



## Contract for Asset Handover and Allocation

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**Abstract:** Entities of Law are free and possess legal instruments for asset allocation. The contract represents the most important instrument for asset allocation and handover. The asset holders may divide the property and pass it over to the heirs with the contract on the asset handover and allocation. Such a legal possibility is in accordance with the free initiative of law because it enables the transfer of property by agreement and with the consent of the holder's successors. The Testament and the Law represent the legal basis for inheritance, an opportunity for the asset holders to hand over the property after their death through these instruments. The research object of this seminar paper is the contract on the allocation and handover of assets. The analysis of the topic starts from the general part of the contract law, continuing on the key topic of the analysis, always encountering absence of materials. The hereditary effect of this contract implies to have it also analyzed under the scope of the Kosovo Law on Heritage, that is, the part of the transactions between the living.

**Keywords:** Contracts; Terms of contracts; asset handover and allocation; validity of allocation and delivery

### 1. Contract for Asset Allocation and Handover

An asset holder, with assets as a whole of individual rights of property character, can gain it as a result of inheritance, gift or lifetime work. Wealth is very important, especially for contemporary trends, because its gain comes with tremendous efforts and commitment. Asset values are of enormous importance to the individual, but these values should not be buried with the individual, because in that case they do not have any effect. It is important for them to transfer or handover from one holder to another while the subjects are alive, but also after their death. As long as the

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subjects are alive, these values can be handed over by acts with reward or even without reward (Kodi Civil Italian, 2014, p. 415).

The exchange of values with rewards is an indispensable instrument to enable the holders to increase the wealth or assets. The handover of assets can be accomplished as a free reward while the subjects are alive. Disposition without reward can also be implemented with the provisions of the right on heritage. Inheritance represents the transfer of hereditary assets to heirs, without counter remunerations, as provisions of a charitable nature. But the subject of the right may also acquire this disposition through the will, as the last statement of the inheritance that determines the fate of the hereditary assets, without any counter remuneration. We mentioned these legal bases for the transfer of hereditary assets that come as a result of the will of the subjects of the law, but to the transfer of assets can come also as a result of the judicial decision and the law. The contract as a consent to the free will of the creditor and the debtor is a legal instrument that enables movement and allocation of assets. It is wise to create such provisions for allocating and handing over the property, because it eliminates any potential conflicts that would arise in the future if that is not foreseen by the asset holder. The Contract for Asset Allocation has a legal basis in the Law on Obligational Relationships of Kosovo<sup>1</sup>, in Article 549; where it provides that: *“With a handover contract, the handler undertakes to handover and allocates the assets to his/her offspring, adopted children, and offspring of adopted children.”* Based on the aforementioned article, the asset right holder has a legal basis to not wait, and for as long as he is alive to allocate and hand over the assets to his heirs. In this way, is avoided any conflict for the future heirs, and also the expenses that would occur by inheritance proceedings are reduced. The Kosovo's Law on Inheritance<sup>2</sup>, in Article 58, foresees that the asset holder may by legal action (in this case the presented as contract) divide and allocate the assets to his/her heirs or offspring's. *“The predecessor, while he is alive, may by legal action divides and hand over his assets to his successors”*. It is natural and a personal right of the asset holder to allocate his assets, either with reward or without reward, while he is alive or with effect after death. Such a legal definition allows the holder to allocate his assets to his successors in the best possible way, always resulting as a reconciliation of free will, and thus hindering the fate of the assets allocation to successors, according to solid legal provisions. This division and allocation may be for the entire inheritance or for any given part of it (Podvorica, 2006, p. 135). For the remainder,

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<sup>1</sup> Law Nr. 04/L-077, *Law on Obligational Relationships*.

<sup>2</sup> Law Nr. 2004/26, *Law on Inheritance in Kosovo*.

it as acted on the basis of the Kosovo Inheritance Law, inheritance on the basis of established norms: that is, Testament and the Law.

### **1.2. Conditions for the Validity of Allocation and Delivery**

The consent of the will to allocate and hand over the assets requires the fulfillment of the conditions set forth by the mandatory provisions of the LOR. As with the absence of even only one element, the disposition becomes invalid and thus leaves room for the effect of the inheritance norms. The conditions that must be met are defined in an imperative manner in the Kosovo's LOR and LIK:

1. *The contract is valid only if consent is given from the offsprings, adoptive children, and offspring's of adopted children who under the law would be called to inherit on the basis of the contract (successor);*
2. *The contract must be concluded in the form of a notarial act;*
3. *Any successor who does not consent can do so later in the same form;*
4. *Allocation and division remains valid even if a non-consenting successor dies before the allocation and leaves no offspring, renouncing the inheritance, being excluded from the inheritance, or if he/she is not worthy to inherit (Law on Obligational Relationships, article 550).*

The contract on the allocation and division of assets for the living subjects, finds legal basis in the Law on the Inheritance in Kosovo, in the part of transactions between the living (allocation and division of assets). We also analyze this part of the LIK, as they have the same object of regulation with the Contract on the Division and Asset Allocation (Nuni, Mustafa & Vokshi, 2013, p. 143).

But the analysis shows that between these two methods of regulation, we find the appointment as an arrangement for allocation and division of assets as a legal action to accomplish this purpose. Meanwhile in the LOR - we find it as a contract on the allocation and division of the hereditary assets. Based on the analysis, the contract represents one of the valuable actions that enable transactions between the living and it is understood that this agreement for this arrangement is called a contract.

The first condition that makes the contract on the division and allocation of assets is the agreement of all legal successors of inheritance at the time of asset allocation. According to the Law on the Inheritance in Kosovo, legal successors are considered: *“Legal inheritors are: the deviser's children and adopted children and their successors, spouse, parents, brothers and sisters and their successors, grandparents and their successors.”* Based on the main principle of marriage, it is

considered that the marital spouse inherits equally as the legal successors (always meeting the legal requirements set forth in the Kosovo Family Law to be considered as a spouse).

Their consent is necessary, as with the violation of their inheritance, the disposition by contract on the division and allocation of assets, becomes invalid. Consent means the consent of all successors to the agreement on the division and allocation of assets and the consent given for a given part of the assets, does not make this part a subject to the inheritance procedure. Also the spouse of the asset holder should give a consent for the division and allocation of the assets, because otherwise this disposition remains invalid or takes the form of a gift. LOR, article 555- “During *the division and allocation, the asset holder may also take into consideration his/her spouse. To do so, the consent of the spouse is necessary. If the spouse has not been taken into consideration, his/her rights on the mandatory part, remain inviolable.*”

Consent for allocation and handing over of assets is valid if it is given at the notary. So far this was the competence of the judge, but now with the functioning of the Notary service, the notary has the competence of hereditary issues (uncontested). Law on Notary in Kosovo<sup>1</sup>, Article 29, paragraph 1.1.3: “the granting of validity for certain legal transactions in respect of which this and other laws provide compulsory processing, so that such transactions have legal effect.” To the competence for efficient transactions are also added the functions of inheritance issues and the compilation of contracts, thus paragraphs 1.4 and 1.5 of Article 29: “*treatment of all non-contentious hereditary procedures; compilation and certification of contracts.*” The beginning of the functioning of the Law on Notary in Kosovo serves for the best functioning of civil affairs, especially those of safer property transactions, because it prepares these transactions and secures authenticity as acts *en minute* and *en brevet*.<sup>2</sup> The form in this case for the validity of the transactions is written and legal, because it is a condition for the validity of the division and allocation of the property. Binding the contract for allocating and handing over the assets can be effective, even if the legal successors agree later. Giving subsequent consent is understandable that gives the predecessor the power to divide the assets, based on the principle of *Pacta*

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<sup>1</sup> Law Nr. 03/L-010 *Law on Notary in Kosovo*.

<sup>2</sup> For further Article 3. Item 3.1. and 3. 2 of the LNK: minute act is a document that the notary must deposit and store in his or her notary records and from which authentic copies or extracts may be issued under certain conditions; 3.2. the act *en brevet* is a document in the form of one or more originals, executed by the notary and may be sent to the parties. No authentic copy or extract from the *en brevet* act can be extracted. Attorneys' authorizations, authorizations, justifications and other ordinary acts may be executed in the *en brevet*.

*Sun Servanda* and in the interpretation of the contracts, always for the purpose of fulfilling them or realizing them, so this consent provides that in the future there will be no conflict of inheritance.

One of the important elements of this transaction that excludes the first conditions for the successful realization of this allocation is the possibility of granting the legal power of this agreement even without the consent of any of the legal successors. This is on the condition that he or she has died or that his successors have renounced the inheritance or even been excluded from inheritance as unworthy of inheriting. The exclusion of their consent is natural because, those who have not succeeded the decedent while he/she was alive, or those who have with their conduct and actions seriously violated his/her: life, personal integrity, have insulted him/her or even the family members. Inheritance is a provision without reimbursement, namely a generosity provision, a unilateral statement that creates power with the expression of the will of the decedent after his death, but with all these attributes the hereditary asset does not pass on successors if they renounce the inheritance as it is natural that they are not obligated to accept the hereditary assets. The moment they renounce it, they also lose the quality of the legal successors and thus their consent is not required for the validity of the contract for the allocation and handover of assets (Podvorica, 2006, p. 84).

The asset holder may, by means of a contract on asset allocation and handing over, do so only with the existing property. In addition to the existing property, he can not and should not compromise by virtue of this contract the indispensable part. In this way, LOR of Kosovo, Article 551 Paragraphs 1 and 2 state that: *“Only existing assets of the handler, in whole or in part, may be included in allocation and division. The provision on the manner of allocation of assets that are part of the general possessor’s property is void.”*

An analysis of the provision on the property that the predecessor can cession is more than understandable because only the existing values and not the wealth that can be created in the future can be divided, as such determination makes the disposition impossible or null. This part of the property divided by contract does not enter into the hereditary assets since it has already been awarded to the contractor by the consent of the successors, and this part thereof is not taken into account in the determination of the hereditary assets belonging to the successors (Podvorica, 2007, p. 93).

LOR in Article 552 item 2. *“Property acquired by his or her successors by handing over and allocation is not classified as part of his or her general assets nor is it calculated when determining the value of such assets.”*

The beneficiaries of the hereditary estate acquired through the asset division and allocation, gain this asset value by singular title if they are not the universal beneficiaries of the total assets but only a part of it (Legier, 2009, p. 215). Based on this, they are not responsible for the debts of the holder; they only earn a certain title or singular, directed to the holder for contract fulfillment. LOR in Article 556: *“The successor to whom the holder has allocated his or her property is not liable for the debts of the holder, unless otherwise provided in the allocation and division agreement.”*

### **1.3. The Indispensable Part**

The holder of the right is free to transfer asset values without any restriction. But the nature of this contract is also presented with an inheritance effect, in this case, the holder's freedom of disposition is restricted in favor of the legal successors and on the basis of a certain quota. This restriction is considered as an indispensable part of inheritance, where in the LIK in Article 31: *“The indispensable successors are entitled to the hereditary estate with which the testator can not dispose and which is called an indispensable part.”* This quota of inheritance, belongs to the indispensable successors, who inherit through blood relation and marriage, and those are: the asset holders offsprings, adopted children, and offspring of adopted children, parents and spouse, the asset holders grandparents, sisters and brothers may become indispensable inheritors only if they are completely unable to work and do not possess any means for living. The indispensable part is the designated part for the legal successors, which can not be violated by the contract on the division and allocation of the assets. If this part is affected by the contract on the division and allocation of assets, then this part is considered as a donation. The donation is calculated to the extent of  $\frac{1}{2}$  for the first and second successors, and  $\frac{1}{3}$  for the successors of the third successive hereditary. LOR Article 559. 2. *“When calculating the indispensable part, those portions of property handed over and allocated by the decedent during his/her lifetime to other successors shall be considered gifts.”*

## **2. The Effect of Contract on Asset Allocation and Hand Over**

The nature of the contract on asset allocation and hand over is special. It is as such because it is a contract bound while the subjects are alive, with the consent of legal

successors and only for the assets existing at the moment when the contract was made. The effects of this contract have been addressed above, meaning it causes relative effects even when the subjects are alive. The relative effect lies only on the creditor and the debtor and only in exceptional cases on a third person. The contract on the allocation of assets has an inherited effect, since the part of the hereditary asset which does not belong to the hereditary estate, is singled out as such. The hereditary character also makes it even more special because in this case we are dealing with singular and non-universal hereditary wealth. This singular wealth is also called the right of request addressed to the subjects obliged to fulfill the order, and that its profit does not oblige the beneficiary to pay the debts of the bearer. This contract belongs to the group of quasi-contracts, because it entitles to a right, a requirement that is regulated even on the basis of the Kosovo LOR.

Above were mentioned the conditions for the contract validity, among them was mentioned the obligation for consent of the legal successors, but what happens if they do not give their consent? Such wealth may be gained by successors, as a gift (Podvorica, 2007, p. 93).

The gift is part of the hereditary assets and as such is taken into consideration during the procedure of hereditary asset allocation. LOR, Article 62.1. *“If there is no consent from any of the successors with the cession and the division, then the parts that have been given to the other successors are considered as gifts and after the death of the forerunner they will be treated same as gifts made to the successors.”*

### **2.1. Keeping the Right of Ususfructus**

Since each contract is a willingness to agree between the creditor and the debtor, they in their agreement may also assign other rights in the field of the right to obligations or even the real one for themselves or for their spouse. The fulfillment of the condition or order from the contract, represents a condition for the validity of the disposition of the assets. Thus, the holder may acquire a right to a living allowance or a life retention for himself and for the spouse. LOR, article 554: when handing over or allocating assets, the holder may retain for him/herself, for the spouse or for any other person, the right of ususfructus on all the assets or part of the assets, or may require a life allowance with cash or deed, life retention or any other compensation.’

The fulfillment of the life allowance contracted to the bearer or the spouse may be presented as an obligation to be fulfilled by two or more beneficiaries, and the death of only one of them will not extinguish this obligation, as this allowance is fulfilled

until the death of the last obliged. Article 554.2 If the agreement on the usufruct or the living allowance has been reached for the bearer and his or her spouse together, then in the event of the death of one of them the usufruct or life allowance belongs to the other in its entirety up to the death of the other, unless otherwise provided by the agreement or unless otherwise provided by the circumstances of the case.

### **3. Termination of the Contract on Asset Allocation and Hand Over**

Contracts are law for the parties and must be met by contractors. But one of the important elements and impacts of this contract is the ability of the asset holder to revoke or demand the return of the given asset. It is only natural that the nature of this contract is without compensation, ie without reward, and it is required to at least respect and care for the bearer and his family members.

In this way, the LOR determines that the asset giver has the right to return what he has handed over under the contract as the beneficiary with his behavior and actions has violated the principles of morality to his or her family. In this way, article 558: 'The asset holder, may revoke the contract because of deep ingratitude, if after the contract is bound, one of the beneficiaries acts towards the holder or any close member in such a manner that according to the fundamental moral principles, it would be unfair to keep what has gained. In addition to this case, the law also provided other cases of the right of the bearer to request the return of the allocated assets: it may be a result of unfulfilment of the duty of life allowance or life retention. For all the other cases the court looks into the causes for gift return.

The successors have the right to request asset return after the death of the predecessor, provided that they are not excluded from inheritance due to unworthiness. LOR, Art. 559, "The successor who was required to return to the asset holder what he has received during the allocation and division, may request his or her indispensable part after the death of the predecessor, unless he is excluded from the inheritance or is not worthy to inherit from the predecessor, or unless he has renounced the inheritance."

### **4. Conclusions and Recommendations**

Until the legal system in Kosovo lacks unification and harmonization at the level of Codification, important topics of civil relations, such as the contract on the allocation of assets, obviously causes uncertainty for citizens and lawmakers in the first place,

as well as failure to apply this very important institute when it comes to asset allocation.

LOR, regulates as a special way and with special effects the allocation and division of title holders assets while they are alive but with post-mortem effects. The Law on Hereditary Relations, on the other hand, regulates the contract for the allocation of assets for living entities. But on the other hand, it recognizes only two bases for the allocation of hereditary assets: the Testament and the Law.

The main recommendation is to harmonize the LOR with the LIK in terms of regulating the legal basis which we propose to be part of the LIK since the main effect of this contract is the profit of this inheritance measure after the death of the asset holder.

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### Legal Articles

Law no. 03/L-154; Law on Property Rights and Other Real Rights.

Law no. 04/L-077; Law on Obligation Relations.

Law on Inheritance in Kosovo, Law Nr. 2004 / 26.

Law nr 03/L-010 on Notary