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THE CERTIFICATE OF INHERITANCE – LEGAL NATURE AND PROBATIVE VALUE

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Abstract: *The certificate of inheritance is the final act of the notary succession procedure which serves as proof of quality of heir and the property right of the accepted heirs over the goods of the successor mass, in the amount awarded to each heir. Doctrine and specialty literature continue to express controversy regarding this notary act, even in the light of new provisions of the Civil Code. Consequently, the current paper aims to analyse the legal nature and the probative value of the certificate of inheritance, regarding the internal legal provisions as well as the European ones, by considering the decisions of national courts and the Court of Justice of the European Union.*

Key words: *notary successor procedure, authentic act, property deed.*

1. Introduction

To valorise their successor rights, the heirs must undergo the succession procedure and obtain the inheritance certificate. Speciality literature and practice often ask the question of whether the inheritance certificate is sufficient to prove the successor rights of accepted heirs, or it is necessary for them to perform *probation diabolica* regarding the rights of their predecessor.

Even if the Civil Code states that the inheritance certificate is proof of property, doctrine still does not have a unanimous opinion in accepting the fact that the certificate of inheritance represents a property title.

The current paper aims to analyse the legal nature of the inheritance certificate in regard to the internal legal provisions as well as the European ones, by considering the decisions of national courts of law and the Court of Justice of the European Union.

2. Introductory issues relative to the notary successor procedure

The public notary plays a significant role in the life of a person who wishes to plan his succession during his lifetime. Its role entails counselling regarding planning the succession procedure as well as drafting and authenticating the last will provisions.

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However, his activity is not concluded once he drafts and authenticates the last will provisions, as it continues after the death of the author, during the succession procedure.

The succession procedure is the means by which the patrimony of the deceased is passed on to one or more living people. Debating the succession procedure can be performed in any of the two ways: judicial or notary.

The notary succession procedure is not mandatory for heirs. Its optional character entails two aspects: on one hand, it entails the heirs' possibility to debate or not debate succession and, on the other hand, it entails the heirs' possibility to choose between the public notary and the court of law.

Unlike the judicial procedure, the notary successor procedure is *non-contentious, gracious*, which means it can occur only with the unanimous agreement of the heirs in regard to all aspects: the number of heirs, their quality, the extent of their successor rights, the successor mass. The non-contentious procedure is composed of the entirety of procedural regulations according to which the courts of law or other organisms solve claims which do not result in the acquiring or establishing a right or opposing interest in relation to another subject of law.

The notary successor procedure is a non-contentious jurisdictional procedure, which is performed exclusively based on the agreement of heirs in regard to all aspects.

The jurisdictional character resides in the fact that, during this procedure, the public notary requests and analyses the documents provided by the parties, he obtains certain documents himself, based on certain protocols concluded between the UNNPR and public institutions, documents which are needed to solve the case, he hears witnesses, he reduces excessive liberalities, he performs the successor mass inventory, he liquidates the successor passive, as all these operations are needed in order to determine the number and quality of heirs, the composition of the successor mass, the extent of rights awarded to each heir.

Thus, in case of the notary successor procedure, the public notary, much like a judge, based on his active role, interprets and enforces rules of law and legal provisions in order to solve the successor file with which he was invested; all these can't question the jurisdictional character of his activity within the successor procedure.

3. The certificate of inheritance

3.1. Notion

The notary succession procedure begins by request of the interested parties and is finalized when there is an agreement between the heirs and sufficient evidence has been provided, at which time the public notary drafts the final conclusion of the succession procedure. This final document can be defined as that procedural act which acknowledges the closure of the notary succession procedure and the issue of the certificate of inheritance.

Based on this document, the public notary will draft the certificate of inheritance. It represents „the synthesis of the activity performed during the notary procedure. Specifically, it is an official document which acknowledges the quality of heir".

According to the provisions of article 1132 of the Civil Code and article 116 of Law no 36/1995 of public notaries and notary activity, republished, the certificate of inheritance contains provisons regarding the succession mass, the number and quality of heirs and the

part which is awarded to each of them; it can also contain provisions regarding the means by which the extent of the successor rights was established, as well as any other provisions which justify the issue of this certificate.

3.2. The legal nature of the certificate of inheritance

In regard to the legal nature of the certificate of inheritance, doctrine and jurisprudence previous to the present Civil Code expressed a unified position, namely that the certificate of inheritance doesn't only prove the quality of heir, but also the amount of the succession mass which is awarded to each heir; it was, however, considered that it did not represent a property deed, as it would only have a limited power, only between heirs, because it is not opposable *erga omnes*.

The controversy continued once the new Civil Code came into force despite the provisions of article 1133.

Thus, there are certain authors who claim the certificate of inheritance is not proof of property as, in case of the succession procedure, the right is passed on ope *legis* at the time the succession procedure begins and not at the time the certificate of inheritance is issued to the heirs. Thus, the inheritance, whether legal or testamentary, is the one which ensures the passing of succession rights and not the certificate of inheritance.

This opinion appreciates that the certificate of inheritance is proof of property to the extent in which the defunct was himself the owner, as it gives rise to a mere relative presumption of property.

This entails that, at the time the successor goods were passed on, the heirs should be able to prove the property right to their author, except for the situation in which the certificate was registered in the property register and this registration would result in the creation of a property right (at this time, we know that the forming effect of registrations was delayed until each administrative territorial unit finalizes its registrations, thus most registrations result only in opposability).

Given this reason, there were numerous situations in which some cadastral offices rejected the requests for registration of the property right acquired by notary procedure based on the certificate of inheritance, as "the certificate of inheritance proves merely the quality of heir and the right of property".

As a consequence, the synthesis of this opinion is that "the certificate of inheritance will only have a declarative effect, as the inheritance itself passes on the property right"; thus, it will never represent a property deed for the heirs.

Other authors are more reserved and approach this issue in a moderate manner, thus appreciating that the certificate of inheritance could represent a property deed to the extent in which the notion of property deed and the proving value of the property deed are synonymous. In this opinion, it is stated that, unlike the translative contracts, which have the express legal qualification of property deed and contribute by themselves to the acquiring of the property deed, the certificate of inheritance is not, in itself, a means of acquiring property.

The reason for this statement resides in the fact that it is unconceivable for two means of acquiring a property deed to coexist, in regard to the same succession mass, namely the certificate of inheritance and the legal or testamentary inheritance. In this opinion, the

certificate of inheritance can be qualified "*alto sensu*, as an approximate property deed". On the other hand, until it is annulled, it "provides the mentioned goods the appearance of having belonged to the defunct and thus, were passed on to its successors".

Finally, there are other authors who claim that, under the ruling of the new Civil Code, namely article 1133, according to which the certificate of inheritance is proof of the quality of heir of the accepted heirs in regard to the goods of the succession mass, the legal nature and proving value of the certificate of inheritance can no longer be questioned.

In support of this opinion, namely that the certificate of inheritance is a property deed, certain arguments regarding the jurisdictional nature of the successor procedure are provided, arguments which determine the nature of the certificate of inheritance, one which is similar to a court decision.

Particularly, during this procedure, the public notary administers evidence much like a judge, in regard to the succession mass, the certificate of inheritance, the final act of the notary succession procedure is issued by the public notary based on the documents which prove the property deed of the defunct. As it is not possible to subsequently claim that the certificate of inheritance can have another value than that of the acts based on which it was drafted. In other words, as the certificate of inheritance is issued based on property deeds which belonged to the defunct, it will have the same value as the acts based on which it was issued, namely that of property deed.

In support of this opinion, we must consider the provisions of article 5 alignment 7 of Government's Decision no 731/2007 for the approval of the Regulation for the enforcing Government's Ordinance no 14/2007 for the regulation of the means and conditions of valorising the goods which come into the private property of the state, according to which, in case of goods coming from vacant successions, the state's property deed is the certificate of vacant inheritance issued by the public notary. There is no distinction between the certificate of inheritance and the certificate of vacant inheritance, as the first represents a form of the latter.

Finally, the supporters of this opinion claim that one can't ignore the fact that article 1133 of the Civil Code is corroborated with the provisions of article 557 of the Civil Code which lists, among the means of acquiring property, *legal or testamentary inheritance* finalized by the issue of the certificate of inheritance, if the succession procedure is debated before the public notary within the non-contentious jurisdictional procedure or by a court decision, if the inheritance is debated within the jurisdictional procedure by the court of law.

As a conclusion, we state that, despite the lawmaker's attempt to clarify the issue of the legal nature of the certificate of inheritance, the doctrinarian controversy continues to exist. Maybe an intervention from the lawmaker in order to clarify these issues is welcomed, as it produces consequences in practice.

Specialty literature also asked the question of whether the certificate of inheritance is a conventional act. One opinion stated that the certificate of inheritance has a conventional value, as is is a document which acknowledges a certain convention.

This statement was criticized by specialty literature for the following reasons:

- civil conventions can be rescinded by mutual agreement of the parties or by unliteral termination, an action which is not possible in case of the certificate of inheritance, as it is an act which acknowledges an agreement of all heirs; thus, its termination requires the agreement of all heirs;
- in case of contracts, the role of the public notary is that of advising the parties, of acknowledging the consent of the parties, in accordance with the law and public order, whereas the issue of the certificate of inheritance entails a more specific role of the public notary (the public notary will administer evidence, acknowledge indignity, draft the succession inventory, reduce excessive liberalities, all activities which exceed the agreement of heirs) derived from the jurisdictional character of the notary successor procedure;
- not every act which contains a convention of the parties represents convention (we consider here the expedient decision which contains a convention of the parties).

Therefore, we can state that the certificate of inheritance represents:

- **an authentic act**, as it is issued by a person invested with state authority and with the respect of the form and conditions regulated by law. Similar was the decision of the Court of Justice of the European Union in case C-658/17 regarding a preliminary decision which stated that the certificate of inheritance drafted by the public notary upon request of all parties who participated in the notary procedure, is not a decision in the meaning of Regulation no 650/2012, as public notaries are not courts of law; thus, it represents an authentic act in the meaning of article 3 first alignment litter l.) of the same Regulation, namely a document whose authenticity refers to the signature and content of the act and was drafted by an authority of the state.

To this end, in case C-80/19, the CJEU stated that the certificate of inheritance issued by a Lithuanian notary is an authentic act, given the procedure, the competence and powers of the public notary in performing the required procedure.
Specifically, authentic notary acts are classified in two categories: acts which require authentication, thus a document of authentication is drafted and acts which do not require authentication but are finalized by notary acts which has the same effect as an authentic act. However, doctrine appreciated or correctly proved that the certificate of inheritance represents a special category of notary acts, as it does not require any type of notary conclusion. However, its nature of authentic act can't be questioned, even if it is based on the parties' convention.

- **"an act of power, of official, executory and irrevocable character"**, thus one can no longer revisit this document. Even if it is of conventional origin resulting from the fact that is is issued based on the agreement of heirs, it represents much more than a regular convention; this is reason why the heirs can't retract or voluntarily revoke the certificate of inheritance, even if they are all in agreement in regard to this matter.

The fact that it can be annulled by judicial or conventional means does not cast doubt on the irrevocable character of the act, as its annulment can only operate under the conditions stated by law and with the agreement of all heirs;

- **a jurisdictional act of voluntary jurisdiction**; the jurisdictional nature of notary activity within the successor procedure can't be questioned, as it is the notary himself who requests and analyses the documents filed by the parties, he obtains certain documents himself, based on the protocols concluded between UNNPR and public institutions, documents which are necessary for solving the case, he hears witnesses, all in order to establish the number and quality of heirs, the successor mass, the extent of the rights of each heir, he performs the reduction of excessive liberalities, he acknowledges successor indignity and so on.

Thus, in case of the successor procedure, the public notary, much like a judge, based on his active role, enforces the regulations of law in order to conclude the succession procedure; this can't question the jurisdictional character of his activity.
As the procedure is performed with agreement of all heirs, it represents a non contentious, gracious or of voluntary jurisdiction procedure, as all these terms have similar meanings.

3.3. The probative value of the certificate of inheritance

According to the provisions of article 1133 of the present Civil Code, the certificate of inheritance represents proof of the quality of heir, whether legal or testamentary, as well as proof of the property deed of accepted heirs over the goods of the succession mass, in the amount awarded to each of them.

The content of this legal provision regulates that the certificate of inheritance:

a. represents proof of the quality of heir,
b. represents proof of the property deed of accepted heirs,
c. represents proof of the amount of the succession mass, which is awarded to each heir,
d. represents proof of factual property over the goods of the successor mass by possession heirs.

The certificate of inheritance, along with the certificate which attests the quality of heir and the court decision, represent the strongest proof of the quality of heir. Civil statute documents are not proof of heir, but a state of fact, namely the succession will of the authors.

They "represent the premise of acquiring the quality of heir and not proof of it". The certificate of inheritance does not provide the heir this specific quality, but it merely acknowledges the quality, as its effects are declarative.

As a novelty, the Civil Code expressly states the fact that the certificate of inheritance is proof of the property deed of accepted heirs.

Thus, the certificate of inheritance represents an assumption of authenticity regarding the quality of heir, but also an assumption regarding the existence of the property deed over the goods which form the succession mass.

However, this assumption is of relative character, which means that any displeased person will have to prove the fact that the content of the certificate is not accurate, as the existence of a legal presumption operates in favour of those for which it is established, thus exempting them from proving the alleged fact.

Even if it presumes property, it will not operate regarding the passing of the property deed, as it will only acknowledge the passing which operated by law, thus maintaining its declarative character.

As it is an authentic act, the certificate of inheritance enjoys an assumption of authenticity thus resulting in the reversal of the task to prove claims, which belongs to the person who challenges the document; therefore, he is tasked with proving that legal conditions were not respected when the document was drafted.

The proving power of the authentic document refers only to the personal observations of the public notary.

This aspect is expressly regulated in article 270 of the Civil Procedure Code which states the fact that "the authentic document represents full proof to any person until it is declared as a false document, in regard to the personal observations of the person who authenticated the document under the conditions of law". A

similar provision is found in article 100 of Law no 36/1995 of public notaries and notary activity, republished. In regard to the parties' statements, these are assumed by the parties'; this is why they are considered proof until proven otherwise both between parties and in regard to third parties.

4. Conclusions

By analyzing the opinions expressed by specialty literature, the legal provisions and the practice of courts of law, we can state, without fear of being wrong, that the certificate of inheritance represents an authentic act, of voluntary jurisdiction, executive and irrevocable; however, its ability to prove property remains uncertain.

It represents proof of property over the goods which form the succession mass, in the amounts awarded to each heir, a proof which is relative and can be overturned by contrary evidence.

However, the certificate of inheritance does not transfer the property deed from the defunct to the heir, but it merely acknowledges the transmission which operates under the conditions of law, as its effects are purely declarative.

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