

The Law and Economics of Marriage

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ABSTRACT - The purpose of article is to analyse the diverse effects of marriage on spouses and examine whether marriage is an economically viable contract. It is important to note that it is not the article's intent to persuade the reader. Rather the objective is to contribute to the public discussion about the value that marriage brings, its effect on the welfare of both parties in terms of gains and losses, and to address the economic roles within the union. The first part of the article looks at marriage from a legal perspective by examining various marital agreements, followed by the characteristics of marriage itself. In the second part of the article the focus shifts to more economic features, rather than legal, researching the economics of love and marriage as well as divorce and relationship dissolution. The article elaborates on previous studies and theories: Gary Becker's theory on the economics of marriage and family, the gains-to-marriage perspective (1991), and the theory derived from exchange or bargaining models (England & Kilbourne, 1990; Lundberg & Pollak, 1996) that have observed the social, economic, and psychological gains associated with marriage; however, these benefits are still a subject of discussion. A more recent study (Alexandra Killewald, 2016) highlights that there is a general trend for the expansion of women's roles, whereas the norm of the man's role of 'breadwinner' has not changed much. However, men are expected to participate at least to some extent in the household chores, which is a major change from previous eras.

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KLJUČNE BESEDE: zakonska zveza, ekonomija ljubezni in zakona

POVZETEK - Namen članka je analizirati različne učinke zakonske zveze na zakonca in preučiti, ali je zakonska zveza ekonomsko upravičena pogodba. Pomembno je omeniti, da namen članka ni prepričati bralca. Glavni namen je prispevati k javni razpravi o vrednosti, ki jo prinaša zakonska zveza, njenem vplivu na blaginjo obeh zakoncev v smislu dobičkov in izgub ter obravnavi ekonomskih vlog znotraj zveze. Prvi del članka poroko obravnava s pravnega vidika s preučevanjem različnih zakonskih sporazumov, ki jim sledijo značilnosti same zakonske zveze. V drugem delu članka je poudarek na bolj ekonomskih značilnostih, ki raziščejo ekonomijo ljubezni in zakonske zveze kot tudi vidik ločitve in razpada. Članek gradi na že obstoječih študijah in teorijah: teorija Garyja Beckerja o ekonomiji zakonske zveze in družine, teorija dobička v zakonski zvezi (1991) in teorija, ki izhaja iz modelov menjave ali pogajanj (England in Kilbourne, 1990; Lundberg in Pollak, 1996), ki so opazovale družbene, ekonomske in psihološke koristi zakonske zveze. Le-te so še danes predmet razprave. Novejša študija (Alexandra Killewald, 2016) opozarja na splošen trend širjenja vlog pri ženskah, medtem ko se moška vloga »hranilca družine« ni bistveno spremenila. Dandanes, naj bi tudi moški vsaj na neki ravni pomagali pri gospodinjskih opravilih, kar je velika sprememba v primerjavi s prejšnjimi obdobji.

1 Introduction

Marriage is one of the most important institutions influencing people's lives and well-being. From a legal perspective, marriage can be viewed merely as a contract, the essence of which is made clear in the marriage vows. The contract itself has several interesting characteristics, such as imperfect information, adaptability and flexibility. All these characteristics mean that the "informal" elements of the contract take on special

importance. Trust, cooperation and willingness to accept change are thus efficient attitudes in a marriage that reduce the transaction costs, which any process of adaptation and new contract implies. The first part of the article looks at the legal aspect of marriage itself by examining various marital agreements: prenuptial agreement, postnuptial agreement, separation agreement, and marital settlement agreement; it then continues to explore the family law regulations and marriage procedure in Slovenia.

In the second part of the article the focus shifts to more economic features, rather than legal, researching the economics of love and marriage as well as divorce and relationship dissolution. Marriage, despite being the peak of romantic love, can be economically analysed. Hence, the aim of this article is to analyse the diverse effects of marriage on spouses and examine whether marriage is an economically viable contract. It is important to note that it is not the article's intent to persuade the reader. Rather the objective is to contribute to the public discussion about the value that marriage brings, its effect on the welfare of both parties in terms of gains and losses, and to address the economic roles within the union. Moreover, results on distinct utility levels between spouses contribute to a better understanding of the sources of well-being in marriage. The decision to marry a particular person, even if based on emotions, is economic – it entails trade-offs and sacrifices. Over the course of a lifetime, however, the utility, information, and opportunities of both marriage partners change, and consequently one or the other will have incentive to breach the contract. Substantial violations of marriage contracts have always occurred. Historically, there were greater costs associated with such violations. Concern about the consequently high divorce rates and the increasing number of extramarital children has stimulated polemical debates over the causes and consequences of marital dissolution. Consequently, the focus has shifted to the transformative nature of men's and women's economic roles within marriage and their attitude towards union dissolution and well-being outside of marriage. The article elaborates on previous studies and theories that have observed the social, economic, and psychological gains associated with marriage; however, these benefits are still a subject of discussion. Gary Becker's theory on the economics of marriage and family (1991) is formulated on the gains spouses acquire from differentiated marital roles and specialization. The theory states that the benefits of marriage are greatest when spouses are chosen from the aspects of substitutability and complementarity. To elaborate, Gary Becker's gains-to-marriage perspective (1991) states that higher economic resources among women indicate less specialization and consequently signal lower marital gains and higher risks of divorce (Becker, 1991). A second theory is derived from the exchange or bargaining models (England & Kilbourne, 1990; Lundberg & Pollak, 1996). From this perspective, marital gains are negotiated in the light of the likelihood of divorce, based on what each spouse has to lose in case of union dissolution. Bargaining models predict that gender inequality may hinder women's ability to use economic resources as leverage in the bargaining process, and thus higher economic resources among women may also be associated with higher risks of divorce. In contrast, gender theorists predict that dissimilar levels of spousal economic resources hinder intimacy and marital satisfaction, and are associated with higher risks of divorce (Cherlin, 2005). Nevertheless, all the evidence shows that economic well-being and

marital status are in fact intertwined. A more recent study (Alexandra Killewald, 2016) highlights that there is a general trend for the expansion of roles women can take on and still have a stable marriage, whereas the norm of the man's role of 'breadwinner' has not changed much. Lately, men are expected to participate at least to some extent in the household chores, which is a major change from previous eras. However, it is important to stress that these types of patterns are always fluid.

2 Marriage is/as a contract

The term 'marriage contract' is the best way to define the legally binding union of two people, voluntarily entered into for life, to the exclusion of all others (Poulter, 1979). However, I am not talking here about a contract reached on the basis of complete freedom of agreement between the parties. On the contrary, the marriage contract is a strongly regulated one in which the law substantially limits the freedom of the parties in reaching an agreement.

Marriage according to the law of this country is the union of one man with one woman, voluntarily entered into for life, to the exclusion of all others.

Why does the law interfere with the freedom of agreement in some contracts, particularly in the marriage contract? Two different reasons are usually given to explain this.

First, reasons of efficiency. According to this point of view, the existence of rules that regulate the marriage contract can reduce transaction costs in the negotiation clauses, and can act as a reference if queries appear at a later date in the resolution of issues not previously agreed upon specifically by the parties. In practice, people getting married do not normally sign a specific agreement but just comply with the general conditions established by civil law. The marital agreements that are reached before getting married generally refer to the future economic functioning of the marital partnership.

The second reason why the law strictly regulates the marriage contract is equity. In pursuit of equity, the law often tries to favour the supposedly weaker party as opposed to the better-placed party who could use this dominant position to obtain unfair advantages. The problem arises, however, when undesired effects occur as a result of the strategies of each of the conflicting parties. Let us take a simple example. It is generally believed that joint property ownership, by which all property acquired by either of the partners during the marriage belongs in equal shares to both parties, is an institution that favours women. The reasoning behind it is that, since women in the majority of cases devote less time to employment and more time to domestic chores, they earn less money and therefore the equal share of earnings benefits them. But, in the long run, this institution may well have been detrimental for women if the expectations raised were high enough to make them think that with joint property ownership their future was guaranteed in the case of a divorce (Eekelaar, 2007).

An important characteristic of the relationship between partners is that the marriage contract has always been conceived as an agreement destined to last a long time. Quite apart from whether we believe or not that the objective of marriage is the commitment to live together 'for life', the marriage contract is not conceived as a fixed-term agreement, at the end of which the parties know that their rights and obligations are those specified at the time of signing. In other words, although in practice the contract may last only a short time, it is drawn up without previously determining the duration (Grandon, 2011).

The marriage contract also has several other interesting characteristics. Firstly, not all the conditions are going to remain constant throughout its validity; secondly, the parties do not have precise information on the possible nature of such changes; and, lastly, it is possible to redraft the contract or add new conditions at any time while it is in force. These characteristics affect the nature of the contract in an important way, specifically with respect to the possibility of bilateral or unilateral breaking of the marital contract, which the current law in Western countries allows. Although marriage is a long-term contract, its implicit conditions may be the object of a new contract at any time within the general framework of family law. This means that the marriage contract, in this sense, shares the characteristics of adaptability and flexibility with recurrent short-term contracts (Grandon, 2011).

The economic literature on contracts usually insists on the superiority of recurrent short-term contracts over those covering a long term in a single agreement. This is because, rather than having to make allowances for all the changes in the original circumstances and their effects on the conditions initially agreed upon, it is possible to adapt the clauses to the new circumstances each time the short-term contract expires. This form of contract is useful for the efficient organization of marital relationships. All these characteristics mean that the 'informal' elements of the contract take on special importance. Trust, cooperation and willingness to accept change are thus efficient attitudes in a marriage that reduce the transaction costs, which any process of adaptation and new contract implies. Furthermore, both marriage partners have incentives to behave in a more cooperative way if they want the contractual relationship to continue over subsequent periods (Scherp, 2016).

2.1 Marital agreements

Marital agreements are contracts signed by couples either before the marriage or shortly after, with drafts usually made well ahead of the official date of the contract. Marriage agreements are usually created to handle the legal issues in case of marriage dissolution; however, they can also deal with the day-to-day affairs for the duration of the marriage. The main contract is the marriage contract itself, which is an agreement to marry your spouse (Nycbar, 2017).

Other agreements that married persons may enter into are:

Prenuptial agreements (prenups): They are already more than 2000 years old. The first contract of this sort was written in Hebrew and was called Ketubah. This contract secured the financial situation of women in case of a divorce or the husband's death. If

it came to a divorce or the husband's death, the woman was entitled to a share of her husband's assets. And it still serves the same purpose; you and your spouse enter into a contract before you get married that relates to the property and financial assets, like stocks, you each have before marriage and, to prevent anxiety and uncertainty, how your property and assets will be handled during, and potentially after marriage. Most often, though not always, it is the groom who requests such a contract when he has accumulated a great deal of wealth or expects a high income.

Postnuptial agreement: Basically, the same as the prenuptial agreement discussed above, except that you and your spouse enter into it after you have already gotten married. It establishes how the couple's assets will be divided in the event of a divorce or legal separation and the amount (if any) of spousal support that one spouse will pay to the other if the marriage ends.

Separation agreement: Useful if you have not yet decided whether to divorce or dissolve your civil partnership, or if you cannot yet do so. It is a written agreement that typically addresses how you and your spouse want to handle child support, child custody and visitation, spousal maintenance, and dividing up your property and assets.

Marital settlement agreement: You and your partner may decide to terminate your marriage and you may be able to settle on the details without getting the court involved. The marital settlement agreement, also called a stipulation of settlement, addresses issues such as handling your property and assets, spousal and child support obligations, and visitation and custody arrangements without court involvement (Nycbar, 2017).

Slovenia, as one of the last European countries to do so, introduced a (pre-)wedding contract by adopting the new Family Code that has entered into force on 15th April 2017, but is applicable from 15th April 2019. A so-called contract on the regulation of property relationships (marriage contract) has been introduced, which is, in addition to the individual provisions in which it appears, regulated by the provisions of Articles 85-94 of the new Family Code. The partners (marital or extramarital) will be able to determine by mutual agreement the regime for the division of assets, both joint and those that arose before the creation of the agreement. The contract can also be signed during the marriage itself. The new provisions are optional and are used only if the spouses cannot reach an agreement otherwise (Feguš, 2017).

Slovenian family law regulates three forms of life union: marriage, an extramarital union, and a (registered) same-sex partnership. The first two forms of life union are intended only for partners of a different sex and are regulated by the Marriage and Family Relations Act (hereinafter: the Slovenian Marriage Act), while a registered same-sex partnership is regulated by a special law, separately from the system of the other two heterosexual life partnerships. It is regulated by the Registration of Same-Sex Civil Partnership Act (hereinafter: the Slovenian Partnership Act) (Mdds, 2017).

2.2 Marriage contract

Marriage is a legally regulated life union between a man and a woman, and to get married is the right of every individual and is based on his or her free will. Couples

who want to make their relationship official and choose to get married in Slovenia need to register the intention and the date at the Slovenian Marriage Registry Office. Doing so is basically an engagement. Any person who has been previously married must submit evidence that the previous marriage has been terminated or annulled. Only the civil ceremony is legally binding in Slovenia, which has to be concluded before the competent state body, but couples can hold a religious ceremony in Slovenia afterwards (E-uprava, 2020).

An administrative unit has jurisdiction for concluding a marriage but it may delegate its competence to a municipality. A marriage is concluded in the presence of a registrar and two witnesses with contractual capacity. A marriage is validly concluded at the moment when the couple express their mutual agreement to its conclusion. The consent is invalid if it originates from fear or if the spouse was not who he or she was pretending to be.

Marriage may not be concluded by persons who are mentally ill nor between persons who are directly related. Naturally, the age of the future spouses has to be over eighteen; otherwise the Social Work Centre looks into it. The Social Work Centre also decides on whether to let relatives get married and, in some cases, decides in their favour (Mddsz, 2017).

Marriage creates legal consequences both between the spouses and in relation to children, whereby marriage sets the presumption that the mother's husband is the father of the children. By entering into a marriage, an individual obtains a number of personal rights and duties (for example, the duty and right to mutual respect, trust and assistance). Personal rights include the right to support for a spouse without their own means of support, for the duration of the marriage and after it. In distinction from other personal rights, the violation of the right to support can be sanctioned during the marriage by an independent suit.

Marriage also creates property consequences. All assets that the spouses obtain through work during the marriage are considered to be the common property of the spouses (2nd paragraph of Article 51 of the ZZZDR). Even a spouse who is not employed is nevertheless considered to work and contribute to the creation of assets and is therefore also entitled to a suitable share of the common property. Assets that a partner brings to a marriage, as well as assets that he or she obtains during the marriage other than by work, such as by inheritance or gift, are considered his or her personal property.

The rule on common property is of a compulsory nature, so spouses may not arrange contradictory mutual property relations by contract to agree that assets created by work during the marriage will not be shared. However, it is possible for spouses to agree that, on entering into the marriage or from a particular day after the marriage, all individual assets of the spouses shall become common property. Because there is no economic benefit, such agreements between spouses are in practice rare (European e-justice, 2016).

3 The economics of love and marriage

All marriages are entered into with the promise that the relationship will last for the rest of their lives. The parties give up some future freedom because each believes that the joint benefit produced by the agreement exceeds the combined benefit that each could achieve individually. Each spouse enters the marriage with the assurance that the other has undertaken a legally binding commitment that restricts his or her future freedom to defect. The insurance itself deters defection, enhancing mutual trust, and encouraging the investment of time, energy, emotions, and resources in the marriage. Often that lifelong promise is broken, and one or both parties seek to dissolve the agreement. Marriage, despite being the peak of romantic love, can be economically analysed. The decision to marry a particular person, even if based on emotions, is economic – it entails trade-offs and sacrifices (Cabrillo, 1996).

Each gender has a lot to offer – sex, physical protection, income, homemaking, child raising, etc. Men and women each desire the other as a provider of vital services. Investing in every good, including children, presents prospective costs and benefits. Firstly, the cost of and return on children last a lifetime. Secondly, in the past (and even in the present) children were something of an investment good, in the sense that parents could expect a financial or material return on their investment. The presence of children as an investment good would hold the marriage together and mitigate damages if one party abandoned the other. Thus, the fundamental reason to marry is to allow for optimal investment in assets, primarily, not exclusively, in children. If no long-term contract were enforceable, the parties would not invest as much in the specific assets of the marriage as otherwise. Typically, women do not wish to undertake the investment of bearing a man's children unless, and until, they have the promise of lifetime support, commitment, and protection. Although children are the central reason for marriage, they are not the only reason. The vow to fulfil one's duty “for richer or for poorer, in sickness and in health” reflects that marriage could also be viewed as an insurance contract (Dnes, 2002).

There are substantial reasons to marry. Over the course of a lifetime, however, the utility, information, and opportunities of both marriage partners change, and consequently one or the other will have incentive to breach the contract. When the marriage contract is breached and terminates in divorce, the wronged party loses a lifetime stream of spousal services. The loss that the wronged spouse suffers from divorce is at least the transaction cost of finding a spouse of equivalent value the second time around. Often the loss will be much greater, for that equivalent match may no longer be available. Therefore, rather than the entire risk of the investment falling on one of the parties, often the parties contractually share the risk.

The market for spouses is monopolistically competitive. All men are potential husbands, all women potential wives. Although some are close substitutes for one another, most others are very imperfect substitutes. There is substantial choice and competition in this market. Moreover, it is highly developed; it offers a rich variety of competing paths to finding a spouse. The participant may see dating as either consu-

mption or investment. Men and women state no value, nor are they exchanged for things that can be priced. The only measure of their value is the quality of the spouses they can acquire (Dnes, 2002).

Substantial violations of marriage contracts have always occurred. Historically, there were greater costs associated with such violations. The religious consciousness has placed considerable internal psychological and external social costs on both spouses in the event of a violation. As opposed to the formal legal constraints, it was the informal social and psychological constraints that preserved marriages from dissolution. Nowadays, the tendency of families to have fewer children and the tendency of women to seek equality and pursue their career goals, are consistent with women investing fewer resources in being wives in general and in being one man's wife in particular out of fear of uncompensated losses caused by a breach (Cabrillo, 1996).

3.1 Economic aspects of divorce and relationship dissolution

In recent times, high rates of union dissolution seem to be an established issue of family structure. Concern about the consequently high divorce rates and the increasing number of extramarital children has stimulated polemical debates over the causes and consequences of marital dissolution. Focus has shifted to the transformative nature of men's and women's economic roles within marriage and their attitude towards union dissolution and well-being outside of marriage.

Various studies such as Gary Becker's theory on the economics of marriage and family, Becker's gains-to-marriage perspective (1991), and the theory derived from exchange or bargaining models (England & Kilbourne, 1990; Lundberg & Pollak, 1996) have observed the social, economic, and psychological gains associated with marriage; however, these benefits are still a subject of discussion. Nevertheless, evidence shows that economic well-being and marital status are intertwined. Women and children outside of marriage are exposed to a higher economic risk. Marital agreements and dissolutions remain economic arrangements with economic consequences. These economic characteristics are concealed in the favoured belief that marital agreements are based on romantic love and commitment, not on financial motives. Yet, men and women's decisions about when to marry, whom to marry, and whether to remain married are actually economic decisions (Fine, 2006).

Economic resources are central to theories of marriage formation and dissolution. Gary Becker's theory of economics of the family (1991) states that the benefits of marriage are greatest when spouses are chosen from the aspects of substitutability and complementarity. Meaning that an optimal outcome takes place when spouses share certain noneconomic characteristics, such as family background, race, intelligence, and education, while varying on other characteristics, for example care-giving abilities and wage earning. This point of view builds on differentiated marital roles, with women specializing in nonmarket work and men specializing in market work, as the basis for the stability of marriage and spouses' satisfaction. The rationale behind the specialization's efficiency and division of work is due to biological differences and human capital, resulting in a comparative advantage for men in paid work and women

in household work. Therefore, any decline in specialization is expected to hinder efficiency and hence diminish the gains to marriage (Becker, 1991).

A second theory is derived from the exchange or bargaining models. These approaches are similar to those originating from the social exchange theory. From this perspective, marital gains are negotiated in the light of the likelihood of divorce, based on what each spouse has to lose in case of union dissolution. This is determined by the marriage market position, skills and preferences, and personal earnings correlated to the utility of being single. Therefore, each party decides whether to stay in or leave a relationship, by comparing the utility in marriage to the expected utility outside the marital union. The same resources that allow for more bargaining power also provide the aims by which each partner can leave a union with less loss (England & Kilbourne, 1990; Lundberg & Pollak, 1996).

Becker's gains-to-marriage theory predicts that the gains from a marital union for women are smaller than those for men, due to women making marriage-specific non-transportable investments (such as childbearing that cannot simply be passed on), where men make specific investments in human capital that they keep even in case of marriage dissolution (Becker, 1991).

In contrast to economic perspectives, gender experts state that similar economic and household roles of spouses increase empathy and companionship (Cherlin, 2005). The specialization of wives in household labour and husbands in market work is increasingly risky in modern societies because of the growing economic interdependence between spouses. Hence, comparable, rather than complementary, spousal roles increase women's and men's emotional gains from marriage, reduce economic risks, and increase marital stability. Men's gains to marriage may actually increase as a result of the presence of another wage earner coupled with men's lesser involvement in household chores and childrearing (Pollak, 2003).

In sum, each of these perspectives predicts that the altered economic circumstances of men and women since the 1950s are driving changes in marriage and divorce patterns. Findings on the relationship between women's and men's resources differ. Gary Becker's gains-to-marriage perspective (1991) states that higher economic resources among women indicate less specialization and consequently signal lower marital gains and higher risks of divorce (Becker, 1991). Bargaining models predict that gender inequality may hinder women's ability to use economic resources as leverage in the bargaining process, and thus higher economic resources among women may also be associated with higher risks of divorce (England & Kilbourne, 1990; Lundberg & Pollak, 1996). In contrast, gender theorists predict that dissimilar levels of spousal economic resources hinder intimacy and marital satisfaction and are associated with higher risks of divorce (Cherlin, 2005).

Prior research (White & Rogers, 2004) has found that men's higher education, earnings, and stable employment increased entry into marriage from singlehood or cohabiting unions. Research work on the association between women's economic characteristics and marriage entry has found less consistent results (Hoffman & Duncan, 1995). Studies that used historical aggregate data on marriage and labour market

trends have generally found a negative association between women's employment and marriage, whereas those that used individual data found that women with better employment prospects were more likely to marry, not less, as compared with women with more constrained employment options (Rogers, 2004). Historically, women with more education have had lower probabilities of marriage compared with less educated women, regardless of race.

Numerous studies (Weiss & Willis, 1997 and Smock & Manning, 1999) in the past have also documented how men's and women's economic resources affect divorce. Divorce has consistently been found to be more likely when men's earnings are lower or declining. One study (White & Rogers) reported that uncertainty about men's employment and earnings was associated with entry into cohabiting unions instead of marriage, and employment instability was associated with greater risks of cohabiting unions ending instead of transitioning to marriage (White & Rogers, 2004).

A more recent study published in 2016 by Alexandra Killewald, professor of sociology at Harvard University, suggests that financial factors such as a couples' overall resources and a wife's ability to support herself in the event of divorce are no longer predictors of whether or not a marriage will last in a modern world. However, the manner in which the couple divides both paid and unpaid labour is linked to the risk of divorce. The study observes how patterns have changed across different marriage units. For marriages prior to the mid-1970s it used to be the case that women took on more of the housework which resulted in a greater stability of the marriage. However, nowadays there is no such association. Women's employment status is not correlated to the risk of divorce. Hence, results highlight that there is a general trend for the expansion of roles women can take on and still have a stable marriage, whereas the norm of the man's role of 'breadwinner' has not changed much. Lately, men are expected to participate at least to some extent in the household chores, which is a major change from previous eras. However, it is important to stress that these types of patterns are always fluid (Killewald, 2016).

4 Conclusion

Marriage enhances a couple's economic resources through three mechanisms: specialization, economies of scale, and greater access to social institutions and networks. Specialization enhances economic well-being by increasing the joint output of couples, making it exceed the sum of outputs produced individually. The economies of scale that result from sharing household and living expenses yield a higher standard of living on the same income level than each partner would realize if each maintained separate households. Married individuals are also more likely than single persons to have access to health insurance and pensions by means of their spouse. Each of these factors is associated with higher savings rates among married individuals compared with single persons.

Hence, a decline in economic well-being should result from divorce. Former spouses now have two households, instead of one, with two sets of expenses to cover. The termination of marriage also eliminates benefits associated with specialization. Because both former spouses are no longer benefiting from specialization and economies of scale, women and men should experience a loss in economic status after divorce.

Eva Kos

Pravni in ekonomski vidik zakonske zveze

Izraz »pogodba« je najboljši način za opredelitev pravnega razmerja med dvema osebama, ki se odločita za skupno življenje in oblikovanje družine (Poulter, 1979). Vendar tu ne govorimo o pogodbi, sklenjeni na podlagi popolne svobode dogovora med strankama. Nasprotno, zakonska pogodba je močno regulirana, saj zakon bistveno omejuje svobodo strank.

Zakaj zakon posega v svobodo dogovora, zlasti v zakonski pogodbi? Za razlago sta običajno navedena dva razloga:

- *Prvi razlog je učinkovitost. V skladu s tem vidikom, členi, ki urejajo zakonsko pogodbo, zmanjšajo transakcijske stroške v pogajalskih klavzulah in lahko služijo kot referenca pri poznejšem reševanju vprašanj/sporov, o katerih se stranke predhodno niso dogovorile.*
- *Drugi razlog, zakaj zakon strogo ureja zakonsko pogodbo, je enakopravnost. V prizadevanju za enakopravnost zakon pogosto poskuša favorizirati domnevno šibkejšo stranko (največkrat ženski spol) v nasprotju z domnevno močnejšo stranko, ki bi lahko z dominantnim položajem izkoristila nepoštene prednosti (Eekelaar, 2007).*

Poročna pogodba ima več zanimivih značilnosti. Prvič, vsi pogoji v času veljavnosti ne bodo ostali nespremenjeni; drugič, stranke nimajo natančnih informacij o naravi takšnih sprememb; in nazadnje je možno kadar koli v času veljavnosti pogodbo preoblikovati ali ji dodati nove pogoje. Te značilnosti pomembno vplivajo na naravo pogodbe, zlasti na možnost dvostranske ali enostranske prekinitve zakonske zveze, kar danes dopušča zakonodaja zahodnih držav. Čeprav je zakonska zveza dolgoročna pogodba, so lahko implicitni pogoji le-te kadar koli predmet nove pogodbe v splošnem okviru družinskega prava. To pomeni, da ima zakonska pogodba v tem smislu značilnosti prilagodljivosti in fleksibilnosti ponavljajočih se kratkoročnih pogodb (Grandon, 2011). Vse našete značilnosti predstavljajo »neformalne« elemente zakonske pogodbe. Zaupanje, sodelovanje in prilagodljivost v duhu sprememb so tako učinkoviti temelji zakona, saj zmanjšujejo transakcijske stroške. Za dolgoletni obstoj zakona sta medsebojno sodelovanje in transparentnost ključnega pomena (Scherp, 2016).

Vse zakonske zveze se sklenejo z obljubo, da bo zveza trajala do konca življenja. Stranki se odrečeta določeni svobodi v prihodnosti, v prepričanju, da skupna korist, ustvarjena v zakonski zvezi, presega korist, ki bi jo lahko dosegla vsaka stranka po-

sebej. Zakonca vstopita v zakonsko zvezo z zagotovitom, da sta oba sprejela pravno zavezujočo zavezo, ki omejuje njuno svobodo v nadaljnje. Prav to zagotovilo odvrta od odstopanj, krepi medsebojno zaupanje in spodbuja vlaganje časa, energije, čustev in sredstev v zakon (Cabrillo, 1996).

Pogosto se obljubo prekrši in posledično ena ali obe strani skušata sporazum razvezati. Poroko, čeprav velja za vrh romantične ljubezni, je mogoče analizirati z ekonomskega vidika. Sama odločitev sklenitve poročne zveze z določeno osebo, tudi na podlagi čustev, je ekonomska – sestavljena iz kompromisov in odrekaj. Vsak spol lahko veliko ponudi – spolni odnos, fizično zaščito, dohodek, vzgojo otrok itd. Moški in ženske vidijo drug drugega kot ponudnika ključnih življenjskih storitev. Naložba v vsako dobro, tudi v otroke, predstavlja nadaljnje stroške in koristi. V preteklosti (ponekod tudi danes) so otroci veljali za investicijsko dobro v smislu, da so starši lahko pričakovali finančno in materialno donosnost svoje naložbe. Kot dobra naložba prisotnost otroka drži zakon skupaj in ublaži škodo, če bi ena stranka opustila drugo (Dnes, 2002).

Temeljni razlog za poroko je torej omogočiti optimalno vlaganje v premoženje, predvsem, vendar ne izključno v otroke. Če nobena dolgoročna pogodba ne bi bila izvršljiva, stranke ne bi vložile toliko sredstev v zakonsko premoženje kot sicer. Najpogosteje so ženske tiste, ki običajno ne želijo vlagati v otroke, dokler nimajo zagotovila življenjske podpore, predanosti in zaščite. Čeprav so otroci osrednji razlog za poroko, niso edini razlog. Zaobljuba, da bomo izpolnili svojo dolžnost »v sreči in nesreči, v bolezni in zdravju«, odraža, da bi zakonsko zvezo lahko obravnavali tudi kot neke vrste (za)varovalno pogodbo (Dnes, 2002).

Trg zakoncev je monopolistično konkurenčen. Vsi moški so potencialni možje, vse ženske potencialne žene. Čeprav so nekateri tesni substituti drug za drugega, je večina drugih nepopolnih. Na trgu obstaja velika izbira in konkurenca. Poleg tega je trg zelo razvit; ponuja bogato paleto konkurenčnih poti do iskanja zakonca. Udeleženec lahko »zmenkarijo« vidi kot porabo ali naložbo. Moški in ženske nimajo denarne vrednosti, niti niso zamenljivi za stvari, ki jim je mogoče določiti ceno. Edino merilo njihove vrednosti je kakovost zakoncev, ki jih lahko pridobijo oziroma postanejo. Možnost bistvenih kršitev zakonskih pogodb je obstajala že od nekdaj. V preteklosti so bili s takimi kršitvami povezani večji stroški. Verska zavest je strankam v primeru kršitve povzročila znatne notranje psihološke in zunanje družbene stroške. Namesto formalne pravne omejitve so zakonske zveze varovale neformalne socialne in psihološke omejitve. Dandanes velja težnja družin, da imajo manj otrok, in težnja žensk k iskanju enakosti in uresničevanju svojih poklicnih ciljev skladno s tem, da vlagajo manj sredstev v to, da so žene na splošno (Dnes, 2002).

Poroka in ločitev ostajata ekonomska sporazuma, katerih ekonomski vidik je zabrisan v splošnem prepričanju, da zakonska zveza temelji le na romantični ljubezni in pripadnosti in ne na finančnih motivih. Kljub temu pa so odločitve žensk in moških o tem, s kom se bodo poročili, kdaj se bodo poročili in ali bodo ostali poročeni, dejansko ekonomske odločitve (Fine, 2006). Teorija temelji na specializaciji zakonskih vlog, kjer so moški specializirani za tržno delo in ženske za netržno delo, kot temelju za

zadovoljstvo in stabilnost v zakonu. Razlog za učinkovitost specializacije so človeški kapital in biološke razlike, ki se kažejo v primerjalni prednosti moških v plačanem delu in žensk v gospodinjstvu. Torej, vsako zmanjšanje specializacije zmanjšuje učinkovitost in s tem zmanjšuje dobiček v zakonski zvezi (England in Kilbourne, 1990; Lundberg in Pollak, 1996).

V nasprotju z zgornjo ekonomsko teorijo strokovnjaki za enakost spolov trdijo, da podobne ekonomske in gospodinjске vloge zakoncev povečujejo empatijo in druženje. Poleg tega trdijo, da je specializacija žena za gospodinjско delo in mož za tržno delo v sodobnih družbah vse bolj tvegana zaradi vse večje gospodarske soodvisnosti zakoncev. Zato primerljive, namesto dopolnilne vloge zakoncev povečujejo čustveni dobiček obeh zakoncev, zmanjšujejo ekonomska tveganja in povečujejo zakonsko stabilnost (Becker, 1991).

Poroča krepki ekonomska sredstva zakonskega para s tremi mehanizmi: specializacijo, ekonomijo obsega in večjim dostopom do socialnih ustanov in mrež. Specializacija krepki gospodarsko blaginjo s povečanjem skupnega donosa para bolj kot vsote njunih posameznih donosov. Ekonomija obsega, ki izhaja iz delitve gospodinjских in življenjskih stroškov, prinaša višji življenjski standard na isti ravni dohodka, kot bi ga imel vsak partner, če bi vsak zase vzdrževal ločena gospodinjstva. Poročeni posamezniki imajo tudi olajšan dostop do zdravstvenega zavarovanja in pokojnin prek zakonca. Vsak od teh dejavnikov je povezan z višjimi prihranki poročenih posameznikov v primerjavi s samskimi.

Posledično pride po razpadu zakonske zveze do upada gospodarske blaginje. Nekdanji partnerji imajo zdaj namesto enega dve gospodinjstvi z dvema sklopoma pripadajočih stroškov. Razpad zakonske zveze odstrani tudi koristi, povezane s specializacijo. Ker oba bivša zakonca nimata več koristi od specializacije in ekonomije obsega, imata tako ženska in moški po ločitvi zmanjšan ekonomski status.

Odločitev o ločitvi, čeprav sprejeta na podlagi analize stroškov in koristi, upošteva tudi negospodarske dejavnike. Merila kakovosti zakonske zveze so močno povezana z obstojčim tveganjem ločitve. Posamezniki, ki so svojo poroko ocenili kot nesrečno, imajo verjetnost za ločitev občutno višjo kot posamezniki v srečnih zvezah. Poleg tega je bilo ugotovljeno, da višja finančna sredstva žena povečujejo tveganje za ločitev le med pari, pri katerih je bilo prvotno zadovoljstvo z zakoncem nizko. Nekateri strokovnjaki menijo, da so prav zakonske težave spodbudile k povečanju dohodka žena, vendar povečanje finančnega dohodka žensk ni imelo škodljivih učinkov na nadaljnji potek zakonske zveze (Weiss in Willis, 1997 in Smock in Manning, 1999). Najpogosteje se ženske in moški z višjimi ekonomskimi sredstvi raje poročijo, kot da bi ostali samski. Negotovost glede finančnih zmožnosti moških je povezana tudi s preferiranim vstopom v zunajzakonske skupnosti (sobivanje) namesto poroke. Moški z višjimi ekonomskimi sredstvi pogosteje prehajajo iz sobivanja v zakonsko zvezo in je manj verjetno, da se ločijo. Nasprotno so vplivi finančnih sredstev žensk na ločitve različni in nedokončni. Nekateri študije poročajo o pozitivni korelaciji med relativnim prispevkom žene k dohodkom ali plačam družine in povečanim tveganjem za zakonske motnje (White in Rogers, 2004). Drugi niso ugotovili nobenega učinka zaslužka žensk, saj menijo, da se

učinek zaslužka tako žensk kot moških stabilizira. Razlike med študijami lahko izvirajo iz nepopolnih modelov, ki spregledajo pomembne negospodarske spremenljivke, povezane z ločitvijo. Jasno je, da so ekonomski dejavniki tesno povezani z odločitvami tako o sklenitvi kot tudi prekinitvi zakonske zveze, ki imajo ekonomske posledice za ženske, moške in otroke (Pollak, 2003).

LITERATURA

1. Boele - Woelki, K. (2003). European family law in action. Antwerpen, Oxford, New York: Intersentia.
2. Becker, G. (1991). A theory of marriage. *Journal of Political Economy*.
3. Cabrillo, F. (1996). The economics of the family and family policy. Massachusetts: Edward Elgar Publishing Company.
4. Cherlin, A. J. (2005). Marriage: Current status and alternative features. National Council on Family Relations, British Colombia.
5. Dnes, A. and Rowthorn, R. (2002). The law and economics of marriage and divorce. Cambridge, UK: Cambridge University Press.
6. Eekelaar, J. (2007). Why people marry: The many faces of an institution. American Bar Association.
7. England, P. and Kilbourne, B. S. (1990). Markets, marriages, and other mates: The problem of power. *Rethinking economy and society*. New York: de Gruyter.
8. Europa (2017). Divorce and legal separation. Retrieved on 6/28/2020 from the Internet: http://europa.eu/youreurope/citizens/family/couple/divorce-separation/index_en.htm.
9. E-european justice (2016, 11 May) Divorce – Slovenia. Retrieved on 5/20/2020 from the Internet: https://e-justice.europa.eu/content_divorce-45-si-en.do?member=1.
10. E-uprava.gov. Sklenitev zakonske ali partnerske zveze v Sloveniji. Retrieved on 5/20/2020 from the Internet: <https://e-uprava.gov.si/podrocja/druzina-otroci-zakonska-zveza/zakonska-zveza/sklenitev-zakonske-zveze-v-sloveniji.html>.
11. Feguš, odvetniška pisarna (2017). Marriage contract – a novelty in Slovenian family legislation. Retrieved on 5/13/2020 from the Internet: <http://fegus.si/en/marriage-contract-a-novelty-in-slovenian-family-legislation/#>.
12. Fine, M. and Harvey, J. (2006). Handbook of divorce and relationship dissolution. Mahwah, New Jersey: Lawrence Erlbaum Associates, Inc., Publishers.
13. Grandon, J. R. (2011). The Relationship Between Marital Characteristics, Marital Interaction Processes and Marital Satisfaction. *Journal of Counseling and Development*, 82, No. 1.
14. Hoffman, S. D. and Duncan, G. J. (1995). The effect of income, wages, and benefits on marital disruption. *The Journal of Human Resources*.
15. Killewald, A. (2016). Money, Work, and Marital Stability: Assessing Change in the Gendered Determinants of Divorce. *American Sociological Review*.
16. Lundberg, S. and Pollak, R. A. (1996). Bargaining and Distribution in Marriage. *Journal of Economic Perspectives*.
17. Nycbar (n.d.). Marriage is a contract. Retrieved on 6/1/2020 from the Internet: <http://www.nycbar.org/get-legal-help/article/family-law/marriage-is-a-contract/>.
18. Pollak, R (2003). Gary Beckers Contribution to Household and Family Economics. *Review of Economics of the Household*.
19. Poulter, S. (1979). The definition of marriage in English law. *The modern law review*, 42, No. 4
20. Republic of Slovenia, Ministry of labour, family, social affairs and equal opportunities (n.d.). Legislation. Retrieved on 6/5/2020 from the Internet: <http://www.mdds.gov.si/en/legislation/>.
21. Scherp, J. (2016). European Family Law Volume II, The Changing Concept of ‘Family’ and Challenges for Domestic Family Law (2nd ed.). Cambridge, UK: University of Cambridge and Fellow of Gonville and Caius College.

22. Smock, P. and Manning, W. D. The effect of marriage and divorce on women's economic well-being. *American Sociological Review*, No. 6.
23. White, L. and Rogers, S. J. (2004). Economic circumstances and family outcomes. A review of the 1990s. *Journal of Marriage and Family*, 62, No. 4.
24. Weiss, Y. and Willis, R. (1997). Match quality, new information, and marital dissolution. *Journal of Labor Economics*, 15, No. 1.