

Notarial powers in non-contentious matters in Peru*

1. Notarial powers in non-contentious matters in Peru

In recent years the work of notaries in Peru has received a special vote of confidence from society. This recognition has been reflected in the delegation of powers to the Notaries, which has increased their participation and extended their jurisdiction, enabling them to offer their services in areas which were previously judicial in nature, and established the significant role which the Notaries now fulfil in the country's legal system.

The original **Law on Notaries**, Law No 26002¹, has been subject to a series of amendments which have helped to supplement and update it. The purpose of this article is to summarise the main legal provisions introduced by the amendments and additions made to the Law on Notaries.

2. The law on notarial powers in non-contentious matters

The law on notarial powers in non-contentious matters (**Law No 26662**)² is without a doubt the legal provision which has had the most far-reaching consequences in the sphere of legislation on notarial matters, in the sense that it has meant a great step forward in the legal system, designed above all to relieve the pressure on the judicial system, by offering the user the freedom to choose between notarial and judicial procedures in order to air a non-contentious matter. It is calculated that pressure on the courts has been significantly relieved in respect of the non-contentious matters which now fall within the jurisdiction of Notaries. Law No 26662 does not go as far as

to grant Notaries jurisdiction over all the non-contentious matters regulated by the Code of Civil Procedure³, but only over those of a kind which, when aired, are less likely to generate a conflict of interests.

Peru is one of the Latin-American countries in which jurisdiction over certain non-contentious matters has been delegated to Notaries, which puts us, in this respect, on an equal footing with European legal systems, into which this delegation of powers has been incorporated successfully in recent decades.

The non-contentious matters over which Notaries now have jurisdiction include the following:

2.1. The correction of certificates

These may be birth, death or marriage certificates issued by the civil registries; the objective is to correct a material error (addition or omission) in the first name, surnames and/or dates which is apparent from the certificate or other documentary evidence. It is not permitted to use the notarial procedure to alter gender or surnames or to make other changes which fall within the exclusive jurisdiction of the Judicial Power.

One aspect which must be taken into account in the analysis and evaluation of this point in Law No 26662 is the description of the documentation processed as correction of certificates, in that there must be uniform criteria between the Notaries and the heads of the civil registries, who are responsible for recording the corrections made in the Notary's office. Experience has fostered the development of uniform criteria both in notaries and civil registrars, so that there are neither abuses nor conflicts when it comes to evaluating and subsequently recording the correction.

2.2. The adoption of persons over the age of majority

Adoption is a procedure by which a natural person grants the status of son/daughter to another natural person, and the adoptee ceases to use the surnames of his biological family. The notarial procedure may be used only for adoptions of persons over the age of majority; this means that the adoptee must have legal capacity and the capacity to act. The adoptee and the adopter both appear before the Notary to state their intentions. There is no objection to a person who is married being adopted by another person but, in that case, the spouse of the adoptee will be required to participate in the proceedings.

* by PEDRO GERMÁN NUÑEZ PALOMINO, Notary of La Perla-Callao, Peru.

1 *Ley del Notariado* (Law on Notaries), *Decreto Ley* (Law Decree) N° 26002 of 27.12.1992, modified and published again by *Decreto Legislativo* (Law Decree) N° 1049, OJ Peru 374810 of 26.6.2008 - Internet: http://www.notarios.org.pe/descargas/Decreto_Legislativo_Numero_1049.pdf

2 *Ley N° 26662, Competencia Notarial en Asuntos No Contenciosos* (Notarial powers in non-contentious matters) http://www.notarios.org.pe/descargas/Ley_Competencia_Notaria_Asuntos_No_Contenciosos.pdf

3 *Código Procesal Civil* (Code of Civil Procedure), internet: <http://spij.minjus.gob.pe/CLP/contenidos.dll?f=templates&fn=default-tuocodproccivil.htm&vid=Ciclope:CLPdemo>

Furthermore, as the adoptee has new parents, the Notary officially notifies the corresponding registry, in order that a new birth certificate may be issued, and the adoption is recorded in the margin of the original certificate.

2.3. Family estate

This is a legal institution which consists in the allocation of a family dwelling or property which may be used for a profit making activity to support the beneficiaries.

Its distinctive features are that it **cannot be subject to a lien**, it may not be assigned and it may be transferred by inheritance. When the family estate is constituted, the property is not transferred to the beneficiaries, but they acquire the right to the use of it. This institution is created to preserve the family residence, protecting it not only from distraint for the constitutor's debts, but also from any acts of disposal he may wish to make in its respect. The beneficiaries may be children, spouses, descendants who are under age or incompetent, parents and other ascendant relatives who are in need.

It should be borne in mind that, just as the notarial procedure may be used to constitute the family estate, it may also be used to amend or terminate it, by carrying out the same formality as for its constitution, that is, drawing up and signing a public deed.

2.4. Inventories

An inventory is a list which is drawn up of assets which are in a certain place and which belong or belonged to a natural or legal person; it is made for the purpose of recording the assets and the liabilities they may have.

The part played by the Notary in an inventory procedure consists in going to the place in which the assets are situated and drawing up the corresponding document, describing the assets (condition and characteristics) without determining their ownership or legal allocation.

In an inventory procedure it is possible to request the inclusion of an asset which did not appear in the original application, provided that its inclusion is supported by documentation; this request for an asset to be included in the inventory may be made only up until the moment at which the actual inventory procedure is carried out. On the other hand, the notarial procedure may not be used to request the exclusion of an asset from the inventory; it is for the judicial body to carry out that procedure.

2.5. Proving a closed will

A **testament** is understood to be the last will and testament of a person before he dies and it is expressed in written form. According to our current Civil Code, "a person may, by Will, make provision for the disposal, after his death, of all or part of his assets, and arrange his own succession within the limits of the Law and in accordance with the formalities laid down thereby". We should point out that making a Will is a legal procedure which requires the physical presence of the testator and does not allow him to be represented by another person, expressing an intention unilaterally, in which he decides to which person or persons his assets shall belong after his death and which is subject to the formalities of the Law.

The **closed will** is one kind of will, governed by the Civil Code and is thus called because the document in which the testator has expressed his wishes is in a closed envelope which he hands to the Notary in the presence of two competent witnesses, and the Notary draws up a deed, transcribes the content of the envelope in his register and returns the envelope to the testator. The closed will is proved when the testator dies and probate is requested in writing by those who consider that they are heirs entitled by law to a fixed portion of the estate, heirs testamentary or legatees of the testator, or by creditors of the testator or of the heir presumptive, in order to determine the validity and content of the will, and to initiate the procedure for executing its provisions.

2.6. Intestate succession

This procedure may be carried out in any of the five circumstances stated in Article 815 of the Civil Code; but we would venture to say that, of the hypotheses described in that body of law, the one in respect of which there are most applications to Notarial offices is the first, which provides: "the estate passes to the legal heirs if the principal dies without making a will, or if the will he made has been declared invalid in whole or in part, or if it has expired because probate has not been sought; or if disinheritance has been declared invalid". This means that, if there is no Will, the persons who consider that they are the deceased's heirs go to a Notary for a declaration of their status as heirs, and do so in the order established by Law, having regard to the fact that close relatives exclude more distant relatives.

The purpose of the application for intestate succession is to dispel the legal uncertainty which prevails when the identity of a person's heir is not known, to recognise his right and at the same time enable him to acquire the deceased's assets. The importance of the intestate succession procedure lies in determining who are a person's heirs, and also in changing ownership of his assets because they pass to his heirs.

The procedure is always carried out before the Notary of the place in which the deceased had his **last residence**. Notices are issued in order to bring the procedure which has been requested to the attention of the public, so that any interested party who considers that he is an heir may, if that is the case, ask to be included in the application or challenge it.

The act or legal fact which allows the intestate succession procedure to be conducted is the death of the principal.

It should be remembered that jurisdiction to conduct non-contentious proceedings has not been removed from the courts; it is simply that jurisdiction to deal with such matters has now been extended to Notaries.

When intestate succession proceedings brought before a Notary involve a **disagreement or dispute between supposed heirs** who cannot reach agreement for carrying out the procedure, which would implicitly involve a lawsuit, which means that it ceases to be a non-contentious matter which may be heard by a Notary, the Notary is required to decline jurisdiction and send all the documents in the case to the **Judiciary**.

3. The law No 27157

Following the pronouncement and term of the Law on Notarial Powers in non-contentious matters and in the light of the beneficial effect of its application for society, Law No 27157⁴ was adopted: this established three additional non-contentious procedures.

3.1. Acquisitive prescription of title by notarial procedure

By this procedure Notaries shall have jurisdiction to declare the acquisitive prescription of an asset, but only if the interested party has no acquisitive public instrument, because the interested party only has possession in his favour, or in any event, if he has a title deed but the person who granted it to him has not registered his right. This requirement for carrying out the prescription procedure must also be supplemented with the other requirements laid down by the Law, such as that the interested party must provide proof of the necessary characteristics of a prescription: continuous peaceful and public possession of the property for more than ten years.

The acquisitive prescription procedure before a Notary is also known as an act of notoriety; that is to say, the Notary makes a value judgement or a specific evaluation of fact, as to whether the interested party has been in possession of the property for more than ten years.

The procedure which is followed is initiated by an application in writing from the interested party or parties (or his/their respective representatives), stating his/their particulars. The reason for making the application must also be given, with a statement of the facts and circumstances which provide evidence to support the right invoked and its corresponding legal basis.

To that end the following must be stated:

- a) The time, date and form of the acquisition, and also the name of the person, if any, with statutory rights over the property.
- b) The names and addresses of the owners of the adjoining properties, where appropriate.
- c) The municipal or administrative registration certificate of the person who appears as owner or possessor of the asset; this is done with the aim of giving a hearing to any persons having an interest in the proceedings.
- d) A transcript of the entries in the public register made at least ten years previously.
- e) The testimony of no fewer than three and not more than six persons over twenty five years of age is also required, being preferably neighbours of the property.
- f) Any other evidence relating to the application.

3.2. Correction of areas, boundaries and perimeter measurements by notarial procedure

In this case the actual data relating to areas, boundaries or perimeter measurements of the property do not coincide with the data entered in the public registers.

This problem often constitutes an obstacle to the transfer of immovable property.

The correction of areas and boundaries before a Notary involves a procedure which is requested by the person concerned, who seeks the declaration and recognition of rights (that the facts should accord with the registration).

Under this procedure the Notary is required to make a judgement or assessment after carrying out the necessary checks in order to confirm the facts which are, namely, the dimensions of the area.

The proceedings will be conducted as a non-contentious matter at the Notarial office, provided that the actual area of the property is the same as or smaller than the area recorded in the corresponding entry, so as not to affect the rights of third parties.

It is possible to obtain the correction of areas, when the actual area is larger than the area registered; for this purpose it will be necessary to have a certificate in which it is specified that the larger area does not overlap another registered area.

3.3. The issue of supplementary titles at the Notarial Office:

Furthermore, the Civil Code⁵ provides two mechanisms for obtaining the first entry of a title deed in the register, also known as registration: titles more than five years old or supplementary titles declared by a court where there are no title deeds.

The supplementary title application is a procedure which allows the person who is the owner/person in possession of an unregistered property to obtain, by means of this instrument, the first registration of his property, and consequently future transfers affecting that property will be registered.

The designation 'supplementary title' is used only in the case of unregistered properties, and in order to obtain a supplementary title from a Notarial office the applicant must be without deeds from the owner, provided that, as the regulations require, the property which is the subject of regularisation is built on an unregistered plot of land.

There are two circumstances in which supplementary titles are created:

- a) The owner/person in possession, who does not have title to an unregistered property, proves that he has been in possession of the property for five years.
- b) The owner of an unregistered property has title but not for the aforementioned length of time (Art. 2018 of the Civil Code); he does not need to prove that he has owned the property for five years.

4 *Ley N° 27157, Ley de Regularización de Edificaciones, del Procedimiento para la Declaratoria de Fábrica y del Régimen de Unidades Inmobiliarias de Propiedad Exclusiva y de Propiedad Común* (Law No 27157 on the regulation of buildings, on the procedure for a declaration of erection and on apartment ownership).

See also *Ley N° 27333, Complementaria a la Ley N° 26662, la Ley de asuntos no contenciosos de competencia notarial, para la regularización de edificaciones* (Law No 27333, complementing Law No 26662 in non-contentious matters in the notarial competence for the regulation of buildings), internet: http://www.notarios.org.pe/descargas/Ley_27333.pdf

5 *Código civil* – Internet: [http://spij.minijus.gob.pe/CLP/contenidos.dll/demo/coleccion00000.htm/tomo00004.htm/sumilla00006.htm?f=templates\\$fn=document-frame.htm\\$3.0#JD_Codigo_Civil](http://spij.minijus.gob.pe/CLP/contenidos.dll/demo/coleccion00000.htm/tomo00004.htm/sumilla00006.htm?f=templates$fn=document-frame.htm$3.0#JD_Codigo_Civil)

The requirements for the creation of supplementary titles are almost the same as those of the acquisitive prescription of title, with the exception that in this procedure it is necessary to submit a negative certificate of registration issued by the registry of the place in which the property is situated.

Furthermore, notices will be published and when twenty-five working days have elapsed since publication of the last notice without any objection having been submitted, the Notary may make a final pronouncement declaring the creation of a supplementary title in favour of the applicant; and this will be recorded in a deed which will contain confirmation of the facts and the rights invoked by the applicant and this deed will be filed in the register of non-contentious matters.