LEGAL MATRIMONIAL REGIME IN B&H

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ABSTRACT

Matrimonial regime between spouses or between extramarital partners, and between parents and children is regulated by the Family Law Act of Bosnia and Herzegovina Federation, hereinafter FLA B&HF (SG FBiH 35/05, 41/05), Family Law Act of the Republic of Srpska, hereinafter FLA RS (SG RS"54/02, 41/08) and the Family Law Act of Brčko District, hereinafter FLA BD (SG RS, 66/07).

Legal rules used for the regulation of the matrimonial regime between spouses, as well as between spouses and third parties make matrimonial regime (Ponjavić, 2005, p. 361). Matrimonial regime between spouses in family legislation in Bosnia and Herzegovina (B&H) is regulated in two following ways: as legal matrimonial regime and as contract matrimonial regime. Legal regime is the one which applies on spouses if not arranged otherwise prior to contracting marriage or during marriage. In this paper the author indicates the differences between the legal matrimonial regimes of the two entities as well as those between the entities and Brčko District of Bosnia and Herzegovina.

Key words: *matrimonial regime, family legislation*

INTRODUCTION

Legal matrimonial regime is regulated by imperative norms, and it is implemented is spouses do not exclude it by means of contract. Comparative law distinguishes three legal matrimonial regimes (Kovaček-Stanić, 2002, p. 44):

- community property systems
- separation of property systems
- delayed community property (combination of the two)

Community property systems are prevalent in comparative law, and the characteristic of this regime is the fact that besides spouses' property there is also community property. In this regime, spouses become owners, joint owners or co-owners of everything obtained by work during a marriage.

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This regime is accepted in Russian, French, Danish, Dutch, Hungarian, Spanish and Portuguese law (Kovaček-Stanić, 2002).

Family legislation in B&H accepts the community property system, in the way that there are differences in determination of matrimonial property. That is, while FLA B&HF and FLA BD regard matrimonial property as co-ownership, FLA RS regards spouses' property as mutual property. In general, according to the legislation in B&H legal matrimonial regime includes matrimonial property and personal property.

Concerning terminology, it should be mentioned that family law acts in B&H use various terms for spouses' property. Family Law Act of Bosnia and Herzegovina Federation and Brčko District name spouses' property as matrimonial property while Family Law Act of the Republic of Srpska uses the term spouses' property. However, this does not pose a problem for the research or for the implementation of these acts, as shall be briefly mentioned further in the text.

CONCEPT AND CONSTITUENT ELEMENTS OF MATRIMONIAL PROPERTY

The concept of matrimonial property is identical in all three family acts, which means that constituent elements are identical.

"Matrimonial acquis includes the property which spouses gained by their work during their marital community, as well as the income from that property" (FLA B&HF, Art 251., sub. 1.; FLA BD, Art 228., sub. 1.)

"Joint property includes the property which spouses gained by their work during their marriage, as well as the income from that property" (FLA RS, Art 270., sub. 5.).

The occurrence of matrimonial property is related to the means and time of its occurrence. Matrimonial property is gained by work during marriage, which is the first constituent element of its occurrence. Work is the way of gaining property value, and as the basis of gaining property work can be individual or mutual, direct or indirect. The work criterion is decisive in determining whether a certain property is matrimonial or personal. For example, if a spouse finds a valuable object, it will become his/her personal property (Rašović, 2005, pp. 176-178). However, when a spouse has a profession of collecting old and abandoned things, the value realized through their sale shall be regarded as matrimonial property (Hrabar, 2002, p. 48). Besides work, Family law acts also include the norms which determine exemptions from work as the means of gaining matrimonial property. They are matrimonial property income, gifts made by the third parties, winnings from games of chance and intellectual property income, which will be further explained.

The income gained from the property acquired by work during marriage is matrimonial property. Matrimonial property income may include interests on bank savings, income from capital, rent etc.). It is important that income originates from the property that makes matrimonial property. The change of property in terms of its character and identity does not affect the co-ownership regime of matrimonial property (Hrabar, 2002, p. 46).

Gifts given to spouses during marriage are also matrimonial property, regardless of the fact which spouse received them, if not specified otherwise by the gift purpose, or if the circumstances at the moment of giving a gift can indicate that the donor wanted to give it to one spouse only (FLA B&HF, Art 251., sub. 1.; FLA RS, Art 270., sub. 6.; FLA BD, Art 228., sub. 2.).

One can assume from the gift itself who it is intended for, although it is not explicitly done. For example, female jewelry, nightgown, woman's perfume are obviously gifts for a female person, being then the personal property of that person. However, if spouses are given things for satisfying basic needs such as refrigerator, vacuum cleaner, dish washer, furniture etc., it is obvious that such gifts are intended for both spouses, and as such they are included in matrimonial property. In the cases in which donor specifically states to whom the gift is given or on which occasion, for example birthday present, presents for obtaining MA title etc., it can be easily concluded that the gift is for one spouse only, and it is included in personal property. Donor's decision to give a gift can be based on various motives (*animus donandi*). In case a donor gives a gift with illicit motives, the contract is void regardless of donee's conscientiousness, as he/she did not know that donor's motive was illegal (Morait, 2007, p. 332).

Winnings from games of chance are not acquired from work, which is the reason why it should not be included in matrimonial property. However, the bets in games of chance most often come from matrimonial property, and the winnings are related to the bets. In the previous jurisprudence, it was necessary to prove that the bets in games of chance come from personal or matrimonial property. "If the money comes from matrimonial property, than the winnings would also be a part of it, on the other hand, if the money is from personal property, then the winnings would be personal property as well" (Sudžum, 1982, p. 168). Spouses are connected with mutual goals and needs. By participating in games of chance, a spouse does not intend to keep any possible winnings to him/herself; he/she is willing to use the winnings to meet their mutual needs. Bearing this in mind, the theory usually presents the opinion that winnings from games of chance should be a part of matrimonial property (Sudžum, 1982, p. 169).

In family acts in B&H it is explicitly stated that winnings from games of chance are included in matrimonial property. Besides being more just, this solution is also more practical. The interpretation accepted in our previous practice, in which the origin of the resources invested in betting defines the type of property in which the winnings will be included, causes difficulties – it is extremely difficult to prove whether the bet was given from personal or matrimonial property (Traljić & Bubić, 2007, p. 74).

Intellectual property includes two parts: copyrights and related rights and the rights on industrial property (patent, know-how, technical improvement, stamp, industrial design and geographical identification of a product). A common idea for all intellectual property rights is that they are human-made products and, as such, they are not related to gaining assets. This means that intellectual property rights do not cease to exist even if their materialized forms fail. Certain forms of intellectual property have their economic function as well; they provide profit to the owners as a result of their economic usage. The standardization in family legislation in B&H (FLA B&HF Art 251., sub. 4.; FLA RS Art 270., sub. 4.; FLA BD Art 228., sub. 1.), which will define that intellectual property related income is included in matrimonial property, various interpretations regarding intellectual property will be eliminated in practice. It is important to emphasize that this regulation does not question intellectual property rights; it covers only the income related to intellectual property (Traljić & Bubić, 2007, p. 74). Author's work of art, a painting for example, is personal property of the spouse who painted it. However, the money received from selling the painting is matrimonial property.

The second constituent element of matrimonial property is the time when such property is gained, the action which occurs during marital community. Legislator uses the term "marital community" instead "marriage". Therefore, matrimonial property can be gained only during the so called "active marriage". "By termination of marital community (separation), regardless of whether the marriage still formally exists, acquiring matrimonial property ceases to exist" (Nakić-Momirović, 2006, p. 435). "Each spouse has his/her own life; they work for themselves and gain their own property. Cooperation does no longer exist, as well as contributions of one spouse to another; there is no mutual help, proprietary interests are separate, which is the reason why matrimonial property cannot exist" (Mladenović & Panov, 2003, p. 191). Short-time terminations of marital community of spouses do not result in the termination of matrimonial property acquisition (field work of one spouse etc.). Months-long separation of spouses shall not always result in termination of matrimonial property acquisition. There are cases in which one spouse is a guest worker in a foreign country where he/she spends several months.

"The existence of marital community requires the willingness of spouses (animus). Thus, even though they do not live in the same households (one spouse works in another country or place due to the nature of work) and they want to live as spouses, the marital community is considered to exist" (Alinčić, et al., 2006, p. 497).

The acquisition of matrimonial property requires a cumulative fulfillment of both elements, work and acquisition during marital community, with the abovementioned exceptions.

MANAGEMENT AND DISPOSITION OF MATRIMONIAL PROPERTY

Spouses can reach an agreement on the means of management. Therefore, one spouse can manage some things that belong to matrimonial property, while the other spouse can manage the rest. Legislator does not specify a form for this kind of agreement, which allows spouses to reach an agreement on property management orally and at any time.

Costs of usage, management and maintenance of things and other related costs for the entire object shall be borne by co-owners, in proportion to the size of their shares (Property Relations Act of Bosnia and Herzegovina Federation, hereinafter PRA B&HF, Art 16., sub. 2.). In other words, each spouse shall be responsible for a half of the costs as the shares that belong to spouses in matrimonial property are equal.

PRA B&HF distinguishes the activities related to routine management and those beyond that scope. Routine management activities require the consent given by co-owners whose shares, when taken together, make more than one half of their value. If such consent is not achieved, and the activities are necessary for regular maintenance, each co-owner shall have the right to demand a court order on that issue (PRA B&HF Art 17. sub. 1. and 2.). Co-owner may, without the consent of other co-owners, perform urgent activities or those necessary for maintaining and keeping things (maintenance related repairs, sowing, harvest, keeping things, payment of costs for all activities, collection of earnings etc.). In such cases, the request for an explicit consent of a spouse is not to be expected.

The consent must be given by all co-owners for activities that are beyond the scope of regular

maintenance (changing of thing/object purpose, removing the entire object without authorization, renting the entire object, mortgage on the entire object, establishing servitude, bigger repairs or alterations that are not required for maintenance etc.) (PRA B&HF Art 17. sub. 3.).

If one spouse takes some legal actions that are beyond the routine management scope, he/she shall be considered to have done some other person's job. Such actions would lead to the occurrence of obligation and the application of the rules valid for order-free business activities.

A spouse can independently have his/her share of matrimonial property at disposal, without the consent of the other spouse (PRA B&HF Art 17. sub. 3. „Co-owner may dispose of his/her share without the consent of other co-owners"). Disposition includes removal without authorization and burden on the property. If the sale of the co-ownership part is to happen, other co-owners have the preemption right only if such right is regulated by the act (PRA B&HF Art 17. sub. 4.). Family Act does not regulate the preemption right for the other spouse. When it comes to divisible things, it is possible for a spouse to intentionally (in a fit of passion, deliberately or out of rashness) sell his/her part (a half of the house, orchard etc.). Spouses acquire matrimonial property for satisfying joint life needs and it is obvious that certain things or objects may have sentimental and some other value for both spouses. This is the reason why it seems that the preemption right should be regulated for the spouse in those cases when property disposal is involved. Such action might correct the current solution according to which the preemption right is recognized to the spouse only in case of a court order which imposes the division of things by sale (only in cases when the division is either impossible or possible with a considerable decrease in property value)(FLA B&HF Art 257.; FLA BD Art 234.).

In accordance to the legal nature of matrimonial property, FLA RS states that spouses should agree on the disposal of matrimonial property. A spouse shall not independently control his/her part, nor can they burden it by some legal action (FLA RS Art 271., sub. 1. and 2.). Strict adherence to this regulation on the disposal of matrimonial property would make legal actions more difficult. It may be advisable to suggest the opinion according to which a spouse may, without the consent of the other spouse (which includes his/her resistance as well), take activities on maintenance and keeping things, as well as those activities necessary for preventing their damage (Rašović, 2005, pp. 249-252).

LEGAL NATURE OF MATRIMONIAL PROPERTY

In nature of matrimonial property, there is a difference between FLA B&HF and FLA BD on one side and FLA RS on the other. FLA B&HF (Art 252. sub. 2.) and FLA BD (Art 229.) defines spouses as co-owners with equal parts in matrimonial property, if not arranged otherwise.

Co-ownership exists when an undivided thing belongs to two or more persons in such a manner that a part of each of these things is defined in proportion to the whole (ideal part) (PRA B&HF Art 15.) Each of the co-owners has their own co-owner's proportional part, provided that the integrity of the ownership right of a certain thing is not affected. FLA B&HF regulates that spouses are co-owners with equal shares, and that it is not possible to demand that the court defines a larger share. The legal presumption on the size of co-owner shares in matrimonial property is irrefutable.

The equal part system defines that spouses' shares are always equal. The fact that one spouse, during the acquisition of matrimonial property, was thrifty and the other like a prodigal, does not affect their co-owner parts (Alinčić et al., 2006, p. 505). Having all this in mind, it is reasonable to accept the claims that the division to equal parts shall not always be just for both spouses (Traljić & Bubić, 2007, p. 80; Alinčić et al., 2006; Mladenović & Panov, 2003). In order for spouses to rule out legal matrimonial regime, or create the regime which suits them most, legislator has left the possibility of concluding a marriage contract. On the other hand, the equal part system especially protects the unemployed spouse, to whom is thus given equality in advance. Division to equal parts contributes to shortening judicial proceedings thus eliminating the lengthy ones, which is also extremely significant (Traljić & Bubić, 2007; Alinčić et al., 2006; Mladenović & Panov, 2003).

FLA RS (Art 270. Sub. 5.) defines that spouses gain joint ownership. "Joint ownership is the ownership of several persons of an undivided thing when their shares are definable but not specified in advance" (Property Relations Act of Republic of Srpska, SG 124/08). FLA RS has defined the shares in matrimonial property of the spouses where each spouse is given one half. Although the norms of FLA B&HF and FLA RS, in terms of the share that belongs to spouses (equal shares, one half) seem to be identical, there are significant differences.

First of all, FLA RS contains a refutable legal presumption that each spouse is entitled to one half of their matrimonial property. Article 273 of FLA RS states that each spouse can demand that the court defines a larger share of the belonging half, if he/she proves that his/her contribution in acquiring matrimonial property is obviously bigger than the contribution of another spouse (Section 1), in which case the court defines the size of the spouses' share.

FLA B&HF and FLA BD, FLA RS (Art 272.) states that, on the occasion of the division of matrimonial property, "each of the spouses is entitled to one half of the matrimonial property". However, the next article defines that each spouse may demand that the court defines a larger portion of matrimonial property for him/her if they proves that their contribution in acquiring matrimonial property is obviously bigger than that of the other spouse (FLA RS Art 273. sub. 1.). In FLA RS, legislator resorts to the model of dividing spouses' property into equal parts. However, in order to avoid a priori iniquity of this solution, legislator also gives a possibility (thus transferring the burden of evidence to the spouse who believes to be deprived in his/her share) for a spouse to refute this legal presumption in a law suit. Family Law Act of the Republic of Srpska thus accepts the mixed system of matrimonial property division (Morait, 2004, p. 39).

SEPARATION OF PARTS OUT OF MATRIMONIAL PROPERTY

FLA B&HF and FLA BD do not regulate a possibility for separation of property that serves for personal needs, personal belongings of spouses, property necessary for their profession, or property that would be of personal interest for any of spouses. This possibility of the inclusion of such parts of the property during its division was regulated by the former Family Law Act of the Socialist Republic of Bosnia and Herzegovina (FLA SRB&H) (Traljić & Bubić, 1998, p. 323). The fact that such norm does not exist in current legislation might lead to unjust situations in practice. For example, a situation may happen in which one spouse is a lawyer who, while

working during marital community, was purchasing professional literature. In the process of matrimonial property division, another spouse would be entitled to a half of the books purchased, although they will be sold. A fact is not to be neglected that a spouse does not have preemption rights unless the court brings the order that the division of property is to be made by selling (in cases where division is impossible or possible with a considerable decrease in the value of property). Without legal regulations in this matter, the legal practice shall bear the burden of overcoming this obstacle.

Unlike FLA B&HF and FLA BD, FLA RS (Art 274) states that, in the division of matrimonial property, a spouse will primarily be given the objects necessary for his/her profession. Also, his/her part shall also include the objects acquired through work while in marital community, that are exclusively for his/her personal needs. If the value of such things is disproportionately higher than the total value of matrimonial property, the spouse who should be given such objects has two options: either to compensate a spouse for the appropriate value, or to cede some other things to a spouse. If a spouse does not compensate for the appropriate value, or does not cede some other things, the property necessary for his/her profession shall be divided.

A spouse entrusted with child care shall, in matrimonial property division, besides his/her part be also given the things necessary for direct child needs (FLA B&HF Art 256; FLA BD Art 233). This solution protects the interests of a spouse entrusted with child care failing which his/her part would be reduced by the value of things intended for direct child needs. If the decision on child care is altered, spouse shall cede such things to the other spouse or the person who was granted child care (FLA B&HF Art 256. sub. 2.). Unlike FLA B&HF and FLA BD, Family Law Act of the Republic of Srpska does not include a norm regarding the return of things intended for child needs or his/her direct usage.

PERSONAL PROPERTY OF SPOUSES

Family legislation in Bosnia and Herzegovina determines personal property from two aspects: time and manner of acquisition.

Personal property a spouse is the property he/she owns at the moment of contracting a marriage, regardless of the manner of acquisition (either by work or by some other legal business)(FLA B&HF Art 254. sub. 1; FLA RS Art 270. sub. 1; FLA BD Art 231. sub. 1). By a broader application of the time criterion accepted for defining the term matrimonial property, personal property also includes the property acquired after matrimony ceased to exist, regardless of the legal basis of its acquisition (Traljić & Bubić, 2007, p. 84). Personal property is also the property given to a spouse after the division of matrimonial property, due to the fact that spouses may request matrimonial property division even during matrimony.[2]

When the property is acquired during marital community, the manner of its acquisition is the decisive factor for defining personal property. The property acquired by a spouse under some other legal basis, other than the one for matrimonial property, is his/her personal property (FLA B&HF Art 254, sub. 2; FLA RS Art 270, sub. 7; FLA BD Art 231, sub. 2). Thus, personal property, besides the property owned by a spouse at the moment of contracting a marriage includes the following:

2 Authors want to emphasize that: This is not the division by marrital contract but the division of matrimonial property in a court procedure (FLA B&HF Art 254, sub. 2; FLA RS Art 270, sub. 7; FLA BD Art 231, sub. 2).

Property acquired during marital community under legal basis other than work (inheritance, scholarships, prizes, compensation damage related to personal property or damage inflicted on a spouse personality), gifts to one spouse, things and rights belonging to a spouse in accordance to a marital contract, special property related income which is not the result of spouses' work (lease, rent) and intellectual property (other than intellectual property income).

General rules of civil law apply to personal property. A spouse is the owner of personal property and he/she independently manages and controls it. Spouses are responsible (by their matrimonial property and their personal property) for the liabilities taken by one spouse for satisfying the needs of matrimony or family, as well as for the liabilities for which both spouses are mutually responsible (FLA B&HF Art 262; FLA RS Art 279; FLA BD Art 239.

CONCLUSION

Family law acts in Bosnia and Herzegovina implement the community property systems. According to family law acts in Bosnia and Herzegovina, matrimonial property includes the property acquired spouses through their work during marital community, as well as the income related to that property. Besides the general definition of matrimonial property, legislator has also regulated exceptions to the rules related to work as a manner of matrimonial property acquisition. Therefore, matrimonial property includes: gifts from the third parties during marital community (money, things, assistance in work etc.), regardless of the fact which spouse receives them, unless concluded otherwise from the purpose of the gift, or one can conclude at the moment of giving a gift that a donor specifically intended it for one spouse only. Winnings from games of chance and intellectual property income acquired during marital community are also matrimonial property.

Spouses are co-owners of matrimonial property with equal shares, while in accordance to the legislation of the Republic of Srpska, they are joint owners with equal shares. The legal regime in Bosnia and Herzegovina Federation and Brčko District do not allow spouses to prove that one spouse had lower or higher contribution in matrimonial property. The possibilities for proving a bigger share in matrimonial property remains in the law in the Republic of Srpska, which seems as a bad solution. Omission of some legal solutions in FLA B&HF and FLA BD, which were included in the former FLA SRB&H, related to the possibilities for the inclusion in a possibility for separation of property of things for personal needs, profession related property and the property for which one spouse may have personal interest, as well as the omission of preemption right (included in FLA RS) might lead to some unjust solutions during matrimonial property division.

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