

## **KJI NEWSLETTER**

### **June 2006**

This newsletter is published to fully inform the magistrates in Kosovo on the activities of the Kosovo Judicial Institute (KJI). This publication is distributed to judges and prosecutors throughout Kosovo. The Monthly KJI Newsletter features articles relating to issues of interest to judges and prosecutors working in Kosovo.

**Osman Tmava**  
**Judge of the Supreme Court of Kosovo**

#### **WITNESSES TO A WILL**

#### **INTRODUCTION**

The Law on Inheritance (LI) in Article 2 provides for that the inheritable property of the testator will be transferred on the successors based on the law and based on the will.

The will implies the expression of final willpower foreseen by the law, by which the decedent orders the distribution of his property after his death, pursuant to the Art. 69. 1 of the Law on Inheritance.

Having into consideration this legal determination, it results that the testament is a judicial work having effect after the death of the person. It is a judicial lucrative work, partial judicial work, exclusively personal, formal and revocable.

In this respect in order to assess the will, the presence of a witness for several forms of the will is very important.

This law aims to provide higher measures of legal protection.

#### **WITNESSES TO A WILL**

As indicated above the presence of a witness is very important and necessary in several forms of the will. This precondition is necessary at the stage which leads to the drafting of the will, for the process of drafting the will, but as well as for the announcement of the will.

Thus, having this into consideration the above mentioned situations it comes out that there are three groups of witnesses of the will: 1. identity witnesses 2. witnesses to a will and 3. witnesses for announcing the will.

## 1. Identity witnesses

Identity witnesses of the testator are manifested in several forms of a will and at the preliminary stage, concretely for the official-public forms of the expression of final willpower by the decedent (judicial will, international will, consular will and military will), in which the judge-official person who is drafting the will has an obligation to preliminary enter in the minutes and to verify the identity of the participant in the procedure, respectively the testator before the will is made.

There is only one way to verify the identity of the testator without the presence of a witness, respectively when the judge-official person personally knows the testator. There are two alternatives in situations when the judge-official person personally knows the testator: 1. When the testator possesses public documentation with photography issued by public authorities and 2. When the testator does not possess any public document with photography and in this case his identity should be verified by two witnesses.

The identity witnesses are special category of witnesses which differ from

other witnesses, especially from witnesses of a will. Such witnesses can be persons who express an interest for the content of the will, the relatives of the testator and his successors.

The identity witnesses do not necessarily have to be literate (they could be illiterate) because these witnesses are not bound by any action to the content of a will or any other action related to drafting of the will.

The identity witnesses and other categories of witnesses should meet the general conditions of suitability in order to be a witness to a will: they should be adults and have the full capacity of acting (*capacitas agendi*).

The duty of the identification witness ends at the certain stage of the procedure upon the request of court-official person who verify the identity of the testator and sign the records. It is important to mention that the fact that the identity witnesses could also be witnesses to a will if the legal conditions allow such a thing.

## 2. Witnesses to a will

For the most testaments it is necessary to have the presence of a witness. Thus, the participation of witnesses is *conditio sine qua non* for the validity of the will. This condition is present for written international and verbal testaments. we will only tackle some of the fundamental issues related to the role of witnesses to a will and several forms of the wills.

The written will in the presence of witnesses (holographic).

The holographic will is determined by Art. 75 of the Law on Inheritance, as a written will in the presence of witnesses.

The role of witnesses in such type of will is multiple, meaning that both witnesses

should be present at the time when the will is signed by testator, both witnesses should hear and understand the statement of the testator who alleges and confirms that he or she has read the will, that this is the original will and at the same time the witnesses have understand the language of the will so they can sign it.

This indicates that the testator has to sign the will with his or her own hand. It comes out that the testator should be literate. This is necessary because he or she should read the will drafted based on his or her story. This fact is also very important due to the fact that after the compilation the will can not be co validated.

The will should be signed or fingerprinted by the testator. In this way the testator will note his name and surname sign or use the sign usually used in legal transaction. The blank signature without the text is null and void same as the will drafted afterwards. The presence of witnesses is mandatory because they can confirm directly that the testator has signed the will, so they can confirm the authenticity of the signature in the will. The signature of testator is inserted at the bottom of the will and the date and place of compilation are inserted underneath of it. If the will contains several pages in the testator shall sign each page.

Any comment or insertion made under the signature does not represent the content of the will. The acceptance of the content by the testator should be done expressively, but can be accepted also by concrete conclusive

actions. This means that even without the formal declaration on the content the testator after dictating to the third person, he will read and sign the will in the presence of two witnesses. The will is valid, because its content for the witnesses is irrelevant and they only confirm the signature and the fact that the will represents the final will of the testator.

When speaking about the quality of personality of a witness, it results that not every person is appropriate to become a witnesses to a will. It is necessary to fulfil the general conditions in this respect including the identity of a witness who should be an adult with the capacity to act, and at the same time should meet a special condition which is to be literate, because it is necessary to understand the language of the will. In this context it results that blind persons are not appropriate people to become witnesses to a will. With respect to the persons who are deaf-mute they could become witnesses provided that there is a possibility to read the letter through the interpreter.

The testator may leave his will with any natural or legal person, so in this capacity he or she can become a witness to a will.

The revocation of the will is analogue with the drafting procedure of the will. Witnesses in such event could be the same persons who were present at the drafting process of the will. Nevertheless other persons can have this capacity as well.

### **Witnesses to an oral will**

Sometimes the testator under certain situations and on extraordinary circumstances is unable to draft the will in written form. In such situations the testator should invite two witnesses as provided for by law to be present during the expression of the final willpower. In this case the family relation to the witnesses is not determined and any person who fulfils the general conditions to be a witness to a will may become one what is applicable also for the category of witnesses specified above. This category of witnesses does not require any special condition (i.e. to be literate).

The witnesses who are present cannot accept any material benefit from the testator regardless of any grounds or even the testament. This also applies to the descendants, ancestors and collateral relatives up to and including the fourth degree, the spouses of these persons, spouse of the testator etc. (Art. 79.2 LI.) The

witnesses are obliged without delay to write down the declarations on the will of the testator as soon as possible and submit it to a court or to repeat it orally before the court indicating when, where and in what circumstances the testator declared his will. This action should be undertaken within the term of 30 (thirty) days starting from the day when the exceptional circumstances cease to exist.

If the witnesses to an oral will are irresponsible in performing their obligations meaning if they are late and in meantime the will is being announced based on the law, in this case the court will find out whether the oral will exists because the irresponsibility of witnesses cannot invalidate the will. In this case if the legal testator in *bona fide* sells one part of the inheritable property, the witnesses to a will are responsible for the risk of caused damage and are responsible to compensate the testamentary heirs.

### **Witnesses to a court will**

The court will is the same as other types of wills drafted according to the rules of court will (the consular will, the will in the ship and the will made in front of military superior – military will), in principal the witnesses for such type of will are not needed. The court will may be drafted by the competent judge, according to the testator's dictation. Under certain situations the presence of witnesses is necessary. The presence of witnesses is conditioned with the fact that the testator is illiterate.

In case the testator is literate, the presence of witnesses is not necessary. However, in situation when the testator is

not literate and is incapable of reading or signing the will it is necessary to have two witnesses. The presence of these witnesses is a part and an element of the form and their inexistence will make the will invalid. It is not necessary for the witnesses of the will be acquainted with the testator, as in the case of the identity witnesses. The witnesses to a holographic will do not have to be informed on the content of the will whereas for the court will it is necessary to notify the witnesses on the content of the will. It is necessary for the witnesses of the will to be literate and to understand the language of the will, which condition is not required for the identity witnesses.

### **Appropriateness of the testamentary witnesses**

The appropriateness of the testamentary witnesses is an element for validity of the will. The inappropriateness is manifested in two forms: 1. an absolute which belongs to the category of persons who regardless of the type and nature of relationship with the testator cannot be witnesses to a will.

This may be: a). general and it concerns the persons who are not adult and persons who don't have the capacity of acting b). special which is only manifested in several forms of the will for example a witness to a court will cannot be the person who is not literate, or the persons who don't understand the language of the will.

This is applicable also for the international will. For the holographic will the witnesses need to be able to read and write in the language which is acceptable by

the testator. Those witnesses do not have to be informed about or to know the content of the will.

The witnesses to an oral will do not have to be literate; however they should know the language in which the testator has expressed the final willpower. Any Kosovo resident or a foreigner may become a witness provided that they meet the conditions.

Besides the first category of absolute inappropriateness there is also the relative inappropriateness of the witnesses who fall in the category of persons who for the reason of certain relationship with the testator cannot become witnesses. This group includes all persons mentioned in Article 79.2 of the Law on Inheritance belonging to the category of descendants and ancestors of the testator.

### **The obligations of the witnesses to a will**

The testamentary witnesses differ from the category of the witnesses set forth in the Provisional Criminal Procedure Code or the Law on Contested Procedure. In order to become a testamentary witness it is not an obligation of a citizen to fulfil and he or she can not be held liable for failing to comply with such an obligation. In the situations

when it is necessary to draft a will without a delay and when there is no possibility to find another person with a capacity to act as witness to a will, then it is an obligation of the citizen and in such case the witness will be responsible for any eventual damages to the testamentary heirs.

### **3. Witnesses to announcement of the will**

For announcing the will after the death of the testator it is necessary to have the presence of two witnesses. These witnesses are not in capacity of witnesses to a will. To be qualified as witness to a will and to announce the will it is necessary to fulfil the general condition, same as in other categories of the witnesses to a will, a

person needs to be an adult should have the capacity to act. The witnesses in fact should be present in one official action in which the court announces the content of the will. In this case the validity of a will is not verified. Any person may act in the capacity of a witness to a will, including the category of persons who are interested to know the

content of the will meaning the relatives of the testator etc. The court interpreter may also be in this capacity besides the judge,

and his or her legal assistant, who conducts the proceedings. The duty of the witness in this case as well is not a duty of a citizen.

## **KJI Training Activities June 2006**

### Seminar – Cooperation between the Prosecution and Police in Riot Cases

Taking into consideration that riot cases require instant and well coordinated actions between the different bodies and institutions, On 01 June 2006 KJI has organised a seminar on this topic with the purpose of increasing the level of cooperation between them in riot cases. Beneficiaries of this seminar were pre-trial judges public prosecutors and police officers. The report of the OSCE Mission in Kosovo/ Legal System Monitoring Section on “The Response of the Justice System to the March 2004 Riots” was also presented and the findings of this report served as a basis for discussion.

### Workshop – Practical Aspects of Inheriting the Inheritable Property

This workshop held on 06 June 2006. Beneficiaries of this workshop were civil judges. This workshop treated topics which are related to the testimonial witnesses, inheritance based on the testament, inheritance based on the law, and other related inheritance issues from the court practice.

### Workshop – New Types of Investigations, Covert and Technical Measures of Surveillance and Investigation

On 08 June 2006 KJI organised training on the above mentioned topic. Beneficiaries of this workshop were judges, public

prosecutors and police. This workshop tackled the issues of covert and technical measures that are undertaken by the public prosecutor, the ones that are ordered by the judge in the pre-trial procedure, their importance and effect in the investigative procedure.

### Seminar for lay judges from Prizren Region

ON 13 June 2006 KJI organised the above mentioned seminar. In accordance with its mandate KJI trains lay judges in the regions all over Kosovo. Training for lay judges is was held in Prizren Region. The training focused on the practical aspects of development of criminal and civil procedure and on the Code of Ethics and Professional Conduct for lay judges.

### Seminar on European Convention on Human Rights

On 15 and 16 June a Seminar on European Convention on Human Rights was held. Beneficiaries of this seminar were judges and public prosecutors. This training gave detailed overview on practical implementation of the provisions of Articles 5 and 6 of the European Convention on Human Rights and served to increase the knowledge of Kosovar judges and prosecutors towards the case law of European Court of Human Rights.

### Seminar – The role of the witnesses in the Criminal Procedure

On 21 June 2006 KJI organised a seminar with the above mentioned seminar. Beneficiaries of this seminar were criminal field judges and public prosecutors. This seminar treated the issue of witnesses in the criminal procedure, protection of cooperative witnesses and injured parties in accordance with the Criminal Procedure Code. This seminar also treated the issue of implementing the examination of witnesses by the public prosecutor and the court.

### Workshop on Code of Ethics

On 27 June KJI organised a workshop with the above mentioned topic. During 2006 KJI has continued with the organisation of workshops on Code of Ethics in all the regions of Kosovo. This time target group of

this training were judges and prosecutors from Peja/Peč Region. The training aimed to give more detailed overview on the practice and experience in which the judicial independence may be worrying. The seminar focused on the position of the judge as individual decision-maker and decision-maker in a panel.

### Seminar – Contractual Relationship and their Specifics

This seminar was held on 29 June 2006. Target group of this seminar were judges from the civil field. This seminar provoked discussions on issues such as contractual relationships, rights and obligations of contractual parties, annulment of contract, business contracts and other issues related to the court practice.

## **Forthcoming events July 2006**

### Acknowledgement and Execution of Criminal Judgements

*Target group: judges and prosecutors*

The purpose of this training is to initiate discussions exchange information and unify the existing practices. There will also be information on the existing experience on the legal assistance by the foreign agencies and public bodies which are competent in the field of judicial-criminal issues. These problems are hampering the efficiency of the judicial system in Kosovo. The existence of criminal decisions is seen as one of the hurdles for implementation of

procedures which are guarantee for an effective and justice.

*Planned date: 04 July 2006*

### Seminar on European Convention on Human Rights

*Target group: judges and prosecutors of Mitrovica region*

KJI will organise training on European Convention on Human Rights in Mitrovica region. This is a two day session which aims to give a detailed overview on practical implementation of the provisions of Articles 5 and 6 of the European Convention on Human Rights with the purpose of

increasing the knowledge of Kosovar judges and prosecutors towards the case law of European Court of Human Rights. Four national trainers who have been certified by the Council of Europe will act as trainers in this session.

*Planned date: 05 and 06 July*

Training for Minor offence Judges

Throughout 2006 KJI will continue to organise special training sessions for Minor Offences judges. The third training session for this year will focus on the Minor Offence Procedure with special emphasis on the Minor Offence Liability, co-liability of natural and legal persons and collection of evidence during the procedure.

*Planned date: 12 July 2006*

## Trainings planned by KJI until the end of 2006

### JULY 2006

- 04 July** Acknowledgement and execution of criminal judgments
- 05 and 06 July** European Convention on protection of Human Rights and Fundamental Freedoms (CoE/KJI)
- 12 July** Training for Minor Offences Court judges

### SEPTEMBER 2006

- 04 and 05 September** Pristina Region, European Convention on protection of Human Rights and Fundamental Freedoms (CoE /KJI)
- 07 September** Gjilan/Gnilane region: Simulation - civil field
- 12 September** Workshop: Confiscation and the procedure for confiscation (criminal)
- 19 September** Mitrovica region: Workshop on the Code of Ethics
- 21 September** Prizren region: Simulation - criminal field
- 22 September** Training session on the investigation and trial of criminal offences related to corruption. (CoE – KJI)
- 26 September** Peja region: Seminar for lay judges



**28 September** The procedure of announcing the missing person dead

## **OCTOBER 2006**

**02 and 03 October** Gjilan/Gnjilane region: European Convention on protection of Human Rights and Fundamental Freedoms (CoE /KJI)

**04 October** Peja/Peç Region: Simulation - civil field

**10 October** Workshop: Maturity of a criminal offence

**12 October** Workshop: Execution of Civil Decisions

**17 October** Training for Minor Offences Court judges

**19 October** Workshop: Appeal and Appeal Procedure in accordance with the CPC

**26 October** Novelties in the Family Law

## **NOVEMBER 2006**

**02 November** Pristina region: Simulation - civil field

**03 and 04 November** Prizren region: European Convention on protection of Human Rights and Fundamental Freedoms (CoE /KJI)

**07 November** Workshop: Protection of victims of trafficking, pursuant to the international standards and PCPCK.

**09 November** Gjilan/Gnjilane region: Seminar for Lay judges

**15 November** Mitrovica region: Simulation in criminal field

**17 November** Seminar on Administrative Law

**21 November** Law on items. Ownership

**23 November** a) Training workshop on the interpretation and management of cases;  
b) Training session on courtroom management (CoE – KJI)

- 24 November** Training session on the judicial opinion drafting (CoE – KJI)
- 30 November** Pristina region: Workshop on Code of Ethics
- DECEMBER 2006**
- 4 and 5 December** Peja/Peç region: European Convention on protection of Human Rights and Fundamental Freedoms (CoE /KJI)
- 06 December** Training for Minor Offences court judges
- 11 December** Training workshop on the alternative dispute resolution (CoE /KJI)
- 12 December** Training on the alternative sanctions to imprisonment (CoE /KJI)
- 14 December** Workshop: The procedure for compensation of damage, rehabilitation and exercise of other rights of damaged or arrested persons.

