german cooperation
DEUTSCHE ZUSAMMENARBEIT

Implemented by

giz Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH

Food and Agriculture Organization of the United Nations

Notarial practices in Serbia:
Strengthening gender equality in land ownership and control

Javnobeležnička praksa u Srbiji:
Jačanje rodne ravnopravnosti u oblasti svojine i kontrole nad nepokretnostima

With the technical collaboration of:

Unión Internacional del Notariado
Union Internationale du Notariat
International Union of Notaries

Notarial practices in Serbia:
Strengthening gender equality in land ownership and control

Javnobeležnička praksa u Srbiji:
Jačanje rodne ravnopravnosti u oblasti svojine i kontrole nad nepokretnostima

Published by
Food and Agriculture Organization of the United Nations
and
Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH
Rome, 2021

GIZ and FAO. 2021. *Javnobeležnička praksa u Srbiji - Jačanje rodne ravnopravnosti u oblasti svojine i kontrole nad nepokretnostima / Notarial practices in Serbia – Strengthening gender equality in land ownership and control.* Rome. https://doi.org/10.4060/cb5717b

ISBN 978-92-5-134716-4 [FAO]

Contents

Sadržaj

ACKNOWLEDGEMENTS

Notarial practices in Serbia: Strengthening gender equality in land ownership and control were prepared by Mirna Rakić Domazetović and Kosana Beker, with contributions by Naomi Kenney, UNFAO, Margret Vidar, UNFAO, Rumyana Tonchovska, UNFAO, Ann Jenderedjian, UNFAO, Lovro Tomasic, International Union of Notaries, Veronika Efremova, GIZ, Jana Schuhmann, GIZ. This Guideline benefited from a review by the Notary Chamber of the Republic of Serbia. The guide was edited by LIBAR Agency for Education and Translation from Bosnia and Herzegovina. The design was prepared by Kushtrim Balaj.

ZAHVALNICE

Notarska praksa u Srbiji: Jačanje rodne ravnopravnosti u vlasništvu i kontroli nad zemljištem pripremile su Mirna Rakić Domazetović i Kosana Beker a doprinos su dali Naomi Keni, UNFAO, Margret Vidar, UNFAO, Rumjana Tončovska, UNFAO, An Jenderedjian, UNFAO, Lovro Tomašić, Međunarodna unija notara, Veronika Efremova, GIZ, Jana Šuman, GIZ. Ove smernice recenzirane su od strane Javnobeležničke komore Republike Srbije. Vodič je uredila LIBAR Agencija za obrazovanje i prevod iz Bosne i Hercegovine. Dizajn je pripremio Kuštrim Balaj.

KEY DEFINITIONS

Marriage:	Marriage is the legally regulated cohabitation of a woman and a man.
Consensual union:	Consensual union is a longer cohabitation of a woman and a man, without marriage obstacles (partners).
Joint property:	Property acquired by spouses/partners through work during cohabitation in a marital/consensual union.
Separate property:	Property acquired by a spouse before marriage, as well as property acquired by a spouse during marriage by the separation of joint property or by inheritance, gift, or any other transaction by which sole rights are acquired.
Spousal consent:	Consent of the other spouse or partner (in a consensual union) for the disposal or encumbrance of joint real property.
Joint registration:	When the names of both spouses are entered in the land registry as joint owners or co-owners
Presumption of joint registration:	Presumption of joint registration means that it shall be deemed that the registration is made in the name of both spouses/partners even when the entry in the land registry was made in the name of only one of them.
Co-ownership:	Several persons have co-ownership on an undivided item when each person's share is determined proportionally to the entire item.
Joint ownership:	Joint ownership is the ownership of several persons on an undivided item when their shares are determinable but are not determined in advance.
Acquisition of ownership:	Ownership is acquired by the law, legal transaction, inheritance or a state authority decision in the manner and under conditions prescribed by the law.
Estate:	Estate consists of all the inheritable rights, which belonged to the deceased at the moment of death.
Statutory heirs:	Statutory heirs are the deceased's descendants, his/her adopted children and their descendants, his/her spouse, his/her parents, his/her adoptive parents, his/her brothers and sisters and their descendants, his/her grandfathers and grandmothers and their descendants and his/her other ancestors.

KLJUČNI POJMOVI

Brak:	Brak je zakonom uređena zajednica života žene i muškarca.
Vanbračna zajednica:	Vanbračna zajednica je trajnija zajednica života žene i muškarca, između kojih nema bračnih smetnji (vanbračni partneri).
Zajednička imovina:	Imovina koju su supružnici/vanbračni partneri stekli radom u toku trajanja zajednice života u braku/vanbračnoj zajednici.
Posebna imovina:	Imovina koju je supružnik stekao pre sklapanja braka, kao i imovina koju je supružnik stekao u toku trajanja braka deobom zajedničke imovine odnosno nasleđem, poklonom ili drugim pravnim poslom kojim se pribavljaju isključivo prava.
Saglasnost supružnika:	Saglasnost drugog supružnika ili partnera (u vanbračnoj zajednici) za raspolaganje ili opterećenje zajedničke nepokretnosti.
Zajednički upis:	Kada su imena oba supružnika upisana u katastar nepokretnosti kao zajednička svojina ili susvojina supružnika.
Pretpostavka zajedničkog upisa:	Pretpostavka zajedničkog upisa znači da se smatra da je upis izvršen na ime oba supružnika/vanbračna partnera i kada je upis u katastar nepokretnosti izvršen na ime samo jednog od njih.
Susvojina:	Više lica imaju pravo susvojine na nepodeljenoj stvari kada je deo svakog od njih određen srazmerno prema celini.
Zajednička svojina:	Zajednička svojina je svojina više lica na nepodeljenoj stvari, kada su njihovi udeli odredivi ali nisu unapred određeni.
Sticanje prava svojine:	Pravo svojine stiče se po samom zakonu, na osnovu pravnog posla, nasleđivanjem i odlukom državnog organa na način i pod uslovima određenim zakonom.
Zaostavština:	Zaostavštinu čine sva nasleđivanju podobna prava koja su ostaviocu pripadala u trenutku smrti.
Zakonski naslednik:	Zakonski naslednici su ostaviočevi potomci, njegovi usvojenici i njihovi potomci, njegov bračni drug, njegovi roditelji, njegovi usvojioci, njegova braća i sestre i njihovi potomci, njegovi dedovi i babe i njihovi potomci i njegovi ostali preci.

INTRODUCTION

Gender equality and the prohibition of gender-based discrimination are guaranteed by ratified international treaties and the Constitution of the Republic of Serbia (art. 15 and 21 of the Constitution). The peaceful tenure of a person's property is also guaranteed (art. 58 para. 1 of the Constitution).

The Republic of Serbia is being encouraged to raise awareness of gender equality issues in accordance with the Sustainable Development Goals (SDGs) of Agenda 2030 which include women's land rights. Target 5a encourages countries to "Undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance, and natural resources in accordance with national laws." To support countries in monitoring progress on Target 5a, the Food and Agriculture Organization of the United Nations (FAO) developed indicator 5a2 "Proportion of countries where the legal framework (including customary law) guarantees women's equal rights to land ownership and/or control." To monitor SDG indicator 5a2, FAO developed a Legal Assessment Tool (LAT) for gender-equitable land tenure.

Gender-based discrimination is understood to be any unjustifiable distinction or unequal treatment or omission (exclusion, restriction or privileging) with the goal or effect to impair, disable or nullify recognition, enjoyment or exercise of human rights and freedoms to any person or group on political, economic, social, cultural, civil, family or any other grounds (Art. 4 para. 1 of the Gender Equality Law).

The Government of the Republic of Serbia adopted the National Strategy for Gender Equality 2016-2020 and the Action Implementation Plan 2016-2018.

Although women and men are equal under the law in Serbia, there are still cases in which the property is registered in the sole name of husband, partner, or brother. Women are much less likely than men to be registered owners of property that constitutes a significant economic power, apartments, business premises, land, etc.

There is, therefore, a clear need to bridge the implementation gap between the law (de jure) and the practice (de facto) to strengthen the property rights of women and daughters (FAO and GIZ, 2019).

The Notary Law defines the notary as a legal expert, appointed by the Ministry of Justice, who, on the basis of public authorisation, receives statements from parties and confers to these statements the requisite written form, and issues documents thereof that have the character of public documents, keeps the originals of such documents and other entrusted documents, issues certified copies of documents, publicly confirms facts, advises clients on matters that are in his/her competence and performs other activities specified under the law (art. 2 para. 4 of Notary Law). The notary is authorised to draft, certify and issue public documents on legal transactions, statements and facts conferring legal rights, to certify private documents, to keep documents, money, securities and other items, to perform duties entrusted to him/her by the law and court decisions, and to perform other duties in accordance with the law (art. 4 of Notary Law).

Notaries play an important role in strengthening gender equality in real property transactions and as court trustees in inheritance proceedings since, in their daily work, they inform and advise parties, including women, of their land tenure rights and effects and consequences of their legal actions and omissions. While

monitoring that the law is properly applied, they have to make sure that women's rights are protected with the final goal to eliminate discrimination, build a strong legal environment and support sustainable development.

The Regional Guidelines on Strengthening Gender Equality in Notarial Practices South-East Europe were developed by GIZ and FAO, with the technical collaboration of the International Union of Notaries. They were drafted on the basis of general principles found in several jurisdictions and offer practical guidance for the exercise of due diligence in situations in which women's rights are at stake (FAO and GIZ, 2019).

This guidance document on Notarial practices in Serbia: Strengthening gender equality in land ownership and control complements the Regional Guidelines and is a collection of applicable local laws and good practices, offering practical guidelines to Serbian notaries in their daily activities. It outlines legal grounds, lists of key questions and checklists of documents notaries may use in their daily work. The guidance is given with a view to eliminating gender-based discrimination and enhancing the economic empowerment of women. It is addressed to all legal professionals, particularly notaries and their Chamber, whose duty it is to implement the legal rules and set standards for best practices at national level.

UVOD

Rodna ravnopravnost i zabrana diskriminacije po osnovu pola je zagarantovana ratifikovanim međunarodnim ugovorima i Ustavom Republike Srbije (čl. 15 i 21 Ustava). Pravo na mirno uživanje imovine je takođe garantovano (čl. 58 st. 1 Ustava).

Republika Srbija se podstiče da podigne svest o pitanjima rodne ravnopravnosti na osnovu Ciljeva održivog razvoja (SDGs) Agende 2030 koji se odnose na pitanje prava žena na nepokretnostima. Target 5a podstiče države da: „Sprovode reforme da bi se ženama dala jednaka prava na ekonomske resurse, kao i pristup svojini i kontroli na nepokretnostima i drugim oblicima imovine, finansijskim uslugama, nasleđu i prirodnim resursima u skladu sa nacionalnim zakonima." Kao podrška državama u kontroli napretka u pogledu Targeta 5a, Organizacija za hranu i poljoprivredu Ujedinjenih nacija (FAO) razvila je indikator 5a2 „Razmera zemalja u kojima pravni okvir (uključujući i običajno pravo) garantuje ženama jednako pravo na svojinu i/ili kontrolu na nepokretnostima." Da bi se pratio SDG indikator 5a2 FAO je razvio Legal Assessment Tool (LAT) za rodno izjednačeno uživanje imovine.

Diskriminacija po osnovu pola je svako neopravdano pravljenje razlike ili nejednako postupanje, odnosno propuštanje (isključivanje, ograničavanje ili davanje prvenstva) koje ima za cilj ili posledicu da licu ili grupi oteža, ugrozi, onemogući ili negira priznanje, uživanje ili ostvarivanje ljudskih prava i sloboda u političkoj, ekonomskoj, društvenoj, kulturnoj, građanskoj, porodičnoj i drugoj oblasti. (čl. 4 st. 1 Zakona o ravnopravnosti polova).

Vlada Republike Srbije usvojila je Nacionalnu strategiju za rodnu ravnopravnost za period od 2016. godine do 2020. godine sa Akcionim planom za period od 2016. do 2018. godine.

Iako su po zakonu žene i muškarci u Srbiji jednaki, postoje slučajevi u kojima je imovina uknjižena samo na muža, partnera ili brata. Žene su znatno ređe nego muškarci vlasnice imovine koja predstavlja značajan ekonomski kapital, stanova, poslovnog prostora, zemljišta i sl.

Postoji dakle jasna potreba da se premosti jaz u primeni između prava (*de jure*) i prakse (*de facto*) kako bi se ojačala prava žena i ćerki na imovinu (FAO i GIZ, 2019).

Zakon o javnom beležništvu definiše javnog beležnika kao stručnjaka iz oblasti prava, imenovanog od strane ministra nadležnog za pravosuđe, koji na osnovu javnih ovlašćenja prihvata od stranaka izjave volje i daje im potrebnu pismenu formu i o tome izdaje isprave koje imaju karakter javnih isprava, čuva originale tih isprava i druge poverene dokumente, izdaje prepise isprava, javno potvrđuje činjenice, daje strankama savete o pitanjima koja su predmet njegove delatnosti i preduzima druge radnje i vrši druge poslove određene zakonom (čl. 2 st.4 Zakona o javnom beležništvu). Javni beležnik je ovlašćen da obavlja sledeće poslove: sastavlja, overava i izdaje javne isprave o pravnim poslovima, izjavama i činjenicama na kojima se zasnivaju prava i overava privatne isprave, preuzima na čuvanje isprave, novac, hartije od vrednosti i druge predmete, na osnovu zakona i po odluci suda obavlja poslove koji mu se po zakonu mogu poveriti, preduzima druge radnje u skladu sa zakonom (čl. 4 Zakona o javnom beležništvu).

Javni beležnici imaju važnu ulogu u jačanju rodne ravnopravnosti u transakcijama koje se odnose na nepokretnosti i kao poverenici suda u postupku raspravljanja zaostavštine obzirom da oni u svojim dnevnim aktivnostima informišu i obaveštavaju stranke, uključujući tu i žene, o pravima na imovinu i značaju i

posledicama pravnih radnji i propuštanja. Prilikom staranja da se zakoni pravilno primenjuju, oni moraju da vode računa da prava žena budu zaštićena sa krajnjim ciljem da se eliminiše diskriminacija, izgradi snažno zakonsko okruženje i podrži održivi razvoj.

Regionalne smernice za jačanje rodne ravnopravnosti u notarskoj praksi Jugoistočne Evrope razvili su GIZ i FAO, uz tehničku podršku Međunarodne unije notara. Smernice su sastavljene na bazi generalnih principa više jurisdikcija i nude praktične smernice za vršenje pravne provere u situacijama koje se tiču prava žena (FAO i GIZ, 2019).

Ove smernice pod nazivom Javnobeležnička praksa u Srbiji - Jačanje rodne ravnopravnosti u oblasti svojine i kontrole nad nepokretnostima predstavljaju dopunu Regionalnim smernicama. Ovaj dokument je zbirka važećih pravnih normi i dobre prakse na nacionalnom nivou, a pri tome nudi praktične smernice javnim beležnicima u Srbiji u njihovim dnevnim aktivnostima. Smernice sadrže pravni osnov, listu ključnih pitanja i listu potrebne dokumentacije koju javni beležnici mogu koristiti u svakodnevnom radu. Smernice su date sa ciljem eliminisanja diskriminacije na osnovu pola i sa ciljem ekonomskog osnaživanja žena. Namenjene su svim profesionalnim pravnicima, naročito javnim beležnicima i njihovoj Komori, čija je dužnost da primenjuju zakonom propisana pravila i postavljaju standrade najbolje prakse na nacionalnom nivou.

I.
GENDER ISSUES IN DIFFERENT TYPES OF NOTARIAL SERVICE

1.1 Client disposing of the property

Legal basis

The law does not explicitly state that a registered owner who acquired a property through work during marriage/a consensual union needs the written consent of the non-registered spouse/partner to sell or to dispose of the property in any other way. However, this obligation derives from the Family Law (hereinafter FLS). Art. 171 para. 1 of the FLS defines jointly owned marital property as property acquired by spouses through work during marriage. According to art. 176 para. 2 FLS, registration shall be deemed in the name of both spouses even when the entry in the land registry is made only in one spouse's name. Furthermore, art. 174 para. 1 and 3 stipulate that spouses shall manage and dispose of jointly owned property together and in agreement, and that a spouse cannot dispose of his/her share in the jointly owned property or encumber it by legal transaction inter vivos. Art. 191 of the FLS establishes the same legal regime for property acquired through work by partners living in consensual union.

Three elements need to be fulfilled for the acquisition of jointly-owned marital property: marriage, cohabitation, and work. The work invested in acquiring a property includes the work that directly accrues income, but also the work that contributes to the maintenance or increases the value of the property (household work, childrearing) (Kovacek-Stanic, 2014). Household work and care for children have been recognized in case law as equal in value to a financial contribution. The judgment of the Supreme Court Rev. 1443/2015 of August 31, 2016 states that "Income from a salary is only one of the criteria for determining the share in jointly-acquired marital property. In this case, it was correct to value the contribution of the plaintiff, which consisted of the care of the household and children and created the preconditions for the defendant to earn an income, to the acquisition of the jointly-owned property, since the work of the plaintiff was not limited to family affairs, but included services rendered to the persons, who came to the defendant for religious issues, from whom the defendant acquired an income."

Jointly-owned property is different from the spouses' separate property, i.e. property acquired by the spouse before marriage or during marriage by the division of joint property, inheritance, gift or any other legal transaction whereby sole rights are acquired (art. 168 FLS). Each spouse manages and disposes of his/her separate property independently (art. 169 FLS).

Therefore, if the notary determines that the subject matter of the transaction is the separate property of one spouse, no further consent is required from the other spouse for the disposal.

However, there are cases in practice, in which the value of a spouse's separate property has been increased during marriage. In cases of minor increase, the other spouse has the right to claim monetary compensation for his/her contribution, while in cases of significant increases of value, the other spouse is entitled to a share in the property for his/her contribution (art. 170 FLS). This is supported by the judgment of the Supreme Court Rev 145/2016 of February 8, 2017. Furthermore, a jointly-owned property may have increased in value after the end of marital cohabitation in which case each spouse has the right to a monetary claim or right to a share proportional to his/her contribution (art. 175 FLS).

The specific nature of the jointly-owned property is that the share of each spouse is not defined, which differs from co-ownership where the shares of co-owners are determined. If the spouses are registered in the land registry as co-owners with predetermined shares, it shall be considered that they have divided the

joint property (art. 176.1). The spouses may agree on the division of property in the form of a notarised (solemnised) deed (art. 179 FLS), and if they cannot agree on the division of property, the division will be conducted by the court (art. 180 FLS). There is a presumption that the shares of spouses in joint property are equal, but each spouse may claim and prove in court proceedings that his/her share in the acquisition of joint property is larger. The decision on this issue is in the competence of the court.

The default marital regime may be changed by spousal agreement. Family law regulates nuptial agreements and joint marital property management and disposition agreements (art. 188 and 189 of FLS). These agreements can relate to existing and future property. They have to be made in the form of a notarised (solemnised) deed and registered in the land registry. The notary must warn the parties that the nuptial agreement excludes the default marital regime (art. 188 para. 2 FLS).

Consequences

If the notary determines that the property was acquired through work during marriage, or that the value of a spouse's separate property was increased during marriage, and where the parties have not agreed on a division of property and a decision on the division has not been passed by the court, the written consent of the other spouse will be required for disposal. If, on the other hand, the property is in the regime of co-ownership, it shall be deemed that the division of joint property was conducted. Therefore, each spouse can dispose of his or her co-ownership share without the consent of the other spouse, however, the other spouse has the right of pre-emption in the case the property is being sold. According to art. 14 para. 2 and 3 of The Property Relations Law (hereinafter PRL), the co-owner can dispose of his/her share without the consent of other co-owners. In case of sale of the co-ownership share, the other co-owners have the right of pre-emption only if this is set forth by law. For the disposal of an entire property which is in the co-ownership regime, the consent of both spouses is required. Moreover, for transactions that exceed the scope of regular maintenance (disposal of the entire property, change of property's purpose, lease of the entire property, mortgage on the entire property, constitution of an easement, major reparation, etc.), the consent of all the co-owners is required (PRL, art. 15). Art. 5 para. 1 of the Property Transfer Law states that the co-owner who intends to sell his/her co-ownership share shall first offer it for sale to the other co-owners.

In practice, the client who is disposing of a property may be single at the time of disposal but may have acquired real property during marriage or consensual union. If only the client disposing of the property is registered in the land registry, and no division was conducted by spousal agreement or court division, the above-stated provisions on the disposal of default joint marital property shall apply to such a transaction, and the notary has to obtain the consent of the former spouse/partner for such a transaction.

Marriage and consensual unions generate the same property rights. Therefore, all the rules that relate to the property relations of spouses apply accordingly to consensual unions (art. 191 FLS). A consensual union is defined as a more permanent cohabitation of a man and a woman, between whom there are no marriage obstacles. Partners have the same rights and obligations as spouses, under the conditions prescribed by law (art. 4 of FLS). Three elements need to be fulfilled in order to establish the existence of a consensual union: cohabitation, lack of marriage obstacle, and longer cohabitation. The consensual union leading to joint property requires the will of a woman and a man, who are not married to a third party, to establish relations that correspond to marital relations and to consciously and willingly exercise the rights and duties of spouses. Furthermore, it is necessary to determine that the consensual union was established with the goal

of acquiring property jointly and to assess whether such acquisition has occurred (Resolution of the Appeal Court in Belgrade no. Gž. 8849/2012). The property acquired by partners in a consensual union through work during cohabitation shall be considered as their joint property and the provisions on property relations of spouses shall apply to the property relations of partners in a consensual union in accordance with art. 191 of the Family Law. There is a legal presumption that the shares of spouses, as well as that of partners, in acquiring joint property are equal in accordance with art. 180 para. 2 of the same law" (Judgment of the Supreme Court of Serbia Rev. 986/10).

Since the date and legal basis of property acquisition are key factors in deciding whether it is mandatory to require the consent of the other spouse for a transaction, the time and the legal basis of acquisition should be entered into real estate cadastre database (hereinafter, REC) and registration documents should be available in digital form for review and use by persons who can prove their legal interest and with personal data protection. In that case, all the interested parties would have easy access and a clear understanding of the applicable property regime. This would facilitate the exercise of due diligence both for notaries and parties to the transactions and their legal counsellors. However, this would require changes to the law and continuation of the of REC digitalisation process.

It is important to outline that the spouse/partner has the right to give or refuse consent. The notary has to inform the spouse if the property is considered joint marital property by the law and that it may be disposed of only with the consent of both spouses. Therefore, the request for a spouse's consent should not be reduced to mere form and should not be asked only in order to limit the notary's liability, but to explain and to inform the non-registered spouse about his/her rights and obligations in relation to joint marital property and his/her right to give or withhold consent to a transaction.

The disposal of real property which falls under the regime of joint marital property without the consent of the other spouse may be challenged before the court (Judgment of the Supreme court Rev 1694/2015). The notary must instruct the parties of the legal consequences.

The same rules apply for the encumbrance of real property, in which case the notary requires the spouse/partner's consent for the constitution and registration of an encumbrance in the case when only one spouse is registered and the property is acquired through work during marriage. The notary should inform the other spouse/partner of the meaning of joint marital property and of the consequences of giving or refusing to give consent for the constitution and registration of the encumbrance.

It is important to note that case law has different positions on the issue of the validity of a mortgage constituted and registered on the real property without the consent of the non-registered spouse. A group of court decisions stands for the principle of trust in the public land registry (art. 63 of the Law on State Survey and Real Estate Cadastre), whereby the data of the land registry are true and reliable, and no one shall bear negative consequences of such reliance (Judgment of the Supreme court Rev 1981/2015). In contrast, there is a case law, now overriding previous decisions, according to which the marital property regime and presumption of joint registration of spouses prevails (Judgment of the Supreme Court, Rev1 14/2018). The consent of the non-registered spouse for the creation and registration of a mortgage on real property will certainly remove any further dilemma on the validity of such a legal transaction, i.e. consent to the transaction and notice on the meaning and consequences of giving or refusing such consent would ensure the validity of such a transaction.

The presumption of joint registration means that the notary should exercise due diligence concerning the date and legal basis on which the real property was acquired, in order to assess whether the property should

be considered joint or separate property, and to determine whether the person disposing of or encumbering the property was married or living in a consensual union at the time of acquisition instead of simple reliance on the REC.

It is important to point out that the notary cannot refuse to take any action for which he/she is authorised. However, he/she is obliged to refuse to perform his/her official duty if the activity is incompatible with the notary's official duty and, in particular, if his/her participation is requested in order to achieve an evidently impermissible or dishonest goal; if the notary determines that an activity is impermissible under the law, and which the notary suspects is being simulated, or conducted to avoid legal obligation, or to illegally cause damage to a third party; if a notary determines that a client is without business capacity, or for any other reason is not capable of concluding valid legal transactions, unless the client is represented by a legal representative; if the notary is aware that a client does not have solemn and free will for the transaction (art. 53 of Notary Law). A notary's resolution on refusing notarisation may be appealed before the court (art. 53 para. a of the Notary Law).

In relevant cases, the notary has to confront the parties with the following questions and use the documents listed in the check-list below. It is important that the notary uses all the information available and critically reflects on the answers of the parties in order to determine the factual and legal situation accurately and completely. The notary is not obliged or even entitled to conduct ex-officio investigations but has to use all sources available to determine the true situation.

Relevant questions

- Who is the registered owner?
  - Is the client the legal owner or are there any obvious doubts as to his ownership?
- What is the client's personal status: is the client married or living in a consensual union, was the client married or living in a consensual union at the time of property acquisition?
  - Ask the parties and explain that they are obliged to give true answers and assist you in obtaining the relevant information and documents.
  - If there are any doubts as to the client's answers, check available information (client database, previous acts recorded, civil registries, internet search)
  - Inform the other party whether and how they are protected when acquiring rights in good faith.
- What property regime applies to the property: is the property subject to a nuptial agreement, a joint property management and disposition agreement, or any other agreement changing the default marital regime? Did the spouses divide their property by spousal agreement?
- Was the property divided by the court or is it subject to a pending court proceeding?
- When was the property acquired and what was the legal basis for property acquisition: was the property acquired/increased through work during cohabitation during marriage or consensual union? Was the loan for the property repaid while the client was married/living in consensual union?

Checklist

- Online REC or land registry extract for the real property
- Online personal register or client's marriage certificate, birth certificate, statement of both partners on consensual union provided there are no marriage obstacles, court judgment on divorce or annulment of marriage, etc. including information about previous marriages/consensual unions
- Property conveyance contract, court decision or state institution decision as a legal basis and time for property acquisition (subject to availability)
- (If applicable) spousal agreement or court decision on the division of property or agreement changing the default marital regime (a nuptial agreement, property management and disposition agreement , etc.)
- The consent of the spouse/former spouse/partner/former partner, included in the contract or given as a separate written notarised (solemnised) statement, if the property is in the default marital regime or if it is required by the agreement regulating property regime
- The consent of the spouse/former spouse/partner/former partner included in the mortgage statement or mortgage contract

1.2 Client acquiring property

The joint registration of spouses is an obligation set forth in art. 7 para. 5 of the Law on Procedure of Registration in the Real Estate Cadastre and Cadastre of Utilities, which has been in force since 2018. This means that joint property acquired during marriage has to be registered as joint ownership of the spouses, with the existence of the marriage entered into the registration document and lodged with the land registry for registration. The property will only be registered in the sole name of the buyer if the deed or decision, submitted by a notary or the court, contains no data on the existence of marriage and spouse, or if both spouses give a statement that the property in question is not joint property, but is the separate property of one spouse, or if the spouses opt for co-ownership with determined shares.

Joint ownership can be subsequently registered on real property, which was entered in the land registry in the name of one spouse, by both spouses giving a statement that the property in question is jointly owned (art. 7 para. 5 of the Law on Procedure of Registration in the Real Estate Cadastre and Cadastre of Utilities).

Joint ownership acquired during marriage will not be registered in the land registry if it was acquired through inheritance, gift deed and legal transactions whereby the sole rights are acquired (since this is the separate property of one spouse and will thus be registered only in his/her name), or if the spouses regulated the issue of joint or separate property acquisition by nuptial agreement (art. 7 para. 7 of the Law on the Procedure of Registration in Real Estate Cadastre and Cadastre of Utilities).

This legal solution contributes to the strengthening of the principle of trust in the Real Estate Cadastre and protects the interests of both partners and diligent third parties who trust the land registry data as true and correct. This kind of registration supports the legal regime of joint property acquired through work during marriage and contributes to the strengthening of gender equality. It may, however, be subject to

criticism. One of the reasons is that registration is performed without the consent (in practice sometimes it may happen even without the knowledge) of the other spouse who is not a party to the transaction. Case law will indicate what the effects of this legal solution will be in practice; even though case law is not the source of the law, it still affects the interpretation of the law to a great extent. The best practice would be to ask both spouses/partners to be parties to the transaction.

Unlike joint registration, the presumption of joint registration, referred to in art. 176 para. 2 of the FLS, which at first glance protects the interests of a non-registered spouse, may create problems in practice. "Despite the fact that the principle of public trust applies to the public registry, what is stated in the registry is not enough for the validity of a contract or the due diligent buyer" (Ponjavić, 2007). This means that the rights of the non-registered spouse, although recognized by the law, are not made transparent through registration in the land registry. This is a challenge for all diligent third parties who rely on such registration. In order to register the title in the land registry, the non-registered spouse has to concur with the other spouse on the division of property or to seek division of joint property in court proceedings.

On the other hand, a statement given to the effect that the property is separate property has significant implications, and the notary is under a duty to advise the party giving such a statement. This is especially important since the motives for making such a statement may differ from the real intent for dividing property (spouse not having a property, does not want to lose tax incentive for future purchase of real property, avoidance of creditors, etc.).

The notary has to clearly inform the spouses of the importance and consequences of such a statement. It is an open issue and case law will show how such a statement may be contested in court proceedings (apart from the reasons for voidable transactions) and whether the court will interpret this statement as a division of property. Therefore, the duty of a notary to inform the clients of the joint marital regime and the consequences of giving a statement that the property is the separate property of one spouse is even more important.

The notary shall inform the clients that at the time of property acquisition the spouses may perform a division of property by determining co-ownership shares, in which case both spouses will appear as contracting parties to the transaction and the determined shares will be registered in their names. At the same time, the notary should inform the clients that for the registration of co-ownership of spouses and partners and disabled persons in REC, there is a token fee, as there is for the subsequent joint registration of spouses (tariff no. 215b of the Law on Republic Administrative Fees). This is a good example of an incentive for joint registration of spouses/partners as co-owners on the real property and for subsequent registration of the joint property of spouses/partners.

The Law on Procedure of Registration in the Real Estate Cadastre and Cadastre of Utilities does not refer to the joint registration of partners in a consensual union. Since marital and consensual union are equal in terms of the property rights and obligations that they generate (art. 191 FLS), if the client acquiring the property claims that he/she lives in a consensual union that meets the requirements of the law to be recognized as such, it would be best to invite both partners to be parties to the transaction and register as co-owners or joint owners, depending on their mutual agreement.

There is no register of consensual unions in Serbia and therefore, the notary must rely on the information given by the parties, explain to them the consequences of giving false statements, and examine whether there are any marriage obstacles at stake.

Relevant questions

- What is the client's personal status: is the client married or living in a consensual union at the time of property acquisition?
- What is the legal basis for property acquisition: was the property acquired through work during marriage/consensual union or was the property acquired by gift deed, inheritance, or legal transaction whereby sole rights are acquired?
- What property regime applies to the property: does your client have a nuptial agreement, joint property management and disposition agreement or any other agreement that changes the default marital regime?

Checklist

- ✔ Online personal register or client's marriage certificate, birth certificate, a statement on cohabitation, court judgment on divorce or marriage annulment, etc.
- ✔ Legal basis for the acquisition of the property (an integral part of the contract)
- ✔ Spousal agreement changing the default marital regime (a nuptial agreement, property management and disposition agreement, etc.)
- ✔ Joint registration is the legal requirement unless a written notarised (solemnised) or authenticated statement of both spouses or as part of the deed or solemnisation clause is given that the property is the separate property of one spouse

I. GENDER ISSUES IN DIFFERENT TYPES OF NOTARIAL SERVICE

II.
INHERITANCE

2.1 Determination of the deceased's personal status

One of the important factors for inheritance proceedings is to determine the deceased's personal status and the deceased's estate. The notary should determine what the deceased's personal status was at the time of death and at the time of acquiring property. If the deceased was married at the time of death, her/his surviving spouse is entitled to inherit in the 1st inheritance line together with the deceased's children in equal parts (art. 9 para. 2 of the Inheritance Law). Brothers and sisters have equal rights to inherit. If the deceased has no children, the spouse will inherit one half of the estate in 2nd inheritance line together with the deceased's parents (art. 12 para. 2 IL). Based on the current Inheritance Law, partners in a consensual union are not entitled to inherit each other. However, the partner is entitled to a family pension after the death of his/her partner according to the Law on Pension and Disability Insurance.

Special attention should be paid if the deceased was single at the time of death but was married or living in a consensual union at the time of acquiring property through work during marriage or consensual union, since in that case, the property should be considered as the joint property of both spouses, and the notary should exercise due diligence in order to ensure that the rights of all the interested parties are identified and protected. The property might be registered only in the deceased's name, but if it was acquired through work during marriage or consensual union the presumption of joint registration should apply, meaning that even though only the deceased was registered, it should be considered that the property was registered in favour of both spouses.

Relevant questions

- Did the deceased leave a will or other document relevant for succession? Do any statutory shares (of the spouse/children etc.) have to be considered when dividing the property among the heirs?
- Was the deceased married at the time of death, or married or living in consensual union at the time of acquiring the property belonging to the estate?
- Did the deceased have a spousal agreement regarding a specific marital regime?

Checklist

- ✔ Online personal register for the deceased or death certificate, marriage certificate, birth certificate, court judgment on divorce or marriage annulment
- ✔ Inspection of the register of wills
- ✔ Online personal register for the heir or birth certificate, marriage certificate, death certificate, court judgment on divorce or marriage annulment
- ✔ Agreement determining specific marital property regime
- ✔ Online REC or extract from REC

- ✔ Property conveyance contract, court decision, or state institution decision (the legal basis for the prior acquisition of property).

This process could be facilitated and sped up if the data on the legal basis of property acquisition and the time of acquisition were entered in the land registry and if registration documents were digitalised, as the notary would not require this data from the parties. This requires changes to the law and further digitalisation of land registry data.

2.2 Duty to identify, inform and invite all heirs to the inheritance proceedings

In the course of the distribution of estates, the notary must identify the deceased's heirs, the property belonging to the estate, and which rights from the estate belong to the heirs and other parties (art. 87 of the Law on Non-Contentious Procedure, hereinafter LNCP).

Notaries must ensure that all the heirs are identified, formally informed, and invited to attend the proceedings.

The duty of a notary to ensure that all parties are invited to the proceedings is especially important as once the inheritance ruling becomes final and binding, it is not possible to repeat the distribution of the estate (art. 130 para. 1 LNCP), or to repeat the proceedings (art. 131 LNCP), but the party will be referred to the court for a civil proceeding.

If it is not known whether the deceased has an heir, or if it is not clear whether all the heirs have been identified, or if a temporary representative is appointed to an heir whose residence is unknown, and the heir does not have an attorney, or if an heir or his statutory representative, who does not have an attorney, is abroad so that the invitation could not be delivered, the court will make a public call for persons who claim to have an interest in the estate to report to the court within one year from the publishing of the announcement on the court notice board, the *Official Journal of the Republic of Serbia* and in any other way (art. 116 LNCP).

In the invitation to the proceedings, the notary will explain the object and purpose of the procedure and will inform the invited parties as to the documents that should be submitted.

In addition to the mandatory elements of the invitation for a hearing (art. 115 LNCP), it is good practice to inform the parties about the documents that need to be submitted and to inform them about their rights and obligations and the consequences of taking or failing to take specific actions.

Relevant questions

- Did the deceased leave a will?
- Did the deceased have children?

- Did the deceased have a spouse?
- Did the deceased have parents, brothers, and sisters, or other relatives?
- What is their address?
- Do any of them live abroad?

Checklist

- ✔ Inspection of the register of wills
- ✔ Inspection of the court register
- ✔ Invitation to the hearing and notice of receipt
- ✔ Certificate of death
- ✔ For the heir: online personal register or birth certificate, marriage certificate, death certificate for the heir, divorce judgment, inheritance resolution, etc.
- ✔ Announcement on the court notice board, official journal or international journal

2.3 Safeguarding the rights and interests of statutory heirs in the case of a will

Statutory heirs are the deceased's descendants, adoptees and their descendants, spouse, parents, adoptive parent, brothers and sisters, grandfathers and grandmothers, and other ancestors. An adoptee from incomplete adoption, the deceased's brothers and sisters, his/her grandfathers and grandmothers, and his/her other ancestors are compulsory heirs only if they are permanently incapable of working and they do not have the necessary means to live (art. 39 of Inheritance Law).

Statutory heirs are entitled to a part of the estate which the deceased could not dispose of and which is a guaranteed portion under the law. The statutory portion of descendants, adoptee and his/her descendants and the deceased's spouse is one half, while other statutory heirs are entitled to one-third of the share that would belong to each of them based on the statutory inheritance line. If the statutory heir cannot or does not want to inherit, his statutory share shall not be added to other statutory heirs (art. 40 of Inheritance Law).

At the beginning of the inheritance proceedings, the notary will determine whether the deceased left a will or disposed of his/her property byway of a life-care contract. If there is a life-care contract, the inheritance procedure will be terminated with respect to the real property that was the subject matter of such a contract.

The will should be read out by the notary, after which the heirs will give their inheritance statements.

Since the statutory portion is part of the estate which the deceased could not dispose of, the notary will inform the statutory heirs of their right to request their statutory portion and on the nature and size of the statutory portion.

The statutory portion is violated if the value of testamentary dispositions and gifts the deceased made to a statutory heir or to a person instead of whom the statutory heir is entitled to inherit, is less than the heir's statutory share (art. 42 of the Inheritance Law).

If there is no dispute between the heirs, the proceedings will be completed before the notary. In the contrary, the subject matter will be referred to the civil court.

Determining a statutory portion violating, reducing a will and/or gift, determining the financial countervalue of the statutory portion, and the person who is obliged to pay are all subject to civil court proceedings.

However, if the heir participated in the inheritance procedure and did not request a statutory portion, he/she cannot claim it in the civil proceedings (Judgment of the Appeal Court in Novi Sad, Gž. 4467/2011).

Therefore, the notary has an obligation to inform the participants in the inheritance proceedings of their rights so that they are not precluded from claiming them later in civil proceedings.

If an heir contests the will (the heir may claim that the will is contrary to imperative provisions, that the deceased was incapable of reasoning, etc.) the subject matter will be referred to the civil court (art. 119 LNCP).

Relevant questions

- Was the real property subject to a life-care contract?
- Did the deceased leave a will?
- Does the will meet the form prescribed by the law?
- Are there any other wills?
- Are any of the heirs entitled to a statutory portion?
- Do statutory heirs claim the statutory portion?
- Do heirs accept or relinquish inheritance?
- Do heirs accept or contest the will?

Checklist

- Life-care Contract
- Deceased's will
- Inheritance statement
- Statutory heir's statement whether he/she accepts or contests the will
- Statutory heir's statement whether he/she claims statutory portion

2.4 Inform the surviving spouse that he/she can request the separation of his/her share in the marital property from the deceased's estate

Advising the surviving spouse is an obligation of the notary, which is derived from art. 171 para. 1 FLS defining joint marital property and art. 176 para. 2 FLS regulating the presumption of joint registration of spouses. If there is a dispute between the parties, not only about the right to the spousal share but also its size, the notary will refer the parties to the civil court (art. 119 LNCP). If there is no dispute, the notary will separate the surviving spouse's share of the marital property from the estate. Since marriage and consensual unions generate the same rights and obligations in relation to property (art. 191 of FLS), the notary may inform the parties that if there is no dispute between them regarding the right and size of partner's share in the joint property, they may conclude a settlement agreement with the partner. In case of a dispute, the notary will inform the partner that he/she can exercise his/her rights before the court.

In practice, the registration is very often done only in one spouse's or partner's name although the property is acquired through work during marriage or consensual union. Although the real property is registered under the sole ownership of the deceased, there is no valid grounds to distribute the entire real property to the heirs since it is necessary to separate the surviving spouse's share from the estate. The notary is under obligation to use all available means to determine the nature of the property, in particular the documents noted below.

The surviving spouse may claim his/her spousal's share of marital property even after the inheritance proceedings (Judgment of the Supreme Court Rev. 1406/05).

The system of joint registration that was introduced by the Law on Procedure of Registration in Real Estate Cadastre and Cadastre of Utilities shall also support the separation of the spousal share.

Relevant questions

- When was the property acquired?
- On which basis was the property acquired?
- Was the deceased married or living in a consensual union at the time of property acquisition?
- Did the deceased have a nuptial agreement or any other agreement changing the default marital regime?
- Does the spouse require the separation of his/her share in the marital property from the estate?
- Do other heirs agree to or contest this?
- Do other heirs agree to conclude a settlement agreement with the deceased's partner regarding a partner's share in the property

Checklist

- ✔ Online personal registry or marriage certificate
- ✔ Online REC or excerpt from the REC
- ✔ Property conveyance contract, court decision or state institution decision (the legal basis for acquisition)
- ✔ Spousal agreement changing the marital property regime (a nuptial agreement, etc.)
- ✔ Separation of spouse's share from the estate, included in the ruling
- ✔ Settlement agreement between heirs and a partner

2.5 Inform the surviving family member that she/he may retain user rights on the immovable property subject to the approval of all co-heirs

It is possible to increase the inheritance share of a spouse/parent according to the Inheritance Law under certain conditions (inheritance in 2nd line and no means to live). The spouse/parent may ask for life user rights on the entire or part of the estate that was inherited by other heirs. Under certain conditions, he/she may ask for ownership (if the value of the estate is so low that due to the division he/she would be left without a means to live, art. 23 and 31 of IL).

On the other hand, other heirs may request a reduction of the spouse's inheritance share under the conditions set forth by the law (art.26 of IL).

The Inheritance Law obliges a notary to inform the farmer who lived or worked together with the deceased that he/she may claim, if there a justifiable need, that the agricultural land be left to him/her provided that he/she pays the other co-heirs the value of the land in cash by a set deadline (art. 233 and 232 IL). This protects the farmer from the division of land but also protects other heirs through monetary compensation.

The above-stated requests fall under court jurisdiction, while the notary informs the heirs of rights and obligations stemming from the law.

The notary may advise the parties, if he/she determines that after distribution of the estate, the spouse or other heir would remain without property or shelter (for example, a wife who is sharing the property with her children or the spouse who is inheriting in second line and has no shelter), that if the parties agree, user rights for life may be constituted on the entire real property in favour of a certain person. In this way, no heir would be relinquishing inheritance but they would agree to enable one person to have user rights for life on the property.

This is a matter of autonomy of will, and not a legal duty of the notary. However, paying attention to this situation may have a great influence on the economic empowerment of women, on the condition that the notary is ready and willing to discuss the circumstances of the particular case by asking questions and informing the heir of the options they have based on the law, which are not binding but are subject to their mutual agreement.

Relevant questions

- Is the property that is to be divided the primary place of residence of any of the co-heirs?
- Do other co-heirs agree to grant user rights for life on the property?

Checklist

- ✔ Statement of acceptance of inheritance and agreement of heirs on the constitution of user rights for life before a notary

2.6 Inform the heirs about the consequences of relinquishing inheritance

The estate is transferred by law to the deceased's heirs at the moment of the deceased's death (art.212 para. 1 IL). The inheritance resolution only has a declarative nature.

The heir may relinquish inheritance by giving a statement before the notary by the termination of the first instance inheritance proceedings. It shall be deemed that the heir who relinquished inheritance was never heir (art. 213 para. 1 and 3 IL).

If by the termination of the first instance inheritance proceedings the heir has not relinquished the inheritance, it shall be deemed that he/she has accepted inheritance (art. 219 para. 1 IL).

Whether the heir accepted or relinquished inheritance, he/she has to sign a statement thereof in person or through a representative. The signature on the statement of acceptance or relinquishment of an estate, which is submitted in writing to the court/entrusted notary, as well as the signature on the power of attorney, is notarised. The statement will declare whether the heir accepts or relinquishes the part that belongs to him/her by law or by will, or whether the statement relates to a statutory portion. When drafting the statement relinquishing inheritance, the court/entrusted notary will warn the heirs that he/she may relinquish inheritance only on his/her own behalf (art. 118 LNCP).

The relinquishment of inheritance may have a significant impact on the heirs, especially on women and daughters. Although the statement accepting or relinquishing inheritance belongs to the area of the party's free will, the notary, as the state authority before whom this statement is given, must explain to the heirs the importance and consequences of accepting or relinquishing by inheritance statement.

The notary must explain to the heirs the consequences of relinquishment, and especially that relinquishment cannot be partial and that the statement on relinquishment is irrevocable (Art. 214 p 2 and 3). The statement has to be clear and explicit.

The notary is not in a position to question the autonomy of will, but may try to explain the effect of relinquishing, especially if the notary suspects that the motives for giving such a statement are traditional, and based on a misconception that female children have a moral obligation to relinquish inheritance in favour of men who will continue the work on a family farm or household. This is especially important since it often happens that family matters, the financial status of parties in the inheritance proceedings, as well as the motives for relinquishing inheritance statements, may change over time, while, once given, an inheritance statement may not be changed. Women need to know that when relinquishing in favour of a male heir, the decision not only affects their own interests but also that of their children and heirs.

Unlike some other national laws, Serbia's national law provides that the heir may relinquish inheritance only in his/her own name (art. 213 para. 2 IL). Therefore, in the case of relinquishment, the notary determines the identity of the descendants of the person relinquishing the inheritance statement and invites them to give inheritance statements. Not complying with this may lead to a lawsuit (Judgment of the Appeal Court in Nis, Gz. 3526/2018).

Relinquishing inheritance in favour of other persons is treated as a statement of acceptance with the inheritance share being assigned at the same time, which is treated as a gift (art. 216 IL). This means that it is subject to inheritance tax and tax on gift deed if there is no tax exemption in accordance with the Property Tax Law. The notary cannot and shall not act as tax adviser but may explain the general tax implications of relinquishment and refer parties for further information to the tax authorities or a tax adviser.

The notary is in a position to postpone inheritance proceedings if she/he thinks that the participants in the inheritance proceedings need additional time to inform themselves of their rights in more detail. The notary should pay special attention to determine if the inheritance statement is given freely and without pressure, since the heir who relinquished the inheritance may request annulment of the statement of relinquishment if it was a product of coercion, threats, fraud or delusion (art. 214 IL). Although the proceedings are formal, the notary is in a position to question the party's free will by taking time to ask direct questions that examine the party's free will.

The motives for relinquishing are sometimes to avoid paying for the deceased's debts since the heir who relinquished the estate is not liable for the deceased's debts (art. 223 IL), avoidance of creditors, etc. The notary should inform the heirs about the consequences of giving positive or negative inheritance statements (for example, that the heir is liable for the deceased's debts up to the value of the inherited property) (art.222 of IL).

Therefore, it is necessary to balance the autonomy of will with the protection of parties in the proceedings by giving all the necessary information to the parties and justifiable reasoning in order for the parties to understand the importance and consequences of the inheritance statement.

In the case of property found at a later date, an heir who previously relinquished inheritance and wishes to accept the later found inheritance will be referred to the civil proceedings (art.130 para. 2 of LNCP).

Relevant questions

- Does the heir accept the inheritance?
- Does the heir relinquish the inheritance?
- Does the heir who relinquished inheritance have descendants?
- Do they accept or relinquish inheritance?
- What are the reasons/motives of the parties?

Checklist

- ✔ Inheritance statement given in person before the notary or written (notarised) statement
- ✔ Inheritance statement before notary through a representative based on notarised special power attorney

2.7 Inheritance contracts

Inheritance contracts, contracts relating to future inheritance and contents of a will are impermissible; they are null and void (Art. 179, 180, 181 IL). Inheritance law regulates two types of inheritance law contracts: the contract on the assignment and distribution of property during lifetime and life-care contract. Both contracts are drafted in the form of a notarised (solemnised) deed (art. 184 para. 1 and art. 195 para. 1 of IL). The notary must warn the parties in both contracts that the property which is the subject matter of the contract will not be part of the assignor's/beneficiary's estate and that statutory heirs cannot be settled from the property (art. 184 para. 2 and art. 195 para. 2 IL)

If the assignor in the contract on assignment and distribution of property and the beneficiary in the life-care contract was married or living in a consensual union at the time of acquiring joint marital property,

the consent of the spouse/partner will be required for the contract. Therefore, the relevant questions and checklist listed in the chapter Client disposing of the property shall apply accordingly.

I.
PITANJA RODNE RAVNOPRAVNOSTI U RAZLIČITIM VRSTAMA NOTARSKE DELATNOSTI

1.1 Klijent koji raspolaže imovinom

Pravni osnov

Zakon ne propisuje izričito da uknjiženom vlasniku koji je stekao imovinu radom tokom trajanja bračne/vanbračne zajednice treba pismena saglasnost neuknjiženog supružika/parnera da bi prodao ili na drugi način raspolagao imovinom. Međutim ova obaveze proističe iz Porodičnog zakona (u daljem tekstu PZS). Član 171 stav 1 PZS definiše zajedničku imovinu supružnika kao imovinu koju su supružnici stekli radom u toku trajanja zajednice života u braku. U skladu sa čl. 176 st. 2 PZS smatra se da je upis izvršen na ime oba supružnika i kada je izvršen na ime samo jednog od njih. Dalje, čl. 174 st. 1 i 3 predviđa da zajedničkom imovinom supružnici upravljaju i raspolažu zajednički i sporazumno i da supružnik ne može raspolagati svojim udelom u zajedničkoj imovini niti ga može opteretiti pravnim poslom među živima. Član 191 PZS predviđa isti pravni režim za zajedničku imovinu stečenu radom vanbračnih partnera.

Tri elementa moraju biti ispunjena za sticanje zajedničke imovine supružnika: brak, zajednica života i rad. Pod radom uloženim u stvaranje imovine podrazumeva se rad koji neposredno donosi prihode, ali i rad koji doprinosi održavanju ili uvećanju imovine (rad u domaćinstvu, podizinje dece (Kovaček-Stanić, 2014). Rad u domaćinstvu i briga o deci su u sudskoj praksi jednako vrednovani kao rad koji direktno donosi prihode. U presudi Vrhovnog kasacionog suda Rev. 1443/2015 od 31.8.2016. godine navodi se: „Prihodi iz zarade su samo jedan od kriterijuma kod utvrđivanja udela u zajednički stečenoj imovini tokom braka. U ovom slučaju pravilno je vrednovan doprinos tužilje u sticanju zajedničke imovine izražen u staranju o domaćinstvu i deci i obezbeđenju uslova tuženom za sticanje zarade, jer rad tužilje nije bio ograničen samo na porodične poslove već i usluge vezane za potrebe lica koja su dolazila kod tuženog po verskim pitanjima i od kojih je tuženi sticao zaradu."

Zajedničku imovinu treba razlikovati od posebne imovine supružnika, odnosno imovine koju je supružnik stekao pre braka, kao i u toku trajanja braka, deobom zajedničke imovine, nasleđem, poklonom ili drugim pravnim poslom kojim se pribavljaju isključivo prava (član 168 PZS). Svojom posebnom imovinom svaki supružnik samostalno upravlja i raspolaže (član 169 PZS).

Dakle, ukoliko javni beležnik utvrdi da je predmet pravnog posla imovina koja predstavlja posebnu imovinu jednog od supružnika, za raspolaganje se ne traži nikakva dalja saglasnost drugog supružnika.

Međutim u praksi se dešava da se tokom trajanja braka uveća vrednost posebne imovine jednog supružnika, te u slučaju neznatnog uvećanja drugi supružnik stiče pravo na novčano potraživanje srazmerno svom doprinosu, dok u slučaju znatnog uvećanja vrednosti, drugi supružnik ima pravo na udeo u imovini srazmerno svom doprinosu (član 170 PZS). Ovome u prilog govori i presuda Vrhovnog kasacionog suda, Rev 145/2016 od 8.2.2017. godine. Dalje, do uvećanja vrednosti zajedničke imovine može doći nakon prestanka zajedničkog života u braku u kom slučaju svaki supružnik ima pravo na novčano potraživanje odnosno pravo na udeo srazmerno svom doprinosu (član 175 PZS).

Specifična priroda zajedničke imovine je da je udeo svakog supružnika neopredeljen, za razliku od susvojine gde su delovi suvlasnika određeni. Ukoliko su supružnici u katastru nepokretnosti upisani kao suvlasnici sa opredeljenim udelima, smatra se da su izvršili deobu zajedničke imovine (čl. 176 stav 1 PZS). Deobu zajedničke imovine supružnici mogu izvršiti sporazumno, u obliku javnobeležnički potvrđene (solemnizovane) isprave (čl. 179 PZS), a ako se supružnici ne mogu sporazumeti oko deobe, deobu vrši sud

(čl. 180 PZS). Postoji pretpostavka da su udeli supružnika u zajedničkoj imovini jednaki, ali ista je oboriva, odnosno svaki supružnik može u sudskom postupku tužbom tražiti i dokazivati da je njen/njegov udeo u sticanju zajedničke imovine veći. Odlučivanje o ovom pitanju je u nadležnosti suda.

Zakonski režim zajedničke imovine može se izmeniti na osnovu ugovora supružnika. Porodični zakon reguliše bračni ugovor i ugovor o upravljanju i raspolaganju zajedničkom imovinom. (čl. 188 i 189 PZS). Ovi ugovori se mogu odnositi na postojeću i buduću imovinu. Oni se zaključuju u formi javnobeležnički potvrđene (solemnizovane) isprave i upisuju se u katastar nepokretnosti. Javni beležnik mora upozoriti stranke da se bračnim ugovorom isključuje zakonski režim zajedničke imovine (čl. 188 st. 2 PZS).

Posledice

Ukoliko javni beležnik utvrdi da je imovina stečena radom tokom trajanja zajednice života u braku ili da je tokom trajanja zajednice života došlo do uvećanja vrednosti posebne imovine supružnika, a stranke se nisu dogovorile oko deobe imovine niti je odluku o deobi doneo sud, za raspolaganje se traži pisana saglasnost drugog supružnika. Ako je, sa druge strane, nepokretnost u režimu susvojine, smatra se da je izvršena deoba zajedničke imovine. Stoga svaki supružnik može otuđiti svoj suvlasnički udeo, bez saglasnosti drugog supružnika, ali se primenjuje pravo preče kupovine drugog supružnika u slučaju prodaje nepokretnosti. U skladu sa čl. 14 stavovi 2 i 3 Zakona o osnovama svojinskopravnih odnosa (u daljem tekstu ZOSO), suvlasnik može raspolagati svojim delom bez saglasnosti ostalih suvlasnika. U slučaju prodaje suvlasničkog dela ostali suvlasnici imaju pravo preče kupovine samo ako je to određeno zakonom. Za raspolaganje celokupnom imovinom koja je u režimu suvlasništva, traži se saglasnost oba supružnika. Štaviše, za preduzimanje poslova koji prelaze okvir redovnog upravljanja (otuđenje cele stvari, promena namene stvari, izdavanje cele stvari u zakup, zasnivanje zaloge na celoj stvari, zasnivanje stvarnih službenosti, veće popravke i sl.) potrebna je saglasnost svih suvlasnika (čl. 15 ZOSO). Član 5 stav 1 Zakon o prometu nepokretnosti propisuje da suvlasnik nepokretnosti koji namerava da proda svoj suvlasnički deo dužan je da ga prethodno ponudi na prodaju ostalim suvlasnicima.

U praksi se može desiti situacija da je lice koje raspolaže imovnom u trenutku raspolaganja slobodnog bračnog stanja, ali je nepokretnost steklo radom u toku trajanja bračne ili vanbračne zajednice. Ako je u katastru nepokretnosti upisan samo klijent koji ima nameru raspolaganja imovinom, a nije izvršena deoba zajedničke imovine sporazumno ili sudskim putem, na takav pravni posao primenjuju se gore navedene zakonske odredbe o raspolaganju zajedničkom imovinom supružnika, a javni beležnik je u obavezi da za takav pravni posao traži saglasnost bivšeg supružnika/partnera.

Bračna i vanbračna zajednica su izjednačene u pogledu imovinskih prava. Dakle, na imovinske odnose vanbračnih parnera shodno se primenjuju odredbe o imovinskim odnosima supružnika (čl. 191 PZS). Vanbračna zajednica je definisana kao trajnija zajednica života žene i muškarca, između kojih nema bračnih smetnji. Vanbračni partneri imaju prava i dužnosti supružnika pod uslovima određenim zakonom (čl. 4 PZS). Tri elementa moraju biti ispunjena da bi postojala vanbračna zajednica: zajednica života, nepostojanje bračnih smetnji i trajnija zajednica života. Da bi postojala vanbračna zajednica koja vodi zajedničkom sticanju, potrebno je da izmedju žene i muškarca, koji nisu u braku sa trećim licem, postoji volja da međusobno uspostave odnose koji odgovaraju odnosima u braku i da svesno i voljno izvršavaju ovlašćenja i dužnosti propisana za supružnike, pri čemu je nužno utvrditi da li je zajednica zasnovana u cilju zajedničkog sticanja i da li je takvog sticanja stvarno i bilo (Rešenje Apelacionog suda u Beogradu Gž. 8849/2012). Imovina stečena

od strane vanbračnih partnera radom u toku trajanja zajednice života u vanbračnoj zajednici je njihova zajednička imovina, a odredbe o imovinskim odnosima supružnika se shodno primenjuju na imovinske odnose vanbračnih partnera, a sve primenom člana 191 Porodičnog zakona. Zakonska pretpostavka je da su udeli supružnika, pa i vanbračnih partnera u sticanju zajedničke imovine jednaki, u skladu sa članom 180. stav 2. istog zakona (Presuda Vrhovnog suda Srbije Rev. 986/10).

Obzirom da su datum i pravni osnov sticanja nepokretnosti ključni faktori u odlučivanju da li je potrebno tražiti saglasnost drugog supružnika za transakciju, datum i pravni osnov sticanja bi trebalo da budi upisani u bazu katastra nepokretnosti (u daljem tekstu KN), a isprave za upis bi trebalo da budu dostupne u digitalnom formatu radi pregleda i korišćenja od strane lica koja mogu da dokažu svoj pravni interes, uz poštovanje principa zaštite podataka o ličnosti. U tom slučaju sve zainteresovane strane bi imale jednostavan pristup i jasnu sliku o svojinskopravnom režimu koji se odnosi na predmetnu nepokretnost. Ovo bi olakšalo postupak detaljne provere kako javnim beležnicima tako i samim strankama i njihovim pravnim zastupnicima. Međutim, ovo zahteva izmene zakona i nastavak digitalizacije podataka KN.

Ono što je bitno istaći je da supružnik/vanbračni partner ima mogućnost da saglasnost dâ ili da saglasnost uskrati. Javni beležnik mora supružnika obavestiti da se radi o zajedničkoj imovini stečenoj u toku braka i da se ista može otuđiti samo uz saglasnost oba supružnika. Dakle, zahtev za saglasnost supružnika ne sme se svesti na puku formalnost i ne treba da se traži samo da bi se izbegla odgovornost javnog beležnika, već neuknjiženi supružnik mora biti upoznat sa svojim pravima i obavezama u pogledu zajedničke imovine supružnika i upoznat sa svojim pravom da saglasnost za transakciju dâ ili uskrati.

Otuđenje nepokretnosti koja je u režimu zajedničke imovine supružnika bez saglasnosti drugog supružnika može biti predmet osporavanja ovakvog pravnog posla pred sudom (Presuda Vrhovnog kasacionog suda, Rev 1694/2015). Javni beležnik mora stranke upoznati sa pravnim posledicama.

Ista pravila važe i u slučaju opterećenja nepokretnosti, kada će javni beležnik takođe zahtevati saglasnost supružnika/vanbračnog partnera za zasnivanje i upis tereta u situaciji kada je u katastru nepokretnosti upisan samo jedan supružnik, a imovina je stečena radom u toku trajanja bračne zajednice. Potrebno je da javni beležnik drugom supružniku/vanbračnom partneru objasni značenje zajedničke imovine supružnika, kao i da ga obavesti o posledicama davanja saglasnosti odnosno odbijanja da dâ saglasnost za konstituisanje i upis tereta.

Ono što je značajno istaći jeste da je sudska praksa podeljena, kada je u pitanju punovažnost zaloge uspostavljene i upisane na nepokretnosti bez saglasnosti neupisanog supružnika. Razlika se sastoji u tome da jednoj grupi pripadaju sudske odluke u kojima se brani princip pouzdanja u javne knjige (član 63 Zakona o državnom premeru i katastru nepokretnosti), kojim je propisano da su podaci o nepokretnostima upisani u katastar nepokretnosti istiniti i pouzdani i niko ne može snositi štetne posledice zbog tog pouzdanja (Presuda Vrhovnog kasacionog suda, Rev 1981/2015). Sa druge strane, postoji sudska praksa, prevlađujuća u odnosu na prethodne odluke, u kojima je prednost data režimu bračne tekovine i pretpostavci zajedničkog upisa bračnih drugova (Presuda Vrhovnog kasacionog suda, Rev1 14/2018). Saglasnost neupisanog supružnika na zasnivanje i upis zaloge na nepokretnosti će svakako otkloniti svaku dalju dilemu o punovažnosti ovakvog pravnog posla, odnosno uz datu saglasnost i pouku o značaju i posledicama davanja odnosno odbijanja ovakve saglasnosti osigurava se pravna valjanost takvog posla.

Pretpostavka zajedničkog upisa znači da javni beležnik treba da izvrši temeljnu proveru u pogledu datuma i pravnog osnova sticanja imovine, kako bi utvrdio da li se imovina ima smatrati zajedničkom ili

posebnom imovinom supružnika i kako bi utvrdio da li je lice koje tu imovinu otuđuje ili opterećuje bilo u braku ili vanbračnoj zajednici u vreme sticanja umesto jednostavnog pouzdanja u podatke KN.

Važno je istaći da javni beležnik ne može da odbije da preduzme bilo koju od radnji za koje je ovlašćen. Međutim, javni beležnik je dužan da odbije obavljanje službene radnje u slučajevima ako je službena radnja nespojiva sa njegovom službenom delatnošću, naročito ako se njegovo učešće zahteva radi postizanja očigledno nedopuštenog ili nepoštenog cilja, ako utvrdi da je radnja prema zakonu nedopuštena, za koju sumnja da je stranka preduzima prividno ili da bi izbegla zakonske obaveze ili da bi protivpravno oštetila treće lice, ako utvrdi da stranka nema poslovnu sposobnost ili iz drugog razloga ne može punovažno zaključivati pravne poslove, izuzev ako u postupku učestvuje zakonski zastupnik tog lica, ako raspolaže sa činjenicama da stranka nema ozbiljnu i slobodnu volju da zaključi određeni posao (čl. 53 Zakona o javnom beležništvu). Na rešenje javnog beležnika o odbijanju overe može se uložiti žalba sudu (čl. 53a Zakona o javnom beležništvu).

U određenim slučajevima javni beležnik bi trebalo da postavi strankama sledeća pitanja i koristi dokumentaciju koja se dole navodi kao lista potrebne dokumentacije. Važno je da javni beležnik koristi sve raspoložive informacije i kritički se odnosi prema odgovorima stranaka kako bi utvrdio tačno i potpuno faktičko i pravno stanje. Javni beležnik nije dužan niti je ovlašćen da sprovodi ex officio istragu ali mora koristiti sve raspoložive izvore da kako bi utvrdio istinito stanje.

Relevantna pitanja

- Ko je uknjiženi vlasnik nepokretnosti?
  - Da li je klijent zakoniti vlasnik ili postoje očigledne sumnje u pogledu njegovog prava svojine?
  - Kakav je bračni status klijenta: da li je klijent u braku ili vanbračnoj zajednici, da li je klijent bio u braku ili vanbračnoj zajednici u vreme sticanja imovine?
  - Pitati stranke i objasniti da su dužne da daju istinite odgovore i da pomognu prilikom pribavljanja relevatnih informacija i dokumentacije.
  - Ukoliko postoji sumnja u odgovore koje klijent daje, proveriti raspoložive podatke (bazu podataka za klijenta, prethodne evidentirane radnje, javne registre, internet pretragu).
  - Obavestiti drugu stranu da li je i na koji način zaštićena ako je savesna prilikom sticanja prava.
- Koji se pravni režim primenjuje na nepokretnost: da li je nepokretnost predmet bračnog ugovora, ugovora o upravljanju i raspolaganju zajedničkom imovinom ili bilo kod drugog ugovora kojim se menja zakonski režim imovine stečene tokom braka? Da li su supružnici sproveli deobu imovine na osnovu sporazuma supružnika?
- Da li je deobu imovine izvršio sud ili je u toku sudski postupak?
- Kada je imovina stečena i koji je bio pravni osnov sticanja: da li je imovina stečena/uvećana radom u toku trajanja braka ili vanbračne zajednice? Da li je zajam za imovinu otplaćen dok je klijent bio u braku/vanbračnoj zajednici?

Lista potrebne dokumentacije

- Elektronska baza podataka KN ili izvod iz lista nepokretnosti za nepokretnost
- Elektronska matična knjiga ili izvod iz matične knjige venčanih, izvod iz matične knjige rođenih za klijenta, izjava oba vanbračna partnera o postojanju vanbračne zajednice pod uslovom da ne postoje bračne smetnje, presuda o razvodu ili poništaju braka, itd, uključujući i informacije o prethodnim brakovima/vanbračnim zajednicama
- Ugovor, sudska odluka ili odluka državnog organa kao pravni osnov sticanja imovine i vreme sticanja imovine (ukoliko je dostupno)
- (Ukoliko je primenljivo) sporazum supružnika ili sudska odluka o deobi imovine ili ugovor kojim se menja režim zajedničke imovine supružnika (bračni ugovor, ugovor o upravljanju i raspolaganju zajedničkom imovinom, itd.)
- Saglasnost supružnika/bivšeg supružnika/partnera/bivšeg partnera kao deo ugovora ili kao posebna pisana, javnobeležnički potvrđena (solemnizovana) izjava ako je imovina u režimu zajedničke imovine supružnika ili ako se saglasnost traži u skladu sa ugovorom koji reguliše imovinske odnose supružnika
- Saglasnost supružnika/bivšeg supružnika/partnera/bivšeg partnera kao deo založne izjave ili založnog ugovora

1.2 Klijent koji stiče imovinu

Obaveza zajedničkog upisa supružnika postoji na osnovu člana 7 stav 5 Zakona o postupku upisa u katastar nepokretnosti i vodova, koji je na snazi od 2018. godine i podrazumeva da zajednička imovina stečena radom tokom trajanja braka mora biti upisana kao zajednička svojina supružnika na osnovu činjenice o postojanju braka unete u ispravu za upis i dostavljene katastru nepokretnosti. Imovina će biti upisana isključivo na kupca ako u ispravi ili odluci za upis, koju dostavi javni beležnik ili sud, nema podataka o postojanju braka i supružniku ili ako oba supružnika daju izjavu da se ne radi o zajedničkoj već o posebnoj imovini jednog od supružnika ili ako supružnici odluče da steknu susvojinu, sa određenim udelima.

Predviđena je i mogućnost naknadnog upisa zajedničke svojine na nepokretnoj imovini koja je već upisana u katastru nepokretnosti na ime jednog supružnika, i to na osnovu izjave oba supružnika da se radi o zajedničkoj svojini (čl. 7 st. 5 Zakona o postupku upisa u katastar nepokretnosti i vodova).

Zajednička svojina po osnovu sticanja u braku ne upisuje se u katastar u slučaju sticanja nasleđivanjem, poklonom i drugim besteretnim pravnim poslom (obzirom da se radi o posebnoj imovini jednog supružnika koja će stoga biti upisana samo na njegovo/njeno ime) ili ako su supružnici bračnim ugovorom drugačije regulisali pitanje sticanja zajedničke ili posebne imovine (čl. 7 st. 7 Zakona o postupku upisa u katastar nepokretnosti i vodova).

Ovakvo rešenje doprinosi jačanju načela pouzdanja u katastar nepokretnosti i štiti interese oba partnera ali i interese trećeg savesnog lica koje se pouzdava u podatke katastra nepokretnosti kao istinite i tačne.

Ovakav upis podržava zakonski režim zajedničke imovine supružnika stečene radom i pospešuje jačanje rodne ravnopravnosti. Međutim, ovo rešenje može se i kritikovati. Jedan od razloga je činjenica da se upis vrši bez saglasnosti (u praksi može se desiti i bez znanja) drugog supružnika, koji nije stranka u pravnom poslu. Sudska praksa, iako nije izvor prava, ali u znatnoj meri utiče na tumačenje prava, pokazaće kakvi će biti efekti ovog pravnog rešenja u praksi. Najbolje rešenje bi bilo pozvati oba supružnika/vanbračna partnera da budu stranke u pravnom poslu.

Za razliku od zajedničkog upisa, pretpostavka zajedničkog upisa iz čl. 176 st.2 PZS, koja na izgled štiti interese neupisanog supružnika, stvara probleme u praktičnoj primeni. „Bez obzira što za javne knjige važi načelo pouzdanosti, za punovažnost ugovora, odnosno za savesnost sticaoca, nije dovoljno samo ono što u njima piše“ (Ponjavić, 2007). Ovo znači da prava neupisanog supružnika, iako su po zakonu priznata, nisu učinjena transparentnim kroz uknjižbu u katastru nepokretnosti. Ovo predstavlja problem za treća savesna lica koja se pouzdaju u takav upis. Da bi upisao pravo svojine u katastar neuknjiženi supružnik treba da se dogovori sa drugim supružnikom o deobi imovine ili da traži deobu u sudskom postupku.

S druge strane, davanje izjave da se radi o posebnoj imovini ima značajne posledice u pravnom prometu o kojima supružnik koji daje takvu izjavu mora biti upozoren od strane javnog beležnika. Ovo tim pre što se motivi za davanje ovakve izjave mogu razlikovati od namere da se izvrši deoba zajedničke imovine (supružnik koji ne poseduje imovinu ne želi da izgubi poresku olakšicu prilikom buduće kupovine nepokretnosti, izbegavanje poverilaca, itd.).

Javni beležnik mora jasno upoznati supružnike o značaju i posledicama davanja ovakve izjave. Otvoreno je pitanje i sudska praksa će tek pokazati kako se ovakva izjava može pobijati u sudskom postupku (osim iz razloga rušljivosti) i da li će sud ovu izjavu tretirati kao deobu zajedničke imovine. Dakle, obaveza javnog beležnika da informiše stranke o režimu zajedničke imovine supružnika i posledicama davanja izjave da je imovina posebna imovina jednog supružnika je utoliko važnija.

Javni beležnik će upoznati stranke da u trenutku sticanja imovine supružnici mogu izvršiti deobu imovine tako što će utvrditi suvlasničke udele u kom slučaju će oba supružnika biti ugovorne strane i kao takvi će biti upisani u katastru nepokretnosti sa određenim udelima. U isto vreme, javni beležnik treba da obavesti klijente da za upis susvojine supružnika/vanbračnih partnera i osoba sa invaliditetom postoji smanjena taksa za upis u KN, kao i za naknadni upis zajedničke svojine (tarifni broj 215b Zakona o republičkim administrativnim taksama). Ovo je dobar primer podsticaja za zajednički upis supružnika/vanbračnih partnera kao suvlasnika na nepokretnosti i za naknadni upis zajedničke svojine supružnika/vanbračnih partnera na nepokretnosti .

Zakon o postupku upisa u katastar nepokretnosti i vodova ne upućuje na zajednički upis vanbračnih partnera. Obzirom da su bračna i vanbračna zajednica izjednačene u pogledu imovinskih prava i obaveza koje proizvode (čl. 191 PZS), ako klijent koji stiče imovinu tvrdi da živi u vanbračnoj zajednici koja ispunjava uslove da bude priznata, najbolje bi bilo pozvati oba vanbračna partera da budu ugovorne strane u pravnom poslu i upisani kao suvlasnici ili zajedničari, zavisno od njihovog dogovora.

U Srbiji ne postoji registar vanbračnih zajednica i stoga se javni beležnik mora pouzdati u informacije koje mu stranke daju, uz upozorenje na posledice davanja lažnog iskaza i proveru da li u konkretnom slučaju postoje bračne smetnje.

Relevantna pitanja

- Kakvo je bračno stanje klijenta: da li je klijent u braku ili vanbračnoj zajednici prilikom sticanja imovine?
- Koji je pravni osnov sticanja imovine: da li je imovina stičena radom tokom trajanja braka/vanbračne zajednice ili da li je imovina stečena na osnovu poklona, nasleđa ili pravnog posla na osnovu kog se stiču samo prava?
- Koji režim se primenjuje na imovinu: da li klijent ima bračni ugovor, ugovor o upravljanju ili raspolaganju zajedničkom imovinom ili bilo koji drugi sporazum kojim se menja režim zajedničke imovine supružnika?

Lista potrebne dokumentacije

- ✔ Elektronska matična knjiga ili izvod iz matične knjige venčanih, izvod iz matične knjige rođenih za klijenta, izjava o postojanju vanbračne zajednice, presuda o razvodu ili poništaju braka, itd.
- ✔ Pravni osnov sticanja imovine (sastavni deo ugovora)
- ✔ Sporazum supružnika kojim se menja zakonski režim zajedničke imovine supružnika (bračni ugovor, ugovor o upravljanju i raspolaganju zajedničkom imovinom, itd.)
- ✔ Zajednički upis je zakonski uslov ukoliko ne postoji javnobeležnički potvrđena (solemnizovana) izjava ili overena izjava oba supružnika ili je kao deo isprave ili solemnizacione klauzule dato da je imovina posebna imovina jednog supružnika.

II.
NASLEĐIVANJE

2.1 Utvrđivanje bračnog statusa ostavioca

Jedno od važnih pitanja za postupak raspravljanja zaostavštine je utvrditi bračni status ostavioca i imovinu ostavioca. Javni beležnik treba da utvrdi kakav je bio bračni status ostavioca u vreme smrti i u vreme sticanja imovine. Ako je ostavilac bio u braku u vreme smrti, preživeli supružnik nasleđuje u prvom naslednom redu zajedno sa ostaviočevom decom u jednakim delovima (čl. 9 st. 2 Zakona o nasleđivanju, u daljem tekstu ZON). Braća i sestre su izjednačeni u pogledu nasleđivanja. Ako ostavilac nije imao dece, supružnik nasleđuje jednu polovinu zaostavštine u drugom naslednom redu zajedno sa ostaviočevim roditeljima (čl. 12 st. 2 ZON). U skladu sa važećim Zakonom o nasleđivanju partner u vanbračnoj zajednici ne nasleđuje drugog partnera. Međutim, vanbračni partner ima pravo na porodičnu penziju nakon smrti svog partnera na osnovu Zakona o penzijskom i invalidskom osiguranju (čl. 12 st. 2 Zakona o penzijskom i invalidskom osiguranju).

Posebno pažnju treba obratiti ako je ostavilac bio slobodnog bračnog stanja u vreme smrti ali je bio u braku ili je živeo u vanbračnoj zajednici u vreme sticanja imovine radom u toku trajanja braka ili vanbračne zajednice obzirom da se u tom slučaju imovina ima smatrati zajedničkom imovinom oba supružnika i javni beležnik mora sprovesti detaljnu proveru kako bi obezbedio da prava svih zainteresovanih strana budu identifikovana i zaštićena. Imovina može biti uknjižena samo na imenu ostavioca ali ako je ista stečena radom u braku ili vanbračnoj zajednici primenjuje se pretpostavka zajedničkog upisa, što znači da iako je upisan samo ostavilac, ima se smatrati da je imovina upisana na oba supružnika.

Relevatna pitanja

- Da li je ostavilac ostavio testament ili drugi dokument relevantan za nasleđivanje? Da li prilikom raspodele zaostavštine naslednicima moraju biti uzeti u razmatranje nužni delovi (supružnika/dece, itd.)?
- Da li je ostavilac bio u braku u vreme smrti ili u braku ili vanbračnoj zajednici u vreme sticanja imovine koja pripada zaostavštini?
- Da li je ostavilac imao zaključen sporazum supružnika o posebnom režimu zajedničke imovine supružnika?

Lista potrebne dokumentacije

- ✔ Elektronska matična knjiga za ostavioca ili izvod iz matične knjige umrlih, venčanih, rođenih, presuda o razvodu ili poništaju braka
- ✔ Provera registra testamenata
- ✔ Elektronska matična knjiga za naslednika ili izvod iz matične knjige rođenih, venčanih, umrlih, presuda o razvodu ili poništaju braka
- ✔ Sporazum kojim se uređuje specifičan režim zajedničke imovine supružnika

- ✔ Elektronska baza KN ili izvod iz lista nepokretnosti iz KN
- ✔ Ugovor, sudska odluka ili odluka državnog organa (pravni osnov prethodnog sticanja imovine)

Upis datuma i pravnog osnova sticanja u katastar nepokretnosti i digitalizacija isprava za upis bi olakšala i ubrazala ovaj postupak obzirom da javni beležnik ne bi tražio ove podatke od stranaka. Ovo zahteva izmene zakona i nastavak digitalizacije podataka katastra nepokretnosti.

2.2 Dužnost identifikovanja, informisanja i pozivanja svih naslednika u ostavinskom postupku

U postupku raspravljanja zaostavštine javni beležnik mora utvrditi ko su naslednici umrlog, koja imovina sačinjava ostaviočevu zaostavštinu i koja prava iz zaostavštine pripadaju naslednicima i drugim licima (čl. 87 Zakona o vanparničnom postupku, u daljem tekstu ZVP).

Javni beležnici će se postarati da svi naslednici budu identifikovani, formalno obavešteni i pozvani na raspravu.

Dužnost javnih beležnika da se staraju da svi nasledni učesnici budu pozvani na ostavinsku raspravu je posebno bitna obzirom da nakon pravosnažnosti rešenja o nasleđivanju ne postoji mogućnost ponovnog raspravljanja zaostavštine (član 130, stav 1 ZVP) niti ponavljanja postupka (član 131 ZVP) već stranke svoja prava mogu ostvariti u parnici.

Ukoliko se ne zna da li ostavilac ima naslednika, ili nije jasno da li su svi naslednici identifikovani, ili ako je nasledniku postavljen privremeni staralac zbog toga što je boravište naslednika nepoznato, a naslednik nema punomoćnika, ili zbog toga što se naslednik ili njegov zakonski zastupnik, koji nemaju punomoćnika, nalazi u inostranstvu, tako da se dostavljanje nije moglo izvršiti, sud će pozvati lica koja polažu pravo na nasleđe da se prijave sudu u roku od godinu dana od objavljivanja oglasa koji će se pribiti na oglasnu tablu suda, objaviti u Službenom glasniku Republike Srbije, a može se objaviti i na drugi način (član 116 ZVP).

U pozivu za raspravu, javni beležnik će objasniti predmet i svrhu rasprave i obavestiće pozvane stranke o dokumentaciji koju treba dostaviti.

Pored obaveznih elemenata poziva za raspravu (čl. 115 ZVP) dobra je praksa informisati stranke o dokumentaciji koju treba da prilože i obavestiti ih o njihovim pravima i obavezama i posledicama preduzimanja ili propuštanja određenih radnji.

Relevantna pitanja

- Da li je ostavilac ostavio testament?
- Da li ostavilac ima dece?

- Da li ostavilac ima supružnika?
- Da li ostavilac ima roditelje, braću, sestre ili druge srodnike?
- Koja je njihova adresa?
- Da li neko od njih živi u inostranstvu?

Lista potrebne dokumentacije

- ✔ Provera registra testamenta
- ✔ Provera sudskog registra
- ✔ Poziv za raspravu i potvrda o prijemu
- ✔ Izvod iz matične knjige umrlih
- ✔ Za naslednika: elektronska matična knjiga ili izvod iz matične knjige rođenih, izvod iz matične knjige venčanih, izvod iz matične knjige umrlih, presuda o razvodu, rešenje o nasleđivanju, itd.
- ✔ Poziv putem oglasne table suda, službenog glasnika ili međunarodnog službenog glasnika

2.3 Zaštita prava i interesa nužnih naslednika u testamentalnom nasleđivanju

Nužni naslednici su ostaviočevi: potomci, usvojenici i njihovi potomci, bračni drug, roditelji, usvojilac, braća i sestre, dedovi i babe i ostali preci. Usvojilac iz nepotpunog usvojenja, ostaviočeva braća i sestre, njegovi dedovi i babe i njegovi ostali preci nužni su naslednici samo ako su trajno nesposobni za privređivanje a nemaju nužnih sredstava za život (čl. 39 ZON).

Nužni naslednici imaju pravo na deo zaostavštine kojim ostavilac nije mogao raspolagati, a koji je deo zagarantovan zakonom. Nužni deo potomaka, usvojenika i njegovih potomaka i ostaviočevog bračnog druga je polovina, a nužni deo ostalih nužnih naslednika je trećina dela koji bi svakom od njih pripao po zakonskom redu nasleđivanja. Ako nužni naslednik ne može ili neće da nasledi, njegov nužni deo ne prirasta ostalim nužnim naslednicima (čl. 40 ZON).

Na početku ostavinske rasprave javni beležnik će utvrditi da li je ostavilac ostavio testament ili ima ugovor o doživotnom izdržavanju. Ukoliko postoji ugovor o doživotnom izdržavanju, u odnosu na nepokretnost koja je predmet ugovora o doživotnom izdržanja, ostavinski postupak će se obustaviti.

Testament će biti proglašen pred javnim beležnikom, a zatim će naslednici dati nasledničke izjave.

Obzirom da je nužni deo deo zaostavštine kojim ostavilac nije mogao raspolagati, javni beležnik će

upoznati nužne naslednike sa njihovim pravom da zahtevaju nužni deo, o prirodi i veličini nužnog dela.

Nužni deo je povređen ako je vrednost ostaviočevih zaveštajnih raspolaganja i poklona učinjenih nužnom nasledniku ili licu umesto koga ovaj dolazi na nasleđe manja od vrednosti naslednikovog nužnog dela (čl. 42 ZON).

Ukoliko među naslednim učesnicima ništa nije sporno, ostavinski postupak će se završiti pred javnim beležnikom. U suprotnom učesnici u naslednom postupku će biti upućeni na parnicu.

Utvrđenje povrede nužnog dela, redukcija zaveštanja i/ili poklona, utrvrđivanje novčane protivvrednosti i obveznika isplate nužnog dela se vrši u parničnom postupku.

Međutim, ako je naslednik učestvovao u ostavinskom postupku i nije tražio nužni deo, tada ne može to pravo ostvarivati u parničnom postupku (Presuda Apelacionog suda u Novom Sadu, Gž. 4467/2011).

Stoga je dužnost javnog beležnika da obavesti nasledne učesnike u ostavinskom postupku o njihovim pravima kako kasnije ne bi bili prekludirani da ih ostvaruju u parničnom postupku.

Ukoliko naslednik osporava testament (naslednik može tvrditi da je testament suprotan prinudnim propisima, da je ostavilac bio nesposoban za rasuđivanje, itd.) stranke će biti upućene na parnicu g (čl. 119 ZVP).

Relevantna pitanja

- Da li je imovina bila predmet ugovora o doživotnom izdržavanju?
- Da li je ostavilac ostavio testament?
- Da li testament ispunjava formu propisanu zakonom?
- Da li postoji drugi testament?
- Da li naslednici imaju pravo na nužni deo?
- Da li nužni naslednici traže nužni deo?
- Da li naslednici prihvataju ili se odriču nasleđa?
- Da li naslednici priznaju ili osporavaju testament?

Lista potrebne dokumentacije

- ✔ Ugovor o doživotnom izdržavanju
- ✔ Testament ostavioca

- ✔ Naslednička izjava
- ✔ Izjava nužnog naslednika da li priznaje ili osporava testament
- ✔ Izjava nužnog naslednika da li zahteva nužni deo

2.4 Informisanje preživelog supružnika da može tražiti izdvajanje svog udela u zajedničkoj imovini supružnika iz ostaviočeve zaostavštine

Obaveza javnog beležnika da informiše preživelog supružnika proističe iz gore pomenutog čl. 171 st.1 PZS koji definiše zajedničku imovinu supružnika i gore navedenog čl. 176 st.2 PZS koji reguliše pretpostavku zajedničkog upisa supružnika. Ako postoji spor između stranaka koji se može odnositi ne samo na pravo na udeo supružnika već i na veličinu udela, javni beležnik će stranke uputiti na parnicu (čl. 119 ZVP). Ukoliko ne postoji spor javni beležnik će izvršiti izdavajanje udela preživalog supružnika na osnovu bračne tekovine iz zaostavštine. Obzirom da su bračna i vanbračna zajednica izjednačene u pogledu imovinskih prava i obaveza koja proizvode (čl. 191 PZS), javni beležnik može obavestiti stranke da ukoliko među njima ne postoji spor u pogledu prava i veličine udela vanbračnog partnera u zajedničkoj imovini, stranke mogu zaključiti poravnanje sa vanbračnim partnerom. U slučaju postojanja spora, javni beležnik će obavestiti vanbračnog partnera da može ostvariti svoja prava pred sudom u parničnom postupku.

U praksi se često dešava da je upis izvršen samo na ime jednog supružnika ili vanbračnog partnera iako je imovina stečena radom u toku trajanja bračne ili vanbračne zajednice. Iako je nepokretnost upisana kao isključiva svojina ostavioca ne postoji pravni osnov da se cela nepokretnost uruči naslednicima obzirom da je neophodno da se izdvoji udeo preživelog supružnika iz zaostavštine. Javni beležnik ima obavezu da upotrebi sve raspoložive mogućnosti da utvrdi prirodu imovine posebno koristeći dole navedenu dokumentaciju.

Preživeli supružnik može zahtevati svoj udeo u zajedničkoj imovini čak i nakon ostavinskog postupka (Presuda Vrhovnog suda Srbije Rev. 1406/05).

Sistem zajedničkog upisa koji je uveden Zakonom o postupku upisa u katastar nepokretnosti i katastar vodova bi takođe trebalo da podstakne izdvajanje supružničkog udela.

Relevatna pitanja

- Kada je imovina stečena?
- Šta je bio pravni osnov sticanja imovine?
- Da li je ostavilac bio u braku ili vanbračnoj zajednici u vreme sticanja imovine?
- Da li je ostavilac imao zaključen bračni ugovor ili drugu vrstu ugovora kojim se menja zakonski režim zajedničke imovine supružnika?

- Da li supružnik zahteva izdvajanje svog udela u zajedničkoj imovini iz zaostavštine?
- Da li se drugi naslednici sa tim slažu ili to osporavaju?
- Da li su drugi naslednici saglasni da se sa vanbračnim partnerom ostavioca sačini poravnanje u pogledu udela vanbračnog partnera u imovini?

Lista potrebne dokumentacije

- ✔ Elektronska matična knjiga ili izvod iz matične knjige venčanih
- ✔ Elektronska baza KN ili izvod iz lista nepokretnosti
- ✔ Ugovor, sudska odluka ili odluka državnog organa (kao pravni osnov sticanja)
- ✔ Sporazum supružnika kojim se menja zakonski režim zajedničke imovine supružnika (bračni ugovor, itd.)
- ✔ Izdvajanje udela supružnika iz zaostavštine, kao deo rešenja
- ✔ Ugovor o poravnanju između naslednika i vanbračnog partnera

2.5 Informisanje preživalog člana domaćinstva da može zadržati pravo plodouživanja na nepokretnosti pod uslovom da se sa tim slažu svi ostali naslednici

Postoji mogućnost povećanja naslednog dela supružnika/roditelja na osnovu Zakona o nasleđivanju pod određenim uslovima (nasleđivanje u drugom naslednom redu i nedostatak nužnih sredstava za život). Supružnik/roditelj može zahtevati doživotno uživanje na celini ili delu zaostavštine koju su nasledili ostali naslednici. Pod određenim uslovima, supružnik/roditelj može zahtevati svojinu (ako je vrednost zaostavštine tako mala da bi njenom podelom zapao u oskudicu, čl. 23 i čl. 31 ZON).

Sa druge strane, ostali naslednici mogu tražiti smanjenje naslednog dela supružnika pod uslovima predviđenim zakonom (čl. 26 ZON).

Zakon o nasleđivanju predviđa obavezu javnog beležnika, kada istupa kao poverenik suda, da upozori poljoprivrednika koji je živeo ili privređivao u zajednici sa ostaviocem da može tražiti, ako to iziskuje opravdana potreba, da mu se ostavi poljoprivredno zemljište a da on vrednost tog zemljišta isplati drugim naslednicima u novcu u određenom roku (čl. 233 i 232 ZON). Ovo sa jedne strane štiti poljoprivrednika od deobe zemlje ali takođe štiti i druge naslednike kroz novčanu nadoknadu.

Gore navedeni zahtevi spadaju u sudsku nadležnost i javni beležnik može obavestiti naslednike o pravima i obavezama koji su propisani zakonom.

Javni beležnik može informisati stranke, ukoliko utvrdi da će nakon raspravljanja zaostavštine supružnik ili drugi naslednik ostati bez imovine ili krova nad glavom (na primer, supruga koja nasleđuje sa decom ili supružnik koji nasleđuje u drugom naslednom redu, a nema krov nad glavom) da se stranke mogu saglasiti da se ustanovi pravo doživotnog plodouživanja na celoj nepokretnosti u korist određenog lica. U tom slučaju, nijedan naslednik se ne bi odrekao nasleđa nego bi se sporazumeli da se jednom licu omogući da ima doživotno plodouživanje na imovini.

Ovo je pitanje autonomije volje, a ne obaveza javnog beležnika. Međutim obraćanje pažnje na ovakvu situaciju može da ima značajan uticaj na ekonomsko osnaživanje žena, pod uslovom da je javni beležnik spreman i voljan da utvrdi okolnosti konkretnog slučaja postavljanjem pitanja i informisanjem naslednika o mogućnostima koje im stoje na raspolaganju po zakonu, a koje nisu obavezujuće već su stvar sporazuma stranaka.

Relevatna pitanja

- Da li je imovina koja je predmet raspravljanja mesto prebivališta nekog od naslednika?
- Da li se drugi naslednici slažu da se konstituiše pravo doživotnog plodouživanja na imovini?

Lista potrebne dokumentacije

- ✔ Izjava o prijemu nasleđa i sporazum naslednika o ustanovljavanju doživotnog plodouživanja pred javnim beležnikom

2.6 Obaveštavanje naslednika o posledicama odricanja od nasleđa

Zaostavština prelazi po sili zakona na ostaviočeve naslednike u trenutku njegove smrti. (čl. 212 st. 1 ZON). Rešenje o nasleđivanju je samo deklarativne prirode.

Naslednik se može odreći nasleđa izjavom pred javnim beležnikom do okončanja prvostepenog postupka za raspravljanje zaostavštine. Smatra se da naslednik koji se odrekao nasleđa nikada nije ni bio naslednik (čl. 213 st. 1 i 3 ZON).

Ako se do okončanja prvostepenog postupka za raspravljanje zaostavštine naslednik ne odrekne nasleđa, smatraće se da se nasleđa primio (čl. 219 st. 1 ZON).

Ako se naslednik primio nasleđa ili se odrekao nasleđa, izjavu o tome mora potpisati on sam ili njegov zastupnik. Potpis na izjavi o primanju nasleđa ili o odricanju od nasleđa, koja se pismeno podnosi sudu/javnom beležniku kao povereniku suda, kao i potpis na punomoćju, moraju biti javnobeležnički potvrđeni. U izjavi treba navesti da li se naslednik prima, odnosno odriče dela koji mu pripada po zakonu ili na osnovu testamenta, ili se izjava odnosi na nužni deo. Prilikom davanja izjave o odricanju od nasleđa

sud/javni beležnik kao poverenik suda upozoriće naslednika da se može odreći nasleđa samo u svoje ime (čl. 118 ZVP).

Odricanje od nasledstva može imati dalekosežne posledice po naslednike, posebno kada su u pitanju žene i ćerke. Iako odluka o prihvatanju ili odricanju od nasledstva spada u domen slobodne volje, javni beležnik kao nosilac javnih ovlašćenja koji prima ovu izjavu, mora objasniti naslednicima značaj i posledice davanja izjave o pihvatanju odnosno odricanju od nasledstva.

Javni beležnik mora objasniti naslednicima koje su posledice odricanja, a posebno da odricanje ne može biti delimično i da je izjava o odricanju neopoziva (čl. 214 st. 2 i 3 ZON). Izjava mora biti jasna i izričita.

Javni beležnik nije u mogućnosti da preisipituje autonomiju volje, ali može da pokuša da objasni posledice odricanja od nasledstva, posebno kada posumnja da je motiv za davanje ovakve izjave tradicionalni, i na zabludi zasnovan, stav da ženska deca imaju obavezu da se odreknu nasledstva u korist muškaraca koji će nastaviti rad na porodičnoj njivi ili imanju. Ovo je posebno bitno jer se dešava da se porodična situacija, finansijska situacija učesnika u ostavinskom postupku kao i motivi za davanje negativne nasledničke izjave vremenom promene dok se jednom data naslednička izjava ne može promeniti. Žene moraju biti svesne da kada daju izjavu o odricanju u korist muškog naslednika da ta odluka ne utiče samo na njihove interese već utiče i na interese njihove dece i naslednika.

Za razliku od drugih nacionalnih zakonodavstsva, srpsko zakonodavstvo predviđa da se naslednik može odreći nasledstva samo u svoje ime (čl. 213 ZON). Prema tome, u slučaju odricanja, javni beležnik će utvrditi identitet potomaka lica koje daje izjavu o odricanju i mora ih pozvati da oni daju nasledničku izjavu. Postupanje suprotno ovome može voditi u sudski spor (Presuda Apelacionog suda u Nišu Gž.3526/2018).

Odricanje od nasledstva u korist određenog lica smatra se izjavom o prijemu nasleđa uz istovremeno ustupanje naslednog dela, a ustupanje se tretira kao poklon (čl. 216 ZON). To znači da podleže porezu na nasleđe i porezu na poklon ukoliko nema poreskih oslobođenja u skladu sa Zakonom o porezima na imovinu. Javni beležnik ne može i ne treba da istupa kao poreski savetnik, ali može objasniti uopšteno strankama poreske implikacije odricanja i uputiti stranke da se za dodatne informacije obrate poreskoj upravi ili poreskom savetniku.

Javni beležnik je u poziciji da odloži ostavinski postupak ako smatra da učesnicima ostavinskog postupka treba dodatno vreme da se detaljnije informišu o svojim pravima. Javni beležnik mora posebno da povede računa i utvrdi da li je naslednička izjava data slobodno i bez pritiska, obzirom da naslednik koji je nasledničku izjavu dao pod uticajem prinude, pretnje, prevare ili zablude može zahtevati poništaj iste (čl. 214 ZON). Iako je postupak formalan javni beležnik je u poziciji da ispita volju stranaka tako što će izdvojiti vreme da postavi direktna pitanja kojima se ispituje da li postoji slobodna volja stranaka.

Ponekada je odricanje od nasleđa motivisano željom da se izbegne plaćanje ostaviočevih dugova obzirom da naslednik koji se odrekao nasleđa ne odgovara za ostaviočeve dugove (čl. 223 ZON), izbegavanje poverilaca, itd. Javni beležnik mora upoznati naslednike o posledicama davanja pozitivne odnosno negativne nasledničke izjave (npr. da naslednik odgovara za ostaviočeve dugove do visine vrednosti nasleđene imovine (čl. 222 ZON).

Potrebno je napraviti pravilan balans između načela autonomije volje i zaštite interesa svih strana u postupku, i to davanjem potrebnih obaveštenja strankama kao i razumljivog obrazloženja da bi stranke shvatile značaj i posledice davanja nasledničke izjave.

U slučaju naknadno pronađene imovine, naslednik koji se prethodno odrekao nasleđa a želi da se prihvati naknadno pronađenog nasledstva biće upućen na parnicu (čl. 130 st. 2 ZVP).

Relevantna pitanja

- Da li se naslednik prihvata nasleđa?
- Da li se naslednik odriče nasleđa?
- Da li naslednik koji se odriče nasleđa ima potomke?
- Da li se oni prihvataju ili se odriču nasleđa?
- Koji su razlozi/motivi stranaka?

Lista potrebne dokumentacije

- ✔ Naslednička izjava data lično pred javnim beležnikom ili pisana (javnobeležnički potvrđena) izjava
- ✔ Naslednička izjava pred javnim beležnikom putem punomoćnika na osnovu specijalnog punomoćja

2.7 Ugovori u naslednom pravu

Ugovori o nasleđivanju, ugovori o budućem nasledstvu, ugovor o sadržini zaveštanja nisu dozvoljeni, odnosno ništavi su (čl. 179, 180, 181 ZON). Zakon o nasleđivanju reguliše dve vrste ugovora u naslednom pravu: ugovor o ustupanju i raspodeli imovine za života i ugovor o doživotnom izdržavanju. Oba ugovora se zaključuju u formi javnobeležnički potvrđene (solemnizovane) isprave (čl. 184 stav 1 i čl. 195 stav 1 ZON). Javni beležnik će u oba ova ugovora upozoriti stranke da imovina koja je predmet ugovora ne ulazi u zaostavštinu ustupioca /primaoca izdržavanja i da se njome ne mogu namiriti njegovi nužni naslednici (čl. 184 stav 2 i čl. 195 stav 2 ZON).

Ako je ustupilac kod ugovora o ustupanju i raspodeli imovine za života i primalac izdržavanja kod ugovora o doživotnom izdržavanju bio u braku ili vanbračnoj zajednici u vreme sticanja zajedničke imovine supružnika, saglasnost supružnika/vanbračnog partnera je neophodna kod zaključivanja ugovora. Prema tome, relevantna pitanja i lista potrebne dokumentacije navedena u odeljku Klijent koji raspolaže imovinom se shodno primenjuju.

CONCLUSION

The work of notaries significantly affects women's rights. They have to make sure that the transaction corresponds to the parties' will, to inform the parties on the meaning, contents, and consequences of the transaction and to check if the transaction is permissible under the law. By ensuring that the spouse provides consent to the disposal and encumbrance of joint marital property, and encouraging the joint registration of property rights, the protection of the statutory portion of inheritance, and the separation of the spouse's share from the estate, notaries contribute to the economic empowerment of women and further reduction of poverty.

The presumption of joint registration, mentioned earlier in the Guidelines, although introduced in the Serbian Family Law with the aim of protecting marital property, created confusion in practice. Although recognized by the law, the rights of the non-registered spouse to the marital property were not secured through registration in the land registry. As a consequence of this, in all the cases where only one spouse is registered, and the presumption of joint registration applies for the other, the notaries have to a perform a detailed due diligence process today in order to properly assess whether the person who is disposing of or encumbering the property was married or living in a consensual union at the time of property acquisition. Since the REC does not contain information on the date and the legal basis of acquisition, this due diligence process is even more comprehensive and time-consuming. Furthermore, the property rights of a diligent third party are also not sufficiently protected. We may see that even case law is divided in some points between the principle of trust in the land registry and presumption of joint registration of marital property.

Although there is no explicit requirement set forth under the law, by asking for the spousal/partner's written consent for the disposal or encumbrance of marital property, the notaries are trying to overcome the problem of a lack of joint registration from the past and to comply with the principle of legality. The mandatory joint registration of spouses introduced by the Law on Procedure of Registration in the Real Estate Cadastre and Cadastre of Utilities was a step forward in this respect. It supports the regime of marital property and its registration in REC. It will help to achieve legal certainty since all the interested parties, including the diligent buyer, will have a clear understanding of the applicable property regime and property rights.

However, joint registration still does not apply to partners in a consensual union. Although marriage and consensual union generate the same property rights, notaries have difficulties in determining the existence of a consensual union without its registration in the appropriate registries. The notaries should at this point be encouraged to use the information available from the parties and other resources and to critically reflect on answers obtained from the parties.

There is a token fee for registration of co-ownership of spouses and partners and disabled persons in REC, as well as for subsequent joint registration of spouses, which stands as a good incentive for joint registration.

Finally, notaries should bear in mind that non-discrimination is a constitutional principle and should always be protected in their daily activities.

The Principles of notarial ethics developed by the International Union of Notaries (UINL) offer a sound

basis to guide notaries in strengthening gender equality in their daily activities. The ethical principles developed by UINL are implemented in the national Code of Ethics. Good practices that aim to strengthen gender equality should be accommodated across the country to ensure legal clarity, legal certainty and to ensure that they are systematically applied. The information notaries give should be in line with the applicable law: it should not be a matter of sole compliance with formal requirements of the law and to avoid any personal liability, but should be made in such a manner so that parties have a full understanding of the meaning and consequences of the transaction, rights, and obligations stemming from it.

The work of notaries is subject to the supervision of the Ministry of Justice, the competent court, and Notary Chamber (art.13 of Notary Law). A notary's liability may be disciplinary, civil (for damages) and criminal. Compliance with matrimonial property and registration law should be – along with many other issues – the subject of general inspections. In cases of intentional or negligent breach of their duties, notaries are liable for damages to the damaged parties. Notaries have to exercise due diligence and respect the statements set out in this guideline.

The Regional Guidelines and this accompanying guidance document are based on applicable legislation. They should be constantly updated and improved in order to support changes in the law and to implement the best practice.

Constant training on gender issues should be organized. The concerns of the notaries about the possibilities of implementing best practice should be taken seriously.

This guidance document is not binding and is based on the current national legislation and practice: it is not a binding interpretation of the law. The Notary Chamber and the supervising authorities and courts will have to determine and decide how the guidelines will be implemented in the notary's daily practice, in the most efficient manner, in order to avoid gender discrimination and to support the economic empowerment of women.

LIST OF LAWS AND COURT DECISIONS

Laws

The Constitution of the Republic of Serbia, (*Official Journal of the Republic of Serbia*, No. 98/2006), hereinafter the Constitution

The Law on Ratification of the Convention on the Elimination of All Forms of Discrimination against Women, (*Official Gazette of the SFRJ – International Treaties*, No. 11/81)

The Law on the Ratification of the European Convention on the Protection of Human Rights and Fundamental Freedoms amended in accordance with Protocols 11, 4, 6, 7, 12 and 13 (*Official Gazette of the SCG – International Treaties*, No. 9/2003, 5/2005 and 7/2005 – correction and *Official Gazette of the Republic of Serbia – International Treaties*, No. 12/2010 and 10/2015)

The National Strategy for Gender Equality 2016-2020 with the Implementation Action Plan for 2016-2018, (*Official Journal of the Republic of Serbia*), No. 4/2016

The Notary Law (*Official Journal of the Republic of Serbia* no. 31/2011, 85/2012, 19/2013, 55/2014 – law, 93/2014 – law, 121/2014, 6/2015 and 106/2015)

The Family Law (*Official Journal of Republic of Serbia*, no.18/2005, 72/2001 – oth. law and 6/2015)

The Property Relations Law (*Official Gazette of the Socialist Federal Republic of Yugoslavia*, no. 6/80 and 36/90, *Official Gazette of the Federal Republic of Yugoslavia*, no. 29/96 and *Official Journal of the Republic of Serbia*, no. 115/2005 – law)

The Law on Procedure of Registration in Real Estate Cadastre and Cadastre of Utilities (*Official Journal of Republic of Serbia,* no. 41/2018, 95/2018, 31/2019 and 15/2020)

The Law on Republic Administrative Fees (*Official journal of the Republic of Serbia*, no.43/2003, 51/2003 - corr., 61/2005, 101/2005 – other law, 5/2009, 54/2009, 50/2011, 70/2011 – corrected RSD amounts., 55/2012 – corrected RSD amounts., 93/2012, 47/2013 – corrected RSD amounts, 65/2013 -other law, 57/2014 -corrected RSD amounts., 45/2015 – corrected RSD amounts., 83/2015, 112/2015, 50/2016 - corrected RSD amounts, 61/2017 – corrected RSD amounts, 113/2017, 3/2018 - corr., 50/2018 – corrected RSD amounts., 95/2018, 38/2019 – corrected RSD amounts, 86/2019, 90/2019 – corr and 98/2020 – corrected RSD amounts)

Law on State Survey and Real Estate Cadastre (*Official Journal of Republic of Serbia,* no. 72/2009, 18/2010, 65/2013, 15/2015)

The Inheritance Law (*Official Journal of the Republic of Serbia,* no. 46/95, 101/2003)

The Law on Pension and Disability Insurance (*Official Journal of Republic of Serbia,* no. 34/2003, 64/2004

– decision of the CCS, 84/2004 – other law, 85/2005, 101/2005 – other law, 63/2006 – decision of CCS, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 108/2013, 75/2014, 142/2014, 73/2018, 46/2019 – decision of CCS and 86/2019)

The Law on Non-Contentious Procedure (*Official Journal of the Socialist Republic of Serbia,* no. 25/82 and 48/88 and *Official Journal of the Republic of Serbia,* no. 46/95 – law, 18/2005 – law, 85/2012, 45/2013 – law, 55/2014, 6/2015 and 106/2015 – law)

The Property Tax Law (*Official Journal of Republic of Serbia* 62/2001, *Official Gazette of the Federal Republic of Yugoslavia* no. 42/2002

Court decisions

Decision of the Constitutional court, 96/2015, 47/2017 – authentic interpretation, 113/2017 – other law, 27/2018 – law, 41/2018 – other law and 9/2020 – other law),

Decision of the Constitutional court, Už 72/2017 dated of April 4, 2019, 4.4.2019

Judgment of the Appeal Court in Belgrade Gž. 1362/2018 dated of January 24, 2019.

Judgment of the Appeal Court in Nis, Gz. 3526/2018 dated of July 5, 2018

Judgment of the Appeal Court in Novi Sad, Gž. 4467/2011 dated of April 4, 2011

Judgment of the Supreme court of Serbia Rev. 986/10 dated of March 2, 2011

Judgment of the Supreme Court, Rev. 114/2018 dated of December 12, 2018

Judgment of the Supreme court Rev. 145/2016 dated of February 8, 2017

Judgment of the Supreme Court Rev. 1406/05 dated of March 1, 2006

Judgment of the Supreme court Rev. 1443/2015 dated of August 31, 2016

Judgment of the Supreme court Rev. 1981/2015 dated of April 14, 2016

Resolution of the Appeal Court in Belgrade no. Gž. 8849/2012 dated of January 29, 2014

Bibliography

FAO and GIZ. *Guidelines on Strengthening Gender Equality in Notarial Practices – South-East Europe*. Rome, Italy, 2018. Available at: http://www.fao.org/3/CA2953EN/ca2953en.pdf

Kovacek-Stanic. *Family Law*. 5th edited and supplemented edition, Novi Sad, 2014.

Ponjavić, Z. *Family Law*, second changed and supplemented edition, Kragujevac, 2007.

ZAKLJUČAK

Rad javnih beležnika znatno utiče na prava žena. Javni beležnici moraju da se uvere da transakcija odgovara volji stranaka, da obaveste stranke o značenju, sadržini i posledicama transakcije i da provere da li je transakcija dopuštena po zakonu. Traženjem saglasnosti supružnika za otuđenje i opterećenje zajedničke imovine supružnika, podsticanjem zajedničkog upisa, zaštitom nužnog dela, izdvajanjem udela supružnika iz zaostavštine javni beležnici doprinose ekonomskom osnaživanju žena i smanjivanju siromaštva.

Pretpostavka zajedničkog upisa, opisana ranije u Smernicama, iako uvedena u srpski Porodični zakon sa ciljem da se zaštiti bračna tekovina, stvara zabunu u praksi. Iako su zakonom bila priznata prava neuknjiženog supružnika na bračnu tekovinu ona nisu bila zaštićena putem upisa u katastar nepokretnosti. Posledično, javni beležnici danas u svim slučajevima u kojima je samo jedan supružnik upisan, a za drugog važi pretpostavka zajedničkog upisa, moraju da preduzmu detaljnu proveru kako bi utvrdili da li je lice koje otuđuje ili zalaže imovinu bilo u braku ili u vanbračnoj zajednici u vreme sticanja imovine. Nedostatak informacije u KN o datumu i pravnom osnovu sticanja usložnjava ovaj postupak detaljne provere i produžava potrebno vreme za njegovo sprovođenje. Štavise, imovinska prava savesne treće strane nisu dovoljno zaštićena. Vidimo da je čak i sudska praksa na pojedinim mestima podeljena između principa poverenja u javne knjige i pretpostavke zajedničkog upisa bračne imovine.

Iako za to ne postoji izričit zahtev propisan zakonom, traženjem saglasnosti supružnika za otuđenje ili opterećenje bračne imovine javni beležnici pokušavaju da premoste ovaj problem nedostatka zajedničkog upisa iz prošlosti i da poštuju načelo zakonitosti. Obavezan zajednički upis supružnika uveden Zakonom o postupku upisa u katastar nepokretnosti i vodova je bio korak napred povodom ovog pitanja. Time se podržava režim zajedničke imovine supružnika i njen upis u KN. Isti će pospešiti pravnu sigurnost jer će sva zainteresovana lica, uključujući i savesnog kupca, imati jasnu sliku o imovinskom režimu koji se primenjuje i imovinskim pravima.

Međutim, zajednički upis se još uvek ne primenjuje na vanbračne partnere u vanbračnoj zajednici. Iako bračna i vanbračna zajednica proizvode ista imovinska prava, javnim beležnicima je teško da utvrde postojanje vanbračne zajednice bez njenog upisa u odgovarajući registar. Javni beležnici bi trebalo da koriste informacije koje dobiju od stranaka i iz drugih izvora i da kritički sagledaju odgovore dobijene od stranaka.

Postoji smanjena naknada za upis u KN susvojine supružnika i vanbračnih partnera kao i lica sa invaliditetom, kao i za naknadni zajednički ups supružnika, što predstavlja motivaciju za zajednički upis.

Na kraju, javni beležnici moraju biti svesni da je nediskriminacija ustavno načelo i da mora biti zaštićeno u njihovim dnevnim aktivnostima.

Principi notarske etike koje je razvila Međunarodna unija notara (UINL) pružaju solidnu osnovu za usmeravanje javnih beležnika ka jačanju rodne ravnopravnosti u njihovim dnevnim aktivnostima. Etički principi koje je razvila Međunarodna unija notara implementirani su u nacionalni Etički kodeks. Dobra praksa koja ima za cilj da podstakne rodnu ravnopravnost treba da bude harmonizovana u celoj državi kako bi se postigla pravna jasnoća, pravna sigurnost i kako bi se takva praksa sistematično primenjivala. Informacije koje javni beležnik daje moraju biti u skladu sa važećim zakonima ali ne treba da budu svedene samo na puku formalnost kako bi se izbegla lična odgovornost javnog beležnika već moraju biti date

na način da stranke u potpunosti razumeju značaj i posledice transakcije, kao i prava i obaveze koje iz transakcije proizilaze.

Rad javnih beležnika je pod nadzorom Ministarstva pravde, nadležnog suda i Komore javnih beležnika (čl. 13 Zakona o javnom beležništvu). Odgovornost javnog beležnika može biti disciplinska, građanskopravna (za štetu) i krivična. Postupanje u skladu sa odredbama o zajedničkoj imovini supružnika i obavezi upisa moraju biti – između mnogih ostalih pitanja – predmet nadzora. U slučaju povrede službenih ovlašćenja namerno ili usled nepažnje, javni beležnici su odgovorni za štetu strankama koje su pretpele štetu. Javni beležnici treba da vrše temeljnu proveru i da poštuju navode ovih smernica.

Regionalne smernice i ove prateće smernice zasnivaju se na važećim propisima. Potrebno je da se stalno ažuriraju i da se na njima neprestano radi kako bi bile u skladu sa izmenama zakona i kako bi se implementirala najbolja praksa.

Potrebno je organizovati stalne treninge na temu rodne ravnopravnosti. Dileme javnih beležnika u pogledu mogućnosti imlementacije najbolje prakse moraju biti ozbiljno uzete u razmatranje.

Ove smernice nisu obavezujuće i zasnivaju se na trenutno važećim domaćim propisima i praksi – ne predstavljaju obavezujuće tumačenje prava. Komora javnih beležnika, kao i organi nadzora i sudovi će utvrditi i odlučiti kako na najefikasniji način implementirati smernice u svakodnevni rad javnih beležnika kako bi se izbegla rodna diskriminacija i podržalo ekonomsko osnaživanje žena.

SPISAK ZAKONA I SUDSKIH ODLUKA

Zakoni

Ustav Republike Srbije (*Službeni glasnik Republike Srbije*, br. 98/2006), u daljem tekstu Ustav

Zakon o ratifikaciji Konvencije o eliminisanju svih oblika diskriminacije žena, (*Službeni list SFRJ – Međunarodni ugovori*, br. 11/81)

Zakon o ratifikaciji Evropske Konvencije za zaštitu ljudskih prava i osnovnih sloboda izmenjene u skladu sa Protokolima 11, 4, 6, 7, 12 i 13 (*Službeni list SCG – Međunarodni ugovori*, br. 9/2003, 5/2005 i 7/2005 – ispravka i *Službeni glasnik Republike Srbije – Međunarodni ugovori*, br. 12/2010 i 10/2015)

Nacionalna strategija za rodnu ravnopravnost za period od 2016. do 2020. godine sa akcionim planom za period od 2016. do 2018. godine (*Službeni glasnik Republike Srbije*, br. 4/2016

Zakon o javnom beležništvu (*Službeni glasnik Republike Srbije* br. 31/2011, 85/2012, 19/2013, 55/2014 – dr. zakon, 93/2014 – dr. zakon, 121/2014, 6/2015 i 106/2015)

Porodični zakon (*Službeni glasnik Republike Srbije*, no.18/2005, 72/2001 – dr. zakon i 6/2015)

Zakon o osnovama svojinskopravnih odnosa (*Službeni list SFRJ*, br. 6/80 i 36/90, *Službeni list SRJ*, br. 29/96 i *Službeni glasnik Republike Srbije*, br. 115/2005 – dr. zakon)

Zakon o postupku upisa u katastar nepokretnosti i vodova (*Službeni glasnik Republike Srbije,* br. 41/2018, 95/2018, 31/2019 i 15/2020)

Zakon o republičkim administrativnim taksama (*Službeni glasnik Republike Srbije*, br. 43/2003, 51/2003 - ispravka, 61/2005, 101/2005 – dr. zakon, 5/2009, 54/2009, 50/2011, 70/2011 – usklađeni din. izn., 55/2012 – usklađeni din. izn., 93/2012, 47/2013 – usklađeni din. izn., 65/2013 - dr. zakon, 57/2014 - usklađeni din. izn., 45/2015 – usklađeni din. izn., 83/2015, 112/2015, 50/2016 - usklađeni din. izn., 61/2017 – usklađeni din. izn., 113/2017, 3/2018 - ispravka, 50/2018 – usklađeni din. izn., 95/2018, 38/2019 – usklađeni din. izn., 86/2019, 90/2019 – ispravka i 98/2020 – usklađeni din. izn.)

Zakon o državnom premeru i katastru nepokretnosti (*Službeni glasnik Republike Srbije,* no. 72/2009, 18/2010, 65/2013, 15/2015)

Zakon o nasleđivanju (*Službeni glasnik Republike Srbije,* no. 46/95, 101/2003)

Zakon o penzijskom i invalidskom osiguranju (*Službeni glasnik Republike Srbije,* br. 34/2003, 64/2004 – odluka USRS, 84/2004 – dr. zakon, 85/2005, 101/2005 – dr. zakon, 63/2006 – odluka USRS, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 108/2013, 75/2014, 142/2014, 73/2018, 46/2019 – odluka US i 86/2019)

Zakon o vanparničnom postupku (*Službeni glasnik Socijalističke Republike Srbije,* br. 25/82 i 48/88 i *Službeni glasnik Republike Srbije,* br. 46/95 – dr. zakon, 18/2005 – dr. zakon, 85/2012, 45/2013 – dr. zakon, 55/2014, 6/2015 i 106/2015 – dr. zakon)

Zakon o porezima na imovinu (*Službeni glasnik Republike Srbije* 62/2001, *Službeni list SRJ* br. 42/2002)

Sudske odluke

Odluka Ustavnog suda, xxx 96/2015, 47/2017 – autentično tumačenje, 113/2017 – dr. zakon, 27/2018 – dr. zakon, 41/2018 – dr. zakon i 9/2020 – dr. zakon)

Odluka Ustavnog suda, Už 72/2017 od 4.4.2019

Presuda Apelacionog suda u Beogradu, Gž 1362/2018 od 24.1.2019.

Presuda Apelacionog suda u Nišu Gž.3526/2018 od 5.7.2018.

Presuda Apelacionog suda u Novom Sadu, Gž. 4467/2011 od 4.4.2011.

Presuda Vrhovnog suda Srbije Rev. 986/10 od 2.3.2011.

Presuda Vrhovnog kasacionog suda, Rev 114/2018 od 12.12.2018.

Presuda Vrhovnog kasacionog suda, Rev 145/2016 od 8.2.2017.

Presuda Vrhovnog suda Srbije Rev. 1406/05 od 1.3.2006.

Presuda Vrhovnog kasacionog suda Rev. 1443/2015 od 31.8.2016.

Presuda Vrhovnog kasacionog suda, Rev 1981/2015 od 14.04.2016.

Rešenje Apelacionog suda u Beogradu Gž. 8849/2012 od 29.1.2014.

Bibliografija

FAO i GIZ. *Smernice za jačanje rodne jednakosti u notarskoj praksi – Jugoistična Evropa*, Rim, Italija, 2018. Dostupno na: http://www.fao.org/3/CA2953EN/ca2953en.pdf

Kovaček-Stanić. *Porodično pravo*, peto izmenjeno i dopunjeno izdanje, Novi Sad, 2014.

Ponjavić, Z. *Porodično pravo*, drugo izmenjeno i dopunjeno izdanje, Kragujevac, 2007.

ISBN 978-92-5-134716-4

9 789251 347164

CB5717B/1/07.21