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LIMITATION OF THE AUTONOMY OF WILL IN THE RIGHT TO THE DISPOSAL OF AN UNWRITTEN MORTGAGE AND RESERVATION OF THE PRIORITY ORDER FOR A NEW MORTGAGE

Abstract: *By the law which defines the process of the registration in the real estate cadaster coming into force, apart from the category of the submitting entities, the rule to initiate and conduct the procedure ex officio is implemented. By this legal solution, the registration of rights is implemented automatically, without any impact on persons in whose favor the rights are registered, as well as on other interested parties, by which the freedom of execution and protection of civil subjective rights of parties is limited. The registration of rights ex officio, with the participation of the submitting entity, has reflected on the regulations of the law which defines mortgage, which has led to the limitations of subjective rights in case of registration of deletion of mortgage. The paper is specifically focused on the limitation of the autonomy of will of the owner of real estate in case of exercising the rights to the disposal of the unwritten mortgage, as well as the right on the reservation of the priority order for the new mortgage. In that sense, the paper will indicate the need for legal definition of the possibility to register the deletion of mortgage upon the request of the party.*

Keywords: *autonomy of will, principle of officiality, registration of the deletion of mortgage, disposal of mortgage that was not erased, annotation of reservation of the right of priority order*

1. INTRODUCTION

The need for automated data processing, efficient and up-to-date system of recording real estates and rights over them is the basis of the justification of the

implementation of unique records of real estates in our legal system. With the support and development of information technologies, unique records of real estates have been established, which has continuously contributed to gradual limitation of disposition of parties through passing of new and change of existing legal regulations, as one of fundamental principles of civil law. Unique records of real estates¹ started to develop within the management authority, through cadaster, in the late 1980s and the beginning of 1990s of the 20th century. It is established based on data from land register and land cadaster, and it assumed that the factual and legal records on real estates are kept together, by the same administrative bodies.² That has led to the gradual abandonment of the land registry system and essential features of land registry law which are based on the disposition of parties.

It was assumed that the implementation of unique records of real estates and principle of obligation of the registration would ensure completeness, correctness and timeliness of both factual and legal records of real estate, which provoked controversy and sharp criticism in theory.³ It was stated that the application of the general principles of civil law should not be questionable in case of exercising the actual rights which are a part of private law in their nature.⁴ The accepted principle of obligation in case of registration of rights has eventually “evolved” in the principle of officiality⁵, which includes that the procedure of the registration of rights in the real estate registry is initiated and kept *ex officio*, only upon request. Digitalization of the real estate registry has enabled the application of the principle

¹ By the Law on State Survey and Cadaster and Registration of Rights on Real Estate, Official Gazette of SRS no. 17/1988, 24/1988, 49/1989, 56/1989 and consolidated wording published under no. 28/1990, unique records of real estate is implemented in Serbia. Unique records of real estate existed as a legal solution only until 1992, i.e. until the passing of the Law on State Survey and Cadaster, Official Gazette of RS no. 83/92, 53/93, 67/93, 48/94, 12/96 and 15/95, which stipulated the principle of obligation for the first time in domestic legal system.

² About unique records of real estate, see Radenka Cvetić, *Savremena evidencija nepokretnosti*, Pravni fakultet u Novom Sadu, Novi Sad 2016, 50 i dalje.

³ “Requiring the obligation of registration leads to the contrast to one of important principles of civil law. According to the principle of free initiative and principle of dispositivity, the right holder may use it at its own discretion, meaning that they can decide not to use it at all. Therefore, the acquirer of certain rights can freely decide to register them in the land register and thereby gain ownership or refrain from registration. If this possibility is not enabled, there is no subjective right towards standards of civilization to which we belong, but only a hybrid creation of obscure character.” Miodrag Orlić, „Uvođenje i obnavljanje zemljišnih knjiga” Anali Pravnog fakulteta u Beogradu, br. 1- 6, Beograd 2000, 49.

⁴ “Each significant deviation from the traditional principles of civil right can lead to the destabilization of legal and finally political system.” More in Dušan Nikolić „Materijalni izvori građanskog prava” *Zbornik radova Pravnog fakulteta u Novom Sadu* br. 4/2012, 94.

⁵ About principle of officiality, see R. Cvetić, “Razvojni put načela obaveznosti upisa u katastar nepokretnosti i njegovo „novo ruho” in *Liber amicorum Vladimir Vodinić*, Miloš Živković (ur.), Pravni fakultet Univerziteta u Beogradu i Pravni fakultet Univerziteta Union u Beogradu, Beograd 2019, 47-58.

of officiality within its complete scope, through e-service desk.⁶ Such a system has enabled automated forwarding of documents eligible for the registration of rights by the submitting entity⁷ to the competent service of the real estate registry, without leaving space for the disposition of parties. In addition to the right to appeal to the decision deciding on the registration of rights, the party may, in exceptional cases only, initiate the procedure for the registration of rights.⁸ The party may not prevent or postpone the submission of the document to the real estate registry when the submitting entity is submitting it *ex officio*.

There are also land registries which are based on the principle of disposition and which are also up-to-date, complete and accurate. Such systems are functional for a long period of time in Germany, Austria, Switzerland. Consistent implementation of the principle of registration and principle of trust in these countries has led to the party to have interest in requiring the registration of their rights. Within domestic legal system, the principle of registration and principle of trust have not been implemented in a legally defined manner. For many years, we witness the existence of off-book acquisition of ownership which has been protected by decisions of the court, as well as non-sanctioned oversights of parties to submit the request for the registration of their rights. In such conditions, the initiations of proceedings according to the principle of disposition could not have ensured complete, correct and timeliness legal records of real estate. The initiation and implementation of the proceeding of the registration of rights *ex officio* seems to be the only way of creating preconditions for the establishment and functioning of the systematically complied legal regulations the future. The choice of the legislator for the current systematically non-complied solution and deviation from basic civil legal principles can be temporarily justified.⁹ Systematic change of the legal regulations, with the settlement of all necessary conditions, is extremely time demanding. At the same time, it is necessary to indicate to subjective civil rights

⁶ E-service desk” – unique central system for connection of different entities and submission of documents for the registration and other acts between state authorities and public authority holders, *ex officio*, implemented by the regulations of the Law on the Registration Procedure with the Cadaster of Real Estate and Utilities, *Official Gazette of RS* no. 41/2018, 95/2018, 31/2009 and 15/2020.

⁷ Submitting entities in terms of Law on the Registration Procedure with the Cadaster of Real Estate and Utilities are courts, public notaries, public enforcement officers and other authorities and organizations which exercise public authorizations within legally defined tenors. See Article 22 and Article 23 of Law on the Registration Procedure with the Cadaster of Real Estate and Utilities.

⁸ Registration is executed only upon the request of the party, in case of: registration of the annotation on a dispute, registration of the annotation of the administrative procedure against the second-instance decision on the registration in the real estate registry and registration of the annotation of the mortgage sales in case when claims are secured by extra-judicial executive mortgage and the creditor opts for the settlement according to the rules of the Mortgage Law.

⁹ Miloš Živković, *Pravo registara nepokretnosti – Opšti deo*, Pravni fakultet Univerziteta u Beogradu, Beograd 2020, 205.

which are limited in their implementation by the stated legal regulations and find solutions to establish and protect such rights to the greatest possible extent, as soon as possible.

Implementation of the registration of rights *ex officio*, with the participation of the submitting entity, influences the way of establishing rights regulated by the law defining mortgage.¹⁰ The rights of the owner to individually execute the registration of the deletion of mortgage, i.e. right to exercise the rights of the disposal of mortgage that was not erased are limited, as is the establishment of the right to the reservation of the right of priority order for a new mortgage.

2. REGISTRATION OF THE DELETION OF MORTGAGE¹¹

Mortgage ceases by the registration of the deletion from the real estate registry, which is the consequence of the principle of registration. As long as the registration of the deletion of mortgage is not executed, the mortgage exists in the records and burdens the real estate. The constitutivity of the registration conditions the constitutivity of deletion, and the publicity of the establishment requires the publicity of the termination of the mortgage.¹² Registration of the deletion of mortgage does not require a separate legal act of the right holder. Only permit for the termination of such a right is necessary.¹³

According to the Mortgage Law, mortgage ceases to exist by erasure¹⁴ from the real estate registry where it was registered, and the registration of the deletion

¹⁰ Mortgage Law, Official Gazette of RS, no. 115/2015, 60/2015, 63/2015 – decision of the Constitutional Court and 83/2015.

¹¹ Intabulation (lat. *intabulatio*) is the registration of the final collection of a certain land registry right, while extrabulation (lat. *extabulatio*) means removal from records, erasure or registration of the deletion of the land registry right. Registration is negative when it refers to the registration of the deletion of registry rights and it is then called extrabulation (registration of the deletion of the registration). See Milan Vujaklija, *Rečnik stranih reči i izraza*, Beograd, 1980, 351. See Leksikon građanskog prava, Beograd, 1996, 234. The term erasing is used in Mortgage Law, while the term registration of deletion will be used in the paper.

¹² Miroslav Lazić, "Značaj javnog registra za hipoteku", *Zbornik Pravnog fakulteta u Nišu* br. 40-41/2001, 90.

¹³ Midhat Muslić, *Priručnik o zemljišnoknjižnom poslovanju*, Beograd 1972, 59.

¹⁴ Term erasing of mortgage is used by the Mortgage Law, Law on the Registration Procedure with the Cadaster of Real Estate and Utilities as well as the Draft of the Civil Code of the Republic of Serbia, while the Draft of the Code on Property and Other Real Rights uses the term registration of the deletion of mortgage. It is necessary to eliminate the nomotechnical differences in the further reform of actual legal system. Wording of the Draft of the Civil Code of the Republic of Serbia is available at the website of the Ministry of Justice of the Republic of Serbia <https://www.mpravde.gov.rs/files/NACRT.pdf>, 15 December 2020 and Draft of the Code on Property and Other Real Rights, whose wording is also available at the website of the Ministry of Justice of the Republic of Serbia

of mortgage is executed upon the request of the debtor, owner of the real estate or creditor, if the secured claim ceases to exist in the way permitted by law.¹⁵ Registration of the deletion of mortgage can be required by the owner of the real estate, i.e. the buyer of the mortgaged real estate in the proceeding of off-court sales, for the purpose of the settlement of the mortgage claims. According to the Mortgage Law, registration of the deletion of mortgage is executed upon request. Request for the registration of the deletion of mortgage can contain mortgage creditor's written statement of agreement with the mortgage being erased (*clausula extrabulandi*) or final court decision establishing that the mortgage creditor's claim has ceased. It can also contain the contract on sale of the mortgaged real estate concluded upon the conclusion of the extra-judiciary sale procedure by which the claim of the mortgage creditor is satisfied or contract on sale by direct arrangement, i.e. subsequent contract.

By the Law on the Registration Procedure with the Cadaster of Real Estate coming into force and the implementation of the category of Submitting entity, the procedure of the registration of the deletion of mortgage has been changed. The document which is the basis for the registration of the deletion of mortgage is delivered *ex officio* to the real estate registry by the submitting entity. In that sense, public notary as the submitting entity delivers the real estate registry every statement created in the agreed form which allows the registration of the deletion of mortgage (mortgage erasure permit), i.e. contracts concluded in the procedure of extra-judicial sales of real estate (contract on the purchase of mortgaged real estate, contract on sale by direct arrangement, i.e. subsequent contract). The court delivers the real estate registry final court decision which defines that the claim of the creditor ceased, *ex officio*.

The document defining the termination of the mortgage, if passed, created, confirmed or certified by the submitting entity is delivered to real estate registry, *ex officio*. Regulations of the Mortgage Law are limited in their application, since that the owners of real estates, i.e. buyers of the mortgaged real estate are unable to individually dispose the document or the request for the registration of the deletion of mortgage. It is proposed that the Law on the Registration Procedure with the Cadaster of Real Estate define the procedure of the registration of the deletion of mortgage upon the request of the party.

The following part of the paper would focus on the analysis of current norms which regulate mortgage discharge, taking into account that this is a document

<http://arhiva.mpravde.gov.rs/cr/news/vesti/zakonik-o-svojini-i-drugim-stvarnim-pravima-radni-tekst.html> 15 December 2020.

¹⁵ Article 43 of the Mortgage Law. The stated legal formulation is not sufficiently precise, taking into account that the mortgage may cease upon the request of the mortgage creditor, even when the secured claim has not ceased, by the renunciation of mortgage.

which is in practice most frequently issued in case of the termination of claims secured by mortgage.

In terms of the Mortgage Law, mortgage erasure permit is a written statement by which the mortgage creditor allows the registration of the deletion of mortgage in the real estate registry. The basis for the issuance of a mortgage erasure permit is usually the termination of the mortgage claims. Mortgage creditor is obliged to allow the registration of the deletion of mortgage if the claims are completely settled, i.e. if the conditions stipulated by the Mortgage Law have been met. Mortgage creditor is obliged to issue the debtor and owner of the mortgaged real estate the certificate on debt settlement, immediately after the settlement of the debt, and to provide them the consent for the deletion of mortgage – mortgage erasure permit.¹⁶ Mortgage creditor can issue mortgage erasure permit in case when the claims are not entirely settled, in case of renunciation of mortgage. Procedure of the registration of the deletion of mortgage can be initiated by the person with legal interest, usually personal or pledge debtor or owner of the real estate, i.e. their successors.

Mortgage erasure permit, as the document which allows the registration of the deletion of mortgage also certifies the termination of a certain claim. It is usually issued as a private document provided by a legal entity or private individual, made in writing with the signature of the authorized person, certified at the public notary or basic court (in cities where public notaries are not appointed until their appointment). Mortgage erasure permit can be a public document when issued by the holder of public authorizations, i.e. legal court decision, when passed by a court. Public notaries, courts as well as public administration bodies and other bodies and organizations which while exercising their public authorities make decisions which represent the ground for registration in the real estate registry are submitting entities *ex officio* in terms of the Law on the Registration Procedure with the Cadaster of Real Estate. Documents which are eligible for the registration of the deletion of mortgage are delivered to the real estate registry by submitting entities *ex officio*, while the request for the registration of the deletion of mortgage loses its purpose.

Despite the regulation of the Mortgage Law which stipulates that the statement of mortgage creditor in writing¹⁷ is sufficient for the issuance of mortgage

¹⁶ Article 44, p. 3 and p. 4 of the Mortgage Law.

¹⁷ It is interesting that the Mortgage Law precisely defines the form individually for each legal work regulated by the regulations of the Law. The stipulated form of the notarial record or certified notarial document for pledge statement in case of unilateral mortgage, for contract on mortgage, subsequent contract, contract of assignment of claim, *clausula intabulandi* for the registration of mortgage, contract on super mortgage. Form in writing with certified signatures is stipulated even for the definition of a third party (security agent) from Article 20a. However, for *clausula extrabulandi*, it is defined that it is a statement in writing. Mortgage Law does not stipulate the certification of signature.

erasure permit, if debt has been settled entirely,¹⁸ in practice, it is usually issued in form of the certification of signature in terms of Law on Notary Public Office.¹⁹ Such actions are supported by the current act on the cadaster survey and real estate registry²⁰ whose regulations are applied. The rulebook defines that the mortgage is erased by the termination of secured claims based on the statement of a mortgage creditor that they accept the erasure of the mortgage, provided in writing with the certificate of the signature of the mortgage creditor, i.e. their proxy holder, in accordance with the law which defines the certification of signatures. Despite the fact that this is a legal act of a lower legal power than a law, its application is confirmed by the practice of real estate registry, practice of mortgage creditors as well as current notifications on notice boards of the competent services of real estate registry and the official website of the Republic Geodetic Authority of the Republic of Serbia.²¹

Certifying the signature, the public notary certifies that the submitting entity, who has been previously identified, has personally signed the stated document in the presence of the public notary, i.e. that the signature which is already on the submitted document is recognized as their own.²² The public notary should be familiar with the content of the submitted document only to the extent necessary for filling the register on certifications and confirmations. They are not held responsible for the content of such a document.²³ They can forward the mortgage erasure permit to the real estate registry based on the regulations of the Law on the Registration Procedure with the Cadaster of Real Estate which has categorized public notary to the category of the submitting entity. Since this is a document based on which the registration of the deletion of right is executed according to

¹⁸ Article 44, p. 2 item 1 of the Mortgage Law.

¹⁹ Law on Public Notary Office, Official Gazette of RS, no. 31/2011, 85/2012, 19/2013, 55/2014 – other law, 93/2014 – other law, 121/2014, 6/2015 and 106/2015. Since 1 March 2017, verification of signatures, manuscripts and transcripts is in the competence of public notaries, thus there is no parallelism of competences between courts, municipalities and notaries, although there are places where notaries have not yet been appointed.

²⁰ See Article 150 of the Rulebook on State Survey and Real Estate Registry, “Official Gazette of RS” no. 7/2016, 88/2016 and 7/2019 – other rulebook, hereinafter Rulebook.

²¹ According to the data from the official website of the Republic Geodetic Authority, in case of the deletion of mortgage, it is necessary to submit the real estate registry, among other, mortgage erasure permit of a legal entity or a private individual, created in the form with the signature of the authorized person, certified at the public notary. See the official website of the Republic Geodetic Authority of Serbia <https://www.rgz.gov.rs/usluge/usluge-katastra-nepokretnosti/brisanje-hipoteke> 15 March 2021.

²² Article 5 of the Law on Verification of Signatures, Manuscripts and Transcripts – ZOPRP Official Gazette of RS, no. 93/2014 and 22/2015.

²³ See Article 11 and Article 69 of Notary Rules of Procedure, Official Gazette of RS, no. 62/2016, 66/2017, 48/2018 and 54/2018.

the Law on the Registration Procedure with the Cadaster of Real Estate²⁴, it implies that the public notary should be familiar with the content of the document they are certifying. The responsibility for the material legality of the document eligible for registration of the right lies with the submitting entity²⁵, however, when certifying a signature, the public notary confirms only the signature of the submitting entity and is not responsible for its content.

Mortgage erasure permit is issued in the form of a notarial note, i.e. in the form of a solemnized document when claim is not entirely settled. Mortgage may cease by the renunciation, based on a mortgage creditor's unilateral declaration of intent at his own request, or at the request of the owner of the mortgaged real estate that contains the attached statement of the mortgage creditor. Before the last changes of the Mortgage Law, there were different interpretations of norms which regulate renunciation of mortgage.²⁶

²⁴ According to Law on the Registration Procedure with the Cadaster of Real Estate and Utilities, "suitable document" is a document issued or compiled, certified or authenticated by the competent authority or other submitting entity, which implies the need to enter or amend the data entered in the real estate cadaster and which contains the prescribed data necessary for such entry, corresponding to the state of the cadaster.

²⁵ R. Cvetić, „Nova pravila u postupku upisa u katastar nepokretnosti. Upis zajedničke svojine supružnika.", *Zbornik radova Pravnog fakulteta u Novom Sadu* br. 4/2019, 1172.

²⁶ Source wording of Mortgage Law in Article 51 defines: "Mortgage may also cease on the basis of a mortgage creditor's unilateral declaration of intent certified with signature certified at court or other authority certified by the law. In case of paragraph 1 of this Article, erasing is executed upon the request of the owner which contains statement from paragraph 1 of this Article. "In legal theory, according to the stated legal regulation, the opinion is that the registration of the deletion of mortgage may be required by the owner of the real estate only, and not mortgage creditor, which disables the formal termination of the mortgage without the agreement of the owner of the burdened real estate. Živković assumed that, as a mortgage cannot cease unilaterally, by renunciation without consent of the owner, unilateral mortgage cannot be established by the will of the owner of the real estate, without consent of mortgage creditor. Request for the registration of unilateral mortgage should be submitted by mortgage creditor, and not the owner of the mortgaged real estate, by which the necessary consent to the acquirer would be achieved. See M. Živković „Novo hipotekarno pravo u Republici Srbiji" u *Stvarnoprava uređenja tranzicijskih zemalja – stanje i perspektive*, Tatjana Josipovic (red.), Zagreb 2009, 23. Professor Popov also interprets the stated regulation so that the mortgage could have ceased based on the unilateral statement of will in writing of the mortgage creditor, provided in the adequate form, but the erasing of the mortgage was executed upon the request of the owner of the real estate, implying that without the consent of the owner, the mortgage creditor could not have achieved the registration of the deletion from the real estate registry. See Danica Popov, „Prestanak hipoteke" *Harmonizacija srpskog i mađarskog prava sa pravom Evropske unije*, tematski zbornik broj IV, Pravni fakultet u Novom Sadu, Novi Sad 2016, 142. Dissenting opinion is found in the comment to Mortgage Law from 2005, provided by the then judge of the Supreme Court of Serbia Stojan Jokić, who assumed that regardless of such a legal norm, active legitimation for the submission of request for the deletion of mortgage with the statement on renunciation lies with mortgage creditor, too. This opinion was later adopted by the amendments of the Mortgage Law. See Stojan Jokić *Komentar zakona o hipoteci*, Beograd 2006, 198. Compare Article 51 of source and current wording of the Mortgage Law.

According to the regulations of the Mortgage Law, mortgage erasure permit can be issued as mortgage creditor's written statement of agreement with the mortgage being erased which includes the issuance of mortgage erasure permit in writing, with personal signature of proxy holders of mortgage creditors. Digitalization of the real estate registry as well as legal norm of the Law on the Registration Procedure with the cadaster of Real Estate which defines the possibility of filing the request in the form of a paper document not later than 31 December 2020 seems to indicate the implementation of electronic documents in the field of the registration of the deletion of mortgage, too.

There are preconditions for the written statement of the mortgage creditor on the acceptance of the registration of the deletion of mortgage to be in electronic forms in terms of the regulations of the law which regulates electronic operations.²⁷ Electronic form for mortgage erasure permit includes that the mortgage erasure permit is signed by the qualified electronic signature which guarantees the highest level of protection of the identification of the signatory. A qualified electronic signature has the same legal effect as a handwritten signature and may replace the certification of a handwritten signature if stipulated by a specific law.²⁸

In that context, certain proposals for the change of the legal wording of the Mortgage Law²⁹ have been made, by which it is proposed that the mortgage erasure permit can be provided in writing, with signatures of mortgage creditors certified at the authorities in charge of the certification of signatures, i.e. form of electronic document in accordance with the law which defines electronic operations.

It should be taken into account that the issuance of mortgage erasure permit usually originates from banks which are mortgage creditors in most cases. Regulations of the Draft Code on Property and Other Real Rights has taken that fact into account, since that it defines that if a mortgage creditor is a bank or other legal entity which provides loans within its activity, an agreement on mortgage can define that the mortgage erasure permit does not need to be certified, if provided on the memorandum of the mortgager and certified by its stamp.³⁰ Banks, as financial institutions, provide services which allow the use of electronic signature, as do administrative bodies, as does a raising number of companies which use services of electronic operations. The process of certifying mortgage erasure

²⁷ Law on Electronic Document, Electronic Identification and Trust Services in Electronic Business, Official Gazette, no. 94/2017.

²⁸ Article 50 of ZEP.

²⁹ Dušan Vasiljević, Đorđe Vukotić, Miloš Živković, Ivan Perović, Jasmina Radovanović, Aleksandar Begović, Adis Berberović, *Ka unapređenju sadržaja i primene zakonskog okvira za upis u katastar nepokretnosti*, created within the project financially supported by Good Governance Fund by the Government of the United Kingdom within the program Reform Assistance to Serbia) Beograd 2019, 29. Wording available at website, 20 December 2020.

³⁰ See Article 582, p. 2 of Code of Property and Other Real Rights.

permit is extremely burdensome and voluminous in practice, it requires time, engagement of personnel and resources of mortgage creditor. Due to many requests submitted to banks, the certification of mortgage erasure permit is appointed once a week at public notaries, and the issuance of mortgage erasure permit takes a lot of time.³¹ All that delays the process of the registration of the deletion of mortgage which is not in clients' interests. Certified documents on the registration of the deletion of mortgage are stored by public notaries in paper copies, one provided to the mortgage creditor and forwarded to the real estate registry through e-service desk in electronic form.³² The issuance of mortgage erasure permit in electronic form would be not only cost-efficient, but also time-efficient, and would provide much greater expediency.

3. DISPOSAL OF MORTGAGE THAT WAS NOT ERASED

Laws which regulated the procedure of the registration of rights, starting from the Law on Land Register of the Kingdom of Yugoslavia³³ to the year of 2018, do not define the limitations in the execution and protection of civil subjective rights during the registration of the deletion of mortgage. By the Law on the Registration Procedure with the cadaster of Real Estate coming into force, and the implementation of the category of the submitting entity, certain regulations of the Mortgage Law are no longer applicable. Certain limitations of the rights of owners to the disposal of mortgage that was not erased manifested by both strict application of legal norms and deviation from them in practice have been identified.

³¹ One medium-size business bank in Serbia certifies more than thirty mortgage discharges per week on average, and there are also many more. That requires a large engagement of employees in the creation of mortgage erasure permits, as well as representatives of creditors who are obliged to attend the office of a public notary for the purpose of the certification of signature once a week or more often. That also requires huge costs for clients. Issuance of mortgage erasure permits usually takes two to three weeks, which is a long period of the client.

³² M. Živković, „Upotreba informacionih tehnologija u postupku upisa u katastar nepokretnosti” *Zbornik radova Pravnog fakulteta u Nišu* br. 84/2019, 184.

³³ According to the rules of the Law on Land Records, *Official Gazette of the Kingdom of Yugoslavia*, no. 146/30 and 281/31 – procedure of the registration of right was executed upon the proposal of the party. Law on Survey and Cadaster and Registration of Rights over Real Estate and Law on State Survey and Cadaster and Registration of Rights over Real Estate define the principle of obligation of the registration, as does the Law on State Survey and Cadaster from 2009, *Official Gazette of RS*, no. 72/09, 18/10, 65/13, 15/15 – decision of the Constitutional Court, 96/15, 47/17 – authentic interpretation, 113/17 – other law, 27/18 – other law, 41/18 – other. Even though the principle of obligation is stipulated in all laws since the establishment of unique real estate records, that has not influenced the procedure of the registration of right which has usually been initiated upon the request of the party, until the passing of Law on the Registration Procedure with the Cadaster of Real Estate and Utilities.

3.1. Limitation of the autonomy of will in the disposal of mortgage that was not erased by the application of legal norms

Mortgage ceases by the registration of the deletion from the real estate registry. Mortgage which secures the ceased claims, if not deleted from the real estate registry, allows several possibilities. Third parties, who would obtain the mortgage that was not erased from the real estate registry, appear as valid mortgage creditor. At the place of the mortgage that was not erased, the owner of the real estate can, within a defined tenor, establish new mortgage, by the expression of their will. In terms of disposal of the place where the written mortgage which secures the ceased claim is, the rule is dispositive. Mortgage holders can freely dispose the place where the mortgage that was not erased is, in accordance with the Mortgage Law.

The owner of a real estate has the right to transfer the mortgage that was not erased from the real estate registry to the registered amount to a new or the same mortgage creditor for the purpose of securing other claims, with the evidence that the claim has ceased.³⁴ The transfer of mortgage to a new mortgage creditor simultaneously includes the registration of the deletion of mortgage of the prior mortgage creditor.³⁵ A claim can cease by the settlement or in other legally stipulated manner, by renunciation, confusion, debt relief, compensation, etc. According to the regulations of the Mortgage Law, mortgage creditor is obliged to issue the debtor and owner of the mortgaged real estate the certificate on debt settlement, immediately after the settlement of the debt, and to provide them with the consent for the deletion of mortgage (*clausula extrabulandi*). With the request for the registration of the deletion of mortgage, the owner can submit different evidence on the ceased claim, which are usually documents which would otherwise be necessary for the deletion of the mortgage.³⁶ These are usually statement in writing of the mortgage creditor that they agree with the erasing of the mortgage with the certificate of the satisfaction of debt, and final court decision which defines that the claim of the mortgage creditor has ceased. In the procedure of extra-judicial sales of real estate, these include the contract on sale of the mortgaged real estate concluded upon the conclusion of the extra-judiciary sale procedure by which the claim of the mortgage creditor is satisfied or contract on sale by direct arrangement, i.e. subsequent contract.³⁷ It is assumed that with the request of the owner who submits the evidence that the claim has ceased, it is necessary to deliver the document by which new mortgage is established,³⁸ even though the Mortgage Law does not define such a document.

³⁴ See Article 53 of the Mortgage Law.

³⁵ S. Jokić, (2006), 203.

³⁶ M. Živković, (2009), 24.

³⁷ See Article 44 of the Mortgage Law.

³⁸ M. Živković, *Akcesornost založnih prava na nepokretnosti*, Pravni fakultet u Beogradu, Beograd, 2010, 186.

If mortgage ceases by unilateral statement of the mortgage creditor by which they accept the erasure of the mortgage, provided in the form of a notarial note or notary confirmed (solemnized) document, which is the case with renunciation of mortgage,³⁹ and if provided in the form of notary certification of a signature, notary public, as submitting entity, forwards such a document to the competent service of real estate registry, *ex officio*. Real Estate Registry Office will, upon the receipt of the document eligible for the registration of rights,⁴⁰ execute the registration of the deletion of mortgage. The owner of the real estate cannot prevent the delivery of the stated documents and cannot establish a new mortgage in the place of the mortgage that was not erased of their own free will.⁴¹

Contract on sale of the mortgaged real estate, contract on sale by direct arrangement or subsequent contract are not adequate documents as the basis for the disposal of mortgage that was not erased, taking into account that the registration of the deletion of mortgage of all registered mortgages on the respective real estate is executed based on these documents, by operation of law.⁴²

Pursuant to the stated reasons, certain proposals of the amendment of the Mortgage Law are provided. It is proposed that Article 44 of the Mortgage Law be supplemented by paragraphs 6 and 7, which would be the following: “Erasing of mortgage, *ex officio*, in accordance with the law defining the procedure of the registration in the real estate registry shall be executed upon the expiry of the tenor of three years, as of the day when the submitting entity delivers the real estate registry the document eligible for deletion, except if the register contains renunciation of the right to the disposal of mortgage that was not erased in accordance with Article 54 hereof. In case of paragraph 6 hereof, Real Estate Registry

³⁹ Mortgage ceases by unilateral statement of the mortgage creditor provided in the form of notarial record or solemnized document in case of renunciation of mortgage. See Article 51 of the Mortgage Law.

⁴⁰ According to Law on the Registration Procedure with the Cadaster of Real Estate and Utilities, “suitable document” is a document issued or compiled, certified or authenticated by the competent authority or other submitting entity, which implies the need to enter or amend the data entered in the real estate cadaster and which contains the prescribed data necessary for such entry, corresponding to the state of the cadaster.

⁴¹ Inability to perform disposal of mortgage that was not erased, but not the inability to exercise right of reservation of the right of priority order is indicated in *White book 2020, Proposals for improvement of the business environment in Serbia, Foreign investors council*, editors Miroљub Labus and Foreign Investors Council, Beograd, 2020, 43. and 135. Wording available at <https://fic.org.rs/projects/white-book/white-book-publication/>, 20 December 2020. One of the recommendations of the Foreign Investors Council is to enable the parties to dispose their requests towards real estate registry in situations when notary, as submitting entity submits the request in their name. Also, the recommendation of the Council is that it is necessary to ensure disposal of the party in the subject opened at public notary, taking into account that it is a notary public service activity.

⁴² See Article 49 of the Mortgage Law.

shall immediately, without passing a special resolution, register the note on the existence of the mortgage deletion statement which is deleted *ex officio*, at the moment of the registration of a new mortgage, in accordance with Article 53 hereof or upon the termination of tenor of three years from paragraph 6 hereof.”

The quoted wording of the proposal states that in all cases when mortgage creditor launches the procedure of the issuance of mortgage erasure permit upon the request of the debtor, the debtor cannot expect that the mortgage which burdens their real estate would be deleted. Upon the receipt of the document eligible for the registration of the deletion of mortgage, real estate registry will not immediately register the deletion of mortgage, but after three years, unless there is the note on the renunciation of the right to the disposal of mortgage that was not erased from Article 54 of the Mortgage Law. This practically means that in most cases,⁴³ real estate registry will not execute the required registration of the deletion of mortgage. By that proposal, the waiting time for the registration of the deletion of mortgage is additionally prolonged which will cause the revolt of clients who are waiting for the registration of the deletion of mortgage for a long time. Also, it will cause significant financial costs.⁴⁴ Proposal is not acceptable due to the fact that in practice, registration of the deletion of mortgage is usually done for first rank mortgages with no annotation on the renunciation of rights to the disposal of mortgage that was not erased. Also, the right to the disposal of mortgage that was not erased is used by a small number of parties, usually companies, and this proposal favors exactly that negligible percentage in comparison to those which urgently needs registration of the deletion of mortgage. This proposal could be acceptable for claims of mortgage creditor which are secured by second or lower rank mortgage.

The proposal wording also limits the rights of owners which cannot require registration of the deletion of mortgage without investment of additional costs or time. If the owner of the real estate wants to have a real estate without burden, despite the remaining claim, they must renounce the right to the disposal of mortgage that was not erased or to stand the annotation of the mortgage erasure permit in the real estate register in the period of three years. The owner’s consent with the registration of the deletion of mortgage is reflected in the renunciation of right to the disposal of mortgage that was not erased. The stated requires the conclusion

⁴³ In more than 90% of cases in practice, registration of the deletion of the first rank mortgage is executed and these are usually placements of private individuals. Annotation on renunciation of right to the disposal of mortgage that was not erased, if provided, is registered in case of second and lower rank mortgages, and these are usually placements of legal entities. The proposed solution can be adequate for claims secured by second or lower rank mortgages.

⁴⁴ If the registration of the deletion of mortgage requires that the clients provide statement on renunciation of right to the disposal of mortgage that was not erased, it requires additional visit to the notary, booking an appointment and solemnization of contract, cost and time.

of a new contract in a defined form between the mortgage creditor and owner of the real estate, which requires new material costs and additional prolongation of the registration of the deletion of mortgage.

The quoted proposal of the amendment of the law uses the term “deletion of mortgage *ex officio*” which does not seem acceptable in the stated context. Registration of the deletion of mortgage is not executed *ex officio*, except in exceptional cases stipulated by the law.⁴⁵ That is supported by the fact on the existence on numerous paid mortgages which are still registered in different real estate registries, as well as the existence of the institute of amortization. Mortgage creditors do not execute the registration of the deletion of mortgage *ex officio*. The procedure of the issuance of mortgage erasure permit is initiated upon the request of the interested party, in accordance with the regulations of the Mortgage Law. Also, the use of the term “deletion of mortgage”, not recognized by the registry regulations is unacceptable, as stated in the introduction.

The option that the Law on the Registration Procedure with the Cadaster of Real Estate defines the procedure of the registration of the deletion of mortgage upon the request of the party seems acceptable and justified. This legal solution completely excludes the possibility for the document which is eligible for the registration of the deletion of mortgage to be delivered *ex officio* to real estate registry and disables the execution of the right to the disposal of mortgage that was not erased for the owner of the real estate, as well as the execution of rights to the reservation of the right of priority order for the new mortgage defined by the Mortgage Law.

3.2. Limitation of the autonomy of will in the disposal of mortgage that was not erased by the application of legal norms

Autonomy of will in case of institute of the disposal of mortgage that was not erased is not only limited by the principle of officiality which is defined by the Law on the Registration Procedure with the Cadaster of Real Estate, but also the practical application of this institute.

The principled legal position is that the owner’s renunciation of right to the disposal of mortgage that was not erased does not produce legal effect.⁴⁶ As an exception, it is stipulated that such a renunciation would produce legal effect if the owner of the real estate is bound to a third party by a contract, especially mortgage creditor with junior priority order, that it would require the erasure of a certain mortgage in their favor and that such a liability is registered in the registry as the annotation of the registered mortgage. In the practice of business banks,

⁴⁵ Exceptions are situations when mortgages are deleted by force of law, after court and extra-judicial sales of real estates. See Article 48 and 49 paragraph 2 item 2 of the Mortgage Law.

⁴⁶ See Article 54 of the Mortgage Law.

legal exception is confirmed as a rule.⁴⁷ Autonomy of will is *a priori* limited, because the owner of the real estate with the mortgage of second or lower rank, does not have the right to exercise their right to the disposal of the rank where mortgage that was not erased is, nor they have the success in the negotiations about that with junior mortgage creditor. The owner is obliged to accept the renunciation of the disposal of multi-rank mortgage that was not erased in favor of the mortgage creditor who should provide loan, with the registration of the second or lower rank. Even though the Mortgage Law stipulates this as an exception, this is an unwritten rule and condition when approving a loan, whose collateral is mortgage of second or lower rank of each business bank in Serbia. Since that the stated exception has become an integral part of loan agreements, which are adhesion agreements in nature, contract upon accession, the party can accept it or not (take it or leave it). In that sense, the autonomy of will of the owner of the real estate, and accordingly, the autonomy of will of the personal debtor is almost gone. The right of the owner of the real estate to the disposal of the rank of the mortgage that was not erased and possible transfer of the mortgage to the registered amount to other claim of the same or other creditor is *a priori* denied.

The possibility of the debtor to opt for better financial conditions or other privileges with the creditor (in terms of more favorable interest, commission etc.) is limited, despite the fact that the debtor has *a priori* accepted the renunciation of a certain right. The owner *a priori* renounces the right to the disposal of mortgage that was not erased, without receiving any economic equivalent for the concession made to the mortgage creditor. That is also the consequence of the lack of interest and knowledge of the debtor. By contractual agreement on the renunciation of the right to the disposal of mortgage that was not erased in favor of the mortgage creditor of the junior priority order, such creditor can not only retain the rank of the mortgage, but it enables them the possibility to enter the place of the first rank mortgage, if the mortgage that was not erased was the first according to the order of settlement.⁴⁸ That is the goal of every mortgage creditor, since that the mortgage of the lower rank, due to the higher risk of collection, conditions

⁴⁷ See Marina Jeremić, „Zasnivanje nove hipoteke sa posebnim osvrtom na raspolaganje neispisanom hipotekom” *Zbornik radova Pravnog fakulteta u Novom Sadu* broj 3/2017, 925-940. “In practice, all junior mortgage creditors will insist on the renunciation of right to the disposal of mortgage that was not erased which makes these regulations more scholarly than practical law”, M. Živković u D. Hiber, M. Živković, *Obezbeđenje i učvršćenje potraživanja*, Pravni fakultet u Beogradu, Beograd 2015, 271.

⁴⁸ “Deletion of unwritten mortgage which is settled before it (mortgage creditor with junior priority order in whose favor renunciation is agreed) according to the priority order, their material and legal position is improved by moving the priority order of settlement. If it was on the second place, by the deletion of the unwritten mortgage, mortgage creditor becomes the first, and if it was third, it also becomes the first.” S. Jokić, 204.

the higher amount of interest.⁴⁹ However, if mortgage of the lower rank is established with the note on the renunciation of right to the disposal of mortgage that was not erased in favor of the creditor, the price of loan does not include the possible benefit which the mortgage creditor would receive by the higher rank, which is enabled by the annotation on the renunciation of right to the disposal of mortgage that was not erased, but the calculation is made only for the risk of collection of mortgage for the order for which the mortgage is established. Renunciation of right to the disposal of multi-rank mortgage that was not erased in favor of the mortgage creditor with junior priority order enables the creditor the smooth progress in the order of settlement. It is certain that the junior mortgage creditor may, possibly without grounds, receive the higher rank of priority regardless of the fact that it is on a much lower rank, since that the movement in the rank is enabled by the owner's renunciation of the right to the disposal of mortgage that was not erased. This is a significant advantage for the mortgage creditor who can get more favorable position without any economic equivalent.⁵⁰

Autonomy of will of the owner of the real estate is also limited in the selection of persons in whose favor the renunciation of right to the disposal of mortgage that was not erased is agreed. Theoretically speaking, a third party, in whose favor the renunciation is agreed, can be any person with certain legal interest in the registration of the deletion of an mortgage that was not erased. In practice, that is always, without exception junior mortgage creditor. Junior mortgage creditor, the one in whose favor the mortgage of the second or lower priority order is established, unjustifiably seeks an opportunity to progress in the rank of settlement, since that due to the lower rank, higher interest rate is agreed. They also want the certainty that upon the settlement of one claim, the mortgage which has been collateral would be erased, and that in the rank, they will be moved forward. That is ensured by entering into a contract which contains the clause on the real estate owner's renunciation of the right to the disposal of mortgage that was not erased in their favor. This is how fixed rank of settlement is relativized.

Renunciation of the right to the disposal in favor of a third party is established by entering into a contract between the owner of the mortgaged real estate and the third party. The agreement is a document eligible for the registration, by which the general condition for the registration of the annotation on the owner's renunciation of the right to the disposal of mortgage that was not erased is met.⁵¹ However, in practice, agreement is, as a rule, not entered into. Usually, the pledge debtor, by the pledge statement by which the mortgage of the second or lower rank

⁴⁹ Miroslav Lazić, „Pravni položaj poverioca po Zakonu o hipoteci” *Pravni život* br. 10/2006, 532 with references.

⁵⁰ See M. Lazić, „Rang stvarnih prava” *Pravni život* br. 10/2002, 77.

⁵¹ General terms for the registration of actual rights, prior annotation and annotation are: existence of the registered real estate, registered predecessor and document for registration. See Article 83 of Law on State Survey and Cadaster and Registration of Rights over Real Estate.

is established in the favor of the mortgage creditor, provides the statement on the renunciation of right to the disposal of mortgage that was not erased in favor of the stated mortgage creditor. Instead of an agreement, the renunciation is made in the form of a unilateral legal work, pledge statement by which unilateral mortgage is established. The legislator does not equate the form in which unilateral mortgage is established in any place with the agreement from Article 54 of the Mortgage Law. Pledge debtor is offered the wording of the pledge statement which is, as a rule, created by a mortgage creditor and formatted by public notary, and which contains the clause on the renunciation of the right to the disposal of mortgage that was not erased. There is no formal consent of the mortgage creditor with this clause, since that there is no concluded agreement between the mortgage creditor and pledge debtor. Renunciation of the right to the disposal of mortgage that was not erased is made by unilateral statement of will of the owner of the real estate, without the consent in whose favor it is established. It is assumed that the consent of the mortgage creditor has been ensured through the norm of the Mortgage Law which stipulates that the registration of the unilateral mortgage based on the pledge statement is made upon the request of the mortgage creditor.⁵² By the Law on the Registration Procedure with the Cadaster of Real Estate coming into force, the registration of the unilateral mortgage based on the pledge statement can no longer be executed upon the request of the mortgage creditor, but *ex officio*.⁵³

Taking into account that the pledge statement is provided in the form of notarial record, it can be concluded that entering into a contract is avoided by the strict form which also includes less strict form stipulated for the agreement on the renunciation of right to the disposal of mortgage that was not erased. Entering into a contract between a mortgage creditor and owner of the real estate about the owner's renunciation of the right to the disposal of mortgage that was not erased as additional document, within the already extensive documentation necessary for loan approval, would generate new financial costs of the borrower, which is not in the interest of clients of mortgage creditors. Thereby, the clause on the owner's renunciation of the right to the disposal of mortgage that was not erased is hidden in the wording of pledge statement proposed by the mortgage creditor,

⁵² Article 14, p. 4 of the Mortgage Law. The reader should be reminded of the opinions in theory according to which the establishment of mortgage on unilateral statement of will of the pledgor is the consequence of the interpretation of unilateral legal works, which is contrary to the main principles of civil law. That is why the amendment of the wording of the Mortgage Law from 2015 includes the implementation of the regulation that the request for the registration based on unilateral statement is submitted by mortgage creditor. The purpose of this was to disable the establishment of mortgage against the creditor's will. See M. Živković u D. Hiber, M. Živković, (2015), 247. By Law on the Registration Procedure with the Cadaster of Real Estate and Utilities coming into force, the regulations of the Mortgage Law on the registration of unilateral mortgage upon the request of the creditor are no longer applicable.

⁵³ In practice, the owner of the real estate can establish a mortgage in favor of a mortgage creditor by pledge statement, without its consent and against his will.

and as such accepted by public notaries and confirmed by real estate registry. Based on such a document, real estate registry registers the mortgage and the annotation on the renunciation of the right to the disposal of mortgage that was not erased in case of mortgage over the respective real estate, at the same time.⁵⁴

It is obvious that the institute of the disposal of mortgage that was not erased is meaningless in practice, due to the agreement on the renunciation of right to the disposal of mortgage that was not erased in favor of the junior mortgage creditor. Junior mortgage creditors have recognized and use the legally approved manner of disabling the use of this institute in their favor. In order to see the benefits and sense of the institute of the disposal of mortgage that was not erased, it is necessary that the Mortgage Law defines that the owner's renunciation of the right to the disposal of mortgage that was not erased does not produce legal effect, without exception. Otherwise, such an institute is meaningless, therefore seems unnecessary in our legal system.

4. ANNOTATION OF RESERVATION OF THE RIGHT OF PRIORITY ORDER⁵⁵

The owner of the subject of the mortgage, with the request for the registration of the deletion of mortgage, can require the annotation of reservation of the right of priority order for the registration of a new mortgage, up to the amount of claims secured by previous mortgage, in the place of the previous mortgage. The owner can exercise this right within three years as of the allowance of the annotation.⁵⁶

The owner of the real estate has the right to ensure the future registration better priority order based on the annotation of reservation of the right of priority order, if they initiate the procedure of the establishment of mortgage or transfer of rights to the respective mortgage.⁵⁷ Annotation of reservation of the right of priority order excludes the sliding rank of settlement.

⁵⁴ Registration of the annotation of the renunciation of the owner's right to the disposal of mortgage that was not erased is executed immediately after the registration of the mortgage on the respective real estate, also in the G sheet of real estate sheet.

⁵⁵ Annotation of the priority order is originally defined by paragraph 60-65 of Law on Land Records. See Ferdo Čulinović, *Komentar zemljišnoknjižnih zakona*, Beograd 1931, 204 i dalje. The term annotation of reservation of the right of priority order was first mentioned in the Draft of the Mortgage Law of professor Orlić. The term was wrongly interpreted in the Mortgage Law by the name annotation of the priority order. The term annotation of reservation of the right of priority order is also used in the Draft of the Code on Property and Other Real Rights (Article 556) and Draft of the Civil Code of the Republic of Serbia (Article 2174). It is necessary to nomotechnically define the term, since this is actually the annotation of reservation of the right of priority order.

⁵⁶ See Article 55 of the Mortgage Law.

⁵⁷ See Article 55, p. 2 of the Mortgage Law.

In practice, annotation of the priority order is used in case of a higher number of mortgages over one real estate and when priority mortgage rank should be enabled for a possible future mortgage creditor and possible future claims. The purpose of this annotation is to ensure the place in the rank to the future mortgage.

In terms of general conditions for the registration of the annotation of reservation of the right of priority order for the new mortgage, the existence of the registered predecessor and registered real estate is necessary, while special document for the registration⁵⁸ is not necessary, according to the current regulations of the Law on State Survey and Cadaster.⁵⁹

According to the regulations of the Mortgage Law, annotation of the priority order is registered upon the request of the owner of the subject of mortgage who intends to burden the real estate by the new mortgage in the place of previous mortgage. It is previously necessary that the claim which has been secured by the prior mortgage has ceased, i.e. that the owner of the real estate, with the request for the deletion of the prior mortgage simultaneously requires the registration of the annotation of reservation of the right of priority order for the new rank, in terms of Article 55 of the Mortgage Law.

The new mortgage secures the claim which cannot be higher than the registered one. Otherwise, mortgage creditors of the lower rank would be endangered. The respective annotation is deleted by the expiry of the time period of three years, *ex officio* or simultaneously with the new registration, i.e. prior annotation of the right executed with the reference to the recorded priority order. The annotation contains the data on right, person in whose favor it is registered, as well as the datum on the highest amount secured by the mortgage.⁶⁰

Request for the registration of the deletion of mortgage can contain mortgage creditor's written statement of agreement with the mortgage being erased or final court decision establishing that the creditor's claim ceased. It can contain the contract on sale of the mortgaged real estate concluded upon the conclusion of the extra-judiciary sale procedure by which the claim of the mortgage creditor is

⁵⁸ Article 86, p. 5 of Law on State Survey and Cadaster and Registration of Rights over Real Estate.

⁵⁹ Law on State Survey and Cadaster and Registration of Rights over Real Estate contains the regulation on the reservation of the right of priority order as does the Rulebook, while Law on the Registration Procedure with the Cadaster of Real Estate and Utilities does not contain special regulation on the annotation of the priority order, which requires the compliance of regulations. Article 15 of Law on Survey and Cadaster and Registration of Rights over Real Estate lists the annotations, providing that the annotation of reservation of the right of priority order is not specifically listed. It can be included in item 21 – other annotations stipulated by the law. It is assumed that the intention of the legislator was not to regulate this special type of annotation by Law on Survey and Cadaster and Registration of Rights over Real Estate, but only by special law – Mortgage Law.

⁶⁰ See Article 160 of the Rulebook.

satisfied or contract on sale by direct arrangement, i.e. subsequent contract. The stated legal regulation is inapplicable in sense that the request for the registration cannot be filed by the owner of the real estate, since that all documents are delivered to real estate registry by the submitting entity, *ex officio*.

If the mortgage ceases by the termination of the entire claim, the debtor may request the certificate on debt settlement or issuance of mortgage discharge by the mortgage creditor. After they are sure the claim has been settled, the mortgage creditor is obliged to issue the debtor the statement, in writing, with the certificate of the signature by which the registration of the deletion of mortgage is allowed. Since this is a document eligible for the registration of right in the real estate registry, public notary, as the submitting entity, will forward the certified document within 24 hours to the competent service of real estate registry. Thereby, the owner of the real estate is prevented from possible registration of the annotation of the priority order of a new mortgage, since that the annotation of reservation of the right of priority order can be filed with the request for the erasure of the mortgage. Also, the mortgage may cease completely based on a court decision. Court delivers real estate registry final decision which defines that the claim of the mortgage creditor has ceased, *ex officio*, thus the owner of the real estate cannot execute the annotation of reservation of the right of priority order for the new mortgage.

Pursuant to the stated, the procedure of the registration of the deletion of mortgage should be legally regulated according to the request of the party, in order to completely exclude the possibility of the delivery of the document eligible for the registration of the deletion of mortgage *ex officio* to real estate registry. That is necessary for the purpose of the creation of possibility of exercising rights to the reservation of the right of priority order for a new mortgage.

5. CONCLUSION

Implementation of the principle of officiality and the category of the submitting entity in the registration of rights in real estate registry has reflected on exercising rights regulated by the regulations of the Mortgage Law. Execution of the change in the real estate registry *ex officio*, through submitting entity has led to the limitation of the autonomy of will of the owner of the real estate during the registration of the deletion of mortgage. Upon the termination of claims secured by the mortgage, the owner of the real estate can require the issuance of the mortgage erasure permit but cannot dispose the document which allows the registration of the deletion of mortgage. Inability to dispose the document which is the basis for the registration of the deletion of mortgage disables the owner's exercise of rights to the disposal of mortgage that was not erased, i.e. exercise of right to the

reservation of the right of priority order for a new mortgage. The right to the conditioned registration of mortgage⁶¹ (prior annotation of the new mortgage) is executed according to the regulations of the Mortgage Law, without any limitations, despite the rule defined the Law on the Registration Procedure with the Cadaster of Real Estate that the registration of rights is executed *ex officio*.

Pursuant to the stated, the autonomy of the owner of the real estate when exercising rights granted by the Mortgage Law is *de facto* limited. Deviation from the legal regulations which regulate the institute of the disposal of mortgage that was not erased, as well as practical application of this institute additionally limits the autonomy of will of the owner of the real estate. By entering into a contract that regulates the renunciation of the right to the disposal of mortgage that was not erased, the existence of this institute becomes meaningless. It is necessary to consider the possibility of the legal regulation of the renunciation of right to the disposal of mortgage that was not erased in other way, so that it does not produce legal effect, without exception.

Taking into account the above stated, the proposal to define the registration of the deletion of mortgage upon the request of the party by the Law on the Registration Procedure with the Cadaster of Real Estate seems purposeful. By such a legal solution, the rights granted by the Mortgage Law can be exercised without limitations.

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⁶¹ This is prior annotation of a new mortgage from Article 56 of the Mortgage Law.

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Ограничење аутономије воље код права располагања неисписаном хипотеком и задржавања првенственог реда за нову хипотеку

Сажетак: Доношењем закона којим је уређен поседујак уписа у катастар непокретности, поред категорије обвезника доставе уведено је правило да се поседујак уписа покреће и води по службеној дужности. Оваквим законским решењем упис права се сироводи аутоматски, без икаквој ушлицаја лица у чију користи се уписује књижно право као и других заинтересованих, чиме је слобода вршења и заштите грађанских субјективних права странака ограничена. Упис права по службеној дужности уз учешће обвезника доставе рефлектовао се и на одредбе закона којим је уређена хипотека, што је имало за последицу ограничења субјективних права код уписа брисања хипотеке. У раду је посебна пажња посвећена ограничењу аутономије воље власника непокретности код вршења права на располагање неисписаном хипотеком као и права на задржавање првенственог реда за нову хипотеку. У том смислу, указаће се на потребу да се законски регулише могућност да се поседујак уписа брисања хипотеке врши по захтеву странке.

Кључне речи: аутономија воље, начело официјелности, упис брисања хипотеке, располагање неисписаном хипотеком, забележба задржавања првенственог реда

Датум пријема рада: 13.04.2021.

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Датум прихватања рада: 05.10.2021.