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Oral Wills Under Vietnamese Civil Law – Some Defects And Recommendations

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Abstract

A will is a unilateral expression of an individual's will while alive to transfer assets to heirs after death. In Vietnam, the Civil Code 2015 stipulates that a will can be made in the form of a written will or an oral will. The form of an oral will (verbal will) can only be made in special cases prescribed by law. This article analyzes the conditions for an oral will to be legally effective, points out the limitations and shortcomings, and makes recommendations to improve the legal regulations on oral wills.

Keywords: *Oral will; form of will; inheritance by will.*

1. Introduction

When alive, a person has the right to make a will to dispose of his property to others after his death. However, not in all cases does the owner of the property have enough conditions to make a written will to dispose of his property after death. For example, a person who is seriously ill or has a serious accident near death does not have enough time to make a written will. In this case, to protect the property owner's freedom of will in disposing of property after death, Vietnamese civil law allows the person leaving the property to make an oral will.

There are very few countries in the world that recognize the form of oral wills (Luong Thi Hop, 2014). Meanwhile, the form of oral wills has been recognized for a long time in the legislative history of Vietnam. Specifically, Article 388 of the Hong Duc Code stipulates: "*If there is an order from grandparents and a will, it must be followed correctly, otherwise it will lose its part*". During the French colonial period, the Civil Codes of Tonkin, Central Vietnam, and Cochinchina did not recognize the form of oral wills. In the South, from 1954 to 1975, the Civil Code 1972 also did not regulate oral wills. Oral wills were recognized again in Vietnamese law in Circular No. 81/TANDTC dated July 24, 1981. Subsequently, the form of oral wills continued to be recognized in the 1990 Inheritance Ordinance, the Civil Code 1995, the Civil Code 2005 and is now recognized in Articles 629 and 630 of the Civil Code 2015. Continuing to recognize the form of oral wills is appropriate, thereby contributing to ensuring the right to dispose of property of property owners in urgent situations. However, the provisions on oral wills in the Civil Code 2015 also have some shortcomings that need to be studied for further amendment and supplementation.

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2. Research methodology

In this article, the author uses the method of written law analysis to clarify the content of the provisions and the understanding of the provisions related to the research. In addition, the research also uses the method of comparative law to clarify the similarities and differences between Vietnamese civil law and the civil law of some countries on the issue of oral wills. In addition, the study also uses the method of surveying trial practices through the study of some judgments to clarify the practical application of legal provisions on oral wills in the Court in some localities. The research method surveys trial practices through the study of judgments to clarify the limitations and difficulties in legal provisions when applied in practice, thereby making recommendations for law amendments.

3. Conditions for an oral will to be valid

An oral will is also a form of will, so for an oral will to be legally effective, it is necessary to satisfy the general conditions for making a will, including: (i) The testator is clear-minded and lucid when making the will; not deceived, threatened, or coerced; (ii) The content of the will does not violate the prohibitions of the law, is not contrary to social morality; the form of the will does not violate the provisions of the law; (iii) The will of a person from fifteen years old to under eighteen years old must be made in writing and must have the consent of the father, mother or guardian on the making of the will; (iv) The will of a person with physical disabilities or of an illiterate person must be made in writing by a witness and notarized or authenticated. In addition, for an oral will to be legally effective, it is necessary to satisfy the following specific conditions:

First, regarding the circumstances of making an oral will: Professor Do Van Dai believes that if a written will is a commonly used form of will with high evidentiary value, an oral will is a form of will of a preventive nature, giving the testator a last chance to leave his wishes for the disposal of his property, so this form of will is not popular and is not encouraged to be used much (Do Van Dai, 2020). Therefore, Article 629 of the 2015 Civil Code stipulates that an oral will can only be made in special circumstances, when the life of the testator is threatened by death and it is not possible to make a written will. A person's life being threatened by death can be understood as when they are in a near-death situation, in an urgent situation where they cannot make a written will in time. For example, a person who is seriously injured in a traffic accident is at risk of death and has expressed his wishes about leaving his property to an heir after death. Thus, in the case of a person making an oral will while he is still healthy, the oral will will not have legal value.

There is a view that a person should be allowed to make an oral will in any circumstance, not necessarily only in circumstances where "life is threatened by death", only then can the testator's freedom of will be guaranteed (Ngo Van Luong, 2023). The author disagrees with the above view, because oral wills are not encouraged by law due to their low reliability, which can lead to damage to other heirs. Therefore, oral wills should only be made in special, urgent circumstances where the testator cannot make a written will in time. Research on the laws of some countries that recognize the form of oral wills shows that oral wills can only be made in special circumstances. For example, Thai law stipulates that in special circumstances such as imminent mortal danger or during war or epidemic, a person is prevented from making his will in any other form among the prescribed forms, he can make an oral will (Article 1633 of the Thai Civil and Commercial Code). Chinese law also stipulates: "In an emergency situation, a testator may make an oral will. An oral will must be witnessed by two or more people. When the dangerous situation is over and if the testator is able to use a written form or a recording, the oral will is invalid" (Article 1138 of the Chinese Civil Code). Thus, the laws of countries that recognize the form of oral will only allow the testator to make an oral will in an emergency situation. If an oral will is not made, it is possible that the will will not be executed in time.

Second, regarding the order and procedures for making an oral will: Making an oral will must comply with the order and procedures for making an oral will as prescribed in Clause 5, Article 630 of the Civil Code 2015, specifically as follows:

First , at the time the testator makes an oral will, there must be at least two witnesses, and immediately after the testator expresses his or her final will, the witnesses must record it, sign it, or fingerprint it. The Civil Code stipulates that the witness to the making of an oral will must immediately record the testator's will in writing to ensure that the written record of the oral will fully and accurately reflects the testator's will. Because a person's ability to remember events and details will decrease over time (Acabiz , 2022). The witness to the making of an oral will must fully meet the conditions prescribed for witnesses to the making of a will in general. In principle, anyone can witness the making of a will, except for the following people: (i) the testator's heirs under the will or by law; (ii) minors, people with no civil capacity (iii) people with rights and obligations related to the content of the will. According to the laws of some countries, in addition to the above-mentioned people, there are other people who are not allowed to witness the making of a will. For example, the French Civil Code stipulates that both husband and wife cannot be witnesses to a will (Article 980 of the Civil Code of the French Republic). The Civil and Commercial Code of Thailand also stipulates that people who are not of sound mind, deaf, mute, or blind are not allowed to witness the making of a will. Comparative research with the laws of the above-mentioned countries shows that the provisions of Vietnamese law on witnesses to the making of a will are still quite "liberal" (Ho Chi Minh City University of Law, 2023).

Second, within five working days from the date the oral testator expresses his or her final will, the oral will must be notarized or authenticated by a notary or a competent person to confirm the signature or fingerprint of the witness (Clause 5, Article 630 of the Civil Code 2015). According to the above provisions, the five-day period for the witness to notarize or authenticate the signature is five working days (weekends or holidays as prescribed such as National Day, International Labor Day, etc. are not counted in the above five-day period). Therefore, if the last day of the period is a weekend or a holiday, the end date for the witness to notarize or authenticate the document recording the content of the oral will is the day following the holiday. The Thai Civil and Commercial Code also stipulates that the document recording the content of the oral will must be authenticated by the witness, but does not specifically stipulate the time limit within which the official must do this.

Third , after three months from the date of making the oral will, if the testator is still alive, lucid, and sober, the oral will is automatically revoked (Clause 2, Article 629 of the Civil Code 2015). It can be seen that the reliability of an oral will is not high,

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so the law only allows a person to make an oral will in circumstances where that person's life is in danger of death. Therefore, if after three months from the date of making the oral will, the testator is still alive, lucid, and sober, it means that the urgent situation requiring the making of an oral will no longer exists and the person leaving the inheritance can completely make a will in another form that ensures higher reliability. Therefore, if after the above time limit, the person who made the oral will still wants to keep the content as stated in the oral will, they need to make another will. This new will is made according to the general provisions (Ho Chi Minh City University of Law, 2023). According to the Civil Code 2015, if the time limit is calculated in months, then one month is thirty days and at the same time the first day of the time limit will not be counted in the time limit. The time of expiration of the time limit is twenty-four hours on the last day of the time limit (Articles 146, 147 and 148 of the Civil Code 2015).

Research on the laws of some countries that recognize the form of oral wills also stipulates that oral wills will automatically become invalid after a period of time from the date of making the oral will and the testator is not dead and they can make a will in written form. For example, the Thai Civil and Commercial Code stipulates that an oral will will become invalid after one month from the time the testator is placed in a position to make a will in any of the prescribed forms (Article 1664 of the Thai Civil and Commercial Code). Chinese civil law also stipulates that when the dangerous situation no longer exists and if the testator is able to use written or audio or video recordings to make a will, the oral will is invalid (Article 1138 of the Chinese Civil Code 2020).

4. Some shortcomings and recommendations to improve regulations on oral wills

Firstly, the provisions on the circumstances of making an oral will are still general, leading to difficulties in applying the law. Specifically, according to Clause 1, Article 629 of the 2015 Civil Code, it is stipulated that: "*In cases where a person's life is threatened by death and it is not possible to make a written will, an oral will can be made*". According to the above provisions, in which case is it considered that the person leaving the inheritance cannot make a written will? In a court judgment, it was stated that, "*Due to cancer, Ms. Phien made an oral will on May 8, 2019. When making the will, there were two witnesses, Mr. Nguyen Tuong H and Mr. Nguyen Trong T1, who recorded Ms. Phien's words in writing, the two of them signed, made a written commitment to sign the will and it was notarized within the time limit prescribed by law, so the will is legal according to the provisions of law. Regarding the qualifications of witnesses, Mr. H and Mr. T1 both meet the conditions to be legal witnesses according to the provisions of Article 632 of the Civil Code 2015. Based on the above grounds, the Appellate Court found that Ms. Phien's oral will made on May 8, 2019 was legal and recognized*" (Judgment 54/2021/DSPT). In the above Judgment, the Court determined that a person with cancer is eligible to make an oral will. However, is a person with cancer considered to be in a situation of "not being able to make a written will"? The author believes that not in all cases where the person leaving the inheritance is seriously ill is considered to be in a situation of not being able to make a written will and has the right to make an oral will. A person with cancer can still make a written will when they are not in a critical situation or are dying. According to the author, only in cases where the person leaving the property is in a life-threatening situation and does not have enough time to make a written will, does he have the right to make an oral will. Therefore, to ensure the correct application of the law and avoid arbitrariness, the competent state agency needs to issue a guiding document or the Supreme People's Court needs to develop a precedent to specifically guide the circumstances under which a person has the right to make an oral will.

Second, Article 630 of the Civil Code 2015 stipulates that "*… immediately after the testator orally expresses his or her final will, the witness records it, signs it or fingerprints it*". The phrase "*immediately after"* has not been clearly explained, so there are different understandings and applications in judicial practice. For example, in a dispute, the Court of First Instance held that the will had two witnesses, but the witnesses did not rewrite it until the next day and gave it to Ms. Linh and Ms. Ty. Therefore, the oral will presented by Ms. Ty was not legally valid because the oral will must be recorded immediately. Meanwhile, the Court of Appeal has followed the direction of recognizing the above oral will. According to the Court of Appeal, there is no specific guidance on how long the phrase "immediately after" is. Without specific provisions of the law, there is no basis to reject the oral will presented by Ms. Ty (Do Van Dai, 2020).

The author believes that it is not necessary for the written record of an oral will to be recorded immediately at the end of the deceased's last words. Because an oral will is made in an urgent situation, it is impossible to require the witnesses to record it immediately at the time the testator declares his will. In practice, there have been courts that have recognized the validity of oral wills even though the witnesses recorded the will of the testator after a period of time from the time the testator expressed his last will. For example, in a judgment, the Court determined that on February 3, 2016, Mr. Hao made an oral will to Ms. Lien, Nguyet, and Thuan. On February 4, 2016, Mr. Hao died. On February 5, 2016, Ms. Lien and Ms. Thuan recorded Mr. Hao's oral will and signed and fingerprinted the Oral Will Confirmation Paper at Truong Giang Giang Law Office. After that, the notary brought the above two documents to Bao Viet Notary Office to make a seal and return the notarized document to the citizen (Judgment No. 407/2020/DSPT).

From the above situation, the author recommends amending Clause 5, Article 630 of the Civil Code 2015 in the direction of removing the phrase "immediately after the testator orally expresses his or her final will". Specifically, Clause 5, Article 630 of the Civil Code 2015 needs to be amended and supplemented as follows: "*An oral will is considered legal if the testator orally expresses his or her final will in front of at least two witnesses, then the witnesses record it, sign or fingerprint it. Within 05 working days from the date the testator orally expresses his or her final will, the will must be notarized or certified by a competent authority to confirm the signature or fingerprint of the witness*".

Third, regarding witnesses for the making of a will: currently, basically, witnesses for the making of an oral will are subject to the provisions on witnesses for the making of a will in general, which are stipulated in Article 632 of the Civil Code 2015. According to Article 632 of the Civil Code 2015, witnesses are regulated by the exclusion method. Accordingly, in principle, everyone can witness the making of a will, except for the following people: (i) heirs according to the will or by law of the testator; (ii) minors, people who have lost civil act capacity; (iii) people with rights and obligations related to the content of the will. The provisions on

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witnesses as above are not really complete, because there are some subjects that do not fall into the above cases, but if they are allowed to witness the making of a will, it is not accurate or does not ensure objectivity, such as: both husband and wife witness the making of a will; father, mother-in-law or father, mother-in-law of the heir; mentally retarded person. Therefore, the author recommends adding the cases where one cannot be a witness to the making of an oral will as mentioned above.

Not allowing the persons specified in Article 632 of the Civil Code 2015 to witness the making of an oral will in all cases is not really reasonable. Because, considering the circumstances of making an oral will, an oral will is only made in extremely urgent circumstances when a person's life is threatened by death. At this time, the people around the testator are mostly relatives, mainly heirs, so it is very difficult to promptly find qualified witnesses. Meanwhile, with the development of audio and video recording devices and according to the provisions of the law on civil procedure, audio and video recordings are also considered a source of evidence and have evidentiary value. Therefore, the author recommends that in cases where the witnesses to the oral will are those specified in Article 632 of the Civil Code 2015 and there is also an audio or video recording of the time when the testator expressed his or her intention to transfer the property to the heir, the oral will should be recognized as legal. This means that if there is no audio or video recording at the time of making the oral will and the will is witnessed by those specified in Article 632 of the Civil Code 2015, the oral will will be invalid. However, if the oral will is witnessed by those listed in Article 632 and there is an audio or video recording of the time when the testator declared his or her intention, the oral will is still valid if the audio or video recording meets the evidentiary requirements prescribed by the Civil Procedure Law. From the above analysis, the author recommends that Article 632 of the Civil Code 2015 should be amended and supplemented as follows:

"Article 632: Witnesses to the making of a will

1. *Anyone can witness the making of a will, except the following subjects:*

a. *The heir according to the will or law of the testator or the father, mother, wife, husband, or children of the heir according to the law.*

b. *Minors, people with no civil capacity, people with difficulty in cognition and behavioral control.*

c. *The person has rights and obligations related to the content of the will.*

d. *Both husband and wife witnessed the making of the will;*

2. *If the above-mentioned persons witness the making of an oral will, the oral will is only valid if at the time of making the oral will there is an audio and video recording and the copy and video recording meet the conditions of being evidence according to the provisions of the law on civil procedure.*

5. Conclusion

The recognition of oral wills is appropriate to ensure the right to dispose of the owner's property after their death in extremely urgent cases where making a written will cannot be done. Through this study, it can be seen that the provisions of the Civil Code 2015 on oral wills still have some limitations and shortcomings that need to be further studied for amendment and supplementation to further improve them.

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