

## FAMILY OWNERSHIP AS A MEANS TO PRESERVE THE INVESTMENT VALUE OF INHERITED ASSETS

ELHAMAL HAMZA<sup>1</sup>, EDABER ABDELKADER<sup>2</sup>, BENFARHAT MOULAY LAHCEN<sup>3</sup>

<sup>1</sup>University of Tamanghasset (Algeria), E-mail: [h.elhamal@univ-tam.dz](mailto:h.elhamal@univ-tam.dz)

<sup>2</sup>University of Tamanghasset (Algeria), E-mail: [kada1984@hotmail.fr](mailto:kada1984@hotmail.fr)

<sup>3</sup>University of Batna 1 (Algeria), E-mail: [bmlacen@gmail.com](mailto:bmlacen@gmail.com)

### **Abstract:**

*This study investigates one of the methods for preserving the investment value of inherited assets : the family ownership system. This system, enshrined in Articles 738 to 742 of the Algerian Civil Code, represents a specific form of co-ownership. Unlike ordinary co-ownership, it is established by agreement, not by law, and is temporary rather than permanent. This agreement among family members defines the conditions and regulations that distinguish it from ordinary co-ownership.*

*Family ownership also has a distinct management structure. The manager enjoys broader authority compared to their counterpart in ordinary co-ownership. Additionally, the legislator imposes restrictions on the disposition of assets by co-owners to ensure the system's longevity and achieve its intended goals.*

*The benefits of regulating family ownership are evident across various investment domains, including agriculture, real estate, commerce, and industry. This system safeguards the unity of land, businesses, and factories, preventing their fragmentation upon the testator's death. Consequently, it preserves the investment value of these inherited assets. To achieve this objective, the legislator permits the family ownership system, enabling the co-ownership to endure for an extended period while restricting partnership solely to the heirs.*

**Keywords:** *Family ownership, ordinary co-ownership, agreement, inherited assets, family members, disposition, management.*

### **INTRODUCTION:**

Inheritance often leads to shared ownership among family members in our societies. Most heirs retain ownership of the resulting co-ownership due to the sentimental value of these assets and the inherited customs and traditions that emphasize their emotional worth. This attachment prompts them to hold onto these assets as a strong bond uniting family members and preserving the investment value of their shared wealth.

Members of the same family, united by common interests and endeavors, often establish shared ownership based on mutual agreement. They choose to keep some of their assets under family management to serve their collective interests. This system is not a recent innovation; rather, it has existed for centuries. Tribal societies have traditionally maintained co-ownership to safeguard shared interests, unity of work, and tribal authority. Consequently, the topic of family ownership is confined to civil law, <sup>1</sup> reflecting its practical prevalence in our societies.

The study of family ownership assumes significance due to its effectiveness in strengthening family bonds and addressing a critical issue that has not received adequate attention from civil law scholars. The adoption of family ownership merits consideration as it provides practical means to protect property from fragmentation caused by inheritance and the transition from a single owner to multiple owners. This system safeguards the investment value of shared assets, reduces conflicts and disputes among family members, and promotes social stability within families.

The primary objective of this study is to introduce the family ownership system and facilitate its utilization. Based on empirical observations, the system is widely prevalent in Algerian families. Family members often resort to co-ownership as a means to preserve certain family assets, despite the drawbacks of ordinary co-ownership. By adopting the family ownership system, they achieve

their goal of maintaining co-ownership within a more stable framework compared to ordinary co-ownership.

The benefits of regulating family ownership are particularly evident in the context of agricultural, real estate, and commercial investments. This system preserves the unity of land, businesses, and factories, preventing their fragmentation upon the death of the testator. Enhancing the investment value of these inherited assets can only be achieved through two fundamental principles: maintaining co-ownership for an extended period and restricting partnership to relative only.

The topic raises practical issues related to the ownership landscape in Algeria and the necessity of preserving inherited assets from division to maintain their investment value and contribute to the national economy. The family ownership system, as codified in civil law, potentially contributes to achieving this objective. This prompts the following question:

***Can the family ownership system preserve the investment value of inherited assets and protect them from division?***

To address this question, the study is divided into three sections:

- ❖ **Chapter 1:** The Concept of Family Ownership
- ❖ **Chapter 2:** Conditions for Establishing Family Ownership
- ❖ **Chapter 3:** Management of Family Ownership

### **Chapter 1: The Concept of Family Ownership**

Since the enactment of the Civil Code through Ordinance No. 75-58, the Algerian legislator has outlined certain provisions for family ownership, drawing inspiration from the Egyptian legislator, who in turn was influenced by Swiss and Italian legal frameworks in this area. The aim was to address a prevailing reality in Algerian society, similar to other Arab societies. To grasp the concept of family ownership, this section will delve into three fundamental elements that enable us to define this form of ownership: firstly, a definition of family ownership; secondly, a distinction between family ownership and similar concepts; and thirdly, an identification of its nature.

#### **Section 1: Defining Family Ownership**

The Algerian legislator, alongside many other legal systems such as those of Egypt, Jordan, Switzerland, and Italy, <sup>2</sup>adopted the family ownership system due to its prevalence in Algerian society, particularly in rural areas. Many families retain their assets in a co-ownership arrangement, especially those inherited, due to their strong ties and shared interests that necessitate maintaining co-ownership. The management of these assets is entrusted to the family's patriarch or eldest member, or to whomever the family agrees upon as its guardian. This guardian provides a detailed account of their management to the co-owners of the shared property. The administration of this ownership is often left to prevailing customs and rarely does a family member request to separate their share and exploit it independently. <sup>3</sup>One of the drawbacks of leaving the organization of family ownership to custom is the potential for the person entrusted with it to monopolize the assets and manage them as they see fit. They may involve their co-owners in detailing their management and provide them with an account, or they may not. The legislator's intervention in regulating this agreement-based ownership aims to facilitate the management process, simplify the owners' control over the assets, and enable partners who wish to do so to exit this ownership structure under the safeguards specified in the legislation<sup>4</sup>.

Legal scholars have not provided an explicit definition of family ownership. However, a descriptive definition can be inferred from Article 738 of the Algerian Civil Code, which defines it as ownership that arises by written agreement among members of the same family who share common interests and unity of work. It is a form of co-ownership that arises by agreement among family members. Co-ownership is a form of ownership in which multiple individuals own a single thing, with each having a share in the common property.

#### **Section Two: Distinguishing Family Ownership from Similar Concepts**

To precisely define the concept of family ownership, it's crucial to distinguish it from other forms of ownership. This chapter highlights the key differences and similarities between family ownership and ordinary co-ownership, joint ownership, and partnerships.

### Subsection One: Distinguishing Family Ownership from Ordinary Co-ownership

While family ownership is indeed a form of co-ownership, as mentioned earlier, it possesses distinct characteristics compared to ordinary co-ownership. Here's a breakdown of these differences:

**Firstly:** Family ownership arises from an agreement written among family members who share common interests and work objectives, as stipulated in Article 738 of the Algerian Civil Code (ACC). This establishes it as a stable and long-term arrangement, unlike ordinary co-ownership which can arise from various circumstances without a formal agreement. Ordinary co-ownership may involve individuals who do not necessarily meet the specific requirements for family ownership. It is a temporary state that ultimately leads to the division of the property or a transfer of ownership to a single co-owner, resulting in sole ownership of the previously shared asset.<sup>5</sup> Therefore, the agreement serves as the foundation for family ownership, regardless of the source of the property, be it inheritance or any other asset that the co-owners decide to include. This point of origin differentiates it from ordinary co-ownership, which can arise involuntarily, as in the case of inheritance, or through voluntary choices like gifts, wills, purchases, acquisitions, or rights of pre-emption (the right of first refusal to buy property).

**Secondly:** Article 740 of the ACC (ACC 740) emphasizes another key difference: "The co-owners cannot request a division of the property as long as family ownership exists. No co-owner may dispose of their share to someone outside the family without the consent of all co-owners." This stands in contrast to the general rule of ordinary co-ownership as outlined in Article 714 of the ACC (ACC 714), which grants each co-owner the right to dispose of their share through any legal means, be it to another co-owner, an outsider, or to utilize and exploit the property, as long as it doesn't cause harm to the other co-owners<sup>6</sup>.

**Thirdly:** As per Article 739 of the ACC (ACC 739), family ownership typically has a defined duration of 15 years<sup>7</sup>. Any co-owner wishing to withdraw their share before the expiration of this period can request permission from the court, provided they have a strong justification. If the family ownership has no specific duration, a co-owner can withdraw their share after six months from the date they notify the other co-owners of their intention to do so. In contrast, ordinary co-ownership allows any co-owner to request a division of the property at any time, except in cases of involuntary co-ownership as stipulated in Article 737 of the ACC (ACC 737)<sup>8</sup>. The rationale behind the limited duration of family ownership may lie in the strong bond of kinship, shared interests, and unified work ethic among the co-owners, fostering trust in their use of the assets for their collective benefit<sup>9</sup>.

**Fourthly:** The management of family ownership is entrusted to one or more co-owners who act as directors. Article 741 of the ACC (ACC 741) states: "The co-owners with the highest share value can appoint one or more of themselves as directors." Management cannot be assigned to an outsider, as trust among co-owners forms the core of this ownership structure. The director's authority is broader within family ownership compared to ordinary co-ownership. Additionally, family ownership can be managed through unconventional methods, relying on agency principles as outlined in Article 742 of the ACC (ACC 742): "Apart from the preceding provisions, the rules of co-ownership and agency apply to family ownership."

### Subsection Two: Distinguishing Family Ownership from Joint Ownership

joint ownership, as defined in Article 743 of the Algerian Civil Code (ACC), refers to the legal status of a built property or a group of built properties where ownership is divided into shares among multiple individuals. It is exclusively applicable to built properties and arises from the voluntary agreement and consensus of individuals to dedicate the property to achieving shared objectives<sup>10</sup>.

In this regard, joint ownership shares some similarities with family ownership, which occurs when multiple individuals meet the conditions specified in Article 738 of the ACC jointly own a property. Each co-owner in family ownership is considered an owner, and the shares are determined based on the origin of the co-ownership. If it is an inheritance, the law determines the share of each heir. If it is a contract, the parties agree on the share of each co-owner<sup>11</sup>. If the shares are not specified, they are considered equal unless proven otherwise. Additionally, each co-owner's share is considered a defined share<sup>12</sup>.

However, a crucial distinction lies in the disposition of shares. In family ownership, no co-owner can dispose of, use, or exploit their share without the consent of all co-owners. In contrast, in joint ownership, where all common parts are subordinate to the private parts, a co-owner cannot dispose of their share independently from their other shares<sup>13</sup>. Joint ownership represents a single property owned jointly by all co-owners, considering each co-owner as an owner of the entire property along with the other co-owners.

### **Subsection Three: Distinguishing Family Ownership from Matrimonial Property**

In this section, we will differentiate family ownership from matrimonial property, highlighting their key distinctions in terms of origin, nature, and duration.

#### ➤ **Origin**

The matrimonial property system arises from an agreement in the marriage contract or a subsequent contract that specifies the proportion of each spouse in the property they acquire during their marriage. Family ownership, on the other hand, arises from an agreement among family members without specifying the degree of kinship between them. However, referring to Article 32 of the Algerian Civil Code, we find that the intended individuals are those who share a common origin. Family ownership does not arise between one spouse and relatives of the other spouse, nor between the husband and wife. The legislator stipulated only the origin<sup>14</sup>, thus excluding the possibility of establishing family ownership between the husband and wife and between the wife and relatives of her husband.

#### ➤ **Nature**

Legal scholars have debated the nature of matrimonial property between spouses. Some consider it a civil partnership, while others view it as a specific type of co-ownership with unique rules. Still, others argue that it acquires a distinct legal personality. However, the prevailing view in comparative law is that it constitutes a legal regime with a unique character<sup>15</sup>.

In contrast, family ownership is a form of compulsory co-ownership where all co-owners share equal rights over the entire property, exercising them based on their status as co-owners.

#### ➤ **Duration**

The legislator has not specified a duration for the matrimonial property regime between spouses. It remains in effect as long as the spouses agree to its continuation and terminate upon the dissolution of the marriage. In contrast, the legislator has set a maximum duration of 15 years for family ownership. Any co-owner wishing to withdraw their share before the expiration of this period can request permission from the court, provided they have a strong justification. If the family ownership has no specific duration, a co-owner can withdraw their share after six months from the date they notify the other co-owners of their intention to do so.

### **Subsection Four: Distinguishing Family Ownership from a Company**

**Firstly:** Article 416 of the Algerian Civil Code defines a company as "an agreement whereby two or more natural or legal persons undertake to contribute to a joint activity by providing a share of work, money, or cash, to share the profits that may result or achieving savings or a common economic goal. " According to this article, a company is a named contract that arises from the will of the partners to achieve their interest in sharing profits without the need for a common origin between them. The shares contributed by the partners are not considered common property between them; rather, they become the separate property of the legal entity resulting from the company contract. The company's assets are independent of the partners' assets<sup>16</sup>. In contrast, the establishment of family ownership does not result in the acquisition of legal personality, and the partners remain co-owners of the property, each according to the amount of their specified share, which is part of their assets<sup>17</sup>.

**Secondly:** As previously mentioned, family ownership has a maximum duration of 15 years. Any co-owner wishing to withdraw their share before the expiration of this period can request permission from the court, provided they have a strong justification. If the family ownership has no specific duration, a co-owner can withdraw their share after six months from the date they notify the other co-owners of their intention to do so<sup>18</sup>. In contrast, a company is an open-ended contract that remains in existence as long as it fulfills the purpose for which it was established.

**Thirdly:** The management of family ownership is entrusted to one or more of its members, who act as directors. As previously mentioned, management cannot be assigned to an outsider, as trust among co-owners is the foundation of this ownership structure. Family ownership can also be managed in unconventional ways, relying on agency principles<sup>19</sup>.

In a company, the appointment of directors varies from one company to another depending on its nature and type. Directors may not necessarily be partners and are chosen based on factors such as competence, expertise, and the specific needs of the company. The powers of directors are defined by the company's bylaws and the applicable laws governing companies each director has the right to object to any transaction before it is concluded<sup>20</sup>.

## **Chapter 2: Conditions for Establishing Family Ownership**

Family ownership is a unique form of co-ownership characterized by its familial nature, aiming to protect assets from division, preserve unity of work and interests, and strengthen ties among family members. Given these distinctive characteristics, the establishment of family ownership is subject to specific conditions. This chapter will delve into these conditions, examining the essential requirements for establishing a valid family ownership arrangement.

### ✓ **Condition 1: Members Must Belong to the Same Family**

At its core, family ownership arises among members of the same family. Typically, the co-owners are the heirs of a deceased individual, sharing a common interest in preserving their inherited assets. These assets, whether agricultural, industrial, or commercial, can be maintained under common ownership, with management entrusted to one of the co-owners<sup>21</sup>.

Article 738 of the Algerian Civil Code explicitly states: "Members of the same family who are united by work or interest may agree in writing to establish family ownership. This ownership is formed either from the inheritance they have received and agreed to make all or part of its family property or from any other property they may have<sup>22</sup>. "

It is noted that the article mentions "members of the same family" without specifying the degree of kinship between them. A crucial question arises: can relations of the deceased spouse join the surviving spouse in establishing family ownership, or vice versa?

Legal scholars have debated the definition of "members of the family" and whether the spouse is considered part of the wife's family and vice versa. In Egyptian legislation, scholars such as Muhammad Kamal Marsi and Abdel Moneim Al Bedawi argue that family ownership cannot be established between one spouse and the relatives of the other spouse, nor between the husband and wife. They base this argument on Article 34 of the Egyptian Civil Code, which corresponds to Article 32 of the Algerian Civil Code<sup>23</sup>. Accordingly, "members of the same family" are interpreted as those who share a common ancestry, excluding the possibility of establishing family ownership between the husband and wife or between the husband and the relatives of the other spouse<sup>24</sup>.

This narrow interpretation has been criticized for limiting family ownership to individuals connected by blood relations. Instead, the concept of family should be expanded to include the spouse, as all heirs are considered members of the same family from one perspective. Moreover, the primary objective of establishing family ownership is to preserve family ties, safeguard shared interests, and maintain unity of work, which serves as the fundamental principle for forming such ownership<sup>25</sup>.

This broader understanding of the family is supported by Article 35 of the Algerian Civil Code, which states: "Relatives of one spouse are considered to be of the same degree of kinship to the other spouse. " This provision aligns with Article 37 of the Egyptian Civil Code. The emphasis should be on achieving the purpose for which family ownership is established, namely to strengthen family bonds, maintain unity of work, and realize shared interests.

### ✓ **Condition 2: Unity of Work and Interest**

The explanatory memorandum accompanying the Egyptian Civil Code states: "The partners must therefore be members of the same family, and it is not a condition that they be siblings, but rather that they be united by a common work or interest, as if the members of the family agree to exploit the family's property in a specific way that requires unity of management, or if the family's



property is an inheritance that is better off remaining as a cohesive block so that it can be exploited in the best way possible.<sup>26</sup>

Some legal scholars, such as Ismail Ghanem, argue that the legislator's inclusion of unity of work and interest is a condition to clarify the connection and reason for which the partners established family ownership. Failure to meet this condition does not render the contract void<sup>27</sup>. Others, such as Muhammad Wahiduddin Saware, believe that the phrase "united by a common work or interest" in Article 851 of the Egyptian Civil Code is unjustified, as the existence of unity of work and interest is self-evident among heirs. It is also a self-evident assumption if the assets are separate, owned by the partners, and they agree to make them family property<sup>28</sup>.

This view is based on Article 336 of the Swiss Civil Code<sup>29</sup>, which assumes the existence of unity of work and interest. This principle is deeply rooted in the ancient rural system and is well-established in the Swiss cantons. The Swiss legislator, by reviving this system through the concept of family ownership, sought to find a solution to prevent the division of property, particularly agricultural property, and distinguished between two types of co-ownership: the first is joint economic exploitation, which is regulated in Articles 336 to 346 of the Swiss Civil Code. The essence of this system is the participation of all family members in the exploitation according to a formula established in the agreement, as a result of which the acts of management and representation revert to all the co-owners and their rights in it are equal<sup>30</sup>.

The second type is co-ownership of income or produce, covered in Articles 347 to 348. This situation occurs when ownership is vested in one of the family members, who has the right of management, on condition that the rights of the remaining partners in the proceedings generated by this property are preserved. This type of co-ownership can be created either by agreement between the parents or by law<sup>31</sup>.

We tend to believe that this view deserves consideration because the motivation behind the contract in family ownership is to preserve unity of work and interest and to protect the estate from division, which is achieved by establishing family ownership. It is, therefore, logical to assume the reason for the establishment of the agreement, even if the phrase were deleted from the text of Article 738 and formulated as follows: "Members of the same family may agree in writing to establish a family ownership", and this ownership is formed either from an inheritance they have received and agreed to make all or part of it family property or from any other property they may have. This would suffice and achieve the meaning that the legislator is seeking.

The legislators did not specify the number of partners in family ownership. Therefore, the agreement can include all family members, regardless of their number, provided that the number is not less than two.

### ✓ **Condition 3: A Fixed Period for Family Ownership**

Article 739 of the Algerian Civil Code states: "It is permissible to agree to establish ownership for a period not exceeding fifteen years. However, any partner may request the court's permission to withdraw his share from this ownership before the expiration of the agreed period if there is a strong justification for doing so."

If the ownership in question does not have a specific duration, each partner may withdraw his share from it after six months from the date he announces to the other partners his desire to do so.

It appears from the text of the article that the establishment of family ownership is by agreement between the partners for a fixed period of 15 years. It is not permissible to agree to establish family ownership for a period exceeding 15 years. In this respect, family ownership differs from ordinary co-ownership, as it is not permissible to agree to remain in ordinary co-ownership for a period exceeding five years, Article 722 of the Algerian Civil Code<sup>32</sup>.

Article 739 of the Algerian Civil Code distinguishes between two cases regarding the duration of family ownership:

(1) Agreement on setting a duration for family ownership for a period of 15 years:

The agreement can set a duration for family ownership for a period of 15 years. If a longer duration is agreed upon, the excess period is not binding on the partners. If it is proven that the contract cannot be concluded for a period less than the agreed-upon duration, it is considered null and void.



However, renewal of the duration of family ownership is permissible after its expiration or before its expiration. The new duration is calculated from the date of agreement on the renewal. It can be renewed several times. If the duration expires without renewal or a request for partition from one of the partners, the ownership reverts to ordinary co-ownership<sup>33</sup>.

It is permissible to agree on a period of less than 15 years. The emphasis here is on not exceeding the maximum limit for establishing family ownership, which is 15 years<sup>34</sup>.

(2) Agreement on not setting a duration for family ownership does not prevent its formation. It remains established. However, a partner who decides to exit from it may withdraw his share after six months from the date of his announcement about his desire to do so to the remaining partners.

It becomes evident from paragraph 2 of Article 739 (ACC) that the setting of the duration to 15 years is intended by the legislator to preserve the stability of family ownership protect the rights of the partners, and achieve the objective of its establishment, following in this regard the approach of the Egyptian legislator. However, the legislator has granted the partners the right to dissolve it whenever any partner sees fit, provided that he requests court permission and has a strong motivation. This could potentially negate the advantages of family ownership, as its essence lies in remaining for a long period to achieve its objectives.

Referring to Article 338 of the Swiss Civil Code (SCC)<sup>35</sup> grants partners the freedom to set a duration or not set a duration for family ownership. There is a difference in each of these two situations:

(1) The duration is set and can be renewed: This option is considered with the aim of considering the attainment of adulthood by all or some family members<sup>36</sup>. This type of family ownership expires upon the expiration of the agreed-upon period, except in cases that include tacit renewal<sup>37</sup>.

(2) The duration is not set: In this situation, any partner may request dissolution of this ownership, provided they notify the remaining partners six months in advance. However, the SCC stipulated in the case of ownership where the subject is an agricultural project that the agricultural custom be respected<sup>38</sup>. The contract establishing family ownership can specify the reasons and justifications for the expiration of this ownership, or it can exclude the possibility of complete dissolution, subject to Article 27 of the Swiss Civil Code<sup>39</sup>.

From the preceding, we can conclude that setting a specific and renewable duration for family ownership is more conducive to preserving the objectives of its establishment.

On the other hand, unlike the Swiss legislator, granting the opportunity for the partner who wants to withdraw their share from it is preferable to granting the right to request dissolution. The latter could potentially conflict with the desire of the remaining partners. However, it is important to consider the restrictions related to the nature of the ownership when allowing a partner to withdraw their share from it. For instance, if it is agricultural, then the agricultural custom must be respected. This could involve exiting at the beginning of the spring season or the end of the autumn season. Similarly, if it is industrial property, then the production cycle must be respected.

It is important to note that Article 739 of the Algerian Civil Code (ACC) fails to specify the type of property. The term "family" should be explicitly included to clarify the intended scope. The revised text should read: "It is permissible to agree on the establishment of family ownership for a period not exceeding 15 years..."

This aligns with Article 738 of the ACC, which explicitly mentions "family ownership."

#### ✓ **Condition 4: Formality Requirement for Establishing Family Ownership**

The establishment of family ownership requires that the members of the family agree in writing. This writing is a condition of training and not merely a condition of proof, as stated in Article 738 of the Algerian Civil Code (ACC). In its absence, the agreement is null and void, even if all the partners acknowledge the existence of the ownership or take an oath to it. The reason for this is the long duration of 15 years that family ownership may last, and the need to refer to the written agreement during this period. Any customary writing is sufficient for the formation of family ownership<sup>40</sup>.

The Algerian legislator has addressed customary deeds in Article 326 (m) 2, stating: "A contract is considered unofficial due to the incompetence or incapacity of the public officer or the lack of form as a customary deed if it is signed by the parties." Similarly, Article 327 states: "A customary

contract is considered to have been issued by the person who wrote, signed or put his fingerprint on it unless he expressly denies what is attributed to him... " The Algerian Civil Code, neither before nor after the amendment, does not provide a clear definition of customary writing. However, it is agreed that this type of writing lacks official character, as it is written by ordinary individuals, with no involvement of a public official or person responsible for a public service. The only element that guarantees the validity of the contract is the signature of the parties or their representatives, which is a translation of the parties' will to enter into the contract. If there are multiple parties to the contract, customary copies are written in their number so that each of them has a copy of this agreement in case of a dispute<sup>41</sup>.

✓ **Condition 5: Assets Owned by Family Members**

Article 738 states that the assets of family ownership can be an inheritance inherited by the family members or any other property they own, and they have agreed to make all or part of these assets into the family property. We conclude here that any cause that can be a source for separate ownership can also be a cause for the emergence of family ownership as long as this cause relates to more than one person at the same time from members of the same family.

This property may be real estate movable property or rights in the debtor's estate. Only property owned by the family members at the time of its establishment enters into family ownership<sup>42</sup>.

We will present the assets constituting family ownership from two elements: assets resulting from inheritance and other assets owned by members of the family ownership, as well as applications of the theory of real subrogation to these assets.

**1. Assets Resulting from Inheritance**

Inheritance is a legal situation that arises after a material event, namely death. It is one of the most common causes of ownership in practical life. Inheritance as a cause of acquiring ownership is mentioned in Article 774 of the ACC, which refers to the Personal Status Law<sup>43</sup> to determine the heirs, their shares in the inheritance, and the transfer of inheritance assets.

It happens that after the death of a person, his heirs may see their situation remain the same as it was during his lifetime, and the inherited property remains on his estate, owned by them in common. They manage it, exploit it, and develop it in a way that is consistent with their interests. They may agree on the entire inheritance or only part of it. Common ownership resulting from inheritance is the practical consideration that has led most legislations to adopt the family ownership system, given that some families keep the common ownership situation for a long time to make the best use of it, preserve this property, and keep it as a cohesive unit<sup>44</sup>.

**2. Other Assets Owned by Family Members**

The Algerian legislator did not specify in Article 738 of the ACC the nature of these assets; it states: "And any other property they may have. " Therefore, these assets can be shared between them or be separate property of each of them, such as if one or more members of the family buy a common property between them. The property may be a gift<sup>45</sup>, a bequest<sup>46</sup>, a possession<sup>47</sup>, or any other cause of acquiring ownership that they wanted to include in the family ownership. The property may also be real estate, movable property, or rights in the debtor's estate.

It is required that these assets be owned by the family members at the time of their submission to establish the family ownership, as it is not permissible for any of the family members to submit to establish assets that may revert to him in the future<sup>48</sup>.

**3. Applications of the Theory of Real Subrogation in Family Ownership Assets**

**Real Subrogation**<sup>49</sup> refers to the "exit of one asset from the patrimony of one person and the entry of another asset into the same patrimony in its place so that the new asset takes the place of the old asset and is subject to the same legal regime that governed the old asset"<sup>50</sup>

While the texts organizing family property in Algerian civil law do not explicitly address the issue of real subrogation, which involves replacing one asset with another in the patrimony of the partners, it is possible to infer applications of the theory of real subrogation from the provisions of Article 741 of the Algerian Civil Code (ACC), which states: "The partners who own the largest share value may appoint one or more of them for management. The manager may introduce into the family

property such changes in the purpose for which the common asset is intended as may improve the methods of usufruct of this asset<sup>51</sup>. "

consequently, if an asset is replaced by another in family property, whether due to a legal transaction, destruction, expropriation, or otherwise, this asset legally replaces the family property by real subrogation, becoming part of the family property, intended for the same purpose and subject to the same legal regime as all other family property<sup>52</sup>.

### **Chapter 3: Management of Family Property**

Family property is considered a form of forced co-ownership and differs from ordinary co-ownership, as previously mentioned, in its objectives and its long-term duration. The purpose of establishing family property is, in principle, to preserve, invest, and manage the asset in a way that optimizes its usufruct and protects it from division. Therefore, the legislator has devoted special provisions to the management of family property to ensure the achievement of the purpose for which it was created.

Article 741 states: "The partners who own the largest share value may appoint one or more of them for management. The manager may introduce into the family property such changes in the purpose for which the common asset is intended as may improve the methods of usufruct of this asset. "It is noteworthy that the legislator relied on an absolute majority to appoint one or more partners as managers to carry out management tasks. This is because family property is of a family nature and its members are from the same family, based primarily on trust, unity of work, and interest. Here, a question arises about the powers granted by the legislator to the partner-manager in family property, which distinguish him from the manager in ordinary co-ownership<sup>53</sup>.

#### **Section One: Powers of the Manager in Family Property**

Returning to Article 741 in its second paragraph: "The manager may introduce into the family property such changes in the purpose for which the common asset is intended as may improve the methods of usufruct of this asset. " We note that the legislator, contrary to what we have mentioned in ordinary co-ownership, granted management power to the manager without distinguishing between management tasks and without restricting him to a system set by the majority. The reason for this is that the manager in family property is one of the partners therein, and the purpose of its establishment goes beyond the preservation and ordinary usufruct of the asset to investing and preserving the nature of the work, such as a craft they have inherited or land they cultivate. The foundation of this partnership is unity of work, interest, and the presumed trust among the partners<sup>54</sup>.

The legislator has allowed the manager in family property to exercise unusual management acts, thus expanding his powers even though unusual management acts carry such risk to the asset that most legislations do not allow them except with the special approval of the partners, represented by the owners of three-quarters of the share value. However, the legislator assumed in the establishment of family property that the partner-manager would strive to achieve the purpose for which it was established, so there is no objection to expanding his management powers to improve the usufruct of the asset and invest it in a way that serves the partners' interest, avoids the division of the property, and gives the manager the capacity to take legal action and represent the partners as their deputy<sup>55</sup>. If the partners agree on more than one manager, then each manager may exercise all management tasks unless the partners agree to define the responsibilities of each of them, which is considered an agency for him and he may not exceed the powers granted to him<sup>56</sup>.

Some jurists, such as Mahmoud Sabry Al-Jundi, argue that in addition to the concept of unusual management mentioned above, the manager of the family property can make modifications to the family property, including introducing new assets and removing existing ones. This process, known as real subrogation, is permitted provided that the conditions are met and the partners do not restrict it<sup>57</sup>.

As previously mentioned, the issue of real subrogation was not explicitly addressed by the legislator in the provisions of family property. In our view, applying it requires more than an absolute majority of the partners who own the largest share value. Since real subrogation is considered a disposition of the common asset, it requires consensus among all partners to activate it<sup>58</sup>.

The management acts performed by the manager bind all partners. The manager acts as their legal agent, and they have no right to object to his management. This is to ensure that the goal for which family property was created is not obstructed. The partners may, by an absolute majority, agree to restrict the manager's power of management to ordinary management or to require the majority's approval for unusual management<sup>59</sup>.

### **Section Two: Removal of the Manager in Family Property**

While the legislator does not grant the partners the right to object to the manager's administration, he does allow them to remove the manager if it becomes apparent that his administration is so poor that it poses a threat to their property. Article 741, paragraph 2 states: "The manager may be removed in the same manner in which he was appointed, even if an agreement to the contrary has been made. The court may also remove him at the request of any partner if there is a strong reason to justify his removal.

This paragraph indicates that the removal of the manager occurs in two cases<sup>60</sup>:

1. **Agreement of an absolute majority of the partners:** The owners of more than half the value of the shares must agree to remove the manager. This is the same majority that appointed him. The legislator does not require a reason for this removal, and it is permitted even if there is an agreement to the contrary, such as a fixed term for the appointed manager before which he cannot be removed or an agreement not to remove him permanently. Their agreement has no effect.

2. **Removal by the court:** The legislator allows the court to remove the manager under two conditions: first, a request from one of the partners, and second, that this request be accompanied by a strong reason that proves the manager's mismanagement to justify his removal. This is the only way for partners who did not participate in appointing the manager to monitor and remove him.

### **Section Three: Application of General Rules of Management**

The provisions of family property differ from those of ordinary co-ownership in the following ways:

- **Disposition of the share:** A partner in family property is not allowed to dispose of his share during the duration of family property. He cannot request division as long as family property exists. He cannot withdraw his share from it throughout its duration. The legislators restrict this with the existence of a strong justification if a period is determined for it, after six months from the date of informing the other partners of his desire to do so if no period is determined for it. This is contrary to ordinary co-ownership, where a partner is not forced to remain in co-ownership for more than five years.

- **Management:** The manager in family property must be one of the partners themselves, unlike ordinary co-ownership, where the manager can be a stranger. The manager's power in the family property exceeds his power in managing ordinary co-ownership<sup>61</sup>.

Article 742 states: "Except for the foregoing provisions, the rules of co-ownership and the rules of agency shall apply to family property." It is clear from the text that the legislator referred to the application of the rules of co-ownership and the rules of agency in matters where there is no specific text.

### **CONCLUSION:**

In conclusion, the Algerian legislature, like other legislations, has regulated family property in the civil code. The Algerian legislature has been influenced by other legislations, especially Egyptian legislation, in granting family property a special system, given its nature and the close relationship between the partners. The establishment and management of this property are subject to the agreement of the partners on the nature of these assets and the purpose for which it was created. The Algerian legislator has also referred some of its provisions to the rules of co-ownership, as stated in Article 742 of the Civil Code, which leads to the application of Article 714 of the Civil Code in the matter of use, exploitation, and disposal. It is noticeable from the text of the article that it does not clarify the nature of the damage, nor does it come in a form that makes it general, making it difficult for the judge to consider it. One of the partners may use it as a pretext to stop benefiting from the property and obstruct this property.



It would have been better for the legislator to define the damage or to state its forms to make it easier to deal with and avoid it, following the example of the Swiss legislator, or to allocate a specific article for family property that includes restrictions on its use, such as using it for the purpose for which it was intended, using it in a way that does not conflict with the interests of the partners, or using it in a way that prevents or hinders the use of other partners.

In family property, we find that the limits of agency include both ordinary and unusual management acts if the manager is appointed by an absolute majority. His authority is broad, but he cannot make any changes to the family property itself, such as replacing other assets with some of its assets. He has the authority only to change the purpose for which the asset was prepared. The partners may also, by an absolute majority, restrict the broad powers of the manager, either at the time of his appointment or after his appointment.

In the case of multiple managers, each manager is considered an agent within the limits of his authority if the partners agree to define the authority of each of them. If no agreement is reached on this matter, the limits of the agency are the same as the limits of the agency for a single manager, but they bind each of them.

The rules of agency oblige the manager in family property, in his capacity as a deputy and agent for the other partners, to exercise the care of an ordinary man of average diligence in fulfilling his obligations.

The provisions of family property do not contain an explicit text that obliges the manager to provide the necessary information and submit an account to the other partners. The legislator has referred in this matter to the application of the aforementioned rules of agency. Therefore, the person in charge of this property is obliged to provide a detailed account to the partners of his management of it.

In family property, the partners may agree on a fee to be received by the manager, and this fee may be an increase in his share of the property's income because he is a partner in it. All partners bear all expenses resulting from the management of the property because they are partners in common, each according to his share in it.

Through the foregoing, the legislator has resolved the controversy surrounding the application of the issue of real subrogation in family property, by explicitly stating it, as the text of Article 741 is open to interpretation. The justification for this is that the manager in family property is one of the partners in it, and the purpose of its establishment goes beyond the preservation and ordinary usufruct of the asset to investment and preserving the nature of the work. The manager may resort to replacing one asset with another to improve the usufruct of the asset. This partnership is based on the unity of work, interest, and the presumed trust among the partners.

The legislator should intervene in the case of multiple managers to determine a mechanism through which the power of management can be exercised between them to protect the interests of the partners.

Due to the nature of the family property and the position of the manager in it as a partner first and as a member of the family, it is expected that he will exercise the necessary care and be more careful in its management to achieve the desired result from its establishment. It would have been better for the legislator to include a specific text defining the responsibility of the agent if he fails to fulfill his obligations to exercise the necessary care to execute the agency, instead of referring it to the general rules.

The legislator should also explicitly state how to distribute the income from the family property, as well as the manager's fee, as is done in the Swiss Civil Code, to avoid disputes between the partners on this matter and to protect their interests from the domination of the head of the family, due to the nature of the relationship between the partners.

If an absolute majority cannot agree on appointing a manager, and one of the partners assumes the management tasks without objection from the other partners, the legislator should intervene in this case by granting the managing partner the authority entrusted to the manager in the family property. For example, Article 340 of the Swiss Civil Code grants a partner the right to undertake the management tasks of the property on condition that they provide a simple proof of their

management and that there is no contestation from any other partner regarding their exercise of this authority. This is done to avoid jeopardizing the common interests.

#### Footnotes:

<sup>1</sup> Order No. 75-58 dated September 26, 1975, including the Civil Code, Official Gazette No. 78, issued on September 13, 1975. Amended and supplemented, Articles 737 to 742.

<sup>2</sup> Egyptian Civil Code: Law No. 131 of 1948 issuing the Civil Code, Egyptian Official Gazette of the Egyptian Government, issued on Ramadan 22, 1367 - July 29, 1948, No. 108 repeated extraordinary number.

Jordanian Civil Code: Law No. 43 of 1976 on January 1, 1977.

-Swiss Civil Code: of December 10, 1907 (Status as of January 1, 2021).

-Italian Civil Code: Royal Decree No. 262 of March 16, 1942 approving the text of the Italian Civil Code (codification).

<sup>3</sup> Meaning the independence of the partner in his share of the money that fell to his lot. See Ahmed Khaldi, the division between Islamic law and Algerian civil law in the light of the jurisprudence of the Supreme Court and the Council of State, Dar Huma, Algeria, p. 200.

<sup>4</sup> Abd al-Razzak al-Sanhouri, The Intermediary in the Explanation of the Civil Code (The Right of Ownership with a Detailed Explanation of Things and Money), Part 8, Dar Ihya al-Turath al-Arabi, Beirut - Lebanon, p. 1043. The explanatory memorandum can be consulted, Collection of preparatory work for the Egyptian Civil Code, Dar al-Kitab al-Arabi Press, Cairo, part 06, p. 152

<sup>5</sup> Ali al-Khafif, Property in Islamic Law with a Comparison to Positive Law, Dar al-Fikr al-Arabi, Egypt, 1996, p. 132.

<sup>6</sup> Belhadj Al-Arabi, Real Rights in Algerian Law in the Light of Judicial Jurisprudence, A Comparative Study, Dar Houma for Printing, Publishing and Distribution, Algeria, 2016, p. 185

<sup>7</sup> Text of Article 739 of the Algerian Civil Code: "It is permissible to agree on the creation of ownership for a period not exceeding fifteen years. However, each partner may request the court to authorize him to withdraw his share of this ownership before the expiration of the agreed-upon period if there is a strong justification for that.

<sup>8</sup> Article 737 of the Algerian Civil Code: "Co-owners of common property may not request its division if it is clear that the purpose for which this property was created is that it should always remain undivided. "

<sup>9</sup> Bessam Suleiman Al-Abaji, "The Comparative Study of Family Property", Dar Al-Hamed for Publishing and Distribution, Amman, 2008, p. 90.

<sup>10</sup> Meriem Touati, "The Legal System of Shared Ownership", Dar Al-Kitab Al-Hadith, Cairo, 2015, p. 39.

<sup>11</sup> Anwar Talba, "Shared Ownership", Al-Maktab Al-Jami'i Al-Hadith, Alexandria, 2017, p. 7.

<sup>12</sup> Ibid., p. 7.

<sup>13</sup> Meriem Touati, op. cit., p. 37. Supreme Court Decision No. 50937 dated 09/05/1990, Judicial Journal, Algeria, No. 02, Year 1991, p. 32. It states: "It is legally established that the roofs and shops used for common interests are common parts in built and unbuilt real estate, owned in common by all joint owners. Therefore, any judicial decision to the contrary is an error in the application of the law, " application of Article 745 of the Algerian Civil Code.

<sup>14</sup> Article 32 of the Algerian Civil Code: "A person's family consists of his relatives, and relatives are all those who have a common origin. " This corresponds to Article 34 of the Egyptian Civil Code. This text is different from the text in the Swiss Civil Code, which defines family as "the spouses and their descendants"

<sup>15</sup> Gidoum Bouzian Aman, "The System of Joint Assets between Spouses in Family Law", Master's Thesis, University of Algiers 01, Season 2013/2014, p. 24.

<sup>16</sup> Nadia Foudhil, "The Company of Assets in Algerian Law", Diwan of University Publications, Algeria, (3rd ed.), p. 35.

<sup>17</sup> Bessam Al-Abaji, op. cit., p. 94. Muhammad Azmi Al-Bakri, "Shared Ownership", Dar Mahmoud, Cairo, 2016-2017 first edition, p. 12.

<sup>18</sup> Ahmed Mahmoud Khalil, "Management and Disposal of Common Property", Al-Maktab Al-Jami'i Al-Hadith, Alexandria, 2016, p. 71.

<sup>19</sup> Mouhamed Wahid al-Din Siwar, "The Right of Ownership in Itself in Civil Law", Dar Al-Thaqafa, Amman - Jordan, (2nd ed.), 2010, p. 181.

<sup>20</sup> Nadia Fawzi, op. cit., p. 54. See Articles 577 and 554 of Decree No. 75/59 dated 26/09/1975 concerning the amended and supplemented Commercial Code.

<sup>21</sup> Abd al-Razzak al-Sanhouri, op. cit., p. 1046.

<sup>22</sup> In the Egyptian Civil Code, Article 851, the phrase "they agreed to include it in this ownership" was added.

<sup>23</sup> Article 32 of the Algerian Civil Code: "A person's family consists of his relatives, and relatives are all those who have a common origin." This corresponds to Article 34 of the Egyptian Civil Code.

<sup>24</sup> See in this sense al-Sanhouri, op. cit., 1048. Abdul Moneim al-Badawi, "Explanation of Civil Law in Original Real Rights", Dar Al-Kitab Al-Arabi, Egypt, (2nd ed.), 1956, p. 223.

<sup>25</sup> Al-Sanhouri added: "The first thing is to take the family in the sense that is familiar in people's talk, so the members of the family include the wife and the husband, and the in-laws can be included if there is a justification for that," op. cit., p. 1048. See also Anwar Talba, op. cit., p. 421.

<sup>26</sup> Preparatory Work Collection, Vol. 6, p. 152.

<sup>27</sup> Anwar Talba, op. cit., p. 421.

<sup>28</sup> See Mouhamed Wahid al-Din Siwar, op. cit., footnote 02, p. 177. And also Bessam Majid Suleiman Al-Abaji, op. cit., p. 63.

<sup>29</sup> Swiss Civil Code Art 336: Relatives may agree to create an undivided estate, either by leaving all or part of an inheritance in it or by putting other property into it.

<sup>30</sup> Bessam Majid Suleiman Al-Abaji, op. cit., p. 64.

<sup>31</sup> Pierre Tour, Henri Descheneaux, the Swiss civil code Editions polygraphique, Zurich, Year 1950, p. 249.

Bessam Majid Suleiman Al-Abaji, op. cit., p. 65.

<sup>32</sup> Text of Article 722: "Each partner may request the division of common property unless he is forced to remain in common by virtue of a text or agreement. The division may not be granted by agreement for a period exceeding five years. If this period is not exceeded, the agreement shall be executed in favor of the partner and his successor in title."

<sup>33</sup> Ismail Ghanem, Original Real Rights (Right of Ownership), Dar Abdullah Wahba, Cairo, Part One, 1959, p. 327. See also Abdul Moneim Al-Sada, op. cit., p. 260.

<sup>34</sup> See Abd al-Razzak al-Sanhouri, op. cit., p. 1050.

<sup>35</sup> Swiss Civil Code Art 338:

1. Undivided ownership is agreed upon for a fixed term or for an indefinite period.
2. In the latter case, it may be denounced by each co-owner with six months' prior notice.
3. If it is an agricultural holding, denunciation is only admissible for the usual spring or autumn term.

-Florence Guillaume, Transfer of hereditary shares and suspension of inheritance partition, Schulthess Juristische medien AG, Zurich-Basel-Geneva, 2014, p. 319.

<sup>36</sup> Bessam Majid Suleiman Al-Abaji, op. Cit. p. 79.

-Claude CONVERS, Director-Conservator of the Geneva Land Registry, Property, Text revised and adapted in November 2005 by A.-E. Fahrni, and in May 2014 by E. Seppey, p. 13. <https://www.vd.ch/territoire-et-construction/registre-foncier/consultation-du-registre-foncier>

<sup>37</sup> Swiss Civil Code Art 343/02: Undivided ownership ceases:

-by the expiration of the time for which it was constituted, unless it is tacitly extended

<sup>38</sup> Text of Article 338 of the aforementioned Swiss Civil Code, paragraph 3. Agricultural custom dictates that one must wait until the harvest has been gathered. This condition was deleted in the report of the Egyptian Senate, justified as follows: "because the custom referred to by the law has not yet been established, and if it is established in the future, there will be nothing to prevent its application." Preparatory Work Collection, Part 06, p. 184. See Abd al-Razzaq al-Sanhuri, op. cit., footnote 4, p. 1051.

<sup>39</sup> Swiss Civil Code Art 27:

1. No one may, even partially, renounce the enjoyment or exercise of civil rights.
2. No one may alienate his or her freedom, nor prohibit himself or herself from using it to an extent contrary to law or morals.

<sup>40</sup> Abd al-Razzaq al-Sanhuri, op. cit., p. 1043. And also Anwar Talba, op. cit., p. 422. And also Bessam Majid Suleiman, op. cit., p. 67.

<sup>41</sup> Amar ALOUI, FONCIER, EDITION HOUMA, ALGER, 6th edition, year 2011, page 135.

<sup>42</sup> Mouhamed Azmi al-Bakri, Encyclopedia of Fiqh, Law and Legislation in the New Civil Law (Right of Ownership), Dar Mahmoud, Cairo, Volume 11, p. 813.

<sup>43</sup> Article 126 of the Algerian Family Law states the reasons for inheritance, which are: marital relationship. Article 127 states that the right to inherit is established upon the death of the testator, either in reality or by judgment. Article 128 sets out the general conditions for the right to inherit.

<sup>44</sup> Abd al-Razzak al-Sanhouri, op. cit., p. 1048.

<sup>45</sup> A gift is a transfer of ownership without consideration and is made during one's lifetime. It is one of the contracts of donation. See Belhadj Arabi, op. cit., p. 290.

<sup>46</sup> A will is a disposition of the estate to be added to what is after death, so its effect does not take effect in the lifetime of the testator. See Nabil Ibrahim Saad, op. cit., p. 561.

<sup>47</sup> Possession is a material fact consisting of actual control over a thing that may be dealt with, and is capable of producing legal effects. See Belhadj Arabi, op. cit., p. 374. Dr. Daraa Hamad also stated that it is: "Actual control over a thing with the intention of acquiring ownership or another real

<sup>48</sup> Abd al-Moneim Al-Sada, op. cit., p. 259. See also Abd al-Razzaq al-Sanhuri, op. cit., p. 1049.

<sup>49</sup> Definitions of subrogation: (it is the substitution of one person or thing for another in a legal relationship). See Xavier Mond, The legal subrogation of the insurer under the Civil Code: History, developments and procedural aspects, Memory presented to the Faculty of Higher Studies with a view to obtaining the degree of Master of Law (LL.M.) , business law option , Faculty of Law, University of Montreal, 2016, p. 10.

<sup>50</sup> Abd al-Razzak al-Sanhouri, op. cit., p. 251-252.

<sup>51</sup> Dr. Mahmoud Sabry Al-Joundi referred to this type of solution and called it "contractual solutions" and added that traditional theories and modern theory agree on the permissibility of agreeing on real solutions while taking into account three restrictions: 1- the agreement does not violate a legal rule, 2- the substitute property is suitable to be subject to the same



legal system as the replaced property, 3- the will is valid and present according to the general rules. See Mahmoud Sabry Al-Jundi, A Look at the Rules of Real Solutions, The Jordanian Journal of Islamic Studies, Vol. 05, No. 03/B, 2009, p. 205.

<sup>52</sup> Abd al-Razzak al-Sanhouri, op. cit., p. 269.

<sup>53</sup> Mouhamed Wahid al-Din Siwar, op. cit., p. 140.

<sup>54</sup> Abd al-Moneim Al-Sada, op. cit., p. 261.

<sup>55</sup> Anwar Talba, op. cit., p. 214.

<sup>56</sup> See Ahmed Mahmoud Khalil, op. cit., p. 73.

<sup>57</sup> Mahmoud Sabry Al-Joundi, op. cit., p. 206.

<sup>58</sup> Perhaps this is what prompted al-Sanhuri to restrict the manager's authority in unusual management acts in this matter by saying: "The manager does not have the power to make changes to the ownership of the family itself by replacing some of its property with other property. All he has is the power to modify the purpose for which the property was created, not the property itself," despite his acknowledgment of the issue of real solutions in family ownership as previously mentioned, since real solutions amount to a disposition. , which is an act that requires the unanimity of the partners. Abd al-Razzaq al-Sanhuri, op. cit., p. 251 and p. 1057.

<sup>59</sup> Mouhamed Wahid al-Din Siwar, op. cit., p. 179. See also al-Sanhuri, The Intermediate Explanation of Civil Law (Right of Ownership with a Detailed Explanation of Things and Property), Part 08, the same reference, p. 1057.

<sup>60</sup> Abd al-Razzak al-Sanhouri, op. cit., p. 1057.

<sup>61</sup> Ahmed Mahmoud Khalil, op. cit., p. 74.