

**NATIONAL REPORT: AUSTRIA**

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August 2008

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### A. GENERAL

- 1. Are there special rules concerning the property relationship between spouses (explaining what is meant by spouses)? If so, briefly indicate the current sources of these rules.**

In Austria the property relationships between spouses are regulated by matrimonial property law.<sup>1</sup> The Austrian Civil Code does not contain a legal definition of the term “spouses”. From § 44 Austrian Civil Code it results that spouses are two people of a different gender, who by means of a marriage contract legally declare their intent to live in a joint community, to procreate, to raise children and to support each other. The conditions for a valid marriage are found in the Matrimonial Act of 6<sup>th</sup> July 1938.<sup>2</sup>

#### a. upon marriage

In connection with property questions upon marriage, Chapter 28 Austrian Civil Code contains special provisions with regard to contractual matrimonial property law, the marriage portion (*Heiratsgut*, §§ 1218 et seq. Austrian Civil Code), the bride price (*Widerlage*, §§ 1230 et seq. Austrian Civil Code), the morning gift (*Morgengabe*, § 1232 Austrian Civil Code), the dowry claim of the children towards the parents as a result of the marriage (§§ 1220 – 1223, 1231 Sentence 2 Austrian Civil Code), as well as gifts between spouses and fiancées (§§ 1246 et seq. Austrian Civil Code).

#### b. during marriage

The regulation of property-related questions during the marriage is also contained in Chapter 28 Austrian Civil Code. Marriage contracts are contracts relating to regulations on property relationships between spouses that deviate from the statutory matrimonial property regime, which can regulate queries relating to property relationships during the marriage.<sup>3</sup> Furthermore, Chapter 28 contains regulations on the statutory matrimonial property regime (§ 1237 Austrian Civil Code), as well as on gifts between spouses and fiancées (§§ 1246 et seq. Austrian Civil Code).

#### c. upon separation

Austrian law does not contain specific regulations for the matrimonial assets in connection with a separation of the spouses. However, the spouses are free to regulate their property relationships via marriage contracts not only during the marriage, but also after the marriage has ended so that they can also divide the matrimonial property following an actual separation.<sup>4</sup> A separation in the legal sense is not provided for under Austrian Law.

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<sup>1</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 477. All Austrian legislation can be found on the Internet (see [www.ris.bka.gv.at](http://www.ris.bka.gv.at)).

<sup>2</sup> Austrian Matrimonial Act (*Gesetz zur Vereinheitlichung des Rechts der Eheschließung und der Ehescheidung [im Lande Österreich und im übrigen Reichsgebiet]*), 06.07.1938, *dRGBl* (Reich Law Gazette) 807/1938.

<sup>3</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 478.

<sup>4</sup> Judgment of 10.1.1905, Oberster Gerichtshof, *JBl* 166; Judgment of 03.03.1976, Oberster Gerichtshof, *EFSlg* 27.134; Judgment of 17.12.1976, Oberster Gerichtshof, *EvBl* 1977/141.

#### **d. upon death**

The Austrian Civil Code contains provisions in connection with property-related questions after the death of a spouse. The most important regulation is the so-called community of property in the event of death (*Gütergemeinschaft auf den Todesfall*) which is found in §§ 1233 et seq. Austrian Civil Code. With the community of property in the event of death the property is separated during the lifetime of the spouses, but after the death of a spouse the assets of both spouses are united. Subsequently, the assets are redivided, the surviving partner receives half and the other half will go to the heirs.<sup>5</sup> The effects of matrimonial property in connection with the death of a spouse additionally regulate the provisions on mutual wills and the contract of inheritance under inheritance law (§§ 1248-1259 Austrian Civil Code), on the so-called marriage portion legacies (*Heiratsgut-Vermächtnisse*, §§ 669 et seq. Austrian Civil Code) and on the spouses' right to inherit (§§ 757-759 and 762 Austrian Civil Code).

#### **e. upon divorce**

Matrimonial property law regulations in connection with a divorce are found in the rules on the division of the marital property after the dissolution of marriage in §§ 81-91 Matrimonial Act, § 1266 Austrian Civil Code as well as in §§ 13 et seq. Austrian Condominium Act (*Wohnungseigentumsgesetz*),<sup>6</sup> and § 97 Austrian Civil Code.

#### **f. upon annulment**

Matrimonial property law regulations in connection with an annulment of the marriage are found in the rules on the division of the marital property after the dissolution of marriage in §§ 97 and 1265 Austrian Civil Code as well as in §§ 81-98 Matrimonial Act and in §§ 13 et seq. Condominium Act.

### **2. Give a brief history of the main developments and most recent reforms of the rules regarding the property relationship between spouses.**

The existing provisions in the Austrian Civil Code are mainly based on a reform of the matrimonial law of 1978, when the legislator announced the preservation of the previously existing principle of separation of property and contractual freedom.<sup>7</sup> The relevant government draft still contained the proposal of the settlement of the community of accrued gains, which was, however, discarded.<sup>8</sup> The main amendments to the former legal situation related to the implementation of regulations on the division of marital savings and consumable property in the event of the termination of marriage through divorce, annulment or dissolution.<sup>9</sup> Additionally, § 98 Austrian Civil Code provides for appropriate compensation for the assistance of the other spouse in his or her profession.<sup>10</sup>

Further, in the sense of a complete separation of property, previously existing modifications to the separation of property were deleted, such as e.g. the provision on the presumption of an administrative power of authority of the husband and the assumption that the purchase

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<sup>5</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, pp. 483 et seq.

<sup>6</sup> 12<sup>th</sup> Austrian Condominium Act 2002, *BGBI* (Federal Law Gazette) 2002/70.

<sup>7</sup> Federal Law of 15.6.1978, *BGBI* (Federal Law Gazette) 1978/280 on the amendment of the inheritance law of spouses, matrimonial property law, and divorce law.

<sup>8</sup> See 1978 Ch. Böhm, *Das neue Ehegüterrecht*, Wiener Juristische Gesellschaft (Sitzung vom 11.4.1979), *ÖJZ* 1979, p. 575; F. Bydlinski, 'Zur Neuordnung des Ehegüterrechts', in: Strasser (ed.), *Festschrift Fritz Schwind zum 65. Geburtstag: Rechtsgeschichte, Rechtsvergleichung, Rechtspolitik*, 1978, pp. 27 et seq.

<sup>9</sup> See Grillberger, *Eheliche Gütergemeinschaft*, 1981, p. 14.

<sup>10</sup> Grillberger, *Eheliche Gütergemeinschaft*, 1981, p. 14.

originated from the husband.<sup>11</sup> Additionally, it was clarified that each spouse may use his or her property fully and at his or her own discretion and therefore any limitation on usage during the marriage was rescinded.<sup>12</sup> Finally, the statutory hereditary rights of the spouses were increased in the factual connection with matrimonial property law and for the first time a right to a statutory compulsory portion was implemented.<sup>13</sup>

**3. Are there any recent proposals (e.g. parliament, reform bodies, academic community) for reform in this area?**

One focus of the judicial government programme for the current (23<sup>rd</sup>) legislation period lies in the further development of the Family Law. The Federal Minister for Justice therefore in joint cooperation with the Federal Minister for Health, Family and Youth established a working group for the topic of „marital property law“, which is located at the Federal Ministry for Justice. The result of the working group was incorporated into the draft for the Family Law Amendment Act 2008.<sup>14</sup> Accordingly, obsolete, in particular discriminating legal institutions, should be removed; this includes the marriage portion (*Heiratsgut*), the bride price (*Widerlage*), the morning gift (*Morgengabe*), the widow's allowance (*Witwengelt*) and legal usufruct (*Advitalitätsrecht*).

Additionally, the disposal of matrimonial consumable property and marital savings prior to the dissolution of the marriage should be made easier. For example, it should be expressly determined that agreements which the spouses made prior to the dissolution of the marriage must be taken into consideration during the procedure of division after the dissolution of the marriage in accordance with the criteria of equity in §§ 81 et seq. Austrian Matrimonial Act. It is essential for the significance of the agreement whether or not it was formed after the receiving of legal advice.<sup>15</sup> As new elections are due in Austria in the autumn of 2008 as a result of the failed coalition in July 2008, it is questionable whether and, if applicable, when the government draft will be further dealt with.

**4. Briefly explain whether or not the rules regarding the property relationship between spouses also apply to registered partnerships?**

Current Austrian law does not allow registered partnerships. However, extramarital communities can be regulated by means of cohabitation contracts between the partners,<sup>16</sup> but one has to note that an analogous application of the provisions regarding the property relationship between spouses is excluded due to the clear wording of the law: “with the intention to form a matrimonial relationship” (§ 1217 Austrian Civil Code).<sup>17</sup>

**5. Are the rules concerning the matrimonial property relationship between spouses exclusive or are there other mechanisms of property law, such as joint ownership, which also play a role in relation between spouses?**

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<sup>11</sup> F. Bydlinski, ‘Zur Neuordnung des Ehegüterrechts’, in: Strasser (ed.), *Festschrift Fritz Schwind zum 65. Geburtstag: Rechtsgeschichte, Rechtsvergleichung, Rechtspolitik*, 1978, p. 28.

<sup>12</sup> F. Bydlinski, ‘Zur Neuordnung des Ehegüterrechts’, in: Strasser (ed.), *Festschrift Fritz Schwind zum 65. Geburtstag: Rechtsgeschichte, Rechtsvergleichung, Rechtspolitik*, 1978, p.29.

<sup>13</sup> Grillberger, *Eheliche Gütergemeinschaft*, 1981, p. 15.

<sup>14</sup> Draft of a Family Law amendment law (FamRÄG 2008), BMJ-B4.000/0017-I 1/2008; see: [http://www.justiz.gv.at/\\_cms\\_upload/\\_docs/Entwurf\\_FamRAEG\\_2008.pdf](http://www.justiz.gv.at/_cms_upload/_docs/Entwurf_FamRAEG_2008.pdf).

<sup>15</sup> Explanatory notes to Government bill (*Erläuterungen zum FamRÄG 2008*) pp. 5 et seq.; see: [http://www.justiz.gv.at/\\_cms\\_upload/\\_docs/Erlaeuterungen\\_FamRAEG\\_2008.pdf](http://www.justiz.gv.at/_cms_upload/_docs/Erlaeuterungen_FamRAEG_2008.pdf).

<sup>16</sup> Möschl, *Die nichteheliche Lebensgemeinschaft*, 2<sup>nd</sup> Edition, 2002, marg. No. 46; Klaar, *Rechtsfragen nichtehelicher Lebensgemeinschaft*, *AnwBl* 1989 *Sondernummer*, p. 18.

<sup>17</sup> Oberster Gerichtshof *ZBl* 1925/236; Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1217 Austrian Civil Code, marg. No. 5.

In the event of the property regime of separation of property, the substantiation of joint ownership of certain property is possible.<sup>18</sup> In this case a direct application of the provisions of Chapter 16 Austrian Civil Code on the “community of property and other rights in rem” (§§ 825 et seq. Austrian Civil Code) will occur. In the event of the agreed community of property, according to the prevailing opinion the joint ownership of both spouses to the property in its entirety is created.<sup>19</sup> It is disputed whether the provisions of Chapter 16 Austrian Civil Code on the “community of property and other rights in rem” (§§ 825 et seq. Austrian Civil Code) and the provisions of Chapter 27 of the Austrian Civil Code on the commercial company (§§ 1175 et seq. Austrian Civil Code) are to be applied. According to prevailing case law, initially §§ 1233 et seq., 1262 and 1265 et seq. Austrian Civil Code, which regulate the community of property, should be applied.<sup>20</sup> Additionally an application of the provisions to the community of joint ownership by analogy should be considered, if these are compatible with the nature of the community of property,<sup>21</sup> as well as a similar application of the provisions to the commercial company, as far as the provisions are not specifically tailored to the commercial company.<sup>22</sup>

## 6. What is the relationship, if any, between the law regarding the property relationship between spouses and the law of succession?

The Austrian Civil Code contains special provisions in §§ 669, 757-759, 762, 1248 and 1249 on property-related questions in connection with the death of a spouse. The inheritance right of a spouse and matrimonial property law therefore initially interact, so that the surviving spouse must deduct certain benefits including from the rate of the statutory right of succession as well as on the statutory compulsory portion, which he or she received as a result of matrimonial property right agreements.<sup>23</sup> In the specific context of marriage contracts the

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<sup>18</sup> Braunerder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1217 Austrian Civil Code, marg. No. 4.

<sup>19</sup> Ehrenzweig, *System des österreichischen allgemeinen Privatrechts*, vol. II, part two, 2<sup>nd</sup> Edition, 1937, p. 157; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 481; Braunerder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 3; Judgment of 24.1.1966, Oberster Gerichtshof, *JBl* 1966, p. 564; Judgment of 17.12.1969, Oberster Gerichtshof, *EFSIlg* 11.726; Judgment of 12.11.1970, Landesgericht für Zivilrechtssachen Wien, *EFSIlg* 13.659. A dissenting scholarly opinion defines the community of property as common property whereby the spouses have undivided ownership and can only use their property jointly (*Gesamthandeigentum*): Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, p. 789; Grillberger, *Eheliche Gütergemeinschaft*, 1981, pp. 66 et seq.; Fenyves, ‘Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht’, in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, pp. 769 et seq.

<sup>20</sup> Judgment of 03.02.1967, Oberster Gerichtshof, *EvBl* 1967/346; Judgment of 29.6.1989, Oberster Gerichtshof, *NZ* 1990, p. 277. See also Rummel, ‘Eheliche Gütergemeinschaft und Gesellschaft Bürgerlichen Rechts’, in: Frotz and Ogris, *Festschrift Heinrich Demelius zum 80. Geburtstag: erlebtes Recht in Geschichte und Gegenwart*, 1973, p. 455. This is the same wording as § 826 Austrian Civil Code.

<sup>21</sup> Judgment of 02.04.1964, Oberster Gerichtshof, *EvBl* 1965/124; M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1233 Austrian Civil Code, marg. No. 3. Contra Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, p. 786.

<sup>22</sup> Judgment of 06.02.1952, Oberster Gerichtshof, *SZ* 25/34; Judgment of 18.1.1962, Oberster Gerichtshof, *SZ* 35/10; M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1233 Austrian Civil Code, marg. No. 3. Contra Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, p. 786.

<sup>23</sup> § 757 para. 2 Austrian Civil Code and §§ 787 et seq. Austrian Civil Code.

spouses additionally often create a mutual will in which they choose each other as heirs.<sup>24</sup> Finally, the contract of inheritance takes a middle of the road position between matrimonial property law and matrimonial inheritance law. This represents a marriage contract, but it additionally requires the form of a last will and testament to be valid.<sup>25</sup>

§ 757 Austrian Civil Code regulates the *statutory inheritance right* of the spouse. This is dependent of the relatives of the testator with whom the spouse is competing. In addition to the children of the testator and their descendents, the spouse inherits one third; in addition to parents and their descendents or grandparents, the spouse inherits two thirds of the estate. In accordance with § 757 para. 2 Austrian Civil Code the spouse must however deduct everything from this statutory portion of the inheritance which he or she received from the property of the testator as a result of marriage contracts or from a contract of inheritance.<sup>26</sup> Thus a bride price (*Widerlage*), a retirement interest (*Ausgedinge*) agreed in a contract of inheritance, the widow's allowance (*Witwengehalt*) or the marriage portion (*Heiratsgut*) which goes to the male spouse must be deducted.<sup>27</sup> If the spouse claims legal usufruct (*Advitalitätsrecht*), he or she will lose his or her entire statutory inheritance right (§ 1258 Austrian Civil Code). *Usufruct law* (§§ 1255 -1258 Austrian Civil Code) is the legal usufruct of the surviving spouse over the property of the deceased spouse.<sup>28</sup>

The benefits given to the spouse from the estate of the community of property as a result of death are also deducted.<sup>29</sup> The benefits from the community of property amongst living partners, however, are not deducted.<sup>30</sup> The unilateral benefits from a last will and testament are also not deducted, such as a bequest (*Vermächtnis*) and the preferential legacy (*Vorausvermächtnis*), as in accordance with § 789 Austrian Civil Code this is only incorporated into the compulsory portion of the spouse.<sup>31</sup> The *preferential legacy* is paid to the spouse independent of whether the spouse is an heir or not. It contains the right to all movable assets belonging to the matrimonial home if these are required for the continuation of the previous standard of living (fixtures and fittings, household objects, carpets, televisions etc.). Additionally, the spouse has the right to continue to live in the matrimonial home.<sup>32</sup> Benefits during one's lifetime, thus gifts, the morning gift (*Morgengabe*) or financial benefits from life insurance will also not be deducted.<sup>33</sup> At this point it must be noted that the testator may also waive a deduction of generally deductible benefits.<sup>34</sup>

<sup>24</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 507.

<sup>25</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 523.

<sup>26</sup> Eccher in: Schwimann, *Praxiskommentar zum ABGB*, vol. III, 3<sup>rd</sup> Edition, 2006, § 757 Austrian Civil Code, marg. No. 5; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 531.

<sup>27</sup> See Eccher in: Schwimann, *Praxiskommentar zum ABGB*, vol. III, 3<sup>rd</sup> Edition, 2006, § 757 Austrian Civil Code, marg. No. 5.

<sup>28</sup> Rosenmayr in: Welser, *Fachwörterbuch zum Bürgerlichen Recht*, 2005, p. 12; Eccher in: Schwimann, *Praxiskommentar zum ABGB*, vol. III, 3<sup>rd</sup> Edition, 2006, § 757 Austrian Civil Code, marg. No. 5.

<sup>29</sup> Fischer-Czermak, *Die erbrechtliche Anrechnung und ihre Unzulänglichkeiten*, NZ 1998, p. 3 et seq; Welser in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. I, 3<sup>rd</sup> Edition, 2000, § 757 Austrian Civil Code, marg. No. 2.

<sup>30</sup> Welser in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. I, 3<sup>rd</sup> Edition, 2000, § 757 Austrian Civil Code, marg. No. 2 with further references.

<sup>31</sup> Eccher in: Schwimann, *Praxiskommentar zum ABGB*, vol. III, 3<sup>rd</sup> Edition, 2006, § 757 Austrian Civil Code, marg. No. 6.

<sup>32</sup> See Welser in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. I, 3<sup>rd</sup> Edition, 2000, § 758 Austrian Civil Code, marg. No. 1 et seq.

<sup>33</sup> Welser in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. I, 3<sup>rd</sup> Edition, 2000, § 757 Austrian Civil Code, marg. No. 5 with further references.

<sup>34</sup> Welser in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. I, 3<sup>rd</sup> Edition, 2000, § 757 Austrian Civil Code, marg. No. 2.

The right of the spouses to a *statutory compulsory portion* is regulated in §§ 762-765 Austrian Civil Code. It exists in addition to the right of the successors or ancestors to a compulsory portion and is half of what the spouse would have received in accordance with the statutory inheritance right. At the request of an heir or a person with the right to a compulsory portion, the spouse must allow certain benefits to be deducted from his or her statutory portion (§§ 787 et seq. Austrian Civil Code). This includes in particular all benefits of the last will and testament, the preferential legacy as well as benefits during one's lifetime, which the testator has paid in advance on the compulsory portion.<sup>35</sup>

In accordance with § 1248 Austrian Civil Code the spouses or bridal couple, in a so-called *mutual will* under the condition of marriage,<sup>36</sup> can appoint each other.<sup>37</sup> Although the mutual will is regulated in Chapter 28 Austrian Civil Code and is often created in connection with contracts of inheritance and other marriage contracts, it is not a marriage contract itself,<sup>38</sup> and therefore the form requirements of marriage contracts do not apply.<sup>39</sup>

§ 1249 of the Austrian Civil Code provides for the option of a *contract of inheritance* between spouses.<sup>40</sup> The contract of inheritance is a bilateral legal transaction between the testator and the heir, by which the same is irrevocably called to inherit.<sup>41</sup> Contracts of inheritance are marriage contracts and can therefore only be concluded between spouses.<sup>42</sup> Contracts between bridal couples can be concluded subject to the condition of a subsequent marriage. The spouses can mutually appoint each other as heir, or one spouse may appoint the other spouse as his or her heir. The special feature of the contract of inheritance is that it represents the strongest reason for appointment; the contractual heir thus has priority over all remaining heirs.<sup>43</sup> The contract of inheritance must be concluded by notarial deed and additionally meet the form requirements of a last will and testament. In accordance with § 1253 Austrian Civil Code the testator must receive at least one quarter of the estate at his or her free disposal, therefore it can only be concluded for three quarters of the estate.<sup>44</sup>

**7. Are there distinct rules concerning general rights and duties of the spouses (as referred to in section B) that are independent of the specific property relationship of the spouses (matrimonial property regimes as referred to in section C)?**

The matrimonial property law regulates the purely property-related relationships between the spouses.<sup>45</sup> In addition, there are a number of other statutory effects of marriage. These are designated "personal legal effects of matrimony" and have their basis in §§ 89-100 Austrian Civil Code. This comprises the law on the married name (§§ 93 and 93a Austrian Civil Code), the instructions on the aim of matrimonial cohabitation (§§ 91, 92 and 95 Austrian Civil Code), maintenance law (§ 94 Austrian Civil Code), the power of authority according to § 96

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<sup>35</sup> See Welser in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. I, 3<sup>rd</sup> Edition, 2000, § 787 Austrian Civil Code, marg. No. 1.

<sup>36</sup> Judgment of 3.2.1967, Oberster Gerichtshof, *EvBl* 1967/346; Judgment of 6.10.1982, Oberster Gerichtshof, *SZ* 55/143. For the deduction of gifts cf. § 785 Austrian Civil Code.

<sup>37</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, pp. 507 et seq.

<sup>38</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 507.

<sup>39</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 507.

<sup>40</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, pp. 522 et seq.

<sup>41</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 522.

<sup>42</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 522.

<sup>43</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 522.

<sup>44</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 523.

<sup>45</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, pp. 477 et seq.

Austrian Civil Code (*Schlüsselgewalt*), the entitlement to the protection of housing (*Wohnungsschutz*, § 97 Austrian Civil Code) and the obligation to assist in the other spouse's profession (§§ 98-100 Austrian Civil Code).<sup>46</sup>

**B. GENERAL RIGHTS AND DUTIES OF SPOUSES CONCERNING HOUSEHOLD EXPENSES, TRANSACTIONS WITH RESPECT TO THE MATRIMONIAL HOME AND OTHER MATTERS IRRESPECTIVE OF THE SINGLE MATRIMONIAL PROPERTY REGIME.**

**8. What, if any, are the obligations of spouses to contribute to the costs and expenses of the family household? In answering this question, briefly explain what your system understands by "costs and expenses of the family household".**

Austrian law does not recognise a specific standard which regulates the division of household expenses. From the provisions in connection with the maintenance law it results that the spouses, unless otherwise agreed, must contribute to the coverage of the requirements according to the principle of equality (§ 94 para. 1 Austrian Civil Code).<sup>47</sup> This should be undertaken to the best of their efforts and according to the design of the matrimonial cohabitation. Therefore both spouses are obliged to seek employment if they can only comply with their duty to contribute in this manner.<sup>48</sup> The spouse, who manages the household, contributes solely by the management of the home and has a claim for maintenance against the other spouse.<sup>49</sup> Any personal income is to be deducted from this claim accordingly.<sup>50</sup> "Costs for the joint family household" are deemed to be expenses in connection with legal transactions, which an ordinary and standard management of the household normally incurs.<sup>51</sup> In addition to costs for food this also includes, e.g. repair costs for household appliances, such as a washing machine,<sup>52</sup> the costs of fuel,<sup>53</sup> books,<sup>54</sup> clothing, footwear, smaller fixtures and fittings and toys,<sup>55</sup> bed linen and towels,<sup>56</sup> a kitchen<sup>57</sup> and the costs of burglary insurance.<sup>58</sup>

**9. Is one spouse liable for the household debts incurred by the other? And if so, to what extent?**

<sup>46</sup> For further detail see Hinteregger, *Familienrecht*, 3<sup>rd</sup> Edition, 2004, pp. 55 et seq; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, pp. 464 et seq.

<sup>47</sup> Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, § 94 Austrian Civil Code, marg. No. 2.

<sup>48</sup> Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, § 94 Austrian Civil Code, marg. No. 2.

<sup>49</sup> Judgment of 28.1.1986, Oberster Gerichtshof, *EvBl* 1987/64; Judgment of 20.9.1983, Oberster Gerichtshof, *EFSlg* 42.518; Judgment of 21.1.1993, Oberster Gerichtshof, *WoBl* 1993/76 (note Markl).

<sup>50</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 523.

<sup>51</sup> Judgment of 20.12.1977, Oberster Gerichtshof, *EFSlg* 28.534; Judgment of 22.3.1994, Oberster Gerichtshof, *EFSlg* 73.839.

<sup>52</sup> Judgment of 23.4.1963, Oberster Gerichtshof, *SZ* 36/64.

<sup>53</sup> Judgment of 20.12.1977, Oberster Gerichtshof, *EFSlg* 28.534.

<sup>54</sup> Judgment of 08.06.1978, Landesgericht für Zivilrechtssachen Wien, *EFSlg* 31.450.

<sup>55</sup> Judgment of Wien 14.9.1984, Landesgericht für Zivilrechtssachen Wien, *EFSlg* 44.901.

<sup>56</sup> Judgment of 24.07.1984, Oberlandesgericht Wien, *EFSlg* 44.902.

<sup>57</sup> Judgment of 24.01.1989, Landesgericht für Zivilrechtssachen Wien, *EFSlg* 58.715.

<sup>58</sup> In general see Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, § 96 Austrian Civil Code, marg. No. 3.



For legal transactions in connection with purchases for the “daily life of the household”, the power of authority according to § 96 Austrian Civil Code (*Schlüsselgewalt*) applies.<sup>59</sup> Its application is independent of the fact whether the matrimonial property regime of the community of property has been agreed or whether, failing an agreement, the matrimonial property regime of separate property exists. According to § 96 Austrian Civil Code the spouse, who manages the joint household, represents the other spouse in the legal transactions of daily life,<sup>60</sup> which he or she concludes for the household and which equate to the spouses’ standard of living. Only the non-participating spouse becomes the business partner and debtor.<sup>61</sup> In this way the business partner can, on the one hand, be protected from asserting a claim towards the head of the household without income. On the other hand, this ensures that the spouse who manages the joint household has the opportunity to conclude legal transactions for the household without becoming personally liable.<sup>62</sup> The condition however is that the representing spouse has no income. If both spouses are employed, only the directly involved spouse becomes the contract partner and debtor.<sup>63</sup>

The power conferred upon the spouse in the interest of the household cannot be asserted if the employed spouse has indicated to the third party that he or she does not wish to be represented.<sup>64</sup> If the third party cannot perceive from the circumstances that the acting party is the representative, both parties are jointly liable for the household debts.<sup>65</sup>

Any exceeding liability is only applicable in the event of a community of property regime as in the event of a separation of property only the immediately acting party becomes a debtor to the creditor.<sup>66</sup> In the community of property regime, however, each spouse also becomes the debtor to the creditors of the other spouse,<sup>67</sup> whereby depending on the extent of the relevant community of property alternative, the liability is limited accordingly.<sup>68</sup>

With the *general community of property* the entire property is also liable for the special debts of a spouse, which he or she entered into alone or which only relates to him or her.<sup>69</sup> The other spouse, who was not involved in the creation of these debts, is also liable with his or her portion, but only with this portion and not with his or her personal assets.<sup>70</sup> The liability of the other spouse is a personal liability which is limited to the total property and after the

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<sup>59</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 476; Hinteregger, *Familienrecht*, 3<sup>rd</sup> Edition, 2004, p. 67.

<sup>60</sup> Judgment of 20.10.1981, Oberster Gerichtshof, SZ 54/148; Judgment of 10.10.1994, Oberster Gerichtshof, JBl 1995, p. 324.

<sup>61</sup> Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. I, 3<sup>rd</sup> Edition, 2002, § 96 Austrian Civil Code, marg. No. 2.

<sup>62</sup> Hinteregger, *Familienrecht*, 3<sup>rd</sup> Edition, 2004, p. 67.

<sup>63</sup> Hinteregger, *Familienrecht*, 3<sup>rd</sup> Edition, 2004, p. 68.

<sup>64</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 523.

<sup>65</sup> Hinteregger, *Familienrecht*, 3<sup>rd</sup> Edition, 2004, p. 68 with further references.

<sup>66</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 478.

<sup>67</sup> Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 8.

<sup>68</sup> Established case law, e.g. Judgment of 29.10.1936, Oberster Gerichtshof, SZ 18/179; Judgment of 24.2.1954, Oberster Gerichtshof, SZ 27/48; Judgment of 26.1.1955, Oberster Gerichtshof, SZ 28/16; Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 8 et seq.

<sup>69</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 481; Fenyves, ‘Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht’, in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, p. 764; Grillberger, *Eheliche Gütergemeinschaft*, 1981, pp. 66 et seq.

<sup>70</sup> See Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1234 Austrian Civil Code, marg. No. 5.

dissolution of the community of property to the value of the assets which he or she has received upon dissolution.<sup>71</sup>

§ 1235 Austrian Civil Code stipulates a different regulation of liability for the *limited community of property*. For the special debts of a spouse, only the debtor is liable and not also the other partner in the community of property.<sup>72</sup> The debtor is liable with his or her personal assets as well as with his or her share in the common property.<sup>73</sup>

**10. To what extent, if at all, are there specific rules governing acquisition and/or transactions in respect of the matrimonial/family home irrespective of the matrimonial property regime? In answering this question, briefly explain what your system understands by „matrimonial/family home“.**

The matrimonial home is the home in which the spouses jointly reside or – in the event of a divorce – most recently resided.<sup>74</sup> According to case law a home is also to be deemed the matrimonial home even if it has never been used as such, but was intended as the matrimonial home.<sup>75</sup> However, a holiday home is not deemed to be a matrimonial home.<sup>76</sup>

The matrimonial home is part of the matrimonial consumable property (§ 81 para. 2 Austrian Matrimonial Act). Austrian law does not recognise any special provisions with regard to any acquisition or use in connection with the matrimonial home. The term matrimonial home is merely important in the event of the division of the matrimonial consumable property after the dissolution of the marriage (§ 81 Austrian Matrimonial Act) as well as during the personal legal effects of the marriage. Thus § 92 in connection with § 90 Austrian Civil Code standardises the duty to reside in the joint matrimonial home and the exceptions to this duty.

Further, spouses are jointly allowed to become owners of an apartment according to the special provisions in §§ 13 et seq. Austrian Condominium Act (*Wohnungseigentumsgesetz*).<sup>77</sup>

**11. To what extent, if at all, are there specific rules governing acquisition and/or transactions in respect of household goods irrespective of the matrimonial property**

<sup>71</sup> Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, p. 764; Ehrenzweig, *System des österreichischen allgemeinen Privatrechts*, vol. II, part two, 2<sup>nd</sup> Edition, 1937, p. 134; Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, p. 792; Judgment of 10.10.1961, Oberster Gerichtshof, *JBl* 1962, p. 515; Judgment of 10.11.1965, Oberster Gerichtshof, *JBl* 1966, p. 256; Judgment of 1.3.1972, Oberster Gerichtshof, *EFSlg* 17.954.

<sup>72</sup> Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, p. 803; Ehrenzweig, *System des österreichischen allgemeinen Privatrechts*, vol. II, part two, 2<sup>nd</sup> Edition, 1937, p. 135; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 482; Grillberger, *Eheliche Gütergemeinschaft*, 1981, pp. 100 et seq.

<sup>73</sup> Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, p. 768.

<sup>74</sup> Judgment of 25.8.1981, Oberster Gerichtshof, *SZ* 54/114; Judgment of 10.9.1986, Oberster Gerichtshof, *EFSlg* 51.712; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 185.

<sup>75</sup> Judgment of 16.9.1981, Oberster Gerichtshof, *SZ* 54/126; Judgment of 25.11.1999, Oberster Gerichtshof, *EFSlg* 90.444. Contra Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 185; Stefula, *Der gemeinsame Hausbau bei der Auflösung von Ehe und Lebensgemeinschaft*, *JAP* 2001/2002, pp. 138 et seq. and pp. 203 et seq.

<sup>76</sup> Judgment of 20.5.1998, Oberster Gerichtshof, *EFSlg* 87.544.

<sup>77</sup> 12<sup>th</sup> Austrian Condominium Act 2002, *BGBI* (Federal Law Gazette) 2002/70.

**regime? In answering this question, briefly explain what your system understands by "household assets".**

The so-called matrimonial consumable property (§ 81 para. 2 Austrian Matrimonial Act) comprises all corporeal objects which served the consumption of both spouses during the matrimonial cohabitation; this includes the contents of the home and the matrimonial home itself.<sup>78</sup> The matrimonial consumable property is subject to division after the dissolution of the marriage. Special provisions on purchasing the contents of the home or their consumption are not contained in the law.

**12. To what extent, if at all, are there other rules governing transactions entered into by one spouse irrespective of the matrimonial property regime (e.g. entering into guarantees, incurring debts...)?**

Independent of the matrimonial property regime, it is possible that spouses apply for credit or take out loans or act as a guarantor for liabilities on behalf of the other spouse or third parties. The guarantee is regulated in §§ 1346 et seq. Austrian Civil Code, the loan agreement in §§ 908 et seq. Austrian Civil Code. However, the Austrian Civil Code does not contain any special instructions for the event that one spouse takes out credit or acts as a guarantor for the debts of a third party. However, if the spouses jointly obtain credit or if one spouse acts as a guarantor for the other, the protective instructions in the Austrian Consumer Protection Act are to be observed: Businesspeople, whose line of business is granting or mediating loans, have special duties of information towards spouses who jointly take out loans as consumers (§ 25a Austrian Consumer Protection Law).<sup>79</sup> The creditors must instruct the spouses by handing over a special deed which states that in the event of a joint and severable liability the full debts can be claimed from any debtor in any order, that the debts remain in effect even after the dissolution of the marriage and that in the event of a divorce, upon request the court can limit the liability of one spouse in such a way that this spouse can only be held liable after an unsuccessful enforcement against his or her former spouse. The same applies if the credit agreement is only concluded by one spouse; however, the other spouse acts as a guarantor. If the spouses do not enter into the liability with a mutual interest the protection provisions under § 25c Austrian Consumer Protection Act are applicable (a notice of the economic situation of the debtor must be given).<sup>80</sup>

**13. To what extent, if at all, are there specific rules concerning one spouse acting as agent for the other?**

One of the legal effects of the marriage is the power of authority according to § 96 Austrian Civil Code (*Schlüsselgewalt*).<sup>81</sup> *Schlüsselgewalt* means that the spouse who manages the joint household represents the other spouse in legal transactions relating to daily life,<sup>82</sup> which he or she concludes for the household and which relate to the standard of living of the spouse. The business partner is in principle only the non-acting spouse.<sup>83</sup> In this way the business partner

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<sup>78</sup> See Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, § 81 Austrian Matrimonial Act, marg. No. 6 et seq.

<sup>79</sup> Koziol and Welsch, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 209; Mayer in: Kosesnik-Wehrle, Lehofer, Mayer and Langer, *Konsumentenschutzgesetz*, 2<sup>nd</sup> Edition, 2004, § 25a KSchG marg. No. 1 et seq.

<sup>80</sup> See Krejci in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, § 96 Austrian Civil Code, marg. No. 4 et seq.

<sup>81</sup> Koziol and Welsch, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 476; Hinteregger, *Familienrecht*, 3<sup>rd</sup> Edition, 2004, p. 67.

<sup>82</sup> Judgment of 20.10.1981, Oberster Gerichtshof, SZ 54/148; Judgment of 10.10.1994, Oberster Gerichtshof, JBl 1995, p. 324.

<sup>83</sup> Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. I, 3<sup>rd</sup> Edition, 2002, § 96 Austrian Civil Code, marg. No. 2.

can, on the one hand, be protected from asserting a claim towards the head of the household without an income. On the other hand, this ensures that he or she has the opportunity to conclude business transactions for the household, without becoming personally liable.<sup>84</sup> This is however subject to the condition that the representing spouse has no income. If both spouses are employed, only the directly involved spouse becomes the contract partner and debtor.<sup>85</sup> The power conferred upon the spouse in the interest of the household cannot be asserted if the employed spouse has indicated to the third party that he or she does not wish to be represented.<sup>86</sup> If the third party cannot perceive from the circumstances that the acting party is the representative, both parties are jointly liable for the household debts.<sup>87</sup>

**14. What restrictions or limitations, if any, are there concerning transactions between spouses irrespective of the matrimonial property regime (e.g. gifts)?**

Gifts amongst spouses, with the exception of the morning gift (*Morgengabe*), are to be evaluated in accordance with the general provisions on gifts (§ 1246 Austrian Civil Code).<sup>88</sup> There are no restrictions with the exception of a form requirement (gifts not actually handed over require a notarial deed in accordance with § 1 para. 1 of the Austrian Notarial Deed Act).<sup>89</sup> If spouses conclude a purchase, exchange or loan agreement, these contracts must also have the form requirement of a notarial deed (§ 1 para. 1 sub b Austrian Notarial Deed Act) in order to be valid.<sup>90</sup> This provision serves the protection of the creditor on the one hand, thus it should protect creditors from such business transactions only being concluded as a sham to their disadvantage and, on the other hand, for the protection of the spouses, which will prevent them from impetuous contract conclusions.<sup>91</sup> The form requirement does not apply to business contracts amongst spouses, however.<sup>92</sup>

**C. MATRIMONIAL PROPERTY REGIMES**

**C. 1. General issues**

**15. Are spouses entitled to make a contract regarding their matrimonial property regime?**

The provisions of the Austrian Civil Code with regard to matrimonial property law are optional.<sup>93</sup> The spouses can therefore make other regulations by *marriage contracts* than provided by law. § 1217 Austrian Civil Code defines marriage contracts as contracts "which are concluded for the property with the intention of entering into marriage". Marriage contracts require a notarial deed (§ 1 para. 1 sub a Austrian Notarial Deed Act) to be valid.

**16. What regime is applicable, using the list below,<sup>94</sup> if spouses have not made a contract (default regime) or are not allowed to make a contract with binding effect?**

In accordance with §§ 1233 and 1237 Austrian Civil Code the system of *separation of property* (IV.) applies to the statutory property regime.<sup>95</sup>

<sup>84</sup> Hinteregger, *Familienrecht*, 3<sup>rd</sup> Edition, 2004, p. 67.

<sup>85</sup> Hinteregger, *Familienrecht*, 3<sup>rd</sup> Edition, 2004, p. 68.

<sup>86</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 523.

<sup>87</sup> Hinteregger, *Familienrecht*, 3<sup>rd</sup> Edition, 2004, p. 68 with further references.

<sup>88</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1246 Austrian Civil Code, marg. No. 1.

<sup>89</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 191.

<sup>90</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 187.

<sup>91</sup> Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 33.

<sup>92</sup> Judgment of 29.8.1994, Oberster Gerichtshof, SZ 67/137.

<sup>93</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 478.

<sup>94</sup> For an explanation of this list, see the document: CLASSIFICATION OF MATRIMONIAL PROPERTY REGIMES PROPOSED BY THE CEFL.

**17. Using the list above, are there other alternative matrimonial property regimes regulated by statute for which spouses can opt besides the default regime (where applicable)?**

The most important marriage contract in practice is the agreement on the *community of property* (I).<sup>96</sup> However, a combination of the regimes of separation of property and community of property may be selected, such as the *participation in acquisition* or the *community of accrued gains* (II).<sup>97</sup> Further statutory types are the *marriage portion* (*Heiratsgut*, § 1218 Austrian Civil Code), the *bride price* (*Widerlage*, §§ 1230, 1231 Austrian Civil Code), the *morning gift* (*Morgengabe*, § 1232 Austrian Civil Code), the *widow's allowance* (*Witwengehalt*, §§ 1242-1244 Austrian Civil Code) and the *legal usufruct* (*Advitalitätsrecht*, §§ 1255 - 1258 Austrian Civil Code). As a result of the contractual freedom, it is at the party's discretion to modify the existing types or to create new types.<sup>98</sup>

**18. Briefly describe the regimes indicated in the answers to:**

**a. Question 16.**

*Separation of property* means that each spouse retains the property brought into the marriage and becomes the sole owner of the property purchased by him or her (§§ 1233-1237 Austrian Civil Code). This is to be interpreted as a "pure separation of property" as under matrimonial property law a spouse has no rights to the property of the other spouse (such as administration or use).<sup>99</sup> Each spouse is also the sole creditor of his or her debtors and the debtor of his or her creditors.<sup>100</sup> The complete separation of property obviously only exists until the annulment, divorce or dissolution of the marriage as in this case a division will take place for which the ownership relationships are not relevant.<sup>101</sup>

**b. Question 17.**

According to the prevailing opinion a *community of property* means that the previously separated property becomes the joint property of both spouses whereby they own the joint property according to the quotas agreed by them (*Miteigentum nach Bruchteilen*).<sup>102</sup> The term

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<sup>95</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 478.

<sup>96</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 479.

<sup>97</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 478.

<sup>98</sup> Brauneder, *Freiheit des Vertragsinhalts und Typenbindung im Ehegüterrecht*, *ZfRV* 1974, p. 1; Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, pp. 688 et seq; Judgment of 17.12.1976, Oberster Gerichtshof, *SZ* 49/160; Judgment of 18.10.1995, Oberster Gerichtshof, *SZ* 68/198.

<sup>99</sup> Judgment of 27.2.1985, Oberster Gerichtshof, *SZ* 58/37; Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1237 Austrian Civil Code, marg. No. 1.

<sup>100</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 523.

<sup>101</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 478.

<sup>102</sup> Ehrenzweig, *System des österreichischen allgemeinen Privatrechts*, vol. II, part two, 2<sup>nd</sup> Edition, 1937, p. 157; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 481; Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 3; Judgment of 24.1.1966, Oberster Gerichtshof, *JBl* 1966, p. 564; Judgment of 17.12.1969, Oberster Gerichtshof, *EFSlg* 11.726; Judgment of 12.11.1970, Landesgericht für Zivilrechtssachen Wien, *EFSlg* 13.659. A dissenting scholarly opinion defines the community of property as a common property whereby the spouses have undivided ownership and can only use their property jointly (*Gesamthandeigentum*): Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, p. 789; Grillberger, *Eheliche Gütergemeinschaft*, 1981, pp. 66 et seq;

*general community of property* is used if this includes the entire current and future (purchased and inherited) assets of the spouses.<sup>103</sup> In case of doubt, however, the *limited community of property* is applicable which only comprises the current assets.<sup>104</sup> The limited community of property also includes the community of property acquired during marriage and the community of movables. Where the *community of property acquired during marriage* only creates joint ownership of the future purchases,<sup>105</sup> the joint ownership with the *community of movables* relates to movable objects and the purchased real estate acquired during the community of property with the exception of inherited objects.<sup>106</sup>

Further, a distinction is made between community of property during one's life and community of property in the event of death. In the community *during one's life* the spouse receives immediate joint ownership of the incorporated property. With the community *in the event of death* there is a separation of property during one's life and in the event of the death of one of the spouses, the assets of both spouses are united. Subsequently the assets are redivided and the surviving partner receives half, while the other half goes to the heirs.<sup>107</sup>

The *marriage portion* (*Heiratsgut*, § 1218 Austrian Civil Code) is deemed to be property which is provided to the husband by the wife or by a third party to the wife to ease the matrimonial expenditure.<sup>108</sup> The *bride price* (*Widerlage*, §§ 1230 and 1231 Austrian Civil Code) is the capital which is promised and handed over to the bride by the groom or a third party as remuneration for the economic benefit of the marriage portion.<sup>109</sup>

The *morning gift* (*Morgengabe*, § 1232 Austrian Civil Code) is the gift which the husband promises to give to his wife on the first morning of the marriage.<sup>110</sup> The *widow's allowance* (*Witwengelt*, §§ 1242-1244 Austrian Civil Code) is the sum which is intended for the maintenance of the wife for the duration of her widowhood.<sup>111</sup> The *legal usufruct* (*Advokationsrecht*, §§ 1255-1258 Austrian Civil Code) is the substantiated right of the surviving spouse as a result of the marriage contract to usufruct over the property of the deceased spouse.<sup>112</sup> It is now very uncommon.<sup>113</sup>

**19. Indicate the frequency of the use made of the regimes (where possible by reference to statistical data) referred to in Questions 16 and 17.**

There is no concrete statistical data with regard to the property regimes between spouses in Austria. Generally the statutory property regime of separation of property is applied. The agreement on the community of property is practically the most important of the marriage contracts.<sup>114</sup> The marriage portion (*Heiratsgut*, § 1218 Austrian Civil Code), the bride price (*Widerlage*, §§ 1230, 1231 Austrian Civil Code), the morning gift (*Morgengabe*, § 1232 Austrian Civil Code), the widow's allowance (*Witwengelt*, §§ 1242, 1244 Austrian Civil Code) and

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Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, pp. 769 et seq.

<sup>103</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 480.

<sup>104</sup> See §§ 1177 and 1233 Austrian Civil Code.

<sup>105</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 480.

<sup>106</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 480.

<sup>107</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, pp. 483 et seq.

<sup>108</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 484.

<sup>109</sup> Rosenmayr in: Welser, *Fachwörterbuch zum Bürgerlichen Recht*, 2005, p. 627.

<sup>110</sup> Rosenmayr in: Welser, *Fachwörterbuch zum Bürgerlichen Recht*, 2005, p. 356.

<sup>111</sup> Rosenmayr in: Welser, *Fachwörterbuch zum Bürgerlichen Recht*, 2005, p. 632.

<sup>112</sup> Rosenmayr in: Welser, *Fachwörterbuch zum Bürgerlichen Recht*, 2005, p. 12.

<sup>113</sup> Rosenmayr in: Welser, *Fachwörterbuch zum Bürgerlichen Recht*, 2005, p. 12.

<sup>114</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 479.

legal usufruct (*Advitalitätsrecht*, §§ 1255-1258 Austrian Civil Code) in contrast represent an obsolete law and are expected to be abolished with the already planned Family Law reform.

## C. 2. Specific regimes

### I. Community of property

#### I. 1. Categories of assets

#### 20. Describe the system. Indicate the different categories of assets involved.

The previously separated property will become the joint property of the spouses.<sup>115</sup> The assets that then belong jointly to the spouses are called common property (*Gesamtgut*). Additionally the spouses can retain their so-called own assets (*Eigengut*) in their sole ownership.<sup>116</sup> It must be observed that the community of property contract alone only provides the title for the creation of the common property.<sup>117</sup> The common property, as such, will only be created by the relevant method, thus the handover,<sup>118</sup> or incorporation in the land register.<sup>119</sup> Hence, the entry of a restriction on use which is relevant to the community of property in the land register is necessary, which states that neither spouse may use his or her share alone during the period of community of property.<sup>120</sup> Additionally a sale or encumbrance ban can be entered in accordance with § 364c Austrian Civil Code.<sup>121</sup> Each spouse may demand the external creation of the community of property by a handover from the other spouse.<sup>122</sup> The effects of the community of property contract are almost exclusively extended to the spouses (*inter partes*).<sup>123</sup> Therefore the legal authority of each spouse does not just continue with regard to the personal assets, but also with the common property.<sup>124</sup> Thus each spouse may acquire receivables alone and assert them or enter into receivables and be held liable for them.<sup>125</sup>

#### 21. What is the legal nature of the different categories of assets, in particular the community?

There are deviating opinions on the legal nature of common property: According to the prevailing legal authorities the spouses have joint property which they possess according to

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<sup>115</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, pp. 481 et seq.

<sup>116</sup> Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, pp. 800 et seq; Kerschner, *Familienrecht*, 2<sup>nd</sup> Edition, 2002, marg. No. 2/98.

<sup>117</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 2.

<sup>118</sup> Judgment of 29.10.1924, Oberster Gerichtshof, SZ 6/344.

<sup>119</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 3.

<sup>120</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 5.

<sup>121</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 5.

<sup>122</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 5.

<sup>123</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 3.

<sup>124</sup> Judgment of 20.2.1957, Oberster Gerichtshof, *EvBl* 1957/187; Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 4.

<sup>125</sup> Judgment of 4.7.1952, Oberster Gerichtshof, SZ 25/192.

quotas agreed by them.<sup>126</sup> Joint ownership means that more than one person has a right to the ownership of a property, whereby each joint owner is entitled to a proportional share, thus a quota.<sup>127</sup> The joint owners have ownership in accordance with non-material shares which are at each owner's individual disposal (*Miteigentum nach Bruchteilen*, § 829 Austrian Civil Code). A dissenting scholarly opinion, in contrast, views the legal nature of the common property as an undivided ownership whereby the spouses can only use their property jointly (*Gesamthandigentum*).<sup>128</sup> In contrast to the prevailing opinion there are no non-material shares of the partners which they have at their disposal, but rather the joint owners can only use the object jointly.<sup>129</sup>

## 22. What do the personal assets of each spouse comprise?

Each spouse's own assets (*Eigentum*) comprise the separate property (*Vorbehaltsgut*) and the special assets (*Sondergut*).<sup>130</sup> Separate property includes anything that should not be included in the common property as per agreement.<sup>131</sup> The special assets comprise rights which are non-transferable and to which, accordingly, no common entitlement can be substantiated.<sup>132</sup> Special assets are, for instance, copyrights,<sup>133</sup> retirement interest,<sup>134</sup> maintenance claims,<sup>135</sup> as well as interests in succession.<sup>136</sup>

## 23. Is substitution of personal assets (e.g. barter agreement) governed by specific rules? Distinguish where necessary between movables and immovables.

Austrian law does not contain any specific regulations with regard to the substitution of personal assets during the existing community of property.

## 24. Is investment of personal assets governed by specific rules? Distinguish where necessary between movables and immovables.

There are no special regulations provided for the investment of personal goods during an existing community of property. However, if the marriage is dissolved the separation of the

<sup>126</sup> Ehrenzweig, *System des österreichischen allgemeinen Privatrechts*, vol. II, part two, 2<sup>nd</sup> Edition, 1937, p. 157; Grillberger, *Eheliche Gütergemeinschaft*, 1981, p. 65; Schramböck, *Ausgewählte Rechtsprobleme der ehelichen Gütergemeinschaft*, ÖJZ 1999, p. 449; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 481; Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 3; Judgment of 24.1.1966, Oberster Gerichtshof, JBl 1966, p. 564; Judgment of 17.12.1969, Oberster Gerichtshof, EFSlg 11.726; Judgment of 12.11.1970, Landesgericht für Zivilrechtsachen Wien, EFSlg 13.659.

<sup>127</sup> Rosenmayr in: Welser, *Fachwörterbuch zum Bürgerlichen Recht*, 2005, p. 353.

<sup>128</sup> Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, p. 789; Grillberger, *Eheliche Gütergemeinschaft*, 1981, pp. 66 et seq; Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, pp. 769 et seq.

<sup>129</sup> Rosenmayr in: Welser, *Fachwörterbuch zum Bürgerlichen Recht*, 2005, p. 227.

<sup>130</sup> Kerschner, *Familienrecht*, 2<sup>nd</sup> Edition, 2002, marg. No. 2/98; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 481.

<sup>131</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 481.

<sup>132</sup> See Kerschner, *Familienrecht*, 2<sup>nd</sup> Edition, 2002, marg. No. 2/98; Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, pp. 800 et seq.

<sup>133</sup> Kerschner, *Familienrecht*, 2<sup>nd</sup> Edition, 2002, marg. No. 2/98.

<sup>134</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1233 Austrian Civil Code, marg. No. 2.

<sup>135</sup> Judgment of 11.12.1957, Oberster Gerichtshof, EvBl 1958/147.

<sup>136</sup> Judgment of 16.10.1974, Oberster Gerichtshof, EvBl 1975/133.



matrimonial consumable property and the marital savings is significant in accordance with §§ 81 et seq. of the Matrimonial Act:<sup>137</sup> Such objects, amongst others, are excluded from the division when they were acquired with the savings of one spouse and the value of assets which were achieved by the sale of entered objects if the assets are still clearly definable<sup>138</sup> and where no conversion was undertaken.<sup>139</sup> An increase in the value of an object is also not subject to division if the increase in value solely derives from the contribution of the entering spouse.<sup>140</sup> The intention of the legislator is that only property which the spouses jointly created will be subject to a division.<sup>141</sup>

**25. What assets does the community comprise? Are there special rules governing the spouses earnings?**

If in doubt the common property comprises all assets which were brought into the marriage by the spouses during the marriage.<sup>142</sup> Although the Austrian Civil Code does not contain any specific provisions in connection with the common property and the earned income of a spouse, according to the case law, however, the earnings of a spouse must also be credited to the other spouse, i.e. the earned income does not come under the category of one's own assets but rather becomes part of the common property.<sup>143</sup>

**26. To which category of assets do pension rights and claims and insurance rights belong?**

The category of assets to which claims from pensions and insurances belong is disputable. According to the former case law, entitlements to benefits from national insurance laws (§ 98 Austrian General National Insurance Act, § 61 Austrian Agricultural National Insurance Act, § 65 Austrian Commercial National Insurance Act) were deemed to be the personal assets of each spouse.<sup>144</sup> According to more recent case law, however, such claims belong to the income and are in any case to be included in the common property.<sup>145</sup> Only the limited community of property that includes just the current property if there is no other agreement (§§ 1177, 1233 Austrian Civil Code) is different: In this case future claims to pension or insurance benefits are not to be incorporated in the calculation.<sup>146</sup>

**27. Can a third party stipulate in e.g. a gift or a will to what category of assets a gift or bequest will belong?**

If in doubt with regard to community of property everything that was acquired by the spouses, thus assets brought into the marriage and acquired during the marriage, are deemed

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<sup>137</sup> Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 184.

<sup>138</sup> Judgment of 29.9.1999, Oberster Gerichtshof, *EFSlg* 90.436; Judgment of 25.9.2002, Oberster Gerichtshof, *EFSlg* 101.002.

<sup>139</sup> Judgment of 15.3.2000, Oberster Gerichtshof, *EFSlg* 93.924.

<sup>140</sup> Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 184.

<sup>141</sup> Judgment of 25.3.1980, Oberster Gerichtshof, *SZ* 53/52; F. Bydlinski, 'Zur Neuordnung des Ehegüterrechts', in: Strasser (ed.), *Festschrift Fritz Schwind zum 65. Geburtstag: Rechtsgeschichte, Rechtsvergleichung, Rechtspolitik*, 1978, p. 39.

<sup>142</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1233 Austrian Civil Code, marg. No. 2.

<sup>143</sup> Judgment of 26.3.1996, Oberster Gerichtshof, *SZ* 69/81.

<sup>144</sup> Judgment of 1.12.1964, Oberster Gerichtshof, *EvBl* 1965/255; see also M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1233 Austrian Civil Code, marg. No. 2.

<sup>145</sup> Judgment of 26.3.1996, Oberster Gerichtshof, *SZ* 69/81.

<sup>146</sup> See Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 480.

to be common property.<sup>147</sup> If a certain asset is to be excluded the spouses can contractually agree that this asset is to be deemed separate property (*Vorbehaltsgut*).<sup>148</sup>

According to the provisions of the matrimonial property law, a third party cannot stipulate the allocation of a certain asset to a certain category of assets with one or both spouses. If the third party wishes to allocate an asset which he or she gives as a gift or an inherited asset to the separate property (*Vorbehaltsgut*), he or she has the option of adding a condition to the gift or the last will and testament in accordance with § 709 Austrian Civil Code. In this condition the third party must oblige the benefited spouse to enter into an agreement with the other spouse that this asset will be separate property (*Vorbehaltsgut*).

In line with § 709 Austrian Civil Code, the condition is to be viewed as a dissolving condition under which, in the event of culpable non-compliance therewith, the estate is to be forfeited.<sup>149</sup> Therefore, only compliance with the condition, thus the agreement between the spouses that this asset as a personal asset is not subject to common property, the gift and/or the last will of the testator is legally executed. The agreement between the spouses that this asset is to be included in the separate property (*Vorbehaltsgut*) of one spouse requires the form of a notarial deed as it would with the original community of property agreement.<sup>150</sup>

## **28. How is the categorisation of personal or community assets proved as between the spouses? Are there rebuttable presumptions of community property?**

§§ 1233 and 1177 Austrian Civil Code contain a rule of interpretation in connection with the scope of the common property: it is initially presumed that the community of property only relates to the current property. The time of the creation of the contract is to be taken into consideration.<sup>151</sup> If community of property was also agreed for future property then the law further presumes that future property only includes property that is acquired in the future, but not assets inherited in the future. As §§ 1233 and 1177 Austrian Civil Code only consist of an optional presumptive rule, deviations may be agreed.<sup>152</sup>

## **29. How is the categorisation of personal or community assets proved as against third parties? Are there rebuttable presumptions of community property?**

§§ 1233 and 1177 Austrian Civil Code contain a rule of interpretation in connection with the scope of the common property. It is initially presumed that the community of property only relates to the current property. The time of the creation of the contract is to be taken into consideration.<sup>153</sup> If community of property was also agreed for future property then the law further presumes that future property only includes property that is acquired in the future,

<sup>147</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1233 Austrian Civil Code, marg. No. 2.

<sup>148</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1233 Austrian Civil Code, marg. No. 2.

<sup>149</sup> Eccher in: Schwimann, *Praxiskommentar zum ABGB*, vol. III, 3<sup>rd</sup> Edition, 2006, § 709 Austrian Civil Code, marg. No. 8; Binder in: Schwimann, *Praxiskommentar zum ABGB*, vol. IV, 3<sup>rd</sup> Edition, 2006, § 938 Austrian Civil Code, marg. No. 34.

<sup>150</sup> Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, p. 73.

<sup>151</sup> Judgment of 22.6.1955, Oberster Gerichtshof, *EvBl* 1955/394.

<sup>152</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1233 Austrian Civil Code, marg. No. 1 et seq.

<sup>153</sup> Judgment of 22.6.1955, Oberster Gerichtshof, *EvBl* 1955/394.

but not property inherited in the future. As §§ 1233 and 1177 Austrian Civil Code only consist of an optional presumptive rule, deviations may be agreed.<sup>154</sup>

As the effects of the community of property contract generally exclusively extend to spouses, but not to third parties,<sup>155</sup> this rule of interpretation only applies to the common property in the relationship between the spouses. If it is to be proven towards third parties that a certain object is common property, for real estate the relevant entry in the land register is decisive. However, a mere notice of the community of property in the main ledger of the land register is not sufficient to have legal effect against third parties, thus to be a right in rem.<sup>156</sup> Lacking such an effect means that although no spouse may utilize his or her non-material share of the real estate unilaterally, if he or she does utilize his or her share contrary to the community of property, this will only have effects under the law of obligations in the internal relationship.

With a mere notice of the community of property in the main ledger of the land register the third party is making a legal acquisition in accordance with the general rules of joint ownership and can demand the division of the community of joint ownership.<sup>157</sup> In order to achieve legal effect towards third parties for immovable objects of a community of property, either a mutual encumbrance or a sales ban is to be incorporated into the land register for the spouses in accordance with § 364c Austrian Civil Code or it is highlighted during the entry of the community of property in the land register that the ownership right of each spouse is only incorporated with the restriction that no spouse may utilize his or her non-material share on his or her own.<sup>158</sup> Shares relating to other objects than real estate, however, cannot be attached to effects against third parties.<sup>159</sup>

### 30. Which debts are personal debts?

Personal debts are the special debts of a spouse which he or she entered into alone or only relate to him or her personally. This includes e.g. pre-marital debts,<sup>160</sup> tort debts,<sup>161</sup> or debts from the divorce dispute.<sup>162</sup>

### 31. Which debts are community debts?

Community debts are debts which the spouses entered into jointly as well as the liabilities which were created during the administration and for the use of the common property (*Gesamtgutschulden*).<sup>163</sup>

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<sup>154</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1233 Austrian Civil Code, marg. No. 1 et seq.

<sup>155</sup> Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 3.

<sup>156</sup> Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, p. 763.

<sup>157</sup> Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, p. 762.

<sup>158</sup> Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, pp. 762 et seq.

<sup>159</sup> Grillberger, *Eheliche Gütergemeinschaft*, 1981, p. 23.

<sup>160</sup> Judgment of 29.6.1960, Oberster Gerichtshof, SZ 33/69.

<sup>161</sup> Judgment of 27.2.1964, Oberster Gerichtshof, EFSlg 1.780.

<sup>162</sup> Judgment of 23.7.1952, Oberster Gerichtshof, SZ 25/209; see also Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 11.

### 32. On which assets can the creditor recover personal debts?

Whether the creditor can make claims against the common property to recover his or her claim against a spouse, or whether the creditor must limit himself or herself to the debtor's share to the common property and his or her personal assets, depends on the type of community of property that was agreed.

With regard to the *general community of property* the creditor can also recover personal debts from the common property of the spouses. Personal debts are debts which a spouse entered into on his or her own or which only concern him or her personally.<sup>164</sup> The other spouse, who was not involved in the creation of these debts, will also be liable with his or her share, however only with this share and not with his or her personal assets.<sup>165</sup> If e.g. the husband has purchased an expensive hi-fi system and the salesperson asserts an attachment against him due to insolvency, the wife shall not be able to prevent the attachment on the community objects. Only her personal assets would be excluded.<sup>166</sup> The liability of the other spouse is a personal liability which is limited to the common property and, after the dissolution of the community of property, to the value of the assets which he or she has received upon dissolution.<sup>167</sup>

§ 1235 Austrian Civil Code stipulates a different regulation of liability for the *limited community of property*. Only the debtor is liable for the personal debts of a spouse, and not also the other partner in the community of property.<sup>168</sup> The debtor is liable with his or her personal assets as well as with his or her share in the common property.<sup>169</sup>

### 33. On which assets can the creditor recover community debts?

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<sup>163</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 11; M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1234 Austrian Civil Code, marg. No. 5.

<sup>164</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 481; Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, p. 764; Grillberger, *Eheliche Gütergemeinschaft*, 1981, pp. 66 et seq.

<sup>165</sup> See Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1234 Austrian Civil Code, marg. No. 5.

<sup>166</sup> For an example see Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 30.

<sup>167</sup> Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, p. 764; Ehrenzweig, *System des österreichischen allgemeinen Privatrechts*, vol. II, part two, 2<sup>nd</sup> Edition, 1937, p. 134; Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, p. 792; Judgment of 10.10.1961, Oberster Gerichtshof, *JBl* 1962, p. 515; Judgment of 10.11.1965, Oberster Gerichtshof, *JBl* 1966, p. 256; Judgment of 1.3.1972, Oberster Gerichtshof, *EFSlg* 17.954.

<sup>168</sup> Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, p. 803; Ehrenzweig, *System des österreichischen allgemeinen Privatrechts*, vol. II, part two, 2<sup>nd</sup> Edition, 1937, p. 135; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 482; Grillberger, *Eheliche Gütergemeinschaft*, 1981, pp. 100 et seq.

<sup>169</sup> Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, p. 768.

For debts which the spouses entered into jointly, they are jointly liable with the common property and beyond that with their relevant personal assets.<sup>170</sup> This also applies if the obligation which was entered into jointly has no relevance to the community of property.<sup>171</sup> Further, the spouses are liable with their common property and special rights for so-called "common property debts" (*Gesamtgutschulden*), thus for debts from a purchase for the use of the common property.<sup>172</sup> The liability regulation in connection with the common property debts is applicable to the general as well as the limited community of property.<sup>173</sup>

## I. 2. Administration of assets

### 34. How are personal assets administered?

Personal assets are in the sole ownership of the relevant spouse, who is entitled to the administration and representation of this property.<sup>174</sup> For the administration and representation of these assets the general regulations are therefore applicable.<sup>175</sup>

### 35. How are the community assets administered?

The administration of the common property is undertaken by both spouses jointly.<sup>176</sup> The administration is carried out in accordance with the regulations as they exist for the community of joint ownership (§§ 833 et seq. Austrian Civil Code),<sup>177</sup> however with the particular feature that the unanimous agreement principle also applies to measures of ordinary administration.<sup>178</sup> The spouses can, however, make deviating rules,<sup>179</sup> or appoint a trustee.<sup>180</sup>

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<sup>170</sup> Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, p. 792; Ehrenzweig, *System des österreichischen allgemeinen Privatrechts*, vol. II, part two, 2<sup>nd</sup> Edition, 1937, p. 134; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 482; Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, p. 764. However cf. case law, e.g. Judgment of 7.2.1963, Oberster Gerichtshof, SZ 36/21.

<sup>171</sup> Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 9.

<sup>172</sup> Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 10.

<sup>173</sup> Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, p. 804; Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1234 Austrian Civil Code, marg. No. 5; Brauneder in: Schwimann, *Praxiskommentar zum General Austrian Civil Code*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 9 et seq.

<sup>174</sup> See Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 481.

<sup>175</sup> Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, p. 764.

<sup>176</sup> Judgment of 1.10.1958, Oberster Gerichtshof, *EvBl* 1958/385; Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 7.

<sup>177</sup> Grillberger, *Eheliche Gütergemeinschaft*, 1981, p. 34.

<sup>178</sup> Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, p. 763.

<sup>179</sup> Judgment of 3.10.1956, Oberster Gerichtshof, *EvBl* 1957/131.

<sup>180</sup> Judgment of 22.9.1954, Oberster Gerichtshof, *EvBl* 1955/43.

**36. Can one spouse mandate the other to administer the community assets and/or his or her personal assets?**

The administration of the common property is generally undertaken by both spouses jointly.<sup>181</sup> This is however not mandatory and therefore one spouse can instruct the other spouse to administer the common property.<sup>182</sup> As the general rules apply to the administration of personal assets, a spouse may at any time instruct the other spouse to administer his or her assets. In both cases the provisions of the "Power of Authority contract" are to be applied (§§ 1002 et seq. Austrian Civil Code).<sup>183</sup>

**37. Are there important acts concerning personal assets or community assets (e.g. significant gifts, disposal of the matrimonial/family home or other immovable property) that require the consent of the other spouse?**

A special consenting right of one spouse for the *purchase* of personal or community assets is not provided for in the Austrian Civil Code. With regard to the common property the regulations on joint ownership are to be correspondingly applied following the application of the unanimous agreement principle for measures of "extraordinary administration" of the community assets (§§ 834 et seq. Austrian Civil Code).<sup>184</sup>

Each spouse may utilize his or her personal assets without the consent of the other spouse. With regard to the common property, based on the prevailing opinion, it is presumed that the legal nature of the common property is in joint ownership.<sup>185</sup> In principle, each spouse is in a position as a joint owner to utilize his or her non-material share. Such a disposal, however, would contradict the purpose of the community of assets, namely the consolidation of the assets to assist in the conduct of marriage.<sup>186</sup> Therefore, it is presumed that no spouse must be allowed to utilize his or her joint ownership in the common property without the consent of the other spouse.<sup>187</sup> This obligation, however, only exists in the internal relationship between the spouses and therefore only has effect under the law of obligations.<sup>188</sup> A transfer to third parties is therefore effective in accordance with the general rules of joint ownership, although it does make the instructing person responsible to his or her spouse.<sup>189</sup>

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<sup>181</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1234 Austrian Civil Code, marg. No. 4.

<sup>182</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1234 Austrian Civil Code, marg. No. 4.

<sup>183</sup> See in general Strasser in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. I, 3<sup>rd</sup> Edition, 2000, § 1002 Austrian Civil Code, marg. No. 1 et seq; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, pp. 209 et seq.

<sup>184</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 297.

<sup>185</sup> Ehrenzweig, *System des österreichischen allgemeinen Privatrechts*, vol. II, part two, 2<sup>nd</sup> Edition, 1937, p. 157; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 481; Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 3; Judgment of 24.1.1966, Oberster Gerichtshof, *JBl* 1966, p. 564; Judgment of 17.12.1969, Oberster Gerichtshof, *EFSlg* 11.726; Judgment of 12.11.1970, Landesgericht für Zivilrechtssachen Wien, *EFSlg* 13.659.

<sup>186</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 481.

<sup>187</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 481; Schwind, *Familienrecht*, 1984, p. 89; Judgment of 21.4.1967, Oberster Gerichtshof, *SZ* 40/56.

<sup>188</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1234 Austrian Civil Code, marg. No. 2 and § 1236 Austrian Civil Code, marg. No. 1.

<sup>189</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 481.

According to the dissenting scholarly opinion that the spouses have an undivided ownership of their property (*Gesamthandeigentum*),<sup>190</sup> the spouses can only jointly dispose of their property and therefore one spouse needs the consent of the other spouse for all acts.

**38. Are there special rules for the administration of professional assets?**

The Austrian Civil Code contains no special provisions for the administration of professional assets.

**39. Is there a duty for one spouse to provide information to the other about the administration of the community assets?**

The Austrian Civil Code does not contain a duty of the spouse to inform the other spouse about the administration of the community assets. As, according to the prevailing opinion, the administration is undertaken in accordance with regulations existing for the community of joint ownership (§§ 833 et seq. Austrian Civil Law),<sup>191</sup> the unanimous agreement principle applies to measures of "extraordinary administration" of the community assets (§§ 834 et seq. Austrian Civil Code), which however, is not just subject to the provision of information to the other spouse, but also to the consent of that spouse.<sup>192</sup> If, however, one spouse is appointed as trustee he or she has the duty to render accounts to the other spouse.<sup>193</sup>

**40. How are disputes between spouses concerning the administration of personal or community assets resolved?**

Disputes between the spouses concerning the administration and use of the common property are to be resolved in non-contentious proceedings in the competent local courts.<sup>194</sup>

**41. What are the possible consequences when a spouse violates the rules governing the administration of personal and community assets? What are the possible consequences in other cases of maladministration of the assets?**

If a spouse violates the rules governing the administration or the use of personal and community assets, he or she is responsible to the other spouse.<sup>195</sup> Possible consequences of maladministration are not regulated in matrimonial property law, but rather in general civil law. According to general civil law, in the event of a violation of the administration of shares in the assets belonging to the other spouse, the spouse whose rights were violated can initiate a possessory action in accordance with §§ 339 and 345 et seq. Austrian Civil Code in order to

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<sup>190</sup> Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, p. 789; Grillberger, *Eheliche Gütergemeinschaft*, 1981, pp. 66 et seq; Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, p. 769 et seq.

<sup>191</sup> Grillberger, *Eheliche Gütergemeinschaft*, 1981, p. 34.

<sup>192</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 297.

<sup>193</sup> Judgment of 28.11.1995, Oberster Gerichtshof, SZ 68/226; M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1233 Austrian Civil Code, marg. No. 4.

<sup>194</sup> Judgment of 2.4.1964, Oberster Gerichtshof, SZ 37/45; Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 5; M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1233 Austrian Civil Code, marg. No. 4; Gamerith in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. I, 3<sup>rd</sup> Edition, 2000, § 835 Austrian Civil Code, marg. No. 6.

<sup>195</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 481.

restore his or her unimpaired assets.<sup>196</sup> An example of a disturbed possession amongst spouses who live in a joint household would be the deregistration of a joint telephone that is in joint ownership.<sup>197</sup> The aggrieved spouse can also, if he or she is no longer the possessing spouse, demand the possessing non-owner to return the object by initiating an action to protect ownership (*rei vindicatio*) in accordance with § 366 Austrian Civil Code.<sup>198</sup>

Further, in accordance with the action against disturbed possession according to § 523 second alternative Austrian Civil Code (*actio negatoria*) the aggrieved spouse can alternatively initiate an action for the suspension of any unlawful disturbance with wrongful interference with his or her property.<sup>199</sup> In addition to these options to assert legal rights, Austrian Law also recognises the *actio publiciana* in accordance with § 372 Austrian Civil Code, which is an action from the rightfully presumed possession or an action by the usucaption owner.<sup>200</sup> The *actio publiciana* is “halfway between” the action to protect ownership and/or the action against disturbed possession, on the one hand, and the possessory action on the other.<sup>201</sup> For the *actio publiciana*, in contrast to the ownership action and/or the ownership rights action, no proof of ownership is necessary; however, only a qualified possessor is entitled thereto.<sup>202</sup> A qualified possessor is someone who is the legal, honest and real owner.<sup>203</sup> Due to the swiftness and simplicity of the possessory action as well as in order to retrieve the revoked property as well as for the prevention of simple disturbances, in practice as a result of the possible problems of proving ownership, the possessory action is preferable to the other actions.<sup>204</sup>

In addition to these actions the aggrieved spouse can also make a claim for compensation in accordance with §§ 1293 et seq. Austrian Civil Code or a claim for unjustified enrichment in accordance with § 1041 Austrian Civil Code. A spouse is entitled to such a claim for unjustified enrichment if a wrongful transfer of assets to the enriched party has occurred other than by a payment from the party who suffered the loss to the enriched person.<sup>205</sup> For example, if an object belonging to one spouse was used, consumed or sold by the other.<sup>206</sup>

## 42. What are the possible consequences if a spouse is incapable of administering

### a. his or her personal assets?

<sup>196</sup> Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, p. 789; Grillberger, *Eheliche Gütergemeinschaft*, 1981, pp. 66 et seq; Fenyves, *Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht*, in Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, pp. 769 et seq.

<sup>197</sup> Klicka in: Schwimann, *Praxiskommentar zum ABGB*, vol. II, 3<sup>rd</sup> Edition, 2005, § 339 Austrian Civil Code, marg. No. 39.

<sup>198</sup> Klicka in: Schwimann, *Praxiskommentar zum ABGB*, vol. II, 3<sup>rd</sup> Edition, 2005, § 366 Austrian Civil Code, marg. No. 1 et seq.

<sup>199</sup> Kindl-Wendner in: Schwimann, *Praxiskommentar zum ABGB*, vol. II, 3<sup>rd</sup> Edition, 2005, § 523 Austrian Civil Code, marg. No. 1 et seq.

<sup>200</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 278.

<sup>201</sup> Böhm, *Sachenrecht Allgemeiner Teil*, 5<sup>th</sup> Edition, 2007, p. 55.

<sup>202</sup> Böhm, *Sachenrecht Allgemeiner Teil*, 5<sup>th</sup> Edition, 2007, p. 55.

<sup>203</sup> See Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 261 et seq.

<sup>204</sup> Böhm, *Sachenrecht Besonderer Teil*, 5<sup>th</sup> Edition, 2007, p. 73; Böhm, *Sachenrecht Allgemeiner Teil*, 5<sup>th</sup> Edition, 2006, p. 51.

<sup>205</sup> Graf and Gruber, *Gesetzliche Schuldverhältnisse*, 7<sup>th</sup> Edition, 2007, p. 71.

<sup>206</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 287.



If one spouse lacks legal capacity because he or she suffers from a physical illness or is mentally handicapped,<sup>207</sup> a trustee (*Sachwalter*) must be appointed to undertake all legal acts connected with the administration of his or her personal assets in accordance with § 268 para. 1 Austrian Civil Code.<sup>208</sup> The trustee then conducts all legal transactions and proceedings for the mentally handicapped or physically ill person and asserts rights of all kind on his or her behalf.<sup>209</sup> As the trustee's sphere of influence is limited to agendas of a legal nature,<sup>210</sup> the trustor can personally carry out actual administration if this is possible.

Instead of the legal appointment of a trustee, since the Austrian Living Will Act,<sup>211</sup> which entered into force on 1<sup>st</sup> June 2006 and the Austrian Trustee Law Amendment Act,<sup>212</sup> which entered into force on 1<sup>st</sup> July 2007, it is also possible with the assistance of an enduring power of authority to determine, in advance, which person should carry out the representative actions, if the appointer loses the legal competence or insight or judgement capacity or his or her ability to express himself or herself (compare §§ 284 et seq. Austrian Civil Code).<sup>213</sup> If one spouse has given the other spouse such an enduring power of authority, he or she is represented by the other spouse in the event of a later inability to undertake business actions.

#### **b. community assets?**

If one spouse lacks legal capacity because he or she suffers from a physical illness or is mentally handicapped,<sup>214</sup> a trustee (*Sachwalter*) must be appointed to undertake all legal acts connected with the administration of the spouse's share of community assets in accordance with § 268 para. 1 Austrian Civil Code.<sup>215</sup> The trustee then conducts all legal transactions and proceedings for the mentally handicapped or physically ill person and asserts rights of all kind on his or her behalf.<sup>216</sup> As the trustee's sphere of influence is limited to agendas of a legal nature,<sup>217</sup> the trustor can personally carry out actual administration if this is possible.

Instead of the legal appointment of a trustee, since the Austrian Living Will Act,<sup>218</sup> which entered into force on 1<sup>st</sup> June 2006 and the Austrian Trustee Law Amendment Act,<sup>219</sup> which entered into force on 1<sup>st</sup> July 2007, it is also possible with the assistance of an enduring power of authority to determine in advance which person should carry out the representative actions, if the appointer loses the legal competence or insight or judgement capacity or his or

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<sup>207</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 54, p. 60 and p. 565.

<sup>208</sup> See Weitzenböck in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2005, § 273 Austrian Civil Code, marg. No. 1 et seq; § 273 Austrian Civil Code was amended by the Austrian Trustee Law Amendment Act 2006 with § 268 Austrian Civil Code.

<sup>209</sup> Weitzenböck in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2005, § 273 Austrian Civil Code, marg. No. 6.

<sup>210</sup> Weitzenböck in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2005, § 273 Austrian Civil Code, marg. No. 6.

<sup>211</sup> *BGBl* (Federal Law Gazette) 2006/55.

<sup>212</sup> *BGBl* (Federal Law Gazette) 2006/92.

<sup>213</sup> See B. Jud, *Die Vorsorgevollmacht*, *AnwBl* 2007, p. 11.

<sup>214</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 54, p. 60 and p. 565.

<sup>215</sup> See Weitzenböck in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2005, § 273 Austrian Civil Code, marg. No. 1 et seq; § 273 Austrian Civil Code was amended by the Austrian Trustee Law Amendment Act 2006 together with § 268 Austrian Civil Code.

<sup>216</sup> Weitzenböck in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2005, § 273 Austrian Civil Code, marg. No. 6.

<sup>217</sup> Weitzenböck in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2005, § 273 Austrian Civil Code, marg. No. 6.

<sup>218</sup> *BGBl* (Federal Law Gazette) 2006/55.

<sup>219</sup> *BGBl* (Federal Law Gazette) 2006/92.

her ability to express himself or herself (compare §§ 284 et seq. Austrian Civil Code).<sup>220</sup> If one spouse has given the other spouse such an enduring power of authority, he or she is represented by the other spouse in the event of a later inability to undertake business actions.

### I. 3. Distribution of assets upon dissolution

#### 43. What are the grounds for the dissolution of the community property regime, e.g. change of property regime, separation, death of a spouse or divorce?

The grounds for terminating the community of property are the death of a spouse (with the survival of the other spouse), the termination of the marriage by divorce, annulment or dissolution (§§ 1265 et seq. Austrian Civil Code) as well as the bankruptcy of a spouse (§ 1262 Austrian Civil Code).<sup>221</sup> The initiation of judicial compensation proceedings is not a valid reason.<sup>222</sup> A unilateral dissolution of the community of property for good and valid cause is not possible.<sup>223</sup> The spouses, in contrast, can conclude an agreement on the dissolution of the community of property which as a marriage contract requires the form requirement of a notarial deed.<sup>224</sup>

#### 44. What date is decisive for the dissolution of the community property? Distinguish between the different grounds mentioned under Q 43. At what date are the community assets determined and valued? Is the fact that the spouses are living apart before the dissolution of the marriage relevant?

In the event of *divorce, annulment or dissolution* of the marriage initially § 1266 Austrian Civil Code is applicable, according to which the marriage contracts have expired for both parties.<sup>225</sup> The decisive point in time for the dissolution of the marriage contract is the legal effect of the divorce decree or in non-contentious proceedings the award in the case of a divorce by consent. Due to the new regulations of the Austrian Matrimonial Amendment Act 1978,<sup>226</sup> on the separation of the matrimonial consumable property and the marital savings in the event of divorce, dissolution or annulment of the marriage in §§ 81 et seq. Austrian Matrimonial Act, the scope of application of § 1266 was considerably restricted. As, according to the prevailing opinion, §§ 81 et seq. Austrian Matrimonial Act are also applicable to marriage contracts,<sup>227</sup> and these provisions have priority over § 1266 Austrian Civil Code.<sup>228</sup> § 1266

<sup>220</sup> See B. Jud, *Die Vorsorgevollmacht*, AnwBl 2007, p. 11.

<sup>221</sup> See Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 14.

<sup>222</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 14.

<sup>223</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1236 Austrian Civil Code, marg. No. 14; *GIU* 5.746.

<sup>224</sup> Judgment of 22.9.1993, Oberster Gerichtshof, NZ 1994, p. 61.

<sup>225</sup> See M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1266 Austrian Civil Code, marg. No. 1.

<sup>226</sup> Federal Law of 15.6.1978, *BGBl* (Federal Law Gazette) 1978/280 on the amendment of the inheritance law of spouses, the matrimonial property law, the divorce law.

<sup>227</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 482.

<sup>228</sup> Judgment of 14.11.2000, Oberster Gerichtshof, *JBl* 2001, p. 309 (note Pfersmann); Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, § 81 Austrian Matrimonial Act, marg. No. 3; M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1266 Austrian Civil Code, marg. No. 4 with further references. However *cf.* Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1266 Austrian Civil Code, marg. No. 8.

Austrian Civil Code is only to be applied with regard to the property which is not subject to the division in accordance with §§ 81 et seq. Austrian Matrimonial Act.<sup>229</sup>

All objects which the spouses have brought into the marriage or which have been acquired as a result of death or as a gift from a third party are not subject to §§ 81 et seq. Austrian Matrimonial Act. With the sale or replacement of such objects the counter value is also excluded from the division. Exceptions apply to the matrimonial home and the contents of the home which were brought into the marriage by one spouse or were acquired as a result of death or as a gift from a third party, if the other spouse urgently requires the residence or the contents of the home or a joint child has a valid requirement for the residence. Such objects which solely serve the personal use of a spouse or his or her profession as well as enterprises and business shares as far as these are not purely investment assets are excluded from the division in accordance with §§ 81 et seq. Austrian Matrimonial Act.<sup>230</sup> The evaluation depends on whether the division is undertaken in accordance with § 1266 Austrian Civil Code or §§ 81 et seq. Matrimonial Act. Within the scope of application of the Matrimonial Act it must be initially evaluated whether an object is included in the property; this evaluation is undertaken at the time of the dissolution of the matrimonial community (§ 81 Austrian Matrimonial Act).<sup>231</sup>

The matrimonial community is dissolved if the spouses no longer comply with their duties in accordance with § 90 Austrian Civil Code,<sup>232</sup> i.e. if they no longer conduct an emotional or spiritual community, have suspended sexual contact, no longer live together as well as no longer fulfil household duties, the obligation of mutual support and professional support, the duty of loyalty and the duty to conduct themselves according to their marriage status.<sup>233</sup> In this case the evaluation of the property to be separated commences. In accordance with the prevailing opinion the key date for the evaluation is the time of the division, i.e. the time of the contractual division or, in non-contentious proceedings, the closing of the hearing of evidence in the first instance.<sup>234</sup> An increase in value, which occurs automatically between the dissolution of the matrimonial community and the time of the division, must, according to the prevailing opinion, be taken into consideration.<sup>235</sup> If the change in value is to be credited to only one spouse (perhaps because he or she invests in this object or only uses it himself or

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<sup>229</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1266 Austrian Civil Code, marg. No. 4.

<sup>230</sup> See Schwimann, *Familienrecht*, 5<sup>th</sup> Edition, 2005, p. 38.

<sup>231</sup> Judgment of 07.10.1981, Oberster Gerichtshof, *SZ* 54/140; Judgment of 29.11.1984, Oberster Gerichtshof, *JBl* 1986, p. 116; Judgment of 10.12.1985, Oberster Gerichtshof, *EFSlg* 48.891; Judgment of 01.09.1988, Oberster Gerichtshof, *EFSlg* 57.293; Judgment of 05.10.1999, Oberster Gerichtshof, *ecolex* 2000/47; Judgment of 23.8.2000, Oberster Gerichtshof, *EFSlg* 93.906; Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, § 81 Austrian Matrimonial Act, marg. No. 1; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 506.

<sup>232</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 494.

<sup>233</sup> See Schwimann/Ferrari in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2006, after § 90 Austrian Civil Code, marg. No. 1 et seq.

<sup>234</sup> Judgment of 03.11.1982, Oberster Gerichtshof, *SZ* 55/163; Judgment of 16.12.1982, Oberster Gerichtshof, *JBl* 1983, p. 648 (note Huber); Judgment of 10.12.1999, Oberster Gerichtshof, *EFSlg* 90.426; see also Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, §§ 83, 84 Austrian Matrimonial Act, marg. No. 9; Kerschner, *Familienrecht*, 2<sup>nd</sup> Edition, 2002, marg. No. 2/146. Contra Judgment of 29.5.2000, Oberster Gerichtshof, *EFSlg* 93.911; Judgment of 11.3.1998, Oberster Gerichtshof, *EFSlg* 87.538.

<sup>235</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 507 with further references.

herself) this will in contrast be disregarded.<sup>236</sup> As the date of the divorce is not relevant for the evaluation of the property under division,<sup>237</sup> but rather must be based on the date of the division of the property, it is not relevant for the evaluation whether the actual separation of the spouses took place prior to the divorce. With regard to the question which specific property is subject to the division, however, the date of the dissolution of the matrimonial community is decisive so that it may be relevant here whether the date of the actual separation and the date of the divorce are different. The evaluation in the case of a separation, in accordance with § 1266 Austrian Civil Code, is carried out after the time of entry and not after the date of marriage.<sup>238</sup> In accordance with § 1266 Austrian Civil Code the separation of the common property from the community of property is thus not problematic, because the still existing objects which he or she brought into the marriage are returned to each spouse.<sup>239</sup>

In the event of the *death of a spouse* (with the survival of the other spouse), the key date for the evaluation of the movable as well as the immovable components of the estate is the date of the testator's death (compare §§ 166 et seq. Austrian Non-contentious Proceedings Act).<sup>240</sup> Movable objects are evaluated by their market value, whereby the evaluation of the contents of the home, consumable property and other movable objects of an obvious lower value can be based on the undisputed and credible information from all parties.<sup>241</sup> Real estate is generally to be evaluated by three times the assessment value (*Einheitswert*). If, however, during the estate proceeding one party requests or it is necessary for the protection of persons under the duty of care that the real estate evaluation act is to be used, it must be complied with accordingly.<sup>242</sup>

In the event of the *commencement of bankruptcy* proceedings against the property of one spouse the community of property ceases to exist in accordance with § 1262 Austrian Civil Code and the community assets have to be divided as in the death of a spouse.<sup>243</sup> The common property becomes part of the bankruptcy assets and the share of the spouse who is not bankrupt will be included in the assets to be divided.<sup>244</sup> Following the commencement of bankruptcy proceedings the liquidator must immediately create an inventory of the bankruptcy assets where the key date is the date of the commencement of bankruptcy proceedings.<sup>245</sup> Generally the estimation is to be combined with the creation of the inventory in accordance with § 96 para. 2 Austrian Bankruptcy Act, which is generally carried out by an assessor.<sup>246</sup> In accordance with § 2 para. 1 Austrian Bankruptcy Act the effects of bankruptcy commence on the day on which the public announcement of the contents of the bankruptcy edict takes place.<sup>247</sup>

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<sup>236</sup> Judgment of 12.3.1992, Oberster Gerichtshof, *EFSlg* 69.312; Judgment of 08.11.1994, Oberster Gerichtshof, *EFSlg* 75.603; Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, §§ 83, 84 Austrian Matrimonial Act, marg. No. 9.

<sup>237</sup> See Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 506.

<sup>238</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1266 Austrian Civil Code, marg. No. 2.

<sup>239</sup> Judgment of 10.5.1988, Oberster Gerichtshof, SZ 61/111.

<sup>240</sup> Ferrari in Ferrari and Likar-Peer, *Erbrecht. Handbuch für die Praxis*, 2007, pp. 454 et seq.

<sup>241</sup> Ferrari in Ferrari and Likar-Peer, *Erbrecht. Handbuch für die Praxis*, 2007, pp. 454 et seq.

<sup>242</sup> Ferrari in: Ferrari and Likar-Peer, *Erbrecht. Handbuch für die Praxis*, 2007, p. 455.

<sup>243</sup> See Question 56.

<sup>244</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1262 Austrian Civil Code, marg. No. 1.

<sup>245</sup> Hierzenberger and Riel in: Konecny and Schubert, *Kommentar zu den Insolvenzgesetzen*, 2<sup>nd</sup> supplemental set 1997, § 96 KO marg. No. 3.

<sup>246</sup> Hierzenberger and Riel in: Konecny and Schubert, *Kommentar zu den Insolvenzgesetzen*, 2<sup>nd</sup> supplemental set 1997, § 96 KO marg. No. 5.

<sup>247</sup> Rechberger and Thurner, *Insolvenzrecht*, 2001, marg. No. 70.

**45. What happens if community assets have been used for investments in the personal property? What happens if community assets have been used for investments in the community property? Is there any right to compensation? If so, is this a nominal compensation or is it based on the accrual in value?**

According to the prevailing opinion, in the community of property the previously separated property becomes the joint ownership of the spouses,<sup>248</sup> whereby, in general, each spouse as a joint owner is in a position to use his or her non-material share at his or her own discretion.<sup>249</sup> Such a disposal, however, would contradict the purpose of the community of assets, namely the consolidation of the assets to assist in the conduct of marriage.<sup>250</sup> Therefore it is presumed that no spouse must be allowed to utilize his or her joint ownership in the common property without the consent of the other spouse.<sup>251</sup> This obligation only exists, however, in the internal relationship between the spouses and therefore only has effect under the law of obligation.<sup>252</sup> Thus with regard to the internal relationship between the spouses the regulations of the general civil law as well as penal law will apply.

Claims relating to compensation, unjustified enrichment, as well as punitive claims, are possible. For claims relating to compensation the provisions of §§ 1293 et seq. Austrian Civil Code are to be applied. Austrian law primarily provides for compensation by restitution in kind (*Naturalrestitution*). If this is impossible or unfeasible, compensation must be paid in monetary form whereby its calculation depends on the gravity of the fault: In case of ordinary negligence the damaging party has to compensate for the suffered damage (*positiver Schaden*). The damage itself is calculated according to the market value at the time the wrongful act occurred.<sup>253</sup> In a case of gross negligence or intent, both the damage suffered as well as lost profits are recoverable (*volle Genugtuung*).<sup>254</sup> For claims relating to unjustified enrichment a spouse is entitled to take action in accordance with § 1041 or § 1435 Austrian Civil Code by analogy. § 1041 Austrian Civil Code is the basis for a claim if a wrongful transfer of assets to the enriched party occurred other than by a payment of the party who suffered the loss to the enriched person.<sup>255</sup> For example, if an object belonging to one spouse was used, consumed or sold by the other.<sup>256</sup> § 1435 Austrian Civil Code by analogy is the basis for a claim if the spouse whose property was used has agreed to an investment, but the expected success did not occur (*condictio causa data non secuta*).<sup>257</sup>

The investment itself however, must not become the subject of a contract.<sup>258</sup> For example, payments which a spouse has made during the existing marriage can be reclaimed after the dissolution of the marriage if they were made with the expectation that the marriage would

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<sup>248</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 481.

<sup>249</sup> Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, p. 762.

<sup>250</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 481.

<sup>251</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 481; Schwind, *Familienrecht*, 1984, p. 89; Judgment of 21.4.1967, Oberster Gerichtshof, SZ 40/56.

<sup>252</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1234 Austrian Civil Code, marg. No. 2 and § 1236 Austrian Civil Code, marg. No. 1.

<sup>253</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, pp. 321 et seq.

<sup>254</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, pp. 323 et seq.

<sup>255</sup> Graf and Gruber, *Gesetzliche Schuldverhältnisse*, 7<sup>th</sup> Edition, 2007, p. 71.

<sup>256</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 287.

<sup>257</sup> Graf and Gruber, *Gesetzliche Schuldverhältnisse*, 7<sup>th</sup> Edition, 2007, p. 67.

<sup>258</sup> Graf and Gruber, *Gesetzliche Schuldverhältnisse*, 7<sup>th</sup> Edition, 2007, p. 67.

be long-lasting and were not made as a gift.<sup>259</sup> The claim relating to unjustified enrichment generally aims at the return of the object or performance and only if this is impossible or unfeasible (§ 1323 Austrian Civil Code by analogy) is the deprived entitled to a compensation based on the market value (§ 417 Austrian Civil Code).<sup>260</sup>

If the other spouse does not agree, then punitive consequences in accordance with the regulations on theft in accordance with § 127 Austrian Penal Code are also possible. The offence of theft has been committed if a person takes an immovable object from another person with the intention being to unlawfully enrich himself or herself or a third party by their arrogation. The use of the property of the other spouse for one's own investment therefore generally fulfils the elements for an offence.

**46. What happens if community assets have been used for payment of personal debts?  
What happens if community assets have been used for payment of community debts?  
Is there a rule of compensation? And if so, how is compensation calculated?**

Within the framework of the general community of property the common property is liable, in addition to the jointly entered debts for all special debts of a spouse which he or she entered into alone or which only relate to him/her personally. The other spouse who was not involved in the creation of these debts is also liable for these with his or her share, but only with this share and not with his or her personal assets.<sup>261</sup> According to the prevailing opinion, however, recourse claims by the spouse not involved in the creation of these debts are generally rejected at the latest during the division of the joint property.<sup>262</sup> In the separation proceeding after the dissolution of the marriage, however, such debts that are not internally related to the matrimonial consumable property and the marital savings and also do not relate to the marital living expenses, cannot be included and are not taken into consideration during the division. They can at most represent a remote fairness criterion in accordance with § 83(1) Matrimonial Act.<sup>263</sup> Even after the dissolution of the general community of property each spouse continues to be liable for the liabilities of the other spouse who created these during the existing community of property, even if they did not become due at this time, up to the value of the assets which he or she has received upon dissolution.<sup>264</sup> According to the prevailing opinion, for liabilities that were jointly entered into, even if they are unrelated to the community of property, the common property as well as the sole assets of each spouse are liable.<sup>265</sup> Recourse claims by one spouse against the other as a result of the payment of community debts from the community assets are not provided for by law.

**47. What is the priority order between compensation rights and community debts?**

<sup>259</sup> Graf and Gruber, *Gesetzliche Schuldverhältnisse*, 7<sup>th</sup> Edition, 2007, p. 68.

<sup>260</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, pp. 294 et seq.

<sup>261</sup> Fenyves, 'Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, p. 764

<sup>262</sup> Grillberger, *Eheliche Gütergemeinschaft*, 1981, pp. 32 et seq; Fenyves, *Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht*, in Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, p. 766.

<sup>263</sup> Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, §§ 83, 84 Austrian Matrimonial Act, marg. No. 6.

<sup>264</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1236 Austrian Civil Code, marg. No. 11.

<sup>265</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1236 Austrian Civil Code, marg. No. 9.

Claims under the law of obligations, in particular also claims relating to unjustified enrichment, can be made by any spouse against another during the existing marriage. A decision on such a claim for unjustified enrichment, however, does not have priority over the division following the dissolution of the marriage in accordance with §§ 81 et seq. Austrian Matrimonial Act. As far as the prevailing element of the property is subject to § 81 para. 2 and 3 Austrian Matrimonial Act, it must be incorporated in the separation proceeding.<sup>266</sup> If a separation proceeding has already taken place after the dissolution of the marriage in accordance with §§ 81 et seq. Austrian Matrimonial Act, §§ 81 et seq. exclude a claim for unjustified enrichment based on the same circumstance in accordance with general civil law.<sup>267</sup> Community debts are, if they are internally related to the matrimonial consumable property and the marital savings, to be taken into account during the division. The outstanding debt encumbrances which exist in connection with the objects to be divided are to be deducted from the value of these objects and the evaluation of the dividing assets is reduced accordingly.<sup>268</sup>

#### 48. How are community assets administered after dissolution but before division?

The law does not provide for a specific regulation for an administration of the community assets after the dissolution but prior to the division.

#### 49. Briefly explain the general rules governing the division of the community assets.

In the event of *dissolution or divorce* both partners amicably decide on the community assets in accordance with § 1266 Austrian Civil Code. If an agreement cannot be reached, it must be differentiated whether the marriage was dissolved with or without fault.<sup>269</sup> With a divorce or the dissolution of the marriage *without fault* or *with equal fault* the marriage contracts are to be deemed dissolved (§ 1266 Austrian Civil Law).<sup>270</sup> Failing an agreement (e.g. in accordance with § 55a Austrian Matrimonial Act) the dissolution takes place automatically with effect *ex nunc*.<sup>271</sup> A claim for dissolution is not necessary.<sup>272</sup> However, if a spouse is attributed with the entire or a predominant amount of the fault, the other spouse has the right to choose. He or she may, as with a divorce without fault, reclaim assets which he or she has brought into the marriage or demand the division of the common property such as in the death of a spouse.<sup>273</sup> The culpable spouse is additionally liable for the other damage caused (§§ 1265 et seq. Austrian Civil Code by analogy).<sup>274</sup>

The *declaration of the annulment* of a marriage incurs the retrospective dissolution of the marriage contracts so that the original situation is to be restored (§ 1265 Austrian Civil Code).

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<sup>266</sup> Judgment of 5.5.1982, Oberster Gerichtshof, SZ 55/70; Bernat in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2005, § 81 Austrian Matrimonial Act, marg. No. 3.

<sup>267</sup> Bernat in Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2005, § 81 Austrian Matrimonial Act, marg. No. 3.

<sup>268</sup> Bernat in Schwimann, *Praxiskommentar zum ABGB*, vol. 1, 3<sup>rd</sup> Edition, 2005, § 81 Austrian Matrimonial Act, marg. No. 26.

<sup>269</sup> Grillberger, *Eheliche Gütergemeinschaft*, 1981, pp. 168 et seq; Rummel, *Zur Auswirkung der Ehescheidung auf die Gütergemeinschaft unter Lebenden*, JBl 1968, p. 406.

<sup>270</sup> See M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1266 Austrian Civil Code, marg. No. 1 et seq.

<sup>271</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1266 Austrian Civil Code, marg. No. 1; Judgment of 22.02.2000, Oberster Gerichtshof, *EvBl* 2000/156.

<sup>272</sup> Judgment of 26.6.1953, Oberster Gerichtshof, SZ 26/171.

<sup>273</sup> Judgment of 10.5.1988, Oberster Gerichtshof, SZ 61/111; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 483.

<sup>274</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 483.

However, if only one of the spouses was unaware of the annulment at the conclusion of the marriage, the consequences of the divorce come to pass (§ 31 Austrian Matrimonial Act).<sup>275</sup> Within the framework of the division of the common property after the dissolution of the marriage in accordance with § 1266 Austrian Civil Code the still existing assets brought into the marriage are returned to each spouse.<sup>276</sup> The division of the accrued gains and the question of a revaluation are disputed: According to the former case law the entire common property should be divided according to the proportion of the original assets brought into the marriage. Profits and losses are to be divided in the same proportion and a possible settlement of value should be paid in the form of money.<sup>277</sup> According to other opinions, only the profit, which was solely created from the assets brought into the marriage, is to be divided proportionally, e.g. due to a change in the market situation. However, any profit which was created independently of the assets brought into the marriage must be divided in half.<sup>278</sup> Money entered should at most be revaluated in accordance with the index for the cost of living.<sup>279</sup> M. Bydlinski distinguishes between the following cases: a) Entered property which still exists relatively unchanged, such as real estate, savings or unused money, is to be returned to the party who entered it. The same should apply to real substitute property without a revaluation. b) Gifts and inherited objects are to be handed over to the relevant beneficiary. c) New acquisitions during the marriage and changes in the value of the entered assets as a result of the extraordinary investments are to be split in half. With new acquisitions the ordinary joint ownership should be maintained; with increased value or loss of value a monetary settlement should be made. The profit is also to be handed over proportionately.<sup>280</sup>

Due to the new regulations of the Austrian Matrimonial Amendment Act 1978<sup>281</sup> on the separation of the matrimonial consumable property and the marital savings in the event of divorce, dissolution or annulment of the marriage in §§ 81 et seq. Austrian Matrimonial Act, the scope of application of § 1266 Austrian Civil Code was considerably restricted: As, according to the legal authorities, §§ 81 et seq. Austrian Matrimonial Act are also applicable to marriage contracts<sup>282</sup> and these provisions have priority over § 1266 Austrian Civil Code,<sup>283</sup> § 1266 Austrian Civil Code is only to be applied with regard to the property which is not

<sup>275</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1265 Austrian Civil Code, marg. No. 1.

<sup>276</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1266 Austrian Civil Code, marg. No. 3; Judgment of 10.5.1988, Oberster Gerichtshof, SZ 61/111.

<sup>277</sup> Judgment of 06.02.1952, Oberster Gerichtshof, SZ 25/34; Judgment of 18.1.1962, Oberster Gerichtshof, SZ 35/10; Judgment of 11.11.1971, Oberster Gerichtshof, SZ 44/173.

<sup>278</sup> Judgment of 22.2.2000, Oberster Gerichtshof, *EvBl* 2000/156; Judgment of 14.11.2000, Oberster Gerichtshof, *JBl* 2001, p. 309 (note Pfersmann). See also Rummel, *Zur Auswirkung der Ehescheidung auf die Gütergemeinschaft unter Lebenden*, *JBl* 1968, p. 414; Gschnitzer, *Österreichisches Familienrecht*, 2<sup>nd</sup> Edition, 1979, p. 88.

<sup>279</sup> Rummel, *Zur Auswirkung der Ehescheidung auf die Gütergemeinschaft unter Lebenden*, *JBl* 1968, p. 414.

<sup>280</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1266 Austrian Civil Code, marg. No. 3.

<sup>281</sup> Federal Law of 15.6.1978, *BGBI* (Federal Law Gazette) 1978/280 on the amendment of the inheritance law of spouses, the matrimonial property law, the divorce law.

<sup>282</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 482.

<sup>283</sup> Judgment of 14.11.2000, Oberster Gerichtshof, *JBl* 2001, p. 309 (note Pfersmann); Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, § 81 Austrian Matrimonial Act, marg. No. 3; M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1266 Austrian Civil Code, marg. No. 4 with further references. However see Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, after § 1266 Austrian Civil Code, marg. No. 8.



subject to the division in accordance with §§ 81 et seq. Austrian Matrimonial Act.<sup>284</sup> All objects which the spouses have brought into the marriage or which have been acquired due to death or as gifts by third parties are not subject to §§ 81 et seq. Austrian Matrimonial Act. With the sale or replacement of such objects the counter value is also excluded from the division. Exceptions apply to the matrimonial home and the contents of the home which were brought into the marriage by one spouse or were acquired as a result of death or as a gift from a third party, if the other spouse urgently requires the residence or the contents of the home or a joint child has a valid requirement for the residence. Further, such assets are excluded from the division after the dissolution of the marriage in accordance with §§ 81 et seq. Austrian Matrimonial Act which serves the sole personal use of one spouse or his or her profession as well as businesses or business shares as far as these are not purely investments.<sup>285</sup>

The regulations on the division after the dissolution of the marriage in accordance with §§ 81 et seq. Austrian Matrimonial Act are always to be applied if the spouses have not made a specific agreement.<sup>286</sup> Each spouse has the option, by an application made within a certain time-limit, to invoke the court-ordered division of certain assets, namely the marital savings and the matrimonial consumable property of both spouses. The division also includes assets from the marriage contract which belong to the categories of marital savings and matrimonial consumable property. If the application for the court-ordered division after the dissolution of the marriage is not made within the provided time-limit in accordance with §§ 81 et seq. Austrian Matrimonial Act, §§ 1265 et seq. Austrian Civil Code will apply to the assets from the marriage contract. Generally all assets belonging to the matrimonial consumable property and marital savings at the time of the matrimonial partnership are subject to the division after the dissolution of the marriage in accordance with § 81 para. 1 Austrian Matrimonial Act. It is irrelevant who the actual owner of these assets may be. Debts, which are internally related to these assets (e.g. debts from loans for the purchase of such assets), must be deducted during the evaluation. Other debts related to the cost of living of the spouses must be "taken into consideration" during the division (§ 83 para. 1 Austrian Matrimonial Act). The undertaking of the division is subject to the attitude of the judge, who should make a fair division in accordance with the principle of the least interference. The judge should not change the allocation of property between the spouses as far as possible (compare § 90 para. 1 Austrian Matrimonial Act). However, if a change of assets is unavoidable in order to reach a fair result, the judge has a number of options available to him with regard to the transfer of assets.<sup>287</sup>

If one of the spouses dies, the joint property is to be divided.<sup>288</sup> The remaining active property after the deduction of all debts will then proportionately be transferred to the surviving spouse and to the inheritance of the deceased.<sup>289</sup>

For the *bankruptcy* of a spouse § 1262 Austrian Civil Code provides that with the community of property the common property becomes an element of the bankruptcy assets and is subject to the use of the liquidator.<sup>290</sup> Such property which is purchased by the spouse who is not involved in the bankruptcy after the commencement of bankruptcy proceedings – and

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<sup>284</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1266 Austrian Civil Code, marg. No. 4.

<sup>285</sup> See Schwimann, *Familienrecht*, 5<sup>th</sup> Edition, 2005, p. 38.

<sup>286</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 504.

<sup>287</sup> See Schwimann, *Familienrecht*, 5<sup>th</sup> Edition, 2005, pp. 39 et seq.

<sup>288</sup> See Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 9<sup>th</sup> Edition, 2008, marg. No. 30.

<sup>289</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 482.

<sup>290</sup> Judgment of 10.7.1974, Oberster Gerichtshof, SZ 47/86; M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1262 Austrian Civil Code, marg. No. 1.

therefore after the dissolution of the marriage contract – however, will not be included in the bankruptcy assets.<sup>291</sup>

## 50. How are the community debts settled?

After the termination of the community of property and after the division of the joint property to the spouses, according to the legal authorities the special liability as a result of the community of property will continue.<sup>292</sup> If both spouses are personal debtors of a creditor, then the dissolution of the community of property and the division of the joint assets has no influence on the legal position of the creditor.<sup>293</sup> If the joint debts have been satisfied, then this must be taken into consideration during the division of the assets following the dissolution of the marriage between the spouses. With the division after the dissolution of the marriage in accordance with §§ 81 et seq. Austrian Matrimonial Act, which is to be undertaken while observing all the relevant circumstances of fairness (§ 83 Austrian Matrimonial Act), in addition to the purchase contribution of the spouses the debts of the spouses which were accrued up to the dissolution of the matrimonial partnership must be taken into consideration.<sup>294</sup> This occurs in two respects: Debts, which are internally related to the assets to be divided, such as debts from loans for the purchase of property, are to be deducted during the evaluation of the divided property (§ 81 para. 1 Austrian Matrimonial Act). For the remaining debts which are related to the matrimonial partnership, such as e.g. loans for the financing of medical treatment, school fees or holidays, these are only to be “taken into consideration” during the division (§ 83 Austrian Matrimonial Act). This means that either a settlement of property is to be created so that the encumbered spouse receives more or the court declares the other spouse liable for payment in the internal relationship.<sup>295</sup>

## 51. Do the spouses have preferential rights over the matrimonial/family home and/or the household's assets?

For the household assets of spouses the special regulation of § 15 Austrian Condominium Act 2002 applies during the division after the dissolution of the marriage. If the marriage is dissolved this does not affect the legal partnership regarding an apartment (*Eigentümergeinschaft*) since this partnership is not dependant on the existence of marriage.<sup>296</sup> If one of the divorced spouses does not wish to continue the legal partnership regarding the apartment and cannot reach an agreement with the other spouse, each spouse has the right to claim the dissolution of the partnership.

The objection of an inappropriate time or a disadvantage in the sense of § 830 Austrian Civil Code cannot be applied to the division action after one year has passed since the dissolution of the marriage (§ 15 Austrian Condominium Act).<sup>297</sup> Although the matrimonial home and the contents of the home are generally not to be included in the separation proceedings in accordance with §§ 81 et seq. Austrian Matrimonial Act,<sup>298</sup> an exception with regard to the home is applicable if one spouse urgently requires the further use of the marital home in order to guarantee his or her basic necessities of life (compare § 82 para. 2 Austrian

<sup>291</sup> Judgment of 18.10.1977, Oberster Gerichtshof, SZ 50/131; M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1262 Austrian Civil Code, marg. No. 1.

<sup>292</sup> Grillberger, *Eheliche Gütergemeinschaft*, 1981, p. 173; Judgment of 13.6.1901, Oberster Gerichtshof, *GIUNF* 1464; Judgment of 7.2.1963, Oberster Gerichtshof, *SZ* 36/21; Judgment of 19.3.1937, Oberster Gerichtshof, *SZ* 19/98.

<sup>293</sup> Grillberger, *Eheliche Gütergemeinschaft*, 1981, p. 174.

<sup>294</sup> Schwimann, *Familienrecht*, 5<sup>th</sup> Edition, 2005, p. 39.

<sup>295</sup> Schwimann, *Familienrecht*, 5<sup>th</sup> Edition, 2005, p. 39.

<sup>296</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 475.

<sup>297</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 304.

<sup>298</sup> Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 184.

Matrimonial Act).<sup>299</sup> As a criterion for whether the other spouse is dependent on the further use of the matrimonial home, case law takes into consideration whether there are vital questions relating to that person's existence such as, for instance, long-term homelessness.<sup>300</sup> The same applies if a joint child has a valid requirement for the further use of the home that must be considered.<sup>301</sup> Also the contents of the home are then taken into consideration in the division if a spouse urgently requires the further use of the contents to guarantee his or her basic necessities of life.<sup>302</sup>

In connection with a proceeding for the division of property after the dissolution of the marriage or in connection with marital proceedings a spouse can also apply for a preliminary injunction for temporary use or the protection of the matrimonial consumable property and marital savings in accordance with § 382 para. 1 No. 8b Austrian Enforcement of Civil Judgements Act. For example, such a security order would be possible in the following situations: If the endangered party is able to prove that the conduct of the other party demonstrates to a substantial degree that during the separation proceedings a court-ordered award of the matrimonial home to the endangered party is to be thwarted, a temporary registered sale and encumbrance prohibition can be ordered against the marital property.<sup>303</sup>

Further, a spouse has the option of asserting a temporary restraining order to secure his or her urgent living needs in accordance with § 382e Austrian Enforcement of Civil Judgements Act: By concluding the marriage the spouse acquires a right to live in the home which does not belong to him/her or not solely to him or her, which is part of matrimonial maintenance law: If this home serves to satisfy his or her urgent living needs he or she can make a claim for maintenance and the further use of the home.<sup>304</sup> As a guarantee, for example court orders for action, the prohibition of actions, and sale and encumbrance prohibitions can be used with regard to the home.<sup>305</sup> For instance, the endangered spouse may instigate a claim for the restoration of previous vested rights by obtaining the key for a changed lock.<sup>306</sup>

In the event of the *death* of a spouse the following applies to the ownership of an apartment: Primarily it depends on the parties' agreements.<sup>307</sup> The spouses have the option, as other property partners do, to make agreements during their lifetime on the legal succession in the event of death, where a succession for a half share is provided for a third party who, in the event of inheritance, is entitled to a claim for the transfer of ownership.<sup>308</sup> Such an agreement must be made at the law offices of a notary or an attorney. Unilateral orders are not valid as the surviving partner must not be compelled to accept a new partner (§ 13 para. 3 Austrian Condominium Act).<sup>309</sup> If the spouses have not made such an order, the surviving partner

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<sup>299</sup> Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 185.

<sup>300</sup> Judgment of 13.10.1999, Landesgericht für Zivilrechtssachen Wien, *EFSlg* 90.449; Judgment of 9.8.2001, Landesgericht Salzburg, *EFSlg* 97.349; Judgment of 26.6.2002, Landesgericht Salzburg, *EFSlg* 101.015; dazu Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 185.

<sup>301</sup> § 82 para. 2 sentence 2 second case Austrian Matrimonial Act; see Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 185.

<sup>302</sup> Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 185.

<sup>303</sup> Holzhammer and Roth, *Exekutionsrecht und Konkursrecht. Grundstudium*, 6<sup>th</sup> Edition, 2008, p. 130.

<sup>304</sup> Holzhammer and Roth, *Exekutionsrecht und Konkursrecht. Grundstudium*, 6<sup>th</sup> Edition, 2008, p. 133.

<sup>305</sup> Holzhammer and Roth, *Exekutionsrecht und Konkursrecht. Grundstudium*, 6<sup>th</sup> Edition, 2008, p. 133.

<sup>306</sup> Holzhammer and Roth, *Exekutionsrecht und Konkursrecht. Grundstudium*, 6<sup>th</sup> Edition, 2008, p. 133.

<sup>307</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 475.

<sup>308</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 475.

<sup>309</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 476.

receives the deceased spouse's share of the ownership at the time of his or her death (§ 14 para.1 No. 1 Austrian Condominium Act). This is viewed as an acquisition pursuant to the Austrian Condominium Act and not as an inheritance-related acquisition.<sup>310</sup> As equivalent for the deceased spouse's share the surviving spouse must pay a takeover fee for the estate in accordance with § 14 para. 2 Austrian Condominium Act.<sup>311</sup> The takeover fee is half of the market value of the ownership.<sup>312</sup> However, if the surviving partner of the ownership is personally entitled to a compulsory portion, to which the home serves to satisfy an urgent living requirement, an exception applies: The surviving partner does not have to pay the takeover fee if no other entitled persons to a compulsory portion exist and the estate is not encumbered with debt. Otherwise he or she must pay a quarter of the market value of the minimum share.<sup>313</sup>

## 52. Do the spouses have preferential rights over other assets?

Generally during the dissolution of the marriage the matrimonial consumable property and the marital savings must be divided.<sup>314</sup> The spouses have special rights in particular to the objects which they entered into the marriage or which they inherited from third parties or received as gifts, as they are not subject to the division. Objects which served the personal use or the profession of a spouse and objects belonging to a business are also not subject to the division.<sup>315</sup>

## 53. To what extent, if at all, does the division of community property affect the attribution of maintenance?

The post-marital maintenance obligation as well as the division of the matrimonial consumable property and the marital savings are included in the consequences of divorce. However, they differ from each other on several points: The division (§§ 81 et seq. Austrian Matrimonial Act) merely concerns the matrimonial consumable property and the marital savings. This must additionally always be applied if one party applies for a court-ordered decision<sup>316</sup> and it is independent of the fault of the spouses in the dissolution or the annulment of the marriage.<sup>317</sup> The maintenance duty after the dissolution of the marriage, however, is generally dependent on whether the spouse is entirely or predominantly at fault (§ 66 Austrian Matrimonial Act). Maintenance must primarily be paid from the income of the person obliged to pay maintenance so that the substance of the property must not be taken into consideration.<sup>318</sup> During the division of the matrimonial consumable property and the marital savings after the dissolution of the marriage, the maintenance allowance may be influenced to a certain extent. For instance a reduction of the maintenance requirement would then be ordered if the further use of the matrimonial home takes place at the expense of the

<sup>310</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 476.

<sup>311</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 476.

<sup>312</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 476.

<sup>313</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 476.

<sup>314</sup> See Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, § 81 Austrian Matrimonial Act, marg. No. 1 et seq; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 505.

<sup>315</sup> § 82 Austrian Matrimonial Act; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 184.

<sup>316</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 505.

<sup>317</sup> Honsell, 'Vermögensteilung nach der Scheidung und Billigkeit', in: Harrer and Zitta (eds.), *Familie und Recht*, 1992, pp. 619 et seq; Judgment of 01.12.1982, Oberster Gerichtshof, *JBl* 1983, p. 488; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 504.

<sup>318</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 497.

person paying maintenance.<sup>319</sup> If the person entitled to maintenance receives interest payments for the settlement paid according to the post-marital dispute, these must be taken into consideration as the income of the former spouse who is entitled to maintenance.<sup>320</sup>

**54. To what extent, if at all, does the division of community property affect the pension rights and claims of one or both spouses?**

The matrimonial consumable property and the marital savings are subject to the separation proceeding after the dissolution of the marriage in accordance with §§ 81 et seq. Austrian Matrimonial Act.<sup>321</sup> The division of the assets is determined after the date of the dissolution of the matrimonial partnership.<sup>322</sup> Prospective entitlements and rights of choice to an indemnity claim do not yet have any value at this point in time and are therefore not to be taken into consideration in the division.<sup>323</sup> Also further processing claims or advance payments on pensions are not to be included in the assets to be divided.<sup>324</sup> This does not apply if the indemnity has already occurred.<sup>325</sup>

**55. Can the general rules of division (above Q. 49) be set aside or adjusted, e.g. by agreement between the spouses or by the competent authority?**

The regulations on the division of assets after the dissolution of marriage or the termination of a marriage contract are optional.<sup>326</sup> Both partners can thus amicably decide on the community assets.<sup>327</sup> This applies to the division in accordance with § 1266 Austrian Civil Code<sup>328</sup> as well as for the division in accordance with §§ 81 et seq. Austrian Matrimonial Act.<sup>329</sup>

**56. Are there besides the rules of succession specific rules for the division of community assets if one of the spouses dies? If so, describe briefly.**

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<sup>319</sup> Zankl in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2006, § 66 Austrian Matrimonial Act, marg. No. 14.

<sup>320</sup> Zankl in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2006, § 66 Austrian Matrimonial Act, marg. No. 27; Judgment of 21.6.1990, Landesgericht für Zivilrechtssachen Wien, *EFSlg* 63.502.

<sup>321</sup> Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, § 81 Austrian Matrimonial Act, marg. No. 1; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 504.

<sup>322</sup> Judgment of 07.10.1981, Oberster Gerichtshof, *SZ* 54/140; Judgment of 29.11.1984, Oberster Gerichtshof, *JBl* 1986, p. 116; Judgment of 10.12.1985, Oberster Gerichtshof, *EFSlg* 48.891; Judgment of 01.09.1988, Oberster Gerichtshof, *EFSlg* 57.293; Judgment of 5.10.1999, Oberster Gerichtshof, *ecolex* 2000/47; Judgment of 23.08.2000, Oberster Gerichtshof, *EFSlg* 93.906; Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, § 81 Austrian Matrimonial Act, marg. No. 1; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 506.

<sup>323</sup> Judgment of 05.10.1999, Oberster Gerichtshof, *ecolex* 2000/47; Judgment of 02.12.2002, Oberster Gerichtshof, 6 Ob 85/02x (unpublished).

<sup>324</sup> Judgment of 05.10.1999, Oberster Gerichtshof, *ecolex* 2000/47; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 183.

<sup>325</sup> Judgment of 23.08.2000, Oberster Gerichtshof, *EFSlg* 93.907.

<sup>326</sup> See § 1266 sentence 1 Austrian Civil Code and § 97 Austrian Matrimonial Act.

<sup>327</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 482.

<sup>328</sup> Judgment of 10.05.1988, Oberster Gerichtshof, *SZ* 61/111; M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1266 Austrian Civil Code, marg. No. 1.

<sup>329</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 505.

If the spouses have a community of property and one of the spouse's dies, the joint assets are to be divided in accordance with the principles of § 1235 Austrian Civil Code. The active property remaining after the deduction of all debts will be transferred proportionally to the surviving spouse and to the estate of the deceased.<sup>330</sup>

#### IV. Community of property

##### IV. 1. Categories of assets

###### 129. Describe the system. Indicate the different categories of assets involved.

In the statutory property regime of separation of property each spouse retains what he or she brought into the marriage and becomes the sole owner of his or her acquisitions (§§ 1233 and 1237 Austrian Civil Code).<sup>331</sup> The entered assets could be e.g. furniture, cars, valuables and such like.<sup>332</sup> For objects that were acquired during the marriage, particular rules apply if – as far as they represent matrimonial consumable assets – they are divided between the spouses with no consideration of the ownership relationships (§§ 81 et seq. Austrian Matrimonial Act) in the event of dissolution of the marriage.<sup>333</sup> During the existing marriage there is a pure separation of property without matrimonial property rights of a spouse, such as e.g. for the administration or use, to the property of the other spouse.<sup>334</sup> With regard to the property the spouses are thus in the same position as unmarried couples.<sup>335</sup>

###### 130. What assets comprise the separate property of the spouses?

Each spouse's own property is, on the one hand, that which he or she brings into the marriage and, on the other, that which he or she inherits during the marriage or acquires.<sup>336</sup>

###### 131. Can spouses acquire assets jointly? If so, what rules apply?

Despite the separation of property the spouses can acquire assets jointly. The provisions of Chapter 16 of the Austrian Civil Code on the "community of property and other rights in rem" (§§ 825 et seq. Austrian Civil Code) are applicable.<sup>337</sup> In particular a legal partnership concerning an apartment in accordance with §§ 13 et seq. Austrian Condominium Act (*Eigentümerpartnerschaft*) is often established.<sup>338</sup> In this case a sale or encumbrance ban against all third parties in accordance with § 364c Austrian Civil Code can be agreed between the spouses.<sup>339</sup>

<sup>330</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 482.

<sup>331</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1237 Austrian Civil Code, marg. No. 1; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 478.

<sup>332</sup> Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 28.

<sup>333</sup> Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 28.

<sup>334</sup> Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1237 Austrian Civil Code, marg. No. 1.

<sup>335</sup> Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1237 Austrian Civil Code, marg. No. 1.

<sup>336</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1237 Austrian Civil Code, marg. No. 1.

<sup>337</sup> See Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1237 Austrian Civil Code, marg. No. 4.

<sup>338</sup> Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1237 Austrian Civil Code, marg. No. 4.

<sup>339</sup> See Spielbüchler in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. I, 3<sup>rd</sup> Edition, 2000, § 364c Austrian Civil Code, marg. No. 1 et seq.

**132. Is substitution of assets (e.g. barter agreements) governed by specific rules? Distinguish where necessary between movables and immovables.**

Austrian Law does not contain any specific regulations with regard to the substitution of personal assets.

**133. What is the position of pension rights and claims and insurance rights?**

With the statutory property regime of separation of property each spouse retains what he or she brought into the marriage and becomes the sole owner of what he or she acquires (§§ 1233 and 1237 Austrian Civil Code).<sup>340</sup> With regard to the property regime the spouses are thus in the same position as unmarried couples.<sup>341</sup> Therefore claims from insurance and pension contracts remain within the scope of assets of the spouse who concluded the insurance.

**134. How is the ownership of the assets proved as between the spouses? Are there rebuttable presumptions?**

§ 1237 Austrian Civil Code determines that failing a separate agreement each spouse is the owner of his or her previous assets and of anything that he or she acquires during the marriage and that the other spouse has no entitlement to these assets.<sup>342</sup>

**135. How is the ownership of the assets proved as against third parties? Are there rebuttable presumptions?**

§ 1237 Austrian Civil Code determines that failing a separate agreement each spouse becomes the owner of his or her previous assets and of anything that he or she acquires during the marriage and that the other spouse has no entitlement to these assets.<sup>343</sup> This also applies towards third parties.

**136. Which debts are personal debts?**

As a result of the separation of property the spouses will conclude business transactions amongst each other in the same way that unmarried couples do.<sup>344</sup> Personal debts are created from each obligation which a spouse personally enters into.<sup>345</sup>

**137. Which debts are joint debts?**

Joint debts are created from legal transactions which the spouses conclude jointly, e.g. if the spouses take out a joint loan (§ 25a Austrian Consumer Protection Act) or conclude purchase, works, or service agreements; this is also the case in an additional assumption of debt by one spouse to a debt of the other spouse (*Schuldbeitritt*, § 1347 Austrian Civil Code), an unconditional declaration of the acceptance of an inheritance by both spouses, thus the acceptance of an inheritance with no reservation as to liability (*unbedingte Erbantrittserklärung*,

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<sup>340</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1237 Austrian Civil Code, marg. No. 1; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 478.

<sup>341</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1237 Austrian Civil Code, marg. No. 1.

<sup>342</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1237 Austrian Civil Code, marg. No. 1.

<sup>343</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1237 Austrian Civil Code, marg. No. 1.

<sup>344</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1237 Austrian Civil Code, marg. No. 1.

<sup>345</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 478.

§ 820 Austrian Civil Code), in cases of community damage (§ 1302 Austrian Civil Code) or when the spouses are associates in a general partnership (*Offene Handelsgesellschaft*, §§ 128 et seq. Austrian Business Enterprise Code).<sup>346</sup> If both spouses are liable for a joint debt, then joint and several liability (*Solidarschuldverhältnis*) exists. In the event that one spouse has the power of authority according to § 96 Austrian Civil Code (*Schlüsselgewalt*) there is the joint and several liability of both spouses if the contract partner cannot recognise from the situation that the acting spouse is a representative.<sup>347</sup>

### 138. On which assets can the creditor recover personal debts?

With the statutory property regime of separation of property each spouse is personally liable for his or her debts.<sup>348</sup> In order to satisfy his or her claims the creditor can only claim the property which is owned by the debtor. The other spouse is not liable for debts which one spouse enters into, unless he or she has taken responsibility as a guarantor or a joint and several debtor.<sup>349</sup> If e.g. the husband has purchased an expensive hi-fi system and the salesperson asserts an attachment against him due to insolvency, the creditor is not able to make a claim against the property of the other spouse even if he or she has assets. The spouse can ward off an execution of the community of movables which are owned by her or him with a restitution claim in accordance with § 37 Austrian Enforcement of Civil Judgements Act (*Exzendierungsklage*).<sup>350</sup>

### 139. On which assets can the creditor recover joint debts?

If both spouses are liable for a joint debt then joint and several liability exists. This is the case if both spouses are obliged to pay an undividable asset (§ 890 Sentence 1 Austrian Civil Code), with an additional assumption of debts (§ 1347 Austrian Civil Code), if there is an unconditional declaration of the acceptance of an inheritance by both spouses, thus the acceptance of an inheritance with no reservation as to liability (*unbedingte Erbantrittserklärung*, § 820 Austrian Civil Code), in the event of joint damages (§ 1302 Austrian Civil Code) and if the spouses are associates in a general partnership, which always have joint and several liability (§§ 128 et seq. Austrian Business Enterprise Code).<sup>351</sup> With joint and several liability it is at the discretion of the creditor against which debtor he or she will claim,<sup>352</sup> i.e. the debtor can instigate a claim against one spouse or the other. If a spouse has paid the debt he or she can make a recourse claim against the other spouse in the internal relationship (§ 896 Austrian Civil Code).<sup>353</sup> If the owed payment is dividable then there is a *partial debt relationship* between the spouses unless otherwise agreed. Each debtor is only liable for his or her share.<sup>354</sup> If *joint liability* exists because the spouses owe a debt which can only be repaid jointly, then they can only pay jointly,<sup>355</sup> i.e. the creditor can only seek satisfaction from both spouses jointly.

## IV. 2. Administration of assets

<sup>346</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 137.

<sup>347</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 476; Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. I, 2000, § 96 Austrian Civil Code, marg. No. 5.

<sup>348</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 478.

<sup>349</sup> Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 28.

<sup>350</sup> Example provided by Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 28.

<sup>351</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 137.

<sup>352</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 137.

<sup>353</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 139.

<sup>354</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 137.

<sup>355</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 140.



**140. How are assets administered?**

With the statutory property regime of separation of property the spouses are in the same position as unmarried couples with regard to property law.<sup>356</sup> Generally, therefore, each spouse administers his or her assets personally.<sup>357</sup> However, the spouses can, despite the separation of property, administer their assets jointly or appoint a third party as a trustee. Such agreements are to be evaluated in accordance with the general rules (§§ 1002 et seq., 1029 Austrian Civil Code).<sup>358</sup> There is no special formality requirement for such agreements.<sup>359</sup>

**141. Can one spouse mandate the other to administer assets?**

Each spouse has the option to instruct the other spouse to administer his or her assets by means of an informal agreement.<sup>360</sup> In this case the general provisions on the authority contract are applicable (§§ 1002 et seq. Austrian Civil Code).<sup>361</sup>

**142. Are there important acts concerning assets (e.g. significant gifts, disposal of the matrimonial/family home or other immovable property) that require the consent of the other spouse?**

With the statutory property regime of separation of property, the spouses are in the same position as unmarried couples in relation to property law.<sup>362</sup> Therefore each spouse can use his or her assets at his or her discretion. For this reason the agreement of the other spouse is not included in any business. This would only apply if the spouses had substantiated the joint ownership of certain assets and this related to a method of "extraordinary administration" (compare § 834 Austrian Civil Code).<sup>363</sup>

**143. Are there special rules for the administration of professional assets?**

The Austrian Civil Code contains no special provisions for the administration of professional assets.

**144. Is there a duty for one spouse to provide information to the other about the administration of the assets?**

With the statutory property regime of separation of property the spouses are in the same position as unmarried couples in relation to property law.<sup>364</sup> Therefore neither of the spouses

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<sup>356</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1237 Austrian Civil Code, marg. No. 1.

<sup>357</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1237 Austrian Civil Code, marg. No. 1.

<sup>358</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 478.

<sup>359</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1237 Austrian Civil Code, marg. No. 1.

<sup>360</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1237 Austrian Civil Code, marg. No. 1.

<sup>361</sup> In general see Strasser in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. I, 3<sup>rd</sup> Edition, 2000, § 1002 Austrian Civil Code, marg. No. 1 et seq; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, pp. 209 et seq.

<sup>362</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1237 Austrian Civil Code, marg. No. 1.

<sup>363</sup> See Gamerith in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. I, 3<sup>rd</sup> Edition, 2000, § 834 Austrian Civil Code, marg. No. 1.

<sup>364</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1237 Austrian Civil Code, marg. No. 1.

is limited in the use of their assets. For this reason, he or she is also not obligated to inform the other spouse about the measures of administration. This would only apply if the spouses had substantiated the joint ownership of certain assets (compare § 834 Austrian Civil Code). In this case for methods of “extraordinary administration” of the community assets (§§ 834 et seq. Austrian Civil Code) the unanimous agreement principle applies, which not only requires informing the other spouse, but also the agreement of that spouse.<sup>365</sup>

**145. How are disputes between the spouses concerning the administration of assets resolved?**

The question of resolving disputes among the spouses regarding the administration and use of their community assets is only relevant in the case of the separation of property if the spouses have established joint ownership of a certain asset or one spouse has the power of authority for the administration of the other spouse’s assets. For disputes within the framework of a community of joint ownership § 838a Austrian Civil Code determines that these must be resolved in non-contentious proceedings.<sup>366</sup> Disputes relating to the maladministration of the spouse who has the power of authority for the administration of the other spouse’s assets have to be resolved in ordinary contentious civil proceedings.

**146. What are the possible consequences when a spouse violates the rules governing the administration of assets? What are the possible consequences in other cases of maladministration of the assets?**

With the statutory property regime of separation of property the spouses are in the same position as unmarried couples in relation to property law.<sup>367</sup> Therefore, neither of the spouses is limited in the use and administration of their assets and the question of the consequences of a possible maladministration is not relevant with regard to matrimonial property law. Should a spouse use the assets of the other spouse despite the separation of property, the general provisions under civil law are to be applied. According to the general civil law in the event of a violation of the administration of shares in the assets belonging to the other spouse, the spouse whose rights were violated can initiate a possessory action in accordance with §§ 339 and 345 et seq. Austrian Civil Code in order to restore his or her unimpaired assets.<sup>368</sup> An example of disturbed possession amongst spouses who live in a joint household would be the deregistration of a joint telephone that is in joint ownership.<sup>369</sup>

The aggrieved spouse can also, if he or she is no longer the possessing spouse, demand the possessing non-owner to return the object by initiating an action to protect ownership (*rei vindicatio*) in accordance with § 366 Austrian Civil Code.<sup>370</sup> Further, in accordance with the action against disturbed possession according to § 523 second alternative Austrian Civil Code (*actio negatoria*) the aggrieved spouse can alternatively initiate an action for the suspension of

<sup>365</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 297.

<sup>366</sup> Gamerith in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. I, 3<sup>rd</sup> Edition, 2000, § 835 Austrian Civil Code, marg. No. 6.

<sup>367</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1237 Austrian Civil Code, marg. No. 1.

<sup>368</sup> Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, p. 789; Grillberger, *Eheliche Gütergemeinschaft*, 1981, pp. 66 et seq; Fenyves, ‘Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht’, in: Ruppe (ed.), *Handbuch der Familienverträge – Zivilrechtliche, steuerrechtliche und sozialrechtliche Folgen von Vereinbarungen zwischen Angehörigen*, 2<sup>nd</sup> Edition, 1985, pp. 769 et seq.

<sup>369</sup> Klicka in: Schwimann, *Praxiskommentar zum ABGB*, vol. II, 3<sup>rd</sup> Edition, 2005, § 339 Austrian Civil Code, marg. No. 39.

<sup>370</sup> Klicka in: Schwimann, *Praxiskommentar zum ABGB*, vol. II, 3<sup>rd</sup> Edition, 2005, § 366 Austrian Civil Code, marg. No. 1 et seq.

any unlawful disturbance with wrongful interference with his or her property.<sup>371</sup> In addition to these options to assert legal rights, Austrian Law also recognises the *actio publiciana* in accordance with § 372 Austrian Civil Code, which is an action for the rightfully presumed possession or an action by the usucaption owner.<sup>372</sup> The *actio publiciana* is “halfway between” the action to protect ownership and/or the action against disturbed possession, on the one hand, and the possessory action on the other.<sup>373</sup> For the *actio publiciana*, in contrast to the ownership action and/or the ownership rights action, no proof of ownership is necessary; however, only a qualified possessor is entitled thereto.<sup>374</sup> A qualified possessor is someone who is the legal, honest and real owner.<sup>375</sup>

Due to the swiftness and simplicity of the possessory action as well as in order to retrieve the revoked property and as for the prevention of simple disturbances, in practices, as a result of the possible problems of proving ownership, the possessory action is preferable to the other actions.<sup>376</sup> In addition to these actions the aggrieved spouse can also make a claim for compensation in accordance with §§ 1293 et seq. Austrian Civil Code or a claim for unjustified enrichment in accordance with § 1041 Austrian Civil Code. A spouse is entitled to such a claim for unjustified enrichment if a wrongful transfer of assets to the enriched party has occurred other than by a payment from the party who suffered the loss to the enriched person.<sup>377</sup> For example, if an object belonging to one spouse was used, consumed or sold by the other.<sup>378</sup>

In the event that despite the property regime of separation of property the spouses have joint ownership of movable or immovable assets, then this joint ownership will result in restrictions in their use and administration. In the event of joint ownership of the spouses in accordance with §§ 825 et seq. Austrian Civil Law with equal shares the ordinary as well as the extraordinary administration is to be applied jointly.<sup>379</sup> If an agreement between both spouses cannot be reached then the non-contentious judge decides whether this administration action is to be undertaken or not.<sup>380</sup> With a disagreement between two self-administering owners of half shares, an action for the suspension of any administration actions by the other joint owner is not possible; therefore the only alternative would be to appoint a trustee.<sup>381</sup> Compensation claims by one spouse against the other could also be created as a result of maladministration, the conditions for which are evaluated in accordance with the general compensation laws under §§ 1293 et seq. Austrian Civil Code. Additionally, within the framework of the extraordinary administration, the use of the joint property

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<sup>371</sup> Kindl-Wendner in: Schwimann, *Praxiskommentar zum ABGB*, vol. II, 3<sup>rd</sup> Edition, 2005, § 523 Austrian Civil Code, marg. No. 1 et seq.

<sup>372</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 278.

<sup>373</sup> Böhm, *Sachenrecht Allgemeiner Teil*, 5<sup>th</sup> Edition, 2007, p. 55.

<sup>374</sup> Böhm, *Sachenrecht Allgemeiner Teil*, 5<sup>th</sup> Edition, 2007, p. 55.

<sup>375</sup> See Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 261 et seq.

<sup>376</sup> Böhm, *Sachenrecht Besonderer Teil*, 5<sup>th</sup> Edition, 2007, p. 73; Böhm, *Sachenrecht Allgemeiner Teil*, 5<sup>th</sup> Edition, 2006, p. 51.

<sup>377</sup> Graf and Gruber, *Gesetzliche Schuldverhältnisse*, 7<sup>th</sup> Edition, 2007, p. 71.

<sup>378</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 287.

<sup>379</sup> Eggelmeier and Gruber/Sprohar in: Schwimann, *Praxiskommentar zum ABGB*, vol. III, 3<sup>rd</sup> Edition, 2006, § 834 Austrian Civil Code, marg. No. 34.

<sup>380</sup> Eggelmeier, Gruber and Sprohar in: Schwimann, *Praxiskommentar zum ABGB*, vol. III, 3<sup>rd</sup> Edition, 2006, § 833 Austrian Civil Code, marg. No. 35; Eggelmeier, Gruber and Sprohar in: Schwimann, *Praxiskommentar zum ABGB*, vol. III, 3<sup>rd</sup> Edition, 2006, § 833 Austrian Civil Code, marg. No. 38.

<sup>381</sup> Eggelmeier, Gruber and Sprohar in: Schwimann, *Praxiskommentar zum ABGB*, vol. III, 3<sup>rd</sup> Edition, 2006, § 834 Austrian Civil Code, marg. No. 34.

requires an agreement, whereby this agreement is often tacit.<sup>382</sup> If the spouses cannot agree on the use, the non-contentious court will order, in turn, a regulation for use.<sup>383</sup>

**147. What are the possible consequences if a spouse is incapable of administering the assets?**

If one spouse lacks legal capacity because he or she suffers from a physical illness or is mentally handicapped,<sup>384</sup> a trustee (*Sachwalter*) must be appointed to undertake all legal acts connected with the administration of the spouse's assets in accordance with § 268 para. 1 Austrian Civil Code.<sup>385</sup> The trustee then conducts all legal transactions and proceedings for the mentally handicapped or physically ill person and asserts rights of all kind on his or her behalf.<sup>386</sup> As the sphere of influence of the trustee is limited to agendas of a legal nature,<sup>387</sup> the trustor can personally carry out actual administration work if this is possible.

Instead of the legal appointment of a trustee, since the Austrian Living Will Act,<sup>388</sup> which entered into force on 1<sup>st</sup> June 2006 and the Austrian Trustee Law Amendment Act,<sup>389</sup> which entered into force on 1<sup>st</sup> July 2007, it is also possible with the assistance of an enduring power of authority to determine in advance which person should carry out the representative actions, if the appointer loses his or her legal competence or insight or judgement capacity or his or her ability to express himself or herself (compare §§ 284 et seq. Austrian Civil Code).<sup>390</sup> If one spouse has given the other spouse such an enduring power of authority, he or she is represented by the other spouse in the event of a later inability to undertake business actions.

**IV. 3. Distribution of assets upon dissolution**

**148. What are the grounds for the dissolution of the matrimonial property regime, e.g. change of property regime, death of a spouse or divorce?**

The statutory property regime of separation of property can be dissolved by the marriage contracts as the conclusion of marriage contracts is also possible after the conclusion of marriage.<sup>391</sup> With the death of a spouse the property regime of separation of property is also terminated; the assets of the deceased then go into the estate.<sup>392</sup> The full separation of property additionally only exists until an annulment, divorce or dissolution of the marriage. Only up to this point in time does the individual freedom of the spouses regarding the property exist. Subsequently, a division should be made, where the ownership relationships are not decisive.<sup>393</sup> Therefore with the dissolution of the marriage the separation of property

<sup>382</sup> See Böhm, *Sachenrecht Besonderer Teil*, 5<sup>th</sup> Edition, 2006, p. 13.

<sup>383</sup> See Böhm, *Sachenrecht Besonderer Teil*, 5<sup>th</sup> Edition, 2006, p. 13.

<sup>384</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 54, p. 60 and p. 565.

<sup>385</sup> See Weitzenböck in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2005, § 273 Austrian Civil Code, marg. No. 1 et seq; § 273 Austrian Civil Code was amended by the Austrian Trustee Law Amendment Act 2006 with § 268 Austrian Civil Code.

<sup>386</sup> Weitzenböck in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2005, § 273 Austrian Civil Code, marg. No. 6.

<sup>387</sup> Weitzenböck in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2005, § 273 Austrian Civil Code, marg. No. 6.

<sup>388</sup> *BGBl* (Federal Law Gazette) 2006/55.

<sup>389</sup> *BGBl* (Federal Law Gazette) 2006/92.

<sup>390</sup> See B. Jud, *Die Vorsorgevollmacht*, *AnwBl* 2007, p. 11.

<sup>391</sup> Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1217 Austrian Civil Code, marg. No. 4 et seq; Judgment of 7.2.1962, Oberster Gerichtshof, *EvBl* 1962/263.

<sup>392</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 482.

<sup>393</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 478.

is converted in favour of the principle of the marital participation rights to the assets.<sup>394</sup> The property-related dispute with a divorce, dissolution or annulment of the marriage takes place in accordance with §§ 81 et seq. Austrian Matrimonial Act. The division however, only takes place if the parties undertake this amicably or if one party makes an application for a court decision.<sup>395</sup> The claim for a division is independent of the fault of the spouses.<sup>396</sup>

**149. What date is decisive for the dissolution of the matrimonial property regime? Distinguish between the different grounds mentioned under Q 148.**

Within the scope of application of the Austrian Matrimonial Act it must be initially evaluated whether an object is included in the property; this evaluation is undertaken at the time of the dissolution of the matrimonial community (§ 81 para. 2 and para. 3 Austrian Matrimonial Act).<sup>397</sup> The matrimonial community is dissolved if the spouses no longer comply with their duties in accordance with § 90 Austrian Civil Code,<sup>398</sup> i.e. if they no longer have an emotional or spiritual community, have suspended sexual contact, no longer live together as well as no longer fulfilling household duties, the obligation of mutual support and professional support, the duty of loyalty and the duty to conduct themselves according to their marriage status.<sup>399</sup> In this case the evaluation of the property to be separated commences. In accordance with the prevailing opinion the key date for the evaluation is the time of the division, i.e. the time of the contractual division or in non-contentious proceedings the closing of the hearing of evidence at the first instance.<sup>400</sup> An increase in value, which occurs automatically between the dissolution of the matrimonial community and the time of the division however, must, according to the prevailing opinion, be taken into consideration.<sup>401</sup> If the change in value is credited to only one spouse (perhaps because he or she has invested in this object or only uses it himself or herself), this will however be disregarded.<sup>402</sup>

<sup>394</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 504.

<sup>395</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 505.

<sup>396</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 504.

<sup>397</sup> Judgment of 07.10.1981, Oberster Gerichtshof, SZ 54/140; Judgment of 29.11.1984, Oberster Gerichtshof, *JBl*, 1986, p. 116; Judgment of 10.12.1985, Oberster Gerichtshof, *EFSlg* 48.891; Judgment of 01.09.1988, Oberster Gerichtshof, *EFSlg* 57.293; Judgment of 05.10.1999, Oberster Gerichtshof, *ecolex* 2000/47; Judgment of 23.08.2000, Oberster Gerichtshof, *EFSlg* 93.906; Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, § 81 Austrian Matrimonial Act, marg. No. 1; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 506.

<sup>398</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 494.

<sup>399</sup> **Zu den aus der ehelichen Lebensgemeinschaft resultierenden Pflichten see Schwimann and Ferrari in: Schwimann**, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2006, after § 90 Austrian Civil Code, marg. No. 1 et seq.

<sup>400</sup> Judgment of 03.11.1982, Oberster Gerichtshof, SZ 55/163; Judgment of 16.12.1982, Oberster Gerichtshof, *JBl* 1983, p. 648 (note Huber); Judgment of 10.12.1999, Oberster Gerichtshof, *EFSlg* 90.426; see also Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, §§ 83, 84 Austrian Matrimonial Act, marg. No. 9; Kerschner, *Familienrecht*, 2<sup>nd</sup> Edition, 2002, marg. No. 2/146. Contra Judgment of 29.5.2000, Oberster Gerichtshof, *EFSlg* 93.911; Judgment of 11.3.1998, Oberster Gerichtshof, *EFSlg* 87.538.

<sup>401</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 507 with further references.

<sup>402</sup> Judgment of 12.03.1992, Oberster Gerichtshof, *EFSlg* 69.312; Judgment of 08.11.1994, Oberster Gerichtshof, *EFSlg* 75.603; Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, §§ 83, 84 Matrimonial Act, marg. No. 9.

**150. What are the consequences of the dissolution of the matrimonial property regime regarding the separate or joint property of the spouses?**

Whilst with a separation of property the spouses have individual freedom relating to their assets for the term of the marriage, the dissolution of the marriage is governed by the principle of marital participation in the assets, as in this case, independent of the ownership proportions, a division of the assets is intended.<sup>403</sup> The division after the dissolution of the marriage is primarily undertaken in kind (*Naturalrestitution*); only if such a division is not possible can the court order a compensation payment.<sup>404</sup> The property previously only belonging to one spouse as a result of the separation of property is thus subject to the division of assets after the divorce.<sup>405</sup>

If the spouses have established joint ownership of a certain asset or real estate, the divorce generally has no effect on the community of joint ownership. However, the spouses can dissolve the community of joint ownership amicably or one spouse can demand the division by a division action through legal proceedings.<sup>406</sup>

**151. How are assets determined and valued? Are e.g. premarital assets and debts, assets acquired by gift, will or inheritance and debts related those assets, the increase in value of the spouses' property and debts related to that property, pension rights and claims and insurance rights taken into account?**

Generally everything that belongs to the matrimonial consumable property and marital savings at the time of the matrimonial partnership is subject to the division after the dissolution of the marriage in accordance with § 81 para. 1 Austrian Matrimonial Act. Who the owner of these assets actually is, is irrelevant. Debts, which are internally related to these assets (e.g. debts from loans for the purchase of such assets), must be deducted during the evaluation. For other debts, which relate to the cost of living of the spouses they must be taken into consideration during the division (§ 83 para. 1 Austrian Matrimonial Act). To the *matrimonial consumable property* belong the matrimonial home and the contents of the home. This further includes all remaining assets which were actually used during the existing marital partnership and served the lifestyle of both spouses (§ 81 para. 2 Austrian Matrimonial Act). This can include necessary or luxury assets.

*Marital savings* are all investments accrued by the spouses during the marital partnership. Investments are objects and rights which are commonly intended for utilization (§ 81 para. 3 Austrian Matrimonial Act), such as e.g. cash, savings bonds, shares, stamp collections as well as art, jewellery and real estate that does not belong to the consumable property. An accident insurance also belongs to the marital savings if the insurance claim occurred during the marriage, as a monetary claim exists towards the third party.<sup>407</sup>

In accordance with § 82 para. 2 Austrian Matrimonial Act, objects which were brought into the marriage by the spouses, were given as gifts by third parties or were acquired as a result of death are *not* subject to the division. Objects which were acquired from funds which a spouse brought into the marriage, were acquired as a result of death or which were given to him or her as a gift by third parties, are generally excluded from the division; this only applies, however, if the substitution is clearly definable.<sup>408</sup> Gifts from the relatives of one

<sup>403</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 504.

<sup>404</sup> Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 180.

<sup>405</sup> For the exceptions see § 82 Austrian Matrimonial Act.

<sup>406</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 299.

<sup>407</sup> Judgment of 10.09.2003, Oberster Gerichtshof, SZ 2003/102.

<sup>408</sup> Judgment of 29.09.1999, Oberster Gerichtshof, EFSlg 90.435; Judgment of 30.01.2001, Oberster Gerichtshof, EFSlg 97.331; Judgment of 25.09.2002, Oberster Gerichtshof, EFSlg 101.002.

spouse are, in a case of doubt, not to be allocated to both spouses.<sup>409</sup> If objects were purchased with the savings that one spouse brought into the marriage or if objects that were brought into the marriage were sold, then these are also excluded from the division as far as the value is still definable,<sup>410</sup> and no conversion was made.<sup>411</sup> It is the intention of the legislator that only property which the spouses have created jointly is subject to the division.<sup>412</sup>

**152. What are the relevant dates for the determination and valuation of assets? E.g. is the fact that the spouses are living apart before the dissolution of the marriage relevant?**

Within the scope of application of the Matrimonial Act it must be initially evaluated whether an object is included in the property; this evaluation is undertaken at the time of the dissolution of the matrimonial community (§ 81 para. 2 and 3 Austrian Matrimonial Act).<sup>413</sup> The matrimonial community is dissolved if the spouses no longer comply with their duties in accordance with § 90 Austrian Civil Code,<sup>414</sup> i.e. if they no longer have an emotional or spiritual community, have suspended sexual contact, no longer live together as well as no longer fulfilling household duties, the obligation of mutual support and professional support, the duty of loyalty and the duty to conduct themselves according to their marriage status.<sup>415</sup> In this case the evaluation of the property to be separated will commence. In accordance with the prevailing opinion the key date for the evaluation is the time of the division, i.e. the time of the contractual division or in non-contentious proceedings the closing of the hearing of evidence in the first instance.<sup>416</sup> An increase in value, which occurs automatically between the dissolution of the matrimonial community and the time of the division however, must, according to the prevailing opinion, be taken into consideration.<sup>417</sup> If the change in value is credited to only one spouse (perhaps because he or she has invested in this object or only uses it himself or herself), this will however be disregarded.<sup>418</sup>

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<sup>409</sup> Judgment of 22.03.2000, Oberster Gerichtshof, *EFSlg* 93.934; Judgment of 18.09.2002, Oberster Gerichtshof, *EFSlg* 101.008.

<sup>410</sup> Judgment of 29.09.1999, Oberster Gerichtshof, *EFSlg* 90.436; Judgment of 25.09.2002, Oberster Gerichtshof, *EFSlg* 101.002.

<sup>411</sup> Judgment of 15.03.2000, Oberster Gerichtshof, *EFSlg* 93.924.

<sup>412</sup> Judgment of 25.03.1980, Oberster Gerichtshof, *SZ* 53/52; F. Bydliniski, 'Zur Neuordnung des Ehegüterrechts', in: Strasser (ed.), *Festschrift Fritz Schwind zum 65. Geburtstag: Rechtsgeschichte, Rechtsvergleichung, Rechtspolitik*, 1978, p. 39.

<sup>413</sup> Judgment of 07.10.1981, Oberster Gerichtshof, *SZ* 54/140; Judgment of 29.11.1984, Oberster Gerichtshof, *JBl* 1986, p. 116; Judgment of 10.12.1985, Oberster Gerichtshof, *EFSlg* 48.891; Judgment of 01.09.1988, Oberster Gerichtshof, *EFSlg* 57.293; Judgment of 5.10.1999, Oberster Gerichtshof, *ecolex* 2000/47; Judgment of 23.08.2000, Oberster Gerichtshof, *EFSlg* 93.906; Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, § 81 Austrian Matrimonial Act, marg. No. 1; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 506.

<sup>414</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 494.

<sup>415</sup> See Schwimann and Ferrari in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2006, after § 90 Austrian Civil Code, marg. No. 1 et seq.

<sup>416</sup> Judgment of 03.11.1982, Oberster Gerichtshof, *SZ* 55/163; Judgment of 16.12.1982, Oberster Gerichtshof, *JBl* 1983, p. 648 (note Huber); Judgment of 10.12.1999, Oberster Gerichtshof, *EFSlg* 90.426; see also Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, §§ 83 and 84 Austrian Matrimonial Act, marg. No. 9; Kerschner, *Familienrecht*, 2<sup>nd</sup> Edition, 2002, marg. No. 2/146. Contra Judgment of 29.05.2000, Oberster Gerichtshof, *EFSlg* 93.911; Judgment of 11.3.1998, Oberster Gerichtshof, *EFSlg* 87.538.

<sup>417</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 507 with further references.

<sup>418</sup> Judgment of 12.03.1992, Oberster Gerichtshof, *EFSlg* 69.312; Judgment of 08.11.1994, Oberster Gerichtshof, *EFSlg* 75.603; Stabentheiner in: Rummel, *Kommentar zum*

Therefore as it is not the time of divorce that is relevant for the evaluation of the assets to be divided,<sup>419</sup> but rather the time of the division of the assets is to be taken into consideration, it is not relevant for the evaluation whether the spouses actually separated prior to the divorce. With regard to the question of which specific property is subject to the division, however, the date of the dissolution of the matrimonial community is decisive so that it may be relevant here whether the date of the actual separation and the date of the divorce are not the same.

**153. What happens if one spouse's assets are used for investments in the other spouse's assets? Is there any right to compensation?**

With the statutory property regime of separation of property the spouses are in the same position in relation to matrimonial property law as unmarried couples with regard to property law.<sup>420</sup> The regulations of general civil law as well as penal law are applicable if one spouse's assets are used for investments by the other spouse. Therefore claims relating to compensation, unjustified enrichment as well as punitive claims are possible. For claims relating to compensation the provisions of §§ 1293 et seq. Austrian Civil Code are to be applied. Austrian Law primarily provides for compensation by restitution in kind (*Naturalrestitution*). If this is impossible or unfeasible, compensation must be paid in monetary terms whereby the calculation depends on the gravity of the fault: In case of ordinary negligence the damaging party has to compensate for the damage suffered (*positiver Schaden*).

The damage itself is calculated according to the market value at the time the wrongful act occurred.<sup>421</sup> In the case of gross negligence or intent, both the suffered damage as well as lost profits are recoverable (*volle Genugtuung*).<sup>422</sup> For claims relating to unjustified enrichment a spouse is entitled to take action in accordance with § 1041 or § 1435 Austrian Civil Code by analogy. § 1041 Austrian Civil Code is the basis for a claim if a wrongful transfer of assets to the enriched party occurred other than by a payment by the party who suffered the loss to the enriched person.<sup>423</sup> For example, if an object belonging to one spouse was used, consumed or sold by the other.<sup>424</sup> § 1435 Austrian Civil Code by analogy is the basis for a claim if the spouse whose property was used has agreed to an investment, but the expected success did not occur (*condictio causa data non secuta*).<sup>425</sup> The investment itself, however, must not become the subject of a contract.<sup>426</sup> For example, payments which a spouse has made during the existing marriage can be reclaimed after the dissolution of the marriage if they were made with the expectation that the marriage would exist on a long-term basis and were not made as gift.<sup>427</sup> The claim relating to unjustified enrichment generally aims at the return of the object or performance and only if this is impossible or unfeasible (§ 1323 Austrian Civil Code by analogy) is the deprived party entitled to compensation in the amount of the market value (§ 417 Austrian Civil Code).<sup>428</sup>

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*Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, §§ 83 and 84 Austrian Matrimonial Act, marg. No. 9.

<sup>419</sup> See Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 506.

<sup>420</sup> Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1237 Austrian Civil Code, marg. No. 1.

<sup>421</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, pp. 321 et seq.

<sup>422</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, pp. 323 et seq.

<sup>423</sup> Graf and Gruber, *Gesetzliche Schuldverhältnisse*, 7<sup>th</sup> Edition, 2007, p. 71.

<sup>424</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 287.

<sup>425</sup> Graf and Gruber, *Gesetzliche Schuldverhältnisse*, 7<sup>th</sup> Edition, 2007, p. 67.

<sup>426</sup> Graf and Gruber, *Gesetzliche Schuldverhältnisse*, 7<sup>th</sup> Edition, 2007, p. 67.

<sup>427</sup> Graf and Gruber, *Gesetzliche Schuldverhältnisse*, 7<sup>th</sup> Edition, 2007, p. 68.

<sup>428</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, pp. 294 et seq.



If the other spouse does not agree, then punitive consequences in accordance with the regulations on theft in accordance with § 127 Austrian Penal Code are also possible. The offence of theft has been committed if a person takes an immovable object from another person with the intention being to unlawfully enrich himself or herself or a third party by their arrogation. The use of the property of the other spouse for one's own investment therefore generally fulfils the elements for an offence.

**154. What happens if one spouse's assets have been used for the payment of a debt of the other spouse? Is there a rule of compensation? And if so, how is compensation calculated?**

With the statutory property regime of separation of property the spouses are in the same position as unmarried couples with regard to property law.<sup>429</sup> The regulations of general civil law as well as penal law are applicable if one spouse's assets are used for the debts of the other spouse. Therefore claims relating to compensation, unjustified enrichment as well as punitive claims are possible. For claims relating to compensation the provisions of §§ 1293 et seq. Austrian Civil Code are to be applied. Austrian Law primarily provides for compensation by restitution in kind (*Naturalrestitution*). If this is impossible or unfeasible, compensation must be paid in monetary terms whereby the calculation depends on the gravity of the fault: In the case of ordinary negligence the damaging party has to compensate the damage suffered (*positiver Schaden*). The damage itself is calculated according to the market value at the time the wrongful act occurred.<sup>430</sup> In the case of gross negligence or intent, both the suffered damage as well as lost profits are recoverable (*volle Genugtuung*).<sup>431</sup> For claims relating to unjustified enrichment a spouse is entitled to take action in accordance with § 1041 or § 1435 Austrian Civil Code by analogy. § 1041 Austrian Civil Code is the basis for a claim if a wrongful transfer of assets to the enriched party occurred other than by a payment by the party who suffered the loss to the enriched person.<sup>432</sup> For example, if an object belonging to one spouse was used, consumed or sold by the other.<sup>433</sup> § 1435 Austrian Civil Code by analogy is the basis for a claim if the spouse whose property was used has agreed to an investment, but the expected success did not occur (*condictio causa data non secuta*).<sup>434</sup> The investment itself, however, must not become the subject of a contract.<sup>435</sup> For example, payments which a spouse has made during the existing marriage can be reclaimed after the dissolution of the marriage if they were made with the expectation that the marriage would exist on a long-term basis and were not made as gift.<sup>436</sup> The claim relating to unjustified enrichment generally aims at the return of the object or performance and only if this is impossible or unfeasible (§ 1323 Austrian Civil Code by analogy) is the deprived party entitled to a compensation in the amount of the market value (§ 417 Austrian Civil Code).<sup>437</sup>

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<sup>429</sup> Brauner in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1237 Austrian Civil Code, marg. No. 1.

<sup>430</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, pp. 321 et seq.

<sup>431</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, pp. 323 et seq.

<sup>432</sup> Graf and Gruber, *Gesetzliche Schuldverhältnisse*, 7<sup>th</sup> Edition, 2007, p. 71.

<sup>433</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 287.

<sup>434</sup> Graf and Gruber, *Gesetzliche Schuldverhältnisse*, 7<sup>th</sup> Edition, 2007, p. 67.

<sup>435</sup> Graf and Gruber, *Gesetzliche Schuldverhältnisse*, 7<sup>th</sup> Edition, 2007, p. 67.

<sup>436</sup> Graf and Gruber, *Gesetzliche Schuldverhältnisse*, 7<sup>th</sup> Edition, 2007, p. 68.

<sup>437</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, pp. 294 et seq.

person with the intention being to unlawfully enrich himself or herself or a third party by their arrogation. The use of the property of the other spouse for one's own investment therefore generally fulfils the elements for an offence.

If in the process of the divorce the matrimonial consumable property and the marital savings are divided, the use of one spouse's assets for the amortization of the debts of the other spouse is in any case taken into consideration. However, if the performance-based reclaim is applied due to the non-occurrence of the expected success, this shall have priority over other claims in accordance with §§ 81 et seq. Austrian Matrimonial Act.<sup>438</sup>

**155. Do the spouses have preferential rights over the matrimonial/family home and/or the household's assets?**

For household assets of spouses the special regulation of § 15 Austrian Condominium Act 2002 applies during the division after the dissolution of the marriage. If the marriage is dissolved this does not affect the legal partnership regarding their apartment (*Eigentümerpartnerschaft*) since this partnership is not dependant on the existence of marriage.<sup>439</sup> If one of the divorced spouses does not wish to continue the legal partnership regarding their apartment and cannot reach an agreement with the other spouse, each spouse has the right to claim the dissolution of the partnership. The objection of inappropriate time or disadvantage in the sense of § 830 Austrian Civil Code cannot be applied to the division action after one year has passed since the dissolution of the marriage (§ 15 Austrian Condominium Act).<sup>440</sup> Although the matrimonial home and the contents of the home are generally not to be included in the separation proceedings in accordance with §§ 81 et seq. Austrian Matrimonial Act,<sup>441</sup> an exception with regard to the home is applicable if one spouse urgently requires the further use of the marital home in order to guarantee his or her basic necessities in life (compare § 82 para. 2 Austrian Matrimonial Act).<sup>442</sup> As a criterion as to whether the other spouse is dependent on the further use of the matrimonial home, case law takes into consideration whether there are vital questions relating to that other spouse's existence such as, for instance, long-term homelessness.<sup>443</sup> The same applies if a joint child has a valid requirement for the further use of the home that must be considered.<sup>444</sup> Also the contents of the home are then taken into consideration in the division if a spouse urgently requires the further use of those contents to guarantee his or her basic necessities.<sup>445</sup> In connection with a proceeding for the division of property after the dissolution of the marriage or in connection with marital proceedings a spouse can also assert a preliminary injunction for the temporary use or protection of the matrimonial consumable property and marital savings in accordance with § 382 para. 1 No. 8b Austrian Enforcement of Civil Judgements Act. For example, such a security order would be possible in the following situations: If the endangered party is able to prove that the conduct of the opponent, which demonstrates to a substantial degree that during the separation proceedings a court-ordered award of the

<sup>438</sup> Graf and Gruber, *Gesetzliche Schuldverhältnisse*, 7<sup>th</sup> Edition, 2007, p. 68.

<sup>439</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 475.

<sup>440</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 304.

<sup>441</sup> Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 184.

<sup>442</sup> Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 185.

<sup>443</sup> Judgment of 13.10.1999, Landesgericht für Zivilrechtssachen Wien, *EFSlg* 90.449; Judgment of 09.08.2001, Landesgericht Salzburg, *EFSlg* 97.349; Judgment of 26.06.2002, Landesgericht Salzburg, *EFSlg* 101.015; dazu Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 185.

<sup>444</sup> § 82 para. 2 sentence 2 second case Austrian Matrimonial Act; see Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 185.

<sup>445</sup> Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 185.

matrimonial home to the endangered party is to be thwarted, a temporary registered sale and encumbrance prohibition can be ordered against the marital property.<sup>446</sup>

Further, a spouse has the option of applying for a temporary restraining order to secure his or her urgent living needs in accordance with § 382e Austrian Enforcement of Civil Judgements Act. By concluding the marriage the spouse acquires a right to live in the home which does not belong to him or her or not solely to him or her, which is a part of matrimonial maintenance law. If this home serves to satisfy his or her urgent living needs he or she can make a claim for maintenance and the further use of the home against the spouse authorised to its use.<sup>447</sup> As a guarantee, for example court-ordered orders for action, a prohibition of actions, and sale and encumbrance prohibitions can be used with regard to the home.<sup>448</sup> For instance, the endangered spouse may make a claim for the restoration of previous vested rights by obtaining a key for a changed lock.<sup>449</sup>

In the event of the *death* of a spouse the following applies to the ownership of an apartment: Primarily it depends on the parties' agreements.<sup>450</sup> The spouses have the option, as other property partners do, to enter into agreements during their lifetime on legal succession in the event of death, where a succession for a half share is provided to a third party who, in the event of inheritance, is entitled to a claim for transfer of ownership.<sup>451</sup> Such an agreement must be made at the law offices of a notary or an attorney. Unilateral orders are not valid as the surviving partner must not be forced to accept a new partner (§ 13 para. 3 Austrian Condominium Act).<sup>452</sup> If the spouses have not made such an order, the surviving partner receives the deceased spouse's share of the apartment's ownership at the time of his or her death (§ 14 para. 1 No. 1 Austrian Condominium Act). This is viewed as an acquisition pursuant to the Condominium Act and not as an inheritance-related acquisition.<sup>453</sup> As an equivalent for the deceased spouse's share the surviving spouse must pay a takeover fee for the estate in accordance with § 14 (para. 2 Austrian Condominium Act).<sup>454</sup> The takeover fee is half of the market value of the ownership in the apartment.<sup>455</sup> However, if the surviving partner is personally entitled to a compulsory portion, to which the home serves to satisfy an urgent living requirement, an exception applies: The surviving partner does not have to pay the takeover fee if no other persons entitled to a compulsory portion exist and the estate is not encumbered with debt. Otherwise he or she must pay a quarter of the market value of the minimum share.<sup>456</sup>

#### 156. Do the spouses have preferential rights over other assets?

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<sup>446</sup> Holzhammer and Roth, *Exekutionsrecht und Konkursrecht. Grundstudium*, 6<sup>th</sup> Edition, 2008, p. 130.

<sup>447</sup> Holzhammer and Roth, *Exekutionsrecht und Konkursrecht. Grundstudium*, 6<sup>th</sup> Edition, 2008, p. 133.

<sup>448</sup> Holzhammer and Roth, *Exekutionsrecht und Konkursrecht. Grundstudium*, 6<sup>th</sup> Edition, 2008, p. 133.

<sup>449</sup> Holzhammer and Roth, *Exekutionsrecht und Konkursrecht. Grundstudium*, 6<sup>th</sup> Edition, 2008, p. 133.

<sup>450</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 475.

<sup>451</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 475.

<sup>452</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 476.

<sup>453</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 476.

<sup>454</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 476.

<sup>455</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 476.

<sup>456</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 476.

Generally during the dissolution of the marriage the matrimonial consumable property and the marital savings must be divided.<sup>457</sup> The spouses have special rights in particular to the objects which they entered into the marriage or which they inherited from third parties or received as gifts, as they are not subject to the division. Objects which served the personal use or the profession of a spouse and objects belonging to a business are also not subject to the division.<sup>458</sup>

**157. To what extent, if at all, does the division of community property affect the attribution of maintenance?**

The post-marital maintenance obligation as well as the division of the matrimonial consumable property and the marital savings are included in the consequences of divorce. However, they differ from each other in several points: The division (§§ 81 et seq. Austrian Matrimonial Act) merely concerns the matrimonial consumable property and the marital savings. This must additionally always be applied if one party makes an application for a court-ordered decision,<sup>459</sup> and it is independent of the fault of the spouses in the dissolution or the annulment of the marriage.<sup>460</sup> The maintenance duty after the dissolution of marriage, however, is generally dependent on whether the spouse is entirely or predominately at fault (§ 66 Austrian Matrimonial Act). Maintenance must primarily be paid from the income of the person obliged to pay maintenance so that the substance of the property must not be taken into consideration.<sup>461</sup> During the division of the matrimonial consumable property and the marital savings after the dissolution of the marriage, the maintenance allowance may be influenced to a certain extent. For instance, a reduction of the maintenance requirement would then be ordered if the further use of the matrimonial home takes place at the expense of the person paying maintenance.<sup>462</sup> If the person entitled to maintenance receives interest payments for the settlement paid according to the post-marital dispute, these must be taken into consideration as the income of the former spouse who is entitled to maintenance.<sup>463</sup>

**158. To what extent, if at all, does the division of community property affect the pension rights and claims of one or both spouses?**

The matrimonial consumable property and the marital savings are subject to the separation proceeding after the dissolution of the marriage in accordance with §§ 81 et seq. Austrian Matrimonial Act.<sup>464</sup> The division of the assets is determined after the date of the dissolution of

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<sup>457</sup> See Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, § 81 Austrian Matrimonial Act, marg. No. 1 et seq; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 505.

<sup>458</sup> § 82 Austrian Matrimonial Act; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 184.

<sup>459</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 505.

<sup>460</sup> Honsell, *Vermögensteilung nach der Scheidung und Billigkeit*, in: Harrer and Zitta (eds.), *Familie und Recht*, 1992, pp. 619 et seq; Judgment of 01.12.1982, Oberster Gerichtshof, *JBl* 1983, p. 488; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 504.

<sup>461</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 497.

<sup>462</sup> Zankl in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2006, § 66 Austrian Matrimonial Act, marg. No. 14.

<sup>463</sup> Zankl in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 3<sup>rd</sup> Edition, 2006, § 66 Austrian Matrimonial Act, marg. No. 27; Judgment of 21.6.1990, Landesgericht für Zivilrechtssachen Wien, *EFSlg* 63.502.

<sup>464</sup> Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, § 81 Austrian Matrimonial Act, marg. No. 1; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 504.

the matrimonial partnership.<sup>465</sup> Prospective entitlements and rights of choice to an indemnity claim do not yet have any value at this point in time and are therefore not to be taken into consideration in the division.<sup>466</sup> Also further processing claims or advance payments on pensions are not to be included in the assets to be divided.<sup>467</sup> This does not apply if the indemnity has already occurred.<sup>468</sup>

**159. Can the general rules (above Q. 150) be set aside or adjusted, e.g. by agreement between spouses or by the competent authority?**

If the marriage ends in divorce, or is dissolved or annulled the spouses are completely free to determine the fate of their assets by agreement (§ 1266 Austrian Civil Code, § 97 para. 2 Austrian Matrimonial Act): The spouses can e.g. mutually waive their share in the other spouse's assets. In this case the statutory separation of property during the marriage is also maintained after the dissolution of the marriage.<sup>469</sup> Further, the spouses may agree to divide the community assets of a possible property contract or transfer parts of one spouse's assets to the other spouse.<sup>470</sup>

If such agreements are made in the current connection with the dissolution of marriage they are not subject to any form requirement (compare § 97 para. 2 Austrian Matrimonial Act). Advance agreements without a connection to a current dissolution of marriage, in contrast, regularly require a notarial deed. However, with regard to the matrimonial consumable property they are inadmissible and therefore invalid.<sup>471</sup>

**160. Are there besides the rules of succession specific rules applicable if one spouse dies?**

The regulations on property-related queries after the death of a spouse outside of inheritance law, such as e.g. the contract of inheritance (§§ 1248-1259 Austrian Civil Code) exclusively relate to the contractual matrimonial property law and are generally concluded by way of marriage contracts.<sup>472</sup> With the statutory property regime of separation of property the general rules of inheritance law are applicable; no special instructions for the event of the death of a spouse are provided in the statutory matrimonial property law.

**V. Separation of property with distribution by the competent authority**

Not relevant.

<sup>465</sup> Judgment of 07.10.1981, Oberster Gerichtshof, SZ 54/140; Judgment of 29.11.1984, Oberster Gerichtshof, JBl, 1986, p. 116; Judgment of 10.12.1985, Oberster Gerichtshof, EFSlg 48.891; Judgment of 1.9.1988, Oberster Gerichtshof, EFSlg 57.293; Judgment of 05.10.1999, Oberster Gerichtshof, ecolex 2000/47; Judgment of 23.08.2000, Oberster Gerichtshof, EFSlg 93.906; Stabentheiner in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part four, 3<sup>rd</sup> Edition, 2002, § 81 Austrian Matrimonial Act, marg. No. 1; Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13<sup>th</sup> Edition, 2006, p. 506.

<sup>466</sup> Judgment of 5.10.1999, Oberster Gerichtshof, ecolex 2000/47; Judgment of 2.12.2002, Oberster Gerichtshof, 6 Ob 85/02x (unpublished).

<sup>467</sup> Judgment of 05.10.1999, Oberster Gerichtshof, ecolex, 2000/47; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 8<sup>th</sup> Edition, 2004, marg. No. 183.

<sup>468</sup> Judgment of 23.8.2000, Oberster Gerichtshof, EFSlg 93.907.

<sup>469</sup> Schwimann, *Familienrecht*, 5<sup>th</sup> Edition, 2005, p. 36.

<sup>470</sup> Schwimann, *Familienrecht*, 5<sup>th</sup> Edition, 2005, p. 36.

<sup>471</sup> Schwimann, *Familienrecht*, 5<sup>th</sup> Edition, 2005, p. 36.

<sup>472</sup> Koziol and Welser, *Grundriss des Bürgerlichen Rechts*, vol. II, 13<sup>th</sup> Edition, 2007, p. 522.

## D. MARITAL AGREEMENTS

**191. Are future spouses permitted to make a pre-nuptial agreement regulating their property relationship? If so, is it binding? Or if it is not binding, does it have any effect?**

Spouses may conclude pre-nuptial agreements (§ 1217 Austrian Civil Code) prior to the marriage to regulate their property relationships. Pre-nuptial agreements are contracts and thus they are binding if they have been concluded legally.<sup>473</sup>

**192. Are spouses permitted to make a post-nuptial agreement regulation or changing their property relationship? If so, is it binding? Or if it is not binding, does it have any effect?**

In the event of divorce the spouses may in particular conclude maintenance contracts (§ 80 Austrian Matrimonial Act) and contracts for the division of the matrimonial consumable property in accordance with §§ 81-96 Austrian Matrimonial Act (§ 97 Austrian Matrimonial Act). In connection with the latter, § 97 para. 1 Austrian Matrimonial Act stipulates that the entitlement to the division of the matrimonial consumable property cannot be waived in advance. Effectively concluded contracts in connection with property-related regulations are binding in accordance with general regulations.

**193. What formal requirements must the pre- and/or post-nuptial agreement fulfil to be valid as between spouses?**

A notarial deed is a form requirement in accordance with § 1 para. 1a Austrian Notarial Deed Act.<sup>474</sup> Some authorities also accept a notarial confirmation by appending the private document to the so-called covering instrument (*Mantelakt*) as sufficient.<sup>475</sup> A notarial deed is also required for a partial amendment,<sup>476</sup> change and dissolution of marriage contracts<sup>477</sup> as well as for preliminary agreements.<sup>478</sup> The form requirements have protective purposes in two respects: On the one hand, to protect the spouses from precipitation<sup>479</sup> and, on the other, to protect creditors, thus third parties.<sup>480</sup> Contracts which regulate the division of matrimonial savings after the dissolution of the marriage in advance require a notarial deed to become legally effective (§ 97 para. 1 final sentence Austrian Matrimonial Act).

**194. What formal requirements must the pre- and/or post-nuptial agreement fulfil to be valid in relation to a third party? Is there a system of registration of pre- and/or post-nuptial agreements? If so describe briefly the system and its effect.**

Based on the purpose of the requirements of form, thus the protection of the spouses from precipitation, on the one hand,<sup>481</sup> and the protection of creditors on the other,<sup>482</sup> the form

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<sup>473</sup> Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1217 Austrian Civil Code, marg. No. 1.

<sup>474</sup> Established case law, e.g. Judgment of 4.7.1985, Oberster Gerichtshof, SZ 58/118.

<sup>475</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, part one, 3<sup>rd</sup> Edition, 2002, § 1217 Austrian Civil Code, marg. No. 6; Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, pp. 697 et seq.

<sup>476</sup> Judgment of 11.12.1923, Oberster Gerichtshof, SZ 5/302.

<sup>477</sup> Judgment of 15.04.1964, Oberster Gerichtshof, RZ, 1965, p. 46; Judgment of 6.5.1975, Oberster Gerichtshof, RZ 1976, p. 1.

<sup>478</sup> Judgment of 23.02.1949, Oberster Gerichtshof, SZ 22/25.

<sup>479</sup> Judgment of 23.11.1972, Oberster Gerichtshof, SZ 45/127.

<sup>480</sup> Judgment of 26.06.1984, Oberster Gerichtshof, SZ 57/118.

<sup>481</sup> Judgment of 23.11.1972, Oberster Gerichtshof, SZ 45/127.

requirement must also be observed towards third parties. The registration of marriage contracts is only provided for the spouses of a business owner, whose company is registered in the company register, or has an unlimited liability of a general partnership (*Offene Handelsgesellschaft*, §§ 128 et. seq. Austrian Business Enterprise Code) or a limited partnership (*Kommanditgesellschaft*, §§ 161 et seq. Austrian Business Enterprise Code). For the effectiveness of property rights granted by marriage contracts towards a (credulous) company creditor, an entry in the company register is required (§ 36 Austrian Business Enterprise Code).<sup>483</sup> Each of the spouses can register the marriage contract in the company register. Only the date of the submitted marriage contract or its amendment as well as the name and the date of birth of the spouse are to be entered (§ 36 para. 2 Austrian Business Enterprise Code). Rights from a marriage contract towards a business owner are invalid towards a company creditor, if his or her claim existed prior to the entry of the marriage contract in the company register (§ 36 para. 3 Austrian Business Enterprise Code).

**195. Is full disclosure of the spouses' assets and debts necessary for the making of a pre- and/or post-nuptial agreement?**

A requirement for the full disclosure of the property relationships of the spouses is not provided for by law.

**196. If the agreement has to be made before an official (e.g. a notary), is that official obliged to inform the spouses of the content and the consequences of the pre- and/or post-nuptial agreement? If so, what happens if the official does not fulfil his or her obligation?**

The Notary has a duty to instruct (§ 52 Austrian Notary Act<sup>484</sup>): During the recording of a notarial deed, thus also with a marriage contract, the Notary is obligated to examine the personal ability and entitlement of each party at the time of concluding the contract where possible, to instruct the parties on the purpose and consequences of the same and to convince himself/herself of the serious and true intention of the spouses. Following the reading of the deed he or she must ensure through personally questioning the spouses that the deed represents the intention of the parties.<sup>485</sup> The duty to instruct is not applicable amongst other things if the parties waive this duty as they have previously received legal advice or are personally familiar with the law (e.g. lawyers) or if an instruction would be pointless.<sup>486</sup> In accordance with § 52 Austrian Notarial Act the lack of instruction has no effect on the validity of the marriage contract, however; it is sufficient that a notarial deed was created. The Notary could become liable for damages towards the clients, however.<sup>487</sup>

**197. Provide statistical data, if available, regarding the making of pre- and/or post-nuptial agreements.**

There is no detailed statistical data for Austria.

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<sup>482</sup> Judgment of 26.06.1984, Oberster Gerichtshof, SZ 57/118.

<sup>483</sup> See Dehn in: Krejci, *Kommentar zu den durch das HaRÄG 2005 eingeführten Neuerungen im Unternehmensgesetzbuch und im Allgemeinen Bürgerlichen Gesetzbuch*, 2007, § 36 UGB marg. No. 1.

<sup>484</sup> *RGBl* (Imperial Law Gazette) 75/1871 last amended by the *BGBl* (Federal Law Gazette) 112/2003.

<sup>485</sup> Wagner and Knechtel, *Kommentar zur Notariatsordnung*, 6<sup>th</sup> Edition, 2006, § 52 Austrian Notary Act marg. No. 7.

<sup>486</sup> Wagner and Knechtel, *Kommentar zur Notariatsordnung*, 6<sup>th</sup> Edition, 2006, § 52 Austrian Notary Act marg. No. 10.

<sup>487</sup> See §§ 5 and 39 Austrian Notary Act.

**198. May spouses through pre- and/or post-nuptial agreements only choose, where applicable, a statutory matrimonial property regime and/or do they have the freedom to modify such a regime or even create their own regime?**

During the conclusion of a marriage contract the spouses may choose whether they prefer a statutory predefined system (community of property, bride price (*Widerlage*), morning gift (*Morgengabe*), a widow's allowance (*Witwengehalt*), legal usufruct (*Advitalitätsrecht*)) or combined systems (participation in acquisitions, community of accrued gains)). As a result of contractual freedom, it is at the parties' discretion to modify the existing types or to create new types.<sup>488</sup>

**199. If spouses can modify through pre- and/or post-nuptial agreements a statutory regime or create their own regime, can those modifications be made to:**

**a. categories of assets?**

As a result of contractual freedom the spouses may create deviating provisions with regard to the categories of assets.<sup>489</sup>

**b. administration of assets?**

As a result of contractual freedom the spouses may create deviating provisions with regard to the administration of assets.<sup>490</sup>

**c. distribution of assets?**

As a result of contractual freedom the spouses may create deviating provisions with regard to the distribution of assets.<sup>491</sup>

**d. depend upon the ground of dissolution of the marriage?**

As a result of contractual freedom the spouses may modify their agreements depending upon the grounds for dissolving the marriage.<sup>492</sup>

**200. Are there typical contractual clauses used in practice to modify essential elements of the matrimonial property regime, where applicable, or to achieve a certain result,**

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<sup>488</sup> Brauner, *Freiheit des Vertragsinhalts und Typenbindung im Ehegüterrecht*, ZfRV 1974, p. 1; Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, pp. 688 et seq; Judgment of 17.12.1976, Oberster Gerichtshof, SZ 49/160; Judgment of 18.10.1995, Oberster Gerichtshof, SZ 68/198.

<sup>489</sup> Brauner, *Freiheit des Vertragsinhalts und Typenbindung im Ehegüterrecht*, ZfRV 1974, p. 1; Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, pp. 688 et seq; Judgment of 17.12.1976, Oberster Gerichtshof, SZ 49/160; Judgment of 18.10.1995, Oberster Gerichtshof, SZ 68/198.

<sup>490</sup> Brauner, *Freiheit des Vertragsinhalts und Typenbindung im Ehegüterrecht*, ZfRV 1974, p. 1; Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, pp. 688 et seq; Judgment of 17.12.1976, Oberster Gerichtshof, SZ 49/160; Judgment of 18.10.1995, Oberster Gerichtshof, SZ 68/198.

<sup>491</sup> Brauner, *Freiheit des Vertragsinhalts und Typenbindung im Ehegüterrecht*, ZfRV 1974, p. 1; Weiß in: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. V, 2<sup>nd</sup> Edition, 1954, pp. 688 et seq; Judgment of 17.12.1976, Oberster Gerichtshof, SZ 49/160; Judgment of 18.10.1995, Oberster Gerichtshof, SZ 68/198.

<sup>492</sup> Judgment of 10.01.1905, Oberster Gerichtshof, JBl 166; Judgment of 03.03.1976, Oberster Gerichtshof, EFSlg 27.134; Judgment of 17.12.1976, Oberster Gerichtshof, EvBl 1977/141.



**e.g., that certain rights are excluded only upon divorce but not on death of a spouse?**

To modify the contractual property regime of community of property, in practice for the purpose of the limitation of liability, often a limited community of property instead of the general one will be agreed upon.<sup>493</sup> The relevant clause could read: "Both spouses are aware that the common property established herewith is at most liable for the joint debts or debts that were entered into for the purpose of the same".<sup>494</sup> For the event of divorce, for example, the following could be agreed: "In the event of the termination or dissolution of the existing marriage for whatever reason, with the exception of death and with no consideration of fault, the spouses agree to the following division of assets, under consideration of the statutory instructions of divorce law, which, as far as they relate to matrimonial consumable property subject to the statutory exceptions of § 82 Austrian Matrimonial Act, can on request be redecided in a court of law if the result in the relevant case would be unfair.

1. Each spouse remains the owner of the assets which are in his or her ownership at the time of termination of the marriage. Assets which are not separately mentioned in this agreement are, if they are included in the joint ownership, only to be released for an appropriate compensation of value if they were left to the other spouse for reasons of fairness. [...]
2. With regard to the remaining marital savings it is agreed that these assets remain with the spouse who has ownership of them and the other spouse has no compensation claim. Accordingly the contractual parties waive the application for division with regard to these savings."<sup>495</sup>

**201. Can the competent authority override, modify or set aside pre- and/or post-nuptial agreements on account of unfairness or any other ground?**

As contracts, the general contract regulations (Chapter 17 Austrian Civil Code) are to be applied to marriage contracts.<sup>496</sup> Therefore the general provisions on misrepresentation, fraud, duress, impossibility etc. have to be applied.<sup>497</sup> Generally, defects must be claimed by one spouse in order to achieve the dissolution of the marriage contract. During legal action the competent authority can raise defects of the form requirements ex officio.<sup>498</sup> If a marriage contract was entered into in contravention of the form requirements it is invalid from the beginning.<sup>499</sup>

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<sup>493</sup> Bittner, *Verträge im Ehegüterrecht*, 2<sup>nd</sup> Edition, 1995, p. 47.

<sup>494</sup> Bittner, *Verträge im Ehegüterrecht*, 2<sup>nd</sup> Edition, 1995, p. 47.

<sup>495</sup> Bittner, *Verträge im Ehegüterrecht*, 2<sup>nd</sup> Edition, 1995, pp. 57 et seq.

<sup>496</sup> Brauneder in: Schwimann, *Praxiskommentar zum ABGB*, vol. V, 3<sup>rd</sup> Edition, 2006, § 1217 Austrian Civil Code, marg. No. 1.

<sup>497</sup> Judgment of 15.03.1967, Oberster Gerichtshof, *EvBl* 1967/437.

<sup>498</sup> Judgment of 03.04.1957, Oberster Gerichtshof, *EvBl* 1957/319.

<sup>499</sup> M. Bydlinski in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol. II, 1. Teil, 3<sup>rd</sup> Edition, 2002, § 1217 Austrian Civil Code, marg. No. 6.