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PECULIARITIES AND PROCEDURE FOR INTERROGATION OF A WITNESS BY A NOTARY PUBLIC

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The subject. The author explores the current theoretical problems of Russian legislation governing the interrogation of a witness by a notary.
Methodology. In the course of the research, formal legal and systematic methods of interpretation of current legal norms were used.
Main results and conclusions. The conducted research and analysis of legal norms allow us to form a critical approach to the model of witness interrogation by a notary that exists in the legislation of the Russian Federation. The author proposes to amend the legislation in terms of granting the notary the right to interrogate a witness only in the absence of a dispute in court. The article provides a correlation between the provisions of the Fundamentals of Legislation on Notaries dated February 11, 1993, which establish the possibility for a notary to interrogate a witness in order to give such testimony evidentiary value in resolving civil disputes in court, and the norms of the Civil Procedure Code of the Russian Federation, the Arbitration Procedure Code of the Russian Federation on securing evidence by the court. The testimony of a witness obtained from a notary in order to provide evidence is accepted by the courts as appropriate and admissible evidence in the case, even if it was obtained after the initiation of proceedings in court.

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1. Introduction

The securing of evidence is an urgent fixation of information about certain legal facts in the form prescribed by procedural legislation for subsequent use in the evidence presentation during court proceedings [1, p. 119].

During the securing of evidence, only one fact of evidence from the cumulative evidence is examined. The specific rules for such an examination are provided in Chapter 15 of the Civil Procedure Code of the Russian Federation. During the securing of evidence, a witness is interrogated at a court hearing according to the rules of Articles 176-179 of the Civil Procedural Code. The material evidence is examined according to the rules of Article 183 of the Civil Procedural Code[2, pp. 156-158].

According to E.I. Nosyreva and D.G. Filchenko, "the securing of evidence includes structural elements of the judicial proof such as reference to facts, reference to evidence and preliminary assessment. The final result of the procedural action of the evaluation of evidence is the possibility of implementing all subsequent elements: presentation, disclosure, examination and final evaluation of evidence" [3].

According to Article 103 of Fundamentals of Legislation on Notaries one of the methods of notary securing of evidence is witness interrogation. According to Article 69 of the Civil Procedure Code and Article 56 of the Arbitration Procedure Code, a witness is a person who may have any information about circumstances relevant to the hearing case. A witness in the notarial process is any person who has applied to a notary to secure the evidence and has testified as a witness in accordance with the legislation on the notary [4].

During the securing of evidence, the notary confirms the facts and circumstances in order to entrench the civil rights of individuals and legal entities [5].

The securing of evidence by a notary is an exception to the principle of the immediacy of the examination of evidence by the court and should be conditioned by the risk of loss of relevant evidence, the impossibility or difficulty of their examination at a court hearing [6].

D.A. Berezin points out that "the legislation defines a special out-of-court notarial procedure for securing evidence that is subsequently presented to the court for investigation and dispute resolution" [7, p. 6].

It should be admitted that such a method of collecting evidence as the interrogation of a witness is more typical of the procedural activities of the court. However, Fundamentals of Legislation on Notaries allow the notary to perform this action.

The question that requires its resolution is whether this is an effective mechanism by which the court receives evidentiary material without incurring the time required to summon a witness to a court hearing and interrogate him, or whether such a form of interrogation can be considered as an element of abuse of the procedural rights of persons involved in the evidentiary process in the framework of a court dispute.

2. The essence of the institution of out-of-court interrogation of a witness by a notary.

According to Article 102 of the Fundamentals of Legislation on Notaries, the notary, at the request of interested persons, secures the necessary evidence, if there are causes to suggest that the presentation of evidence will subsequently become impossible or difficult.

Paragraph 2 of article 102 said that a notary does not secure evidence if a case, when the interested person appeals to the notary, is pending in a court or an administrative body. Now this paragraph is void. The notary may secure evidence even if there is an initiated by court civil proceedings. There are no exceptions to this rule for the interrogation of a witness by a notary.

At the same time, there is a contradiction between the provisions concerning securing evidence in Article 102 of Fundamentals of Legislation on Notaries, the provisions of Article 64 of the Civil Procedural Code and Article 72 of the Arbitration Procedure Code. Thus, persons participating in the case who have reason to fear that the presentation of the necessary evidence may be impossible or difficult may ask the court to secure this evidence (Article 64 of the Civil Procedural Code), including an interrogation of a witness. According to Article72 of the Arbitration Procedure Code, the court has the right, at the request of a

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citizen or an organization, to take separate measures to secure evidence before filing a claim in court. But legal literature indicates that from the literal interpretation of the Arbitration Procedure Code, it follows that when securing evidence, a judge cannot interrogate a witness, since evidence must be provided according to the rules for securing a claim [8].

Thus, persons involved in a case may have reason to fear that the presentation of evidence necessary for them may be impossible or difficult and may request the court to secure such evidence. A motion for securing evidence is submitted to the court in which the case is being considered or in the area of activity in which procedural actions are to be carried out to secure evidence. The motion must specify the content of the pending case; information about the parties and their place of residence or location; evidence that needs to be secured; the circumstances for which this evidence is needed; the reasons that prompted the applicant to request the security of evidence.

Accordingly, the notary has the authority to provide evidence by interrogation of a witness only in the absence of proceedings initiated by the court in the case.

The notarial provision of evidence is an alternative to pre-trial securing of evidence by the court [9, p. 27].

M.A. Agalarova notes that there is a close link between judicial and notarial activities [10]. However, the notary should not replace the court, including in matters of securing of evidence.

D.V. Feigel, T. Mishanenkova claim that "in most cases the photographs taken, inspection protocols or interrogation of a witness by notary do not provide anything but are only substitute which is trying to replace proper evidence" [11, p. 31]. In other words, in the legal literature has been formed a critical approach has been formed for notarial actions to secure evidence, including the interrogation of a witness.

One should agree that notarial evidence differs from judicial evidence and violates the principle of free evaluation of evidence by the court [12, pp. 68-69].

One believes that the legislation on notaries should prohibit the possibility of a notary interrogating a witness if there is a trial dispute in court. Under this condition, the witness should be interrogated only by the court in accordance with the requirements of procedural legislation in order to ensure equal procedural rights of persons involved in the case, as well as to implement the principle of immediacy in civil and arbitration proceedings. In this case, it is fairer to allow the court in the civil process to take measures to secure evidence before initiating proceedings in the case, as it is codified in the arbitration procedural legislation. This would respond to the principles of civil procedure.

Currently, procedural legislation allows for the interrogation of a witness if he or she is unable to appear at a court hearing through the use of web-conferencing and videoconferencing systems (Articles 155.1, 155.2 of the Civil Procedural Code and Articles 153.1, 153.2 of the Arbitration Procedure Code), as well as through letters rogatory (Article 62 of the Civil Procedural Code, Article 73 of the Arbitration Procedure Code). This procedural form of witness interrogation provides access to the collection of evidence based on the principle of immediacy.

The personal presence of a witness at a court hearing would allow the court to directly hear his or her testimony, ask questions in order to eliminate contradictions in his or her testimony, and verify the accuracy of the information provided to the court. The persons involved in the case are also entitled to the right to participate in the interrogation of the witness to clarify the factual circumstances of the case.

Moreover, each witness evaluates and perceives the situation differently, e.g., in a psychological aspect, when he or she comes to court to testify or when he or she is interrogated by a notary. The judicial procedural form should prevail when it is necessary to obtain testimony as a source of evidence in a civil case.

An appeal by a person to a notary for interrogation of a witness contains an element of abuse of law, including when, before the initiation of proceedings, potential parties secure evidence to the notary by interrogating the witness.

Such an interrogation actually aims to obtain evidence in the absence of interested persons, with

the expectation that the witness will not be questioned by the court in the future, e.g., because of his or her non-appearance at the court hearing. As a rule, after the initiation of proceedings by the court, it would be impossible for the court to receive the testimony of a witness because the witness did not appear at the court hearing. In this case, the party would appeal the protocol of the witness's interrogation made by a notary. The protocol should be evaluated by the court. However, the court and the persons involved in the case are deprived of the opportunity to directly interrogate the witness within the framework of the procedural form. On the one hand, it is not possible for the court to verify the authenticity of the testimony of such a witness, on the other hand, the court cannot fail to accept this protocol.

We can give an example. One side of potential participants in a dispute could appeal to a notary from another region. All interested persons are notified by a notary about the upcoming interrogation, but, due to any kind of difficulties, they are unable to ensure the presence of a notary during the interrogation of a witness in another region. However, this is not an obstacle to interrogating a witness by a notary. The potential party to the dispute receives proper evidence in the form of a witness's interrogation protocol, which is subsequently attached to the case file. In turn, after the initiation of proceedings in court, the interested person, who could not have been present during the interrogation by the notary, may bring into question the reliability of the testimony and file a motion to interrogate the witness in court. But the witness refuses to appear in court and does not appear at the court hearings for interrogation. Unfortunately, the procedural law does not contain a real mechanism of action if a witness does not appear at a court hearing. In civil proceedings, along with a fine, a witness may be forcibly brought if he or she fails to appear in court for a second time (part 2 of Article 168 of the Civil Procedural Code). But in arbitration proceedings, compulsory bringing is not fixed as a sanction against an unscrupulous witness (part 2 of Article 157 of the Arbitration Procedure Code). It turns out that the only proper evidence in a civil case for the court will be the testimony of a witness interrogated by a notary. One should recognize that it is quite difficult to overcome the strength of such evidence obtained in accordance with the Fundamentals of Legislation on Notaries.

And even more so, there are many questions from the point of view of evaluating the testimony of the witness, which was given to the notary after acceptance of a statement of claim for hearing.

The implementation of a procedural form is an important aspect, all civil proceedings follow this form, and it distinguishes legal proceedings from any other law enforcement activity [13]. That is the only proceeding regulated by law and carried out by the court. Since the purpose of securing evidence is to present evidence later to the court as part of the resolution of the case, only the court should have such a function to secure evidence, in particular, in relation to the interrogation of a witness. Security of evidence is provided at a court hearing with notification of the persons participating in the case.

It is noteworthy that the Civil Procedure Code of the RSFSR of 1964 established the rule that before initiating a case in court, an interested person could apply to a notary with a request for securing evidence. The current Civil Procedural Code and the Arbitration Procedure Code do not contain such norms. Some authors note this as a drawback of the procedural legislation [14, pp. 35-41].

The nature of securing evidence allows us to refer it to judicial evidence. One should agree with T.V. Yaroshenko, who says that securing evidence is one of the stages of proceedings [15].

At the same time, "as the historical development of the institution shows, the main evidence to be secured, up to the nineteenth century, was precisely witness testimony" [16].

This information allows us to conclude that the protocol of the notary's interrogation of a witness is permissible only in the absence of civil proceedings initiated in court and only as an exception to the general rule on securing evidence by the court. Otherwise, such evidence should be admitted as incompetent testimony, and cannot be taken into account by the court during trial.

3. Conditions and rules for the notary's securing of evidence in the form of witness interrogation.

Articles 102-103 of Fundamentals of

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Legislation on Notaries allow us to formulate the conditions and rules that must be followed when a notary secures evidence by interrogating a witness:

1. An interested person applies to a notary for the performance of the notarial act. The witness cannot take the initiative to interrogate him or her, otherwise the status of the applicant (interested person) and the witness would coincide.

However, a notary could not unassisted expand the range of evidence to be secured.

2. There is reason to believe that the presentation of evidence would become impossible or difficult. The notary set out this reason from the explanations of the applicant, drawn up in a written motion, and further reflects it in the protocol of the witness' interrogation. R.A. Prosvalygin points out that the list of such cases is not regulated by any regulations, so the notary and the judge decide the necessity of securing evidence themselves [17].

3. The notary adheres to the civil procedure legislation of the Russian Federation when performing procedural actions to secure evidence.

4. The notary notifies all parties and interested parties of the time and place of securing evidence. However, their absence would not be an obstacle to securing evidence. Securing evidence without notifying all parties and interested parties could be done only in urgent cases or when it is impossible to determine who would participate in the case.

According to the legislation, the notary must notify the interested person about the interrogation of the witness.

Notaries and the courts could face one problem in the future when evaluating evidence obtained in this way. The problem is the identification of the circle of interested persons who are entitled to be present during the interrogation, and their proper notification by the notary.

The interested persons are potential parties to civil and arbitration proceedings, the defense of whose rights and interests may need the presence of relevant evidence.

The notary makes a conclusion on the identification of a person as interested and information about his or her place of residence only if this person applies to the notary to secure evidence.

However, this information may be initially incomplete, biased, or unreliable, although "it is the applicant in this case who is interested in observing the procedural purity of the evidence indicated, its relevance, admissibility, and other requirements" [18]. The notary is not required to verify this information.

However, if, during the evaluation of evidence, the court finds that the notary did not ensure that all interested persons were present during the interrogation and/or did not properly inform them of the date and time of the notarial act, the court would have no legal grounds for recognizing the record as the proper evidence in the case. Such a record should lose its legal force, regardless of its content and the significance of the witness' testimony. Similar consequences should occur in the following situation. If there is a person about whom neither the applicant nor the notary did not know in order to notify them of the witness's interrogation, and if this person disagrees with the results of the witness's interrogation by the notary.

As a way out of this situation, legal literature suggests providing for the possibility of participation of a witness, parties and interested persons by using a video-conferencing system with another notary, as well as using a web-conference system [10].

Information about the witness and his or her testimony is classified as a notarial secret. Therefore, an interested person who has the right to participate in the interrogation of the witness by a notary cannot obtain from the notary a copy of the record of the witness's interrogation. Such evidence may be provided to the court by the person who initiated the interrogation of the witness, and the notary is obliged to provide the court with a copy only if the court requests it.

5. The notary's lack of interest in securing evidence by interrogating a witness. For example, the arbitration court did not accept as evidence a record of the interrogation of a witness by a notary who was a relative of one of the sides[1].

[1] The decision of the Arbitration Court of the Omsk region dated October 26, 2023 in case no. A46-3495/2023. https://kad.arbitr.ru/Document/Pdf/98f946a9-f2bb-452b-

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6. The notary warns a witness of criminal liability for intentionally making a false statement and refusing to testify. It is Articles 307 and 308 of the Criminal Code. We should notethat Article 307 of the Criminal Code establishes criminal liability for intentionally making a false statement during trial or pre-trial proceedings. Securing evidence by a notary is not a part of pre-trial proceedings.

The notary, during the interrogation of the witness, is guided by the provisions of the Civil Procedure Law. The notary is not responsible for the assessment of evidence during interrogation. T.G. Kalinichenko notes that “False evidence is not subject to the security of evidence, and their credibility should not be assessed by a notary” [4. c. 12].

The notary, the person applied to the notary, all invented interested persons and parties could ask a witness [19, pp. 109-114]. However, all interested persons and parties could send a range of questions (by mail, e-mail, fax) if interested persons and parties were not present during the interrogation of the witness. This provision should be added to the Fundamentals of Legislation on Notaries.

7. The notary makes a record of the witness’s interrogation. This record is signed by the witness, all interested persons participate in the interrogation and shall be sealed with the stamp of the notary. The record must include information that the notary explains to the witness his or her rights, otherwise such a record cannot be considered admissible evidence.

There is a difference between the record of a witness' interrogation and the statement in which the notary certifies the signature of the person. In the second case, the notary does not certify the validity of the information received, but simply states that the signature on such a statement was affixed in the presence of a notary by the person therefore, such a statement will not be evidence in a civil case.

“Due to a gap in legislation, sometimes notaries certify the genuineness of the signature of a person on the statement, which could have various facts for the trial. So, we can call it witness testimony. However, such a statement cannot have the evidentiary force in court which could have correctly made the record of the witness's interrogation” [8, p. 53]. Article 80 of the Fundamentals of Legislation on Notaries treats this as an independent notarial act.

The notary does not prove nor bring into question information in the statement during the certification the genuineness of the signature of a person [18].

8. The law does not state whether it is mandatory for a witness to appear before a notary public for interrogation. As a rule, the interrogation takes place on a voluntary basis, when the person who applied to the notary ensures the appearance of the witness to the notary.

However, if a witness fails to appear, the notary shall inform the court at the place of residence of the witness or expert in order to take measures provided for by legislative acts of the Russian Federation. The notary does not have the power to impose a fine or to ensure a witness reconduction to the notary.

9. While interrogating a witness, the notary does not check whether the information provided by such a witness meets the requirements of relevance and admissibility and is related to the subject of a future dispute. However, a compulsory condition for approving of securing evidence by the court is the fact that the evidence requested by the applicant meets the requirements of relevance and admissibility to the subject of the claim [20]. So, the provision of evidence by a notary is the recordation of their presence and content at a certain point in time [21].

10. It is possible to overcome the evidentiary force of the record of interrogation of a witness by a notary only by interrogating a witness in court. By principle of direct proceedings, the court is obliged to grant the motion of the person participating in the case for the interrogation of a witness, even if the court does not have any questions about the form and content of the submitted record of the witness's interrogation by a notary.

At the same time, it is possible for the court,

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while comparing other evidence in the case, to evaluate such evidence according to compliance with the procedural form and its content when compared with others. The law does not provide for such a method of protection as challenging the actions of a notary upon summoning a witness[2].

11. The notary charges a fee for securing evidence. So, there is an interesting question, whether the costs incurred by a person to secure evidence by interrogating a witness are among the court costs, in accordance with Article 94 of the Civil Procedure Code, which are recoverable from the opposite party based on the results of consideration of the dispute on the merits.

We believe that such costs can be attributed to the number of court costs only if the party who incurred the costs proves that it is impossible to obtain the testimony of a witness in another way at a lower cost[3].

The person claiming to recover court costs must prove the connection between the costs incurred by him or her and the case being considered in court with his or her participation. The lack of evidence of these connections is a reason for the refusal to reimburse court costs[4].

12. There is still a question, whether remuneration is paid to witnesses who appear for interrogation by a notary. The legislation does not state this problem. T.G. Kalinychenko suggests that "the notary demands from the person who requested the production of evidence to pay money for the remuneration of witnesses and experts and other expenses of securing evidence. Experts and witnesses are rewarded repayment for distracting them from their work at the rates set for awarding remuneration when calling witnesses and experts to court" [22].

13. If a notary considers it impossible to secure evidence, he or she must, in accordance with Article 48 of the Fundamentals of Legislation on Notaries refuse to perform a notarial act. In accordance with the procedure provided for in Chapter 37 of the Civil Procedure Code [23] the interested person may appeal the refusal.

4. Conclusion

Notarial activity is aimed at ensuring the protection of the rights and legitimate interests of individuals and legal entities by performing notarial acts provided for by legislative acts on behalf of the Russian Federation [24, p. 42].

One should note that the notary's activity in securing evidence has great practical importance for the realization and protection of the rights of persons involved in legal proceedings. However, such activity should have the limits of implementation enshrined in notarial legislation.

The activities of the court and the notary are certainly similar to each other. At the same time, however, they cannot be opposed to each other: they should be considered as logically interrelated stages of the process of protecting violated or disputed rights [25].

The Ruling of the Constitutional Court of the Russian Federation dated January 29, 2019 No. 223-O[5] states: "the provision of Article 102 of the Fundamentals of Legislation on Notaries, provides notaries notary right to secure evidence, to assist the parties in carrying out their evidentiary activities in order to achieve the objectives of civil proceedings for the correct and timely consideration and resolution of civil cases."

However, we believe that the tasks facing a notary and defined by special legislation should empower a notary to interrogate a witness exclusively at the stage of pre-trial proceedings and in strict compliance with the provisions of civil procedure legislation. At the same time, the

[2] Ruling of the First Court of Cassation of General Jurisdiction dated 08.02.2023 No. 88-4737/2023. SPS "Consultant Plus".

[3] Appeal ruling of the Tula Regional Court dated 11.01.2018 No. 33-4358/2017 // SPS "Consultant Plus".

[4] Paragraph 10 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated January 21, 2016 No. 1 "On some issues of the application of legislation on reimbursement of costs related to the consideration of the case". SPS "Consultant Plus".

[5] Definition of the Constitutional Court of the Russian Federation dated 29.01.2019 No. 223-O "On refusal to accept for consideration the complaint of citizen Nikolayev Egor Alexandrovich for violation of his constitutional rights by Article 102 of the Fundamentals of the legislation of the Russian Federation on notaries". SPS "Consultant Plus".

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interrogation of a witness conducted by a notary should not have an increased evidentiary value. Notaries should not share the jurisdiction of the court in matters of securing evidence in the form of interrogation of a witness. It is necessary to amend the provisions of the civil procedure legislation in terms of granting the court the authority to secure evidence, including interrogation of a witness, before trial, as well as introduce actively the practice of using pre-trial evidence support in court. This would contribute more to the implementation of the principles of civil and arbitration proceedings, ensuring the protection of the rights of participants in the process, and the proper collection of reliable, relevant and acceptable evidence in the framework of civil law dispute resolution.

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