ИССЛЕДОВАТЕЛЬСКАЯ СТАТЬЯ

Наследство должника: некоторые аспекты совершения нотариальных действий по обращению кредитора

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Аннотация: В статье исследуется проблематика и особенности оформления наследства после смерти должника, рассматриваются теоретические аспекты принятия нотариусами мер к охране наследственного имущества по обращению кредитора, анализируются позиция российских цивилистов и современная судебная практика, регулирование оформления наследственных прав. Дореволюционное регулирование предполагало принятие мер к охране по обращению кредитора в первую очередь в отношении товара и имущества, являвшихся предпринимательскими активами умерших. Интересы кредиторов не превалировали над интересами наследников, а опись всего имущества умершего не производилась лишь на том основании, что за его охраной обратился кредитор. С развитием института банкротства физических лиц, ростом числа обращений за признанием умершего банкротом все больше возникает вопросов применения норм права в области мер охраны наследственного имущества в ситуации, когда присутствуют не только претензии к имуществу наследодателя со стороны кредиторов, но и очевидные конфликтные ситуации между наследниками и супругами наследодателя-должника. Отсутствует четкое регулирование процедуры описи имущества по просьбе кредитора, в том числе в случае, когда кредитору не известно о фактическом составе такого имущества, а наследники препятствуют получению информации о нем, а также не дают доступа для принятия мер к охране наследства, в том числе в виде описи наследственного имущества.

Ключевые слова: нотариальная деятельность, кредитор, опись наследственного имущества, принятие мер к охране наследственного имущества, наследование, нотариальное действие, судебная практика, фактическое принятие наследства

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Debtor's inheritance: some aspects of notarial actions on creditor's appeals

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RESEARCH ARTICLE

Abstract: The article investigates the issues and aspects of registration of inheritance after the death of the debtor, reviews the theoretical aspects of notary measures to protect inherited property at the request of the creditor, analyzes the position of Russian civilists and modern judicial practice, and discusses the regulation of registering the inherited rights. Before the revolution, regulations focused on safeguarding goods and property that belonged to the deceased's business, allowing creditors to appeal. The creditors' interests did not prevail over the heirs' interests, and an inventory of the deceased's entire estate was not made just because a creditor applied for its protection. A growing number of questions regarding the application of legal norms in the area of measures to protect inherited property arise when there are not only claims to the testator's estate from creditors but also conflicts between the testator's spouse and other heirs. These issues are brought up by the development of the institution of individual bankruptcy and the increasing number of applications for recognizing the deceased as bankrupt. Currently, there is no clear regulation of the procedure for inventorying property at the request of a creditor. This includes situations where the creditor is not aware of the true nature of the property, and the heirs are preventing access to information about it and taking steps to safeguard the inheritance, such as creating an inventory of inherited property.

Keywords: notarial activity, creditor, inventory of inherited property, measures to protect inherited property, inheritance, notarial action, judicial practice, actual acceptance of inheritance

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Introduction

The various aspects of notaries protecting inherited property upon a creditor's appeal are highly significant in contemporary notarial practice. The creditor has two options if the debtor passes away without paying the debt: either the debtor is declared bankrupt and the debt is repaid from the debtor's estate, or the debt is transferred to the debtor's heirs by court order.

According to the Fundamentals of the Legislation of the Russian Federation on Notaries[1] (hereinafter Fundamentals), the notary who is working on the inheritance case shall exercise the powers provided by 127-FZ «On Insolvency (Bankruptcy)» in a bankruptcy case involving the death or declaration of death of a citizen concerning whom bankruptcy proceedings have been initiated.

If bankruptcy proceedings have not been initiated against a deceased citizen, and the creditor expects to recover the debt from the heirs, according to the law, the creditor will need to interact with the notary handling the inheritance case to formalize the rights to the property and collect and record information.

The creditor is interested in determining whether the heirs accepted or rejected the inheritance within the allotted time period. This way, after six months, when identifying the testator's circle of heirs, creditor will have all the information needed to realize the inheritance as soon as possible without losing value and to satisfy all claims. A notary is a person who acts impartially and is a guarantor of citizens' rights and legitimate interests; the notary is entrusted by law with the function of conducting the inheritance case. As a result, the creditor cannot in any way influence the heirs.

Initially, in addition to filing a claim in court, the creditor can send a claim to the notary so that the latter can familiarize the heirs with it.

Furthermore, heirs might not always act honorably, concealing inheritances or delaying timely probate to avoid having to pay the deceased's debts. This situation often results from the heirs not knowing about the deceased's debts, which makes it difficult for them to decide whether to accept the inheritance with debts or to reject it.

The next item regarding notaries is that a draft law[2] that would require them to notify heirs of the testator's credit debt has been submitted to the State Duma of the Russian Federation. The law's adoption is anticipated to have a favorable effect on heirs' dutiful payment of debts to creditors.

When heirs deliberately conceal inheritance from a creditor, they often do not open a case within the allotted six months, taking advantage of the fact that the accepted inheritance is recognized as theirs from the date of opening the inheritance, regardless of when it is accepted as inheritance on paper. This behavior is widespread if the heirs are not acting in delusion or incapable of considering the pros and cons of their decision[3]. Acceptance of inheritance is confirmed through factual actions. The interested party collects supporting documentation to prove acceptance of inheritance and requests execution after bankruptcy proceedings conclude at a convenient time. In addition, in a typical scenario without creditors, the act of formalizing rights beyond the time limit is not illegal. The law does not impose any requirement on an individual to establish their inheritance rights within the allotted six months.

When evaluating the number of applications filed with the court to register inheritance rights after the six-month period, it is necessary to consider the statistics provided by the Supreme Court's Judicial Department[4]. These statistics show that each year, the number of claims for acceptance of inheritance, restoration of missed terms, and ownership recognition of inheritance increases, with the courts of first instance receiving approximately 50,000 applications for consideration. The specified category of disputes includes claims for recognition of ownership of the factually accepted inheritance, as well as cases of registration of inheritance rights after the statute of limitations for the application of creditors' claims to the testator's inherited property has expired.

Many authors and law enforcement officials point out that the current regulation of the inheritance rights registration procedure ignores the interests of creditors. According to E.Yu. Petrov[5], the process for handling inheritance cases is unsatisfactory for creditors because, regardless of whether an inheritance case is opened with the notary or not, its materials rarely contain information about heirs who have accepted the inheritance through their factual actions. These heirs continue to live in the apartment of the «indebted» testator, thereby accepting the inheritance but failing to formalize it. This deprives creditors of the chance to have their claims satisfied at the

1 Art. 63.1 of the Fundamentals of the Legislation of the Russian Federation on Notaries (approved by the Supreme Soviet of the Russian Federation on February 11, 1993, No. 4462-1) (as amended on July 24, 2023).

2 https://sozd.duma.gov.ru/bill/395002-8

3 Articles 1114 and 1152 of the Civil Code of the Russian Federation.

4 http://cdep.ru/index.php?id=79&item=7041

5 *Petrov E.Yu.* Bankruptcy of the inherited estate. https://zakon.ru/blog/2019/03/21/bankrotstvo_nasledstvennoj_massy

expense of assets that ought to have been part of the inheritance estate.

The Resolution of the Plenum of the Supreme Court of the Russian Federation No. 9 of May 29, 2012, paragraph 36[6], gave the heir ample opportunity to verify the fulfillment of actions on the factual acceptance of inheritance. This allowed the heir to execute inheritance rights at the notary after the six-month period, which the creditor could not have known under any circumstances.

The law does not oblige the notary to inform the creditor about the heir's appeal for registration of inheritance rights upon completion of bankruptcy proceedings and on acceptance by a citizen during his bankruptcy of an inheritance not included in the bankruptcy estate. The financial manager is obliged to identify these assets[7]. According to the current legislative regulation, it is preferable for the creditor that the court recognize the heirs' right to inheritance because, in this situation, the creditor can prove that the citizen concealed property by monitoring court cases involving the debtor and enter the case as a third party, asserting independent claims.

After the general jurisdiction court procedure is finished, the creditor can request a review of the decision regarding the completion of the debt restructuring or the realization of the citizen's property and may even file an application to foreclose on the property with the arbitration court.

With the adoption of the Regulation on Performance of Notarial Actions (the Regulation) (paragraph 52) on August 30, 2017[8], the heir's options to verify the execution of actions on actual acceptance of inheritance for the notary's document execution are greatly reduced. When initiating an inheritance case on factual acceptance of the inherited property, the notary can establish information regarding the acceptance of inheritance based on documents verifying the heir's performance of actions evidencing the acceptance of inheritance, *such as:* documentation from local self-government bodies or management organizations, civil registration authorities, or other sources attesting to the heir's cohabitation with the testator at the time the inheritance was opened. If the heir fails to disclose in the application that he did not take any action to factually accept the inheritance, a judicial act may be necessary.

This norm is interpreted by almost all notaries in the sense that the Regulation allows the notary to obtain information regarding the heir's factual acceptance of inheritance only if the heir and the testator have lived together; in all other cases, the court is competent to determine the actual acceptance of inheritance.

Some notaries believe that the Regulations' use of the adverb «for example» leaves the list open, whereas the wording «namely» would mean closed and allow the inheritance to proceed following a broad range of actions taken by the heir chosen by the Plenum.

The author's personal experience indicates that, following the adoption of the Regulations, there has been a significant decrease in the number of cases involving notaries registering heirs' inheritance rights through factual acceptance. The cases that are still pending relate to the registration of the rights of joint tenants in a dwelling, which is most often the debtor's only residence and is of no interest to the creditor due to the impossibility of realizing such property.

The state's proactive measures also lessen the severity of the creditor's problem. These include the state's counterclaim to recognize the inherited property as escheat, which is filed in court when the heir intentionally misses the six-month term and increases the risk of losing the property. Thus, Federal Law No. 397-FZ of July 31, 2023, «On Amendments to Certain Legislative Acts of the Russian Federation», defines the procedure for measures to identify property that has signs of escheat property and strengthens state control over the registration of rights.

Thus, let us consider how a notary can interact with a creditor and what notarial acts the notary will make on the creditor's appeal.

Previously, when opening an inheritance case, a person applying to a notary was required to confirm the fact of the testator's death. Also, the Federal Chamber of Notaries (FCN), in the letter of July 26, 2013, No. 1605/06-09[9], did not recommend notaries take measures to protect inherited property if the inheritance case was opened without documentary con-

6 Resolution of the Plenum of the Supreme Court of the Russian Federation, «On judicial practice in inheritance cases», No. 9 of May 29, 2012 (as amended on December 24, 2020).

7 Letter of the Federal Chamber of Notaries No. 6224/06-09 of October 26, 2021. https://disk.yandex.ru/d/FxF8_7h0xnk-aw

8 Order of the Ministry of Justice of Russia No. 156 of August 30, 2017, «On Approval of the Regulations for the performance of notarial acts by notaries, establishing the amount of information required by a notary for the performance of notarial acts and the method of its recording» (as amended on November 24, 2021) (together with the Regulations for the performance of notarial acts by notaries, establishing the amount of information required by the notary for the performance of notarial acts and the method of its recording, approved by Decision of the Board of the Federal Chamber of Notaries No. 10/17 of August 28, 2017, Order of the Ministry of Justice of Russia No. 156 of August 30, 2017) (Registered in the Ministry of Justice of Russia on September 6, 2017, No. 48092).

9 https://www.consultant.ru/document/cons_doc_LAW_131036

firmation of the fact of the testator's death, the place of the testator's residence, or the testator's ownership of inherited property – a vehicle pledged under a loan agreement.

Presently, a creditor's claim or an interested party's application can initiate an inheritance case. The notary can open the case, confirm the details provided by the applicant regarding the fact of the testator's death, and request clarification regarding the deceased's last known address of residence. The testator's creditors must notify the heirs known to the notary of the receipt of appeals (claims)[10].

If a creditor requests information about heirs or inherited property, the notary clarifies that the creditor has the right to sue the inherited property. The notary is only required to provide information at the court's request or with the approval of the individuals who have accepted the inheritance[11].

As of September 1, 2018, paragraph 3 of Article 1175 of the Civil Code of the Russian Federation has been amended and supplemented. The norm stipulates that to protect the inherited property, creditors' claims can be made against it before the inheritance is accepted. In this case, the executor of the will or a notary should be involved. In 2015, the Fundamentals of the Legislation of the Russian Federation on Notaries came into effect, and Article 63.1 states that a notary cannot make an inventory of inherited property if the notary becomes informed that the testator has filed for bankruptcy.

Creditors are interested in taking action to defend inherited property in order to stimulate the heir to appear and claim the assets or to acquire legally significant messages by attempting to safeguard the heir's notification record.

The notary is not allowed to refuse an application because it is deemed unreasonable or to take protective measures at their discretion under the amendments to the Civil Code of the Russian Federation of 2017[12]. The notary must follow the legal procedures.

According to Article 1172 of the Russian Federation's Civil Code, steps to safeguard inherited property include making an inventory of it, transferring it to the heir or another designated person for safekeeping at the notary's discretion, depositing cash with the notary, and transferring valuables such as cash, precious metals, stones, and articles made of them, as well as securities not requiring management, to a bank for safekeeping.

Based on court decisions, it is expected that the notary will gather the necessary data, notify the heirs, and either create an inventory or note that inheritance cannot be inventoried[13].

Now, let us discuss how the law has evolved over time and whether it is even feasible to take action at the request of a creditor to safeguard inherited property.

According to B.S. Antimonov and K.A. Grave[14], notarial bodies in the Soviet era implemented protection measures «when they recognized it expedient in the interests of the state or heirs». In other words, the creditors' interests were not considered at the stage of inheritance protection.

A characteristic feature of Russian pre-revolutionary legislation on insolvency (bankruptcy) was that the main subjects of bankruptcy law were individuals involved in trade.

Civilists in pre-revolutionary Russia discussed the problem of «forcible» taking by bailiffs at the court decision of measures to protect property at the request of an interested party and the relationship between such actions and the interests of creditors and heirs. Article 1226 of the Code of Laws of the Russian Empire's Civil Laws stipulated that the inventory of inherited property left by the deceased and its sealing were necessary if there were no heirs or the property needed to be transferred to the guardianship administration. Whenever there was a question as to whether all of the heirs were present or if any of the heirs were missing, an inventory of movable property was required.

The protection of inheritance, according to K.P. Pobedonostsev[15], is intended to serve the purposes of keeping the hereditary estate protected and defining its extent in the interests of those who may appear as heirs and be recognized as such, or third parties who may be allowed to claim personal rights from the hereditary estate (creditors).

In the interest of an existing sole heir who had already taken possession of the inheritance, as well as at the request and application of interested par-

10 Methodological Recommendations on the Execution of Inheritance Rights (approved by the Decision of the FCN Board of March 25, 2019, protocol No. 03/19), paragraph 4.3.

11 Methodological Recommendations on the Execution of Inheritance Rights (approved by the Decision of the FCN Board of March 25, 2019, protocol No. 03/19).

12 Federal Law of the Russian Federation No. 259-FZ of July 29, 2017.

13 Appeal ruling of the Investigative Committee for civil cases of the Moscow Regional Court dated March 14, 2013, in case No. 33-6209/13, Appeal ruling of the Investigative Committee for civil cases of the Moscow City Court dated April 10, 2023, in case No. 33-15701/2023.

14 *Antimonov B.S., Grave K.A.* Soviet inheritance law. P. 59.

15 *Pobedonostsev K.P.* Course of civil law. Part two: family, hereditary and testamentary rights. Moscow: Statut, 2003.

ties claiming or having a claim to the inheritance, the justice of the peace may, at his discretion, start proceedings for the protection of the estate to protect it from potential later claims by co-heirs or creditors discovered later.

K.P. Pobedonostsev noted two opposing views in the reasoning about measures to protect inherited property. On the one hand, inheritance protection is an official measure implemented to safeguard the property against potential attempts and to benefit third parties who may be entitled to the inheritance. On the other hand, he proposed that the inheritance protection law be seen as an instrument that allows interested parties to independently defend and safeguard their rights. Legal scholars argue that the goal of the law is not so much to guarantee the safeguarding of the property as it is to ensure that it is never left without a responsible person until an heir has been identified. That is to say, even during that time when the creditor had the right – rather than the interested party, as it does today – to request protection of the property that was legally protected, a «forcible» inventory of property could not be carried out against the will of the heirs.

K.N. Annenkov[16] draws attention to Article 1238 of the Civil Laws, which states that when a factory or manufacturing establishment's keeper dies, the property is inventoried and sealed to safeguard both the testator's creditors and heirs in situations where it is impossible to ascertain the property's mass and balance based on the documentation that is currently available. In all cases when the testator traded using loans and credits, the heirs requested that the remaining inherited property be sealed and subjected to an inventory. This was both legally required and permissible to safeguard the interests of the testator's creditors if they declared the deceased's heirs to be absent or unable to pay their claims.

Before the revolution, regulations focused on safeguarding goods and property that belonged to the deceased's business, allowing creditors to appeal. The heirs' interests took precedence over the creditors', and the deceased person's whole estate was not inventoried merely because a creditor asked that it be protected.

Article 1238 of the Civil Laws of the Russian Empire states that, in some situations, inheritances cannot be protected. In such cases, upon the testator's death or later, if there are indicators of insolvency, the entire estate shall be transferred to the bankruptcy administration.

Under Article 63.1 of the Fundamentals of Legislation on Notaries (introduced by Federal Law No. 391-FZ of December 29, 2015)[17], a notary who has information of the initiation of bankruptcy proceedings against the testator is not required to inventory inherited property and the notary whose case is still pending will have the authority to act in the bankruptcy case.

The notary can protect and manage the inheritance at the request of one or more heirs, the executor of the will, the local government, guardianship and trusteeship authority, or other persons acting in the interests of preserving the inherited property. According to Article 1171 of the Civil Code of the Russian Federation, the notary can, in theory, take action at the request of a creditor.

Since 2018, the time limit for taking protective and inheritance management measures has been changed. According to Article 1171 of the Russian Federation's Civil Code, the notary will determine the period based on the type and value of the inheritance and the amount of time needed for the heirs to take possession of the property. Such a measure removes the six-month time limitation that was previously used to determine the time for both the start and end of the inventory.

According to the Methodological Recommendations, paragraph 4.4.2, the applicant is required to notify the notary about the witnesses and heirs at law, along with the location (address) of the property for which protection measures are being requested[18].

By verifying in the notary's unified information system whether there is information regarding the testator's will preparation, the notary will be able to obtain the information based on its content. The information will pertain to the heirs under the will and the executor of the will, who is entitled to attend the inventory drawing independently. The parties who are entitled to be present during the inventory of inherited property will not be informed of the location and time of the inventory if it is not possible to determine the heir's or the executor's place of residence from the contents of the will, or if the applicant does not know the name and residence of those parties[19].

If the heir has permitted access to the property

16 *Annenkov K.N.* The system of Russian civil law. St. Petersburg: Tipografiya M.M. Stasyulevicha, 1902.

17 Fundamentals of the legislation of the Russian Federation on Notaries (approved by the Supreme Court of the Russian Federation on February 11, 1993, No. 4462-1) (as amended on July 10, 2023).

18 Methodological recommendations for registration of inheritance rights (approved by the decision of the FCN Board of March 25, 2019, protocol No. 03/19).

19 Methodological recommendations for registration of inheritance rights (approved by the decision of the FCN Board of March 25, 2019, protocol No. 03/19), paragraph 4.4.2.

– allowing entry to the apartment or other location, opening the car, allowing inspection and identity number verification, agreeing to accept the property for safekeeping, or agreeing that the property will be transferred to another person for safekeeping – a notary mcanay make the inventory.

At the same time, Article 25 of the Russian Federation's Constitution guarantees its citizens the inviolability of their homes, stating that no one may enter against the will of the residents unless authorized by federal law or based on a court decision in compliance with that law. Article 35 of the Constitution states that private property rights are legally protected. According to the Resolution of the Plenum of the Supreme Court of the Russian Federation of December 9, 2008, the actions of a person who attempted to break into a vehicle, such as a creditor, may be qualified as attempted theft without the purpose of theft [20].

The heirs' constitutional rights to privacy of their home and protection of their property would limit creditors' ability to inventory and preserve property, and the notary would not be permitted to take protective action against the heirs' wishes and will in a non-contentious case.

Conclusion

Today, the issue of balancing between the rights and interests of the testator's creditors and the heirs remains highly disputed. More and more questions about the application of legal norms in the area of measures to protect inherited property arise in situations where there are not only claims to the testator's estate by creditors but also evident conflict situations between heirs and spouses of the testator-debtor. These questions are brought up by the development of the individual bankruptcy institute and the increasing number of applications for recognizing the deceased as bankrupt. The process for inventorying property upon a creditor's request is not clearly regulated; this includes situations in which the creditor is not aware of the true nature of the property, and the heirs are preventing access to information about it and taking steps to safeguard the inheritance, such as creating an inventory of inherited property. It appears that the following steps are required to enhance the creditor-notary interaction model:

- inclusion in the Russian Federation's Civil Code of the notary's duty to notify creditors of the heir's application for registration of inheritance rights following the conclusion of bankruptcy proceedings and of a citizen's acceptance and registration of inheritance during bankruptcy that is not included in the bankruptcy estate;
- creation by Federal Law of the mandated bankruptcy process and order for the inherited property when its inadequacy is discovered, along with comprehensive guidelines governing the process itself, considering the possibility that dishonest heirs may conceal property;
- amending the Fundamentals of Legislation on Notaries and Part 3 of the Civil Code of the Russian Federation to align and harmonize the legal provisions of the Federal Law on Bankruptcy, the Fundamentals of Legislation on Notaries and the Civil Code of the Russian Federation governing the procedure for interaction between notaries, bankruptcy administrators, creditors, and heirs.

20 Resolution of the Plenum of the Supreme Court of the Russian Federation of December 9, 2008 No. 25 (as amended on May 24, 2016) «On judicial practice in cases of crimes related to violation of traffic rules and operation of vehicles, as well as their unlawful taking without the purpose of theft».

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