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MUTUAL WILL AS A SPECIFIC FORM OF *MORTIS CAUSA* DISPOSITION

Abstract

Transactions on the bases of inheritance involve the transmission of goods in case of death. Depending on the legal system, there are different instruments of mortis causa disposal: testament, contract of inheritance, contract on future succession, agreement on waving from future inheritance etc. German law recognizes a specific form of mortis causa bequests – the joint will that is by legal nature between standard testament and inheritance contract. The aim of this paper is to draw attention to the specific features of this legal instrument that is not recognised in our legal system, and through a comparative analysis with other related institutes (classic testament, contract of inheritance) to point out its advantages and disadvantages, in the context of the current reform of the modern inheritance law.

Key words: *freedom of mortis causa disposition, testament, joint will, inheritance agreement, binding effect of mortis causa disposal.*

1. INTRODUCTION

Instruments of *mortis causa* disposition are various. Apart from testament as general accepted in all legal systems, there are some other instruments of *mortis causa* disposition recognized in most of european laws, such as inheritance agreement, contract on future inheritance, contract of waving his/her inheritance right etc. In countries of German legal tradition specific testamentary form are present, such as joint will.

Joint will, as well as other legal instruments mentioned, contributes to the extension of *mortis causa* liberty, at the same time limiting testamentary freedom due to its specific binding effects. Unlike some other restrictions imposed into some legal systems, particularly those of continental orientation (eg. the right to a compulsory share), this is about voluntary restriction that an individual imposes himself.

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Joint will, as well as inheritance contract, has its roots in family law, and it is directed towards achieving the same goal, which is to maintain property within a family. The reason for their introduction into modern inheritance law is a reflection of the need of a spouse as a testator to secure economic position of his/her surviving spouse or his or her children. For that purpose, spouses are able to make unilateral disposition based on their common decision on the method of property disposal, associating complied statements of last will in the same document – joint will.[1]

2. TERM AND TYPES OF JOINT WILL

Legal systems that recognize joint will do not give precise definition of this legal disposition. It is a legal business that, actually, combines two individual and independent statements of last will. Its key attribute is association of the last wills declared. The creation of joint will implies the pre-existence of the intention of both of testators to dispose in common manner in the case of death. Therefore, it can be conditionally considered as "common last will".

Legal nature of joint will is complex, because it is a legal business that contains some elements of classic testament and inheritance agreement, as well. As it is the case with any legal business, the purpose of joint will is to achieve specific legal purpose that represents a *causa* of that legal disposal. The legal objective to be achieved by making a joint will is the same as with other testamentary forms – a distribution of assets in case of death. Since the will of testator is based on the initiative to make some person a heir, motive for this disposition approaches to the *causa,* as it is a case with all lucrative dispositions.

The communion, as a main feature of joint will, reflects in the association of the last wills, ie. in the identical manner of inheritance distribution. Therefore, if the joint testament wasn't made in a single document, mutual effect of testators' dispositions may not be assumed, but explicitly or tacitly expressed within testament.

Joint will appears in different modalities in legal systems that recognize it and it is mainly reserved for a limited number of persons. Due to a nature of disposition, i.e. its content, there are three types of joint will (*testamentum mere simultaneum*), (*testamentum reciprocum) (testamentum corespectivum)*.[2]

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[1] J. Hochmuth, G. Ubert, *Erbrecht,* Leitfadenverlag Sudholt, 2003, 184.

[2] H. Brox, *Erbrecht,* Carl Heymanns Verlag, Köln-Berlin-München, 2004, 115.

As far as *testamentum mere simultaneum* is concerned, it consists of two independent wills that are formally attached, being incorporated in the same document, which implies the community of testament creation.[3],[4] In this type of a joint will, dispositions of testators are completely independent from each other, i.e. each of them is determined by his successor independently. This form of bequests is often used because of some formal privileges, as it is the case with handwritten testament (specific for German law).

As far as *testamentum reciprocum* is concerned, the bequests of both testators areclosely connected, although they are not mutualy dependant. The purpose of this type of testament is that testators appoint each other to be a heir, thus their final legal position depends on the fact who lives longer. Reciprocical relation between dispositions has to be provided clearly in testament, whether in explicit or tacit way.[5]

The main characteristic of *corespective testament* is a mutual conditionality of the testators' bequests. Invalidity or revocation of a disposition of one of the testator implies invalidity of the other testator's bequest, as well as the invalidity of the whole testament.[6] Dependence between testators' bequests is based on the assumption that none of the testators will not have made his disposition without a proper disposition of the other. Corespective (conditional) provisions may refer only to the appointing of a heir, determining legacy and other burdens. Provision on appointing the will executor or on inheritance deprivation may not be mutually dependent.

Unless explicitly stated which kind of disposition has been made, it will be defined through interpretation of the last will, in order to determine the true intention of the testator. If the interpretation may not help to determine the actual will of the testator, than, the legal assumptions that are precisely defined by the law shall apply.[7] The main disadvantage of these legal approach is that the surviving spouse might be attached to the bequest after the death of his/her spouse, although it was not their real intention. [8]

Depending on the manner of inheritance distribution among cotestators, there are two common models of testamentary disposition: a model of unity

[3] *Ibid.*, 115.

[4] M. Povlakić, D. Softić-Kadenić, *Da li je potrebno uvesti nove forme raspolaganja morts causa u nasljedno pravo u Bosni i Hercegovini?*, Zbornik radova Sveučilišta u Splitu, Neum, 197.

[5] S. Branković, *Zajednički testament*, Glasnik Advokatske komore Vojvodine, br. 4 (1953), 4.

[6] Art. 2270(1) of German Civil Code, http://www.gesetze-im-internet.de/englisch_bgb/, august, 2016.

[7] Art. 2270(2) of German Civil Code.

[8] M. Povlakić, D. Softić-Kadenić, *op.cit.*, 299.

and separation mode (Einheitsprinzip-Berliner Testament und Trrenungsprinzip).[9]

As far as the model of unity is concerned, the property can be divided among the testators (that are usually spouses) in various ways. The testators may agree that the property that makes the legacy of the first deceased belongs to the surviving partner after his death and assimilates with his own property, while after the death of surviving spouse, this property belongs to the heirs determined in the joint will by both testators (most often that final heirs are children).[10] In that case, the surviving spouse appears as a full successor of the deceased spouse, without any limitation due to acquired rights (Vollerbe). As direct successors of the survivng spouse appear to be their common children who have the status of a final successor (Schlusserben). [11]

By disposing of the legacy in fore mentioned way, one coherent property unit has being made, of which a surviving testator may freely dispose. The communion of joint testament is reflected in the fact that the persons who would in the event of his death acquire inherited property are pre-determined.

Another possibility of disposition by joint will is i.e. *separation model*. It is reflected in the constitution of the limited rights of surviving testator, relating to the estate of the deceased partner. His legacy is treated as a separate property in relation to the property of the surviving spouse, for whose benefit lifelong usufruct on the property that makes the legacy, or a limited right of ownership might be established.

In the case of constitution of a lifelong usufruct in favor of surviving spouse, he or she is entitled to all the rights and obligations that implies the position of usufructuary, and after his death, the property will be inherited by heirs appointed (who acquire the ownership over it). Thus will contribute to economic certainty of the surviving spouse who will retain the same economic position, as it was at the time of the death of his spouse.

Fideicomissary provisions are very present in this separation model of joint will, where the assets of the deceased and the surviving testator have been treated separately, as far as testamentary disposition is concerned.[12] The union of these depositions is not reflected in the unity (integration) of the

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[9] D. Leipold, *Erbrecht –mit Fällen und Kotrollfragen*, Mohr Siebeck, Tübingen, 2002, 163, 164.
[10] Art. 2269. of German civil code.
[11] J. Hochmuth, G. Ubert, *op.cit.*, 187.
[12] T. Đurđić-Milošević, *Fideikomisorna substitucija i sloboda zaveštajnog raspoalaganja*, Pravni život, 10/2012, 719-732.

assets of both testators, but in the common intention of the testators to dispose with their own property in the same, in joint will defined manner. Since it is about successive inheriting, the surviving spouse has a position of previous successor (vorerbe) during the first succession and inherits the estate of the deceased as a separate assets. He can freely dispose of this property, within legal frame that are implied by the legal position of previous heir. At the same time, he has autonomy to dispose of his own property, since it is independent in a relation to the inherited one. When it comes to the death of a surviving spouse, another succession occurs and the third person who had been previously appointed by joint will, inherits as a final heir. Successors are usually common children who inherit on two grounds: first, they acquire the legacy of the first deceased as the latter heirs (vorerbe), while the property of the surviving spouse they inherit as his direct heirs.

If we compare these two different manners of testamentary dispositions, it appears that the advantage of so called Berliner testament, as a model of unity, from the perspective of the surviving spouse' interest, reflects in the fact that the surviving spouse may freely and unlimited manage and dispose of the legacy inherited from a deceased partner. The successive inheriting, on the other hand, implies a restriction of property rights. Apart from the advantage mentioned, separation model may result in jeopardizing the property interests of the children as a final successors, since there is a possibility that one of the spouses spends the entire inheritance. In this case, the children could exercise their right to a forced share, claiming it against the surviving spouse (Phlichtteilsforderung).

3. THE MAIN CHARACTERISTICS OF JOINT WILL

3.1. Form of joint will

Joint will can be made by two or more persons as testators, and their common last will is usually contained in the same testament, as a single document. Although the form of joint will is of constitutive importance, statements of last wills of both testators may be contained in the different documents. This is often the case with handwritten testament that may be created through two independent acts of testators (as is the case in German law). In fact, one of the testator makes a last will and sign it while the other

testator agrees to its content by signing it, when joint will is finally formed.[13] However, it is important while making bequests, that testamentary bequests of both testators are substantively attached, and that each of them is familiar with the content of the disposal of his partner.

When creating a joint will, each of the testators has the right to choose the form of his testamentary disposition, and selected forms of both testators may be different. In jurisdictions where a joint will may take a form of extraordinary testament, if the prerequisites for this form are met on the side of one testator, the other testator may opt to express his last will in a regular testamentary form. [14]

In the case of doubt which testamentary form is concerned, the will of the testator shall be determined by interpretation of his last will. In the case that it cannot be defined by interpretation which form of testament has been chosen by testator, than legal presumption of so called Berliner testament applies.[15]

When it comes to the formal requirements, they are quite flexible, as far as joint will is concerned. Namely, in German law the joint will can take one of the forms prescribed for classic testament, which means it can be made as a private and public testament, regular and extraordinary, as well.[16]

3.2. The content of joint will

When it comes to the content of joint will, general rules as for a classic testament apply. If joint will consists of only unilaterally binding provisions, then it would not be much different from standard testament. The peculiarity of the joint will are reciprocal and conditional provisions by which unilateral but dependent dispositions are provided.

In a joint will are often present clauses on remarrying (Wiederheiratungklauzeln), no matter if it is about model of unity or model of separation. This clause should ensure that descendants receive their part of inheritance from surviving parent during his/her life, in the case he re-marriages.[17]

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[174] P. Breitschmid, *Testament und Erbvertrag-Formprobleme*, in: Testament und Erbvertrag-Praktische Probleme im Lichte aktuellen rechtsentwiklung, Verlag Paul Haupt ,Bern und Stütgart, 1991, 44-57.

[14] Art. 2266 of German Civil Code.

[15] Art. 2269 of German Civil Code.

[16] H. Bartholomeyczik, W. Schlüter, *Erbrecht,* C.H.Beck´sche Verlagsbuchhandlung, München, 1975,165; H. Lange, K. Kuchinke, *op.cit.*, 427-431.

[17] H. Lange, K. Kuchinke, *op. cit.*, 425, 426.

In the separation model surviving spouse has a legal position of previous successor (Vorerbe), while children have the position of a latter successor (Nacherbe). It can be provided that in case of remarriage latter successor enters into the legal position of the heir, not in the moment of death of first died spouse, but at the time of remarriage of surviving spouse. [18]

In the model of unity or, so called, Berliner testament, in the case of remarriage, surviving spouse would share his inheritance with children, under the rules of intestate succession. Entering into marriage represents subsequent condition for previous and latter testamentary succession. Children become latter heirs and inherit to the amount of their intestate share , and surviving spouse becomes the later successor with the proper intestate share. If the surviving spouse doesn't enter into marriage again, he remains in that case a complete successor.

Such provisions are often immoral, because they condition the acquisition or loss of inheritance to certain facts that might occur or not (e.g. if the spouse remarries loses inherited property). Since they are not in compliance the moral principles, generally they do not produce any effects, no matter if they are part of the contents of classic or joint bequest or inheritance contracts.

3.3. The circle of persons entitled to make joint will

In German law a joint will is reserved for spouses and registered partners[19], and the termination of a marriage between the testators shall provide invalidity of joint will.[20] Spouses usually appoint each other as a heir, and after the death of a surviving partner the legacy usually belongs to their common children, or to other close person who they have appointed together. In addition, in Austrian law joint will can be made by fiancé, if it comes to marriage. Since joint will is usually made between spouses, it is often noted as a spouses last will (Ehegattentestament).[21]

The limitation of the circle of persons who are entitled to make a joint will is prescribed in order to prevent a successor's influence over the will of the testator by third persons. [22] It is interesting to note that joint will has been

[18] F. Reiner, *Erbrecht,* München, Beck, 2000, 159.
[19] Art. 2265 of German Civil Code.
[20] Art. 2268, 2077 of German Civil Code.
[21] H. Bartholomeyczik, W. Schlüter, *op.cit.,* 163, 164.
[22] S. Ferrari, *Erbrecht-Ein Handbuch für die Praxis,* Manzshe Verlags – und Universitätsbuchhandlung, Wien, 2007, 177.

allowed in Serbian Civil Code from 1844. and was regulated within provisions governing marital relations, allowing its formation only between spouses.

3.4. The communion as a main characteristic of joint will

An essential feature of joint will is not the unity of documents in the formal sense, but association of statements of the last wills of both testators which results in binding effect of this testamentary form.

This communion is reflected, primarily, in the attachment of declared wills by which they are obliged to dispose with his/her inheritance in advanced agreed manner. As it is a case with any legal work a disposal by joint will is made in order to achieve a particular legal objective, which is the *cause* of the legal transaction. The legal objective to be achieved by making the common will is the same as with other testamentary forms - a disposal of assets in the event of death. Since the will of the testator is based precisely on the initiative to make certain person a successors, the motive for disposition by joint will approaches the *causa.*

However, a distinction between testamentary forms is not always easy to make. Hence the question of the legal nature of two or more testaments formally attached within the same document, where the testament bequests are independent and autonomous between each other, the communion has only a formal meaning. There is dilemma whether this is joint will in its full meaning, or two independent classic testaments?

It is considered in theory that this type of *mortis causa* disposition constitutes so-called. simultaneous joint will, which is not a joint will in the real sense, but a community of making testament, in its formal sense. Therefore, in some legal systems that do not allow joint bequests, a possibility of conversion of simultaneous joint will in to two classic testaments is permitted, if the formal legal requirements for their formation are fulfilled.[23]

As it is about two independent testamentary dispositions that are just formally bonded, one question arises: would this modality of joint will be allowed in our legal system?

Testament as legal businessess in our law, as well as in most of the legal systems of the continental law family, is considered to be a unilateral legal act produced by a declaration of one will-will of the testator. Therefore, any impact on will of a testator (unless those of consultative nature) leads to the voidances of the whole testament. By prohibiting of common testamentary

[23] M. Povlakić, D. Softić –Kadenić, *op.cit.*, 197.

disposition, unilateral character, as a key feature of testament, is emphasized, as it is the case in our law. [24] In legal theory it is considered that there are no obstacles for two classical testaments to be formally attached in the same document, since no substantive connection between these dispositions has been made. Both testaments are independent declarations of last will that produce legal effect completely independent.

In the opposite situation, when the statements of last will of both testators are not incorporated in the joint will, arises a question how would the communion of the last wills be proven? For valid creation of joint will it is necessary that joint character of wills is explicitly emphasized in the testament itself. This is particularly the case by mutual (reciprocal) disposals where the last wills of testators are structurally attached, and it is even more emphasized in the corespective testamentary disposals that are mutually conditioned. [25]

Binding effect of joint will relates to the possibility to revoke the testament. In that sense, irrevocability of inheritance agreement is a rule, while joint will is generally revocable, with some exceptions.

3.5. Right to revoke joint will

Binding effect of joint bequest results in a limited ability to revoke the bequest. The realization of this right as well as its scope are determined by the nature of testamentary disposals (it depends on whether it is about unilateral, reciprocal or corespective provisions, and whether they become effective during the lifetime of both testators, or after the death of one of them).

For the life of the testator, a joint will may be revoked at any time, by consent of the testators or unilaterally (without even informing the other testator) if the content of the bequests is composed by non-binding provisions (nicht wechselbezüglicher Verfügung), which are actually unilateral and reciprocal provisions. [26]

When it is about corespective (conditional) provisions, they could be for the life of the testators revoked jointly by both testators, for example, by making a new joint will. The possibility of unilateral revocation of these

[24] See O. Antić, Z. Balinovac, *Komentar Zakona o nasledjivanju*, Nomos, Beograd, 1996, 306; Serbian Civil Code from 1844 was created according to the Austrian Civil Code, allowing the joint will between spouses (Art. 779 of Serbian Civil Code).
[25] M. Povlakić, D. Softić – Kadenić, *op.cit.*, 197.
[26] Art. 2253. of German Civil Code; H. Bartholomeyczik, W. Schlüter, *op.cit.*, 172.

provisions exists only if the statutory form is fulfilled. This means that the statement of revocation has to be certified by a notary and submitted by the second testator. In this way, the other partner is informed about revocation, which is very important concerning conditional character of dispositions, since a revocation of one disposal implies invalidity of the other[27]. Such a formal way of revocation of the last will, prevents from secret revocation, thus preventing misuse of this entitlement, as well.

To revocation of the joint will the provisions governing the revocation of the contract of inheritance apply. Therefore, we come to the conclusion that in the domain of revocation these legal instruments correspond to each other.

The above mentioned rules on revocation apply only during the lifetime of both testators of joint will. The right of revocation ceases in the moment of death of one of them, which means that with the death of first diseased, the surviving spouse loses the right to revoke the testament or to edit its content, and becomes permanently bound by joint will.[28] Thus follows that the testator may not be limited in their right to freely dispose of their own property *inter vivos*, even if he had previously disposed with his property by joint will.[29] [30]

Thus, the binding effect of joint will is linked to the moment of death of the testator who dies first. Such a provision is of discretionary nature, and it can be excluded by mutual agreement of testators, which brings to a question justification and usefulness of joint will in comparison to a classic testament. Also, the attachment of the surviving spouses to joint will may cease to exist if he waive his right to inherit on the bases of the joint will. [31]

Subsequent disposal of the surviving spouse will be void if it is made with the intention to make difficult the position of a heir appointed by joint will. For example, if the surviving spouse makes a gift to a third party with the intention to aggravate the legal position of the heir, after acquisition of inheritance, this heir would be entitled to require return of the gifts from a beneficiary, in accordance with the rule of unjust enrichment. However, this subsequent disposal would not always be invalid, for example, if they improve legal position of a heir, or in case of neutral or meaningless

[27] Art. 2271(1) of German Civil Code.
[28] Art. 2271 (2) of German Civil Code; H. Bartholomeyczik, W. Schlüter, *op.cit.,* 172; D. Leipold, *op. cit.,* 166, 167.
[29] J. Hochmuth, G.Ubert, *op. cit.,* 203.
[30] Art. 2286. of German Civil Code.
[31] Art. 2271 (2) of German Civil Code.

dispositions (eg. the successor dies before the surviving spouse) they will be effective.[32]

Joint will ceased to exist with the termination of marriage (no matter if there has been a divorce, or annulment of marriage) unless the intention of the testators was different. On termination of the joint will due to the termination of marriage the provisions governing the termination of the classic testament apply. [33]

It is important to draw attention to the fact in specific circumstances, even after the death of one spouse, surviving spouse may be released from binding effect of joint will and gain full freedom of disposition. This can be achieved contracting the exculpatory clause (Freistellungsklausel). Specifically, parents commonly appoint their children to be heirs. As the future behavior of children is unpredictable, arranging these clause parents often retain the right to change or to revoke subsequently their *mortis causa* disposal. The right of revocation in this case can be achieved only by making a new will, but not by annulment of the will. [34]

4. JOINT WILL IN COMPARATIVE LAW

German law allows variety of possibilities to become bounded by mortis causa dispositions. In Austrian law critical approach towards binding effect of mortis causa disposition is taken, while in Swiss law this concept is not explicitly regulated.[35] There is a presumption in German law that the dispositions made by spouses through joint will are mutually dependent, i.e. a disposition of one spouse would not have been made without the disposition of the other.[36] In Austrian law, any assumption of mutual dependence is not permitted, even in the case of mutual appointment as a heir between testators, and mutuality of dispositions have to be explicit agreed.[37] The conditional bequest may be revoked at any time, even after the death of first deceased, when proper mutual disposition losses its effect.[38] In Swiss law, for example, joint testament is not legally prescribed, but not

[32] J. Hochmuth, G.Ubert, *op. cit.,* 198.
[33] Art. 2268. of German Civil Code.
[34] J.Hochmuth, G.Ubert, *op.cit.,* 203.
[35] H. Bartholomeyczik, W. Schlüter, *Erbrecht,* C.H.Beck´sche Verlagsbuchhandlung, München, 1975, 161.
[36] Art. 2270 (1) of German Civil Code.
[37] Art. 1248 of Austrian civil code http://www.ris.bka.gv.at/, august, 2016.
[38] *Ibid.*

explicitly prohibited. However, in judiciary practice there is a dominant view that testament represents unilateral act and it can only be a manifestation of one last will. Therefore, it is not possible for more than one persons to be engaged with testament creation.

5. JOINT WILL AND OTHER LEGAL BEQUESTS

5.1. Joint will and standard testament

Prerequisites proscribed for classic testament have to be met by joint will as well, such as testamentary capacity, free will of the testator manifested in statutory form and declared with the intention of making bequests (*animus testandi*).

Beside free and exact will of the testator for making a valid joint will, the testator's will has to be unilateral and personal. Unilateral character is one of the key characteristics of classic testament, and any impact on the will of the testator by third parties leads to its voidances. This feature is particularly emphasized in the domestic succession law in which is prohibited to attach a testamentary disposition of one person with the last will of the other, which has been particularly manifested through the prohibition of making the joint will.[39]

In contrast to standard will, joint will is characterized by mutuality and sometime by interdependence between dispositions, thus derogating from the unilateral character of testamentary disposition.

The last will of the testator has to be personally presented, regardless of the form concerned. Thus, a joint bequest can't be made by a legal representative nor an attorney, but only personally by the testator. Personal character of testamentary disposal is manifested through a revocation of legacies since the testator is able only personally, with freely expressed will to revoke bequests.

Unlike the standard testament that is revocable legal business and therefore does not bind the testator, the joint will is, generally speaking, also revocable legal instrument which, in some cases, constitutes a obligations for testators. Binding effect of the joint will is, at the same time, the point of distinction from standard testament and the key argument for justification of their separate regulation. [40]

[39] O. Antić, Z. Balinovac, *op. cit.*, 306.

[40] W. Zimmenrman, *Ebrecht,* Erich Shcmidt Verlag, Berlin, 2010, 91.

Joint will matches classic testament until the moment of death of the first deceased testator. Until that moment the joint will is revocable, as a classic testament. From the moment of death of one of the spouses, it becomes irrevocable bequest, thus limiting the autonomy of surviving testator concerning further property disposals. At the same time, it secures the realization of the last will of the deceased whose dispositions in the case of death remains unchanged.

The right of revocation is the manifestation of freedom of testamentary disposition, and waiver of this right in the classic testament has no legal effect. By a joint will, waiver of the right of revocation is possible, but entails specific consequences, since in this case joint will shall take effect as a inheritance contract, if it meets legal requirements for the validity of this contract.[41]

5.2. Joint will and contract of inheritance

It is indisputable that the inheritance agreement and a joint will are closely related institutes, because they have roots in the family law. Their common characteristic is reflected in the legal aim achieved through their standardization, and it is to maintain the assets of the decedent within family. Common points between joint will and inheritance contracts are those in which the joint will differs from classic testament as unilateral business, i.e. those that make a difference between inheritance contract and classic obligatory agreement.[42]

The basic common feature of the contract of inheritance and joint will is their *mortis causa* effect and binding nature. Both legal transaction are made with the same goal, to appoint the partner as a heir.[43]

Joint testament can be made by a limited group of people (usually between spouses and registered partners), while there is no such a restriction for inheritance agreement.

While testamentary ability is prerequest for the creation of valid testament, for the conclusion of valid inheritance agreement contractual capacity is a precondition. If the agreement is concluded between the spouses or fiancé, then it may also be concluded by persons of limited contractual capacity. Both, contract on inheritance and a joint will are specially adapted

[41] S. Branković, *op.cit.*, 6.

[42] T. Đurđić-Milošević, *Razgraničenje ugovora o nasleđivanju od drugih pravnih poslova,* Pravni život, 10/2014, 513-526.

[43] H. Lange, K. Kuchinke, *Erbrecht,* C.H. Beck, München, 2001, 421, 422.

to the marital community, and historically, they were most often concluded between the spouses.

Joint bequest can be made in any form prescribed for classic testament, while for the contract of inheritance only notary form is provided.[44] The reason for greater presence of joint will in practice is the privilege of form that is particularly specific for handwritten testament, since iy doesn't involve strict formal requirements.[45]

The difference between the inheritance contract and a joint will is reflected in the nature of their binding effect. The binding effect of the agreement on succession is linked to the moment of conclusion of the contract, while the binding effect of the joint will is linked to the moment of death of the other spouse.[46] Before the moment of death, a joint will is unilaterally revocable if a revocation was made in the form of a notary certified document, but from the moment of death, the right of revocation ceases.[47]

Since a contract of inheritance is formed by making an agreement between contracting parties on the subject matter, for the validity of the joint will prior consent of its participants to create such a testament is required.[48] It is about two unilateral declarations of will in case of death that are integrated in the same legal business, but do not have a contractual character. Statements of the last will might be mutually dependent, so that joint disposals of the testators depend on each other (nullity of one testator declaration implies the nullity of the statement of the other, implying the nullity of the whole testament as well), which reminds on the contractual provisions.

Although reciprocity is one of the main features of the contractual disposals, joint will does not provide contractual effect. Testamentary dispositions do not produce binding effect for the life of the spouses, but their binding effect is attached to the moment of death of the first deceased testator.[49] In this regard, a joint will represents a legal transaction *mortis causa*, as opposed to contract of inheritance. It is of double legal nature - a contract and disposition in the case of death (for example, some of the

[44] Art. 2276 of German Civil Code.
[45] Art. 2267 of German Civil Code.
[46] H. Bartholomeyczik, W. Schlüter, *op.cit.*, 162.
[47] H. Borx, *Erbrecht,* Carl Hezmanns Verlag, Köln-Berlin-München, 2004, 112.
[48] D. Živojinović, T. Đurđić-Milošević, *Inheritance Contracts and its Substitutes in European and Srebian law,* Revija za Evropsko pravo, br. 2/3, 2015, 75-76.
[49] H. Borx, Erbrecht, *op.cit.*, 110.

obligations exist during the lifetime of the contracting parties e.g the obligation of maintenance and some are being realized only after the death of first deceased e.g acquiring ownership over the assets).

It is important to note that the binding effect of the joint will doesn't arise from the agreement of the testator to dispose together, but is based on the law. The obligation arising from a joint will is justified by the objective to be achieved by its constitution, which is to secure that the last will of the testator who has die first, is going to be realized.

6. CONCLUSION

From the previous analyze we can come to the conclusion that the joint will is a specific form of associate testamentary dispositions that has significant similarities with standard testament, but with the inheritance agreement as well. Its specific binding effect is a key point of distinction between all these institutes. While the classic testament has no binding effect, in contract of inheritance the binding effect has the primary character, and in joint will secondary. Binding effect of these legal affairs is aimed to protect the interests of the deceased spouse, ensuring the realization of his last will, since the surviving spouse is disabled to change testamentary disposition of his death partner.

Recently, in the German legal doctrine a growing criticism of the binding effects of private joint will is dominant. As the biggest disadvantage it is pointed out that in most cases the testator is not aware of the effect that joint will might produce. Since notaries are not involved in the creation process, testators are not introduced in all legal effects of making the will, as is the case with the agreement on inheritance. Therefore, there are suggestions to limit the binding effect of private joint will, or to allow its creation only in the public form. However, there are some opposite views in comparative legal doctrine that private form of joint will should not be completely abolished. An argument in favor of this attitude some formal benefits are mentioned, as it is the case with the handwritten bequest *mere simultaneum*.

If only public form of joint will would be permitted, its legal purpose would be disputable, since the contract of inheritance is concluded only in the public form, and it is possible to achieve the same purpose as it is with the joint will (mutual appointment of a heir). In the legal systems that are not familiar with these two forms of binding disposal in case of death (as is the case with our law), it is clear that the joint will is not in compliance with the fundamental principles of testamentary disposition. The issue of contractual

disposal in case of death remained open, since it should be considered from the broaden perspective – autonomy of *mortis causa* disposition.

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