COMMENTARIES

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# INTERPRETATION OF WILLS IN RUSSIA. CALL FOR REFORM

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**Abstract:** The article describes the current rules and case law on drawing up wills in Russia. The author argues that the literal approach and the lack of stop-gap rules are hardly compatible with succession law policy. Due to the problem of correct interpretation of a will, we cannot talk about real testamentary freedom. The situations with wills are usually complicated because the authors are absent. As for interpretation of wills, the contemporary landscape shows that most of European countries prefer intentional approach: when the interpreter would take into account the indirect extrinsic evidence. Speaking of Russian approach, the priority is given to the literal interpretation: the methodological recommendations on drawing up the rights of inheritance clarify that in order to understand the literal meaning of words and phrases in the will, their plain meaning should be determined, and when interpreting the legal terms, their meaning set forth by the legislator in the corresponding legal instrument shall be used. On the base of comparative research and empirical experience "new" intentional approach is proposed.

**Key words:** construction, will, testator, intention, interpretation, stop-gap rules.

Article 1132 of the Civil Code provides:

*When the will is being interpreted by a notary, executor or court, the literal sense of words and phrases contained therein shall be taken into account.*

*In case of ambiguity of the literal sense of any provision of the will, it shall be determined by comparison of such provision with other provisions and the general idea of the will. In such case, the implied intent of the testator shall be implemented to the fullest possible extent.*

**(a)** Competing approaches. In the absence of the correct interpretation of a will, there is no real testamentary freedom. The dispute between different approaches to interpretation of a will through its literal sense or its intent is as old as the hills. The best known example in respect of succession is Causa Curiana[1]. This competition has remained in the modern laws. Both approaches are aimed to determine the meaning of the text. The situation with the will is complicated because the author who could have clarified it has long six feet under. The first approach provides for doing this strictly based on the literal sense of the wording. The advantage of this approach is its simplicity and, therefore, inexpensiveness. A testator should take care themselves of understanding it properly. The literalists assert that if an interpreter does not have confidence in the plain meaning, the risk of coming to improper conclusion is comparatively the same. The second approach allows the court in case of ambiguity (if it is clear, it does not need interpretation) to distinguish the true intent of the particular but not abstract testator who is not to be an expert in semantics and legal niceties, and recognizes the priority of such true intent over the literal sense of the wording.

The contemporary landscape shows that most of European countries prefer intentional approach.[2] In common law countries after Perrin v Morgan [1943], the so-called "arm chair doctrine" is used for interpretation of wills. Reviewing the will from the point of view of the testator, the interpreter, in case of finding any ambiguity, shall take into account the indirect extrinsic evidence. Such evidence includes testator's business occupation, domicile, native language, and other personal peculiarities on the date of execution of the will. Since 1983, in England the direct extrinsic evidence such as the testator's correspondence and diaries, and the testimony of the solicitor who prepared the draft can be used in accordance with Section 21 of Administration of Justice Act 1982 (latent ambiguity, equivocation). However, the informal documents and oral evidence shall not substitute or amend testamentary dispositions.[3] The Civil law countries use a similar to "arm-chair doctrine" method to find out testator's intention (for example, Article 133 of the German Civil Code). Moreover, intentional approach contains supplementary

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[1] The will said, "If I give birth to a son and he dies before coming of age I wish Curius to be my successor." No son was born. Quintus Mucius Scaevola proved that in such case, according to the wording of the will, Curius had no rights and the estate to be transferred to the legal successors. Lucius Licinius Crassus referred to the intent of the testator and advocated for the inheritance right of Curius.

[2] See The Max Planck Encyclopedia of European Private Law, 2012. Ed.by J. Basedow, K.J. Hopt, R. Zimmermann, and A. Stier, Vol. 2, p.1775-1776 (author – S. Herler).

[3] Regarding England see R. Kerridge, Parry & Kerridge, The Law of Succession, 13th. ed., 2016, p. 268. A correction of technical errors when wrong wording was included (or proper wording was missed) in process of drafting is called rectification. In Marley v Rawlings (2014) rectification allowed to retain a will signed by Mr Rawling which was actually a will of his wife.

interpretation techniques to reconcile ambiguity. Such measures comprise "stop-gap rules", i.e. a prompt, for the interpreters that, for example, suggest how to proceed when several persons come within the definition of the "only heir" or when a person appointed as testamentary heir dies before the opening of succession (the similar rule was provided in Article 95 of the Draft Civil Code of Russian Empire), maxims of drawing up, i.e. principles for judges, which shall be applied in insoluble situations preventing invalidation of the will due to uncertainty.[1]

**(b) Russian approach: priority of the literal interpretation.**

An Article devoted specifically to the rules for interpretation of a will first appeared in the Russian law. That is not to say that the issue regarding interpretation of a will was not relevant in the period of the Soviet Union. Obviously, the hegemony of open public wills prevented any possible disputes. Experienced notaries converted the intents of a testator into clear legal wordings, excluded the equivocal language and so on. However, even in those times there was much concern about interpretation of a will, for instance, when the will was changed by the execution of a new one. After the complication of individual property environment, the appearance of private and emergency wills, and the increase in the number of cases when the wills were executed abroad, the rules for interpretation become more urgent.

The article under consideration forms a combination of Article 431 of the Russian Civil Code that provides for the contract interpretation procedure and Article 1167 of the Community of Independent States Model Civil Code that provides for the use of the literal sense of words and phrases when interpreting the wills or, in case of any ambiguities, for the comparison of the will provisions. In other words, the Russian Civil Code gives priority to the literal interpretation similar to the contract interpretation procedure. Neither the notary nor court may distance from the doctrine of the literal interpretation of will wordings or replace such wordings with the reconstructed true intention of the testator considered by them as the most probable.

Thus, when interpreting a will, the interpreter who may be a notary, executor or court (final interpreter) shall proceed from the literal sense of words and phrases. Hence, the methodological recommendations approved by the Federal Notary Chamber on drawing up of the rights of inheritance clarify that in order to understand the literal sense (meaning) of the will words and phrases, their plain meanings should be determined; when interpreting the legal terms, their meanings set forth by the legislator in the corresponding legal instrument shall be used (Art. 33).

Drawing up a will and the commencement of succession may not coincide in time or in place. The literal sense of the will words and phrases shall be determined with the consideration for the date and place of the will issue (for the purpose of interpretation, a will begins to "tell" at the date of its execution). Thus, the phrase "I leave everything

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[1] See, for example, Max Rheinstein and Marry Ann Glendon, The Law of Decedents' Estate, 1971, p. 466-476.

to my wife" shall be interpreted in favor of the person who was the spouse at the date of the will issue. It might also refer to the lack of stop-gap provisions in Russian succession law. What does the wording "spouse" mean: condition or simple identification? Testator living in Germany distributes the estate among his/her children assuming that any of the early deceased children will be substituted with his/her issues. Even if the last habitual residence of such testator was Russia, our opinion is that the will shall be interpreted using a "prompt" which was likely to be considered by the testator as an extension of the will's text (search of context within literal approach).[1]

That might be the end of the interpreter's efforts. The Russian law does not mention any indirect or direct extrinsic evidence.[2] The above mentioned methodological recommendations clarify that the law does not entitle the notaries to use other documents such as testator's letters and diaries, etc., in addition to the will, for determination of the true intention of the testator. According to the example popular in Germany, if testator leaves to his/her friend a library the heir will receive some books but not the collection of wines regardless of the fact that testator always used the term 'library' in that meaning.[3]

Is such decision consistent? The key feature that distinguishes the interpretation of a will from the interpretation of a contract is the absence of other party who may rely on the words but not on the thoughts. Therefore, the rules for contract interpretation are usually more stringent. In contrast, the article 1132 sets forth stricter rules for the wills. Hence, the case law gives the examples of the literal interpretation of the wills against actual intention. Paragraph 79 of Resolution of Plenum of the Supreme Court of the Russian Federation no. 9 dated May 29, 2012 allows testators to make the wills with regard to buildings without determination of the fate of the land where they are located. Many aged testators act in this way, especially, when the land at the date of making of a will is still owned by the public entity assuming that the building and the land would transfer to the heir as a whole. According to the case law, the lack of arrangement regarding the title to land in a will results in adding the land (usually privatized after making a will) to the list of intestate (Decision of Division for Civil Cases of the Supreme Court of the Russian Federation No.18-KG17-116 dated 01/08/2017). Without discussing the issues related to the unity of a land and a building, it should be

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[1] In Russia, there are no conflict-of-law rules devoted specifically to the issues of drawing up wills. In England, a will is interpreted in accordance with the law of the country of testator's domicile at the date of execution a will unless the contrary testator's intention appears. See for example John G. Ross Martyn, Jane Evans-Gordon, Alexander Learmonth, Charlotte Ford, Thomas Fletcher, Theobald on wills, 18 Edition. Thomson Reuters. 2016, p.33, 39.

[2] There has been a continuity in the Soviet succession law approach. For example, see B.S.Antimonov, K.A.Grave, Soviet succession law, 1955, p.186-187. The authors have defined the rule of exclusion of any extrinsic evidence. The jurisprudence of the Senate before the Revolution allowed studying of the testator's letters.

[3] Häcker B. What's in a will? Examining the modern approach towards the interpretation and rectification of testamentary instruments, *Current Issues in Succession Law*, ed. by B. Häcker, Ch. Mitchell, p. 147.

pointed out that such approach means interpretation of the will against the intention of the decedent. There are other examples as well. It is likely that a legacy containing such wording as "pay one million rubles to my creditor Ivanov" will be executed even if by the date of opening inheritance the debt is paid.[1] Due to interpretation restricted to the text legacy providing for the use of dwelling premises made in favor of the designated person, this will hardly allow the legatee to settle in his/her house.

On the other hand, the position adopted by the legislator, that when interpreting a will it is not important to know what a testator wanted to say but it is important what he/she has said based on the lexical meaning of the words and phrases[2], makes the interpretation much easier, facilitates the resolution of the disputes arisen and prevents many possible errors pertaining to determination of the testator's true intent.

**(c) Comprehensive interpretation.** The second sentence of Article 1132 of the Russian Civil Code comes into action when the literal sense of the words and phrases does not result in understanding by the interpreter of the sense of a testamentary arrangement (due to presence of alternatives or overall ambiguity). In such case, similar to contract interpretation, the ambiguous arrangement shall be compared with other provisions of the will and with the general idea of a will (search of intention within the will).

Further, the legislator removes the procedure provided for contract interpretation. When the above described comprehensive interpretation does not enable to clear up an ambiguity or inconsistency of a will, the interpreter's right to use extrinsic evidence (peculiarities of life, documents and views of testator) is not mentioned in Art. 1132 of the Russian Civil Code as opposed to Art. 431 of the Russian Civil Code.

What is the point of such difference between these two articles which are almost identical in other respects? This may mean that the legislator insists, that the interpreter should not find out about the testator and see, as it is said, with his/her eyes even when a will contains ambiguities or inconsistencies that cannot be resolved through the literal or comprehensive interpretation.

But how does the Russian law propose to proceed in the event of interpretive impasse when an ambiguity or inconsistency cannot be resolved through the literal or comprehensive interpretation ("I bequeath to my niece Anna", when the testator has two nieces Annas but he/she did not know about the existence of the second niece due to the family situation)? Shall the court in such event just declare such will null and void or acknowledge the both nieces' right to inherit? Both solutions are hardly reasonable.

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[1] It again reveals scarceness of succession law originally considered for primitive estate and testamentary dispositions. Let us assume that initially a testator bequeathed all his/her property to two his/her sons, and, after that, such testator gifted a half of the house owned by him/her to one of the sons. The other son claims for interpretations of the will in such a manner as to give him personally the other half of the house. The Russian court will dismiss his claim regardless of any extrinsic evidence because the plain meaning of words and phrases ensures unambiguousness of the testamentary arrangements.

[2] Abramenkov M.S. Interpretation and Execution of a will, *Succession Law*, 2011, no. 2, SPS KonsultantPlus Publ.

Therefore, it would be logical in the current situation, at least, to allow the court to recognize ambiguity and determine the true intent of the testator and interpret the debatable provisions of a will with consideration for extrinsic evidence when the text contains equivocation or illegible words. Apart from that if the literal meaning is clear but undoubtedly absurd and there are no doubts that the testator meant something different, it would be logical to apply the absurdity doctrine and to allow the interpreter to back out of the literal meaning of words and phrases. This is required by the principle of "*favor testament*". Let us assume that the property was bequeathed to "issues", but the deceased had only stepchildren.

**Conclusion.**

In our opinion literal interpretation of a will is against the testamentary freedom because such approach often leads to intestate succession due to the uncertainty of disposition or to devolution of the estate according to somebody's other will but not the will of deceased.

1. Due to the growth of estate and relational diversifications, Russian succession law needs more stop-gap rules and other ancillary instruments for correct interpretation.

2. The testator and, even notary, are not final experts in language and legal meaning. It must be permitted to claim for ambiguity of a particular wording in a will upon the external evidence.

3. A huge gap between the execution a will and the commencement of inheritance is a tricky thing. Testator bequeathed a "money" further convert one into other financial asset (bonds, etc.) supposing his will covers it. There is no other party of the will, it is not a contract. Russian law does not know differentiation between special and absolute legacies. Hence the approach to drawing up a will should estimate a layman's perception of their previous testament.

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