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DECLARING A PERSON MISSING OR DEAD

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Abstract

Person rights and freedoms and the exercise of this rights is guaranteed and realized as long as the person is alive. The natural or the civil death is a sufficient legal cause that lead to the interruption of their legal rights and legal relations. The legal relations and the exercise of duties and rights are clear in the case of natural death which entails their inheritance. The legal situation is not clear in the cases of the disappearance and the presumption of death which brings legal uncertainty in the rights and the duties of third parties. This paper aims to analyze the procedure according to the Albanian law and through the comparison with foreign legislation to bring changes and their common points. The civil legislation provide terms, entities and clear procedures for the regulation of these situation and in order to ensure the duties and rights of third parties.

Keywords: procedure, declaring a person missing, declaring a person dead, protection of the rights

1. INTRODUCTION

In the Roman law the condition to have and to exercise the legal capacity of persons was related to his existence which begins with the birth and ends with death. So he must have been born alive, even if life lasted only a moment. This brief moment of life was enough for a person to enjoy his rights that after his death would be passed to his inheritors.

Roman scholars give different theories on how to verify if the baby was born alive or not. For Proculians scholars was enough that the baby cried only once. Sabinians scholars (thesis which prevailed) claimed that was enough any kind of life signs like breathing or limb movements. (Dhima.V. 2007. p.401)

Legal capacity is defined as the human ability to be the holder of rights and obligations, this expression is equal to that of legal personality. (Galgano.F. 2006. p. 104)

Legal personality continues until the person is alive and terminates with his death or declaration of death.(Gams A. 1986. p.116)

The institute of "declaring a person missing" is the entirety of norms, through which interested persons require within the terms and the time limits, to terminate the legal relationship with the person declared missing, in order to minimize the negative consequences created by these uncertain situations.

The institute of declaring the person missing or dead is a legal necessity, as it is connected with the protection of the rights of the parties who are involved in this situation. If the person will be missing from his domicile or from his last residence for a long time his absence could bring legal consequences for people who are in the legal relationship with him.

A "missing person" means- a person who has disappeared from his domicile and he has not any contacts with his relatives and that is not confirmed the fact of death or that his body is not yet found.

Different legislations provide different time limits for the declaration of the presumed death of a person, by the last day of news of the missing person: 10 years since the last news¹; a person who is missing- is thought to have died, or has not been known to be alive for a period of at least 7 years² and according to the Albanian legislation the person must be declared dead if he is missing from his domicile for more than six years from the last news.

There are also provided special situations where the court may declare the presumed death without previously declaring him missing. In those situations where the circumstances prove the death of person, such as: the case of the immigration of the Albanians to Italy in 1997; in case if the person is missing during the war operations, and this loss is confirmed by military authorities, if it has passed two years without news from the date of entry into force of the peace agreement or three years from the end of war operations, the court has the power to declare his death without having previously declared him missing³.

The procedure of declaring the person missing or dead is of a particular importance and it brings consequences not only for the person declared missing or dead. Thereupon, the court after taking into consideration the request made by interested persons, publishes the request in the Official Gazette or in a newspaper specified by it. Publicity as a legal requirement is presumed to bring more opportunities for obtaining information.

2. THE PROCEDURE OF DECLARING A PERSON MISSING

The importance of the institute of declaring a person missing or dead is to protect the interests of persons who are interested in property and personal relationship with the person declared missing or dead.

At the request of interested persons declaring the person missing or dead requires the verification of two situations (moments): the absence from the domicile and the verification of the fact that the person is alive or not.

Persons who are legitimized to submit such a request must have legitimate interests: as social interests or property rights. As legitimate persons can be the spouse, parents and children, who are affected directly by the missing or death of their relative, but like an interested person can be legitimated even the closest relatives, when in the absence of parents or children, are those who have interests that may arise from inheritance. As an interested person can be legitimated even the custodian, in cases where the person has been under custody. As a legitimize person to submit

¹ Art. 58, Civil Code of Italy

² Art. 1Presumption of Death Bill, United Kingdom 2012

³ Art. 18, Civil Code of Albania

a request, are even state authorities as the public prosecutor⁴ who is interested to know the destiny of a person who may have been the victim of a crime.

The legitimize persons are generally the closest relatives or the spouse, which suffer the loss of their close relative and through the process of declaring the person missing keep their hopes for finding him when their individual efforts have failed. These people are legitimized, since it is presumed that they would be the first with whom the absent person will hold contacts or will give news.

While in the legal literature are given different opinions about the declaration of missing, to the declaration of the person dead, all scholars share the same opinion. Some scholars think that both in the declaration of missing as well as in the declaring of the person dead, it is presumed the death of the person because the decision of the tribunal shall be true only when it will verify that the person is no more alive. (Yurchenko A.M. 1982. p. 41) Other authors believe that, in the declaration of missing person is presumed that the person is still alive, because there are insufficient information for the presumption of death of the person. (Volozhina.V.P 1985. p. 186) But there is another approach, which in my opinion is the most appropriate, which is expressed by Grishaeva S.P. According to her there is no presumption in declaring a person missing because the court deals with ascertainment of the facts and doesn't make presumption of life or death. (Grishaeva. S.P. 1999. p. 256)

The interested person should be addressed to the competent court, where has been the last domicile of the missing person. In the request to declare the person missing or dead should be determinate the first and last name of the person proposed to be declared missing or dead, as well as personal data of the person as, birthday, domicile and his last residence. These are necessary requirements for the identification of the person which is required to be declared missing or dead, in order not to make mistakes on the identity of the person. A brief description of the circumstances that are known until the disappearance of the person, and the evidence which ascertained these facts should be given in the request. Persons who are or might be his heirs, as well as all the other persons to whom it is known that from this fact would won or lose rights should be mentioned too.

The first paragraph of art. 376 , provide the legal interests of persons who are interested in declaring a person missing or dead. Although it is not literally expressed, it is presumed that the request should contain the applicants generalities as well as his address, in order to justify the legitimacy⁵. In contrast to our legislation the Kosovo legislation provides the content of the request in a special provision⁶.

Only through a court decision and by a special procedure a person can be declared missing. The court must verify the absence for a long time from his domicile or from his last residence, that according to Article 15 of the C.C "The person that is absentee from his domicile or his last residence for more than two years and there are no news of him, may be declared missing."

Domicile is the unit of local government where the citizen has his residence for a period longer than one year. The residence is the unit of local government, where the citizen has his habitation for a period of more than 45 days and less than a year⁷.

⁴ Art. 24, The procedural civil code of Albania

⁵ Art. 374 The Procedural Civil Code of Albania

⁶ Art. 51 Law Nr. 03/L-007 " Non contestable procedure "

⁷ Art. 3/ a, 3/b. Law Nr. 8950 "Civil status law"

The domicile and the residence have a special attention because they define the competent court, to which is filed the request, and because is there where the publication of the request shall take place.

The court during the process of declaring the person missing or dead and in order to determine the absence of the person, administers evidences such as hearings sessions of his relatives, of persons who have entered in legal relationship with him, evidences from communes or municipality where he had his domicile or last residence, and any other evidence that can provide any news on this person⁸. During the process the presence of the public prosecutor is provided in order to protect the interests of the person and to avoid any form of abuse.

Article 49 of the Law Nr. 03/L-007 " Non contestable procedure "to declare a missing person, provides: "A person who is absent from the place of domicile or his last residence and for whom there is no information for more than two years, by the request of any natural or legal person that for such a thing has a legal interest, can be declared missing by the decision of the competent court"⁹.

The period of two-year specified in the Albanian legislation is seen as a reasonable time to obtain sufficient information on the person's absence and to create the full conviction on this absence. The Russian Civil Legislation provides a shorter period of time necessary to declare a missing person. In Article 42 of the Civil Code of Russia is provided that; "The person may be declared missing, by the request of interested persons, if there are no news from his domicile or his residence within a year".

While our legislation provides only the declaration of the person missing or dead, the Italian legislation provides a special institute which is "the absence." To declare the absence of the person under Italian law is not provided a certain period but is enough that the person is absent from his domicile or residence and his absence have occurred in uncertainty conditions.

To declare a missing person the Italian legislation provides a two-year time limit from the moment of receiving the latest news on the person, but the legitimate persons to request his missing are more limited that those provided in the Albanian legislation. Italian legislation defines as legitimate persons, not every person who has a legitimate interest but only the potential heirs of the person to whom is required the declaration of missing and also the persons which may have property rights that depend on his death.

The Spanish legislation as well as the Italian one recognize the institute of "the absence" Article 181. In any event, upon the disappearance of the person from his domicile or from his last place of residence, without having any further news of him, the judge may, at the request of the interested party or of the Public Prosecutor, appoint a defender to protect and represent the disappeared person in court or in any business which does not admit delay without serious detriment.

While in both legislations declaring the absence is not subject to time limits, in contrast to Italian legislation, in the Spanish Civil Code the time limits for the declaration of the missing person is determined depending if his property is under administration or not. "A person who has disappeared from his domicile or last place of residence shall be deemed to be under a situation of legal absence:

⁸ Art. 14 Civil Code of Albania, Art. 378 The Procedural Civil Code Of Albania

⁹ Art. 49,para.1 Law Nr. 03/L-007 " Non contestable procedure "

1. After one year has elapsed from the last news of him, or, in the absence thereof, from his disappearance, if he should not have left an attorney with powers of administration over all his property.
2. After three years have elapsed, if he should have empowered someone to the administration of all his property"¹⁰.

The request filed to the court to declare the person missing is subject to publicity. The purpose of the publicity of the request stands not only to inform people who might have information on the location of the person who is demanded to be declared missing, but creates the possibility for the person to get information and to create the opportunity to contest the fact and protect his interests and his personal property.

According to article 377, the Court, within ten days from the day that the request is filed, send a copy of this to the municipality or commune, where was the last residence of the person who is demand to be declared missing or dead, to announce in a visible place. The above request is published in the Official Gazette and at least one local newspaper¹¹.

The judgment of the request cannot be done until six months from the announcement of the application or its publication in the Official Journal. This time limit is considered sufficient for receiving information or news on the person.

After the trial, the Court makes the publication of the summary of the decision in the Official Journal, in a official newspaper determine by the court, as well as other ways of publication if it will see it reasonable. Case by case the court considers the possibility of publishing the decision in other forms if it find it appropriate. In my opinion the law should provide other forms of publication because the development of technology makes possible to obtain in a faster time the information. So I consider as necessary the publication of the decision in the official website of the state police, the registry office or a special site created for the publication of these decisions.

The Spanish legislation provides the procedure of publication but in a more detailed form that that provided in our legislation. Declaring a person missing is done by a legal act (art 2. 038.4 de la LEC) and in every case it requires to be preceded by a publicity, which is a "necessary term ... the beginning of the publication of two decrees with an interval of 15 days, to be published in the Official Bulletin of the State, in a Madrid newspaper with a large circulation and in the province in which the person declared missing would have had domicile or his last residence. Also, it has to be notified by the National radio twice and with the same interval of 15 days. The Court may also determine other ways for making broad publicity if it sees it reasonable". (Alvarez. 2005. p. 70)

The Italian legislation gives discretion to the judge in determining the form of publication and its limits in the case of the declaring the person missing, meanwhile it provides specific procedure and time limits prescribed in case of publication of the declaring the person dead. In the Art.723 of Civil Procedures Code "The president of the tribunal fixes by decree the hearing to appear in front of him ' or a judge nominated by him to the applicant and all indicated persons. Could also ordered that the decree must be published in one or more newspapers. The decree shall be communicated to the Public Ministry". For declaring the person dead in the article 727 " The president of the tribunal appoints a judge in accordance with Article 723 and ordered by the

¹⁰ Article 183 of the Civil Code of Spain

¹¹ Art. 377 The Procedural Code of Albania

applicant, the request within the period that the he fixed, be included to extract, twice in a consecutive distance of ten days, in the Official Gazette of the Republic and in two newspapers, with a request to anyone who has news for the missing person to send it to the court within six months after the last publication. If all ads are not executed within the time limit, the request shall be abandoned. The president of the court may also ask for other means of publicity.

3. THE PROCEDURE OF DECLARING A PERSON DEAD

As more time passes from the moment of the declaration of the person missing as more reduced the chances to find the person alive, and the presumption of death becomes the only way and the final solution to end an uncertain situation.

It is important to give the difference the declaration of death and the death by natural causes.

The declaration of a person dead is made only by the court decision and is not based on real facts, but on presumptions, the absence of a person from his last residence and the failure to have news for a certain period. While the death from natural causes can be requested from every member of the family or relative and in their absence from a person who is in charge from the municipality or commune where he lived or has been found dead. The declaration is valid only when it is accompanied by a medical report. (Nuni. A. 2009. p. 133)

The consequences that come from the decision of the court to declare a person dead are the same with the consequences that come from that of the death by natural causes: dissolution of the marriage and the opening of heritage.

The declaration of death will follow the same procedure that is followed even in the case of declaring a person missing. The first step to take that is outlined in all legislations is the request made by interested persons to declare a person dead. Interested persons to do the request to declare a person dead are the same who have the legitimacy for the request of declaring a missing person.

Which is the importance of studying the procedure of the declaration of a person dead?

Time limits and the moment wherein they start differ from one legislation to another:

In Article 17 of the Civil Code of the Republic of Albania says "The person who is declared missing, with the request of any interested person, can be declared dead by the decision of the court, when has passed four years without news from the date that he has been declared missing".

According to the legislation of Kosovo "The person who is declared missing by a court decision, with the request of any interested person can be declared dead by the decision of the court, when has passed three years without information from the day that he is declared missing"¹².

The Italian legislation provides a period of 10-years for the declaration of the person dead, but which starts from the moment of the latest news and not from the moment of declaring him missing¹³. At the same moment starts the time limits even under Spanish legislation¹⁴.

¹² Art. 59 Law Nr. 03/L-007 " Non contestable procedure "

¹³ Art. 58 Civil Code of Italy

The Council of Europe 2009 Recommendation on Missing Persons takes account of the circumstances of the disappearance and the related probability of the death of the missing person.

In the Principle 4 – Waiting period for lodging the request

1. Where, in the light of all the circumstances, the death of the missing person can be taken as certain, the lodging of the request mentioned under Principle 3 should preferably be possible without a waiting period.

2. Where the circumstances of disappearance of the missing person are such that it is reasonable to conclude that his or her death is likely, the time which must have elapsed from the disappearance, or from the receipt of the last news that the person was alive, for lodging the request should preferably be one year at the most.

3. Where the death of the missing person is uncertain, the time which must have elapsed from the disappearance, or from the receipt of the last news that the person was alive, for lodging the request should preferably be seven years at the most¹⁵.

Taking into consideration the Recommendation of the Council of Europe, several legislations mentioned in this paper treat the age of a person as determination of the timeline for the declaration of his death.

Spanish Civil Code provides that the time limits of declaring a person dead in Article 193, second paragraph, where the declaration of a person dead will be within a 5 year period if, upon expiration of such period, the absentee should have reached the age of 75. The same provision makes the Portuguese legislation but if the missing person has reached the age of 80¹⁶.

The German legislation makes provision for a waiting period of 25 years for persons who were under 25 at the time of their disappearance, in circumstances that were not dangerous to their lives¹⁷.

The time limits for declaring a person dead for who 'Were under 25 at the time of their disappearance, is a particular provision of the German legislation. This particularity is expressed not only in the period of 25 years for persons who were under 25, but in the fact that the legislator makes the determination of situation of missing person, because if that person was declared missing in a war than the period would be three months¹⁸.

Article 19 of the Civil Code of Albania "The person who has lost during a natural disaster or in circumstances which lead to believe that the death occur, can be declared as such by a court decision, when has passed two years without news from the day the disaster happened, without having necessary previously declaring him missing".

Also for special circumstances legislations provide possibility of declaring the person dead without passing through the procedure of declaring the person missing. .

The Albanian Civil Code provides the opportunity to declare the person dead without necessary declare him missing in some situations:

¹⁴ Art. 193 Civil Code of Spain

¹⁵ Recommendation CM/Rec(2009)12 of the Committee of Ministers to member states

¹⁶ Art.114 Civil Code of Portugal

¹⁷ Sections 3(1)-(2) of the Verschollenheitsgesetz 1939.

¹⁸ Sections 4-7 of the Verschollenheitsgesetz 1939

- The person lost during military actions, with such missing certified by the competent military authorities, when there is no notice for two years from the peace establishing agreement has entered into force or three years from the end of military actions, may be declared deceased by decision of the court without being first declared missing.
- The person missing during a natural disaster or in circumstances which appear to show he is deceased, may be declared deceased by decision of the court, when there have been no notices from him for two years after the disaster has occurred, without necessarily being previously declared missing. When the date of disaster is not established, the two-year term starts to run on the day 1 of the month following the month the disaster occurred and, when neither the month can be established, the term starts to run on the day 1 of January of the following year. When is not determinate the day when happened the disaster, two year time limits begins from the first day of month that follow that in which happens the disaster and, when cannot be assigned neither month, the time line begins from the first day of January of the following year.

Russian legislation provides that in such situations which can cause the death as (war) or those cases in which becomes easier for the presumption of death as a consequence of accidents, by a legitimate request and after verification committed, the court has the right to declare the person dead within 6 months from the date of receiving the latest news.¹⁹

When all necessary verifications by the court are made, and the court determines from the investigations that the person is not alive anymore, the court declares dead the missing person. When the death of a missing person is declared, is assigned the day when it occurred.

4. RECOMMENDATION

The importance of the institutes of the declaring of a person missing or dead is revealed in the conservation of personal and property rights. Rendesia e institutit e shpalljes se personit te zhdukur apo te vdekur shfaqet ne ruajtjen e te drejtave personale dhe pasurore.

The role of the institute of the declaration missing or dead of the person have more interest in extreme situations such as during the war, or in the cases of air or maritime accidents and natural disasters.

The particularity of this institute is the procedure of declaring the missing person or dead and, specifically the time limits that must be met from the moment of receiving the last news in the declaration of the missing person, until the declaration of death.

During the analyze of foreign legislations was noted that their approach on the institute of declaring a person missing or dead provided some exceptional cases on the definition of time limits in specific situations for which there are no provision in the Albanian legislation.

According to the Portuguese and the Spanish legislation the age of the person justifies the reduction of time limits of declaration of death: 5 years after the person has reached the age of 80 years old by the Portuguese legislation, and 75 years under the Spanish law.

¹⁹ Art.45 The Civil Code of the Russian Federation

Such a provision is of much interest because it gives an appropriate solution to a situation which is based on the possibility of survival of an elderly. Given that the average age of death in Albania according to official data is 80 years old, I propose that such a provision as that defined in the Portuguese legislation is suitable also for the Albanian legislation

In the same logic, the German legislation provides that the declaration of death of the person who is under the age of 25 at the time of their disappearance, the time limits of the declaration of death are of 25 years.

It would be appropriate to provide longer time limits for people who have been declared missing in a young age such as under the age of 20 or 25 years old, being justified by the fact that the reasons of the person absence would be linked with familiar conflicts, human trafficking for prostitution or beggarly or vengeance.

Cohabitation as a new institute provided in the new Family Code of 2003 which is also an Albanian trend of young people, should bring to legitimacy the partners as subjects to request the declaration of missing or dead of the other partner, since they are included in personal and property relations.

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