

# HERMENEUTICS OF THE FAMILY USUCAPTION: ANALYSIS OF THE PRESUPPOSITIONS OF FAMILY USUCAPTION ACCORDING TO SYSTEMIC INTERPRETATION

HERMENÊUTICA DA USUCAPIÃO FAMILIAR:  
ANÁLISE DOS PRESSUPOSTOS DA USUCAPIÃO FAMILIAR  
A PARTIR DE UMA INTERPRETAÇÃO SISTÊMICA

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## ABSTRACT

The usucaption institute is truly nuclear for Real Rights. This subject is achieved through action seeking property, and the purpose is to achieve the right of ownership, by proving the requirements, ie the intention to own, term and others. Specifically, in 2011, family cancellation occurred, which requires that the family leave, the exclusive possession for two years, possession with all qualification requirements, and the author cannot be the owner of another urban or rural property, also must have respect for the location of the property in urban area and the property cannot exceed the measure of 250 meters. This is a subject that is full of doubt, in theory and in the tribals. Therefore, the difficult point of this work is the investigation into the possibility of reducing this species to family abandonment or if we can defend other hypotheses, because the Laws of Civil Law of Brazil place the abandonment of home alongside other equally complicated hypotheses in the Family right. The studies done let us understand that abandoning the home requires the sum of abandoning the home and family. In another matter, the word "ex-husband" has to do with the reality of the separation. Finally, the abandonment requirement is as serious as the other requirements of article 1573 of the Civil Code, for example, such as physical or moral aggression, therefore, the adverse possession of the family is only in the case of abandonment

**KEYWORDS:** Usucaption. Abandonment. Family. Spouses.

## RESUMO

*O instituto da usucapião verdadeiramente é nuclear para os Direitos Reais. O referido instituto é logrado tipicamente por meio de ação petítória, cujo propósito consiste na obtenção do direito real de propriedade, mediante a comprovação da qualificação possessória, isto é, da intenção de dono, prescrição aquisitiva e*

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outros. De modo específico, em 2011, insurgiu a usucapião familiar, que exige para a sua configuração o abandono familiar, a posse exclusiva de dois anos e qualificada, além de o usucapiente não poder ser proprietário de outro imóvel urbano ou rural, respeitando ainda a localização do imóvel em zona urbana e que o imóvel não poderá sobejar a metragem de 250 metros quadrados. Ocorre que essa modalidade é alvo de múltiplas discussões doutrinárias e jurisprudenciais. Diante disso, o ponto melindroso deste trabalho não é outro senão a investigação a possibilidade de restringir esta modalidade ao abandono familiar ou se é defensável inserir outras hipóteses, em virtude de o ordenamento civil pátrio posicionar o abandono de lar ao lado de outras hipóteses similarmemente nefastas, na. Assim, os estudos realizados nos permitem compreender que o abandono de lar exige o cúmulo do abandono do imóvel e da família. Noutra giro, a expressão “ex-cônjuge” ou “ex-companheiro” está ligada à situação fática de separação. Por derradeiro, o pressuposto de abandono é tão gravoso quanto outras hipóteses descritas no artigo 1573 do Código Civil, tais como a ofensa física ou moral, razão pela qual a usucapião familiar não deve se restringir ao abandono.

**PALAVRAS-CHAVE:** Usucapião. Abandono. Família. Cônjuges.

## 1 INTRODUCTION

The most distinct sources of Brazilian law commonly convey the extinction of guilt for divorce. In fact, the fact is that this discussion lost its furor in Family Law (*Direito de Família*), especially after the supervenience of Constitutional Amendment 66 of 2010 (*Emenda Constitucional 66 de 2010*), which aimed to abolish minimum time lapses for the purpose of dissolving the bond or the conjugal society. However, after one year of this Amendment, there was a certain instigation to resume this discussion in the Law of Things (*Direito das Coisas*), due to Law nº 12.424 of 2011, due to the insertion of the new form of adverse possession (or usucaption), namely the family adverse possession (or family usucaption), whose basic assumption it consists of the proof, by the *usucapiente* (who is in the process of acquiring or acquired by adverse possession), of the abandonment of home (historical hypothesis of guilt<sup>2</sup> for the divorce, in the terms of article 1573, IV of the Civil Code of 2002) (*Código Civil Brasileiro de 2002*).

At this point, the anguish of this research emerges, from the identification of the “mens legis” that illuminated the mind of the legislator. The spouse “agent of the material marital relationship” will suffer a nefarious patrimonial consequence, which will consist of the loss of the parcel of property that was peculiar to him (in a condominium with the abandoned spouse), due to the reprehensible conduct of abandonment. In this discourse, we systematically believe that abandoning a home in the conjugal area finds hypotheses similarly reprehensible.

2 In an authentic exemplary role, in addition to leaving home, the following are hypotheses of guilt for divorce: Art. 1.573. Some of the following reasons may characterize the impossibility of the communion of life:

- I - adultery;
- II - death attempt;
- III - ill-treatment or severe injury;
- IV - voluntary abandonment of the conjugal home for one continuous year;
- V - conviction for infamous crime;
- VI - dishonorable conduct.

Sole paragraph. The judge may consider other facts that make the impossibility of life in common evident. (BRASIL, 2002) (Our translation into english)

In this perspective, the expression "systemic interpretation", contained in the title, was used with the aim of looking at family adverse possession in all its angles and presuppositions, in view of the institutes involved in Family Law and in the Law of Things.

This article will unfold in five chapters, which will bring principled and institutional views that will gravitate towards family adverse possession. All this work will have the purpose of verifying the possibility of extending reprehensible hypotheses, in the field of family adverse possession, beyond the abandonment of home.

## 2 PRINCIPIOLOGY

Principles are nuclei of thought, through which hermeneutics itself is structured. In this capacity, the Philosophy of Law<sup>3</sup> is dedicated to studying the space occupied by the principles in the Science of Law. Although there are doctrinal dissonances, the most prudent thing is to bring objective aims to the principles, in comparison with the subjectivity of morality, in addition to the mark of enforceability (chargeable).

Tércio Sampaio Júnior explains the strength of the principles in the following terms:

The principles, as we see, are directors enunciated of human activity legally considered. The ones we mentioned are regional. However, there are principles that apply in all areas. These are general principles of law, such as that of equality, that of liability for damages, that the agreement must be observed (*pacta sunt servanda*) etc. In its name, dogmatics seeks to understand law as a whole, postulating its unity. For its, despite the distinctions, the law is, ultimately, only one. Hence the systematizing sense of its task. The resulting system, as we have seen, may not be a strictly logical set, but it must manifest a certain coherence and sense of cohesion. (FERRAZ JÚNIOR, 2017, p.108) (Our translation into english)

Principles are parameters, waves of maturation of legal thinking. They are pillars capable of clarifying and enlightening the minds of the actors of law. In this way, the principled application conveys congruence and interpretative sustainability.

To elucidate the impact of the principles let us see the thought of the jusphilosophist Miguel Reale:

Principles are, therefore, truths or fundamental judgments, which serve as a foundation or guarantee of certainty to a set of judgments, ordered in a system of concepts related to a given portion of reality. Sometimes propositions are also called principles, which, although not evident or resulting from evidence, are assumed to be the foundations of the validity of a particular knowledge system, as its necessary assumptions. (REALE, 2002, p.60) (Our translation into english)

3 So it was with Philosophy: it was reborn. And the Philosophy of Law arrived with all its usual energy. Revolutionary, since it's not tied to any parameters; she returned to free the legal thought. There is no State Science, much less Philosophy. There is also no Market Science or Philosophy (this mark of the present times). Philosophy has to help loosen the bonds, unveil the concealment brought by language, show the limits of technique, teach how to work with principles, make clear fundamental values and ethics, generate courage to do justice, in short, to produce an awareness of the relevant social role that every student and operator of the Law should have. (NUNES, 2015, p. 18) (Our translation into english)

Therefore, the principles bring clarity to the speech or legal decision. In this speech of exaltation, the normative precepts are nothing more than principled radiations.

## 2.1 DIGNITY OF THE HUMAN PERSON

The dignity of the human person presents as irradiations: the protection of physical and moral integrity. These irradiations incline us once again to the axiological proximity between the dignity of the human person and the personality, it's an umbilical harmony.

According to Bretas and Machado: "The dignity of the human person is the justifying source of the entire Brazilian Legal System, the pillar on which all normative structures must rest". (BRETAS E MACHADO, 2018, p.60)

They are also basic species of dignity, ontics and assistance. The first of which refers to the perception that dignity is: a legal, latent good, inherent to man. That is, 'I am a man so I have dignity'. On the other hand, assistance is understood as the need for the State to protect the dignity of man, in a preventive, repressive, extrajudicial and jurisdictional way. In this line:

The value of dignity reaches all sectors of the legal order (...) the material substrate of dignity thus understood can be deployed in four postulates: i) moral subject (ethical) recognizes the existence of others as subjects equal to him; ii) deserving of the same respect for the psychophysical integrity to which it is held; iii) is endowed with free will, with self-determination; iv) it's part of the social group, in relation to which it's guaranteed not to be marginalized. (MORAES, 2006, p.17) (Our translation into english)

Dignity, according to the invoked precepts, is considered a "stone clause" (*cláusula pétrea*), therefore, protected materially by the original constituent power, under the terms of article 60, paragraph four, of the current Brazilian Federal Constitution.

Dignity is a personal and individual right, therefore, it belongs to the list of individual rights, therefore, a fundamental right of the first generation. In this sense, the discourse is interconnected with revolutionary defenses (French, American Revolutions and so many others), according to Puccinelli Júnior (2015, p.26)

The dignity, understood as a fundamental right, carries with it: horizontal effectiveness (between people, not hierarchical, there must be reciprocity of respect and the promotion of respect for dignity); vertical efficacy (the State must excel in the zeal for dignity, similarly to the discourse of dignity of assistance); and, radiating efficacy (the defense of dignity concerns the most different horizons and spheres), as it's possible to extract from André Puccinelli Júnior's reflection (2015, p.263-264).

## 2.2 PRIVATE AUTONOMY

The first hermeneutic care to be taken is to identify the most appropriate morphology. That is, we cannot confuse private autonomy and autonomy of the will, after all, the autonomy of the will is very much related to the perspective of unlimited freedom, without major state interference. On the other hand, private autonomy allows, more clearly, State interference, considering the discourse of the social function of contracts, for example. Let's see:

In a flagrant way, private autonomy must be confronted with the autonomy of the will. Although we know that the first one presents marked legal limitations, differently from the autonomy of the will, taking into account the freedom concerning to the individuals, sensibly studied in the contractual orbit, however, without the perceptions of marked legal limitations. (BRETAS, 2015, p.127) (Our translation into english)

Private autonomy is translated, in objective terms, as limited freedom in the patrimonial context. This principle has a series of consequences, including mandatory, initial intangibility, contractual freedom and freedom to contract, among others.

The limitation of autonomy can be made due to conventional and normative limits. Categorically, autonomy is limited by the social function of contracts, as well as by the dignity of human person.

According to Perlingieri, private autonomy must be interpreted as:

(...) the freedom to regulate one's own actions or, more precisely, to allow all individuals involved in a common behavior to determine the rules of that behavior through a common understanding. (PERLINGIERI, 2002, p.17) (Our translation into english)

That said, private autonomy must lead the interpreter to the levels of contractual and contracting freedoms. In this tone, we must conceive freedom in a manner consistent with rational normative limits.

## 2. 3 SOCIAL FUNCTION OF THE PROPERTY

The property, since the most remote times, has undergone significant transformations. From communal to private. From absolute and intangible property, according to the Romans to social-function property, as theorized by Szaniawski, quoting Léon Duguit (2000, p.32). In other words, it's a question of migration from the 'property-right' perspective to 'property-duty'.

Fachin (1988, p.15) clarifies that, in more remote periods of history, private property represented the exacerbation of individualism, moreover, it was marked by inviolability and absolutism. In this sense, it's understood that in that period there was no possibility for State intervention. Since the perpetual and absolute character of the property prospered.

The legislator did not exhaust the concept of 'social function of possession' and 'social function of property', in fact, his stance was none other than to posit a general clause, through which parameters and pillars of the social function were established, especially regarding to the environment, under the terms of article 186 of the Constitution of the Federative Republic of Brazil.

What is decisive when evaluating the social function of possession and the social function of property is to perceive its profound interconnection with the legal good: dignity of the human person. In this sense, from a serious reading of the "Legal Statute of Minimum Equity" ("*Estatuto Jurídico do Patrimônio Mínimo*"), by Luiz Edson Fachin (2008), we can reach the proposition that dignity is the main element that makes up the patrimony. For, when we talk about State heritage, the premise is that all tangible and intangible (corporeal and incorpo-

real) assets are components of this heritage, and the existential structures concerning to their people.

Thus, the dignity of the human person and the social function are inseparable, as well as, according to article 186 of the current Brazilian Federal Constitution, the rational use of the soil, respect for the environment and workers.

In this same dogmatic tone, let us see Gonçalves's conception:

The current Federal Constitution provides that the property will serve its social function (art. 5º, XXIII). It also determines that the economic order will observe the function of property, imposing a brake on business activity (art. 170, III) (...) This whole set, however, ends up tracing the current profile of property law in Brazilian law, which has ceased to present the characteristics of absolute and unlimited law, to become a right of social purpose (GONÇALVES, p.241-242, 2018) (Our translation into english)

We must also see that, as taught by Pietro Perlingieri (2002, p.229), the social function is a decisive element of property, that is, if there is no compliance with the parameters of the social function, essentially, there is no way to recognize ownership.

### 3 ELEMENTARY CONCEPTS

Ineluctably, the interpretative exercise requires the construction of variables and institutes. In this work, the institutes to be confronted are: detention, possession and property.

It's important to mention, preliminarily, that the expression "possessor" is not to be confused with the owner, since he – owner – carries with him the attributes of disposing and claiming the thing in the face of the one who unjustly holds it, under the terms of article 1.228 of the current Civil Code.

Possessor is also not to be confused with holder; it's also important to consider that the qualified possession (*posse qualificada*) is not to be confused with the detention, being certain that this does not induce usucaption and that – qualified possession – yes.

#### 3.1 POSSESSION

The legal nature of 'possession' will always be stormy. At first, according to the lessons of Carlos Roberto Gonçalves (p.382, 2019) we must understand it as factual, inasmuch as the materialization of its attributes can occur independently of any adjustment of designs. It can also be taken as a right, since its vilipendium establishes in favor of its legitimate addressee a series of extrajudicial, typical and atypical possessory mechanisms, for guardianship purposes.

What is certain is that: no reflection we make will be sufficiently robust to settle historical doctrinal spirits. However, although we are far from exhausting this issue, beforehand we must remove the positioning of possession as a real right, despite its interface and a certain



"umbilicalism" with property, since possession is not regulated in the apparent taxing role of Rights Reais (*Direitos Reais*), pursuant to article 1.225 of the current Civil Code of 2002.

### 3.1.1 Concepts and Theories

In the Law of Things, there is an indispensable study about two critical legal assets, both concerning the fundamental rights of the first generation (property and possession). On the other hand, we also present the relevant discourse on second generation fundamental rights, with a view to social rights.

Beforehand, it's necessary to propose that in the light of the Civil Code of 2002, under the terms of article 1.196, the possessor is one who exercises one of the attributes of owner, which are prescribed in article 1.228, caput, of the Civil Code, that is, it's of those - possessor - who exercise the attribute (s) of using, possess and enjoying the thing.

### 3.1.2 Detention

Among the modalities of detention, the following ones emerge: mere permission or tolerance, under the terms of article 1.208 of the Civil Code, as well as the unjust modalities (violence and clandestinity, while they last, and precariousness).

In addition to these initials, let us invoke the infamous "servant possessor" (*fâmulos possuidor*) (the one that retains possession in favor of third parties. In the case of this modality, adverse possession is possible, provided that we are faced with the depletion of subordination), under the terms of the article 1.198 of the Civil Code.

Finally, the factual exercises, apparently possessory on public goods, under the terms of article 191, sole paragraph, 183 of the Federal Constitution of Brazil (*Constituição Federal do Brasil de 1988*), according to the Summary 619 of the Superior Court of Justice (*Súmula do Superior Tribunal de Justiça*) and 340 of the Supreme Federal Court (*Súmula do Supremo Tribunal de Justiça*), and article 99 of the Civil Code (*Código Civil Brasileiro*), will not induce the adverse possession. Thus, in the terms of Summary 340 of the Supreme Federal Court: no matter what kind of public good, be it dominical, special or common use, none of these modalities will induce adverse possession, "a priori".

We can see the jurisprudential sense, when reflecting on this Summary, since the usucaption is a hypothesis of original acquisition, due to the possessory exercise, bringing a tendency to individual character (certainly of *inter parts* reach in favor of the *usucapiente*).

## 4 ADVERSE POSSESSION / USUCAPTION

### 4.1 ESSENCE

The institute of adverse possession is complex and assumes a central position in the Law of Things. Usucaption or adverse possession is a classic institute of the Law of Things, it consists of the means through which, according to Rizzardo (2016, p. 54), the original acquisition in favor of the *usucapiente* will be perfected, being transmitted, by virtue of the recognition of qualified possession, a suitable title for the purpose of transferring the property.

Understanding this work involves understanding possession. After all, possession in its cosmopolitan standard is fact and right, as well as having a series of classifications, such as: simple versus qualified, direct versus indirect, 'with-possession' (*composse*) versus exclusive, objectively addicted versus not addicted, good faith versus bad faith etc.

This work requires dogmatic and axiological valuations. With regard to possession, the Civil Code of 2002 adopts the simplified theory of possession, by Rudolf Von Ihering, according to article 1.196.

According to this theory, the possessor is the one who brings with him the attributes: *affectio tenendi* and *corpus*. These assumptions, which lead us to believe that the possessor is the one that has the appearance of an owner, that is, we are facing that a subject who behaves with considerable zeal in relation to the thing to the point of resembling the owner, we are facing the discourse of visibility, of exteriorization. So let's note:

Today the name 'corpus' is given to the person's external relationship with the thing established by the apprehension. Roman jurists, on the contrary, used this expression only to designate the manifestation of the will in the act of apprehension. The 'corpus', according to the dominant theory, is the physical power or the indeed supremacy over the thing, such is the fundamental notion by the current theory. It's absolutely erroneous, as can be seen in my work already cited: The foundation of possessory protection. (IHERING, 2002, p.43) (Our translation into english)

On the other hand, the valuation is unequivocal, to a lesser extent (when compared to the prestige of Ihering's Theory), p on the part of the Civil Code, of the Subjective Theory of Von Savigny, according to which, according to Gonçalves' interpretation (2019, p. 371), possessor is the one who gathers the subjective (*animus domini*) and objective (corpus: inclining ourselves to the power of the subject in relation to something) assumptions.

Add to that the sociological theory, supported by authors such as Silvio Perozzi, according to Gonçalves (2019, p. 374), bringing up the thesis that the possessor imposes an absence in relation to the collectivity, promoting an authentic social recognition.

Paulo Nader invokes the sociological conception in the following terms:

Sociological currents, sensitized by the profound social inequality, which affects a large part of the peoples and marks the beginning of the third millennium, seek to value possession as an instrument of property acquisition, emphasizing social justice as a preeminent value. The doctrine finds a valuable foundation in the studies of Frenchman Raymond Saleilles. Sensitive to



the trend, the Civil Code, giving projection to the constitutional principle of the social function of property (art. 5º, XXIII), confers the domain of extensive area, after five years of uninterrupted possession and in good faith, to a considerable group of people who, together or separately, has carried out works and services of social and economic interest (art. 1.228, § 4º) (NADER, 2016, p.39) (Our translation into english)

Therefore, in comparative law on possession the Italian, French and German influences are worthy of appreciation, for the purpose of building the Law of Laws in Brazil<sup>4</sup>. As we have explained, the theories of Savigny and Ihering were and are developed in Germany. In another round, Silvio Perozzi's theory was developed in Italy. Finally, comparatively, we cannot ignore the "Napoleonic" impact in France.

Based on the Civil Code of 2002, under the terms of article 1.196, the possessor is one who exercises one of the attributes of the owner, which is prescribed in article 1.228, caput, of the Civil Code, that is, it's the one who exercises the attribute (s) of using, possess and enjoying the thing (*usar, fruir e gozar da coisa*).

## 4.2 MODALITIES AND ASSUMPTION

Multiple are the forms of adverse possession, being certain that they all have multiple points in common. In the first moment, we must confront the usucaption over movable versus immovable property, the first is prescribed in article 1.260 of the Civil Code and which is divided into: ordinary (requires good faith and fair title, in addition to the three-year period) and extraordinary (time lapse of five years, regardless of fair title and good faith). On the other hand, the adverse possession of real estate (usucaption over immovable property) has a series of developments, which will foresee time lapses varying between 2, 5, 10 and 15 years.

Independently of the form of adverse possession, qualified possession will be essential, that is, *ad usucapionem*, capable of fulfilling the whole of assumptions for purposes of usucaption. These assumptions reveal the need, essential, for possession to be tame, peaceful, uninterrupted and with *animus domini*.

The *extraordinary* modality: it's provided for in article 1.238 of the Civil Code, which provides for the 15 or 10 year acquisition time lapse (provided that the *usucapiente* exercises possession for housing purposes or has built relevant works under the social or economic

4 Previous to the controversy between Savigny and Ihering, the Code Napoléon, by art. 2.228, thus defines the object of our present study: "Possession is the detention or enjoyment of a thing or a right that we have or that we exercise by ourselves, or by someone else who has it or who exercises it in our name". Apparently the legislator would not have distinguished possession from detention, which is not real, since the term detention was not used in a technical sense, but equivalent to apprehension. The 'possession' is designed as a simple fact and not as a subjective right. The system admits, in addition to the possession of things, that of rights. With a distinction between natural and civil possession, the Spanish Civil Code, of 1888, by art. 430, conceptualizes civil possession in the light of Savigny's subjective theory, placing natural possession as "the possession of a thing or the enjoyment of a right by a person". The specific difference in civil possession is that a person has a thing or enjoys a right with the intention of owning it. Natural possession, or detention, is characterized, according to Aubry and Rau, when "a person does have in fact something under his power, without the intention of subjecting him to the exercise of a real right". (Direct quotes with our english translation)

The Civil Code of Germany - the homeland of Savigny and Ihering - did not elaborate on the definition of possession (Besitz), limited to providing for its acquisition: "Possession of a thing is acquired by obtaining in fact power over the thing..." (art. 854). From Savigny's conception he assimilated only the corpus element. The theme of 'possession' is developed in the other devices - art. 855 to 872. According to the BGB, you will have possession when someone actually exercises power over a thing. By virtue of art. 1,140, 1st part, the Italian Civil Code, 1942, endorsed the theory of Rudolf von Ihering. (NADER, 2016, p.39). (Direct quotes with our english translation)

aegis). It's important to mention that this modality does not require good faith, a fair title, nor are there any length limits.

*Ordinary:* article 1.242 of the Civil Code, in which the acquisitive prescription is 10 or 5 years (single paragraph of the article in focus). This modality will require good faith and fair title of the *usucapiente*.

*Specials:* all of these modalities provide for a five-year delay for the original acquisition via usucaption, value the housing element, as well as if the property must be located in the urban or rural area, finally, the *usucapients* cannot own other urban properties or rural. Specifically see the developments of the special modalities:

*Urban individual (Urbana especial)* (article 9º of Law nº 10.257/01, whose length cannot be over 250 square meters).

*Urban collective special (Especial coletiva urbana)* (article 10 of Law nº 10.257/01), whose normative content is:

Art. 10. Informal urban centers that have existed without opposition for more than five years and whose total area divided by the number of possessors is less than two hundred and fifty square meters per possessor are likely to be usucaped collectively, provided that the possessors are not owners of another urban property or rural. (BRASIL, 2001) (Our translation into english)

*Rural Constitutional or Pro-Labore (Constitucional rural ou pró-labore)* (article 191 of the Federal Constitution), whose length cannot exceed 50 hectares, provided that the property is located in a rural area and serves for housing and labor, under the terms of the aforementioned constitutional article.

*Family urban individual (Individual urbana familiar)* (article 1.240-A of the Civil Code), whose legitimacy concerns the abandoned spouse (according to the Federal Justice Council (*Conselho de Justiça Federal*), abandonment will simultaneously require the abandonment of possession and of family), provided that the latter exercises exclusive possession for two years, in an urban area, in a property that does not exceed 250 m<sup>2</sup>.

Finally, we have the ones of complex materialization, which are: Administrative (Law nº 13.105/2015), as well as Silviculture (Law nº 6.001/1973).

Amid all these modalities, multiple borderline assumptions can be glimpsed, among which: 'to usucapt' it's essential that possession is more than simple, more than *ad interdicta*; possession needs to be qualified, *ad usucapionem*, that is, it must be a quiet, peaceful, uninterrupted possession, and with the subjective remnant of Savigny's theory of possession, the *animus domini*. It's worth stating that it's essential that the possessors exercise their possession with the intention of ownership, as if they really were owners.

## 5 PRESUPPOSED / ASSUMPTIONS OF FAMILY USUCAPTION

This final chapter will present the assumptions of the 'individual family urban special adverse possession', as a result of Federal Ordinary Law nº 12.424 of 2011, capable of inserting article 1240-A, of the Civil Code of 2002, according to which:

Anyone who exercises, for 2 (two) years uninterruptedly and without opposition, direct possession, exclusively, on an urban property of up to 250 m<sup>2</sup> (two hundred and fifty square meters) whose property he/she shares with a former spouse or ex-partner who abandoned home, using it for his/her home or family, he/she will acquire full ownership, provided he/she does not own another urban or rural property.

§ 1º The right provided for in the caput will not be recognized by the same possessor more than once. (BRASIL, 2002) (Our translation into english)

This modality has a striking similarity with the 'individual urban special usucaption', since both are attached to properties located in the urban area, as well as both will only be achieved if the property subject to adverse possession does not have an excess of 250 square meters in its footage. Still in a similar tone, it's clear that both have the restriction that the *usucapiente* cannot have another urban or rural property. However, what differentiates 'family adverse possession' from the 'individual urban special' is certainly the two-year period, as well as exclusive possession, and the fact that it requires abandoning the home. In another way, the 'individual urban special' does not require abandonment of the home, nor does it require exclusive possession. Finally, its acquisition time span is five years.

The *usucapiente* in the modality in focus must prove that the property is the one in which there is habitual housing, being certain that this modality cannot be achieved more than once by the same subject.

Therefore, it's important to place the interlocutor that this modality is not subject to retroactivity. For this reason, the understanding was established, according to the statement 498 of the Federal Justice Council (*Enunciado 498 – Conselho de Justiça Federal*), that family adverse possession can only be vindicated from June 16, 2013.

The assumption of abandonment deserves special mention, for purposes of adverse possession in the current modality. Preliminarily, this modality should never be considered absurd, because even before the supervenience of family adverse possession, article 1.275 of the Civil Code of 2002 already provided that abandonment is a hypothesis of loss of property.

According to Farias and Rosenvald (2017):

As and what the caput of art. 1,240 of the Civil Code, the maximum length of the property will be 250 m<sup>2</sup>. With the abandonment of the home for the biennium, the ex-spouse or ex-partner who remained in the property will claim the usucaption of the immovable part that did not belong to him/her, and being that the provenance of the claim will determine a new form of extinction of co-ownership, different from those that are recommended in family law (FARIAS E ROSENVALD, p. 461, 2017) (Our translation into english)

The interpretation of the Federal Justice Council in relation to the institute still deserves extreme appreciation, according to which family adverse possession does not imply discussion about guilt for divorce. In the meantime, there is no need to discuss guilt in this form of adverse possession, which is why statement 595 of this Council emerges, which revoked statement 499:

The 'abandonment of the home' requirement should be interpreted in the perspective of the family adverse possession institute as voluntary abandonment of ownership of the property in addition to the absence of family

guardianship, regardless of the finding of guilt for the end of the marriage or stable union (...) (TARTUCE, 2018)<sup>5</sup> (Our translation into english)

It is noticeable that, for the configuration of abandonment, for purposes of family adverse possession, the abandonment of the property, as well as of the family<sup>6</sup>, will be required, observing the circumstances of the specific case. In this sense:

The spouse or partner of the usucapient must have left the home. Abandonment is characterized by helplessness. The spouse or partner leaves home, leaving their consort and / or children helpless, without their contribution, without their physical presence. The fact that the spouse or partner leaves home, but continues to contribute, does not constitute abandonment. (FIUZA, p.982, 2014) (Our translation into english)

As explained in the previous chapters, in addition to specific assumptions, it will be necessary, the "animus domini" and that possession is tame, peaceful and uninterrupted. In addition, we need to pay attention to the morphology of the words "ex-spouses" and "ex-partners", contained in article 1.240-A. In this semantic tone, an ex-spouse or ex-partner is only configured if there has already been the dissolution of the marital bond or stable relationship, which is why the mere separation would in fact not dissolve the marital bond, therefore, it could not configure family adverse possession, in a literal view.

De indeed separation, although, by itself, is not capable of dissolving the marital bond, it can fulfill one of the requirements of family adverse possession. How can we see: Let us imagine that Fernanda is married to Josué, and that both are married under the legal regime (partial communion of goods), according to Law nº 6.515/1977, and that the couple acquired a property in the constancy of the marriage. Based on this information, pursuant to article 1.658 of the Civil Code, the property is owned by Fernanda and Josué. Thus, if Fernanda leaves the home and Josué remains in this home for more than two years with exclusive possession of the property, combined with the other assumptions previously analyzed, there is no denying that there was de indeed separation, however, both are still in the condition of spouses (that is, they are not yet ex-spouses, as morphologically article 1.240-A is demanding), and despite that, we do not propose, in the narrated terms, any obstacles for Josué to succeed family adverse possession. For this reason, we believe that the extensive interpretation in relation to the device is applicable, due to the fact that family adverse possession is both applicable between spouses or partners, who are actually separated, according to the statement 501 of the Federal Justice Council<sup>7</sup> being certain that the core point will be the configuration of abandonment, which is due to the abandonment of the property, as well as the abandonment of the family itself, checking if there was family helplessness.

5 TARTUCE, Flávio. Official disclosure of the statements approved at the VII Civil Law Conference in September 2015 (Divulgação oficial dos enunciados aprovados na VII Jornada de Direito Civil em Setembro de 2015). Available in: <https://flaviotartuce.jusbrasil.com.br/noticias/247806230/divulgacao-oficial-dos-enunciados-aprovados-na-vii-jornada-de-direito-civil-em-setembro-de-2015>. Accessed on: December 18, 2018.

6 Family in the definition of Rodrigo da Cunha Pereira has a very broad connotation, under the conjugal aegis or not, fruit of natural fertilization or not, etc.: A genus that comprises two species, in its constitution: the conjugal family and the parental family. The conjugal is one that is established based on a loving relationship, involving sexuality and may result from children, or not. It can be hetero-affective or homo-affective, by marriage or stable union, simultaneous to the other, breaking the principle of monogamy, or not; the parental family is the one that results from the formation of consanguineous or socio-affective bonds. It can be by natural or artificial insemination, generated in a proper or replacement uterus (surrogacy). In any case, parental or conjugal, it's in the Family Law's interest to include all these new configurations so that rights can be attributed and receive protection from the State. (PEREIRA, 2018, p.288)

7 The expressions "ex-spouse" and "ex-partner", contained in art. 1.240-A of the Civil Code, correspond to the factual situation of separation, regardless of divorce.

According to the most distinct sources of law, the hypothesis that generates family adverse possession is restricted to abandonment. However, abandonment in the family civil sphere generates which effect historically? The guilt<sup>8</sup> for divorce, whose discussion is predominantly softened in terms of understanding (since it shines the thought that the blame for divorce, therefore Constitutional Amendment 66 of 2010 (*Emenda Constitucional 66/2010*), no longer makes any sense), it has become harmless for Family Law, although there is no explicitly abolitionist normative provision. In this same bias:

In fact, if abandonment of the home is no longer a legal basis for divorce inasmuch as this right is essentially potestative and dispenses specific cause declared, on the other hand, it may result in the recognition of adverse possession in favor of the spouse or partner who remained in the couple's property, exercising quiet, peaceful possession and with *animus domini* (GAGLIANO, PAMPLONA FILHO, p. 1012, 2017) (Our translation into english)

In this context, abandonment is accompanied, according to article 1.573, of so many other hypotheses:

Art. 1.573. Some of the following reasons may characterize the impossibility of the communion of life:

I - adultery;

II - death attempt;

III - ill-treatment or severe injury;

IV - voluntary abandonment of the conjugal home for one continuous year;

V - conviction for infamous crime;

VI - dishonorable conduct.

Sole paragraph. The judge may consider other facts that make the impossibility of life in common evident. (BRASIL, 2002) (Our translation into english)

For this reason, the legislator in article 1.240-A of the Civil Code of 2002 established a single hypothesis that generates family adverse possession. Thus, based on an inescapable systematic between the invoked article and article 1.573 of this diploma, we do not see any obstacles to the extension of the hypotheses that generate family adverse possession.

## 6 FINAL CONSIDERATIONS

After all the interpretive path taken, we believe that the family adverse possession experience in fact experienced complex doctrinal and jurisprudential dissonances. In fact, the

8 When discussing the reflection of guilt/fault in the context of family adverse possession: Consequently, by inserting among the requirements of adverse possession the voluntary and unjustified abandonment of the home by one of the spouses or partners, Law nº 12.424/11, apparently, it rescues the discussion of the violation of the duties of marriage and stable union. That is to say, to the detriment of freedom and the confirmation of the end of affectivity, guilt and the cause of separation would be evaluated, themes that had been abolished by the referred Constitutional Amendment whose effectiveness is immediate and direct, not demanding the edition of any infraconstitutional norm. If the rules prior to EC nº 66/2010 are no longer welcomed by the legal order, certainly, the later ones - such as the one now being discussed - can be considered ineffective in the constitutional order. More consistent with a constitutional vision, it will be to interpret the requirement of abandonment, as an omission of the fundamental duty of family coexistence (art. 227, CF) by that parent who was absent from home. (FARIAS, ROSENVALD, p. 461, 2017) (Our translation into english)



legislator, in his harsh ratio legis, was happy to bring this new form of usucaption, inasmuch as the conduct of abandonment of home between partners or spouses deserves to be protected in a different way, since it reveals the breach of a conjugal duty, in addition to generating for the one who was abandoned, congruently, *animus domini* and the possibility of exercising exclusive possession. Incidentally, guardianship in relation to family adverse possession took place in the most typical way of Civil Law, that is, through a patrimonial reflex. Accordingly, the abandoned spouse or partner will become, in its entirety, owner of the property that he/she had in a condominium with his/her consort, the “abandoner”.

Supported by this legislative reason, the Federal Court of Justice establishes that abandonment, for purposes of family adverse possession, will occur through the accumulation of abandonment of possession of the property *to be usucaptured* and the abandonment of the family, in view of the observance of helplessness. In this sense, family adverse possession values the spell of the spouse or partner's possessory detachment, as well as repudiating the conduct of abandonment of the family.

So, if abandonment of the family is also relevant to the configuration of family adverse possession, we systematically see that, by diving into the aforementioned “harsh legislative reason”, there would be other hypotheses (also considered in the scope of Family Law (*Direito de Família*)), provided for in article 1.573 of the Civil Code in force, which could generate family adverse possession. Thus, adultery, infamous crime, bodily injury, attempted murder, are foreseen in the same abstract factual support that prescribes abandonment (article 1.573 of the Civil Code of 2002), being certain that all of them are hypotheses historically and similarly serious in the conjugal scope.

Therefore, we try to promote a hermeneutic encounter between Family Law and the Law of Things, based on two critical institutions: marriage and adverse possession. From this meeting, accompanied by the interpretative zeal we had, when trying to reach the *mens legis* peculiar to article 1.240-A, we are in favor of the insertion of other hypotheses of article 1,573 of the current Civil Code, for the configuration of the individual family urban special adverse possession (*usucapião especial urbana individual familiar*).

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