

REVIEW OF THE INHERITANCE MEASURE IN THE NOTARY. DIFFERENCES BETWEEN THEORY AND ITS PRACTICE IN PRACTICE: THE CASE OF NORTH MACEDONIA

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Abstract: The institution of inheritance is an old, very important institution that has continuous and frequent application in daily practice. It is the only institution that enables the transfer of property rights and obligations from the deceased to other persons. The procedure for reviewing the inherited property is an uncontested procedure and as such it is regulated by the Law on Uncontested Procedure of 2008.

Northern Macedonia followed European standards by transferring non-contentious jurisprudence cases from the courts to notaries. The notary as a "trustee" of the court takes action and decides in accordance with the provisions of the Law on Uncontested Procedure and the Law on Inheritance. The notary directs and examines the inherited property only when there is no dispute over the facts or the application of the inheritance right. In the competence of notaries, among others, are the compilation of legal affairs from property inheritance issues such as legal wills, drafting of the contract for permanent maintenance, the contract for division of property, the contract for donation, etc.

This study analyzes the role of the notary in the examination of inherited property, identifies the differences between the theory and its application in practice, and highlights the legal gaps that enable non-realization of inheritance law by a certain category of citizens with vulnerable positions, such as married girls of the testator, extramarital minors, etc.

This study provides arguments for the introduction of the family register and further electronic digitization as a step towards the approximation of Macedonian inheritance legislation with European legislation. The positive Macedonian legislation does not provide for a public document that summarizes all personal data in one place for parents and for each child (married or illegitimate), which would facilitate the work of the notary, speed up legal circulation and increase legal certainty in property-inheritance legal relations.

This paper has a theoretical-empirical approach, using these methods: descriptive-comparative, analysis of positive inheritance legislation, and surveys with notaries operating in the Republic of Northern Macedonia. This study emphasizes the need for legal reforms in the inheritance scheme, as well as giving modest suggestions regarding the measures to be taken in order to improve the legal framework and drafting new policies.

Keywords: Notary, inheritance measure, Northern Macedonia, legal and procedural reform.

1. INTRODUCTION

This paper is structured in two parts: the first part (theoretical part) includes an in-depth analysis of legal provisions through which the procedure for reviewing the inheritance measure in the notary premises in the Republic of Northern Macedonia (hereinafter RNM) is regulated; while in the second part (empirical part), the attitudes and evaluations of notaries regarding the topics covered are summarized and analyzed.

The research hypothesis is as follows: *"The lack of electronic data related to the family organization of citizens enable/facilitate the concealment of legal heirs"*.

The research question is as follows: *"Are legal and procedural reforms needed in the procedure for reviewing the inheritance measure?"*

The notary service is considered as part of a strategic reform of the justice system, which aims to create a functional and efficient justice system. The modern era is characterized by three main groups of public notaries: Latin, Anglo-American, and Scandinavian. In continental Europe, the legal tradition is based on the Latin notary. This type of notary is represented in the RNM (Janevski, 2001:24).

In order to modernize the legal and political sphere, Northern Macedonia followed the steps of European states by accepting challenges and reforms based on the principles of the European Union. These principles required the dismissal of the judiciary from non-contentious cases, which enabled the growth and improvement of functioning of the legal system, which means more efficient and faster resolution of uncontested cases by notaries on the one hand, and disputed cases by the courts on the other (Janevski & Zoroska-Kamiloska, 2010: 116).

In the judicial system of the RMV, the institution of the notary public was promoted in the provisions of the Law on the Performance of Notarial Activities of 1996 (Janevski, 2001: 26). The scope of work and authorizations of

notaries is regulated by the Law on Notaries⁵⁸, according to which *“the Notary is a person who performs public authorizations defined by law, and performs services independently and impartially in accordance with the Constitution, law, international agreements that have been ratified in accordance with the Constitution of the Republic of Macedonia and other rules and general acts based on law”* (Article 3). In the competence of notaries are mainly cases that fall in the field of uncontested jurisprudence (Article 4).

With the enactment of the Law on Non-Contested Procedure⁵⁹, the notary gained competence in reviewing the inheritance as a “trustee of the court” (Articles 131-141).

Inheritance-property relations are regulated by legal and national acts. The legal framework includes: the Constitution⁶⁰, the Law on Inheritance⁶¹, the Law on Property and Other Real Rights⁶², the Law on Obligations, the Law on Non-Contested Procedure, and the Law on Notaries (Spirovi - Trpenovska, 2010: 153-271).

The Law on Uncontested Procedure states that *“in case of death or declaration of a missing person as dead, the body responsible for registering the death in the registry book of the deceased, within 30 days from the day of death must compile and submit the death certificate in the Inheritance Court”* (Article 142).

The death certificate is a document certifying the death of a natural person and contains personal data (name, surname, place of residence, occupation, date of birth, and death) of the deceased, personal data of children, husband and other persons who can be called to inherit based on will or law; data on the ownership of the testator, including the approximate value of real estate (immovable property) and movables, while, if possible, other data are recorded, such as: the location of the property left by the testator, if there were securities, items of value, savings book, or other important documents; if the testator has left debts, a contract for perpetual maintenance or an agreement for the assignment and division of property for beneficiaries, in the event of having left a will, and it is specifically stated whether the birth of the child of the deceased is expected, if the spouse or any of the children have passed away before the death of the testator, etc. (Article 145). *“The data for the compilation of the Death Certificate are taken from the persons who have cohabited with the testator, the testator's cousins or other persons who can provide the necessary information”* (Article 147).

Upon receipt of the death certificate, the court verifies whether it is competent to review the inherited measure. If it is not competent, it is declared incompetent by a decision, and submits the death certificate together with other necessary documents to the competent court (Article 161). The court, within 8 days from the receipt of the death certificate, entrusts the review of the inheritance measure to the notary. If there are more notaries, the distribution of the inheritance case is done in alphabetical order. The notary cannot refuse the entrusted work, unless there are justifiable reasons, and the justification of reasons is decided on by the court that has entrusted the work (Law on Notaries, Article 132). Upon receipt of the case, the notary checks whether the death certificate is complete and contains all the necessary data. If from the death certificate it is noticed that the deceased has no property, the inheritance will not be examined. The notary, during the review of the inheritance measure, must take care of: the rights and interests of minors who lack parental care, other persons who are not able to take care of their rights and interests and take measures to protect property (Article 164). At the request of the heirs or legatees, the notary is obliged to carry out an inventory and assessment of the inherited property in accordance with legal provisions. This is done in cases when the heirs are not known or their place of residence is not known, if the heirs are minors, persons with mental illness or are unable to take care of their own affairs, when the inherited property must be handed over to the RNM, as well as in other reasonable cases (Articles 146-148). In addition to legal inheritance, the notary also plays a role in testamentary inheritance. The will is opened and read in the presence of two adult witnesses. The minutes shall state the number of wills found, the date and place where they were found, who submitted the will to the court, whether the will was submitted as open closed, what stamp it bears, who was present

⁵⁸ Law on Notaries, Official Gazette of the Republic of Macedonia, No. 55/2007, No. 86/2008, No. 39/2009, available at: <https://www.pravdiko.mk/wp-content/uploads/2013/11/Zakonot-za-notarijatot-20-04-2007.pdf>

⁵⁹ Law on Non-Contested Procedures, Official Gazette of the Republic of Macedonia, No. 9/2008, available at: <https://www.pravdiko.mk/wp-content/uploads/2013/11/Zakon-za-vonparnichna-postapka-18-01-2008.pdf>

⁶⁰ The Constitution of the Republic of Macedonia with the Amendments of the Constitution I-XXX], available at: <https://www.sobranie.mk/WBStorage/Files/Kushtetuta%20e%20RM-se%20Final%20ALB.pdf>

⁶¹ Law on Inheritance, Official Gazette of the Republic of Macedonia, No. 47/1996, available at <https://www.pravdiko.mk/wp-content/uploads/2013/11/Zakon-za-nasleduvaneto-12-09-1996.pdf>

⁶² Law on Property and Other Real Rights, Official Gazette of the Republic of Macedonia], No. 18, 15.03.2001 available at: https://mioa.gov.mk/sites/default/files/pbl_files/documents/legislation/zakon_za_sopstvenost_i_drugi_stvarni_prava_konsolidiran_032018.pdf

during the opening and announcement of the will, if the seal in the will is damaged, erased, lined, or something has been improved in it (Articles 155-160).

During the examination of the inherited property, the notary certifies the possible heirs, the property that constitutes the inherited measure, the size of the inherited part of each heir, and the right of legacy (Article 171). The notary will examine the inheritance on the basis of the declarations and data at its disposal (Article 168). If in the procedure for review of inheritance all the heirs by agreement propose the manner of division, the notary will take note of that agreement in the decision on inheritance, if such disposition is not contrary to the legal provisions and the provisions of ratified international agreements and is in accordance with the constitution and morals. If there is a dispute between the heirs regarding the facts or the application of the law, then the notary terminates the procedure for reviewing the inherited property and instructs the potential heirs to initiate the contentious or administrative procedure (Article 173). The procedure for reviewing the inheritance ends with the issuance of a ruling on inheritance, in which case the heirs are announced and the part of the inherited property that belongs to each is ascertained (Article 177). The ruling is served on all heirs and persons who during the inheritance procedure have submitted a request for inheritance. If there are no heirs or it is not known if there is an heir and no one who proves that he/she is entitled to the examined inheritance is presented within the foreseen deadline, the notary will decide that the inheritance be handed over to RNM. If, after the entry into force of the decision on inheritance of the property of the testator, property is found that was not known to exist when the decision on inheritance was made, the found inheritance will be divided by a new decision based on the previous decision (Article 185). After the completion of the inheritance procedure, meaning after the entry into force of the decision, the notary returns the inheritance case to the court that has entrusted it to him and keeps in his archive scanned copies or written documents of the case in electronic form.

2. MATERIALS AND METHODS

For the needs of research are used methods: descriptive-comparative, historical, doctrinal research, analysis of legal acts in the field of inheritance such as the Constitution, the Law on Inheritance, the Law on Non-Contested Procedure, the Law on Obligations, the Law on Notary, the Law on Property and Other Real Rights, etc.

Primary data is taken from the survey (structured type). The surveys were distributed at the notary premises in the RNM and were completed by notaries (intentional sample).

3. RESULTS AND DISCUSSIONS

In order to obtain more detailed and in-depth information on the topics covered, a survey with 30 notaries was conducted.⁶³ The survey with notaries highlights the differences between the theory and its application in everyday practice as well as the arguments proving legal loopholes.

Table 1. Questions from the survey conducted with some notaries who operate in the RNM

Research Questions	Possible answer options	Results
1. How is the procedure for reviewing the inheritance measure initiated in current practice?	At the request of persons who have a legal interest (potential heirs)	78%
	The municipal civil status body notifies the court of the death of a natural person	22%
2. In everyday practice, which state body compiles the act of death?	Municipal civil status body	26%
	Notary	74%
3. Is there a legal requirement to verify the information provided in the death certificate?	Yes	0%
	No	100%
4. Does the lack of electronic data related to the family organization of citizens enable/facilitate the concealment of legal heirs?	Yes	68%
	No	0%
	Maybe	32%
5. Are legal and procedural reforms needed in the procedure for reviewing the inheritance measure?	Yes	85%
	No	15%
6. Would the entry into force of the family	Yes	63%

⁶³ The survey includes 6 questions through which we can understand more about the topics covered. The survey was conducted directly at the notary premises and were completed in the period from March 5, 2022 to April 28, 2022.

book facilitate and expedite the work of the notary during the examination of the inheritance measure?	No	0%
	Maybe	37%

This study highlights the legal shortcomings in the regulation of hereditary relations:

- The lack of initiation of inheritance cases according to the ex-officio principle - although the Law on Non-Contested Procedure obliges the municipal body, namely the competent official for recording the death in the registry of deaths, to send the death certificate to the inheritance court within the deadline set by law; in the current practice, the court does not receive notification from the municipal body as provided by legal provisions and in the absence of notification it is left to the potential heirs to initiate the procedure themselves. As a result, it happens that the inherited property is not examined even several years after the death of the testator and this leads to abuse and non-realization of the inheritance right for a category of citizens with vulnerable positions, such as the testator's married daughters or his/her illegitimate minor children;
- There is no legal requirement to verify the information provided in the death certificate - the death certificate is considered a very important document as the inherited property listed in it is divided only between the heirs listed in it (Article 144-146). The death certificate is drafted on the basis of data obtained from persons who have cohabited with the testator or have been close to him/her. These data are taken as reliable and there is no legal requirement for verification or research for the existence of heirs other than those listed in the death certificate.
- The lack of electronic data related to the family organization of citizens – allows for the possibility of false statements or fraud of various forms. Macedonian inheritance legislation does not provide a public document that in one place summarizes all personal data for parents and each child (marital or extramarital) which would facilitate the work of the notary as well as would ensure and guarantee the realization of the inheritance right of every citizen, especially when it comes to a vulnerable category of citizens. Based on the current practice in the field of inheritance, we can see that there are frequent cases when, as a result of lack of complete data, some heirs are deliberately deleted in order for other heirs to gain a larger share of the inheritance. These situations are made possible due to the fact that in positive legislation, there is explicitly no single document that summarizes and includes all personal data relating to parents and their children, all data on personal and family status of family members, as well as changes in personal and family status. To overcome such problems, a family book is needed, in which a document will incorporate all the data related to parents and children. The family book is issued upon marriage or the birth of the first child. This will facilitate the procedure for review of inherited property, the work of the notary, and at the same time will reduce the costs to citizens. On the other hand, this will increase legal certainty in legal property-inheritance relations. In comparative law, many legislations, apart from the birth register, the death register, and the marriage registry, also have the family registers. The family book is provided in German legislation, French legislation, Belgium, Switzerland, Spain, and Turkey.
- The need for legal and procedural reforms in order to ensure and guarantee the inheritance rights for every citizen of the RNM.

4. CONCLUSIONS AND RECOMMENDATION

Based on the theoretical and empirical data of the research, we observe obvious differences between the positive inheritance legislation and its application in current practice. Given the fact that legal loopholes allow for the misuse of the law and consequently make it difficult to secure and enforce the inheritance right of a vulnerable category of legal heirs, such as the testator's married daughters or illegitimate minor children, this research highlights the need for legal reform and therefore suggests the following:

- In a rigorous method, inheritance procedures must be initiated according to the ex officio principle, as provided by legal provisions, at the same time to provide penalties for the body or responsible official, in cases of failure to inform the court about the recording of death in the registry of deaths;
- To permit legal request for verifying the details noted on the death certificate;
- To allow the access of notaries to the database of the civil registry;
- To enter into force the family register as well as further electronic digitalization as a step towards the approximation of the Macedonian inheritance legislation with European legislation.

BIBLIOGRAPHY

- Azizi, A. & Neziri, L. (2020). "Common traditional norms against legal norms on the family property inheritance distribution between genders among the Albanians of Northern Macedonia". In Knowledge- International Journal Scientific Papers, Vol. 40.6, Skopje, ISBN 1857-923X. p. 1049-154.

- Azizi, A. & Neziri, L., (2018). "Between Law and Traditions- the Practice of (Non) Participation of girls from the Albanian Community in Macedonia in the Family Property Inheritance". In European Journal of Interdisciplinary studies, European Center for Science education and research, Rottenburg, Germany, ISBN 2411-958X. pp. 57-66.
- Kaprolli, F. (2017). "The role of the notary as a trustee of the court in inheritance procedure in Republic of Macedonia", In Knowledge- International Journal Vol. 20.3, Bansko, ISBN 1857-923X, p. 1535-1540.
- Janevski, A., & Zoroska-Kamiloska, (2010). "*Вонпарнично Право*", Skopje, p. 116.
- Janevski, A. (2001). "Нотарската Дејност во Р.М.", Notary No. 1, Notary Chamber of the R.M., Skopje, p. 24 – 37.
- Janevski, A. (2009). "Потреба од растоварување на судовите од неспорни работи", Notary No. 12, Notary Chamber of the R.M., Skopje, p. 30 – 41.
- Law on Non-Litigation Procedure, Official Gazette of the Republic of Macedonia, No. 9/2008.
- Law on Inheritance, Official Gazette of the Republic of Macedonia, No. 47/96.
- Law on Notary, Official Gazette of the Republic of Macedonia, No. 55/07, No. 86/2008, No. 39/2009.
- Neziri, L. (2019). "Analysis of property inheritance norms, institutions and procedures in the Republic of North Macedonia" In Knowledge International Journal Scientific Papers, Voll.35.5, pp.1507-1512, Bansko, ISBN 1857-923X. p. 1507-1512. p. 21-26.
- Neziri, L. & Azizi, A. (2018). "Правна основа за наследство на имот во Република Македонија и меѓународни практики", In 9th International Scientific Conference "International dialogue: east-west" International Center for Slavic education, Sveti Nikole, ISBN 1857-9299. pp. 21-27.
- Nikollovski Z. (2009). "Правна положба на нотарот како повереник во оставинската постапка", Notary No. 11 Notary Chamber of the R.M., Skopje, 2009, p. 5 – 12.
- Spirovic-Trpenovska, L., Mickovic, D., & Ristov, A. (2010). "Наследното право во Република Македонија, Skopje.