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**The predominance of contractual freedom in „family property”  
relations**

Thesises of PhD dissertation



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## TABLE OF CONTENT

I. The aim, subject and sturcture of the dissertation.....	3
II. The methods of the research.....	5
III. The summary of the results of the dissertation.....	6
III.1. Terminological proposals.....	6
III.2. The system of contracts between spouses, registered partners and de facto partners.....	7
III.3. The contractual freedom in the family property contract and the limit of that.....	8
III.4. Matrimonial property system in Europe.....	9
III.5. The family law limits of contract freedom – Principles of family law.....	10
III.6. The invalidity of the family property contract.....	12
III.7. Protection of third parties in the family property contract.....	12
IV. Publications related to the PhD dissertation.....	14

## **I. THE AIM, SUBJECT AND STRUCTURE OF THE DISSERTATION**

Family is one of the most fundamental elements of our legal system, the estimation of it has changed much throughout the history. This is especially true in today's society, where accelerated and changing life situations require recent solutions, a different approach. As a result, the system of family relationships continues to include traditional forms such as marriage or the parent-child relationship, while newer forms of family have also gained ground in legal regulation based on age and societal expectations. In addition to the intimate, emotional conditions of family life, economic factors also appear, which are reflected in the regulation of the property relations of family members.

Family law has traditionally been an integral part of private law, as in the relationships it regulates, there are mostly equal persons in equal positions with each other. It is a separate area of law, but in many cases interweave with other fields of civil law.

The property relations of family members are the integral part of family law, which has an impact on the internal relations of the family members and the external relations of the family members and third parties. The dominant element of this special legal relationship is private autonomy, which extends mostly to the parties' freedom of action. To ensure this, the legislator allows to family members the regulation of their relationships (as well as in other areas of family law) by contracts and considers it necessary to intervene only in the absence of their negotiation. This solution is realizing mostly in the property contracts of family members.

There can be many reasons for concluding contracts, but most often it is justified by concerns about starting risky businesses or more complicated personal and property relationships resulting from remarriage. However, a total or partial separation of assets can make the party who has no or own only minimal assets vulnerable, either because of the care or upbringing of the children or because (s)he has run the business on behalf of the other party and thus does not gainful employment. Also, contracts often can cause harm to third parties as well, who have a business or other relationship with the family members. Although the agreement of the family members is a contract and consequently, the principle of the freedom of contract, as a fundamental principle of contract law, shall be also applied here, but with regard to the special nature of property contracts, this can only be achieved to a limited extent. However, the restriction takes a complex form because the interweaving between the areas of private law necessarily results in a complex system of protection. The dissertation aims to examine the property contracts of family members, especially in the framework of relationship forms (marriage and other partnerships, which are regulated by law) with an emphasis on the

extent of the parties' freedom of contract and the question, where are the limits of contract freedom in family property contracts?

During the assembling of the dissertation, we tried to delimit the various issues gradually. Accordingly, the first substantive chapter is devoted to examining the definition of family relationships through the legal systems, amplify with a complex approach and some interdisciplinarity. The conceptual approach of family law raises many issues and societal expectations, which are not always reflected in the legal solutions. At the same time, it is undeniable that traditional family relationships go beyond the present and bring many new forms under the protection of the law. Therefore, we consider it necessary to get a detailed and comprehensive examination of the definition of the family relation, however, we would like to state that the analysis of the definition was made only about the forms of partnership, and we did not deal with the detailed analysis of the parent-child relationship. In the second substantive chapter, we analyzed the property relations between the family members, including the examination of the aspect of legal history, and then the presentation of the domestic situation. Here we also showed that the change in the definition of family relation necessarily affects to the property relations of family members, by which the domination of matrimonial property stops and the range of property relations expands. However, these legal relationships show many similarities, which is why we consider it appropriate to include them under a common terminology. Accordingly, we attempted to develop a new concept, the so-called family property law. Family property law can be examined from a broader and a narrower concept, but from the viewpoint of the dissertation we analyze it from the narrower sense. In practice these contracts have primary relevance and the scope of contractual freedom is the most controversial issue in these cases. In the third substantive chapter, we examined the property contractual relations of family members and focused primarily on separating them from other contractual relations of the family member (for example the agreement of child custody) and separating certain property contracts between family members. In the fourth substantive chapter, we examined the content of family property contracts in the narrower sense. Here, we have mainly analyzed the matrimonial property law systems in Europe and Hungary, which are part of the legal regulation, as these are the ones that most influence the content of the contacts. In the last substantive part, we studied the issue of contractual freedom, examining in detail the limitations arising from family law regulation, the limits provided by contract law, and the protection of third parties in relation with family members. It can be seen from all this that we tried to structure the dissertation by moving from the broader preliminary questions (as family

relations → family property law → family property contract) to the examination of the narrower scope of the topic of the dissertation, the freedom of contract in family property contracts.

## **II. THE METHODS OF THE RESEARCH**

During the preparation of the dissertation, we used several research methods. As the source of the research in the dissertation, we utilized primarily on many products of the legal literature, the rules of the related legislation, and the related Hungarian case law. Considering that the focus of our research is on the domestic regulations, accordingly, the predominance of Hungarian sources, legislation and judicial decisions can be observed and we used foreign sources in a more modest number, in proportion to an international outlook. In the field of legislation, the earliest Family Law Act (Act IV. of 1952) and the Civil Code (Act V. of 2013), which includes the current rules, was primarily the basis of the research, but we also processed the related legislation. From the case law, the resolutions, opinions, decisions in principle, and individual decisions of the Curia were highlighted and incorporated using the *inductive method*.

The most important research methods are the *normative and dogmatic methods*, which was applied throughout the whole dissertation. The basis of the research was the Hungarian legal environment, in which the examination of the Hungarian legal sources is emphasized, so where necessary, we also used the method of grammatical, logical, and systematic/taxonomic interpretation. The latter played a particularly important role in the analysis of the legal relations of de facto partnerships. We also used the definition-analysis and definition-creating methods, primarily to dissolve terminological differences and inconsistency. In the framework of this, the dissertation focused on the legal definition of family relations, family property law, and family property contracts. The historical method was also used to analyze the different stages of legal development and the connection with the current regulations. The use of comparative and teleological methods can also be found in the dissertation. The comparison of laws has mainly served to clarify demarcation issues and also appears in international perspectives, while the teleological method has been used in cases where the current legislation does not yet have a practical interpretation, such as the regulation of de facto partners. Beyond all this, the dissertation does not miss the use of the critical method either.

### **III. THE SUMMARY OF THE RESULTS OF THE DISSERTATION**

#### *III.1. Terminological proposals*

Life situations within the family necessarily require an interpretation of the definition of family relationships based on today's conditions. Consequently, it is necessary to determine which elements can form the definition. In the first substantive chapter of the dissertation, we examined the elements which can influence the definition of family relationships from several perspectives, due to a complex approach. In the research, we analyzed the issue in detail concerning the forms of partnership (especially marriage, registered partnership, and de facto partnership), which is justified by the results that can be found in the legislation of recent years. The traditional nature of marriage is unquestionable and occupies a dominant part both in societies and in legal regulation. However, the form of cohabitation outside to marriage gets more and more attention, and is now receiving legal protection as well. Accordingly, it is necessary to find common features to research these issues. However, in addition to those living in a relationship, other family members are equally prominent, who were identified in the dissertation with family members, who regulated by Book Four of the Hungarian Civil Code. These persons have undergone similar changes recently as the relationship's form, and their regulation has also expanded, which justifies their unify in common terminology. In our opinion, a scientific research needs to use a unified terminology for family relationships in the legal literature, however, we think that incorporating it into legislation is an impossible mission. The reason for this, in our view, is that it is not possible to give an mere, clear legal definition that can describe all forms of family relationships, including those that are recognized by other disciplines (such as sociology) but those, have not legal protection. At the same time, we consider it important that the legally regulated family law relations can be materialized in one unified definition, so in the dissertation we characterized these legal relations with the definition of the family law relationship.

Changes of family law and the expansion of relevant legal norms require to the similar legal effects would be treated in a unified way. In connection with the property relations, we analyzed and justified the fact that the property issues of family members can be concentrated in one terminology because there are lots of similarities in legal rules. A parallel can be observed between the different regulations, so we attempted to define a new legal institution, the family property law, in a broader and in a narrower sense. The starting point/source of the definition was the matrimonial property law, which is an old and integral part of family law,

and by analyzing it and projecting it on other forms of property law, we can create a unified definition on family property law:

***Family property law is the collection of legal rules which regulate the property relations between persons, who live in a legally regulated partnership and family members, who are regulated by the Book Four of Hungarian Civil Code and third parties - unless the parties otherwise agreed - for a period which is specified by the legal rules.***

The narrow aspect is based on the distinction made by the legislator, and accordingly, we proposed to define the definition of narrower family property law only to the forms of partnerships:

***In the narrower sense family property law is the collection of legal rules which regulate the property relations between spouses, registered partners, de facto partners and with third parties - unless the parties otherwise agreed – in the event of the termination of the marriage, registered partnership and under the cohabitation of de facto partners.***

However, changes in property relations also necessarily affect contractual property law, which also makes it necessary to bring property contracts under a united definition. Accordingly, and in line with the previous ones, we proposed the use of the definition of a family property contract as a summary name.

### *III.2. The system of contracts between spouses, registered partners and de facto partners*

With regard to the topic of the dissertation is the contractual relations between spouses, registered partners and de facto partners (which is identified in the dissertation with family property contract in the narrower sense), we defined the system of contractual relations with respect to these legal entities. However, we believe that the system, what we introduced in the dissertation can be applied to all family members. Legal relations between family members require the highest level of private autonomy compared to other areas of private law. This requirement has been expressed over time in both legislation and case law. As one of the instruments of ensuring privacy, the legislator prefers the contractual method of settling legal relations primarily, which is also expressed in legal regulations. It is no extravagance to say that in all areas of family law, contract-based methods take precedence and only in the absence of these will the family law regulations come into force.

Contractual relations in family law can be divided into three parts: on the one hand, we can talk about contracts between family members, which also settle personal legal relations, and on the other hand, contractual relations in family property law and contracts where personal and property relations are particularly mixed. Given the complexity of life situations, it is certainly questionable whether it is necessary and possible to sharply separate relationships within family law. In our view, a narrower and broader interpretation of family property contracts can provide an answer to this question, which we attempted to define in the dissertation. Accordingly, the broader concept of family property contracts includes all contracts that have, in whole or in part, property characteristics. Consequently, this includes contracts governing the property relations of spouses, registered partners and de facto partners for the duration of the cohabitation and in the event of its termination, as well as agreement about using the family house and maintenance contracts. However, according to the narrower interpretation, only the property contracts named in the Civil Code are included. They are regulated by the Civil Code. 4:63. § and 6: 515. § about sharing the property between the spouses, registered partners and de facto partners, and regular contracts (as a sales contract or a gift) between spouses, registered partners and de facto partners. Given the technical limitations of the dissertation and their significance in judicial practice, the scope of the research is more narrowly defined to family property contracts, therefore we applied the family property contract terminology to these contracts in later chapters of the dissertation.

In addition, we attempted to review the system of family property contracts in the narrower sense, and we examined the similarities and differences between the types of property contracts. The results tilted the balance to the side of similarities, which provided evidence that the family property contract could be interpreted as a unified terminology. Following the circumscribe, we analysed the main characteristics of property contracts in a unified system, such as the participants of the contracts, their temporal effect, formal requirements and the possibilities of modifying and termination/abrogation. The research was based on the detailed rules of matrimonial property contracts from Civil Code, because it contains this in detail, but at the same time we have also analysed the differences in each type of contract.

### *III.3. The contractual freedom in the family property contract and the limit of that*

Contractual freedom is an important part of family property relations. Private autonomy between family members cannot tolerate intervention, , but at the same time there are lots of situations that make it necessary. The limits of contractual freedom have a complex system in



the Civil Code. The reason for that is that the protection of legal rules has two directions: on the one hand, it helps the family member in a vulnerable situation, and on the other hand, it protects third parties who have a legal relationship with the family members. Another important reason for the complexity is the connectable nature of the legal rules, as property contracts are primarily regulated by family law and secondly by contract law. As a result, we can find limits which came from family law orders, as well as those that have a contractual nature but at the same time adjust to the family relationships. The principles at the beginning of the Book Four of the Hungarian Civil Code seem as pure family law limits, especially concerning to equity and the protection of the weaker party. However, the courts have emphasized in many cases that the principles can only be an obstacle to contract freedom in extreme situations. Circumstances that cause the invalidity of the contracts can be identified as one of the contractual legal limits, especially the vitiated consent (mistake, deceit, unlawful threat or sham contracts), gross disparity in value, immoral contracts and the illegal/unlawful contracts. Ineffectiveness is the other contractual limit, the relative ineffectiveness – which arises from the behavior of the parties, when they remove the security of contractual execution – is the most frequented situation. However, the protection of third parties is more pronounced in family law regulations, especially in the Civil Code. 4:41. § and 4:67. § in which the legislator has declared it as a special norm of family law.

#### *III.4. Matrimonial property system in Europe*

Almost without exception, property law between couples is part of the family law regulations of European states. In most countries, the regulations of matrimonial property regimes appears in legal norms, however, where alternative forms of partnership also receive legal protection, the property regulations of these forms is of course also part of the legislation. In the dissertation, we devoted a separate chapter to the system-wide presentation of property law solutions applied across Europe, with the aim to present the main features in a kind of specific logical system. Of course, analyses of these property law models appear in the legal literature, but we have not yet encountered a unified study or book. As legal property law between spouses is prominently present in most countries, this has been highlighted in the analyses. The reason for this is that in property contracts, almost without exception, contractual freedom prevails, so the content of the contract is defined by the parties. There are legal systems that help with alternative rules for creating the content of the contracts, but the parties are entitled to form completely unique content. Therefore, systemic characteristics are difficult to examine through

solutions that can be applied exclusively in property contracts. At the same time, the rules of family property law can be found in all legal systems, and they can be classified into one of the three major groups. The analysis of these is already more expedient and thus the system-wide peculiarities can be revealed.

The property systems applied in Europe show an extremely colourful picture of the legal property systems, which reflects the current social and economic situation and the opinion of the states on the forms of partnership. Some regulations are based on the autonomy of the parties, while others emphasize the solidarity and cooperation between the parties. The legal solutions can be divided into three groups: the common property systems, which bring the parties' assets together, the separate property system that ensures the property independence, and the acquisition communities or limited communities that combines the two other solutions. The common property system and the separate property system play a role in a few legal systems as a legal property law solution, but at the same time they have a prominent role in contract law as well, especially separation of property system. The mixed systems as legal property rights is much more widespread, and within this, limited community property models implementing the principle of real acquisition are the most common.

The Hungarian legislation also uses this solution as the legal property right of the spouses, but in the case of de facto partners, a specific solution appears, which is based on the value-added principle. We also analysed these solutions primarily to point out the uncertainties inherent in the system that may provide a reason for the parties to enter into a property contract. In addition, we also examined the alternative property solutions of the Hungarian Civil Code specifically recommended for property contracts.

### *III.5. The family law limits of contract freedom – Principles of family law*

The principles can be found in the introductory regulations of the Family Law Book. They are general principles that shall be taken into account in the specific family relationships. These principles are not new elements in the regulation of family law, over time they have gradually been incorporated into the legislation from judicial practice. The Family Law Book contains four principles, namely the protection of marriage and the family, the protection of the interests of children, the desire for equality between spouses and the equity and protection of the weaker party. Of these four principles, equity and the protection of the weaker party are what appear in the judicial practice of property contracts, so the dissertation also deals with this in a weighted way.

According to the Family Law Book, family relations must be settled fairly and with regard to the protection of the weaker party in the enforcement of his interests. By raising the applicability of the principle to the level of law and making the applicability of the principle general, the legislator has ensured legal protection for all family relationships, including family property contracts. However, this solution can be in conflict with the principle of contract freedom, which the case law has resolved in favour of the principle of contract freedom. The notion of equity in contractual property law relations between family members must be assessed differently. This means that rather the enforcement of the contract and not the balance between the parties' property will be the aim. . This can necessarily lead to the so-called inequality. However, it is also important to explore the motivations of the contracting parties, which can lead the parties to enter into such contract relationship which is not equivalent, and it come in conflict with social estimation. Emotional factors play a key role also, because as long as everything is fine in the relationship and the parties reach a contract in this situation, without any influencing factor, it would also result an unfair situation to attack their contract later, using equity as a possible attacking reason. The property contract can contain a risk element which shall be taking into account during they conclude a contract. It is possible that one of them will perform the property calculations expected from the contract, while the other party will be at a disadvantageous situation, even for reasons beyond his control. Equity is based on individualization, and accordingly the aim is to avoid that the using of an abstract rule of law may lead to an unfair result. However, the contract – which created adjust to individual needs – settles the legal relations in a unique way, what is obligatory for the parties and the court. Consequently, the interpretation of the rules which helps to avoid the execution of an unpleasant but legally valid contract is highly questionable. This would be meaning to give up the will of the parties and the basic of the property contract, with the consequence that the parties cannot have confidence in the contract, and the court could intervene extensively in their contractual relationship. That is why András Kőrös says that equity can only be applied exceptionally in family property contracts. This is also reinforced by the case law of the Curia, which has been analysed in detail in the related chapter of the dissertation.

The second half of the principle is to ensure the protection of the weaker party, which is closely linked to equity. It is difficult to find a legal solution to take social aspects and individual circumstances into account in specific legal norms. The neuralgic point of the previous private law was that it considered equal the entities or subjects, who often from economic, social, educational, etc. viewpoint was no equal. However, the principle provides an opportunity for the appropriate correction of these aspects, which prevails in family law on the side of a

vulnerable party who needs help due to his or her age, state of health and possibilities. However, ensuring the protection of the weaker party – given that it is closely linked to equity – can also be exceptional only in property contracts.

### *III.6. The invalidity of the family property contract*

About invalidity, we take the view that the system of invalidity reasons and their interpretation in property contracts do not justify distinguish regulation, even though we emphasize to make a difference in dissimilar life situations. It means that it is necessary to assess differently a purely business relationship and a situation between family members, which based on emotional grounds. The unity of the Hungarian judicial practice also supports this. However, the legal consequences of invalidity, as an important issue is already a neuralgic point. In the case of family property contracts, the long-term nature makes it difficult to use the traditional legal consequences of contract law and it also complicates to find a perfect solution for the legal argument of parties. This is especially true in the internal/intimate legal relations of the parties, where the basis of accounts is called into question - because the property of the parties is always changing -, it is difficult to reconstruct the circumstances at the time of concluding the contract, not to mention the temporary changes in the value of the property. However, the rules of the legal property system can provide an appropriate background for settling property relations between family members.

### *III.7. Protection of third parties in the family property contract*

Protection of third parties is appearing in family property contracts in the special norms of family law and through the rules of contract law. There is no doubt that the legislator must also give protection to third parties who enter into a legal relationship with family members. We also agree that protection should take an individual form, specifically for family members and third parties. At the same time, under the research, we concluded that in some cases it is necessary to clarify the legal norms for making unified rules for all family relationships and to make the interpretation clear.

The oldest element of third parties' protection is the formality of contracts. The present regulation maintains the oldest rules, according to which contracts between spouses - with a few exceptions - must be included in a public document or a private document drawn up by a lawyer, regardless of the type. This requirement also appears in the case of de facto partners in

the Civil Code 6: 515. §, and indirectly, but also in connection with the use of the legal property system rules. However, there is no rule for usual business contracts (as a sales contract, exchange contract, contract of gift or contract of the loan) between de facto partners, which weakens the position of third parties of de facto partners.

Beyond the formality, we consider it necessary to standardize the information of the third parties in the usual business contracts, which are also not rules for de facto partners. Accordingly, we have proposed the creation of cohesion between family relationships due to a reference rule, which also provides an excellent opportunity for the family law rules to be unified for all legally regulated forms of partnership.

The purpose of third parties' protection is to prevent the infringement of third parties, who stand in a business relationship with family members, by family members moving assets between themselves. This situation requires more protection than other usual business situations, which the legislator provides primarily by informing the third parties. In our opinion, informing of third parties is important, because they can demand successfully their interest if they have all the information about the relationship of family members. At the same time, it is important to find balance, meaning that the protection of third parties cannot be achieved at the expense of family members. However, the extreme security may burden the internal legal relationship of family members, while imperfect protection is harmful to the interests of third parties. It is welcomed that the legislator created this balance through independent norms, adapting it to the specific family relationships. Nevertheless, in our opinion, the many interpretive problems which are detailed in the related part of the dissertation make it necessary to clarify the legal rules. We have determined opinion that the balance can be build up by limiting the rules and interpret it only in the relationships of these three people, including in situations where the behavior of the parties is intended to disadvantage one of the parties. No rule can be acceptable which also restricts the cases of movement of property between the parties which would not change the situation of either party, much less if it favors it. A significant part of these requirements is already available through correct interpretation, but we also proposed further clarification for the existing legal rules as well.

#### IV. PUBLICATIONS RELATED TO THE PHD DISSERTATION

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