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The Legal Status of Marital Home in the Macedonian and Comparative Family Law

Abstract: *The marital home is a necessity without which we cannot imagine the existence of a family and the performing of its functions. It is the core connecting spouses, parents and children in the exercise of family rights and duties. For this reason, the modern family law legislations provide the marital home with a special legal protection during the existence of the marriage, as well as after the marriage is divorced, but there are minor children. This issue becomes particularly sensitive when the spouse who has been entrusted to raise and educate the children has not independently solved the question of living place. Therefore, a frequent consequence of the divorces is the sale of the marital home and the relocation of the children in a new environment which has a negative impact on their development. This paper is focused on the question whether it is necessary for the marital home to receive a special legal protection in the Macedonian family law. The author argues in favor of the regulation of this new institute and provides an analysis of the existing legislation and problems present in practice. Considering these issues, as well as the solutions regarding the marital home from the comparative law, at the end of the paper the author suggests that special protection of the marital home would be a beneficial development in the Macedonian family law.*

Keywords: *marital home, spouses, divorce, the child's best interest, division of property.*

The legal status of the marital home¹ is essential for the existence of the marriage, the family and the realization of the family relationships. Almost all of the family functions (biological, emotional, cultural, social, educational etc.) are dependent or associated with its existence.² In this sense, the marital home is not just an ordinary real estate which often has the highest value in the family property, but also a place that provides peace, as well as psychological and emotional shelter to the family and its members. It is the place where the family life and the privacy of family members are accomplished.

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¹ There is no unique term in comparative law defining the home where the spouses and the family members live. Certain legislations use the terms *marital home*, *matrimonial home*, *family residence* (U.S.A., U.K.), while some others use the terms *le logement de la famille*, *logement familial* (France, Switzerland, Quebec). Despite the variety, these terms represent the same object – the family home, the home of the family or the family habitat.

² More on the family functions in: Миле Хаџи Василев, *Семејно право*, Самоуправна практика, Скопје, 1987, p.p. 219-220; Љиљана Спировиќ Трпеновска, *Семејно право*, Правен факултет „Јустинијан Први“ – Скопје, 2001, p.p. 45-50.

Despite these features, for a long time the marital home did not enjoy special legal protection in the family law.³ In the past decades, it became a subject of interest both for the researchers and the modern legislations. Thus, one may predict the development of a special protection for the marital home.⁴ Bearing in mind the importance of the marital home for the family, for some authors it is equal to the family.⁵ The regulation of special protection of the marital home in family law provides a greater protection for the children and family during the marriage, as well as after the marriage ends. For these reasons, in modern legislations on family law, the marital home is regulated with special rules which limit the ownership in favor of the best interests of the children.⁶

In order to answer the main question - whether it is necessary to envisage a special protection of the marital home in the Macedonian law, arguments in favor of special regulation of the marital home will be presented in the first part of this paper. In the second part, the status of the marital home in the existing Macedonian law will be analyzed. The third part deals with the solutions related to the legal status of the marital home in comparative law and jurisprudence. At the end, on the basis of the analysis of the existing Macedonian legislation and the problems in practice, as well as the solutions from the comparative law,⁷ we will suggest regulation of the special protection of the marital home in the family law of the Republic of Macedonia.

I. Arguments in favor of special protection of the marital home

Considering the importance of the marital home for the family and family relationships, there are in theory several arguments in favor of envisaging its special legal protection.⁸ According to the first argument, the marital home is a place of shelter and as such, it deserves to enjoy special legal protection. In this sense, the Report of the Commission for law reforms of Ontario states that the "marital home must be subject to a special regulation which corresponds with its special meaning as a great part of the property, the primary family

³ See: Pierre Petot, *Histoire du Droit Privé Français, La Famille*, Editions Loysel, Paris, 1992; Jean Bart, *Histoire du droit privé*, Montchrestien, Paris, 1998.

⁴ More about it in: Pierre Wessner, "Le divorce des époux et l'attribution judiciaire à l'un d'eux de droits et obligations résultantes du bail portant sur le logement de la famille", 11, Séminaire sur le droit du bail, Neuchâtel, 2000, p. 3.

⁵ Withnall, 'Negligence and the House that Jack Built', *Otago Law Review*, 7 (2), 1990, p. 189.

⁶ Gordana Kovaček Stanić, *Uporedno porodično pravo*, Univerzitet u Novom Sadu – Pravni fakultet, Novi Sad, 2002, p. 74.

⁷ More on comparative law in: Konrad Zweigert, Hein Kotz, *Introduction to Comparative Law*, Clarendon Press, Oxford, 1996; Budimir Košutić, *Uvod u velike pravne sisteme današnjice*, Službeni list SRJ, Beograd, 2002.

⁸ More about it in: Tom Altobelli, "The Family Home in Australian Law", Australian Institut of Family Studies Conference, University of Wollongong.

shelter, and as a focal point of the family activities."⁹ In this direction, the theory states that one of the transcendent and enduring problems that marked the 20th century is the lack of suitable accommodation which occurs as a result of economic factors.¹⁰ Precisely this phenomenon in modern society led to the situation where the marital home became a part of the ongoing reforms in modern legislation.

The second argument regarding the regulation of the marital home derives from the importance of marriage in society.¹¹ Hence, the attitude of the legislator toward the marital home reflects the importance of the marriage in society. Therefore, some authors rightly point out that "the marital home is carrying pillar of the marriage",¹² but also of the family. In this sense, in some legislations (UK, New Zealand, etc.), the marital home enjoys protection in terms of division of property between spouses, as well as in terms of creditors. Apart from the legislations, this attitude about the marital home is accepted by jurisprudence. Thus, in the case *Caines v. Caines (1984)*, the Court of Ontario stated that "there is no other significant property that is so associated with the relationship between man and woman and that includes long-term financial management, shared sacrifice and psychological efforts to achieve common goals as is the marital home."¹³

The third argument in favor of envisaging a special legal protection of the marital home, unlike the other parts of the family estate, is its property value. Because of this, for a great number of married couples the marital home is the most valuable asset. Data obtained from a study in 1990's speaks in favor of this. According to it, the marital home accounts for approximately 85% of the total value of the marital property of the spouses.¹⁴ As a consequence, the opponents of this standpoint pose the question whether marital home should enjoy special legal protection in terms of its creditors. Considering this, the legislators face the challenge how to establish a balance between the interests of the spouses and the children and the interests of the creditors in relation to the marital home.¹⁵ This argument is among the most contested by the opponents of those favoring a special legal protection of the marital home. Under the pretext that both spouses contribute in its acquisition and maintenance with their work, the proponents of this viewpoint argue in favor of

⁹ Kovaks, 'Matrimonial Property Law Reform in Australia: The Home and the Chatelst Expedient. Studies in the Art of Compromise', *University of Tasmania Law Review*, 1978-1980, p. 227.

¹⁰ Tom Altobelli, *op. cit.*, p. 5.

¹¹ More on marriage and family in the modern society: Дејан Мицковиќ, *Семејството во Европа XVI-XXI*, Блесок, Скопје, 2008, p.p. 142-157.

¹² Watson, 'Matrimonial Property Research Paper: Housing After Divorce', *Australian Law Reform Commission*, 1985, p. 1.

¹³ Report on Family Law, Pt. IV. *Family Property Law*, p. 134.

¹⁴ Bordow and Harrison, 'Outcomes of Matrimonial Property Litigation: An Analysis of Family Court Cases' *Australian Journal of Family Law*, 1994, p.p. 264, 269.

¹⁵ Tom Altobelli, *op. cit.*, p.12.

abandoning the special treatment of the marital home.¹⁶ This point of view is accepted in certain cases by the judicial practice. In this sense, Judge Heaney in the case *Kucera v. Kucera (2005)* emphasized the unfairness of the special legal protection of marital home in cases where the marriage lasted very shortly, making this solution "unfair enrichment to the spouse non-owner. While marriage lasted less than five years it is possible to create inequity."¹⁷ In the case *Harris v. Stuart Harris (2005)*, before their divorce the couple lived together for barely 13 weeks. The wife's claim on the value of the marital home amounted to \$ 400 000, despite the fact that the marital home was the husband's property. Judge Scott stated that it would be unreasonable to grant the wife an equal share of the marital home. For this reason, he awarded \$ 10 000 to the wife, on the grounds that her husband enriched due to her efforts related to the home settling.

The fourth and the most important argument in favor of envisaging special legal protection of the marital home are the children.¹⁸ In most divorce cases, the children are entrusted to one of the spouses and it is usually the mother. Thus, they are forced to move from the marital home.¹⁹ Changing the home and the environment is a reason for stress and it affects negatively child's development and emotions.²⁰ Because of this, the treatment of the marital home is increasingly becoming a concern to the courts. Thus, they embrace the viewpoint according to which the principle of the best interests of the child should be taken into consideration. In practice, this interest is accomplished by permitting the children to remain in the marital home, close to their friends and school.²¹

According to MacDonald, the first three months of the divorce are "highly disturbed and emotional period ... the husband is the one who usually keeps the house, while the woman leaves."²² In that sense, it is quite correct to embrace the theory which permits the children to remain in the marital home and to retain the comfort and the living standard without being disturbed. As a result of this, during

¹⁶ More about it in: Fareen Jamal, 'Abolish the Special Treatment of the Matrimonial Home', *Matrimonial affairs*, Vol. 22 No. 5, Ontario Bar Association, July 2011.

¹⁷ *Ibid*, p. 2.

¹⁸ *Ibid*.

¹⁹ More about the measures for children protection in: Suzana Bubić, Nerimana Traljić, *Roditeljsko i starateljsko pravo*, Pravni fakultet Univerziteta u Sarajevu, Sarajevo, 2007, p.p. 193-218.

²⁰ According to Funder, in the 1980's every third marriage ended with divorce. That led to the abandonment of the marital home for one among six children under the age of 18 years. During 1990's this number rose. In 1974, 25,505 children were affected by the divorce of their parents, while in 1993 this number rose almost twice (48,055). According to the survey, after the divorce of their parents, 85% of children continued to live with their mother.

²¹ According to statistical data, in 1996 in Australia almost 19% of the families (467 200) were monoparental, consisting of one parent and child/children. The marital home was sold in 40% of the cases, in 35% it was awarded to the wife and in almost 20% it was awarded to the husband.

²² See: Martha F. Davis, 'The marital home: equal or equitable distribution?', *University of Chicago Law Review*, Vol. 50, No. 3, p.p. 1089-1090.

the division of the marital home the interests of the children should be taken into account in the first place. The lower age of the child, the need and dependence on the marital home is greater. Despite this, the trend of moving children from the marital home is constantly on the rise. Thus, according to one study concerning the first three years after divorce, nearly two-thirds of the children had more than once changed their place of residence.²³ These changes have had a profound impact on the changes in the children's standard of living, as well as on their education and circle of friends. So far, the experience indicates that the damages incurred as a result of these factors were very difficult to deal with by parents and relatives, as well as by teachers.²⁴

The need to consider the interest of children in cases of separation of property as a result of divorce is underlined by the results of a study researching for 25 years the impact and the consequences of divorce on children. This study notes that "there is a serious gap in the legal system between standpoints of the judges, lawyers, mediators and psychologists and child, who is invisible and silent in the proceedings."²⁵ In this sense, the authors of this study point out that to "protect the best interests of children includes not only the question of how we can protect our children today, but in the future."²⁶ Besides the above mentioned, there are other arguments in the theory. Another argument in favor of envisaging a special protection of the marital home is the trend of non-payment of alimony by the spouse.²⁷ This trend exists in almost all societies, including Macedonia.²⁸ Certain legislations rightly envisage awarding the marital home to the spouse to whom the children are entrusted in custody, as a compensation for the alimony that the other spouse has to provide. In most cases the custody of the children is decided in favor of the wife. Another argument in favor of this solution is the fact that women usually have smaller incomes than man. Finally, the last argument highlights the fact that the special regime of marital home allows the judges greater flexibility in deciding about it. This is confirmed by the rich case law in the states where the decision of getting the marital home depends on the discretion of the court.

²³ P. McDonald, '*Settling Up – Property and Income Distribution on Divorce in Australia*', Australian Institute of Family Studies, Prentice Hall, 1986, p.161.

²⁴ See: Tom Altobelli, *op. cit.*, p. 23.

²⁵ A survey on the impact of the change of the marital home on children quotes a nine-year-old girl saying: "I feel nervous. I hate to go to a different school because when we get there, we feel frightened." *Ibid*, p. 25.

²⁶ Wallerstein and Lewis, 'The Long Term Impact of Divorce on Children. A First Report from a 25-Year Study', *Family and Conciliation Courts Review*, 36 (3), 1998, p. 368.

²⁷ See: Martha F. Davis, *op. cit.*, p. 1089-1090.

²⁸ *Ibidem*.

II. The status of the marital home in the Macedonian law

Present Macedonian law does not recognize the institute marital home. Also, the term marital home is unknown to the Macedonian legislator.²⁹ In the Family Law Act (1992), the legislator mentions marital home in only one provision, according to which: "Spouses amicably decide about the place of living together and about the managing of the common habitation" (Article 32, paragraph 2).³⁰ Considering this, we may conclude that the Macedonian legislator treats this issue inappropriately. As a result, there is an absence of provisions about its special legal protection.

Under the current law, the fate of the marital home during the marriage and after divorce depends on whether it is separate or joint property of the spouses.³¹ As a result of this solution, it is frequent that after the divorce the spouse to whom the children are entrusted for raising and education is forced to leave the marital home which was an exclusive property of the other spouse and to look for another accommodation. The same result occurs in the case when the marital home was jointly owned. After the divorce, it happens frequently that one of the spouses is unable to pay for his part of the joint property to the other spouse. Thus, the marital home has to be sold (Article 70, paragraph 3, Law on property and other relative rights). These legal

²⁹ Swedish law defines the matrimonial home in the following manner: land owned or leased, if there is a building designed as a common home of the spouses, as well as property used for that purpose; land on which one or both spouses have the right to use for construction or land owned by one or both spouses, if the building is designed as a common home of the spouses and property used for that purpose; building or part of a building used by one or both spouses on the basis of lease, ownership or another similar right, if the building is designed as a common home and used for that purpose. Gordana Kovaček Stanić, *op. cit.*, p. 75. Under the Matrimonial Property Act (Law on marital property) marital home is defined as a property: 1) purchased or owned by one or both spouses; 2) which is or has been ruled by the spouses as their marital home, and 3) which is a house, or part of the house, as an independent dwelling, mobile home, residential facility or apartment. See: The Matrimonial Home Report for Discussion No. 14, *Alberta Law Reform Institute*, March, 1995. According to Brian Madigan, "any property in which the person has an interest, if the spouses are divorcing, was at the time of separation usually occupied by a person or his spouse as a family residence is their matrimonial home.", Brian Madigan, *Seasonal Residences as Matrimonial Homes*, p. 2. Considering this, Anglo-American law defines marital or family home as any house, estate, house-boat or other structure that has been provided or made available by one or both spouses or civil partners. The new Family Code of Bulgaria envisages new legal definition of the term "family dwelling" that is a dwelling in which both spouses and their minor children live (§ 1). See: Цанка Цанкова, Методи Марков, Анна Станева, Велина Тодорова, *Коментар на новия Семейен Кодекс*, ИК „Труд и право“, София, 2009, p. 225-230.

³⁰ *Zakon za semejstvo i drugi propisi*, „Služben vesnik na Republika Makedonija“ Skopje, 1993, p. 43.

³¹ According to Article 66 of the Law on Property and other real rights: „The estate of the spouses can be common and separate. The common property is the estate which the spouses obtain during the marriage.“

solutions are contrary to the principle of "the best interests of the child", as envisaged by the International Convention on the Rights of the Child which has been ratified by our state and forms part of the internal legal order.

Despite this, our legislation and judicial practice do not take into account the interests of the children which are forced to move from the marital home in a new environment. Therefore, it is necessary that in future the Macedonian legislature regulates the special protection of the marital home in favor of the interests of the children. The resolution of this issue is urgent and it has also been observed by the judicial practice.³² In one case, the court correctly assessed that the Center for Social Work illegally awarded the child's custody to the father, under the pretext that the marital home is his property, despite the fact that the father had committed domestic violence against the mother before the child's eyes!³³ The decision according to which a domestic violence offender gets custody of the child only because he is the owner of the marital home and he has better housing conditions is a precedent in comparative law!³⁴

Under the current Law on property, spouses amicably decide on the management and disposition of the common property (Article 70, paragraph 1). Before determining his share in the joint property, the spouse cannot independently dispose with it or burden it. In case of sale of a certain part of the common property, the spouses have the right of pre-emption (Article 70, paragraph 3). However, we wonder whether at this time of economic recession and poverty, such a provision can be implemented in practice. Unfortunately, practice shows that such cases are very rare. When performing the tasks beyond the framework of regular management and disposal of the property, the consent of the other spouse in the appropriate form is acquired (Article 72). If the spouses can not agree on how to manage the joint property, the court decides (Article 73). When it comes to the management and disposition of separate property, each of the spouses

³² See the Judgment of the Principal Court Skopje 1, Skopje 17.Π1-862/11 from January 4, 2012.

³³ „After the conflict between the spouses ... the respondent's hair was pulled while she has been drown down to the stairs and literally driven out of the apartment in which the family lived at the time. The respondent attempted to take with her the juvenile, but as it was forbiddeen by the plaintiff, the respondent had to leave the child and to go to live with her parents ... The only difference which the profesional Council of the Centre for social protection expressed is the opinion that the minor A. should be entrusted to the custody of the father, as he has better housing conditions, unlike the respondent who has not solved this issue. However, the court ... brought its decision on the basis of the reasoning that for a child of that age it is a priority to be with the mother ... The Court stated that the act of throwing out the mother from the home in front of the child's eyes is a fact that the child will never forget and which will affect very strongly the formation of its conscience and subsequent understanding. If such violence is approved from the Centre and later on by the Court, the dark image in the consciousness of the child would be complete - it will realize that violence pays off and that the mother's love is less important than having a children's room with a computer."See more in the previously cited judgment.

³⁴ *Ibid.*

independently manages and disposes of his separate property, unless the parties have agreed otherwise in writing (Article 68, paragraph 3). Considering this, we can conclude that in the Macedonian law there is no legal restriction in the disposition of the matrimonial home when it is a separate property during the marriage, as well as after divorce. That is the reason why the spouse non-owner, even though children are awarded for raising and education to him is forced to leave the marital home. Finally, beginning with the analysis of the legal provisions, we may note that there is no distinction in terms of the marital home and the rest of the property. This indicates that the legislator attaches no importance to this issue. Unlike marital home, other parts of the property, such as objects for personal use, the objects used to perform professional activity and objects that serve to the children or for their immediate use, enjoy special legal protection (Articles 76 and 77). Taking into account the above, the marital home can receive different legal treatment in practice only if it was envisaged in the marriage contract. However, considering the fact that our legislator has not yet regulated the marital contract, the special legal protection of the marital home is infrequent in our practice, as well as the marital contracts.³⁵

Unlike the current law, the legislator paid more attention to the status of the marital home in the past.³⁶ In this sense, the right to a socially owned apartment belonging to the spouses was related to concluding and divorcing the marriage. According to those rules, spouses acted simultaneously as housing rights holders (tenants) "until they live together in a common household, regardless of the circumstance that only one of them had concluded the contract to use the apartment ... In case of divorce the former spouses had the right to agree who will remain as the sole holder of the housing right."³⁷ Otherwise, the court had to decide about the request of one of the spouses in court procedure. It should be emphasized that the court's decision depends, *inter alia*, on its assessment of the housing needs of the spouses and their children.³⁸

The analysis of the existing legislation and the special treatment enjoyed by certain types of objects in the division of the joint property poses even more questions. Are the moving (personal) objects only in the interest of the children? Isn't the marital home and housing more important and significant? It is undisputable that the marital home has a greater significance and interest to children than other objects. Whether the household objects are not in the interest of the children? With regard to this issue, the legislator is again not

³⁵ More about marital contract in: Ангел Ристов, 'Брачен договор – непознаница, реалност или нужност во современото македонско семејно право', *Зборник на Правниот факултет „Јустинијан Први“ во Скопје во чест на проф. Љиљана Спировиќ Трпеновска*, Правен факултет „Јустинијан Први“ во Скопје, 2012; Дејан Мицковиќ, Ангел Ристов, 'Реформите во семејното и наследното право и ингеренциите на нотарите', *Редовно стручно советување на нотарите од Република Македонија 11-13 ноември 2011 година*, *НОТАРИУС*, Скопје, декември 2011, p.p. 70-83.

³⁶ See: Миле Хаџи Василев, *op. cit.*, p.p. 219-220.

³⁷ *Ibid.*, p. 219.

³⁸ *Ibid.*

sufficiently precise and clear. In this sense, we believe that a justified solution would be that these objects remain in the common home and that they belong to the spouse to whom the children were entrusted for raising and education. Therefore, it is necessary that the legislator adopts a solution regulating this issue properly. In that way, the marital home and the household objects would obtain a specific legal regime which would differ from the separate and joint property of spouses, following the example of France, Bulgaria, Sweden, Italy and other legislations.

III. Status of the Marital Home in Comparative Law

In the comparative law there are no unique solutions in terms of the status of the marital home. Therefore, there are various solutions regulating it.³⁹ According to the Swedish law, the right to dispose of marital home during the marriage is limited by the consent of the other spouse, even though it is a separate property.⁴⁰ The consent of the non-owner spouse is required for sale, pledging, leasing or providing a use of the marital home and the household objects. An exception from this rule exists only in cases where the separate property is acquired by gift or will. Swedish law envisages the right of the spouse with a greater need to acquire the marital home or household objects after divorce. This is followed by an appropriate reduction of his share in the common property. However, if such a property is of little value, he may exercise this right without a reduction of his share.

Solutions which are similar to the Swedish exist in the French law. In this sense, no matter if the marital home is a separate or joint property, one spouse cannot dispose of it without the consent of the other. With the adoption of the Law of May 26, 2004, the French legislator envisaged provisions for a special legal protection of the housing (*du logement*) after divorce.⁴¹ After the divorce, the marital home belongs to the spouse who owned it. However, the court may bring a decision establishing the right to lease in favor of the other spouse to whom the children are awarded in custody and if that is in the interest of the child (Art. 285-1 *Code civil*). This right ceases with a new marriage or cohabitation of the former spouse. The lease can be terminated in the event of changed circumstances. If the marital home is jointly owned, then the court may decide selling it or prolonging its division for five years. Finally, the court may decide to transfer the ownership of the marital home to one of the spouses with the obligation to pay a certain sum of money to the other spouse.⁴²

According to the Italian law, in the cases of couples without children the court must take into account the economic situation of the spouses, giving priority to the economically weaker spouse.⁴³

³⁹ See: Gordana Kovaček Stanić, *op. cit.*, p.p. 75-76.

⁴⁰ *Ibid.*

⁴¹ Code civil, Nouvelle Édition, Prat, 2005, p. 78.

⁴² See: Boulanger François, *Droit civil de la famille*, 3e édition, tome I, Aspects Comparatifs et Internationaux, Economica, Paris, 1997, p.p. 288-294.

⁴³ See: Gordana Kovaček Stanić, *op. cit.*, p. 75-76.

However, if the couple does have children, the marital home is awarded to the spouse to whom the children are assigned in custody, regardless of the fact who is its owner.

Equally as the Italian, the Swiss law determines that during the ruling on the question who should obtain the marital home, the court is not bound by the facts on its ownership. With regard to this, in deciding on the fate of the marital home, the court begins with the family situation and especially the interests of the children. In Switzerland, the special status of the marital home is regulated in the provisions of the Swiss Civil Code (Article 121 CCS).⁴⁴ If the marital home is owned by a third party and if there are common children or other reasons justifying such a solution, the court may transfer the lease right to the spouse to whom the children are entrusted to custody (Article 121, paragraph 1). The spouse who does not figure as a tenant any more is liable for the rent jointly and severally until the expiration of the contract, but in any case this period cannot be shorter than two years (Article 121, paragraph 2). If the spouse is obliged to pay the rent for the marital home, then this value should be offset from the value required for the maintenance of children. Under the same conditions, when the marital home belongs to one spouse, the court may award it to the other spouse to whom the custody of the children is awarded (Article 121, paragraph 3). In this case, the other spouse has right to equitable compensation. The right to use the marital home as a personal servitude can last for some period of time, but maximum to the children's age of majority.

In German law, the former spouses have right to decide jointly which one will get the marital home after the divorce. If they cannot agree, they can request the Court for family relationships to decide.⁴⁵ When considering the question who should obtain the marital home,

the court does not always bring its decision on the basis of property relations. In most cases, it decides on the basis of the principle of fairness. If the household objects were common property of the spouses, they will be divided equitably. The objects whose owner is one spouse can be assigned to the other, if there is such a need and if such a distribution is fair under the circumstances.⁴⁶ In a large number of cases the right of lease has been established, notwithstanding the transfer of the ownership.⁴⁷

Like many other European countries, the Greek law provides a special legal protection of the marital home (Article 1393 *Greek Civil Code*). According to the provisions of the Greek code, in the event of termination of living together, the court may grant one of the spouses an exclusive right to use all or part of the real estate which acts as a family home, regardless who owns it or has the right of use. This decision is brought after the examination of the circumstances of the spouses and the children's needs and interests. Also, court's decision may be changed in case of changed circumstances. If the

⁴⁴ Code civil Suisse, du 10 décembre 1907 (Etat le 1er juillet 2008), p. 210.

⁴⁵ Peter Gottwald, Dieter Schwab, Eva Büttner, *Family and Succession Law in Germany*, Wolters Kluwer, 2001, p.p. 64-65.

⁴⁶ *Ibid.*, p. 65.

⁴⁷ *Ibid.*

family home belongs to a third party, the court can regulate the right to use of one of the spouses only in agreement with the third party.⁴⁸ When marital home was assigned by the court to one of the spouses, he should pay an adequate compensation or accept an adequate reduction with regard to the financial matters.⁴⁹

In Bulgarian law, the special legal protection of the family home has a long legal tradition.⁵⁰ Bulgaria's new Family Code (FC) from 2009, unlike other jurisdictions, regulates the issue of the family home much more thoroughly.⁵¹ Thus, while the marriage lasts, disposing of the family home is limited by the consent of the other spouse, even in cases when the family home is a separate property of the other spouse (Article 23 FC). The situation, as well as the decisions regarding the family home of a divorced couple are more complex (Article 56 FC). Thus, when the family home (residence) can not be used separately by both spouses, the court will assign its use to the spouse who needs housing. A significant element is the solution according to which in a case when there are minor children, the court must decide on this issue *ex officio*. Equally as the other legislations in the comparative law, the Bulgarian law determines that the ownership of the family home is not relevant to its qualification as a family home. That is why the family home can belong to the spouses, to one of them, to their relatives or third parties.⁵² When there are minor children and the family home is owned by one spouse, the court may assign its use to the other spouse to whom the parental rights have been entrusted (Article 56, paragraph 2). Under the same circumstances, when the family home is owned by close relatives (for example parents) of one spouse, the court may assign its use to the other spouse, if the children have been entrusted to him, for a period of one year (Article 56, paragraph 3). The right to use the family home ceases with the expiration, termination of the necessity of using the family home or if the spouse concludes a new marriage. When the spouses are co-owners or joint owners of the family home, the court will award its use to one of them, considering the interests of minor children, the questions of guilt, health and other circumstances (Article 56, paragraph 5). If the circumstances change, each of the former spouses may require a change in the use of the family residence. The decision of the court establishes tenancy relation and it can be written at the property registry. It is important to note that these provisions in the Bulgarian law shall apply only in cases where spouses in the marriage contract have agreed otherwise (Article 58).

Just like the Bulgarian law, the law of Hungary allows arranging of the legal status of the marital home after divorce in a

⁴⁸ *Greek Civil Code*, translation by Constantin Taliadoros, Ant.N.Sakkoulas Publishers, Athens-Komotini, 2000, p. 195.

⁴⁹ *Ibid.*

⁵⁰ See: Екатерина Матеева, *Семейно право на Република България*, ВСУ "Черноризец Храбър", София, 2010, p.p. 275-284.

⁵¹ More about this in: Цанка Цанкова, Методи Марков, Анна Станева, Велина Тодорова, *op. cit.*, p.p. 225-230.

⁵² *Ibid.*, p. 225.

marriage contract.⁵³ In case where there is not such an agreement, the question which one will get the marital home is solved considering the interests of the children. When the marital home is co-owned or jointly owned by both spouses, the court has the discretion to decide which one should obtain the right to it.⁵⁴

Equally, according to the law of the United Kingdom, the institute matrimonial home enjoys special protection in case of divorce.⁵⁵ The Family Law Act (1996) regulates the rights of spouses concerning their living in a shared residence when the latter is owned by one of them or he has a right to live in it on another basis; the right of habitation in case of divorce; the rights of the extramarital partners during the cohabitation and after the termination of cohabitation; the status of the spouse or extramarital partner if any of them has no right to habitation.⁵⁶ According to this law, if the marital or extramarital partner has been living in the marital home, they can not be omitted or be forbidden an access to the marital home by the other partner, except by a court decision. If they did not live in a marital home, the decision of the court may grant them right to enter the home and to live in it. When making the decision, the court shall in particular take into account the needs and opportunities of each of the parties related to the problem of habitation. In that case, the court considers the financial possibilities of each of the parties, presumed action of the decision on health, safety and the benefits of each of the parties and the children, the nature of the relations of the parties, the duration of the relationship, etc. These decisions have a character of provisional measures and they may last up to six months, with a possibility of their re-imposition.

In the United Kingdom case law there is a great number of cases concerning the special legal status of the marital home. Matrimonial Causes Act which regulates the division of marital property after divorce envisages an equitable division of the property,

⁵³ See: Martha Dóczi, *Changes in the Matrimonial Property Law in Hungary (Past-Present-Future)*, Draft Paper, p.p. 5-6.

⁵⁴ *Ibid.*

⁵⁵ Two influential decisions related to the division of the marital home are known in practice so far: Mesher decision and the decision on outright transfer. According to the decision *Mesher*, the marital home was divided in equal parts, while the sale was delayed until the children reached the age of majority. Until then, the parent which obtained custody of the children had right to live in the marital home. According to the opinion of the Court, the purpose of this decision “is to preserve the home for the children while they are minor, enabling the parent who got the custody of the children to realize his right later.” According to the second decision, concerning the outright transfer, the right to the marital home was transferred completely to the spouse who obtained custody. However, this decision may result in the reduction of the part of the spouse to whom the marital home is awarded, as well as in paying the entire value of the marital home or a certain amount. Beside this decisions, the court can allow to one of the spouses to remain in the marital home for a certain period, establish a lease (*Tinsdale v. Tinsdale, 1983; Harvey v. Harvey, 1982*) or to decide in favor of a sale of the marital home. Which decision will be made depends on the circumstances of the case, but the principle aim is still to ensure the best accommodation for the spouses and children. See: Gordana Kovaček Stanić, *op. cit.*, p. 75.

⁵⁶ *Ibid.*, p. 79.

thus leaving a wide discretion to the judge to decide.⁵⁷ In this sense, equally as in the U.S.A., the court may decide in favor of a sale or division of the marital home or it may grant it to one of the spouses. The most important principle considered by the courts in deciding who will obtain the marital home are the needs of the spouses and, especially, the needs of the children. So far, two principles are distinguished upon which the courts decide in practice. The first one is providing a support and accommodation for children from the marriage, while the second is taking into account the needs of spouses. In that sense, in the case *Browne v. Pritchard* (1975) the court stated that whenever "decides for families with limited incomes, the needs are more important than the sources of revenue ... in many cases, for most families the most important need is the home ... that is why the courts should turn their attention to the home."⁵⁸ Considering this, when deciding who will obtain the marital home, the English courts give priority to the spouse to whom the children are entrusted for raising and education, primarily as a result of the needs of children. This technique is called *Mesher*, upon the case *Mesher v. Mesher* (1980) in which for the first time the marital home was assigned to the spouse to whom the children were entrusted in custody. The court applied this technique in the case *Harvey v. Harvey* (1982), when it decided in favor of delaying the sale of the marital (family) home until the end of the wife's life, obliging her to pay rent to the former husband until the age of majority of the children. Despite the fact that the protection of the marital home in British law is well established, the courts and the Parliament are going further in developing techniques to ensure a balance between the needs and property interests. With regard to this, in the case of *Williams v. Williams* (1977) Lord Denning stated that "when courts decide on the marital home, they need to have in mind the fact that the house was purchased as a home in which the family will grow up ... that is why it is not treated as real property to be sold, nor as an investment for the realization of income."⁵⁹

In the U.S.A., the status of the marital home depends on the legal regime that governs the property of the spouses.⁶⁰ In that sense, the family laws of the federal states accept two types of marital property regimes – the common property regime (*community property*) and the regime of customary law (*common law*). These models of regimes differ on the basis of the principle of common and shared ownership. As a result of the diversity of these two models, certain states accept the principle of equal (*equal*) division of the marital property, while others accept the principle of fair (*equitable*) division of the marital property. Equal division means a division of marital property in equal shares, with excluded or small opportunities for the court's discretion in deciding. Equitable division of marital property allows the court a wide discretion to decide on the basis of the principle of fairness (*equity*). Different principles of division of the

⁵⁷ See: Eekelaar, 'Some Principles of Financial and Property Adjustment on Divorce', *95 Law Q. Review*, 1979, p. 253.

⁵⁸ Martha F. Davis, *op. cit.*, p. 1108.

⁵⁹ *Ibid.*

⁶⁰ Martha F. Davis, *op. cit.*, p. 1091.

marital property have an impact on the different treatment and status of the marital home.⁶¹ Namely, in the states which accepted the equitable division of marital property, the courts are in a better and more flexible position in deciding on the status of the marital home. In the states which accepted the principle of an equal division of marital property, the courts do not have such an opportunity and in most cases the marital home is a subject of sale.

In the judicial practice of states which have accepted the principle of equal division of marital property, several cases relating to the status of the marital home are known. In the case of *Duke v. Duke (1980)*, the Court of Appeal of California provides important arguments why the marital home should have a different treatment from the other marital property. With regard to this, the court noted that "the value of the marital (family) home for the family members can not be judged solely by its market value. The longer the stay is in it, the more important became non-economic factors and the relocation in a new environment becomes more stressed and disturbing for the children whose roots become heavily intertwined in the school and social environment of their neighborhood."⁶² However, despite these arguments, in California the principle of equal division of marital property is applied with almost no exceptions.⁶³ In the case *Holmgren v. Holmgren (1976)* after the divorce of the marriage which lasted 21 years, the wife obtained the custody of a minor child. During the procedure, the wife claimed that the marital home was the only property that provided for her a residential security and that its sale under these circumstances would be unreasonable. Despite this, in accordance with the legal provisions, the court applied the principle of equal division of marital property. Given that the wife was not able to buy the husband's share from the marital home, it was sold and the value of the sale was divided.⁶⁴ In the case of *Gonzales v. Gonzales (1981)* the court decided the use and possession of the marital home in favor of the wife, while the ownership was left to both spouses together. In the explanation, the California Court of Appeal stressed that the use of the marital home was awarded to the wife, on the basis of economic reasons, respecting the ownership interests and the best interests of the child.

The judicial practice of the states which apply the principle of equitable division of marital property allows a special treatment of the marital home. In this sense, in the case *Collette v. Collette (1979)* on a marital home which was in possession of one of the spouses, the court relied on the need to "preserve the stability of marriage (family) home in the interest of the parent who received custody of the minor child."⁶⁵ In case *Schaeffer v. Schaeffer (1982)*, the court outlined "the financial and emotional needs of the child", while in the case *Lavery v. Lavery (1972)* the court stressed "the child's need for shelter." The

⁶¹ See: Branka Rešetar, 'Matrimonial Property in Europe: A Link between Sociology and Family Law,' *Electronic Journal of Comparative Law*, Vol. 12.3 (December) 2008.

⁶² Martha F. Davis, *op. cit.*, p. 1098.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, p. 1102.

⁶⁵ *Ibid.*

interest of the child is the determining factor for awarding the marital home in other cases, as well. Thus, in the case *Slatsky v. Slatsky* (1979) the court highlighted the "negative effects on the child of changes in the environment," as well as in the case *Molnar v. Molnar* (1981) in which the court stated that the award of the marital home to one of the parents is in "the best interest of the child."⁶⁶ In cases where the court decided not to award the marital home to one of the spouses, the explanation emphasized that the marital property is too little to be a subject of equitable division. Despite the differences in the principles of division of the marital property, a standpoint prevails in theory that it is desirable that in the division of marital property, marital home enjoys a special legal protection.⁶⁷

In the U.S.A., Maryland is one of the rare states which have adopted a Law on family relations which established a special legal regime of the marital home (1978). This law clearly separates the marital home as a "family personal property" from the rest of the marital property, giving the courts discretion to grant the use and possession of the property to the spouse which obtained custody of the children for up to three years. When making the decision, the courts must take into account the interests of the minor children and spouses regarding the marital home as a residence and as an investment.⁶⁸

Unlike the above mentioned legislations which improve the position of the spouse, the new Family Law Act of Scotland (2006) envisages measures which, in certain circumstances, restrict the rights of the non-owner spouse with regard to the marital home.⁶⁹ After May 4, 2006 a non-owner spouse which did not live with the owner for a continuous period of more than two years and which had not in his possession the marital home during those two years, loses the right of use and possession of the marital home. In this case, the spouse non-owner loses the right to demand from the court to continue living in the marital home.⁷⁰ Beside this, in accordance with the legal provisions, if the spouse which is owner of the marital home does not have the consent for the sale of the marital home by the spouse non-owner, he may request the court to allow selling the marital home.

IV. The status of the marital home in the Macedonian law *de lege ferenda*

Beginning with the analysis of the existing national legislation and the problems occurring in practice, the need for envisaging a special legal protection of the marital home is obvious. Introducing this novelty would be one of the key reforms in the Macedonian family law. Considering the solutions in the comparative law and the decisions of the judicial practice, we believe that it is necessary that the legislator envisages a special legal protection of the marital home during the marriage and in the event of divorce of the marriage. While

⁶⁶ Martha F. Davis, *op. cit.*, p. 1102.

⁶⁷ *Ibid.*, p. 1099.

⁶⁸ *Ibid.*, p.1111.

⁶⁹ See more in: Family Law (Scotland) Act, Occupancy Rights, *Scottish Women's Aid*, 2006.

⁷⁰ *Ibid.*

the marriage exists, it is necessary to provide a solution according to which the disposition of the marital home is limited with the consent of the other spouse, even though the marital home is in the exclusive property of one of the spouses. In case of divorce, the legislator should envisage a solution according to which the court can make a decision depending on the legal regime of the marital home, the needs of the spouses, their estate and other criteria. But the first criteria in deciding the fate of the marital home must be the best interest of the children. In that sense, it should be envisaged that the court obtains a discretionary power to decide, according to the legal criteria, to establish a personal servitude (*habitatio*) or to establish a lease in favor of the spouse to whom the minor children are entrusted in custody. In case of divorce when the marital home is a separate property of one spouse, at the request of the other spouse to whom the children have been entrusted for raising and education, the court would be able to establish a lease or personal servitude *habitatio* until the age of majority of the children. When the marital home was used on the basis of a lease contract, after the divorce, on the basis of the court's decision, the tenancy relationship should be transferred to the spouse to whom the children are awarded in custody. It is also desirable that the legislator envisages a solution according to which the household objects would be awarded to the spouse to whom the children are entrusted in custody. These solutions would significantly improve the position of children, considering the principle that decisions should be made in the best interest of the children. Given that moving to live on a new location and environment is a burden and stress for the child, the regulation of these issues should prevent such occurrences in future. Among the above mentioned solutions in comparative law, the legislator should especially take into account the decisions of the Bulgarian law which provides a very detailed regulation of the situations concerning the marital home.

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**The Legal Status of Marital Home in the Macedonian
and Comparative Family Law**

Summary

The author aims to prove the hypothesis that it is necessary to envisage in the Macedonian law a special legal protection for the marital home. In this sense, at the beginning, the author presents the arguments from theory in favor of introducing this institute in the Macedonian family law. The analysis of the existing Macedonian legislation, as well as the problems present in practice with regard to the marital home, lead the author to the conclusion that the need for special regulation of the marital home is obvious and urgent. Considering these, as well as the solutions from the comparative law, at the end of the paper the author suggests envisaging a special protection of the marital home in the Macedonian family law.

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