

# Closed Will in Russian Civil Law: Specific Aspects

Farida Buniatova

**Abstract**—Testamentary succession rules in the Russian Federation have been developing intensively since the collapse of the Soviet Union. The article analyzes specific aspects of the closed will in Russian civil law. It discusses advantages and drawbacks of the closed will. In addition to that, the paper focuses on the will drafting and attestation procedures. The research provides ways to improve and enhance Russian legislation governing the closed will.

**Keywords**—Closed will, testamentary succession, testator, will.

## I. INTRODUCTION

**S**UCCESSION law issues have become very urgent in Russia so far due to the development of market economy, entrepreneurship and property rights. Thus, the range of objects that can be inherited has expanded.

In Soviet times one's estate would at the most include a country house, an automobile and a bank deposit. Today, however, a person can own any type of property without limitations as to value or amount.

Consequently, succession law rules have become especially important to develop. Therefore, in 2001 Russian legislators adopted Part III of the Civil Code, which came into force on March 1, 2002 [1]. This part of the Civil Code deals with succession rules and is a landmark in the Russian succession law development.

Part III of the Civil Code has changed the role of a will and it has now become the primary grounds for succession.

By contrast, the previous 1964 Civil Code contained only 11 articles on testamentary succession (as opposed to the current 23), and they were preceded by the rules governing intestate succession. This fact indicated the priority of intestate succession over testamentary dispositions.

The new Civil Code has set forth five types of wills i.e. wills attested by a notary, closed wills, wills qualifying as wills attested by a notary, the testamentary dispositions of funds in banks and wills under extraordinary circumstances.

This article discusses the closed will, its peculiarities and specific aspects and suggests ways to improve it.

## II. DRAFTING PROCEDURE

According to the Russian Civil Code a closed will must be handwritten and signed by the testator. This is a statutory requirement for validity of the closed will (Article 1126 paragraph 1 of the Civil Code).

Therefore, it is impossible to use a computer or a typewriter to draft the closed will.

Upon completing the text, the testator puts the will into an envelope and seals it. Afterwards, the testator passes the envelope to the notary in the presence of two witnesses, who sign the envelope.

The notary inserts the envelope he gets from the testator into another envelope and seals it. Russian notarial practice defines it as a *storage envelope* [2].

Subsequently, the notary inscribes the second envelope with the testator's and witnesses' names and residential addresses in compliance with their identity documents.

Moreover, the inscription contains the date and the place of acceptance of the envelope by the notary (Article 1126 paragraph 3 of the Civil Code).

It is, however, important to note that the Article 1124 of the Civil Code does not require determining the mental capacity of witnesses. At the same time mental incompetence of a witness can be grounds for invalidating a will.

Another significant aspect is that the notary informs the testator about compulsory heir rights and handwriting requirement only after receiving the *storage envelope*. At this stage it is obviously too late for the testator to get to know this information.

Furthermore, on the face of it the *storage envelope* contains inscriptions as to the testator's and witnesses' names and residential addresses and place and date of the will acceptance by the notary.

The notary issues a certificate whereby he confirms the acceptance of the closed will (Article 1126 paragraph 3 of the Civil Code). The closed will is deemed to be made on the day indicated in the certificate.

There is a special procedure to open the envelope containing the closed will upon the testator's death.

The notary receives the death certificate from the parties concerned.

Afterwards, within 15 days the notary opens the envelope and reads out the text of the will in the presence of at least two witnesses and the persons concerned from among the legal heirs who expressed their desire to attend.

The procedure is followed by the notary's drafting a protocol setting forth the complete text of the will. The protocol shall be signed by the notary and the witnesses.

The will's original copy remains at the notary's office. Beneficiaries get certified copies of the protocol (Article 1126 paragraph 4 of the Civil Code).

There is obviously a point to consider: whether the notary has a duty to determine kinship between the deceased person (the testator) and persons claiming to be legal heirs.

We may assume that the notary should make sure the persons who wish to attend the procedure are indeed testator's legal heirs. The reason is that the data provided in the protocol must be true and correct. Therefore, a person who is unable to

F. Buniatova is with the Lomonosov Moscow State University, Moscow, Russia (e-mail: faridabuniatova@hotmail.com).

confirm their kinship to the testator cannot be indicated as a legal heir in the protocol.

If one of the heirs cannot confirm their kinship to the testator, this can be done for them by other heirs who have appropriate documents proving the fact of kinship. This should be stipulated in the protocol.

It is worth mentioning that according to the Guidelines on 'will attestation, notary's acceptance, opening and announcement of a closed will' (provision 71) [3], the notary denies non-heirs the right to attend the announcement procedure.

Correspondingly, the Fundamental Principles of Legislation for Notary Activities (Article 48) [4] suggest that the notary should issue an act certifying his refusal.

However, aforementioned provisions may seem disputable.

It appears that heirs unable to prove their kinship to the testator by the time of the will announcement procedure can nevertheless attend it.

Obviously, there is a rationale behind this statement. A person can challenge the notary's refusal in court within ten days after they get to know about the refusal (Article 310 paragraph 2 of the Civil Procedure Code) [5]. At the same time the legislation has established a 15-days preclusive term for the closed will announcement.

Hence, it may appear impossible to argue the notary's actions in court.

Evidently, this violates individual's right to judicial protection, which is one of the main human rights provided by the Russian Constitution.

### III. CLOSED WILL: ADVANTAGES

Obviously closed wills have certain advantages.

Firstly, it helps to avoid disputes and quarrels between the heirs in case it becomes clear that one of them gets smaller share in the estate than others.

Secondly, it excludes the possibility of forgery.

Thirdly, the testator can make a closed will outside the notary's office. The testator exercises this right if they cannot go to the notary's office due to illness, mobility impairments or other similar circumstances.

Before we turn to the way and procedure for preparing and making a closed will, it would be reasonable to analyze some of its drawbacks.

### IV. CLOSED WILL: DRAWBACKS

Evidently, the closed will has several drawbacks.

Firstly, it is impossible to check the contents of the will while the testator may have failed to take into account certain rules, e.g. compulsory heir rights, etc. This may be grounds for invalidating a will. As a consequence, the estate will pass to legal heirs and not to devisees.

Secondly, the rules governing the closed will limit the testator's freedom to some extent. The testator not only should be mentally competent, but they must as well comply with other legal requirements.

For example, an illiterate person or a person unable to sign their will owing to certain circumstances cannot make a closed will.

It is, however, worth to mention that the notary can accept a closed will from a speech impaired person. This person shall communicate their intention to submit the closed will either in writing or via an interpreter.

Thirdly, the will stored in an envelope may turn out to be drafted in a foreign language unknown to the notary.

Nonetheless, the law requires an immediate announcement of the closed will upon opening the envelope containing it (Article 1126 paragraph 4 of the Civil Code).

Consequently, the notary opens the envelope, but is unable to finish the procedure, i.e. to read out the text.

Therefore, we can suppose that it would be reasonable to set a timeframe to translate a closed will into the state's official language.

If we take into account the drawbacks of the closed will, it appears that there are not so many reasons to choose it among other types of wills.

Undoubtedly, there are cases when it is logical to turn to a closed will.

For instance, a closed will can be a sensible way to express testator's intentions in a rural area. The notary who attests an ordinary will can be someone's neighbor or relative.

Therefore, the testator cannot make sure that the contents of the will are kept secret.

Another reason to resort to a closed will is the testator's high social status. Certainly, neither the notary nor the notary's office employees can get to know and, therefore, disclose the contents of the will.

### V. FOREIGN EXPERIENCE

Taking into consideration the drawbacks of the closed will in the Russian Federation it appears obvious that the drafting procedure should be amended and modified.

Russian legislator could consider foreign law governing testamentary succession, adopt and adapt certain rules in order to advance and improve the closed will.

Therefore, it would be reasonable to turn to the experience of countries which have mechanisms similar to the Russian closed will in their legislations.

Indeed, there are a number of states which have a closed will among available testament forms. It can be termed differently depending on a country i.e. sealed will, mystic will, or secret will.

#### A. France

The mystic will (*testament mystique*) (art. 976-980 of the Civil Code) in France is used rarely and is considered very complicated in terms of procedure.

However, the rules seem to be less strict than in Russia in that the mystic will in France does not have to be necessarily handwritten by the testator.

Alternatively, the mystic will can be typed by the testator or by someone on their behalf.

Consequently, an illiterate person or the one who is not able to write can as well make a mystic will.

The will is signed by the testator and sealed in an envelope in the presence of a notary and two witnesses. The notary creates an *acte de suscription* registered on the sealed will or envelope. The content remains secret until it is opened upon the death of the testator.

There is no legal requirement for a will to be stored by the notary, so it can be kept by the testator.

Despite the advantages of secrecy, the mystic will is the least popular form of testamentary disposition in France.

Indeed, there are other testament forms in France (e.g. an international will and a holographic will), which are easier to draft while keeping the secrecy of the will.

In fact, one of the main reasons why the mystic will is unpopular in France is the complicated procedure.

Therefore, there is always a risk that unintentional disregard of formalities will invalidate the will [6].

#### B. Monaco

Generally, the Civil Code of Monaco is based on the French Civil Code, but care must be taken since the laws of two countries have evolved differently with regard to certain details.

Consequently, there are marked differences and one of them can be found in the law applicable to successions.

Mystic will is governed by articles 842-846 of the Civil Code.

It can be written either by the testator or by a third person. If written by the testator, they can sign only the last page of the document, while if written by a third person, the testator is supposed to sign every single page of the testament.

Interestingly, the Code states that the document or an envelope containing the will should be sealed in such a manner that it is impossible to open and read it without breaking the seal (art. 843 of the Civil Code).

According to the procedure, the testator provides the notary with the sealed envelope in the presence of four witnesses.

Alternatively, the testator can seal the envelope containing the will in the presence of the notary.

Notably, the Monegasque law requires more witnesses to attest the closed will than the French law does.

Obviously, a person who is unable to write can make a closed will.

If a person is speech impaired, but they can write, they can make a closed will provided the will is entirely written, dated and signed by testator's own hand.

However, the closed will is not available to those who cannot read.

#### C. Greece

Greek legislation also provides an opportunity to make a mystic will (art. 1738-1743 of the Civil Code).

The mystic will in Greece takes effect upon handing it by the testator to a notary in the presence of three witnesses or of a second notary and one witness. It should be declared orally that the specific document contains the testator's last will.

The text of the mystic will can be written by the testator or another person and should be signed by the testator.

If the testator is unable to sign the will they must declare in the presence of the notary and witnesses that they have read the document and it contains the testator's true will.

Moreover, the document must set out the reasons for which the testator is impeded from signing the document.

The will is then sealed in the presence of the notary and witnesses.

An important point to mention is that Greek law recognizes holographic wills.

Consequently, if a mystic will is null it can be effective as a holographic will provided it would be valid as such.

Therefore, to make a mystic will in Greece a testator should have the ability to read, but they can be unable to write.

#### D. Spain

Spanish succession law uses the term *closed will* (*testamento cerrado*) (art. 706-715 of the Civil code).

Closed wills are handwritten or typed by the testator or a third person, stating the place, year, month and day it was written and signed on each page by the testator.

The testator does not inform the notary about the contents of the will and delivers it to the notary in a sealed envelope.

Alternatively, the testator may seal the envelope in the presence of the notary.

The testator states that the document they have delivered to the notary contains the last will of the testator. The notary in their turn records the granting of the will.

Furthermore, there is no legal requirement for the will to be stored by the notary. The will may be returned to the testator, although it is common for it to be left with the notary.

As for the witnesses, the law in Spain does not require their presence during the procedure.

However, if the notary or the testator requests so, the carrying out of the closed will may be attended by two witnesses.

Obviously, the rules governing the closed will in Spanish legislation are less strict than those provided in Russian, French, and Greek succession laws.

#### E. Brazil

In accordance with the Brazilian Civil Code a testator is also entitled to make a closed will (*testamento cerrado*) (art. 1868-1875 of the Civil Code).

Article 1868 of the Code states that the closed will can be written by the testator or some other person on the testator's behalf.

Moreover, the closed will can be handwritten or typed. In the latter case the testator should sign every single page of the document.

The closed will is deemed effective if the testator declares in the presence of the notary and two witnesses that the document presented to the notary contains the testator's true will.

Obviously, a person who is unable to read cannot make a closed will.

However, if a person is speech-impaired, they can confirm their intention to make a closed will in writing in the presence of two witnesses and the notary.

Afterwards the notary registers the will and it can be returned to the testator.

According to estimates, the closed will accounts for 20 per cent of all wills and there are calls for its abolition due to modest usage [7].

Indeed, the closed will requires more formalities than any other type of will, and this is the case in all countries which recognize the closed will.

#### F. Other Countries

Some countries while not having a closed will as a separate kind of testament still envisage rules similar to the ones specific to the closed will.

For instance, *German* legislation, which recognizes only holographic and authenticated wills, sets out a provision which can be used by a testator to keep their will secret.

Thus, the German Civil Code (§ 2232) says the testator can provide the notary with the document containing their last will in a sealed envelope.

Moreover, the will can be written by the testator or by someone else.

*Switzerland* does not have a closed will, but the Swiss Civil Code sets out a provision whereby the testator can keep the contents of their will secret.

Thus, article 501 of the Swiss Civil Code states that when making a notarized will the testator is not bound to inform the witnesses of its contents.

*Austrian* General Civil Code (section 578 et seq.) recognizes a specific type of will i.e. an allographic or non-holographic will (*fremdhändiges Testament*).

This will is normally written or typed by a third person. It is signed by the testator and three witnesses.

Afterwards, the witnesses must state that the testator declared that the signed document represents the testator's will and that they are acting as witnesses.

It is important to mention that the witnesses should not necessarily know the contents of the will. They just attest to the validity of the testator's signature and intent.

#### VI. WAYS TO ADVANCE THE CLOSED WILL IN RUSSIA

Study of the closed will has revealed the difference in the way succession law has been developing in Russia and foreign countries.

This becomes especially evident when comparing the history of the closed will in Russia and abroad.

Indeed, the closed will was introduced into the Russian legislation only in 2001 as a modern type of testamentary disposition.

By contrast, in other countries this type of testament is regarded as outdated and obsolete. Consequently, it is rarely used by a testator.

Rather, most European countries recognize holographic wills which can serve as an alternative to the closed will in that a holographic will can be written by the testator and

stored at the notary's office thus maintaining the secrecy of the will.

Due to the fact that the provisions governing the closed will are relatively new in Russia, they are not as elaborated as in the countries discussed in this article.

The analysis conducted in the article clearly shows that provisions governing the closed will in Russia need to be amended, modified and advanced.

Thus, Russian legislator should reform the mechanism of the closed having due regard to the foreign countries' experience and to the advantages and drawbacks of the closed will in foreign legislations.

Certain rules existing in foreign legislations regarding the closed will can be adopted and adapted in the way appropriate for Russia.

Firstly, it would be reasonable to enable drafting the closed will by a third person provided the document is signed and dated by the testator.

Secondly, if the testator is unable to sign and date the will due to a physical disability, they can confirm in the presence of the notary and witnesses that they have read the document and it contains the testator's last will.

Accordingly, the law can stipulate an obligation for the notary to set out the reasons for which the testator is impeded from signing the document.

Thirdly, it would be appropriate to issue templates containing guidelines on how to draft a closed will. Those templates could be available in specific stores.

Evidently, this measure could be implemented in order to avoid mistakes which may invalidate the will.

Fourthly, to keep up with modern trends in succession law and to advance the existing legislation, Russian legislator could allow video-recorded wills. This could be a good solution to make a closed will available to the testators who are illiterate or the ones with certain physical disabilities.

#### REFERENCES

- [1] Civil Code of the Russian Federation 26.11.2001 №146-FZ. SZ RF 2001, №49, art. 4552.
- [2] B.A. Borzenko, "Closed Will. Legal regulation and implementation practice", *Zakon*, 2006, №4.
- [3] Guidelines on 'will attestation, notary's acceptance, opening and announcement of a closed will' 01-02.07.2004, №04/14), *Notarialniy Vestnik*, 2004, №9.
- [4] Fundamental Principles of Legislation for Notary Activities 11.02.1993 № 4462-I, *Vedomosti SND*, 1993, № 10.
- [5] Civil Procedural Code of the Russian Federation 14.11.2002 № 138-FZ. SZ RF 18.11.2002, №46, art. 4532.
- [6] Jeffrey A. Schoenblum, *Multistate and Multinational Estate Planning*, 2009 ed. Vol. 1, Chicago: CCH, 2008, p. 15-8-15-9.
- [7] Kenneth G. C. Reid, M. J. De Waal, R. Zimmermann, *Comparative Succession Law. Testamentary Formalities*. Vol.1, New York: Oxford University Press Inc.: 2011, p. 105.