german cooperation
DEUTSCHE ZUSAMMENARBEIT

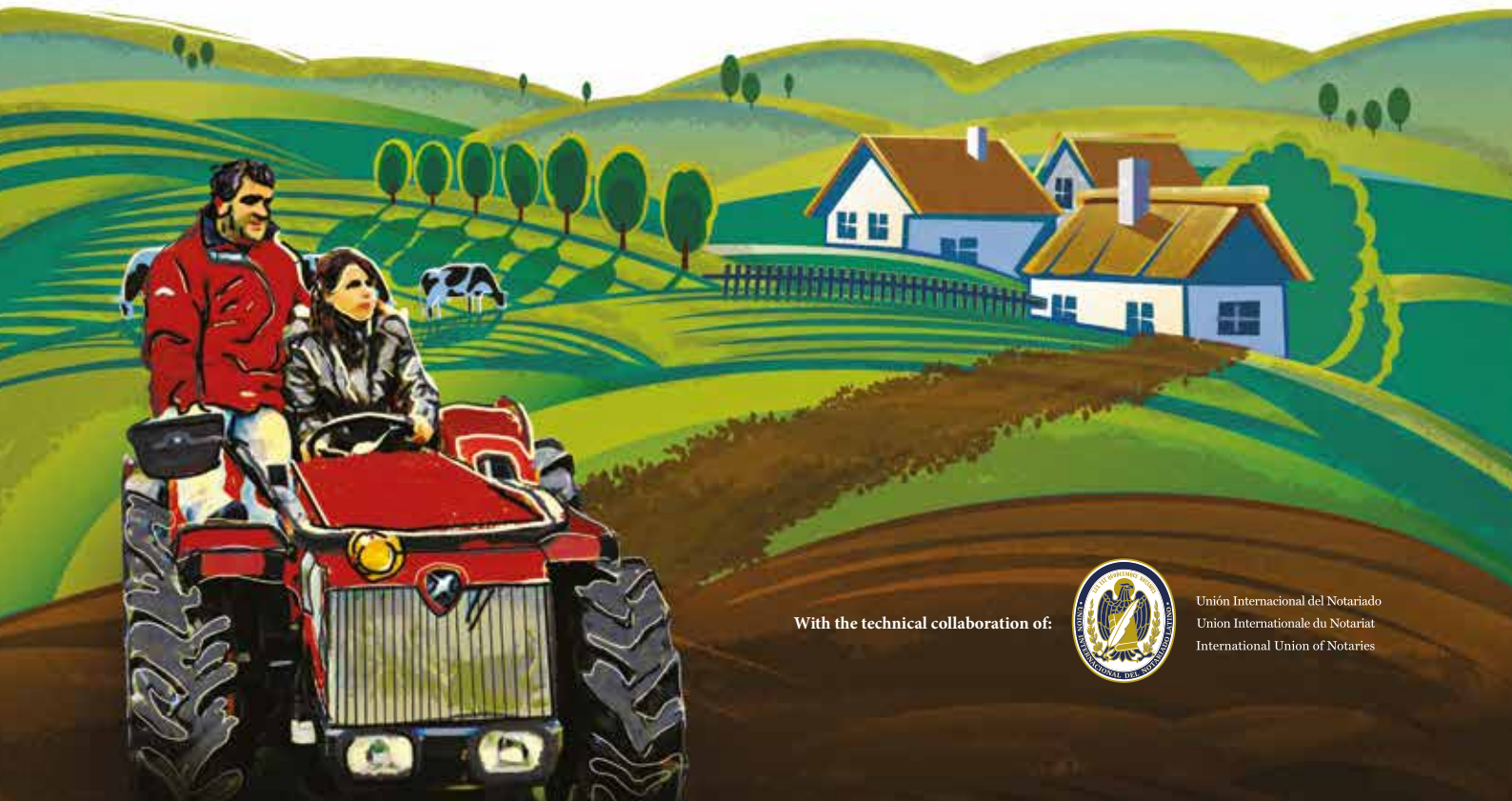
Implemented by

giz Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH

Food and Agriculture Organization of the United Nations

Notarial practices in Bosnia & Herzegovina:
Strengthening gender equality in land ownership and control

Notarska praksa u Bosni i Hercegovini:
Jačanje rodne ravnopravnosti u oblasti vlasništva i kontrole nad zemljištem



With the technical collaboration of:

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

Notarial practices in Bosnia & Herzegovina:
Strengthening gender equality in land ownership and control

Notarska praksa u Bosni i Hercegovini:
Jačanje rodne ravnopravnosti u oblasti vlasništva i kontrole nad zemljištem

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

Required citation:
GIZ and FAO. 2021. *Notarial practices in Bosnia and Herzegovina - Strengthening gender equality in land ownership and control/ Notarska praksa u Bosni i Hercegovini - Jačanje rodne ravnopravnosti u oblasti vlasništva i kontrole nad zemljištem*. Rome. https://doi.org/10.4060/cb5574b

ISBN 978-92-5-134679-2 [FAO]

Contents

Sadržaj

ACKNOWLEDGEMENTS

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

ZAHVALNICA

Notarske prakse u Bosni i Hercegovini: Smjernice za jačanje spolne ravnopravnosti u vlasništvu i kontroli nad zemljištem je izradila Selma Mezetović-Međić, uz doprinos Naomi Kenney (UNFAO), Margret Vidar (UNFAO), Rumyana Tonchovska (UNFAO), Ann Jenderedjian (UNFAO), Lovro Tomasić (Međunarodna unija notara), Veronika Efremova (GIZ) i Jana Schuhmann (GIZ). Prilikom izrade Smjernica uzeta su obzir mišljenja Notarske komore Federacije Bosne i Hercegovine i Notarske komore Republike Srpske. Lekturu Smjernica je radila LIBAR agecija za obrazovanje i prijevod u Bosni i Hercegovini. Dizajn je izradio Kushtrim Balaj.

KEY DEFINITIONS

Marriage:	The legally regulated cohabitation of a woman and a man.
Non-marital union:	The union of a woman and man. who are neither married or in a non-marital union with another person, which has lasted at least three years, or less if a biological child was born in it.
Marital property:	Property and revenue from property acquired by spouses through work during cohabitation in marriage. The term is used interchangeably with matrimonial property.
Separate property:	Property acquired by a spouse before marriage, as well as property acquired by a spouse during marriage by separation of marital property, or by inheritance or gift, where the donor makes his intention clear that the gift is only for one of the spouses.
Spousal consent:	The requirement that the other spouse or partner (in a non-marital union) agrees to the disposal or encumbrance of real property.
Joint registration:	Registration of both spouses in the land registry as joint owners or co-owners.
Presumption of joint registration:	The presumption 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:	Ownership of an asset where the shares of owners are determined proportionally to the entire asset (ideal shares).
Joint ownership:	Ownership of an asset where the shares of owners are not determined in advance, but are determinable.
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:	The deceased's estate consists of all the rights that can be inherited, and 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 or non-married partner, his/her 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:	Zakonom uređena zajednica žene i muškarca.
Vanbračna zajednica:	Zajednica žene i muškarca koji nisu u bračnoj ili vanbračnoj zajednici sa drugom osobom, u trajanju od najmanje tri godine ili manje u slučaju da imaju dijete rođeno u toj zajednici.
Bračna stečevina:	Imovina i prihodi od te imovine koje su bračni partneri stekli radom za vrijeme trajanja bračne zajednice. Ponekad se u istom značenju koristi i izraz "bračna imovina" (eng. matrimonial property).
Posebna imovina:	Imovina koju je jedan bračni partner stekao prije braka, kao i imovina koju je jedan bračni partner stekao za vrijeme trajanja braka diobom bračne stečevine ili primio kao naslijeđe ili poklon, ukoliko je evidentno da je poklon bio namijenjen samo jednom bračnom partneru.
Saglasnost partnera:	Uslov da drugi bračni partner ili vanbračni partner (u slučaju vanbračne zajednice) mora dati saglasnost za raspolaganje ili upis pravnog tereta na nepokretnu imovinu.
Zajednički upis:	Upis oba bračna partnera u zemljišne knjige u svojstvu suvlasnika ili zajedničkih vlasnika.
Pretpostavka zajedničkog upisa:	Pretpostavka da je upis izvršen na ime oba bračna partnera, čak i u slučaju kad je upis u zemljišne knjige izvršen na ime samo jednog partnera.
Suvlasništvo:	Vlasništvo nad određenom imovinom u kojem su vlasnički udjeli u cijeloj imovini utvrđeni proporcionalno ("idealni dijelovi").
Zajedničko vlasništvo:	Vlasništvo nad određenom imovinom u kojem vlasnički udjeli nisu unaprijed određeni, ali se mogu odrediti.
Sticanje vlasništva:	Vlasništvo se stiče na osnovu zakona, zakonitim pravnim poslom, nasljeđivanjem ili odlukom nadležnog organa, na način i pod uslovima propisanim zakonom.
Ostavština:	Ostavštinu umrlog čine sva prava koja se mogu naslijediti, a koja su umrlom pripadala u trenutku smrti.
Pravni nasljednici:	Pravne nasljednike umrlog čine njegovi/njeni potomci, usvojena djeca i njihovi potomci, bračni ili vanbračni partner, roditelji, braća i sestre i njihovi potomci, djedovi i bake i njihovi potomci, te drugi predci umrlog.

INTRODUCTION

Gender equality and the prohibition of discrimination is guaranteed in the legal system of Bosnia and Herzegovina.[1] The Constitution provides for the enjoyment of the highest level of internationally recognized human rights and fundamental freedoms, by listing these rights and freedoms, and by referring to the binding international agreements listed in Annex I to the Constitution (art. II para. 2 and art. II para. 3 of the Constitution of Bosnia and Herzegovina). The enjoyment of these rights shall be ensured for all persons in Bosnia and Herzegovina without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (art. II para. 4). Therefore, these rights are to be enforced without any discrimination. The prohibition of discrimination is of an accessory nature, and always related to violations of fundamental rights and freedoms.

One of the fundamental rights listed is the right to property: the enjoyment of this right, freely and without discrimination, is guaranteed to all persons on the territory of Bosnia and Herzegovina. As international documents, including the European Convention on Human Rights, are directly applicable in the legal system of Bosnia and Herzegovina, the importance of the right to property is additionally highlighted, especially due to the application of art. 1 of Additional Protocol No. 1 to the European Convention on Human Rights, which guarantees property protection. This provision protects the right of every natural or legal person to the peaceful enjoyment of their possessions. Like men, women can only be deprived of their property for reasons of public interest and subject to the conditions provided for by law and by general principles of international law.

Bosnia and Herzegovina is being encouraged to raise awareness of gender equality issues based on the Sustainable Development Goals (SDGs) of Agenda 2030 including women's land rights. Target 5a encourages countries to "Undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance, and natural resources in accordance with national laws." The Food and Agriculture Organization of the United Nations (FAO) is the custodian agency for indicator 5.a.2 which reads "Proportion of countries where the legal framework (including customary law) guarantees women's equal rights to land ownership and/or control." Within the framework and guidance of its official reporting methodology, the indicator collects all existing national policy objectives, draft provisions, legal provisions and applicable legislation that reflect good practices in guaranteeing 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 SDG indicator 5.a.2 over time.

Gender-based discrimination means treating an individual or group less favourably on the basis of sex. Gender-based discrimination prevents women and men from enjoying their human rights and freedoms,

1 Bosnia and Herzegovina is administratively divided into two entities: the Federation of Bosnia and Herzegovina and the Republic of Srpska. The Federation of Bosnia and Herzegovina covers 51% of the area of Bosnia and Herzegovina and consists of ten cantons, while the Republic of Srpska covers 49% of territory. The entities were constituted by the Dayton Agreement of 1995. Within this division, the District of Brčko of Bosnia and Herzegovina does not belong to either of the entities, but is a special administrative unit over which the institutions of Bosnia and Herzegovina have sovereignty. The entities have a very high degree of autonomy in all three branches of government, i.e. legislative, executive and judicial. Such an administrative division leads to three laws being enacted at three administrative levels.

and exercising their rights under the law on an equal basis. In Bosnia and Herzegovina, the Law on Gender Equality defines gender discrimination as "any distinction, exclusion, restriction or preference based on gender, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and freedoms in all spheres of society under equal terms" (art. 3). Gender-based discrimination can be direct, when a person or group of persons has been, is or may be treated less favourably than another individual or group in a same or similar situation; and indirect, when an apparently neutral legal norm, criterion or practice, equal for all, puts or may put a person or group of one sex at a particular disadvantage compared with persons of other sex (art. 3).

The Gender Action Plan of Bosnia and Herzegovina (GAP) 2018-2022 has been prepared by the Agency for Gender Equality and adopted by the Council of Ministers of Bosnia and Herzegovina. It represents a strategic document containing goals, programs and measures for the realization of gender equality in all areas of social life and work, in the public and private sphere, along with guidelines for the development of annual operational plans at entity, cantonal and local levels.

Although under all the relevant laws women and men are equal in Bosnia and Herzegovina, there are still cases in which property is registered in the sole name of the male co-owner or joint owner, be it husband, partner or brother. Women are much more rarely registered owners of property that constitutes a significant source of economic power, such as apartments, business premises, land, etc. There is, therefore, a clear need to bridge the implementation gap between the law (de jure) and the practice (de facto) to strengthen the property rights of women and daughters (FAO and GIZ).

The role of notaries in Bosnia and Herzegovina is defined and regulated by the respective laws on notaries of both entities and Brčko District that have been in force since 2007/2008. Notaries have significantly contributed to the enhancement of general legal certainty, particularly in the field of legal transactions with real estate, and to the unburdening of public authorities through the conferral of competences in the field of authentication of signatures and photocopies. The full notarial authentication of declarations of consent (notarisation, notarial deeds) and the notary's role as the impartial third, whose task it is to equally protect the interests of both parties and avoid unclear or unlawful clauses from being inserted into a legal act, contribute to the reduction of legal disputes in the areas of law that are in the competence of notaries.

When it comes to strengthening gender equality in real property transactions, the notaries contribute by advising on land tenure rights, the effects and consequences of certain legal actions and omissions, and by ensuring that, in cases of co-ownership or joint ownership, the women are consulted regardless of the fact that they might not be registered as owners.

While monitoring the proper application of relevant laws, notaries have to make sure that women's rights are identified and protected, with the final goal of preventing and eliminating discrimination, thereby contributing, in the long run, to raising awareness of women's entitlement to economic power.

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

UVOD

Pravni sistem Bosne i Hercegovine garantuje ravnopravnost spolova i zabranjuje diskriminaciju.[1] Ustav garantuje uživanje najvišeg stepena međunarodno priznatih ljudskih prava i temeljnih sloboda, taksativno navodeći ta prava i slobode i pozivajući se na pravno obavezujuće međunarodne sporazume navedene u Aneksu I Ustava (članovi II.2. i II.3. Ustava Bosne i Hercegovine). Ova prava mogu uživati sve osobe u Bosni i Hercegovini, bez diskriminacije po bilo kom osnovu uključujući spol, rasu, boju, jezik, vjeru, političko ili drugo mišljenje, nacionalno ili socijalno porijeklo, povezanost sa nacionalnom manjinom, imovinu, rođenje ili bilo koji drugi status (član II.4.). Stoga se ova prava mogu ostvarivati bez diskriminacije bilo koje vrste. Zabrana diskriminacije je po svojoj prirodi sredstvo i uvijek se odnosi na povredu nekog od temeljnih prava i sloboda.

Jedno od gore navedenih ustavnih prava je i pravo na imovinu, koje svim osobama na teritoriji Bosne i Hercegovine garantuje slobodno uživanje ovog prava bez diskriminacije. S obzirom da se međunarodni dokumenti, uključujući Evropsku konvenciju o zaštiti ljudskih prava, direktno primjenjuju u pravnom sistemu Bosne i Hercegovine, značaj prava na imovinu se dodatno naglašava zbog primjene člana 1. Dopunskog protokola br. 1 Evropske konvencije o zaštiti ljudskih prava kojim se garantuje zaštita imovine. Ova odredba štiti pravo svake fizičke i pravne osobe na mirno uživanje imovine u svom vlasništvu. Kao i muškarcima, ženama se imovina može oduzeti samo iz razloga javnog interesa i pod uslovima utvrđenim zakonom i općim načelima međunarodnog prava.

Bosni i Hercegovini se preporučuje da podigne javnu svijest o problematici ravnopravnosti spolova u skladu sa ciljevima održivog razvoja (*Sustainable Development Goals - SDGs*) iz Agende za 2030. godinu, što uključuje pravo vlasništva žena na zemljištu. Cilj 5.a potiče zemlje da "Provedu reforme kako bi žene imale jednaka prava na ekonomska dobra i pristup vlasništvu i kontroli nad zemljištem i ostalim oblicima imovine, finansijskim uslugama, nasljedstvu i prirodnim dobrima, u skladu sa važećim zakonima", a mjeri se pomoću dva indikatora: Organizacija Ujedinjenih nacija za prehranu i poljoprivredu (FAO) je nadležna za indikator 5.a.2. koji glasi: "Procenat zemalja u kojima pravni okvir (kao i običajno pravo) garantuje jednaka prava žena na vlasništvo i/ili kontrolu nad zemljištem". U ovom okviru i u skladu sa službenom metodologijom izvještavanja, ovaj indikator posmatra sve postojeće ciljeve iz nacionalnih politika, nacrte odredbi, pravne odredbe i primjenjive zakone koji odražavaju pozitivnu praksu i ženama garantuju prava vlasništva i/ili kontrole nad zemljištem. Pored zvanične metodologije izvještavanja za SDG indikator 5.a.2, FAO je pripremio i alat za pravnu analizu (Legal Assessment Tool - LAT) za rodno ravnopravno vlasništvo nad zemljištem, koji države mogu koristiti za kontinuirano praćenje implementacije SDG indikatora 5.a.2.

Rodna diskriminacija znači nepovoljan način postupanja prema pojedincima ili grupama zbog njihovog spola. Rodna diskriminacija ženama i muškarcima ne dozvoljava da uživaju svoja ljudska prava i slobode i da ta prava ravnopravno ostvaruju pred licem zakona. Zakon o ravnopravnosti spolova u Bosni i Hercegovini definira diskriminaciju po osnovu spola kao "svako izdvajanje, isključivanje, ograničavanje ili preferencijalni

1 Bosna i Hercegovina je administrativno podijeljena na dva entiteta: Federaciju Bosne i Hercegovine i Republiku Srpsku. Federacija Bosne i Hercegovine pokriva 51% površine Bosne i Hercegovine i sastoji se od deset kantona, a Republika Srpska pokriva 49% teritorije. Entiteti su uspostvljeni zaključivanjem Dejtonskog sporazuma 1995. godine. Tu je također i Brčko distrikt Bosne i Hercegovine koji ne pripada ni jednom entitetu već čini posebnu upravnu cjelinu za koju nadležnost imaju institucije Bosne i Hercegovine. Entiteti imaju jako visok stepen autonomije u sve tri grane vlasti: zakonodavnoj, izvršnoj i pravosudnoj. Ovakva administrativna podjela rezultira donošenjem tri zakona na tri nivoa uprave.

tretman po osnovu spola kojim se negira ili otežava priznavanje, uživanje ili ostvarivanje ljudskih prava i sloboda u svim sferama društva i na ravnopravnoj osnovi" (član 3.). Spolna diskriminacija može biti direktna, u slučaju da se osoba ili grupa osoba dovodi u nepovoljan položaj u odnosu na drugu osobu ili grupu osoba u istoj ili sličnoj situaciji, te indirektna, kada prividno neutralna pravna norma, kriterij ili praksa koja se jednako primjenjuje na sve dovodi osobu ili grupu osoba jednog spola u nepovoljniji položaj u odnosu na osobe drugog spola (član 3.).

Agencija za ravnopravnost spolova Bosne i Hercegovine je izradila Gender akcioni plan Bosne i Hercegovine (GAP) za period 2018-2022, koji je usvojen od strane Vijeća ministara Bosne i Hercegovine. Ovaj plan predstavlja strateški dokument sa ciljevima, programima i mjerama za ostvarivanje ravnopravnosti spolova u svim sferama društvenog života, kako javnim tako i privatnim, te nudi smjernice za razvoj godišnjih operativnih planova na entitetskom, kantonalnom i lokalnom nivou.

Iako su po svim relevantnim zakonima u Bosni i Hercegovini žene i muškarci ravnopravni, i dalje postoje slučajevi gdje je imovina upisana samo na ime muškog suvlasnika tj. vlasnika dijela - muža, partnera ili brata. Žene su mnogo rjeđe upisane kao vlasnice imovine koja predstavlja bitan izvor ekonomske moći, npr. stanova, poslovnih prostora, zemljišta i sl. Stoga postoji jasna potreba da se premosti jaz između pravnih propisa (*de iure*) i prakse (*de facto*) u cilju jačanja imovinskih prava žena i kćerki (FAO i GIZ).

Uloga notara u Bosni i Hercegovini je uređena zakonima o notarima u entitetima i Brčko distriktu koji su na snazi od 2007/2008. godine. Notari su značajno doprinijeli većoj pravnoj sigurnosti, posebno u domenu pravnih poslova s nekretninama i oslobodili su kapacitete javnih vlasti preuzimanjem nadležnosti za ovjeru potpisa i fotokopija. Puna notarska obrada izjava o saglasnosti strana (notarizacija, notarska isprava) i uloga notara kao nepristrasnog svjedoka čiji je zadatak da jednako štiti interese obje strane i spriječi unošenje nejasnih ili nezakonitih odredbi u službenu ispravu, doprinosi smanjenju broja pravnih sporova u pravnim oblastima za koja su nadležni notari.

Što se tiče veće ravnopravnosti spolova u pravnim poslovima koji se tiču nepokretne imovine, doprinos notara leži u tome što savjetuju stranke o pravima vlasništva nad zemljištem, učincima i posljedicama određenih pravnih radnji i neizvršavanja istih, a u slučaju suvlasništva ili zajedničkog vlasništva konsultuju i ženu bez obzira da li je upisana kao vlasnik ili ne.

Uz praćenje urednosti primjene relevantnih propisa, notari se moraju pobrinuti za prepoznavanje i zaštitu prava žena u cilju sprečavanja i eliminacije diskriminacije, čime dugoročno doprinose većoj svjesnosti žena o tome da imaju pravo na ekonomsku moć.

GIZ i FAO su pripremili Regionalne smjernice za jačanje rodne ravnopravnosti u notarskoj praksi u Jugoistočnoj Evropi, tehničkoj saradnji sa Međunarodnom unijom notara. Dokument je zasnovan na općim načelima prisutnim u nekoliko nadležnosti i nudi praktične smjernice za provođenje dubinske analize u situacijama koje se tiču prava žena (FAO i GIZ).

I.
GENDER ISSUES IN DIFFERENT TYPES OF NOTARIAL SERVICE

I. GENDER ISSUES IN DIFFERENT TYPES OF NOTARIAL SERVICE

This guidance document on Notarial practices in Bosnia & Herzegovina: Strengthening gender equality in land ownership and control complements the Regional Guidelines and is a collection of applicable national laws and good practices, offering practical guidelines to notaries in Bosnia and Herzegovina in their daily activities. It is structured around the main types of notarial services, in which gender equality is most relevant. Each type of service provides the legal grounds, lists of key questions and checklists of documents notaries may use in their daily work. This guidance document is prepared with the goal of eliminating gender-based discrimination and enhancing the economic empowerment of women. It is based on the current national legislation and practice, and it is addressed to all legal professionals, particularly notaries and their chambers, whose duty is to implement the legal rules and set standards for best practices in notarial practice throughout the country. The laws of relevance to this guidance document are enacted at both entity and Brčko District level. Consequently, the analysis of the relevant legal basis will always, where applicable, contain references to legal instruments from the entities and Brčko District.

1. PROPERTY LAW

1.1 Client disposing of and encumbering the property

Legal basis

None of the family laws and laws on property rights of the Federation of Bosnia and Herzegovina, the Republic of Srpska and the Brčko District which regulate property relations during marriage and non-marital unions explicitly stipulate that a registered owner who acquired property through work during marriage or non-marital union needs the consent of the non-registered spouse/partner to sell or in any other way dispose of the property. However, all three family laws recognize full community of property acquired during marriage with the only difference being that the default marital property regime in Federation of Bosnia and Herzegovina and in Brčko District is co-ownership, whereas in the Republic of Srpska it is joint ownership. Due to the nature of the property's legal status, the obligation to obtain the non-registered spouse's/partner's consent derives from the provisions regulating the type of property acquired during marriage or non-marital union, and the relevant provisions of property laws regulating co-ownership and joint ownership. Namely, art. 252 of the Family Law of the Federation of Bosnia and Herzegovina (hereinafter referred to as FL FBIH) and art. 229 of the Family Law of Brčko District (hereinafter referred to as FL BD) stipulate that the spouses are co-owners of matrimonial property with equal shares. This can be changed only by the conclusion of a nuptial contract, which requires notarial form. Both of these laws prescribe the right of the non-registered spouse to request the registration of their co-ownership (art. 252 FL FBIH; art. 229 FB BD).

In Republic of Srpska the matrimonial property regime is defined as joint ownership. In contrast to co-ownership, joint ownership is the ownership over an asset where the shares are not determined in advance (they are determinable but not determined). Despite the fact that the Family Law of Republic of Srpska (hereinafter referred to as FL RS) defines the matrimonial property regime as joint ownership, it determines the share (each partner is owner of one half) (art. 272 FL RS). At the same time, each spouse can request their share be determined as more than a half, if he/she proves an obviously larger contribution to the matrimonial property (art. 273 FL RS).

Regardless of the different legal nature of marital property in different parts of the country, the criteria for the property to be considered marital are the same: the property needs to be acquired during marriage or in the course of a non-marital union. Marital property also includes indirect property, *ie.* the revenues from property acquired during marriage. Contribution in equal parts is not required, as nowadays all the work during cohabitation is recognised as contribution in equal parts, such as, for example, managing the household or raising children.

In the Federation and in Brčko District, each spouse independently manages and disposes of his/her separate property and matrimonial property jointly and with the consent of the spouses under the general rules of property and obligation law (art. 253 FL FBIH; art. 271 FL RS; art. 230 FL BD). In the Republic of Srpska, a spouse may not independently dispose of his or her share in joint matrimonial property nor burden it with legal operations *inter vivos (*art. 271 FL RS).

The property acquired by a spouse before marriage is his/her separate property, and he/she is entitled to manage and dispose of such property independently. The same applies to property the spouse acquired during marriage, but in ways other than what is provided by law as the manner for acquiring matrimonial property (inheritance, gift intended only to that one spouse, etc) (art. 270 FL RS; art. 254 FL FBIH; art. 231 FL BD). Therefore, if the notary determines that the object of the transaction is the separate property of one spouse, no further consent is required from the other spouse for the disposal or encumbrance of his/her share. In order to confirm that the gift received during marriage was intended for one spouse only, it would be useful for the notary to request a gift contract containing a clause that the gift is for the benefit of the recipient exclusively. On the other hand, it is important not to lose sight of the fact that property acquired by inheritance does not have to be entirely separate property, as spouses can increase the value of such a property, by for example investing in it or renovating. Even if such actions would not grant the contributing spouse a co-ownership stake, it would still be useful for the notary to check whether there have been significant contributions to the increase of the value of such a property. Any such contribution entitles the contributing spouse to request the value of his/her share of the increase. If the money invested is marital property, then the contributing spouse will be entitled to 50% of the value of the increase. This is a factual issue and will depend on the circumstances of each individual case, and can thus be challenging to determine.

The spouses may opt out of the default marital property regime and arrange for their property to be governed in a different way by concluding a nuptial agreement (art. 252 FL FBIH; art. 271 FL RS; art. 229 and art. 2 FL BD). This agreement can be concluded before marriage as a pre-nuptial agreement which takes effect upon marriage. In the Federation of Bosnia and Herzegovina and in the Republic of Srpska, the compulsory form and precondition for the validity of the nuptial or pre-nuptial agreement is the form of notarial deed (form *ad solemnitatem*), (art. 259 FL FBIH; art. 271 FL RS), whereas in the Brčko District, this contract can be concluded in the form of notarial deed or alternatively before another state body (art. 235 FL BD). In all cases where present, the notary must warn the parties that the nuptial agreement excludes the default marital regime. The notary as a neutral third party is further required to advise both (future) spouses in order to find equal, fair solutions which will protect both parties and which is in line with the law.

Everything aforementioned regarding the existence and division of marital property also applies to property acquired during a non-marital union (art. 263 FL FBIH; art. 284 FL RS; art. 240 FL BD). Non-marital partners have the same rights and obligations as spouses regarding ownership and mutual support under the conditions prescribed by law. The property acquired through work while the non-marital union lasted is treated the same way as matrimonial property: as co-ownership in FBIH and BD, and as joint ownership in RS (art. 12 FL RS). However, not every cohabitation of a man and a woman is considered to be a non-marital union. First, a non-marital union is a more permanent cohabitation of man and woman, between whom there are no marriage obstacles. In the Federation of BIH and in the Brčko District, it is necessary for the union to have lasted for at least three years or less if biological children were born. The latter precondition is not prescribed in the Republic of Srpska, where the requirement for the duration of cohabitation is required only regarding mutual support, regardless of whether biological children were born or not.

Consequences

If the property is in the regime of co-ownership, the shares are proportionally determined (ideal shares). Therefore, each spouse or partner can dispose of his or her co-ownership share, without consent of the other spouse or partner. In the Federation of Bosnia and Herzegovina and in the Brčko District, in case of the sale of a co-owner's share by one spouse, the other spouse has the right of pre-emption, but this is only the case if the asset is immovable. This is regulated by art. 27 of the Law on Property Rights of Federation of Bosnia and Herzegovina (hereinafter referred to as LPR FBIH) and art. 55 of the Law on Property Rights and Other Rights in Rem of Brčko District (hereinafter referred to as LPR BD).

The Law on Property Rights of the Federation of Bosnia and Herzegovina regulates in detail the procedure for exercising pre-emption rights, with the strong involvement of the notary. In the Republic of Srpska no pre-emption right is foreseen.

Each co-owner is entitled to request the division of the asset at any time, except when such division may cause damage to the other co-owners, unless otherwise prescribed by law. The contract by which a co-owner would permanently waive his/her right to division of the co-owned asset shall be considered null and void. Co-owners shall, by mutual agreement, define a method of division of their property, and in case they cannot reach an agreement, the court shall decide on the matter. If physical division of an asset is impossible, or it is possible only with significant depreciation of the asset, the court shall decide on the execution of division by sale.

Marriage and non-marital unions generate the same property rights. Therefore, all the rules that relate to property relations of spouses apply to partners in non-marital unions. In practice, the client who is disposing of property may be single at the time of disposal but may have acquired real property during marriage or non-marital union. If only the client disposing of property is registered in the land registry, and no division was performed based on spousal agreement or court division, the provisions on disposal or encumbrance of marital property still apply to such a transaction and the notary has to require the consent of the former spouse/partner for such a transaction.

If a third party is acquiring property that is part of the seller's marital property, his/her acquisition is legally protected as long as he/she relied on the land registry data as correct and complete, and at the same time had no reason to doubt anything. There is no duty to investigate the factual non-registered state for the client to be acquiring in good faith. However, if he/she is aware of any facts that might influence the transaction being concluded, he/she cannot ignore them with the excuse of not being obliged to check the factual state. This is regulated by art. 55 and 56 of LPR FBIH, art. 35 and 36 LPR BD, and art. 55 and 56 of the Law on Property Rights of Republic of Srpska (hereinafter referred to as LPR RS).

Besides, notaries play a crucial role in such cases by stressing the necessity to verify whether a certain asset was acquired during marriage and is co-owned by the spouse. If the answer is affirmative, the valid transfer requires the consent of the non-registered spouse. On the other hand, a statement given to the effect that the property is separate property has significant consequences and the notary is under a duty to inform the party giving such statements thereof.

The non-marital union is defined as a more permanent cohabitation of a man and a woman that has lasted for at least three years. If partners have children, the duration of their cohabitation can also be shorter. It is important to also note that as long as there is an existing marriage, besides the cohabitation, this

represents an obstacle for the non-marital union to have its legal status and effect. This is so irrespective of whether any children have been born in it or not. The property acquired by partners through work during cohabitation in a non-marital union shall be considered as their co-ownership if they reside on the territory of the Federation or Brčko District, and respectively as joint property if they reside on the territory of Republic of Srpska.

Since the date and legal basis of acquiring property are key factors in deciding whether it is mandatory to require the consent of the other spouse for the transaction, the time and the legal basis of acquisition should be entered into the land registry. It would be very useful if registration documents were available in digital form for review and use by persons who can prove their legal interest and with personal data protection. In that case, all the interested parties would have easy access and a clear understanding of the applicable property regime. This would facilitate the due diligence process.

It is important to stress that the spouse has the right to either give or refuse consent. The notary has to inform the spouse if the property is considered marital property by law and that it may be disposed of only with the consent of both spouses. The disposal of real property which falls under the regime of marital property without the consent of the non-registered spouse or partner may be challenged before the court. It is, therefore, very important that the request for the spouse's consent is not reduced to a mere formality so as to limit the notary's liability, but rather to explain and to inform the non-registered spouse of his/her rights and obligations in relation to marital property and his/her right to give or withhold consent to the concrete transaction, as well as the legal consequences any action he/she undertakes will have.

The same rules apply for encumbrance of real property, in which case the notary requires the spouse's consent for the constitution and registration of an encumbrance when only one spouse or partner is registered as owner and the property is acquired during marriage or in the course of a non-marital union. In these cases, too, the notary should inform the other spouse or partner of the meaning of marital property and of the consequences of giving or withholding consent for the constitution and registration of the encumbrance.

The presumption of the existence of marital property requires the notary to perform due diligence concerning the date and the legal basis on which the real property was acquired, in order to assess whether the property should be considered marital or separate property, as well as to determine whether the person disposing of or encumbering the property was married or living in a non-marital union at the time of acquisition. Simple reliance on the land registry data is not sufficient, and the notary's active engagement is required.

In relevant cases, the notary has to confront the parties with the following questions and use the documents listed in the checklist below. It is important that the notary uses all the available information and critically reflects on the answers of the parties in order to determine the truth. The notary is not obliged or even entitled to conduct ex-officio investigations but has to use all sources available to determine the true situation. Furthermore, the notary should document all the findings on the marital property regime in the deed.

Relevant questions

- Who is the registered owner?
- Is the registered owner the legal owner or are there any doubts as to his/her ownership?
- Are there any other registered owners?
- What is the client's personal status: is the client married or living in a non-marital; was the client married or living in a non-marital union at the time of acquisition of property?
    - Ask the parties and explain that they are obliged to give true answers and assist you in obtaining the relevant information and documents.
    - If there are any doubts as to the client's answers, check available information (client database, previous acts recorded, civil registries, internet search)
- If there is a spouse/non-married partner, does he/she consent to the transaction?
    - Inform your client's spouse of their rights and interests in the property
    - Inform your client's spouse of their right to provide written consent to the transaction, or to refuse it
    - Inform the parties of the requirement of registering the property jointly.
- Inform the other party whether and how they are protected when acquiring rights in good faith.
- What property regime applies to the property: is the property subject to nuptial agreement, co-ownership/joint property management and disposition agreement, or any other agreement changing the default marital regime? Did the spouses divide the property based on this agreement?
- Was the property divided by the court or is it subject to a pending court proceeding?
- When was the property acquired and what was the legal basis for property acquisition: was the property acquired/its value increased through work during cohabitation in marriage or non-marital union? Was the loan for the property repaid while the client was married/living in non-marital union?
- Is there a separate property: was it received by gift contract or by inheritance or some other legal basis? Was the gift intended for one spouse only? Have the spouses made any investments in order to increase the value of the separate property received by inheritance?

Checklist

- ✔ Land registry extract for the real property
- ✔ Personal register or client's marriage certificate, birth certificate, statement of both partners on non-marital union provided there are no marriage obstacles, court judgment on divorce or marriage annulment, etc. including information as to prior marriages/non-marital unions

- Property conveyance contract, court decision or state institution decision as the legal basis and time of property acquisition (subject to availability)
- (If applicable) spousal agreement or court decision on the division of property or agreement changing the default marital regime (a nuptial agreement, property management and 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
- Contract establishing the marital property regime or agreement changing the default marital property regime (subject to availability)
- The consent of the spouse/former spouse/partner/former partner included in the mortgage statement or mortgage contract
- The gift contract containing a clause that the gift was made to one spouse exclusively as his/her separate property

1.2 Client acquiring property

Even though there is no express obligation to register jointly, notaries should warn their client who is acquiring property, and who at the same time has the status of a spouse or partner in a non-marital union, that this property will be considered marital property, and will thus entitle the non-registered spouse/partner to request their registration, or potentially request a deduction in probation proceedings if no joint registration was performed while the marriage lasted, unless expressly stated that the property is being acquired as separate. This is particularly the case when the buyer is spending money earnt during cohabitation. In order to prevent the possible registration of a sole owner, where in fact the property being acquired is co-owned or jointly owned, the notary should request a statement from the buyer that he/she is acquiring the property as separate.

Since marriage and non-marital unions generate the same property rights and obligations, if the client acquiring property claims that he/she lives in a non-marital union that meets the requirements of the law to be recognized as such, it would be best to invite both partners to be parties to the transaction and register as co-owners in FBIH and in BD, or joint owners in RS, or differently in each of the administrative units depending on their mutual agreement.

There is no register of non-marital unions in Bosnia and Herzegovina 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.

However, the notary cannot impose the obligation to the client acquiring property to register together with their spouse or partner, as the reasons for obtaining property as sole owner may be diverse, but the notary should instruct the client about all the consequences, and the rights the non-registered spouse or partner will have over the property that is being acquired.

In the Republic of Srpska, the notary should inform the clients that the spouses may perform a division of property at the time of acquisition by determining co-ownership shares, in which case both spouses will appear as contracting parties to the transaction and will be registered according to the determined shares.

Relevant questions

- What is the client's personal status: is the client married or living in a non-marital union at the time of acquiring the property?
- What was the legal basis for acquiring property: was the property acquired through work during marriage/non-marital union or was the property acquired by gift deed, inheritance, or some other legal transaction that could result in the acquisition of separate property?
- What property regime applies to the property: does your client have a nuptial agreement or is there information on any other fact that would replace the default property regime?
- Does your client have any knowledge of the property to be acquired other than the information listed in the land registry extract? (if client is buying property that is the seller's matrimonial property)

Checklist

- ✔ Personal register or client's marriage certificate, birth certificate, a statement on cohabitation, court judgment on divorce or marriage annulment, etc.
- ✔ Legal basis for property acquisition (an integral part of the contract)
- ✔ Spousal agreement changing the default marital regime (a nuptial agreement, property management and disposal agreement, etc.)

II.
INHERITANCE

2.1 Determination of the deceased's personal status

One of the important factors for inheritance proceedings is to determine the deceased's personal status and the deceased's property. The notary should determine the deceased's personal status at the time of death and at the time of the acquisition of the property that is part of the decedent's estate. If the deceased was married at the time of death, her/his surviving spouse is entitled to inherit in the 1st inheritance line together with the deceased's children in equal parts. This is regulated by art. 10 of the Law on Succession of the Federation of Bosnia and Herzegovina (hereinafter referred to as LS FBIH); art. 9 of the Law on Succession of the Republic of Srpska (hereinafter referred to as LS RS), and art. 10 of the Law on Succession of Brčko District of Bosnia and Herzegovina (hereinafter referred to as LS BD).

There is no difference between male and female children of the deceased. All the descendants of the deceased have the same status. If the deceased had no children, the spouse will inherit one half of the estate in the 2nd inheritance line together with the deceased's parents (art. 12 LS FBIH; art. 11 LS RS; art. 12 LS BD).

Marriage and non-marital unions partially generate the same succession rights. Male and female surviving partners have an equal right to inherit a share of the deceased's estate in the Federation of Bosnia and Herzegovina and in Brčko District of Bosnia and Herzegovina (art. 9 LS FBIH; art. 9 LS BD), whereas in Republic of Srpska, partners are still not entitled to inherit each other.

Special attention should be paid in case the deceased was single at the time of death, but was married or living in a non-marital union at the time of property acquisition through work during marriage or a non-marital union. In that case the property should be considered as the marital property of both spouses and the notary should exercise further due diligence in order to make sure that the rights of all the interested parties are identified and protected in compliance with the relevant laws on marital property, as well as succession law. The property might be registered only in the deceased's name, but if it was acquired during marriage or in the course of a non-marital union, the non-registered spouse or partner is entitled to primarily request the division of property according to the relevant legal provisions regulating marital property before any property division in the inheritance proceedings can continue.

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 non-marital union at the time of death or at the time of acquiring property belonging to the estate?
- Did the deceased have a spousal agreement regarding a specific marital regime?

Checklist

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

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

In the procedure for the distribution of an estate, the notary must identify the deceased's heirs, the property belonging to the estate, and which rights from the estate belong to the heirs and other parties. Notaries must ensure that all the heirs are identified, formally informed, and invited to attend the proceedings.

The notary has the duty to check whether the inheritance procedure has already been conducted for the same deceased person by another notary, to avoid dividing the estate twice. The notary also has to ensure that the parties are invited to the proceedings. These steps are especially important since after the inheritance ruling becomes final and binding, it is not possible to repeat the distribution of the estate. This is regulated by art. 251 of LS FBIH, art. 254 LS BD, and art. 138 of the Law on Non-contentious Proceeding of Republic of Srpska, (hereinafter referred to as LNCP RS). It is also not possible to repeat the proceedings, but the party will be referred to the court for a civil proceeding (art. 253 LS FBIH; art. 138 LNCP RS; art. 254 LS BD).

If it is not known whether the deceased has an heir or if it is not clear whether all the heirs have been identified, or if a temporary representative is appointed to the heir whose residence is unknown and the heir does not have an attorney, or if an heir or their statutory representative, who does not have an attorney is abroad so that delivery could not be performed, the court will make a public call for persons who claim to have interest in the estate to report to the court within one year from the publishing of an announcement on the court notice board, the relevant official gazette, and in any other appropriate way (art. 235 LS FBIH; art. 124 LNCP RS; art. 239 LS BD).

In the invitation to the proceedings, the notary will explain the subject matter of the hearings and will inform the invited parties as to the documents that should be submitted (art. 234 LS FBIH; art. 123 LNCP RS; art. 238 LS BD).

Relevant questions

- Did the deceased leave a will?
- Did the deceased have children?
- Did the deceased have a spouse or a 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: personal register or birth certificate, marriage certificate, death certificate for the heir, divorce judgment, inheritance resolution, etc.
- ✔ Announcement on the court notice board, official journal or international journal

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

Statutory heirs are the deceased's descendants, adoptees and their descendants, spouse, parents, adoptive parents, brothers and sisters, grandfathers and grandmothers, and other ancestors. An adoptee from incomplete adoption, the deceased's brothers and sisters, his/her grandfathers and grandmothers, and his/her other ancestors are compulsory heirs only if they would have been invited to inherit as statutory heirs, and they are permanently incapable of working without the necessary means to live (art. 28 LS FBIH; art. 30 LS RS; art. 32 LS BD).

Statutory heirs are entitled to a part of the estate that the deceased could not have disposed of and which is a guaranteed portion under the law. The compulsory portion of descendants, an adoptee and his/her descendants and deceased's spouse is one half of the inheritance share they would have received had they been statutory heirs, while other statutory heirs are entitled to one-third of the share that would belong to each of them based on the legal inheritance line.

At the beginning of the inheritance proceedings, the notary will determine whether the deceased left a will or disposed of his/her property by any contract (life-care contract, agreement on the transfer and distribution of assets for life of testator, or inheritance contract). If any of these contracts included real property, the inheritance procedure will be terminated in relation to property that is the subject matter of such a contract, as these contracts have priority in implementation.

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

Since the compulsory portion is part of the estate which the deceased could not dispose of, the notary will inform compulsory heirs on their right to request their portion and on the nature and size of the compulsory portion, provided that the entire estate has been covered by either will or an inheritance contract. The compulsory portion is breached if the value of the deceased's testamentary disposal and gifts made to the statutory heir or person instead of whom he/she is entitled to inherit is less than the heir's statutory share. If there is no dispute between the heirs, the proceedings will be completed before the notary. On the contrary, the heirs will be referred to the court. The heirs will also be referred to the court in case there are disputes between heirs regarding requests for disposals by will and/or gift to be reduced.

However, the waiver or any declaration regarding renunciation or acceptance of inheritance is irrevocable, even in the civil proceeding. It is, therefore, important for the notary to inform the participants to the inheritance proceedings of their rights so that they are not later precluded to claim them in civil proceedings.

If an heir challenges the will (the heir may claim that the will is contrary to imperative provisions, that the deceased was incapable of reasoning, etc.) the parties will be referred to civil proceedings (art. 239 LS FBIH; art. 127 LNCP RS; art. 243 LS BD).

Relevant questions

- Was the real property subject to a life-care contract, an agreement on the transfer and distribution of assets for life of testator, or an inheritance contract?
- Did the deceased leave a will?
- Was the will drafted in accordance with the legal requirements pertaining to the form and content?
- Is 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
- Agreement on the transfer and distribution of assets for life of testator
- Inheritance 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

The obligation to inform the surviving spouse or partner is based on the legally established default marital property regime, and the non-marital union property regime respectively. If there is no dispute the notary will perform the separation of the surviving spouse's/partner's share of the marital property from the estate. Since marriage and non-marital unions generate the same rights and obligations in relation to property, 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. If there is a dispute between the parties which may relate not only to the right to the spousal share but also its size, the notary will refer the parties to civil proceedings (art. 239 LS FBIH; art. 127 LNCP RS; art. 243 LS BD). This will also be the case if the status of a partner from a non-marital union is disputed. This will most likely be done by the children of deceased. His/her status has to be established before the notary can proceed with the further division of property.

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

Relevant questions

- When was the property acquired?
- What was the legal basis for property acquisition?
- Was the deceased married or living in a non-marital union at the time of acquiring property?
- 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 challenge that?
- Do other heirs agree to conclude a settlement agreement with the deceased's partner regarding a partner's share in the property?

Checklist

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

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

This option is not envisaged by any of the applicable succession laws in Bosnia and Herzegovina. However, there is no legal obstacle for such an agreement to be made in practice, provided all the heirs give their consent. Such practice would greatly contribute to women's empowerment, and particularly so when the property was registered solely in the name of deceased spouse or partner, and the surviving spouse/partner has lived together with the deceased in the matrimonial house. If this solution seems appropriate, notaries can advise clients to draft their wills accordingly in order to create user rights for the spouse.

Relevant questions

- Is the property that is to be divided the primary place of residence of any of the co-heirs?
- Has the surviving spouse/partner lived together with the deceased in the matrimonial house additionally to his/her inheritance rights?
- Do other co-heirs agree to grant user rights for life on the property?

Checklist

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

2.6 Inform the heirs about the consequences of relinquishing inheritance

The heir is considered to be the owner of his inheritance share from the moment of death of the deceased. Namely, the estate of a deceased person passes by force of law to his/her heirs at the time of his/her death (art. 162 SL FBIH; art. 153 SL RS; art. 167 SL BD). This transfer happens at that very moment so no property is left without a right holder for any period of time.

However, despite the application of principles of universal succession, based on which all rights and obligations are transferred from the deceased to heirs, all heirs are entirely free to decide not to accept their inheritance. They can do so by giving a hereditary statement on relinquishing inheritance. This statement is an explicit, clear, strictly formal and irrevocable declaration of the will of a potential heir given within a prescribed period of time in order not to accept inheritance. The heir may relinquish inheritance by a statement given before the notary by the termination of the first instance inheritance proceedings. It shall be deemed that the heir who relinquished the inheritance never was an heir (art. 163 SL FBIH; art. 154 SL RS; art. 168 SL BD). If the heir does not relinquish the inheritance by the termination of the first instance inheritance proceedings, it shall be deemed that he/she has accepted the inheritance. An heir can give a statement of acceptance, but such a declaration is not obligatory, and no one is obliged to give it in order to be considered an heir (art. 237 SL FBIH; art. 126 LNCP RS; art. 241 SL BD). If the heir accepted or relinquished inheritance, he/she has to sign the statement in person or through a representative. The signature on the statement accepting or relinquishing an estate, which is submitted in writing to the court/entrusted notary, as well as the signature on the power of attorney, has to be notarised. The statement contains precise identification of the estate that is either being accepted or relinquished (art. 237 SL FBIH; art. 126 LNCP RS; art. 241 SL BD).

The relinquishment of inheritance has a significant impact on the heir, particularly female heirs, and is flagged as one of the main reasons why women, especially those living in rural areas, rarely have real estate registered in their own name. Due to the fact that relinquishment is irrevocable, special focus should be put on advising female heirs on the irreversibility of the decision, the importance and long-term consequences

any of their actions taken in the concrete probate proceeding will have. The notary cannot take sides and his/her impartiality should be kept in all cases, but they should be aware of cultural bias which considers men to be the owners of land, because they are those who earn for the family. The heirs' decision is likely to be guided by these cultural practices and the notary should, as far as possible, protect the true and free will prior to an heir's declaration.

The relinquishment of inheritance in favour of other persons is treated as a statement of acceptance with the assignment of the inheritance share at the same time (art. 166 SL FBIH; art. 157 SL RS; art. 171 SL BD). In practice, it leads to a gift deed that could potentially have tax implications.

Relevant questions

- Does the heir accept the inheritance?
- Does the heir relinquish the inheritance?
- Does the heir who relinquished inheritance have descendants?
- Do they accept or relinquish inheritance?
- What are the reasons/motives of the parties?
- Are parties fully aware of consequences of any declaration in relation to inheritance?

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 attorney

2.7 Inheritance contracts

Inheritance law in Bosnia and Herzegovina recognizes three types of inheritance law contracts: contract on property division among descendants (art. 135-145 SL FBIH; art. 128-138 SL RS; art. 139-149 SL BD), life-care contract (art. 146-154 SL FBIH; art. 139-145 SL RS; art. 150-159 SL BD), and inheritance contract (art. 125–134 SL FBIH; art. 130–134 SL BD). All three of these contracts are concluded in the form of a notarised (solemnised) deed. This form foresees an engaged and strong advisory, impartial role by the notary, that contributes to the general legal certainty, but also to full trust by the parties, as well as their awareness of the importance and consequences of all relevant segments related to these contracts. Notaries should particularly warn parties that the property which is the subject matter of the contract will not be part of the estate and that heirs, regardless whether inheriting by law or will, cannot be settled from that property.

If the deceased concluded a contract on property division among descendants, then all descendants must agree with such a division. The spouse can be included in this division; in any case, his/her position as compulsory heir is guaranteed.

A life-care contract can be concluded with any person having full legal capacity. If a person, who was party to such a contract with the beneficiary, also participates as an heir in the inheritance division after the beneficiary's death, their rights on these two different legal grounds (life-care contract and inheritance) are independent of each other.

If the property that is subject matter in any of these two contracts was acquired while the deceased was married or living in a non-marital union, then the consent of the spouse/partner will be required for any of the two contracts. Therefore, the relevant questions and checklist listed in the chapter on Client disposing of the property shall apply accordingly.

In the Federation of Bosnia and Herzegovina and in the Brčko District, the spouses have the possibility to agree on their relationships regarding succession by concluding a contract on inheritance (art. 125–134 SL FBIH; art. 130–134 SL BD). This contract has to be concluded in the form of a notarial deed/notarised act, too. This solution gives the spouses an additional opportunity to regulate their relationships in the way most convenient for them. In practice, this contract is generally concluded along with the nuptial contract. If there is such a contract, it takes priority for the division of estate, and is executed first before any will, and legal hereditary order. This contract provides spouses with more flexibility to arrange their mutual relationships regarding succession.

I.
RODNA PROBLEMATIKA U RAZNIM VRSTAMA NOTARSKIH USLUGA

I. RODNA PROBLEMATIKA U RAZNIM VRSTAMA NOTARSKIH USLUGA

Ovaj dokument sa smjernicama za notarsku praksu u Bosni i Hercegovini "Jačanje rodne ravnopravnosti u oblasti vlasništva i kontrole nad zemljištem" dopunjava "Regionalne smjernice" i predstavlja zbirku važećih pravnih propisa i pozitivne prakse u zemlji, čime notarima u Bosni i Hercegovini nude praktične smjernice koje mogu koristiti u svakodnevnom radu. Dokument je strukturiran u skladu sa osnovnim notarskim uslugama koje su najrelevantnije za ravnopravnost spolova. Za svaku vrstu usluga navodi pravni osnov, spisak ključnih pitanja i kontrolnu listu dokumentacije koju notari mogu koristiti u redovnom radu. Ove smjernice su izrađene u cilju eliminiranja spolne diskriminacije i jačanja ekonomske moći žena. Zasnovane su na važećim pravnim propisima i praksi u zemlji i namijenjene su svim pravnicima, posebno notarima i notarskim komorama, čija je dužnost da provode zakonom utvrđena pravila i postavljaju standarde pozitivne prakse u notarskoj praksi širom zemlje. Zakoni na koje se ove smjernice oslanjaju su usvojeni na nivou entiteta i Brčko distrikta. Shodno tome, analiza pravnog osnova se uvijek oslanja i poziva na pravne instrumente entiteta i Brčko distrikta.

1. IMOVINSKO PRAVO

1.1. Stranka raspolaže sa nekretninom ili upisuje teret na nekretninu

Pravni osnov

Nijedan od zakona o porodičnim i imovinsko-pravnim odnosima u Federaciji Bosne i Hercegovine, Republici Srpskoj i Brčko distriktu koji uređuju imovinsko-pravne odnose u bračnim i vanbračnim zajednicama ne sadrži odredbe koje propisuju da je upisanom vlasniku nekretnine stečene radom za vrijeme trajanja braka ili vanbračne zajednice neophodna saglasnost neupisanog bračnog/vanbračnog partnera da bi izvršio/la prodaju ili na drugi način otuđio/la predmetnu nekretninu. Međutim, sva tri zakona priznaju vlasništvo oba partnera nad nekretninama stečenim za vrijeme trajanja braka, a jedina razlika leži u tome da se režim bračne stečevine u Federaciji Bosne i Hercegovine i Brčko distriktu zasniva na suvlasništvu, a u Republici Srpskoj na zajedničkom vlasništvu. Zbog prirode pravnog statusa takve nekretnine, obaveza dobijanja saglasnosti od drugog, neupisanog bračnog ili vanbračnog partnera proizilazi iz odredbi koje uređuju vrste imovine stečene u vrijeme trajanja bračne ili vanbračne zajednice, kao i iz relevantnih odredbi imovinskog prava koje uređuju suvlasništvo i zajedničko vlasništvo. Konkretno, čaln 252. Porodičnog zakona Federacije Bosne i Hercegovine (u nastavku: "PZ FBiH") i član 229. Porodičnog zakona Brčko distrikta (u nastavku: "PZ BD") propisuju da su bračni partneri suvlasnici bračne stečevine sa jednakim udjelima. To se može promijeniti jedino bračnim ugovorom, a koji mora biti notarski obrađen. Oba zakona propisuju da neupisani bračni partner ima pravo na podnošenje zahtjeva za upis suvlasništva (član 252. PZ FBiH, član 229. PZ BD).

U Republici Srpskoj režim bračne stečevine pretpostavlja zajedničko vlasništvo. Za razliku od suvlasništva, kod zajedničkog vlasništva udjeli nisu unaprijed utvrđeni (mogu se utvrditi ali nisu utvrđeni). Bez obzira na činjenicu da Porodični zakon Republike Srpske (u nastavku: "PZ RS") režim bračne stečevine definiše kao zajedničko vlasništvo, propisana je visina udjela (svako od partnera je vlasnik/ca jedne polovine) (član 272. PZ RS). U isto vrijeme, svako od bračnih partnera može zatražiti udjel veći od polovine ukoliko mogu dokazati da su dali očigledno veći doprinos sticanju bračne stečevine (član 273. PZ RS).

Bez obzira na različitu pravnu prirodu bračne stečevine u različitim dijelovima zemlje, za utvrđivanje bračne stečevine primjenjuju se isti kriteriji. Bračna stečevina je imovina stečena u vrijeme trajanja braka ili vanbračne zajednice. Bračna stečevina obuhvata i indirektnu imovinu, odnosno prihode od imovine stečene u vrijeme trajanja braka. Doprinos ne mora biti jednak, s obzirom da se danas sav rad tokom trajanja zajednice, kao što je npr. vođenje domaćinstva ili briga o djeci, priznaje kao ravnopravan doprinos.

U Federaciji i Brčko distriktu svaki bračni partner može svojom posebnom imovinom samostalno raspolagati ili je prodati, a bračnom stečevinom zajednički i uz saglasnost bračnog partnera u skladu sa općim uslovima koje propisuje imovinsko i obligaciono pravo (član 253. PZ FBiH, član 271. PZ RS, član 230. PZ BD). U Republici Srpskoj jedan bračni partner ne može samostalno raspolagati svojim dijelom bračne stečevine niti je opteretiti pravnom radnjom *inter vivos* (član 271. PZ RS).

Nekretnina koju je jedan bračni partner stekao steklo prije stupanja u brak se smatra njegovom/njenom posebnom imovinom i ta osoba ima pravo na samostalno raspolaganje i prodaju te imovine. Isto važi za nekretnine koje je jedan bračni partner stekao u vrijeme trajanja braka ali na način koji nije propisan zakonom kao način za stjecanje bračne stečevine (nasljeđivanje, poklon namijenjen samo jednom od bračnih partnera, itd.) (član 270. PZ RS, član 254. PZ FBIH, član 231. PZ BD). Zbog toga u slučaju da notar utvrdi da je predmet pravnog posla posebna imovina jednog bračnog partnera, nije potrebna saglasnost drugog bračnog partnera za raspolaganje istom ili upis tereta na njegov/njen dio. Kao potvrdu da je poklon koji je primljen u vrijeme trajanja braka namijenjen samo jednom bračnom partneru, korisno je da notar zatraži ugovor o poklonu koji sadrži odredbu da se poklon daje isključivo navedenom partneru. S druge strane, važno je imati na umu činjenicu da nekretnine stečene nasljeđivanjem ne moraju u cjelosti biti posebna imovina zbog toga što bračni partneri mogu uvećati vrijednost te nekretnine kroz npr. ulaganja ili renovacije. Čak i ako to ne bi značilo da se doprinos drugog bračnog partnera smatra suvlasničkim udjelom, korisno je da notar provjeri da li je bilo značajnih doprinosa koji su uvećali vrijednost te nekretnine. Razlog je to što svaki takav doprinos drugom bračnom partneru omogućava da potražuje vrijednost svog učešća u tom uvećanju vrijednosti. Ako uloženi novac čini dio bračne stečevine, bračni partner koji je dao doprinos ima pravo na 50% uvećanja vrijednosti. Ovo je stvar činjeničnog stanja i zavisi od okolnosti svakog slučaja, tako da dokazivanje može predstavljati izazov.

Bračni partneri mogu odustati od primjene redovnog režima bračne stečevine i bračnim ugovorom odrediti drugačiji način postupanja sa njihovom imovinom (član 252. PZ FBiH, član 271. PZ RS, član 229. PZ BD). Taj ugovor se može zaključiti prije stupanja u brak u obliku predbračnog ugovora koji stupa na snagu po zaključenju braka. U Federaciji Bosne i Hercegovine i Republici Srpskoj bračni ili predbračni ugovor se smatra valjanim ukoliko je načinjen u obliku notarski obrađene isprave (*ad solemnitatem*) (član 259. PZ FBiH, član 271. PZ RS), dok se u Brčko distriktu ugovor može zaključiti u obliku notarski obrađene isprave ili pred drugim javnim organom (član 235. PZ BD). U svim predmetima u kojima je prisutan, notar mora upozoriti stranke da bračni ugovor isključuje primjenu redovnog režima bračne stečevine. Notar u svojstvu neutralne treće strane mora posavjetovati oba (buduća) bračna partnera u cilju iznalaženja ravnopravnog i poštenog rješenja koje će zaštiti obje stranke i koje je u skladu sa zakonom.

Sve navedeno u vezi s postojanjem i raspodjelom bračne stečevine se također odnosi i na imovinu stečenu u vanbračnoj zajednici (član 263. PZ FBIH, član 284. PZ RS, član 240. PZ BD). Vanbračni partneri imaju ista prava i obaveze u pogledu vlasništva i međusobne podrške kao bračni partneri, u skladu sa zakonom propisanim uslovima. Imovina stečena radom u vrijeme trajanja vanbračne zajednice se tretira isto kao bračna stečevina: kao suvlasništvo u FBIH i BD i kao zajedničko vlasništvo u RS (član 12. PZ RS). Ne smatra se svaka zajednica muškarca i žene vanbračnom zajednicom. Prvo, vanbračna zajednica pretpostavlja trajniju zajednicu muškarca i žene, pod pretpostavkom da ne postoje prepreke koje bi spriječile zaključenje braka između njih. U Federaciji BiH i Brčko distriktu ova zajednica mora trajati najmanje tri godine ili manje u slučaju da imaju dijete. Ovaj drugi preduslov nije propisan u Republici Srpskoj, gdje se traži određeni period trajanja zajednice samo u smislu međusobne podrške, bez obzira da li imaju biološku djecu ili ne.

Posljedice

Ukoliko je imovina pod suvlasničkim režimom, udjeli se određuju proporcionalno (“idealni dijelovi”). Stoga svaki bračni/vanbračni partner ima pravo prodati svoj suvlasnički udjel bez saglasnosti drugog bračnog/vanbračnog partnera. U Federaciji Bosne i Hercegovine i Brčko distriktu, u slučaju da jedan

partner prodaje svoj suvlasnički udjel, drugi partner ima pravo preče kupovine, ali samo ukoliko se radi o nepokretnoj imovini. To je uređeno članom 27. Zakona o stvarnim pravima Federacije Bosne i Hercegovine (u nastavku: "ZSP FBIH") i člana 55. Zakona o vlasništvu i drugim stvarnim pravima Brčko distrikta (u nastavku: "ZSP BD").

Zakon o stvarnim pravima Federacije Bosne i Hercegovine detaljno uređuje postupak ostvarivanja prava preče kupovine, u kojem notar igra važnu ulogu. U Republici Srpskoj nije propisano pravo preče kupovine.

Svaki suvlasnik ima pravo u bilo kom trenutku podnijeti zahtjev za diobu imovine, izuzev u trenutku kada bi se tom diobom nanijela šteta drugim suvlasnicima, osim ako je drugačije popisano zakonom. Ugovor kojim bi se suvlasnik trajno odrekao svog prava na diobu imovine koja je predmet suvlasništva se smatra nevažećim. Suvlasnici sporazumno određuju način podjele njihove imovine, a u slučaju da sporazum nije moguć odluku donosi sud. Ukoliko se nekretnina ne može fizički podijeliti ili bi takva podjela rezultirala značajnim smanjenjem vrijednosti predmetne nekretnine, sud donosi odluku o diobi putem prodaje nekretnine.

Imovinska prava su ista za bračne i vanbračne zajednice. Stoga se sva pravila koja se odnose na imovinsko-pravne odnose između bračnih partnera jednako primjenjuju i na vanbračne zajednice. U praksi se dešava da je stranka koja prodaje nekretninu samac/samica u trenutku prodaje, ali je možda nepokretnu imovinu stekao/la u vrijeme trajanja bračne ili vanbračne zajednice. Ako je stranka koja raspolaže imovinom upisana u zemljišne knjige i ako nije izvršena sporazumna ili sudska dioba, na taj pravni posao se primjenjuju odredbe o raspolaganju ili upisu tereta na bračnu stečevinu i notar mora zatražiti saglasnost bivšeg bračnog/vanbračnog partnera prije izvršenja pravnog posla.

U slučaju da treća strana kupuje imovinu koja čini dio prodavčeve bračne stečevine, takva kupoprodaja je pravno zaštićena pod pretpostavkom da se treća strana pouzdala u tačnost podataka upisanih u zemljišne knjige i u tom trenutku nije imala povoda za bilo kakvu sumnju. Ne postoji obaveza utvrđivanja neupisanog činjeničnog stanja da bi se smatralo da kupac pristupa kupovini u najboljoj namjeri. Međutim, u slučaju da je on/ona upoznat/a sa činjenicama koje bi mogle utjecati na pravni posao, ne smije ih ignorisati obrazlažući to nepostojanjem obaveze da utvrdi činjenično stanje. To je propisano članovima 55. i 56. ZSP FBIH, članovima 35. i 36. ZSP BD, te članovima 55. i 56. Zakona o stvarnim pravima Republike Srpske (u nastavku: "ZSP RS").

Pored toga, u ovakvim slučajevima notari igraju ključnu ulogu stoga što naglašavaju potrebu za provjerom da li je predmetna imovina stečena u vrijeme trajanja braka i da li je u suvlasništvu bračnog partnera. Ukoliko je odgovor potvrdan, za valjanu kupoprodaju neophodna je saglasnost neupisanog bračnog partnera. S druge strane, izjava da ta imovina predstavlja posebnu imovinu nosi značajne posljedice i notar ima dužnost da o tome obavijesti davatelja te izjave.

Vanbračna zajednica je definisana kao trajna zajednica muškarca i žene, u minimalnom trajanju od tri godine. Ukoliko su partneri imali djecu, trajanje te zajednice može biti i kraće. Važno je napomenuti da sve dok postoji prethodni brak, pored zajedničkog života, vanbračna zajednica ne može dobiti pravni status i učinak. To je slučaj bez obzira da li vanbračni partneri imaju djecu ili ne. Imovina koju su partneri stekli radom u periodu zajedničkog života u vanbračnoj zajednici se smatra suvlasništvom ukoliko žive na teritoriji Federacije ili Brčko distrikta, odnosno zajedničkom imovinom ako žive na teritoriji Republike Srpske.

S obzirom da datum i pravni osnov sticanja imovine predstavljaju ključne faktore pri utvrđivanju obaveze da se prije izvršenja pravnog posla zatraži saglasnosti drugog bračnog partnera, podaci o vremenu i pravnom

osnovu sticanja bi se trebali unositi u zemljišne knjige. Bilo bi vrlo korisno ako bi upisna dokumentacija u digitalnom obliku bila dostupna na uvid i korištenje osobama koje mogu dokazati da imaju pravni interes, uz zaštitu ličnih podataka. U tom slučaju bi sve zainteresovane strane mogle lako izvršiti uvid i steći jasnu sliku o režimu koji se primjenjuje. Time bi se olakšao postupak dubinske analize.

Važno je naglasiti da bračni partner može ali ne mora dati svoju saglasnost. Notar je dužan da obavijesti bračnog partnera ukoliko se imovina po zakonu smatra bračnom stečevinom, odnosno ako se može prodati samo uz saglasnost oba bračna partnera. Prodaja bračne stečevine koja spada pod režim bračne stečevine bez saglasnosti neupisanog bračnog ili vanbračnog partnera se može osporiti sudskim putem. Zbog toga je jako važno ne posmatrati obavezu traženja saglasnosti bračnog partnera kao običnu formalnost kojom se ograničava odgovornost notara, već neupisanog partnera treba obavijestiti i upoznati s njegovim/njenim pravima i obavezama vezanim za bračnu stečevinu i time da ima pravo dati ili uskratiti svoju saglasnost na predmetni pravni posao, kao i pravnim posljedicama bilo koje radnje koju preduzme.

Ista pravila se primjenjuju i na upis pravnog tereta na nekretninu, u kom slučaju notar traži saglasnost bračnog partnera za formiranje i upis tereta ako je samo jedan bračni/vanbračni partner upisan kao vlasnik a nekretnina je stečena u vrijeme trajanja bračne zajednice ili vanbračne zajednice. I u ovom slučaju bi notar trebao obavijestiti drugog bračnog/vanbračnog partnera o tome šta je bračna stečevina i posljedicama davanja ili uskraćivanja saglasnosti za formiranje i upis tereta.

Pretpostavljeno postojanje bračne stečevine od notara zahtijeva da izvrši dubinsku analizu na osnovu datuma i pravnog osnova za sticanje nepokretne imovine kako bi sagledao da li se ta imovina treba smatrati bračnom stečevinom ili posebnom imovinom, odnosno da bi utvrdio da li je osoba koja prodaje ili upisuje teret na nekretninu u tom trenutku živjela u bračnoj ili vanbračnoj zajednici. Prosto pouzdavanje u podatke iz zemljišnih knjiga nije dovoljno i notar se mora aktivno angažovati po ovom pitanju.

U relevantnim slučajevima, notar mora stranke suočiti sa sljedećim pitanjima uz korištenje dokumenata nabrojanih u kontrolnoj listi ispod. Važno je da notar iskoristi sve raspoložive informacije i kritički sagleda odgovore stranaka da bi utvrdio istinu. Notar nema obavezu niti je ovlašten za provođenje službenih istraga, ali mora iskoristiti sve raspoložive informacije da bi utvrdio stvarno stanje. Pored toga, notar mora dokumentovati sve nalaze vezane za režim bračne stečevine u datoj ispravi.

Relevantna pitanja

- Ko je upisani vlasnik?
  - Da li je upisani vlasnik zakoniti vlasnik ili postoji sumnja u pogledu vlasništva?
  - Da li postoje drugi upisani vlasnici?
- Kakav je lični status stranke: da li je stranka oženjena/udata ili živi u vanbračnoj zajednici; da li je stranka bila oženjena/udata ili je živjela u vanbračnoj zajednici u trenutku sticanja predmetne nekretnine?
  - Postavite pitanja strankama i objasnite im da su dužni dati istinite odgovore i pomoći Vam da dođete do relevantnih informacija i dokumenata.
  - Ukoliko postoji bilo kakva sumnja u vezi s odgovorima koje ste dobili od stranke, provjerite dostupne izvore informacija (bazu podataka o strankama, ranije evidentirane akte, javne evidencije, pretraga na internetu).
- Ako postoji bračni/vanbračni partner, da li je on/ona saglasan/na sa izvršenjem pravnog posla?
  - Obavijestite bračnog partnera Vaše stranke o njegovim/njenim pravima i interesima vezanim za nekretninu
  - Informišite bračnog partnera vaše stranke da ima pravo dati ili ne dati svoju pismenu saglasnost sa pravnim poslom.
  - Obavijestite stranke o obavezi zajedničkog upisa vlasništva.
- Informišite drugu stranu da li je i na koji način zaštićena pri kupovini prava u dobroj namjeri.
- Koji se imovinski režim primjenjuje na predmetnu nekretninu: da li je nekretnina predmet bračnog ugovora, ugovora o upravljanju i raspolaganju suvlasničkom/zajedničkom imovinom ili drugom ugovoru koji mijenja redovni režim bračne stečevine? Da li su bračni partneri izvršili podjelu imovine na osnovu tog ugovora?
- Da li je imovina sudski podijeljena ili se predmet nalazi u sudskoj proceduri?
- Kada je nekretnina stečena i po kojem pravnom osnovu: da li je nekretnina stečena/unaprijeđena radom u vrijeme trajanja bračne ili vanbračne zajednice? Da li je kredit za nekretninu otplaćen u vrijeme dok je stranka živjela u bračnoj/vanbračnoj zajednici?
- Da li je prisutna posebna imovina: da li je nekretnina primljena kao poklon na osnovu ugovora o poklonu ili nasljeđivanjem ili po nekom drugom pravnom osnovu? Da li je poklon bio namijenjen samo jednom bračnom partneru? Da li su bračni partneri ulagali kako bi uvećali vrijednost posebne imovine stečene nasljeđivanjem?

Kontrolna lista

- Zemljišnoknjižni izvadak za predmetnu nekretninu.
- Lični dokument stranke ili vjenčani list, rodni list, izjava oba partnera o vanbračnoj zajednici pod pretpostavkom da ne postoje prepreke za sklapanje braka, sudsko rješenje o razvodu ili poništenju braka, itd. i informacije o prethodnim bračnim ili vanbračnim zajednicama.
- Ugovor o prijenosu nekretnine, odluka suda ili javne institucije kao pravni osnov po kojem je nekretnina stečena (ukoliko postoji).
- (Po potrebi) sporazumno ili sudsko rješenje o podjeli imovine, odnosno ugovor kojim se mijenja redovni režim bračne stečevine (bračni ugovor, ugovor o ustupanju i raspolaganju nekretninom, itd.).
- Saglasnost bračnog/vanbračnog partnera/bivšeg partnera obuhvaćena ugovorom ili data kao zasebna pismena (notarski ovjerena) izjava ukoliko nekretnina potpada pod redovni režim bračne stečevine, odnosno da li se isti primjenjuje na osnovu ugovora kojim je uređen režim za predmetnu nekretninu.
- Ugovor kojim se uspostavlja režim bračne stečevine ili ugovor koji mijenja redovni režim bračne stečevine za predmetnu nekretninu (ako postoji).
- Saglasnost bračnog/vanbračnog partnera/bivšeg partnera uključena u izjavu o hipoteci ili hipotekarni ugovor.
- Ugovor o poklonu sa odredbom o tome da se poklon daje isključivo jednom bračnom partneru kao njegova/njena posebna imovina.

1.2. Stranka stiče nekretninu

Iako obaveza zajedničkog upisa nije izričito propisana, notari bi stranku koja stiče nekretninu, a koja ima status bračnog partnera ili vanbračnog partnera, trebali upozoriti da će se predmetna nekretnina smatrati bračnom stečevinom i da neupisani bračni/vanbračni partner samim tim ima pravo podnijeti zahtjev za upis ili eventualno zahtjev za izuzimanje u ostavinskoj raspravi ukoliko upis nije izvršen u vrijeme trajanja braka, osim u slučaju da je izričito navedeno da se nekretnina stiče u svojstvu posebne imovine. Ovo je posebno važno ako kupac troši novac stečen u vrijeme trajanja zajednice. Da bi se spriječio upis nekretnine na jednog vlasnika u slučaju da je predmetna nekretnina zapravo suvlasništvo ili zajedničko vlasništvo partnera, notar od kupca treba zatražiti izjavu da nekretninu stiče kao posebnu imovinu.

S obzirom da bračna i vanbračna zajednica proizvode ista imovinska prava i obaveze, ako stranka koja stiče nekretninu tvrdi da živi u vanbračnoj zajednici koja zadovoljava zakonske uslove i može biti priznata kao takva, najbolje je pozvati oba partnera da učestvuju u pravnom poslu i izvrše upis suvlasništva u FBIH i BD, odnosno zajedničkog vlasništva u RS, tj. različito u svakoj upravnoj cjelini shodno međusobnom dogovoru.

U Bosni i Hercegovini ne postoji registar vanbračnih zajednica i stoga se notar oslanja na informacije primljene od stranaka, objašnjava im posljedice davanja lažne izjave i utvrđuje postojanje pravnih prepreka za sklapanje braka.

Međutim, notar ne može stranci koja stiče nekretninu nametnuti obavezu da izvrši upis zajedno sa svojim bračnim/vanbračnim partnerom pošto postoje razni razlozi zbog kojih bi stranka željela biti jedini vlasnik nekretnine, ali notar je dužan stranku upozoriti o svim posljedicama kao i pravima koje neupisani bračni/vanbračni partner ima na predmetnu nekretninu.

U Republici Srpskoj notar je dužan stranke upozoriti da bračni partneri prilikom sticanja nekretnine mogu izvršiti diobu i utvrditi suvlasničke udjele, u kom slučaju se obje stranke pojavljuju kao potpisnici u pravnom poslu i vrše upis svog ugovorenog dijela.

Relevantna pitanja

- Kakvo je bračno stanje stranke: da li je stranka oženjena/udata ili živi u vanbračnoj zajednici u trenutku sticanja predmetne nekretnine?
- Po kojem pravnom osnovu se nekretnina stiče: da li je nekretnina stečena radom u vrijeme trajanja bračne ili vanbračne zajednice, ili je stečena po osnovu ugovora o poklonu, nasljeđivanja ili drugog zakonitog pravnog posla koji bi mogao rezultirati sticanjem posebne imovine?
- Koji se imovinski režim primjenjuje na nekretninu: da li stranka ima zaključen bračni ugovor ili postoje informacije koje bi upućivale na primjenu drugog imovinskog režima?
- Da li je stranka upoznata sa činjenicama vezanim za nekretninu koju kupuje, a koje nisu navedene na zemljišnoknjižnom izvodu? (U slučaju da stranka kupuje nekretninu koja je bračna stečevina prodavca.)

Kontrolna lista

- ✔ Lični dokument ili vjenčani list stranke, rodni list, izjava o zajedničkom životu, sudsko rješenje o razvodu ili poništenju braka, itd.
- ✔ Pravni osnov po kojem stiče nekretninu (kao sastavni dio ugovora).
- ✔ Sporazum između partnera kojim se mijenja redovni režim bračne stečevine (bračni ugovor, ugovor o upravljanju i raspolaganju nekretninom, itd.).

II.
NASLJEĐIVANJE

2.1. Utvrđivanje bračnog stanja ostavitelja

Jedan od bitnih faktora u ostavinskim postupcima je utvrđivanje bračnog stanja i imovine ostavitelja. Notar utvrđuje bračno stanje umrlog u trenutku smrti i u trenutku sticanja nekretnine koja čini dio njegove/njene ostavštine. Ukoliko je ostavitelj bio/la u braku u trenutku smrti, prvi nasljedni red čine njegov/njen preživjeli bračni partner i djeca u jednakim dijelovima.

To je uređeno članom 10. Zakona o nasljeđivanju Federacije Bosne i Hercegovine (u nastavku: "ZN FBIH"), članom 9. Zakona o nasljeđivanju Republike Srpske (u nastavku: "ZN RS") i članom 10. Zakona o nasljeđivanju Brčko distrikta (u nastavku: "ZN BD").

Ne pravi se razlika između muške i ženske djece ostavitelja. Svi potomci ostavitelja imaju isti status. Ukoliko ostavitelj nije imao/la djecu, bračni partner nasljeđuje jednu polovinu ostavštine u drugom nasljednom redu zajedno sa roditeljima ostavitelja (član 12. ZN FBiH, član 11. ZN RS, član 12. ZN BD).

Bračne i vanbračne zajednice dijelom proizvode ista prava nasljeđivanja. Preživjeli muški i ženski partneri imaju jednako pravo nasljeđivanja dijela ostavštine u Federaciji Bosne i Hercegovine i Brčko distriktu Bosne i Hercegovine (član 9. ZN FBIH, član 9. ZN BD), dok u Republici Srpskoj partneri i dalje nemaju pravo nasljeđivanja imovine jedni od drugih.

Posebnu pažnju treba obratiti u slučajevima gdje je ostavitelj bio/la samac/samica u trenutku smrti ali je živio/la u bračnoj ili vanbračnoj zajednici u trenutku sticanja nekretnine radom za vrijeme trajanja bračne ili vanbračne zajednice. U takvim slučajevima nekretninu treba tretirati kao zajedničku bračnu stečevinu oba partnera i notar mora izvršiti dubinsku analizu radi utvrđivanja i zaštite prava svih interesnih strana u skladu sa važećim propisima koji uređuju bračnu stečevinu i nasljeđivanje. Nekretnina je možda upisana samo na ime ostavitelja, ali ako je stečena u vrijeme trajanja bračne ili vanbračne zajednice neupisani bračni ili vanbračni partner ima preče pravo da zatraži diobu imovine u skladu sa važećim propisima o bračnoj stečevini prije bilo kakve diobe imovine u nasljednom postupku.

Relevantna pitanja

- Da li ostavitelj ima testament ili drugi dokument bitan za nasljeđivanje? Da li se pri podjeli vlasničkih udjela u nekretnini moraju uzeti u obzir zakonski nasljednici (bračni partner, djeca, itd.)?
- Da li je ostavitelj živio/la u vanbračnoj zajednici u trenutku smrti ili u trenutku sticanja nekretnine koja čini dio ostavštine?
- Da li je ostavitelj imao bračni ugovor o posebnom režimu bračne stečevine?

Kontrolna lista

- ✔ Lični dokument ostavitelja ili smrtovnica, vjenčani list, rodni list, sudsko rješenje o razvodu ili poništenju braka.

- ✔ Uvid u registar testamenata.
- ✔ Lični dokument nasljednika ili rodni list, vjenčani list, smrtovnica, sudsko rješenje o razvodu ili poništenju braka.
- ✔ Ugovor koji uređuje poseban režim bračne stečevine.
- ✔ Izvod iz zemljišne knjige.
- ✔ Ugovor o prijenosu nekretnine, odluka suda ili javne institucije (pravni osnov po kojem je nekretnina prethodno stečena).

2.2. Dužnost obavještavanja, informisanja i pozivanja svih nasljednika na ostavinsku raspravu

U postupku diobe ostavštine, notar mora utvrditi nasljednike, nekretnine koje ulaze u ostavštinu i koja prava na ostavštinu pripadaju nasljednicima i drugim strankama. Notari moraju osigurati da su svi nasljednici utvrđeni, formalno obaviješteni i pozvani da učestvuju u postupku.

Notar je dužan izvršiti provjeru da li je drugi notar već proveo postupak za tog ostavitelja, kako ne bi došlo do dvostruke diobe ostavštine. Notar pored toga mora osigurati i da su stranke pozvane da učestvuju u postupku. Ovi koraci su izuzetno važni zbog toga što se nakon izdavanja konačnog rješenja o diobi naslijeđa, ostavština ne može ponovo dijeliti. To je propisano članom 251. ZN FBIH, članom 254. ZN BD, te članom 138. Zakona o vanparničnom postupku Republike Srpske (u nastavku: "ZVP RS"). Ponavljanje postupka isto tako nije moguće, već se stranka upućuje na sud radi parničnog postupka (član 253. ZN FBIH, član 138. ZVP RS, član 254. ZN BD).

U slučaju da nije sasvim jasno da li ostavitelj ima nasljednika ili nije sigurno da su svi nasljednici pronađeni, ili u slučaju da je nasljedniku čije je boravište nepoznato dodijeljen privremeni zastupnik, a nasljednik nema advokata, ili ako nasljednik ili njegov zakonski zastupnik, a koji nema advokata, boravi u inostranstvu i stoga mu/joj nije moguće uručiti poziv, sud će uputit javni poziv za osobe koje tvrde da imaju vlasnički interes u ostavštini da se jave sudu u roku od jedne godine od objave obavještenja na oglasnoj tabli suda, u relevantnom javnom glasniku ili na drugi odgovarajući način (član 235. ZN FBiH, član 124. ZVP RS, član 239. ZN BD).

U pozivu na raspravu notar navodi predmet rasprave i obavještava pozvane stranke koje dokumente trebaju dostaviti (član 234. ZN FBiH, član 123. ZVP RS, član 238. ZN BD).

Relevantna pitanja

- Da li ostavitelj ima testament?
- Da li je ostavitelj imao/la djecu?

- Da li je ostavitelj imao/la bračnog ili vanbračnog partnera?
- Da li je ostavitelj imao/la roditelje, braću i sestre ili druge rođake?
- Na kojoj adresi borave?
- Da li bilo ko od njih živi u inostranstvu?

Kontrolna lista

- ✔ Uvid u registar testamenata.
- ✔ Uvid u sudski registar.
- ✔ Poziv na raspravu i potvrda prijema.
- ✔ Smrtovnica.
- ✔ Za nasljednika: lični dokument ili rodni list, vjenčani list, smrtovnica nasljednika, rješenje o razvodu, rješenje o nasljeđivanju, itd.
- ✔ Obavještenje na oglasnoj ploči suda, u službenom glasniku ili u međunarodnom glasniku.

2.3. Zaštita prava i interesa zakonskih nasljednika u slučaju da postoji testament

Zakonski nasljednici su potomci umrlog, usvojenici i njihovi potomci, bračni partner, roditelji, usvojitelji, braća i sestre, bake i djedovi i drugi predci. Usvojenik iz nepotpunog usvojenja, braća i sestre umrlog, njegovi/njeni djedovi i bake i drugi predci su nužni nasljednici samo ako su pozvani kao nasljednici u datom predmetu u svojstvu zakonskih nasljednika i ako su trajno nesposobni za rad i nemaju dovoljno neophodnih sredstava za život (član 28. ZN FBiH, član 30. ZVP RS, član 32. ZN BD).

Zakonski nasljednici imaju pravo nasljeđivanja dijela ostavštine kojim ostavitelj nije mogao/la raspolagati i koji po zakonu pripada garantovanom dijelu. Nužni dio koji pripada potomcima, usvojenicima i njihovim potomcima i bračnom partneru umrlog iznosi jednu polovinu dijela naslijeđa na koji bi imali pravo da su zakonski nasljednici, dok ostali zakonski nasljednici imaju pravo na trećinu dijela koji bi svakome od njih pripadao po zakonskom nasljednom redu.

Na početku ostavinskog postupka notar utvrđuje da li je ostavitelj imao/la testament i da li je raspolagao/la svojom nekretninom na osnovu ugovora (ugovora o doživotnom izdržavanju, ugovora o ustupanju i raspodjeli imovine ili ugovora o nasljeđivanju). Ukoliko se bilo koji od tih ugovora odnosi na nekretnine, ostavinski postupak za nekretnine koje su predmet ugovora ove vrste se obustavlja pošto ugovori ove vrste imaju pravo prvenstva.

Notar treba pročitati testament, nakon čega nasljednici daju svoje izjave o nasljeđivanju.

S obzirom da nužni dio predstavlja dio ostavštine kojom umrli nije mogao/la raspolagati, notar će nužne nasljednike obavijestiti o njihovom pravu da traže svoj dio, kao i o prirodi i veličini nužnog dijela, pod uslovom da je cijela ostavština obuhvaćena testamentom ili ugovorom o nasljeđivanju. Povreda nužnog dijela nastaje u slučaju da je vrijednost raspolaganja testamentom i poklona učinjenih zakonskom nasljedniku ili osobi umjesto koje on/ona stiče nasljedno pravo manja od nasljednikovog zakonskog dijela. U slučaju da nema spora između nasljednika, postupak se okončava kod notara. U suprotnom, nasljednici se upućuju na parnični postupak. Nasljednici se upućuju na parnični postupak i u slučaju da između njih postoji spor u vezi sa zahtjevima za umanjenje raspolaganja testamentom i/ili poklonom.

Međutim, svako odricanje ili izjava o odricanju ili prihvatanju naslijeđa je neopoziva, čak i u parničnom postupku. Zato je važno da notar obavijesti učesnike u ostavinskom postupku o njihovim pravima, kako ista ne bi kasnije potraživali parničenjem.

U slučaju da nasljednik ospori testament (nasljednik može tvrditi da testament krši obavezne odredbe, da ostavitelj nije bio pri punoj svijesti, itd.) stranke se upućuju na parnični postupak (član 239. ZN FBiH, član 127. ZVP RS, član 243. ZN BD).

Relevantna pitanja

- Da li je nekretnina bila predmet ugovora o doživotnom izdržavanju, ugovora o upravljanju i raspodjeli sredstava za života ostavitelja ili ugovora o nasljeđivanju?
- Da li ostavitelj ima testament?
- Da li je testament sačinjen u skladu sa zakonski propisanim zahtjevima u pogledu forme i sadržaja?
- Da li postoji drugi testament?
- Da li bilo ko od nasljednika ima pravo na nužni dio?
- Da li zakonski nasljednici potražuju nužni dio?
- Da li nasljednici prihvataju ili se odriču naslijeđa?
- Da li nasljednici prihvataju ili osporavaju testament?

Kontrolna lista

- ✔ Ugovor o doživotnom izdržavanju.
- ✔ Ugovor o ustupanju i raspodjeli imovine za života ostavitelja.
- ✔ Ugovor o nasljeđivanju.

- ✔ Testament ostavitelja.
- ✔ Izjava o nasljeđivanju.
- ✔ Izjava zakonskog nasljednika o tome da li prihvata ili osporava testament.
- ✔ Izjava zakonskog nasljednika o tome da li potražuje zakonski dio.

2.4. Informisanje preživjelog bračnog partnera da može zahtijevati izdvajanje svog dijela bračne stečevine iz ostavštine

Obaveza informisanja preživjelog bračnog ili vanbračnog partnera je zasnovana na zakonom propisanom režimu bračne stečevine, odnosno režimu vanbračne stečevine. Ukoliko ništa nije sporno, notar iz ostavštine izdvaja dio koji pripada preživjelom bračnom ili vanbračnom partneru po osnovu bračne stečevine. S obzirom da bračne i vanbračne zajednice proizvode ista prava i obaveze u pogledu imovine, notar može obavijestiti strane da, ukoliko ništa nije sporno po pitanju partnerovog udjela u zajedničkoj imovini, mogu zaključiti sporazum s partnerom. U slučaju spora, notar obavještava partnera da svoja prava može ostvariti sudskim putem. Ukoliko između strana postoji spor koji se ne odnosi samo na pravo na partnerski dio već i na veličinu istog, notar u svakom slučaju upućuje stranke na parnični postupak (član 239. ZB FBiH, član 127. LN RS, član 243. ZN BD). To je slučaj i ako se osporava status vanbračnog partnera. Ovo najčešće čine djeca preminule osobe. Njegov/njen status mora biti utvrđen prije nego što notar nastavi sa podjelom imovine.

U praksi se upis vrlo često vrši samo na ime jednog bračnog ili vanbračnog partnera iako je nekretnina stečena radom u vrijeme trajanja bračne ili vanbračne zajednice. Čak i ako je ostavitelj upisan kao jedini vlasnik nekretnine, ne postoji valjan osnov za podjelu cijele nekretnine među nasljednicima obzirom da se dio koji pripada preživjelom bračnom/vanbračnom partneru mora izuzeti iz ostavštine. Notar ima dužnost da iskoristi sva dostupna sredstva kako bi utvrdio prirodu nekretnine, posebno dole navedenih dokumenata.

Relevantna pitanja

- Kada je nekretnina stečena?
- Po kojoj pravnoj osnovi je stečena?
- Da li je ostavitelj živio/la u vanbračnoj zajednici u trenutku smrti ili u trenutku sticanja nekretnine?
- Da li je ostavitelj imao/la bračni ugovor ili drugi ugovor koji mijenja redovni režim bračne stečevine?
- Da li bračni partner zahtijeva izdvajanje njegovog/njenog dijela bračne stečevine iz ostavštine?
- Da li su nasljednici saglasni ili osporavaju taj zahtjev?

- Da li su drugi nasljednici saglasni sa zaključenjem sporazuma sa partnerom ostavitelja o njegovom/njenom vlasničkom udjelu u nekretnini?

Kontrolna lista

- ✔ Lični dokument ili vjenčani list.
- ✔ Izvod iz zemljišne knjige.
- ✔ Ugovor o prijenosu nekretnine, sudsko rješenje ili rješenje javne institucije (pravni osnov po kojem je nekretnina stečena).
- ✔ Sporazum između partnera kojim se mijenja redovni režim bračne stečevine (bračni ugovor, itd.).
- ✔ Izdvajanje partnerovog dijela iz ostavštine, u sklopu odluke o nasljeđivanju.
- ✔ Sporazum između nasljednika i partnera.

2.5. Informisanje preživjelog člana porodice da može zadržati pravo na korištenje nekretnine uz saglasnost svih nasljednika

Ovu opciju ne predviđa nijedan od važećih zakona o nasljeđivanju u Bosni i Hercegovini. Međutim, ne postoje pravne prepreke koje bi spriječile zaključenje takvog ugovora u praksi, pod uslovom da su svi nasljednici saglasni. Ovakva praksa bi uveliko doprinijela osnaženju žena, posebno ako je nekretnina bila upisana samo na ime umrlog bračnog ili vanbračnog partnera, a preživjela partnerica je živjela zajedno s njim u zajedničkom bračnom domu. Ukoliko se ovo čini kao adekvatno rješenje, notari mogu posavjetovati stranke da svoje testamente pripreme na odgovarajući način i time uspostave pravo korištenja za svog bračnog partnera.

Relevantna pitanja

- Da li je nekretnina koja je predmet diobe bila primarno mjesto stanovanja bilo koga od nasljednika?
- Da li je bračni/vanbračni partner živio/la sa ostaviteljem u bračnoj kući?
- Da li su drugi nasljednici saglasni da korisniku dodijele doživotno pravo na nekretninu?

Kontrolna lista

- ✔ Izjava o prihvatanju naslijeđa i sporazum nasljednika o uspostavljanju doživotnog prava pred notarem.

2.6. Informisanje nasljednika o posljedicama odricanja od naslijeđa

Nasljednik se smatra vlasnikom svog dijela naslijeđa od trenutka smrti ostavitelja. Naime, ostavština umrlog se po zakonu prenosi na njegove/njene nasljednike u trenutku smrti (član 162. ZN FBiH, član 153. ZN RS, član 167. ZN BD). Prijenos se vrši u trenutku smrti, tako da je nosilac prava na nekretninu poznat u svakom trenutku.

Međutim, bez obzira na primjenu načela univerzalnog nasljeđivanja po kojem se sva prava i obaveze prenose sa ostavitelja na nasljednike, svi nasljednici imaju pravo da odbiju svoj dio naslijeđa. To mogu učiniti davanjem izjave o odricanju od naslijeđa. Ova izjava predstavlja izričit, jasan, strogo formalan i neopoziv iskaz volje potencijalnog nasljednika, dat u propisanom roku, u svrhu odricanja od naslijeđa. Nasljednik se može odreći naslijeđa davanjem izjave ispred notara do okončanja prvostepenog ostavinskog postupka. Smatra se da nasljednik koji se odrekao naslijeđa nikada nije ni bio nasljednik (član 163. ZN FBiH, član 154. ZN RS, član 168. ZN BD). Ukoliko se nasljednik nije odrekao naslijeđa do okončanja prvostepenog ostavinskog postupka, smatra se da je prihvatio naslijeđe. Nasljednik može dati izjavu o prihvatanju, ali ta izjava nije obavezna i niko ne je mora dati da bi se smatrao nasljednikom (član 237. ZN FBiH, član 126. ZN RS, član 241. ZN BD). Ako je nasljednik prihvatio ili se odrekao naslijeđa, mora lično ili putem zastupnika potpisati izjavu o tome. Potpis na izjavi o prihvatanju ili odricanju od ostavštine koja se u pismenom obliku podnosi sudu/notaru, kao i potpis na punomoći, mora biti notarski ovjeren. Izjava sadrži precizan opis ostavštine koja je predmet prihvatanja ili odricanja (član 237. ZN FBiH, član 126. ZN RS, član 241. ZN BD).

Odricanje od naslijeđa ima značajan utjecaj na nasljednika, posebno ženske nasljednike i označen je kao jedan od glavnih razloga zašto žene, posebno žene koje žive u ruralnim područjima, rijetko imaju nekretnine upisane na njihovo ime. Zbog toga što je odricanje neopozivo, poseban naglasak treba staviti na savjetovanje ženskih nasljednika o neopozivosti ove odluke, kao i o važnosti i dugoročnim posljedicama svih radnji koje preduzmu u datom ostavinskom postupku. Notar ne može zauzimati strane i mora ostati nepristrasan u svim predmetima, ali treba obratiti pažnju na kulturološke obrasce po kojima se muškarci smatraju biti vlasnicima zemlje jer su oni ti koji zarađuju novac za porodicu. Odluke nasljednika su često vođene ovakvom kulturološkom praksom i dužnost notara je da u najvećoj mogućoj mjeri zaštiti njihovu istinsku slobodnu volju prije uzimanja izjave od nasljednika.

Odricanje od nasljedstva u korist drugih osoba se smatra izjavom o prihvatanju uz istovremeni prijenos udjela u naslijeđu (član 166. ZN FBiH, član 157. ZN RS, član 171. ZN BD). U praksi to vodi do isprave o poklonu, koja potencijalno može imati porezne implikacije.

Relevantna pitanja

- Da li nasljednik prihvata naslijeđe?
- Da li se nasljednik odriče naslijeđa?
- Da li nasljednik koji se odrekao naslijeđa ima potomke?

- Da li oni prihvataju ili se odriču naslijeđa?
- Kakve razloge i motivaciju navode stranke?
- Da li su stranke potpuno svjesne posljedica davanja bilo kakve izjave o nasljeđivanju?

Kontrolna lista

- ✔ Izjava o nasljeđivanju se daje lično pred notarom ili u obliku pismene (notarski ovjerene) izjave.
- ✔ Izjava o nasljeđivanju data pred notarom posredstvom zastupnika ovlštenog na osnovu notarski ovjerene punomoći.

2.7. Ugovori o nasljeđivanju

Zakon o nasljeđivanju u Bosni i Hercegovini priznaje tri vrste ugovora o nasljeđivanju: ugovor o ustupanju i raspodjeli imovine za života (članovi 135.-145. ZN FBiH, članovi 128-138. ZN RS, članovi 139-149. ZN BD), ugovor o doživotnom izdržavanju (članovi 146.-154. ZN FBiH, članovi 139.-145. ZN RS, članovi 150-159. ZN BD) i ugovor o nasljeđivanju (članovi 125.–134. ZN FBiH, članovi 130.–134. ZN BD). Sve tri vrste ugovora se zaključuju u obliku notarski obrađene isprave. To podrazumijeva aktivnu, temeljnu i nepristrasnu savjetodavnu ulogu notara koja stvara pravnu sigurnost i puno povjerenje stranaka i osigurava da su stranke adekvatno upoznate sa važnošću i posljedicama svih relevantnih elemenata vezanih za ugovor. Dužnost notara je da posebno upozori stranke o tome da nekretnina koja je predmet ugovora neće činiti dio ostavštine i da nasljednici, bez obzira da li nasljeđuju po zakonu ili na osnovu testamenta, ne mogu polagati pravo na tu nekretninu.

Ukoliko je ostavitelj zaključio ugovor o raspodjeli imovine među svojim potomcima, svi potomci moraju biti saglasni sa tom raspodjelom. Bračni partner može biti uključen u raspodjelu, ali u svakom slučaju mu/joj je garantovan status nužnog nasljednika.

Ugovor o doživotnom izdržavanju se može zaključiti sa bilo kojom osobom koja ima punu poslovnu sposobnost. Ukoliko se osoba koja je potpisnik ove vrste ugovora sa korisnikom istovremeno pojavi kao nasljednik u diobi imovine nakon smrti korisnika, prava te osobe po ova dva odvojena pravna osnova (ugovor o doživotnom izdržavanju i nasljeđivanje) se tretiraju zasebno.

Ako je nekretnina koja je predmet ove dvije vrste ugovora stečena dok je ostavitelj živio/la u bračnoj ili vanbračnoj zajednici, tada je za zaključenje takvog ugovora potrebna saglasnost bračnog/vanbračnog partnera. Stoga treba postaviti relevantna pitanja i koristiti kontrolnu listu iz poglavlja koje se odnosi na stranke koje raspolažu nekretninom.

U Federaciji Bosne i Hercegovine i u Brčko distriktu bračni partneri se mogu dogovoriti o načinu međusobnog nasljeđivanja kroz ugovor o nasljeđivanju (članovi 125.–134. ZN FBIH; članovi 130.–134. ZN BD). Ovaj ugovor se isto zaključuje u obliku notarski obrađene isprave. Ovakvo rješenje omogućava bračnim partnerima da svoje odnose urede na način koji njima odgovara. U praksi se ovaj ugovor obično zaključuje

zajedno sa bračnim ugovorom. Ako takav ugovor postoji, isti ima prednost pri diobi ostavštine i primjenjuje se prije testamenta i pravnog nasljednog reda. Ovaj ugovor bračnim partnerima nudi fleksibilniji način da urede međusobne odnose u pogledu nasljeđivanja.

CONCLUSION

Generally, one of the most important roles of the notary is the enhancement of legal certainty and rule of law, while at the same time directly unburdening public authorities and – indirectly – the courts. The notaries do so due to their strong impartial commitment and legal advice to all parties. Accordingly, the work of notaries significantly affects women's rights, too. They have to make sure that the transaction corresponds to the parties' will, to inform the parties on the meaning, contents, and consequences of the transaction and to check if the transaction is permissible by law. By ensuring that the spouse provides consent to the disposal and burdening of joint marital property, and by encouraging the joint registration of property rights, the protection of the statutory portion of inheritance, and the separation of the spouse's share from the estate, notaries contribute to the economic empowerment of women and further reduction of poverty.

The principles of notarial ethics developed by the International Union of Notaries (UINL) offer a sound basis to guide notaries in strengthening gender equality in their daily activities. It is important to ensure that the good practice is applied by all the notaries throughout the country and that the law is interpreted uniformly. To this end, notarial practices that aim to strengthen gender equality should be conciliated across the country to ensure legal clarity, legal certainty and to ensure that they are systematically applied, bearing in mind the existing differences between the administrative parts in Bosnia and Herzegovina. The information notaries give should be in line with the applicable law, but should not be reduced to a mere formality in order to avoid personal liability; rather it should be given in a manner so that parties have a full understanding of the meaning and consequences of their actions, the transaction at hand, and their rights and obligations stemming from it.

The potential shortcoming of the legal system in Bosnia and Herzegovina that could endanger the effectiveness of notarial work is the fact that there is no obligatory registration of property acquired during marriage or non-marital union as co-owned or jointly owned, depending on the administrative unit where the marriage exists. Notaries do request information on the marital status of parties, and act in accordance with the information obtained, but this practice cannot entirely prevent the possibility of only one partner being registered as a sole owner despite the fact that such property was actually acquired while a marriage or non-marital union lasted. This is due to the fact that the relevant laws do not foresee obligatory registration as marital property (co-ownership or joint ownership), but only envisage the possibility of the non-registered partner to request their registration after the legal transaction has been concluded. However, such a registration cannot be performed without the consent of the registered partner. If he/she is not willing to give such consent, the only option for the non-registered partner is to start a long court proceeding to claim his/her share. Only after reaching the final decision in such proceeding can he/she request the registration to be performed by the land registry office. Family laws regulating marital property foresee the possibility of acquiring separate property and registering as a sole owner. Furthermore, the relevant laws on land registries envisage that there has to be a legal basis for the registration, i.e., most often a contract. Registration cannot be done in the name of a person who is not signatory to the contract, and therefore the non-registered spouse or partner cannot be registered without the consent of the registered spouse. For example, this could be in the case where one partner is buying something with money he/she inherited. In any case the notaries cannot check the money flows but can only work on the basis of the parties' statements.

The Regional Guidelines and its supporting guidance document for Bosnia and Herzegovina are based on applicable legislation. They should be constantly updated and improved in order to support changes in

the law and to implement the best practices. Continuous training on gender issues should be organized. The concerns of the notaries about the actual possibilities of implementing the best practices should be taken seriously.

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

ZAKLJUČAK

Jedna od najvažnijih uloga notara je da obezbijedi što veću pravnu sigurnost i vladavinu prava, dok istovremeno direktno rasterećuje javne organe i – indirektno – sudove. Notari tu dužnost obavljaju tako što postupaju nepristrasno i posvećeno u pružanju pravnih savjeta svim strankama. Prema tome, rad notara ima bitan utjecaj i na prava žena. Notari moraju osigurati da pravni posao odražava volju stranaka, informisati stranke o značenju, sadržaju i posljedicama tog pravnog posla i provjeriti da li je pravni posao dopušten zakonom. Osiguravajući saglasnost bračnog partnera za svako raspolaganje ili upis tereta na zajedničku bračnu stečevinu i potičući zajednički upis prava na nekretnine, zaštitu nužnog dijela naslijeđa i izdvajanje iz ostavštine dijela koji pripada bračnom partneru, notari doprinose ekonomskom jačanju žena i smanjivanju siromaštva.

Načela notarske etike Međunarodne unije notara (UINL) postavljaju solidne temelje za rad notara i jačanje ravnopravnosti spolova u njihovom svakodnevnom radu. Važno se pobrinuti da svi notari širom zemlje imaju dobru praksu i da se propisi tumače na isti način. Zbog toga treba uskladiti notarsku praksu širom zemlje u smjeru jačanja ravnopravnosti spolova, čime bi se osigurala pravna jasnoća, pravna sigurnost i sistematska primjena takve prakse, uzimajući u obzir razlike prisutne među upravnim cjelinama u Bosni i Hercegovini. Informacije koje daju notari moraju biti u skladu sa važećim zakonom, ali ne smiju se svoditi na običnu formalnost radi izbjegavanja lične odgovornosti već moraju biti date na način koji će strankama jasno objasniti značenje i posljedice njihovih postupaka, predmetnog pravnog posla, te prava i obaveza koji proizilaze iz istog.

Nedostatak u pravnom sistemu Bosne i Hercegovine koji bi potencijalno mogao otežati djelotvoran rad notara je činjenica da ne postoji obaveza da se nekretnina stečena u vrijeme trajanja bračne ili vanbračne zajednice upiše kao suvlasništvo odnosno zajedničko vlasništvo, zavisno od upravne jedinice kojoj ta zajednica pripada. Notari traže informaciju o bračnom stanju stranaka i postupaju u skladu sa primljenim informacijama, ali ovakva praksa ne može u potpunosti spriječiti mogućnost upisa samo jednog partnera kao jedinog vlasnika nekretnine čak i ako je nekretnina stečena u vrijeme trajanja bračne ili vanbračne zajednice. Ovo proizilazi iz činjenice da relevantni zakoni ne propisuju obavezu upisa nekretnine kao bračne stečevine (suvlasništva ili zajedničkog vlasništva), već propisuju samo to da neupisani partner može zatražiti da bude upisan/a po zaključenju pravnog posla. Međutim, u tom slučaju upis se ne može izvršiti bez saglasnosti upisanog partnera. Ako upisani partner nije spreman/na dati saglasnost, neupisanom partneru kao jedina mogućnost preostaje pokretanje dugotrajnog sudskog postupka za potraživanje svog dijela. Upis u zemljišne knjige može se izvršiti tek po izdavanju pravosnažne odluke iz tog postupka. Porodični zakoni koji uređuju bračnu stečevinu propisuju i mogućnost sticanja posebne imovine i upis vlasništva 1/1 za istu. Pored toga, važeći zakoni o zemljišnim knjigama propisuju da svaki upis mora imati pravni osnov, što je najčešće ugovor. Upis se ne može izvršiti na ime osobe koja nije potpisnik ugovora, te stoga neupisani bračni ili vanbračni partner ne može upisati svoj dio vlasništva bez saglasnosti upisanog partnera. Primjer ovakvog slučaja je kada jedan partner kupuje nešto naslijeđenim novcem. Notari svakako ne mogu provjeravati novčane tokove već moraju postupati po izjavama stranaka.

Regionalne smjernice i dopunske smjernice za Bosnu i Hercegovinu se oslanjaju na važeće zakone. Potrebno ih je stalno osvježavati i poboljšavati kako bi odražavale izmjene zakona i najbolju praksu. Redovne edukacije o rodnim pitanjima trebaju biti organizovane. Komentare notara na stvarnu izvodljivost najboljih praksi je neophodno ozbiljno razmotriti.

Ove smjernice su zasnovane na trenutno važećim zakonima i praksi u zemlji, ali ne predstavljaju službeno tumačenje zakona. Notarske komore će morati da utvrde najefikasniji način primjene ovih smjernica u svakodnevnom radu notara u cilju sprečavanja spolne diskriminacije i podrške ekonomskom osnaženju žena.

List of laws

The Constitution of Bosnia and Herzegovina (Annex 4 of the Dayton Peace Agreement)

The Family Law of Brčko District. *Službeni glasnik BD BiH* / *Official Gazette BD BIH* 23/07

The Family Law of Republic of Srpska. Službeni glasnik RS / Official Gazette RS 54/02, 41/08, 63/14.

The Family Law of the Federation of Bosnia and Herzegovina. *Službene novine FBiH* / *Official Gazette FBIH* 35/05, 31/14

The Gender Equality Law of Bosnia and Herzegovina. Službeni list BiH / Official Gazette BiH

16/03, 102/09, 32/10 (consolidated text)

The Law on Non-Contentious Proceedings of Republic of Srpska. *Službeni glasnik RS* / *Official Gazette of the Republic of Srpska* 36/90 and 91/16

The Law on Property Rights and Other Rights in Rem of Brčko District. *Službeni glasnik Brčko Distrikta BiH /Official Gazette of Brčko District BiH* 11/01, 8/03, 40/04, 19/07

The Law on Property Rights of Federation of Bosnia and Herzegovina. *Službene novine Federacije BiH/ Official Gazette of the Federation of Bosnia and Herzegovina* 66/2013, 100/2013

The Law on Property Rights of Republic of Srpska. Službeni glasnik Republike Srpske / Official Gazette of the Republic of Srpska 124/08, 58/09, 95/11, 60/15, 18/2016 – Constitutional Court decision of Republic of Sprska, and 107/2019

The Law on Succession of Brčko District of Bosnia and Herzegovina. *Službeni glasnik Brčko Distrikta BiH /Official Gazette of Brčko District BaH* 36/17

The Law on Succession of Federation of Bosnia and Herzegovina. *Službene novine FBiH* / *Official Gazette FBiH* 80/14

The Law on Succession of Republic of Srpska. *Službeni glasnik RS* / *Official Gazette RS* 1/09, 55/09 – correction, 91/1616, 28/19 – Constitutional Court decision and 82/19

Lista zakona

Ustav Bosne i Hercegovine (Aneks 4. Dejtonskog mirovnog sporazuma)

Zakon o ravnopravnosti spolova Bosne i Hercegovine, „*Službeni list BiH*“ *br. 16/03, 102/09, 32/10*

Porodični zakon Federacije Bosne i Hercegovine, *“Službene novine FBiH” br. 35/05, 31/14*

Porodični zakon Brčko distrikta, *“Službeni glasnik BD BiH” br. 23/07*

Porodični zakon Republike Srpske *Službeni glasnik RS 54/02, 41/08, 63/14*

Zakon o stvarnim pravima Federacije Bosne i Hercegovine, *“Službene novine Federacije BiH” br. 66/2013, 100/2013*

Zakon o vlasništvu i drugim stvarnim pravima Brčko distrikta, *“Službeni glasnik Brčko Distrikta BiH” no. 11/01, 8/03, 40/04, 19/07*

Zakon o stvarnim pravima Republike Srpske, *Službeni glasnik Republike Srpske br. 124/08, 58/09, 95/11, 60/15, 18/2016 – Odluka Ustavnog Suda Republike Srpske 107/2019*

Zakon o nasljeđivanju Federacije Bosne i Hercegovine, *“Službene novine FBiH” no. 80/14*

Zakon o nasljeđivanju Republike Srpske, *“Službeni glasnik RS” br. 1/09, 55/09 – ispravka, 91/1616, 28/19 – odluka Ustavnog suda i 82/19*

Zakon o nasljeđivanju Brčko distrikta Bosne i Hercegovine, *“Službeni glasnik Brčko Distrikta BiH” br. 36/17*

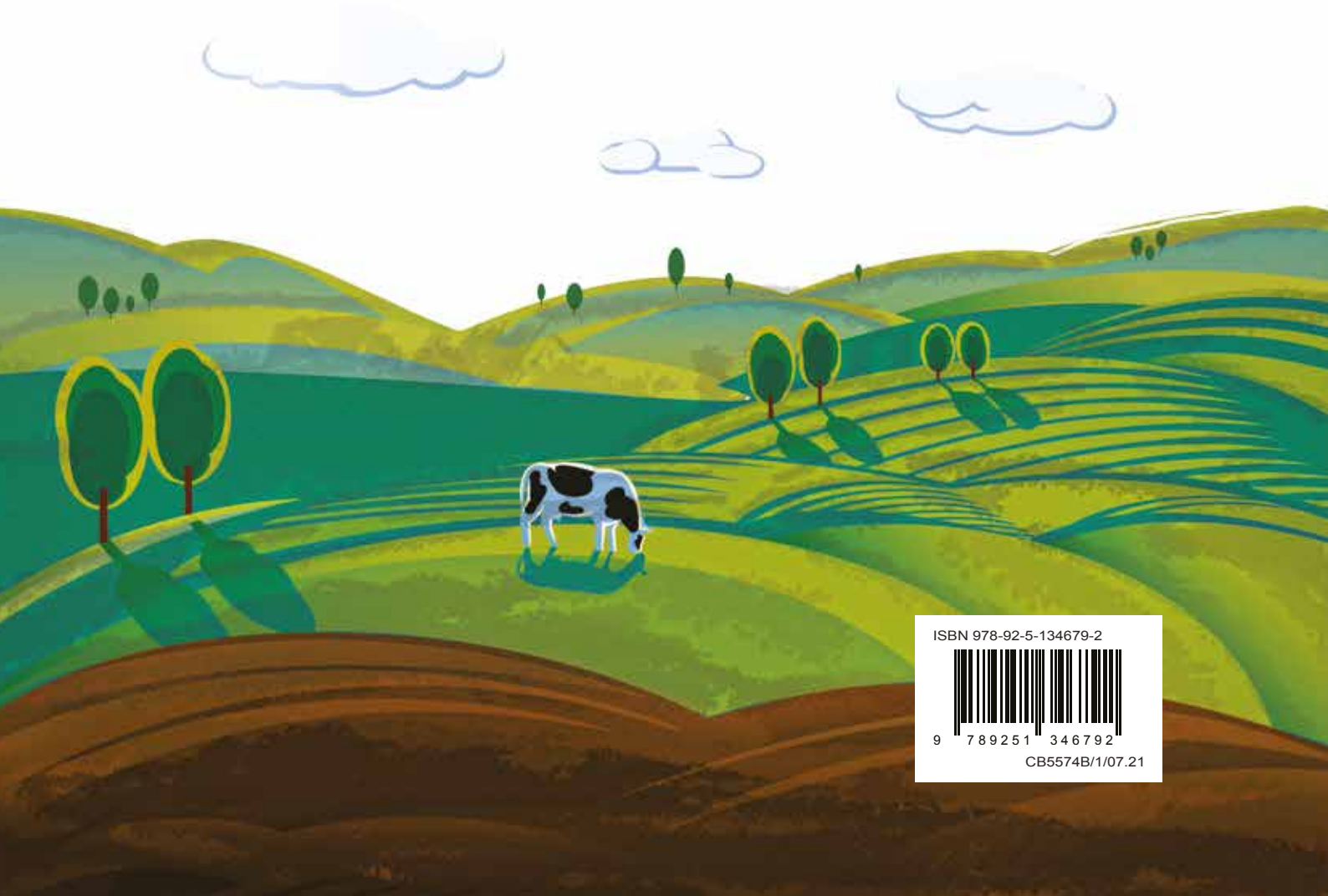
Zakon o vanparničnom postupku Republike Srpske, *“Službeni glasnik RS” br. 36/90 i 91/16*

Bibliography

FAO and GIZ. *Guidelines on Strengthening Gender Equality in Notarial Practices – South-East Europe*, Rome, Italy, 2019. Available at: http://www.fao.org/3/CA2953EN/ca2953en.pdf

Literatura

FAO i GIZ *Gsmijernice o jačanju rodne ravnopravnosti u notarskim praksama – Jugoistočna Evropa,* Rim, Italija, 2019. godine. Dostupno na: http://www.fao.org/3/CA2953EN/ca2953en.pdf



ISBN 978-92-5-134679-2

9 789251 346792

CB5574B/1/07.21