

REGULATION OF TESTAMENT PRESENCE OF WITNESSES AND NOTARIAL TESTAMENT ACCORDING TO THE LAW OF KOSOVO COMPARING WITH THE LAW OF EU-COUNTRIES

Egzona OSMANAJ

PhD candidate-South-East European University, Republic of Macedonia

Lecturer, College Dukagjini Peje, Republic of Kosovo

egzona.osmanaj@evun.eu

Abstract—The aim of this paper is to analyse the law provisions in Kosovo according to which the testament in the presence of witnesses and the notarial testament are adjusted. In addition, in general the aim of this paper is to analyse the legal regulations that are made to the testament in the presence of witnesses and notarial testament and according to the legislations of EU countries. The research questions addressed in the context of this paper are as follows: -What are the conditions of form that are required to be met according to the Law of Kosovo for the validity of the allograph testament and notarial testament; -To what extent the allograph testament and the form of notarial testament is widespread respectively, legislation of which European countries recognize these two types of testaments. The paper was mainly accomplished relying on the method of analysis of the legislation. In conclusion, the paper shows that the conditions of required form to be met under the Law of Kosovo about the validity of the allograph and notarial testament, which do not differ much from the terms of the form required to be met according to the laws of the EU in which the form of allograph and notary testament are known.

Keywords: heiress, heritage, allograph, notarial will, the testator.

1 INTRODUCTION

Inheritance relations in Kosovo are adjusted by "The Inheritance Law" (No.2004/26 -year 2004). The Law on Inheritance of Kosovo recognizes two legal grounds to call for inheritance a) testamentary inheritance and b) legal inheritance. Under the contained provisions, in the LTK testamentary inheritance enjoys priority in relation to the legal heritage in the context that legal inheritance applies only in cases of intestacy or when the declared testament is invalid. LTK adjusts these forms of testaments: a) testament written by the testator; b) testament written in the presence of witnesses (allograph); c) a court testament; and d) oral testament. It is worth noting that the law on Notary of Kosovo (No.03/L-010 of 2008), as a form of a testament and recognizes notarial testament drafted by the notary. This kind of testament hasn't been applied in Kosovo until 2012, because at this time the notary service in Kosovo wasn't functionalized. In this paper was treated the form of (allograph) testament in the presence of witnesses and notarial testament.

This paper aims to analyse the positive legal provisions in Kosovo, according to which the allograph and notarial forms

are adjusted. In general the aim of the paper is to analyze the legal regulation of the testament in the presence of witnesses and the notarial testament under the legislation of EU countries. The research questions addressed in the context of this paper are as follows: -To what extent the allograph testament and the form of notarial testament is widespread respectively, legislation of which European countries recognize these two types of testaments. -To what extent are the allograph testament and the form of notarial testament widespread, respectively, legislation of which European countries recognize these two types of testaments; -Are significant differences expressed between the legislations that recognize the form of the allograph and notarial testament, regarding the terms and conditions which are required to be met by the law for the validity of the testament. The paper is divided into two parts. The first part of the paper deals with the form of the allograph testament i.e. required conditions to be met by law for the validity of this form of the testament, whereas the second part of the paper deals with the final required terms to be filled by law for the validity of the notarized testament. The paper was

mainly accomplished relying on the method of analysis of the legislation and the method of legal doctrine.

1.2 Testament written in the presence of witnesses (testamentum allographum)

This kind of testament is familiar since the Roman law, known as "testamentum allographum"[1]. The Law on Inheritance of Kosovo has arranged this form of will in article 75 where it is stated that a written testament in the presence of witnesses is the kind of "testament that the testator has signed with his/her own hand, regardless of who has written the will, declaring in presence two witnesses that the same belongs to him/her, provided that the testator is literate in the language in which the testament was written. Witnesses sign the will themselves and it is useful to note their capacity as witnesses. [2]"

Therefore, related to validity of this form of the will it necessarily required to respect these rules: the testator must be able to read and write; testator must sign the hand of self will, and the testator must declare the will is his/her in the presence of two witnesses who understand the language of testament. In LIK it is not mentioned of who might be a person who can draft an allograph will, it is not even known if he/she should be an adult or allowed to be even more minor without legal capacity of action [3]. LIK defines more precisely the issue of who can be a witness in the case of drafting of an allograph will. LIK in article 79.1 explicitly requires from witnesses to possess certain properties, such as; must be adult, who hasn't been removed the capacity to act can read and write and understand the language of testament. LIK's (article 79.2) in capacity of being a witness to the will drafting excludes the successors of the testator, adopted persons and their descendants, and their successors, his/her adoptive parents, his/her persons in gender in direct line to the fourth degree, spouses of all these persons and the husband of testator. In case the persons mentioned above have been witness to the drafting and the same testament and the same benefit from it, then in such cases provisions of the will are considered invalid [4].

Form of the allograph will is defined by a number of European legislations Countries which apply this form of the will are: Austria, Czech Republic, Denmark, Croatia, Cyprus, Estonia, Finland, Hungary, Latvia, Slovakia, Sweden, Ireland, England and Wells and Scotland. In Ireland and Cyprus allograph testament is known as the only form of a will [5]. In legislations of all countries it is foreseen provided that the al-

lograph will should be made in the presence of two witnesses who must also sign the will, except for the austrian legislation which provides for the form of the allograph will should be made in the presence of three witnesses, whereas, the Scottish legislation also recognizes allograph testament made in the presence of only one witness [6].

In Roman Right required allograph testament was required to be made in the presence of seven witnesses [7]. Some of European countries in which forms of allograph will is not recognized are Belgium, Germany, Netherlands etc [8]. Among the countries that not define the form of allograph will are both, Macedonia [9] and Albania [10].

Table 1 The list of the EU countries in which the testament allograph is recognized

EU countries in which the testament allograph is recognized	
1. United Kingdom	10. Czech Republic
2. Austria	11. Slovakia
3. Denmark	12. Sweden
4. Estonia	
5. Finland	
6. Hungary	
7. Ireland	
8. Croatia	
9. Latvia	

[11] See: European network of registers of wills association (ENRWA) "Europe Wills" Programme Status report on schemes of Wills registration and search in Europe Version 10 March 2010

1.2 Notary will testament

Kosovo Inheritance Law does not define the form of a notary testament; the possibility of making a notary testament is stipulated by the Notary Law of Kosovo (03/L-010, 2008) [12]. According to the notary law, testament is drafted by notary upon a request of the testator and signed by the testator in the presence of two witnesses [13]. This means that, validity of the notary testament requires meeting of following conditions: to be drafted by a notary, the testator to place signature and the presence of two witnesses.

The procedure of making a notary will is: notary designs the testament according to the latest narrative will of the testator, and then the testator in the presence of a notary and two witnesses signs the testament. Prior to commencing with drafting of the testament notary must initially verify the identity of the testator, then he must verify if the testator is mentally healthy and if there is a real desire of testator to make the testament, or

is forced due to influence of violence, threat etc., to make such testament. Thus, notary only after reliable findings that the testator is able to make a testament, based upon his/her free volition, as the readiness upon making the testament is allowed by the law, as well as after informing the testator to consequences of his drafted testament based on the statement obtained by testator [14].

Notary testament is recognized by Albanian Legislation. CCA (in Section 397), defines the meaning of a notary testament, thus "*Testament with notarized act by a notary and signed by the testator in the presence of the notary*" [15]. Pursuant to this provision it results that that the notary testament in Albania is valid only in the presence of the notary, therefore, for the validity of will the presence of witnesses is not necessary, unlike in Kosovo the validity of the notary testament requires by the law the presence of two witnesses. Even the German Civil Code is the same regarding the validity of the will, the same as CCA which for validity of notary testament doesn't consider necessary the presence of the witnesses upon the making of will [16]. In many legislations of EU countries, it is provided that the notarial testament should take place in the presence of a notary and two witnesses, such as for example in Slovenia, Malta, Luxemburg Bulgaria, Latvia, etc. It is worth mentioning that the French Civil Code has adjusted the issue of presence of the witnesses upon the making of testament in a different way. According to CCF notarial testament, or authentic, as titled differently, should take place in presence of two notaries, or one notary and two witnesses [17].

Table 2. The list of the EU countries in which the authentic testament is recognized

EU countries in which the authentic testament is recognized	
1. Austria	15. Luxembourg
2. Belgium	16. Malta
3. Bulgaria	17. The Netherlands
4. Croatia	18. Poland
5. Czech Republic	19. Portugal
6. Denmark	20. Romania
7. Estonia	21. Slovakia
8. France	22. Slovenia
9. Germany	23. Spain
10. Greece	
11. Hungary	
12. Italy	
13. Latvia	
14. Lithuania	

See: A, Jashari & E, Osmanaj (2016). Type of Testaments in Albania and France. [18]

CONCLUSION

The main purpose of this study was to analyse the positive legal provisions in Kosovo under which the forms allograph and notarized testament are adjusted. From what was discussed in this paper it was shown that the validity of the allograph testament under Kosovo law necessarily requires to meet the said terms, the testator must be able to read and write; testator must sign the testament with his/her own hand and the testator must declare his/her will is in the presence of two witnesses who understand the language of the testament. In a similar way the Law of Kosovo has adjusted the form of a notarized testament or the validity of the notarized testament, where the Law of Kosovo requires drafting of the testament in the presence of two witnesses, signed by the testator, but unlike allograph testament, the notarized testament is required to be drafted by the notary.

Alike the Law of Kosovo, the legislation of the European countries in which the forms of notarial testament is recognized, is adjusted the terms of required form to be met for the validity of the allograph and notarial testament almost in similar way. It is worth noting that the form of the allograph testament is recognized by 12 legislations of the EU, whereas the form of a notarial testament is recognized by 23 legislations of the EU. Thus, the notarial testament represents the most widespread form of the testament of the EU.

REFERENCES

- [1] Borkowski's, Roman Law, Fifth Edition Paul De Plessis, Oxford University Press, 2015
- [2] Law no. 2004/ 26 on Inheritance in Kosovo, see article 75.1 and 75.2

- [3] H. Podvorica, *Heritage Law*, Prishtina, 2010. Pg 133
- [4] Law no. 2004/ 26 on Inheritance in Kosovo, see article 80
- [5] Garb, L, & Wood, J, *International Succession*, Third Edition, Oxford University Press,2010. Pg 200-437
- [6] Garb, L, & Wood, J, *International Succession*, Third Edition, Oxford University Press,2010. Pg 33-631
- [7] A.Mandro, *The Roman Law* , Tirana, 2006. Pg 436
- [8] Status Report-European network of registers of wills association (ENRWA) "Europe Wills" Programme Status report on schemes of Wills registration and search in Europe Version 10 March 2010
Available at <http://www.arert.eu/IMG/pdf/etatdeslieux-2010-03-10-EN.pdf>
- [9] Law no. 47/96 on Inheritance in Macedonia, see article 62-75
- [10] N.Biçoku, *Inheritance Law of Republic of Albania* , Tirana. Pg 152
- [11] Status Report-European network of registers of wills association (ENRWA) "Europe Wills" Programme Status report on schemes of Wills registration and search in Europe Version 10 March 2010
Available at <http://www.arert.eu/IMG/pdf/etatdeslieux-2010-03-10-EN.pdf>
- [12] Law no.03-L-010 on notary in Republic of Kosovo, see article 1.4
- [13] Law no.03-L-010 on notary in Republic of Kosovo , see article 40.1
- [14] Adrian Nuni & Luan Hasneziri, *Civil Right III (Inheritance)*,Tirana 2010 pg 120
- [15] Law no. 7850 date 29.07.1994 *Civil Code of The Republic of Albania*
- [16] *The German Civil Code*, see article 2232
- [17] *The French Civil Code*, see article 971
(Translated by Georges ROUHETTE, professor of Law, with the assistance of Anne BERTON, Research Assistant in English.
Available at:
<https://phalthy.files.wordpress.com/2006/11/civil-code-france.doc>).
- [18] A, Jashari & E, Osmanaj (2016). *Type of Testaments in Albania and France*, *European Journal of Humanities and Social Sciences* No2, *East West, Association for Advanced Studies and Higher Education GmbH*, Vienna. Pg 73
Available at https://ew-a.org/upload/iblock/bd4/EJH_2_2016.pdf