



## Special Issues Regarding The Family's Residence

### Private Law

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**Abstract:** In the light of the current Civil Code, the family's residence has a special legal regime, being properly protected. In this context, our article regarding of the main rules which ensure the protection of this residence is justified. As a result, our object of study is mainly directed at the special regulations regarding the hypothesis in which the residence is involved, as well as examining the legal rights of each spouse, even if only one of them is the holder of the lease contract or this contract is concluded before marriage. Such an endeavor is based on examining the provisions in this area and in specialty literature, as jurisprudence is now being clarified on this matter.

**Keywords:** family residence; consent; beneficiary of the lease contract

### 1. Introduction

The special regime of protecting the family's residence is a series of imperative legal provisions – articles 321-324 of the Civil Code<sup>2</sup>. Thus, the notion of family residence is legally regulated (article 321), the judicial regime of some acts (article 322), the rights of each spouse over the rented residence (article 323) and attributing the lease contract (article 324)

This series of regulations is placed by the lawmaker within the common provisions regarding the rights and patrimonial obligations of the spouses, which are

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<sup>2</sup> Law no 287/2009, republished in the Romanian Official Gazette no 505/15.07.2011, with subsequent changes and additions.

mandatory regardless of the matrimonial regime. Such a conclusion is seen in article 312 of the Civil Code which states: “*regardless of the chosen matrimonial regime, the provisions of the present section are mandatory if the law does not state otherwise*”. The family residence is part of the primary imperative regime, as there are no possible waivers from this regime by matrimonial convention.

In regard to the enforcement of the new regulation, according to the provisions of articles 30-32 of Law no 71/2011 for the coming into force of the Civil Code<sup>1</sup>, the legal provisions which we are about to analyze will be applied accordingly to the marriages which are valid at the time the current Civil Code came into force, if the disposition acts over the family residence or the goods which furnish it or decorate it, the lease contracts or attributing the lease contract occurred after this date.

The family residence is determined by both spouses, by mutual agreement, as regulated by article 308 of the Civil Code: “The spouses mutually decide in all aspects of marriage”, and the protection ensured by the text of law which we analyzed is exclusive, as just one of the family houses can be established as the family residence (Florian, E., 2011). The unjustified refusal of one of the spouses to live together with the other spouse is grounds for divorce (Ghiță & Albăstroiu, 2012).

In regard to the time protection of the family residence, it exists in time as long as the marriage lasts (if it was not invalidated or became void, thus protection exists even if the spouses are separated or have started the legal proceedings for divorce), regardless of whether there was a change in the matrimonial regime during marriage. (Baias & Chelaru et al., 2012).

## 2. Concept Explanation

The family residence is legally defined by article 321 alignment 1 of the Civil Code as being “the mutual residence of the spouses or, in lack of, the residence of the spouse which has custody of the children”. This is a result of the definition given by special law (Law no 114/1996<sup>2</sup>-the law for residences) which defined, in article 2 letter a) the residence as “*the construction formed of one or more living chambers*”

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<sup>1</sup> Published in the Romanian Official Gazette no 409/10.06.2011, rectified in Romanian Official Gazette no 489/08.07.2011.

<sup>2</sup> Republished in the Romanian Official Gazette no 393/31.12.1997.

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*with dependencies and utilities, which satisfies the living needs of a person or a family”.*

Based on these two regulations, a doctrine definition was created (Bodoaşcă, 2013), as follows: the family residence is *“that construction, of one or more living chambers with dependences and utilities in which, regardless of the title, the spouses are living or the spouse which has custody of the children is living”.*

The general criteria is that of the destination of the house, namely that of serving the interest of the family (Baias & Chelaru et al., 2012). By developing this concept, doctrine (Florian, E., 2011) identifies two criteria which will determine the family residence: “an objective one – the material existence of a living construction and a subjective one – the destination of the construction, namely that of family residence”. Following this idea, the family owns the residence by mutual will of the spouses which turned that good into a family asset. (Florian, 2011).

Also, in order for a house to become a family residence, there are no special legal forms; the simple cohabitation of the spouses is enough (Florian, 2011). Still, in order to ensure third party opposability and to protect the goodwill third parties (as regulated by law – article 902 alignment 3 of the Civil Code, a third party is *“any person who has a real right or another right in regard to that specific good”*), the provision of article 321 alignment 2 of the Civil Code states that *“each of the spouses can ask for a house to be established as a family residence by inscription in a cadastral registry, even if he is not the owner of the house”*. This provision is doubled by article 902 alignment 2 point 5 of the Civil Code. It is appreciated (Bodoaşcă, T., 2013) that *“even in the case in which the spouses only have a claim over the residence, regardless of the title, the third party who owns the immobile good can’t fight the inscription as the spouses’ rights over the home derives from law, not from their convention”*.

Not turning a house in a family residence reflects on the complaint which can be filed by the injured spouse, who did not give consent; thus, alignment 5 of article 322 of the Civil Code states that the annulment of the act can’t be requested, just damages from the other spouse, except for the case in which the third party of goodwill has had knowledge of the house statute as family residence by any other means.

A consequence of the quoted legal text is that the family residence is protected, as the spouses are obliged to live together, not to have a common domicile. As a result, in practice, it is possible for the spouses to have separate domiciles, but to

own a common house, as it is subject to special protection (Baias & Chelaru, 2012). Also, the spouses are obliged to live together; living separately is an exception which is justified in case there are serious reasons. The conclusion is that the family residence must not be mistaken for the domicile of the spouses, only with the domicile of minor children which have no exercise capacity and who live with one or both parents (Bodoaşcă, 2013).

The last part of article 32 alignment 1 of the Civil Code points to the conclusion according to which in case the spouses are separate or have separate domiciles, the family residence is the house in which one of the spouses lives or where the children of the spouses live.

When discussing the legal nature of the family residence, we must mention that it can consist of a joint property good or it can be a personal good of one of the spouses; also, the house can be rented or used by any other title (lease, life interest cohabitation) by both spouses, without actually owning it. (Crăciunescu & Lupaşcu, 2012).

### **3. Ensuring Legal Protection for Judicial Acts Regarding the Family's Residence**

According to the provisions of article 322 alignment 1 of the Civil Code “*neither of the spouses, even if he has sole property over the house, can't decide over the family residence and can't conclude acts which will affect its use without written consent from the other spouse*”.

The same line of thinking is applied to goods which furnish or decorate the residence – according to article 322 alignment 2 these can't be moved or decided upon without consent from the other spouse; this is an exception to the rule regulated by article 346 alignment 2 of the Civil Code, which states that any of the spouses can decide alone on the mutual good whose disposal is not subject to publicity formalities.

The acts to which this regulation refers to are listed by specialty doctrine (Avram, 2013), as *inter vivos* acts, valuable or free acts among living people as follows: selling, exchanging, donation, mortgage, input in company.

As the previously quoted regulation makes no mention about the form of the document which expresses the legally required consent, it is accepted (Bodoaşcă,

2013) that it can be expressed by holographic signature, by a solemn document; there is no such possibility in case the family residence will be inscribed in the cadastral register, as for such a hypothesis article 1244 of the Civil Code will be applied, requiring solemn form for these papers.

The text of law which we have examined is an actual legal limitation of one of the spouses' rights to administer his family's residence on his own (Baias et al, 2012); the result of this limitation is that the spouses are prevented from concluding abusive or imprudent acts which would affect the lives of the family members. (Crăciunescu & Lupașcu, 2012)

On the other hand, according to the provisions of article 322 alignment 3 "*in case consent is denied without legitimate reason, the other spouse can file a complaint at the tutelage authority, as the institution must authorize the conclusion of such an act*". This text of law sanctions the potential legal abuse. Of course, nothing prevents the parties from resolving this matter amicably (Spîrchez, 2013).

It is also believed (Bodoașcă, 2013) that the reason is legitimate in case the selling of the house forces the spouses to live separately and the children would live with other people than their family.

We must keep in mind that the provisions regarding consent from the spouse who doesn't own the residence determines "*a relative unavailability of the family residence*" (Florian, 2011), the consequence being that the family home can't be subject to execution without previous consent from the spouse who doesn't own.

Legal doctrine (Baias et al., 2012) listed the exceptional situations from the above mentioned rule:

- written consent from both spouses is needed in case of voluntary disposal acts, thus allowing for expropriation, for example.
- the spouse who owns can administer the house by will, which is a *mortis causa* act, which produces effects from the time the marriage is dissolute (by the death of the testator spouse) thus ending the matrimonial regime.
- any of the spouses can ask for the partition of common goods, without previous consent from the other spouse in case the residence is mutually owned or owned with a third party.
- starting from the principle of the free exercise of any profession, we can admit that, in case the residence is owned based on a lease contract, the

spouse who has a salary can quit even if, indirectly, the family is deprived of that residence.

- considering the fact that these regulations do not mean the residence can't be subject to mortgage, it could be requested by a debtor of one of the spouses if, according to the matrimonial regime which applies, the residence is part of the goods which can be required, without any previous consent from the other spouse. Thus, we will distinguish between the direct disposal acts (which require consent from the other spouse) and indirect disposition acts, by assuming some debts (Avram, 2013).

In regard to the complaint which can be filed by the injured spouse - the spouse who did not give consent, this is an action for annulment which can be filed within a year from the date the spouse acknowledged the act; under no circumstance, the complaint can't be filed after a year passes, according to the provisions of article 322 alignment 4 of the Civil Code.

As for relative annulment, it can be covered by the spouse whose consent was not asked for through confirmation, be it express or tacit. The practical example provided by specialty literature (Baiaş et al., 2012) used to illustrate this confirmation is that of the participation of the spouse who did not give consent to the handing over of the apartment which was the family's residence to collecting payment. Also, this action is of *intuitu personae* character, which means that it can only be filed by the spouse whose interest was disrespected when concluding the act.

#### **4. The Spouses' Rights over the Rented Home. The Issue of Awarding the Lease Contract**

Based on the fact that, in practice, there are specific situations in which the spouses have a common residence in a rented house, article 323 of the Civil Code states that, in these cases, each spouse has his own locative right, even if only one of them is the holder of the contract or the contract is concluded before marriage.

In light of this regulation, it is concluded (Bacaci et al., 2012) that the personal locative right of the spouse is a result of the law, regardless of whether he was part of the lease contract or not.

The same conclusion (Bacaci et al., 2012) is reached by stating that a spouse, even if he is the exclusive holder of the lease contract, can't sublease, dissolve or surrender the contract without written consent from the other spouse.

The provisions of article 322 of the Civil Code, the ones which we discussed throughout this article are applied in this situation which entails the rights of the spouses over the rented residence.

In case one of the spouses dies, article 323 alignment 3 of the Civil Code states that the surviving spouse continues to exercise his location right, if he does not expressly renounces based on article 1834 - in the 30 day term from the time of registering the death. This is a special regulation, which waives common law in lease contracts (Avram, 2013)

The lawmaker was preoccupied with regulating the locative rights in case the marriage is dissolute, thus relevant are the provisions of article 324 of the Civil Code, as follows:

*“(1) When the marriage is dissolved, if it is not possible for both spouses to use the family residence as they do no get along, the lease contract will be awarded to one of the spouses, keeping in mind the best interest of the children, the guilt in dissolution of the marriage and the locative possibilities of ex spouses.*

*(2) The spouse who was awarded the lease contract must pay to the other spouse an amount of money in order to cover the expenses made with moving into a new house, except for the case in which the divorce was pronounced by the exclusive guilt of one of the spouses. If there are mutual goods, the amount of money can be reduced, in the partition of common goods, according to the interest of the spouse who was awarded the lease contract.*

*(3) Awarding the lease contract is made with citing the owner and produces effects from the date the court's decision was final.*

*(4) The provisions of alignments (1) - (3) are similarly applied in case the good is in the common property of the two spouses, as the award of the lease contract produces effects form the date the partition decision is final”.*

As for the award criteria stated in the above quoted provision, these must be applied in the order in which they were stated. This is translated, in practice, by the following: if, for example, we determine one of the spouse guilt in the dissolution of marriage and that spouse has no locative possibilities, the lease can't be awarded

to the spouse who is guilty, even if the other spouse has his own housing possibilities. (Frențiu, 2012)

## 5. Conclusions

One of the legislative novelties of the current Civil Code is the concept of family residence and the protection it benefits from. Thus, in the current paper we had the opportunity to discuss the legal aspects, the rules and exception of common law in regard to family residence, the goods which furnish or decorate the house, the rights of each spouse over the rented home and awarding the lease contract to one of the spouses, when the marriage is dissolute.

Restricting one of the spouses' property rights, by obliging him to ask for personal consent from the other spouse when concluding acts which affect the family residence, is a welcomed provision and it is meant to protect the family. Also, we must point out the lawmaker's preoccupation with ensuing balance between the regulations which consider the spouses and those which consider third parties.

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