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THE RIGHT TO SURVIVOR'S BENEFITS IN THE REPUBLIC OF SERBIA

The right to survivor's benefits is one of the basic rights from the pension and disability insurance, which is provided to the family members of the deceased insured, under the conditions determined by the Law on Pension and Disability Insurance of the Republic of Serbia. This Law was adopted in 2003, but since then the National Assembly has adopted numerous amendments to this regulation, including amendments adopted in December last year, in connection with the exercise of the right to survivor's benefits¹.

The adopted amendments to the Law stipulate that under certain conditions, the right to survivor's benefits will also be exercised by cohabitants, which was not the case in our law until the aforementioned changes. Until the adoption of these amendments, in the Republic of Serbia, as well as in most Eastern European countries, cohabitants have not exercised the right to survivor's benefits regardless of the length of extramarital community, and therefore a large number of persons was not able to acquire right to survivor's benefits, having reached old age without adequate income for dignified life. As *ratio legis* for the adoption of the mentioned amendments to the Law on Pension and Disability Insurance it is pointed out, along with the harmonization of the Law with the relevant norms of the Constitution of the Republic of Serbia, primarily the need to equate marriage and cohabitation, in relation to the exercise of the right to family pension, and also idea to increase the coverage of the elderly population with incomes from pensions, which will promote their economic position in society². Above-mentioned novelties in our pension and disability legislation will be a subject of this review.

First of all, it should be noted that the institute of survivor's benefits has a long tradition in the legal system of the Republic of Serbia. The first forms of security appeared in the middle of the 19th century, when pensions for widows and children of deceased civil servants were initially provided, and then pensions for teachers'

1 Law on Pension and Disability Insurance (Official Gazette of RS, no. 34/2003, 64/2004 - decision of the Constitutional Court of RS, 84/2004 - other law, 85/2005, 101/2005 - other law, 63 / 2006 - decision of the Constitutional Court of RS, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 108/2013, 75/2014, 142/2014, 73/2018, 46 /2019- decision of the Constitutional Court and 86 / 2019).

2 Draft Law on Amendments to the Law on Pension and Disability Insurance, explanation, page 41: http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/2019/2666-19.pdf

widows and their children. Prior to the adoption of the mentioned amendments, it was envisaged that the holders of the right to survivor's benefits, except for the immediate family members of the deceased insured, i.e. pension beneficiaries, spouses and children, born in or out of wedlock or adopted children, as well as stepchildren and grandchildren, could be also the members of the extended family of the deceased, i.e. parents, brothers, sisters and other orphans, i.e. children who have one or both parents who are completely incapable of work, and who were supported by the insured, i.e. the beneficiary³. It should be noted that members of the extended family will be entitled to survivor's benefits only if there are no members of the immediate family. Cohabitants have been included in the family members of the deceased insured by the amendments to the Law on Pension and Disability Insurance since December last year.

It is important to emphasize that in the Serbian legislation, a family member of a deceased insured person can exercise the right to survivor's benefits, only under the condition that so-called general conditions concerning the deceased insured person are met. The stated conditions in the Law on Pension and Disability Insurance are alternatively set, so the right to a survivor's benefits can be exercised by family members of the deceased insured who has completed at least five years of insurance or has met the requirements for old-age, early old-age or disability pension, i.e. family members of the deceased beneficiary of an old-age, early old-age or disability pension. In the event that a person dies as a result of an injury at work or an occupational disease, his or her family members acquire the right to a survivor's pension regardless of the length of that person's pension⁴.

In the Republic of Serbia has for years been present a controversy related to the exercise of the right to survivor's benefits, which refers to the fact that the right to survivor's benefits was not recognized to unmarried partners, even though the marriage was equated with cohabitation by the Constitution of the Republic of Serbia (2006) and Family Law of the Republic of Serbia (2005)⁵. On this occasion, in 2008 the Constitutional Court of the Republic of Serbia addressed the initiative for establishing the unconstitutionality of certain provisions of the Law on Pension and Disability Insurance.

The initiative stated, among other things, that certain provisions of the Law are inconsistent with the provisions of the Constitution and that they discriminate against persons living in cohabitation in relation to persons living in marriage, and the disputed provisions are in the opinion of the initiators contrary to constitutional norms that guarantee the equality of marital and extramarital union before the law⁶. However, the Court has said that there is no basis to proceed, or not to be competent to decide on this occasion. The Court found that there was no basis for initiating

3 Law on Pension and Disability Insurance (2003), Article 34.

4 Law on Pension and Disability Insurance (2003), Article 27 .

5 Constitution of the Republic of Serbia (Official Gazette of RS, no. 98/2006), Article 62, paragraph 5; Family Law (Official Gazette of RS, no. 18/2005, 72/2011 - other law and 6/2015), Article 4, paragraph 2.

6 Decision of the Constitutional Court of Serbia on the rejection of the initiative for the assessment of the constitutionality of Art. 28, 29, 30 and 34 of the Law on Pension and Disability Insurance, no. IUz 90/2008 of 30 June 2011.

proceedings in that case because it did not have the role and powers of a legislator, but only the authority to repeal the existing norm, bearing in mind that the Law on Pension and Disability Insurance does not contain provisions on cohabitants' rights to survivors' benefits⁷.

However, the Court undertook to send a letter to the National Assembly in which it would point out the need to challenge the disputed provisions of the Law on Pension and Disability Insurance governing the right to survivor's benefits, which were recognized to the insured's spouse, i.e. beneficiary, and rights of the cohabitant, i.e. widows and widowers, in accordance with the Constitution and recognized international acts⁸. It took almost a decade to the National Assembly to accept the recommendation of the Constitutional Court, and the right to survivor's benefits, as stated has been recognized to cohabitants only since December last year.

The newly adopted provisions, as previously stated, anticipated that family members of the deceased insured are considered cohabitants, and in accordance with the regulations governing family relations⁹.

Amendments to the regulations of the Republic of Serbia regulate the pension and disability insurance, as a separate branch of social security, cohabitants are equal fully with the spouses, as is logical, and keeping in mind the mentioned constitutional norms, as well as provisions of domestic legislation. However, in addition to the special conditions, which will be analyzed in the continuation of the presentation, additional conditions are set, which are related to the duration of the cohabitation. It is envisaged that a cohabitant may exercise the right to survivor's benefits if the cohabitation lasted for at least three years, or if he or she has a joint child with the deceased insured person, i.e. the beneficiary of the right.

The same conditions are prescribed in our law for spouses, and bearing in mind that it has been noticeable in many situations that there were marriages of interest between an older man and much younger woman in order after the death of the insured that a women realize the right to survivor's benefits. Amendments to the Law on Pension and Disability Insurance stipulate that the right to survivor's benefits can be exercised not only by a spouse from a divorced marriage but also a cohabitant after the termination of the cohabitation of partners, provided that the Court established right to maintenance¹⁰. With regard to proving the existence of cohabitation, the legislator has clearly provided that the existence of cohabitation is established in a non-litigious procedure.

Legislative changes equated also the conditions for entitlement to survivor's benefits for the widows and widowers with the terms for cohabitants, and in case of death of a spouse or cohabitant. It is envisaged that the widow will be entitled to

7 Decision of the Constitutional Court of Serbia on the rejection of the initiative for the review of the constitutionality of Art. 28, 29, 30 and 34 of the Law on Pension and Disability Insurance, no. IUz 90/2008 of 30 June 2011.

8 Decision of the Constitutional Court of Serbia on the rejection of the initiative for the assessment of the constitutionality of Art. 28, 29, 30 and 34 of the Law on Pension and Disability Insurance, no. IUz 90/2008 of 30 June 2011.

9 Law on Pension and Disability Insurance (2003), Article 28, paragraph 1, item 1.

10 Law on Pension and Disability Insurance (2003), Article 28.

survivor's benefits when she reaches a certain number of years of age, i.e. provided that she has reached the age of 53 by the time of death of the spouse or cohabitant, regardless of previous insurance experience, which leads to the conclusion that the widow can exercise that right even though she was unemployed during her life, i.e. outside the labor market¹¹.

The widow shall be entitled to survivor's benefits if until the death of spouse, or cohabitant, or within one year after the death of a spouse, or cohabitant, has become totally incapacitated for work, but also if, after the death of a spouse, i.e. cohabitant, one or more children are left who are entitled to survivor's benefits for that spouse, i.e. a cohabitant, and the child is vested to widow for care and custody. The law also stipulates that a widow who has not reached the age of 53 by the time of the death of her spouse, i.e. cohabitant, but has reached the age of 45, acquires the right to survivor's benefits when she reaches the age of 53.

The widower acquires the right to survivor's benefits under similar conditions as the widow. The only difference is observed during initial conditions, where it is anticipated that the widower shall be entitled to survivor's benefits if until the death of a spouse, or cohabitant he is 58 years old, which is five more years than in the requirement for survivor's benefits, which is projected for the widows of the deceased insured¹². For widowers it is not foreseen the possibility that they subsequently exercise their right to survivor's benefits, i.e. at the moment when they turn 58 years of age, and if at the time of death of a spouse or cohabitant they reached 45 years of life, as provided for widows.

Given that in recent years in the Republic of Serbia there is a high unemployment rate for men over 50, it seems that in some future amendments to the Law on Pension and Disability Insurance, the legislator could take into account the above legal gap and to provide, with somewhat stricter conditions than that provided for widows, that the right to survivor's benefits may subsequently be exercised after reaching the age of 58, and if the widower has reached the age of 53 at the time of the death of the spouse or cohabitant¹³.

11 Law on Pension and Disability Insurance (2003), Article 29.

12 Law on Pension and Disability Insurance (2003), Article 30.

13 In general, widows have been in an unequal position in relation to widows for years, in connection with the exercise of the right to survivor's benefits, and the application of the historical law method shows that initially, with the exception of children, only widows were entitled to survivor's benefits, and that the widower could not exercise this right for many years. The ILO Convention no. 102 on minimum standards of social security in the event of the death of a family provides only the payment of social benefits for children and widows, which once again confirms the necessary revision of these international standards.