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Notarization of Electronic Transactions: Digital Technologies

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Abstract
The relevance of the study. The article considers the legal possibility of notaries making (certifying) electronic transactions using digital technologies. A sufficient level of guarantees of the rights of the parties to electronic transactions is achieved only with the participation of a notary by notarizing documents that acquire the highest evidentiary value. This allows ensuring and protecting the rights of persons in civil circulation as much as possible and avoiding entering into a transaction with defects of will or content. With the development of legislation, electronic document management, the modern legal system, and the legal culture of the population, appeal to the notary as a body through which the state ensures the protection of personal and property rights and freedoms of citizens becomes popular. Various forms of improvement make the notary more accessible to the population of the country.
Purpose of the article. The purpose of the article is to study the legal nature and features of electronic transactions certified by notaries, as well as the guarantees of legality and responsibility of the notary for conducting electronic transactions, which certainly increases the security of the parties to the transaction and simplifies (in terms of time and number of documents required for the collection) the transaction itself. The article examines the principles of notarization of electronic transactions in the aspect of a general theoretical and legal understanding of the nature and essence of notarial actions on the example of the legislation of the Russian Federation, as well as some European countries.
Methods. The leading method of studying the problem was the deductive method, which allowed studying the legal nature, role, and place of the institute of notarization of electronic transactions in the aspect of digitalization of modern society and the state. System analysis, historical method, induction method, etc. were used as well.
Results. The article concludes that the registration authority is not responsible for the content of the transaction (including those made electronically), in contrast to the notary, who checks the electronic transaction, its legality, admissibility, and correctness in the preparation of all necessary documents and signs (certifies) the documents with his/her qualified electronic signature. Both systems (notarization of electronic transactions and state registration of rights) are designed to

ensure and protect the legitimate interests and rights of citizens in the field of property relations. The notary, with the introduction of the possibility of electronic transactions, also provides the most convenient, reliable, and fast interaction with the state bodies of participants in civil turnover.

Key-words: Notarization, Electronic Transactions, Electronic Signature, Digitalization.

1. Introduction

The development of property relations has had a great impact on the education and development of modern society, in which inheritance relations play a significant role. A sufficient level of guarantees of the rights of the parties to most transactions is achieved only with the participation of a notary by notarizing documents that acquire the highest evidentiary value. This allows maximizing the protection of the rights of persons in civil circulation and avoiding entering into a transaction with defects of will or content. With the development of legislation, electronic document management, the modern legal system, and the legal culture of the population, appeals to the notary as a body through which the state ensures the protection of personal and property rights and freedoms of citizens become more popular. Various forms of improvement make the notary more accessible.

The interaction of the notary and the registering authority when registering an electronic transaction through a notary develops of paramount importance in comparison with the rest of the regulation of the interaction of the notary with other authorities and departments. Today, there is still an urgent problem of the lack of an extraterritorial principle of concluding electronic notarial transactions with real estate.

2. Methods

The positive potential of electronic technologies began to be used in notarial activities, including the certification of electronic transactions (Vergasova, 2013).

The reform of inheritance law marks the established priority of testamentary succession almost from the very beginning of the formation of the institution of inheritance, which was emphasized each time by the legislator, so the gradual reduction in the size of the mandatory share also testifies to this orientation. However, the constant improvement of this issue has led to the fact that today, there are consequences that are still not possible to fill in any way. For example, when two wills were drawn up (before March 2002 and after), which do not contradict each other in content or contain an order regarding a part of the property, or the second will contains an order

regarding a second one, previously undevised part of the property, and in practice, it is also necessary to allocate a mandatory share. Relevant questions arise: what size of this share should be taken into account (1/2 or 2/3) and the rules of which code should be applied (Borisova, 2016)?

To date, the question remains open, as the Plenum of the Supreme Court of the Russian Federation also did not give explanations. Separately, in the chapter, we identified and emphasized the inattention of the legislator, which gave rise to another topical "dispute" of norms among themselves (clause 2 of Article 1152 and 1111 of the Civil Code of the Russian Federation). The conflict is contained in the absence in Article 1111 of the Civil Code of the Russian Federation of the grounds for inheritance reflected in Article 1152. We have proposed to improve the legislation and we believe that this gap should be filled soon.

3. Results

Having considered the main aspects of notarization of transactions, including electronic, to protect the rights and interests of citizens and compared it with the state registration of rights to real estate as well as notarization of real estate transactions, we can draw the following conclusions:

a) the registration authority is not responsible for the content of the transaction (including those made electronically), in contrast to the notary, who checks the electronic transaction, its legality, admissibility, and correctness in the preparation of all necessary documents and signs (certifies) the documents with his/her qualified electronic signature;

b) both systems (notarization of electronic transactions and state registration of rights) are designed to ensure and protect the legitimate interests and rights of citizens in the field of property relations. The notary, with the introduction of the possibility of electronic transactions, also provides the most convenient, reliable, and fast interaction with the state bodies of participants in civil turnover.

The doctrine and judicial practice of Western European countries develop numerous casuistic criteria, according to which the rule on soluti retentio is undergoing increasing restrictions. For example, in the Italian legal order, the effect of this rule is denied, and the grantor has recognized the right to restitution when it agrees only related to an immoral purpose, but not immoral as such (for example, an agreement to secure a debt arising from an immoral contract); when accipiens is not the "true" final addressee of the provision (for example, in the case of an order to bribe an official with the intermediary withholding the amount provided to him/her for this); when the solvents, although participating in an immoral agreement, has suffered deception or mental abuse by the accipiens, or

belongs to the social class or category of persons whom the legislator intends to protect. In addition, the rule in question does not apply to acts of renunciation of rights. Finally, the accipiens' claim of retention is assessed in light of the general principles of the legal order in the area of obligations. On the other hand, the opposite trend is also observed, namely, the extension of the soluti retentio rule – when it seems appropriate for one reason or another – to other transactions and to other claims that are formally outside its scope. The German doctrine seeks to extend the rule on soluti retentio contained in paragraph 2 of Section 817 of the BGB, which is formally limited to conditions, also to vindicatory and other claims for the reverse reclamation of property provided for immoral and illegal transactions.

Another example of an extended interpretation of the rule under study is the Italian judicial practice. According to the prevailing opinion in Italian doctrine, based on a literal interpretation of the law, Article 2035 Codice Civile, which specifically provides for soluti retentio only in respect of grants contrary to good morals, does not apply to an illegal contract, as well as to a contract made in circumvention of the law. However, "judicial practice has very often shown its favor for the application of this principle also where the agreement was contrary to the law, thus imposing a judgment on the assessment of the illegality of the agreement... (about its) immorality...".

It was also noted that the presence of Article 2035 with its rule on soluti retentio leads to the desire "to bring the actual composition of the transaction under illegality or immorality, depending on whether they are willing or unwilling to protect solvents, assessing, in particular, his/her possible position of psychological superiority concerning accipiens as a motive for refusing to reclaim...". Also, "a significant part of the doctrine and the same jurisprudence believe that in the case of competition between illegality and immorality, the rule... Article 2035 is equally applicable, even though the norm meant to link the impossibility of condictio, i.e. reverse claim, with immorality alone".

4. Discussion

The theory of the issue of notarization of transactions, including (in recent years), was studied by such Russian scholars as I.S. Andreechev (2003), V.N. Argunov (1991), V.Yu. Bagdasarov (1996), V.M. Baranov (2000), M.A. Dolgov (2005), P.B. Evgrafov (1981), A.E. Zhalinskii (1997), D.F. Zharkov (1996), S.K. Kuznetsov (1904), O.E. Leyst (2002), V.M. Polenina, etc. Despite a significant number of studies and scientific works in the field of corporate, obligation, family, inheritance, civil law, and notarial activities, as well as official information sources, in the

modern scientific world, the content of the activities of a notary as a guarantor of the rights and freedoms of citizens seems to us insufficiently researched and requires further study, consideration, and improvement in the aspect of digitalization of notarial actions.

The freedom of civil rights reflects the ability to perform any notarial actions with any notary, except in specially provided cases. Among other things, each notarial action is directly provided for by law and must meet all the established requirements. The very fact that a notary acts on behalf of the state makes this unique legal institution maximally focused on the observance, protection, and implementation of civil rights and freedoms of every person. The notary public in civil society ensures the protection of private property and the indisputability of property rights, its activities have a distinctive feature – the protection of rights is carried out directly by performing notarial actions. To consider the issue of protecting the property rights of citizens by notarizing transactions related to real estate, it is important to determine what exactly the legislator refers to the concept of "real estate". Since September 1, 2006, forests and perennial plantings were excluded from the list of immovable things (real estate) in Russian legislation, and later, in July 2015, space objects were removed from this list; this fact is important, for example, when registering inheritance rights. Real estate is also property complexes, which is directly indicated by Article 132 of the Civil Code of the Russian Federation. The development of the real estate institute has also created a new form of state regulation, namely the state registration of rights to real estate and transactions with it (Borisova, 2016). The most frequent transactions of the whole variety of real estate objects in notarial practice are transactions with housing, which should contain several necessary information entered into the Unified State Register of Taxpayers (hereinafter – USRT).

To certify such transactions, the notary verifies that the property belongs to the owner based on the documents of title, the reference to which is mandatory in the text of the contract. Since civil rights can arise from any contracts and other transactions, there is no approximate list of documents that can be accepted as title documents. In addition to these necessary documents, the notary also requests documents on the state registration of the real estate object. For the maximum protection of the property rights of citizens, the state, at the level of the law, provided for the need and obligation for the courts to provide information on the fact of recognizing a citizen as incapable or on the limitation of his/her legal capacity to the bodies of Rosreestr, which are subject to registration in the USRT within no more than three working days from the date of receipt the specified information (clause 12 of Article 32 and a. 4 of Article 38 of the Federal Law of July 13, 2015, No. 218-45 FL "On state registration of real estate"). Here we see one of the topical problems of modern notaries, a kind of junction between necessity and reality. The reality is that so far this is the only valid fact of

joint work of the notary and other bodies to provide information about the important status of a citizen from a notarial point of view. Other databases, unfortunately, are not yet available to notaries, although today there are many negotiations regarding the need for notaries to obtain this information in the process of performing a particular notarial action.

5. Conclusion

Ensuring the legality of transactions (including electronic transactions), thereby protecting civil rights, the notary shall comply with both general and special rules for performing notarial actions, as well as make sure that the applicant has the legal capacity, whether he/she has the rights to perform a particular action, for which the notary requires the necessary documents. It is in the interests of all participants in the civil turnover that a notary has the right to refuse to perform a notarial action or to postpone it. It is possible, for example, if action is contrary to the law, the transaction does not meet the requirements of the act or these requirements do not correspond to the documents provided to perform the act (article 48 of the Fundamentals of legislation of the Russian Federation on notaries). All this ensures the protection of the civil rights of not only certain persons who have applied to the notary but also the rights of third parties and all participants in civil turnover, this, in part, is the protective function of the notary. Regarding the protection of civil rights, all actions must be performed in a strictly established sequence, according to regulated rules, a deviation from which means the invalidity of a notarial act, so a notarized act provides the party with a preferential position at the stage of proof (Zaitseva, 2015).

6. Recommendations

With the development of statehood, the economy of the country and, accordingly, first state and then private property, the latter has acquired special significance and importance. Therefore, the state separately, disjunctively protects the property rights of citizens, which proves the above-mentioned fact of providing information about the civil status of citizens in an open form, personally by the courts to the bodies of Rosreestr, bypassing other constitutional provisions regarding medical secrecy, based on which such a base is not created for notaries. Therefore, we believe that there is a certain injustice, an imbalance in relation to other human rights and legitimate interests. In no other instance for performing a notarial action, a notary has no opportunity to obtain information about the recognition of a citizen as incompetent or with limited legal capacity. This always entails huge risks not only for the notary but also for the parties to the transaction. We consider the norm of Part 3 of

Article 44.2 Fundamentals of the legislation of the Russian Federation on notaries important, according to which a notarized document in electronic form or a certificate issued by a notary in electronic form is signed with a strengthened qualified electronic signature of a notary.

Here we see two aspects of this problem: the priority of some bodies over others, even though the notary is called upon to ensure, protect, and guarantee the rights, freedoms, and interests of citizens like no other institution of civil law; and the priority of property relations of citizens of the Russian Federation over others. One of the main ways that notaries use to protect the property rights of citizens when certifying transactions for the disposal of real estate, the rights to which are subject to state registration or any other notarial transaction required by law, is to require the consent of the second spouse to such a transaction in relation to real estate that is in common joint ownership of the spouses, which, as a rule, contains the terms of the transaction and its price. The spouse can set the minimum amount for which the property can be sold, the procedure for obtaining this amount (a one-time payment before/after signing the contract, etc.), also specify a specific buyer or other conditions at their discretion. However, there is one invariable, important and mandatory indication in the text – it is the definition of the subject of the transaction to which consent is given (paragraph 3 of Article 157.1 of the Civil Code of the Russian Federation).

Since such consent must be notarized, which is explicitly stated in paragraph 3 of Article 35 of the Family Code of the Russian Federation, the text of the transaction can reflect when and by whom it was certified or, in the absence of the fact of marriage registration, indicate that the citizen is not in a registered marriage. This is the key point when concluding any contract with real estate, even if the citizen does not have a spouse. It is also necessary to pay attention to the fact that this consent is required in both cases, that is, from each party to the transaction.

A separate important point is to clarify the method of acquisition of such real estate by the founder of the management, if it was acquired during the marriage, then the consent of the second spouse is required. If the property that is transferred to the trust management belongs to a minor citizen, the conclusion of the contract will require the consent of the tutorship and guardianship authority. The role of the notary in protecting the property rights of citizens is reflected more clearly in the draft wording of Article 76 of the Foundations on notaries, which provides the grounds on which the notary is entitled to impose and remove the prohibition of alienation of property that demonstrates the indisputable guarantee of observance and protection of the public property rights. Here, the notary is a kind of interested person in protecting and guaranteeing the property rights of citizens.

Another urgent problem concerning the property rights of citizens can be called the problem of making a transaction for the disposal of their real estate only at the location of this real estate (Article 56 of the Notarial Act). It is interesting to recall the conclusion of a marriage contract, which can be concluded with any notary, but in its meaning contains conditions for the disposal of property, including real estate (Borisova, 2016). At present, when citizens have several real estate objects located in different regions of the country (including under state programs and social initiatives of the Government of the Russian Federation, for example, the development of land in the Far Eastern Federal District in Russia), from our point of view, this rule is already archaic.

The notary public needs to develop in this matter and take an example from other bodies, for example, Rosreestr, which has moved to the extraterritorial principle of registration, when documents are sent for registration in electronic form anywhere. We believe that the legislator needs to abolish Article 56 of the Fundamentals of the legislation of the Russian Federation on notaries. It is in the interests and for the convenience of citizens that the notary must switch to extraterritorial certification, as is the case in European countries, for example, France (Gongalo et al., 2015).

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