
Probate proceedings in Estonia *

1. Introductory remarks on the office of Notary in Estonia

The Estonian Notary is the **holder of a public office**, upon whom the state has conferred the power to authenticate, at the request of the parties involved, legal transactions and legal facts and to perform other functions **in order to secure the protection of lawful rights of persons and the state and the stability of public order** (section 2 subsection 1 Notaries Act)¹. Notaries are **impartial** and independent and perform their functions in their own name and on their own responsibility. A Notary is neither a civil servant nor an undertaking (section 2 subsection 3 Notaries Act).

A university degree in law is a necessary prerequisite for being a Notary. The **training period for a notary candidate** lasts by law for two years but may also be longer. A Notary is not permitted to perform any other salaried work except teaching or research.

Notarial fees are fixed by statute². In probate proceedings the fee is only due when the certificate of inheritance is issued. The level of the fee depends on the value of the estate and amounts to half of a contract fee (with the same transaction value).

2. Notary's duties in succession law

2.1. Competence for attesting wills and for probate proceedings

The **Estonian Succession Act**³ dates from 1997. At that time it replaced the Seventh Part of the Soviet Civil Code on the law of succession. Initially intended as a transitional arrangement, it continues to be valid today with almost no amendments.

Under the **earlier, Soviet law** the Notary was entrusted both with the attestation of wills and with probate proceedings. The legislature did not want to change these areas of competence at the same time as the new law of succession was enacted; later amendment was, however, contemplated. In accordance with the original planning, jurisdiction for probate proceedings and for the issue of certificates of inheritance should have been transferred to the courts from 1.1.2000. The argument put forward in favour of this was that succession matters are susceptible to dispute and that it was therefore sensible to let a court handle the proceedings right from the start.

At the end of 1999, however, the legislature decided to leave the **previous system unchanged**. It was felt that

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1 An English translation of the Notaries Act 2000 can be found under: <http://www.legaltext.ee/text/en/X50001K5.htm> (translation by the Estonian Legal Language Centre <http://www.legaltext.ee/indexen.htm>)

2 English translation of the Notary Fees Act 1996 (Notaries Fees Act): <http://www.legaltext.ee/text/en/X90020.htm> (Estonian Legal Language Centre).

3 English translation of the Succession Act 1996: <http://www.legaltext.ee/text/en/X1001K3.htm> (Estonian Legal Language Centre).

the courts should not be burdened with an additional task which, by general consensus, the Notaries coped with well⁴. Thus the parties involved only have to resort to the courts if they wish to challenge the will, or if they think that assets were incorrectly included in the estate or that their share in the estate is wrongly stated, and if the parties cannot find an agreed solution in the proceedings before the Notary.

2.2. Will and contract of inheritance

The Estonian Notary also has authority to attest testamentary dispositions. The Estonian law of succession recognises both the individual will and the joint will of spouses, and also the contract of inheritance.

2.2.1. Holographic will

A will does not necessarily have to be authenticated by a notary in order to be valid. The testator may also draw up a “private” (**handwritten**) will (either as a holographic will or as a two-witness will); this sort of will is, however, **only valid for a period of six months** (like an emergency will). If the testator is still alive after that time he or she must draw up a new will, otherwise intestate succession will occur.

The testator may also deposit his or her holographic will with a Notary by **delivery of an open or sealed envelope**; the will thereby becomes effective as a notarially authenticated will.

2.2.2. Notarially authenticated will

When authenticating a will, the Notary encounters the same problems as may arise with the authentication of other declarations of intention. First of all the Notary must establish whether the testator has legal capacity, which here means **testamentary capacity**, and thereafter must ascertain what dispositions the testator wishes to make. Establishing the existence of testamentary capacity may not be easy, particularly in the case of people in frail health.

In terms of the **Notarisation Act** (sections 4 and 11 Notarisation Act⁵) the Notary may not carry out a notarial act if it is apparent that the party lacks the necessary legal capacity or the capacity to exercise will. If legal capacity cannot be ascertained for certain, in terms of section 11 subsection 2 of the Notarisation Act the Notary must indicate this fact in the notarial deed. This possible course of action is, however, used very rarely, the general view being that it gives the deed the appearance of invalidity. Court judgments on this subject are unfortunately lacking.

In order to avoid later uncertainty regarding the validity of the deed, Notaries try to bring about certainty regarding legal capacity by means of an interview with the party. If this does not succeed, no authentication takes place.

Third party influence cannot always be completely excluded; sometimes it is therefore necessary to ask the people accompanying the testator to wait outside the room where the attestation takes place.

As far as the **content of the disposition** is concerned, the Notary is also particularly motivated to strive for clarity as he himself may later have to undertake the probate proceedings.

2.2.3. Contract of inheritance and joint will

Contracts of inheritance are rarely concluded in Estonia. Evidently testators wish to be as free as possible in making their testamentary dispositions. Favoured over contracts of inheritance are gifts subject to a right of residence to be recorded in the land register.

Joint wills by spouses are, on the other hand, commonly used.

2.2.4. Wills Register

The Notary must notify the **Wills and Probate Register** about every attested or deposited will or contract of inheritance. The Wills and Probate Register is a central register that in organisational terms is part of the Court of First Instance in Tallinn. The application must include the name and personal identity number of the testator, the date and type of testamentary disposition and the attesting Notary. The content of the testamentary disposition may not be given.

2.3. Probate proceedings

2.3.1. Jurisdiction

In the case of both testate and intestate succession an application for a certificate of inheritance must be lodged with the Notary. The law stipulates which Notary is competent in respect of the probate proceedings, unlike the situation with other notarial activities. In accordance with section 117 subsection 1 in conjunction with section 3 subsection 3 of the Succession Act, the **Notary** within whose territorial jurisdiction the **testator had his or her last place of residence is competent** in respect of the application.

For all other attestations the parties are free to go to the Notary of their own choosing with no restriction as to the place of residence or domicile of the parties or the location of the subject matter.

2.3.2. Acceptance or disclaimer of inheritance

In the application the applicant must either accept the inheritance and request the issue of a certificate of inheritance or disclaim the inheritance. The **disclaimer of inheritance also includes the compulsory portion**. In both cases the application must be notarially attested. The Notary attests the application on the basis of an interview with the applicant. In the course of this the potential heir will be advised that after accepting the inheritance he or she may no longer disclaim it and, conversely, that after disclaimer the inheritance can no longer be accepted.

4 URVE LIIN, *Succession Law* (in Estonian), Handbook, Tallinn 2005, p. 212.

5 English translation of the Notarisation Act 2001 (Notarisation Act): <http://www.legaltext.ee/text/en/X50058K3.htm> (Estonian Legal Language Centre).

Both acceptance and disclaimer must relate to the whole of the inheritance; partial disclaimer is not possible.

It is also **not possible to disclaim an inheritance on behalf of someone else**. If a person entitled to succeed disclaims an inheritance, the persons who would have succeeded, if the person who disclaimed the inheritance had died before the death of the testator, are entitled to succeed. This often surprises heirs as under the previous Soviet law it was possible to disclaim an inheritance on behalf of another person.

If, for example, the son of the testator wants his share of the inheritance to go only to his daughter and not to his son, he should first accept the inheritance himself and then gift the inherited items on to his daughter. As there is **no inheritance or gift tax** in Estonia, this normally does not create a heavy financial burden for the parties involved.

2.3.3. Application for a certificate of inheritance

When accepting the inheritance all the information necessary to establish succession to the estate must be recorded. The applicant must give details of the **assets** constituting the estate, liabilities, and information about possible **testamentary dispositions** and other heirs.

Evidence backing up this information must also be produced. The heir must present the death certificate to the Notary when the application is lodged; other documents may also be forwarded later. In the case of intestate succession, birth, death and marriage certificates must be produced as proof of relationship to the deceased; in the case of testate succession, a note to the effect that the testator drew up a will or entered into a contract of inheritance is sufficient. It is usual in respect of the most significant assets forming the estate for the acquisition documents (purchase, gift) or certificates of inheritance to be produced.

2.3.4. Enquiries with the Wills Register

The probate proceedings begin with the application for the certificate of inheritance or application for disclaimer. The proceedings themselves receive scant regulation by statute. The role of the Notary in cases involving unusual circumstances can, therefore, be a very complex one. It can be said that in many respects the proceedings depend on the experience and judgement of the Notary.

First of all the Notary informs the **Wills and Probate Register** of the application. When doing so he also asks the two questions, namely whether a testamentary disposition is registered there and whether any applications for certificates of inheritance have already been attested by other Notaries. If it turns out that another Notary is already dealing with the same probate proceedings, the new application will also be forwarded to him.

The question as to the existence of wills and contracts of inheritance is always asked even if the heirs know nothing about any testamentary dispositions. The register notifies the Notary as to which Notary attested a will or contract of inheritance so that he can request a copy from this Notary. In this way the testator's last will is still taken into account even if the certified copy produced for the testator is no longer available. Moreover in Estonia too, testate succession takes precedence over intestate succession.

2.3.5. Informing and setting time limits for the other heirs

The next step the Notary should take is **to inform all those who may be entitled to inherit** about the probate proceedings. To do this he uses primarily the information contained in the application for a certificate of inheritance. In addition the Notary has access to the population register which might contain information about the deceased's relatives. The data in the population register is, however, incomplete and often out-of-date; since 1992 there has no longer been an obligation in Estonia to provide information to the register.

Section 6 subsection 3 of the Regulation by the Minister of Justice on Probate Proceedings⁶ therefore provides that if there is no reliable information about possible heirs, the Notary may publish **a notice in the Estonian official gazette** regarding the probate proceedings. In practice a notice is always published despite the fact that hardly anyone habitually follows the official gazette which, since 2002, has only been published on the internet. But alongside the incomplete population register and information from other heirs, it is the only means open to the Notary for tracing the heirs.

In terms of section 118 of the Succession Act the heirs have, in principle, **10 years in which to accept or disclaim the inheritance**. If, however, a co-heir has already lodged an application for a certificate of inheritance with a Notary, the Notary can set the other heirs a time limit for acceptance or disclaimer; this time limit must amount to at least two months. The heirs known to the Notary and for whom he has addresses will be informed by the Notary in writing about the time limit. Other affected parties will be advised by publication of a notice in the official gazette. As a general rule **a time limit of 2-3 months** will be set. If an heir does not declare his or her acceptance of inheritance within the time limit set, he or she is deemed to have disclaimed the inheritance.

2.3.6. Implied acceptance of inheritance

Acceptance of inheritance can, in principle, also be **implied** from use of the assets forming the estate. If registration in the appropriate register is later necessary, however, the heir must then apply for a certificate of inheritance and prove acceptance of the inheritance for this purpose. It would be sufficient, in the case of a piece of land, for example, to produce documents showing that the heir had paid the local authority tax on land and buildings or the electricity bills; at the request of the heir the local authority will also issue certificates confirming that the heir has used the house or apartment as a residence. The Notary must decide here as to whether he regards this as sufficient proof of acceptance of inheritance.

Under Estonian law the estate does not devolve automatically upon the heir without the heir's involvement. **A person becomes heir only through acceptance of the inheritance** whether by express acceptance, where an ap-

⁶ Regulation of the Minister of Justice of 25.1.2002 on "the duties of the Notary under the Succession Act".

plication is lodged with the Notary within the above-mentioned time limit, or by implied acceptance, where a person at least begins to use an object belonging to the estate (and if applicable can later also prove this).

Implied acceptance of inheritance “through use” could, in principle, occur wholly without the involvement of the Notary. However the heir is forced by the setting of a time limit by the Notary to lodge an express application, otherwise the certificate of inheritance would only be issued in respect of the other heirs and the “user” would only be able to enforce his or her rights by recourse to the courts.

2.3.7. Interpretation of the will and ascertaining the estate

In the case of testate succession there is generally little difficulty when there is a notarially attested will.

In the case of a **domestic will** (“private” will) matters can become more complex. Private wills are generally **not registered in the Wills and Probate Register**; in such cases the Notary must rely wholly on the information from the heirs. A private will can be drawn up by the testator **by his or her own hand** without the calling in of witnesses or in writing with the calling in of **two witnesses**. In practice the witnesses will be requested to make a declaration to the Notary that they were present when the will was drawn up and that in their opinion the testator had testamentary capacity. It is very difficult for the Notary to adopt a position on the possible forgery of handwritten, unwitnessed wills.

The certificate of inheritance also contains information about the **items constituting the estate**. The heirs are obliged to submit information and documents which concern the estate to the Notary. In relation to most items the Notary will, however, make **enquiries** as to whether the information is correct, although there is no legal requirement to do so. There is an irrebuttable presumption that the information contained in the land register and the securities register is correct; the Notary is also able to access this information electronically over the internet. By contrast, the information contained in the commercial register about company shareholdings is for information purposes only and has no legal significance; the Notary will therefore ask for confirmation from the board of directors of the company. In the same way, enquiries will be made of the vehicle register as to the ownership of vehicles and of the banks as to the ownership of bank accounts.

2.3.8. Certificate of inheritance

In accordance with section 140 subsection 2 of the Succession Act the Notary can issue a certificate of inheritance if there is sufficient proof of the right of succession and the extent thereof. This vague provision basically only tells the Notary that the certificate of inheritance may be issued if there are no disputes between the (potential) heirs.

When issuing a certificate of inheritance the Notary must also take account of the **testator’s matrimonial property regime** and of possible joint marital property.

As the older register data is not reliable in this regard, this often means that the Notary must ascertain the matrimonial property regime on the basis of documents and the law. But the actual matrimonial property regime does not always coincide with the official one if, for example, the spouses have lived apart for a long time without, however, getting divorced. In such cases the heirs are often disagreeably surprised when the spouse claims his or her rights in the estate: if there is no marriage contract, the law automatically provides for **community of property acquired during the marriage**.

The certificate of inheritance does **not have a constitutive effect** (i.e. it does not establish the right of succession), but rather only a declaratory effect (i.e. it only determines what has already passed to the heirs). The heir becomes owner with retroactive effect to the date of death of the testator⁷. The necessary register entries can be made on the basis of the certificate of inheritance; in the case of bank accounts, banks will pay out the money on presentation of the certificate of inheritance.

As the **Notary’s fee** is only due upon the granting and delivery of the certificate of inheritance, many heirs in the first place only lodge the application for acceptance of the inheritance. They do not collect the certificate of inheritance immediately but rather only when they have to prove their ownership status (and accordingly, indirectly, their status as an heir), for example in the case of the disposal of property which is subject to a registration requirement.

2.3.9. Jurisdiction of the court

Although, according to the law, probate proceedings run their course without the involvement of the court, there are nevertheless many cases in which the courts do have to become involved. The following case groups can be identified in this regard:

- **challenges** to the will or contract of inheritance, or a gift, if this is regarded as an advancement;
- ascertainment of **implied acceptance** of succession through use within the specified time;
- disputes about the testator’s **matrimonial property regime**,
- challenges in respect of failure to comply with the **time limit for acceptance**.

During the course of the court proceedings the **probate proceedings are suspended by the Notary** in order to await the decision of the court. This can, however, take many years.

2.3.10. Planned reform

The greatest change envisaged by a planned reform of the succession law in Estonia is that the estate would pass automatically to the heir without any involvement from the latter (**automatic devolution** as, for instance, in Germany). An application to the Notary would accordingly only be necessary if someone wished to disclaim an inheritance.

⁷ URVE LIIN, Succession Law (footnote 4), page 189.

Those in favour of the reform argue that in this way the rights and interests of absent heirs would be better protected and that the probate proceedings with their attendant costs could be dispensed with⁸. The latter point is, however, not entirely accurate, as in order for the new owner to be registered in the applicable register, proof of his or her status as an heir would continue to be necessary.

For Notaries the reform means that the cumbersome process of ascertaining the heirs in the case of implied acceptance of inheritance through use would no longer have to be undertaken. All persons entitled to succeed would be considered as heirs as long as they had not disclaimed their inheritance.

The population register's incomplete data base would, however, enable malicious heirs to conceal other co-heirs so that a certificate of inheritance could be issued without their knowledge. By contrast, the situation of a passive co-heir who does not declare his or her disclaimer of inheritance and is not interested in the estate carries with it the risk for the other heirs that the size of the shares in the estate remained unknown for an extended period of time and that the items belonging to the estate are thus unable to be sold.

As yet the reform law does not contain any regulations concerning probate proceedings. From the point of view of Notaries, however, it would be welcome if the legislator were also to regulate the procedural rules for probate proceedings more precisely.

3. Private international law

The Notary has to deal with private international law if, in the probate proceedings, there is a will drawn up abroad or if a certificate of inheritance has already been issued abroad but part of the estate is located in Estonia.

3.1. *Lex successionis* in accordance with testator's residence; choice of law option

In terms of section 24 of the Private International Law Act⁹, succession is governed by the law of the **last state of residence of the deceased**.

The testator may **choose** in a will or contract of inheritance that instead of the law of his or her state of residence, the law of the state of his or her **nationality** shall apply.

3.2. Recognition of the principle of *locus regit actum* for testamentary dispositions

In respect of the form of the will, the **Hague Convention of 5th October 1961** on the law applicable to the form of testamentary disposition applies¹⁰. In terms of the Convention, as a general rule a will is valid if it is valid as regards form in the place where it is made (**recognition of the principle of *locus regit actum***). The Notary must thus first of all clarify what the rules as to form are in the country in question. The Notary can approach the Ministry of Justice or Foreign Ministry in this regard. A translation of the will is also usually necessary.

3.3. Additional Estonian certificate of inheritance necessary with foreign certificate of inheritance

A certificate of inheritance issued abroad normally only relates to the part of the estate located abroad. In order to implement the probate proceedings also in relation to items of property registered in Estonia, the heir must approach an Estonian Notary who will issue an additional Estonian certificate of inheritance on the basis of the foreign certificate. The procedure and the actions of the Notary are not regulated by statute in this regard; however the Estonian register in question will not always accept the foreign documents if they do not contain precise details of the items forming part of the estate.

4. Literature on the Estonian law of succession

4.1. Literature in foreign languages of Western Europe

RAINER HAUSMANN/URVE LIIN, *Grundzüge des neuen estnischen Erbrechts (Main Features of the new Estonian Law of Succession)*, Yearbook for Eastern European Law (Jahrbuch für Ostrecht) 2/2000, p. 261 et seq.

ULRICH SCHULZE, *Estland*, in: FERID/FIRSCHING/ DÖRNER/HAUSMANN (ed.), *Internationales Erbrecht (International Succession Law)*, (loose-leaf edition), state: 1.1.2008.

REMBERT SÜB (ed.), *Erbrecht in Europa (Succession Law in Europe)*, 2nd edition 2008.

4.2. Literature in Estonian

There are two handbooks in Estonian about the succession law:

ERKI SILVET/IVO MAHHOV, *Kuidas pärida ja pärandada (Heirs and Bequests)*, Tallinn 1997. (This contains a presentation of the new law; the authors assume that probate proceedings will be transferred to the courts).

URVE LIIN, *Pärimisõigus (Succession Law)*, Tallinn 2005 (a handbook intended both for legal practitioners and for lay persons).

There are, unfortunately, no legal commentaries.

8 Short report in the daily newspaper "Postimees", on 6.10.2005, Internet: http://www.postimees.ee/061005/online_uudised/179279.php

9 English translation of the Private International Law Act 2002: <http://www.legaltext.ee/text/en/X30075.htm> (Estonian Legal Language Centre).

10 http://www.hcch.net/index_en.php?act=conventions.text&cid=40