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ОСОБЕННОСТИ ИСПОЛНИТЕЛЬНОЙ НАДПИСИ НОТАРИУСА КАК СПОСОБА ОХРАНЫ ПРАВА СОВМЕСТНОЙ СОБСТВЕННОСТИ СУПРУГОВ

В статье исследуется специфика совершения исполнительной надписи нотариуса в процессе охраны права совместной собственности супругов. Автор определяет требования к исполнительной надписи, основания его совершения, последствия, особенности уведомления должника и обязанности взыскателя, предлагает соответствующие изменения в национальное законодательство в исследуемой сфере.

***Ключевые слова**: исполнительная надпись нотариуса, охрана права общей собственности, супруги, должник, взыскатель.*

Nikituk Olena

FEATURES NOTARY EXECUTIVE HEALTH AS OF SPOUSES JOINT OWNERSHIP

The article deals with the specifics of the executive commission of notary in the protection of rights of joint ownership of spouses. The author defines the requirements for the writ of execution, the grounds commit effects, features and responsibilities debtor message recipient suggests relevant changes in national legislation in the field of study.

***Keywords:** executive inscription notary, public rights of common property of spouses, the debtor, creditor.*

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NOTARIAL AND JUDICIAL SUCCESSION CERTIFICATE, TAKING INTO ACCOUNT THE JURISPRUDENCE ON THIS SUBJECT

The article deals with legislation relating to the procedure for acquisition of inheritance. The European certificate of inheritance and the document confirming the right to inheritance is analysed, and legal consequences arising for heirs is made.

***Keywords:** notary, inheritance, testimony, universal succession, court.*

In the Polish legal system, as a result of the enactment of the Act of 24 August 2007 on amending the Act – the Notary Public Law and other acts [1], a significant change in the method of documenting the acquisition of the inheritance by the heirs has been introduced. The essence of this change is to replace the existing status of the decision issued by the court confirming the

acquisition of the inheritance with a system, in which documenting the rights by the heir can be done alternatively – either with the decisions of the court, or on the basis of a certificate issued by a notary, defined by the legislator as "a deed of succession certification"[2]. The idea behind this change was to relieve the courts of actions that can be performed in a different mode [3]. It is also important to point out the significance of the works aiming at creating a European Certificate of Inheritance [4], as a document, which does not have to come from the court, which is effective throughout all Member States, confirming the right to inheritance. The regulation also introduces a European Certificate of Succession. This document is issued by the authority conducting the inheritance proceedings for the needs of heirs, legatees, executors of the testament or administrators of the estate, and can be used, when it is necessary, to prove their rights and privileges in other Member States [5]. Upon its release the European Certificate of Succession is recognized in all Member States without the need for special procedures. In connection with the new, alternative way to determine the right to inheritance, the basic assumptions and characteristics of both modes and their mutual influence will be indicated.

The Polish law does not impose a duty to obtain the confirmation of acquisition of inheritance or the deed of succession certification by the heir [6]. Without the confirmation of acquisition of inheritance or the notary succession certificate, the heir can perform legal and factual actions concerning the inheritance, and in particular may possess the inheritance, manage it, and benefit from it [7]. The heirs may also sell the inheritance or part of it, and dispose of objects (items, debts etc.), which belong to them [8]. Without the confirmation of the rights to inheritance, the hairs may also bring an action pursuant to Art. 1029 of the Civil Code [9] and prove in this dispute that they are the heirs [10]. These documents are also not necessary for the creditors of the deceased, legatees or persons entitled to a legitimate to bring a legal action against the heir [11]. All these legal consequences arise for the heirs, not from the subjective right arising from inheriting, but from the fact that they became the owner of the items included in the inheritance under the law at the time of the testator's death, and so actually these effects are covered by the construction of universal succession.

Lack of the decision confirming the acquisition of inheritance does not prevent a third party from brining a legal action against the heirs. A third party who does not claim rights to inheritance, may prove a right to the legal succession after the deceased with all the evidence, because in this field the rule of Art. 1027 of CC cannot be applied. This is independent of whether the party proves the existence of any subjective right of the heirs or not. A. Szpunar indicates that the construction contained in that provision was supposed to be in favour of the existence of subjective rights resulting from the inheritance. The deed of succession certification is an additional, next to the decision confirming the acquisition of inheritance, document, by which the heir can prove the right to inheritance. The preparation of the deed of succession certification is a conventional activity involving the confirmation, in the form of a notarial act, of the fact of a statutory or testamentary inheritance, with the exception of inheritance based on special testaments, performing of which needs to be done in a presence of a notary or other authorized person, taking into account the specific elements and principles, which are required by the provision of the law or the will of the parties [12].

1. Judicial succession certificate

Final decision of the court confirming the acquisition of inheritance by statutory heirs (Art. 931-937 of CC) or testamentary successors (Art. 959-967 of CC) creates a legal presumption that the person mentioned in the decision is the heir (Art. 1025 § 2 of the Civil Code), entitled to claim the right to inheritance against third parties who do not claim any rights to inheritance (Art. 1027 of CC) and to dispose of the rights that are included in the inheritance, with the consequences arising from Art. 1028 of CC for third parties [13].

According to Art. 1025 § 1 of CC, the decision confirming the acquisition of inheritance is made at the request. Only in the case provided in Art. 681 of CCP the court shall confirm the acquisition of inheritance *ex officio*. As for the repeal or change of the *ex officio* final confirmation of acquisition of inheritance compare Art. 678 and 690 § 2 of CCP.

Persons having an interest in seeking confirmation of acquisition of inheritance (Art. 1025 § 1 of CC) are in particular: the actual or implied heir, the person who has common rights or obligations with the testator, the creditor of inheritance or the creditor of heirs, the buyer of inheritance or part of inheritance, the legal successors of the above-mentioned persons, as well as the executor of the testament and the inheritance curator. According to Art. 1109 of CCP, in relation to inheritance opened abroad, but under the jurisdiction of the Polish court, pursuant to Art. 1108 § 1 of CCP, the request for confirmation of acquisition of inheritance may be filed by a Polish diplomatic mission or consular office. As pointed out by the Supreme Court [14], the requirement of the court during the proceedings for confirmation of acquisition of inheritance for determination whether a person claiming its share in such a case has a legal interest conditioning the possibility of becoming a participant in the proceedings, is not detrimental to the rights and freedoms declared in Art. 21 paragraph 1 and Art 64 paragraph 1 of the Constitution of the Republic of Poland and Art. 8 of the ECHR.

The subject of the applicant's requests is the confirmation of acquisition of inheritance after a particular testator. However, the claim to confirm the acquisition of inheritance in favour of certain persons is not an essential part of the content of the request, as the court, regardless of the applicant's claims, confirms the acquisition of inheritance by the real heirs (Art. 677 § 1 of CCP) [15]. The applicant must, however, indicate in the request as concerned, the persons who are not only mentioned in the testament, but also those who are entitled by the law to the inheritance,

include information about the testaments prepared by the testator, and in the case of the statutory inheritance – also about any farm or land contribution in any agricultural production cooperative included in the inheritance [16]. The application must be accompanied by the proof of death of the testator and the proof stating the last place of residence of the deceased, unless the place has been given in the submitted document from the files of civil status.

The hearing is mandatory, unless the content of the request states an obvious lack of the entitlement of the applicant (Art. 514 § 2 of CCP). The obligation to summon to a court hearing of the people who can be established as statutory or testamentary heirs, states that summoning of the statutory heirs is necessary even if the testator in the testament established the heirs to the entire inheritance estate and if the last will does not arise any objections as to its validity, and this is to allow them to defend their rights [17].

At the stage of confirming the acquisition of inheritance, beyond the scope of jurisdiction of the court are issues such as: the composition of assets of the inheritance estate, debt burden, the inclusion by the testator in the testament of records and commands as well as information on how the inheritance was acquired. Beyond the scope of jurisdiction of the court in the proceedings for the confirmation of acquisition of inheritance is the question of the method of the acquisition of inheritance [18]. It is not permissible to appeal against the lack of information stating that the acquisition of inheritance occurred with the benefit of inventory in the decision confirming the acquisition of inheritance [19]. On the other hand, the inclusion in the operative part of the decision of the information on the direct acquisition of inheritance can be the subject to appeal [20].

The party seeking the release of the real estate, which is obliged by the court to submit – under pain of suspension of the proceedings – the decision confirming the acquisition of inheritance, has an objective purpose in initiating the proceedings to obtain such a decision. This means that the party has an interest in bringing proceedings for a confirmation of acquisition of inheritance. It cannot be assumed that for obtaining the status of the person concerned it is necessary to receive the results of the court's evaluation of the validity of claims for the release of the real estate. Such an evaluation would go beyond the jurisdiction of the court and wouldn't have any significance in the case of the release of the real estate. In the light of Art. 1025 § 1 of CC the request for the confirmation of acquisition of inheritance can be submitted by anyone who have an interest in it. This may be any person who is interested in causing the legal consequences associated with the final confirmation of acquisition of inheritance, in particular the consequences specified in Art. 1025 § 2 and Art. 1027 of CC. The legal interest in this case acts as a legitimacy, and precisely – as an entitlement to initiate proceedings for the confirmation of acquisition of inheritance [21].

2. Notarial succession certificate

The Act of 24 August 2007 on amending the Act – the Notary Public Law and other acts amended Art. 1025-1028 of CC. It introduced the notarial succession certificate alongside the court's decision confirming the acquisition of the inheritance.

The deed of succession certification drawn up by a notary refers both to statutory and testamentary inheritance, but excluding inheritance based on special testaments (Art. 95 of the Notary Public Law [22]). Registered deed of succession certification causes the same effects as a final court decision on the confirmation of acquisition of inheritance (Art. 95j of NPL)[23]. In particular, creates a presumption that the person who has obtained a succession certificate is the heir (Art. 1025 § 2 of CC), and that this document is, next to confirmation of acquisition of inheritance for a third person who does not claim the rights to inheritance due to succession, the sole proof that the heir has legal rights resulting from the succession (Art. 1027 of CC)[24].

Before the preparation of the deed of succession certification, the notary draws up an inheritance protocol with the participation of all persons who may come into consideration as statutory or testamentary heirs (Art. 95b and 95c of NPL)[25]. After completing the inheritance protocol the notary draws up the deed of succession certification if there are no doubts as to the existence of the national jurisdiction, the content of the applicable foreign law, the heirs and their share of inheritance (Art. 95e § 1 of NPL). The notary includes on the inheritance protocol the information that the deed of succession certification has been drawn up (Art. 95g of NPL). The notary refuses to draw up the deed of succession certification in three cases mentioned in Art. 95e § 2 of NPL. The content of a deed of succession certification is defined in Art. 95f § 1 of NPL[26].

According to Art. 95h § 1 of NPL, the notary immediately after the preparation of the deed of succession certification, makes its entry in the register of deeds of succession certification (from 8 September 2016 – the Inheritance Register) by inserting, through information and communication system, the data referred to in Art. 95h § 2 points 3 to 7 of NPL. The notary signs the entry with a safe electronic signature verified by a valid qualified certificate. The notary, after receiving the confirmation of registration of the deed of succession certification, put an annotation of the registration on the deed (Art. 95h § 3 and 4 of NPL, from 8 September 2016 – Art. 95h § 2 and 3).

Article 95j of NPL indicates that the registered deed of succession certification has the effects of a final court decision on the confirmation of acquisition of inheritance. Other provisions, both substantive and procedural, indicate an equal position of the court's decision on the acquisition of inheritance and the deed of succession certification regarding the effect, which is to identify the persons entitled to the inheritance estate and the size of their shares.

3. Mutual relations between the notarial and judicial succession certificates

Article 1025 of CC indicates two ways to obtain the confirmation of acquisition of inheritance by the heir: through court proceedings and before a notary. According to § 2 of this provision the same presumption of being the heir is made in relation to people who have a final decision confirming the acquisition of inheritance, as well as the registered deed of succession certification. Also, other provisions of the Civil Code involve the same, as described in these regulations, effects of the two mentioned ways of confirming the rights to inheritance.

Article 1026 of CC indicates that the confirmation of acquisition of inheritance and the succession certificate of inheritance cannot take place earlier than six months from the opening of the inheritance, unless all known heirs have already submitted the declaration of acceptance or rejection of the inheritance. The judicial confirmation of acquisition of inheritance and the succession certificate are mentioned together, resulting in the same legal effects, in further provision of the Civil Code, i.e. Art. 1026, 1027 and 1028 of CC.

The deed of succession certification is drawn up by a notary and is included in the notarial actions of a separate nature, not constituting a notarial deed [27]. The deed of succession certification is therefore considered a judicial succession certificate, although made by a notary. Despite equality in many aspects, the decision confirming the acquisition of inheritance and the considered deed, the legislature gives priority to the court's decision confirming the acquisition of inheritance [28].

Despite the equal status of the judicial and notarial confirmation of rights to inheritance, the latter is a subject to a number of important limitations. Those are mainly the result of the assumptions that formed the basis of creation of the institution of the notarial succession certificate, as a form of acknowledgment of rights to inheritance in indisputable and simple situations. The first is ensured by the obligation to participate in the notarial actions of all persons who may come into consideration as statutory and testamentary heirs. The second is secured by the limitation of possibilities of obtaining a notary certificate confirming the rights to inheritance only to cases of statutory inheritance and inheriting on the basis of ordinary testaments. The special testaments are excluded, with an indication that in relation to this category of testaments "it is a rule to conduct evidentiary proceedings, during which it is necessary to examine witnesses of the testament, to assess the reliability of the statements submitted by them, and these actions should naturally be reserved exclusively for jurisdiction".

According to Art. 95a of NPL, the notary draws up the deed of statutory or testamentary succession certification with the exception of inheritance based on special testaments [29]. This regulation lists only some limitations of the notarial way to obtain the succession certificate. There are subjective and objective limitations during the preparation of the notary certificate. Therefore, the notary will not draw up the deed of succession certification if the inheritance is based on a special testament, if there is no consistent request of the parties for settling the inheritance by a notary, if, after the preparation of the written inheritance protocol, the notary has doubts as to the heirs and their share of the inheritance, and if the testator made a debt collection record in relation to the person to whom the testator made the record and the subject of the record (Art. 95e § 1 of NPL), due to absence of spouse of the deceased and relatives entitled to statutory inheritance, the inheritance falls on the statutory heir, the municipality or the State Treasury (Art. 95e § 2 point 3 of NPL), the testator at the time of death was a foreigner, or not having any nationality, did not live in the Republic of Poland or in the inheritance includes property rights or possession of real estate located abroad (Art. 95e § 2 point 4 of NPL), the inheritance was opened before 1 July 1984, while meeting all necessary prerequisites, the testament (with the exception of the notarial testament), which is the basis for inheritance, was filed in court [30].

Apart from the above-mentioned negative circumstances, which exclude the possibility of a notary succession certificate [31], the notary will refuse to issue the deed of succession certification, if the opening of the inheritance occurred earlier than six months ago, and not all heirs and the persons entitled due to the vindication record submitted statements of acceptance or rejection of the inheritance (Art. 95c § 3 of NPL), the parties have not submitted to the notary all of the legally required documents to draw up the inheritance protocol (Art. 95c § 4 of NPL), a decision confirming the acquisition of inheritance has been previously issued in relation to the inheritance (Art. 95c § 2 point 4 and Art. 95e § 2 point 1 of NPL), court proceedings for the confirmation of acquisition of inheritance are pending (Art. 95c § 2 point 4 of NPL), the deed of succession certification has been previously issued in relation to the inheritance (Art. 95e § 2 point 1 of NPL), the course of preparing the inheritance protocol reveals some circumstances, which indicate that during its preparation not all persons who may come into consideration as statutory or testamentary heirs or the persons on whose favour the testator made vindication records were present, or if other testaments, which were not opened and announced, exist or existed (Art. 95e § 2 point 2 of NPL)[32].

Doubts are also raised by the way of processing the request for confirmation of acquisition of inheritance in a situation where, before closing the trial, the deed of succession certification considering the same inheritance is drawn up and registered, and in particular whether there is a basis for the rejection of the request. Although the deed of succession certification has the effects of a final decision confirming the acquisition of inheritance, it does not benefit from the principle of *res judicata*. It is indicated that in such a situation the deed of succession certification can be treated at most as the so-called alternate adjudication of the case and justify the dismissal of the request for confirmation of acquisition of inheritance [33].

4. Conclusions

Upon the registration the deed of succession certification drawn up by the notary has the effects of a final decision confirming the acquisition of inheritance, which means that only a registered deed creates a legal presumption that the person mentioned in the deed is the heir [34]. This deed has therefore the consequences of a final court decision on the confirmation of acquisition of inheritance. This means that the activity of a notary obtains the status of a judicial decision, as in the decision on the confirmation of acquisition of inheritance, we also deal with the legal presumption arising directly from Art. 1025 § 2 of CC.

The court decision on the confirmation of acquisition of inheritance and the notary succession certificate have an equal status. According to Art. 1025 § 2 of CCP, it is presumed that the person who has obtained the confirmation of acquisition of inheritance or the succession certificate is the heir. Art. 95j of the Act of 14 February 1991 on the Notary Public Law constitutes that the registered deed of succession certification has the effects of a final decision on the confirmation of acquisition of inheritance. It seems that the notary succession certificate is justified in the absence of a dispute between the heirs.

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Джоанна Студзінська

НОТАРІАЛЬНЕ ТА СУДОВЕ СВІДОЦТВО ПРО ПРАВОНАСТУПНИЦТВО: НА МАТЕРІАЛАХ СУДОВОЇ ПРАКТИКИ

У статті розглянуто законодавство, що стосується порядку придбання спадщини. Проаналізовано європейське свідоцтво про право на спадщину, як документ, що підтверджує право на успадкування, а також правові наслідки, які виникають для спадкоємців.

Ключові слова: *нотаріус, спадщина, свідоцтво, універсальне правонаступництво, суд.*

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НОТАРИАЛЬНОЙ И СУДЕБНОЙ СВИДЕТЕЛЬСТВО О ПРАВОПРЕЕМСТВО: НА МАТЕРИАЛАХ СУДЕБНОЙ ПРАКТИКИ

В статье рассмотрено законодательство, касающиеся порядка приобретения наследства. Проанализировано европейское свидетельство о праве на наследство, как документ, подтверждающий право на наследование, а также правовые последствия, которые возникают для наследников.

Ключевые слова: *нотариус, наследство, свидетельство, универсальное правопреемство, суд.*