N O T A R I A T

Marriage and Civil partnerships between persons of same sex in Slovenian law

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The field of property relationship between spouses and cohabitation partners, and in a partnership is in the Republic of Slovenia governed in the **Marriage and Family Relations Act** from 1976 with some later amendments, in the **Partnership A**ct which was passed this year while some stipulations will come into effect in February 2017, and with the **Private International Law and Procedure Act.**
21.03.2017 new Family Law was enforced, that will come to use in march 2019.

Since my presentation concentrates on the relationship between persons of the same sex, let me point out to the Constitution of the Republic of Slovenia as the basic legal act. (*Marriage and Civil Partnerships between Persons of Same Sex*).

The Constitution of the Republic of Slovenia does now allow any discrimination of partners of the same sex; just the opposite: when preparing the Constitution of the Republic of Slovenia, the constitutional body recognized the circumstance of sexual orientation and specially defined its view of this question. Sexual or same-sex orientation is one of circumstances from Art. 14 in the Constitution of the Republic of Slovenia where the Government in particular must not allow any discrimination and must even stand up for equality (Art. 14, passage 2 of the Constitution of the Republic of Slovenia).
The Constitutional Court of the Republic of Slovenia has been guiding with its judgement the legislative regulations in the Republic of Slovenia into a complete equalization of same-sex partnerships with a marriage and cohabitation partnership.

As we all know, the European Court of Human Rights has already taken up the point of view (hereinafter referred to as ECHR) that the concept of family life - which is characterized by close personal bonds between partners - refers to a partnership of a man and a woman as well as also to a stable same-sex partnership.

Let me also mention the Charter of Fundamental Rights of the European Union which clearly defines the existing powers, in the first line specifically the powers of authorities and institutions of the European Union. In Art. 9, it stipulates that the right to a marriage and the right to create a family shall be guaranteed to everybody regardless of his/her religion, national origin, colour, sex or sexual orientation.

There are many other documents at the European level, among them also the Council Directive 2000/78/EC from 27 November 2000 which prohibits any discrimination on the basis of sexual orientation of unmarried couples at a working place.

The present Partnership Act in Slovenia considers a partnership between two persons in all its elements equal to a marriage. It is also for the first time in the history of the Slovenial legislation that a relationship between two persons of the same sex who live in a partnership for a longer time is governed by law. Also a partnership which is not concluded is in all its elements equalized with a cohabitation of a woman and a man.

The Partnership Act refers to an application by analogy of legal stipulations which govern the marriage (in relation to conditions for the existence and validity of a partnership, the procedure before the conclusion and the conclusion of partnership, for the rights and obligations of partners, for property relations between partners, a termination of partnership, for relations between dissolved partners and legal consequences of a partnership).

A significant goal which is pursued by the new Act is the new legislative regulation of a same-sex civil partnership in the sense of equalizing the legal consequences between partners with the legal consequences as anticipated by law for such partnership between a man and a woman (ie. a marriage in the event of a formal acknowledgement and an unconcluded partnership, under the condition that two women or two men, who did not enter into a partnership, have been together for a longer time and if there are no reasons which would make a civil partnership between them invalid).

The proposed arrangement equalizes legal consequences only in a relationship between partners, and only when law provides some right or when it prescibes some obligations from the frame of rights held by the other spouse or if these are demanded by both of them exclusively from the title of the existence of a marriage as a legal relationship in the part which is in effect between spouses. However, the legislation does not govern family relations or relations in regard to third persons (as for example in regard to children). Partners in a civil partnership cannot adopt children together. Partners in a civil partnership are not entitled to an assisted medical reproduction.

The legislation defines that future civil partners will apply for a registration of their civil partnership which will be entered into in the presence of the Head of Administrative Unit or in the presence of some other authorized person and a Registrar. Unlike the currently valid registration, civil partnerships will be entered into publicly and with a solemn ceremony in special official areas – the same as marriage.

Legislation recognizes the legal consequences also for a partnership not concluded by two same-sex persons if there are no reasons existing which would make their marriage invalid.

As mentioned before, the Partnership Act equalizes a partnership community in all its elements with marriage and it refers to application by analogy of legal stipulations which govern marriage also for property relations between partners.
Therefore, I would like to briefly represent how law governs the property regime between spouses and which accordingly refers to a cohabitation of a man and a woman and also to a same-sex partnership which can also be registered or non-registered.

In accordance with the legislation of property relations between spouses valid in the Republic of Slovenia today til the new familiy law wil come to use, there is a legal regime governing the joint property of spouses. Joint property of spouses is defined on the basis of a joint ownership over property.

This is combined with an independent ownership over a separate property held by one of the spouses before marriage or which that spouse obtained on a free basis during marriage (ie. a gift or inheritance) and/or from a separate property (ie. interest and profits) (Art. 51 of the Law Marriage and Family Relations Act). Joint property consists of complete property obtained from work or derived from their joint property during marriage, irrespective of which spouse holds rights on that property. The shares of joint property held by the spouses are not defined, yet they can be defined.

In the division of joint assets, it shall be considered that the share of the spouses of the joint assets is equal, but the spouses may prove that they contributed to the joint assets in another, higher proportion. In a dispute on the amount of the share of each of the spouses of the joint assets, the court shall consider not only the income of each of the spouses but also other circumstances, such as the assistance which the spouse gives the other spouse, the care and upbringing of the children, performing household work, care in maintaining the property (Art. 59 of the Marriage and Family Relations Act).

All personal income (including the income from pension) or any income originating from the part of a spouse or from a profit from the joint property is legally considered as being a part of joint property. Any spouse may demand some property to be his/her separate property only if he/she proves that it originates from the time before marriage or that it is not derived from their joint property.

The joint property of the spouses shall be managed and disposed of jointly and by agreement, except if they agree that only one of them shall administer this property or that she or he manages and also disposes of it, respecting the interest of both spouses. Either of the spouses may withdraw from such agreement at any time (Art. 52 of the Marriage and Family Relations Act). If one spouse disposes of joint property without a previous consent from the other spouse, the latter one can challenge such legal transaction if a third person in this legal transaction knew or should have known that the related property is part of the joint property. Otherwise, the deprived spouse is entitled only to claim a compensation from the other spouse. The spouses are not allowed to independently dispose of any undefined share of their joint property, but they are independent in exercising their right to the ownership over the separate property.

Both spouses shall be responsible jointly and individually with their assets for obligations which appertain to both spouses according to general regulations, for obligations created in connection with joint assets and for obligations which one spouse takes on for the current needs of the family.

Both spouses shall be jointly responsible for the debt accrued at the time of their marriage and which is connected with their joint property and costs of their marriage. The joint property can be used to pay off creditors. If this is not sufficient, separate property of the spouses may also be used. A spouse shall have the right to claim from the other spouse the refund of the sum over and above his/her share which they have paid in forced settlement of a joint debt (Art. 56 of the Marriage and Family Relations Act). A creditor may demand on the basis of a legally binding decision that a court determine the share of common assets of a debtor and then demand forced settlement on that share (Art. 57 of the Marriage and Family Relations Act).

As mentioned at the beginning, the valid Marriage and Family Relations Act prohibits the spouses to define the regime of matrimonial property which differs from the matrimonial regime of a joint property.

A legal business between spouses is valid only if made in the form of a notarial deed.

An acceptable agreement between spouses and its amendments have to be in the form of a notarial deed.

According to the valid legislation, a registration of acceptable agreements is not necessary.

In the event of death of one spouse, their joint property shall be equally divided and the share of the late spouse becomes a part of his/her inheritance. The heirs or the surviving spouse may demand from the court to define a different ratio of shares. After the division, the surviving spouse inherits in compliance with the first or second order of succession. In the first order of succession, the surviving spouse inherits together with decendent's children, where the inheritance is divided in equal shares. If decendent does not leave any living children behind, the spouse shall inherit according to the second order of succession together with decendent's parents and receives one half of the property.

Highlighting of the legal solutions which are defined by currently valid legislation for the property of registered and non-registered partners.

The cohabitation is defined as a longer relationship, similar to marriage, between two heterosexual partners who could have entered into a marriage if wanted. This means there may be no legal obstacles for the conclusion of marriage between them. The property regime for partners in a cohabitation is equivalent to the property regime for a married couple. Their joint property is formed in the same way as the joint property of married couples. A registration for heterosexual couples is not possible. It is almost impossible to define when a partnership becomes a long-term partnership. Therefore, in the event when there are no obstacles for a couple to enter into marriage, all property acquired after partners started to live together is considered to be their joint property.

The same-sex partners can register their same-sex partnership which has the same property relations between partners as in the event of a marriage (The Partnership Act (Official Gazette of the Republic of Slovenia 33/2016 dated 9 May 2016 which begins to be applied in accordance with Art. 10 of the Act 9 months after its enforcement, which is February 2017).

An unconcluded partnership is treated the same as a cohabitation with the same legal consequences.

Authority which is responsible in the event of disputes and other legal questions in relation to the matrimonial property.

In accordance with the general rules on jurisdiction, the Slovenian court has the international jurisdiction for disputes in relation to matrimonial property if the defendant has his/her permanent residence in the Republic of Slovenia. If the defendant does not have his/her permanent residence in any other country, the jurisdiction may also be based on his/her temporary residence in Slovenia (Art. 48 of the Private International Law and Procedure Act).

A court in the Republic of Slovenia shall have jurisdiction in disputes over property relations between spouses concerning their property in the Republic of Slovenia, also when the permanent residence of the defendant is not in the Republic of Slovenia. If the majority of the property is in the Republic of Slovenia, and the remainder abroad, then a court in the Republic of Slovenia may rule on that property which is abroad only if the defendant permits the court in the Republic of Slovenia to rule on the matter. (Art. 67 of the Private International Law and Procedure Act).

The law of the country whose citizens the spouses are shall be used for personal and matrimonial property relations between spouses. If the spouses are citizens of different countries, then the law of the country of their permanent residence shall be used. If the spouses do not have the same citizenship or a joint permanent residence in the same country, then the law of the country of their most recent joint permanent residence shall be used. If the law which is to be used cannot be determined under the first, second or third paragraphs of this Article, the law of the country with the closest connection to the relationship shall be used. (Art. 38(1) of the Private International Law and Procedure Act).

The ownership relations between unmarried partners who live together are governed in a similar way by the law of the country the citizen of which they are. If they are citizen of different countries, the law of the country shall be used in which they have their joint residence.

If a married couple concluded an agreement about their property, the law shall be used which was used for their property relations at the time when the agreement was made.

Bilateral agreements on the international legal assistance which include rules on a conflict of laws in matters concerning matrimonial property regimes were concluded between the Czech Republic, France, Hungary, Mongolia, Poland, Rumania, the Russian Federation and Slovakia (see http://www.mp.gov.si).

The spouses choose the law which is used for their property relations if this choice is allowed by the Act which was initially used for their property relations (Art. 39 of the Private International Law and Procedure Act). But the selected law is not used if the effect of this choice is in conflict with public policy of the Republic of Slovenia (Art. t of the Private International Law and Procedure Act). The Slovenian legislation itself does not allow the choice of applicable law.

Presentation of a new Family Code in the Republic of Slovenia

This Family Code governs the area of marriages as well as the area of cohabitation of two persons of different sex.

The Code strenghtens the presence of notaries in the conclusion of agreements in the field of conventional property relations. Namely, the Code eliminates the cogent regime of a joint property of spouses which gives freedom to an understanding between spouses.

The contractual property regime is one of the most important novelties in the law concerning the property regime between spouses.

The Act stipulates that an agreement on arrangement of property relations of future spouses should be entered into a register of contracts governing the property relations which will be established by the Chamber of Notaries of Slovenia (on their previous consent which is followed by notary's application for registration) at the moment when future spouses enter into marriage. By that point of time, a draft shall be kept at notary's office until marriage.

The issue of complete disclosure of all information about the property of each spouse has been particularly exposed.

The principle that each spouse has to completely and truthfully disclose his/her property, financial situation (the property each of them has, their income), has become a part of duty of each spouse before entering into an agreement on the arrangement of their property relations. If any of them fails to do this, the other one can then challenge such agreement which governs their property relations. False or concealed information of the property situation of a spouse can namely lead to concluding an agreement on the arrangement of property relations with such content which the other spouse would not have concluded if he/she had known for the actual property situation of the other spouse.

It is also expressly defined that cohabitation partners can, if they wish, avoid the legal property regime with a separate agreement which is not an agreement on the arrangement of their property relations in the strict sense of the word. The stipulations contain reference that stipulations of that Code on the arrangement of property relations can apply adequately also for agreements on property regime between cohabitation partners. Such agreement would be valid – the same as between spouses – only when partners would not dispose of those rights in it which they cannot dispose of.

Notary's obligation for explanations

The new Family Code now specifically governs the notary's obligation for explanations. With a special Article which in a certain part duplicates the description of notary's obligations in Art. 42 of the Notaries' Act, the proposer wanted to expose the issue of concluding such a specific and complex legal business as the agreement on the arrangement of property relations.

Securing the interest of a spouse depends largely on the fact if notary as public official will advise them impartially and - in regard to the content of their agreement - instruct them in an understandable manner on its legal consequences. The proposer believes that notary should be in particular attentive in cases when the content of the agreement on the arrangement of property relations is written expressly in favour of one spouse and to the detriment of the other one. In addition to providing for the agreements where notaries participate to be legal, they should also take care that parties receive a good legal advice on legal business they are to conclude. It is only then that we can talk about the true will of contracting parties which is also in the public interest and not only in the interest of spouses themselves. This is confirmed also by present demands for a conclusion of any kind of property agreements between spouses in the form of a notarial deed.

Notary cannot make any adjustment of the content of the agreement arranging the property relations which he/she finds unjust towards one of partners, although the content is still legal. But the proposer believes that notary has to see that both spouses get adequate instructions about the legal property regime. He has to explain to them how their property relations would be treated like by the Code in the event they do not conclude the agreement on the arrangement of propery relations. Only after notary is convinced that spouses – after having received notary's independent legal advice - are still willing to conclude the agreement with a specific content, especially the one whose rights - to which he/she would be entitled on the basis of legal property regime – seem to be reduced, only then the notary can put it down.

It is important that spouses get a truly indpendent advice from notary.

Therefore notary should not be satisfied with the fact that spouses had already been advised by a lawyer who may be the lawyer of one of the spouses only and who will in the first line take care of his client's legal interests. We must always keep in mind also the circumstance that concluding the agreement on the arrangement of property relations between spouses is not completely equal to concluding a legal business with third parties where (in principle) the commercial aspect is in the foreground. Here, a specific emotional moment is (in principle) present although the agreement deals with property issue. The possibilities for exploitation of the weaker contracting party are even bigger in such agreements.

The notary has to explain to the parties who wish to conclude the agreement on the arrangement of property relations how the Code governs the registration of their agreement on the arrangement of property relations into a special register of agreements on the arrangement of property relations. The notary has to inform them that they have the possibility to enter the agreement on the arrangement of property relations into a special register of agreements on the arrangement of property relations which means that their property regime will obtain the publicity effect (about the existence of their agreement on the arrangement of property relations and not also in relation to getting insight into their agreement) and will be valid not only in the relation between them but also in relation to third persons, which is erga omnes. The notary has to instruct them of their possibility that their property regime remains in their private sphere which means that they can decide that their agreement on the arrangement of property relations is not entered into the register of agreements on the arrangement of property relations. Further, the notary has to explain to the spouses that in such event, the contractual property regime is valid only in their mutual relation while the existence of a legal property regime in relation to third persons is only presumed.

Responsibilities and risks on the side of individuals have been continually growing. This is a process which cannot be stopped. The question of legal safety, also in the field of family law, has to be viewed in the frame of the European Union. There is no legal safety possible without a unification.

There is still a lot of responsible work ahead waiting for us on the European path of strengthening the legal safety and search how to join traditional values like legal safety and notary's role as a public official in these global trends of a fast and often paperless business development in all spheres of human life and work.

Thank you for your attention!