her death. An individual with full civil capacity has the right to make a will. The right to make a will is exercised personally. Making a will through a representative is not allowed (Article 1234 of the Civil Code) (Civil Code of Ukraine, 2003).

In general, relations regarding the certification of a will are regulated by the legislation of Ukraine, namely: the Constitution of Ukraine, the Civil Code of Ukraine, the laws of Ukraine: 'On Notaries,' 'On International Private Law,' applicable international treaties of Ukraine, as well as by-laws of Ukraine: the Procedure for Certifying Wills and Powers of Attorney Equated to Notarised Ones, approved by Resolution of the Cabinet of Ministers of Ukraine No. 419 dated 15.06.1994, Procedure for performing notarial deeds by notaries of Ukraine, approved by Order of the Ministry of Justice of Ukraine No. 296/5 of 22.02.2012, Procedure for performing notarial deeds by officials of local self-government bodies, approved by Order of the Ministry of Justice of Ukraine No. 3306/5 of 11.11.2011 (Official web portal of the Parliament of Ukraine, 2024).

It should be noted that specific features of certifying the wills of Ukrainian citizens residing in the temporarily occupied territories of Ukraine include the provisions of the Law of Ukraine 'On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine,' which provides that a special legal regime for crossing the administrative border and the line of contact between the temporarily occupied territory and other territory of Ukraine, and for making legal deeds, applies in the temporarily occupied territory for the period of validity of this Law. In other words, the certification of a will as a legal deed has specific features due to the legal regime of the temporarily occupied territory of Ukraine (Article 4 of this Law). Moreover, Article 5 of this Law stipulates that the particularities of exercising other rights and freedoms of the civilian population and making transactions in the temporarily occupied territory are determined by this and other laws of Ukraine. Therefore, according to Article 11 of this Law, in the temporarily occupied territory, any legal deed regarding real estate, including land plots, made in violation of the requirements of this Law, other laws of Ukraine, is considered invalid from the moment of its execution and does not cause legal effects, except for those related to its invalidity.

Therefore, the certification of wills of Ukrainian citizens residing in the temporarily occupied territories may be exercised by public or private notaries, as well as other persons authorised by law, only in the territory of Ukraine. It is inadmissible to certify wills by bodies or persons whose activities are contrary to Ukrainian legislation. Such legal deeds – wills – are invalid from the moment of such legal deed are made and entail the legal effects arising from such invalidity.

It should also be noted that the legal regime of martial law, which was introduced in Ukraine in February 2022, also entails certain specifics for the category of citizens defined in the Law of Ukraine 'On the legal regime of martial law'. Therefore, the relevant amendments have been made to implement the provisions of the law. Under martial law, in the absence of access to the Inheritance Register, notarisation of a will, amendments thereto and its cancellation are carried out without the use of this register with the subsequent entry of relevant information into it within five business days from the date of restoration of such access (Procedure for performing notarial acts by notaries of Ukraine, approved by Order of the Ministry of Justice of Ukraine No. 296/5 of 22 February 2012). Under martial law, the wills of servicemen of the Armed Forces, other military formations formed in accordance with the laws of Ukraine, as well as employees of law enforcement (special) bodies and civil protection bodies involved in measures to ensure national security and defence, repulse and deter armed aggression by a foreign state, can be certified by the commander (chief) of these formations (bodies) or another person authorised by such commander (chief) with further sending such wills through the General Staff of the Armed Forces, the Ministry of Defence, the relevant law enforcement (special) or other body to the Ministry of Justice or its territorial body to ensure their registration by notaries in the Unified Register of Powers of Attorney, the Inheritance Register. Commanders (chiefs) of these formations (bodies, institutions) or another person authorised by such a commander (chief) certify powers of attorney and wills in accordance with the Procedure for certifying wills and powers of attorney equated to notarised ones, approved by Resolution of the Cabinet of Ministers of Ukraine No. 419 of 15 June 1994 (Resolution of the Cabinet of Ministers of Ukraine No. 164 of 28 February 2022 'Some issues of notary during martial law'). In addition, Resolution of the Cabinet of Ministers of Ukraine No. 164 of 28 February 2022 'Some issues of notary during martial law' stipulates that during martial law and within one month from the date of its termination or cancellation, notarial acts shall be performed with due regard to the following specific features (prohibitions): 1) incomplete notarial acts at the request of a person associated with the aggressor state, as defined

by the Resolution of the Cabinet of Ministers of Ukraine No. 187 of 3 March 2022 'On ensuring the protection of national interests in future claims of the State of Ukraine in connection with the military aggression of the Russian Federation,' shall be suspended. If such a person applies for a notarial act, the notary shall refuse to perform it.

That is, russian citizens do not have the right to inherit by will in Ukraine. They do not have the right to draw up a will with a Ukrainian notary.

As already mentioned, relations regarding wills are regulated by the international treaties of Ukraine in force. For example, pursuant to Article 39 of the Treaty between Ukraine and the Republic of Poland on legal assistance and legal relations in civil and criminal matters, the ability to make or revoke a will, as well as the legal effects of defects in the expression of will, are determined by the legislation of the Contracting Party the testator was a citizen of at the time of making or revoking the will. The method of making or revoking a will is determined by the law of the Contracting Party the testator was a citizen of at the time of making or revoking the will. However, compliance with the law of the Contracting Party in the territory thereof the will was made or revoked is sufficient.

In other words, Ukraine's international bilateral treaties in force generally contain conflict-of-laws provisions and determine the law of the state that will govern relations regarding the form of a will, the procedure for drafting, signing, amending or cancelling a will.

It should also be noted that the conflict of provisions of international private law exist. According to Article 72 of the Law of Ukraine 'On International Private Law,' a person's ability to make and cancel a will, as well as the form of the will and the act of its cancellation, are regulated by the law of the state in which the testator had permanent residence at the time of the act or at the time of death. A will or an act of revocation cannot be declared invalid due to non-compliance with the form if the latter meets the requirements of the law of the place of making the will or the law of citizenship or the law of the testator's habitual residence at the time of making the act or at the time of death, as well as the law of the state in which the real estate is located.

Therefore, wills of Ukrainian citizens are certified only on the territory of Ukraine by notaries or officials specified in the law, in the manner prescribed by the national legislation of Ukraine, unless otherwise provided by an international treaty of Ukraine in force.

It should be noted that we support the scholars that although the relations regarding the certification of a will are private law relations like inheritance relations, such relations are not inheritance relations by their nature and content that arise after the death of the testator.

Pursuant to Article 56 of the Law of Ukraine 'On Notaries,' notaries or officials performing notarial acts certify wills of legally capable individuals drawn up in accordance with the requirements of Ukrainian legislation and personally submitted by them to a notary or an official performing notarial acts, and ensure state registration of wills in the Inheritance Register in accordance with the procedure approved by the Cabinet of Ministers of Ukraine. It is not allowed to certify a will through a representative, as well as one will on behalf of several persons. When certifying a will, the testator is not required to submit evidence confirming his or her right to the property to be bequeathed.

That is: 1) a will is certified in a notarial proceeding or by way of procedural actions by officials performing actions equivalent to notarial acts; 2) the mandatory participants in the certification of a will are a legally capable person (the testator) and a notary or an official who performs acts equivalent to notarial acts; 3) the will is drawn up in accordance with the requirements of Ukrainian law; 4) the will is made personally by the testator; 5) several testators are not entitled to sign one joint will, except in cases where, for example, a spousal will is concluded; 6) a will shall not be made through a representative; 7) a will shall be registered in the Inheritance Register; 8) a testator has the right to amend or cancel a will.

According to Articles 1235, 1236, 1237, 1240, 1242, 1244, 1246, 1254, 1286 of the Civil Code, a testator is endowed with an array of rights. These are:

1) He/she has the right to appoint one or more individuals as his/her heirs, regardless of whether he/she has family or kinship relations with these individuals, as well as other participants in civil relations;

2) He/she has the right to deprive any person from among the heirs by law of the right to inherit without giving any reason. In this case, this person cannot obtain the right to inherit (but he/she has no right to deprive persons entitled to a compulsory share in the inheritance of the right to inherit);

3) He/she has the right to cover in his/her will the rights and obligations that he/she has at the time of making the will, as well as those rights and obligations that may be assigned to him/her in the future;

4) He/she has the right to make a will regarding all or part of the inheritance;

5) He/she has the right to make a testamentary refusal in a will;

6) He/she has the right to oblige the heir to perform certain non-property actions, in particular, to dispose of personal papers, determine the place and form of the burial ritual;

7) He/she has the right to oblige the heir to perform certain actions aimed at achieving a socially useful goal;

8) He/she has the right to condition the right to inheritance of the person appointed in the will on the existence of certain conditions, whether related or not to his/her behaviour (presence of other heirs, residence in a certain place, birth of a child, education, etc;)

9) He/she has the right to appoint another heir in case the heir named in the will dies before the opening of the inheritance, does not accept or refuses to accept the inheritance, or is disqualified from inheritance, as well as in the absence of conditions specified in the will;

10) He/she has the right to establish in his/her will a servitude in respect of a land plot, other natural resources or other immovable property to meet the needs of other persons;

11) He/she has the right to make a new will at any time. Each new will cancels the previous one and does not restore the will made by the testator before it;

12) He/she has the right to amend the will at any time;

13) He/she is given the right to appoint an executor of the will.

According to Article 1236 of the Civil Code, the validity of a will regarding the composition of the inheritance is established at the time of commencement of the inheritance.

Requirements to the content and form of a will are set out in Ukrainian law. For example, according to Article 1247 of the Civil Code, a will shall be made in writing, indicating the place and time of its execution. In addition, civil law scholars emphasise that foreign legislation provides for other forms of wills, such as oral or electronic wills, which may be introduced in Ukraine. For example, France provides for a handwritten will (Article 970 of the Civil Code of France), Switzerland for a handwritten will (Article 505 of the Swiss Civil Code); a will in the form of a public act is valid in Germany (paragraphs 2232-2233 of the Civil Code of Germany); an oral will in Poland (Article 952 of the Civil Code of Poland); a secret will in Japan (Article 970 of the Civil Code of Japan), etc.

3. Specifics of certifying a will in connection with the temporary occupation of the territories of Ukraine

In our opinion, given the social relations that have arisen in Ukraine in connection with the temporary occupation of the territories of Ukraine, the provisions on the form of a will may be improved in terms of concluding oral wills and wills in electronic form.

Another condition for the validity of a will is its certification as a handwritten will or a will written by a computer (printed will). Thus, according to Article 1248 of the Civil Code, a notary certifies a will written by the testator in his/her own hand or with the help of generally accepted technical means. At the request of the person, the notary may record the will in his or her own words or with the help of generally accepted technical means. In this case, the will shall be read aloud by the testator and signed by him or her. If the testator is unable to read the will himself or herself due to physical disabilities, the will shall be certified in the presence of witnesses (Article 1253 of the Code).

In this regard, it should be noted that we support scholars in amending the Civil Code and providing for an electronic form of a will that can be signed by the testator using an electronic key and sent to a notary for certification and state registration.

It should be emphasised that the Resolution of the Supreme Court composed of the panel of judges of the Second Judicial Chamber of the Civil Court of Cassation dated 22 January 2020 in case No. 674/461/16-ц (proceedings No. 61-34764св18) concluded that "a signature is a mandatory requisite of a legal deed made in writing. The signature confirms the intentions and will and records the expression of will of the party(ies) to the deed, ensures their identification and the integrity of the document in which the deed is embodied. As a result, the legal deed is signed by the party(ies) or authorised persons. The main, fundamental content of a will is the appointment of heirs under the will and the determination of the fate of property (movable and immovable) that will be in the testator's ownership at the time of his/her death" (Resolution of the Supreme Court in the composition of the panel of judges of the Second Judicial Chamber of the Civil Court of Cassation, 2020).

It is worth noting that the scientific and practical analysis of the inheritance legislation of Ukraine enables to distinguish the following types of wills: personal will (Articles 1234, 1247 of the Civil Code): a personal will signed personally by the testator (Article 1248 of the Civil Code), a personal will signed in front of witnesses (Article 1253 of the Civil Code), a personal will written by a notary in the words of the testator; a secret will (Article 1249 of the Civil Code); a spousal will (Article 1243 of the Civil Code); a will with a condition (Article 1242 of the Civil Code).

For example, Article 1249 of the Civil Code provides for the notarisation of secret wills,

namely a will that is notarised without familiarisation with its contents, in the following manner: the person who has made the secret will submits it in a sealed envelope to the notary. The envelope shall have the testator's signature on it. The notary shall affix his or her certification inscription to the envelope, seal it and, in the presence of the testator, place it in another envelope and seal it.

The Civil Code enshrines the principle of secrecy of a will (Article 1255 of the Civil Code), which provides that a notary, other official, official who certifies a will, witnesses, as well as an individual who signs a will instead of the testator, are not entitled to disclose information about the fact of making a will, its content, cancellation or amendment of a will before the commencement of the inheritance.

It should also be noted that a will is a civil law agreement (deed), whereas a notary's certification endorsement is a notarial deed.

The Civil Code provides for conditions under which a will is void. Thus, pursuant to Article 1257 of the Civil Code, a will drawn up by a person who did not have the right to do so, as well as a will drawn up in violation of the requirements for its form and certification, is void. At the request of an interested person, the court will invalidate a will if it is established that the testator's will has not been expressed freely and is not consistent with his or her will. The invalidity of a separate order contained in a will does not entail the invalidity of another part of the will. In case of invalidity of a will, the heir who was deprived of the right to inherit under this will shall be entitled to inheritance by law on general grounds.

It should also be noted that we agree with the court practice that the presumption of validity of a legal deed means that the deed is considered valid, that is, the deed that gives rise to the acquisition, modification or termination of civil rights and obligations, until this presumption is rebutted. Thus, until the presumption of validity of a transaction is rebutted, all rights acquired by the parties under it may be freely exercised and the obligations created are subject to fulfilment. The presumption of the validity of a transaction is rebutted in the following cases: when the invalidity of a legal deed is directly established by law (i.e., its voidance); if it is declared invalid by a court, that is, there is a court decision that has entered into force (i.e., the disputed deed is declared invalid by a court). The right to make a will may be exercised throughout a person's life and includes both the right to make a will or several wills and the right to amend or cancel them. All of the above powers of the testator, together with the means of their legal protection and defence, are the exercise of the freedom of will, which is a principle of inheritance law. Freedom of testament covers the personal exercise by the testator of the right to make a will by means of a free expression of will, which, being duly expressed, is subject to legal protection even after the testator's death. Freedom of testament as a principle of inheritance law includes, among other elements, the need to respect the testator's will and the obligation to fulfil it. Classifying a will as void for the reasons of an expanded understanding of the requirements to the form and procedure for its certification, as mentioned in part one of Article 1257 of the Civil Code of Ukraine, would violate the principle of freedom of will. In the absence of defects in the testator's will and expression of will when drafting and certifying a will, classification of the latter as void on the grounds not expressly provided for either in this article or in the provisions of Chapter 85 of the Civil Code in general, essentially cancels the testator's free will without the possibility to express his/her will by drafting another will in connection with his/her death. Only if the testator has physical disabilities that prevent him or her from reading the will, the will should be certified only in the presence of witnesses. In this case, failure to comply with such a requirement regarding the procedure for certifying a will in accordance with part one of Article 1257 of the Civil Code of Ukraine results in the voidance of the will (Resolution of the Supreme Court in case No. 461/2565/20 of 20 July 2022).

4. Conclusions

Ukrainian civil law in general and inheritance law in particular contains provisions under which persons (citizens of Ukraine, foreigners or stateless persons) in Ukraine, having full civil capacity, unless otherwise provided by the national legislation of Ukraine, have the right to exercise their indisputable right in the notarial process, namely to draw up and certify a will, amend it, cancel it (to be a testator) or inherit an inheritance by will (to be an heir).

The certification of wills of Ukrainian citizens residing in the temporarily occupied territories may be exercised by public or private notaries, as well as other persons authorised by law, only in the territory of Ukraine. It is inadmissible to certify wills by bodies or persons whose activities are contrary to Ukrainian legislation. Such legal deeds – wills – are invalid from the moment of such legal deed are made and entail the legal effects arising from such invalidity.

In the course of implementation of these rights, the inheritance legislation of Ukraine has specific features which distinguish the relations on making and certifying a will, amending

or cancelling a will, from the relations which arise after the death of a testator and are inheritance relations.

We support researchers in expanding the forms of wills in Ukraine.

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ЗАГАЛЬНИЙ ПОРЯДОК ПОСВІДЧЕННЯ ЗАПОВІТУ ЗА НОТАРІАЛЬНИМ ЗАКОНОДАВСТВОМ УКРАЇНИ: СУДОВА ТА НОТАРІАЛЬНА ПРАКТИКИ

Анотація. ***Мета.*** Метою статті є розкриття порядку посвідчення заповітів за нотаріальним законодавством України. ***Результати.*** В науковій статті детально розглянуто порядок посвідчення заповітів у нотаріальному процесі України. Зокрема, визначено ключових суб'єктів, які беруть участь у процедурі посвідчення заповіту: це заповідач, нотаріус або інші особи, уповноважені на посвідчення заповіту відповідно до чинного законодавства України. Автор наголошує, що процедура посвідчення заповіту на території України регулюється внутрішнім законодавством, включаючи Цивільний кодекс України, Закон України «Про нотаріат» та інші спеціалізовані нормативно-правові акти. У разі наявності іноземного елемента у спадкових відносинах застосовується Закон України «Про міжнародне приватне право», а також міжнародні договори України, що регламентують питання спадкування. Особливу увагу в статті приділено порядку посвідчення заповітів громадян України, які перебувають на тимчасово окупованих територіях. Зазначено, що такі заповіти можуть посвідчуватись виключно державними чи приватними нотаріусами, а також іншими уповноваженими законом особами лише на території, підконтрольній уряду України. Наголошено на неприпустимості посвідчення заповітів органами чи особами, діяльність яких суперечить українському законодавству. Заповіти, посвідчені такими суб'єктами, визнаються недійсними з моменту їх укладення, а юридичні наслідки, що випливають із такої недійсності, чітко визначені законом, зокрема, не визнаються чинними і не створюють відповідних правових наслідків для осіб, зазначених у таких заповітах. ***Висновки.*** Зроблено висновок, що спадкове законодавства України при реалізації цих прав має особливості, які відрізняють відносини щодо складення та посвідчення заповіту, внесення до заповіту змін чи скасування заповіту, від відносин, які виникають після смерті заповідача і є спадковими відносинами. Автор підкреслює важливість дотримання законодавчих вимог до процедури посвідчення заповітів для забезпечення їх правової дійсності, а також гарантування належного захисту спадкових прав громадян як в умовах мирного часу, так і в умовах конфліктних чи окупаційних ситуацій, які створюють додаткові правові виклики для реалізації спадкових прав.

Ключові слова: нотаріальний процес, захист прав людини, спадкування, спадкові відносини, заповіт, нотаріус.