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SECRET WILL: THEORETICALLY-LEGAL NATURE AND WAYS OF "ENRICHING" DOMESTIC LEGAL REGULATION

СЕКРЕТНИЙ ЗАПОВІТ: ТЕОРЕТИКО-ПРАВОВА ПРИРОДА ТА МОЖЛИВОСТІ ВДОСКОНАЛЕННЯ ВІТЧИЗНЯНОГО ПРАВОВОГО РЕГУЛЮВАННЯ

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Modern civilized society cannot be imagined without appropriate rules of behavior, designed to regulate everyday relationships. This is precisely why issues related to the inheritance law remain relevant and require continuous evaluation of new situations and opportunities for establishing an adequate legal regulation of particular public relations. This article looks at ways in which such special type of testament as the secret will is defined and functioning at the national level.

The main contribution of this study is to analyzed contemporary scientific situation in the secret will investigation. In author's personal opinion, it matters a great deal: without appropriate theoretical foundations, there will be legal lacunas in domestic legal practice that in its turn will have a negative effect on the property rights exercising.

Abovementioned has resulted in specific structure of the research, intentionally selected by the author in order to revitalize the doctrine of the secret will. Firstly, the author examines theoretically-legal essence of the secret will, namely its definition and distinguishing features. Secondly, some risks of the employment of researches category were analyzed and taken into consideration. Thirdly, current article directly addresses the issues related to the national practice of secret will regulation. For this reason, special stages of its preparation and reading procedure were singled out.

Trying to find an appropriate framework, the author made following conclusions. Essentially, there is some methodological confusion regarding the notion of secret will. On this grounds, man "civil attributes" inherent in secret will theoretical construction were suggested. This allowed author to offer some recommendations on improvement of secret will civil regulation.

Key words: secret will, civil legislation, notarial actions.

Стаття присвячена аналізу цивільно-правової природи особливого виду заповіту – секретного. Зокрема, автором було проаналізовано декілька підходів до визначення досліджуваного поняття. Особливу увагу приділено теоретико-правовим особливостям конструкції секретного заповіту. Також на основі аналізу вітчизняного законодавства було виокремлено основні стадії складання такого заповіту та його оприлюднення. Унаслідок проведеного дослідження запропоновано шляхи вдосконалення відповідного правового інституту.

Ключові слова: секретний заповіт, цивільне законодавство, нотаріальні дії.

Статья посвящена анализу гражданско-правовой природы особого вида завещания – секретного. В частности, автором было изучено несколько подходов к определению исследуемого понятия. Особое внимание уделено теоретико-правовым особенностям конструкции секретного завещания. Также на основе анализа отечественного законодательства было выделено основные стадии составления такого завещания и его оглашения. В результате проведенного исследования предложены пути совершенствования соответственного правового института.

Ключевые слова: секретное завещание, гражданское законодательство, нотариальные действия.

Introductory remarks. Topic relevance of the current research primarily can be explained by the fact of fundamental changes taking place in any civil society. The adoption and the further implementation of the Ukrainian Civil Code have dramatically changed the inheritance legal institution. Thus, social changes that have occurred require not only an appropriate legal regulation with other branches of law, but also profound theoretical investigation in order to identify essential parameters of different civil law constructions.

Particularly, among such legislative construction inherent to the succession law is the category of the secret will, stipulated in the provisions of the domestic civil legislation, but rarely used in practice.

Prominently, at this stage of civil law development, there are no significant scientific researches regarding the civil nature of the secret will, its place among the other types of testament. Nevertheless, there are some domestic and foreign academic researches devoted to this issue. Namely, among them are investigations made by N.M. Denysiak, O.V. Kytyzov, O.G. Lazarenkova, L. Garb, J. Wood and some others.

At the same time, all existed literature offers only fragmented analysis of the researched category. Most of them devoted to the particular aspects of the secret will and do not take into consideration contemporary legal practices.

Thus, the overall aim of the current article is to analyze comprehensively and systematically theoretical and practical issues related to the legal regulation of inheritance relations, more specifically – relations resulting from the secret will preparation.

Consequently, there can be distinguished article's main tasks: 1) to examine some approaches regarding to the secret will definition; 2) to mark out essential secret will essential parameters; 3) to analyze domestic legislation on secret will preparation and its reading procedure and, finally, 4) to suggest some useful recommendations on improvement of the Ukrainian legislative practice.

Main material presentation. The methods and forms of testamentary prescription stipulated by law are designed to ensure the availability of wills and the practical possibility for the right holder to determine the procedure for testamentary inheritance. Particularly, among such forms of testamentary disposition is special legislative construction known as the "secret will". This type of will considered to be a legislative novel in most countries with the Post-Soviet heritage.

But first, in author's personal opinion, to "extract" specific features and legal nature of secret will, some approaches to its definition should be outlined. Domestic and foreign civil law theory has developed not so many definitions aimed at the revealing essential parameters of the secret will, which could serve as the "distinguishing markers" of this testament type. Some civil theorists define secret will as the testator's will vested in the form prescribed by law, aimed at determining the legal fate of his/her property, property and some non-property

rights, after the death of the testator [1, p. 56]. Foreign dictionary literature also has its own interpretations of the secret will. It is a quite interesting fact that the first references to the secret will can be found in early 1743 [2, p. 6]. A Law Dictionary: Adapted to the Constitution and Laws of the United States edited by J. Bouvier and R. Kelham in 1839 uses such term as "mystic testament" and suggest its synonym "solemn testament", arguing that "… it requires more formality than a nuncupative testament". In this regard, this type of testament is defined as the special form of making a will, which consists principally in enclosing it in an envelope and sealing it in the presence of witnesses. Originally, secret will (that is, mystic testament or also known as the closed will) was used in Louisiana and made in a special manner: the testator must write by his- or herself personally and sign his/her dispositions and then closes and seals it. Then testator present such will to a notary officer in the presence of the seven witnesses. After that, testator makes the declaration about the genuine character of such a will and the notary then draw up a such-called "act of superscription", which usually is written on that paper [3, p. 435–436]. Such a position is also offered in Black's Dictionary of Law and comparative scientific research made by L. Garb and J. Wood [4, p. 797; 5, p. 286].

It is well-recognized that legal institution of a secret will designed to provide maximum guarantees to the confidentiality of such will by excluding the possibility to examine the contents of the testator's will by a third person, even by a notary officer. For this reason, in the scientific literature the right to draft a secret will is closely interconnected with the well-known principle of the freedom of will. This principle in relation to the closed will predetermined that a citizen has right:

– to make a will or do not draw up it; to draw up one or several wills;

– to dispose in the event of his/her death the property in whole or partly;

– in any way determine the shares of inheritance and order of its heirs; bequeath the property to any person;

– to disinherit one, several or all the heirs at law, without specifying the reasons for such deprivation;

– indicate in the secret will, in addition to the primary heirs, the alternate heirs if the heir appointed by the testator or the legal heir will die before the commencement of succession, either simultaneously with the testator, or after the commencement of succession not having enough time to accept the inheritance;

– to impose a duty on one or several heirs to perform through inheritance any pecuniary obligation in favor of one or more persons;

– to impose a duty on one or several heirs to perform any pecuniary action aimed at the realization of a common purpose;

– incorporate in the text other provisions stipulated in the civil legislation;

– revoke or change the executed secret will [6, p. 154].

Within this background, the civil essence of the secret will boils down to the following: it presupposes the certain requirements to form, according to which it must be materialized in a hand-written way and signed by the testator personally. That is, there is a strict compliance to the definite consistency of actions. Non-compliance with these rules may entail the invalidity of the will [7, p. 36].

With a primary focus on the domestic legal regulation on the secret will, relevant Ukrainian civil legislation should be analyzed profoundly. Particularly, testamentary succession is stipulated in the Chapter 85 of the Civil Code of Ukraine. A number of domestic legislative provisions (particularly Art. 1249–1250 specially devoted to the regulation of the secret will in Ukrainian society) enables the author to develop following practical scheme for the secret will operationalization.

1. The procedure for the drawing up a secret will and its acceptance for safekeeping

There is a special procedure for the drawing up a secret will, when no one, except the testator himself/herself, has the opportunity to become acquainted with its content. This is the only exception when no one except the testator knows the contents of the will. At the same time, it is the responsibilities placed on the testator to keep the secret of the will and to have a right not acquaint anyone with its content, including the relatives, notary officer, witnesses and heirs.

Secret will requires more strict procedure requirements for the drawing up of a will. Furthermore, such a testament must necessarily be in a handwritten form and signed by the testator. Therefore, interpretation of the current civil legislation assumes that persons who are unable to do this cannot express their will in the secret form.

Notionally, there two stages of the researched testamentation process. The first one – its preparation and signing – fully complies with the known standards of transaction making. And the second one, namely the document transfer to a notary office (storage) is considered to be obligatory, otherwise such document will be invalid by virtue of the civil legislation.

Secret will in a sealed envelope then transferred by the testator to a notary officer who accepts the envelope, signs it and put it into the second envelop. However, Ukrainian legislation does not provide with the requirement, according to which this procedure is necessarily accompanied with the two witnesses.

2. Reading procedure of the secret will

If the acceptance of the secret will has a direct analogy with the common notarial procedures, the reading procedure of this document can be deemed as an absolute innovation.

At the same time, the procedure stipulated in the Art. 1250 of the Ukrainian Civil Code cannot be considered as the sufficient for the regulation of this procedure. However, in-depth analysis of the domestic legislation, allows the author to highlight several key features of abovementioned process.

Firstly, an envelope with a secret will can be opened by a notary officer only after the testator's death. The fact of death (as the legal circumstance) must be confirmed by a testator's burial certificate or it's duplicate.

Secondly, the basis for the relevant notarial proceedings is the receipt by the notary from any sources of reliable information about the testator's death. To calculate the time limits set by the law regarding the reading procedure of the secret will, it is required to fix the moment when the testator's burial certificate was receipt by a notary officer.

Thirdly, the notary officer fixes the date and the time for the reading procedure of the secret will and undertakes measures in order to notify the legal heirs, whose whereabouts is known, and obliges them to present evidences of their connection with the testator's legal heirs.

Fourthly, before the opening the envelope with the secret will, the notary officer independently involves impartial witnesses. Unfortunately, Ukrainian civil legislation does not stipulate special requirement for such witnesses.

Fifthly, the envelope with a secret will is taken from the "storage" envelope in the presence of all interested persons and impartial witnesses. Then, in their presence, the notary officer makes sure this "storage envelope" is undamaged, reads the identification inscription on the envelope with an aim to eliminate any doubts about the ownership of the envelope with the secret will to a particular testator. The notary officer having extracted from the "storage envelope" the envelope with the secret will, then demonstrates the fact of undamaged envelope to all present persons. It is also demonstrated that the envelope with a secret will is sealed and there is signatures of both testator and notary officer on it. After this, notary officer opens the envelope and brings up its content.

Sixthly, after the opening of a second envelope (within a secret will), the notary officer immediately read out the text of the document. Then, notary officer makes a copy of the secret will and draw ups a report regarding the reading procedure. As a general rule, this report is giving to the witnesses for the

proof-reading and signing (as well as this action is also made by the notary officer). Unfortunately, Ukrainian civil legislation as well as special regulatory acts does not have any direct references about the requirements of the secret will registration. Particularly, on the author's personal opinion, such a report must be registered in the special Register of Notarial Actions Registration.

And, finally, both the original document (that is original text of the secret will) and the report regarding its reading procedure remain on storage in the notary officer's archive. The heirs are granted with the notary attested copies [8].

Additionally, the issues regarding the revocation of the secret will or its amendment procedure remain unresolved both at the level of contemporary civil theory and domestic legal practice.

Some further point should be made in addition on the information supplied above. Among contemporary legal theorists and practitioners there are vigorous debates not only about distinctive features of the secret will, namely the parameters of its legislative construction, but also regarding the significant risks that may be caused by the secret will. The conducted analysis of the relevant academic literature allowed to identify several substantial problems related to this type of testamentation:

– the lack of qualified legal assistance provided by a notary officer during a drafting of the will; it has a quite negative affect on the law enforcement practice; the operationalization with such type of will poses a great risk in situations where a testator is not familiar with the procedure on the secret will drafting; logically, in this case the assistance of a notary officer, who is able to provide qualified legal assistance is necessary and essential; otherwise, the absence of such legal aid necessarily resulted in a number of substantial defects in the text of the secret will and, accordingly, to its nullity;

– inability to use any technical equipment in the testamentation process;

– some difficulties with the determination of the moment of its execution;

– the law "is silent" on the need for the notary to verify the mental capacity of the person who want to make a secret will.

– overwhelming majority of national legislative acts failed to address the requirement to test the testator's legal capacity at the moment when he/she draft the text of the certificate of acknowledgment on the envelope with a secret will [7, p. 37–38].

In the consideration of the foregoing, additional crucial issues of current Ukrainian legislation should be highlighted. Firstly, after the acceptance of the envelope, the notary officer faces the most serious and responsible task – the custody of a will, particularly will in a single copy. Secondly, the testator may not indicate forced heirs or incorrectly determine their share of the inheritance. With this combination of circumstances, the rights of forced heirs are recovered in judicial proceedings. Moreover, the secret will in this case will be recognized as invalid only in the part, in which obligatory share is constituted. At the same time, among the most critical issues related to the secret will is that there is a general legislative provision, according to which the will must be drawn up in a written form and attested by a notary. Thus, a secret will is not excluded from the list of actions for which a mandatory notarial form is stipulated. Moreover, when accepting a secret will, the notary officer does not records the will as a deed, but only certifies the fact of accepting the envelope with a certain document, reportedly as a secret will. Challenges, which are typical for the secret will also include that there is no any guarantees that in the envelope accepted by the notary officer is the will rather than other information, including discrediting the honor and dignity of any person, or even prohibited provisions.

In foreign countries this type of will is also included in civil legislation of the Czech Republic, France, Luxembourg, the Netherlands, Romania, Slovenia, Spain and other [9].

Concluding remarks and prospects for the further scientific inquiries. Secret will is a form of testament that to the full extent guarantees the secrecy of the document's content.

Fundamental analysis of both scientific literature and relevant legal practice make it possible for the author to distinguish following specific features of the secret will:

1. According to the current legal framework, secret will must be personally written (that is, in a handwritten form) and signed by the testator. Consequently, non-compliance with these essential requirements may entail the invalidity of such will.

2. Secret will presupposes general rule: this type of document shall also be communicated in a sealed envelope to a notary officer personally by the testator in the presence of two witnesses who sign this envelope. There are some formal requirements to the witnesses that are stipulated in national legislation.

3. Secret testament can be substantially changed, and testator can make a new one, which is attached to the first envelope.

4. If citizen due to some preventing circumstances cannot personally make a will and requests assistance (for instance, translator), this testament will be invalid and cannot be considered as the closed.

Drafting the secret wills is not widely used in practice, despite the fact that this procedure is regulated thoroughly by the legislator. Among substantial advantage of this form of testament is the possibility of preserving the absolute secret of the testator's will. In contrast, disadvantages include some restrictions regarding the subject, as well as a greater potential in violation of numerous legislative requirements, since the notary performing an advisory function failed to guarantee their full compliance with the requirements stipulated in specific national legislation.

Nevertheless, in author's opinion it is of urgent importance to make following concrete recommendations that can be used by the Ukrainian legislator with an aim to enrich the inheritance practice:

– It seems that the legislator should develop special regulations for the secret wills storage. Perhaps, it can be special lock boxes, which are not accessible to any outsiders, etc., as well as additional measures of notary responsibility for the disappearance of the documents.

– The secret will must be drawn up on the special blank of notarial documents and signed by the testator. This will allow a notary officer, without violating the principle of secret of a closed will, into the contents of such will, to provide assistance for a testator to express his/her will in accordance with legal standards.

– Taking account that according to the current legislation, if a citizen has limited capacities and cannot personally make a will, it is not possible to make a secret will; against this background, it is necessary to establish a special rule regarding the new form and procedure for the execution of a secret will; namely, a citizen who, due to his/her physical defects, serious disease or illiteracy, is not able to write and sign a closed testament personally, has the right to make a secret will in audio and video form. Of course, a testament made in this way will not contain the signature of the testator. Therefore, it is desirable that the will should include argumentation for what reasons a citizen cannot personally write and sign a will.

– Granting to the officials (for example, bodies of local self-government authorities) the right to accept a secret will, probably would promote the enhancement of the citizens' rights who, due to certain circumstances, have no opportunity to make notary attested secret will.

In its turn, mentioned above a set of recommendations formulates following directions in further scientific investigations. Primarily, special attention should be drawn to the foreign legal practice regarding the preparation of a secret will and its main substantial and procedural parameters.

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ДЕЯКІ АСПЕКТИ ПРАВОВОГО РЕГУЛЮВАННЯ ЕЛЕКТРОННОГО СТРАХУВАННЯ В УКРАЇНІ

SOME ASPECTS OF THE LEGAL REGULATION OF THE ELECTRONIC INSURANCE IN UKRAINE

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Стаття присвячена дослідженню питань правового регулювання електронного страхування та використання електронних страхових полісів. Авторами проведений аналіз норм законодавства в галузі страхування та виявлено деякі проблемні аспекти у використанні електронних страхових полісів на прикладі договорів обов’язкового страхування цивільно-правової відповідальності власників наземних транспортних засобів.

Ключові слова: страхування, внутрішній електронний договір, електронний страховий поліс, страхувальник, страховик, он-лайн-страхування.

Статья посвящена исследованию вопросов правового регулирования электронного страхования и использования электронных страховых полисов. Авторами был проведен анализ норм законодательства в отрасли страхования и были выявлены некоторые проблемные аспекты в использовании электронных страховых полисов на примере договоров обязательного страхования гражданско-правовой ответственности собственников наземных транспортных средств.

Ключевые слова: страхование, внутренний электронный договор, электронный страховой полис, страховщик, застрахованный, он-лайн-страхование.

The article is devoted to the study of the legal regulation issues of electronic insurance and the use of electronic insurance policies. The authors analyzed the norms of the legislation in the insurance sphere and identified some problematic aspects in the use of electronic insurance policies taking the cases of compulsory insurance contracts of the civil liability of vehicles owners.

The rapid development of the competition on the insurance market makes insurance companies to find new ways of attracting customers, taking into account their needs as well as seeking cost reduction in providing insurance services. Analyzing the insurance practice in other countries, it is discovered a consumers interest increase on the electronic insurance market (on-line insurance). On-line insurance is the provision of services by the insurer, namely issuing an insurance policy through the insurance company site.

Today, the practice of online insurance is not quite widespread in Ukraine. The analysis of the legal literature on this issue suggests that there is no a comprehensive research of the current situation in the sphere of the legal regulation of electronic insurance.

The purpose of this article is to analyze the existing legislation and the existing approaches to the on-line insurance in Ukraine, to identify some problematic aspects in the legal regulation of the procedure of making electronic insurance contracts (taking the cases of compulsory insurance contracts of the civil liability of vehicles owners).

Key words: insurance, internal electronic contract, electronic insurance policy, insured, insurer, on-line insurance.