

KJI NEWSLETTER

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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.

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THE PROCEDURE OF PRESUMPTIVE DEATH OF A DISAPPEARED PERSON AND DEATH CERTIFICATION

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INTRODUCTION

The law on Non-contested Procedure (hereinafter LNP), in the provision of Article 57 provides for the procedure for announcing the missing person dead and the procedure of proving death, when for the death cause of person there are no evidence, document foreseen by the law.

This legal definition indicates that this procedure proves, ascertains the existence of facts for the death of a person. Death respectively birth of a person are proceses of nature but at the same time serve as legal facts. The legal capacity is gained by birth and ceases to exist when a person dies.

The procedure of announcing the missing person dead and proving death of a person, determines the time of death of one person. The disappearance of person occurs with or against his of her will. This is not expressively stated by the law in the above mentioned provision. This procedure announces the missing person as dead and the death of a person for whom there is no information on his or her whereabouts within the legal timeframe is proven. Within this timeframe the person should have the possibility to appear. Two types of situations rise from the above mentioned legal provision, these are two separate procedures:

1. The procedure of announcing the missing person dead and
2. The procedure of proving death

I. THE PROCEDURE OF ANNOUNCING THE MISSING PERSON DEAD

Court jurisdiction

The jurisdiction to announce the missing person dead belongs to the Municipal Court in the region of which the missing person resided permanently, however if he did not have permanent residence, the jurisdiction

falls with the court in the region of which the person resided temporarily.

The procedure is initiated through a decision rendered by an individual judge.

The subjects who are competent to initiate the procedure

The procedure of announcing the missing person dead may be initiated by the following persons:

- a) any person (legal or natural) who has a legal interest on the issue and
- b) the public prosecutor

The act of initiating the procedure (proposal)

The procedure of announcing the missing person dead, is initiated through presenting a

proposal to the competent court by the competent person

The content of the proposal

The proposal as an act respectively a submission should especially include: The name of the court, name and family name of the person subject to the proposal for announcing as dead, date of birth and the last place of residence permanent or temporary of the missing person, facts on which the proposal is based, which is the

legal interest of the person who proposes, evidence to prove these facts, name and family name of person who proposes and his or her address.

Together with the proposal there should be a copy from the register of born persons for the person subject to the proposal.

The conditions for presumptive death of a disappeared person

LNP in its article 57 par 1 provides for the conditions under which the person may be announced as dead. These conditions are of material-legal nature and this is specific for this procedural law. A presumptive death may be declared for the person:

- a) for the life of whom in the last five years there are no news, and the person is over 70 years of age;
- b) for the life of whom in the last five years there are no news, and circumstances in which

the person disappeared make to believe that the person is not alive;

- c) who disappeared in a shipwreck, transport accident, fire, inundation earthquake, or another direct risk of death, and for the life of whom, for six months from the event have no news.
- d) Who disappeared during the war event and for the life of whom for one year from the peace day have been no news.

Calculation of deadlines

Deadlines mentioned in items a and b of Article 57 shall be calculated from the day when according to the last news the disappeared persons without doubt has been alive, and if such a date can not be determined accurately, these deadlines are calculated starting from the

end of the month of year in which the disappeared person was alive according to the last news. For other situations the deadline is calculated from the day when the risk that threatened the life of person ceased to exist respectfully from the day of peace.

Who is considered a missing person?

The law does not give definition but one may conclude that a missing person may be considered:

- a) a person who is missing from the place of residence for a certain period of time,
- b) when there are no information on his or her whereabouts

- c) when it is uncertain if the person is dead or alive.

These are presented as procedural presumptions for the missing person, and they should exist cumulatively in the time when the judicial procedure is initiated.

Preliminary review of the proposal

A court after it receives an appropriately prepared petition verifies if basic conditions (presumptions) for initiating the procedure are met respectfully it will verify the jurisdiction of the court, the regularity of the petition, existence of the legal interest and the identity of the missing person.

If on basis of data presented in the petition, or verification made, the court considers that

preconditions are met it shall appoint, within the fixed deadline, a guardian for representation in the procedure.

A guardian is required to collect data related to disappearance of life of the missing person and to submit such data to the court. The court itself ex officio shall gather evidence for facts whether the missing person is dead, when he or she died, or he or she is alive.

The rejection of the petition

When the court finds that the presumptions indicated above are not met the petition is rejected.

Announcement (public announcement)

If the court considers that the basic preconditions for initiating the procedure are met, the court issues an announcement where essential circumstances are presented such as:

- basic circumstances of the case
- call the disappeared person

-as well as any other person who knows something about his or her life to immediately notify the court and

-makes known that after three months from the publishing day of the announcement in the Official Gazette the court will decide on the petition.

The publication of announcement

The announcement is published in the Official Gazette and is posted on the announcement board of the court as well as posted in the

permanent or temporary residence of the disappeared person and in premises of the Municipal Assembly where the person resided.

Payment of the expenses for the publication of the announcement

If the petitioner, on the basis of the court order and within the fixed deadline, fails to deposit the needed amount for publishing the

announcement, the petition shall be³ considered withdrawn, except when the public prosecutor has submitted the petition.

Judicial Session

Three months after the publishing day of the announcement in the Official Gazette if the missing person does not appear and there are no traces that he is alive, the court shall set a session where shall summon the petitioner and the guardian of the disappeared person and shall

present necessary evidence. In any of the preconditions provided in Article 57 of this law are met and from the whole procedure results for sure that the missing person is not alive, the court shall decide the presumptive death of the missing person.

Court decision

The decision with which the presumptive death of the person is declared shall include the following information: name and surname, the last permanent or temporary residence of the missing person, name and surname of his or her parents, date month and place of birth and the date month and year and if possible hour presumed as the time of death of the missing person.

The time of death is presumed to the day when the evidence proves that the missing person was dead or the day when the missing person demonstrably was not alive. If such a day can not be proven, the death is presumed to have occurred the first day after the deadline provided by Article 57 of this Law.

Delivery of the court decision

The final decision for declaring a person as dead is delivered to:

- the authorized employee of civil register,
- to the competent court

- to the guardianship Authority
- cadastre service
- public prosecutor when he is in the capacity of petitioner

Abrogation of the court decision

The court shall abrogate the final decision for declaring the missing person as dead when:

- a) a person who is declared as dead personally appears to the court, the court after verifying his or her identity, without further procedure shall abrogate the decision for declaring such a person as dead.

- b) A court after taking a decision for declaring the missing person as dead in any manner is informed that the disappeared person is alive, the court shall ex officio initiate and conduct the procedure for abrogating the decision. The court conducts such a procedure also on the basis of a petition of the interested persons or public prosecutor.

Changing the court decision

If after taking the decision for declaring the death of missing person becomes known that the disappeared person was dead in another day

different from the day which according to the decision is considered as the day of death, the court on the basis of a petition of any person

that has a direct legal interest or the public prosecutor shall conduct the procedure for

amending the decision.

The notification on the abrogation-amendment of the decision

Once the procedure for abrogation or amendment of the decision has been initiated the court is obliged to notify:

- The guardianship authority
- The court of probate which is conducting the procedure of such person.

If the inheritance has been decided with a final decision including also real estate the court shall order to record the procedure for abrogating or changing the decision for

declaring the missing person as dead in the land record or the other public record of real estate.

When the court refuses the petition for repealing or changing the decision for declaring the presumptive death of a missing person it shall notify the guardianship authority and cadastre service for canceling the note for the procedure.

II. The procedure of certifying the death

In this procedure the court decides to declare the presumptive death of a disappeared person and determines the death of a person when evidence provided by law does not exist, Any person with a direct legal interest or the public prosecutor may submit a petition for declaring the presumptive death of a disappeared person.

Provisions of the chapter for declaring the presumptive death of a disappeared person shall apply also in the procedure for certifying the death, provided that the declaring deadline cannot be either shorter than 15 or longer than 30 days depending on

a concrete case the court shall determine the deadline.

Another specific of this fact is that in this procedure the petition for certifying death may be submitted at the court immediately after the death of a person is certified.

The decision of the court to admit the petition indicates the day in which a person a person according to the administer evidence has died. If the day of death can not be certified without doubts, the day of death will be considered the day in which it was verified that the deceased did not survive.

Legal consequences after declaring the death of a missing person as dead respectively certifying the death of a person.

In the above mentioned procedures there is a harmonization of the factual situation with the legal situation. The decision issued pursuant to the above mentioned procedures has the same legal effect as the natural death of a person. This is realized through registering the person in the

public book of dead persons. With the death of person his legal capacity ceases to exist and the legal effects are therefore presented such as: the inheritance procedure is initiated, the annulment of marriage is done, the authorizations which were given to other persons cease to exist the

issue of the rights from insurance basis is initiated, compensation of damage etc. In this respect it is of crucial importance to specify in

the decision the date respectively the exact time of death of one person.

The procedure of declaring the missing person as dead respectively certifying the death of a person with foreign nationality.

The law for settlement of conflict of laws with provisions of other countries in the relations foreseen by Article 16 provides that for declaring a missing person as dead belongs to the state national of which was the person during the time of disappearance. This law in its article 78 par 1 provides that our courts have exclusive jurisdiction to announce the death of

our missing national irrespectively where he resided. In its par 2 of the above mentioned provision provides that our court is also competent to certify the death of a foreign national or person without any nationality provided that this person has died within the territory of our state.

III. Conclusion

As a consequence of war in Kosovo many persons have disappeared. In order to declare these people as dead in Kosovo courts a small number of judicial procedures have been

initiated. I share the opinion that it would be of interest for their families to initiate the judicial procedure for the sake of realization of their legal interests

IV. Literature

The law on Non-contested Procedure (Official Gazette of SAPK no.41/1986 dated 24.10.1986)

Law on settlement of Conflict of Laws with Other Countries in Specific Relationships (Official Gazette of SFRY no.43/1982 dated 23.07.1982).

Dr Faik Brestovci: Law on Civil Procedure II. Pristina 1977.

KJI Training activities September 2006

Seminar on European Convention on Human Rights

On 04 and 05 September 2006 KJI organised a seminar on the European Convention on Human Rights for Pristina region. This was a two day session which aimed at giving a detailed overview on the implementation of provisions of Article 5 and 6 of the Convention with the purpose of increasing the knowledge of Kosovar judges and prosecutors in relation to the case law of the European Convention on Human Rights. Four national trainers who have been certified by the Council of Europe acted in the capacity of trainers in this session.

Practical skills training: Simulation of a trial

On 07 September KJI organised a practical simulation of a trial for civil judges from the region of Gjilan. A problematic case from the court practice was selected for the purpose of this simulation. The participants discussed the problems related to the civil procedure in the cases similar to the selected case.

Workshop - Confiscation and the procedure of confiscation

On 12 September 2006 KJI organised a Workshop on the procedure of confiscation. The main purpose of this workshop was to present and analyse the problems of the judicial practice through cases from the court practice that are related to the confiscation and the procedure of confiscation.

Workshop on Code of ethics

Within the scope of its training activities throughout the regions of Kosovo On 19 September KJI organized a workshop on the Code of Ethics. This time the beneficiaries of this training were judges and prosecutors from

Mitrovica Region. The purpose of this training was to give a detailed overview on the experience and practice where the independence of a judge may be worrying. The training focused on the position of a judge as individual decision maker and as decision maker in a panel.

Simulation of a trial – Criminal field

Simulations of trials from the criminal field have been organized in different regions in Kosovo, this time such training was organized in Prizren region on 21 September 2006.

A case study from the court practice was selected for the purpose of this training, this case contained a lot of problematic issues related to the difficulties which are encountered by judges and prosecutors from Prizren region during their practice.

Seminar – Investigation of corruption related criminal offences

In cooperation with the Council of Europe on 22 September KJI organized a seminar related to investigation and hearing of the corruption related criminal offences. During the work of this seminar there were international experts with vast experience in this field in the capacity of trainers who will pass their knowledge to the participants.

Seminar for lay judges in Peja region

On 26 September 2006 KJI organized training for lay judges in the region of Peja. The training focused on the practical aspects of the procedures in criminal and civil fields, including some aspects of the Code of Ethics.

Workshop – the procedure for announcing the missing person dead

Taking into consideration the general post war situation, the huge number of missing persons and the reflection of this issue in property relationships the non-contested procedure provides for conditions which have to be met for a missing person to be announced as dead, on 28

September KJI organized a workshop on this topic. These and other issues foreseen in the legal provisions elaborated through case studies from the court practice were subject of discussion during his workshop

Forthcoming events October 2006

Seminar on European Convention on Human Rights

Target group: Judges and prosecutors of Gjilan Region. KJI will organise a seminar on the European Convention on Human Rights for judges and prosecutors of Gjilan region. This was a two day session which aimed at giving a detailed overview on the implementation of provisions of Article 2 and 3 of the Convention with the purpose of increasing the knowledge of Kosovar judges and prosecutors in relation to the case law of the European Convention on Human Rights. Four national trainers who have been certified by the Council of Europe acted in the capacity of trainers in this session.
Planned date: 02 and 03 October 2006.

Practical skills training: Simulation of a trial

Target group: civil judges
KJI is planning a practical simulation of a trial for civil judges from the region of Peja. A problematic case from the court practice will be selected for the purpose of this simulation. The participants will discuss the problems related to the civil procedure in the cases similar to the selected case.

Planned date: 04 October 2006

Workshop – Prescription of a criminal offence

Target group: judges and prosecutors
The main purpose of this workshop is to present and analyse the problems of the judicial practice through cases from the court practice that are

related to the prescription of a criminal offence, prescription of execution etc.
Planned date: 10 October 2006.

Workshop on execution of civil judgements

Kosovo Judicial Institute is planning to organise a workshop in which special focus will be on the issues of execution of civil judgements and problems which are encountered in the court practice in this respect. The purpose of this workshop is to harmonise the practice in Kosovo.
Planned date: 12 October 2006

Training for Minor offence Judges

Throughout 2006 KJI will continue to organise special training sessions for Minor Offences judges. The fourth 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: 17 July 2006

Seminar – The novelties on the Family Law

Target Group Judges of the Civil Field

The topics which will be subject to review during the seminar will mainly focus on the issues that are related to the novelties in the Family Law especially the ones related to the certification of parenthood, adoption, child custody in cases of divorce etc. Special focus

will also be paid to the difficulties which are encountered by judges when applying the new provisions of the Family Law respectively when hearing cases from this field.
Planned date: 26 October 2006.

Workshop – Appeal and Appeals Procedure
Target group: Judges and Prosecutors

The main purpose of the workshop is to present and analyse the reasons of the appeal, the instances of decision-making based on the appeal and the concrete cases from the court practice will be presented in order to see where are the main difficulties and dilemmas so that they can be eliminated.
Planned date: 27 October 2006