The International Survey of Family Law

2012 Edition

MEMBERS OF THE INTERNATIONAL SOCIETY OF FAMILY LAW

ASSOCIATION INTERNATIONALE DE DROIT DE LA FAMILLE

INTERNATIONALE GESELLSCHAFT FÜR FAMILIENRECHT

Website: www.law2.byu.edu/ISFL

Officers and Council Members 2011-2014

PRESIDENT
Professor Patrick Parkinson
Faculty of Law
University of Sydney
SYDNEY 2006
AUSTRALIA
Tel: +61 2 9351 0309
Fax: +61 2 9351 0200
E-mail: patrickp@law.usyd.edu.au

EDITOR OF THE INTERNATIONAL SURVEY
Professor Bill Atkin
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
NEW ZEALAND
Tel: +64 04 463 6343
Fax: +64 04 463 6366
E-mail: bill.atkin@vuw.ac.nz

TREASURER
Professor Adriaan van der Linden
Beetslaan 2
3818 VH Aersfoort
THE NETHERLANDS
Tel: +31 33 461 90 97
Fax: +31 33 465 94 29
E-mail: a.vanderlinden@law.uu.nl

SECRETARY-GENERAL
Professor Marsha Garrison
Brooklyn Law School
250 Joralemon Street
Brooklyn, NY 11201
USA
Tel: +1 718 780 7947
Fax: +1 718 780 0375
E-mail: marsha.garrison@brooklaw.edu

EDITOR OF THE NEWSLETTER
Professor Margaret F Brinig
Fritz Duda Family Professor of Law
University of Notre Dame
Box 780, 3157 Eck Hall of Law
Notre Dame, IN 46556
USA
Tel: +1 574 631 2303
Fax: +1 574 631 3595
Email: mbrinig@nd.edu

Immediate past president

Professor Dr Bea Verschraegen LLM, MEM
Abteilung für Rechtsvergleichung
Universität Wien – Juridicum
Schottenbastei 10-16
A-1010 Wien
AUSTRIA
Tel: +43 1 4277 35102
Fax: +43 1 4277 9351
E-mail: bea.verschraegen@univie.ac.at

Vice presidents

Professor Olga Dyuzheva
Law Faculty
Moscow State University (Lomonosov)
Moscow 119991
RUSSIA
Tel: +7 495 939 5153
Fax: +7 495 939 5195
E-mail: odyuzheva@gmail.com

Professor Dominique Goubau
Faculté de droit de l'Université Laval
Québec QUE
G1V 0A6
CANADA
Tel: +1 418 656 2131 (#2384)
Fax: +1 418 656 7230
E-mail: Dominique.goubau@fd.ulaval.ca

Professor Satoshi Minimakata
Faculty of Law
Niigata University
8050 Ikarashi-ninocho
Nishi-ku
Niigata
JAPAN 950-2181
Tel: +25 262 6522 or 6478
Fax: +25 262 5435
E-mail: satoshi@jura.niigata-u.ac.jp

Professor Hugues Fulchiron
Faculté de Droit
Université Jean Moulin
Lyon 3, 15 quai Claude-Bernard
F-69007 Lyon
FRANCE
Tel: +33 4 72 41 05 54
Fax: +33 4 78 78 71 31
E-mail: hugues.fulchiron@online.fr

Professor Giselle Groeninga
Rua Professor Artur Ramos 241 #93
São Paulo SP 01454-030
BRAZIL
Tel: +55 11 30315320
Fax: +55 11 30315320
E-mail: giselle@groeninga.com.br

Professor June D Sinclair
PO Box 651479
Benmore 2010
SOUTH AFRICA
Tel: +27 82 900 8690
E-mail: june.sinclair@up.ac.za

Executive council

Professor Penelope Agallopoulou
University of Piraeus
4 Kyprou Str
154 52 P Psychico
Athens
GREECE
Tel/Fax: +30 210 67 75 404
E-mail: agal@otenet.gr

Professor Dr MV Antokolskaia
VU University Amsterdam
Faculty of Law
De Boelelaan 1105
1081 HV Amsterdam
THE NETHERLANDS
Tel: +31 20 5986294
Fax: +31 20 5986280
E-mail: m.v.antokolskaia@rechten.vu.nl

Associate Professor Datin Noor Aziah Mohd Awal
Faculty of Law
Universiti Kebangsaan Malaysia
43600 Bangi
Selangor
MALAYSIA
Tel: +60 3 89215921
Fax: +60 3 89215117
E-mail: naha@pkrisc.cc.ukm.my

Dr Ursula Cristina Bassett
Faculty of Law
Pontificia Universidad Católica Argentina
Santa María de los Buenos Aires
Alicia Moreau de Justo 1400
Buenos Aires
ARGENTINA
Tel: +54 005411 43490200
E-mail: ubassett@uca.edu.ar

Dr Piotr Fiedorczyk
Faculty of Law
University of Bialystok
15-213 Bialystok
Ul Mickiewicza 1
POLAND
Tel: + 48 85 7457146
E-mail: fiedorczyk@tlen.pl

Professor Olga A Khazova
Institute of State and Law
Russian Academy of Sciences
Znamenka Str 10
119992 Moscow
RUSSIA
Tel: +7 495 691 1709
Fax: +7 495 691 8574
E-mail: o.khazova@gmail.com

Professor Nigel Lowe
Cardiff Law School
University of Wales
PO Box 427
Cardiff CF10 3XJ
UK
Tel: +44 029 20 874365
Fax: +44 029 20 874097
E-mail: lowe@cardiff.ac.uk

Professor Marie-Therese Meulders
29, Chaussee de la verte voie
1300 Wavre
BELGIUM
Tel: +32 10 24 78 92
Fax: +32 10 22 91 60
E-mail: meulders@cfap.ucl.ac.be

Peter Barth
Federal Ministry of Justice
Museumstraße 7
1070 Wien
AUSTRIA
Tel: +43 1 52152 2069
Fax: +43 1 52152 2829
E-Mail: peter.barth@bmj.gv.at

Professor Dr Nina Dethloff LLM
Institut für Deutsches, Europäisches und Internationales Familienrecht
Universität Bonn
Adenauerallee 8a
D 53113 Bonn
GERMANY
Tel: +49 228 739290
Fax: +49 228 733909
E-mail: dethloff@uni-bonn.de

Professor Sanford N Katz
Boston College Law School
885 Centre Street
Newton Centre, Mass 02459
USA
Tel: +1 617 552 437
Fax: +1 617 552 2615
E-mail: sanford.katz@bc.edu

Associate Professor Zdeńka Králíčková
Faculty of Law
Masaryk Univerzity
Veveří 70
611 80 Brno
CZECH REPUBLIC
Tel:+420 723 727 060
Fax:+420 549 49 7926
E-mail: zdenka.kralickova@law.muni.cz

Professor Dr Miquel Martin-Casals
Facultat de Dret
Universitat de Girona
Campus de Montilivi 17071
Girona
SPAIN
Tel: +34 972 41 81 39
Fax: +34 972 41 81 46
E-mail: martin@elaw.udg.edu

Professor Jo Miles
Trinity College
Cambridge
CB2 1TQ
UK
Tel: +44 1223 339922
Fax: +44 1223 338564 [FAO Jo Miles]
E-mail: jkm33@cam.ac.uk

Professor Linda Nielsen
Copenhagen University
Faculty of Law
Studiegården, Studiestræde 6
1455 Copenhagen K
DENMARK
Tel: +45 35 32 31 23
Fax: +45 35 32 32 06
E-mail: Linda.Nielsen@jur.ku.dk

Professor JA Robinson
Faculty of Law
Room 8, Old Main Building
Potchefstroom Campus of the North West University
Potchefstroom 2520
SOUTH AFRICA
Tel: +27 18 299 1940
Fax: +27 18 299 1933

Professor Anna Singer
Uppsala University
Faculty of Law
PO Box 512
SE-751 20 Uppsala
SWEDEN
Tel: +46 18 471 20 35
Fax: +46 18 15 27 14
E-mail: anna.singer@jur.uu.se

Professor Hazel Thompson-Ahye
Eugene Dupuch Law School
Farrington Road
PO Box SS-6394
Nassau, NP
THE BAHAMAS
Tel: +242-326-8507/8
Fax: +242-326-8504
E-mail: thomahye2000@yahoo.com

Professor Avv Maria Donata Panforti
Dipartimento di Scienze del linguaggio e della cultura
Largo Sant'Eufemia 19
I-41100 Modena
ITALY
Tel: +39 059 205 5916
Fax: +39 059 205 5933
E-mail: panforti.mariadonata@unimore.it

Professor Carol Rogerson
Faculty of Law
University of Toronto
78 Queen's Park
Toronto M5S 2C5
CANADA
Tel: +1 416 978 2648
Fax: +1 416 978 3715

Professor dr juris Tone Sverdrup
Department of Private Law
Faculty of Law, University of Oslo
PO Box 6706 St Olavs plass
NO-0130 Oslo
NORWAY
Tel: +47 22859781
Fax: +47 22859620
E-mail: tone.sverdrup@jus.uio.no

Professor Paul Vlaardingerbroek
Faculty of Law
Tilburg University
PO Box 90153
5000 LE Tilburg
NETHERLANDS
Tel: +31-013-466-2032/2281
Fax: +31-013-466-2323
E-mail: p.vlaardingerbroek@uvt.nl

Professor Lynn D Wardle
Bruce C Hafen Professor of Law
518 J Reuben Clark Law School
Brigham Young University
Provo, UT 84602
USA
Tel: +1 801 422 2617
Fax: +1 801 422 0391
E-mail: Wardlel@law.byu.edu

Professor Barbara Bennett Woodhouse
LQC Lamar Chair in Law
Co-Director of the Barton Child Law and Policy Clinic
Emory University
Gambrell Hall
1301 Clifton Road
Atlanta, GA
USA
Tel: +1 404 727 4934
Fax: +1 404 727 6820
E-mail: barbara.woodhouse@emory.edu

Professor Dr Jinsu Yune
School of Law, Seoul National University
599 Gwanak-ro, Gwanak-gu
Seoul, 151-743
Republic of Korea
Tel: +82 2 880 7599
Fax:+82 2 885 7584
E-mail: jsyune@snu.ac.kr

CONTENTS

Macedonia

THE LEGAL REGULATION OF NONMARITAL COHABITATION IN MACEDONIAN FAMILY LAW

*Dejan Mickovikj and Angel Ristov**

Résumé

Les changements rapides qui se produisent dans la famille et dans les relations familiales ont contribué à l'essor de la conjugalité hors mariage dans presque toutes les sociétés modernes. Bien que légèrement en retard par rapport à d'autres juridictions, la loi macédonienne de la famille prévoit la cohabitation basée sur le concept de 'mariage non enregistré'. Selon le droit familial macédonien, la cohabitation est définie comme l'union de l'homme et de la femme qui a duré au moins un an. La cohabitation est assimilée au mariage mais uniquement pour ce qui est des biens acquis pendant la vie commune ainsi que de l'obligation alimentaire. Les conjoints n'ont pas de droits successoraux, ni de droits dans les domaines de l'assurance maladie, des retraites ou de la sécurité sociale. Ils ont, par contre, accès à la procréation médicalement assistée ainsi qu'à la procréation à titre posthume.

L'analyse de la législation nationale permet de constater qu'il existe de nombreuses lacunes dans l'encadrement des relations hors mariage, ce qui crée des problèmes au niveau des recours judiciaires. Ces lacunes devraient être corrigées dans les futures réformes de droit de la famille, qui seront intégrées dans le nouveau Code Civil qui est actuellement en chantier. À cet égard, il conviendra d'appliquer à la cohabitation les obstacles du mariage, de même qu'il faudra prévoir un meilleur arrimage entre le mariage et la cohabitation au chapitre du droit patrimonial. La prochaine reforme devrait reconnaître aux cohabitants certains droit successoraux, introduire un système d'enregistrement volontaire et accorder le statut d'héritier à l'enfant né après le décès d'un parent.

* Dejan Mickovikj, Associate Professor at Faculty of Law 'Iustinianus Primus', University 'Saints Cyril and Methodius', Skopje, Republic of Macedonia.
Angel Ristov, lecturer at Faculty of Law 'Iustinianus Primus', University 'Saints Cyril and Methodius', Skopje, Republic of Macedonia.

I INTRODUCTION

In modern Western societies the famous saying of Napoleon 'Les concubins ignore le loi, le loi les ignore'[1] is obviously no longer valid. The statistical data for marital and family relations of Western countries clearly shows that marriage does not represent a unique form to start a family.[2] This dramatic increase in nonmarital cohabitation confronts the legislators with the dilemma 'whether legal policy should take an adverse attitude, to ignore or to accept the evolution in the sphere of the custom'.[3] This is a relatively new phenomenon, because, as Mary Ann Glendon states: '[a]s late as the 1960s, informal cohabitation was not considered a legal subject ... It was as though jurists everywhere had agreed to pretend the phenomenon did not exist.'[4] The number

---

1 Marie-Thérèse Meulders-Klein 'Mariage et concubinage ou les sens et contresens de l'histoire' in *La Personne, La Famille et le Droit 1968–1998, Trois décennies de mutations en occident* (Brussels: Bruylant, Paris: LGDJ, 1999) 23.

2 In New Zealand with a total population of a little over 4 million, according to the 2006 census, 428,130 people lived in nonmarital unions, compared with 87,960 in 1981 when figures were first collected. Two in five people between 15 and 44 years were in de facto relationships. Also according to the 2006 census there were 6,171 couples living in same-sex relationships, 2,655 male couples and 3,516 female couples. See Bill Atkin 'The Legal World of Nonmarital Couples: Reflections on "De Facto Relationships" in recent New Zealand Legislation' (2009) 39 VUWLR 793–812. According to the 2006 Census 28.8% of all families in Quebec were nonmarital. See further on cohabitation in Canada Martha Bailey 'Polygamy and Nonmarital Cohabitation' Canada in Bill Atkin (ed) *International Survey of Family Law, 2011 Edition* (Jordan Publishing Limited, 2011) 139–145. According to Judith A Seltzer in the USA in 1960 there were 400,000 nonmarital couples, and in 2004 the number of nonmarital couples was 4.6 million. See Judith A Seltzer 'Cohabitation in the United States and Britain: Demography, Kinship and the Future' (2004) 66 *Journal of Marriage and Family* 922. According to Popenoe the percentage of nonmarital couples compared to all couples in Australia, for the period 1996–2006, increased from 10.1% to 15%. In France for the period 1995–2001 the percentage of nonmarital couples increased from 13.6% to 17.2%. In Great Britain for the period 1995–2004 the percentage of nonmarital couples increased from 10.1% to 15.4%. See David Popenoe *Cohabitation, Marriage and Child Wellbeing* (The National Marriage Project, 2008) 2. For the increase of the number of nonmarital communities see: François Boulanger *Droit Civil de la Famille* 3 édition, tom I, 'Aspects comparatives et internationaux' (Paris: Economica, 1998) 355–356.

3 Marie-Thérèse Meulders-Klein, above n 1, 14. In this sense, Bill Atkin states: 'The Western phenomenon of increasing cohabitation outside marriage hardly needs documenting. From a legal point of view, it cannot be ignored. There are several approaches that can be taken into account, for example: laissez faire, leaving the parties to rely on the general law for any remedy; an 'opt-in' scheme, which enables parties to jointly sign up to a legislatively determined regime (or perhaps to choose from more than one option).' Bill Atkin, above n 2, 793. According to Sarah Bulloch and Debbie Headrick: 'Approaches to legal recognition of cohabitants can be broadly separated into: the *registration approach* (Netherlands, France), the *presumptive approach*, (Australia, New South Wales, New Zealand) and the *contractual approach*'. See Sarah Bulloch and Debbie Headrick *Cross-jurisdictional Comparison of Legal Provisions for Nonmarital Cohabiting Couples* (Legal Studies Research Team, Scottish Executive, No 55, 2005) 2.

4 Mary Ann Glendon *The Transformation of Family Law* (Chicago and London: The University of Chicago Press, 1989) 252.

of European legislators that allow spouses to choose whether they will contract a marriage or will enter into another legally regulated form of cohabitation is growing.[5]

The increase in nonmarital cohabitation does not only pose a dilemma for the legislators, but also represents a huge challenge for legal and social theory, in which there is an enormous increase of published texts in peer-reviewed social science journals.[6] Nonmarital cohabitation, according to many authors, is not only a first step towards marriage, as before, but in contemporary society it is an actual alternative to marriage. This leads to a change in attitude by the courts when they resolve disputes related to nonmarital cohabitation.[7]

In Macedonian family legislation, nonmarital cohabitation was regulated, for the first time, in the Family Law Act[8] of 1992. The basis for this change was the

---

5 See further: Jacqueline Rubellin-Devichi *Des concubinages dans le monde* (Paris: Centre de droit de la famille, Editions du Centre National de la Recherche Scientifique, 1990).

6 According to Pamela Smock, Lynne Casper and Jessica Wyse the number of published texts that analyse nonmarital unions in peer-reviewed social science journals for the period 1988–1993 was 88, for the period 1994–1999 was 196, and for the period 2000–2005 was 436. See Pamela Smock, Lynne Casper and Jessica Wyse *Nonmarital Cohabitation: Current Knowledge and Future Direction for Research* Report 08–648 (University of Michigan, Population Studies Center, July 2008) 2.

7 According to Katherine O'Donovan: 'Where a man and a woman have lived together for some 20 years it has nevertheless been held as follows: "To say two people masquerading, as these two were, as husband and wife there being no children to complicate the picture, that they were members of the same family, seems to be an abuse of the English language" and the court therefore denied the status of family membership to the survivor' (*Gammans v Ekins* [1950] 2 KB 328). However, in a later case, 21 years of heterosexual cohabitation sufficed to enable the tenancy to pass to surviving cohabitee. The word 'family' was 'not restricted to blood relationships and those created by the marriage ceremony', but must be considered in common parlance or the 'popular meaning or concept of the word' (*Dyson Holdings v Fox* [1976] QB 503 (CA)). See Katherine O'Donovan *Family Law Matters* (London: Pluto Press, 1993) 34. According to Katz, in 1976, the California Supreme Court decided the case of *Marvin v Marvin*, and the court in this case basically recognised a social reality. Katz points out that the decision by the Supreme Court of California is important for recognising that there can be legal consequences for two adults living together in a nonmarital relationship. In particular, the court specifically allows nonmarital couples who live together the power to arrange their lives using contract principles. In addition, the court also permits the judicial application of equitable remedies if facts permit it. In the case *Marvin v Marvin* 18 Cal 3d 660 (1976) the Supreme Court of California recognised the rights of nonmarital couples to sue each other for compensation if the facts support either contract or some equitable doctrine. In the case *Wilcox v Trautz* 427 Mass 326 (1998), Justice Greany wrote: 'Social mores regarding cohabitation between nonmarital parties have changed dramatically in recent years and living arrangements that were once criticized are now relatively common and accepted. With the prevalence of nonmarital relationships today, a considerable number of persons live together without benefit of the rules of law that govern property, financial, and other matters in a marital relationship ... Thus, we do well to recognize the benefits to be gained by encouraging nonmarital cohabitants to enter into written agreements respecting these matters, as the consequences for each partner may be considerable on termination of the relationship or, in particular in the event of the death of one of the partners.' See Sanford N Katz 'New Directions for Family Law in the United States' in *Dret revista para el analisis del derecho* (Barcelona, April 2007).

8 *Official Gazette of Republic of Macedonia* nos 80/92, 9/96, 38/2004, 33/06, 84/08 and 157/08.

new Constitution of the Republic of Macedonia[9] of 1991. Article 40(2) states: 'Marriage, the family, and *nonmarital cohabitation* are regulated by Law.' The legal regulation of the status of nonmarital cohabitation was one of the more significant innovations introduced in Macedonian family legislation.[10] In the Republic of Macedonia, the greatest reform since the independence of the country in the sphere of civil law recently started.[11] The government of the Republic of Macedonia adopted a decision in December 2010 to establish a Commission for drafting a Civil Code of the Republic of Macedonia. This will represent the most serious reform in the sphere of civil law. With the drafting of the Civil Code, the expectation is that a new quality in the regulation of civil law can be achieved. Following the example of the European Civil Codes, the new Macedonian Civil Code will consist of the general part, property law, the law of obligations, inheritance law and family law. The Commission accepted this concept, unlike other post-socialist family legislation, such as the Russian Federation, where family law is not an integral part of the Civil Code, but is regulated in a specific family code of the Russian Federation.[12]

The legal recognition and regulation of nonmarital cohabitation represents one of the novel developments in contemporary family law systems, following the enhancement of the legal status of children born out of wedlock. Nonmarital cohabitation is becoming a more prevalent and important basis for the creation of a family.[13] Having this in mind, as well as other transformations in the family that are taking place in Macedonian society, it is obvious that there is a need to introduce more significant reforms in family legislation, including reform regarding nonmarital cohabitation. It is expected that these changes will be incorporated in the new Civil Code.[14] Therefore, this paper will provide an analysis of the legal regulation of nonmarital cohabitation, in order to answer

---

9 *Official Gazette of Republic of Macedonia* no 52/91.

10 See more: Ljiljana Spirovikj-Trpenovska *Characteristics of Family Law in Republic of Macedonia, Family legislation in Republic of Macedonia* Essays on the National Consultation (Skopje: Supreme Court of the Republic of Macedonia, 1994) 11–12; Hadji Lega Kocho 'Nonmarital Cohabitation: Occurrence, Termination, Property Relations and Maintenance of Non-marital Couples' in *Family Legislation of Republic of Macedonia* Essays on the National Consultation (Skopje: Supreme Court of the Republic of Macedonia, 1994) 214–221.

11 See more: *Codification of Macedonian Civil and Trade Law,* Miscellany on the scientific debate held in Skopje on 18 June 2008, Macedonian Academy of Sciences and Arts.

12 For more information see: Alexandra Matveevna Nechaeva, *Family Law* (Moscow: Yurait, 2011). For the reforms in the family law systems in post-soviet states see further: Olga A Khazova 'Family Law on Post-Soviet European Territory: A Comparative Overview of Some Recent Trends' (2010) 14(1) *Electronic Journal of Comparative Law.*

13 Regarding the question of a specific number of nonmarital communities in Macedonian society, there are no official figures. However, compared to Scandinavian countries and other countries in Europe, nonmarital communities in the Republic of Macedonia are insignificant. This is due to patriarchal values, still dominant and present in our society.

14 See: Dejan Mickovikj and Angel Ristov 'The Changes within Family and Family Law Reforms in European Countries' in *Collection of articles in honour of Prof Naum Grizo* (Skopje: Law Faculty 'Iustinianus Primus', 2011); Dejan Mickovikj and Ristov Angel 'Reforms in Family and Inheritance Law and Competencies of Notaries' (2011) *Notarius* (Skopje: professional magazine).

the question whether it is necessary to revise certain remedies and introduce changes and reforms to the legal status of nonmarital cohabitation in the Republic of Macedonia.

II LEGAL REGULATION OF NONMARITAL COHABITATION

Macedonian family law did not regulate nonmarital cohabitation until the adoption of the Family Law Act (FLA) in 1992.[15] In the preceding period, nonmarital cohabitation was not regulated and did not enjoy legal protection.[16] Nonetheless, in judicial practice there were a few cases where the nonmarital cohabitation partner had certain property rights.[17] Regarding the attitude of society towards this phenomenon, we can see fluctuations that depended on the development of social relations, but in general the attitude towards nonmarital cohabitation was negative.

In Macedonian family law theory, nonmarital cohabitation is defined as 'the community of life between man and woman, which, according to the content of the actual relations between the nonmarital partners, is no different than the marriage community'.[18] According to another opinion, nonmarital cohabitation represents 'a community of life of two people of different sex who did not enter into marriage, based on their intention that this relation was to be permanent'.[19] In other words, nonmarital cohabitation represents community of life with a permanent character of a man and woman, which did not conclude in a valid marriage.

---

15 Unlike Macedonia, the other republics and provinces, members of the former Federation, in their legislation started to regulate nonmarital cohabitation after the adoption of the Constitution of Yugoslavia (SFRJ) in 1974: Kosovo (1974), Slovenia (1976), Croatia (1978), Bosnia and Herzegovina (1979) and Serbia (1980). See Mile Hadji Vasilev 'Family Law' (1990) *Student's Word* (Skopje) 225–226.

16 Macedonia's Constitutions from 1946, 1963 and 1974 did not contain provisions for nonmarital cohabitation: ibid.

17 For judicial practice see: Hadji Lega Kocho, above n 10, 215; Kiril Chavdar *The Law on Family and other Regulations* (Skopje: *Official Gazette of Republic of Macedonia*, 1993). According to the decision of the Supreme Court of Macedonia, where the plaintiff suffered from the beginning of the nonmarital cohabitation with the defendant, after she was promised that they would enter into marriage and the defendant hid the fact that he had child born out of wedlock and that he lived in a nonmarital union with another woman – the defendant was responsible for the damage, because he deluded the plaintiff. Without this the plaintiff would not have entered into nonmarital cohabitation relations with the defendant (*VSM Gz 366/72, Zb. VM I odl. 169*).

18 Mile Hadji Vasilev, above n 15, 223.

19 Kocho Hadji Lega, above n 10, 215.

In the FLA, even though during the drafting period, the idea of introducing 'registered' nonmarital cohabitation was present, the concept of unregistered nonmarital cohabitation was accepted.[20] In art 13 of the FLA nonmarital cohabitation is defined as:

> 'The living community of a man and woman, which has not been established according to the provisions of this law (nonmarital cohabitation) and has endured at least one year, is equal to marriage in the right of mutual maintenance and the property acquired during the time of existence of that cohabitation.'

It can be noticed that the essential conditions for the existence and validity of nonmarital cohabitation are: (1) the existence of community between a man and woman; and (2) the endurance of this cohabitation for at least one year.

(1) With regard to the *first condition* – diversity of sexes, it can be ascertained that Macedonian family law legislation envisages and permits only heterosexual nonmarital cohabitation. For the recognition of nonmarital cohabitation, the totality of the relations between spouses, its quality and a real intention for joint living are essential.[21] Therefore, it is rightly pointed out that 'temporary, short-term, and often "accidental" relations between man and woman cannot be called nonmarital cohabitation'.[22]

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

From the legal definition of nonmarital cohabitation and conditions envisaged for its validity, it can be noticed that the legislator did not envisage legal impediments for nonmarital cohabitation partners. In family law theory, even before the adoption of the FLA, a number of authors wrote that there should be marriage impediments if nonmarital cohabitation is to produce legal consequences.[23] This attitude has not changed even today, and some authors are of the opinion that this omission should be remedied.[24] Thus, the legislator

---

20 See: Ljiljana Spirovikj-Trpenovska *Characteristics of Family Law in Republic of Macedonia,* above n 10, 11–12.

21 See: Ljiljana Spirovikj-Trpenovska *Family Law* (Skopje: Law Faculty 'Iustinianus Primus', 2008) 252.

22 Mile Hadji Vasilev, above n 15, 224.

23 On this view Mile Hadzi Vasilev considers that nonmarital cohabitation communities where there are no marriage obstacles are rightfully permitted. According to Mile Hadzi Vasilev, nonmarital cohabitation communities where there are certain obstacles, envisaged by law, are to be considered illegal and immoral communities: ibid.

24 See: Dejan Mickovikj, Lidija Stojkova 'Non-marital Cohabitation in Contemporary Families'

should envisage that, in order to equalise the legal effects of marriage and nonmarital cohabitation, with regard to the right to maintenance and division of property acquired during the community, *there should be no marriage impediments between the individual nonmarital cohabitation partners.*[25]

In comparative law, most of the European legislation envisages that individual nonmarital cohabitation partners should have no marriage impediments between them,[26] but Macedonia is the rare country where, according to the current solution envisaged in the FLA, marriage impediments are not envisaged at all for nonmarital partners.[27] As a result of this omission of the legislator in Macedonia, in reality there are cases where a man or a woman can have simultaneously marital and nonmarital partners, which represents a rare case in comparative law.[28]

This kind of omission by the legislator causes legal inconsistencies and troubles in practice. In Macedonia the nonmarital cohabitation community might create legal consequences, even though one or both nonmarital partners are in a marriage or are closely related, for example they are first cousins etc. The legal regulation of nonmarital cohabitation in Macedonia produces a lot of dilemmas and problems in judicial practice.[29]

(1999) 15 *Student's Word* (Skopje: Eurodialogue) 99; Ljiljana Spirovikj-Trpenovska *Analogy between Non-marital Cohabitation and Marriage* Collection of articles in honour of Prof Borislav Blagoev (Skopje, 2007); Dejan Mickovikj 'Legal Regulation of Non-marital Cohabitation' (2008) 195–196 *Lawyer* (Lawyers Association of Republic of Macedonia, magazine) 8; Angel Ristov *Non-marital Cohabitation and the Status of Non-marital partners due to the Law on Inheritance* (Strumica: Association Iuridica, 2010); Ljiljana Spirovikj-Trpenovska, Dejan Mickovikj and Angel Ristov, *Succession Law in Republic of Macedonia* (Skopje: Institution of culture 'Shine', 2010); Ljiljana Spirovikj-Trpenovska, Dejan Mickovikj and Angel Ristov, 'Does the Law on Inheritance in Republic of Macedonia Require Changes?' in *Collection of articles in honour of Prof Ganzovski* (Skopje: Law Faculty 'Iustinianus Primus', 2011).

25 Ljiljana Spirovikj-Trpenovska, Dejan Mickovikj and Angel Ristov *Inheritance in Europe* (Skopje: Institution of Culture 'Shine', 2011).

26 See: Ljiljana Spirovikj-Trpenovska, Dejan Mickovikj and Angel Ristov, ibid 164–169.

27 In the Family Law Acts and judicial practice in the former Yugoslav republics, the view was that there should be no marriage impediments between nonmarital partners. Nonmarital cohabitation does not produce legal consequences, if during the existence of the community, one of the partners was married (Decision of District Court Kragujevac Gzh *169/92, 23.02.1993, ISP – 7).* See: Ilija Babik *Comments on the Law on Marriage and Family matters* (Belgrade: *Official Gazette of SRJ*, 1999) 15.

28 See Angel Ristov 'Nonmarital Cohabitation Community', Scientific Conference on the occasion of the 20th anniversary of the establishment of Faculty of Law in Veliko Trnovo, *Ius est ars boni et aequi,* Republic of Bulgaria, 14–16 April 2011.

29 In the case 17 P-927/10 од 30.11.2010, the Primary Court Skopje 2 determined that the plaintiff SA on the basis of joint acquisition of property in nonmarital cohabitation with the deceased SA obtained the right of mutual ownership of real estate in Skopje. In the appeal against the first instance decision the defendant stated that the existence of marriage represented a marital impediment for the existence of nonmarital cohabitation. The Primary Court provided the following answer: 'Pursuant to Article 13 from the Family Law Act, the community of living between man and woman that is not based on the provisions of this law (nonmarital cohabitation) and which lasts for at least one year is equal with marriage, regarding the right to mutual maintenance and acquired property during the common life. The higher court in the

III THE BEGINNING OF NONMARITAL COHABITATION

One of the most significant differences between marriage and nonmarital cohabitation is in the informal character of the beginning of the nonmarital community. In order to conclude a valid marriage certain essential conditions are necessary to be fulfilled. Essential conditions for a valid marriage according to the Macedonian FLA are: (1) different sexes of the partners; (2) free will to conclude a marriage from both partners; and (3) fulfillment of the formal requirements to conclude a marriage. To conclude a valid marriage there should not be any marital impediments. Marriage is concluded with a specific written and official form (*ad solemnitatem*) in the presence of the future marital partners, two witnesses and an official registry officer. Unlike marriage, nonmarital cohabitation is informal, and based on the free will of the nonmarital partners to live together. For its establishment there is no need for participation of a competent state authority, witnesses or other persons. In Macedonian legislation the marital impediments are not prescribed as a condition for the validity of the nonmarital community. In order to produce legal consequences, the legislator has prescribed only two conditions for nonmarital community: differences of sex of the nonmarital partners and a common life that should last at least one year.

Macedonian family law has accepted the concept of unregistered nonmarital cohabitation, so there is no need for a written statement, or for registration of the nonmarital community in front of any competent state authority. For its establishment a common life between the man and women for at least one year is sufficient. The exact moment of the establishment of nonmarital cohabitation is known only to the nonmarital partners, but not to the wider public. Because nonmarital cohabitation is not registered and no public document is issued, after its termination it is necessary to prove the beginning and the cessation of community, so that the rights in the FLA can be applied correctly.

In comparative law, there are only a few countries (Croatia, Slovenia, Monte Negro and Kosovo) which approve legally unregistered nonmarital cohabitation.[30] Therefore, we consider that the legislator should provide a solution for nonmarital partners who want to avoid possible difficulties in the exercising of their rights, enabling them to formalise their union with a

---

first judgment stated that nonmarital cohabitation cannot produce legal consequences, if there are marital impediments. After the second judgment of the Primary Court, the Skopje Court of Appeal reached a verdict by which the appeal of the co-defendant E.A. was rejected as groundless, and the verdict of the Primary Court Skopje was confirmed. In the explanation of the verdict, the Court of Appeal stated that the formal existence of marriage as an impediment for the actual existence of nonmarital cohabitation cannot be an obstacle for nonmarital cohabitation to create legal consequences.' For more information see Dejan Mickovikj and Angel Ristov 'Reforms in Family and Inheritance Law and Competencies of Notaries' (2011) *Notarius* (Skopje: professional magazine) 70–83.

30 See: Ljiljana Spirovikj-Trpenovska, Dejan Mickovikj and Angel Ristov, above n 25, 203–212.

two-sided statement. The statement could be certified and deposited to a notary. Nonmarital cohabitation will produce legal consequences from the day of certification of the statement. Under this proposal, the termination of a nonmarital community will be either with a joint statement or with a statement of the will expressed by one of the partners. Nonmarital partners who do not want to register their nonmarital union will be exposed to more severe consequences and problems in the proving of the existence of the nonmarital life and in exercising their rights.

IV THE LEGAL CONSEQUENCES OF NONMARITAL COHABITATION

Nonmarital cohabitation in the Macedonian FLA is equalised to marriage in regard to *the right of jointly acquired property and the right of maintenance*.[31] In comparative law there is legislation which prescribes the same legal effects for nonmarital cohabitation as for marriage. Nonetheless, as a result of conservative and the traditional values, there are still some countries that do not regulate nonmarital cohabitation.[32]

According to the provisions of the FLA (art 13), it can be concluded that nonmarital partners do not enjoy other rights and duties. In that sense, nonmarital partners, unlike spouses, do not enjoy certain rights in the area of the social security, health and pension insurance.[33] In the Macedonian FLA there is a difference between the legal position of marital and nonmarital partners towards their children. The paternity of children born in marriage is not subject to assessment, whereas the paternity of the children born out of wedlock is subject to assessment through the procedure prescribed by the FLA (arts 51–64).[34] Pursuant to the FLA the marital spouse of the mother is

---

31 For more details see: Ljiljana Spirovikj-Trpenovska, *Family Law,* above n 21, 252, Ljiljana Spirovikj-Trpenovska *Analogy between Non-marital Cohabitation and Marriage*, above n 24; Dejan Mickovikj 'The Law on Biomedical Assisted Fertilization – Dilemmas' (2009) 203 *Lawyer* (Lawyers Association of Republic of Macedonia, Skopje) 45.

32 In Bulgarian law nonmarital cohabitation is not regulated, even though nonmarital cohabitation is widely present, which can be seen by the huge number of children born out of wedlock (over 50%). Although, the regulation of nonmarital cohabitation was hinted at as a significant innovation in the draft Family Code, it was omitted during the adoption of the Family Code, due to influence of the church and traditional values. See Ekaterina Mateeva *Family Law of Republic of Bulgaria* (Sofia, 2009); Canka Cankova, Metodi Markov, Anna Staneva and Velina Todorova *Comment on the New Family Code* (Sofia: IK Labour and Law, 2009); Hristo Tasev *Bulgarian Law on Inheritance* new editorial, Georgi Petkanov, Simeon Tasev (Sofia: Siela, 8th edn, 2006); Metodi Markov *Family Law and Inheritance Law* (Sofia: Sibi, 2009).

33 According to the decision of the Supreme Court of Macedonia: 'The beneficiary of permanent social assistance cannot be a person who lives in nonmarital cohabitation' *(VSM* У *1139/82,* 36. *VSM III dec. 93)*.

34 The court practice of the European Court of Human Rights was essential for improving the legal position of children born out of wedlock (for example, the case of *Marchx v Belgium* (1979) 2 EHRR 330). The systematic and continuous adoption of judgments for the benefit of the children born of out of wedlock by the Court is proven by the recent decision of

considered to be father of the child born during the marriage or within 300 days after the termination of the marriage (art 50). The father of the child born out of wedlock is considered to be the person who recognises the child. Paternity can be recognised in front of a registrar officer, Centre for Social Work and the court. Recognition of paternity can be made via will, as well.

(a) The right of nonmarital partners to joint property

Macedonian family law envisages two marital regimes: the legal marital regime and the conventional marital regime. The legal marital regime is dominant,[35] because, in the sphere of the conventional property regime, the Law on Property and Other Real Rights (LPORR)[36] from 2001 envisages only the contract with which marital partners regulate the management and use of their joint and individual property.[37] Nevertheless, this contract represents only a small part of the conventional regime of property. The legal marital property regime foresees that the property of the marital spouses can be individual property or joint property, and the same applies to nonmarital spouses.

With the adoption of the LPORR (arts 203–218), the provisions that regulate the marital property of spouses and nonmarital spouses were taken from the FLA. These provisions in the LPORR were incorporated in the part that regulates joint ownership (arts 59–94). Article 81 of the law that regulates the acquisition of property in nonmarital cohabitation stipulates that: 'The property that the nonmarital partners acquired in a nonmarital community is considered their joint property.'

(i) Joint property of nonmarital partners

Joint property shall be considered the property acquired by the nonmarital partners during their nonmarital cohabitation (LPORR, art 67). Therefore, in order to have joint property, a nonmarital partner must live in a nonmarital community for at least one year and the property should be acquired during the

Zaunagger v Germany (2009) 50 EHRR 38. In this case the plaintiff, a nonmarital father, submitted to the European Court of Human Rights that the decision of the German court, where his demand for mutual parenthood was overruled, represented an infringement of his right under Art 8 and Art 14 of the ECHR. The European Court of Human Rights in *Zaunagger v Germany* decided that Arts 14 and 8 from the ECHR were infringed. In the judgment, the Court underlined that the term 'family' envisaged in Art 8 refers not only to marital relations, but entails other de facto family relations, when persons live in nonmarital cohabitation. The child born in this kind of relationship ipso iure is part of the family from the moment of birth. See Elaine O'Callaghan 'Annual Review of International Family Law 2009' in Bill Atkin (ed) *International Survey of Family Law, 2011 Edition* (Jordan Publishing Limited, 2011) 13.

35 For more on the regulation of property relations of spouses see: Ljiljana Spirovikj-Trpenovska, *Family Law*, above n 21, 240–252; Bozidar Kochov 'Property relations of spouses' (Skopje: Family legislation of the Republic of Macedonia Supreme Court of the Republic of Macedonia, 1994) 197–214.

36 *Official Gazette of Republic of Macedonia*, nos 18/01 and 92/08.

37 'This kind of agreement can be concluded by spouses regarding their individual, as well as the joint property': Ljiljana Spirovikj-Trpenovska, *Family Law*, above n 21, 250–251.

common life. Apart from these conditions, judicial practice states that it is necessary to have a mutual consensus between the partners that the acquired property would be mutual.[38] Unlike individual property, for joint property, the law does not provide a clear definition of how the property can be acquired. The most significant basis for the creation of joint property is the work and the income of the nonmarital partners. According to judicial practice, contributions to the joint property are considered work, which does not create property directly, but includes raising children, domestic work, etc. Besides work, the joint property of the nonmarital partners can be gained with gifts, in favour of both nonmarital partners, by inheritance, as well as other gift rights, where both nonmarital partners are included. If the property of one of the partners is acquired after the termination of the nonmarital cohabitation, this property shall not be considered as mutual, but as individual property.[39]

The nonmarital partners have joint responsibility for the debts that one of the partners has incurred for the fulfillment of the current needs of the community (LPORR, art 79(2)). The partner who has fulfilled a joint obligation from individual property has the right to request compensation from the other partner (LPORR, art 79(3)).

The ownership right of the nonmarital partners over real estate that is their joint property is registered in the public register in the name of the two partners as their joint property (LPORR, art 69(1)). If in the public register only one of the partners is registered as the owner of the joint property, it will be considered that the registering is carried out in the name of the two partners (LPORR, art 69(2)). If the interests in the joint property are determined, then the nonmarital partners are registered as co-owners.

(ii) Individual property of nonmarital partners

Individual property, according to Macedonian law, is the property that a partner possessed before the conclusion of the marriage,[40] as well as the property obtained on the basis of inheritance, legacy and gift after the wedding. Basically, individual property is not acquired by mutual work of both nonmarital partners.[41] Apart from these provisions, the legislator omitted to regulate certain contentious issues pointed out by the courts and legal theory.[42] Contentious is the issue of the revenues from the rights of intellectual property

---

38 According to the decision of the Supreme Court of Macedonia: 'Property acquired in a nonmarital cohabitation belongs to the nonmarital partners, if according to their behaviour there is a will for it to be considered as mutual.' (*VSM 249/85,* ЗБ. *VSM IV dec. 55*).

39 According to the decision of the Supreme Court of Macedonia: 'The funds of the partners acquired by one of the partners after the termination of cohabitation are not considered as joint property.' (*VSM rev 174/82ZB VSM III dec. 17).*

40 According to the decision of the Supreme Court of Macedonia: 'By entering into marriage and repaying the due instalments during the marriage, a marital spouse does not acquire a right to mutual ownership of the flat, which before entering into marriage was bought by one of the spouses.' (*VSM rev 675/83* 36 *VSM dec. 18*).

41 Bozidar Kochov, above n 35, 199–200.

42 Ibid 200–201.

created before the beginning of the nonmarital community, and entering into effect during the period of the community, as well as the status of the property acquired on the basis of revenues from individual property of one of the nonmarital partners during the nonmarital cohabitation. Also, in Macedonian legislation there is no provision that regulates the property acquired on the basis of a game of chance. Thus, it is necessary for the legislator to envisage a provision, according to which the property acquired through a game of chance shall represent joint property, except in cases when one of the partners invested funds from his or her individual property.

The other partner is not responsible for the obligations which one of the partners had before the marriage or cohabitation, nor the personal obligations contracted after the beginning of the community (LPORR, art 79(1)).

(iii) Management and use of the nonmarital partners' property

With regard to the management and use of the joint property, the nonmarital partners can decide by agreement (LPORR, art 70(1)).[43] A spouse while alive cannot independently use or burden with legal action his or her part in the joint property before it is divided (LPORR, art 70(2)). During the sale of a certain part of the joint property, the nonmarital partners have priority of purchasing. The partners can agree in written form for the management and use of the joint property or part of it to be carried out by one of them (LPORR, art 71(1)). The agreement can refer to all works of management and use of the property or just to the regular management or to exactly specified matters. The agreement can be broken at any time, except where obvious damage is inflicted on the other partner with the breaking of the agreement (LPORR, art 71(4)). For carrying out matters which pass the boundaries of regular management or use of property, the consent of the other partner is required, expressed in a form required for appropriate legal action (LPORR, art 72). If the partners cannot agree on the management of the property, then it is determined by a competent court (LPORR, art 73). With regard to the management and use of separate property, each partner independently manages and uses it, if they do not otherwise agree in written form (LPORR, art 68(3)).

(iv) Necessity to regulate the agreement

Macedonian family legislation, unlike other modern legislation, does not regulate the marital agreement.[44] Nevertheless, even though in the FLA the marital agreement is not legally regulated, it is present in practice on the basis

---

43 'There are no legal consequences when one of the marital spouses, without the permission of the other marital spouse, has alienated and burdened the property acquired during the marriage before its division among the marital spouses.' (Supreme Court of Macedonia *rev 282/86* 36. *VSM IV dec. 3*).

44 Angel Ristov 'Marital contract – Obscurity, Reality or Necessity in Modern Macedonian Family Law' in *Collection of articles in honour of Prof. Ljiljana Spirovikj-Trpenovska* (Skopje: Faculty 'Iustinianus Primus', 2012).

of the principle of freedom of contract. Apart from marital spouses, in Macedonian law this kind of agreement can be stipulated between nonmarital partners as well.[45]

In Macedonian family legislation the legal marital property regime dominates.[46] This is due to the fact that the legislator envisages only one agreement, which can be used by spouses or nonmarital partners, for the regulation and the use of the separate and joint property (LPORR, arts 68(3) and 71). However, this agreement is rarely used in practice, and therefore it represents an insignificant part of the conventional regime of property of spouses and nonmarital partners.

There have passed 2 decades since the independence of the Republic of Macedonia and the establishment of the new social and legal system. During this period, it can be noted that, in the area of property relations of marital and nonmarital partners, the legislator did not foresee any changes and has adopted, almost in its entirety, the same solutions from the previous legal system.[47] Taking into account that the new social, legal and economic systems are based upon the principle of freedom of the market and entrepreneurship, it is high time for the revision of the provisions that regulate the property of marital spouses.

In comparative law the marital agreement is widely accepted.[48] Marital agreements are accepted in many of the post-socialist countries (Croatia,[49] Serbia,[50] Russia,[51] Bulgaria,[52] Monte Negro, Republika Srpska, Hungary, etc).[53] In Macedonia, the marital agreement, as an unnamed agreement, can be

---

45 Ibid.

46 For more details see Ljiljana Spirovikj-Trpenovska, *Family Law,* above n 21, 240–252; See also Bozidar Kochov, above n 35, 197–214.

47 In the Positive Law as well as the Primary Law on marriage from 1946, the following models for the marital regime are accepted: (1) legal property regime in which there is a regime of joint property of the marital spouses and regime of individual property of the marital spouses, and (2) conventional property regime. Ljiljana Spirovikj-Trpenovska, *Family Law,* above n 21, 240.

48 Marital agreements are accepted in France, Germany, Austria, Switzerland and other countries.

49 For the Croatian Law see: Mira Alinčić, Dubravka Hrabar, Dijana Jakovac-Lozić and Aleksandra Korać-Graovac *Family Law* (Zagreb: National Newspapers, 2007) 514–518.

50 For the marital agreement in Serbian Law see: Slobodan Panev *Family Law* (Belrade: Faculty of Law at the University in Belgrade, 2010) 356–368; Gordana Kovachek Stanikj *Family Law: Law on Partners, Law on Children and Custodian Law,* (Novi Sad: Faculty of Law in Novi Sad, 2007) 125–129; Marija Drashkikj *Family Law and Law on Children* (Belgrade: *JP Official Gazette*, 2009) 408–412; Milan Pochucha *Family Law* (Novi Sad: University Business Academy, 2010) 324–326.

51 For the amendments in the Russian Law see: Aleksandra Matveevna Nechaeva, above n 12, 77–78.

52 According to Mateeva: 'The introduction of the institution of the marital agreement can be determined as the essence of the reform in the new Family Code in the area of marital and property relations', above n 32, 164. For more in depth see: Canka Canova, Metodi Markov, Anna Staneva and Velina Todorova, above n 32, 105–133; Metodi Markov, above n 32, 58–63.

53 For the marital agreement in comparative law see: Gordana Kovachek Stanikj *Comparative Family Law* (Novi Sad: University in Novi Sad, Faculty of Law, 2002) 62–72.

concluded only on the basis of the principles of the Law of Obligations. Based on the advantages of marital agreements for spouses and nonmarital partners and the experiences from comparative law, we can expect that, in the future reform of family legislation in Macedonia, marital agreements will be accepted and regulated by the FLA.

(v) Division of joint property of nonmarital partners

During the duration and following the end of the community, the nonmarital partners can agree to divide the joint property (LPORR, art 74(1)). If an agreement cannot be reached, the division of the joint property is carried out by the court, and the basic principle is that the joint property of nonmarital partners is divided into equal parts (LPORR, art 75(1) and (2)). Nevertheless, at the request of one of the spouses, the court can award a larger part of the joint property, if that spouse can prove that his or her contribution to the joint property is obviously and significantly larger than the contribution of the other spouse. The same principles for the division of joint property are applied for the nonmarital partners as well.

During the division of the joint property, the items that belong exclusively for the personal use of the nonmarital spouses are separated (LPORR, art 76(2)). Each nonmarital spouse has the right to acquire the items from the joint property that serve for carrying out this activity. (LPORR, art 76(1)). If the value of the items from paragraphs 1 and 2 of this article is disproportionately large compared to the value of the joint property, division of those items will also be carried out, unless the spouse who should receive these items does not compensate the other spouse with the appropriate value or give other items to the other spouse with that spouse's consent (LPORR, art 76(3)).

The spouse who is entrusted to raise and educate the joint children is also awarded the ownership of items that serve for the children or are intended solely for their direct use (LPORR, art 77(1)). The spouse who is awarded custody of the joint children is also awarded those objects where there is an obvious interest in their remaining in the property and to be owned by the spouse with the custody of the children (LPORR, art 77(2)). Gifts that the spouses had given to each other before or during the nonmarital cohabitation are not to be returned (LPORR, art 80).[54]

V RIGHT TO MAINTENANCE OF UNSUPPORTED PARTNER

Nonmarital partners, apart from the right of joint property, have the right to maintenance. According to the provisions of the FLA, when the court is

---

[54] 'The relatives of the fiancé who gave gifts to the fiancée during the betrothal have no right to ask to have the gifts returned, if a marriage is concluded, or in cases where the marriage has been terminated.' (Supreme Court of Macedonia *rev 347/85* 36 *VSM IV dec. 13*).

'deciding on the maintenance of a nonmarital partner, a provision which refers to the maintenance of spouses shall be applied appropriately' (art 193). On the basis of this, the same provisions for spouses are applied to nonmarital partners to regulate the conditions for obtaining maintenance, the moment when the right to maintenance occurs, the limitation period for requesting maintenance, the duration of maintenance and termination of maintenance (FLA, arts 185–202).

(a) Conditions for obtaining maintenance for the nonmarital partner

The first condition for obtaining maintenance for a nonmarital partner is the termination of a nonmarital community. With this the need for maintenance of the unsupported partner arises. The *second condition* is the duration of the nonmarital union: at least one year from its beginning. The *third condition* for maintenance is that the nonmarital partner does not have enough estate for maintenance and is incapable of work or does not have work through no fault of their own. In this sense the nonmarital partner is entitled to maintenance from his or her nonmarital partner proportionately to the latter's abilities (FLA, art 185(1)). The court must take into account all the circumstances of the case, and reject the request for maintenance, if maintenance is required by a nonmarital partner who maliciously or without justified reasons has left the other partner (FLA, art 185(2)). *The fourth condition* is the nonexistence of circumstances on the basis of which the court can reject the request for maintenance of the other nonmarital partner. In that case, the court can reject the maintenance request, if the nonmarital partner without serious provocation by the other nonmarital partner, behaved cruelly during the nonmarital cohabitation or if the request for maintenance represents an obvious injustice for the other partner (FLA, art 187). Furthermore, the court can reject the maintenance request if the nonmarital partners live separated for a long period, fully independently, and each of them is providing assets for his or her maintenance. The court will reject the maintenance request if the circumstances of the case determine that the nonmarital partner who requests maintenance is not put in a more difficult position than the one in which he or she was in at the moment of the beginning of the nonmarital cohabitation (FLA, art 188).

(b) Determination of maintenance

In determining the need for maintenance of the nonmarital partner, the court shall take into consideration the status of the estate of the nonmarital partner, working ability, employment possibilities, health status as well as other circumstances on which the assessment of needs depends (FLA, art 194(1)). In determining the position of the nonmarital partner who is obliged to pay maintenance, the court must take into account all the income and the real possibilities for earning, as well as his or her own needs and legal obligations to maintain other persons (FLA, art 194(3)). The amount of maintenance the court can determine can be a certain sum of money or a percentage of the

realised personal income, realised from the revenues and incomes of other types of activity (FLA, art 196). If the circumstances on which the order was based change, a nonmarital partner may request the court to increase, to decrease or to abolish the maintenance (FLA, art 201).

(c) Time limitation for submission of a request for maintenance

If all conditions for acquiring maintenance are fulfilled, the unsupported nonmarital partner has the right to make a special complaint at the moment when the nonmarital cohabitation ceased. On the basis of this complaint the court can determine the amount of maintenance to be paid to the unsupported nonmarital partner (FLA, art 186(1)). The right to maintenance of the unsupported nonmarital partner can be exercised within one year after the termination of the nonmarital life (FLA, art 186(2)).

(d) Duration of the maintenance

Pursuant to the legal provisions of the FLA, the right to maintenance of the unsupported former nonmarital partner shall endure no more than 5 years from the termination of the nonmarital community (art 189(1)). Nevertheless, if the nonmarital partner requires, the court may prolong the maintenance even after this period if there are justifiable reasons, and particularly if the unsupported nonmarital partner is incapable of maintaining (supporting) him or herself (FLA, art 189(2)). Nonetheless, the court can determine that the maintenance is to last less than 5 years, when there is a presumption that the nonmarital partner will be capable of providing means and estate for his or her own maintenance in the future. In those cases where the nonmarital union lasted for a short period of time, the court may decide that the maintenance is to last for a determined period of time, or to completely reject the request for maintenance if the nonmarital partner who requests maintenance can provide his or her own means for maintenance in a foreseeable time frame. In some cases, the court can prolong the payment of maintenance for an undetermined period (FLA, art 190(3)). In this case, the application for prolonging maintenance can be submitted solely after the termination of the period for maintenance (FLA, art 190(4)).

(e) Termination of the maintenance

The right to maintenance of an unsupported nonmarital partner can be terminated on the basis of several reasons. Thus, the right to maintenance of the former nonmarital partner ceases when the conditions for maintenance envisaged by the law cease to exist. The right to maintenance of the former nonmarital partner shall cease with the end of the time determined in the order for maintenance and when the former nonmarital partner enters a new marriage or begins a new nonmarital union (FLA, art 191).

VI RIGHT TO BIOMEDICAL ASSISTED REPRODUCTION

With the adoption of the Law on Biomedical Assisted Reproduction (LBAR) in 2008,[55] nonmarital partners obtained a right to biomedical assisted reproduction.[56] According to the legal provisions of this Law, the procedure of biomedical assisted reproduction (BAR) shall be implemented if prior treatment for infertility is unsuccessful and in cases where a severe hereditary disease can be transmitted to the offspring.[57] The Law envisages priority being given to the use of personal reproductive cells, or an embryo of the marital and nonmarital partners, on whom the procedure is performed.[58] Donated sperm, ovum or embryo of other persons can be used only in cases when it is not possible to use personal cells or if they are not used to prevent the transmission of a severe hereditary disease to the child.[59] According to the provisions of the Law on BAR, when prior treatment is unsuccessful, the right to use the procedure of BAR resides with adult men and women, who are capable of performing parental care and who are married or live in *nonmarital cohabitation*, as well as single women, who are not married or who do not have a nonmarital partner (art 9). This provision of the Law, that regulates subjects of BAR, causes two problems. The first one is related to the determination of the existence of nonmarital cohabitation. Unlike other European countries, where nonmarital partners who live in nonmarital cohabitation have the duty to register their nonmarital union (usually with a notary) in order for this union to produce legal consequences, in Macedonia this is not the case. Nevertheless, it is not stated how the existence of cohabitation will be proved. Thus, organisations that carry out the procedure of BAR must simply trust the man and woman who are submitting the application that they live in nonmarital cohabitation.[60] In the Law on BAR of the Republic of Macedonia, as well as most European countries, choosing the sex of the child is banned, as well as the combination of male or female reproduction cells, that is, that originate from the spermatozoids of two or more men or ova from two or more women. In Macedonian BAR the reproductive cloning of human beings and surrogate motherhood are also not permitted.

VII RIGHT TO POSTHUMOUS REPRODUCTION

The Republic of Macedonia is one of the countries in Europe where posthumous reproduction is allowed and regulated by the law. The Law on

---

55 *Official Gazette of Republic of Macedonia*, no 37/2008.

56 For more details see: Dejan Mickovikj 'Law on Biomedical Assisted Fertilization – Dilemmas' (2009) 203 *Lawyer,* (Lawyers Association of Republic of Macedonia, Skopje).

57 Article 3 of LBAR.

58 Article 6 of LBAR.

59 Article 7 of LBAR.

60 Ibid.

BAR, besides spouses, extends the right to posthumous reproduction to nonmarital partners.[61] In art 33 of the Law on BAR it is stated that:

> 'A man and woman, who on the basis of medical examinations and the experience from the medical sciences face the danger of infertility due to health reasons, can keep their spermatozoids, ova, tissue from the ovaries or testes, for their personal use in an authorized medical institution. In the case of death of the man, a posthumous BAR is allowed upon his prior written consent during the period of one year after his death.'

In this sense under the Macedonian Law on BAR it is envisaged that the child should be conceived within one year of the death of the donor. We consider that this deadline is too short. After the death of the spouse, the woman should have a reasonable time for grieving and time to consider whether she wants to start the procedure of posthumous reproduction. Immediately after the death of the partner she finds herself in a difficult emotional condition, when she has to face the loss of the beloved and close person, and during this period she is not capable of making such a serious decision as to conceive a child who shall not have a father, and whom she will have to take care of alone.[62] Therefore, we consider that the deadline for posthumous reproduction should be at least 2 or 3 years, having also in mind that the procedure is not always successful the first time. The decision of the woman whether she is going to use the process of posthumous reproduction or not depends only on her. She has no legal or moral obligations to bear a child with the sperm of her deceased nonmarital partner. For that reason she should have a reasonable period of time at her disposal in order to be able to make a serious and meaningful decision, and not a decision based on stress, grief or distraction caused by the death of the nonmarital partner.

According to the provisions of the Law on BAR the right to posthumous reproduction is envisaged for nonmarital partners. This solution is contradictory to most contemporary legislation. The comparative legal analysis of the legal solutions in European countries and in the United States shows that, in most cases, posthumous reproduction is allowed only for married couples.

If posthumous reproduction occurs and if the child is born after the death of the husband who gave his consent to posthumous reproduction (during a period longer than 300 days), then the child will be considered as illegitimate, due to the fact that the marriage of his or her parents ceased to exist after the death of one of the spouses.[63] The same applies when the partners are not married. For these reasons, in order to determine paternity it is necessary to

---

61 *Official Gazette of Republic of Macedonia*, no 37/2008.

62 See also J Greenfield, 'Dad Was Born a Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance, with a Focus on the Rule Against Perpetuities' (2007) 8(1) Minn J L Sci & Tech 292.

63 Article 50 of the FLA envisages that the spouse of the mother shall be considered the father of the child born during the marriage, or within 300 days after the termination of the marriage.

follow the procedure envisaged by the law.[64] The paternity of a child born out of wedlock (with posthumous reproduction it will always be the case, because the biological father is already dead before the conception of the child) can be recognised even before the birth of the child.[65] Determination of paternity has very great significance for the identity of the child and for the establishment of relations between the child and the relatives of the father.

In compliance with Macedonian inheritance law, the conceived child has no right of inheritance. Namely, in art 122 of the Law on Inheritance[66] of 1996, it is envisaged that an heir can be a person who is alive at the moment of the death of the decedent, or a person who is conceived during the life of the decedent. Having regard to the fact that in posthumous reproduction the child is conceived after the death of the decedent, the posthumously conceived children should be recognised as legal heirs.[67]

VIII RIGHT TO INHERITANCE OF NONMARITAL PARTNERS

In the Macedonian inheritance law, nonmarital partners do not have a right to an intestate inheritance.[68] Therefore, in the Law on Inheritance nonmarital partners are not considered as legal heirs. According to the provision from art 13 of this Law: 'the bequest of the deceased is inherited by his children and his spouse. They inherit equal shares'. However, there are no obstacles, as with any other third person, for a nonmarital partner to become an heir by will of the other nonmarital partner.

---

64 Article 51 of the FLA predicts that the father of the child born out of wedlock will be considered the person who will acknowledge the child as his own. Paternity may be acknowledged in front of the registry officer, the Centre for Social Work and the court. The authority to whom this acknowledgement has been given has the duty to deliver the acknowledgment of paternity to the registry officer authorised for the registration of the child in the register of births, without delay. Acknowledgment of paternity may be also made by will.

65 Article 53 of the FLA prescribes that the declaration for acknowledgment of paternity for a child born out of wedlock may be also made prior to the birth of the child. A declaration made before the birth of the child shall have legal consequences provided that the child has been born alive.

66 *Official Gazette of Republic of Macedonia*, no 47/96.

67 In the Macedonian legal system children born out of wedlock have the same hereditary right as the children born in marriage. In art 4 of the Law on Inheritance it is envisaged that, in respect of inheritance, nonmarital children are equal to marital children.

68 For more details see: Dejan Mickovikj and Angel Ristov *Civil Applied Law – Succession Law,* (Skopje: Institution of Culture 'Shine', 2011) 72; Angel Ristov 'Hereditary Rows' in *Collection of articles in honour of Prof. Ganzovski* (Skopje, Faculty of Law 'Iustinianus Primus', 2011); Ljiljana Spirovikj-Trpenovska, Dejan Mickovikj and Angel Ristov *Succession Law in Republic of Macedonia*, above n 24, 76–81; Ljiljana Spirovikj-Trpenovska *Succession Law* (Skopje: 2 August 2009) 109–112; Kiril Chavdar *Comment on the Law on Inheritance* (Skopje: Academic, 1996).

With regard to the issue of whether nonmarital partners should have a right to inheritance, legal theory in Macedonia for quite some time has been striving to recognise the hereditary and legal status of nonmarital partners.[69] This proposal is completely justifiable, because nonmarital unions occur more and more in contemporary societies. The proposal is justified given the fact that the Macedonian legislator envisages the possibility for certain persons who lived in a permanent community with the deceased, uninterruptedly for 5 years until death, to appear as heirs under the conditions prescribed by the Law on Inheritance (art 29). In this sense, it is more than necessary to anticipate a provision according to which nonmarital partners will have a right to intestate inheritance. Nonmarital cohabitation should be envisaged as a basis for intestate inheritance if it lasted for more than a specifically determined period prescribed by the Law on the condition that there is no matrimonial impediment between the nonmarital partners. Thus, a solution is needed according to which, if nonmarital cohabitation lasted for at least 5 years until the death of the deceased, the nonmarital partner would have a right to inheritance, subsequent to provision for the spouse, within the intestate inheritance rules.[70] In cases where during nonmarital cohabitation there were mutual children, the term should be shorter, ie nonmarital cohabitation should have lasted for at least 3 years until the death of the deceased. Under this proposal, this will be the period necessary for the nonmarital partner to obtain a right to inheritance.[71]

---

69 See more: Ljiljana Spirovikj-Trpenovska *Analogy between Non-marital Cohabitation and Marriage*, above n 24, 8–9; Dejan Mickovikj *Legal Regulation of Non-marital Cohabitation*, above n 24, 8; Ljiljana Spirovikj-Trpenovska, Dejan Mickovikj and Angel Ristov *Succession Law in Republic of Macedonia,* above n 24, 76–81.

70 See Dejan Mickovikj *Legal Regulation of Non-marital Cohabitation*, above n 24, 8.

71 Norway adopted a law which entered into force on 1 July 2009, according to which nonmarital partners who have mutual children have legal rights to inheritance. See more: John Aslan and Peter Hambro, 'New Developments and Expansion of Relationships Covered by Norwegian Law' in Bill Atkin (ed) *International Survey of Family Law, 2009 Edition* (Jordan Publishing Limited, 2009) 381.