

UDC: 347.626:347.628.42
 COBISS.SR-ID 183365129
 doi: <https://doi.org/10.61837/mbuir030225081i>

PROFESSIONAL WORK

RECEIVED: 17. 05. 2024.
 ACCEPTED: 03. 12. 2025.

ESTATE RELATIONS OF UNMARRIES PARTNERS

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Abstract: According to our legislation, an unmarried partnership is a cohabitation of two individuals of different genders lacking the legal form of marriage, characterized by its duration and stability. In some Western European countries, unmarried partnerships have become a common form of cohabitation over the past few decades, but they are not legally regulated by family law regulations as in Serbia, where the actions of such partnerships are regulated by provisions on the right to maintenance, as well as on the acquisition and division of joint property. Considering that with contemporary social changes, property relations in unmarried partnerships have undergone changes in terms of their recognition by positive legislation, the subject of this study will be the regulation of property relations of unmarried partners, from the perspective of positive legislation within which unmarried partners are allowed to adjust them to their own needs and interests.

Keywords: unmarried partnership, cohabitation, non-marital property, joint property, separate property, prenuptial agreement, rights protection

1. INTRODUCTION

In accordance with our legislation, an unmarried partnership is a cohabitation between two individuals of different genders lacking the legal form of marriage. Another characteristic of an unmarried partnership is its duration and stability. For an unmarried partnership to enjoy legal protection under the provisions of the Family Law, the following conditions should

characterize it: gender diversity, monogamy, cohabitation, the permanence of such cohabitation, and the absence of marital impediments at the establishment of the unmarried partnership. The Family Law, in defining an unmarried partnership, stipulates that it concerns the cohabitation of an unmarried woman and an unmarried man, with no predetermined duration. In previous Yugoslav judicial practice, there

were attempts to fix a necessary duration for an unmarried partnership that would trigger property-related actions. “It was assessed that property acquired during an unmarried partnership lasting longer than five years would be considered joint property” [21]. Although the Family Law of the Republic of Serbia (FL) almost entirely equates marital and non-marital partnerships concerning family and property relations, the law does not contain detailed provisions regulating the property rights of unmarried partners, which is not the case when it comes to the property rights of spouses. This is most evident concerning the acquisition and division of non-marital property and the enforcement of maintenance rights. Regarding property rights, Article 191 of the of the Law on Family Law stipulates that property acquired by unmarried partners during their cohabitation represents joint property, and the legal provisions regulating property relations between spouses apply to property relations between unmarried partners [8]. By prescribing that the legal provisions regulating property relations apply to unmarried partners, the legislator introduces a legal property regime concerning unmarried partners, leaving them the possibility to modify this regime through agreements to regulate their property relations on existing or future property. According to Article 188 of the FL, a prenuptial agreement is a written agreement between spouses or future spouses regulating their property relations on existing or future property [8]. Based on existing legal regulations, there is no obstacle for unmarried partners to, through an agreement without judicial proceedings, divide property acquired through joint efforts during their cohabitation. If they fail to reach an agreement, the division of property acquired during the unmarried partnership would be decided by the court in a property dispute upon the claim of one of the unmarried partners or their legal heirs if an unmarried partner dies before filing the lawsuit, considering that the right to division of non-marital property is inheritable. In such a dispute, as a preliminary question for the court’s decision on the recognition of rights to the acquisition and division of non-marital property, the duration of the cohabitation and

its effect on property relations between unmarried partners need to be conclusively determined. If the disputed moment of the start of the unmarried partnership arises, proving it in such a dispute will be much more complex than in the case of a marital partnership, which is subject to legal presumptions related to the moment of marriage. However, in the event of the termination of an unmarried partnership, proving it may not be more complicated than in the case of the termination of cohabitation between spouses, which may not coincide with the termination of marriage. In both cases, for the court’s decision on the amount of contribution to the acquisition of joint property, the moment of the start and termination of the cohabitation of two individuals is relevant.

2. JOINT AND SEPARATE PROPERTY OF UNMARRIED PARTNERS

The Family Law provides for the legal regime governing the relationships of unmarried partners. Within this legal regime, a distinction is made between common property and separate property. According to Article 15, paragraph 1 of the Family Law, property acquired by unmarried partners during the duration of their cohabitation constitutes their common property [8]. Common property among unmarried partners is characterized by the fact that the shares of the partners in it are not predetermined in advance. The rights of unmarried partners extend to all property acquired during the duration of their cohabitation. Although the Family Law allows spouses, or future spouses, to regulate their property relations through a marital contract and thereby exclude the application of the legal regime to existing or future property, such a possibility is not explicitly prescribed for unmarried partners who live in a longer-term cohabitation but have no intention of marrying. We believe that this legal solution does not hinder unmarried partners from regulating their property relations differently through such a contract and excluding the application of the legal regime to property acquired during the duration of their cohabitation. Supporting this view is the fact that the property relations of

unmarried partners, according to the existing legal regulations, are equated with the property relations of spouses. To determine the concept of common property of unmarried partners, according to the legal definition, two conditions must be met: cohabitation as a longer-term life partnership and work performed by unmarried partners. Cohabitation constitutes an economic and factual partnership in which unmarried partners maintain a common household that takes into account the needs of the partners, family members, and other individuals living in the household. The Family Law does not specify what constitutes a longer-term life partnership. It is a legal standard whose precise meaning and scope are determined by judicial practice. In the majority of court decisions, it is expressed that a cohabitation is considered longer-term when it is a stable partnership between a man and a woman without marital impediments, lasting for several years, involving the birth of children, or when the partners express their intention to establish a long-lasting life partnership. In the rationale of the Family Law proposal, it is stated that the duration of cohabitation is not decisive, but rather the intention of unmarried partners for the permanence of their partnership. Based on this characteristic, a cohabitation should resemble a marriage and be established with the intention of lasting indefinitely. This definition of cohabitation, as a longer-term and stable partnership between a man and a woman without marital impediments, differs from short-term, transient emotional partnerships where such a defined shared life is not the primary purpose of existence. This condition is the basis for distinguishing between stable, longer-term cohabitations with the desire for a shared life among unmarried partners and transient, short-term partnerships focused on entertainment, fulfilling passions, and sexual desire. In practice, as a contentious issue in disputes regarding the property relations of unmarried partners, the length of the partnership and the moments of its beginning and end may arise. Not every emotional partnership is a cohabitation, nor is every longer partnership a longer-term life partnership with the characteristics of cohabitation. The existence of marriage

is an absolute impediment to recognizing the cohabitation of a man and a woman, regardless of the length of their partnership. Such a position is also expressed in judicial practice in the judgment of the Supreme Court of Cassation Rev 4920/2020 of February 9, 2022, according to which the plaintiff does not have the right to claim a share of the immovable property based on acquisition in a cohabitation with the defendant who was married, as the life partnership of the litigants during the disputed period was not a cohabitation [21]. ...Namely, from the established factual situation, it follows that the plaintiff D.D. and the defendant Ž.P. lived together from 1978 to 1983, however, as the defendant Ž.P. was married to M.P. during that time (marriage concluded in 1972), which marriage was dissolved in 1983, contrary to the allegations of the revision not only from the statements of the plaintiff in the lawsuit for main interference but also from the attached evidence, legally valid judgment of the District Court in Belgrade P 4184/82 of January 11, 1983, it is the correct conclusion of the appellate court that the life partnership between the plaintiff D.D. and the defendant Ž.P. was not a cohabitation, considering that a cohabitation is a longer-term life partnership between a man and a woman, without marital impediments as prescribed by Article 4 of the Family Law, and therefore there are no conditions to establish the plaintiff's share in the subject property based on acquisition in a cohabitation" [22]. Regardless of the duration of cohabitation between unmarried partners, the property acquired by a partner before the commencement of cohabitation or after its termination is their separate property. However, determining the separate property of unmarried partners can be problematic in practice. This issue arises from the fact that unmarried partners initiate and terminate their cohabitation through informal agreements. Since there are no appropriate registers for unmarried partnerships where they could be documented, determining the property that a partner had before the formation of the partnership must reliably establish its beginning. In the absence of agreement on this matter, the court will determine

that moment in a dispute concerning the property relations of unmarried partners.

In litigation, the existence of an unmarried partnership is proven by evidence, with the hearing of the litigants and witnesses being of paramount importance in establishing the factual circumstances relevant to the court's decision. This is understandable, as the events subject to proof are life occurrences that can be directly observed and have an immediate impact on the rights and obligations of the participants.

Regarding the property consequences of the termination of an unmarried partnership, the legislator has provided the same rules as for the termination of a marital union. The application of these rules is not necessary at the time of establishing an unmarried partnership.

In practice, in the absence of an agreement, the property relations of unmarried partners are resolved by a court judgment in a lawsuit filed by one of the partners to recognize their share in the acquisition of common property. Before initiating proceedings before the court, positive law allows unmarried partners to resolve disputes over property relations through mediation. By resolving the dispute in this way, unmarried partners could avoid a lengthy and expensive court process. The number of property disputes resolved by mediation between unmarried partners in some countries is greater than those resolved in court proceedings. However, in domestic practice, unmarried partners still rarely opt for this relatively quick, inexpensive, and efficient way of resolving disputes while respecting their needs and interests.

In addition to a lasting cohabitation, another condition for recognizing the right to contribute to the acquisition of common property arises from the work of unmarried partners. Besides work that generates income, contributing to the maintenance or increase of existing property is also significant for the acquisition of common property. Under the regime of common property, unmarried partners manage and dispose of property by mutual agreement. However, there is a difference depending on whether the disposal relates to movable or

immovable property. In the case of disposing of movable property, there is an assumption that unmarried partners do so with the consent of the other. In the case of disposing of immovable property, if there is no consent, the disposal is invalid.

According to the law, in a situation where one unmarried partner disposes of immovable property that becomes part of the common property without the consent of the other partner, any interested party, including the unmarried partner whose consent was lacking, may request a court to declare the nullity of such a contract. In a dispute where the claim is upheld by a judgment, the court would annul the contract and all legal consequences it produced. Subsequent consent of the other unmarried partner would allow such a contract to remain in force.

Considering that the legal regime of marital property also applies to unmarried partnerships, which are expressly equated with marriage in terms of property relations, the same presumption of equal shares of each unmarried partner in its acquisition applies to unmarried property. This presumption of equal shares in the acquisition of unmarried property can be corrected by negotiating a different proportion in shares. The legal regime implies clearer property relations, better realization of the principle of family solidarity, and equality. Moreover, judicial practice, based on family law, often determined their shares in equal parts. However, in practice, the legal property regime, as envisaged by the Family Law, could lead to injustice, especially in the case of unequal contributions of unmarried partners to property creation. Such a situation arises when one partner makes maximum efforts and contributes while the other does not contribute at all and often only consumes the created property. Such behavior contradicts the idea of the rights and duties of unmarried partners. In the case of unequal contributions to common property, an unmarried partner can conclude an agreement with the other partner stipulating their unequal shares in the unmarried property. If no agreement is reached, an

unmarried partner can protect their rights regarding greater contributions to the acquisition of common property by filing a lawsuit requesting the division of unmarried property. In proceedings conducted according to such a lawsuit before the court, an unmarried partner would rebut the legal presumption of equal shares of unmarried partners in the acquisition of unmarried property. In addition to the common property acquired through work during the duration of the partnership, according to the provisions of Article 10 in conjunction with Article 191 paragraph 2 of the Family Law, the property that an unmarried partner had at the time of the establishment of the partnership, property acquired by dividing common property, inheritance, gift, or other legal transactions resulting in exclusive rights represent their separate property [8]. Each unmarried partner manages and disposes of their separate property independently. Property encompasses absolute and relative rights. Absolute rights include real rights (ownership, servitudes, mortgages, state ownership, etc.). Relative rights comprise contractual rights, intellectual property rights (copyrights and industrial property rights), and personality rights that can be monetarily expressed and separated from their holder in legal transactions.

As an absolute right, the right of ownership over movable or immovable property can be acquired by derivative or original acquisition, where the criterion depends on whether the acquirer bases their ownership right on the right of a predecessor. The method of acquisition determines its legal status, meaning that the property acquired by unmarried partners can be either common or separate. In the case of original acquisition, an unmarried partner can acquire property by finding others' property (occupation). Ownership of a lost item is acquired under law-prescribed assumptions. Whether property is deemed common or separate depends crucially on work and its contribution to property acquisition. If an unmarried partner accidentally finds an item, it becomes their separate property. However, if they professionally

engage in collecting items (e.g., collecting recyclable materials), such acquired items and the proceeds from their sale are considered common property of unmarried partners.

Work serves as the dominant criterion in determining the status of unmarried partners' property. This criterion also applies when unmarried partners jointly create a new item from their material and, under Article 22 of the Law on Obligations and Property Relations, acquire co-ownership rights over it [15]. The most common way of acquiring ownership rights in this manner is through the construction of a family home using the joint funds of unmarried partners. In a dispute arising from the composition of common property, which includes a family home where one unmarried partner is registered as the exclusive owner, the other unmarried partner seeking recognition of their share in the common property must prove that both unmarried partners participated in its acquisition, using funds from their separate property as well as joint funds.

In addition to the mentioned cases, unmarried partners can acquire ownership rights over movable or immovable property through possession. The statutory limitation period for movable property is three years, while for immovable property, it is ten years. Following the provisions of Article 30 paragraph 1 of the Law on Obligations and Property Relations, the commencement of the limitation period for unmarried partners regarding movable or immovable property representing their common property begins when both or one of the unmarried partners takes possession of the property and ends with the expiration of the last day of the maintenance period [15].

If both unmarried partners or just one simultaneously take possession of the property, the maintenance period ends with the expiration of the last day of the maintenance period. In cases where the maintenance period runs simultaneously for both unmarried partners, questions of dishonesty, as a reason preventing the acquisition of ownership rights through possession, must be considered concerning both unmarried partners.

The lack of conscientiousness of one cohabiting partner in a situation where maintenance simultaneously applies to both cohabiting partners prevents the acquisition of property rights to items that constitute joint property of cohabiting partners, even in cases where the other cohabiting partner is conscientious. Such an outcome results from the fact that both cohabiting partners have simultaneously entered into possession of the items, thereby making conscientiousness and legality of possession assessed in relation to both cohabiting partners, just as the deadline for maintenance expires simultaneously for both cohabiting partners.

As previously mentioned, cohabiting partners, besides absolute rights, can also acquire relative rights. Relative rights or obligations have effects solely between participants in the given obligation relationship. The most significant source of relative rights is the Law on Obligations. The law considers contracts, causing damage, acquiring without grounds, agency without authority, and unilateral expressions of will as sources of obligations. In some cases, the Law on obligations has recognized the right of cohabiting partners under certain conditions the right to monetary compensation that can be awarded to a cohabiting partner in the event of the death or severe disability of a close person, provided that there was a lasting cohabiting relationship between the deceased (injured) and the cohabiting partner [15]. The existence and duration of the cohabiting relationship are factual questions determined by the court in the procedure for compensation, taking into account all circumstances of the case. The surviving cohabiting partner will be entitled to compensation for non-material damage if they prove that they lived with the deceased (injured) in a cohabiting relationship that constitutes a cohabiting union. The duration of that cohabiting union, as a preliminary question on which the right to compensation depends, is not prescribed by the law, but according to existing judicial practice, it refers to a cohabiting relationship that lasted longer [12], [11]. With the new amendments to the Law on Pension and Disability Insurance

in Article 28 paragraph 2 it is prescribed that a cohabiting partner can exercise the right to family pension of the deceased insured person, i.e., old-age, early old-age, or disability pension [6], [5], [6]. In this way, with the amendments to the Law on Pension and Disability Insurance, the cohabiting partner is allowed to exercise the right to family pension, provided that they prove in court that they lived in a cohabiting relationship with the deceased insured person. Except for the mentioned cases in which the rights of cohabiting partners are equated with the rights of spouses, domestic legislation does not recognize rights to cohabiting partners that are recognized to spouses. An example is the Law on Inheritance, which exhaustively lists the circle of persons who are statutory heirs, among which a cohabiting partner is not included, and the Labor Law in Article 77 prescribes that an employee has the right to leave from work with wage compensation (paid leave) for a total duration of five working days during the calendar year, in case of their spouse's childbirth [14], [3]. Although the employee is not explicitly granted the right to paid leave in case of their cohabiting partner's childbirth, the law allows the possibility for this right to be recognized by the employer's general act, indicating that the realization of this right depends on the employer's discretionary decision. Top of Form

CONCLUSION

Non-marital cohabitation is a legal institution regulated by various provisions with different legal effects. In family law, the definition of non-marital cohabitation reflects legislative views on the necessary prerequisites for its family effects. However, difficulties can arise in the application of regulations, particularly regarding the duration of the cohabitation as a condition for recognizing the establishment of a non-marital cohabitation and the effects it produces on the rights and obligations of cohabiting partners. Existing family law regulations governing the property relations of non-marital partners are characterized by a small number of provisions. In essence, the

situation is quite clear, at least from a theoretical standpoint, and judicial practice has commendably expressed itself on legal regulation.

More precisely, the provisions of the new family legislation have created initial conditions to avoid lengthy legal proceedings in the future, which sometimes lasted for a decade or more just to determine each non-marital partner's share in the creation and subsequent ownership of common property that needed to be divided. The introduction of a new institution into our family law system, the marital agreement, which allows non-marital partners to regulate their property relations concerning existing or future property, should certainly contribute to avoiding disputes regarding property division.

Based on all the above, it can be concluded that in the legal system of the Republic of Serbia, non-marital cohabitation is

equated with marriage, primarily based on the Constitution and the Family Law regulating marriage, family relations, and personal status of citizens. Non-marital partners can also claim rights from social security, such as the right to family pension and the right to compensation for non-material damage in case of the death or severe disability of a close person. Outside of these cases, a non-marital partner is not equated with a spouse in inheritance law and in certain rights related to employment. The current Law on Inheritance does not include a non-marital partner in the circle of legal heirs, but this current legal solution does not exclude the possibility of future changes in the legal regulation of this issue, aiming to equalize their inheritance rights, considering societal trends. The same applies to other areas of legal regulation where non-marital cohabitation is not equated with marriage.

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ИМОВИНСКИ ОДНОСИ ВАНБРАЧНИХ ПАРТНЕРА ПАРТЕРА

Резиме: Према законодавству Републике Србије, ванбрачна заједница је заједнички живот две особе различитог пола којима недостаје законски облик брака, а карактерише је трајање и стабилност. У неким западноевропским земљама, ванбрачне заједнице су постале уобичајен облик заједничког живота у последњих неколико деценија, али нису правно регулисане прописима породичног права као у Србији, где је деловање таквих заједница регулисано одредбама о праву на издржавање, као и о стицању и подели заједничке имовине. С обзиром на то да су са савременим друштвеним променама, имовински односи у ванбрачним заједницама претрпели промене у смислу њиховог признавања позитивним законодавством, предмет ове студије биће регулисање имовинских односа ванбрачних партнера, из перспективе позитивног законодавства у оквиру којег је ванбрачним партнерима дозвољено да их прилагоде својим потребама и интересима.

Кључне речи: ванбрачна заједница, заједнички живот, ванбрачна имовина, заједничка имовина, посебна имовина, предбрачни уговор, заштита права