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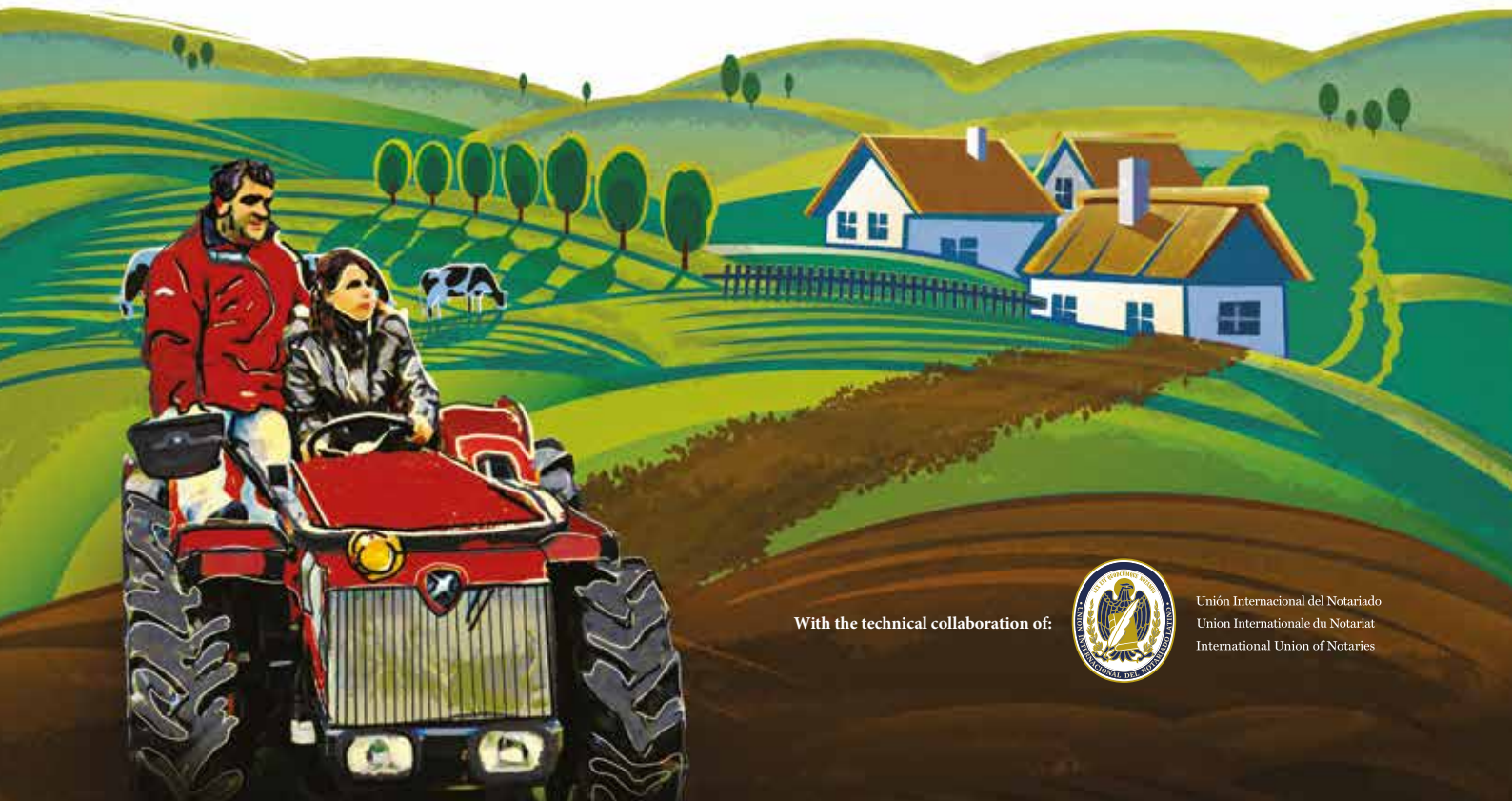
Notarial practices in Montenegro:
Strengthening gender equality in land ownership and control

Notarska praksa u Crnoj Gori:
Jačanje rodne ravnopravnosti u vlasništvu i kontroli nad zemljištem



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Sadržaj

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Notarial practices in Montenegro: Strengthening gender equality in land ownership and control were prepared by Bojan Božović, 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 Montenegro. The guide was edited by LIBAR Agency for Education and Translation from Bosnia and Herzegovina. The design was prepared by Kushtrim Balaj.

ZAHVALNICA

Notarska praksa u Crnoj Gori: Smjernice za jačanje rodne ravnopravnosti u vlasništvu i kontroli nad zemljištem je izradio Bojan Božović, uz doprinos Naomi Kenney, UNFAO, Margret Vidar, UNFAO, Rumyana Tonchovska, UNFAO, Ann Jenderedjian, UNFAO, Lovro Tomasic, Međunarodna unija notara, Veronika Efremova, GIZ, Jana Schuhmann, GIZ. Prilikom izrade Smjernica uzeta su obzir mišljenja Notarske komore Crne Gore. Lekturu Smjernica je radila LIBAR agencija za obrazovanje i prevođenje iz Bosne i Hercegovine. Dizajn je izradio Kushtrim Balaj.

KEY DEFINITIONS

Marriage:	Marriage is a legally regulated cohabitation of a woman and a man.
Extramarital union:	Longer cohabitation of a woman and a man.
Consensual union:	Longer cohabitation of two persons.
Same-sex civil partnership:	Legally regulated union of two persons of the same sex concluded before a competent authority.
Marriage contract:	Contract by which spouses, during marriage or before marriage, regulate property relations for existing or future property.
Joint property:	Property acquired by spouses through work during cohabitation in marriage. The term is used interchangeably with marital property or matrimonial property.
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 from which sole rights are acquired.
Spousal consent:	The requirement that the other spouse or partner (in a consensual union) agrees to the disposal or encumbrance of 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:	A presumption of joint registration means that it shall be deemed that the registration is made in the name of both spouses 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 has a share determined proportionally to the entire item.
Joint ownership:	Joint ownership is 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 law, legal transaction, inheritance and a state authority decision in the manner and under the conditions set forth by the law.
Estate:	An estate consists of all the rights that could be inherited, 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.

KLJUČNE DEFINICIJE

Brak:	Brak je zakonom uređena zajednica života žene i muškarca.
Vanbračna zajednica:	Duža zajednica života žene i muškarca.
Konsenzualna zajednica:	Duža zajednica života dva lica.
Životno partnerstvo lica istog pola:	Zakonom uređena zajednica života dva lica istog pola zaključena pred nadležnim organom.
Bračni ugovor:	Ugovor kojim bračni supružnici, tokom trajanja braka ili prije sklapanja braka, uređuju svoje imovinske odnose na postojećoj ili budućoj imovini.
Zajednička imovina:	Imovina koju su bračni supružnici stekli radom u toku trajanja bračne zajednice. Umjesto ovog izraza koriste se i izrazi bračna tekovina ili bračna imovina.
Posebna imovina:	Imovina koju je bračni supružnik stekao prije sklapanja braka, kao i imovina koju je stekao u toku braka izdvajanjem iz zajedničke imovine ili nasljeđem, poklonom ili bilo kojom drugom transakcijom na osnovu koje se stiču isključiva prava.
Saglasnost supružnika:	Uslov da se drugi supružnik ili partner (u konsenzualnoj zajednici) saglasi sa raspolaganjem ili opterećivanjem nepokretnosti.
Zajednička registracija:	Kada se imena oba supružnika kao zajedničara ili suvlasnika upišu u registar nepokretnosti.
Pretpostavka zajedničke registracije:	Pretpostavka zajedničke registracije podrazumijeva da se smatra da je nepokretnost uknjižena na ime oba supružnika čak i ako je upis u registar nepokretnosti izvršen na ime samo jednog od njih.
Susvojina:	Više lica imaju pravo susvojine na nepodijeljenoj stvari kada je dio svakog od njih određen srazmjerno prema cjelini.
Zajednička svojina:	Zajednička svojina je svojina više lica na nepodijeljenoj stvari kada su njihovi udjeli odredivi, ali nijesu unaprijed određeni.
Sticanje svojine:	Pravo svojine stiče se po samom zakonu, na osnovu pravnog posla, nasljeđivanjem i odlukom državnog organa na način i pod uslovima određenim zakonom.
Zaostavština:	Zaostavštinu čine sva prava podobna za nasljeđivanje koja su ostaviocu pripadala u trenutku njegove smrti.
Zakonski nasljednici:	Zakonski nasljednici su potomci ostavioca, njegovi usvojenici i njihovi potomci, njegov supružnik, njegovi roditelji, njegovi usvojioci, njegova braća i sestre i njihovi potomci, njegovi djedovi i babe i njihovi potomci, i njegovi drugi preci.

INTRODUCTION

Gender equality means that women and men participate equally in all spheres of public and private life, and that they have equal status, equal opportunities to enjoy and exercise all their rights and freedoms, make use of their individual skills and capabilities for the development of society and equally benefit from achieved results.

The Constitution of Montenegro guarantees the equality of women and men, and requires the country to develop and implement equal opportunity policies, prohibit any kind of direct or indirect discrimination, determine the possibility of introducing special measures aimed at creating conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any grounds (art. 18 and 8 of the Constitution). In addition, Montenegro has ratified a number of international documents on human rights (CEDAW, Istanbul Convention, etc.), updated national legislation with a series of systemic laws to set out the preconditions for protection from discrimination and human safety, while gender equality and the economic empowerment of women are regulated by a set of key strategies adopted by the Government of Montenegro.

Women in Montenegro make up half of the population (50.61 percent), almost half of whom are unemployed. Activity rates are highest for the age range 25-49 amounting to 86 percent for men and 73.6 percent for women (Monstat). Women make up the majority of those employed in education (75.3 percent). However, they are the absolute minority in decision-making positions in education institutions with the exception of pre-school education (MEF, 2017).

Since declaring its independence in 2006, Montenegro has made significant progress in the field of development and human rights. In the period 2006–2007, the country became a member of the United Nations (UN), the World Bank, the International Monetary Fund (IMF) and the Organization for Security and Co-operation in Europe (OSCE). In 2010, Montenegro became an official candidate country for membership of the European Union. But, Montenegrin society, despite rapid developments in the process of EU accession, remains highly patriarchal. Even though the Constitution, national legislation and internal obligations guarantee women in Montenegro the full enjoyment of their social, economic and political rights, the progress towards gender equality has been slow because of the traditional gender stereotypes, poor implementation of existing policies and commitments and lack of financial support for responsible institutions and agencies. A combination of structural gender inequality and cultural factors have resulted in multiple forms of discrimination and have continuously deprived women of their rights.

According to the Montenegrin Law on gender equality (*Official Gazette of Republic of Montenegro*, no. 46/07 of 31 July 2007 and *Official Gazette of Montenegro*, no. 73/10 of 10 December 2010, 40/11 of 8 August 2011, 35/15 of 7 July 2015), gender equality implies equal participation of women and men, as well as persons of different gender identities, in all areas of the public and private sector, equal status and equal opportunities to exercise all rights and freedoms and use of personal knowledge and skills for the development of society, as well as to equally benefit from the results of work.

The Action Plan for achieving gender equality in Montenegro (2017–2021) is the third development document for the implementation of a gender equality policy in Montenegro. Like the previous two, this document is also based on the international and domestic legal framework dealing with gender equality

issues. This document is based on national legislation and international human rights instruments, the legal documents of the United Nations, the Council of Europe, the European Union and other international organizations in those areas relating to gender equality.

The Food and Agriculture Organization of the United Nations (FAO) is the custodian agency for Sustainable Development Goal (SDG) indicator 5.a.2 "Proportion of countries where the legal framework (including customary law) guarantees women's equal rights to land ownership and/or control." In addition to the official reporting methodology for SDG indicator 5.a.2, FAO developed a Legal Assessment Tool (LAT) for gender-equitable land tenure, which countries can use to monitor the implementation of indicator 5.a.2 over time.

Notaries play an important role in strengthening gender equality in transactions relating to real property and as court trustees in inheritance proceedings, owing to their duty to inform and advise parties, including women, on their land tenure rights and the 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 identified and protected with the final goal of eliminating discrimination, building a healthy environment and supporting sustainable development. Notaries are members of an independent profession with public authority, which they are expected to execute professionally, independently, autonomously and neutrally, and issue documents that have the character of public instruments. Notarial documents are public instruments. A notarial act may also be an executive document - a document which can be enforced directly - without conducting a court procedure. Participants in a legal transaction, which does not require a compulsory form of a notarial act, may request the notary to acknowledge their private instruments in that transaction. Such a certified document has the power of a notarial act, and with the fulfilment of the assumptions defined in its content, it also has the power of an executive document.

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 are drafted on the basis of general principles found in several jurisdictions and offer practical guidance for the exercise of due diligence in the situations in which women's rights are at stake (FAO and GIZ, 2019).

This guidance document on Notarial practices in Montenegro: Strengthening gender equality in land ownership and control complements the Regional Guidelines and is a collection of applicable legal rules and good practices at national level and offers practical guidelines to Montenegrin notaries in their daily activities. It contains 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. This guidance document is based on the current national legislation and practice. 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 podrazumijeva da žene i muškarci ravnopravno učestvuju u svim oblastima javnog i privatnog života, i da imaju jednak položaj i jednake mogućnosti za uživanje i ostvarivanje svih svojih prava i sloboda, da koriste svoja lična znanja i sposobnosti za razvoj društva, kao i da ostvaruju jednake koristi od postignutih rezultata.

Ustavom Crne Gore jemči se ravnopravnost žena i muškaraca i zahtijeva se da država razvija i sprovodi politiku jednakih mogućnosti, zabranjuje se svaka vrsta neposredne ili posredne diskriminacije, utvrđuje se mogućnost uvođenja posebnih mjera koje su usmjerene na stvaranje uslova za ostvarivanje nacionalne, rodne i ukupne ravnopravnosti i zaštite lica koja su po bilo kom osnovu u nejednakom položaju (čl. 18 i 8 Ustava). Pored toga, Crna Gora je ratifikovala brojna međunarodna dokumenta o ljudskim pravima (Konvenciju o eliminisanju svih oblika diskriminacije žena, Istanbulsku konvenciju itd.), ažurirala je domaće zakonodavstvo nizom sistemskih zakona kako bi se postavili preduslovi za zaštitu od diskriminacije i za bezbjednost ljudi, dok su rodna ravnopravnost i ekonomsko osnaživanje žena uređeni nizom ključnih strategija koje je usvojila Vlada Crne Gore.

Žene u Crnoj Gori čine polovinu stanovništva (50,61 %), i gotovo polovina njih je nezaposlena. Stope aktivnosti su najviše u starosnoj grupi od 25 do 49 godina i iznose 86 procenata za muškarce i 73,6 procenata za žene (Monstat). Žene čine većinu zaposlenih u obrazovanju (75,3 posto). Međutim, one su apsolutna manjina na mjestima odlučivanja u obrazovnim institucijama, sa izuzetkom predškolskog obrazovanja (UPCG, 2017).

Od proglašenja nezavisnosti 2006. godine, Crna Gora je postigla značajan napredak u oblasti razvoja i ljudskih prava. U periodu od 2006. do 2007. godine, zemlja je postala članica Ujedinjenih nacija (UN), Svjetske banke, Međunarodnog monetarnog fonda (MMF) i Organizacije za evropsku bezbjednost i saradnju (OEBS). Godine 2010, Crna Gora je postala zvanična država kandidat za članstvo u Evropskoj uniji. Međutim, crnogorsko društvo je, i pored brzih promjena u procesu pristupanja EU, i dalje veoma patrijarhalno. Iako se Ustavom, domaćim zakonodavstvom i unutrašnjim obavezama ženama u Crnoj Gori jemči puno uživanje njihovih socijalnih, ekonomskih i političkih prava, napredak u ostvarivanju rodne ravnopravnosti je spor zbog tradicionalnih rodnih stereotipa, lošeg sprovođenja postojećih politika i preuzetih obaveza i nedostatka finansijske podrške za nadležne institucije i organe. Kombinacija strukturalne rodne neravnopravnosti i kulturnih faktora dovela je do višestrukih oblika diskriminacije i kontinuirano lišava žene njihovih prava.

Prema crnogorskom Zakonu o rodnoj ravnopravnosti ("Službeni list RCG", broj 46/07 od 31. jula 2007. godine i "Službeni list CG", br. 73/10 od 10. decembra 2010. godine, 40/11 od 8. avgusta 2011, 35/15 od 7. jula 2015. godine), rodna ravnopravnost podrazumijeva ravnopravno učešće žena i muškaraca, kao i lica drukčijih rodnih identiteta u svim oblastima javnog i privatnog sektora, jednak položaj i jednake mogućnosti za ostvarivanje svih prava i sloboda i korišćenje ličnih znanja i sposobnosti za razvoj društva, kao i ostvarivanje jednake koristi od rezultata rada.

Plan aktivnosti za postizanje rodne ravnopravnosti u Crnoj Gori (2017–2021) je treći razvojni dokument za sprovođenje politike rodne ravnopravnosti u Crnoj Gori. Kao i prethodna dva, i ovaj dokument se zasniva na međunarodnom i domaćem pravnom okviru koji uređuje pitanja rodne ravnopravnosti. Ovaj dokument zasniva se na domaćim propisima i međunarodnim instrumentima o ljudskim pravima, pravnim

dokumentima Ujedinjenih nacija, Savjeta Evrope, Evropske unije i drugih međunarodnih organizacija u oblastima koje se odnose na rodnu ravnopravnost.

Organizacija Ujedinjenih nacija za hranu i poljoprivredu (FAO) je organ zadužen za indikator 5.a.2 ciljeva održivog razvoja (SDG) koji glasi: "Udio država u kojima pravni okvir (uključujući i običajno pravo) garantuje ženama jednaka prava na vlasništvo nad zemljištem i/ili kontrolu nad zemljištem." Pored zvanične metodologije izvještavanja za indikator 5.a.2 ciljeva održivog razvoja, FAO je razvila i Alat za pravnu procjenu (LAT - eng. *Legal Assessment Tool*) za rodno ravnopravno posjedovanje zemljišta, koji države mogu da koriste za praćenje sprovođenja indikatora 5.a.2 tokom vremena.

Notari imaju važnu ulogu u jačanju rodne ravnopravnosti u transakcijama koje se odnose na nepokretnu imovinu i kao povjerenici suda u ostavinskom postupku, zbog svoje obaveze da informišu i savjetuju stranke, uključujući i žene, o njihovim pravima na posjedovanje zemljišta i dejstvima i posljedicama njihovih pravnih radnji i propuštanja. Dok prate da se zakon pravilno primjenjuje, moraju i da se postaraju da se ženska prava prepoznaju i zaštite sa konačnim ciljem eliminisanja diskriminacije, izgradnje zdravog okruženja i podrške održivom razvoju. Notari su pripadnici nezavisne profesije sa javnim ovlašćenjima koju se očekuje da će vršiti profesionalno, nezavisno, samostalno i neutralno, i izdaju dokumenta koja imaju karakter javnih isprava. Notarski akti su javne isprave. Notarski akt može da bude i izvršna isprava - dokument koji se može izvršiti direktno - bez vođenja sudskog postupka. Učesnici u pravnom poslu za koji nije propisana obavezna forma notarskog akta mogu zahtijevati od notara da potvrdi njihove privatne isprave u tom poslu. Takva ovjerena isprava ima snagu notarskog akta, a ukoliko su ispunjene pretpostavke definisane u njenom sadržaju ima i snagu izvršne isprave.

Regionalne smjernice za jačanje rodne ravnopravnosti u notarskoj praksi – Jugoistočna Evropa izradili su GIZ i FAO, uz tehničku saradnju Međunarodne unije notara. Sačinjene su na osnovu opštih načela iz više jurisdikcija i pružaju praktična uputstva za primjenu dužne pažnje kada se radi o ženskim pravima (FAO i GIZ, 2019).

Ovaj dokument koji sadrži smjernice za notarsku praksu u Crnoj Gori: Jačanje rodne ravnopravnosti u vlasništvu i kontroli nad zemljištem dopunjava Regionalne smjernice i predstavlja zbirku važećih zakonskih pravila i dobrih praksi na nacionalnom nivou i pruža praktične smjernice crnogorskim notarima za njihove svakodnevne aktivnosti. Sadrži pravne osnove, liste ključnih pitanja i listu za provjeru dokumenata koje notari mogu da koriste u svom svakodnevnom radu. Smjernice se daju sa ciljem da se eliminiše rodno zasnovana diskriminacija i unaprijedi ekonomsko osnaživanje žena. Ovaj dokument se zasniva na važećem domaćem zakonodavstvu i praksi. Namijenjen je svim pravnicima, naročito notarima i njihovoj komori koji su dužni da primjenjuju zakonska pravila i utvrđuju standarde za najbolje prakse na nacionalnom nivou.

I.
GENDER ISSUES IN DIFFERENT TYPES OF NOTARIAL SERVICE

1.1 Client disposing of and encumbering the property

Legal basis

Marriage is founded on the free decision of a man and a woman to enter into marriage, on their equality, mutual respect and mutual assistance (art. 3 of the Family Law). Property relationships in the marriage are based on the principles of equality, reciprocity and solidarity, as well as on the protection of interests of children.

The union of a man and a woman of a longer duration is equated with marital union with regard to the right to mutual support and other property-legal relationships.

Spouses may have separate and joint property. Separate property consists of the property that a spouse obtained before entering into marriage, as well as the property that the spouse obtained during marriage through inheritance, gift or other forms of obtaining property free from encumbrances. According to art. 288 of the Family Law, the incomes from the separate property gained through the work of the spouses are incorporated into the joint property, as is property gained on games of chance, unless a spouse invested his/her separate property in the game. This provision stipulates that the property which spouses acquired through work during cohabitation in marriage shall be their joint property (community of property).

Every spouse independently manages and disposes of his/her separate property, if the spouses do not agree otherwise.

Three elements need to be fulfilled for the acquisition of jointly owned marital property: marriage, cohabitation, and work. The work invested in acquiring property includes the work that directly accrues incomes, but also the work that contributes to the maintenance or increases the value of the property (work in the household, raising children).

Joint property consists of the property that spouses gained through their work during the marriage, as well as the incomes from that property. Joint property, during marriage, shall be managed and disposed of jointly and by mutual consent of both spouses (art. 291 of the Family Law). It is very important to note, however, that spouses may conclude a contract, which regulates that one of them shall perform the activities of managing and disposing of the whole joint property or its parts. The contract can be limited only to management or only to disposition. When not agreed otherwise, management shall include disposition within regular business operation. The contract may refer to all management and disposition activities or only to the activities of regular management or to certain individual activities. Each spouse may terminate the joint property management or disposition contract at any time, except when it is obvious that termination of the contract shall inflict damage on the other spouse (art. 291 of the Family Law).

After the last family law reform in Montenegro, it is possible to enter into a nuptial contract before and during marriage. The nuptial contract is an agreement that regulates the property relations of the spouses (during marriage), or future spouses (before marriage) for current or future property (art. 301 to 303 of the Family Law). The law recognises only the term "nuptial contract" and not "prenuptial agreement." The nuptial contract has two forms determined by the time of its conclusion: future spouses either conclude it before marriage, but its legal effect is delayed until marriage, or spouses enter into it at the point of marriage (Čepić).

In Montenegro, marriage between persons of the same sex is not possible at the moment as the Montenegrin Constitution and Family Code defines marriage as a partnership between a man and a woman, and therefore a nuptial contract between two persons of the same sex is void. However, on 1 July 2020, Montenegro legalised same-sex partnerships. The Law on Same-Sex civil partnership, which would give same-sex couples the same legal rights as heterosexual couples, except the right to adopt children, passed Montenegro's 81-seat legislature by a margin of 42 votes to five. Montenegro is the first European country outside of Western Europe and the EU to legally recognise same-sex couples. Same-sex life partnership is the legally regulated union of two persons of the same sex concluded before a competent authority according to art. 2 of the Law on Same-Sex life partnership. This Law enters into force 8 days after its publication in the *Official Gazette*, but will apply from July 2021.

Consequences

Acts drawn up by a notary, according to the above procedure, in which the notary is a neutral and professional public service provider, lead to a greater degree of legal certainty and avoidance of disputes. Notaries are given by law the exclusive competence to draw up notarial deeds on prescribed legal transactions, the subject of which is the acquisition of property and other real rights to immovable property.

It is important to outline that 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 the spouse's consent should not be reduced to a mere formality 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 presumption of joint registration means that the notary should perform 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 land registry data. But in practice there are examples of more complicated entries in the records of the Real Estate Cadastre in cases with extramarital partners.

Before drawing up the act, the notary must examine the will of the parties and instruct them on the legal consequences of the intended legal transaction (Law on Notaries, art. 48).

Partner consent is required for land transactions. The rights of spouses regarding joint property, under art. 288 of the Family Law, must be registered in the land registry and other appropriate registries in the names of both spouses as their joint property without determining the ownership of the parts of it.

The notary is obliged to inform the parties that if only one spouse is entered in the land registry and other appropriate registries as the owner of the joint property, it shall be presumed that the entry was made on behalf of both spouses, unless the entry was made on the basis of a written agreement between spouses. If both spouses are entered in the land registry and other appropriate registries as co-owners on precisely defined parts of the property, it shall be considered that they have divided the joint property in that way (Family Law, art. 289).

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. These courts, however, do not concur in every situation, as we can see (please read Annex 1). Therefore, it is very important to note that the analysis presented below covers the decisions brought by the Constitutional Court in 2017, the decisions of the Supreme Court which were repealed by the the Constitutional Court decisions and the decisions brought by the Supreme Court following the decisions of the Constitutional Court and all in the context of protecting the joint property of the spouses (supra Annex 1).

Before drawing up an act, the notary must examine the will of the parties and inform them of the legal consequences of the intended legal transaction. The notary will compile the statements of the parties completely, clearly and specifically and enter them into the notarial deed, after which he/she will read the statements to the parties and ensure, through immediate questioning, whether the content of the notarial deed corresponds to the will of the parties. The notary will warn the parties when he/she considers that their statements are vague, incomprehensible and ambiguous, and point out to them possible disputes and legal obstacles that could arise from such statements. If the parties continue to maintain their statements, the notary must enter them in the act he draws up, stating the fact that they have been warned of the consequences of such statements (Law on Notaries, art. 48).

Notarial deeds consist of: 1) nuptial contracts and contracts on property relations between spouses and between persons living in a consensual union; 2) contracts on the disposal of property of minors and persons who do not have a business capacity, whose objects are real estate or more valuable movables and rights; 3) contracts on the distribution and transfer of property for life, life-care contracts and inheritance statements; 4) purchase agreements with retention of title; 5) promises of gifts and contracts on gifts in case of death; 6) legal transactions whose subject is the transfer or acquisition of property or other real rights to real estate.

Relevant questions

- Who is the registered owner?
- Is the registered owner the legal owner or are there any obvious doubts as to his/her 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 acquisition of property?
- What property regime applies to the property: is the property subject to a nuptial agreement, joint property management and disposition agreement, or any other agreement changing the default marital regime? Did the spouses perform a division of property on the basis of this agreement? In addition, the notary is obliged to inform parties that it excludes the legal regime of joint property.
- When was the property acquired and what was the legal basis for property acquisition: was the property acquired or increased in value through work during cohabitation in marriage or extramarital union? When was the property acquired and what was the legal basis for property acquisition: was the property acquired/increased through work during cohabitation in marriage or a consensual union? Was the loan for the property repaid while the client was married/living in a consensual union?

Checklist

- land registry extract for the real property;
- client's marriage certificate, birth certificate, statement of both partners in consensual union provided there are no marriage obstacles, court judgment on divorce or marriage annulment, etc. including information as to the 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) marriage contract or court decision on the division of property or agreement changing the default marital regime (a nuptial agreement, property management and disposal 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

In accordance with art 288 of the Family Law, the joint property is entered in the land registry and other registries in the name of both spouses with unspecified shares. If one spouse is entered in the registries as the owner of the joint property, the presumption of entry for both spouses is valid, unless the entry was made on the basis of a contract between the spouses.

During marriage, spouses manage and dispose of the joint property jointly and by agreement, with the possibility of entering into a different agreement. However, the courts have taken the position that, in a situation where one spouse has joint property, it is considered that he/she does so with the consent of the other spouse with whom he/she is in a harmonious marital relationship, which is very problematic, because, according to art. 291 of the Family Law, joint property, during marriage, shall be managed and disposed of jointly and by **mutual consent** of both spouses.

The notary shall inform the clients that at the time of acquiring ownership the spouses may perform a division of property by determining co-ownership shares in which cases both spouses will appear as contracting parties to the transaction and will be registered on the determined shares.

But there is no register of consensual unions in Montenegro and, therefore, the notary relies on the information given by the parties, explaining to them the consequences of giving a false statement, and examines whether there are any marriage obstacles at stake. That can create problems in practice, especially considering that the Real Estate Cadastre is only a recording body and this is its primary function.

Relevant questions

- What is the client's personal status: was 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, 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 disposal agreement or any other agreement that changes the default marital regime?

Checklist

- ✔ 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);
- ✔ nuptial contract changing the default marital regime.

II.
INHERITANCE

2.1 Determination of the deceased's personal status

It is necessary for the court to know about the death of the testator in order to initiate a probate proceeding in the legal system of Montenegro. One of the principles of probate proceedings is the principle of officiality. The principle of officiality in probate proceedings means that the participants have no possibility of arbitrarily influencing the initiation, course, termination and subject matter of a proceeding. Therefore, initiation and the course of a probate proceeding depend only on the court that ex officio initiates the proceeding as soon as they become aware of the death of testator, which is regulated by art. 97 of The Non-Litigious Civil Procedure Act. There are some exceptions regarding the principle of officiality. If the testator leaves no real estate, the probate proceeding is not initiated ex officio but a person is authorised to conduct it. It is very important to observe that the Higher Court is the court of appeal on decisions of the Basic Court. The Basic Court has the exclusive power to issue a certificate of inheritance (art. 16, Court Law). The Higher Court has territorial jurisdiction in case the testator at the time of death had a permanent or temporary residence on its territory. If the testator had neither permanent nor temporary residence at the time of death then the Higher Court where most of his/her real estate is has territorial jurisdiction (art. 95, para. 1 and 2 Non-Litigious Civil Procedure Act). The notary public can give an inheritance statement there, draw up a notarial testament (will), life-care contract and contract of assignment and distribution of property during one's life but notaries have not been authorised to conduct probate proceedings or to issue a certificate of inheritance.

Statutory heirs can legally inherit even in the existence of a will (Law on Inheritance, art. 6). Article 9 expressly stipulates the line of succession, the conditions that apply to inheritance and the shares that heirs are entitled to in Montenegro. Heirs and their share of inheritance may be determined by the testator by legal act *mortis causa*, in which case it is deemed voluntary succession.

In foreign legal systems, voluntary succession is possible on the basis of three legal acts: a will, an agreement of succession and a common will. The agreement on succession and the common will fall into the category of absolutely void transactions. The nullity of the agreement on succession is expressly stipulated in art. 121 of the Law on Inheritance. The nullity of common wills is derived from its hybrid nature, since the death of one of the testators, the legal effects of the common will are identical to the legal effect of the agreement on succession. Therefore, the Montenegrin law limited the possibility of voluntary succession only to a legal act, the testament. In Montenegro, the heir can inherit one part of the inheritance as a statutory heir and the other one as a testamentary heir. In this way, it deviates from the rule of Roman law, according to which no one can inherit a part on the basis of a will and a part by the law. Testamentary succession takes precedence over the statutory (art. 7, art. 28 and art. 137 of the Law on Inheritance).

Besides voluntary succession, there is also statutory succession. In statutory succession, the criteria for determining the heirs and their share of the estate are determined by the legislator according to legally relevant relationships between the decedent and potential heirs.

The inheritance rights of spouses come from the existence of their marriage with the decedent at the time of the decedent's death. The spouse will not be a statutory heir if the marriage was terminated or annulled in the lifetime of the testator. The spouse's inheritance line is conditioned, as a rule, by the validity of the marriage (art. 25 Law on Inheritance). In the first order of succession, the testator's estate is divided into equal parts between the testator's spouse and children (art. 11 Law of

Inheritance). Members of the second order of succession can stake a claim if the testator did not leave any descendants who could or want to inherit (art. 13 Law on Inheritance). The spouse cannot be the sole heir in the first order of succession. The spouse is treated as an heir of the first order only when there is at least one descendant who can and wants to inherit. Therefore, half of the deceased's estate is the highest inheritance share that a spouse can inherit in the first order of succession. In second order of succession the deceased estate is divided into equal portions between the spouses and the testator's relatives. The spouse in that case inherits half of the estate, and the other half which is intended for the testator's relatives is divided into equal portions for the decedent's parents so that each of them will be awarded one-fourth of the inheritance. When there is no relative in the second order of succession who could and wants to inherit from the decedent, the entire legacy belongs to the spouse (art. 16 Law on Inheritance). If the spouse cannot or will not inherit, the right of succession is not applied. A spouse cannot have the capacity of succession per stripe (presentation), because it could lead to a situation where the decedent's stepchildren stake a claim to the inheritance, and the latter are not included in the list of statutory heirs.

Accepting complex family structures as the reality of modern society, Montenegrin legislature wanted to give it additional legitimacy by providing that the testator's common-law partner, under certain conditions, becomes one of the statutory heirs and has the same status as a spouse. In order for a common-law partner to become a legal successor, three conditions must be cumulatively fulfilled: 1) that the informal marriage is legitimate, 2) that it lasted for a longer period of time, and 3) that it existed at the time of the decedent's death (art. 9, para. 2 and 3, Law on Inheritance). Common-law marriage is legitimate if it is consistent with current social morality, or in other words, if it is between persons who can legally enter into a valid marriage. Extramarital partners will not become statutory heirs of a decedent, if there is an obstacle that hinders them from contracting a valid marriage. Mutual legal succession between common-law partners is only possible if the common-law marriage lasted for a longer period of time. This condition should prevent a person who was in a temporary romantic relationship with the testator from identifying themselves as a common-law partner, and consequently a statutory heir. Since the legacy passes to heirs at the point of death, non-marital relationships can be the basis for staking a claim to the estate only if the extra-marital union existed at the time of death. If the common-law marriage was terminated before the decedent's death, the common law partner cannot be a statutory heir. In calculating the statutory share of the common-law partner, the same rules that apply to spouses are applied (art. 9 para. 2 Law on Inheritance).

Special attention should be paid by the notary to cases where the deceased was single at the time of death, but was married or living in an extramarital union at the time of acquiring the property through work during marriage or consensual union, since, in that case, the property should be considered as the joint property of both spouses. In such situations, the notary should exercise further due diligence in order to make sure that the rights of all the interested parties are identified and protected. The notary should identify whether the property was registered only in the deceased's name. However, 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, the property should be considered as registered in favour of both spouses.

Relevant questions

- Did the deceased leave a will or other document relevant for succession? Do any statutory heirs (spouse/children etc.) have to be considered when dividing the property into shares?
- Was the deceased married or living in a consensual union at the time of death or at the time of acquiring property belonging to the estate?
- Did the deceased have a marriage contract 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 land registry or land registry extract;
- ✔ 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 Montenegrin legal system, inheritance is viewed solely as a right and not as an obligation. Every person is free to decide whether they want to inherit, otherwise they will not be called to the proceedings as statutory or testamentary heirs. A partial exception to this rule is the state, which is the final statutory heir in the order of succession. The state can only benefit if the deceased left no statutory or testamentary heirs who could or wanted to inherit.

Before drafting the act, the notary determines the identity of the parties and other participants by reviewing the document issued by the competent state body on the basis of which identity can be established

in an unequivocal manner. If the identity of the party cannot be established, the notary establishes the identity of the party on the basis of the statements of two adult witnesses whose identity he or she establishes in the manner previously prescribed. The notarial deed shall state the manner of determining the identity of the party, as well as the designation of the document on the basis of which the identity was established (Law on Notaries, art. 45).

Relevant questions

- Did the deceased leave a will?
- Did the deceased have children?
- Did the deceased have a spouse or common-law partner?
- 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

When a spouse who does not have the necessary means of subsistence is invited to inherit with other heirs, the court may, at the request of the spouse, decide that the spouse is entitled to lifelong enjoyment (usufruct) of all or part of the inheritance inherited by other heirs. In such cases, the court may, when there are justified reasons and at the request of the spouse, decide that instead of lifelong enjoyment, the spouse inherits a part of the inheritance that other heirs should inherit by law, and may decide that the spouse

inherits the whole estate (art. 24 Law on Inheritance). This principle, which is a specific instrument of probate law, aims to prevent the basic existence of the testator's spouse being jeopardised, which can occur, on the one hand, when the spouse loses maintenance because of the death of the decedent, but, on the other hand, must share property with other heirs. The share of the spouse may be increased in two ways: 1) a small increase in the share and 2) a large increase in the share. A small increase in the share is when the court decides, in favour of the spouse, to constitute a usufruct on the whole or a part of the estate. In order to come to an increase in the share of the spouse, it is necessary to meet three conditions: 1) that the spouse is without necessary means of subsistence after the decedent's death, 2) the spouse must submit a claim to receive the increase, and 3) the decision to increase the spouse's share of inheritance comes at the discretion of the court. The court will decide to increase the spouse's share if it considers it expedient.

The large increase in the share exists when the court decides that the spouse will inherit the entire estate. The court will award the entire estate to a spouse if, in addition to the conditions required for a small increase, two additional conditions are fulfilled: 1) The spouse must submit a request to be granted the entire estate and 2) the estate must be of so little value that its division would leave the spouse with too little.

The legislator defines due portion as a portion of the legacy that a testator cannot dispose of. Only persons whom the legislator explicitly identified have a right to a statutory portion. Statutory heirs in Montenegro are: descendants, adopted children and their descendants, spouse, parents, foster parents, brothers, sisters, and grandmothers and grandfathers (Law on Inheritance, art. 27). The grandparents and siblings of the testator are statutory heirs only if they are permanently incapable of work and do not have the necessary means of subsistence (art. 27). Statutory heirs are guaranteed a certain amount of the decedent's estate after the death of the decedent.

Relevant questions

- Was the real property subject to a life-care contract?
- Did the deceased leave a will?
- Does the will meet the form and all conditions set out in the law?
- Are there any other will?
- 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 challenge the will?

Checklist

- Life-care contract;
- Deceased's will;
- Inheritance statement;
- Statutory heir's statement whether he/she accepts or challenges 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

All notarial deeds, under the conditions prescribed by the law, have the formal probative value of public documents (that the notarial deed was issued by a notary within his powers and that the essential elements of the form prescribed by the Law are fulfilled). However, not all notarial deeds have the same degree of probative value. The degree of probative force of notarial deeds depends on their type, and what the crucial form and procedure for their compilation are. Notarial records and records equated with them on the confirmation of private documents, and notarial records have the full probative value of a public document, i.e., in addition to the formal probative force, they also have material probative force, which refers to the presumption of the truthfulness of the content of notarial deeds (the notary draws up, i.e., confirms the content of the deed).

The probative force of a notarial deed is reflected in the fact that, in cases provided by law, it can be an enforceable document, and this ability to be an enforceable document is given to a notarial record and a record of confirmation of a private document.

The obligation to inform the surviving spouse is an obligation of the notary. If there is a dispute between the parties, which may relate not only to the right to spousal share but also its size, the notary will refer the parties to civil proceedings. If there is no dispute, the notary will separate the surviving spousal share based on the marital property from the estate. Since marriage and consensual union are equal in terms of property acquisition, the notary may inform the parties that if there is no dispute between them regarding the right and size of a partner's share in 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 this situation, if only the deceased is registered on the real property in the land registry, the spouse should be informed of his/her right to ask for the separation of his/her share in marital property from the estate. Otherwise, his/her share might be distributed to the heirs. The notary should advise the parties on their legal rights, especially since the law applies a presumption of joint ownership/co-ownership even if only one of the spouses is registered in the land registry.

As we know, marriage and consensual unions generate the same property rights in Montenegro. Therefore, all the rules that relate to the property relations of spouses apply accordingly to the consensual

union, according to Family Law. But we have also encountered cases in which women in consensual unions had difficulties in exercising their pension and disability insurance rights when inheriting their partners because the Pension and Disability Insurance Act does not recognise a non-marital partner. The provision of art. 42 of the Law on Pension and Disability Insurance prescribes: "The right to a family pension may be exercised by family members: 1) a deceased insured person who has completed at least five years of insurance or at least ten years of pension or met the conditions for old-age or disability pension". The same Law prescribes in art. 43: Family members of a deceased insured person, i.e., beneficiary of the rights referred to in art. 42 of this Law, shall be considered: 1) spouse; 2) children (born in or out of wedlock or adopted and stepchildren supported by the insured, i.e., the beneficiary). The right to a family pension may also be exercised by a divorced spouse, under the conditions from art. 44 and art. 45 of this Law, if he has been awarded the right to maintenance by a final judgment. In relation to the provisions of the mentioned Law, and the non-marital spouse's inability to realise a family pension, the Protector issued an opinion with a recommendation, and determined a violation of the right from art. 1 of Protocol No. 1 to the Convention on Discrimination on the Grounds of Marital and Family Status (according to the judgment of *Munos Dias vs. Spain* before the European Court of Human Rights, in which these rights are protected by art. 1 of Protocol 1 to the European Convention).[1]

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 or contest to that?
- 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 register or marriage certificate;
- ✔ online land registry or excerpt from the land registry;
- ✔ property conveyance contract, court decision or state institution decision (the legal basis for acquisition);

1 Mišljenje Zaštitinika br. 149/19 od 16.09.2019. g. Dostupno na: http://www.ombudsman.co.me/docs/1572434664_16092019-preporuka-mrsspio.pdf

- ✔ spousal agreement changing the marital property regime (a nuptial agreement, etc.);
- ✔ separation of spouse's share from the estate, included in the inheritance ruling;
- ✔ settlement agreement between heirs and a partner.

2.5 Inform the heirs about the consequences of relinquishing inheritance

The notary is obliged to inform the heir that he/she can waive the inheritance by a statement to the court until the end of the inheritance proceeding (Law on Inheritance, art. 131). Renunciation also applies to the descendants of the one who renounced, if he did not explicitly state that he renounces only in his own name. The notary is also obliged to inform the heir who renounced the inheritance only in his own name, that he is considered as if he had never been the heir.

An heir who disposed of all or part of the estate may not renounce the inheritance. However, measures taken by one heir solely to preserve the estate, as well as ongoing management measures, do not deprive him/her of the right to renounce the inheritance (Law on Inheritance art. 133). The notary must ensure that the declaration of renunciation in favour of another heir must be explicit, clear and irrevocable. A waiver in favour of a particular heir is considered a statement of acceptance of the inheritance with the simultaneous assignment of the inheritance. Upon receipt of the assigned part, the rules on the gift apply to the relationship between the assignor and the receiver (Law on Inheritance, art. 134).

The notary is obliged to inform the heir that the statement renouncing or accepting the inheritance cannot be revoked. The declaration of renunciation of inheritance refers only to that inheritance which was known to the heir at the time of giving the declaration. The heir who made the statement may request the annulment of the statement if it was caused by coercion or threat or was given as a result of fraud or misrepresentation (Law on Inheritance, art. 136).

Furthermore, the renunciation of an inheritance that is not open has no legal effect. Exceptionally, a descendant who can independently dispose of his/her rights may, by contract with the ancestor, renounce the inheritance that would have belonged to them after the death of the ancestor. When certifying, the judge or notary will read the contract and warn the ancestor and heir of the consequences of the contract (Law on Inheritance, art. 135). The part of the statutory heir who renounced the inheritance only in his/her own name is inherited as if that heir had died before the testator (Law on Inheritance, art. 138).

Relevant questions

- Does the heir accept the inheritance?
- Does the heir relinquish the inheritance?
- What are the reasons/motives of the parties?
- Is he/she acting of his/her free will?

Checklist

- inheritance statement given in person before the notary or written (notarised) statement;
- inheritance statement before notary through a representative authorised by a notarised special power of attorney.

2.6 Inheritance contracts

Statutory heirs who lived in a community with the testator and with their work, earnings or otherwise assisted him/her in earning, have the right to demand that a part corresponding to their contribution to increasing the value of the testator's property be set aside from their inheritance. This share is taken out when calculating the other heirs' share (Law on Inheritance, art. 34). The surviving spouse and descendants of the testator who lived with the testator in the same household are entitled to household items of lesser value that serve to meet their daily needs, such as furniture, furniture, bedding and the like.

I.
RODNA PITANJA KOD RAZLIČITIH VRSTA NOTARSKIH USLUGA

1.1 Raspolaganje i opterećivanje nepokretnosti od strane klijenta

Pravni osnov

Brak se zasniva na slobodnoj odluci muškarca i žene da sklope brak, na njihovoj ravnopravnosti, uzajamnom poštovanju i međusobnom pomaganju (član 3 Porodičnog zakona). Imovinski odnosi u braku zasnivaju se na načelima ravnopravnosti, uzajamnosti i solidarnosti, kao i na zaštiti interesa djece.

Zajednica života muškarca i žene koja traje duže vrijeme izjednačena je sa bračnom zajednicom u pogledu prava na međusobno izdržavanje i drugih imovinsko-pravnih odnosa.

Bračni supružnici mogu imati posebnu i zajedničku imovinu. Posebnu imovinu sačinjava imovina koju je bračni supružnik stekao prije sklapanja braka, kao i imovina koju je stekao u toku braka nasljeđem, poklonom ili drugim oblicima besteretnog sticanja. Saglasno članu 288 Porodičnog zakona, u zajedničku imovinu ulaze i prihodi od posebne imovine koji su ostvareni radom bračnih supružnika, kao i imovina stečena igrom na sreću, osim ako je jedan bračni supružnik ulagao u ovu igru posebnu imovinu. Ovom odredbom propisano je da zajedničku imovinu sačinjava imovina koju su bračni supružnici stekli radom u toku trajanja bračne zajednice (imovinska zajednica).

Svaki bračni supružnik samostalno upravlja i raspolaže posebnom imovinom, ukoliko se bračni supružnici nijesu drukčije dogovorili.

Za sticanje zajedničke imovine treba da budu ispunjena tri elementa: brak, zajednica života, i rad. Rad koji je uložen u sticanje nepokretnosti uključuje rad kojim se neposredno ostvaruju prihodi, ali i rad kojim se doprinosi održavanju vrijednosti nepokretnosti ili se njena vrijednost povećava (rad u domaćinstvu, podizanje djece).

Zajedničku imovinu sačinjava imovina koju su bračni supružnici stekli radom u toku trajanja bračne zajednice, kao i prihodi iz te imovine. Zajedničkom imovinom, u toku braka, upravljaju i raspolažu zajednički i sporazumno oba bračna supružnika (član 291 Porodičnog zakona). Veoma je važno, međutim, napomenuti da bračni supružnici mogu da zaključe ugovor kojim se uređuje da upravljanje i raspolaganje cjelokupnom zajedničkom imovinom ili njenim djelovima vrši jedan od njih. Ugovor se može ograničiti samo na upravljanje ili samo na raspolaganje. Kada drukčije nije ugovoreno, upravljanje obuhvata i raspolaganje u okviru redovnog poslovanja. Ugovor može da se odnosi na sve poslove upravljanja i raspolaganja ili samo na poslove redovnog upravljanja ili na pojedine određene poslove. Svaki bračni supružnik može raskinuti ugovor o upravljanju ili raspolaganju zajedničkom imovinom u svako doba, osim u vrijeme u koje se raskidom očigledno nanosi šteta drugom bračnom supružniku (član 291 Porodičnog zakona).

Nakon posljednje reforme porodičnog prava u Crnjoj Gori, predviđena je mogućnost da se prije i tokom trajanja braka može zaključiti bračni ugovor. Bračni ugovor je sporazum kojim se uređuju imovinski odnosi bračnih supružnika (tokom trajanja braka) ili budućih bračnih supružnika (prije sklapanja braka) na postojećoj ili budućoj imovini (čl. 301 do 303 Porodičnog zakona). Zakon prepoznaje samo pojam „bračni ugovor“ a ne „predbračni ugovor“. Bračni ugovor ima dvije forme koje su određene vremenom kada se zaključuje: budući bračni supružnici ga zaključuju ili prije braka, ali se njegovo pravno dejstvo odlaže do sklapanja braka, ili ga bračni supružnici zaključuju u vrijeme sklapanja braka (Čepić).

U Crnoj Gori, brak između lica istog pola trenutno nije moguć jer je Ustavom Crne Gore i Porodičnim zakonom brak definisan kao partnerstvo između muškarca i žene, te je iz tog razloga bračni ugovor između dva lica istog pola ništav. Ipak, 1. jula 2020. godine, Crna Gora je legalizovala istopolna partnerstva. Zakon o životnom partnerstvu lica istog pola, koji će istopolnim parovima dati ista zakonska prava kao i heteroseksualnim parovima, osim prava da usvajaju djecu, crnogorsko zakonodavno tijelo koje ima 81 poslanika usvojilo je sa 42 glasa za i 5 glasova protiv. Crna Gora je prva evropska država izvan Zapadne Evrope i EU koja je zakonom priznala istopolne parove. Životno partnerstvo lica istog pola je zakonom uređena zajednica života dva lica istog pola zaključena pred nadležnim organom, shodno članu 2 Zakona o životnom partnerstvu lica istog pola. Ovaj zakon stupa na snagu osmog dana od dana objavljivanja u "Službenom listu Crne Gore", a primjenjivaće se od jula 2021.

Posljedice

Akti koje je sastavio notar, prema gore navedenom postupku, u kojem je notar neutralan i profesionalan pružalac javne usluge, dovode do većeg stepena pravne sigurnosti i izbjegavanja sporova. Notarima je zakonom data isključiva nadležnost za sastavljanje notarskih zapisa o propisanim pravnim poslovima čiji je predmet sticanje nepokretnosti i drugih stvarnih prava na nepokretnostima.

Važno je naglasiti da notar mora da obavijesti bračnog supružnika ako se po zakonu nepokretnost smatra zajedničkom imovinom i da se njome može raspolagati samo uz saglasnost oba supružnika. Iz tog razloga, zahtjev za saglasnost supružnika ne bi trebalo da se svodi na puku formalnost i ne bi trebalo da se traži samo da bi se ograničila odgovornost notara, već da bi se dalo objašnjenje i informisao neupisani supružnik o svojim pravima i obavezama u odnosu na zajedničku imovinu i o svom pravu da da ili uskrati saglasnost za transakciju.

Pretpostavka zajedničke registracije podrazumijeva da bi notar trebalo da primijeni dužnu pažnju u pogledu datuma i pravnog osnova po kojem je nepokretna imovina bila stečena, kako bi procijenio da li bi tu imovinu trebalo smatrati zajedničkom ili posebnom imovinom i utvrdio da li je lice koje raspolaže nepokretnošću ili je opterećuje bilo u braku ili je živjelo u vanbračnoj zajednici u vrijeme sticanja, a ne da se osloni samo na podatke iz registra nepokretnosti. Međutim u praksi postoje primjeri komplikovanijih upisa u evidenciju Katastra nepokretnosti kada se radi o slučajevima koji uključuju vanbračne partnere.

Prije sastavljanja akta notar mora ispitati volju stranaka i podučiti ih o pravnim posljedicama namjeravanog pravnog posla (Zakon o notarima, član 48).

Za pravne poslove sa nepokretnostima potrebna je saglasnost partnera. Prava bračnih supružnika na zajedničku imovinu u smislu člana 288 Porodičnog zakona moraju se upisati u registar nepokretnosti i druge odgovarajuće registre na ime oba bračna druga kao njihova zajednička imovina sa neopredijeljenim djelovima.

Notar je dužan da informiše stranke da ako je u registar nepokretnosti i druge odgovarajuće registre upisan kao vlasnik na zajedničkoj imovini samo jedan bračni supružnik, smatraće se kao da je upis izvršen na ime oba bračna supružnika, ukoliko do upisa nije došlo na osnovu pisanog ugovora zaključenog između bračnih supružnika. Ako su u registar nepokretnosti i druge odgovarajuće registre upisana oba bračna supružnika kao suvlasnici na opredjeljenim djelovima, smatraće se da su na ovaj način izvršili diobu zajedničke imovine (Porodični zakon, član 289).

Raspolaganje nepokretnošću koja je obuhvaćena režimom zajedničke imovine, bez saglasnosti drugog supružnika, može se osporiti pred sudom. Ovi sudovi se, međutim, ne slažu u svakoj situaciji, kao što možemo i vidjeti (v. Prilog 1). Stoga je veoma važno napomenuti da analiza prikazana u nastavku ovog dokumenta obuhvata odluke koje je donio Ustavni sud 2017. godine, odluke Vrhovnog suda koje su ukinute odlukama Ustavnog suda i odluke koje je Vrhovni sud donio nakon odluka Ustavnog suda, a sve u kontekstu zaštite zajedničke imovine supružnika (*supra* Prilog 1).

Prije sastavljanja akta notar mora ispitati volju stranaka i podučiti ih o pravnim posljedicama namjeravanog pravnog posla. Notar će izjave stranaka potpuno, jasno i određeno sastaviti i unijeti u notarski akt, nakon čega će izjave pročitati strankama i neposrednim pitanjima se uvjeriti da li sadržaj notarskog akta odgovara volji stranaka. Notar će upozoriti stranke kad smatra da su njihove izjave nejasne, nerazumljive i dvosmislene i ukazati im na moguće sporove i pravne smetnje do kojih bi moglo doći zbog takvih izjava. Ako stranke i dalje ostanu pri svojim izjavama, notar ih mora unijeti u akt koji sastavlja uz navođenje činjenice da su upozorene na posljedice takvih izjava. (Zakon o notarima, član 48).

Notarske zapise čine: 1) bračni ugovori i ugovori o imovinskim odnosima između bračnih drugova i između lica koja žive u vanbračnoj zajednici; 2) ugovori o raspolaganju imovinom maloljetnih lica i lica koja nemaju poslovnu sposobnost, čiji predmeti su nepokretnosti ili vrednije pokretne stvari i prava; 3) ugovori o raspodjeli i ustupanju imovine za života, ugovori o doživotnom izdržavanju i nasljedničke izjave; 4) ugovori o kupovini sa zadržavanjem prava vlasništva; 5) obećanja poklona i ugovori o poklonima u slučaju smrti; 6) pravni poslovi čiji je predmet prenos ili sticanje svojine ili drugih stvarnih prava na nepokretnostima.

Relevantna pitanja

- Ko je upisani vlasnik?
- Da li je upisani vlasnik zakonski vlasnik ili postoje očigledne sumnje u njegovo vlasništvo?
- Koje je lično stanje klijenta: da li je klijent u braku ili živi u vanbračnoj zajednici, da li je klijent bio u braku ili je živio u vanbračnoj zajednici u vrijeme sticanja nepokretnosti?
- Koji se imovinski režim primjenjuje na nepokretnost: da li je nepokretnost predmet bračnog ugovora, ugovora o upravljanju i raspolaganju zajedničkom imovinom, ili bilo kog drugog ugovora kojim se mijenja podrazumijevani bračno-imovinski režim? Da li su supružnici izvršili podjelu imovine na osnovu ovog ugovora? Pored toga, notar je dužan da podući stranke da se njime isključuje zakonski režim zajedničke imovine.
- Kada je nepokretnost stečena i koji je bio pravni osnov za sticanje nepokretnosti: da li je nepokretnost stečena ili joj je uvećana vrijednost radom tokom trajanja zajednice života u braku ili vanbračnoj zajednici? Kada je nepokretnost stečena i koji je bio pravni osnov za sticanje nepokretnosti: da li je nepokretnost stečena/uvećana radom tokom trajanja zajednice života u braku ili konsenzualnoj zajednici? Da li je kredit za nepokretnost otplaćen dok je klijent bio u braku/živio u vanbračnoj zajednici?

Lista za provjeru

- izvod iz registra nepokretnosti za predmetnu nepokretnost;
- klijentov izvod iz matične knjige vjenčanih, izvod iz matične knjige rođenih, data izjava oba partnera u vanbračnoj zajednici da ne postoje smetnje za sklapanje punovažnog braka, presuda o razvodu braka ili poništenju braku itd. uključujući podatke o prethodnim brakovima/vanbračnim zajednicama;
- ugovor o prenosu prava na nepokretnosti, odluka suda ili odluka državnog organa kao pravni osnov i vrijeme sticanja nepokretnosti (ukoliko je dostupna);
- (ako je primjenjivo) ugovor između bračnih supružnika ili odluka suda o podjeli imovine ili ugovor o promjeni podrazumijevanog bračno-imovinskog režima (bračni ugovor, ugovor o upravljanju i raspolaganju imovinom itd.);
- saglasnost supružnika/bivšeg supružnika/partnera/bivšeg partnera, unijeta u ugovor ili data kao posebna pisana ovjerena (solemnizovana) izjava ako je nepokretnost u podrazumijevanom bračno-imovinskom režimu ili ako je to propisano ugovorom kojim se uređuje imovinski režim;
- saglasnost supružnika/bivšeg supružnika/partnera/bivšeg partnera unijeta u založnu izjavu ili ugovor o hipoteci.

1.2 Sticanje nepokretnosti od strane klijenta

U skladu sa članom 288 Porodičnog zakona, zajednička imovina upisuje se u registar nepokretnosti i druge registre na ime oba bračna druga kao njihova zajednička imovina sa neopredijeljenim djelovima. Ako je u registre upisan kao vlasnik na zajedničkoj imovini samo jedan bračni supružnik, važiće pretpostavka upisa na na ime oba bračna druga, ukoliko do upisa nije došlo na osnovu ugovora zaključenog između bračnih supružnika.

U toku braka, bračni supružnici upravljaju i raspolažu zajedničkom imovinom zajednički i sporazumno, uz mogućnost da zaključe ugovor kojim će ugovoriti drukčije. Ipak, sudovi su zauzeli stav da, u situaciji kada zajedničkom imovinom raspolaže jedan bračni drug ima se smatrati da to čini uz saglasnost drugog bračnog duga sa kojim je u skladnim bračnim odnosima, što je veoma problematično, jer, saglasno članu 291 Porodičnog zakona, zajedničkom imovinom u toku braka upravljaju i raspolažu oba bračna supružnika zajednički i **sporazumno**.

Notar je dužan da poduči klijente da u vrijeme sticanja prava svojine bračni supružnici mogu da izvrše diobu imovine određivanjem suvlasničkih udjela i u tom slučaju oba bračna supružnika će se pojaviti kao ugovorne strane u transakciji i biće upisani na opredijeljenim djelovima.

Međutim, u Crnoj Gori ne postoji registar vanbračnih zajednica i, iz tog razloga, notar se oslanja na informacije koje su dale stranke, objašnjavajući im posljedice davanja lažnog iskaza i ispituje da li u konkretnom slučaju postoje smetnje za sklapanje punovažnog braka. To može stvoriti probleme u praksi, naročito imajući u vidu činjenicu da je Katastar nepokretnosti samo tijelo koje vrši upis i da je to njegova primarna funkcija.

Relevantna pitanja

- Koje je lično stanje klijenta: da li je klijent bio u braku ili je živio u vanbračnoj zajednici u vrijeme sticanja nepokretnosti?
- Koji je pravni osnov za sticanje nepokretnosti: da li je nepokretnost stečena radom o toku braka/ vanbračne zajednice ili je nepokretnost stečena ugovorom o poklonu, nasljeđivanjem, pravnim poslom kojim se stiču isključiva prava?
- Koji se imovinski režim primjenjuje na nepokretnost: da li vaš klijent ima zaključen bračni ugovor, ugovor o upravljanju i raspolaganju zajedničkom imovinom ili bilo koji drugi ugovor kojim se mijenja podrazumijevani bračno-imovinski režim?

Lista za provjeru

- ✔ klijentov izvod iz matične knjige vjenčanih, izvod iz matične knjige rođenih, izjava o zajednici života, presuda o razvodu braka ili poništenju braka itd.;
- ✔ pravni osnov za sticanje nepokretnosti (sastavni dio ugovora);
- ✔ bračni ugovor kojim se mijenja podrazumijevani bračno-imovinski režim.

II.
NASLJEĐIVANJE

2.1 Utvrđivanje ličnog stanja ostavioca

Da bi se u pravnom sistemu Crne Gore pokrenuo ostavinski postupak neophodno je da sud sazna za smrt nekog lica. Jedno od načela ostavinskog postupka je načelo oficijelnosti. Načelo oficijelnosti u ostavinskom postupku znači da učesnici u postupku nemaju mogućnost da svojevoljno utiču na pokretanje, vođenje, obustavljanje i predmet postupka. Dakle, pokretanje i vođenje ostavinskog postupka zavise isključivo od suda koji po službenoj dužnosti pokreće postupak čim sazna za smrt ostavioca, što je uređeno članom 97 Zakona o vanparničnom postupku. Postoje i neki izuzeci od načela oficijelnosti. Ako ostavilac nije ostavio nepokretnost, ostavinski postupak se ne pokreće po službenoj dužnosti, ali lice ima pravo da ga pokrene. Veoma je važno voditi računa da viši sud odlučuje u drugom stepenu po žalbama na odluke osnovnog suda. Osnovni sud ima isključivo ovlašćenje da izda potvrdu o nasljeđivanju (član 16, Zakon o sudovima). Viši sud je mjesno nadležan ukoliko je ostavilac u vrijeme smrti imao prebivalište, odnosno boravište na njegovom području. Ako ostavilac u vrijeme smrti nije imao ni prebivalište, ni boravište, mjesno nadležan je Viši sud na čijem se području nalazi pretežni dio njegove nepokretne imovine (član 95 st. 1 i 2 Zakona o vanparničnom postupku). Notar tu može dati nasljedničku izjavu, sastaviti notarski testament, ugovor o doživotnom izdržavanju i ugovor o raspodjeli i ustupanju imovine za života, ali notari nijesu ovlašćeni da vode ostavinski postupak ili izdaju potvrdu o nasljeđivanju.

Zakonski nasljednici mogu naslijediti na osnovu zakona čak i ukoliko postoji testament (Zakon o nasljeđivanju, član 6). Članom 9 izričito je propisan pravo nasljeđa, uslovi koji se primjenjuju na nasljeđivanje i djelovi na koje nasljednici imaju pravo u Crnoj Gori. Nasljednike i njihov nasljednički dio može odrediti ostavilac pravnim poslom za slučaj smrti (*mortis causa)*, u kom slučaju se to smatra dobrovoljnim nasljeđivanjem.

U pravnim sistemima drugih država, dobrovoljno nasljeđivanje je moguće na osnovu tri pravna akta: testamenta, ugovora o nasljeđu i zajedničkog testamenta. Ugovor o nasljeđu i zajednički testament spadaju u kategoriju apsolutno ništavih transakcija. Ništavost ugovora o nasljeđu je izričito propisana članom 121 Zakona o nasljeđivanju. Ništavost zajedničkih testamenata proizilazi iz njihove hibridne prirode, poslije smrti jednog od ostavilaca, pravno dejstvo zajedničkog testamenta identično je pravnom dejstvu ugovora o nasljeđu. Stoga, crnogorsko pravo ograničava mogućnost dobrovoljnog nasljeđivanja isključivo na pravni akt – testament. U Crnoj Gori, nasljednik može naslijediti jedan dio nasljedstva kao zakonski nasljednik a drugi kao testamentalni nasljednik. Time se odstupa od pravila rimskog prava prema kome niko ne smije da naslijedi dio na osnovu testamenta i dio na osnovu zakona. Testamentalno nasljeđivanje ima primat u odnosu na zakonsko nasljeđivanje (član 7, član 28 i član 137 Zakona o nasljeđivanju).

Pored dobrovoljnog nasljeđivanja, postoji i zakonsko nasljeđivanje. Kod zakonskog nasljeđivanja, kriterijume za određivanje nasljednika i njihovog udjela u zaostavštini utvrđuje zakonodavac shodno pravno relevantnim odnosima između ostavioca i potencijalnih nasljednika.

Nasljedna prava supružnika proizilaze iz postojanja njihovog braka sa ostaviocem u vrijeme ostaviočeve smrti. Supružnik neće biti zakonski nasljednik ako je brak razveden ili poništen za života ostavioca. Supružnikovo pravo nasljeđa uslovljeno je, po pravilu, punovažnošću braka (član 25 Zakona o nasljeđivanju). U prvom nasljednom redu, zaostavština ostavioca dijeli se na jednake djelove između ostaviočevog supružnika i djece (član 11 Zakona o nasljeđivanju). Lica koja pripadaju drugom nasljednom redu mogu da polažu pravo na nasljeđe ako ostavilac nije ostavio potomke koji bi mogli ili željeli da naslijede (član 13 Zakona o nasljeđivanju). Supružnik ne može biti jedini nasljednik u prvom nasljednom redu. Supružnik se tretira kao nasljednik prvog nasljednog reda samo ako postoji najmanje jedan potomak koji može i želi da

naslijedi. Prema tome, polovina ostaviočeve zaostavštine je najveći nasljednički dio koji supružnik može da naslijedi u prvom nasljednom redu. U drugom nasljednom redu ostaviočeva zaostavština se dijeli na jednake djelove između supružnika i ostaviočevih srodnika. Supružnik u tom slučaju nasljeđuje polovinu zaostavštine, a druga polovina koja je namijenjena ostaviočevim srodnicima dijeli se na jednake djelove za ostaviočeve roditelje tako da će svakom od njih pripasti jedna četvrtina nasljedstva. Ako nema srodnika u drugom nasljednom redu koji bi mogao i želio da naslijedi ostavioca, cijela zaostavština pripašće supružniku (član 16 Zakona o nasljeđivanju). Ako supružnik ne može ili neće da naslijedi, pravo nasljeđivanja se ne primjenjuje. Supružnik nema mogućnost da naslijedi po lozama (*per stirpes*) (načelo reprezentacije), jer bi to moglo dovesti do situacije da pastorci ostavioca polažu pravo na nasljeđe, a oni nijesu obuhvaćeni listom zakonskih nasljednika.

Prihvatajući kompleksne porodične strukture kao realnost savremenog društva, crnogorski zakonodavac želio je da mu pruži dodatni legitimitet time što je predvidio da ostaviočev vanbračni supružnik, pod određenim uslovima, postaje jedan od zakonskih nasljednika i ima isti status kao bračni supružnik. Da bi vanbračni supružnik postao pravni nasljednik, moraju kumulativno biti ispunjena tri uslova: 1) da je neformalni brak legitiman, 2) da je trajao duže vremena i 3) da je postojao u vrijeme ostaviočeve smrti (član 9 st. 2 i 3 Zakona o nasljeđivanju). Vanbračna zajednica je legitimna ako je u skladu sa važećim društvenim moralom ili, drugim riječima, ako postoji između lica koja mogu zakonito da sklope punovažni brak. Vanbračni partneri neće postati zakonski nasljednici ostavioca ako postoji smetnja koja ih sprečava da zaključe punovažni brak. Međusobno pravno nasljeđivanje između vanbračnih partnera moguće je samo ako je vanbračna zajednica trajala duže vremena. Ovaj uslov trebalo bi da spriječi lice koje je bilo u privremenoj emotivnoj vezi sa ostaviocem da se identifikuje kao vanbračni supružnik i, prema tome, kao zakonski nasljednik. S obzirom na to da nasljedstvo prelazi na nasljednike u trenutku smrti, vanbračni odnosi mogu biti osnov za polaganje prava na zaostavštinu samo ukoliko je vanbračna zajednica postojala u vrijeme smrti. Ako je vanbračna zajednica prestala prije smrti ostavioca, vanbračni supružnik ne može da bude zakonski nasljednik. Prilikom izračunavanja nužnog dijela vanbračnog supružnika primjenjuju se pravila koja važe za bračne supružnike (član 9 stav 2 Zakona o nasljeđivanju).

Notar treba da obrati posebnu pažnju na slučajeve kada ostavilac nije bio u braku/vanbračnoj zajednici u trenutku smrti, ali je bio oženjen ili je živio u vanbračnoj zajednici u vrijeme sticanja imovine radom tokom trajanja bračne ili vanbračne zajednice, jer, u tom slučaju, imovinu treba smatrati zajedničkom imovinom oba supružnika. U takvim situacijama, notar treba dodatno da primijeni dužnu pažnju kako bi se postarao da su prava svih zainteresovanih strana utvrđena i zaštićena. Notar bi trebalo da utvrdi da li je imovina upisana samo na ime ostavioca. Međutim, ako je stečena radom tokom trajanja bračne ili vanbračne zajednice, trebalo bi primijeniti pretpostavku zajedničke registracije, što znači da, iako je upisan samo ostavilac, treba smatrati da je imovina upisana u korist oba supružnika.

Relevantna pitanja

- Da li je ostavilac ostavio testament ili drugi dokument bitan za nasljeđivanje? Da li ima zakonskih nasljednika (supružnik/djeca itd.) koje treba uzeti u obzir prilikom diobe imovine na djelove?
- Da li je ostavilac bio u braku ili je živio u vanbračnoj zajednici u vrijeme smrti ili u vrijeme sticanja imovine koja je obuhvaćena zaostavštinom?
- Da li je ostavilac imao zaključen bračni ugovor o posebnom bračno-imovinskom režimu?

Lista za provjeru

- onlajn registar ličnih stanja za ostavioca ili izvod iz matične knjige umrlih, izvod iz matične knjige vjenčanih, izvod iz matične knjige rođenih, presuda o razvodu braka ili poništenju braka;
- uvid u registar testamenata;
- onlajn registar ličnih stanja za nasljednika ili izvod iz matične knjige rođenih, izvod iz matične knjige vjenčanih, izvod iz matične knjige umrlih, presuda o razvodu braka ili poništenju braku;
- sporazum kojim se utvrđuje posebni bračno-imovinski režim;
- onlajn registar nepokretnosti ili izvod iz registra nepokretnosti;
- ugovor o prenosu prava na nepokretnosti, odluka suda, ili odluka državnog organa (pravni osnov za prethodno sticanje nepokretnosti).

Ovaj proces bi se mogao olakšati i ubrzati ako bi se podaci o pravnom osnovu za sticanje nepokretnosti i vremenu sticanja unosili u registar nepokretnosti i ako bi se dokumentacija o uknjižbi digitalizovala, jer notar ove podatke onda ne bi tražio od stranaka. To iziskuje izmjenu zakona i dalju digitalizaciju podataka iz registra nepokretnosti.

2.2 Obaveza da se svi nasljednici identifikuju, obavijeste i pozovu na raspravu zaostavštine

U crnogorskom pravnom sistemu nasljeđivanje se posmatra isključivo kao pravo, a ne kao obaveza. Svako lice može slobodno da odluči da li želi da naslijedi, u suprotnom neće biti pozvano da učestvuje u postupku kao zakonski ili testamentalni nasljednik. Djelimični izuzetak od ovog pravila je država, koja je krajnji zakonski nasljednik po redu nasljeđivanja. Državi može da pripadne korist samo ako ostavilac nije ostavio zakonske ili testamentalne nasljednike koji bi mogli ili željeli da naslijede.

Prije nego što počne sa sastavljanjem akta notar utvrđuje identitet stranaka i drugih učesnika uvidom u dokument izdat od strane nadležnog državnog organa na osnovu kojeg se identitet može utvrditi na nesumnjiv način. Ako identitet stranke nije moguće utvrditi, notar utvrđuje identitet stranke na osnovu izjava dva punoljetna svjedoka čiji identitet utvrđuje na prethodno opisan način. U notarskom aktu se navodi način utvrđivanja identiteta stranke, kao i oznaka dokumenta na osnovu kojeg je utvrđen identitet (Zakon o notarima, član 45).

Relevantna pitanja

- Da li je ostavilac ostavio testament?
- Da li je ostavilac imao djecu?
- Da li je ostavilac imao bračnog ili vanbračnog supružnika?
- Da li je ostavilac imao roditelje, braću i sestre, ili druge srodnike?
- Koja je njihova adresa?
- Da li neko od njih živi u inostranstvu?

Lista za provjeru

- ✔ uvid u registar testamenata;
- ✔ uvid u sudski registar;
- ✔ poziv na raspravu i obavještenje o prijemu;
- ✔ izvod iz matične knjige umrlih;
- ✔ za nasljednika: onlajn registar ličnih stanja ili izvod iz matične knjige rođenih, izvod iz matične knjige vjenčanih, izvod iz matične knjige umrlih za nasljednika, presuda o razvodu, rješenje o nasljeđivanju itd.;
- ✔ isticanje oglasa na oglasnoj tabli suda, u službenom listu ili međunarodnom listu.

2.3 Zaštita prava i interesa zakonskih nasljednika u slučaju testamenta

Kad je supružnik koji nema nužnih sredstava za život pozvan na nasljeđe sa drugim nasljednicima, sud može, na zahtjev supružnika, odlučiti da supružniku pripadne doživotno uživanje (plodouživanje) na cjelini ili dijelu zaostavštine koju su naslijedili ostali nasljednici. U takvim slučajevima sud može, kad za to postoje opravdani razlozi i na zahtjev supružnika, odlučiti da umjesto doživotnog uživanja supružnik naslijedi i jedan dio onog dijela zaostavštine koji bi po zakonu trebalo da naslijede ostali nasljednici, a može odlučiti da supružnik naslijedi i cijelu zaostavštinu (član 24 Zakona o nasljeđivanju). Ovo načelo, koje je specifični instrument ostavinskog prava, ima za cilj da spriječi da bude ugrožena osnovna egzistencija ostaviočevog supružnika, što se može dogoditi, s jedne strane, kada supružnik izgubi izdržavanje zbog smrti ostavioca, a, s druge strane, mora podijeliti imovinu sa drugim nasljednicima. Nasljedni dio supružnika može se povećati na dva načina: 1) malim povećanjem nasljednog dijela i 2) velikim povećanjem nasljednog dijela. Malo povećanje nasljednog dijela je kada sud odluči da, u korist supružnika, uspostavi plodouživanje na cjelini ili dijelu zaostavštine. Da bi došlo do povećanja nasljednog dijela supružnika, potrebno je da budu

ispunjena tri uslova: 1) da supružnik nema nužnih sredstava za život nakon smrti ostavioca, 2) supružnik mora istaći zahtjev da mu se poveća nasljedni dio, i 3) odluku o povećanju nasljednog dijela supružnika donosi sud na osnovu svog diskrecionog prava. Sud će odlučiti da poveća nasljedni dio supružnika ako to smatra cjelishodnim.

Veliko povećanje nasljednog dijela postoji kada sud odluči da će supružnik naslijediti cijelu zaostavštinu. Sud će dodijeliti supružniku cijelu zaostavštinu ako su, pored uslova propisanih za malo povećanje, ispunjena i dva dodatna uslova: 1) supružnik mora istaći zahtjev da mu se dodijeli cijela zaostavština i 2) zaostavština mora da bude tako male vrijednosti da bi njenom podjelom supružnik zapao u oskudicu.

Zakonodavac definiše nužni dio kao dio zaostavštine kojim zavještalac ne može da raspolaže. Pravo na nužni dio imaju samo lica koja je zakonodavac izričito naveo. Nužni nasljednici u Crnoj Gori su potomci, usvojenici i njihovi potomci, supružnik, roditelji, usvojioci, braća, sestre i babe i djedovi (Zakon o nasljeđivanju, član 27). Djedovi i babe i braća i sestre ostavioca su nužni nasljednici samo ako su trajno nesposobni za rad i nemaju nužnih sredstava za život (član 27). Nužnim nasljednicima garantuje se određeni dio ostaviočeve zaostavštine nakon smrti ostavioca.

Relevantna pitanja

- Da li je nepokretna imovina bila predmet ugovora o doživotnom izdržavanju?
- Da li je ostavilac ostavio testament?
- Da li testament ispunjava formu i sve uslove utvrđene zakonom?
- Da li postoji neki drugi testament?
- Da li bilo koji od nasljednika ima pravo na nužni dio?
- Da li nužni nasljednici polažu pravo na nužni dio?
- Da li nasljednici primaju nasljeđe ili se odriču nasljeđa?
- Da li nasljednici prihvataju ili osporavaju testament?

Lista za provjeru

- ✔ Ugovor o doživotnom izdržavanju;
- ✔ Ostaviočev testament;
- ✔ Nasljednička izjava;
- ✔ Izjava nužnog nasljednika da li prihvata ili osporava testament;
- ✔ Izjava nužnog nasljednika da li polaže pravo na nužni dio.

2.4 Obavijestiti nadživjelog supružnika da može da zahtijeva izdvajanje svog udjela u zajedničkoj imovini iz ostaviočeve zaostavštine

Svi notarski akti, pod uslovima propisanim zakonom, imaju formalnu dokaznu snagu javnih isprava (da je notar izdao notarski akt u okviru svojih ovlašćenja i da su ispoštovani bitni elementi forme propisane Zakonom). Međutim, nemaju svi notarski akti isti stepen dokazne snage. Stepen dokazne snage notarskih akata zavisi od vrste tih akata, a u tome je presudna forma i postupak za njihovo sastavljanje. Notarski zapisi i sa njima izjednačeni zapisi o potvrdi privatnih isprava, te notarski zapisnici imaju punu dokaznu snagu javne isprave, tj. pored formalne dokazne snage imaju i materijalnu dokaznu snagu koja se odnosi na pretpostavku istinitosti sadržine notarskih akata (notar sastavlja, odnosno potvrđuje sadržinu akta).

Dokazna snaga notarskog akta ogleda se i u tome što on, u slučajevima predviđenim zakonom, može biti izvršna isprava, a ta sposobnost da bude izvršna isprava data je notarskom zapisu i zapisu o potvrdi privatne isprave.

Obaveza obavještavanja nadživjelog supružnika je obaveza notara. Ako između stranaka postoji spor koji se može odnositi ne samo na pravo na udio supružnika, već i na njegovu veličinu, notar će uputiti stranke na parnični postupak. Ako nema spora, notar će iz zaostavštine izdvojiti dio nadživjelog supružnika na osnovu bračne tekovine. S obzirom na to da su brak i vanbračna zajednica jednaki u pogledu sticanja imovine, notar može obavijestiti stranke da ako između njih ne postoji spor u pogledu prava i veličine udjela partnera u zajedničkoj imovini, mogu sa partnerom zaključiti sporazum o poravnanju. U slučaju spora, notar će obavijestiti partnera da svoja prava može da ostvari pred sudom. U toj situaciji, ako je samo ostavilac upisan na nepokretnosti u registru nepokretnosti, supružnik treba da bude obaviješten o svom pravu da traži izdvajanje iz zaostavštine svog udjela u zajedničkoj imovini. U suprotnom, njegov dio može se raspodijeliti nasljednicima. Notar treba da poduči stranke o njihovim zakonskim pravima, naročito jer zakon primjenjuje pretpostavku zajedničke svojine / susvojine čak i ako je samo jedan od supružnika upisan u registar nepokretnosti.

Kao što znamo, brak i vanbračne zajednice u Crnoj Gori stvaraju ista imovinska prava. Prema tome, sva pravila koja se odnose na imovinske odnose bračnih supružnika shodno se primjenjuju i na vanbračnu zajednicu, shodno Porodičnom zakonu. Ali nailazimo i na slučajeve u kojima su žene u vanbračnim zajednicama imale poteškoća u ostvarivanju svojih prava iz penzijskog i invalidskog osiguranja prilikom nasljeđivanja svojih partnera, jer Zakon o penzijskom i invalidskom osiguranju ne prepoznaje vanbračnog partnera. Odredbom člana 42 Zakona o penzijskom i invalidskom osiguranju propisuje se da: "Pravo na porodičnu penziju mogu ostvariti članovi porodice: 1) umrlog osiguranika koji je navršio najmanje pet godina staža osiguranja ili najmanje deset godina penzijskog staža ili ispunio uslove za starosnu ili invalidsku penziju". Istim zakonom propisano je u članu 43: Članovima porodice umrlog osiguranika, odnosno korisnika prava iz člana 42 ovog zakona smatraju se: 1) bračni drug; 2) djeca (rođena u braku ili van braka ili usvojena i pastorčad koju je osiguranik, odnosno korisnik prava izdržavao). Pravo na porodičnu penziju može ostvariti i razvedeni bračni drug, pod uslovima iz čl. 44 i 45 ovog zakona, ako mu je pravnosnažnom presudom dosuđeno pravo na izdržavanje. U vezi sa odredbama navedenog zakona, i nemogućnošću vanbračnog supružnika da ostvari porodičnu penziju, Zaštitnik je dao mišljenje sa preporukom i utvrdio povredu prava iz člana 1 Protokola br. 1 Konvencije zbog diskriminacije po osnovu

bračnog i porodičnog statusa (prema presudi u predmetu Munoz Diaz protiv Španije pred Evropskim sudom za ljudska prava, u kojoj su ta prava zaštićena članom 1 Protokola 1 Evropske konvencije).[1]

Relevantna pitanja

- Kada je nepokretnost stečena?
- Po kom osnovu je nepokretnost stečena?
- Da li je ostavilac bio u braku ili je živio u vanbračnoj zajednici u vrijeme sticanja nepokretnosti?
- Da li je ostavilac imao zaključen bračni ugovor ili bilo koji drugi ugovor kojim se mijenja podrazumijevani bračno-imovinski režim?
- Da li je supružnik zahtijevao izdvajanje iz zaostavštine svog udjela u zajedničkoj imovini?
- Da li su drugi nasljednici sa tim saglasni ili to osporavaju?
- Da li su drugi nasljednici saglasni da zaključe ugovor o poravnanju sa ostaviočevim partnerom u pogledu udjela partnera u imovini?

Lista za provjeru

- ✔ onlajn registar ličnih stanja ili izvod iz matične knjige vjenčanih;
- ✔ onlajn registar nepokretnosti ili izvod iz registra nepokretnosti;
- ✔ ugovor o prenosu prava na nepokretnosti, odluka suda ili odluka državnog organa (pravni osnov za sticanje);
- ✔ ugovor između supružnika kojim se mijenja bračno-imovinski režim (bračni ugovor itd.);
- ✔ izdvajanje udjela supružnika iz zaostavštine, unijeto u rješenje o nasljeđivanju;
- ✔ ugovor o poravnanju između nasljednika i ostaviočevog partnera.

1 Mišljenje Zaštitinika br. 149/19 od 16.09.2019. g. Dostupno na: http://www.ombudsman.co.me/docs/1572434664_16092019-preporuka-mrsspio.pdf

2.5 Obavijestiti nasljednike o posljedicama odricanja od nasljeđa

Notar je dužan da obavijesti nasljednika da se može odreći nasljeđa izjavom sudu do završetka rasprave zaostavštine (Zakon o nasljeđivanju, član 131). Odricanje važi i za potomke onog koji se odrekao, ako nije izričito izjavio da se odriče samo u svoje ime. Notar je dužan i da obavijesti nasljednika koji se odrekao nasljeđa samo u svoje ime da se smatra kao da nikad nije bio nasljednik.

Ne može se odreći nasljeđa nasljednik koji je raspolagao cijelom ili jednim dijelom zaostavštine. Međutim, mjere koje jedan nasljednik preduzme samo radi očuvanja zaostavštine, kao i mjere tekućeg upravljanja, ne lišavaju ga prava da se odrekne nasljeđa (Zakon o nasljeđivanju, član 133). Notar se mora postarati da izjava o odricanju od nasljeđa u korist drugog nasljednika mora da bude izričita, jasna i neopoziva. Odricanje u korist određenog nasljednika smatra se izjavom o prijemu nasljeđa uz istovremeno ustupanje nasljednog dijela. Po prijemu ustupljenog dijela na odnose između ustupioca i prijemnika primjenjuju se pravila o poklonu (Zakon o nasljeđivanju, član 134).

Notar je dužan da obavijesti nasljednika da se izjava o odricanju od nasljeđa ili o primanju nasljeđa ne može opozvati. Izjava o odricanju od nasljeđa se odnosi samo na onu zaostavštinu koja je nasljedniku bila poznata u vrijeme davanja izjave. Nasljednik koji je dao izjavu može tražiti poništenje izjave ako je ona izazvana prinudom ili prijetnjom ili je data usljed prevare ili u zabludi (Zakon o nasljeđivanju, član 136).

Nadalje, odricanje od nasljeđa koje nije otvoreno nema nikakvog pravnog dejstva. Izuzetno, potomak koji može samostalno raspolagati svojim pravima može se ugovorom s pretkom odreći nasljedstva koje bi mu pripalo poslije smrti pretka. Prilikom ovjere, sudija ili notar će pročitati ugovor i upozoriti pretka i nasljednika na posljedice ugovora (Zakon o nasljeđivanju, član 135). Dio zakonskog nasljednika koji se odrekao nasljeđa samo u svoje ime nasljeđuje se kao da je taj nasljednik umro prije ostavioca (Zakon o nasljeđivanju, član 138).

Relevantna pitanja

- Da li nasljednik prima nasljeđe?
- Da li se nasljednik odriče nasljeđa?
- Koji su razlozi/motivi stranaka?
- Da li postupa po svojoj slobodnoj volji?

Lista za provjeru

- ✔ nasljednička izjava data lično pred notarom ili pisana (ovjerena) izjava;
- ✔ nasljednička izjava pred notarom preko zastupnika ovlašćenog ovjerenim specijalnim punomoćjem.

2.6 Ugovori u vezi sa nasljedstvom

Zakonski nasljednici koji su živjeli u zajednici sa ostaviocem i svojim radom, zaradom ili na drugi način pomagali mu u privređivanju, imaju pravo da zahtijevaju da im se iz zaostavštine izdvoji dio koji odgovara njihovom doprinosu u povećanju vrijednosti ostaviočeve imovine. Ovaj dio se ne uzima u obzir prilikom izračunavanja dijela drugih nasljednika (Zakon o nasljeđivanju, član 34). Nadživjelom supružniku i potomcima ostaviočevim koji su živjeli sa ostaviocem u istom domaćinstvu pripadaju predmeti domaćinstva manje vrijednosti koji služe zadovoljavanju njihovih svakodnevnih potreba, kao što su pokućstvo, namještaj, posteljina i slično.

CONCLUSION

The role of the Chamber is very important for these guidelines and for gender equality in general. Notaries, as holders of public service, provide in practice efficient and economical public service with their documents. Namely, all tasks within the competence of notaries should be completed professionally and in a timely manner. There is no long wait, as was the case in the courts, due to their overload. This guidance document provides important suggestions to ensure the realisation of the protection of the rights of all persons. This is especially important in the context of future cooperation with the real estate cadastre and other relevant state bodies.

The right to property is a fundamental human right guaranteed by the Constitution, which must be equally enjoyed by men and women. In Montenegro, the right to renounce property usually benefits male family members and is used widely. Women in Montenegro continue to relinquish their share of inheritance in favour of male family members, despite their legal right to inherit as statutory heirs. The patriarchal ideology is extremely strong, so women, regardless of economic status and level of education, will often waive their rights to property to further family traditions. In order to change this practice, it is necessary to work on informing all citizens about their rights. Notaries have a very important role in this process. Constant education on rights, pointing out shortcomings in legal systems and uniform practice of all institutions, will contribute to strengthening the awareness of all citizens about their rights. Therefore, constant training on gender issues should be organized. The concerns of the notaries as to actual possibilities of implementation of best practice should be taken seriously.

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

The guidance document is not a binding interpretation of the law. However, it is based on the current national legislation and practice. The Notary Chamber and the supervising authorities and courts will have to determine and decide how the guidelines will need to be implemented in notaries' daily practice in the most efficient manner in order to avoid gender discrimination and to support the economic empowerment of women, in addition to all the above guidelines that can help protect women from de facto discrimination in Montenegro. We believe that these guidelines will also help our Chamber protect the rights of persons in same-sex civil partnership, because a new Law gives same-sex couples the same equal, legal rights as heterosexual ones, except for child adoption. For Montenegro, still a relatively conservative society, the role of the Notary and these guidelines will therefore be even greater.

ZAKLJUČAK

Uloga Komore je veoma važna za ove smjernice i uopšte za rodnu ravnopravnost. Notari, kao nosioci javne službe, u praksi svojim ispravama pružaju efikasnu i ekonomičnu javnu uslugu. Naime, svi poslovi iz nadležnosti notara trebalo bi da se stručno i blagovremeno završavaju. Nema dugotrajnog čekanja, kao što je to bio slučaj u sudovima, zbog njihove preopterećenosti. Ove smjernice sadrže važne sugestije kako bi se obezbijedilo ostvarivanje zaštite prava svih lica. Ovo je naročito važno u kontekstu buduće saradnje sa katastrom nepokretnosti i drugim nadležnim državnim organima.

Pravo svojine je osnovno ljudsko pravo zajemčeno Ustavom, koje moraju ravnopravno uživati i muškarci i žene. U Crnoj Gori obično muški članovi porodice imaju korist od prava na odricanje od imovine i korišćenje tog prava je rasprostranjeno. Žene u Crnoj Gori i dalje se odriču svog nasljednog dijela u korist muških članova porodice, i pored toga što imaju zakonsko pravo da naslijede kao zakonski nasljednici. Patrijarhalna ideologija je izuzetno jaka, pa će se žene, bez obzira na svoj ekonomski status i nivo obrazovanja, često odreći svojih prava na imovinu kako bi nastavile porodičnu tradiciju. Da bi se ova praksa promijenila potrebno je raditi na informisanju svih građana o njihovim pravima. Notari imaju veoma važnu ulogu u ovom procesu. Stalna edukacija o pravima, ukazivanje na nedostatke u pravnim sistemima i jedinstvena praksa svih institucija, doprinijeće jačanju svijesti svih građana o svojim pravima. Stoga bi trebalo organizovati kontinuiranu obuku o rodnim pitanjima. Zabrinutosti notara u pogledu stvarnih mogućnosti za primjenu najbolje prakse treba shvatiti ozbiljno.

Regionalne smjernice i njihov prateći dokument sa smjernicama zasnivaju se na važećim propisima. Trebalo bi ih kontinuirano ažurirati i unapređivati kako bi se podržale izmjene zakona i primijenila najbolja praksa.

Smjernice ne predstavljaju obavezujuće tumačenje zakona. Međutim, zasnivaju se na važećem domaćem zakonodavstvu i praksi. Notarska komora i nadzorni organi i sudovi moraće da odrede i odluče na koji način smjernice treba na najefikasniji način primijeniti u svakodnevnoj praksi notara kako bi se izbjegla rodna diskriminacija i podržalo ekonomsko osnaživanje žena, pored svih gore navedenih smjernica koje mogu pomoći da se žene u Crnoj Gori zaštite od faktičke diskriminacije. Smatramo da će ove smjernice pomoći našoj komori i da zaštiti prava lica koja su zaključila životno partnerstvo lica istog pola, jer novi zakon istopolnim parovima daje ista jednaka, zakonska prava kao i heteroseksualnim parovima, osim usvojenja djeteta. Za Crnu Goru, koja je još uvijek relativno konzervativno društvo, uloga notara i ovih smjernica biće stoga još važnija.

ANNEX

A.1. Judgment of the Supreme Court Rev. br. 1046/13 of 12 November 2013

Judgment of the Supreme Court of Montenegro Rev. br. 1046/13 of 12 November 2013 rejected as unfounded the application for revision submitted by the plaintiff against the judgment of the High Court in Podgorica Gž-br. 2245/13 of 10 June 2013. In this case (according to the reasoning of the judgment of the Supreme Court), the first instance court accepted the plaintiff's claim and established that the plaintiff has the right of joint property in relation to the second respondent (the plaintiff's spouse) and the first respondent (the bank), regarding the apartment on which the second respondent raised a mortgage in favour of the bank as collateral for the loan granted by that bank to the son of the plaintiff and the second respondent and found that the mortgage agreement was null and void, while the second-instance court reversed the aforementioned judgment of the first-instance court in the part by which that judgment found that the mortgage agreement was null and void. When deciding on the revision of the judgment of the second-instance court, the Supreme Court found that the application for revision was unfounded. The Supreme Court based such decision on the following findings: the plaintiff and the second respondent had been married since 1977 and in the course of their marital union, they purchased the apartment in question by their joint labour and funds in 1992; a mortgage agreement was concluded in 2008 between the first respondent as mortgage creditor and the second respondent as mortgage debtor; the mortgage was raised as collateral for the main and secondary claim of the mortgage creditor against the debtor (a legal entity) based on a loan agreement concluded between the son of the plaintiff and the second respondent, as the executive director, and the first respondent; the loan beneficiary defaulted on the loan repayment, which was the reason for initiating an out-of-court settlement procedure. Having found also that the first-instance court adopted the plaintiff's claim that the contested mortgage agreement was null and void, providing the reasoning that under art. 290 of the Family Law (OGRM 1/07; FL) the second respondent could not dispose of his share in the undivided joint property or encumber it with a legal transaction inter vivos without the plaintiff's consent, and that the second-instance court made a conclusion to the contrary on the basis of the same facts that, namely, the mortgage agreement was legally valid, that there was no reason for it to be null and void, which is why it reversed the judgment of the first-instance court and rejected the claim as unfounded, the Supreme Court concluded that the second-instance court acted correctly by bringing the decision as set out above. The Supreme Court based its decision on the following: a view that, although the provision of art. 290 of the FL stipulates that a spouse may not dispose of his/her share in the undivided joint property and he/she cannot place legal encumbrances on the property inter vivos, and as it had been found that the plaintiff and the second respondent had been in a harmonious marriage since 1977, that they lived in a common household with their son who raised a loan as an owner and executive director of a legal person, the second instance court's conclusion that the plaintiff had known and must have known of the encumbrance, i.e., the raising of the mortgage on the apartment concerned which was a joint property of the plaintiff and the second respondent as collateral for the loan taken out by their son, and that she consented to it was quite logical and the only correct conclusion the court could make, and a view that the consent of a spouse can be given in writing or verbally, including in the form of tacit consent as in this particular case, just as it was held by the second-instance court.

A.2. Decision of the Constitutional Court Už-III br. 50/14 of 31 March 2017

The plaintiff submitted a constitutional complaint against the decision of the Supreme Court referred to under A.1 in which she, essentially, stated that the claim was based on the fact that the second respondent could not conclude a mortgage agreement without the consent of his wife, who is the applicant submitting the constitutional complaint, because the apartment had been purchased with the spouses' joint funds during the marital union and, thus, constituted joint property; that, relying on the provision of art. 289 paragraph 2 and art. 290 of the FL, the first-instance court found that the second respondent could not encumber the apartment concerned with a mortgage without his wife's consent, for which reason it found that the mortgage agreement was null and void, and that, as opposed to that, the second-instance court and the Supreme Court reversed the first instance judgment having found that the applicant submitting the constitutional complaint had consented to the conclusion of the mortgage agreement; that the Supreme Court had taken a different view in an identical factual and legal matter (Rev. br. 1057/09 of 21 October 2009); that the position taken by the Supreme Court in the contested judgment transferred the responsibility for the failure of the bank onto the applicant; that, in the course of the proceedings, the respondent bank did not contest the fact that the applicant had not been informed that the mortgage agreement had been concluded, nor was her consent requested; that the bank was obliged to act with due professional care and examine whether the apartment in question was a separate or joint property, and only thereafter to proceed with the conclusion of the mortgage agreement; that the Supreme Court departed from the previous established case-law without good reason and reasoning, having thereby created legal uncertainty and, thus, called into question the legal provisions regulating the joint property of the spouses; that the Supreme Court did not adjudicate properly on the reasons for revision and that the applicant was unlawfully deprived of her right of ownership of the apartment in question, proposing to accept the constitutional complaint, repeal the contested decision of the Supreme Court and to remand the case for a retrial.

In this particular legal matter upon the constitutional complaint, the Constitutional Court requested the response of the Supreme Court and obtained the case files of the first-instance court.

As regards the above decision of the Supreme Court, the Constitutional Court found that the observations made in the reasoning of the decision of the Supreme Court that "(...) quite logical and the only correct conclusion that the plaintiff knew and must have known about (...) raising a mortgage on the apartment (...), and that the consent of the other spouse can (...) be tacit consent, as in this particular case..." "suggest that the reasoning of the challenged decision is not sufficiently substantiated and clear, because the basis from which the Supreme Court drew conclusions in this dispute cannot be seen. Such an approach of the revision court is given weight by the fact that the first-instance judgment described in detail the procedure for individual assessment of the evidence, establishing interrelationships between them and inferring that there was evidence that the applicant had not been aware that the disputed mortgage agreement had been concluded and that, accordingly, she had not consented to it, which is why it was assessed that the applicant's husband had concluded the mortgage agreement contrary to the provisions of artt. 290 and 291 of the Family Law." Therefore, the Constitutional Court pointed out that "the obligation of the courts in the second-instance proceedings and in the revision proceedings is to state, in the reasoning of the judgments, the reasons on the basis of which the courts consider that a fact has been proven or not proven, and the manner in which such a conclusion has been made." In this respect, the Constitutional Court stated its position that "as long as the final judgment does not provide the sufficient and relevant reasons that guided the court when

making its decision, which could lead us to believe that the court really examined the case and responded to all substantive allegations of the parties, it cannot be considered that such judgment meets the general requirements arising from the right to a fair trial guaranteed by the Constitution and the Convention." Having in mind the above, the Constitutional Court concluded that "the disputed decision of the Supreme Court violated the applicant's right to a reasoned judicial decision" and that as it found "a violation of the right to a fair trial under art. 32 of the Constitution and art. 6 § 1 of the European Convention, in the above described part of this Decision, the Constitutional Court did not examine the applicant's allegations concerning a possible violation of other constitutional rights referred to in the constitutional complaint".

A.3. Judgment of the Supreme Court of Montenegro Už-Rev. Br. 12/17 of 8 November 2017

In the judgment rendered upon the decision of the Constitutional Court cited under A.2, the Supreme Court once again rejected the application for revision filed against the judgment of the High Court in Podgorica Gž. br. 2245/13 of 10 June 2013 as unfounded, however, it substantively supplemented the reasons stated in the Judgment Rev. br. 1046/13 of 12 November 2013 (see supra under A.1).

Namely, taking the view that it is not disputable that the courts have a margin of appreciation as to which arguments and evidence will be accepted in a particular case and that they have an obligation to state reasons for their decision by providing clear and comprehensible reasons on which they based such decision, while referring to the relevant decisions of the ECtHR, the Supreme Court pointed out that it also assessed that "the conclusion of the court of second instance that the mortgage agreement was legally valid is correct, on the grounds that the plaintiff had to be aware of the conclusion of the disputed agreement and had to have consented to it, as she had been in a harmonious marriage with the second respondent since 1977, that it was collateral for the loan taken by their son with whom they lived in the common family household." The Supreme Court based such a position on the following excerpt: that "under art. 289 (2) of the Family Law (...) in case of fiction, as in case of the joint property of the spouses, it shall be considered that the entry was made in the names of both spouses even if the entry was made in the name of only one of them, unless the entry was made on the basis of a written agreement entered into by and between spouses, and it was necessary to make annotation in the real estate cadastre on the joint ownership of the property and manner of management and disposal and to make clear to third parties that it is a jointly-owned thing", and that, otherwise, there would be no purpose of the main principle of a real estate cadastre - the principle of reliability – that no one can bear harmful consequences when relying on the faithfulness and reliability of data on real estate registered in the real estate cadastre, in accordance with the provision of art. 10 of the Law on State Surveying and Cadastre of Immovable Property (...) which prescribes that the data on immovable property registered in the real estate cadastre shall be deemed to be accurate and that no one can incur adverse consequences in immovable property transactions and other relations in which such data is used. Furthermore, the Supreme Court also took a view as regards the repealing decision of the Constitutional Court in which it was underlined that it was not clear from the contested decision on the basis of which evidence the Supreme Court drew the conclusion that the plaintiff knew and had to know of the mortgage on the apartment concerned and that thereby she gave tacit consent to raise a mortgage, and it provided the following arguments: - that the provision of "art. 291 of the Family Law lays down that the joint property, during the marriage, shall be managed and disposed of jointly and by mutual consent of both spouses;" - that, accordingly, "even with regard to a third person, it is assumed that in a situation where

a joint property is disposed of by one spouse, it shall be deemed that he/she is doing that with the consent of the other spouse with whom he/she is in a harmonious marital relationship, and in particular when the property is registered in the name of the spouse disposing of such property;" - that in "harmonious marital relationships tacit consent is acceptable (...) just as is explicit consent," which means that "the other spouse," i.e., "the plaintiff has the burden of rebutting the presumption of consent in the case concerned, for which she did not provide evidence;" - that, if "a priori allegations of the plaintiff that she did not give consent to the mentioned disposal of the joint property by her husband were accepted, that (..) could result in the abuse of the rights, especially at the time when there was no notarial service in Montenegro as was the period in which the agreement concerned was made." On the basis of the aforesaid, the Supreme Court concluded: - "that the sued bank neither knew nor had to know that it was a jointly owned immovable property since there is no such entry in the public registers;" - that, since, on the other hand, "marriage as a community of life is based on mutual respect, understanding and assistance, it would mean that the existence of a mortgage registered in the public registers accessible to all interested persons could not have remained unknown to the plaintiff and that there existed also her tacit consent to raise the mortgage;" - that "the opposite point of view would also lead (...) to the conclusion that in the given situation the mortgage creditor would have to undertake investigation of the family status of the mortgage debtor, which would be contrary to the above-mentioned provisions of the law on the rules on mortgage and the registration of rights and encumbrances on real estate.". Finally, the Supreme Court noted that providing additional reasons rectified the violation indicated in the repealed decision of the Constitutional Court.

A.4. On the above decisions

The decisions of the Supreme Court and the Constitutional Court discussed above deal with two exceptionally important interrelated legal issues. The first one concerns the legal status of the joint property of spouses, especially the real estate which is registered in the real estate cadastre, and the second one relates to implications of the circumstance that only one spouse is registered in the cadastre as the owner of the real estate that the spouses acquired during marriage with joint labour and funds.

In the first decision of the Supreme Court, when dealing with the two mentioned issues, the focus was apparently placed on the "factual" presumption that a spouse who was not registered in the cadastre as a co-owner of the jointly-owned real estate had given tacit consent that the other spouse may dispose of that immovable property; especially in the case of a "harmonious" marriage lasting for many years in which the spouse registered in the cadastre allowed the mortgage to be raised on the jointly-owned apartment as collateral for a loan granted to a legal entity "owned" by their son who lived with his parents. It is a presumption that would be accorded the relevance of a sort of (judicial) legal presumption, i.e., the relevance which is referred to in some legal systems as the so-called prima facie evidence, by the adoption of a relevant legal opinion of principle by the Supreme Court accompanied by the established case-law. That presumption would also be related to the issue of the distribution of the burden of proof, namely, the assumptions that would have to be met to rebut such a presumption.

In its repealing decision, the Constitutional Court criticised the Supreme Court for not providing sufficient reasons for the factual and legal positions taken in its decision challenged by the constitutional complaint and that the decision it rendered did not state reasons the way it had to. However, the Constitutional Court did not engage in a specific explanation of its assessment in the statement of reasons for its decision, but rather settled for the fairly general, mainly "standardised" statements (formulas) about the deficiencies

in the statement of reasons. The arguments stated in the decision of the Constitutional Court are rather similar to those stated in the decisions of the higher courts repealing the decisions of the lower courts on the grounds of the deficiencies due to which they cannot be examined (art. 367 para. 2 item 15 of the LCP). The Constitutional Court did not take a stance with regard to the view of the Supreme Court that, in this particular case, the unregistered spouse gave tacit consent to the registered spouse to raise a mortgage on the jointly-owned immovable property in favour of a legal entity "owned" by their son. The Constitutional Court did not specify in its decision the differences between the view of the first instance court, on the one hand, and the views of the second-instance court and the Supreme Court, on the other hand, with regard to the determined substance of the factual basis of the dispute and in what sense the "unfettered evaluation" of the evidence in the case at hand was insufficiently substantiated, and to which facts it actually related, namely, whether it was unfettered evaluation of the evidence as a method of forming a conclusion on the existence of a fact or a finding derived on the basis of established facts as to whether the applicant of the constitutional complaint knew or had to know of the mortgage agreement and whether she had given her tacit consent to its conclusion, and, in this respect, which of the parties was to bear the burden of proof in regard to certain facts.

In its new decision, in which it ruled the same as in the repealed decision, the Supreme Court explained in more detail the view it took in that decision, i.e., the position on the existence of the presumption of tacit consent of the unregistered spouse if there was no annotation of joint ownership in the cadastre, invoking, inter alia, the principle of the reliability of the cadastre of immovable property and the relevance of that principle to legal certainty. The Supreme Court also took the view that the applicant who submitted the constitutional complaint failed to produce evidence that would rebut the presumed consent, which is, in fact, a view that she bore the burden of proof that the unregistered spouse had not given the consent that the registered spouse may dispose of the immovable property in question, including also the burden of proof that the bank which granted the loan knew that the property in question was a joint property. It also warned of possible abuses of joint property rights in cases where only one spouse is registered in the cadastre and the problems that could occur for the banks that grant loans if they would have to check each property as to whether it is jointly owned and who is authorised to dispose of it. Having accepted the existence of the aforementioned presumption of tacit consent and the relevance of the principle of reliability of the cadastre as a public register, the Supreme Court took a certain legal view on the legal regime of joint ownership of the spouses over the immovable properties registered in the cadastre, underlining thereby also the implicit relevance of the annotation of joint ownership in that public register, which should be taken – although that was not explicitly stated – as an expression of the principle of good faith and honesty in legal transactions. It could also be noted that the Constitutional Court, by its repealing decision, prompted the Supreme Court to give more complete reasoning for its original decision and to elaborate further legal arguments for the legal positions on which that decision was based, although, perhaps, the repealed decision already led to the conclusion that in the case at hand both the second-instance court and the Supreme Court based their decision on the assumption that the unregistered spouse, who allowed the other spouse to be registered as the sole owner of the immovable property in the cadastre, gave tacit consent that the registered spouse may dispose of the immovable property on behalf of both spouses, which would require the Constitutional Court to declare whether the legal view of the Supreme Court adversely affected the unregistered spouse's right of joint ownership of immovable property registered in the cadastre. By taking a position on this issue, the Constitutional Court would determine the content of the new decision of the Supreme Court. Since that did not happen, the Constitutional Court may have an opportunity to express its opinion on this issue when a new constitutional complaint is submitted against a new decision of the Supreme Court. Regarding the mentioned assumption on which the second-instance court and the Supreme Court relied in their

repealed decisions, the decision of the Constitutional Court did not specify whether the deficiencies in the reasoning of those decisions concerned unfettered evaluation as a method of determining the facts having the significance of the so-called presumptive basis for the application of the aforementioned assumption, i.e., the finding that the applicant knew of the mortgage agreement, or the conclusion about the so-called presumed fact – the conclusion that the applicant submitting the constitutional complaint, who knew of the mortgage agreement (presumptive basis), gave her tacit consent to the conclusion of that agreement.[2]

2 Mihajlo Dika, Ivana Martinović, *Analiza uticaja odluka ustavnog suda Crne Gore na sistem redovnih sudova sa posebnim osvrtom na odnos Ustavnog i Vrhovnog suda Crne Gore*, Savjet Evrope, 2018, Podgorica, str.9-16.

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PRILOG

A.1. Presuda Vrhovnog suda Rev. br. 1046/13 od 12. novembra 2013. godine

Presudom Vrhovnog suda Crne Gore Rev. br. 1046/13 od 12.11.2013. odbijena je kao neosnovana revizija tužioca protiv presude Višeg suda u Podgorici Gž-br. 2245/13 od 10.06.2013. U ovom predmetu (prema obrazloženju presude Vrhovnog suda) prvostepeni sud je usvojio tužbeni zahtjev tužioca i utvrdio pravo zajedničke svojine tužilje protiv drugotuženog, inače supruga tužilje, i prvotužene banke, nad stanom na kojem je drugotuženi zasnovao hipoteku u korist banke za kredit koji je ta banka odobrila zajedničkom sinu tužilje i drugotuženog, te je utvrdio da je ništavan ugovor o hipoteci, dok je drugostepeni sud preinačio navedenu presudu prvostepenog suda u dijelu kojim je tom presudom utvrđeno da je ništavan ugovor o hipoteci. Odlučujući po reviziji protiv presude drugostepenog suda, Vrhovni sud je našao da revizija nije osnovana. Takvu svoju odluku Vrhovni sud je zasnovao na utvrđenju: - da su tužilja i drugotuženik u braku od 1977. i da su u toku trajanja bračne zajednice zajedničkim radom i sredstvima 1992. otkupili predmetni stan, i to na ime drugotuženog; - da je 2008. između prvotuženog kao hipotekarnog povjerioca i drugotuženog kao hipotekarnog dužnika zaključen ugovor o hipoteci; - da je hipotekom obezbijeđeno glavno i sporedno potraživanje hipotekarnog povjerioca prema dužniku, pravnom licu, na osnovu ugovora o kreditu koji je u svojstvu izvršnog direktora s prvotuženim zaključio sin tužilje i drugotuženog; - da korisnik kredita svoju obavezu vraćanja kredita nije izvršio, zbog čega je započet postupak vansudskog poravnanja. Utvrdivši pored toga da je prvostepeni sud usvojio tužbeni zahtjev tužilje da je sporni ugovor o hipoteci ništavan uz obrazloženje da drugotuženi saglasno čl. 290. Porodičnog zakona (SL RCG 1/07; PZ) nije mogao bez saglasnosti tužilje raspolagati svojim dijelom u nepodijeljenoj zajedničkoj imovini niti ga opteretiti pravnim poslom među živima, a da je drugostepeni sud na osnovu istog utvrđenja činjeničnog stanja izveo suprotan zaključak - da je ugovor o hipoteci pravno valjan, da ne postoji razlog ništavosti, zbog čega je preinačio presudu prvostepenog suda i odbio tužbeni zahtjev kao neosnovan, Vrhovni sud je zaključio da je drugostepeni pravilno postupio odlučivši na izloženi način. Vrhovni sud je svoju odluku zasnovao: - na stavu da je, iako je odredbom čl. 290. PZ propisano da svojim dijelom u nepodijeljenoj zajedničkoj imovini ne može bračni drug raspolagati niti ga može opteretiti pravnim poslom među živima, ipak kod utvrđenja da se tužilja i drugotuženi nalaze u skladnom braku od 1977. godine, da su živjeli u zajednici sa svojim sinom koji je u svojstvu vlasnika i izvršnog direktora pravnog lica podigao kredit, sasvim logičan i jedino ispravan zaključak drugostepenog suda da je tužilja znala i morala znati za opterećivanje - stavljanje hipoteke na predmetnom stanu, koji predstavlja zajedničku imovinu tužilje i drugotuženog, a radi obezbjeđenja kredita koji je podigao njihov sin i da se s tim saglasila, - te na stavu da se saglasnost bračnog druga može dati u pisanoj formi ili usmeno, ali i prećutno kao u konkretnom slučaju, kako je to zaključio i drugostepeni sud.

A.2. Odluka Ustavnog suda Už-III br. 50/14 od 31. marta 2017. godine

Protiv odluke Vrhovnog suda navedene pod A.1. tužilja je podnijela ustavnu žabu u kojoj je, u suštini, navela: - da je tužbeni zahtjev zasnovan na činjenici da drugotuženi nije mogao zaključiti ugovor o hipoteci bez saglasnosti svoje supruge, podnositeljke ustavne žalbe, jer je stan kupljen zajedničkim sredstvima supružnika za vrijeme trajanja bračne zajednice, pa predstavlja zajedničku svojinu; - da je, polazeći od odredbe člana 289. st. 2. i člana 290. PZ, prvostepeni sud utvrdio da drugotuženi nije mogao opteretiti predmetni stan hipotekom bez saglasnosti svoje supruge, zbog čega je utvrdio ništavost ugovora o hipoteci, a da su, tome nasuprot, drugostepeni i Vrhovni sud preinačili prvostepenu presudu našavši da se podnositeljka ustavne žalbe saglasila sa zaključenjem ugovora o hipoteci; - da je Vrhovni sud u identičnoj činjeničnoj i pravnoj stvari (Rev. br. 1057/09 od 21.10.2009) zauzeo drugačiji stav; - da se stavom Vrhovnog suda u pobijanoj presudi odgovornost za propust banke prebacuje na podnositeljku žalbe; - da tokom postupka tužena banka nije sporila činjenicu da podnositeljka nije bila upoznata sa zaključenjem predmetnog ugovora o hipoteci, niti je tražena njena saglasnost; - da je banka bila dužna da postupa sa pažnjom "dobrog stručnjaka" i da ispita da li predmetni stan predstavlja posebnu ili zajedničku imovinu, pa da tek onda pristupi zaključenju ugovora o hipoteci; - da je Vrhovni sud bez valjanog razloga i obrazloženja odstupio od dosadašnje ustaljene prakse i takvim postupanjem stvorio pravnu nesigurnost, a samim tim doveo u pitanje i zakonska rješenja kojima je regulisana zajednička svojina bračnih drugova; - da Vrhovni sud nije na valjan način odlučivao o razlozima revizije i da je podnositeljka na nezakonit način lišena prava svojine na predmetnom stanu, predloživši da se usvoji ustavna žalba, ukine pobijana odluka Vrhovnog suda i predmet vrati na ponovni postupak.

U konkretnoj pravnoj stvari po ustavnoj žalbi Ustavni sud je zatražio izjašnjenje Vrhovnog suda i pribavio predmet prvostepenog suda.

U vezi s izloženom odlukom Vrhovnog suda, Ustavni sud je našao da konstatacije u obrazloženju odluke Vrhovnog suda da je "(...) sasvim logičan i jedino ispravan zaključak da je tužilja znala i morala znati za (...) stavljanje hipoteke na predmetnom stanu (...) i da saglasnost drugog bračnog druga može (…) biti data i prećutno, kao što je u konkretnom slučaju..." "upućuju na zaključak da konkretno obrazloženje osporene odluke nije u dovoljnoj mjeri argumentovano i jasno, jer se ne vidi na osnovu čega je Vrhovni sud izveo zaključke u ovom sporu. Ovakav pristup revizijskog suda ima posebnu težinu s obzirom na to da je prvostepenom presudom detaljno opisan postupak pojedinačne ocjene dokaza, njihovog dovođenja u međusobnu vezu i izvođenje zaključaka o dokazanosti da podnositeljka nije znala za zaključenje spornog Ugovora o hipoteci i da se, shodno tome, s istim nije saglasila, zbog čega je ocijenjeno da je suprug podnositeljke zaključio predmetni ugovor o hipoteci, suprotno odredbama čl. 290. i 291. Porodičnog zakona". Zato je Ustavni sud s tim u vezi ukazao "da je obaveza sudova u drugostepenom i revizijskom postupku da u obrazloženjima presuda navedu razloge, na osnovu kojih sudovi uzimaju da je neka činjenica dokazana, odnosno da nije dokazana, te način na koji se došlo do takvog zaključka". U skladu s navedenim, Ustavni sud iznio je svoj stav "da sve dok u pravosnažnoj presudi nijesu navedeni dovoljni i relevantni razlozi kojima se sud vodio u donošenju svoje odluke, a koji mogu dovesti do uvjerenja da je taj sud stvarno ispitao slučaj i odgovorio na sve bitne navode stranaka, ne može se smatrati da ta presuda zadovoljava opšte zahtjeve koji proizlaze iz Ustavom i konvencijom zajamčenog prava na pravično suđenje". Imajući u vidu navedeno, Ustavni sud je zaključio "da je osporenom odlukom Vrhovnog suda povrijeđeno pravo podnosioca na obrazloženu sudsku odluku" te da zato što je utvrdio "povredu prava na pravično suđenje iz

čl. 32. Ustava i čl. 6. st. 1. Konvencije, u prethodno opisanom dijelu ove Odluke, Ustavni sud nije ispitivao navode podnositeljke o eventualnoj povredi ostalih ustavnih prava na koja se ukazuje ustavnom žalbom".

A.3. Presuda Vrhovnog suda Crne Gore Už-Rev. Br. 12/17 od 8. novembra 2017. godine

U presudi koju je donio po odluci Ustavnog suda navedenoj pod A.2. Vrhovni sud je ponovno odbio reviziju kao neosnovanu protiv presude Višeg suda u Podgorici Gž. br. 2245/13 od 10. juna 2013. godine, dopunivši bitno razloge koje je iznio u presudi Rev. br. 1046/13 od 12. novembra 2013. godine (v. *supra ad* A.1.).

Naime, Vrhovni sud je, uzevši da i po njemu nije sporno da sudovi imaju određenu diskrecionu ocjenu u vezi s tim koje će argumente i dokaze prihvatiti u određenom predmetu i da imaju obavezu da obrazlože svoju odluku tako što će navesti jasne i razumljive razloge na kojima su tu odluku zasnovali, pozivajući se pri tom na odgovarajuće odluke ESLJP-a, ukazao na to da je i po njegovoj ocjeni "pravilan zaključak drugostepenog suda da je ugovor o hipoteci pravno valjan, uz obrazloženje da je tužilja, kod utvrđenja da je ista bila u skladnom braku sa drugotuženim još od 1977. godine, da se radilo o obezbjeđenju kredita njihovog sina, sa kojim žive u zajedničkom porodičnom domaćinstvu, morala biti u saznanju za zaključenje spornog ugovora i sa time bila saglasna". Takav svoj stav Vrhovni sud zasnovao je na izvodu: da "saglasno čl. 289. st. 2. Porodičnog zakona (...) kod fikcije, da se kod zajedničke imovine supružnika, smatra da je upis izvršen na ime oba supružnika i kad je upis izvršen na ime samo jednog od njih, osim ako do upisa nije došlo na osnovu pisanog ugovora zaključenog između bračnih drugova, bilo je neophodno da se u katastru nepokretnosti izvrši zabilješka o zajedničkoj svojini na imovini i načinu upravljanja i raspolaganja zajedničkom imovinom i trećim licima jasno stavi do znanja da se radi o stvari u zajedničkoj svojini", te da, u suprotnom, gubi smisao osnovno načelo katastara nepokretnosti - načelo pouzdanosti, da niko ne može snositi štetne posljedice zbog pouzdanja u istinitost i pouzdanost podataka o nepokretnostima upisanim u katastar nepokretnosti, saglasno odredbi čl. 10. Zakona o državnom premjeru i katastru (...), koji propisuje da se podaci o nepokretnostima upisanim u katastar nepokretnosti smatraju tačnim i niko ne može snositi štetne posljedice u prometu nepokretnosti i drugim odnosima u kojima se ti podaci koriste. Uz to, Vrhovni sud odredio se i prema ukidnoj odluci Ustavnog suda u kojoj je potencirano da se iz pobijane odluke ne vidi na osnovu kojih dokaza je Vrhovni sud izveo zaključak da je tužilja znala i morala znati za postojanje hipoteke na predmetnom stanu i time prećutno dala saglasnost za zasnivanje hipoteke, uz argumentaciju: - da je odredbom "čl. 291. Porodičnog zakona određeno da zajedničkom imovinom bračni drugovi u toku braka upravljaju i raspolažu zajednički i sporazumno", - da, prema tome "i za treće lice važi pretpostavka da u situaciji kada zajedničkom imovinom raspolaže jedan bračni drug ima se smatrati da to čini uz saglasnost drugog bračnog duga sa kojim je u skladnim bračnim odnosima, a naročito onda kad je imovina upisana na bračnog druga koji njom raspolaže", - da je u "skladnim bračnim odnosima prihvatljiva (...) i prećutna saglasnost kao i izričita", što znači da je "na drugom bračnom drugu", tj. "u predmetnom sporu na tužilji teret obaranja postojanja pretpostavke saglasnosti, u kom pravcu ona nije pružila dokaze", - da bi, kada "bi se prihvatili a priori navodi tužilje da nije dala saglasnost za predmetno raspolaganje zajedničkom imovinom od strane njenog supruga, to (...) moglo voditi ka zloupotrebi prava, naročito u vrijeme kada u Crnoj Gori nije postojala notarska služba, a upravo iz tog perioda i potiče predmetni ugovor". Na osnovu izloženog Vrhovni sud je zaključio: - "da tužena banka nije znala niti morala znati da se radi o nepokretnosti u zajedničkoj svojini, jer takvog upisa u javnim knjigama nema", - da kako se, s druge strane,

"brak kao zajednica života zasniva na obostranom poštovanju, razumijevanju i pomaganju, kod postojanja prava hipoteke upisanog u javnim knjigama dostupnim svim zainteresovanim licima, proizlazilo bi da ova činjenica nije mogla ostati nepoznata ni tužilji i da je postojala i njena prećutna saglasnost o zasnivanju hipoteke", - da bi "suprotno stanovište vodilo (…) i zaključku da bi u datoj situaciji hipotekarni povjerilac morao da se upušta u istraživanje porodičnog statusa hipotekarnog dužnika, što bi bilo u suprotnosti sa gore navedenim odredbama Zakona o pravilima o hipoteci i upisu prava i tereta na nepokretnostima". Konačno, Vrhovni sud je konstatovao da je iznijetim dodatnim razlozima otklonjena povreda na koju je ukazano ukidnom odlukom Ustavnog suda.

A.4. O navedenim odlukama

Izložene odluke Vrhovnog suda i Ustavnog suda tiču se dvaju izvanredno važnih pravnih pitanja, koja su međusobno povezana. Prvo se odnosi na pravni status zajedničke imovine bračnih drugova, naročito nepokretnosti koje su upisane u katastar nepokretnosti, a drugo implikacija okolnosti da je samo jedan bračni drug upisan u katastar kao vlasnik nepokretnosti koju su bračni drugovi stekli u toku braka zajedničkim radom i sredstvima.

U prvoj odluci Vrhovnog suda težište u tretiranju navedenih dvaju pitanja je, po svemu sudeći, bilo stavljeno na "faktičku" pretpostavku da je bračni drug koji nije upisan u katastar kao suvlasnik zajedničke nepokretnosti prećutno dao svoju saglasnost da drugi bračni drug raspolaže tom nepokretnošću, i to naročito u slučaju postojanja dugogodišnjeg "skladnog" braka u kome je upisani bračni drug dopustio zasnivanje hipoteke na zajedničkom stanu kao obezbjeđenje za kredit koji je dat pravnom licu u "vlasništvu" zajedničkog sina, koji je živio zajedno s roditeljima. Riječ je o pretpostavci koja bi zauzimanjem odgovarajućeg načelnog pravnog shvatanja Vrhovnog suda koje bi bilo praćeno i ustaljenom sudskom praksom dobila i značenje svojevrsne (sudsko)pravne pretpostavke, značenje onoga što se u nekim pravnim porecima naziva tzv. *prima facie* dokazom. S tom bi pretpostavkom bilo povezano i pitanje rasporeda tereta dokazivanja, odnosno pretpostavki koje bi morale biti ispunjene za njeno obaranje.

Ustavni sud je u svojoj ukidnoj odluci prigovorio Vrhovnom sudu da u svojoj ustavnom žalbom pobijanoj odluci nije iznio dovoljne razloge za zauzete činjenične i pravne stavove, da odluka koju je donio nije obrazložena na način na koji je trebala biti obrazložena. Pri tom se Ustavni sud u obrazloženju svoje odluke nije upuštao u posebno obrazlaganje svoje ocjene, već se zapravo zadovoljio relativno uopštenim, uglavnom "standardizovanim" konstatacijama (formulama) o nedostacima u obrazloženju. Argumentacija iz odluke Ustavnog suda ima dosta sličnosti s onom iz odluka viših sudova kojima ukidaju odluke nižih sudova zbog nedostataka zbog kojih se one ne mogu ispitati (čl. 367. st. 2. t. 15. ZPP). Ustavni sud se nije odredio prema stavu Vrhovnog suda da je u konkretnom slučaju neupisani bračni drug dao prećutnu saglasnost upisanom bračnom drugu da nepokretnost u zajedničkom vlasništvu optereti hipotekom u korist pravnog lica u "vlasništvu" zajedničkog sina. Ustavni sud nije određeno u svojoj odluci naznačio u čemu se stavovi prvostepenog suda, s jedne strane, i drugostepenog i Vrhovnog suda, s druge strane, u pogledu utvrđenog sadržaja činjenične osnove spora međusobno razlikuju i u kom je smislu "slobodna ocjena" dokaza u konkretnom slučaju nedovoljno obrazložena i kojih se činjenica ona zapravo tiče, odnosno je li uopšte u pitanju slobodna ocjena dokaza kao metoda formiranja zaključka o postojanju neke činjenice, ili utvrđenje izvedeno na osnovu utvrđenih činjenica o tome je li podnositeljka ustavne žalbe znala ili morala znati za ugovor o hipoteci i je li dala svoju prećutnu saglasnost za njegovo zaključenje, a s tim u vezi i na kojoj je od stranaka bio teret dokazivanja u pogledu određenih činjenica.

Vrhovni sud je u novoj odluci, kojom je jednako sudio kao i u ukinutoj, dopunski obrazložio svoj stav koji je bio zauzeo u toj odluci, dakle stav o postojanju pretpostavke o prećutnoj saglasnosti neupisanog bračnog druga ako u katastar nije upisana zabilješka o zajedničkom vlasništvu, pozvavši se, uz ostalo, i na načelo pouzdanosti katastra nepokretnosti i značenje tog načela za pravnu sigurnost. Vrhovni sud je pri tom zauzeo i stav da podnositeljka ustavne žalbe nije iznijela dokaze kojima bi oborila pretpostavku saglasnosti, zapravo stav da je na njoj teret dokaza da neupisani bračni drug nije dao saglasnost da upisani bračni drug može raspolagati datom nepokretnošću, ali i teret dokaza da je banka koja je odobrila kredit znala da se radi o zajedničkoj imovini. Upozorio je i na moguće zloupotrebe prava zajedničke imovine u slučajevima u kojima je samo jedan bračni drug upisan u katastar i na probleme koji bi mogli nastati za banke koje odobravaju kredite kad bi morale za svaku nekretninu provjeravati da li se nalazi u zajedničkom vlasništvu i ko je sve njome ovlašćen da raspolaže. Vrhovni sud je, prihvativši postojanje navedene pretpostavke o prećutnoj saglasnosti i o značenju načela pouzdanosti u katastar kao javnu knjigu, zauzeo određeni pravni stav o pravnom režimu zajedničkog vlasništva bračnih drugova na nepokretnostima upisanim u katastar, naglasivši time implicitno i značenje upisa zabilješke o zajedničkom vlasništvu u tu javnu knjigu kao, treba uzeti iako to nije eksplicitno rečeno, izraza načela savjesnosti i poštenja u pravnom prometu. Moglo bi se konstatovati i da je Ustavni sud svojom ukidnom odlukom naveo Vrhovni sud da potpunije obrazloži svoju prvobitnu odluku i da dopunski razradi pravnu argumentaciju za zauzete pravne stavove na kojima se ona zasniva, iako bi se, možda, već na osnovu i ukinute odluke moglo izvesti da su u konkretnom slučaju i drugostepeni i Vrhovni sud svoje odluke zasnovali na pretpostavci da je neupisani bračni drug koji je dopustio da se samo drugi bračni drug upiše kao vlasnik nepokretnosti u katastar dao prećutnu saglasnost da taj bračni drug raspolaže tom nepokretnošću u ime oba bračna druga, što bi zahtijevalo od Ustavnog suda da se izjasni vrijeđa li se zauzetim pravnim stavom Vrhovnog suda pravo zajedničkog vlasništva neupisanog bračnog druga na nepokretnosti upisane u katastru. Zauzimanjem stava o tom pitanju Ustavni sud odredio bi i sadržaj nove odluke Vrhovnog suda. Budući da do toga nije došlo, Ustavni sud će se o tom pitanju imati priliku eventualno izjasniti po novoj ustavnoj žalbi na novu odluku Vrhovnog suda. U vezi s naznačenom pretpostavkom od koje su pošli drugostepeni i Vrhovni sud u svojoj ukinutoj odluci, u odluci Ustavnog suda nije određeno naznačeno tiču li se nedostaci u obrazloženju tih odluka slobodne ocjene kao metode utvrđivanja činjenica koje imaju značenje tzv. prezumptivne baze za primjenu navedene pretpostavke, dakle utvrđenja da je podnositeljka ustavne žalbe znala za ugovor o hipoteci, ili samog zaključka o tzv. prezumpiranoj činjenici - zaključka da je podnositeljka ustavne žalbe, koja je znala za ugovor o hipoteci (prezumptivna baza), dala svoju prećutnu saglasnost za njegovo zaključenje.[2]

2 Mihajlo Dika, Ivana Martinović, *Analiza uticaja odluka Ustavnog suda Crne Gore na sistem redovnih sudova sa posebnim osvrtom na odnos Ustavnog i Vrhovnog suda Crne Gore*, Savjet Evrope, 2018, Podgorica, str. 9-16.

Spisak zakona

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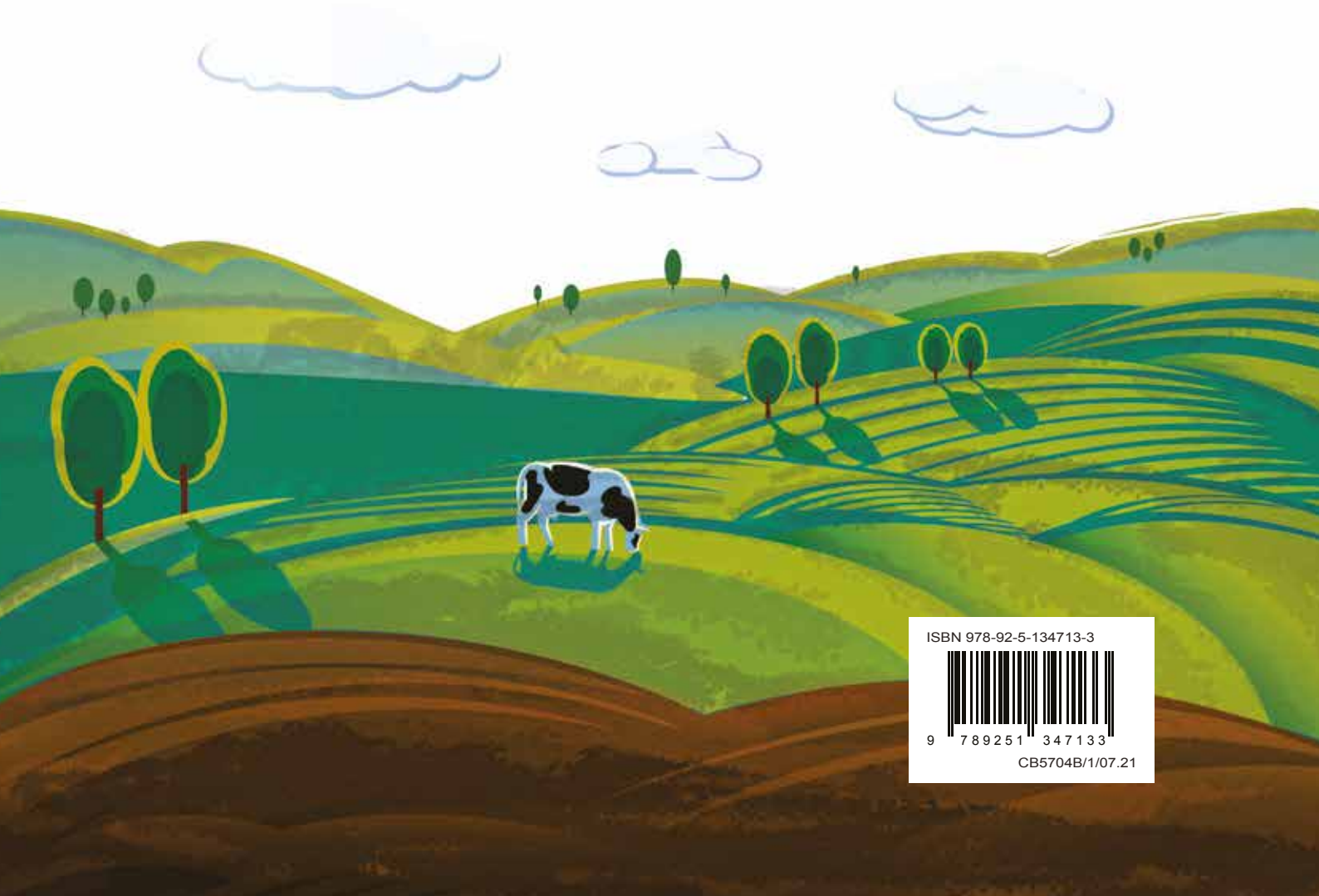

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