

**RIGHT OF A GREATER SHARE OF THE JOINT
MATRIMONIAL PROPERTY DUE TO A CONTRIBUTION
ACCORDING TO THE BULGARIAN FAMILY CODE**

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Abstract: The present article reveals the main legal characteristics of the right of acquisition of a greater share of the joint matrimonial property due to a contribution according to the Bulgarian family law. The author discusses the prerequisites for the occurrence and the manifestation of the right, its legal subject, the preclusive term and method in which it must be exercised. In connection to the right of a greater share, it is also given consideration to the legal regimes of property relations between spouses, especially to the regime of joint matrimonial property and its objects, including from historical point of view. Discussed are also the relevant methods for the termination of the joint matrimonial property. In addition, an analysis is made of a several important questions arising from the case law concerning the law of a greater share.

Keywords: Family Code of Bulgaria, matrimonial property law; joint matrimonial property; right of a greater share of the joint matrimonial property due to a contribution.

1. The new Family Code of Bulgaria (hereinafter FC), adopted in 2009¹, made a fundamental shift of paradigm in the concept of *joint matrimonial property (community of property; joint property; community; common property)* – i.e. a specific property, acquired by the spouses

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¹Promulgated in the State Gazette, issue 47 of 23.06.2009, in force since 01.10.2009.

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during the marriage. In contrast, the previous FC², adopted in 1985, provided for an imperative *ex lege* regime of community of property. According to this singular regime, the spouses were not eligible to waive the occurrence of the joint matrimonial property by means of a contract, for example. Such contracts were declared null and void.

For the first time, the Bulgarian Family law acknowledges the legal possibility of the spouses to optionally choose a regime of property relations, which they consider most appropriate. The new FC defines three regimes of property relations between spouses. According to article 18, paragraph 1 of the FC, regimes of property relations between spouses are the legal regime of joint matrimonial property; the legal regime of severability; the contractual regime. The community property regime is applied when the persons entering into matrimony have not selected a regime of their property relations, as well as when they are under age of eighteen or have been judicially declared incapacitated.

Moreover, the family law stipulates the concept of the marriage contract. It contains clauses only as concerns property relations between the parties (spouses) such as: the rights of the parties on property that is acquired during the marriage; the rights of parties over their possessions before marriage; the methods of management and disposition of property, including the family home; the participation of the spouses in the family costs and obligations; the property consequences of an eventual divorce; the alimony of spouses during marriage and at divorce; the alimony of children born during the marriage; any other property relations, to the extent which is not contrary to the relevant provisions of the FC.

Upon the regime of severability, real rights acquired by each spouse during the marriage remain his or her personal property. However, upon dissolution of the marriage by a civil action each spouse is entitled to receive a part of the value of the other spouse's personal belongings, acquired during the marriage. This is possible, if the spouse has contributed to the acquisitions by efforts, funds, care for the children, household work or otherwise (art. 33, paragraph 2 of the FC).

2. The right of acquisition (determination) of a greater share of the joint matrimonial property due to a contribution (hereinafter: *right of a greater share*) arises when the property relations between the spouses are regulated by the regime of the joint matrimonial property.

² Promulgated in the State Gazette, issue 41 of 28.05.1985, in force since 1.07.1985, repealed in the State Gazette, issue 47 of 23.06.2009, in force since 1.10.2009.

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Regardless of the method by which the joint matrimonial property has been terminated, the shares of the spouses are equal. Upon termination due to a divorce or due article 27, paragraph 2³ of the FC the court may determine a greater share of total assets of the community property in favor of a spouse if his or her contribution in the acquisitions significantly exceeds the contribution of the other spouse (article 29, paragraph 3 of the FC)⁴.

3. Therefore, the right of a greater share arises only upon the presence of several prerequisites:

3.1. *A greater share can be determined only of the objects of the joint matrimonial property.*

With respect to the objects of joint matrimonial property, the FC determines the following:

"Article 21

(1) Real rights acquired during marriage as a result of joint contributions, should be joint matrimonial property, regardless of in whose name they were acquired.

(2) Joint contribution may be the accumulation of funds or efforts, childcare and household work.

(3) A joint contribution is presumed until proven otherwise."

Joint matrimonial property is a specific integral property, which differs from common ownership. The objects of the joint matrimonial property are real rights. Thus, the joint matrimonial property will be established as regards real rights and limited real rights acquired during the marriage⁵.

The subjective right of a greater share arises simultaneously on all objects of the joint matrimonial property which after termination of the community have been transformed into joint (common) ownership. Greater share may not be determined of a singular object of the

³ Termination of the joint matrimonial property by a court decision during the marriage due to important reasons.

⁴ The Family Code provides two more prerequisites for the determination of a greater share. According to Article 29, paragraph 2, in case of termination of joint matrimonial property by divorce the court may determine a greater share of the common property to the spouse *who is granted the custody of minor children, if it causes particular difficulties for the spouse*. Article 29, paragraph 2 provides that a spouse *who is granted custody of minor children receives chattels intended for their upbringing in addition to his or her share of the terminated joint matrimonial property*.

⁵ Personal property are real rights acquired prior to the marriage, as well as such acquired during the marriage by gift and descent belong to the spouse who has acquired them. Personal are also real rights acquired by one of the spouses when a creditor had initiated execution of a personal debt of the other spouse under Chapter 44 of the Civil Procedure Code upon real rights which are community property. Personal are movables acquired by one of the spouses during marriage intended for ordinary personal uses, for exercising a profession or craft. Personal are real rights acquired by a spouse, sole proprietor during the marriage for the exercise of business activity and are included in the spouse's enterprise (article 22 of the FC).

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terminated joint matrimonial property. The reason for this conclusion is based on the integrity of the joint matrimonial property which is its main characteristic. *As a result, when the right of a greater share arises, it embeds simultaneously, thoroughly and comprehensively all objects of the terminated joint matrimonial property.*

3.2. The joint matrimonial property must be terminated. Principally, there are five methods for termination of the joint matrimonial property. It is brought to an end by the entry into force of the court's decision finalizing the divorce or annulment of the marriage and upon the death or declaration of death of either or both spouses (article 27, paragraph 1 of the FC). Real rights acquired during the actual separation or during the pending judicial process for the dissolution of the marriage by divorce or annulment, are also included in the joint matrimonial property. It is also terminated by a court decision during the marriage in the presence of important reasons (article 27, paragraph 2 of the FC).

Although not relevant to the right of greater share, for the comprehensiveness of the analysis must be noted that the joint matrimonial property is also abolished during the marriage by enforcement proceedings on the joint property for personal debt of one of the spouses. In both cases the termination is carried out by the courts. Article 27, paragraph 3 of the FC introduces two new grounds for termination of the joint matrimonial property during the marriage (also irrelevant to the right of a greater share) –selection of a regime of severability or conclusion of a marriage contract. That means real rights acquired before the establishment of the regime of severability or before signing the marriage contract, are also included in the joint matrimonial property.

It must be noted though that the right of a greater share arises only by termination of the joint matrimonial property upon the entry into force of the decision ordering the divorce or annulment of the marriage and upon termination of the joint matrimonial property by a court decision during the marriage in the presence of important reasons (article 29, paragraph 3 of the Family code). These relevant methods will be discussed in more detail below.

3.2.1. Divorce

Divorce is defined as "*a judicial dissolution of a marriage during the lifetime of both spouses on the basis of circumstances, occurred after its conclusion*"⁶. According to the Bulgarian

⁶ See. Nenova, L. Family Law of the Republic of Bulgaria, Sofia, 1994, p 543.

family law, there are two types of divorce. Both of them are exercised only in a court procedure.

3.2.1.1. Divorce due to a deep and irretrievable breakdown

Each of the spouses is entitled to request a divorce where the marriage has been deeply and irretrievably broken down. The spouse-plaintiff must prove that *deep and irretrievable marital breakdown*⁷ has occurred. Its presence is a condition for the pronouncement of a divorce. The court also passes judgment on the guilt for the breakdown of the marriage if any of the spouses has requested that (article 49, paragraph 3 of the FC)⁸.

Divorce due to deep and irretrievable breakdown (article 49 of the FC) is always a substantive condition for the manifestation of the right of a greater share as the court proceedings result in the dissolution of the marriage and the occurrence of a common ownership.

3.2.1.2. Divorce by mutual consent

It was pioneered by the Decree-law of the marriage of 1945. Civil Procedure Code of 1952 in paragraph § 12 of the Transitional provisions repealed the right of divorce by mutual consent. It was again restored by the first Family Code of 1968 and prolonged by the Family Code of 1985 and the Family Code of 2009.

According to Article 50 of the FC, the court may allow a divorce if there is a *serious and firm mutual consent* of both spouses. They should set forth their settlement as to the discharge of parental rights, the personal relations, and the support of the children, the use of the matrimonial home, the alimony between them, and the family name (Article 50, paragraph 1 FC). The settlement is ratified by the court after it is convinced that the interests of the children have been protected (article 51, paragraph 2 FC). Where the settlement is not complete or the interests of the children are not well protected the court sets a term during

⁷ The term "deep and irretrievable marital breakdown" does not have a legal definition, but Decree of the Plenum of the Supreme Court № 10 of 1971, summarizing the practice of the courts for the admission of divorce, gives the following explanation: "*Deep* is a breakdown in which the spouses lack mutuality, respect, trust and cooperation. In these cases, marital relationship exists only formally and lacks the content, as the law and the society require. *Irretrievable* is a breakdown that can not be vanquished and where the normal relations between the spouses can not be restored. It will be present when the relations between the spouses have reached such poor condition that excludes the possibility to be vanquished." Prof. Nenova defines it as "a condition in which the existing marital relations between the spouses are formal and finally emptied of its internal content required by the morality and the law. (See. Nenova, L. Family Law of the Republic of Bulgaria, Sofia, 1994, p. 552).

⁸ Contrary, according to the Family Code of 1985 (repealed), together with the decision allowing the divorce the court pronounces *ex officio* as to the guilt for the breakdown of the marriage unless it is caused by objective reasons which cannot be ascribed as guilt to any one of the spouses.

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which these defects should be eliminated. Where in the set term the defects have not been left out of consideration, the divorce action is dismissed.

In order to dissolve the marriage by mutual consent, the spouses submit a request to the District Court. They are not plaintiff and defendant, because the request which initiates the proceedings is not a "claim" but a request for assistance. It is a prerequisite for the formation of a special judicial protective proceeding. The court's decision for granting the divorce is not subject to appeal.

For the submission of divorce by mutual consent, the current FC does not require spouses to agree on property relations. Therefore, dissolution of marriage through divorce by mutual consent is also a substantive condition for the occurrence of the right of a greater share. However, if spouses enter into an agreement on property rights, it will abolish the joint ownership (which has arisen after the termination of the joint matrimonial property). The right of a greater share will not arise due to lack of an object.

3.2.1.3. According to Article 44, paragraph 2 of the FC, the *annulment (invalidation) of the marriage is the second ground for its dissolution*. As opposed to the divorce, where reasons for dissolution of the marriage have occurred after its conclusion, the annulment of a marriage has always been associated with defects which existed prior to or during its conclusion. They are expressed in the absence of positive prerequisites for the marriage and the presence of negative ones.

The court decision for the annulment of the marriage has an *ex nunc* effect (Article 48, paragraph 1 of the FC). Otherwise, the joint matrimonial property would be regarded as not having originated. In these cases, the subjective right to a greater share would not have arisen due to lack of an object. Nobody is entitled to refer to the annulment of the marriage until it is decreed by the court. From the moment of the contraction of the marriage, until the entry into force of the court decision for its annulment, arise all consequences as from a regular marriage. This conclusion also applies to the property relations between spouses⁹. Therefore, during a voidable marriage arises a joint matrimonial property, which is canceled and converted into joint ownership *ex nunc* from the entry into force of the annulment of the

⁹ A distinction between a void and a voidable marriage should be made. The first one is not concluded, a nonexistent marriage (eg only religious marriage, "marriage", concluded between spouses not by a legally appointed municipal officer, etc.). It has no legal effect. The voidable marriage produces the effect of a regular marriage until its judicial termination.

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marriage. At this moment it turns into substantive condition for the determination of a greater share of the joint matrimonial property pursuant to Article 29, paragraph 3 of the FC.

3.2.1.4. The joint matrimonial property is also terminated by a court decision during the marriage in the presence of important reasons (article 27, paragraph 2 of the FC). At present FC does not provide a legal definition for the term "important reasons". Correspondingly, the courts should consider in each case whether "important reasons" are present, which require termination of the joint matrimonial property during the marriage¹⁰.

3.3. *The contribution of a spouse in the acquisition of the joint matrimonial property must significantly exceed the contribution of the other spouse.* In order that an object accrues in the joint matrimonial property, its acquisition must be a result of joint contributions of the spouses. *Joint contribution* is a legal concept that was introduced for the first time by the FC of 1985. Examples of forms of joint contributions are such as: accumulation of funds or efforts, childcare and household work. The text of Article 21, paragraph 2 of the FC establishes a legal presumption of joint contribution, which may be challenged by each of the spouses through an action both during marriage and after its dissolution.

This brings up the question, how should be interpreted the requirement for "significant" excess in the contribution of a spouse, compared to the contribution of the other spouse. The FC does not provide a numeric value. It is assumed that in each case the existence of a significant difference between the contributions of the both spouses must be proved. As the right to greater share is realized only in a court procedure, its determination must be executed by the court during the judicial process. The decision of the court regarding the presence or absence of a significant difference between the spouses' contributions will be regulated by the specifics of each case in which the court is seised. It should be noted that the court must examine all forms of contribution. It is not sufficient to determine that a spouse has invested more money in the acquisition of real rights. The contribution of the other spouse must also be considered. It can consist in childcare and household work (so-called *indirect (non monetary) contribution*). The non monetary contribution is as consequential as the monetary one.

There is a considerable case law relevant to the assessment of significance in the contribution. For example, in decision Nr.1065 of 28.10.1998 on civil case Nr. 1005/1997, District court of

¹⁰ For example, the case law acknowledges the following "important reasons": "such a behavior of a spouse, which creates a serious risk of harm to the interests of the other spouse and children of both spouses; judicial declaration of incapacity of a spouse, etc. (see. Decree of the Plenum of the Supreme Court Nr.5 of 1972).

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Sofia (DCS), the court assumes that it is not sufficient to determine during the judicial process, that there are differences in the incomes of the spouses or that one of them had invested more efforts for the acquisition of joint property. According to the court, "awarding a greater share of total matrimonial assets due to a significant contribution of a spouse suggests significantly higher incomes earned by the latter."

In another case, the court stipulates that a greater share can be determined, if during the marriage only the wife has realized incomes and she exclusively has taken care of the child, while in most of the time her husband and father of the child has been abroad and has not provided child support (but received one from his wife). The court states that there was not only significant difference between the incomes of the spouses, but also the indirect (non monetary) contribution was solely provided by the wife.¹¹

3.4. *Subject to the right of a greater share is each of the former spouses whose marriage has been dissolved by divorce or annulment.* Legal norms provide for only one case in which the right of a greater share can arise in favor of a person who still has a quality "spouse" in a valid marriage. This is possible when the community property is terminated during the marriage pursuant to Article 27, paragraph 2 of the Family Code. Therefore, for the occurrence of the right of a greater share is relevant and decisive not the presence or absence of marriage, but the existence of terminated matrimonial joint property. Therefore, both former and current spouses are subjects to the right of a greater share.

Subject is also a minor (former) husband, regardless of whether the community is terminated by divorce, annulment of the marriage or termination during marriage due to important reasons.

It is possible that one of the spouses have been judicially declared incapacitated. It is abstract, but not thoroughly impossible to assume, that such a spouse forms a significant contribution to the acquisition of the joint property. However, the contribution cannot be excluded during the period from the contraction of the marriage until the moment when a spouse falls into the condition which has caused the judicial disability. The question then arises, will the spouse under judicial disability be a subject to the right of a greater share? There should be a positive answer to this question. Depending on the type of the judicial disability and according to the

¹¹ decision Nr. 119 of 19.02.2009 on civil case Nr. 4040/2008 of DCS.

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method of termination of the joint matrimonial property, it is possible other legal subjects to represent the spouse and to give consent to the exercise of the right of a greater share.

3.5. *The FC defines a period within which the right of a greater share must be exercised.* According to Article 31 of the Family code, the action for a greater share should be brought within one year following the dissolution of the marriage or the termination of the joint matrimonial property. The analysis of the text discloses that the beginning of the period is subsidiary to the termination of the joint matrimonial property. Methods for the termination of the joint matrimonial property, which permit the emergence of the subjective right of a greater share include the presence of divorce, the dissolution of a marriage and the termination of the joint matrimonial property during the marriage due to important reasons pursuant to Article 27, para 2 of the FC.

The initial starting point of the period is the entry into force of the final court decision for the termination of the joint matrimonial property by each of the methods mentioned above. Consequently, if the joint matrimonial property is terminated by divorce, the one-year period for the exercise of the right starts from the entry into force of the court decision for divorce. Upon termination of the joint matrimonial property by annulment of the marriage, the period commences from the entry into force of the court decision for the annulment of marriage. In the case of termination of the joint matrimonial property during the marriage due to important reasons, the beginning of the period is the entry into force of the court decision for the termination of the joint property.

The one year period for the exercise of the right of a greater share in its character is preclusive. The case law has accepted that conversion rights are exercised almost always in preclusive terms¹². As the right of a greater share is exercised with the participation of a state authority (i.e. the court), not bringing the action within the statutory period leads to the suspension of the right itself.

In conclusion it must be noted that the right of a greater share is a specific subjective right. It arises exclusively in the presence of the prerequisites required by article 29, paragraph 3 of the FC and must be exercised within the term, provided by article 31 of the FC.

¹² Decree of the Plenum of the Supreme Court of the Republic of Bulgaria Nr.5 of 1972.

**ПРАВО НА ПО-ГОЛЯМ ДЯЛ ОТ СЪПРУЖЕСКАТА
ИМУЩЕСТВЕНА ОБЩНОСТ ПОРАДИ ПРИНОС СПОРЕД
БЪЛГАРСКОТО СЕМЕЙНО ПРАВО**

РЕЗЮМЕ

Цветалина Петкова

Настоящата статия разглежда основните правни характеристики на правото на по-голям дял от съпружеската имуществена общност поради принос според българското семейно право. Анализирани са предпоставките за възникването му, субектите и обектите, начина на упражняване и срока. Във връзка с разглежданото право се посочват и режимите на имуществени отношения между съпрузите, като се отделя специално внимание на режима на съпружеската имуществена общност и нейните обекти, включително от историческа гледна точка. Дискутират се и релевантните методи за прекратяване на общността. Прави се анализ на няколко важни въпроса на съдебната практика, свързана с определянето на по-голям дял поради принос.