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**Minor's right to his/her family habitat:  
evident discrimination under a commodate or lease contract below it**

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Among the various problems that involve the actual society, surely great importance has the instability of the affective relationships, that reveals itself in the proliferation of the relationships "more uxorio" and in the separation and divorce of the spouses proceedings, that numerically increase year by year.

Well, it is worth to make some reflections: granted that the commodate is the contract through the a party (bailer) gives to the other one (commodatary) a mobile or immobile thing, in order that he uses it for a determined time or use, with the obligation to give back the same received thing (art. 1803 italian civil code) and that it's a real, obligatory, free and unilateral, according to the judgement of the italian Supreme Court of Cassation, United Divisions, July the 21<sup>st</sup>, 2004 nr. 13603 (conformable Cassation February the 13<sup>th</sup>, 2006, nr. 3072), where the commodate of a real estate has been stipulated without duration

limits in favour of a already formed or by the way to be formed **family nucleus** (especially, by one of the spouses' parent), we are in the hypothesis of the commodate at undetermined time, characterized by the unpredictability of the moment when the destination of the asset will stop.

In fact, in this case, because of the agreeing will of the parties, it has been given to it a **destination bond to the family housing requirements** (and therefore not only and not so much personally for the commodatary) suitable to give to the use – the thing has to be destined for – the implicit character of the duration of the relationship, **also over the marital crisis and without possibility to let the bond's stop depend exclusively on the will, ad nutum, of the bailer**, except the right for this last one to request the restitution of the real estate in the hypothesis of a cropping up need, according to art. 1809 paragraph 2 of the italian civil code, signed by the requirements of the urgency and not forecast .

What does it mean? Practically, considered that, during the separation of the spouses, in the overwhelming majority of the cases the Judge orders that the juvenile children remain living with their mother, if the juvenile's grandfather had allowed his own son to use a real estate of his property and this son afterwards separates with his wife, the grandfather, just owner of the real estate, will be not able to come back in possession of it for an enormous time, that is not only until when the grandchildren will become major, but also further, that is until when they will be major economically self-sufficient.

In fact, in a separation or divorce proceeding, the above mentioned judgment **doesn't modify the nature and the content of the enjoyment title on the real estate, but it determines a concentration, in the grantee's person, of this enjoyment title**, that remains regulated by the contract's discipline, with the consequence that the bailer must allow the extension for the use provided in contract, except a cropping up urgent and unprovided need,

according to art. 1809, paragraph 2 Italian Civil Code (*Supreme Court of Cassation, I Division, March the 23<sup>rd</sup>, 2005 nr. 6278*).

We have to ask: what is the ratio (reason) of all?

The ratio (reason) is the protection that Italian law offers to the juvenile children with regard to the **domestic habitat**, understood as place of the affections, interests and habits the family life expresses itself in and goes off the continuity of the domestic relationships, aggregation and unification centre for the nucleus' members, complex of assets functionally organized to assure the family community's existence, that just under the essential characters of stability and continuity appears to be as incompatible concept with an enjoyment signed by temporariness and uncertainty.

**Therefore, after all, the ratio (reason) is in the highest interest of the juvenile child not to suffer the "shock" to be uprooted from his world, from his family habitat.**

**But at this point we have to ask: if the ratio legis (law reason) is the juvenile child's interest, why then does Italian law provide a different regulation in the hypothesis of family house's alienation, according to if the juvenile is child of the real estate's owner, or he is child of the real estate's rentner, or he is child of the real estate's commodatary?**

In fact if the minor is child of real estate's owner, according to the judgement of the Italian Supreme Court of Cassation, United Divisions, n. 5067 of April the 2<sup>nd</sup>, 2003, in the separation and divorce proceedings the judicial measure about the assignation of the family home to the foster spouse, having surely certain date, is exceptionable, even though not transcribed, to the third subsequent buyer of the real estate on a following date, in the limit of the period nine years, since the assignation measure's date; for the period exceeding the nine years, instead, the assignation measure is exceptionable to the third subsequent buyer

only if it has been previously transcribed, therefore is irrelevant the third's knowledge about the assignation of the real estate he bought, being the only exceptionability discipline just that one coming from the transcription and the legal knowability of the act by the third.

Furthermore the third subsequent buyer of the real estate after the assignation measure in the same duration limits (nine years since the assignation date or, in case of transcription, also over the nine years) within the measure is exceptionable to him, must respect the spouse's enjoyment (and so of the juvenile children or major and not economically self-sufficient without guiltiness) in the same judicial way of the assignation, as destination bond joined to the children's interest.

Therefore is excluded every payment obligation from the beneficiary for this enjoyment, granted that every compensation form distorts the function of this law rule, because incompatible with its only purpose of children's protection and it would draw on directly on the patrimonial relationships between the spouses regulated in the separation or divorce proceeding (italian Supreme Court of Cassation, n. 12705/2003; so as italian Supreme Court of Cassation, n. 4188/2006).

According to the italian Supreme Court of Cassation's recent judgment n. 10104 of April the 30<sup>th</sup>, 2009, in the separation of the spouses, the assignation measure of the family home determines a transfer ex lege (according to the law) of the lease contract in favour of the assignee spouse and the extinction of the relationship for the spouse originally renter; this extinction happens also if both spouses undersigned the lease contract, so the assignee succeeds the ideal share of the other spouse.

Therefore, at the natural expiry of the contract, the minor, together with the foster parent, will have to leave the house and therefore his family habitat.

If the minor is child of the commodatary of the real estate used as family home, if the bailer sells this real estate, the commodate contract stipulated with the buyer, after its transfer, is not exceptionable to the buyer of the real estate object of the commodate, granted that the provisions of art. 1599 Italian Civil Code are not extendable for their special character to different relationships from the lease (Italian Supreme Court of Cassation, n. 5454/91).

The buyer is legitimated to obtain from the commodatary the real estate's release (therefore the minor loses his domestic habitat), but if he has acted as ayant cause from the bailer's heirs, so enforcing in proceeding the same right of these last ones, he is obliged to respect the expiry term of the commodate contract fixed for all commodatary's life (Italian Supreme Court of Cassation, n. 21059/2004) and in case of commodate of a real estate in order that it is destined as family home of the spouses, the following buyer who acts as ayant cause from the bailer's heirs must respect this destination until when the minor becomes major economically self-sufficient.

**Then, what about the minor, child of persons who have rented a real estate, but they are defaulting in the payments of the fees?**

**The minor will be evicted from the habitation together with his parents.**

**In this case, doesn't the Lawgiver consider the minor's loss of his family habitat?**

**Therefore, in the above mentioned cases there is a strong and unreasonable discrimination among minors, in contrast with art. 3 of the Italian Constitution.**

*Probably it happens under the so-called reconciliation of opposing interests, according to it, in case of lease, to the minor's right to the so-called family habitat it is possible to oppose the property right recognized by the Italian Constitution at the art. 42; however, de iure condendo, it would be surely*

*desirable an explanatory intervention of the Lawgiver or of the Constitutional Court.*