

A study of the legal aspects of the creation of a right of residence by means of a will

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Abstract. The Civil Code, which came into force on 1 January 2021, establishes for the first time the manner in which the right of abode is to be established in the form of an article of law. However, there is no clear provision on how the right of residence is established by way of a will, and judicial practice is not uniform in its determination. By analysis the rules on the subject and object elements of the system of registration of the right of residence by will, it is easy to see that the main lack of foundation for the system is the conflict of rights: the conflict of interests between the heir and the owner of the right of residence, and the conflict of rights between the public interest and the private interest. Taking this as the basis, we will explore the path of perfecting the system of registration of the right of residence established by will, and determine the value orientation of protecting the vulnerable groups.

Keywords: right of abode; testamentary creation; registration rules; balance of interests.

1. Presentation of the problem

A search of 2,356 civil cases was conducted using the term right of abode as a search criterion. It can be seen that there are three ways of creating the right of abode: by mutual agreement, by a valid judgement and by the making of a will. As shown in Figure 1, only 339 cases, or 15% of the total, were classified as contractual or quasi-contractual disputes. Marriage and family disputes accounted for 906 cases, or 40% of the overall percentage. There were 159 cases of inheritance disputes and 163 cases of other matrimonial and family and inheritance disputes, making a total of 339 cases, or 10% of the overall proportion.

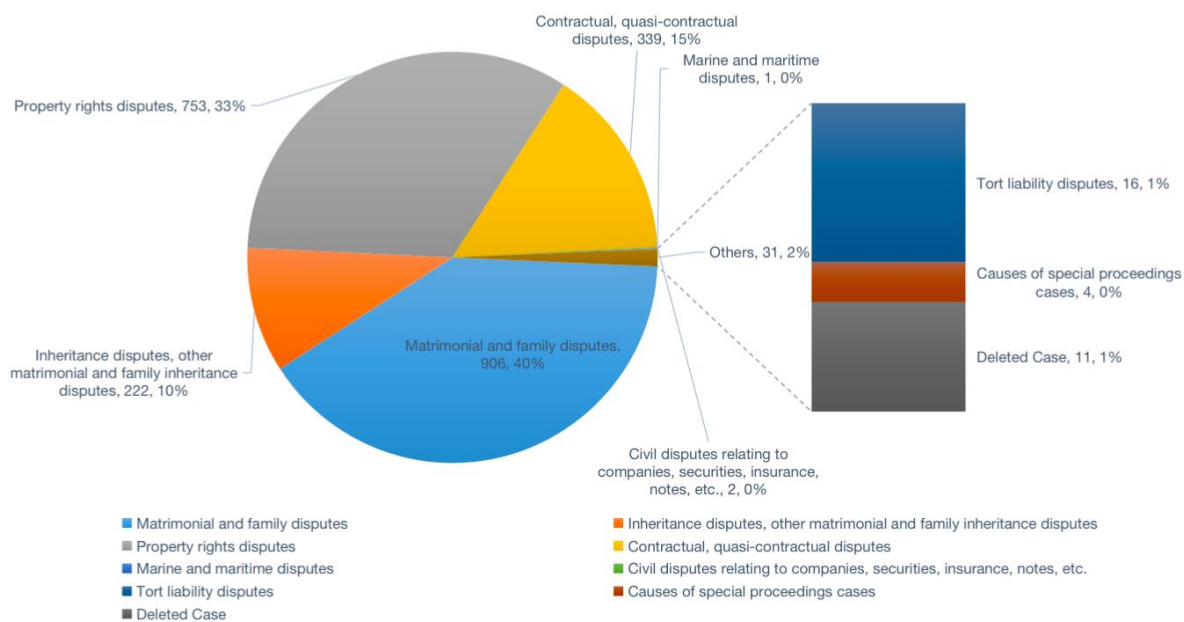


Fig. 1 Distribution of causes of residency cases

Due to space limitations, this article will only discuss the creation of a right of abode by will. The three main forms of inheritance are bequests, testamentary trusts and testamentary succession, while the creation of a right of residence by will is a separate form from the three. Article 368 of the Civil Code provides that the right of residence is created without compensation, unless otherwise agreed by the parties. If the right of residence is created, it shall be registered with the registry office. The right of residence is established from the moment of registration. Article 371 of the Civil Code only provides that if the right of residence is established by will, the relevant provisions shall apply by reference. That is, it refers to Article 368 of the Civil Code, but it does not specify the legal effects of the establishment of the right of residence by will. There are different views on the legal effect of the establishment of the right of residence by means of a will, and some scholars believe that the right of residence should take effect from the date of the will. In determining the content of the right of residence in a bequest and the time when the right of residence is created, the rules of inheritance law, namely the interpretation of the intent of the non-relative and the principle of ex officio succession, should be given priority. Some scholars, on the other hand, believe that the declaratory doctrine of inheritance applies in China and does not recognize the doctrine of the registration of the right of residence to take effect.

As can be seen, when the right of residence is created by will, the lack of clarity in the registration system prevents the interests of the right of residence or third parties from being protected to the greatest extent possible. Whether Article 371 of the Civil Code, which establishes the right of residence by will, can be applied by reference to the rule in Article 368 that the right of residence is established upon registration requires a great deal of interpretative work. Article 371 of the Civil Code is not sufficiently prepared to deal with the compatibility between the right of abode regime and the inheritance regime, which involves a fundamental problem: the lack of clarity as to the subject and object of the registration of the right of abode by means of a will. This is not a problem that can be solved by simply using the relevant provisions as a reference.

2. Basis for the construction of a regime for the creation of a right of abode by way of a will

2.1. Elements of the subject matter of the registration of the right of abode by way of a will

The subject system for the creation of a right of residence by will is unclear and is affected by the debate over the nature of the right of residence. The right of occupancy in our country is a right of residence established by the family as the main body. However, due to the misplaced concept, especially because the title of the public house has not been registered, it is not clear who can live in the house, which is not conducive to the protection of the right of residence of the people concerned. Some scholars have argued that, given the personal nature of the right of occupancy, the right of occupancy must also be a right with a personal connection, so that only civil subjects with a personal relationship with the occupant, or with a relationship of personal attachment, can establish the right of occupancy for them. Article 369 of the Civil Code stipulates that the right of abode may not be transferred or inherited, and that the right of abode may only be granted in servitude. However, articles 366, 367, 368 and 370 of the Civil Code provide for both servitude and non-servitude rights of residence. The debate over the nature of easement and non-easement occupancy is also reflected in the system of registration of occupancy rights. In five regions, the application for registration of a right of residence created by will provides for a unilateral application by the owner of the right of residence. Of these, Shenzhen, Jinan, Shanghai and Wuhan are more detailed, while Guangzhou does not specify unilateral application, but only application by the parties.

The content of the real estate cadastral survey is the content of the materials that the parties need to submit when applying for registration. Article 16 of the Provisional Regulations on Real Estate Registration states: The applicant shall submit the following materials and shall be responsible for the authenticity of the application materials: (a) an application for registration; (b) documents proving the identity of the applicant and the agent, and a power of attorney; (c) relevant documents proving

the origin of the real estate title, documents proving the reasons for registration, and the certificate of real estate title; (d) real estate (d) materials such as boundary address, spatial boundaries and area; (e) materials stating the interest with others; (f) other materials stipulated by laws, administrative regulations and the implementing rules of this Regulation According to the above provisions, when applying for registration of the right of residence, in addition to the deed of right of residence as the reason for registration, it is necessary to Produce the title deed of the house, which must be held by the owner of the house, without which it is difficult to register the right of residence. Therefore, the registration of the right of occupancy must be done on the application of the owner.

2.2. Object elements of the registration of a right of occupancy by way of a will

The object element of the registration of the right of residence by means of a will is mainly reflected in the division of the house. Article 366 of the Civil Code provides that the owner of the right of occupancy shall have the right to occupy and use the dwelling of another person in accordance with a contractual agreement in order to satisfy the needs of living and living. In a broad sense, the object of the right of occupancy can be a building suitable for habitation as long as it is used as a residence or a building with a residential function. However, some scholars believe that limiting the object of the right of occupancy to the term dwelling greatly limits the scope of this concept and that the scope of the right of occupancy should be extended from a functional point of view. Article 327 of the Civil Code stipulates that if the usufruct right is extinguished or the exercise of the usufruct right is affected by the expropriation or requisition of real or movable property, the owner of the usufruct right shall be entitled to compensation in accordance with the provisions of Articles 243 and 245 of this Code. While the owner of the right of residence is entitled to compensation as the owner of the usufruct, Article 243 clearly stipulates that the ownership of housing and land is the object of expropriation. Therefore, the occupancy right holder does not obtain the status of compensation directly, but needs to claim the right to compensation indirectly from the owner of the rural residential land, i.e. the heirs.

The vagueness of the object of registration of the right of residence by will is also reflected in the fact that one of the spouses establishes the right of residence for another person by will, as stipulated in article 367 of the Civil Code: The contract for the right of residence generally includes the following provisions: (i) the name or name and residence of the parties; (ii) the location of the dwelling, which shows that the object of the right of residence is required to be definitive. Therefore, regardless of whether the couples common ownership of the house is joint or shared, the division of the common house is a necessary condition for one of the spouses to create the right of residence for another person by bequest. But a share is a form of abstraction which is the amount of the owners ownership of all property and is not limited to a particular part of all property, but exists abstractly in minute portions of all property, or even in the whole. This brings us to the problem of the creation of a right of occupancy in a house shared between spouses, where the object of division is unclear.

3. Conflict of rights resulting from the creation of a right of residence by way of a will

3.1. Conflict of interest between heirs and right of abode holders

As there were cases in judicial practice prior to the Civil Code where the right of residence was created for another person by will, the right of residence, which was a right in usufruct, was then converted into a claim, a method which could lead to the defeat of the purpose of the will. The conflict of interest between the owner of the right of residence and the heirs is particularly intense in remarried families, and the purpose of establishing the right of residence by will after remarriage is mostly to prevent opposition from the children, to protect the right of residence of the current spouse, to prevent the current spouse from being left without a place to live after the death of the testator, or to protect

the right of residence of children not born in the current family. Yu Lizhi was the stepmother of the four defendants, and her husband, Jin Rongman, left a 77 square metre house in Anshan City, which was identified in the will as one of the defendants inheriting the ownership of the house, which was used by Lizhi when she was alive and had the right to live in it. When Jin Rongman died in 2014, the four defendants did not allow Yu Lizhi to live in it, and she had to rent a room outside. At the time of the registration of the right of occupancy, there is bound to be a situation where the right of occupancy cannot be exercised by the occupant, even if it is established by will, as the testamentary heirs do not have the same positive incentive to exercise their rights as the occupant.

Article 230 of the Civil Code provides for effects from the commencement of succession, which is in turn distinguished from the registration effect doctrine of Article 368. It has been argued that a distinction should be made between changes in property rights that create a right of occupancy by will, which are not based on legal acts, and changes in property rights based on legal acts, the former arising from the entry into force of the will of the owner of the house on death, and the latter resulting from a division by a judge. It is therefore necessary to further improve the system of registering the right of occupancy by means of a will, and on the basis of the registration rules already constructed, the balance of interests between the owner, the heir and the owner of the right of occupancy should also be maintained, incorporating the principle of public order and morality. For example, in the Luzhou second wife case, the court held that the plaintiff, Zhang Xueying, knowing that Huang Yongbin had a spouse and lived with him for a long time, his behaviour was prohibited by law, social morality and ethics, and violated the legitimate rights and interests of Jiang Lunfang, which was inconsistent with the law and reason.

3.2. Conflict between public and private interests

The role of subsidized housing is to solve the housing problems of low-income groups in society, so whether rural house bases, as a kind of subsidized housing, can establish the right of residence by means of a will. A distinction needs to be made between constitutional and civil law perspectives as to whether the creation of a right of residence infringes on the fundamental rights of citizens in a broad sense. The State has an obligation to guarantee the fulfilment of the citizens need for a dwelling. However, the right to housing in civil law is a personal right, which is restricted to the rights of others, to protect the rights and interests of specific subjects and to satisfy personal housing needs. Today's accelerated urban modernisation has deprived some citizens of their right to housing, not only in rural areas, but also in those eligible for affordable housing. Although China currently has multi-level housing types, such as low-cost housing, public housing, affordable housing, and restricted housing, all of which provide better living conditions for low and middle income people. However, the coverage is still very limited because of the different standards in each region.

There are two doctrines of the relationship between public interest (the limitation of rights) and rights, the extrinsic limitation doctrine and the intrinsic limitation doctrine, the extrinsic limitation doctrine advocates that the issue of what constitutes a right should be resolved first, to determine the subject of the right and the object of the guarantee of the right within a broad scope of authority, and then to weigh what claims of rights cannot be supported. Therefore, when defining the scope of the subject of the right of residence, the boundary between individual and state obligations needs to be strictly grasped, distinguishing public law from private law. Perhaps a focus on addressing the residency of vulnerable groups could serve as this boundary. The UK has created and protected around marital and family relationships, focusing on the division of dwellings based on divorce cases and domestic violence, and when dividing dwellings as a result of divorce, the tendency is to protect the party raising the children and to divide the right to use the dwelling based on the need to protect the living accommodation of specific vulnerable groups.

4. The path to perfection in establishing the right of residence by way of a will

4.1. Clarifying the registration system for the creation of a right of abode by will

The division can be made according to whether or not the right holder dies, i.e. before or after the creation of the will. If a right of occupancy is to be established, the parties should jointly apply for the right of occupancy before the death of the right holder, as the owner of the house has the appropriate civil capacity at this time. After death, there are two situations: the heirs of the house agree to the establishment of the right of occupancy; the heirs do not agree to the establishment of the right of occupancy. In the former case, by analogy with the situation before the death of the right holder, there is a joint registration of the establishment by the heirs and the right of occupancy. In the latter case, as it involves damage to the heirs own interests, there is no expectation of the possibility of joint registration by both parties and the right of occupancy may be applied for by the right of occupancy alone, and the registrar should make the corresponding assessment and, if necessary, ask the right of occupancy to provide a lesser amount of security in order to reduce the risk that the heirs may take.

The principle of the right of residence is based on the principles of good faith, autonomy and public order. The right of occupancy is granted to the owner of the dwelling on an individual basis for reasons of public order and morality. The Civil Code establishes the right of abode system and grants the right of abode holders the right to occupy and use the dwellings owned by others, which reflects the function of the legislation to protect the vulnerable groups of the right of abode and has important practical significance and contemporary features. For example, in the appeal case of the dispute between Gao See and Zhang Shengju over the exclusion of nuisance, from the perspective of analogous application, although Zhang Shengju was not related to the owner of the house by blood, she had taken care of her grandfather for many years and did not have any other housing herself. From the point of view of purposive expansion, it belongs to the category of family members, and the right of residence should be safeguarded for the elderly who have no place to live or reside. The Court of Second Instance held that the first instance judgment was contrary to general social and moral perceptions under the perspective of public order and morality. The judgment was accordingly reversed. In the case of Zhang v. Zhang Yaou, the court held that the agreement on the right of residence was the true intention of the parties, did not violate the mandatory provisions of the law, and was in line with the formal elements of the Civil Code on the establishment of the right of residence and its legislative spirit, which not only guaranteed the elderly to meet their needs for living and residence, but also maintained a good atmosphere of family harmony, in line with the core socialist values and public order and morality.

4.2. Identifying the value of safeguarding vulnerable groups

In judicial practice, the judge may rule that the ownership of the house remains unchanged, but create a right of residence for the surviving spouse of the testators children, or for the supporters who have provided significant assistance during their lifetime and who are living in insecurity; it is also possible to establish a prior compulsory renegotiation procedure prior to the decision. The objective is to guarantee the right to housing for socially vulnerable groups such as women, minors and the elderly, due to the social and personal nature of housing. When establishing the right of residence by means of a will, the protection of the right of residence of vulnerable groups should be the main value, and the scope of the object of such right of residence should be divided in favour of vulnerable groups. Our Constitution has always regarded the protection of the value of citizens residence and their survival and development as a fundamental objective of constitutional socio-economic rights.

Since both the right of abode and the renegotiation procedure are designed to encourage transactions and further the ends of both parties. The renegotiation procedure, although mainly used in the context of a change of circumstances, can also be used in the adjudication of the right of abode. In the renegotiation procedure, the parties may agree to a rent in lieu of the right of occupancy, the size of which may be determined by the financial situation of the heirs and the occupier and the market

rate of rent. If the right of abode holder has no home or only one home with a small living area, the amount of rent may be increased appropriately, and this form of substitution of the right of abode may be used to safeguard the rights of vulnerable groups. The State effectively guarantees the right of citizens to live.²⁰²¹ The Ministry of Natural Resources issued on the issuance of <Registration Measures for the Right of Residence, etc. (for trial implementation) stipulates four circumstances in addition to the driving range including parents, children, couples, etc. to guarantee the establishment of the right of residence in housing for vulnerable groups:..... g) In the process of demolition and resettlement, the demolition unit for the demolished people in the resettlement housing to establish the right of residence, etc., with a certain housing social security function of public rental housing, government departments of welfare housing and housing expropriation to protect the housing of the expropriated people in the resettlement housing to establish the right of residence on the situation. reflects the fact that the scope of the object of the right of occupancy is being expanded in the direction of protecting vulnerable groups.

5. Summary

The right of abode system is of great significance to the realisation of housing for all. In order to protect the residential interests of the heirs before the start of the inheritance, the testator can establish the right of residence for other subjects with residential needs after handing over the ownership of the residence to the heirs or legatees, reflecting the testators right to freely dispose of the residence. However, there is a lack of clarity as to the subject and object of the registration of the right of residence by way of a will. By analysing the conflict of rights behind it: namely, the conflict of interests between the heirs and the owner of the right of residence, and the conflict of rights between the public good and the private interest. With this in mind, we explore the ways to improve the system of registration of the right of abode by will, with a view to clarifying the system of registration of the right of abode by will and identifying the value of protecting the vulnerable groups.

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