

THE FICTION OF NASCITURUS AND SOME OF ITS EFFECTS IN CIVIL LAW-COMPARATIVE ANALYSIS WITH SPECIAL REGARD AT THE REPUBLIC OF KOSOVO

Abstract

Every living person has legal capacity and is capable of acquiring civil subjective rights and of course, to assume obligations. As for persons who are not alive, they are considered not to be subjects of law and cannot acquire rights or obligations before the act of birth. However, this rule has exceptions because persons that are in the mother's womb and who are born alive, under specific legal circumstances, are subject to certain legal subjectivity acknowledged by the law. This principle has a long historical legal tradition since Roman law, namely from Paulus - Digestae 1, 5, 7 "*Nasciturus pro iam nato habetur, quotiens de commodis ipsius partus quaeritur*", which has the meaning that "*The unborn is deemed to have been born to the extent that his own benefits are concerned*". Nasciturus is one of the most well-known legal fictions that exist in justice, especially in inheritance law. This article on short points will address some of the most essential elements of this institution, with comparative overview in some EU countries as well as in the case law of the Republic of Kosovo and other countries in the region and beyond. The methods that have found the most use in this article are: the doctrinal research method, the method of comparison, the method of analysis of legislation, the method of analysing case-law and the like.

Keywords: *legal capacity, nasciturus, fiction, legislation, case-law.*

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1. CONDITIONAL AND LIMITED LEGAL CAPACITY OF THE NASCITURUS

The fact of birth and death produces legal consequences as to the legal capacity of persons. By the fact of birth is gained legal capacity by natural persons, meanwhile by the fact of death the legal capacity of these persons ceases. The death of a natural person creates a problem of the further fate of his rights, obligations and other legal entities that belonged to him at the time of death, and there are some further problems that also need to be solved (eg someone needs to bury the deceased, etc.).² Even announcing the missing person dead or declaring the person dead produces the same legal consequences as natural death. In the case of declaring a missing person dead, the opening of the inheritance occurs at the moment when the decision on declaring the missing person dead becomes final. Announcing the missing person dead or declaring the person dead shall be conducted in accordance with the relevant provisions of the Law on Non-Contentious Procedure of Kosovo³.

According to Professor Kadriu, Judge of the Constitutional Court of North Macedonia *“Except for the birth of a person whose birth is accompanied by legal capacity, in civil law another situation is specifically addressed and explained. The word is for the natural person conceived, but not yet born. They are considered subjects of the law. This always happens when his interests are at stake.”*⁴

It can be freely stated that the concept of protecting the rights of an unborn child, but expected to be born alive, has been heavily supported by the Federal Constitutional Court of Germany by its 1975 decision, BVerfGE 39, 1⁵.

The maxim *“Nasciturus pro iam nato habetur, quotiens de commodis ipsius partus quaeritur”* is very old by the time of publication, but has survived the time and is still to this day incorporated into the provisions of Civil Codes of states with a modern legal system. As for Kosovo a great support for this principle has been provided by the provisions of the Law on Inheritance⁶, which will be discussed below.

Fiction differs in that it is assumed that there is a legal fact that actually

2 For Croatian law, see: N. Gavella, V. Belaj, *Nasljedno pravo*, 3rd ed., Narodne novine d.d., Zagreb 2008, 41-42.

3 Official Gazette No. 03 / L-007.

4 O. Kadriu, *Hyrje në të drejtën civile*, Tringa design, Skopje 2008, 169. Same: A. Gams, *Hyrje në të drejtën civile*, Enti i teksteve dhe i mjeteve mësimore të Krahinës Socialiste Autonome të Kosovës, Pristina 1972, 116.

5 J. Schwabe, *Vendime të përzgjedhura të Gjykatës Kushtetuese Federale Gjermane*, translated and adapted into Albanian language B. Kadzadej, VINSENT-GRAFIKA, Skopje 2010, 128. [https://www.kas.de/c/document_library/get_file?uuid=37c80a15-dbb5-b074-e515-a8288664deb0&groupId=252038], Accessed 04 April 2020.

6 [Official Gazette Nr. 2004 / 26](#).

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does not exist. For e.g., an unborn child is considered to be born when his or her interest in inheritance is protected, otherwise known as *nasciturus pro iam nato habetur*, in this case the inheritance is divided between the living heirs and the one who is still unborn but is considered to be born.⁷

The child is considered to have been born from the moment it was conceived into the mother's womb, so this rule applies *ex tunc* (from the beginning, from the outset). So this rule is meant to be in the interest of the child who is not yet born, to acquire certain rights (e.g. the right to inheritance), but not in any way to assume obligations. Since we said that the nasciturus can acquire the right to inheritance, it should be emphasized that it applies to both legal and testamentary inheritance.

There are certain conditions that must be met in order for the nasciturus to be considered a subject of the law.

These conditions are:

- the person must be conceived during the life of the deceased physical person (decedent), farthest to the opening of the inheritance;
- to be born alive within the time limit prescribed by the law and
- if this is in his / her interest.⁸

The conditions mentioned above must be met cumulatively. Hereafter one by one all the conditions mentioned above will be addressed.

As to the first condition, as stated in the first sentence of parag. 3 of Art. 5 of the Law on Inheritance of Kosovo: „*The right to inheritance is acquired upon the death moment of the decedent.*” If the person is not born alive, is considered to have never been subject of the law, namely that has never been a holder of civil subjective rights.⁹ So we are dealing with a resolutive condition. The rule thus established is a rule that derives from the law, namely Art. 7 parag. 1 of the Law on Inheritance of Kosovo stipulates that: “*Any person who is alive at the time the inheritance is opened, or any person conceived before the death of the decedent, and born alive, may inherit.*” Also Art. 126 parag. 2 of the Law on Inheritance of Kosovo stipulates that: “*A child conceived at the time of opening of inheritance*

7 Sh. Sylejmani, *E drejta civile*, in: Academy of Justice (ed.), *E drejta civile, administrative dhe ekonomike*, Pristina 2017, 18. [<http://jus.igjk.rks-gov.net/757/1/E%20drejta%20civile%20administrative%20dhe%20ekonomike.pdf>], Accessed 04 April 2020.

For Albanian law, see: V. Kondili, *E drejta civile I (Pjesa e përgjithshme)*, Geer, Tirana 2008, 114; V. Kondili, *E drejta civile II (Pjesa e posaçme): Pronësia, të drejtat reale të përkohshme dhe trashëgimia*, Geer, Tirana 2008, 202. For Croatian law, see: M. Vedriš, P. Klarić, *Gradansko pravo-Opći dio, stvarno pravo, obvezno i nasljedno pravo*, 14th ed., Narodne novine d.d., Zagreb 2014, 710.

8 Compare: D. Đurđević, *Institucije naslednog prava*, 10th ed., Faculty of Law University of Belgrade 2018, 62.

9 B. Vizner, *Gradansko pravo u teoriji i praksi*, Tisak vjesnik, Zagreb 1962, 38.

*shall be considered a child already born, if it is born alive later.”*¹⁰

Persons who have been conceived after the death of the decedent cannot become his heirs.¹¹ It does not matter how long the nasciturus lived after birth, because the law has not set such a deadline, even if the nasciturus died immediately after coming to life, the nasciturus has already acquired the status of heir. In case of suspicion that the child (nasciturus) was born alive, it is assumed that he¹² was born alive. Whoever claims the opposite should prove it.¹³

As to the second condition, it is a legal principle that a person will be considered to have been conceived at the time inheritance is opened if such person is born alive within 300 days after the death of the decedent.¹⁴ If the heir is born dead or is born after the legal deadline stated above, the same cannot be called to inheritance. For comparison purposes, according to Art. 725 parag. 1 of the Civil Code of the Republic of France (in original: Code Civil): *„In order to succeed, one must exist at the moment of the opening of the succession or, having been conceived, be born viable.“*. In theory it is said that the calculation of the 300 days deadline is based on biological and medical criteria, because the maximum pregnancy can last up to 300 days.¹⁵ If dilemmas arise as to whether the nasciturus exists, its existence is verified by hospital technical means, implemented by a gynecologist.

As to the third condition, it is necessary to re-emphasize that *“Nasciturus pro iam nato habetur; quotiens de commodis ipsius partus quaeritur”* principle is meant to be in the interest of the child who is not yet born, but not in any way to assume obligations. A part of the Austrian literature on this issue states that: *„the Civil Code of Austria (in original: Allgemeines bürgerliches Gesetzbuch) through Article 22, an unborn child (nasciturus) since the time of its conception (= mating of ovarian and sperm cells) has recognized its rights as a born child: but never obligations. The nasciturus has conditional and limited legal capacity.”*¹⁶. It is

10 Compare: Art. 13 parag. 2 of the Draft Civil Code of the Republic of Kosovo, which provides that: *“The child born alive enjoys legal capacity since the time of conception for cases of inheritance. By virtue of special law, other cases may be foreseen.”*. [<https://md.rks-gov.net/desk/inc/media/89AFEE64-B2C2-4B74-B15C-CCE8C3EC76E7.pdf>], Accessed 04 April 2020.

11 The Supreme Court of the Republic of Croatia – Gzz 156 / 1955, cited by D. Đurđević, *Osnovi naslednog prava Crne Gore*, CID Podgorica 2010, 51, fn 217.

12 In this article, when it is said “his” or “he”, it is also meant for the female gender without any discrimination.

13 For more see: M. Kreč, Đ. Pavić, *Komentar Zakona o nasleđivanju sa sudskom praksom*, Narodne novine d.d., Zagreb 1964, 420.

14 See Art. 7 parag. 2 of the Law on Inheritance of the Republic of Kosovo. For Kosovo law, see: H. Podvorica, *E drejta trashëgimore*, Faculty of Law University of Pristina 2010, 41.

15 N. Sulçe, *“Aspekte të trashëgimisë ligjore sipas legjislacionit shqiptar dhe ndërkombëtar”*, doctoral thesis, Faculty of Law University of Tirana 2017, 29.

16 P. Bylldinski, *„E drejta civile, Vëllimi I, Pjesa e përgjithshme”*, translated and adapted into

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assumed that the conceived child is born, when it comes to his interests, provided he is alive. This rule is provided by Art. 17 parag. 2 of the Law of Obligations of Croatia (in original: Zakon o obveznim odnosima).¹⁷ Meanwhile, the Civil Code of the Swiss Confederation (in original: Schweizerisches Zivilgesetzbuch) in Art. 544 has stipulated that: „1. A child is capable of inheriting from the moment of conception onwards, providing he or she is subsequently born alive. Ibis. If it is required to protect the child's interests, the child protection authority shall establish a deputyship. 2. If the child is stillborn, it is disregarded for inheritance purposes.“.

In terms of procedural law, various authors from Croatia have stated that: „*Nasciturus may have the capacity of the party quotiens de commodis eius agitur. Contested procedure may be implemented under the resolutive condition that the nasciturus is born alive, thus, as an exception to the general rule of impermissibility of proceedings, subject to future events.*”¹⁸. This view is also supported by commentators of the Law on Contested Procedure¹⁹ of Kosovo.²⁰ If the child is not born alive, all procedural actions, including the judgment if issued, remain without legal effects, namely are inexistent.

2. BRIEFLY ON THE TYPE OF CIVIL RIGHTS THE NASCITURUS ACQUIRES

Theorists are not unique about what rights the unborn child-nasciturus, if born alive, acquires. Some theorists, such as Stojanović-Antić, express their views that the nasciturus has legal capacity only in terms of inheritance rights.²¹ Other theorists, especially Popov, express the view that contemporary law has accepted this fiction and has expanded the range of interests of the child conceived not only

Albanian language I. Morina, B. Sermaxhaj, Educational Centre L.L.C., Pristina 2015, 44, 45. For serbian law, see: V. V. Vodinelić, *Građansko pravo, Uvod u građansko pravo i Opšti deo građanskog prava*, Faculty of Law University Union-Službeni glasnik, Belgrade 2014, 350-354.

17 Compare: Art. 1923 parag. 2 of the Civil Code of the Federal Republic of Germany last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719); Art. 320 in relation with Art. 2 of the Civil Code of the Republic of Albania, Fletore Zyrtare No. 7850, 8536, 8781, 17 / 2012, 121 / 2013, 113 / 2016; Art. 126 parag. 2 of the Law on Inheritance of the Republic of Montenegro, Službeni list No. 74 / 2008 i 75 / 2017.

18 S. Triva/V. Belajec/M.Dika, *Građansko parnično procesno pravo*, 6th ed., Narodne novine d.d., Zagreb 1986, 238; Šeparović, V., “*Stranke i suđelovanje trećih osoba u parnici*”, in *Naša Zakonitost - Časopis za pravnu teoriju i praksu*, Year XLII, September-October 1989, No. 9-10, Zagreb 1989, 1023.

19 Official Gazette No. 03 / L-006.

20 I. Morina, S. Nikçi, *Komentar-Ligji për Procedurën Kontestimore*, (GIZ) GmbH, Pristina 2012, 166.

21 D. Stojanović, O. Antić, *Uvod u građansko pravo*, 2nd ed., Faculty of Law University of Belgrade 2004, 136.

in inheritance rights, but also in other civil rights. The conceived child, but not yet born (*infans conceptus, nasciturus*), must be admitted to legal capacity from the day of conception because since then it has become a human being. From this moment he is the holder of some personal rights (right to life, health, privacy, human dignity), but can also acquire property rights.²² Supporting the second view, we present the opinion of the theorist Radolović: „*Man is the subject of personality rights from birth to death, and even in some sense even before birth or after death.*”²³. To us more acceptable and preferable would be the second view, which has apparently received its support in the case law as well.

3. THE DEATH OF THE CHILD IN THE MOTHER’S WOMB IN A TRAFFIC ACCIDENT: CASE STUDY

In the following we will present some hypotheses which will be then answered within this chapter. Those are: 1. Does the right of family members to compensation for non-pecuniary damages belong to them only in the event of the death of a living person, or even the loss of a embryo-nasciturus? and 2. Can this right belong to parents (eg the father) who can legally be considered the alleged father of an unborn child who does not yet have paternity proven?

Regarding the questions posed above, from reading the text of the Law of Obligations of Kosovo²⁴, we can say that this issue is not covered by legal provisions.

According to Art. 184 parag. 1 of the Law of Obligations of Kosovo: “*If a person dies the court may award just monetary compensation to his/her immediate family members (spouse, children and parents) for their mental distress.*”. Not only parag. 1 of this Art., but all Art. 184 of the Law of Obligations of Kosovo was taken as a copy-paste from the Law of Obligations of the Socialist Federal Republic of Yugoslavia (SFRY) (in original: *Zakon o obligacionim odnosima*)²⁵, which entered into force on 01 October 1978.

Kosovo’s applicable law does not provide exclusively that for the loss of an unborn child, who is expected to be born alive, the court may assign to members of his immediate family a fair monetary compensation for their experienced spiritual pain.

22 D. Popov, *Građansko pravo (Opšti deo)*, 7th ed., Faculty of Law University of Novi Sad 2012, 75.

23 A. Radolović, *Pravo osobnosti u novom zakonu o obveznim odnosima*, in: *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 27. No. 1., Rijeka 2006., 144. [<https://hrcak.srce.hr/8204>], Accessed 04 April 2020.

24 Official Gazette No. 04 / L-077.

25 Official Gazette No. 29/1978.

The Law of Obligations of Croatia²⁶, in contrast to the Law of Obligations of Kosovo, has explicitly regulated this issue in Art. 1101 parag. 3 in relation with parag. 1 thereof.

In any case, all this fog or legal uncertainty at first glance seems to have been covered by the legal conclusion of the Court of Appeal of Kosovo, given in the Judgment Ac. No. 4148 / 13, dated 07 September 2017²⁷, in p. 6, according to which: *“the provision of Art. 201 parag. 1 of the Law of Obligations of Yugoslavia, in this case must be applied by analogy as in the case where relatives’ compensation for the lost family member is accepted. This Court considers that in this case the conditions for the application of the provision by analogy are met, because in other cases the child who is not yet born is entitled to the condition that he is born alive (such as inheritance). In the present case it is the assessment of this court that it would be likely that the child (fetus = being born alive if the traffic accident which caused it) did not occur, which is caused by the fault of the insured party to the respondent, because in the case file there is evidence that the injured party, herein the plaintiff, was in good health, consequently it is understood that the fetus was also in good health.”*

As for the second question, The Court of Appeal of Kosovo, in p. 6 of the cited Judgement, holds that: *“First of all, the paternity of a child who is expected to give birth in any case is an assumption, but which can only be dropped if the opposite is proved. In the present case it is impossible to prove the opposite, but even if the possibility of proving existed, the respondent wouldn’t be legitimate to give such an objection. From such a circumstance also taking into account the fact that according to the marriage certificate, it turns out that the plaintiffs are married (they are spouses), then it follows that the plaintiff would even legally be the father of the child who was expected to come to life until the contrary could be established.”*

In such a hypothetical case, each parent would suffer significant psychological damage, manifested in essential reductions in life activity, increased emotional and psychological stress, difficulty sleeping comfortably, bad thoughts about future pregnancies, and so on.

4. APPOINTMENT OF A GUARDIAN FOR PROTECTING THE RIGHTS OF THE NASCITURUS

Due to diametrically opposed interests in the process of inheritance segregation, the law provides for a special guardianship institution that serves when the

26 Official Gazette NN 35/05, 41/08, 125/11, 78/15, 29/18.

27 The Court of Appeal of the Republic of Kosovo, Ac. No. 4148 / 13, dated 07 September 2017. [https://www.gjyqesori-rks.org/wp-content/uploads/verdicts/AP_AC_4148_13_SQ.pdf], Accessed 04 April 2020.

interests between the parent and the child regarding the right to inheritance are in conflict. Such guardianship in theory is known as guardianship for special cases-curator ventris²⁸. This type of guardianship is assigned when there are collusive or conflicting interests between the interests of parents and children with regard to the right to inheritance. For e.g., if the mother and child in the womb of the mother, who is still unborn, but is expected to be born alive, appear as co-heirs of the deceased father.

Law on Non-Contentious Procedure of Kosovo in Art. 156²⁹ has provided that: “1. *If it is expected a birth of the child which would have the right on inheritance, the hereditary court will for this notify the Body of Guardianship.*” and “2. *If the Body of Custody does not act differently, then for the rights of the scarcely born child will take care one of his parents.*”.

It follows from the interpretation of Art. 156 of the Law on Non-Contentious Procedure, that in Kosovo special care for unborn children-nasciturus, expected to be born alive, is principally designated by the Body of Custody or Municipal Social Welfare Center.³⁰ For comparative purposes, Switzerland clearly provides that custody in special cases for unborn children-nasciturus is determined by the Body of Custody³¹.

However, the law has allowed an exception, according to parag. 2 of Art. 156 of the Law on Non-Contentious Procedure of Kosovo, if the custodial body does not act differently, then one of his parents will take care of the rights of the unborn child, which is a bit of an anomaly because the parent in this case can not serve as a fair, objective and sincere guardian because he has a collisional interest with the best interests of the child, therefore in our opinion this provision should be edited in the future.

It's very important to emphasize the experience of the Croatian legislator and to talk a little bit about this experience when we are discussing this problematic issue. The State of Croatia, within its social welfare bodies, has also established the Center for Special Custody. This body was established under the novels of the Croatian Family Law (in original: Obiteljski zakon) of 2015 NN 103 / 15, 98

28 See for e.g. M. Alinčić *et al*, *Obiteljsko pravo*, 3rd. ed., Narodne novine d.d., Zagreb 2007, 430-434.

29 This legal provision has been amended in accordance with Art. 28 of the Law on Amending and Supplementing the Law on Non-Contentious Procedure of the Republic of Kosovo, Official Gazette No. 06 / L - 007: “*Art. 156, parag. 1 of the law, after the words “inheritance court”, the words “or notary” shall be added.*”, because based on the new legislation on non-disputed inheritance cases, the notary decides on the basis of the competence defined in the Law on Notary (Official Gazette No. 06 / L-010).

30 H. Gashi/A. Aliu/A.Vokshi, *Komentar i Ligjit për Familjen*, (GIZ) GmbH, Pristina 2012, 509; A. Aliu, H. Gashi, *E drejta familjare*, Faculty of Law University of Pristina 2007, 288; H. Podvorica, *E drejta familjare*, 5th ed., Faculty of Law University of Pristina 2019, 288, 289.

31 Art. 544 of the Civil Code of the Swiss Confederation.

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/ 19 (Art. 544-550).³² This is a public body that operates throughout the territory
of Croatia. It is financed on the basis of state funds.³³

The scope of the Center for Special Custody is defined in Art. 547 of the
Croatian Family Law of 2015, which stipulates that: “*The Center for Special
Custody in the Exercise of Public Powers: - represents children in proceedings
before courts and other bodies in accordance with Art. 240 of this Law, - represents
persons referred to in Art. 241 of this Law.*”

The appointment of a special guardian is governed by Art. 242 of the Croatian
Family Law of 2015, which clearly stipulates that a decision on the appointment
of a special guardian is issued by a Social Welfare Center, unless the law stipulates
that the decision is made by a court.³⁴

Since we are dealing with sensitive issues, in which there is a need for a
high level of professionalism, it should be motivating for the state of Kosovo, the
provision of Art. 240 parag. 3 of the Croatian Family Law of 2015, which states
that: “*The special guardian is the person who has passed the Bar Exam employed
at the Social Welfare Center.*”³⁵. Such a provision would be welcome and very
necessary for Kosovo because it increases professionalism and avoids possible
mistakes.

Let’s return the discussion to Kosovo again, in the act of death should be
noted especially if it is expected a birth of testator’s child, according to Art. 136
parag. 3 of the Law on Non-Contentious Procedure of Kosovo. If the testator
is expecting a child who may be called upon to inherit, the hereditary court or
notary must notify the Body of Custody or Municipal Social Welfare Center to
appoint a guardian for the protection of the property rights of the unborn child
and if the Body of Custody does not operate otherwise, one of his parents will
take care of the rights of the unborn child. It is worth noting that these persons
cannot give an inheritance statement on behalf of the unborn child.

The inheritance court or notary should postpone the examination of the
inheritance until the child is born, because if the child is born alive, he / she gains
the undisputed right to inheritance. On the occasion of the birth of a child, the
non-contentious procedure for the examination of the inheritance continues and
is conducted at the stage where it is left, in accordance with the rules set out in the

32 R. Šantek, M. Parać-Garma, *Sudjelovanje djeteta u sudskim postupcima te zaštita prava i
dobrobiti djeteta u tim postupcima*, Pravosudna akademija, Zagreb 2016, 40.

33 Art. 545 of the Croatian Family Law of 2015.

34 *Ibid*, 41.

35 Regarding the special guardian of the child according to the Family Law of 2015, see B.
Rešetar, D. Rupiĉ, *Posebni skrbnik za dijete u hrvatskom i njemaĉkom obiteljskopравnom sustavu*,
in: *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 37. No. 3., Rijeka 2016., 1182-1187.
[<https://hrcak.srce.hr/173038>], Accessed 04 April 2020.

Law on Non-Contentious Procedure and with its subsequent changes.³⁶

In the following, it is presented a sentence of Croatian case law, in the field of the Law of Obligations, regarding the life support contract, which is related to the topic addressed in this chapter, according to which: *„When the decision of the Social Welfare Center authorizing the special guardian to conclude a life support contract is subsequently annulled, then the concluded life support contract is null and void.”*³⁷

5. RECOMMENDATIONS

In the Civil Code of Kosovo, we propose to incorporate a kind of provision similar to that of Art. 1101 parag. 3 in relation with parag. 1 of the Law of Obligations of Croatia, according to which even with the loss of the embryo (nasciturus), the court may assign to members of his immediate family (e.g. parents) a fair monetary reward for their spiritual pain.

It would be advisable for Kosovo to form by legal provisions a “Center for Special Custody”, the same as Croatia did with the new novels of the Family Law of 2015, which would operate throughout the territory of Kosovo and be funded by the state budget funds, all this depending on the economic conditions and the long-term economic goals of Kosovo.

Since we are dealing with sensitive cases where additional legal knowledge is needed, we propose that the rules of Art. 240 parag. 3 of the Family Law of Croatia of 2015, should also be placed in Kosovo, where we recommend that special guardian must have passed the Bar Exam before the commission formed by the Ministry of Justice of Kosovo.

36 Law No. 03/L-007, Official Gazette of Kosovo, No.45/12 January 2009 and Law No. 06/L-007 on Amending and Supplementing the Law No.03/L-007 on Non-Contentious Procedure, Official Gazette of Kosovo, No. 22/18 December 2018.

37 Varaždin County Court, GŽ-1428 / 08-2, dated 08 December 2008, cited by M. Butković, *Ugovor o doživotnom i dosmrtnom uzdržavanju u sudskoj praksi*, Tisak Denona d.o.o, Zagreb 2012, 21, 22.

PRAVNA FIKCIJA NASCITURUS I NEKI EFEKTI U GRAĐANSKOM PRAVU - KOMPARATIVNA ANALIZA SA POSEBNIM OSVRTOM NA REPUBLIKU KOSOVO

Sažetak

Svaka živa osoba ima pravnu sposobnost i sposobna je steći građanska subjektivna prava i, naravno, preuzeti obveze. Što se tiče osoba koje nisu žive, smatra se da nisu subjekti prava i ne mogu steći prava ili obveze prije čina rođenja. Međutim, ovo pravilo ima iznimke jer osobe koje su u majčinoj utrobi i koje su rođene žive pod određenim pravnim okolnostima podliježu određenom pravnom subjektivitetu koji zakon priznaje. Ovo načelo ima dugu povijesnu pravnu tradiciju još od rimskog prava, naime od Paulus - Digestae 1, 5, 7 "*Nasciturus pro iam nato habetur, quotiens de commodis ipsius partus quaeritur*", što ima značenje da se "Nerodeni smatra rođenim u mjeri u kojoj se to tiče njegovih koristi.". Nasciturus je jedan od najpoznatijih pravnih fikcija koji postoje u pravu, posebno u nasljednom pravu. Ovaj članak o kratkim točkama će se baviti nekim od najvažnijih elemenata ove institucije, sa uporednim pregledom u nekim zemljama EU kao i sudskom praksom Republike Kosovo i drugim zemljama u regionu i šire. Metode koje su u ovom članku pronašle najviše koristi su: metoda doktrinarnog istraživanja, metoda usporedbe, metoda analize zakonodavstva, metoda analize sudske prakse i slično.

Ključne riječi: pravna sposobnost, nasciturus, fikcija, zakonodavstvo, sudska praksa.