The International Survey of Family Law

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General Editor
Bill Atkin
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

Associate Editor (Africa)
Fareda Banda
Reader in the Laws of Africa
School of Oriental and African Studies
London

Family Law

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MACEDONIA

FAMILY LAW IN THE NEW CIVIL CODE OF THE REPUBLIC OF MACEDONIA: KEY ISSUES AND NECESSARY REFORMS

*Dejan Mickovik and Angel Ristov**

Résumé

La République de Macédoinerédige actuellement son Code civiletle droit de la familleen sera partieintégrante. Les auteursprésentent une analysedela place du droitde la familledanscette codification. Ils suggèrentqu'il devrait y avoirune réforme dudroit de la famille. Ils formulentdes propositionsd'amendements à lalégislation macédoniennerelative à la réglementationde la cohabitation. Ils préconisent une réglementationdu contrat demariage. Les auteurs proposentl'adoption de laresponsabilité parentaleconjointe après le divorce etinsistent surla nécessité de créer un système d'audition de l'enfant pour recueillir son avis lorsque les parents et les institutions prennent des décisionsrelatives à ses droits et ses intérêts.Ils recommandent une réglementation du statutjuridique et de la protection du logement familial.

I INTRODUCTION

The most significant reform of family law in Macedonia was made in 1992, when the Family Law Act was enacted,[1] which was a 'mini codification' in this area, because the parts of family law – marital law, parental rights, adoption and guardianship – which hitherto had been regulated in separate laws, were united in one legal text. Since then, despite the rapid and dynamic changes in the field of family and family relationships,[2] family law experienced a few

* * Dejan Mickovik PhD, Professor at the Faculty of Law 'Iustinianus Primus', University 'Saints Cyril and Methodius', Skopje, Republic of Macedonia. Angel Ristov PhD, Assistant Professor at the Faculty of Law 'Iustinianus Primus', University 'Saints Cyril and Methodius', Skopje, Republic of Macedonia.

1 *Official Gazette of Republic of Macedonia*, n 80/92, 9/96, 38/2004, 33/06, 84/08, 157/08, 67/10, 39/12, 44/12.

2 In the last several decades in all European countries dramatic changes in marital and family relations are happening: the number of divorces is increasing, as well as the number of non-marital couples, children born out of wedlock and single parent families, the number of marriages is decreasing and there is a dramatic fall in the birth rates in European countries. For more on the changes in modern family, see Martine Segalen *Sociologie de la famille*(Armand Colin, Paris, 2004); Mary Daly Changing family life in Europe: significance for state and

changes, regarding the procedure of adoption, regulation of domestic violence and deprivation of parental rights. Significant reform of family law is expected to be completed during the development of the Civil Code of the Republic of Macedonia that will include regulation of family relations as well. The Government of Macedonia in 2010 decided to form a Commission for drafting the Civil Code of the Republic of Macedonia[3] and this Commission to date has prepared the draft versions of Obligations (Book II of the Civil Code)[4] and Succession[5] (Book IV of the Civil Code). The Commission is working on the preparation of Book V of the Civil Code, which will regulate family relations.

This chapter will assess the place of family law in the Civil Code of the Republic of Macedonia, and the authors will propose amendments to family law in the sphere of regulation of cohabitation, divorce, exercise of parental rights, protection of the rights and interests of children and regulation of the status of family home. We believe that these changes in regulation of family relations in Macedonia 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.

II PLACE OF FAMILY LAW IN THE CIVIL CODE OF THE REPUBLIC OF MACEDONIA

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 the 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 codification is based on the division of civil 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, 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 and understandable for every citizen.[6] Thus, the main reason for the inclusion of family law in the Civil Code is to provide

society (2005) 7(3) *European Societies*; Graham Allan, Sheila Hawker and Graham Crow, 'Family Diversity and Change in Britain and Europe' (2001)22(7) *Journal of Family Issues*.

3 *Official Gazete of Republic of Macedonia*, n 4/2011.

4 See the Civil Code of the Republic of Macedonia, Book II, Obligations, Draft version prepared by the Commission for drafting the Civil Code of the Republic of Macedonia, Skopje, July 2013.

5 See the Civil Code of the Republic of Macedonia, Book IV, Succession, Draft version prepared by the Commission for drafting the Civil Code of the Republic of Macedonia, Skopje, July 2013.

6 See more Gunther A Weiss 'The Enchantment of Codification in the Common-Law World' (2000)25 *Yale Journal of International Law* 435.

regulation of all issues important to the citizens, from birth to death, in one legal text, in a comprehensive and systematic way.[7] Furthermore, family law is an integral part of the most significant civil codes in Europe, such as the French and German Civil Codes,[8] and this is the situation in all countries of Western Europe that have civil codifications.[9]

Only in the former socialist countries that were influenced by the legislation of the Soviet Union was family law not an integral part of civil codifications. After the October Revolution of 1917, the reform of family law was a top priority, and it had already started in the same year, even though the country fought a civil war.[10] The main objective of the Soviet authorities was to change the old family model and build a new one, in accordance with the basic principles of Marxism-Leninism, which is why the Soviet Union has built a family law system radically different from systems in Western Europe.[11] One of the main features of Soviet law was the separation of family law from civil law. The main reason for this deviation from the European civil law tradition had an ideological character: Soviet Bolsheviks believed that the 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.[12] 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 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 a special Family Code.[13]

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 adopting civil codifications have abandoned the communist ideological

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7 L Chanturia *Introduction to the Civil Code of Georgia* (Tbilisi, 2001) 2.

8 According to James D Apple and Robert P Deyling, formal and comprehensive codification of civil law norms in the modern period started in France and Germany. In the French Civil Code Family Law was included in Book I and in the German Civil Code Family Law was regulated in Book IV. For more on the history of the process of the codification of civil law in the countries of continental Europe, see J D Apple and Robert P Deyling, *An example of the Civil-Law System* (Federal Judicial Center, Washington DC, 1995).

9 Family Law was an integral part of the Italian Civil Code from 1865, Portuguese Civil Code from 1867, Spanish Civil Code from 1889, Dutch Civil Code from 1838, Austrian Civil Code from 1811, Swiss Civil Code from 1907, Turkish Civil Code from 1926. Family Law was an integral part of the Serbian Civil Code from 1844 (brought under the influence of the Austrian Civil Code), that has for a long time been applied in Macedonia as well.

10 For more on the development and characteristics of the Soviet Family law, see M V Antokolskaia 'Development of Family Law in Western and Eastern Europe: Common Origins, Common Driving Forces, Common Tendencies' (2003) *Journal of Family History*.

11 See at O A Khazova, 'Family Law on Post-Soviet European Territory: A Comparative Overview of Some Recent Trends' (2010) 14(1) *Electronic Journal of Comparative Law* 5.

12 Ibid.

13 Z Radwański *GREEN PAPER, An Optimal Vision of the Civil Code of the Republic of Poland* (Ministry of Justice, Warsaw, 2006) 21.

matrix, returned to the original European legal tradition and all have included 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 about upon their separation from the Soviet Union,[14] and family law was included in the Civil Code of Georgia, passed in 2001.[15] Similarly, Slovakia has abandoned the influence of Soviet law, and the Government of the Slovak Republic in 2009 decided to start a process of drafting of a new Civil Code under which 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 will be included in Hungarian Civil Code.[17] In Poland the Civil Code contains five parts, which are expected to be adopted soon,[18] and that is so in the newest version of the Civil Code of the Czech Republic, 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.

III CHANGES IN THE REGULATION OF COHABITATION

Cohabitation in Macedonia has been regulated by the Family Law Act since 1992,[20] and this provision, without any changes, is in force today. In many European countries there are provisions that no marital impediments should exist for nonmarital partners, but according to art 13 of Family Law Act, no marital impediments are envisaged for nonmarital partners in Macedonia. As a

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14 For more on the process of bringing Civil Codes into the countries of Central and Southeast Europe, see P Cserne *Drafting civil codes in Central and Eastern Europe, A case study on the role of legal scholarship in law-making* (Pro Publico Bono Online, *Támop Speciál*, 2011). Also see O A Khazova, above n 11, 1–2.

15 In the Civil Code of Georgia, Family law is regulated in Book IV. See more in L Chanturia, above n 7, 2.

16 See more in M Jurčova, *Re-codification of Slovak Civil Law,* Paper presented at the international conference: Perspectives on European Private Law, 7–8 May 2009 at the Faculty of Law, University of Santiago de Compostela.

17 For more on the Procedure for bringing the Hungarian Civil Code, see P Cserne, above n 14, 12–23.

18 For the arguments in favour of including family law in the Civil Code of Poland, see Z Radwański, above n 13, 21–25.

19 P Cserne, above n 14, 8. For the arguments in favour of including family law in the Civil Code of the Czech Republic see D Elischer, 'The new Czech Civil Code. Principles, perspectives and objectives of actual Czech civil law recodification: On the way to monistic conception of obligation law' (2010) 19(2) *Dereito*. See also Z Kralickova, 'Czech Family Law: The right time for re-codification' in B Atkin (ed) *The International Survey of Family Law 2009 Edition* (Jordan Publishing Limited, 2009) 157.

20 In art 13 of the Family Law Act, cohabitation is defined as: 'The living community of a man and woman, which has not been established according to the provisions of this law (non-marital 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.'

result of this provision in the Family Law Act, in reality there are cases where a man or a woman can have simultaneously marital and nonmarital partners. Also, there is no prescribed form for proof of the existence and duration of cohabitation, because Macedonian Family Law Act has accepted the concept of unregistered nonmarital cohabitation. The exact moment of the establishment of nonmarital cohabitation is known only to nonmarital partners, which creates problems of proving the existence and the duration of the common life after the dissolution of the nonmarital community. For these reasons, and the fact that the existing legal framework for cohabitation creates numerous problems in practice,[21] certain changes are necessary in the regulation of cohabitation. We have already pointed out the need for changes in the regulation of cohabitation.[22] We believe that the reform of the civil law in Macedonia that began with the drafting of the Civil Code is a good opportunity to amend the current inadequate regulation of cohabitation in the Macedonian legal system. The Macedonian legislature should envisage in the new Civil Code that there should be no marriage impediments between the individual nonmarital cohabitation partners in order for their nonmarital cohabitation to produce legal effects. Moreover, to make it easier to prove its existence, nonmarital partners should be able to register their community with a two-sided statement which could be certified and deposited with a notary. Nonmarital partners who do not want to register their union will be exposed to greater risk and problems of proving the existence and duration of their nonmarital union in the case of termination of the common life. Moreover, bearing in mind that the number of nonmarital unions is constantly increasing, we believe that nonmarital partners who live together for more than 5 years, or more than 3 years if they have common children, should have the right to lawful inheritance, according to the rules applicable to spouses.

IV INTRODUCTION AND REGULATION OF MARITAL AGREEMENTS

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

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21 Failure of the Macedonian legislature to envisage the marital impediments for non-marital couples creates serious problems, because it opens the possibility of non-marital union producing legal effects despite the fact that one or both of the nonmarital partners are married or are relatives.

22 See more Dejan Mickovik and Angel Ristov 'The Legal Regulation of the Nonmarital Cohabitation in the Macedonian Family Law' in B Atkin (ed) *International Survey of Family Law 2012 Edition* (Jordan Publishing Ltd, 2012); Dejan Mickovik and Lidija Stojkova, 'Non-marital Cohabitation in Contemporary Societies' *Eurodialogue* No 15, Student's Word, Skopje 1999. Dejan Mickovik 'Legal Regulation of Non-marital Cohabitation' *Lawyer,* Lawyers Association of the Republic of Macedonia, Skopje, 2008. Angel Ristov 'Non-marital Cohabitation and the Status of Non-marital Partners in the Law of Inheritance', *Association Iuridica*, Strumica, 2010.

think that it allows for the realisation of the spouses' free will, which can change the rigid legal framework regulating property relations in marriage. Proponents of the marital contracts believe that this agreement lessens the problems during the divorce, because the spouses do not have to stretch out a long, difficult and uncertain 'war' on the division of the property in the case of a divorce.

Overall, the basic problem of the marital contract, according to its 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 specialised in divorces said: 'You cannot regulate the human heart with contract. You should have confidence in the person you marry, not in the legal document'.[23] Other authors suggest that the basic problem with marital agreements is that, with their conclusion, distrust is expressed towards the marital partner.[24] In addition, a major objection regarding marital agreements is that they 'destroyed' romance in marriage.[25] Some authors believe that the acceptance of the 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 affects the stability and success of the marriage and often leads to divorce.[26] The marriage 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 a marital agreement. According to Servidea the conclusion of a marital agreement is a strong indicator that the spouses are preparing for divorce as early as the time of the celebration of the marriage.[27]

Despite these criticisms 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 a marital agreement spouses can exercise their free will in regulating their relationships during the marriage and in the event of divorce. This contract

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23 Citation by Allison A Marston 'Planning for Love: The Politics of Prenuptial Agreements' (1997) 49(4) *Stanford Law Review* 889.

24 According to Ralph Underwager and Holida Wakefield, marital contracts disrupt the confidence between spouses, see Ralph Underwager and Holida Wakefield 'Psychological Considerations in Negotiating Premarital Contracts' in *Introduction to Premarital and Marital Contracts: A Lawyer's Guide to Drafting and Negotiating Enforceable Marital and Cohabitation Agreements* (Edward L Winner & Lewis Becker (eds), 1993).

25 According to Mary Rowland, the biggest challenge in creating financial arrangements during the celebration of the marriage is not whether it will be accepted by the courts, but whether money interfering with love does not destroy the romantic relationship: 'Linking Love and Money' *New York Times*, 25 February 1990.

26 In this sense Underwager and Wakefield pointed out that the marital contract glorifies the independence and individual interest. According to them, this disrupts the feeling of partnership and equality which are necessary for successful marriage. See more Ralph Underwager and Holida Wakefield, above n 24, 280.

27 For the arguments in favour of marital contracts, see K Servidea 'Premarital Agreements and Gender Justice'(1994) 6 *Yale Journal of Law & Feminism* 279.

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 a 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 marriage. According to some authors the fact that spouses discuss the signing of a marital contract is 'a reflection of the stability of the relationship and the maturity of the spouses'.[28] One of the strongest arguments in favour of the marital agreement is that it protects spouses in divorce, because it deals with all property issues and prevents lengthy, expensive and traumatic procedures for settlement of property relations after divorce.

The 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,[29] Serbia,[30] Russia,[31] Bulgaria,[32] Montenegro, Republic of Srpska, and Hungary)[33] where the spouses are allowed to choose or create a regime of marital property. 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 not only different needs and desires, but their requirements in terms of property relationships may change during marriage. It is very important to allow the spouses, according to their specific needs and interests, to regulate their property relations themselves.[34] We believe that the marital agreement should be introduced in the Civil Code of the Republic of Macedonia.[35] This will allow the spouses to be able in front of a notary to regulate their mutual rights and

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28 See Irena Majstorovic *Marital agreement – Novelty in Croatian family law* (Zagreb, 2005) 225.

29 For the Croatian law, see M Alinčić, D Hrabar, D Jakovac-Lozić and A Korać-Graovac, *Family Law* (Narodne Novine, Zagreb, 2007) 514–518.

30 For marital contracts in Serbian law, see Slobodan Panov, *Family Law* (Faculty of Law, University of Belgrade, Belgrade, 2010) 356–368; Gordana Kovacek-Stanic, *Family Law* (Faculty of Law Novi Sad, Novi Sad, 2007) 125–129; Marija Draškić *Family Law and Child's Law* (JP Službeni glasnik, Belgrade, 2009) 408–412; Milan Počuča *Family Law* (Univerzitet Privredna Akademija, Novi Sad, 2010) 324–326.

31 For the changes in Russian law, see А М Нечаева, Семейное право (Юрайт, Москва, 2011) 77–78.

32 According to Е Матеева: 'Introduction of the marital agreement may be defined as the heart of the legislative reform in the field of matrimonial property relations in the new Family Law Act'. Е Матеева, Семейно право на Република България (ВСУ „Черноризец Храбър', София, 2010) 164. See more on the marital contract: Ц Цанкова, М Марков, А Станева, В. Тодорова, Коментар на новия Семеен Кодекс (ИК „Труд и право', София, 2009) 105–133; М Марков, Семейно и наследствено право (Сиби, София, 2009) 58–63.

33 For marital contracts in comparative law, see Gordana Kovacek-Stanic, *Uporedno porodično pravo* (University of Novi Sad, Novi Sad, 2002) 62–72.

34 See Mary Ann Glendon *The Transformation of Family Law* (University of Chicago Press, Chicago and London, 1999) 135–136.

35 For the arguments in favour of introducing the marital contract in Republic of Macedonia, see Dejan Micković and Angel Ristov, 'Marital Contracts in Macedonian and Comparative Law', *Legal Life* (Association of Lawyers of Serbia, Belgrade, 2012), Angel Ristov 'Do We Need the Marital Contract in Macedonia's Family Legislation', *Notarius*, Notary Chamber of the Republic of Macedonia, Skopje 31–45.

obligations in relation to title to property, with which the partners independently will regulate property relations for the duration of their union and in the case of its termination.

V REPLACEMENT OF THE TERM 'PARENTAL RIGHTS' WITH 'PARENTAL RESPONSIBILITIES'

In the last few decades in all European countries significant changes have occurred in the content of parental rights, changes that have put in the foreground the obligations and responsibilities of parents, as well as the need for greater respect for the interests and autonomy of the will of the child. These changes are closely associated with the adoption of the UN Convention on the Rights of the Child in 1989. This is the most important international document for children's rights that has been adopted and ratified by the vast majority of member states of the United Nations. This Convention uses the concept of parental responsibility, and the children in the Convention are treated as subjects of rights, rather than as objects whose protection is guaranteed by the parents and the state. The new concept of the rights and responsibilities of parents, based on their obligations to the child, and which provides rights to the parents only if they are aimed at caring for the upbringing, education and protection of the child, led to changing the term used for labelling of parental rights and responsibilities. In many international documents, as well as in several European countries, instead of 'parental rights', a term used in the Family Law Act of the Republic of Macedonia,[36] the term 'parental responsibility' is used more often.[37] The term 'parental responsibility' better signifies the essence of the relationship between parents and children. In contemporary societies parents have primarily obligations and responsibilities towards their children, and the rights that are prescribed by law for the parents are envisaged only to allow them to fulfil their obligations towards their children. Several of the most important international documents concerning the rights of children in recent decades have used the term 'parental responsibility'.[38] This term is gradually accepted in many European jurisdictions, suggesting a substantial change in the conception of the rights and

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36 Parental rights in the Family Law Act of the Republic of Macedonia are regulated in Part 3, art 44-95.

37 The term 'parental responsibility' is used in the revised Brussels II Regulation, in the Council's of Europe Recommendation No R (84) 4 on 'Parental Responsibilities' and in the White Paper on Principles Concerning the Establishment and Legal Consequences of Parentage (2002) CJ-FA(2001) 16 Rev.

38 In art 18, para 1 of the UN Convention on child's rights it is determined that the countries will make every effort to accept the principle that both parents have mutual responsibility for the child's development. The term 'parental responsibility' is used in the Hague Convention for the protection of children and cooperation in the field of international adoption from 1993, and in the European Convention on the exercise of the rights of the child from 1996. This concept is accepted in Recommendation 1121 of the Parliamentary Assembly of the Council of Europe. For more on the acceptance of the term 'parental responsibility' see S Gratalou *L'enfant et sa famille dans les norms européenes* (LGDJ, Paris, 1998) 315.

obligations of parents towards their children.[39] We believe that the Civil Code of the Republic of Macedonia, in Book 5, which will regulate family relationships, should abandon the term 'parental rights' which is used in the current Family Law Act and accept the term 'parental responsibilities'. By accepting the term 'parental responsibilities' Macedonian legislation will be conformed to the most important international documents and the general trend in European legislation. This change has not only terminological meaning, but it expresses more appropriately the new ideas and ideology in the exercise of parental responsibilities, which are primarily based on the obligations of parents towards their children.

VI PREDICTING THE POSSIBILITY FOR 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 the child's will and wishes, especially if, given the age and maturity, the child is capable of forming an opinion on relevant issues concerning 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, can we 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.[40] This concept is accepted in the most important European convention in this area, the European Convention on the exercise of rights of the child.[41]

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39 In France the term 'parental power' was used until 1970 because of the dominant role of the father in caring for the child. In 1970, this term was replaced by 'parental authority'. After the adoption of the UN Convention on the rights of the child, France adopted the term 'parental responsibility' in 1993. The State Council of France stated that the replacement of the term 'parental authority' with 'parental responsibility' is justified by the need to take into account the evolution of the parental role in French society. See more in Huet–Weiller, Ganghofer, R (ed) *Le droit de la famille en Europe, Son évolution de l'antiquité à nos jours* (Presses Universitaires de Strasbourg, Strasbourg, 1992). In England, the term 'parental responsibility' is used in Children Act 1989. According to Cretney, words like 'rights' and 'authority' have unpleasant connotations and therefore he considers that the responsibilities of parents should be described as 'responsibility' and 'commitment'. See SM Cretney, *Family Law* (Sweet & Maxwell, London, 1997) 168. The term 'parental responsibility' is used in Belgium (see H. De Page, *Traité élémentaire de droit civil belge, T. II (Les Personnes)*, Vol. 2 (by J.-P. Masson) (Brussels: Bruylant, 1990) 947. The term 'parental responsibility' is used in the Norwegian Children Act 1981, and in Portugal, in Law 61/2008. See more in Nigel Lowe *A Report for the attention of the Committee of Experts on Family Law*, CJ-FA (2008) 5, 13.

40 In art 12, para 1 of the UN Convention on the Rights of the Child it is determined that states parties shall assure to the children a right to their own opinion, right of free expression of opinions in all matters affecting the child, giving due weight to the opinion of the child in accordance with the age and maturity of the child.

41 In Art 3 of the European Convention on the exercise of the rights of the child from 1996 it is

Much 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.[42] 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 the parents tried to forbid.[43] 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 are accepted in the particularly important and influential case *Gillick v West Norfolk and Wisbech Area Health Authority* in the UK.[44] Based on the decision in this case, in the English case-law a new concept appeared: the 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 in each case, depending on the complexity of the issues in question, and the emotional and intellectual maturity of the juvenile.[45]

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 on the parents, when they make important decisions for the child, to take account of the child's opinion.[46] Moreover, the children in Switzerland, who have reached a certain level of maturity, have the right to independently organise their lives.[47] In the Czech Republic, the legislature has also taken into

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determined that: 'A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights: a. to receive all relevant information; b. to be consulted and express his or her views; c. to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.'

42 See more in L Lenti *Droit de la famille: Italie, Juris-Classeur de Droit Comparé* (Michèle Klein (ed), Paris, 1997).

43 See more in F Boulanger *Droit civil de la famille, Aspects comparatives et internationaux* (Economica, Paris, 1994) 238.

44 [1986] AC 112 (HL). In this case, the mother of four girls under 16 years disputed the decision of the Department of Health and Social Security, according to which doctors, in exceptional cases, can give advice and prescribe treatment in the field of contraception for girls under 16 years of age, without the consent of parents. Ms Gillick asked the court to revoke this decision, because it violated her rights as a parent. The House of Lords rejected the appeal. In explanation of the judgment, the House of Lords stated: 'The right of parents comes behind children's rights to make their own decisions when they reach the age and intelligence sufficient to form an opinion and decide on areas and issues that require a decision.' See more in MT Meldeurs-Klein *La personne, la famille et le droit, Trois décennies de mutations en occident* (Bruylant, Brussels, LGDJ Paris, 1999) 359.

45 Cretney, above n 39, p 170.

46 See art 144, para 2 of the Swiss Civil Code.

47 See more G Guillod *Droit de la famille: Suisse, Juris – Classeur de Droit Comparé* (Michèle Klein (ed), Paris, 1999).

account the views of the child.[48] The Family Law stipulates that, when a child is capable of forming opinions and of understanding the measures that relate to the child, the child has the right to obtain all necessary information and to speak freely about all decisions of the parents in essential matters affecting the child.[49] In France, the child's right to express their opinion is based on the amendments to the Civil Code of 1993,[50] and the children's right to express their opinion in some countries, such as Poland, is provided in the Constitution.[51]

Macedonia does not provide consistent application of Art 12 of the UN Convention on the Rights of the Child, although the Act on protection of children provides that the opinion of the child should be taken into account when deciding for the child and in relation to the child's rights and interests.[52] However, the Family Law Act, which regulates the most important issues relating 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 the child's rights and interests. Certain articles of the Family Law Act, pertaining to the maintenance of personal contact of the child with the parent, when parents do not live together,[53] or adoption,[54] or designation of a guardian,[55] provide 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, the Family Law Act does not provide an obligation for the Court and Centre for Social Work to hear the child and to take into consideration the child's 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

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48 Generally, the child has a right to be heard in any proceedings in which essential matters relating to the child are decided (s 31, para 3 of the Czech Family Code).

49 M Zuklinova, *Droit de la famille: République Tchèque, Juris-Classeur de Droit Comparé* (Michèle Klein (ed), Paris, 1999) 11.

50 According to art 388–1 of the French Civil Code (since the Act of No 93–22 of 8 January 1993) the minor child can be heard before the court or before the person appointed by the court, in any proceedings related to the child.

51 Article 72, s 3 of the Polish Constitution provides a rule, according to which, when assessing a child's rights, the public authorities and persons responsible for the child should hear the child and, to the extent possible, take the child's opinion into consideration.

52 In art 3 b from the Act on the Protection of Children it is determined that the state has a duty to ensure the right of the child to express their views on all matters that concern them and that the views of children should be given due weight in accordance with their age and maturity.

53 In art 79, para 2 of the Family Law Act it is prescribed that the Centre for Social Work will inform the child and take into account the child's views and opinions depending on the age and level of development of the child, when it is deciding about maintaining personal relations of the child with the parent.

54 Article 103, para 1 of the Family Law Act prescribes that the adoptee who is older than 12 years should give consent to the adoption.

55 In art 135, para 4 of the Family Law Act it is determined that, in deciding about the guardian, the Centre for Social Work should take into account the wishes of the person under guardianship.

authorities, when making decisions for the child, to have an obligation to hear the child, and to take child's views into consideration, according to the age and the maturity of the child.[56]

VII PREDICTING SPECIFIC LEGAL PROTECTION OF THE FAMILY HOME

Under the 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 we 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.[57] Despite these features, the family home, for a long period of time, has not enjoyed special legal protection in family law in European countries.[58] It became the object of interest of legal theory and modern reform legislation in the last several decades, and has acquired special legal protection. In modern legislation the family home is regulated by special legal rules in a way that limits ownership rights in order to protect the interests of the children. The question of the specific status of the family home is becoming important in situations where a spouse to whom the children are entrusted after divorce has not been provided with a house or an apartment. Therefore, selling the family home after divorce and moving the children into new environment is very common, which has a negative influence on the children's development.[59] Given this, legislators are faced with the dilemma of 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 favour of predicting specific legal protection for the family home is the interests of the children to have a stable environment.[61] In most cases of divorce, children who are entrusted to the

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56 For the opportunity to take into account the position of the child in determining questions relating to the child, see Bo Borce Davitkovski, Gordana Buzarovska, Gordan Kalajdziev and Dejan Mickovik *Comparative Review of the Legislation in the Republic of Macedonia and the Convention on the Rights of the Child* (UNICEF, Ministry of Justice, Skopje, 2010) 104–112.

57 See more in Angel Ristov 'The Legal Status of the Marital Home in the Macedonian and Comparative Law' (2012) *Iustinianus Primus Law Review,* Skopje.

58 See P Petot, *Histoire du Droit Privé Français, La Famille* (Editions Loysel, Paris, 1992); J Bart, *Histoire du droit privé* (Montchrestien, Paris, 1998).

59 In theory there are more reasons and arguments for predicting specific legal protection of the family home. See more in T Altobelli 'The Family Home in Australian Law', *Australian Institute of Family Studies Conference,* University of Wollongong; Kovaks 'Matrimonial Property Law Reform in Australia: The "Home and Chattels" Expedient. Studies in the Art of Compromise' (1978–1980) *University of Tasmania Law Review* p 227; P Wessner, 'Le divorce des époux et l'attribution judiciare à l'un d'eux de droits et obligationas résultant du bail portant sur le logement de la famille', 11 e Séminaire sur le droit du bail (Neuchâtel, 2000) 3; Withnall, 'Negligence and the House that Jack Built' (1990) 7(2) *Otago Law Review* 189.

60 T Altobelli, above n 59, 12.

61 See more on the measures for protecting the child: S Bubić and N Traljić, *Parental and Guardianship Rights* (Faculty of Law in Saraevo, Saraevo 2007) 193–218.

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 lived is a very emotional experience that negatively affects their development.[62] Because of this, the treatment of the family home is increasingly becoming a concern for the courts and the legislators, who must take account of the principle of the best interests of the child after divorce. These interests in practice are accomplished by the child's remaining living in the family home, close to their friends and their school.[63] An argument for predicting the special protection of the family home is a common trend of non-payment of alimony by the spouse, which is present in almost all societies, including the Macedonian,[64] and the fact that the special regime of the family home allows greater flexibility for judges, when deciding the child's fate. This confirms the rich case-law in states where it is left to the discretion of the courts.

Because of all this we believe that there is a need to provide specific legal protection for 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 the event of divorce, the legislature could envisage provisions in the Civil Code whereby the court can make a decision regarding the family home, based on the interests of the children, the 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 children.[65]

In addition to these changes in the family law in Macedonia, we propose that the Civil Code should accept the concept of joint execution of parental responsibilities after divorce,[66] and to introduce the possibility for a notary public, not the court, to dissolve the marriage by mutual consent, when partners have no children. Also, we propose that in the case of a divorce by mutual consent, there should be an obligatory requirement for the partners, other than agreement about the guardianship of the children, to agree on

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62 According to statistics from 1996 in Australia almost 19% of families (467,200) consisted of one parent and child. The family home was sold in 40% of the cases.

63 See more in M F Davis 'The marital home: equal or equitable distribution?' (1983) 50(3) *University of Chicago Law Review* 1089–1090.

64 M F Davis, above n 63, 1089–1090.

65 In art 3, para 1 of the UN Convention on the rights of the Child it is provided that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child should be a primary consideration.'

66 In the Republic of Macedonia there are no precise legal provisions that parents continue to conduct joint parental rights after divorce. See more Dejan Mickovik and Angel Ristov 'The Exercise of Parental Rights After Divorce in Macedonian Family Law' in B Atkin (ed) *International Survey of Family Law 2013 Edition* (Jordan Publishing Limited, 2013) 251–265.

alimony and division of joint property. Moreover, it is necessary to simplify the procedure for adoption, which is now very complicated and lengthy, and to provide for payment to a guardian, making the guardian more efficient and more accountable in performing custody functions. We propose creation of a special law on domestic violence, and to allocate all the provisions for domestic violence, which are now included in Family Law and Criminal Law, to this separate law on domestic violence. We believe that these changes to family law in Macedonia, which would be included as part of the Civil Code, would be in accordance with international standards and with the general trends in the legal regulation of family relations in European countries, and that these changes will provide greater protection of the rights and interests of all family members, especially children.