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Research Article
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Family Law in the Civil Code of the Republic of Macedonia

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Abstract

In this text the authors provide an overview of the major reforms in the Macedonian family Law that should be implemented in the Civil Code of the Republic of Macedonia. The paper presents the arguments in favor of the regulation of family relations in the Civil Code. In addition, the authors present several proposals for the amendment of family law, which would achieve greater protection of the rights and interests of family members, especially children. In this sense, the authors consider that the changes in the regulation of cohabitation are necessary, and that marital agreement should be regulated in the Civil Code of the Republic of Macedonia. Also, the authors propose the adoption of the principle of shared parenting after divorce, which is in the best interests of children, as well as the implementation of the principle that the children should have the possibility to express their opinion in all proceedings where the competent authorities are deciding about their rights and interests. In the end, the authors believe that the Civil Code of the Republic of Macedonia should provide a special protection of the family home, which will ensure that children will have the opportunity to continue to live in the home after their parents' divorce.

Keywords: Civil Code; Marital agreement; Exercise of parental rights

Introduction

In Republic of Macedonia there is an ongoing process of serious reforms in the legal system, which includes the codification of the civil law. In December 2010 the Government of Republic of Macedonia decided to form a Commission for drafting the Civil Code [1] and Professor Gale Galev was appointed as a president. To date this Commission had prepared the draft versions of Obligations (Book II of the Civil Code) [2] and Succession [3] (Book IV of the Civil Code). The Commission is now working on the preparation of Book V of the Civil Code, which will regulate family relations. In Macedonian Family Law, the most significant reform was made in 1992, when was enacted the Family Law Act (FLA) [4]. This Act was a kind of a "mini codification", because all the parts of the family law - marital law, parental rights, adoption and guardianship, which hitherto have been regulated in separate laws, were united in one legal text. Since then, the Macedonian family law was amended several times, but without any significant changes. Despite this, in the last several decades, dramatic changes in the marital and family relations took place in all European countries: the number of divorces is increasing [5], as well as the number of non-marital couples and children born out of wedlock and single parent families [6], the number of new marriages is decreasing [7] and there is dramatic fall of the birth rates in almost all European countries [8]. These rapid and dynamic changes in the field of the family and family relationships are present in Macedonia too. That is why, from all the parts of the Civil Code, the most significant reforms are expected to be enacted in the area of family law.

In this text we will focus our attention on the place of the family law in the Civil Code of the Republic of Macedonia, and the main proposals of the reforms in the family law in the regulation of cohabitation, marital agreement, exercise of parental rights, protection of the rights and interests of children and regulation of the status of family home. We believe that these are the most important changes in regulation of family relations in Macedonia, and that those reforms will be aligned with changes in the family, the most important international documents, and the basic tendencies of regulation of family law in European countries.

Place of the Family Law in the Civil Code of the Republic of Macedonia

In the begging, during the preparation of the Civil Code of the Republic of Macedonia, there were certain opinions according to which family law should not be an integral part of civil codification, but that family relations should be regulated by a special law. The idea that family law should not be included in the Civil Code is based on the division of civil law relations on personal relationships (which should be regulated in a separate family code) and proprietary relationships (which should be regulated in the Civil Code). However, in the reality it is not easy to separate personal and proprietary relationships, because they are closely intertwined. In addition, there are other, more important reasons why family law should be an integral part of civil codification. The main aim of codification is to cover a wide field of law and to be the most important source of law in a particular area. Codification must not have gaps and its introduction should reduce the number of sources of law. Moreover, codification should be simple, understandable for every citizen [9]. Thus, the main reason for the inclusion of Family law in Civil Code is to provide regulation of all issues important to the citizens, from birth to death, in one legal text, in a comprehensive and systematic way [10]. Furthermore, family law is an integral part of the most significant civil codes in Europe, as French and German Civil Code [11], and such is the situation in all countries of Western Europe that have civil codifications[12].

Only in the former socialist countries, which were influenced by the legislation of the Soviet Union, Family law was not an integral part of civil codifications. After the October Revolution of 1917, the reform of Family law was a top priority, and it has already started in the same

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year, although the country fought a civil war [13]. The main objective of the Soviet authorities was to change the old family model and build a new, in accordance with the basic principles of Marxism-Leninism, which is why the Soviet Union has built family law system radically different from systems in Western Europe [14]. One of the main features of Soviet law was separation of family law from civil law. The main reason for this deviation from the European civil law tradition had ideological character: Soviet Bolsheviks believed that family should be distinguished from bourgeois families in western countries, and that family relations should be based on love, respect and support, not a property interest [15]. Under the influence of Soviet law, this concept of separation of family law from civil codifications was accepted in all other countries of the socialist bloc. In this sense Zbigniew Radvanjski pointed out that the Communist doctrine, determined that family law should be separated from civil law, and consequently, in the USSR, as in other "popular democracies", family law was regulated in special Family Code [16].

After the dissolution of the Soviet Union, and after the democratic changes in the former socialist countries, significant reforms were made in the sphere of civil law. All former socialist countries that have adopted or are in the process of adoption of civil codifications, have abandoned communist ideological matrix, returned to the original European legal tradition and all have included the family law in their civil codes. For example, the former Soviet republics of Estonia, Lithuania and Latvia have included family law in their civil codes, which were brought upon their separation from the Soviet Union [9], and family law was included in the Civil Code of Georgia, passed in 2001 [17]. Similarly, Slovakia has abandoned influence from Soviet law, and the Government of the Slovak Republic in 2009 decided to start a process of drafting of new Civil Code whereas family law will be regulated in Book II of the Civil Code [16]. Hungary follows the example of other former socialist countries, so family law is included in Hungarian Civil Code [15]. In Poland the Civil Code contains five parts, which are expected to be adopted soon [18], ant that is so in the newest version of the Civil Code of Czech, and family law is regulated in Book II, as an integral part of civil codification [19]. Due to the fact that family law is an integral part of civil codifications of nearly all European countries, as well as the need to regulate all relations in the sphere of civil law in one legislative text, in a coherent and comprehensive way, the Commission for the preparation of the Civil Code of Macedonia has decided that family law should be included in Book V of the Civil Code.

Legal Regulation of Nonmarital Cohabitation

Macedonian family law did not regulate nonmarital cohabitation, until the adoption of the Family Law Act (FLA) in 1992 [20]. In the preceding period, the nonmarital cohabitation was not regulated and did not enjoy legal protection [21]. Nonetheless, in the judicial practice there were a few cases where the nonmarital cohabitation partner had certain property rights [22].

In the Family Law Act, even though that during the drafting period, the idea of introduction of "registered" nonmarital cohabitation was present, the concept of unregistered nonmarital cohabitation was accepted. In article 13 from FLA the nonmarital cohabitation is defined as: "*The living community of a man and woman, which has not been established according to the provisions of this law (nonmarital cohabitation) and has endured at least one year, is equal to the marriage in the right of mutual maintenance and the property acquired during the time of endurance of that cohabitation.*" It can be noticed that the essential conditions for the existence and validity of the nonmarital cohabitation are: 1) Existence of community between man and women and 2) The endurance of this cohabitation is at least one year.

1) With regard to the *first condition*-diversity of sexes, it can be ascertained that the Macedonian family law legislation envisages and permits only heterosexual nonmarital cohabitation. For the recognition of the nonmarital cohabitation essential importance is given to the totality of the relations between the spouses, its quality and the real intention for joint living [22]. Therefore, the science rightly points out that "temporary, short-term, and often 'accidental' relations between man and woman cannot produced legal effects of the nonmarital cohabitation [14]."

2) *The second condition* envisaged by the FLA is that nonmarital cohabitation should last at least one year. Bearing in mind that in Macedonia law is accepted the concept of "unregistered" nonmarital cohabitation, the necessity to prove the existence and the duration of the nonmarital cohabitation is essential when the nonmarital cohabitation is terminated. This problem is present in the Macedonian judicial practice and is often connected with long and difficult judicial processes. Thus, one of the more important principles, the principle of legal security in the property relations is endangered.

From the legal definition of the nonmarital cohabitation and conditions envisaged for its validity, it can be noticed that the legislator did not envisaged legal impediments for nonmarital partners. In Family law theory, even before the adoption of the FLA, a number of authors wrote that there should be marriage impediments, if nonmarital cohabitation is to produce legal consequences [23]. This attitude is present today, and some authors are of opinion that this omission should be amended [22]. Thus, the legislator should envisage that in order to equalize the legal effects of marriage and the nonmarital cohabitation, with regard to the right to maintenance and division of property acquired during that community, *there should not be marriage impediments between the nonmarital cohabitation partners* [24].

In the comparative law, most of the European legislations envisage that there should be no marriage impediments between the nonmarital cohabitation partners [25], and Macedonia is the rare country where, according to the current solution envisaged in FLA, marriage impediments are not envisaged for nonmarital partners [26]. As a result of this omission of the legislator in Macedonia, in reality there are cases where a man or a woman can have simultaneously marital and nonmarital partner, which represent rare case in the comparative law [27].

This kind of omission of the legislator causes legal inconsistencies and troubles in practice. In Macedonia the nonmarital cohabitation community might create legal consequences, even though one or both nonmarital partners are in a marriage or are closely related, for example they are first cousins. The legal regulation of nonmarital cohabitation in Macedonia produces a lot of dilemmas and problems in the judicial practice [28].

Regulation of the Marital Agreement

The marital agreement is one of the most controversial contracts in family law and the law generally. This contract has many opponents who believe that it does not correspond with the nature of the marriage in contemporary societies, which is based on love, which is diametrically opposed to any property calculations. On the other side, marital agreement has many supporters, who think that it allows the realization of the free will of the spouses, and that this agreement

can change the rigid legal framework for regulation of the property relations in the marriage.

Overall, the basic problem of marital contract, according to his opponents, is that it introduces the principle of interest and desire for profit in the marriage, which is characteristic of market relations, and promotes egoism and selfishness in a relationship which should be based on love, respect, support, and readiness for sacrifice for the partner. In this sense, a prominent New York lawyer who specialized in divorces says: "You cannot regulate the human heart with contract. You should have confidence in the person you marry, not in the legal document [29]." Other authors suggest that the basic problem in marital agreements is that with their conclusion there is an element of distrust that is expressed towards the marital partner [30]. In addition, a major objection regarding marital agreements is that they are "destroying" the romance in the marriage [30]. Some authors believe that the acceptance of marital contract in the legal system means that much more attention is paid to the interests and welfare of the individual, rather than the welfare of the couple, which ultimately negatively affect the stability and success of the marriage and often leads to divorce [31]. Marital contract is often an indicator that there is no trust between spouses and that they try to protect their property and financial interests by concluding marital agreement. According to Servidea, the conclusion of the marital agreement is a strong indicator that the spouses are preparing for divorce as early as the time of the conclusion of marriage [32]. Despite the criticism of the marital agreement, there are many arguments that it should be accepted and regulated in the legal system and that it has positive effects on spouses and their children. With the ability to conclude the marital agreement spouses can exercise their free will in regulating their relationships during the marriage and in case of divorce. This contract allows them to regulate their property relations differently from the provisions provided by the law. Supporters believe that the marital contract is not an expression of lack of confidence between the spouses, but that it is an expression of genuine sincerity, which is the basis for a successful marriage, as well as confirmation that the spouses have no hidden intentions in the marriage. According to some authors, the fact that spouses discuss the signing of the marital contract is "a reflection of the stability of the relationship and the maturity of the spouses [33]." One of the strongest arguments in favor of the marital agreement is that it protects spouses in case of a divorce, because it deals with all property issues and prevents lengthy, expensive and traumatic procedures for settlement of property relations after divorce.

Marital contract is not regulated in the Family Law Act of the Republic of Macedonia, unlike many European countries, such as France, Germany, Switzerland, and several former socialist countries (Croatia [34], Serbia [35], Russia [36], Bulgaria [37], Montenegro, Republic of Srpska, Hungary) [38] where the spouses are allowed to choose or create a model of marital property regime. There are authors who think that any marital property regime is not always suitable and adequate to meet the needs of each couple. Different couples have different needs and desires, and their requirements in terms of property relationships may change during marriage. It is very important to allow to the spouses, according to their specific needs and interests, to regulate their property relations themselves [39]. We believe that the marital agreement should be introduced in the Civil Code of the Republic of Macedonia [40].

Exercise of Parental Rights in Macedonian Family Law

In Macedonian Family Law Act there is no precise legal provision under which the parents jointly perform parental rights after the divorce. The joint performance of parental rights arises from the provisions laid down in Article 45 of the Family Law Act [41], as well as from the Article 76 of the Family Law Act [42]. Hence, the legislator has foreseen the joint exercise of parental rights as a basic principle in the family law. However, there is a need to explicitly predict the joint exercise of the parental responsibilities after divorce. In real life in Macedonia the parent to whom the children have been entrusted for upbringing after divorce makes all the important decisions concerning the rights and the interests of the children, and the other parent is awarded only with the right to maintain personal relationships with the children and the obligation to pay child support. This negatively influences parent's willingness to engage in maintaining a personal relationship with the child, because he is practically excluded from the opportunity to decide on the matters that are crucial for the future of the child. The joint exercise of parental rights after divorce is of mutual interest of the father, of the mother and of the children. According to Marjorie Lindner Gunnoe and Sanford L. Braver, the benefit for the father in case of joint exercise of the parental rights after divorce consists of feeling less emotional loss and depression, anger and discontinuity in performing of the parental role. The benefit for the mother consists in a father's greater willingness to pay child support, more assistance in taking care for the child and more time for professional development. The benefits for the child is to have better relationships with both parents, better cooperation between parents in the exercise of the parental responsibilities and better child adjustment after divorce [43]. In this context, it is important to amend the Family Law Act and to provide that the joint exercise of parental rights after the divorce should be a fundamental principle. The law should provide that the court may entrust the exercise of parental rights to one of the parents, only if that is required by the interests of the child.

In addition, the law should be ammended in the part that lists the compentences of the Center of Social Affairs in relation to the exercise of parental rights after the divorce and the supervision over the exercise of parental rights. The Center of Social Affairs has extremely wide powers in the supervision over the performance of parental rights, and maintainance of personal relations and direct contact with the child. In this sense, the Center of Social Affairs can take the child from one parent, and entrust the guarding and upbringing of the child to the other parent, or any other person or adequate institution, when parents or the parent with whom the child lives neglected the child in terms of upbringing and education, or when there is a serious danger to the child's proper development and raising [44]. Such a solution is contrary to the UN Convention on the Rights on the Child which provides a judicial review when decisions is made by which a child is separated from one or both parents. This solution is contrary to the Law on Non-Litigation Procedure of the Republic of Macedonia, which envisages that the court, and not the Center of Social Work is authorized to revoke or restrict parental rights. Considering this, and the fact that court decisions provide higher level of legal certainty, impartiality and flexibility in decision making, we think that in the prospective amendments of the Family Law Act need to be underlined that the Court, and not the Center of Social Affairs should be competent to decide on issues related to the exercise of parental rights after divorce.

Allow the Possibility for the Children to Express their Opinion in all Proceedings Concerning their Rights and Interests

In the context of the exercise of parental responsibilities, it is important to take account of the child's autonomy and the influence

of his will and his wishes, especially if, given the age and maturity, the child is capable of forming an opinion on relevant issues concerning his rights and interests. Connected with this, of great importance is the question of the possibility for the child to be heard in procedures before the state authorities who decide on specified issues relating to the rights and interests of the child. These are essential questions, because only if parents and state agencies really take account of the views, opinions and wishes of the child, we can speak of a real application of the UN Convention on the Rights of the Child, which considers the child as a subject of rights, rather than as a passive object of care [45]. This concept is accepted in the European Convention on the exercise of rights of the child [46].

Many European legislation explicitly stipulates the obligation of parents, in the exercise of parental responsibilities, to take into account the opinions and views of the child. The Italian Civil Code provides that parents have the right and obligation to support, educate and raise their children, taking into account their abilities, natural inclinations and aspirations [47]. Courts in Italy take account of the wishes and autonomy of minors. The court in Bologna in 1973 ruled that the minor may leave the parental home in order to maintain the relationship that they tried to forbid [48]. The child's right to autonomy is provided in case law in other European countries, and the child's right to make decisions for themselves and their rights and interests is accepted in the particularly important and influential case *Gillick v. West Norfolk and Wisbeach Area Health Authority in the UK* [49]. Based on the decision in this case, in the English case law appeared new institute: mature minor under 16, which opens numerous dilemmas. Namely, it is unclear how it will be determined whether the minor has sufficient understanding and intelligence to be able to make decisions for themselves and their rights and interests and whether this could lead to possible danger to the rights of children. According to Cretney, it is a factual issue that should be resolved within each case, depending on the complexity of the issues in question, and the emotional and intellectual maturity of the juvenile [50].

The child's right to express an opinion that should be taken into account is provided in other European jurisdictions. The Swiss Civil Code stipulates the obligation for the parents, when they make important decisions for the child, to take care for his opinion [51]. Moreover, the children in Switzerland, that have reached certain level of maturity, have the right to independently organize their lives [52]. In the Czech Republic, the legislator has also taken into account the views of the child [53]. The Family Law stipulates that when a child is capable of forming their own opinions and to understand the measures that relate to it, it has the right of parents to obtain all information necessary to plead all measures of parents [54]. In France, the child's right to express their opinion is based on the amendments of the Civil Code of 1993 [55], and the children's right to express their opinion in some countries, such as Poland, is provided in the Constitution [56].

Macedonia does not provide consistent application of Article 12 of the UN Convention on the Rights of the Child, although the Act on protection of the children provides that the opinion of the child should be taken into account when deciding for his rights and obligations [57]. However, the Family Law Act, which regulates the most important issues related to the rights and interests of children, does not contain any general provision that parents and state institutions should take into account the opinion and the wishes of the child when deciding about his rights and interests. There are several articles of the Family Law Act, pertaining to the maintenance of personal contacts of the child with the parent, when parents do not live together [45], or adoption [58], or designation of a guardian [59], where the Family Law Act provides for an obligation to take into consideration the wishes of the child. However, for some extremely important situations, such as, for example, the question whether the child should live with the father or the mother after divorce, Family Law Act does not provide an obligation for the Court and Center for Social Affairs to hear the child and to take into consideration his wishes and opinions. Because of this, we believe that the Civil Code of the Republic of Macedonia should provide a general obligation for the parents, as well as for all public authorities to have an obligation to hear the child, and to take his views into consideration, according to the age and the maturity of the child [60].

Predicting Specific Legal Protection of the Family Home

In family law of the Republic of Macedonia there are no provisions for separate legal status and protection of the family home. At the same time, it is undisputed that the family home is a necessity without which one cannot imagine the existence of the family and the exercise of its main functions. It is a central hub that connects spouses, parents and children in the exercise of family rights and duties [61]. Despite these features, the family home, for a long period of time, has not enjoyed special legal protection in family law in the European countries It has become the object of interest of the science and the modern reform legislation in the last several decades, and has acquired special legal protection. In modern legislation family home is regulated by special legal rules that provide limitation of the ownership rights in order to protect the interest of the children. The question of the specific status of the family home is becoming important in the situations when a spouse to whom the children are entrusted after divorce has not provided a house or an apartment. Therefore, selling the family home after divorce and moving the children in new environment is very common, which has negative influence for the development of the children [62]. Given this, legislators are faced with the dilemma how to establish a balance between the interests of spouses and children and the interests of creditors in respect of the family home [60]. The most important argument in favor of predicting specific legal protection of the family home is the interests of the children to have a stable environment [60]. In most cases of divorce, children who are entrusted to the custody and education of one spouse, and it is usually the mother, are forced to move out of the family home. Changing the home and the environment in which the children live is very emotional experience that negatively affects their development. Because of this, the treatment of the family home is increasingly becoming a concern for the courts and the legislators, who must take into account the principle of the best interests of the child after divorce. This interest in practice is realized by allowing the child to live in the family home, in the familiar surroundings, close to his friends and his school [61]. Because of all this we believe that there is a need to provide specific legal protection of the family home in the Civil Code of the Republic of Macedonia. This protection would have effect during the marriage, as well as in the event of divorce. During the marriage, it is necessary to provide a solution under which the disposition of the family home is limited, and subject to the approval of the other spouse, even though the family home is the exclusive property of one of the spouses. In case of divorce, the legislator could envisaged the provisions in the Civil Code whereby the court can make a decision regarding the family home, based on the interests of the children, legal regime of the family home, as well as the income and the needs of the spouses. These solutions would significantly improve the situation of the children, taking into account the principles contained in the UN Convention on the Rights of the

Child that decisions should be made in the best interest of the children [62].

Conclusion

In this paper the authors present an opinion that the Family law should be an integral part of the Civil Code of the Republic of Macedonia, because the family relations are very important for the citizens, and bearing in mind the fact that Family law is an integral part of the Civil Codes in most European countries. The authors believe that the Family law, which will be included in the Fifth Book of the Civil Code, should undergo serious reforms. The reason for this is that there were deep transformations in marital and family relations in the last few decades, but despite that the lawmakers in Macedonia did not made any significant reform of the Family law.

Within the reform of the Macedonian family law the authors propose detail regulation of the cohabitation. In addition, they propose that Macedonian Civil Code should accept the marital agreement, which will enable the spouses to regulate their property relations in a way that suits their needs and interests. The authors believe that the Civil Code should provide for joint exercise of the parental rights after divorce, that is a general tendency in much European legislation. One of the most important reforms will be predicting the children's right to express their opinion in all the situations when the courts and other institutions are deciding on their rights and interests, which is not the case in the current legislation. One of the most important reforms of the Macedonian Family law, according to the authors, should be the special protection of the family home. According to the authors, that will be in the best interests of the children, because they will not have to change their habitat in the event of divorce.

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