CONFLICTING INTERESTS OVER THE FAMILY HOME:
A COMPARATIVE OVERVIEW

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The family home is the place where the family resides and has its roots, where its members meet, where they belong and finally where they return after having been away. In addition to this, it is also a building which expresses the personalities of those who live in it, shows their means, and reflects their social and cultural position. The family house is an asset which will be bequeathed to someone, or be sold to be replaced by a more beautiful or a more modest one, according to the situation and means of the family.

A close bond exists between the family and its home. “Most part of historical, sociological and anthropological studies let the family boundaries clash with the dwelling boundaries.” Those family models which are composed of more than one group living in separated places (as happens for instance in some tribes of the African Bantu, where each wife lives with her children in a distinct hut, and the husband comes regularly to visit them) are considered exceptional at all.

Since XIX century, in the western world, there has been a shift towards smaller family groups than in the past and houses have grown correspondingly smaller with the need to accommodate only one family. In present western societies it is the norm for young couples to move into a dwelling of their own.

In consequence of the housing policies which spread in Europe in the second half of the XIX century, a very high percentage of families has acquired a house or a flat. As that house has been received by inheritance in relatively few cases – the lengthening of the average life span has reduced the incidence of people inheriting from their parents at a time when they are still at the beginning of their professional and family life – almost all the acquisitions have been made through financing from banks and finance corporations.

In a few countries, where housing is especially expensive, it is rather common for parents to place at their son’s or daughter’s disposal part of the funds needed to buy a house or flat, (which they might otherwise not be able to afford to do). This phenomenon is particularly interesting in countries like Italy, where the percentage of only children or children with only one sibling has risen dramatically (from 23% in 1958 to 38% in 1998; it is predicted that this figure will rise to 54% by 2008 and to more than 65% by 2018). Having only one child, or at most two, allows parents to give consistent financial support.

The spur to acquire buildings rather than to rent them is the outcome of an economic policy, promoted by states, which views the house as just another market commodity. By convincing people to buy newly built houses on building plots on the peripheries of towns, financial societies and banks, with the support of the state, have also managed to sell credit and financial products.

The increased frequency of house ownership has made certain questions and issues more relevant than they were in the past; for instance the conflicts which may arise between owners and those who have lent the money for the purchase, for instance mortgagors, or between owners and prospective buyers.

Other conflicts also related to the house can arise between the members of the couple. In the course of the 19th century and especially in the second half, the notion spread that both partners had the same duties and equal rights, and that therefore all family property must be equally divided between them: this model of community of property has been adopted in several European countries and this implies that the family wealth must be divided equally in the event of divorce. In the same
period family law came to recognise and protect the rights of minors and children more rigorously than in the past, which in its turn underlined the importance of the family home as a place of stability in which children could grow up.

The family home is therefore at the centre of a conflict of interests between several different parties. Considering that in most cases the house represents the most valuable single item of family property, the destination of this property is interesting because comparative analysis shows that it is sometimes left to the parties’ will. More often the law specifies who is to receive it on the basis of meditated choices and a precise hierarchy of values, intended to achieve a balance between the interests involved.

In European legal systems the current prevailing trend is to award a right to live in the home, for a short or a long period of time, to the partner who has the custody of the children. Obviously, he or she must not be the owner of the house, otherwise the automatic right to live in the premises would follow as a consequence of this.

The link between the family home and family is broken when the couple separates, because a group which lived in one single place will have to live in two.

Under Italian law, the family home is taken into consideration both in the case of separation and divorce. So it is granted preferably to the parent to whom the children are awarded in custody or with whom they still live if over 18 years of age. (art. 155 of the civil code for the case of separation, art. 6 of the law 1970, n. 898 for divorce).

Regarding conflicts with third parties, a very quarrelsome situation arises when both partners have contributed financially to the buying of a house, which has later been registered in the name of only one of them. If the registered proprietor sells the house, or mortgages it but is unable to repay his or her loan, there will be a conflict between the other partner and the purchaser or mortgager. The former can base his or her claim upon, possession of the house, the trust of the partner and the need to protect the couple's children; the latter can rely for instance on a purchase for value and without notice of the existence of rights different from those of the registered owner.

These interests are conflicting and irreconcilable. They act as an unavoidable test bench of the hierarchy of values that the legal system will in the end express in awarding the pre-eminence of one over the other.