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STRENGTHENING PROCEDURES TO PROTECT THE RIGHTS OF WOMEN TO INHERIT AND JOINTLY REGISTER RIGHTS IN PROPERTY

USAID Property Governance Activity

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ACRONYMS AND ABBREVIATIONS

AGE – Agency for Gender Equality

Moj – Ministry of Justice

KCA – Kosovo Cadastral Agency

MCO – Municipal Cadastral Office

KCLIS – Kosovo Cadaster Land Information System

KCN – Kosovo Chamber of Notaries

OCS – Office of Civil Status

OPM – Office of the Prime Minister

CRA – Civil Registration Agency

MESPI – Ministry of Environment, Spatial Planning and Infrastructure

INTRODUCTION

Gender equality is a fundamental value of the Republic of Kosovo, and its institutions are making constant efforts so that this value is recognized and applied by society in Kosovo. While gender equality touches upon all fields, the right to own property without any discrimination is at the center of economic empowerment of all individuals, especially women, and is essential in promoting equality between genders. Property rights are crucial also for the safety of women and provide them the possibility to live independently and prosper individually.

Despite the fact that the right to own property is guaranteed¹ and that it applies equally to both genders, the number of women in Kosovo owning immovable property registered in their names is significantly lower (19.17%) than men (78.93%).² This data indicates deficiencies in the protection of women's property rights. While this situation is influenced by traditional and social norms in Kosovo, the laws and procedures in place may also put women in more unfavorable position than men, ending up with them relinquishing their property rights or not registering them in the land registry/KCLIS. The number of women being lawful property right-holders is surely higher, as married women are owners of joint marital property in equal shares with their husbands, as will be explained below, but such rights are for now undisclosed in the KCLIS due to legal gaps.

This legal memorandum specifically examines two aspects of women's property rights, their rights to inherit property and the registering procedure of their joint property gained during marriage with their spouse or cohabitating partner. It specifically analyzes the effectiveness of current procedural safeguards for the application of gender equality with the aim of identifying any impediments to their effective implementation.

While development of inheritance proceedings and certification of property transactions can involve both the courts and notaries, this memorandum focuses mainly on the work of notaries who deal with most of the cases in Kosovo. The Notary, as a free legal profession offering public services, has a key role in informing and advising parties, including women, on their inheritance and land tenure rights, contributing to eliminating discrimination and strengthening gender equality.

The methodology used for drafting this memorandum is 1. Desk research of the relevant primary laws, sub-legal acts, guidelines, and various international and local reports related to the abovementioned topics in Kosovo, as well as the available statistics through the Kosovo Cadastral Agency (KCA), and 2. Interviews with representatives of the Ministry of Justice (MoJ), Kosovo Chamber of Notaries (KCN), KCA and Agency for Gender Equality (AGE), as well as the Kosovar Centre for Gender Studies - a civil society organization working on gender matters.

Based on the findings presented below, this memorandum provides specific recommendations on legislative and non-legislative measures to be implemented by institutions and other stakeholders to strengthen the protection of women's property rights and ensure gender equality.

¹ Article 46, paragraph 1 of the Kosovo Constitution. Available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>

² Statistical data from the Kosovo Cadastral Agency. 1.91% of property is registered in the name of legal persons. Available at: <https://akk-statistics.rks-gov.net/> accessed February 21, 2023.

THE SAFEGUARDS IN INHERITANCE PROCEEDINGS

APPLICABLE RULES

The key principles and rules for inheritance in Kosovo are set in the Law on Inheritance.³ As inheritance proceedings are primarily non-contentious, they are regulated in detail by the Law on non-Contentious Procedure.⁴ If contested by a pretending heir, the non-contentious procedure is suspended and the contentious procedure commences in the Court.⁵

To ensure efficiency of the inheritance proceedings and strengthen the protection of women's rights, in 2019 the Kosovo Assembly adopted amendments to the Law on Inheritance⁶ and the Law on non-Contentious Procedure.⁷ The figure below presents the process chart of the non-contentious inheritance procedure, based on the abovementioned laws and amendments.

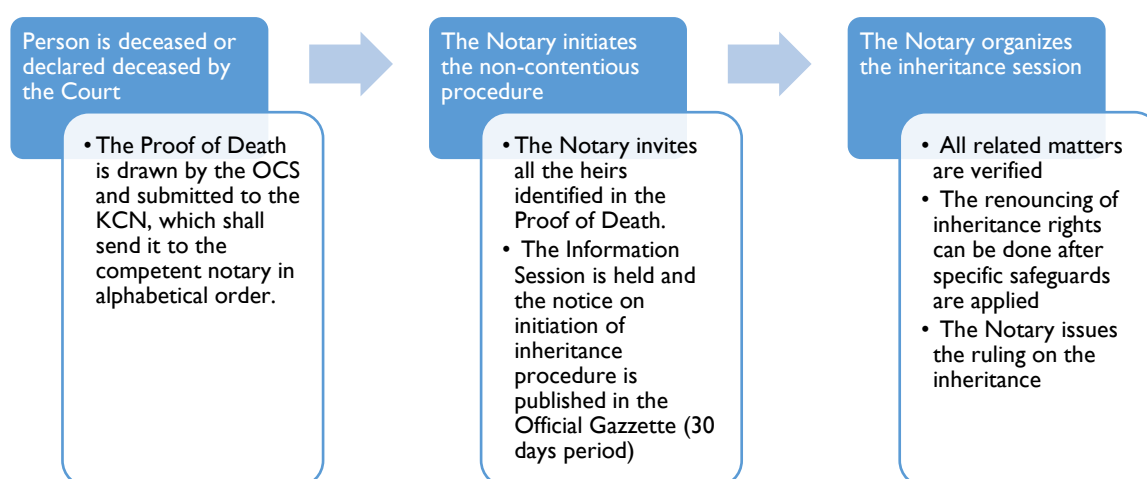


Figure 1 - The Legal non-contentious inheritance procedure

As presented in the figure above, the 2019 legislative amendments foresee the Notary, apart from the Court, as the responsible authority for developing the non-contentious inheritance procedure. These amendments also provide the following safeguards for persons relinquishing their inheritance rights:

- any relinquishing declaration shall be followed by a separate discussion of the Notary with that person (without the presence of other possible heirs), to ensure that 1) the party understands fully his or her rights to inheritance, 2) is no longer under pressure against his or her will to

³ Law no. 2004/26 on Inheritance, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2407>

⁴ Law no. 03/L-007 on Non-Contentious Procedure, available at: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2608>

⁵ Article 16 of the Law on Out-Contentious Procedure

⁶ Law no. 06/L-008 on amending and supplementing the Law no.2004/26 on Inheritance in Kosovo, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18305>

⁷ Law no. 06/L-007 on amending and supplementing the Law no. 03/L-007 on non-Contentious procedure, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18304>

relinquish the rights, and to 3) assess the reasons behind such relinquishment and 4) notify the party that the relinquishment is irrevocable.

- the Notary shall keep minutes, and record by audio and video such relinquishing declaration.
- the recordings are attached and archived with the original inheritance file⁸, which are accessible upon the request of the relinquishing party or the competent institutions.⁹

However, all these safeguards presented above do not apply if the relinquishing party, after being informed by the Notary, requests that the procedure is developed without audio-video recording.¹⁰ Nevertheless, such request must be justified and registered in the minutes.

This memorandum assesses whether the abovementioned procedure, as foreseen by applicable laws, is applied in practice, with the specific focus on women's rights in such proceedings. This part of analysis is divided into three procedural steps corresponding to the figure above: 1) the death of the decedent; 2) initiation of the non-contentious procedure; 3) organization of the inheritance session. The analysis will focus also on 4) the *inter-vivos* agreements between the decedent and the heirs.

THE DEATH OF THE DECEDENT

As presented above, the Law on non-Contentious procedure sets the legal obligation for the Office of Civil Status (OCS)¹¹ to *ex-officio* draw up the Proof of Death, according to data obtained independently by the civil registry, within fifteen (15) days upon registering death and send it to the KCN, which further assigns the competent notary for that inheritance procedure, according to alphabetical order.¹² The analysis shows that this procedural step is not implemented in practice.

The non-contentious inheritance procedure in practice commences with the initiative of one (or several) heirs, who apply to the OCS to obtain the formal Proof of Death of the decedent. For this process, the applicant submits his or her ID, the death certificate of the deceased, declaration on the heirs of the decedent, extracts of birth of heirs, and other documents proving the property of the decedent. This means that it is in the complete discretion of the applicant to declare the potential heirs (apart from himself/herself) and the property in possession of the decedent.

The OCS issues the Proof of Death based on the submitted documents and does not further assess whether any of the potential heirs or property were not included in the application for the Proof of Death. It has to be mentioned that there is a clear legal possibility that the data for drafting the Proof of Death may be verified also by relatives of the deceased person, persons with whom the deceased person cohabitated, as well as other persons, who may provide data to be entered into the Proof of Death.¹³ However such diligence is not applied by the OCS and in practice such diligence is seriously impeded by the fact that the 'family tree' is not part of the civil registries, which would list all the predecessors and descendants of every person.

One possibility for the OCS is to check the Certificate of Family Union of the decedent, which is part of the civil registry as a document that could have been issued during the time the decedent was

⁸ See Article 131 of the Law no. 03/L-007 as amended by Article 8 of the Law no. 06/L-007

⁹ Article 131.4. Ibid.

¹⁰ Article 131.3. Ibid

¹¹ Civil status offices are part of the Kosovo Civil Registry Agency but offer their services through their municipal offices in the entire territory of Kosovo

¹² Article 133.1 of the Law no. 03/L-007 as amended by Article 10 of the Law no. 06/L-007

¹³ Article 134.1 of the Law no. 03/L-007 as amended by Article 11 of the Law no. 06/L-007

alive.¹⁴ Such Certificate may list the persons living with the decedent (for ex. the spouse, children, parents and/or other family members), but even this document is of a completely declarative nature not verified against the civil registry (as the family tree is not part of the system) and which the decedent/declarant was able to change it anytime while he or she was alive.

In addition, there is no interoperability of the civil registry with the KCLIS, or other public register on property, such as the register of cars. In practice there are also cases when the data in the civil registry and the KCLIS for the same person do not correspond, due to technical mistakes in the entered names or surnames in the systems.

It has also to be noted that a high number of constructions without permit and constructed apartments and other buildings after the war in Kosovo, especially in urban areas, are not yet registered in the KCLIS, which makes the property identification by the OCS even more difficult.

Another weakness in the system is that the Proof of Death can be issued in any of local community offices within certain municipalities (in neighborhoods, villages), making it very easy to get anywhere and with low chances that it is verified against the other public records in possession generally by the municipality or the center level.

As the inheritance procedure is not initiated by a public body – OCS or the municipality, but by one or several heirs, there is a high risk that other potential heirs who legally have the right to inherit the decedent, are excluded. This risk is particularly applicable to women (especially female children), who due to traditions, family, and social pressure, as explained in the introductory part, are often considered not to be eligible for inheritance. It can further extend to other vulnerable groups such as persons with disabilities, LGBTIQ+, etc. This makes them be excluded as potential heirs from the Proof of Death, or if not excluded at that point, they relinquish formally their inheritance rights during the subsequent inheritance proceedings.

This risk is even higher with women cohabiting partners.¹⁵ The Law on Inheritance recognizes the right to inheritance of the non-marital spouse equally with that of the marital spouse¹⁶, subject to fulfilment of the following conditions.¹⁷: There is no legal requirement for the registration of such consensual unions, making it very difficult for the OCS or the Notary subsequently to prove their existence, resulting in cases where a cohabitating partner and particularly women being excluded from inheritance proceedings.

Another important fact to note is also that the exclusion of potential heirs, in most of the cases seems to be done by an agreement between the heirs.¹⁸ Considering the large Kosovan diaspora, the heirs voluntarily agree to occasionally exclude heirs living outside of Kosovo, including women. This is intended to ensure the efficiency of the inheritance proceedings and avoid costs of notary declarations in the residence country of persons living abroad or traveling particularly from countries far away from

¹⁴ This is a document commonly requested in different administrative proceedings, as a result it is very likely that such certificates exist for most of Kosovo citizens.

¹⁵ The terms ‘consensual unions’ or ‘non-marital souse’ are used interchangeably for ‘cohabitating partners’.

¹⁶ Article 11.2 of the Law no. 2004/26

¹⁷ As per Article 28.1 of the Law no. 2004/26:

(a) if the union lasted until the deceased’s moment of death and had existed for at least five (5) years, and if children were born into this relationship – for at least three (3) years, and if,

(b) at the moment of the decedent’s death, neither of the cohabitants was legally married to a third person, or if the decedent was legally married to a third person, but he/she had filed a petition for divorce or annulment of this marriage, and after his/her death such a petition was found to have merit.

¹⁸ As confirmed through interviews

Kosovo such as the United States, Australia, or New Zealand. This is also influenced by the fact that inheritance proceedings consist of several steps – the information session, publication for the 30-day period of the notice in the Official Gazette and inheritance session, which might require these persons to travel twice to Kosovo, increasing therefore the cost.

Prior agreements on inheritance, generally create opportunities for women to be excluded or relinquishing their inheritance rights either by choice or by pressure from their family members.

Any false declaration by the applicant for Proof of Death, or the heir during the inheritance proceedings before the Court or the Notary, is considered a criminal offence in Kosovo which seems to be a valid safeguard to include all the heirs.¹⁹ The indications, however, are that no such criminal offences were reported so far, even that exclusion of heirs undoubtedly happens in practice.

Lastly, an important fact to mention is that notarial services are not provided in all municipalities in Kosovo and particularly in those where most living citizens are Serbs. Out of ten such municipalities, there is only one Serbian notary operating in the territory of the Novobërdë Municipality, whereas in two other municipalities with Serbian majority, there are two Albanian notaries operating.²⁰ This can create barriers for this community in initiating inheritance proceedings or language procedural difficulties.

INITIATION OF THE NON-CONTENTIOUS PROCEDURE

As presented above, after the heir receives the Proof of Death by the OCS, he/she submits it to the Notary, who then initiates the non-contentious procedure. In accordance with the Law, the Notary holds the information session with all the identified heirs in the Proof of Death. If the Notary, depending on the circumstances, assesses that the Proof of Death is incomplete, it shall ask the OCS to verify data.²¹ In the information session, the identified heirs are informed of the procedure and inheritance rights and obligations. The Notary also determines also whether the deceased left a will or disposed of the property through a life-care contract and collects the relevant statements. While life-care contracts are registered in the KCLIS, there is no register of wills in Kosovo.

When the estate or a part of it is identified as a joint property of spouses, the Notary informs the surviving spouse who was married under a regime of joint ownership that he or she can retain their share of the property prior to the division of the estate between the heirs. This is a very important safeguard to ensure that women's rights in the joint property are protected. However, the fact that the joint property is in most cases registered only in the name of the husband, makes it more difficult for the Notary to determine the nature of the property, requiring therefore additional assessments. This becomes even more difficult in cases of joint property deriving from consensual unions.

Apart from the declarations of heirs involved in inheritance proceedings, the Notary is obliged to exercise due diligence in identifying other potential heirs or property of the deceased. The Notary is also obliged to suspend the procedure if any additional information is found out, which is not declared in the Proof of Death. However, this due diligence is limited because notaries do not have access to the civil registry or other public registries, apart from partial access to the KCLIS (with payment). Even if notaries had access to the civil registry, the current effect would be limited as the civil registry does

¹⁹ Article 161.8 of the Law no. 03/L-007 as amended by Article 32 of the Law no. 06/L-007

²⁰ Please see the list of active notaries at the website of KCN - <https://www.noteria-ks.org/noteret/?lang=en>
Accessed on February 28, 2023.

²¹ Article 134.2 of the Law no. 03/L-007 as amended by Article 11 of the Law no. 06/L-007

not show the ‘family tree’ of persons. These facts make it challenging for the Notary to verify authenticity of documents submitted by the parties in the proceedings. Constructions not registered in KCLIS exacerbate the problem.

Another important safeguard for women’s property rights is the right of the surviving spouse to use the residential dwelling where the spouse lived during the marriage. This right can be exercised until the death or remarriage of the spouse, and if the residential dwelling is sold or alienated in any other way, the surviving spouse shall be provided with a necessary residential dwelling.²² The Notary shall inform the parties involved in the inheritance proceedings of this particular right of the surviving spouse and ensure that the inheritance ruling makes it applicable in practice.

The notice on initiation of inheritance procedure is afterwards published in the Official Gazette²³ and in the webpage of KCN.²⁴ Such notice provides for a 30-day period for other potential heirs, not included in the Proof of Death, to become part of the inheritance procedure. While this safeguard was introduced in the 2019 amendments, in practice it seems not to produce any important results, as from that time there was not even a single case of any potential heirs revealing themselves in response to the abovementioned notice.²⁵

THE INHERITANCE SESSION

After the 30-day notice period expires, the Notary organizes the inheritance session where all the identified heirs are invited again, and the estate is divided as per inheritance ranks and/or the will of decedent, in accordance with the Law on Inheritance. Throughout the inheritance proceedings, any of the heirs have the legal right to relinquish their inheritance rights, however this must be done through the safeguards mentioned above on information, registration and recording of such declaration.

The practice shows that although most of the notaries in Kosovo inform and discuss separately with the party willing to relinquish his or her rights, and that their office is equipped technically to record such statement, in the majority of cases the party does not change the original position to relinquish the rights. They request that the relinquishment is developed without audio-video recording. All these facts are recorded in the minutes of the procedure and become part of the file. Such practice prevails because, as mentioned above, a prior agreement exists between heirs. While the safeguards on relinquishing inheritance rights are correct in the legal sense, it seems their effect is limited, considering that the number of women relinquishing their inheritance rights continues to be high.²⁶

The heir who made the statement may require its annulment, before the Court, if such a statement was issued under a threat, or actual violence, or due to fraudulence or error.²⁷ It should be mentioned that the heir excluded from inheritance may challenge that fact before the Court and claim his or her right to inheritance. There is no statute of limitation for such claim.²⁸

²² Article 12.3 of the Law no. no. 2004/26 as amended by Article 3 of the Law no. 06/L-008

²³ See the section of the Official Gazette where such notices are published - <https://gzk.rks-gov.net/SearchIn.aspx?Index=2&so=1&CatID=119> accessed on February 22, 2023.

²⁴ The webpage of the KCN links directly to the list of published notices in the Official Gazette

²⁵ As presented by the KCN

²⁶ Page 8 of the Assembly Report on the monitoring of implementation of the Law on Notary.

²⁷ Article 135.2 of the Law no. 2004/26.

²⁸ The previous statute of limitation was 10 years for *bona fide* possessors and 20 years for *mala fide* possessors (Article 138 of the Law no.2004/26). It was deleted with the amendments to the Law no.2004/26, specifically by Article 10 of the Law no. 06/L-008.

After all declarations are made and facts are assessed, the Notary completes the non-contentious procedure with a ruling on the estate, which, as mentioned above, can be challenged anytime at the court in a contentious procedure.

INTER-VIVOS AGREEMENTS

The *inter-vivos* agreements between the decedent, while he or she is still alive, and one or several heirs, are occasionally used in Kosovo. Such agreements occur when the owner of the property is of an old age and with health difficulties and therefore decides to transfer ownership rights to the potential heirs, usually men, because of family and social traditions, and with the aim of avoiding any potential disagreements and contentious procedures between the heirs in the future. Such situations raise concerns for women's property rights, as the primary objective of such agreements is to exclude daughters. These agreements are mostly made in the form of delivery and distribution of property contracts.

The Law on Obligation Relationships sets important safeguards for these types of contracts, firstly by stipulating that such contracts must be concluded in the form of a notarial act, and secondly that they shall only be valid if consented to by all the deliverer's heirs who would be called on to inherit based on the estate of that contract.²⁹ From the assessment made, such contracts are certified in practice by notaries and in most cases they apply the procedural step of informing and asking for the consent of the potential heirs.

Similarly, the Law on Inheritance provides the safeguard that legal heirs must give their consent to such assignment and division of property³⁰, although with differences in the terminology and specificity regarding descendants, as well as the competent body to certify such contracts – the court.³¹ In addition, the inconsistency also exists on whether the spouse must provide consent to such agreements. The Law on Obligation Relationships makes it optional for the deliverer to consider his or her spouse during delivery and distribution of the property *inter-vivos*. This lack of clarity from the legal sense, bears the risk that women as spouses are excluded and they are left only with the compulsory share from the estate that is left by the decedent, and which does not include the part that was delivered and distributed.

The practice shows, however, that there are cases when other contracts, such as sales contracts, are used to transfer property rights to the potential heirs *inter vivos*. According to these contracts, the beneficiary of the property pays the price of the contract, which might also be fictive, considering the close relation between the contracting parties. In such cases, another regime applies, and the other potential heirs enjoy no immediate and direct legal or procedural protection. The only safeguard in place for such occasions is that the Notary should be diligent in advising the parties for the right type of contract to be concluded and identifying and not allowing fictive transactions.

²⁹ Article 550 of the Law no. 04/L-077 on Obligational Relationships, available at: <https://gzk.rks.gov.net/ActDocumentDetail.aspx?ActID=2828>

³⁰ Article 59 of the Law no. 2004/26

³¹ 'Notarial practices in Kosovo – Strengthening gender equality in land ownership and control', 2021 GIZ and FAO, page 23, available at: <https://www.fao.org/documents/card/es/c/cb5711b/>

THE SAFEGUARDS FOR JOINT REGISTRATION OF PROPERTY

THE CONCEPT OF JOINT PROPERTY

The Law on Family stipulates that the property acquired through a common contribution through the course of the marriage as well as incomes deriving from such property is joint property of the spouses.³² They are joint owners in equal shares of this joint property, unless agreed otherwise.³³

The Law on Family also makes equivalent the two types of contribution through the course of the marriage: 1) personal incomes and other revenues of each spouse; and 2) assistance of the spouse provided to the other spouse, i.e. children's care, conduct of housework, care, and maintenance of property, as well as any other form of work and cooperation pertaining to the administration, maintenance, and increase of joint property.³⁴ The joint property of spouses is different from their separate property³⁵ and co-ownership, where the shares of co-owners are determined in advance.³⁶ Joint property can therefore become co-ownership if spouses determine their shares based on their agreement.³⁷

The joint immovable property can be registered in the name of both spouses in the KCLIS³⁸ and when only one of the spouses is registered as property right holder, it shall be considered as if registration was carried out on behalf of both spouses.³⁹ The rights to joint property cannot be transferred to a third person, without the consent of both spouses⁴⁰.

While the Law is clear in requiring the consent for the transfer of property rights, it does not specifically include the consent for mortgaging the property.⁴¹ Nevertheless, the practice shows that such consents are required by banks in the procedure of mortgaging, although with difficulties in identifying joint property and especially deriving from consensual unions.

As explained above, the regime of joint property can derive from consensual unions.⁴² These unions, exist between the husband and the wife who live in a couple, characterized by a joint life that

³² Article 47.1 of the Law no. 2004/32 on Family, as amended by Article I of the Law no. 06/L-077 on amending and supplementing the Law no. 2004/32, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2410>

³³ Article 47.4 of the Law no. 2004/32, as amended by Article I of the Law no. 06/L-077.

³⁴ Article 47.2 of the Law no. 2004/32, as amended by Article I of the Law no. 06/L-077.

³⁵ Joint property of spouses is different from the separate property of spouses. See Article 46 of the Law no. 2004/32. Their separate property is the property belonging to the spouse before entering marriage which remains their separate property. Separate property is also property acquired during marriage through inheritance, donation, or other forms of legal acquisition. Separate property includes also property belonging to the spouse based on the proportion of common property, and also the product of art, intellectual work or intellectual property. Each spouse independently administers and possesses his/her separate property during the course of the marriage.

³⁶ Several persons have co-ownership on an undivided item when each of them has a share determined proportionally to the entire item.

³⁷ Article 53 of the Law no. 2004/32

³⁸ Article 50.1. Ibid.

³⁹ Article 50.2. Ibid.

⁴⁰ Article 50.3. Ibid.

⁴¹ 'Legal research on the separation of joint property and financial alimony', INJECT, page 24, available at: <https://inject-ks.org/publications/6/attachment/Hulumtim-Ligjor-rreth-Ndarjes-se-Pasurise-se-Perbashket-dhe-Mbajtjes-Financiare-%E2%80%93-Ligji-dhe-praktika-gjyqesore-ne-Kosove-ALB.pdf>

⁴² Article 39.2 and Article 58.2 of the Law no. 2004/32, as reaffirmed by the Supreme Court Decision Rev. no. 56/2012 of 09.01.2014

represents a character of stability and continuation.⁴³ Two conditions have to be applied for a consensual union to be valid - both partners are 1) eligible to marry but did not obtain a legal marriage and 2) have cohabitated openly as a couple.

Despite the fact that the applicable legal framework grants legal protection for the joint property of both spouses and cohabitating partners, in practice the number of women registered as property owners remains significantly lower than that of men. Not having property registered in their name exposes women to uncertainties and hinders their chances of economic growth.

NOTARIAL TRANSACTIONS

The most common form of transferring immovable property rights is through notarial transactions. Although both spouses are owners of joint marital property in equal shares, such joint property does not always translate into joint registration in the KCLIS.

If joint property is being transacted, the Notary informs the spouse or cohabitating partner that such property may be disposed only with the consent of both spouses or partners, and as a result shall request this consent from them for the transaction to be valid. While with spouses who are married, the Notary easily identifies their personal status, the situation is more difficult with consensual unions. Such unions are not registered, and it remains at the discretion of the partner in the transaction to declare whether the property in question is joint property acquired through a common contribution within the consensual union and reveal the partner.

The Notary should always perform due diligence regarding the origin of the property in the transaction based on available data, and the personal status of the person at the time of acquisition of that property. Such due diligence is applied by asking the relevant questions and assessing the submitted documents to the Notary, as well as using all other available resources to determine the true situation. However, as mentioned above, due diligence of notaries is hampered by the limited access to public registers.

The Law on Notary allows that the spouse can give a special consent on non-registration of the joint property in the name of two spouses.⁴⁴ This consent is even provided without any financial cost for the declarant.⁴⁵ This is a major disincentive for the joint registration of property in the name of both spouses. In addition, this consent seems in practice to be more often included in the transactional contract in the form of a separate paragraph, rather than as a special consent as required by the Law on Notary.

The special consent from the spouse of non-registration of the joint property in both names bears further the risk of interpretation in the future as a statement for division of property.⁴⁶ Although there is no specific case law developed so far on this specific topic, the courts practice is to assess the contribution of spouses and not weigh them equally as is the rule in the 2019 amendments to the Family Law.⁴⁷ Such interpretation resulted in decisions when one of the spouses (usually the husband) was given the full ownership right to the joint property, where the other spouse (usually the wife) was

⁴³ Article 39.1 of the Law no. 2004/32

⁴⁴ Article 41.1.3 of the Law no.06/L-010 on Notary, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18334>

⁴⁵ Ibid.

⁴⁶ 'Notarial practices in Kosovo – Strengthening gender equality in land ownership and control', 2021, GIZ and FAO, page 10.

⁴⁷ 'Legal research on the separation of joint property and financial alimony', INJECT, page 30.

compensated financially for her contribution related to housework, children-care and others.⁴⁸ Renouncing the right of non-registration of the joint property in both names can be seen as validating the abovementioned interpretation of the court on joint property.

Bearing this in mind, it is very important that the Notary inform clients on the joint property regime and the possible consequences of giving a special consent of non-registration. All in all, the option of non-registration consent is very often used to the detriment of women in transactions, hence the number of registered women as property owners in the KCLIS remains low.

REGISTRATION PROCEDURES IN THE LAND REGISTRY / KCLIS

The Municipal Cadastral Office (MCO) is competent for registering immovable property rights in the KCLIS, based on the request of the party. These procedures, which are regulated by the Law on the Establishment of immovable property rights register, the Law on Cadaster, and the relevant sub-legal acts, also foresee the possibility for registration of joint property in the name of both spouses, in cases when both spouses are part of the transaction as explained above. However, the published template for the registration request⁴⁹ does not refer to the personal status of the requestor and provides no space for including the name of the spouse. Although with no direct legal importance, the template surely has an awareness effect, particularly for women who are in many cases excluded from the registration of joint property in the name of both spouses.

A major difficulty for registration of joint property is that the legal framework does not provide for any simplified procedure for registration of joint property in the name of both spouses in cases when the property in question is already registered in the KCLIS in the name of only spouse (usually in the name of the husband). If the non-registered spouse in such cases would initiate the procedure to register that property also in his or her name, it would require the consent of the registered spouse, despite the fact that the property in question is joint property, by entering in agreement with the registered spouse on the division of property or alternatively asking for a division of joint property in court proceedings.

Apart from the consent, it would require the non-registered spouse to submit to the MCO, all the required documents regarding the act (transaction proof and property certificate), in the same procedure as the property is being transacted at that time, and registered in the name of new owner(s).

The Civil Code, currently being drafted by the Government, seems to emphasize this procedure, as it foresees that the spouse who is not registered as a holder of a right of ownership in an immovable property that is joint property, can at any time apply to register his or her name to the name of the registered spouse, as a titular of joint immovable property.⁵⁰ Although the Code is not yet adopted, such obligation is implied also from the current Family Law, and the KCLIS procedures should allow simplified registration for non-registered spouses of joint property.

While the Law on Family allowed for years registration of joint-property only in the name of one spouse, resulting therefore in a very low number of women being registered as owners of property, the same possibility seems to be with the draft Civil Code. Article 1174(2) of the draft Code replicates

⁴⁸ Ibid, page 63.

⁴⁹ The template is published at the Kosovo Cadastral Agency website, available at: <https://akk.rks-gov.net/storage/app/media/formular/K%C3%ABrkes%C3%AB%20p%C3%ABr%20Registrim.pdf>

⁵⁰ Article 1174(3) of the draft Civil Code. Available at: https://www.kuvendikosoves.org/Uploads/Data/Documents/ProjektkodiciviliRepublikeKosoves_8vPTcUG6tG.pdf

the current provision of the Law on Family⁵¹, stipulating that ‘When only one of the spouses is registered as property right holder or any other right of the joint property in the immovable property rights Register, shall be considered as if registration was carried out on behalf of both spouses.’. While this provision should apply for the joint property that is already registered in the KCLIS, it would be a major impediment for registration of joint property in the name of both spouses, if applied also for future property transactions and registration.⁵²

If the objective is to increase the number of women registered as property owners, the legislator should draw a line by making it mandatory that any future registration of joint property is registered in the name of both spouses. This would also ensure compliance with the principles of the Law on Property and other Real Rights, where it is clearly envisaged that ‘The transfer of ownership of an immovable property requires a valid contract between the transferor and the transferee as a legal ground and the registration of the change of ownership in the immovable property rights register.’ The registration property makes the ownership transfer valid and this Law does not allow that the property is registered only in the name of one of the owners if the property is joint property or co-property.

The Law on the Establishment of immovable property rights register is a law which was adopted in 2002 and amended in 2008 and 2011, however it did not follow the other legislative developments in the field of family law, inheritance, and notary of 2018 and 2019 respectively.

A positive development regarding registration is the exemption from the registration services fee, foreseen by the Administrative Instruction of 2016 on Special measures for registration of joint immovable property on behalf of both spouses. Serving as a temporary measure from 2016, the exemption fees are being implemented in practice and the Government of Kosovo extended the transition period until April 2023. This measure has led to a noticeable increase in the registration of women as property owners, from only 104 in 2016 to 7,417 in 2020 and an additional 1,505 registered properties in 2021. Despite the improvement, the number of women registered as owners of property remains very low.

⁵¹ Article 50.2 of the Law no. 2004/32

⁵² It is worth noting that in Albania and Serbia registration of both spouses as co-owners/joint owners of the matrimonial property is compulsory. Please see ‘Guidelines on strengthening gender equality in notarial practices South-East Europe’ 2019, GIZ and FAO, page 38, available at: https://www.giz.de/en/downloads_els/ORF%20Legal%20Reform%20-%20Guidelines%20on%20Strengthening%20Gender%20Equality%20in%20Notarial%20Practices%20-%20South-East%20Europe.pdf

CONCLUSIONS AND RECOMMENDATIONS

The legislative framework in Kosovo provides for important safeguards to ensure the protection of women's property rights and prohibits gender discrimination.

Despite this, traditions, customs, and even legal clarity put women, and especially daughters as heirs, in a disadvantage in the exercise of their inheritance rights. The inheritance proceedings are heavily impeded by the lack of comprehensive and accurate public records and the capacity of public authorities for their verification. Although the practice of notaries is unified in Kosovo and most of the procedural safeguards are applied, their access to the abovementioned records makes their work even more difficult. The inheritance proceedings are also impeded by the fact that the majority of joint marital property is registered in the name of only one spouse (usually the husband). The property rights are more insecure for cohabiting partners, particularly women.

The legal provision granting that spouses are owners of joint property with equal shares, did not translate into joint registration of such property. This creates uncertainties and impediments in the economic growth of women, who are significantly less registered as property owners than men. The deficiencies in the legal framework allow for registration of joint property only in the name of one spouse and there are no simplified procedures for the non-registered spouse to get registered along with the name of their registered spouse. Notwithstanding the positive increase, the identified legal gaps do not allow for a more serious increase of the numbers of women registering property in their name.

To address all these issues, it is recommended that the public authorities in Kosovo undertake a set of legislative and implementation measures. These measures are the following:

For the local level/municipalities:

- Organize training for municipal officials on inheritance proceedings and joint registration of marital property, with a particular focus on gender equality and inclusion of vulnerable groups, women, members of non-majority communities, persons with disabilities, LGBTIQ+, etc.
- Organize awareness raising campaigns for the public and specifically women, on inheritance proceedings and joint registration of property.
- Train officials of OCS and other officers of civil registry on due diligence and collection of information, when issuing proofs of death in inheritance proceedings.
- Assign only central municipal status offices to issue proofs of death, to ensure professionalism, due diligence, and collection of all relevant information regarding the decedent, therefore preventing women or other heirs from being excluded from inheritance proceedings.
- Identify additional incentives to ensure that women's property rights are exercised and recognized.

For the central level:

Office of the Prime Minister (OPM):

- Ensure sustainability of the Administrative Instruction for exemption of registration services fee for the joint property in the name of both spouses, by extending its application for longer periods or making it permanent.

The Moj:

- Harmonize the Law on Obligation Relationships with the Law on Inheritance to clarify that the consent of a spouse is required when *inter-vivos* agreement to deliver and distribute the property are made and clarify the competent public body for certification of such agreements.
- Undertake a legislative initiative to register consensual unions between cohabiting partners.
- Amend the Law on Notary to remove the possibility of giving a consent by the spouse of not having the property register in her or his name (Article 41.1.3).
- Provide sound legal basis for the establishment and functioning of the Register of Wills. Such Register shall consist of wills submitted to the court and the Notary. Change Article 1174(2) of the draft Civil Code before approval, to make it mandatory for the registration of joint property in the name of both spouses in the future transactions/registrations, and also stipulate that joint property cannot be encumbered without the consent of both spouses, in addition to not being alienated.
- Ensure coverage of notarial services in all municipalities of Kosovo, Including of those non-majority communities.

The Ministry of Environment, Spatial Planning, and Infrastructure (MESPI):

- The sub-legal act deriving from the Law on the Establishment of immovable property rights is amended to provide a simplified procedure for the non-registered spouse of joint property to get registered along with the registered spouse. This can be done through the presentation of the marriage certificate to the MCO, which will further decide on the legality of such requests by assessing the relevant case file, to determine whether the property in question is joint property.
- The template for the request for registering property is updated to include data about the personal status of the requestor and the eventual name of the spouse, as well as gender neutral language.
- The Ministry of Internal Affairs (MIA) / Civil Registration Agency (CRA): Start creating and generating the 'family tree' in the civil registry, for every registered person, to avoid the inheritance procedure being initiated and developed based on declaration of the heir(s).
- OCS to initiate *ex-officio* the non-contentious inheritance procedure by sending the Proof of Death to the KCN, which further assigns it to the competent notary in alphabetical order.
- Ensure the interoperability of the civil registry with the KCLIS, car registry and other public registries, as well as the registry of KCN on other constructions and buildings.
- Provide proportional access to the notaries in the civil registry, KCLIS and other public registries, to allow them application of due diligence in non-contentious inheritance procedure.

The KCN:

- develop Guidelines on the non-contentious inheritance procedure, focusing on the implementation of safeguards ensuring the property rights of women are protected. The Guidelines should also include safeguards on *inter-vivos* agreements. Include such Guidelines in the form of a separate training module for the notaries and employees at notarial offices and ensure continuous training sessions are held on this topic.

organize training sessions for existing and new notaries, as well as their employees, on inheritance proceedings with a particular focus on property rights of women and rights of other vulnerable groups.