

INHERITANCE PROCEDURE AND REGULATION OF INHERITANCE PROCEDURE WITH A FOREIGN ELEMENT IN REPUBLIC OF NORTH MACEDONIA

Fjolla Kaprolli

International Balkan University-Skopje f.kaprolli@ibu.edu.mk

Abstract

The right to inherit is one of the most important human rights because through it are being transferred the ownership from the deceased to his heirs. The property also is considered as one of the fundamental human rights and as a fundamental value in the constitutional order of one country. In the Constitution of the Republic of North Macedonia the right to protect the ownership is raised as one of the most important values with which is guaranteed the right of ownership for every citizen. The meaning of inheritance is that it provides us with property security in the family, in the marital community also, and that everything that is gained within one family after the death of the testator/deceased will remain in the circle of that family. That is also the importance of civil law and inheritance law as part of it, everyone to be secured and to give security of the family as a basic cell in a society, to provide the existence of all members in the marital and family community. The topic of this paper is about the inheritance rights, subjects, inheritance in international aspect, and it will cover all the aspects related to them. So, in this paper the articles that regulates the inheritance procedure will be subject of analysis, especially those of Law on non-contentious procedure which regulates the inheritance procedure and a special attention will also be paid to the inheritance procedure for deciding about the inheritance property, where the international element is present.

Keywords: *Inheritance procedure, Inheritance procedure subjects, Law on non-contentious procedure, International inheritance procedure, Notary public*

Introduction

The significance of this paper rests on the importance of the inheritance institute and the procedure for dealing with the inheritance property, as one of the oldest institutes of civil law, one of the biggest non-contentious procedure, but also of the great social significance that it has for each individual. As a result of the transition, a process that is present today in every sphere and direction of economic and social life, as well as in many countries around the world, in our legal system the lawmakers are seeking a way that will result to a faster and efficient process in which it will be decided about the inheritance property. In the Republic of North Macedonia, the inheritance procedure is regulated by the Law on non-contentious procedure. This paper will attempt to focus on the meaning and significance of the inheritance procedure and also of the elements which are important for such a procedure, the work and powers of the notary public in the inheritance procedure as a trustee of the inheritance court which authority were possible after the bringing of the new Law on non-contentious procedure in 2008 and which innovation caused a faster and more efficient procedure and the subjects in the inheritance procedure without whom there will not be any inheritance procedure. Also, a special part in this paper will be dedicated to the inheritance procedure of international character i.e. of the inheritance procedure which contains the foreign element in it, the cases that may occur in practice and how they will be solved.

1. The notion and meaning of inheritance procedure

Inheritance procedure belongs to the category of non-contentious proceedings and as such is regulated with Law on non-contentious proceedings. The definitions that define this procedure are numerous and vary depending on the authors who make such definitions, but in general, the procedure for dealing with an inheritance can be said to be a matter of transfer of property, rights and obligations of the deceased to his heirs, after his death. Inheritance procedure is one of the biggest non-contentious procedure and belongs to the group of proceedings that regulates property relations. This procedure is regulated with Law on noncontentious proceedings from Chapter VII till Chapter XIII. In the cases of a lack of provisions in this law which regulates the inheritance procedure, the general provisions of

the Law on noncontentious will be applied, and if there is lack of those provision also, then the provisions of the Law on Civil Procedure will be applied.¹

The division and transfer of rights and obligations between the heirs arising from the property is not the sole purpose of the inheritance proceeding, but it has another, very important purpose also. It is the protection of both the inheritance and the interests of the participants in the proceedings. This protection is achieved through the establishment of temporary measures.

During the proceedings, the court in which the deceased had his residence, as well as the court in the area where the deceased property is located, can determine several provisional measures to secure the deceased inheritance property. This stage is optional and does not always occur during the inheritance procedure, and as such is of “temporary nature”.² However, in cases where there is a need to determine such measures, the court will be able to determine these measures during all stages of the proceedings. The judge can also withdraw them before the conclusion of the procedure, but only when he considers that the reasons and the circumstances which led the judge to determine them do not exist anymore. The circumstances that arise and because of which the judge is obliged to take measures to temporarily secure the legacy are set out in the Law on non-contentious procedure. The judge in the inheritance proceeding will order such a measure when: finding that none of the heirs are capable of managing the property and have no legal representatives, or if the heirs are not known or absent, and when the circumstances ask for such an attention.⁶ In such cases, the competent Administrative Authority will transfer all or only part of the estate of the deceased to a trustee.

The inheritance procedure raises a number of questions concerning: the deceased, heirs, inheritance, the rights and obligations of heirs, legates and third parties, as well as the grounds for invoking inheritance. A person who leaves behind him the property which

¹ *Law on Civil Procedure*, published in the Official Gazette of Republic of North Macedonia, no. 79 of 2005, with amendments no. 110/08, no. 83/09, no. 116/10, 7/11, and no. 124/15.

² Јаневски.А, Зороска – Камилоска. Т, (2010), *Граѓанско процесно право - Вонпарнично право*, Скопје,

pg.130 ⁶ Law on Civil Procedure, article 155

constitutes the inheritance property, can be any natural person. The condition for acquiring the ability of the person whose property can be inherited is that he should be declared dead and to leave behind him inheritable property.³ Without these two conditions the inheritance procedure cannot be initiated. This is because, first, if the person is not deceased, his heirs cannot be called to inherit, and secondly, if he has left no property, his heirs, who can be called after his death, they have nothing to inherit. Chapter 2 of the Law on Inheritance⁴ provides the succession lines in the case of legal inheritance. According to this Law, heirs are considered to be: the descendants of the deceased, his adoptive children and their descendants, the spouse, adoptive parents, parents, brothers and sisters and their descendants, grandparents and their descendants.⁵ Depending on the portion they may inherit from the deceased, the heirs can be singular or universal heirs. The estate in fact is the property, and it can be movable and immovable property, as well as real rights related to that property. Otherwise, the inheritance is also known as the subject of inheritance and as such is provided in the Law on inheritance, Article 2. Depending on the inheritance property of the deceased, it depends how much rights the heirs, the legates and the third parties, who have some interest in the inheritance, will have to realize. Lastly, as part of the inheritance procedure, the basis for invoking inheritance is also very important. Article 6 of the Law specifies two grounds for inheritance: the law and the will. The inheritance agreement according our law is not considered a base for inheritance.

The inheritance law together with the inheritance procedure has its origin with the appearance of the state itself, i.e. with its legal regulation, which means that the inheritance procedure occurred when the customary rules were replaced by legal rules. The institution of inheritance and the inheritance procedure have appeared as early as the first slave states, such as Egypt, Babylon, India, etc. It is known that the inheritance rules vary from one state to another, and according to the studies that were made by the anthropologists especially in studying and analyzing these rules have observed gender discrimination, or patrilineal inheritance, meaning that only men had the right to inherit. But over time, this discrimination

³ Podvorica. H, (2006), *E drejta trashëgimore*, Prishtina, pg. 41

⁴ *Law on Inheritance*, published in the Official Gazette of Republic of North Macedonia, no. 47 of 1996

⁵ *Law on Inheritance*, article 12, paragraph 1

has slowly begun to disappear, and in some states, it has disappeared at all. As an example, we can take the judiciary of ancient Islamic Law where to female heirs are given the opportunity to inherit, though not in equal parts as male heirs. Thus, male heirs inherited twice as much as female heirs. So, it is obvious that the position of women in history has been very discriminatory. Here we will focus on the connection between the two oldest sacred books, the Koran and the Bible, as well as their views on inheritance. There is a pretty big difference between these two books. According to the Bible⁶, a widow and sisters cannot inherit. Daughters can inherit only when their father has left no male heirs or sons. While at the pagan Arabs, before Islam, we can see the same discriminatory attitude towards female heirs, that is, only male inherited. This situation changed with the emergence of the Koran⁷, giving women the right to inherit.

It is not considered accidental the mentioning of the treatment of women throughout history in inheritance relationships, and thus her participation in the process of inheritance procedure. Today, according to the principle of gender equality and non-discrimination, women are treated in the same way as men in all aspects, such as: economic, political, social, etc. In North Macedonia and its democratic system all citizens are equal in inheritance. Equality in inheritance procedure is also stipulated in the Law on inheritance, according to which all persons are equal in inheritance in the same conditions.⁸ There are certain cases where the subject of the inheritance procedure may also be a foreigner. They will have the same inheritance rights as the citizens of North Macedonia, but only if there is reciprocity between North Macedonia and the state of the foreign citizen. At the same time, this ensures gender equality in inheritance, even that women in every proceeding where the deceased property is being divided appear as subject, but because of the tradition, from generation to generation, regardless of the rights they inherit based on the law or the will, they remain passive until the end of the procedure. After numerous conversations with the judges of the Basic Court in Gostivar and authorized notaries of those courts, we came to the conclusion

⁶ The Old and New Testament Scriptures (Bible), Sixth Edition, Tisk: Delo - Tiskarna, Ljubljana, no. 27: 1 - 11

⁷ Koran el Ahram, Kaljub-Kairo, (1414)-1994, 4:7, 11, 12, 176

⁸ *Law on Inheritance*, article 3

that there is a small number of women that accept their part of the inheritance, which part belong to them by law.

Inheritance and its procedure in addition to social, have economic significance as well. In other words, all of this implies the significance of this procedure for both the society and the economy of the state, as well as for persons who are related in one way or another to the deceased inheritance property. To find out the social and economic significance of the inheritance procedure, we first need to reveal the social and economic effects of such a procedure. The inheritance property is an integral part of every family's property, economic institutions and laws, which has an impact on the distribution of property on a social level. Based on a research, both at national and international level, quite interesting results are achieved. In most cases a person's background and education are taken as a criterion for promoting that person. But these two terms play a very minor role in man's progress in comparison to the role of the heir's inheritance, especially if the inheritance portion has increased over time, according to which that property and other assets have been subject to the inheritance property inherited from generation to generation. In poor countries where the probable portion of inheritance can be quite small or nonexistent, the number of suicides and illnesses, such as diabetes and hypertension, is quite high.⁹ On the other hand, in countries with rich and stable economies, where heirs have the opportunity to succeed, such persons are given a completely different status, i.e. a higher status in society, as well as the opportunity for greater economic development and promotion. Another economic importance of this procedure is also the fact that the state can more easily collect the debts that the citizens owe to it, as well as avoid the possibility of any dispute between the subjects in the procedure.

2. Subject of inheritance procedure

The Law on non-contentious procedure regulates the inheritance procedure in detail. From the very beginning of the Chapter VII which contains the provisions of this procedure, the subjects of the procedure have been specified, in it is stated everything crucial for the procedure and what terms are relevant to the same as well. At the beginning of Chapter VII

⁹ Dubner. S, (2008), *How big of a deal is income inequality? A guest post*, The New York Times

of the Law on non-contentious procedure¹⁰, it is stated that in the inheritance procedure, the court determines the deceased's heirs, then determines the property that constitutes his inheritance and the rights and obligations arising from the deceased inheritance for the heirs, the legates and third parties.¹¹

Upon the death of a person, i.e. after a final decision is brought by which a missing person is declared dead, in order to transfer the property of the deceased or the person declared dead to his heirs and thus transfer his rights and obligations to the notary public, certain tasks appear. Initially it should determine who are the heirs of the deceased person who will be the holders of the deceased rights and obligations, to determine the basis on which the heirs have the right to inherit (law, will), then as a result of the data from the cadastral books or from the registered books, data from the inventory and appraisal of the estate, the notary is obliged to determine the size and value of the property. Subsequently, the notary public, by law or will, will determine who will be singular and who universal heir, and then will determine the existence of the legates, the bearer of the costs of the procedure, and many other important issues which are determined by law. The notary public will always rely on the provisions governing the litigation procedure as general rules (*lex generale*) and on the provisions governing non-contentious proceedings, which directly deal with the procedure for disputing the inheritance, rules which they are known as *lex specialis* – Law on non-contentious procedure.

3. Inheritance procedure with foreign element

In the civil legislation of North Macedonia, for both legal and testamentary inheritance, the Law of the State whose citizenship had the deceased, will be applied. This is stipulated in the Law on International Private Law¹², which states that "the inheritance is the right of the state whose citizen was the deceased at the time of death".¹³ But not in all cases article 35 of

¹⁰ *Law on non-contentious procedure*, published in the Official Gazette of Republic of North Macedonia, nr. 9/2008

¹¹ *Law on non-contentious procedure*, article 120

¹² *Law on International Private Law* published in the Official Gazette of Republic of North Macedonia, no. 87/2007, 156/2010

¹³ *Law on International Private Law*, article 35

this law is specific, as there are cases whose solutions provide flexibility of this Article. These cases are foreseen in the Law on non-contentious procedure in the part where it is regulated the inheritance procedure for which is competent foreign authority. The Law on non-contentious procedure foresees the case when the Inheritance Court of North of Macedonia, or the notary public as its trustee, is competent for inheritance proceedings. In determining whether the court or the notary public, as its trustee, is or is not locally competent, and whether they are competent to conduct the inheritance proceedings where the international element is present, the rules of the Law on International Private Law will be taken into account.

In the cases when the deceased is a citizen of North Macedonia, while his/her residence is in another country, the notary public will be competent to decide about the inheritance only if the rules of that state in which the deceased inheritance property is located allow this, i.e. when according to the rules of that state, the authority is not competent to decide about his inheritance, that is, his real estate.¹⁴ The same case occurs when the foreign authority of the state, where the inheritance property of the deceased (real estate), who is a citizen of North Macedonia, refuses to decide about the inheritance, is authorized by the court of North Macedonia to entrust the inheritance case to the notary as his trustee.

As a result of globalization, the process of movement of capital, of services, and of people in particular has begun, a process that has also been present in the Republic of North Macedonia as well as in other developing countries. Therefore, there are frequent cases when at the moment of death of the person, although a foreign citizen, he/she had last residence or residence in the territory of North Macedonia. In this case, the question of the competence for deciding for the inheritance of the authority is raised. The focus should always be concentrated on the location of the property or the real estate of the deceased (foreign citizen). If the deceased real estate is located in North Macedonia, the Inheritance Court of North Macedonia is exclusively authorized to decide about the inheritance, and thus the notary public as a trustee of that court. The only condition to be met in this case, i.e. when it comes to the inheritance procedure, where the international element is present, is the

¹⁴ *Law on non-contentious procedure*, article 126. paragraph 4

existence of reciprocity between the states, i.e. the state whose citizen is the deceased person and Republic of North Macedonia.

The same thing occurs when the deceased estate (foreign citizen) is consisted of movable property. In such cases, the notary public in whose region the foreign citizen has resided will only be competent when in the state of the deceased the authority is not competent for deciding about the inheritance property.¹⁵ In the event of an inheritance dispute arising out of the claim of the creditors against the deceased (foreign national) inheritance property, if his real estate is located in the territory of North Macedonia, the court in whose region that property is located will be competent for conducting the inheritance procedure. Also, when it comes to a dispute of an inheritance nature and the claim of creditors over the inheritance of movable property of the deceased who is a foreign citizen, the Court of North Macedonia will be competent, if the court of the state which citizenship had the deceased does not have jurisdiction to decide about his inheritance property, if it is consisted of movable property or immovable property (article 85, paragraph 3 of the Law on International Private Law). In order to secure the inheritance property of the deceased, who is a foreign citizen from various misconducts, as well as to protect the rights deriving from the inheritance located on the territory of North Macedonia, and when the court of North Macedonia will not be competent to decide about the transfer of the inheritance property for which competent is the authority of the state whose citizen was the deceased, in those case the court of North Macedonia can determine measures and for their determination to inform the competent foreign body. It should be emphasized that only the court can determine measures for securing the inheritance property, not the notary as his trustee.

In addition to the above mentioned Law on non-contentious procedure provision, more precisely article 126 of this law, also the Law on International Private Law contains provisions that analogously resolve the issue of jurisdiction of the court to deal with the inheritance of a citizen of North Macedonia when his real estate or movable property are abroad. Thus, the Law on international private law also contains a separate article (article 84) which regulates the international jurisdiction over the disposition of property in the case

¹⁵ Стоев.Ф, *Положба и овластувања на нотарот како повереници на судот во оставинската постапка*, Нотариус, no.11, pg. 14

of a deceased Macedonian citizen and international jurisdiction in the case of disputes arising from creditors and lawsuit against real estate. According to this article, the court of North Macedonia, i.e. the notary public as its trustee, will be exclusively competent for deciding about the inheritance property, when it is composed of real estate located in North Macedonia and when the deceased was a citizen of North Macedonia. As stated above, due to the movement of people and capital as a result of globalization, the real estate of the citizen of North Macedonia can be also located abroad. In such cases, the court of North Macedonia will be competent in inheritance procedure only if according to the rules of the state in which the real estate of the deceased who was a citizen of North Macedonia, its authority is not competent (Inheritance Court or the notary public as its trustee and if in that state the notaries have jurisdiction to conduct inheritance procedure).¹⁶ In the same way it will be conducted in cases when the inheritance of the deceased – citizen of North Macedonia, is consisted of movable property that are not located in the territory of North Macedonia, and when, under the law of a foreign State, in which the movable property of the deceased is located, the foreign authority is not competent or if that authority refuses to decide for the estate of the deceased consisting of movable property. In these cases, the court of North Macedonia or the notary public as its trustee will be competent to conduct and to decide in inheritance procedure. In a case of a dispute over a claim by the creditor against the property of the deceased who is a citizen of North Macedonia and when the real estate is located in the territory of North Macedonia, then the court in North Macedonia is competent to resolve disputes of this nature.¹⁷ In these cases, competent in territorial aspect is the court in whose territory the court conducts the inheritance procedure. Also, in the event of inheritance-legal disputes as well as creditors' claims disputes, the court of North Macedonia will also be competent when the real estate is located abroad, if according to the rules of that state its authority is not competent for resolving the emerging dispute. The same thing happens when the movable property of the citizen of North Macedonia is abroad, but the court of that state refuses to settle the same dispute related to the inheritance or if the law of that state excludes the jurisdiction of his court to resolve that specific dispute. A special category of persons, and in most of the case undesirable for many countries in the world, are stateless persons or

¹⁶ *Law on International Private Law*, article 35, paragraph 2

¹⁷ *Law on Civil Procedure*, article 55

persons with refugee status. We say that they are undesirable because of the frequent conflict of laws when it comes to the inheritance procedure. Most states today have attempted to completely regulate the issue of these category of people when it comes to decide about the inheritance property. Thus, paragraph 1 of article 86 of the Law on International Private Law stipulates that the for the inheritance procedure in which the subject in the procedure are the stateless persons or refugees, competent will be the Inheritance Court or the notary public as its trustee. In the same way will be solved the inheritance case of stateless persons or refugee when it comes to movable property located in the territory of the North Macedonia, or when the stateless person or the refugee had permanent or temporary residence in the region of the Inheritance Court, or of the notary public as his trustee.¹⁸ In all of the above cases it should be emphasized that if it is verified that the deceased is a citizen of North Macedonia and has immovable or movable property abroad, the foreign authority will be competent to conduct an inheritance procedure and as for the notary public, he will declare himself as non-competent for deciding in the inheritance procedure by written notice to the Inheritance Court in whose region the deceased had his domicile or last residence. In addition, the notary public will not be competent to decide about the inheritance of the deceased, who is a foreign citizen and who at the time of his death had a residence or domicile in the territory of North Macedonia, if there is no reciprocity between North Macedonia and the State of the foreign citizen/deceased. In those cases, the foreign authority, i.e. the foreign Inheritance Court, is competent to conduct the inheritance procedure.

Summary

The Republic of North Macedonia, not only in the political field, but also in the legal field, in order to modernize it, has accepted all the challenges and changes, based on the principles of the European Union which in the field of the judiciary required the discharge of the judiciary from certain jurisdictions, in particular those cases which are considered undisputable. The Republic of North Macedonia is also following in the footsteps of countries of EU, and started to discharge the courts from non-contentious cases. In the group of non-contentious procedure, from 2008 also included the inheritance procedure. The discharge of courts in North Macedonia was accomplished through giving the notary public

¹⁸ *Law on International Private Law*, article 86, paragraph 2

in non-contentious procedures authorization to decide in inheritance procedure which enabled reducing of the costs for citizens, as well faster and far better quality of the decisions that were product of the work of notary public. Although Law on non-contentious procedure at first seems perfect and without any imperfections, still as a result of everyday practice of notary public it is concluded that there is a space for some changes in this law especially when it comes to some issues that will make the procedure even more efficient such as issues related to the expenses of the procedure, representation of the participants in the procedure in front of the notary public, issues related with the deadlines in the procedure and similar. That the powers and authorization that were given to the notary public through the new Law on non-contentious procedure are proven as successful, is shown by the satisfaction of the citizens who through their personal communication with the notary are notified for their rights and duties, as well with the satisfaction of the quick way of finishing “the job” – fast completion of the inheritance procedure. So, citizens are the best indicator for the way how the inheritance procedure will be conducted and proceeded according to the Law on non-contentious procedure, and for the successful development of the legal system in Republic of North Macedonia and also a successful inheritance procedure.

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