UDC: 347.961:340.13(497.7)
347.961:341.24
Professional paper

FACILITATION OF THE JUDICIARY IN THE REPUBLIC OF NORTH MACEDONIA BY APPLYING THE NOTARY SERVICE

Irma BAJRAMI[1], Agim NUHIU[1]

[1]*Department of Civil Law, Faculty of Law*
**Corresponding Author: email: agim.nuhiu@unite.edu.mk*

Abstract

With the independence of the Republic of North Macedonia in 1991, the need was felt for the legal circulation of goods and services. In order to facilitate legal transactions due to their multiplicity, in 1996, for the first time, we brought the corresponding law for notaries. They operate within various branches based on law.
The public power was entrusted to him from November I of 1997, and in 1998 we had the first notaries. One of the reasons for introducing notaries is to make the courts easier. This process of non-judgment in European countries is not recent. As early as September 16, 1986, the Committee of Ministers of the Council of Europe adopted the Recommendation on measures to prevent and reduce court overcrowding in order to relieve the courts of cases that do not fall within the typical judicial function. The transfer of some powers from the courts to bodies outside the judicial system for non-contentious matters is an effective means of their relief. The legal basis for the action of notaries as court commissioners is found in the Law on Notaries, which provides that the court may entrust the notary with duties defined by special laws.

Keywords: notarial service, Recommendation from the Council of Europe, Law on notary of Republic of North Macedonia.

Introduction

Historically, the Republic of North Macedonia (Decision on the promulgation of Amendments XXXIII, XXXIV, XXXV and XXXVI of the Constitution of the Republic of Macedonia, no. 08-184/1, 2019), before its independence, as a country that respects the sovereignty, territorial integrity, and political independence of the neighboring states, has previously gone through three periods until the adoption of the Constitution of the Republic of Macedonia on 17.11.1991. The first notaries in the RNM started working in June 1998, whereas in the same year the Chamber of Notaries in RNM, and other bodies and branches were established. The activity of notaries in RNM was under the competence of non-contentious courts, and a part of them was also under administrative bodies. With the introduction of the Law on Courts (Official of the Republic of Macedonia", no. 58/06, 38/08, 150/10, 83/18, 198/18, 96/19), conditions were created for a part of the non-contestation procedure to be taken over by the courts, and with the Law on Notary Services (Official Gazette of the Republic of Macedonia", no. 59/96), as the first law, they were given under the jurisdiction of notaries.
The notary public performs the duty as a basic profession, for the time for which the office was established. He does not have the right to practice other professions if he is appointed by the Ministry of Justice as a notary public. "The notary" performs notarial work in a free, independent, professional and impartial manner based on the Constitution, the law, ratified international agreements and other provisions and general acts based on the law" (Article 3, Law on Notary Services).
The notary service includes the drafting and issuing of public documents for legal affairs in the form of the Notarial Act, declarations and certifications of facts based on which rights and

https://doi.org/10.62792/ut.jus.v12.i21-22.p2756

obligations are established, approval of decisions in the procedure for issuing notary payment orders, certification of private documents (solemnization), issuance of certificates, verification of signatures and fingerprints, description, translation, acceptance for safekeeping of documents, money and securities for their delivery to other persons or bodies, as well as performing of entrusted works determined by law.

With the establishment of the notary as a separate public service, a part of the work of judicial jurisdiction related to the preparation of documents, receiving statements of the minutes, verification of copies, signatures, etc., have passed to the jurisdiction of the notary public, which is based on the field of basic courts. This provides a relief to the courts from these non-contentious cases.

A notary can be described as a public law officer whose duty it is to draw, authenticate, or certify under his/her seal official documents and other documents, including wills or other testamentary documents, conveyances of personal real estate, and authorizations; certify such documents under his official signature and seal in such manner as to render them admissible, as evidence of the matters certified by him, to the judicial or other public authorities in the place where they are to be used, either by issuing a notarial certificate for the proper execution of such documents or issuing them in the form of public instruments; keep a record containing the originals of all instruments he makes in public form and issue authentic copies of such instruments; to administer oaths and declarations for use in proceedings (Paul & Reuter, 2014, 210).

The notary is a public official who, depending on the situation, has the power to recognize signatures, administer oaths, accept testimony, and issue subpoenas for witnesses. A notary is a person authorized by the state to notarize certain documents.

Some notarizations also require the Notary to place the signer under an oath, stating under penalty of perjury that the information contained in a document is true and correct. Deeds, wills, and powers of attorney are examples of documents that usually require a notary.

The central issue of a legal and political nature in all countries where notaries are admitted or extended is related to the work performed by notaries. What do notaries do, what work has the state entrusted to them? The answer to this question is not always and everywhere the same. In different periods and different areas of the state, notarial transactions varied in type and scope. Depending on the socio-economic conditions, the goals of the notary service, and the needs of legal actions, the competence of notaries in certain countries was also determined.

Traditional notarial work is related to some family and inheritance relationships, as well as real estate relationships (Gomez & Bassac, 2011, 10). In modern law, the range of work of notaries in countries that accept the free Latin notary model is expanding. This particularly refers to activities related to the establishment and change of the status of companies, the performance of certain non-contentious procedures, enforcement, mediation, and activities related to public registers.

By entrusting notaries with certain tasks, the legislator wants to achieve the defined legal and political goals. Determining the scope of work of notaries often reconciles opposing economic, social, and legal interests (Hiber, 2004, 17). By choosing the legal issues, actions, and procedures given to notaries, the legislator seeks to increase legal certainty in certain areas. The notary, as an independent, impartial, and professionally qualified official of public trust, guarantees legal certainty for transactions of great value (e.g. real estate) or of particular importance to the parties (marriage contract), i.e. of importance for economic life (issues related to founding companies). Notaries carry out some legal issues compulsorily, some optionally, and some alternatively. A series of legal actions do not produce a legal effect unless they are notarized. Other formal legal actions can be connected with the notary but also with another body (court, administrative body), but informal legal actions can be connected in the form of the notary with the will of the parties.

Notarial activities contribute to the speed of legal actions, since they, as a rule, are concluded as valid, the content is easier to prove, and often represent an executive document. Also, the procedure of drafting legal issues is carried out in one place, in the notary's office, instead of being done by the lawyer and certified by the court (Kadiq, 2012, 313). The work of notaries contributes mostly to facilitating the courts in carrying out their activity. This is not only because part of the work is done by notaries instead of the court, but also because there are fewer disputes about the work done by notaries, and even when disputes arise, proving the content, rights, and obligations of the parties is much easier. By taking over part of the court work and preventing disputes, notaries significantly facilitate the work of the courts, to some extent even of some administrative bodies.

By defining the work of notaries, the legislator is guided by the legal and political goals he wants to achieve in this field. The legislature chose a middle ground, guided largely by the solutions of the Notary Act of 1930, and solutions adopted in surrounding legislation. By defining the work of notaries, in so-called normative powers and notarial law (Црнић & Дика, 1994, 92).

The consular-monitoring function of the notary service is reflected in the duty of the notary to protect the interests of the parties in the same way; to enter the true will of the parties in the notarial deed completely, clearly and concretely; instruct the parties on the legal consequences of the intended legal action before drafting the notarial deed and warn them of all the prerequisites for the validity of the legal action (Dika, 2004, p. 239). Thus, the notarial service has been expanded somewhere, that is, notaries also perform some secondary tasks in addition to the basic ones, such as representing the parties before the courts and other bodies in indisputable matters, which are related to the act made by the notary. Also, in some jurisdictions, such as in Croatia, notaries in competition with the courts perform the activity of voluntary pledges and fiduciary insurance. They have also been entrusted with the enforcement of law with the determination of execution based on a reliable document (Kancelak, 2013, 542-543).

As mentioned above, one of the reasons for the establishment of notaries is to facilitate the courts. This process of de-judging in European countries is not recent. As of September 16, 1986, the Committee of Ministers of the Council of Europe approved the Recommendation (Recommendation for measures to prevent and reduce the burden in courts, n.d.) concerning the measures to prevent and reduce the overload of the courts to relieve the courts from cases that are not included in the typical judicial function. The transfer of some powers from the courts to bodies outside the judicial system for non-contentious matters is an effective tool for their relief (Janevski & Povlakiq, 2013, 504). The legal basis for the action of notaries as court commissioners is found in the Law on Notaries, which provides that the court can entrust the notary with tasks determined by special laws (Article 6, parag.3 on LN).

In modern comparative law, there is a tendency to expand the competence of notaries by entrusting notaries with several "non-contestable issues". There are more and more cases when notaries are entrusted with issues previously decided by the courts or administrative bodies if no decision is taken on the subjective civil rights violated or endangered. With the transfer of non-contestable cases from the jurisdiction of the court to the competence of notaries, the so-called dejudgment process is carried out, which usually begins with the notaries' trust in the verification process, and then with the procedure of removing the ability to act, removing parental right, as well as it is proposed that he be entrusted with the performance of consensual divorce, the regulation of relations between co-owners, the dissolution of co-ownership, the regulation of borders (margins), etc (Dika, 2003, 1158) the competence of notaries by transferring judicial affairs to the field of uncontested jurisdiction has justifications in the matter of the regulation of property relations which are regulated by dispositive norms, where the public interest is not emphasized at all but is presented as a

regulation of inter partes relations. In other words, the transfer of duties from judicial to notarial jurisdiction in the uncontested status procedure should be avoided, especially in the case of transactions that do not have mainly dispositive characteristics.

Recognizing the need to relieve the courts from cases that do not decide with authority on disputes in the substantive sense, the legislator entrusted notaries with the performance of the procedure for discussing or opening the delacion of inheritance, as the most common and most important official procedure and uncontested. The position of notaries as judicial commissioners in the inheritance dispute procedure is regulated by the Law on Non-Contestation Procedure 2008, (Official Gazette of the Republic of Macedonia, no. 09 of 18.01.2008) Chapter VII in the regulation of property-legal relations, as we have seen in the section on the jurisdiction of the notary, that the president of the basic court, after assessing the situation in his court, entrusts all inheritance matters to the notaries based on the offices of that courts, namely notaries as judicial guardians. The court entrusts the inheritance procedure to the notary and delivers the death certificate, namely the proposal for the initiation of the inheritance argumentation procedure. This means that the verification procedure is initiated ex officio, while the actions in the inheritance argumentation procedure are carried out by the notary as the trustee of the court, which brings a decision on the division of the inheritance (Dika, 2013, 495). In three cases, the notary is authorized to conduct the verification procedure, as follows: 1) when it is necessary to appoint the temporary guardian of the property, 2) when the request is made for the separation of the property from the heir's property and 3) when it is necessary to determine the measures for securing the property.

Also, The Law on Non-Contestative Procedure (Article 132 par. 2) dispositively determines that when the court, due to the existence of several reasons such as: the impossibility of the notary not to undertake procedural actions for subjective reasons (illness or other reasons), as a consequence of disregarding the official actions, as well as for other reasons assessed by the court, to take the case to the notary for further examination of the inheritance procedure, immediately the competent court examines the case itself or delegates it to another notary that is in the circle of basic competence.

After bringing the Decision by the notary, the notary must return the case to the competent court if the participants have disputed facts on which some of their rights depend, now he is authorized to decide on sending the participants to civil proceedings. Therefore, the notary will terminate the will, and the procedure he is developing and will refer the participants to the judicial process (Stojaniviq, 2011, 42).

The right to challenge the decision of the notary, which is decided by the court that entrusted the notary with the execution of the will procedure. This provides an effective legal remedy that enables judicial control of the legality of acts issued by the notary in verification procedures. The transferring effect of the appeal determines the jurisdiction of the court that decides on full jurisdiction, which is in accordance with Article 13 of the ECHR (Jaksic, 2006, p. 150). The court deciding on the appeal may revoke, confirm, or modify the notary's decision. If the decision is revoked, the court will continue to decide and no appeal is allowed against such a decision. However, if the court upholds or changes the notary's decision against such a decision, the appeal of the court of second instance is allowed. Such a definition is considered more appropriate for the implementation of the verification procedure entrusted to notaries because the courts will not be freed enough if they are "assigned the task of acting on legal remedies brought by notaries" (Gjurgjeviq, 2013, 167-700)

Regarding the trust of the procedure for the discussion of inheritance to notaries, several main decisions are foreseen: 1) The supervision of the work of the notary as a judicial commissioner is carried out by the president of the basic court, who has entrusted him with the hearing of the law, presents a report every six months, 3) the notary answers, and not the court, for the damage it may cause to the parties, 4) the court may confiscate the case files

from the notary and entrust it to another notary or conduct the procedure itself when there are justified reasons (Janevski, 2012, 6).

The law on notaries provides that the court may trust the notary:

1) Heritage inventory and assessment,
2) Storage of inheritance documents, money, securities, or valuables, as well as
3) Other activities are determined by special laws.

The law provides that the inventory and evaluation of the inheritance, as one of the measures for the protection of the inheritance, will be carried out according to the official duty in cases such as: 1) when the heirs are not known, 2) when the place of residence is not known, 3) when the heirs are who for due to minors, mental illness or other circumstances cannot take care of their rights and interests; as in other justified cases. This measure of protection of the leg can also be set at the request of the heirs, legatees, or creditors. At the request of these persons, the notary will make an inventory and valuation of the property during the compilation or completion of the death certificate. In any case, the inventory and assessment of the leg will be done compulsorily in case of violation of the necessary part when the calculated value of the leg must be determined.

For the registration and evaluation of the inheritance to be valid, they must be carried out in the presence of two adults and, when necessary, with the participation of experts in the relevant profession. The rule is that everyone interested can participate in the registration and assessment. The list includes all movable and immovable assets that were the subject of inheritance in the state of the testator at the time of his death, as well as those in the possession of another person, indicating when and on what basis, but also those items kept by the testator, which are claimed not to be his property. In the inventory of assets, the claims and debts of the testator will be recorded, and in particular the unpaid taxes and other contributions to the state. Participants have the right to object to the inventory or assessment. In that case, the court can decide to redo the inventory and valuation of the property, and if the inventory is not done at all, the court, at the request of the interested persons, can determine which property the testator enters his property, the reporting has special rules (eg weapons, antiques) will be dealt with under these regulations after registration. The law provides rules for listing movable and immovable assets. Notaries will often be required to appoint an expert to assess the value of certain items that enter the estate (valuables, paintings, etc.). Although the inventory and valuation of the estate are two separate actions, they are usually carried out simultaneously, where the assets are inventoried according to the situation at the time of deletion and the valuation according to the situation at the time of the death of the testator, but according to the market value, e.g. at the request of the legal heirs, take a special decision on determining the inventory and valuation of some movable items of the decedent (eg works of art) whose value is unknown to them. The decision means what things are being assessed, where and when (time and place) they are assessed, which two adults participate in the assessment, and which expert will do the assessment. The appraisal report, in which the notary states the value of the item based on the expert's finding and opinion, is signed by all the participants present and the notary.

The notary, as a judicial guardian, can determine the measure of handing over items in custody as a measure to ensure the inheritance. The transfer of items to custody takes place when it is determined that none of the heirs can manage the property if the heirs are unknown or absent or when other circumstances require special care. The notary will then, in case of emergency, deliver all or part of the property to a trustee and inform the competent court, which may modify or revoke the measure. However, money, securities, valuables, savings books, and other important documents, in the above situations, are handed over for safekeeping to the court or notary in whose territory the property is located. This means that even in cases where the procedure for the discussion of inheritance is conducted by the court, the notary can be entrusted with the custody of these items. On the other hand, if it is

necessary to appoint a temporary guardian of the property, the notary conducting the verification procedure is obliged to return the case file to the court that entrusted the procedure.

For the registration and evaluation of the inheritance to be valid, they must be carried out in the presence of two adults and, when necessary, with the participation of experts in the relevant profession. The rule is that everyone interested can participate in the registration and assessment. The list includes all movable and immovable assets that were the subject of inheritance in the state of the testator at the time of his death, as well as those in the possession of another person, indicating when and on what basis, but also those items kept by the testator, which are claimed not to be his property. In the inventory of assets, the claims and debts of the testator will be recorded, and in particular the unpaid taxes and other contributions to the state. Participants have the right to object to the inventory or assessment. In that case, the court may decide to redo the inventory and valuation of the property, and if the inventory is not done at all, the court, at the request of the interested persons, may determine which property of the testator is included in his property. Reporting has special rules (eg weapons, antiques) and they will be handled according to these regulations after registration. The law provides rules for listing movable and immovable assets. Notaries will often be required to appoint an expert to assess the value of certain items that enter the estate (valuables, paintings, etc.). Although the inventory and valuation of the estate are two separate actions, they are usually carried out simultaneously, where the assets are inventoried according to the situation at the time of deletion and the valuation according to the situation at the time of the death of the testator, but according to the market value, e.g. at the request of the legal heirs, take a special decision on determining the inventory and valuation of some movable items of the decedent (eg works of art) whose value is unknown to them. The decision means what things are being assessed, where and when (time and place) they are assessed, which two adults participate in the assessment, and which expert will do the assessment. The appraisal report, in which the notary states the value of the item based on the expert's assessment and opinion, is signed by all the participants present and the notary.

The notary as a judicial guardian can determine the measure of handing over items in custody as a measure to ensure the inheritance. The transfer of items to safekeeping takes place when it is determined that none of the heirs can administer the property if the heirs are unknown or absent or when other circumstances require special care. The notary will then, in case of emergency, deliver all or part of the property to a trustee and inform the competent court, which may modify or revoke the measure. However, money, securities, valuables, savings books, and other important documents, in the above situations, are handed over for safekeeping to the court or notary in whose territory the property is located. This means that even in cases where the procedure for the discussion of inheritance is conducted by the court, the notary can be entrusted with the custody of these items. On the other hand, if it is necessary to appoint a temporary guardian of the property, the notary conducting the verification procedure is obliged to return the case file to the court that entrusted the procedure.

Methods

In accordance with the nature of the scientific article, theoretical, comparative, and normative analysis methods were used, always seeking the most accurate answers related to hypotheses and concrete issues. In particular, the following methods were employed: scientific description and explanation of existing theoretical positions, comparative methods, and the method of synthesis of scientific achievements for the research objective.

Discussion and conclusions

In addition to the work performed by the notary based on the Committee of Ministers of the Council of Europe in 1986, it adopted the Recommendation regarding measures to prevent and reduce the overloading of the courts to relieve the courts from cases that are not included in the typical judicial function. Transferring some powers from the courts to bodies outside the judicial system for non-contentious matters is an effective tool for their relief. The legal basis for the action of notaries as court commissioners is found in the Law on Notaries, which stipulates that the court can entrust the notary with duties defined by special laws.

The trust of the inheritance discussion procedure in notaries is often represented in the comparative legislation. It is accepted in the legislation of Serbia, Croatia, Macedonia, the Federation of BiH, Republika Srpska, Austria (certain actions), Hungary, etc. It is believed that it will significantly facilitate the work of the courts and enable faster and more efficient implementation of the verification procedure, more direct communication with the participants in the verification procedures, and ensuring the conclusion of disputes within a reasonable time. It is expected that these goals will be achieved and the working conditions of notaries. In terms of professional qualifications, notaries are no different from judges. Any notary can be appointed as a judge, which guarantees that notaries will complete inheritance matters quickly and efficiently. Suppose it is known that in our law the inheritance is acquired at the moment of deletion, ex-lege, and that the decision on the inheritance has a declarative character. In that case, the notary must determine the heir of the deceased, what belongs to the heirs, legatees, and persons others will not present any particular difficulties. The lack of disputes in the verification procedures and the need to relieve the courts from cases in which there is no trial justify the legislator's decision to remove the inheritance argumentation procedure from the jurisdiction of the court and transfer it to notaries. The independence and impartiality of notaries as officers of public trust are a guarantee that the rights of heirs and heirs during the probate procedure will be effectively exercised and protected.

As a result of this, in the future, it is expected that even in some foreseen laws such as The Law on the Family, it will be possible to recognize paternity before the notary as a person authorized to draw up public documents. In addition, it should also provide that the notary signs the marriage contract, the contract on the property relations of extramarital partners, and the contract on property relations in a family community.

Whereas, the Inheritance Law provides for competing jurisdiction to make a will. According to him, the testator can draw up a will by a notary according to the rules of the non-contestable and notarized procedure.

The basic characteristic of all the above-mentioned laws for notaries is that they have accepted the so-called Latin type of notary, which prevails in the countries of the European Union. These laws are based on the common characteristics of the European notary, that is, they are fully based on the principles of the Madrid Declaration, dated 22 / 23.03.1990.

References

[1] Decision on the promulgation of Amendments XXXIII, XXXIV, XXXV and XXXVI of the Constitution of the Republic of Macedonia, no. 08-184/1, dated January 11, 2019, "Republic of Macedonia" is replaced with words: "Republic of North Macedonia", while the word "Macedonia" is replaced with words: "North Macedonia."

[2] Law on Courts ("Official Gazette of the Republic of Macedonia," no. 58/06, 38/08, 150/10, 83/18, 198/18, 96/19).

[3] Law on the performance of notarial work ("Official Gazette of the Republic of Macedonia," no. 59/96).

[4] Black's Law Dictionary, 10th ed. (St. Paul MN: Thompson Reuters, 2014), s.v "notary public."

[5] UpCounsel. (n.d.). Legal Definition of Notary Public. Retrieved from https://www.upcounsel.com/legal-def-notary-public
[6] The Society of Notaries Public of BC. (2011). Becoming a Notary. Archived 21 July 2011 at the Wayback Machine.
[7] Gomez-Bassac, V., Pidoux E., " Droit notarial," Paris, 2011.
[8] Hiber, D., "With Notaries in Europe", 2013.
[9] Кадић, L., "The role of the notary in verification procedures according to the positive inheritance regulations of Montenegro", "Foreign Legal Life", ISSN. 1/2012.
[10] Crnic I., Dika, M. " In Law on Public Notary", "Notary issues." Zagreb, 1994
[11] Dika, M., "Notary issues in the Republic of Croatia ", "Law and Taxes", no. 12/2001.
[12] Kanceljak, I., "Public notaries for the purpose of burdening the courts - Civil Law Forum for Croatia: in Southeast Europe - Summary of Studies and Analyses", Third Regional Conference, Tirana, 2013.
[13] Velibor Korac, "Notaries and notary records" 3M Makarije - Podgorica, April 23, 2018.
[14] Recommendation for measures to prevent and reduce the burden in courts - Recommendation for measures to prevent and reduce excessive workload in courts, no. R (8612). Retrieved from www.justice.gov.sk/RECOMMENDATION%20No.%20R%20(86)%2. Accessed 23.01.2014 years.
[15] Janevski, A, Pavlakic, M. "Comparative report - Notary service in charge of dissolving courts. In Civil Law Forum for Southeast Europe - Collection of Studies and Analyses," "Third Regional Conference", Tirana, 2013.
[16] Dika, M., "Civil Law Forum for Southeast Europe - Collection of Studies and Analyses", "Third Regional Conference", Tirana, 2013.
[17] Dika, M. (Year). "Non-litigation and conciliatory function of the notary - de lege lata and de lege ferenda," 2013.
[18] Law on non-contestation procedure of NRM, ("Official Gazette of the Republic of Macedonia," no. 09 of 18.01.2008).
[19] Dika, M, "Civil law, court decisions and court settlement," "IKS", 2013, Zagreb.
[20] Stojanovic N, "The role of the public notary in probate matters," "Legal life", no. 12/2011.
[21] Dika, M., "Civil law, court decisions and court settlement," "IKS", Zagreb.
[22] Stojanovic, N., "The role of the public notary in probate matters", Belgrade,2006
[23] Djurdjevic, D.," The position of notaries as judicial trustees in verification procedures- In Perspectives on the application of European standards in the legal system of Serbia", 2013.
[24] Janevski, A., "Notaries as court trustees in the procedure for discussion of inheritance", "Legal Life", 12/2012.