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Peculiarities of protection of inherited property of exclusive rights by a notary under the law of the Republic of Kazakhstan.

Abstract. This article deals with one of the most pressing problems of inheritance law, namely the protection of exclusive rights in the area of inheritance. Based on the analysis of research literature, judicial practice the concepts, principles, protection of inherited property of exclusive rights by a notary in the territory of the Republic of Kazakhstan are considered. The aspect on the terms and conditions of protection of such rights is also disclosed.

Keywords: Inheritance, notary, exclusive rights, property, protection of inheritance.

Inheritance of exclusive rights in Kazakhstan does not occur as often as in foreign practice, but if it does, the role of the notary in this process acquires conceptual significance. The role of the notary in modern social life has a tendency to strengthen, it concerns both various areas of legal regulation of various legal relations [1, p.145] and certification of facts in respect of which there is no dispute [2, p.42]. However, the role of the notary in matters of inherited property protection and exclusive inherited rights in particular, still provokes questions and discussions.

The Civil Code of the Republic of Kazakhstan reflected the issue of protection and management of exclusive rights as inheritance, Article 1071 of the Civil Code states that when inheriting by law, the notary is appointed trustee of inheritance, which must implement the protection and management of this inheritance. He takes these measures at the request of the heirs, or other persons carrying out their activities in the interests of the property transferred by inheritance.

In addition to the Civil Code, there was "Instruction on the procedure for notarial acts in the Republic of Kazakhstan" (No. 539 of 29 July 1998, no longer in force [3]), and now "Rules of notarial acts by notaries" apply [4]. According to these rules, the notary takes measures to protect the inherited property; such measures include an inventory of the property, its transfer for safekeeping and the appointment of a trustee.

A. A. Suchkov believes that the notary public and today may take action to protect the inheritance on their own initiative, in the interests of interested persons

as heirs, beneficiaries, creditors or the state [5, p.9], including through the appointment of trustee inheritance, which is confirmed by paragraph 3 of Art. 1071 Civil Code of RK and art. 101 of the Law of the Republic of Kazakhstan "On Notaries" [6].

According to the disposition of Article 1071 of the Civil Code of the Republic of Kazakhstan, it is the notary who is charged with the burden of protecting and managing inheritance. To be more specific, direct protection of inherited property transferred by will, according to Article 1059 of the Civil Code of the Republic of Kazakhstan, should be performed by the trustee of inheritance. But it is the notary, according to Clause 117 of the Rules of notarial actions by notaries [4], who makes a decision about the appointment of a trustee.

At first glance, everything is quite obvious and problems should not arise in law enforcement practice, however we are faced with the fact that it is the notary who must take specific actions aimed at the protection and management of inheritance. It is important to emphasize that the notary will manage the inheritance only if there is an application from a specific range of persons: the heir, the executor of the will, the local government body, the guardianship authority, and other persons acting in the interests of preserving the inherited property.

At the same time, the executor of the will (executor of the will) may take similar measures on his own or at the request of heirs, either one or several (Clause 2, Article 1071 of the Civil Code of the RK). In practice, we are faced with the fact that the executor of the will must submit an application to a notary. This is due to the fact that the notary has a wide range of powers, and it is he who will make the final decision on the appointment of the executor of the will.

This raises the question of the scope of powers of notaries, whether they have the right to request banks and other credit institutions, as well as legal entities about the property held by these entities, which belongs to the testator. The question also remains about to whom the notary can inform the received information, whether it will be the heir or the executor. In this connection we consider it expedient to reflect it at a legislative level by adding a corresponding norm to Article 1071 of the Civil Code of the RK.

Another important aspect of notarial protection of inherited property is the term of such protection. In the legal doctrine there are different views, which are certainly related to the existing legal provisions of the legislation, which is analyzed by researchers. For example, the legal scholars of the Russian Federation point to six and nine months of protection of inheritance. In particular, A. A. Suchkov indicates a period of six months, but not more than nine months [5, p.10].

In turn, M. V. Telyukina does not agree with the position according to which there is a strict limitation of time for the notary to protect inheritance [7, p.164].

The legislation of the Republic of Kazakhstan enshrines only one term, which is also analyzed in the national legal doctrine, which is six months, for entry into the right of inheritance, and, consequently, six months for protection of inheritance [8]. However, it is worth recognizing that M.V. Telyukina is right in that situations at inheritance, in particular at inheritance of exclusive rights, arise differently, and we do not consider it expedient to rigidly limit the heirs within six months.

The legislator made an attempt to remove time limitations by means of the disposition of clause 4 of Article 1059 of the Civil Code of the RK which says about the executor of the will who performs his/her functions during the period which is reasonable and necessary for cleaning the inheritance from debts, collection of amounts due to the testator and entry of all heirs into the inheritance, but this provision is not applicable to notaries. It follows from the above that it is necessary to supplement Article 1071 with a corresponding paragraph.

It seems possible to talk about notarial protection of the property rights of heirs. However, not all authors share this point of view, distinguishing between protection of property and protection of property rights [9].

We believe that the lack of legal regulation of the activity of notaries and authors' associations in the sphere of protection of heirs' property rights does not prevent the protection of heirs' interests. Based on the fundamental principles of civil law, protection of hereditary interests must be provided not only by protection of property as such, but also by the right to such property. Notarial protection of heirs' rights is based on the heir's knowledge of the scope of his right to a particular result of intellectual activity of the testator, who has the right to this result as the author or right holder. Such statement is confirmed by the provisions set forth in clause 1 of Article 976 of the Civil Code of the RK, clause 1 of Article 2 and sub clause 1 of clause 1 of Article 15 of the Law of the RK on copyright. Hence, the notary should make sure by checking the availability of the copy of the work with the testator's name on it or the patent with the testator's name on it. In this case the notary can be assisted by "KazAK", which can be requested if the work has been deposited.

Also as evidence of the existence of exclusive rights of the testator is the existence of a contractual relationship, or a court decision recognizing the person as the second work.

When a notary certifies the inheritance of intellectual property rights, the issue of the duration of the exclusive right is of paramount importance. If the author of the work (co-author) and the date of his death are known, it will not be difficult for the notary to issue a certificate of inheritance of the exclusive right to the work. To do so, the notary must examine the author's death certificate and make sure there is a recorded date of death for the calculation of the seventy-year period. In situations where the author publishes the work anonymously or the work is published after the death of the author, the period of protection should be calculated from January 1 of the year following the year of publication of such work.

As a result, unless the heir can prove that the work was published anonymously or after the author's death, the period of protection of exclusive rights may expire.

In modern notarial practice, notaries issuing inheritance certificates must specify the property included in the inheritance estate, including exclusive rights, but without specifying the work whose rightful owner becomes the heir.

At the same time, we emphasize that not all copyrights can be transferred by inheritance, since one creative result can have several authors, somewhat changing the registration procedure.

Moreover, copyright arises and exists for each work individually, not for all of the author's works. After drawing up a certificate of inheritance and issuing such a

certificate, the notary must specify the rights to certain works, the exclusive right to which the testator has.

When issuing an inheritance certificate, the notary should emphasize that the heir has the exclusive right to works which contain an inscription with the name of the deceased testator as the author, unless otherwise proven. All available evidence of the heirs' exclusive right to the work must be taken into account.

It is noteworthy that there is no direct indication in the legislative documents on the actions to be performed by a notary in respect of exclusive rights, if such rights act as an object of inheritance. Paragraph 184 of the "Rules for Notarial Actions by Notaries" states only that notarial acts relating to translations of newspaper publications, books, articles, monographs, laws and bylaws of the Republic of Kazakhstan are performed in compliance with copyright law and in the manner prescribed by law [10]. That is, it concerns not the objects of intellectual property, but simply the property in the possession of the testator. In other words, a notary may exercise protection over the subject matter of an exclusive right, but not over the property rights to it.

It turns out that legislative acts reflect the issue of protection of copyright by a notary, but the object of protection is set as "property", and the property rights arising from this property are not taken into account. Putilina E.S. notes that "the lack of protection over exclusive property rights violates the principle of protecting the interests of the heir, which is the main principle of inheritance law...".

In comparison with the Republic of Kazakhstan, in many countries with the Anglo-Saxon system of law, for example, in the USA, what matters most is the value of the copyrighted object itself, rather than to whom it will be passed on after the death of the author. The norms of copyright are prescribed in the Constitution itself and their purpose is "to support the development of science and useful crafts".

We agree with the opinion of O.A. Ruzakova, who raises the question of "the need to finalize the institute of inheritance law, namely the resolution of issues in the field of exclusive rights" [11; 12, p.204].

Thus, we can conclude that in legal practice, the process of non-acceptance of inheritance and the renunciation of the inheritance of exclusive rights has its own characteristics. There are limitations and problems in legislative acts that significantly complicate the procedure of refusal of inheritance, and especially when it comes to the objects of exclusive rights. The Civil Code and legislative acts do not fully cover the issues of inheritance of intellectual property rights and the rules of their protection after the opening of the inheritance. In this regard, the objects of exclusive rights are among the most complex in the system of civil relations, and the problems arising from their imperfection need to be investigated and further supplemented by the rules of inheritance succession.

We also consider it advisable to supplement Article 1071 of the Civil Code of the Republic of Kazakhstan by paragraph 6, which will enshrine the measures implemented by the notary for the protection/management of inheritance, which includes exclusive rights.

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