

# Problems of Legal Regulation of the Appearance of Ownership of the New Thing (Paragraph 1 of Article 218 of the Civil Code of the Russian Federation)<sup>126</sup>

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## ABSTRACT

The article examines the actual problem of legal regulation of the occurrence of ownership of the new thing (paragraph 1 of Article 218 of the Civil Code of the Russian Federation). The focus is on the characteristics of one of the two mandatory conditions of the occurrence of ownership of the new thing — the creation of a thing “for yourself”, which today is the subject of discussions in the scientific environment. The study is conducted through the analysis of the application of this condition to acquire ownership of movable and immovable property. In addition, attention is drawn to the controversial issues of the doctrinal and judicial interpretation of the occurrence of ownership of the new thing, ways to improve legislation in this area are offered.

**Keywords:** the emergence of ownership, ownership of a new thing, creating a thing for themselves, real estate, creating a real estate object, acquisition, state registration

In paragraph 1 of Article 218 of the Russian Civil Code<sup>129</sup>, it is established that the ownership right to a new thing created or manufactured by an individual for his own needs is acquired by him subject to compliance with all legal requirements.

For example, if a person has built a house, then based on the norm, he could become its owner in compliance with two mandatory conditions (circumstances): if the person built this real estate object for himself and did not violate any legislative and other legal regulations when creating it.

It is obvious that a person manifests the freedom of his own will by creating a new thing, but the law requires mandatory compliance with two conditions for acquiring ownership of a thing when creating it<sup>130</sup>.

It seems that these conditions limit the individual's freedom when creating a new thing. Of course, compliance with legal norms is mandatory when implementing all the grounds for acquiring property rights, including when creating a new thing. For example, if a person independently makes counterfeit money or weapons, then he will not become the owner of these things, because such activity is prohibited by law. As for the mandatory condition concerning making things for yourself, some questions arise here.

I share the opinion of V.V. Bogdanov that this restrictive condition should be interpreted according to the circumstances<sup>131</sup>. So, it should not be interpreted literally, but it is subject to a broad interpretation.

Consider an example. If an individual has made a thing to satisfy his own needs, then this condition will not be violated (for example, a jeweler makes a gold jewelry for himself), this expresses the freedom of his will. But if a jeweler in the manufacture of a gold product initially decided that he would give it to his wife, then how in this case to interpret the possibility of acquiring ownership of a new thing, because the master immediately decided to create a thing not for himself, which means that he violated one of the mandatory conditions for acquiring ownership of a new thing, established in paragraph 1 of Article 218 of the Civil Code of the Russian Federation. In this case, not only the jeweler will not become the owner of the gold product at the end of the manufacturing process, but also his wife, who will later accept this thing as a gift and will use it.

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<sup>129</sup> Civil Code of the Russian Federation (part 1) of November 30, 1994 No.51–FZ (as amended on July 31, 2020) // Collected Laws 1994. No.32. P. 3301.

<sup>130</sup> Ruling of the Judicial Collegium for Civil Cases of the Supreme Court of the Russian Federation dated 04.21.2015 No.20–KG15–3 [Electronic resource] // Reference and legal system “ConsultantPlus”. URL: [http://www.supcourt.ru/stor\\_pdf.php?id=1320444](http://www.supcourt.ru/stor_pdf.php?id=1320444) (date of access 28.03.2021).

<sup>131</sup> Bogdanov, E. V. Legal Regulation the Emergence of Ownership of a New Thing /E.V. Bogdanov // Modern Law. 2020. No.3. P. 53–57.

It turns out that a jeweler does not have the right to give a gold jewelry that he did not make for himself. But then who will be the owner of a thing made not for their own needs? This question can be answered only with an extended interpretation of paragraph 1 of Article 218 of the Civil Code of the Russian Federation, i.e. it is necessary to take into account all the accompanying circumstances.

Many modern civilists support the possibility of an expansive interpretation of the condition in question.

For example, V. V. Gerbutov directly points out that paragraph 1 of Article 218 of the Civil Code of the Russian Federation is subject to an expansive interpretation<sup>132</sup>.

According to A. A. Rubanov, it is advisable "in the broadest sense" to understand the indication in the law to manufacture a thing "for oneself"<sup>133</sup>.

K. A. Novikov notes that the wording of paragraph 1 of Article 218 of the Civil Code of the Russian Federation is far from perfect, because the words "for themselves" prescribed in this norm cause the assumption that the owner, creating a new thing from the materials available to him by order of another person, does not acquire ownership of the created thing and it immediately after creation becomes the property of the customer. According to the scientist, the interpretation of paragraph 1 of Article 218 of the Civil Code of the Russian Federation is more correct, according to which if an individual makes a new thing from his materials by order of another person, i.e. if not for his own needs, then he becomes the original owner of the new thing himself, although later he has the right to agree with the customer about something else<sup>134</sup>.

In my opinion, the presence in the Civil Code of the Russian Federation of a norm that allows for the possibility of an expansive interpretation and which can put the subject in a state of uncertainty does not improve the current civil legislation. In addition, such regulations become too subtle regulators of freedom and arbitrariness. After all, analyzing the above example, a jeweler does not become the owner of a thing on the basis of clause 1 of Article 218 of the Civil Code of the Russian Federation, because he did not make a thing for himself, but at the same time, with an extended interpretation of this norm, the jeweler made a gold jewelry for his own needs, in order to give it to his wife later, which means that formally he can be the owner of this thing.

And what if the situation becomes complicated by the fact that the jeweler decides to sell the manufactured gold product to another person? It turns out that he originally created it not for himself, but for sale. If a jeweler first makes a gold piece for himself, but then changes his mind and decides to sell it? How, in this case, will the ownership of the gold product arise? Will it be sold to the buyer without the right of ownership? With an extended interpretation of paragraph 1 of art. 218 of the Civil Code of the Russian Federation, a jeweler acquired ownership of a manufactured product as a new thing at the time of its creation, and all that remains for a jeweler to do, if he wants to systematically sell jewelry, is to register as an individual entrepreneur.

The issue of acquiring ownership of a new thing is also treated ambiguously if a person makes it from his own materials for subsequent transfer of it under a contract to other persons after the end of the manufacturing process. Here it is necessary to consider the fact that a person does not make a thing for his own needs from the very beginning, therefore, the right of ownership based on paragraph 1 of clause 1 of Article 218 of the Civil Code of the Russian Federation does not arise for it. However, if a contract has been concluded for the creation of a new thing, then the person performs production activities and here it is necessary to be guided by paragraph 2 of clause 1 of Article 218 of the Civil Code of the Russian Federation, where it is said that the manufacturer receives the right of ownership of products obtained as a result of the use of property based on Article 136 of the Civil Code of the Russian Federation. This norm stipulates that products created as a result of the use of a thing, regardless of who uses this thing, belong to the owner of the thing, unless otherwise established by law, contractual legal relations or does not follow from the substance of the relationship.

As a result, I see an incident that occurs when using clause 1 of Article 218 of the Civil Code of the Russian Federation and Article 136 of the Civil Code of the Russian Federation, indicating that the condition of creating a thing "for oneself" is superfluous in the norm under consideration.

A lot of questions arise when applying Part 1 of Article 218 of the Civil Code of the Russian Federation with respect to newly created real estate objects, and here the key problem concerns the establishment of a legally significant fact, namely the creation of a thing "for oneself", which determines the possibility of acquiring ownership of a new real estate object.

For the emergence of ownership of immovable property, it is necessary to have the fact of the creation of a real estate object as the basis for the acquisition of the right, as well as the state registration of this right in the Unified State Register of Immovable Property. In other words, it requires the emergence of several circumstances, each of which together forms a single legal basis for the emergence of property rights.

The current civil legislation does not disclose what exactly is meant by the creation of an immovable thing. If we refer to paragraph 1 of Article 218 of the Civil Code of the Russian Federation, then according to its meaning, ownership of a newly created real estate object can be acquired only if there are two mandatory conditions: firstly, a person must erect a real estate

<sup>132</sup> Herbutov, V. S. Overview of the Dissertations on the Topic of Unjust Enrichment /V. S. Gerbutov // Bulletin of Civil Law. 2008. No.2. P. 77–80.

<sup>133</sup> Commentary on the Civil Code of the Russian Federation, part 1/ed. T. E. Abova and A. Yu. Kabalkina. M.: Yurayt, 2011. 872 p.

<sup>134</sup> Novikov, K. A. Extension of Pledge on the Substitute Assets: on One Rule of Article 345 of the Civil Code of Russia /K. A. Novikov // Herald of Economic Justice. 2017. No.1. P. 82–102.

object for their own needs, and secondly, the entire construction process must comply with current legal regulations in this area. Based on this, the absence of at least one of the above conditions does not allow the right of ownership to immovable property to arise.

According to the criteria discussed above, it can be assumed that the person who created it can register a newly created object of immovable property only if he has all the necessary documents confirming not only the legality of the construction of the object, but also that the person built this property for himself. But if we turn to Articles 14, 18 and 40 of the Federal Law "On State Registration of Real Estate"<sup>135</sup>, they do not indicate the mandatory provision of a document stating that a person erected a newly created real estate object "for himself". In addition, in the Civil Code of the Russian Federation there are also no separate mentions of any document confirming the construction of a real estate object for their own needs.

Modern doctrine is critical of the possibility of applying the criterion "for oneself" when creating a new immovable thing.

According to R. S. Bevenko, Part 10 of Article 40 of the Federal Law "On State Registration of Real Estate" is directed against considering the criterion "for oneself" when creating real estate, because in such a situation, the emergence of ownership rights begins to depend on the facts and mutual obligations that are difficult to establish by third parties<sup>136</sup>.

Judicial practice often contradicts scientific views on this issue. For example, the Supreme Court of the Russian Federation, considering various disputes on the recognition of ownership of immovable property, quite clearly expresses its legal position: "The provision established in Part 1 of Article 218 of the Civil Code of the Russian Federation, as conditions for the emergence of ownership of a newly created thing, calls two legally significant circumstances: the creation of a new thing for itself and the absence of violations of the law when it was created"<sup>137</sup>.

However, in law enforcement practice it is quite difficult to find any clear instructions on how to determine the criterion for creating a thing "for yourself". Often, in the presence of a dispute about the ownership of a new thing within the scope of the subject of proof, in addition to compliance with legal regulations when creating a disputed real estate object, the courts pay attention to the fact of the creation of property by their own efforts or by their own means by a person who is a contender for ownership<sup>138</sup>. It seems to me that this shows that the courts consider more the involvement of the applicant for property in the process of creating a thing (the presence of personal labor or financing of construction), and do not literally take into account the mandatory condition for creating a thing "for themselves".

In such situations, the personal involvement of an individual in the creation of a real estate object (participation in construction work, financing, etc.) does not confirm that such actions of a person are aimed at creating a thing "for themselves". This follows from paragraphs 4 and 5 of the Resolution of the Plenum of the Supreme Court of the USSR of 31.07.1981 No.4 (ed. dated 30.11.1990) "On judicial practice in resolving disputes related to the right of personal ownership of a residential building"<sup>139</sup>, from which it follows that "the fact of assistance to the developer" is not a separate basis for the recognition of ownership rights. In the Ruling of the Supreme Court of the Russian Federation dated 11/23/2004 No.18-V04-574<sup>140</sup>, it is emphasized that the emergence of ownership of a part of the house for family members who assisted in its construction is possible if there are the following mandatory conditions: the existing agreement on the creation of common ownership of real estate and investment of labor and funds in the construction of a residential facility.

V. A. Alekseev, regarding the grounds for the emergence of ownership of newly created property, notes that "the determining factor for the concept of an object created for itself is the presence of the creator of the purpose of acquiring ownership of the object or part of it"<sup>141</sup>.

In my opinion, this position most clearly characterizes the condition under consideration for the acquisition of property rights, because new property is created by the free expression of the individual's will, which is implemented in practice as a result of certain actions by a person aimed at achieving a specific result. Such a result in this case is the emergence of ownership of new property based on paragraph 1 of Article 218 of the Civil Code of the Russian Federation. However, according to the Definition of the Supreme Court of the Russian Federation dated 05/21/2019 No.307-ES18-25854, this norm regulates the basis for the acquisition of such a right (by creating a thing for oneself), but does not regulate the moment

<sup>135</sup> On state registration of real estate: federal law dated July 13, 2015 No.218-FZ (as amended on December 30, 2020) // Collection of legislation. 2015. No.29 (part I). P. 4344.

<sup>136</sup> Bevenko R.S. The emergence of ownership of newly created real estate: commentary to Article 219 Civil Code of the Russian Federation/R.S. Bevenko // Bulletin of Civil Law. 2019. No.3. P. 137–153.

<sup>137</sup> Ruling of the Judicial Collegium for Civil Cases of the Supreme Court of the Russian Federation dated April 21, 2015 No.20-G15-3 [Electronic resource] // Reference and legal system "ConsultantPlus". URL: [http://www.supcourt.ru/stor\\_pdf.php?id=1320444](http://www.supcourt.ru/stor_pdf.php?id=1320444) (date of access: 28.03.2021).

<sup>138</sup> Resolution of the Arbitration Court of the Ural District of March 14, 2019 No.F09-463/19 in case No.A47-2521/2018 [Electronic resource]. URL:[https://kad.arbitr.ru/Document/Pdf/54ebe6c9-41b9-4595-a479-93d6cfe35224/1cb6ebe7-d502-4ac8-99bd-3564ea24b12a/A47-2521-2018\\_20190314\\_Reshenija\\_i\\_postanovlenija.pdf?IsAddStamp=True](https://kad.arbitr.ru/Document/Pdf/54ebe6c9-41b9-4595-a479-93d6cfe35224/1cb6ebe7-d502-4ac8-99bd-3564ea24b12a/A47-2521-2018_20190314_Reshenija_i_postanovlenija.pdf?IsAddStamp=True) (date of access: 28.03.2021).

<sup>139</sup> On judicial practice in resolving disputes related to the right of personal ownership of a residential building: Resolution of the Plenum of the Supreme Court of the USSR No.4 dated July 31, 1981 [Electronic resource] // Reference and legal system "ConsultantPlus". URL: [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_136496/](http://www.consultant.ru/document/cons_doc_LAW_136496/) (date of access: 03.24.2021).

<sup>140</sup> Ruling of the Supreme Court of the Russian Federation of 23.11.2004 No.18-B04-57 [Electronic resource] // Reference and legal system "ConsultantPlus". URL: <http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=ARB;n=196313#05536036890772267> (date of access: 27.03.2021).

<sup>141</sup> Alekseev, V. A. Real Estate Law of the Russian Federation. Real Estate Rights: General Problems /V. A. Alekseev. M.: Yurayt, 2020.

when such a right arises. According to the court, this rule should be applied in conjunction with the provisions of Articles 8.1, 131 and 219 of the Civil Code of the Russian Federation<sup>142</sup>.

According to the articles noted by the court, the right of ownership to newly created immovable property arises from the moment of making an entry about this right in the Unified State Register of Real Estate. As follows from Article 14 of the Federal Law "On State Registration of Real Estate", the state registration of real estate is carried out in the declarative order, therefore it is impossible to implement it without the direct will of the applicant for the acquisition of property rights. Given these circumstances, it can be assumed that the very fact of applying for state registration of a real estate object, as well as providing the necessary documentation for making an entry on the ownership of real estate in the Unified State Register of Immovable Property by the person who erected it, is proof that this person built this property "for himself" in order to subsequently obtain ownership of it. A person who participated in the construction of a real estate object, but did not set himself the goal of obtaining ownership of it, with a high degree of probability will not commit actions aimed at obtaining an undesirable right<sup>143</sup>. After all, the existence of the right of ownership implies not only the ownership of a real estate object, but also the assumption of responsibilities for the maintenance of this property, the risks of its destruction and damage (Articles 210, 211 of the Civil Code of the Russian Federation). This conclusion follows from Article 209 of the Civil Code of the Russian Federation, if interpreted in conjunction with Articles 8.1, 131, Part 1. Articles 218 and 219 of the Civil Code of the Russian Federation.

In my opinion, the condition established in Part 1 of Article 218 of the Civil Code of the Russian Federation on the creation of a thing "for oneself" is a legally significant condition for the acquisition of property rights, and this applies to both movable and immovable property. Thus, the current legislation does not contain clear legal criteria for confirming this condition, although law enforcement practice often indicates compliance with it as necessary for the acquisition of ownership of newly created property. We believe that the condition for creating a thing "for oneself" is subject to an expansive interpretation, therefore it should be established by the courts in each specific case, depending on the specific circumstances of the case.

As for the emergence of ownership rights to newly created immovable property, we believe that compliance with the condition of creating a thing "for oneself" is confirmed by the direct implementation by the person engaged in the construction of the real estate object of the state registration of ownership of this object in the Unified State Register of Immovable Property, in any case, before the emergence of possible claims by third parties.

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<sup>142</sup> Determination of the Supreme Court of the Russian Federation dated May 21, 2019 No.307–ES18–25854 [Electronic resource]. URL: [https://kad.arbitr.ru/Document/Pdf/fa8cf5dd-6d6e-4c76-bbac-b7d181dbde94/2c35f9a5-4949-4f57-9c91-b6770b9f5091/A56-21553-2017\\_20190521\\_Opredelenie.pdf?IsAddStamp=True](https://kad.arbitr.ru/Document/Pdf/fa8cf5dd-6d6e-4c76-bbac-b7d181dbde94/2c35f9a5-4949-4f57-9c91-b6770b9f5091/A56-21553-2017_20190521_Opredelenie.pdf?IsAddStamp=True) (date of access: 25.03.2021). 164 p.

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