The Testamentary Creation of Rights of Habitation under Chinese Law: Legal Uncertainties and Proposed Reforms

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Abstract: The Civil Code of the People's Republic of China recognizes the right of habitation as a usufructuary right intended to protect residential needs. Article 371 provides that the relevant provisions governing this right apply mutatis mutandis where it is created by will. That provision, however, does not specify how rules designed for contractual creation should be adapted to testamentary dispositions. Two questions remain particularly difficult: Whether the right arises upon the commencement of succession or only upon registration, and whether a testamentary right of habitation must satisfy the written-form requirement applicable to a contract creating such a right. This article examines three competing approaches to registration—constitutive registration, declaratory registration, and registration as a requirement for opposability—and argues in favour of the third as a proposed interpretation of Article 371. On this view, the right should arise when the will becomes operative, while registration should ordinarily be required before the right may be asserted against qualifying good-faith third parties. The article also argues that the formal requirements for wills should not be mechanically equated with those governing contracts. A valid will should not be excluded solely because it is not a conventional paper document, although the statutory requirements for each testamentary form remain mandatory.

Keywords: Right of Habitation; Testamentary Disposition; Application Mutatis Mutandis; Registration and Opposability; Testamentary Formalities

1. Introduction

The right of habitation is a new usufructuary right introduced in the Property Book of the Civil Code of the People's Republic of China (hereinafter the "Civil Code"). In my view, its origins can be traced back at least as far as ancient Rome. Unlike easements, the right of habitation falls within the category of personal servitudes: it is designed to safeguard the residential interests of particular groups, granting them the right to use a dwelling owned by another. Articles 366 to 371 of the Civil Code lay down its basic provisions, and they make clear that the right may be created either by contract or by will. China's habitation-right system, however, got off to a late start. I would argue that the mechanism for establishing a right of habitation through a will is still far from mature, which is why its application gives rise to a great many controversies.

2. Historical Development of Testamentary Rights of Habitation

The institution of habitation can be traced back to Roman law. There, together with usufruct and use within the system of personal servitudes, it formed a complete system of rights. I think testamentary succession was both the earliest and the most important setting for its use. Usufruct was originally aimed mainly at providing subsistence support in inheritance for family members such as widows and unmarried women [1]. In 530 AD, Justinian, by decree, expressly defined the right of a Roman head of household to bequeath a house for another person to live in as habitation; this was recorded in Justinian's Code and Institutes [2]. From that point on, habitation gained clear legal recognition as an independent right. Since modern times, France, Germany, Switzerland, Italy and other civil-law countries have adopted the right of residence system to varying degrees. France places this right under the system of use rights and residence rights. Importantly, the scope of the right depends on the establishment document and the holder's family living needs. France also restricts transfer of the right. Germany constructs the right of residence through "limited personal servitude" and "dwelling right." According to Article 1093 of

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the German Civil Code, the holder of a right of residence has the right to use the building or part of it as a dwelling and may exclude interference from the owner. This right usually needs to be registered in the land register, reflecting the principle of publicity of real rights in immovable property. Switzerland also explicitly stipulates that the right of residence is the right to live in another person's building or part of it, and it provides that the right of residence cannot be transferred or inherited. In Italy, beyond traditional habitation, inheritance law also grants the surviving spouse a right to reside in the family home. In my view, this shows special attention to the spouse's livelihood protection.

In the early years of the People's Republic of China, Soviet legal thought strongly influenced civil law, while limited property rights developed slowly. After reform and opening up, codification returned to the legislative agenda, but the right of habitation received limited attention in legal writing [3]. A 2002 draft Property Law included the right among usufructuary rights. Article 27 of an earlier judicial interpretation of the Marriage Law also referred to helping a financially distressed spouse after divorce through ownership of, or a right to live in, a home. The Property Law adopted in 2007 did not include a general chapter on habitation. The Civil Code, which took effect on 1 January 2021, later introduced the right in a separate six-article chapter.

3. Legal Issues Concerning Testamentary Creation

The Civil Code has established the right of residence. However, current rules contain only six articles. This is clearly a systematic weakness. The provisions also lack clear guidance. Consequently, the legislative purpose and value functions of the right are hard to fully realize. The rules on creating the right by will are especially brief. Article 371 provides only a general statement. Importantly, it does not clearly identify which rules to refer to or where the boundaries of application lie. This creates real difficulties for testamentary creation of the right of residence. Courts must deal with uncertainty over how such a will takes effect and what formal requirements apply. In practice, similar cases may therefore receive different judgments. We should take this risk of inconsistent rulings seriously.

3.1 Uncertainty Regarding the Time and Effect of Creation

Article 371 of the Civil Code stipulates: "In the case of establishing a right of residence by will, the relevant provisions of this chapter shall apply by reference." "Application by reference" means that the facts of the case to be handled are merely similar to, but not identical with, the legal facts contemplated by the provision to be applied. Statutory language often uses signal words such as "apply by reference" and "apply mutatis mutandis" to indicate this. The Civil Code also contains direct application. If the facts of the case are identical with, or can be evaluated as identical with, the legal facts in the provision, the statute usually uses words such as "apply" and "in accordance with [4]." The "by reference" formulation leaves the judge to decide in the individual case. I think it is selective and preference-based: the judge may apply by reference, but need not [5]. This has led to a controversy over legal application: should a testamentary right of habitation be governed by Article 368 or Article 230 of the Civil Code?

Testamentary creation and contractual creation of a right of habitation differ fundamentally in their requirements for effectiveness. The former is a unilateral juristic act, and its effectiveness presupposes the death of the decedent. The latter is a bilateral juristic act, and it takes effect through mutual consent and registration. If we simply apply the registration-effectiveness doctrine for contractual creation to testamentary creation, I think it will conflict with Article 230 and increase uncertainty in legal application. Scholars mainly hold the following views on the mode of effectiveness for a testamentary right of habitation.

The first view adopts the registration-effectiveness rule. Some scholars argue that acquiring a right of residence through a will should refer to Article 368 of the Civil Code. The right of residence is established only upon registration. After the will takes effect, the beneficiary must still register the right; otherwise, the beneficiary cannot acquire it [6]. They treat the creation of a right of residence by will as a burden-imposing act. It does not directly change property rights. It merely entitles the beneficiary to request registration of the right of residence. So, although the will becomes effective upon the testator's death, the beneficiary must still complete registration before actually acquiring the right [7]. Other

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scholars go further. They regard this arrangement as a mortis causa act that creates a new property right. It differs from the inheritance of an existing property right. Therefore, Article 230 of the Civil Code should not be applied directly. To protect estate creditors and safeguard the security of housing transactions, they propose that registration should serve as the condition for the right of residence to take effect after the estate's debts have been paid [8].

The second view adopts the declaratory-registration approach [5]. Scholars who support it argue that creating a right of residence by will may refer to Article 230 of the Civil Code. In their view, the right of residence is established when the will takes effect, that is, at the beginning of inheritance. Registration is not required as a condition for its creation [9]. A will is indeed a civil juristic act. Yet what actually makes it effective is the testator's death. The fact of the testator's death is what triggers the change in property rights. Under the registration-effectiveness approach, the beneficiary may fail to acquire the right of residence if the heir refuses to register it. This would clearly frustrate the testator's intention [10].

The third view supports the registration-opposability approach. Scholars holding this view argue that a right of residence created by will takes effect when inheritance begins. The change in property rights occurs then [11]. However, registration still plays an important role. It enhances public notice and credibility. More importantly, it allows the right to be asserted against bona fide third parties. This view strikes a reasonable balance between inheritance law and the Property Rights Book of the Civil Code. It also helps reduce conflicts in legal application. As a result, courts widely apply this approach in judicial practice. Some scholars further suggest distinguishing between testamentary succession and legacy. Since the two differ in legal nature, the effective time of the right of residence and the legal effect of registration should be determined separately.

Specifically, a right of residence established through testamentary succession follows the declaratory-registration approach. By contrast, a right of residence established through a legacy follows the registration-effectiveness approach [12].

3.2 Controversies Concerning Testamentary Formalities

Following the introduction of the right of habitation in China's Civil Code, the law explicitly mandates a written form for its contractual creation. If this formal requirement is analogously applied to the establishment of the right of abode by will, only a written will can meet the formal requirements for the establishment of the right of abode, otherwise the right of abode cannot be established. However, there is a potential conflict between this inference and the validity rules of wills in the succession series of the Civil Code. The current law does not regard "written form" as the essential effective requirement for determining the validity of six kinds of wills, such as self-writing, proxy writing, printing, oral, notarization and audio-visual recording, but focuses on the conformity between the testator's true meaning expression and legal formal procedures, such as witness, signature and date. Therefore, it has not yet reached a consensus in the academic circles whether the right of residence must be established in writing by will.

What counts as "written form"? Article 469(2) of the Civil Code answers this. Written form means a form that can tangibly express the content, such as a contract, letter, telegram, telex, or fax. Holographic wills, wills written by another person, printed wills, and notarized wills all record the will's content in writing. They satisfy the formal requirement for creating a testamentary right of habitation. This point is not controversial.

An audio-video recorded will is a will that records the testator's intention by audio or video and thereby fixes the will's content. Article 469(3) of the Civil Code provides that a data message that can tangibly express the content through electronic data interchange, email, or other means, and that can be accessed and retrieved at any time, is deemed to be in written form. This type of will does not use paper writing. Still, it converts the will's content into storable and readable data through data coding. In essence, it remains within the written-form category of "tangibly expressing the content." Audio-video recording can record the testator's language, expressions, and behavioral details throughout the creation of the right of habitation. It can truly reflect the testator's intent. By fixing the testator's statement through audio-visual material, it can directly show the intention and prevent later disputes among heirs from casting

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doubt on the testator's true wishes. Audio-video files can also be preserved long-term on cloud platforms, hard drives, and other media. This avoids the risk of evidence loss caused by wear, dampness, or loss of paper media. In my view, an audio-video recorded will meets the core function of written form in a broad sense and can serve as a valid medium for creating a right of habitation.

The last type is the oral will. Scholars hold two views on whether an oral will can create a right of habitation. Opponents argue that Article 367 of the Civil Code expressly requires written form for creating a right of habitation. In their view, this provision already excludes oral wills; if oral creation were allowed, it would directly conflict with the statute [13]. Those scholars who support the establishment of a residence right through an oral will argue that oral wills do not lack evidentiary validity. They contend that mechanically applying the "reference application" provision in Article 371 of the Civil Code to all situations not only ignores the diversity of will establishment methods but also may lead to overly rigid legal application, failing to adapt to the complex needs in practice and potentially violating the will of the testator [14]. In response to this, some scholars have offered different opinions based on the functional aspects of the formal requirements system, arguing that although a written form helps to fix the true intentions of the testator, for oral wills that meet the legal conditions, it is not appropriate to deny their validity for merely lacking a written medium [15].

4. Proposals for Clarifying the Legal Framework

Improving the system of setting up a right of residence in wills helps fill legal gaps and balance conflicting interests. By clarifying how it takes effect and the formal requirements for corrections, it not only ensures the testator's ultimate concern of having a place to live, but also protects the heirs' property rights, ultimately promoting family harmony and social stability. This is not just a legal improvement, but also a systemic response to the social ideal of ensuring that the elderly are well cared for and have a place to live.

4.1 Registration as a Requirement for Opposability

I argue that testamentary creation of a right of habitation is unilateral. Its effectiveness model should follow the registration-opposability model. The right arises by law when the will takes effect. But without registration with the real estate registry, it cannot be asserted against good-faith heirs, transferees of the dwelling, or other interested parties. The reasons are as follows.

First, look at legal application. Article 371 of the Civil Code uses "application by reference" for testamentary creation of a right of habitation. It does not use "direct application." Direct application is mandatory. The judge must decide strictly according to the provision. Application by reference requires adaptation in light of the nature of the norm. A will and a contract differ fundamentally in legal nature. A contract is a bilateral juristic act. The real-right change created by a contractual right of habitation is a typical "real-right change based on a juristic act." A will is a unilateral juristic act. Its effect depends only on whether the testator's declaration of intent is true. The real-right change is not caused directly by making the will. It is caused by the event of the testator's death. The prevailing view in Chinese legal scholarship holds that making a will does not directly cause a real-right change. It only affects the distribution of property. The substantive effective time of the real-right change is the moment of the decedent's death. Therefore, testamentary succession has the same legal effect as statutory succession. Both take effect at the decedent's death, and the corresponding real-right change occurs [16].

Second, to realize the testator's true intention, the inhabitant's residential interest should take priority over the heir's possessory entitlement to the dwelling. The creation of the right of habitation and testamentary succession take effect simultaneously. On one hand, the testator creates an independent real-right interest for the inhabitant. On the other hand, this creation imposes a statutory burden on the heir. When the heir acquires ownership, the heir must respect the testator's dispositive intent. The heir cannot use ownership to infringe the inhabitant's residential interest. The creation of the right and the heir's burden are inseparable. Therefore, the right should take effect at the same time as testamentary succession, namely at the decedent's death. This also aligns with Article 230 of the Civil Code. Under that article, a real right acquired through inheritance takes effect

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when inheritance begins.

Third, practical effects matter. If we adopt the registration-effectiveness model for testamentary creation, we increase the risk of harm to the inhabitant. I think this is bad for protecting the inhabitant's lawful rights. The key difference between contractual and testamentary creation is this. In contractual creation, the party obligated to register is the contractual creator. That person is alive and is a party to the contract. Cooperation in registration is performance of that person's true intent. Procedural resistance is relatively small. In testamentary creation, the testator is necessarily dead. The heir succeeds to ownership of the dwelling. The heir usually knows well that the right of habitation will reduce the dwelling's value and restrict its marketability. Testamentary creation is often gratuitous. The inhabitant pays no consideration. The heir can hardly benefit. So the heir may respond passively or even refuse to cooperate with registration. The right of habitation then cannot be created. If we mechanically apply the registration-effectiveness model, a legal gap appears between the opening of inheritance and completion of registration. The right arises because the will takes effect. But without registration, it cannot be asserted against the heir or other third parties. The inhabitant may face forcible eviction. The inhabitant may also lack a clear path of legal protection. As a result, the right of habitation may exist in name but cannot be exercised in practice. This goes against the testator's intention to protect a particular person's housing interests. It may also lead to disputes between heirs and the holder of the right, resulting in a waste of social resources.

Finally, although setting up a right of residence through a will doesn't require registration to be valid, registration is still an important way to make property rights public. Registration has the effect of public notice and credibility. During transactions, third parties can rely on the information recorded in the registration book to know whether a residence has a right of residence, which helps them better estimate the property's value, makes it fairer for third parties, and reduces transaction risks. For the person with the right of residence, having the right recorded in the real estate registration book strengthens the protection of their rights. Therefore, the registration process is significant throughout the entire process of establishing, exercising, and even terminating the right of residence. If we adopt the principle of merely declaring registration, registration would lose its practical meaning, which goes against the legislator's original intention. Thus, setting the registration procedure as a requirement to assert the right of residence created by a will aligns with the principle of public notice and credibility of property rights, reasonably refers to the registration effect of rights established by contract, and better meets the legislature's expectation of the registration obligation for the right-holder.

4.2 Clarifying Testamentary Formalities and Proposing Documentary Mechanisms

In order to unify the standards of judicial judgment and avoid the phenomenon of "different judgments in the same case" in the case of establishing the right of residence by will, it is necessary to clarify the formal requirements of this kind of will, especially the boundary of the effectiveness of oral will, rather than taking written form as the only standard. As to whether the oral will can establish the right of residence, this paper opposes the across-the-board behavior of excluding the oral will. Although the oral will is not in written form, it is not completely ineffective. When the formal requirements of the oral will are corrected, the establishment of the right of residence by the oral will should be considered as effective. The reasons are as follows:

First of all, the legality of establishing a right of residence through an oral will is rooted in the nature of it being a unilateral legal act, so there's no need to rigidly apply the written form requirements of contracts. A will, as a typical unilateral civil legal act, centers on the testator's independent and autonomous expression of intent, whereas the core purpose of a written contract is to solidify mutual consent and prevent future disputes. The two differ fundamentally in both their legal nature and legislative goals. According to Article 367 of the Civil Code on the written form of right-of-residence contracts, the legislative intent is to clarify the boundaries of rights and obligations in property changes and reduce performance risks. But this rule is based on the bilateral nature of contracts and can't directly apply to the unilateral legal act of establishing a right of residence through a will. Furthermore, even though a right of residence involves significant interests of the parties, the legal relationship is

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not complicated. The core content is just the location of the residence and the duration of the right, and other issues can be handled by law. Oral expression doesn't affect the completeness or authenticity of the intent, and an oral will is sufficient to record the testator's intention to establish a right of residence [14]. Therefore, requiring a written form shouldn't be a mandatory barrier for establishing a right of residence via a will. Legal requirements for the form of a will should follow the principle of "priority to intent, form as auxiliary." As long as the testator's true intent can be verified, establishing a right of residence through an oral will both makes legal sense and meets practical needs, and its legality and reasonableness should be recognized.

Secondly, there are two main purposes for the conclusion of the right of abode contract: first, the establishment of the right of abode has increased the burden on the owner of the house, so it is required that all people should be cautious when setting the right of abode for others with their own houses, and adopting the written form can make all people more cautious when signing the right of abode establishment contract. Second, the requirement of evidence retention, the right of abode contract in written form can make the rights and obligations of both parties recorded in black and white, and once disputes between the two parties occur afterwards, they can be directly used as evidence, which also helps to reduce the occurrence of disputes [17]. The application of oral will is very strict. Oral will is only allowed to be started in an emergency, and its establishment must be based on the simultaneous presence of more than two qualified witnesses. These requirements make it possible for all people to carefully consider and retain the right of residence for others by will, which is in full compliance with the formal norms. If the will to establish the right of residence is forced to be in written form like a contract, it will deprive the testator of the right to establish the right of residence for others by audio, video or oral means in an emergency. Therefore, when establishing the right of residence for others by will, it is not limited to writing, as long as it meets the formal requirements of the will. In addition, since the disposal of the estate can take the form of oral will, the act of creating rights is also applicable.

Finally, although oral wills have shortcomings in both form and function, they can be corrected through certain methods, allowing the will's contents to be carried out through proper channels. An oral will that has been corrected should be recognized as having legal effect in establishing a right of residence, enabling the testator's true intentions to be converted into official registered documents, ensuring the legality and enforceability of the residence right. This can be achieved through the following two paths:

Correction Path One: Written confirmation by heirs. If the other heirs unanimously agree with the arrangements regarding the right of residence in the oral will and reach a clear agreement, the intention can be formalized in writing. This written document both meets the formal requirements for registration of the residence right and reflects the true intentions of all heirs.

Correction Path Two: Court-issued effective judgment. When the person with the right of residence and other heirs have disputes over the content of the right of residence and cannot resolve them through negotiation, they can turn to the court to confirm the validity. The court will examine the facts based on the evidence submitted by both parties and issue a legally binding judgment. This judgment can serve as a statutory proof document for registering the right of residence, so a court-confirmed effective ruling on the establishment of the residence right also constitutes one method of correcting an oral will.

5. Conclusion

Article 371 of the Civil Code stipulates that the establishment of a residence right through a will is a significant measure for the free disposition of property by the testator and the protection of the legitimate rights and interests of the residence right holder. However, it also brings about two major problems. The first is whether the establishment of a residence right through a will should be subject to the provisions of Article 230 of the Civil Code, which takes effect from the beginning of inheritance, or to those of Article 368 of the Civil Code, which is established upon registration. To ensure the realization of the testator's true intentions and the consistency with the principle of public trust in the manifestation of property rights, the registration opposition doctrine should be adopted. The second is whether a residence right established through a will must be in written

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form. Compared with the establishment of a residence right through a contract, the establishment of a residence right through a will has its particularity. It cannot be mechanically applied to the provisions of Article 367 of the Civil Code regarding "written form", but should explore the core function of "preserving evidence" of "written form". Self-written, notarized, printed, and notarized wills all adopt the form of written documents. Audio-visual wills essentially belong to the category of "written form of the content recorded in a tangible form". They meet the formal requirements for establishing a residence right through a will. Oral wills have very strict application and do not lack evidentiary force. After the formal requirements are corrected, the establishment of a residence right through an oral will should be recognized as valid. This is conducive to safeguarding the true intentions of the testator and can more flexibly adapt to the needs of judicial practice, without causing overly rigid application of the law.

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