



Medical expertise in non-contentious proceedings

Medicinsko veštačenje u vanparničnom postupku

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Introduction

Expertise is a kind of evidence in a non-contentious proceeding as well. An expert testimony is introduced in all such cases when the court does not avail with particular professional, specialized knowledge necessary to form the factual basis in the decision-making process¹. An expert witness is a person summoned to express before the court, using its professional knowledge and experience, his/her observations, and to present his/her findings and opinion on facts which might be relevant for determination of the veracity of allegations subject to proving².

The Law on Non-Contentious Proceedings³ does not contain the rules on the procedural status of experts and the method of adducing this evidence because those are covered by the provisions of the Civil Procedure Law⁴ which are applied *mutatis mutandis* in non-contentious proceedings as well. Please note that the 2011 Civil Procedure Law provides for a private expert's findings and opinion, in addition to the expert testimony. The legislator has provided for the possibility that a party may support its motion (claim, counterclaim, response to a claim) with a document containing the findings and opinion of a suitably qualified expert in order to clarify any facts requiring professional knowledge which, in such party's opinion, the court does not avail of⁵. Nevertheless, as regards this private document, the statutory procedural regime concerning the expert testimony as evidence does not apply⁶. According to these rules, the court has to pass a decision on determination of an expert witness from the register of expert witnesses, and identify precisely the objective of such expertise and the time frame for the expert to produce the expertise.

An expert witness is obliged to present his/her findings in writing, with detailed basis of its formulation and to appe-

ar before the court when summoned to provide additional explanations to the parties and the court. On request of the court or parties, the expert shall supplement or clarify the presented findings by additional oral explanation. The expert is entitled to a fee for his/her work, comprised of the reimbursement of material labor costs and a consideration for performed work. The court may fine an expert who fails to appear at the hearing, provided that he/she was duly summoned but failed to furnish an excuse for his/her absence. Expert witnesses are formally guaranteed an impartial position in the proceedings and their testimonies are protected by immunity⁷. An expert witness may be held liable for damages inflicted to others arising from a wrongful or untimely testimony, however, only if caused by gross negligence. Besides, the judge has no knowledge of subject matter and, naturally, relies upon experts' opinions; therefore, the issue of experts' procedural discipline needs to be addressed, which would imply their awareness of the court procedure, compliance with deadlines and alike. The provisions of the Law on Non-Contentious Proceedings which regulate particular non-contentious proceedings regard expert testimony as evidence⁸ which is supposed to enable the court to form the factual background for its ruling when the court lacks the necessary professional knowledge. In status non-contentious proceedings, medical expertise is proposed as evidence.

Proceedings for removal of legal capacity

One of the non-contentious proceedings in which the medical expertise is particularly important is the proceeding for removal of legal capacity. In such proceedings, the court examines whether an adult, based on the level of his/her ability of articulate reasoning, is capable of protecting his/her own rights and inte-

rests, and rules on complete or partial removal of legal capacity if it establishes the existence of statutory reasons, as well as on restoring of legal capacity when the reasons for the removal or restriction of legal capacity cease to exist. In addition to the proceedings for removal of legal capacity, the court institutes *ex officio* a proceeding to assert the existence of reasons for further validity of the ruling on removal of legal capacity, since this is a measure which limits the legal capacity as a human right of any natural person guaranteed by the Constitution. The law provides that the court is obliged to review any rendered ruling on removal of legal capacity within specified deadline and in proceedings which are validly terminated.

To decide on removal of legal capacity, the court needs to be aware of mental health status of the person concerned and his/her ability of reasoning. Since the court does not possess the necessary professional medical knowledge, it needs the assistance of a medical expert so as to be able to determine the relevant facts. In these proceedings, the court is obliged to order medical expertise *ex officio* in order to assess the mental health status and the extent of the reasoning ability of the person concerned, which is highly important for determination of the scope of the measure which might be pronounced, extended or modified in the proceedings⁹.

Pursuant to the law provisions, the expert testimony on the mental health status should be provided by qualified expert witnesses – at least two doctors of adequate specialties (psychiatrists, neuropsychiatrists, clinical psychiatrists, etc.) appointed by a court decision and registered in the register of expert witnesses for a particular field of expertise. The expert testimony may not be provided by doctors who determined the diagnosis before the institution of the proceedings for removal of legal capacity, and whose expert opinion is attached to the motion by the petitioner. In court proceedings in general, findings and opinions are attributed to a legal function and become legally relevant in court proceedings.

In its decision, the court defines the experts' task, which is to specify in their findings and opinion whether the person subjected to the proceedings for removal of legal capacity is oriented in time and space and in relation to third persons and whether, mindful of the mental health status, he/she is able to protect his/her own rights and to fulfill his/her obligations. In their findings, the experts are supposed to state the actual psychological state of the person concerned, describe the overall health status of that person, and state whether the person is oriented in time and space, establishes verbal communication and, if so, whether such communication is maintained and deepening, whether the train of thoughts includes insane ideas, whether there is a critical attitude to ideas, etc. The appointed experts are obliged to determine the diagnosis and provide an opinion on the capacity of the person concerned, in terms of his/her ability to protect his/her rights and fulfill obligations.

In the provisions of the Law on Non-Contentious Proceedings, the legislator has not provided what happens if the opinions of two medical experts differ. In that case, the general rules on evidence provided under the Civil Procedure Law apply. The court shall first advise the expert witnesses to harmonize their opinions, if possible. Otherwise, the court

has to order a new expertise entrusted to either a commission of medical experts specialized in neuropsychiatry (most often three of them) or, in more complex cases, an expert opinion of a health care institution registered in the register of expert witnesses may be asked for (neuropsychiatric hospital and, naturally, in the most difficult cases, the Faculty of Medicine).

All participants in the proceedings may raise an objection to experts' findings. In such a case, the court may present evidence from a new expertise. In its decision determining on the removal of legal capacity, the court shall, mindful of the mental health status, pronounce the measure of full or partial restriction of legal capacity over particular time period, and set the deadline for review the existence of the grounds for further validity of the ruling. If the court finds, based on the findings and opinion of the commission of medical experts, that the person's legal capacity should be partially removed, the decision shall contain the legal actions which may be taken by such a person to the extent of his/her legal capacity. A pronounced measure of removal of legal capacity is not of permanent nature, because its validity period must not exceed three years. Upon expiry of that deadline, the court shall review the presence of conditions for restoration of legal capacity, or for further extension or modification of the pronounced measure. Introduction of periodical review of the court ruling is compliant with the Recommendation of the Committee of Ministers of the Council of Europe no. R (99) 4 Principle 14, stipulating that „the measures of protection should be of limited duration, subject to periodical review”. This legal arrangement contributes to a better protection of concerned persons' interests, and to the control of the guardianship authority's performance¹⁰. For the court to be able to review the existence of reasons for further validity of the measure on removal of legal capacity pronounced through a valid ruling, it is obliged to schedule a hearing where, apart from the person concerned and his/her guardian and guardianship authority, it should summon expert witnesses, preferably those determined in the concluded proceedings, in order to assess the mental health status of the person concerned and decide on the extent of his/her legal capacity.

Proceedings for restoration of legal capacity

In the Proceedings for restoration of legal capacity, the provisions on removal of legal capacity apply *mutatis mutandis*. This practically means that the person shall be re-examined by at least two neuropsychiatrists who shall assess whether the health status has improved. The situation is identical in case of doctors' disagreement about the extent of the health status improvement, therefore, the above described procedure shall be followed.

Proceedings for detention in a neuropsychiatric health care institution

The Law on the Protection of Persons with Mental Disorders¹ provides for special non-contentious proceedings

for detention of persons with mental disorders in a health care institution without his/her consent for the purpose of treatment, when the nature of a mental condition makes it necessary in order to prevent a significant health deterioration, to prevent life and safety threat to others and establish the capacity for consenting to a proposed medical step. For those reasons, a person with mental disorder may be pronounced restricted freedom of movement or communication with external world, when a doctor of medicine and a physician-psychiatrist assess the extent of the mental disorder and inability to apply less restrictive modes of health care provision.

The proceedings for compulsory hospitalization are instituted by court after receiving the notice from a health care institution that a person is admitted for treatment without his/her consent further to assessment of medical reasons for stationary treatment without his/her consent. The court shall schedule and hold a hearing in the psychiatric institution, where it shall hear the person held for treatment and adduce evidence from expert testimony. The court shall order an expert witness to conduct a detailed medical examination and examine the medical dossier of the person concerned. The expert witness is obliged to state in his/her findings the psychological state of the person and whether the person is oriented in time and space, whether he/she establishes verbal communication and whether such communication is maintained and deepened, whether the train of thoughts includes insane ideas, and whether there is a critical attitude to ideas, etc. The expert is obliged to determine a diagnosis. He/she shall state in the findings whether further treatment in hospital conditions is necessary for the protection of the person's own life and health, and public safety.

Although the compulsory detention in a stationary health care institution, without the concerned persons' consent, undoubtedly represents a restriction of the freedom of movement, regardless of the legally prescribed maximum duration of compulsory detention, it still does not contradict the European legal standards observed by the European Court for Human Rights and the provisions of the Law on the Protection of Persons with Mental Disorders which stipulates that no person shall be compelled to undergo medical examination with a view to determining whether or not he/she has a mental disorder, except in the cases and in the procedure authorized by law. In this situation, observing the principle of proportionality between the interests of the society to properly and accurately assess a person's mental health in order to undertake the legally prescribed measure of his/her protection and the right to freedom of movement, the legislator has provided for compulsory detention of limited duration with the objective to assess the mental health status and treatment, so that this court decision does not constitute a violation of the right to privacy, dignity and family life¹¹.

In case the court decides that the admitted person should be detained in the health care institution, it shall determine the detention period which must not exceed 30 days as counted from the day when the psychiatrist made the decision on detention of the person with mental disorder without the latter's consent.

In more drastic situations, when the health care institution estimates that the detained person needs to remain hospitalized even after the expiry of the period determined by the court decision, it is obliged to propose an extension of detention without consent five days before expiry of the detention period, in compliance with the estimates of the institution's medical consilium regarding the outcome of the treatment. The court may pass a decision to extend the person's detention in the psychiatric institution by up to three months. Any further detention may be extended by a court decision to a six-month period. The psychiatric institution is obliged to deliver to the court regular quarterly reports on the health status of the person detained without consent, or more frequently as requested by the court.

The law has provided for the possibility that the court may, even before the expiry of the determined detention period in a health care institution, *ex officio* or on proposal of the detained person, his/her legal representative or psychiatric institution, decide to discharge the detained person from the health care institution if determined in the proceedings that the medical reasons for further detention for treatment without consent have ceased to exist. The key word here is, naturally, "determined", because it is quite certain that the court has no knowledge of whether or not there has been any improvement in the medical status of a person with a mental disorder, or to which extent his/her medical status has actually improved¹². Passing of this decision shall depend on obtaining an expert opinion from a psychiatrist listed among expert witnesses.

Extension of parental rights

The need for medical expertise may also arise in proceedings for extension of parental rights instituted before maturity of a person, for reasons stipulated by law¹³. If a person fails to reach the maturity required for acquiring full legal capacity, due to an illness or a disorder in psychophysical development, or when he/she is not capable of protecting his/her own rights and interests, the law provides for the possibility of extension of parental rights. The basis for the extension of parental rights, according to the Family Law, is an illness or disorder in psychophysical development due to which a full-aged person is unable to take care of himself/herself and his/her own interests or actions, thus compromising his/her own rights and interests.

According to the provisions of Article 7 of the Family Law¹⁴, the parental right belongs to the mother and father together, provided that the parents are equal in the exercise of the parental right. For that reason, these proceedings may be instituted either by both parents together, as petitioners, or by only one of them if he/she exercises the parental right on his/her own. Since an adopting parent has the legal status of a parent, he/she also belongs to the group of persons with the right of action. The Supreme Court of Serbia has taken the stand that "a guardian of a person with removed legal capacity who failed to file a petition for restoration of the legal capacity, has no right of appeal against a ruling by which the legal capacity of his/her ward has been restored in proce-

edings where the latter was represented by a special guardian.” (Supreme Court of Serbia, rev. 1734/93 of June 2nd 1993).

In these proceedings, the court *ex officio* determines the mental and physical condition of the child, relevant for his/her ability to protect his/her personality, rights and interests. The person over whom the parental right is sought to be extended may have severe health disorders, but still that might not influence rendering of the ruling to extend the parental right (a child who is blind, deaf, mute or paralyzed). The only criterion for the court is whether a person who is about to turn 18 is able, based on his/her psychophysical condition, to take care of himself/herself, and whether the achieved level of mental development is sufficient for an average capability acquired at maturity – to take care of himself/herself and make decisions relevant for one’s own self.

The central issue in these proceedings is the mental status and ability of the child, which has to be assessed in a procedure before the court¹⁵. In these proceedings, the child shall be necessarily examined by at least two doctors of adequate specialty (neuropsychiatrists, psychiatrists), since these proceedings are made equal to the proceedings for removal of legal capacity in terms of legal consequences. In their findings, the expert witnesses need to explain briefly the assignment ordered by court. They need to analyze the opinion and findings of the Center for Social Work and the report of the institution where the child is treated, and specify heterogeneous data. For example, the child’s date of birth, the therapy administered, whether the child is conscious, oriented and what is his/her illness, whether he/she is able to protect his/her personality, interests and right.

The opinion of the Center for Social Work on the appropriateness of extension of parental right is particularly important for the court to estimate whether an extension of parental right is in the interest of the “child” as the person concerned. The Center shall not be invited to provide a professional opinion concerning the reasons related or unrelated to the level of mental development of a full age child. Its role is to estimate the appropriateness, in terms of proper attitude of parents to a full-aged child and their capacity to overtake the care of the “child” who shall be actually deprived of legal capacity due to the fact that the parental right shall be extended. The opinion of the Center for Social Work, as an expert witness, must be substantiated from the aspect of its competences. The Center should provide an opinion on the extent of child’s capability, the child’s attitude to parents or vice versa, and the child’s potential living conditions, and the extent of parents’ capabilities and motivation for performing these very delicate tasks in the forthcoming period¹⁶.

Once extended, the parental right does not necessarily have to remain permanent. In fact, in case of an improvement in the health status of the person subjected to extended parental right, the court’s ruling may be revoked. To rule on cessation of the parental right, the court needs to engage two expert witnesses specialized in neuropsychiatry to testify. The task of the neuropsychiatrists is to verify the allegation that the health status of the person concerned has improved, and to provide reasoning thereof.

Granting permission to conclude marriage

Medical expertise is also necessary in the proceedings for granting a permission to conclude marriage when one or both persons wishing to conclude marriage are minors. The prime task of the court in these proceedings is to rule on whether the minor or both minors are ready to conclude marriage, meaning that it needs to be determined whether they have reached the physical and mental maturity required for the exercise of matrimonial rights and duties. To determine this, the court needs to obtain an opinion from a health care institution on the psychophysical maturity of one or both potential spouses. Besides, if required, the court needs to obtain an opinion on personal faculties of the client if there is a doubt or uncertainty, from a competent person – an expert witness specialized in psychology or psychiatry, or a health care institution.

Proceedings for determination of birth

In the proceedings for determination or proving of birth, when recognition of legal capacity of so called legally invisible persons¹⁷ is concerned (persons who are not registered in the birth registry), the need for medical expertise may arise. The role of the expert witness may be assigned to a doctor of adequate specialty, who shall examine the person concerned and provide findings and opinion on his/her age.

In the wording of the law, the term “a doctor of adequate specialty” is not precisely defined, which might give rise to some concerns in judicial practice. Assessment of age may be performed by pediatricians when children are involved, or gerontologists when old people are involved, and the expertise may be performed by specialists in forensic medicine as well. Besides, a DNA expertise may be performed if required.

Documents

A separate chapter of the Law on Non-Contentious Proceedings¹⁸ regulates the procedures concerning documents. If the court, i.e. notary public is in charge of drawing up a document, the Laws on Public Notary¹⁶ and on Non-Contentious Proceedings stipulate that the documents shall be drawn at the court, i.e. at the notarial premises, and outside the court or notarial premises only when a participant is unable to come to the court or notarial premises or when there are other justified reasons^{19,20}. The legislator has not detailed the reasons for a person’s inability to appear before the court, but instead leaves it up to the court to decide¹⁶. In practice, this situation is normally associated to the health status of a person. In that context, the court may ask for a medical expert’s opinion on whether the illness is of such nature that the person is only prevented from coming (immobility, severe disability, etc.) or the medical reasons are of such nature that they disable reasoning and validity of the expression of will of the person who is supposed to make a statement. Depending on this circumstance and the obtained expert opinion, the court shall first decide whet-

her to allow the drawing up of a document, and then whether to have it drawn up outside the court premises. The obtained doctor's opinion must be formulated in writing. If only a certificate is concerned, for example for complete immobility or impaired mobility, it is sufficient to obtain the opinion of a practicing physician, a certificate of a community health center or another common medical documentation confirming the patient's health status.

When drawing up documents on a legal transaction, the court or public notary examines whether the participants possess the legal capacity required for closing of subject transaction and whether there are any impediments in terms of the health status of the person making the statement, or persons making it on his/her behalf. It means that the court or public notary shall use the services of a medical expert, preferably a psychiatrist. Only exceptionally, the court or public notary may obtain the opinion of another doctor who monitors the patient's status on the circumstance that the patient may be currently undergoing extreme pain, strong therapy or alike. These circumstances as well may influence the validity of drawing up of documents from the aspect that such a person, for example, may have been administered morphine or some sedatives, or may be undergoing another medical intervention or therapy which influences the state of mind at the moment of drawing up the document or making an oral statement concerning the document contents.

Provision of evidence in non-contentious proceedings

When there is a reasonable doubt that a piece of evidence shall not be adduced or that its subsequent adducing in a court procedure shall be made difficult, the proceedings for provision of evidence before the non-contentious court or public notary may be instituted. The court practice has supported this, and "it is not allowed to request provision of evidence in non-contentious proceedings for the purpose of DNA expertise to determine whether the petitioner is the biological father of the petitioner's opponent, for the reason that the petitioner has failed to produce evidence that there is a reasonable risk that the proposed evidence could not be adduced in subsequently instituted litigation" (Decision of the Higher Court in Belgrade Gž 1048/2015 of July 18th, 2015).

Besides, the person seeking to draw up a will or a life-long care agreement, but his/her health is seriously impaired, may request from the court or public notary to adduce evidence in non-contentious proceedings by expert testimony of a neuropsychiatrist on the circumstances of his/her

psychological state – accountability. This evidence may be relevant later, in case the legal transaction is contested. The fact that a person's overall health status is poor does not in itself mean that such a person is unable to conclude legal transactions. To prevent any possible subsequent speculations whether the overall health status influenced his/her ability of reasoning and expertise based on medical documents and hearing of witnesses, it is possible to adduce evidence in non-contentious proceedings in advance, showing the person's state of mind and ability of reasoning²¹.

If a person has, for example, suffered a severe accident or occupational injury, and the liability of the other driver or employer is disputable, in such cases the person may request a medical examination and adducing of evidence through expert testimony in non-contentious or notarial proceedings, on the following circumstances: kind of injuries, the manner of infliction, consequences of injuries in terms of reduced overall living and working abilities, and maybe an expert testimony on the circumstance of necessary treatment, common therapies, duration of rehabilitation, etc. This way, the person may provide evidence on the kinds and intensity of injuries suffered, and legal consequences of the detrimental event until deliberated whether another person is liable for the damages inflicted. The standard of proof of evidence obtained in proceedings for provision of evidence is relative. It shall be treated as any other proof and evaluated according to the general rules of the standard of proof, by being evaluated in the context of any other proofs, severally and jointly⁷.

Provision of evidence shall only make other proceedings easier for the court, if assessment of particular facts is currently difficult due to the time elapsed or other circumstances, such as civil proceedings for compensation of damages, or a labor dispute between the employer and employee for compensation of damages. This is because the court shall avail with a competent impartial opinion of a medical expert who shall confirm the incidence of particular injuries or the mental state of a patient at particular time, relevant for ruling.

Conclusion

The provisions of the Law on Non-Contentious Proceedings which regulate particular non-contentious proceedings regard expert testimony as evidence which is supposed to enable the court to form the factual background for its ruling when the court lacks the necessary professional knowledge. In status non-contentious proceedings, medical expertise is proposed as evidence.

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