

NATIONAL REPORT: BELGIUM
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 University of Leuven
 August 2008

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- 1. Are there special rules concerning the property relationship between spouses (explaining what is meant by spouses) a) upon marriage and/or b) during marriage and/or c) upon separation and/or d) upon death and/or e) upon divorce and/or f) upon annulment? If so, briefly indicate the current sources of these rules. If so, briefly indicate the current sources of these rules.**

Spouses are married persons of different sexes and of the same sex. Registered partners are persons of different sexes or of the same sex, who have concluded a declaration of legal cohabitation. While they are not considered spouses, they are subject to a part of the rules of the primary system (See Question 4). Factual cohabitants are not considered as spouses.

Upon marriage and during marriage, the property relationship between spouses is regulated by matrimonial property law. Matrimonial property law has two parts. Firstly, it regulates the rights and duties of the spouses. This is the so-called "primary regime" and is contained in Art. 212-224 Belgian Civil Code. These rules are applicable to all spouses, whatever the chosen matrimonial property regime (Art. 212 Belgian Civil Code). The primary regime provides a minimum of solidarity between the spouses and protects a measure of autonomy for both of them. Secondly, the "secondary regime" regulates the different matrimonial property regimes and describes the rules whereby the spouses can make a matrimonial (prenuptial or postnuptial) agreement (Art. 1387-1474 Belgian Civil Code). It also regulates the legal matrimonial property regime (one of community of properties). Matrimonial property law is applicable for the duration of the marriage.

Upon separation, the property relationship is still regulated by matrimonial property law. Art. 223 Belgian Civil Code regulates the applicable system in the case of separation.

Matrimonial property law regulates the liquidation of the matrimonial regime without any distinction between dissolution by death, divorce and annulment.

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

According to the Napoleonic Code (1804), the legal matrimonial property regime was one of limited community of property. The wife lacked legal capacity. The husband managed the community exclusively. The Law of 20th July 1932 introduced the primary regime and improved the position of the wife. The Law of 30th April 1958 suppressed the legal incapacity of the wife and introduced equality between husband and wife. The Law of 14th July 1976 made this equality effective by modifying the secondary matrimonial regime. The reform of 1976 introduced a balance between the autonomy of each spouse and the solidarity between both of them. It modified the primary regime, mainly the protection of the family home. It also reformed the secondary regime, introducing a modified regime based on the community of acquests during the marriage, managed by both spouses on the basis of equality. The invariability, in principle, of the matrimonial regime was eased by the law of 9th July 1998. The interference of the court, initially required, has been suppressed by the law of 14th August 2008.

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

As regards the law of matrimonial property, two recent proposals can be reported.

Proposal *dd.* 18 October 2007, submitted by Ms Christine Defraigne, amending Art. 1213 Belgian Judicial Code (*Gerechdelijk Wetboek*), concerning the settlement of the matrimonial property regime.¹ The aim of this bill is to impose a time limit for the liquidation/distribution of the matrimonial regime, so that parties know what they can expect. In fact this means the establishment of a “procedure calendar” (compare with Art. 747 Belgian Judicial Code in the legal procedure of liquidation/distribution).

Proposal *dd.* 6 March 2008, submitted by Mr Guy Swennen, concerning the institution of a divorce liquidator to make the liquidation/distribution upon divorce more flexible.² Following the reform of the Belgian law of divorce, the proposer of this bill also wishes to reform the phase of liquidation/distribution after divorce. In this bill it is proposed that, rather quickly after the liquidation/distribution has been initiated, an expert – the divorce liquidator – takes a position which has to be formulated in an expert report. The parties can make remarks on the report of the divorce liquidator. There would be a strict time regime. It is proposed that when the spouses have no agreement concerning the liquidation and distribution of their assets, irrespective of who is the claimant, or whether they jointly ask for a distribution, the court would have to appoint an expert (a lawyer or notary) who has to develop a complete proposal within six months (or nine, in the case of complicated files) concerning liquidation and distribution and deliver it to all parties involved and to the judge at the end of that period. As from then, the parties have one month to point out their objections to this proposal. The judge will pronounce judgment within a month thereafter. In this way the duration of the liquidation and distribution process on divorce is restricted to approximately a year in comparison to the current system, where this can last for many years.

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

Registered partners are subject to a primary regime (Art. 1477 Belgian Civil Code). This primary regime is limited compared to that for spouses and concerns only the protection of the family home (See Question 10), contributions to the costs and expenses of the family household (See Question 8), liability for the household debts (See Question 9) and urgent and provisional measures (See Question 12).

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?

No. Matrimonial property law regulates the matrimonial property relationship between spouses to a large extent. While it does not do so exclusively, there is little room for the mechanisms of property law.

All spouses are submitted to the primary regime by the mere fact of marriage. With regard to their secondary regime, they have a choice between different regimes. If they choose for the regime of separation of property, they will be subject to a regime that is close to the regime of joint ownership (See Question 129-160).

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

¹ *Parl.St.* Senate, 52S4-302/001, adoption of 51S3-1834/001.

² *Parl.St.* Senate, 52S4-621/001.

These are independently regulated matters. In the case of the death of a spouse, first the matrimonial regime is dissolved and the assets are divided between the surviving spouse and the estate of the deceased spouse.

The devolution of the estate (including the personal assets of the deceased spouse and his or her part of the matrimonial regime) is regulated by the law of succession (Art. 745bis-745septies Belgian Civil Code).

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 primary regime includes the rights and duties of the spouses with certain property aspects and the secondary regime concerns the specific property relationship of the spouses.

B. GENERAL RIGHTS AND DUTIES OF SPOUSES CONCERNING HOUSEHOLD EXPENSES, TRANSACTIONS IN RESPECT TO THE MATRIMONIAL HOME AND OTHER MATTERS IRRESPECTIVE OF THE SINGEL 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”.

The primary regime not only imposes several personal obligations on both spouses, but also imposes important proprietary obligations such as the obligation of each of the spouses to contribute to the household expenditure.

Art. 213 Belgian Civil Code provides that assistance between spouses is obligatory.³ Accordingly, spouses have a duty to give necessary support to one another. This obligation differs from the common maintenance obligation since necessity is not required in relation to Art. 213 Belgian Civil Code.⁴ This obligation is carried out in kind in the matrimonial home. When the obligation cannot be carried out in kind, e.g. because of actual separation, the duty to lend assistance is realized by means of a maintenance payment.⁵

Art. 221 Belgian Civil Code defines the scope of the contribution. Every spouse has to contribute to the marriage expenditure according to his or her ability. As the obligation to lend assistance is formulated in Art. 213 Belgian Civil Code, it also comprises a legal, reciprocal obligation. Accordingly, a failure to comply with this obligation by one of the spouses will not entitle the other spouse unilaterally to stop performing his obligation to contribute.

The provision that each spouse must contribute according to one's ability specifies that each of them needs to contribute 'to its possibilities', in particular (the possibility to) income from earned income and personal assets as well as the performance of efforts in kind such as the completion of domestic tasks or assistance in the professional practice of one of the spouses. The Court of Cassation recently confirmed that the presiding Judge, when giving a decision in interlocutory proceedings within the scope of provisional measures, needs to make an estimate taking into account not only the *actual* income of the maintenance creditor, but also

³ W. Pintens, B. van der Meersch and K. van Winckelen, *Inleiding tot het Familiaal Vermogensrecht*, Leuven: Universitaire Pers, 2002, p. 56, No. 71.

⁴ Cass. 18.10.1963, *Pas.* 1964, I, 179.

⁵ Brussels 13.01.2005, *NjW* 2005, 707, note Verschelden.

his *potential* to acquire an income.⁶ The court also takes account of the property which does not directly belong to a spouse, but which belongs to the capital of a legal person of which the spouse actually has control. Accordingly, the court may give attention to the reserved profits in a private company of which the spouse is a director and also the majority shareholder.⁷

An increase in the potential to contribute results in a proportional increase in the contribution required; a decrease results in a proportional reduction. A spouse who contributes more than is necessary has recourse against the other spouse to secure repayment.

Costs and expenses of the marriage comprise all the costs of married and family life, not only the personal maintenance of the spouses, but also the maintenance and the education of the children (all children who are part of the family must be taken into account, irrespective of whether they descend from one or from both spouses). This includes all costs in private life such as housing, clothing, feeding, leisure activities and holidays. All expenditures caused by common acquisition, daily costs and maintenance of a family home are classified as marriage expenditures.⁸

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

Usual household debts are considered to be essential in the matrimonial context and, therefore, automatically engage each of the spouses and hold them jointly liable.

The joint liability for housekeeping debts as described in Art. 222 Belgian Civil Code applies to all debts contracted for the household, even if they are not necessary.⁹ These include: rent and rental expenditure, fuel, gas and electricity, clothing, food and domestic articles including the installation costs of e.g. a kitchen,¹⁰ but also the premiums for a familial insurance policy and the balance in a bank account if this was used for domestic expenditure.¹¹ Hospitalization periods for the care of a spouse are also considered as debts contracted for the family.¹² Investments and professional activities are not included.

There are household debts as long as there is a household. This is in principle no longer the case with *de facto* separation.¹³ Nevertheless, it is accepted that a household still exists when one spouse lives together with the children, when a spouse proves that the other is at fault in respect of the origin or of the continuance of the actual separation, or when a contracting party could not be informed of the actual separation and therefore relied upon external appearances. The burden of proof lies with the spouse rejecting joint liability since the marriage creates a presumption of cohabitation and of a common household from which a presumption of joint liability as long as the marriage exists can also be deduced.

Art. 222 para. 2 Belgian Civil Code provides that there is no joint liability when the incurred debts are exorbitant in view of the means of the family. The exorbitance is evaluated *in concreto*. Although the law refers explicitly to the means, it is considered that the evaluation

⁶ Cass., 27.11.2007, *T.Fam.* 2008, 62, note P. Senaevé.

⁷ Cass., 27.06.1980, *Pas.* 1980, I, 1367.

⁸ Cass., 22.04.1976, *Arr. Cass.* 1975, 249.

⁹ W. Pintens, B. van der Meersch and K. van Winckelen, *Inleiding tot het Familiaal Vermogensrecht*, Leuven: Universitaire Pers, 2002, p. 92, No. 153.

¹⁰ Cass., 14.05.2004, *Rev. trim. dr. fam.* 2005, 579, note Tainmont.

¹¹ Brussels, 18.11.1986, *J.T.* 187, 176.

¹² Bergen, 21.02.2000, *J.T.* 2001, 390, *Rev. trim. dr. fam.* 2001, 172, note Tainmont. Implicit: Cass., 15.10.1999, *Div. Act.* 2000, 18, note De Wilde D'Estmael.

¹³ Antwerp, 02.03.2005, *T.F.R.*, 2005, 716, note Crommen.

must be made by means of the standard of living, since the third contracting party will generally have no knowledge of the family's means of support.¹⁴

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".

There are protective measures as regards the matrimonial home.¹⁵ First of all, the family home and the household effects are protected since the consent of both spouses is required to deal with these assets. Art. 215 Belgian Civil Code guarantees the enjoyment of the family home to both spouses and their children, even if only one of the spouses has property or tenancy rights concerning the family home. The family home is protected against disposition or encumbrance by one spouse without the consent of the other.

Art. 215 Belgian Civil Code protects the main family home and the household effects. Only a family home in which a spouse has a right *in rem* (property, usufruct, use, residence, building lease, ground lease) or a tenancy right is protected. A family home which is occupied on the basis of other agreements such as e.g. a loan, does not enjoy any protection. Moreover, a family home which belongs to a company of which both or one of the spouses is a (majority) shareholder, and which the spouses have only the right to use, does not enjoy protection as spouses do not have property rights therein. The same rule applies to the rights in a service house/official residence, since this element is part of an employment contract and the spouse must be free to terminate the contract.¹⁶

The law protects the 'immovable property that is being used as the most important house'. From this description three elements can be extracted:

1. A family home is protected only if it is established in an immovable property. The family home established in a movable property such as a caravan or a boat does not have any protection. The immovable property, however, has to be considered in a wide sense. Both the places which are effectively used as a family home and the accessories of the immovable property, such as the garden and the annexes, are protected.
2. Art. 215 Belgian Civil Code protects only one family home, that is the house which is effectively inhabited by the family members. If spouses own several houses, then the one which is really used as the main family home needs to be chosen. The legislature did not put forward any criteria to assist the court. The court will need to look for the house which has the most important role in family life.
3. The family home must effectively be used as a family home.

The requirement of consent is accompanied by two types of remedies. The first is a sanction which may be invoked if one spouse acts without the prescribed consent of the other. In that case the other spouse is entitled to ask the court to nullify the forbidden act. Accordingly, it is not permissible for one spouse to encumber his or her rights without the approval of the other spouse or to dispose *inter vivos* of any of his or her rights in the family home, nor to encumber his or her property with a mortgage. By 'dispose', the legislature means any

¹⁴ Antwerp, 08.02.1999, *T.B.B.R.* 2000, 183.

¹⁵ See e.g. E. Vieujean, "Protection du logement principal de la famille contre le conjoint", in: *Le logement familial*, Collection Famille et droit, Story Scientia, 1999, pp. 35-112. M. Verwilghen, "La protection du logement familial", *Rép.Not.*, Les régimes matrimoniaux (La réforme de 1976), I, pp. 243-276.

¹⁶ W. Pintens, B. van der Meersch and K. van Winckelen, *Inleiding tot het Familiaal Vermogensrecht*, Leuven: Universitaire Pers, 2002, p. 63, No. 81.

positive act which could result in pushing aside the occupation of the family home. The second type of remedy is required for the situation where a spouse is unable or does not want to give the required consent. In the case of the incapacity or illness of one spouse, or if one spouse refuses to cooperate without a sound reason or engages in bad management or fraudulent behaviour, the other spouse may ask the court for permission to act alone, or even, more generally, to be substituted in the first spouse's management rights.¹⁷

During marriage the tenancy rights in the family home belong to both spouses together, even if only one of them entered into the tenancy contract, and even if he or she did so before marriage. It means that the landlord, who entered into a tenancy agreement with one spouse or with a future spouse, has, besides his contractual tenant, also a legal tenant under a legal fiction. Both spouses possess equal and undivided tenancy rights. The result is that terminations, notifications and writs must be sent to or be served on each spouse individually or must originate from both spouses together.

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

As already mentioned in Question 10, Art. 215 Belgian Civil Code protects the main family home and the household effects. Therefore it is not permissible for one spouse to encumber unilaterally his or her rights in the household effects or to dispose *inter vivos* any of his or her rights in the family home, nor to encumber his or her property with a mortgage. The approval of the other spouse is required. The term 'to dispose' must be interpreted widely.

The legislator did not define the notion of 'household effects'. Based on Art. 534 Belgian Civil Code we can assume that it means the following: all furniture and all other assets that the spouses use for their household and for the decoration of their home. Kitchen equipment, a car and a motorbike are also recognized as household effects. Collections of art of a certain value and books are not covered by this notion.

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...)?

According to Art. 224 Belgian Civil Code the court of first instance is entitled to consider specific acts constituting summary offences under prohibitive provisions of the primary regime to be void.

Under Art. 224 para. 1 No. 2 Belgian Civil Code, acts done by one of the spouses contrary to a prohibition to alienate or to mortgage, as determined under Art. 223 Belgian Civil Code after the transcription of the petition or of the court order, are voidable. As the text of Art. 224 Belgian Civil Code refers to the transcription of the petition or of the court order in the registers of the land and mortgage registry, which concern only immovable property, only legal acts concerning immovable property are intended to be voidable. Legal acts as regards movable property cannot be invalidated. It can only be decided that these acts may not be invoked against the other spouse. For other parties, only penalties are possible.

Gifts *inter vivos* and (personal) guarantees may be nullified if they endanger the interest of the family.

The harmed spouse can also receive compensation, both when he or she has not sought to invalidate the particular act or when this was rejected or granted. The request to invalidate or

¹⁷ Art. 220-221, 1420-1421, 1426 Belgian Civil Code.

to compensate must be made, under penalty of cancellation, within one year of the day on which the operation has come to the knowledge of the spouse applicant. If the spouse dies before the cancellation took place, his or her heirs have a new period of one year as from the day of death.

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

The general law does not prohibit a mandate between spouses. Art. 219 Belgian Civil Code also provides explicitly that every spouse is entitled to give the other a general or particular mandate during the marriage to represent him or her in the exercise of his or her authority as stipulated in his or her matrimonial property regime. Art. 219 Belgian Civil Code, however, adds nothing to this common right.

In the case of the incapacity or illness of one spouse, or if one of the spouses refuses to cooperate without a sound reason or engages in bad management or fraudulent behaviour, the other spouse may ask the court for permission to act alone, or even, more generally, to be substituted in the first spouse's decision-making authority (Art. 220-221, 1420-1421, 1426 Belgian Civil Code). In the worst case scenario, a judicial separation or property might be requested (Art. 1470-1474 Belgian Civil Code).

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

A purchase agreement or a contract of sale between spouses is principally unenforceable (Art. 1595 Belgian Civil Code). There are, however, four exceptional cases in which a contract of sale between spouses is permitted:

- when one of the spouses transfers assets to the other spouse from whom he or she is judicially divorced, in order to settle his or her rights;
- when the transfer from the husband to his wife, even if they are not divorced, has a legitimate cause, such as a re-investment of her alienated immovable property, if the immovable property does not fall within the community property;
- when the wife transfers assets to her husband for the payment of an amount of money which she promised him as a matrimonial asset, and when there is no community of property;
- when one of the spouses buys the share of the other spouse in an undivided asset at a public sale or with authorization of the court.

These four exceptions are themselves subject to the rights of the heirs of the contracting parties, if there is indirect benefit.

When the separation of property regime applies, one spouse can buy a share in one or more goods of the other only at a public sale or with the authorization of the court (Art. 1469 para. 2 Belgian Civil Code).

C. MATRIMONIAL PROPERTY REGIMES

C.1. General issues

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

The spouses are entitled to make a prenuptial agreement at their discretion (Art. 1387 Belgian Civil Code). This freedom to stipulate the content of their prenuptial agreement is considered as a particular application of the principle of the autonomy of the will. There are certain restrictions, to which we will refer in our answer to Question 192.

16. What regime is applicable, using the list below,¹⁸ if spouses have not made a contract (default regime) or are not allowed to make a contract or are not allowed to make a contract with binding effect?

The legal regime applied *ex lege* is the Community of property regime:

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 Civil Code proposes two models:

1. A community of property that can be extended to a universal community (Art. 1454-1465 Belgian Civil Code). See Question 20–56.
2. Separation of property (Art. 1466-1469 Belgian Civil Code). See Question 129–160.

However, spouses can also introduce modifications to the legal regime which have not been stipulated in the law.

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

The legal regime consists of a limited community, i.e. a separation of property with a community of acquests. The legal regime looks for a middle course between solidarity and party autonomy. Through the institution of a community of property the solidarity between spouses is emphasised. Moreover, by putting forward equality between spouses as far as the administration of the community property is concerned, the spouse without an earned income who contributes in kind, although not in money, to building up the community property is also assigned with a decision-making authority. This means that the capacity to contract does not have a dead character.

In the legal regime, there are three categories of property. Next to the community property, each spouse has his personal assets.

The community property is the residual category and consists of the assets as enumerated in Art. 1405 Belgian Civil Code such as earned income, income from capital, income and interest from each spouse's personal property and donations and bequests made to both spouses.

The personal assets of each spouse include assets which were acquired before marriage (Art. 1399 Belgian Civil Code), assets acquired for no consideration during marriage (Art. 1399 Belgian Civil Code), the accessories (Art. 1400 Belgian Civil Code) and the strict personal assets (Art. 1401 Belgian Civil Code) such as clothes and objects for personal use, literary, artistic, industrial property rights, the right to recover from personal, physical, and moral damage, the entitlement to a pension or annuity or similar benefit which one of the spouses holds alone, and membership rights.

Although the spouses' personal property has become more important, the legal regime remains a community regime given the residual character of the community property.

The regime of pure separation of assets reduces the proprietary consequences of marriage to a minimum. On the one hand, everything remains separated such as property, debts and the administration of assets, but on the other hand some proprietary implications such as e.g. the duty to contribute to the marriage expenditures and the education of the children are already settled in the primary regime. Thus, the legislator needed only four articles (Art. 1466-1469

¹⁸ For an explanation of this list, see the document: CLASSIFICATION OF MATRIMONIAL PROPERTY REGIMES PROPOSED BY THE CEFL.

Belgian Civil Code) to describe the pure separation of assets. These articles can be found under the title 'Stipulated separation of assets'. These rules apply to all cases where there is separation of assets, irrespective of its cause. Accordingly, the rules apply not only if spouses have opted for a regime of separation of assets in their prenuptial agreement or in a contract of modification, but also when the separation of assets is imposed judicially or when spouses are separated from bed and board. Spouses are entitled to add particular stipulations to a pure separation of assets, such as stipulations regarding the furnishing of proof between the spouses or presumptions of property, stipulations concerning the distribution of savings or the addition of a company of acquests.

Spouses can opt for the regime of pure separation of assets by referring to Art. 1466-1469 Belgian Civil Code in a pre- or postnuptial agreement or in the contract of modification. In a regime of separation of assets there are only two categories of property, the personal property of each spouse. Each spouse remains the owner of what he or she owned before the marriage and of what he or she obtains during the marriage, irrespective of the manner of acquisition. All income and savings will thus remain their own property. There is no community property. At the most, a joint ownership is created. The undivided shares of each of the spouses belong to their personal property. To be considered as the owner, it is sufficient to acquire the assets in one's own name, even if they are paid for by the other spouse.¹⁹ Art. 1468 para. 2 Belgian Civil Code also provides that movable property of which it cannot be proved to be the property of one spouse will be considered as undivided between the spouses.²⁰ This legal presumption of undivided assets also applies in relation to creditors.

The community of property can also be extended to a universal community. Spouses can agree that their own present and future movable or immovable property, as described in Art. 1399 Belgian Civil Code, will be brought entirely or partially into the common property (Art. 1452 para. 1 Belgian Civil Code). When all present or future goods, with the exception of the ones which are personal and of the rights which are exclusively bound to that person, will be brought into the marriage, then a regime of general community of property arises (Art. 1453 para. 1 Belgian Civil Code).

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.

No statistical data available.

¹⁹ Antwerp, 01.03.1989, *Rev. not. b.* 1990, 165; Antwerp, 16.06.2004, *NjW* 2005, 924.

²⁰ See e.g. Gent, 27.5.2004, *T.B.B.R.* 2006, 372; Juge des Saisies Liege, 16.11.2005, *J.L.M.B.* 2006, 471.

Please answer the following specific questions ONLY with regard to the following two regimes: (1) the default regime and (2) a regime, whether or not regulated by statute, which next to the default regime is most frequently used.

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 legal regime involves three categories of property: the personal property of each spouse and a limited community, i.e. a separation of property with a community of acquets. The different categories of assets involved are set out in Question 22 and Question 25.

The legal regime seems to correspond mostly to the situation of an average family where spouses do not possess much property in the beginning and where the earned income of both spouses is the main source of income and of the community property. Personal property applies to cases in which spouses do have some property before marriage and do acquire some assets by gratuitous title during marriage.

The legal regime looks for a middle course between solidarity and party autonomy. Through the institution of a community of property the solidarity between spouses is emphasised. Besides, by advancing the equality between spouses as far as the administration of the community property is concerned, the spouse without an earned income, who in fact does not help, although not in money, to build up the community property, is also assigned a decision-making authority. The association of the spouses is restricted in a well-balanced way thanks to a well-balanced composition of the property of the husband and wife and of the community property.

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

Both personal and community property constitute a distinct property with rights and liabilities and a specific regulatory regime.

The community property is quite similar to, but needs to be distinguished from, the notion of joint ownership. Firstly, the community property is a purposive one. This means that it exists as long as the marriage subsists, except in cases of a modification of the matrimonial property regime, a judicial separation of assets or a judicial separation. Spouses, however, need to persuade one another if they are to alter their matrimonial property regime. If they do not, they are forced to respect the regime, unless a spouse is able to satisfy the legal conditions to claim a judicial separation of assets. Secondly, the community property is also separate property, which means that it is separated from the property of the husband and wife (and not from the person of the husband and wife). It therefore again differs from the concept of joint ownership. A co-owner is able to dispose of his or her property and thus to dispose of his or her share in the joint ownership. This possibility is excluded in respect of the community property, which in principle exists as long as the marriage subsists. Thirdly, other rules apply as far as the administration of the community property and of the joint ownership are concerned.

However, the community property is separated only partially since it does not have corporate personality. Consequently, it is unable to appear in court, neither as a plaintiff nor as a

defendant, and does not have any debts. Creditors who want to pursue a claim against the community property are therefore unable to sue the community property directly in court. Instead, spouses are to be summoned. Likewise, only the spouses can serve a summons on a third party.²¹

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

According to Art. 1399-1400 Belgian Civil Code the personal assets of each spouse are divided into two categories: personal assets because of their origin and personal assets because of their nature. No distinction is made between movable and immovable property.

The former category of assets consists of all movable and immovable, corporeal and incorporeal property and all claims belonging to the spouses before marriage, and the assets acquired for no consideration during the marriage, in particular assets acquired by way of a gift and by way of inheritance (Art. 1399 Belgian Civil Code).

The latter category of assets comprises the accessories (Art. 1400 Belgian Civil Code) and the strict personal assets (Art. 1401 Belgian Civil Code).

The accessories are assets which are used for the benefit of another asset (Art. 1400 Belgian Civil Code). These comprise:

- 1° the accessories of one's own immovable property or immovable rights;
- 2° the accessories of one's own negotiable instruments;
- 3° property transferred to a spouse by a relative in the ascending line;
- 4° a share acquired by a spouse in a property of which he is already a co-owner;
- 5° property acquired through substitution, investment or reinvestment of personal property;
- 6° tools and equipment used in a professional practice;
- 7° rights attached to a personal insurance policy concluded by the beneficiary him or herself, which he or she acquires at the spouse's death or after the dissolution of the regime.

The strict personal assets comprise (Art. 1401 Belgian Civil Code):

- 1° clothing and objects for personal use;
- 2° literary, artistic and industrial property rights;
- 3° entitlement to compensation for personal, physical or moral damage;
- 4° entitlement to a pension, annuity or similar benefit, which one of the spouses holds alone;
- 5° membership rights.

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

Pursuant to Art. 1400, No. 5 Belgian Civil Code property acquired through the substitution of personal property is also part of the spouse's personal property (See Question 22). This article applies the theory of real subrogation, implying that property acquired as a result of the alienation of personal property, or because of the loss of personal rights, replaces the alienated or lost asset (see also Question 24 for reinvestment).

Substitution takes place in the case of an exchange of movable or immovable property or rights (e.g. the acquisition of shares in exchange for a contribution to the company, the exchange of old for new shares, compensation paid by insurance companies in the case of fire, the destruction of or damage to personal property which replaces the perished or damaged

²¹ Cass., 05.09.2006, *Rev. trim. dr. fam.* 2007, 265.

property, and compensation for expropriation). Property acquired during marriage in substitution for existing property obtains the status of the replaced property.

As far as the additional payment in case of exchange is concerned, Art. 1400, No. 5 Belgian Civil Code applies only if the additional payment is less important than the exchanged property. If it is not, the acquired property will belong to the community property, which will, upon the dissolution of the marriage, owe compensation to the spouse amounting to his or her exchanged personal property.

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

Pursuant to Art. 1400, No. 5 Belgian Civil Code property acquired through the investment or reinvestment of personal property is also part of the spouse's personal property (See Question 22). This article applies the theory of real subrogation, implying that property acquired as a result of the alienation of personal property or because of the loss of personal rights replaces the alienated or lost asset.

The investment of personal assets implies the acquisition of assets with one's own capital. Reinvestment implies that property is acquired with money from the alienation of personal assets. The legislator distinguishes between movable and immovable (re)investment (Art. 1402-1404 Belgian Civil Code).

In the case of immovable investment or reinvestment, an immovable property (or right) is acquired with one's own capital or with money from the sale of personal property respectively. In order to also qualify the new property acquired by means of reinvestment as one's own, two conditions need to be fulfilled. The material condition requires that the spouse has paid for more than half of the acquired property with the proceeds of the alienation of his or her own immovable asset, or with money of which its own character has been adequately established. The formal condition requires that the spouse declares that the purchase occurs in order to serve him or her as a reinvestment and that more than half of the acquisition has been paid for with the proceeds of the alienation of his or her own immovable property, or with money of which its own character has been adequately established. This declaration must take place in the notarial deed of sale. This double declaration is a formal requirement without which the reinvestment and its consequence (the acquired asset's own character) cannot be invoked against the other spouse or against third parties, who will be able to prove the contrary at any time. It is required, however, that only the acquisition was funded with more than half of one's own capital. Consequently, the consent of the other spouse is not required. The remaining sum might also be paid with common funds, in which case compensation will be owed to the community property upon the dissolution of the regime. A spouse referring to reinvestment needs to prove the property's own character. Art. 1399 Belgian Civil Code applies (See Question 28 and 29).²²

Immovable reinvestment requires that the spouse immediately possesses his or her own capital or personal property amounting to half of the purchase price. The legislator has remedied this shortcoming through the introduction of the early immovable (re)investment (Art. 1403 Belgian Civil Code). In this case, the asset is bought completely with common money, but will still belong to the personal property if more than half is repaid within a period of two years after the notarial deed. If not, the property is definitely acquired for the benefit of the community property, in which case the consent of the other spouse is also required. Moreover, the spouse having the intention to acquire the ownership of the property needs to make an explicit statement of early reinvestment in the authentic deed of sale.²³

²² Gent, 10.12.1999, *T. Not.* 2002, 696

²³ W. Pintens, B. van der Meersch and K. van Winckelen, *Inleiding tot het Familiaal Vermogensrecht*, Leuven: Universitaire Pers, 2002, p. 132 et seq.

Movable (re)investment implies the (re)investment of movable or immovable assets or right (or the investment of one's own capital) into movable assets or rights (Art. 1404 Belgian Civil Code). For this kind of reinvestment no formalities are required. It is enough to prove that the acquisition occurred with one's own capital or with the proceeds of the sale of personal property. Evidence has to be produced in accordance with the provisions of Art. 1399, para. 2 and 3 Belgian Civil Code (See Question 28 and 29). Early reinvestment does not apply to movable property.

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

Art. 1405 Belgian Civil Code sets out a number of specific community assets and defines, furthermore, the community property as a residual category. The specific community assets comprise:

- income from professional activities;
- profits, income and interest from personal property;
- gifts and legacies to both spouses.

Art. 1405, No. 4 prescribes that all assets that have not been proved to belong to one of the spouses in pursuance of a statutory provision (or all assets which are not mentioned in Art. 1399-1404 Belgian Civil Code) are common and belong to the community of property.

As mentioned above, income from professional activities is one of the specific community assets. For this reason, in the legal regime spouses' earnings always and immediately belong to the community and will never be part of one spouse's property. The income must be interpreted widely and comprises income from employment, income or compensation replacing or supplementing earned income, and income from public or private mandates (Art. 1405, No. 1 Belgian Civil Code).

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

Under the legal regime, all income of both spouses always and immediately belongs to the community of property. It has been explained in Question 25 that, for the purposes of the categorisation of the assets, income must be interpreted widely and comprises income from employment, income or compensation replacing or supplementing earned income, and income from public or private mandates. Therefore, pension rights will always be community assets as they replace earned income. However, only the payments which are made during the marriage belong to the community of property. On the other hand, the entitlement to a pension belongs to the personal property of one of the spouses.

As far as insurance rights are concerned, an important decision by the Constitutional Court of May 26th 1999 must be taken into account. In pursuance of that decision, a distinction must be made between an ordinary life insurance policy, on the one hand, and a life insurance policy which is at the same time a savings transaction on the other. In the case of ordinary life insurance, where the capital is distributed upon the day of the death of the insured person, the capital belongs to the beneficiary's personal property. If a life insurance policy also implies a savings transaction, e.g. when the capital is distributed *either* upon the day of the death of the insured person, *or* when he or she reaches a particular age, the distributed capital will be considered to belong to the community property, since such life insurance is also intended as a supplementary income. If, in that case, the capital has not yet been distributed on the day of the dissolution of the community property, a distinction needs to be made between the right to surrender the policy, on the one hand, and the surrender value, on the other. The former belongs to the personal property, the latter to the community property.²⁴

²⁴ Brussels, 09.12.2000, *Rec.gén.enr.not.* 2001, 206, note Rousseau.

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?

Gifts or legacies normally belong to the beneficiary's property in accordance with Art. 1399 Belgian Civil Code (See Question 22). Art. 1399 Belgian Civil Code, however, needs to be read together with Art. 1405, No. 3 Belgian Civil Code, according to which the property donated or bequeathed to both spouses or to one spouse on condition that the property will be common, belongs to the community property. However, a gift or bequest to both spouses will belong to the community property only as long as the donor or testator did not specify the specific share of each spouse in the donated or bequeathed property. If he or she has done so, Art. 1405, No. 3 Belgian Civil Code does not apply and each share will belong to the property of the respective spouse pursuant to Art. 1399 Belgian Civil Code.

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

Between spouses (and their heirs) the categorisation of personal or community assets can be proved by all means, including witnesses, presumptions and general knowledge (Art. 1399 para. 3 Belgian Civil Code).²⁵

Spouses are also able to insert specific presumptions of ownership in a pre- or postnuptial agreement, provided that these apply only between the spouses and do not apply as regards third parties, who can at any time rely on Art. 1399 para. 2 Belgian Civil Code (See Question 29).

As mentioned in Question 25, Art. 1405, No. 4 Belgian Civil Code involves a rebuttable presumption in favour of the community property, providing that all assets, in the absence of conclusive evidence of their own character, are considered to belong to the community property.

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

Furnishing evidence is much stricter as far as third parties are concerned. Art. 1399 para. 2 Belgian Civil Code gives an exhaustive enumeration of possible evidence:

- an inventory drawn up as authentic according to Art. 1175 et seq. Belgian Judicial Code. Evidence to the contrary cannot, in principle, be provided against a regular inventory. Only a procedure alleging forgery will be allowed. The inventory must, however, be drawn up *in tempore non suspecto*: property acquired before marriage needs to be drawn up before marriage; property acquired during marriage needs to be drawn up as soon as possible after acquisition;
- proof of regular possession when applying the rule "possession amounts to title", which implies continual, continuous, undisturbed, public and unambiguous possession (Art. 2229 Belgian Civil Code). Given the actual merger of the spouses' property, this possession will often be unambiguous so that evidence to the contrary can easily be provided;
- titles with a fixed date. By this both notarial deeds and private documents having a fixed date, according to Art. 1328 Belgian Civil Code, are understood. Art. 1328 Belgian Civil Code provides for a fixed date on the day of registration, on the day of the death of the one who signed the act or on the day on which the main content has been established in an act drawn up by public servants, such as the minutes of a seal or those of an inventory;
- records of public services describing their own character (dated before the marriage);

²⁵ Cass., 07.11.1983, R.W. 1984-85, 1124.

- statements in regularly held or drawn up registers or records, or specifications imposed by law or ratified through use, e.g. bank statements, specifications of bill brokers, notification of inheritance and invoices.

All these pieces of evidence need to allow the property to be individualised and to have its own character determined. All other evidence like witnesses, presumptions or that which is generally known are not allowed.

It is disputed whether or not a list of personal assets included in or attached to the pre- or postnuptial agreement has any evidential value as against third parties. Some of the case law and doctrine consider a similar list to be a title with a fixed date and to have evidential value as long as evidence to the contrary has not been furnished.²⁶ Other case law and doctrine state that the court has a sovereign power of judgment. Even the fact that the list is included in a notarial deed, in particular in a pre- or postnuptial agreement, would not seem to help, because the civil-law notary does not make the assessments as regards those assets by himself, since he is not able to verify the authenticity of those declarations and because the list cannot be an infringement of the law of evidence.²⁷

As mentioned in Question 25, Art. 1405, No. 4 Belgian Civil Code involves a rebuttable presumption in favour of the community property, providing that all assets, in the absence of conclusive evidence of its own character, are considered as belonging to the community property.

30. Which debts are personal debts?

As far as personal debts are concerned, there is a particular parallel with the personal assets of each of the spouses. The law also gives an exhaustive enumeration of the spouses' own debts in Art. 1406 and 1407 Belgian Civil Code. Debts whose own character has not been proved are deemed to be common (Art. 1408 para. 7 Belgian Civil Code).

The personal debts of each spouse are also divided exhaustively into two categories: personal debts because of their origin and personal debts because of their nature.

The former category consists of debts dating from the period before marriage, and debts arising out of inheritances, bequests and donations which are obtained during marriage. The legislator thereby applies the adage "*Ubi emolumentum ibi onus*". Because the assets and claims which spouses possess before marriage or acquire during marriage for no consideration belong to one spouse's property in accordance with Art. 1399 para. 1 Belgian Civil Code, debts charging those assets are also their own.

The latter category comprises the contractual and (quasi-)delictual debts incurred by a spouse during marriage. Art. 1407 Belgian Civil Code enumerates exhaustively the debts which belong to one spouse's property because of their nature:

- Debts incurred by one of the spouses for the exclusive purpose of his or her personal property;
- Debts arising from a personal or commercial security provided by one of the spouses in an interest other than the one of the community property;
- Debts by virtue of forbidden professions or forbidden acts;

²⁶ Antwerp, 10.1.1994, *R.W.* 1994-95, 571, note Casman/Verbeke; Brussels, 16.12.1997, *Pas.* 1997, II, 19.

²⁷ W. Pintens, B. van der Meersch and K. van Winckelen, *Inleiding tot het Familiaal Vermogensrecht*, Leuven: Universitaire Pers, 2002, p. 127-128, No. 231; Liège 21.12.2001, *J.T.* 2002, 519; Antwerp, 17.06.2003, *NjW* 2004, 164.

- Debts arising from a criminal sentence or from a wrongful act committed by one of the spouses.

Only the capital of debts is included in this provision; interest accrued during marriage is paid at the expense of the community property (Art. 1408 Belgian Civil Code).

31. Which debts are community debts?

Community debts are enumerated in Art. 1408 Belgian Civil Code:

- Debts incurred by both spouses, jointly or severally;
- Debts incurred by one of the spouses for the benefit of the housekeeping and the education of the children;
- Debts incurred by one of the spouses for the purpose of the community property;
- Debts arising out of donations or bequests which belong to the community property;
- Interest on personal debts;
- Maintenance debts towards relatives in one of the spouse's direct line;
- Debts that have not been proved to belong to one spouse's property in accordance with a particular statutory provision.

The list is not exhaustive: debts of which their own character has not been proved, either because the law does not state that they are personal debts, or because it cannot be proved that they satisfy the legal conditions to be qualified as personal debts, are deemed to be community debts (Art. 1408 *in fine* Belgian Civil Code).

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

Personal debts can in principle be recovered from the property and from the earnings of the spouse debtor (Art. 1409 Belgian Civil Code). The personal property of the other spouse may never be held liable for damages. On the other hand, the community property will in exceptional cases also serve partly as security for one spouse's creditors.

The recoverableness of personal debts against the property of the spouse debtor is quite logical. However, Art. 1409 Belgian Civil Code also makes the personal debts recoverable against the spouse debtor's earnings, including all income from employment or from capital. Although these belong to the community property from their inception, they nevertheless belong to the personal creditors' security. According to Art. 7 and 8 Belgian Law of Mortgages (Hypotheekwet / Loi hypothécaire), the debtor has to guarantee his debts with all his or her assets, regardless of their nature and the time at which those assets were taken up in his or her property. The marriage may not be a means by which to make oneself impecunious.

The legislator did not create an order of ranking between personal property and earnings so that a creditor is not bound to recover his or her claims first against his or her debtor's personal assets before being able to recover his or her claims against his or her debtor's earnings. The question has arisen whether earnings lose their character as earnings at the moment of collection, or whether these can be considered as earnings without any limitations. Another question is that of when earnings become gains. A part of the doctrine defends a very restrictive point of view and argues that debts are recoverable against earnings only as long as these are not collected.²⁸ A more balanced view accepts the recoverableness as long as

²⁸ e.g. Delière, "Le régime légal: le passif et les droits de créanciers", in: *Sept leçons sur la réforme des régimes matrimoniaux*, Liège: Université de Liège - Faculté de droit, 1977, p. 104, No. 36.

earnings are individualized. Once these are merged with community assets, the original character of earnings would be lost and earnings would become gains.²⁹

In exceptional cases the personal creditor's security is not limited to his or her debtor's property and earnings, but extends partly to the community property. The following personal debts will be recoverable against the community property:

- prenuptial debts and obligations of gifts and inheritances;
- debts by virtue of forbidden professions or forbidden acts;
- debts arising from a criminal sentence or from a wrongful act;
- debts incurred by both spouses in a different capacity.

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

Community debts are in principle recoverable against both spouses' property and against the community property. The creditor does not have to take a particular order into account (Art. 1414 para. 1 Belgian Civil Code). The recoverableness against the three properties can be explained because the community property does not possess corporate personality and is thus unable to be seized on its own, and because both spouses need to guarantee community debts with their entire property.

However, some community debts can only be recovered from the community property and from the contracting spouse's property, but not from the personal property of the other spouse. These debts are listed exhaustively in Art. 1414 para. 2 Belgian Civil Code:

- Debts incurred by a spouse for the benefit of the housekeeping and the education of the children, when these involve excessive obligations having regard to the family's means of support;
- Interest on a spouse's personal debts;
- Debts incurred by a spouse in his or her professional practice;
- Maintenance debts towards a spouse's relatives in the descending line.

All other community debts can be recovered from any of the three types of property.

I.2. Administration of assets

34. How are personal assets administered?

Art. 1425 Belgian Civil Code applies the principle of the autonomy of administration as far as the administration of the personal assets is concerned, without any distinction between the husband and wife. Accordingly, each spouse administers his or her personal property autonomously, without interference by the other spouse.

The administration of the personal property includes all powers of management, enjoyment and disposition, as well as the ability to encumber the property with debts. The negotiation of a loan for the exclusive benefit of the personal property is a personal debt which cannot be recovered from the community property (Art. 140, para. 1 and Art. 1410-1412 Belgian Civil Code) (See Question 30 and Question 32). A principle of absolute and exclusive administration applies: the other spouse cannot seek the nullity of the loan.

²⁹ e.g. W. Pintens and B. van der Meersch, "Het passief in het wettelijk stelsel", in: W. Pintens and B. van der Meersch (eds.), *De wederzijdse rechten en verplichtingen van echtgenoten en de huwelijksvermogensstelsels*, Antwerp/Apeldoorn: Maklu, 1997, p. 161, No. 307.

However, the primary regime involves some specific forced provisions which spouses need to take into account and which they cannot disregard. Art. 1425 Belgian Civil Code, however, refers only to Art. 215 para. 1 Belgian Civil Code as an exception to the principle of the autonomy of administration, which deals with the protection of one's own family home (See Question 10). Nevertheless, the decision-making authority of the personal property is also restricted by other provisions of the primary regime, in particular Art. 215 para. 2 Belgian Civil Code (protection of the rented family home, See Question 10), Art. 221 Belgian Civil Code (authorisation of receipt), Art. 223 Belgian Civil Code (urgent and temporary measures) and Art. 224 Belgian Civil Code (nullification of gifts and personal securities as regards one's own assets which jeopardize the family interests, See Question 12 and Question 14).

Besides this, the relationship between the decision-making authority and the family interests need to be taken into account. As regards the administration of the personal property, a spouse is allowed to perform all acts as long as he or she does not harm the family interests. If he or she does harm the family interest, he or she can be deprived of his or her decision-making authority in respect of his or her personal property (Art. 1426 Belgian Civil Code).

35. How are community assets administered?

As far as the administration of the community assets is concerned, the legislator opted for a diversified regulation of the administration, in relation to the nature of the assets, the nature of the acts and the intended objectives. The concurring administration generally applies, the joint administration applies to certain important acts (see Question 37) and the exclusive administration applies to certain professional activities (see Question 38).

The concurring administration implies that each spouse is able to exercise his or her decision-making authority individually. The community assets are administered by one spouse, and an obligation is imposed on the other spouse to respect the particular act of administration. This applies to all cases in which another type of administration (joint administration or exclusive administration) has not been chosen.

Joint administration requires the consent of both spouses to perform a particular act, whereas exclusive administration implies that one spouse, to the exclusion of the other, is assigned decision-making authority concerning a part of the community property.

The administration of the community assets comprises, as with the administration of the personal property, all powers of management, enjoyment and disposition, including the power to encumber the community property with debts.

Spouses have to exercise their decision-making authority in respect of the community property for the benefit of the family. They may not exercise their decision-making authority arbitrarily, but need to use this authority for the sake of the family, which includes the joint interest of spouses and children. However, it is not required that the act of administration serves exclusively the family interest. Acts of administration performed for the benefit of the personal property of one spouse but which also serves the community property, even indirectly (e.g. through improving the personal property with common money by which a surplus value is realised), are also allowed. An act of administration may not, however, be for the exclusive benefit of one spouse or his or her relatives.

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

According to Art. 219 Belgian Civil Code spouses can give one another a general or particular mandate to represent the other during marriage in the exercise of his or her decision-making authority of the primary (See Question 13) and secondary marital regime, both as regards their own and community property. The mandate, however, can concern only proprietary

matters. The mandate can be general or particular, explicit or tacit, although the latter will for practical reasons be excluded for important acts. It does not result in incapacity as the mandatory is always able to act personally.

The mandate is at all times revocable. Therefore it can be given only during the marriage and not in a pre- or postnuptial agreement or in a deed of modification, since otherwise the irrevocable character of the pre- or postnuptial agreement would be compromised.

The mandatory is accountable to the granter for the exercise of his or her mandate and needs to give an account of all that he or she has received by virtue of the mandate, even if he or she does not owe the mandatory the received things (Art. 1993 Belgian Civil Code). Even between spouses the mandatory is responsible for mistakes committed in the exercise of his or her mandate. Since the mandate between spouses is normally gratuitous, the responsibility for mistakes will be assessed less harshly than in the case of a mandate for consideration.

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?

As far as the administration of the community assets is concerned, it was mentioned in Question 35 that the legislator opted for a diversified regulation of the administration, in relation to the nature of the assets, the nature of the acts and the intended objectives. Although the concurring administration generally applies, joint administration applies to certain important acts.

The specific acts as regards the community property for which the consent of both spouses is required, are listed exhaustively in Art. 1417 para. 2, 1418 and 1419 Belgian Civil Code. They are interpreted restrictively:

- To dispose of property within the framework of a joint professional practice;
- To acquire, to dispose of or to encumber with rights *in rem* assets capable of mortgage;
- To acquire, to transfer or to give in pledge a commercial undertaking or a firm;
- To enter into, to renew or to terminate tenancy agreements for more than nine years and to permit a commercial tenancy agreement or a lease;
- To transfer or to give in pledge a mortgage claim;
- To receive payment of alienated immovable assets or to repay a mortgage claim and to grant the lifting of the registration of mortgage;
- To accept or to reject bequests and gifts which are made on condition of being common;
- To take out a loan;
- To enter into a loan agreement as defined by the Belgian Consumer Credit Act of 12 June 1991;
- To donate community assets.

As far as the administration of personal assets is concerned, it was mentioned in Question 34 that each spouse administers autonomously his or her personal property, without interference and to the exclusion of the other spouse, as long as he or she does not jeopardize the family interests. However, it was also mentioned that some provisions of the primary regime limit the decision-making authority of the spouses as far as personal property is concerned. Art. 215 Belgian Civil Code gives protection to the family home which belongs to one spouse and guarantees a spouse and children the enjoyment of the family home on which the other spouse has rights *in rem* or tenancy rights.

A spouse having rights *in rem* upon the family home is only entitled to dispose of this property, whether for valuable consideration or not, with the consent of the other spouse. He or she is not entitled to decide individually to encumber the family home with a mortgage. The legislator does not allow any positive unilateral act whereby the occupation of the family

home could be jeopardized. Accordingly, it is protected against any act of disposition (e.g. sale, exchange, gift, division, contribution in a company, encumbrance with usufruct or a right of use or a right of residence, letting for more than nine years, etc.), but also against any act which would force the spouses to leave the family home (e.g. letting for less than nine years), as well as against any act limiting the enjoyment of the family home (e.g. partial letting, establishing an easement). A part of the doctrine even expands the protection to all acts which do not make the residence impossible but which diminish the quality of the title to ownership of the family home (e.g. a sale under reservation of usufruct or of a right of residence).

Acts which do not limit the enjoyment of the family home can be performed without the consent of the other spouse. Accordingly, a spouse is e.g. able to enter individually into a fire insurance contract and to perform the contract individually by accepting a friendly settlement.³⁰

A spouse having tenancy rights upon the family home is also restricted in his or her decision-making authority. During marriage, the tenancy rights of the family home belong to both spouses together, even if only one of them entered into the tenancy contract, and even if he did so before marriage. This means that the landlord, who entered into a tenancy agreement with one spouse or with a future spouse, has, besides his contractual tenant, also a legal tenant due to a legal fiction. Both spouses possess equal and undivided tenancy rights.³¹ This rule applies to all tenancy agreements, except to commercial tenancy agreements and to agricultural leases. The result is that terminations, notifications and writs must be sent to or be served on each spouse individually or must originate from both spouses together.

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

As mentioned in Question 35, the exclusive administration applies to professional activities. It implies that one spouse is assigned decision-making authority over a part of the community property to the exclusion of the other spouse.

In the primary regime several applications of this type of administration can be found, such as the authority to receive and to spend one's own earnings (Art. 217 para. 1 Belgian Civil Code), to purchase and to administer assets which are well-considered for one's professional practice (Art. 217 para. 2 Belgian Civil Code) and the authority to open a deposit account or to hire a safe (Art. 218 Belgian Civil Code).

In the legal regime the most important application of exclusive administration is to be found in Art. 1417 para. 1 Belgian Civil Code, which provides that a spouse having a profession performs all the necessary acts of administration for the professional practice individually. This provision is mainly of importance for spouses having a profession outside the scope of an employment contract. The legislator wanted to allow the professional spouse to have as much freedom as possible in his professional practice and considered it to be unacceptable that acts concerning the professional practice of one spouse could be performed by the other spouse not having that profession, or that the consent of the other spouse would be required, as it would jeopardize professional autonomy. In any case, the professional spouse must be able to bind the community property since it enjoys the benefit of earned income and since the impossibility of suing the community property would diminish a spouse's creditworthiness.

Art. 1417 para. 1 Belgian Civil Code complements Art. 217 para. 2 Belgian Civil Code, providing that each spouse has the exclusive administration of his or her well-considered professional assets, irrespective of their personal or common character. This autonomy of

³⁰ Cass., 15.5.1986, *J.T.* 187, 468, *Rev.not.b.* 1986, 589, *R.W.* 1986-87, 1352.

³¹ Cass., 6.10.1978, *Arr.Cass.* 1978-79, 152.

administration is expanded to other community assets, as far as it concerns acts of administration which are necessary for the professional practice. Acts of administration for no consideration are not included.

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

There is no legal duty for one spouse to provide information to the other about the administration of community assets. However, the community property must be administered for the sake of the family. The administration of the community property thus has a specific objective. Spouses are not allowed to exercise their decision-making authority arbitrarily, but need to apply this authority for the sake of the family, which is the common interest of spouses and children. It is not required, however, that the act exclusively serves the interests of the family. Therefore, if an act of administration by one spouse is disputed by the other, conformity with this above-mentioned requirement will have to be established.

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

The performance of a particular act of administration might have far-reaching consequences for the spouses and their property. On the one hand, the concurring administration (See Question 35) involves the risk that a spouse refuses his or her consent without valid reasons for an act which might be beneficial for the family. On the other hand, the joint and exclusive administration (See Question 35) involves the possibility that a spouse performs an act against the will of the other spouse, by which the community property and even the other spouse's personal property might be encumbered. To prevent these situations the legislator provided, besides the rules of the primary regime, a few preventive and repressive measures as far as the administration of both the community and personal property is concerned.

If a spouse refuses to give his or her consent without a justified reason, the other spouse may apply to the court of first instance and ask for the authorization of the court to perform individually one of the acts for which the consent of both spouses is required (Art. 1420 Belgian Civil Code). Whether or not the other spouse had legal reasons to refuse his or her consent will be noted by the court, which will have to take into account the family interests and the interests of the other spouse. However, a legal reason suffices to refuse the authorization. The authorization of the court may be requested for all acts which are subjected to joint administration (See Question 37). However, the court is only entitled to grant a particular authorization so that it applies only to the performance of the specific act requested. A generally applicable authority is prohibited under Art. 1420 Belgian Civil Code. The authorization by the court results in the same consequences as if the other spouse had given his or her consent.

In addition, each spouse may also apply to a justice of the peace for a restraining order, so that the other spouse is prohibited from performing a particular act of administration. Such an order will be granted if the other spouse might suffer from the particular act of administration or if the family might be harmed if the act of administration is performed (Art. 1421 para. 1 Belgian Civil Code). This possibility is particularly useful in case of actual separation since the alienation of movable community assets is subjected to concurring administration (See Question 35). It applies to all acts of administration as regards the community property, irrespective of whether the act would be performed for housekeeping needs or because of professional practice, and irrespective of the type of administration that the particular act is subjected to. The requesting spouse needs to prove that the act of administration would jeopardize the family interest or would harm him or herself.

In Question 34 it was already mentioned that each spouse autonomously administers his or her personal property, without interference and to the exclusion of the other spouse.

However, it has been explained that the primary regime involves some specific forced provisions which spouses need to take into account and which they cannot disregard, and that a spouse is allowed to perform acts as regards his or her personal property only if he or she does not harm the family interests. If he or she does harm the family interests, he or she can be deprived of his or her decision-making authority concerning his or her personal property (Art. 1426 Belgian Civil Code) (See Question 42).

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?

At the request of a spouse having a legal interest and without prejudice to the rights of third parties in good faith, the court of first instance might consider particular acts which the other spouse has performed to be void (Art. 1422 para. 1 Belgian Civil Code). Art. 1422 Belgian Civil Code sets out a limitative list of three kinds of acts capable of being declared void, in particular the acts performed by one spouse:

- acts contrary to the provisions of joint administration;
- acts contrary to prohibitions or conditions imposed by the court, in particular a restraining order (See Question 40) or a deprivation of decision-making authority (See Question 42);
- acts to the deceptive prejudice of the plaintiff's rights. It includes all cases of deceit which do not fit into the other two categories. The term 'deceit' must be interpreted widely, in particular to include the aim to act contrary to the family interest, in favour of others or without demonstrable benefit.

The above-mentioned acts can also give rise to a right of compensation in favour of the community property. If a claim for nullification has not been filed or if it has been rejected because of a third party's good faith or if it did not rectify the damage completely, compensation to the community property amounting to the suffered damage can be claimed (Art. 1433 Belgian Civil Code). If damage has been caused to a spouse's personal property, only a claim on the basis of the general law will be allowed as Art. 1433 Belgian Civil Code does not apply to this situation. The claim for nullification needs to be filed within a year of the day on which the spouse plaintiff has been given notice of the act of the other spouse and at the latest before the definite liquidation of the regime.

According to Art. 224 Belgian Civil Code the court of first instance is also entitled to consider specific acts void, without prejudice to the right to claim compensation:

- acts contrary to Art. 215 Belgian Civil Code (protection of the family home, See Question 37);
- acts contrary to a prohibition to alienate or to mortgage;
- gifts jeopardizing the family interest;
- personal securities jeopardizing the family interest.

In these situations, the harmed spouse is also entitled to claim compensation, even if a claim for nullification has been filed. If the claim has also been allowed, compensation will be granted only if the nullification did not rectify the damage completely. The claim for nullification also needs to be filed within a year of the day on which the spouse plaintiff has been given notice of the act.

The court of first instance is also allowed to deprive a spouse wholly or partly of his or her decision-making authority over both the community and the personal property, according to Art. 1426 Belgian Civil Code (See Question 42).

Finally, the judicial separation of assets can be claimed. It is the *ultimum remedium* for a spouse to protect his or her proprietary interests without having to seek a divorce. It abolishes the existing regime and, instead, an absolute separation of assets comes into force. The judicial separation of assets has retrospective effect from the day of the claim, which is the day on which the writ has been served upon the other spouse. This rule applies both between the spouses and towards third parties (Art. 1472 Belgian Civil Code) (see further Question 44).

42. What are the possible consequences if a spouse is incapable of administering his or her personal assets and the community assets?

The court of first instance can deprive a spouse wholly or partly of his or her decision-making authority over both one's own and the community property (Art. 1426 Belgian Civil Code). Deprivation of decision-making authority can be claimed by one spouse if the other spouse displays evidence of unsuitability in his or her administration or jeopardizes the family's interests. All circumstances, in the past (proved maladministration) or in the future (the fear of maladministration), indicating that a spouse is not able to exercise his or her decision-making authority for physical or psychological reasons (e.g. advanced age, mental illness, lack of experience, alcoholism or low intelligence), are meant. Fault is not required, as Art. 1426 Belgian Civil Code does not intend to punish a spouse, but only to safeguard the interests of the personal and community property. The family's interests can be jeopardized by various acts, such as the squandering of earnings or the destruction of assets.

If the court deprives a spouse wholly of his or her decision-making authority, the spouse will become incompetent to administer his or her property. However, authority of a personal character (e.g. to exercise parental authority, to make a will) can still be exercised by the spouse who has been deprived of his or her decision-making authority. The court is also entitled to decide to deprive a spouse only partly of his or her decision-making authority (e.g. only the decision-making authority over the community property or only acts of disposition). The court decides to which persons the decision-making authority will be transferred: the other spouse or a third party, whether a relative, or someone else. It is also possible for several persons to be appointed.

Acts of administration by persons who were assigned the decision-making authority of one of the spouses will have the same consequences as if they were acts of administration performed by the spouse him or herself. If the authority was transferred to the other spouse, however, the authorization of the court will still be required to perform acts of administration which are subject to joint administration.

Acts of administration performed by a spouse who has been deprived of his or her decision-making authority are capable of being nullified (See Question 41). A claim for nullification might be filed by the other spouse or by the incapable spouse himself.

Moreover, if a spouse finds it impossible to indicate his will, the other spouse is also entitled to go to the Court of first instance to obtain the authorization of the court to perform individually one of the acts for which the consent of both spouses is required (Art. 1420 Belgian Civil Code) (See also Question 40). The 'impossibility to indicate his will' needs to be interpreted widely. It includes all cases of impossible indication of intention for physical or psychological reasons. The authorization of the court is possible for all acts which are subject to joint administration (See Question 37). The court, however, is only entitled to grant a particular authorization that applies to the specifically requested act. A generally applicable authority is excluded under Art. 1420 Belgian Civil Code. The authorization of the court has the same consequences as if the other spouse had given his or her consent.

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 matrimonial property regime is dissolved in circumstances prescribed by law, which are (See Art. 1427 Belgian Civil Code):

- Dissolution by death;
- Dissolution by divorce by mutual agreement;
- Dissolution by divorce on the basis of an irretrievable breakdown of the marriage;
- Dissolution by judicial separation;
- Dissolution by judicial separation of property;
- Dissolution by a modification of the matrimonial property regime.

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?

Dissolution by death

The community of property is dissolved by the death of one of the spouses. For the purposes of both matters between spouses and those involving third parties, the matrimonial property regime dissolves at the date of the death of the first spouse.

The marriage is dissolved by death if a spouse dies before the divorce judgment has become final and conclusive.

If a spouse dies after the judgment has become final and conclusive, but before it has been registered, the marriage will, from the day on which the divorce judgment has become final and conclusive, be dissolved by divorce, for the purposes of the spouses and third parties. The divorce will take effect at the date of death, subject to the suspensive condition that the divorce judgement is registered in the register of births, deaths and marriages (Art. 1278 para. 3 Belgian Judicial Code).

Dissolution by divorce by mutual agreement

In the case of divorce by mutual agreement, the marriage will be dissolved upon the day on which the divorce judgment is final and conclusive. In respect of third parties, however, the judgment will take effect only after its registration in the records of births, deaths and marriages. Between spouses and as far as the assets are concerned, the judgment has retrospective effect from the day of the first appearance before the President of the court (and not to the day of depositing the petition) (Art. 1304 Belgian Judicial Code).

However, notarial practice frequently deviates from this retrospective effect of the divorce judgment. The deed of settlement often provides that between spouses the divorce will take effect from the day of the deed instead of the day of first appearance. Accordingly, it fills the gap between the day of the deed and the day of first appearance and prevents particular facts or legal transactions from taking effect according to matrimonial property law. This practice is not a violation of the law laying down the time of dissolution, since only the composition of the community property at the time of dissolution is altered and not the time of the dissolution itself.

Dissolution by divorce on the basis of an irretrievable breakdown of the marriage

In the case of a dissolution by reason of divorce on the basis of an irretrievable breakdown of the marriage, the marriage is dissolved for the purposes of third parties from the time of the registration of the divorce judgment in the records of births, deaths and marriages and between spouses from the day upon which the judgment is final and conclusive (Art. 1278, par. 1 Ger.W.). Between spouses and as far as the assets are concerned, the judgment has

retrospective effect from the day on which the claim has been brought, that being the day of the service of the writ or of the voluntary appearance. If a counterclaim has been brought, the judgment has retrospective effect from the day of the first claim even if that claim has been rejected, and does not have retrospective effect from the day on which the counterclaim has been brought (Art. 1278 para. 2 Belgian Judicial Code). A procedural tie between both claims is required.³² The legislator assumes that, even if the first divorce claim has been rejected, the understanding between both spouses has deteriorated to such an extent that the *affectio societatis* has disappeared, so that the maintenance of the solidarity of the matrimonial property regime would no longer be appropriate. The retrospective effect is, however, restricted to the composition of the property only. The value of the assets needs to be calculated on the day of the distribution.

However, the retrospective effect of the divorce judgment between spouses as far as their assets are concerned (from the day on which the first claim has been brought) insufficiently reflects the lack of *affectio societatis* between spouses if they had previously separated and lived apart. Therefore Art. 1278 para. 4 Belgian Judicial Code provides that in a case of the liquidation of the community property it is permissible for particular assets which have been obtained or particular debts which have been incurred since the actual separation to be discounted.³³ An action under this provision can be brought by one of the spouses, between the introduction of the divorce proceedings and the date on which the liquidation is definitely closed.³⁴ Fault in respect of the divorce is irrelevant. However, Art. 1278 Belgian Judicial Code can only be applied if the plaintiff cites exceptional circumstances, which the court will assess in an equitable fashion.³⁵ It is not bound to allow the claim, even if exceptional circumstances have been established. The court's decision as to the exceptional character of the circumstances is final and conclusive.³⁶ Furthermore, the law allows *specific* assets or debts to be discounted for the purposes of liquidation. The court needs to specify which assets and debts will not be taken into account. The spouse also has to specify which assets and debts are to be excluded.³⁷ General retrospective effect from the beginning of the actual separation is not permitted. The court may, however, specify that particular assets and debts need to be taken into account, in view of the exceptional circumstances typical to the case, which in fact constitutes the entirety of the assets and debts which have been obtained or incurred since the factual separation.³⁸

Dissolution by judicial separation

Judicial separation does not dissolve the marriage but dissolves the community regime as it always results in a regime of separation of assets. The rules as regards dissolution by reason of divorce on the basis of an irretrievable breakdown of the marriage or by mutual agreement apply similarly to dissolution by reason of judicial separation (Art. 311*bis* Belgian Civil Code and Art. 1306 Ger.W.). A reconciliation between spouses terminates the judicial separation. It does not, however, result in a re-establishment of their previous matrimonial property regime. Therefore, a modification of the regime according to the general law is required (Art. 1394 et seq.).

Dissolution by judicial separation of property

The judicial separation of assets is the *ultimum remedium* which a spouse, married under a community regime, has at his or her disposal when his or her proprietary interests are

³² Cass., 24.02.2005, *E.J.* 2006, 82, note Vanboeckrijck, *R.W.* 2005-06, 1101, note Declerck and Du Mongh.

³³ Liège, 9.11.2004, *Div. Act.* 2005, 74.

³⁴ Gent, 22.06.1999, *T. Not.* 2002, 567,

³⁵ Cass., 21.11.1980, *Arr. Cass.* 1980-81, 332; Antwerp, 01.12.2004, *Not. Fis. M.* 2006, 19, note Brouwers.

³⁶ Cass., 21.11.1980, *Arr. Cass.* 1980-81, 332.

³⁷ Gent, 22.06.1999, *T. Not.* 2002, 567.

³⁸ Cass. 21.11.1980, *Arr. Cass.* 1980-81, 332.

jeopardized by the other spouse, without having to seek a divorce. It abolishes the existing regime; instead a regime of an absolute separation of assets comes into force.

The judicial separation of assets has, as far as its consequences are concerned, retrospective effect from the day of the claim, being the day on which the writ has been served upon the other spouse. This rule applies both between the spouses and in respect of third parties (Art. 1472 Belgian Civil Code).

However, in order to avoid any possible deceit towards creditors, Art. 1473 Belgian Civil Code requires the effective execution of the decision on the judicial separation of assets. The statement of liquidation of the preceding regime must in principle be drawn up by notarial deed within one year of the publication of the excerpt of the decision in the Bulletin of Acts and Decrees; if this is not done the decision has no effect whatsoever so that the spouses remain married under the unaltered regime.³⁹

Dissolution by a modification of the matrimonial property regime

A modification of the matrimonial property regime does not always result in the dissolution of the preceding regime. It does so e.g. in case of a change from a legal regime to a regime of separation of assets, but not in a case of an extension of the existing community to a complete community. Between spouses the preceding regime is dissolved from the day of the deed of modification; in respect of third parties from the day that an excerpt of the stipulated modifications has been published in the Bulletin of Acts and Decrees, unless the spouses informed them of the modification.

45. What happens if community assets have been used for investments in the personal property? What happens if personal 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?

The first step in the liquidation is indeed the calculation of compensation. The composition of one's own and of the community property can undergo important property alterations during marriage, e.g. when the community property invests in the personal property or vice versa without obtaining any ownership rights. Should this property alteration go uncorrected, one property would be enriched without justification at the expense of the other. Compensation is due.

Compensation will be owed whenever a spouse has benefited from the community property (e.g. through a purchase of personal assets with common money or part-reinvestment with common money, or generally if community assets have been used for investments in the personal property) or when the community property has benefited from one of the spouses' personal property (e.g. when a spouse's own money or money from the alteration of one's own asset falls into the community and has not been invested or reinvested, as well as, in general, each time the community property receives a benefit from one of the spouses' personal property (Art. 1434 Belgian Civil Code), e.g. when the purchase price of one's own asset falls within the community property).⁴⁰

As far as the amount of the compensation is concerned, the general rule provides that the compensation may not be less than the amount lost by the category of property which is entitled to it (Art. 1435 Belgian Civil Code). Art. 1435 Belgian Civil Code does not provide for a general adaptation as a result of currency depreciation. The principle of nominal value has been retained. The compensation is in principle calculated nominally.

³⁹ Cass. 27.04.1990, *T. Not.* 1991, 325, note Bouckaert; Cass. 03.04.1959, *Pas.* 1959, I, 70.

⁴⁰ Bergen, 05.12.2000, *Rev. Trim. Dr. Fam.* 2002, 366; Brussels 02.10. 002, *Rev. Not. B.* 2003, 527.

However, the principle that compensation is calculated nominally has an important exception: if money from one property has been used for the acquisition, preservation or improvement of an asset of the other property, the increase in the value of that asset needs to be taken into account (Art. 1435 Belgian Civil Code). Three situations must be distinguished:

1. At the time of dissolution, the asset still belongs to the property which owes the compensation. In order to calculate this compensation, the value of the asset at the time of dissolution must be taken into account.

(For example: In 1978 Jan inherits with his brother Marc a piece of land worth 25,000 EUR. In 1982 Jan purchases his brother's share (½) with money from the community property. The asset increased in value to 37,500 EUR.. In 1989 Jan's wife dies. Upon the dissolution the asset is worth 50,000 EUR. Jan's personal property will have to pay compensation to the community property for the purchase of Marc's share. The basis for this is not the value of the asset at the time of the purchase, but that at the time of dissolution. The community will thus be entitled to compensation amounting to half of the value at that moment, specifically 25,000 EUR, or ½ of 50,000 EUR).

2. The asset has been alienated before dissolution. The basis for the calculation of the compensation is the value of the asset at the time of sale.

(Ditto as in example 1, but Jan sold the asset before the death of his wife for 45,000 EUR. Compensation of 22,500 EUR, or ½ of 45,000 EUR, is owed.)

3. The alienated asset is replaced by another asset. The compensation must be calculated on the basis of the value of the new asset at the time of dissolution.

(Ditto as in example 1, but Jan sold the asset for 45,000 EUR and bought another asset with it, which at the time of the dissolution of the regime has a value of 80,000 EUR. Compensation of 40,000 EUR, or ½ of 80,000 EUR is owed.)

Since nominal compensation is the general rule and the revaluation of the compensation is an exception, the possibility of a revaluation must be interpreted restrictively. The invested money must really have been used for the acquisition, maintenance or improvement of an asset. It requires a causal link between the investment and the acquisition. This is not the case e.g. when a spouse pays a mortgage loan with money from an estate if that loan has been negotiated for the payment of a community asset. In that case, the compensation is equal to the nominal amount of the investment since a causal link does not exist between the investment and the acquisition of the asset, which took place before the investment.

Moreover, doctrine also applies a particular exception to the general rule of nominalisation. If tools and instruments which are useful for the professional practice of a spouse (and thus which belong to his or her personal property) have been bought with common funds, compensation needs to be paid when the community property is dissolved. Although the compensation may not in principle be less than the sum of money spent by the community property, a strict application of this rule would lead to a particularly unfair outcome since these assets are subjected to a strong depreciation and contributed to the acquisition of common income. Therefore it seems to be fair that compensation only for the residual value has to be paid.

According to Art. 1436 para. 2 Belgian Civil Code, compensation accrues interest by operation of law from the day of the dissolution of the matrimonial property regime. In the case of divorce and considering the retrospective effect between spouses as far as the assets are

concerned, interest will be owed from the day of the introduction of the claim.⁴¹ Interest is owed from the day of dissolution to the day of payment, even if the claim for distribution has been filed very late.

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

As mentioned under Question 45, the first step in the liquidation is the calculation of compensation. The composition of personal and community property can undergo important property alterations during marriage, including e.g. when the community property pays a debt which has, in the relation between the spouses, a personal character. Should this property alteration go uncorrected, one property would be enriched without justification at the expense of the other.

Each spouse owes compensation amounting to the money which he or she has taken out of the community property to pay his or her own debt (Art. 1432 Belgian Civil Code),⁴² e.g. when common money is used for the payment of a prenuptial debt, a debt associated with a gift or estate which has been obtained during marriage (e.g. a registration fee and inheritance tax) or a debt which has been undertaken for the exclusive benefit of the personal property.

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

Community debts must be taken into account before compensation rights (Art. 1430, par. 3 Belgian Civil Code). It means that community creditors precede the spouse who is entitled to compensation.

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

The dissolution of the matrimonial property regime converts the community property into a post-communal joint ownership. Except for the liquidation and division, the joint ownership is not subjected to the rules of matrimonial property law, but to the general law, in particular the rules of co-ownership.⁴³

The administration of the joint ownership is also governed by the rules of co-ownership (Art. 577-2, §§ 5-7 Belgian Civil Code). These rules have retrospective effect from the day that the claim has been submitted and replace the regulation of the administration of the legal regime.

The regulation of the administration concerning the co-ownership means that each spouse is able to perform acts of maintenance and of provisional management (Art. 577-2, § 5, para. 2 Belgian Civil Code). Other acts of management as well as acts of disposition must be performed by both spouses together (Art. 577-2, § 6 Belgian Civil Code). Each spouse has a right to use and to enjoy (Art. 577-2, § 7 Belgian Civil Code).

A spouse who undertakes the management of the co-ownership is answerable for it. He or she must set up a management account concerning the income and expenses.

If one of the spouses exploits an undivided asset as a mandatory or as an administrator, the profits will belong to the joint ownership. The spouse administrator who performs such activities in his or her professional practice needs to be paid for his or her work proportionally. If the spouse does not act as a mandatory or as an administrator, but on his or

⁴¹ Bergen, 29.11.2003, *Rev. Trim. Dr. Fam.* 2005, 1206; Gent, 24.04.2003, *Not. Fisc. M.* 2006, 132, note Casman.

⁴² Cass., 30.09.2005, *Rev. Trim. Dr. Fam.* 2006, 1283.

⁴³ Cass., 17.11.1983, *R.W.* 1983-84, 2982; Cass., 18.03.1977, 779.

her own behalf, he or she will owe compensation for the exclusive use of an undivided asset. He or she may keep the profits of his or her work, however.

Debts incurred by a spouse as regards the undivided assets need to be repaid when the community regime is liquidated, according to the general principles of management of another's affairs or of unjust enrichment. Necessary expenses will be repaid completely; useful expenses to the amount of the surplus value. Embellishment expenses will not be repaid.

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

The credit balance is divided into two halves (Art. 1445 Belgian Civil Code), irrespective of the number of participants as they always obtained their rights from one spouse or the other and are not allowed to enforce more than these rights. Spouses are, however, entitled to deviate from the equal division in a pre- or postnuptial agreement. Further, Art. 1448 Belgian Civil Code provides that the spouse who is found guilty of fencing, loses his share in the fenced asset.

The division principally takes place in kind. Assets which cannot be divided properly will be sold. The preferential allocation on the basis of Art. 1446 and 1447 Belgian Civil Code also implies an important exception to the rule of the division in kind (See Question 51).

The division has a declaratory and not a translative character. It has retrospective effect from the day of the dissolution of the marital community regime.

The credit balance may be negative, due to amounts which need to be paid to the common creditors or to the compensation to which one of the spouses is entitled. In this respect Art. 1440 para. 1 Belgian Civil Code provides that each spouse is answerable for the community debts which are left after dissolution with all his or her assets. Spouses are jointly liable.⁴⁴ Accordingly, common creditors can recover their claim after distribution using all the assets of both spouses.

Art. 1440 para. 2 Belgian Civil Code, however, protects the non-contracting spouse who is, as regards incomplete community debts (See Question 33) which cannot be recovered from his or her personal property during marriage, only answerable to the amount of what he or she has received by the distribution.⁴⁵ Accordingly, he or she enjoys a limited privilege of *emolumenten*.

If a spouse has paid a complete or incomplete community debt after the distribution, he or she has a right to recover half of this from the other spouse.

50. How are the community debts settled?

Art. 1439 Belgian Civil Code provides the order in which the community creditors have to be settled:

- privileged creditors according to the rank of their privilege;
- mortgagees according to the day of their registration;
- common creditors having recourse in respect of the three properties;
- common creditors having recourse in respect of the community property and the personal property of one of the spouses.

⁴⁴ Liège, 14.12.1994, *J.T.* 1995, 387.

⁴⁵ Brussels, 19.12.1989, *Pas.* 1990, II, 215.

It is not required that all community debts are paid off at the moment of the settlement. It is possible that the dissolved matrimonial community of property is inadequate or that particular debts are only due or will be claimed after dissolution. If community debts cannot be paid off (because the balance is negative due to e.g. the amounts owed to common creditors or the compensation which has to be paid to one of the spouses), Art. 1440 para. 1 Belgian Civil Code provides that each spouse is answerable for the community debts which are left after dissolution with all his or her assets. Spouses are jointly liable.⁴⁶ Accordingly, common creditors can recover their claim after distribution using all the assets of both spouses.

Art. 1440 para. 2 Belgian Civil Code however protects the non-contracting spouse who is, as regards incomplete community debts (See Question 33) which cannot be recovered from his or her personal property during marriage, only answerable to the amount of what he or she has received by the distribution.⁴⁷ Accordingly, he or she enjoys a limited privilege of *emolumenten*.

If a spouse has paid a complete or incomplete community debt after the distribution, he or she has a right to recover half of this from the other spouse.

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

When the matrimonial community has been dissolved, spouses can demand to be allocated preferentially particular assets, if necessary on condition that a bonus is paid. This right of preferential allocation is provided in the case of the dissolution of the regime by reason of death (Art. 1446 Belgian Civil Code), divorce, judicial separation and judicial separation of assets (Art. 1447 Belgian Civil Code).

A preferential allocation can only be claimed in relation to the community assets and does not apply to the personal assets of the other spouse.⁴⁸ The rules apply neither to spouses married under a regime of complete separation of assets,⁴⁹ nor to undivided assets which belong to a company of acquests.⁵⁰

According to Art. 1446 Belgian Civil Code spouses can demand the allocation of one of the immovable properties which serves as family home, together with the present household assets. The law does not require the family home to be the main family home, so that spouses may choose which home they want to be allocated (e.g. a weekend residence). However, they can only be allocated one family home, which may be linked to an immovable professional asset (See Question 52).

The immovable property has to serve or has to be served unambiguously as a family home at the time of the dissolution of the community regime. The fact that the property lost its destination at the time of allocation is not an obstacle.⁵¹

There is discussion about the question of whether or not a spouse is compelled to take over the household assets as well as the immovable property.

When the legal regime is dissolved by reason of death, the court must grant the request of the surviving spouse for the allocation according to Art. 1446 Belgian Civil Code.

⁴⁶ Liège, 14.12.1994, *J.T.* 1995, 387.

⁴⁷ Brussels, 19.12.1989, *Pas.* 1990, II, 125.

⁴⁸ Brussels, 06.11.1995, *Div. Act.* 1996, 140.

⁴⁹ Antwerp, 14.1.2003, *T.B.B.R.* 2005, 278.

⁵⁰ Antwerp, 12.5.2004, *T.B.B.R.* 2006, 169.

⁵¹ Liège, 4.3.1996, *Rev. Trim. Dr. Fam.* 1988, 111.

When the legal regime is dissolved by reason of divorce, judicial separation or judicial separation of assets, the preferential allocation can be demanded by both spouses in accordance with Art. 1447 para. 1 Belgian Civil Code. However, the request for the allocation will never be granted by operation of law, even if it has been requested by only one of the spouses.⁵² When the other spouse opposes, the court will have to decide the matter with regard to the social and the family interests which are involved, the compensation rights or claims of the other spouse,⁵³ and domestic violence (Art. 1447 para. 2 Belgian Civil Code). The court has a large margin of appreciation and is not obliged to grant the allocation.

Social interests include e.g. creditors' rights, which may not be harmed by the allocation of the matrimonial home. This will not normally lead to many problems as Art. 1440 Belgian Civil Code para. 1 Belgian Civil Code provides that each spouse is answerable for the community debts which are left after the dissolution, with all of his or her assets.

The court will also take account of the family interests. The court will take account of the interest of a spouse in creating a family environment with the children and who does not want to move or to return to the matrimonial home.⁵⁴ The spouse to whom custody of the children was awarded will be able to allow this family interest to prevail over the interests of the other spouse.⁵⁵ Jurisdiction and doctrine have completed and elaborated the concept of the family interest with other criteria such as the affective criteria (taking account of the origin of the asset) and the purely financial criterion (taking account of compensation rights and claims of the spouse who does not take over the family home).

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

According to Art. 1446 Belgian Civil Code spouses can also demand the allocation of the immovable property which serves or has served for their professional practice, together with the movable property which is present for professional purposes.

The immovable property has to serve or has to be served unambiguously for the professional practice at the time of the dissolution of the regime. The fact that the property lost its destination at the time of the allocation is not an obstacle. It is accepted that the interested spouse is entitled to demand the allocation, even if the involved property only obtained its function after death or after an action for a divorce has been brought.

There is a debate about the question of whether or not a spouse is compelled to take over the movable property for professional purposes together with the immovable property (See also Question 51).

The allocation of the immovable property used for professional purposes must be based upon the interests of the spouse having a profession in the immovable property. This criterion will also be decisive for the allocation of the family home itself, if a spouse has a profession in only a part of that property. The professional criterion, however, is not an absolute criterion but only a minor one. The actual family interests have priority. Nevertheless, the family interests need to take account of the professional interests and will in some cases be dependent on those professional interests.

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

⁵² Liège, 4.3.1996, *Rev. Trim. Dr. Fam.* 1988, 111.

⁵³ Art. 1447 para. 3 Belgian Civil Code.

⁵⁴ Liège, 24.11.1997, *Rev. Trim. Dr. Fam.* 1998, 702, note; Brussels, 20.1.1992, *J.T.* 1992, 346.

⁵⁵ Brussels, 17.11.1987, *J.L.* 1988, 348.

The law of 27 April 2007 regarding the reform of divorce altered Art. 301 Belgian Civil Code, which now provides that the court should determine the amount of the maintenance payment, which must cover at least the needs of the claimant spouse. The distribution of the community property will affect those needs of a spouse. In determining whether the needy spouse can claim maintenance and in determining the amount of maintenance, the income and the potential income of the needy spouse are taken into account. 'Income' encompasses professional income as well as income obtained within the scope of the distribution of matrimonial property.

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 division of community property does not affect the pension rights and claims of one or both spouses. The entitlement to a pension and the payments still belong to the holder's personal property. It is debated whether the community has a right to compensation for the payment of the premiums. The spouse who is not entitled to a pension has a pension claim derived from the pension rights of the other spouse based on social security law.

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?

After the matrimonial system has been dissolved, spouses can agree whatever they want. However, the court is bound by the law and cannot deviate from it.

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.

The same rules apply in the case of dissolution by death and in the case of dissolution by divorce.

II. Community of accrued gains/Participation in acquisitions

Not relevant.

III. Deferred community

Not relevant.

IV. Separation of property

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

The matrimonial regime of separation of property is regulated by Art. 1466-1469 Belgian Civil Code. The regime of pure separation of property is the regime that reduces the impact of matrimonial property on the marriage to the minimum. On the one hand, everything remains separated, assets, debts and the administration of assets, while, on the other hand, some implications concerning e.g. the duty to contribute to the costs of the marriage and the education of the children are governed in the primary regime. These rules are to be applied to all separate assets, irrespective of their origin. They are thus not only applied if spouses have opted for a scheme of separation of goods in their marital agreement or in a modification

certificate, but also when the separation of goods is legally imposed or when the spouses are separated from bed and board.⁵⁶

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

In a regime of separation of goods there are only two categories of property, the personal property of each spouse. Each owner remains the owner of what he or she owned before the marriage and of what he or she obtains during the marriage, irrespective of the manner of acquisition. All income and savings earned in this income will thus remain one's own. There is no common property. At the very most, a joint tenancy can occur. The undivided shares of each of the spouses belong to their personal property.

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

The spouses can acquire assets jointly. These assets are undivided and owned by both spouses. If no shares are specified, each spouse will be presumed to own half of the undivided assets. Art. 1468, second paragraph Belgian Civil Code also stipulates that movable property that has not been proved to belong to one spouse or the other will be considered as undivided between the spouses.⁵⁷ This legal presumption of undivided goods will also be applied by creditors.

The administration of undivided assets is governed by Art. 577-2 Belgian Civil Code. (See Question 140).

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

No, the general law of subrogation applies.

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

There is no special position for pension rights and claims and insurance rights in a regime of separation of property. They are the sole property of the holder.

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

According to Art. 1468 Belgian Civil Code, the ownership of assets between spouses is proved according to the rules of Art. 1399 Belgian Civil Code (See Question 28).

Spouses are also able to insert specific presumptions of ownership in the pre- or postnuptial agreement, provided that these apply only between spouses and do not apply as regards third parties, who can at any time rely on Art. 1399 para. 2 Belgian Civil Code (See Question 29).

There is also a legal presumption of ownership in Art. 1468 para. 2 Belgian Civil Code. When the ownership of assets cannot be proven, they are presumed to be a joined asset. This presumption is applicable between the spouses as well as against third parties.

The furnishing of evidence for claims is different from that for assets. General law applies. It means that when the claim exceeds EUR 375 or when the spouse proves against a written document, a written document is needed (Art. 1341 Belgian Civil Code) except when the

⁵⁶ W. Pintens, B. van der Meersch and K. van Winckelen, *Inleiding tot het Familiaal Vermogensrecht*, Leuven: Universitaire Pers, 2002, p. 274, No. 565.

⁵⁷ Juge des Saisies Liège, 16.11.2005, *J.L.M.B.* 2006, 471.

spouses have agreed on other rules in their prenuptial agreement. This rule does not apply when there is the beginning of written proof of which the other spouse is the author (Art. 1347 Belgian Civil Code) or when there is a moral incapacity to obtain written proof (Art. 1348 Belgian Civil Code). However, it must be observed that marital status as such is not sufficient to establish a moral incapacity.⁵⁸

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

Concerning the assets, the provision for the furnishing of evidence is much stricter as against third parties.

According to Art. 1468 Civil Code, the ownership of assets against third parties is proved according to the rules of Art. 1399 Belgian Civil Code. That article gives an exhaustive enumeration of possible evidence which was explained under Question 29 and 134. All these pieces of evidence need to enable the property to be individualized and to enable its own character to be determined. All other evidence, such as witnesses, presumptions or that which is generally known is not allowed.

Concerning claims, the same rules apply against third parties as between spouses. The furnishing of evidence is regulated by the general law, which in principle means that a written document is needed when the claim exceeds EUR 375 (Question 134).

136. Which debts are personal debts?

All debts that are not joint debts are personal (See Question 137). It is irrelevant whether the debts were incurred before the marriage or during the marriage.

137. Which debts are joint debts?

Debts contracted by both spouses and household debts (Art. 222 Belgian Civil Code, see Question 9) are joint.

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

Personal debts can only be recovered from the assets of the debtor and from his or her part of the joint assets.⁵⁹ Creditors cannot recover them from the assets of the other spouse.⁶⁰

As long as a household debt is not exaggerated, the spouses are severally liable for it, and it can, therefore, be recovered from all the assets. It is irrelevant whether or not the spouses have contracted these debts together.

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

Joint debts can be recovered from all the assets of each spouse, to the extent of his or her part in the joint debt (Art. 1220 Belgian Civil Code).

IV.2 Administration of Assets

140. How are assets administered?

⁵⁸ W. Pintens, B. van der Meersch and K. van Winckelen, *Inleiding tot het Familiaal Vermogensrecht*, Leuven: Universitaire Pers, 2002, p. 278-285.

⁵⁹ *Gent*, 5.09.2007, *NjW* 2008, 225, note GV.

⁶⁰ *Gent*, 12.01.1985, *Rec. Gén. Enr. Not.* 1986, No. 23267.

Each spouse has exclusive rights of administration, enjoyment and disposal of his or her assets (Art. 1466 Belgian Civil Code).

The administration of joint assets is determined by general law concerning joint property (Art. 577-2 Belgian Civil Code). Art. 577-2 Belgian Civil Code provides that co-owners have rights and duties proportionate to their property rights in the joint assets. They can dispose of their part.

The administration is limited only by the rules of the primary regime (See Question 8-14) and by other legal provisions such as the prohibition of sale between spouses (Art. 1595 Belgian Civil Code).

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

According to Art. 219 Belgian Civil Code spouses can give one another a general or particular order to represent the other during the marriage in the exercise of his or her decision-making authority concerning the primary (See Question 13) and secondary marital regime. As explained in Q 36, however, the mandate can only concern proprietary matters. The mandate can be general or particular, explicit or tacit. The mandate is at all times revocable. The mandatory is accountable to the mandator for the exercise of his mandate and needs to provide an account of all that he has received by virtue of the mandate, even if he does not owe the mandatory the received things (Art. 1993 Belgian Civil Code).

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?

There are no important acts that require the consent of the other spouse, except acts concerning the family home (Art. 215 Belgian Civil Code). See Question 10.

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

There are no special rules.

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

In normal circumstances, there is no duty to provide information about the administration of the assets. However, when one of the spouses violates his or her duty to give the necessary support to the other spouse according to Art. 213 Belgian Civil Code, the competent judge (mostly a justice of the peace) can force the negligent spouse to provide information about the administration of the assets (Art. 221 Belgian Civil Code).

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

Aside from the rules of the primary regime that are applicable to all spouses (See Question 40, concerning the mechanism of Art. 221 Belgian Civil Code and specifically the special rules concerning the protection of the family home in Art. 215 Belgian Civil Code), there are no specific rules.

Disputes between spouses will be resolved by applying the general rules of joint ownership. According to Art. 815 Belgian Civil Code, no one can be forced to retain joint ownership. Art. 1469 Belgian Civil Code confirms the general law and specifies that every spouse can ask to end the joint ownership. It is not necessary to wait for the end of the matrimonial regime.

However, according to Art. 1469, para. 2 Belgian Civil Code, one spouse can buy a share in one or more goods of the other only at a public sale (see Question 14)

There are two exceptions:

- the asset to be divided may not be the family home (Art. 215 Belgian Civil Code);
- the spouses must not have concluded an agreement of indivision (Art. 815 para. 2 Belgian Civil Code); this agreement is limited in duration (max. 5 years), can be renewed for a maximum term of five years and, in the case of immovable property, can only be opposed to third parties when it is registered in the registers of the mortgage keeper (Art. 815 para. 3 Belgian Civil Code).

The division can be amicable or compelled when the spouses cannot agree.

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?

Generally, the common rules of joint ownership are applicable. The administration of joint assets is determined by Art. 577-2 Belgian Civil Code.

This means that, to be valid, the acts of administration and the disposal of joint assets (with the exception of acts for the preservation of the assets and acts of provisional administration) must be settled with the cooperation of both spouses. Acts that are settled without the cooperation of both spouses are invalid.

The specific rules of the primary regime must also be taken into consideration. Art. 224 Belgian Civil Code mentions the cases in which the Court of First Instance can pronounce the nullity of specific deeds which constitute a summary offence under some prohibition provisions of the primary regime. Under Art. 224 para. 1 No. 2 Belgian Civil Code acts by one of the spouses which violate a prohibition to alienate or to mortgage as determined under Art. 223 Belgian Civil Code after the transcription of the appeal or the ordinance of the judge are voidable. As the text of Art. 224 Belgian Civil Code refers to the transcription of the petition or the ordinance in the registers of the mortgage registry, which are exclusively possible in respect of immovable property, only the nullification of legal acts concerning immovable property is provided for. Nullity is not possible for legal acts concerning movable property. At most, these acts cannot be invoked against the other spouse. For the others, only penalties are possible.

Gifts *inter vivos* and (personal) guarantees may be nullified if they endanger the interest of the family.

The disadvantaged spouse can also claim damages, even if he or she has not established a claim for cancellation or the request was rejected or granted. The request for cancellation or remuneration must be established under penalty of decline within one year from the day on which the operation has come to the knowledge of the spouse applicant. If the spouse dies before the decline has been entered, his or her heirs have a new period of one year as from the date of death.

The specific rules governing the regimes of community of property (Art. 1420-1426 Belgian Civil Code) do not apply.

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

The specific rules governing the regimes of community of property (Art. 1420-1426 Belgian Civil Code) do not apply (See Question 42a).

By contrast, the rules of the primary regime do apply, specifically the rules of Art. 220 Belgian Civil Code. It means that in case of the incapacity or illness of one spouse, the other spouse may ask the court for permission to act alone, or even, more generally, to be substituted in respect of the first spouse's decision-making authority (Art. 220-221 Belgian Civil Code).

Moreover, if a spouse is incapable of administering the assets for physical or mental reasons (e.g. advanced age, illness) the other spouse can request a justice of the peace to designate him or her as the provisional administrator of the assets of his or her incapable spouse. This procedure of provisional administration is the common procedure for incapable adults and is governed by Chapter Ibis of the Civil Code (Art. 488bis a-488bis k Belgian Civil Code). The provisional administration can be requested by every interested party, including the spouse of the incapable person and the incapable person him or herself. The administration is supervised by the competent justice of the peace. The justice of the peace determines the extent of the competences of the provisional administrator, according to the personal (including medical) situation of the incapable spouse. The justice of the peace can designate the spouse as a provisional administrator, but has no obligation to do so. The provisional administrator will, within the limits of his competences determined by the justice of the peace, administer the assets of his or her incapable spouse.

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 matrimonial property regime is dissolved in the following cases:

- Dissolution by death;
- Dissolution by divorce by mutual agreement;
- Dissolution by divorce on the basis of an irretrievable breakdown of the marriage;
- Dissolution by a modification of the matrimonial property regime.

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

The rules determining the decisive date for the dissolution of the matrimonial property regime are the same as in case of a community of property regime. These rules are extensively explained under Question 44.

In summary, they mean that in the case of dissolution by death, the matrimonial property regime dissolves on the day of the death of the first spouse, both between spouses and as against third parties.

In the case of dissolution by divorce, the dissolution of the matrimonial property regime will take effect towards third parties from its registration in the records of births, deaths and marriages. Between spouses it will take effect from the day upon which the divorce judgment is final and conclusive (Art. 1278 para. 1 Belgian Judicial Code).

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

Every spouse retains his or her separated property, without any possibility of reallocation. Joint property is divided in equal parts.

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?

Concerning the determination of the assets, please refer to Question 134 and 135. In summary, according to Art. 1468 Civil Code, the ownership of assets between spouses is proved according to the rules of art. 1399 Civil Code, while the furnishing of evidence for claims is dominated by general law, which means that when the claim exceeds EUR 375 or when the spouse proves against a written document, a written document is needed (Art. 1341 Belgian Civil Code).

The value of the assets is calculated on the day of distribution. The normal market value must be determined. For claims, the principles of nominalisation are applicable.

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?

The value of assets is calculated on the day of distribution.

153. What happens if one spouse's assets are used for investments in the other spouse's assets? Is there any right to compensation? If so is this a nominal compensation or is it based on the accrual in value?

The spouse who invested in the assets of the other will have a claim against the other spouse. Compensation based on the accrual in value is not possible. To have a possibility of obtaining nominal compensation the spouse will have to prove the factual payment. This proof must be given according to the common rules of the law of obligations, namely by a written document, when the value exceeds EUR 375 (Art. 1341 Belgian Civil Code), except when the matrimonial agreement provides for other rules.

It is not only the fact of payment that must be proved; the legal ground of that payment must also be determined. The spouse from whom the compensation is claimed can raise a defence by referring to the obligation to contribute to the costs and expenses of the family household (Art. 221 Belgian Civil Code) or the existence of a natural obligation (Art. 1235 Belgian Civil Code). Referring to a donation is not useful given the revocable character of donations between spouses (Art. 1096 Belgian Civil Code).

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

The spouse whose assets have been used for the payment of a debt of the other spouse will have a claim against the other spouse. The value of the claim will be calculated according to the principles of nominalisation. See Question 153.

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

No. The right of a preferential allocation of certain assets (the immovable property which serves as the family home, together with the household assets) is not applicable to the matrimonial regime of separation of property (compare Question 51 for regimes of community of properties).

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

No. The right of a preferential allocation of certain assets (the immovable property which serves or has served for professional purposes, together with the movable property which is present for professional purposes) is not applicable to the matrimonial regime of separation of property (compare Question 52 for regimes of community of properties).

157. To what extent, if at all, does the dissolution of the matrimonial property regime affect the attribution of maintenance?

The same solution applies as for the dissolution of the matrimonial community regime. As explained in Question 53, the distribution (and not the dissolution) of the regime will affect the financial situation of the former spouses, and therefore has an influence on the question of whether or not the former spouse is in a state of financial need according to Art. 301 Belgian Civil Code.

158. To what extent, if at all, does the dissolution of the matrimonial property regime affect the pension rights and claims of one or both spouses?

Since property is separated, the dissolution of the matrimonial property regime does not affect the pension rights and claims of one or both spouses. This includes the additional pension rights that have been built up on a private basis as well as the benefits of life insurance policies.

Concerning the general pension rights built up according to the social security system, both spouses have a personal pension right.

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

As every spouse retains his or her separated property while joint property is divided in equal parts, this question can concern only joint property. By agreement, the former spouses can decide what they want. The competent authority will be bound by the general rules.

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

No. The applicable rules are similar in the case of the dissolution of the matrimonial regime by death and by divorce.

V. Separation of property with distribution by the competent authority

Not relevant.

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?

If spouses do not want to fall within the scope of the legal regime, they can make a prenuptial agreement. Spouses are free to adopt a different regime or to introduce modifications or supplements to the legal regime.

The prenuptial agreement is subject to the general rules of the law of obligations. Consequently, the legal validity of the prenuptial agreement must satisfy the requirements of consent, competence, lawful cause and certain object.

According to Art. 1392 Belgian Civil Code, prenuptial agreements must be drawn up in a formal document. Since the prenuptial agreement is a solemn contract, it is impossible to draw up a valid prenuptial agreement orally or privately.

In accordance with Art. 1391 Belgian Civil Code the stipulated matrimonial property regime becomes effective from the date of the marriage.

However, the prenuptial agreement can be declared completely or partially null and void. Complete nullity arises when e.g. a formal requirement has not been observed or when the consent of a spouse is lacking. If the prenuptial agreement contains a condition which is e.g. contrary to public safety or public morality, only this condition will be null and void. The prenuptial agreement remains valid in respect of the other provisions, unless the void condition is connected to the remainder of the agreement in such a way that it can only be seen as one inseparable whole. In such a case, the nullity of the condition will result in the nullity of the whole agreement since it is considered that there is an indivisibility between the conditions of the prenuptial agreement.

Spouses whose prenuptial agreement has been declared null and void will be deemed to be married under the legal regime *ex tunc*.

The prenuptial agreement is binding. It cannot be set aside by the parties or by the Court, except when it is contrary to public order or other statutory provisions.

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

Spouses are allowed to introduce modifications to the prenuptial agreement during the marriage. However, such modification in the first place assumes a mutual agreement between the spouses. Unilateral modifications are not allowed, with the exception of the judicial separation of property.

The prenuptial agreement is binding. It cannot be set aside by the parties or by the Court, except when it is contrary to the public order or other statutory provisions.

Spouses modify their settlement at their own discretion. They can even adopt another regime (Art. 1394 para. 1 Belgian Civil Code). The law is very liberal: provisions on their duration have not been prescribed, the number of (successive) modifications is infinite, a reason for the modification is not required and spouses are free to determine the scope of the modification.

However, the freedom to modify the settlement is not unlimited. As with the prenuptial agreement which has been drawn up before marriage, the contract of modification cannot

contain a condition which is contrary to either public safety or public morality. The equality and capacity of both spouses to contract is of crucial importance. Moreover, spouses cannot include stipulations limiting personal freedom, such as an agreement not to divorce or to remarry after divorce, an agreement not to claim the judicial separation of assets or the exclusion of a conventional modification of the prenuptial agreement. However, it is possible to provide that certain advantages will cease to have effect upon a second marriage. Spouses are not entitled to deviate from the provisions of the primary regime, from the provisions of parental authority and custody or from the rules determining the legal order of succession. Spouses must also respect the essential characteristics of the stipulated regime, as these are imperative. The prenuptial agreement has to be drawn up as one coherent whole and the regulation cannot in any case contain any contradictions. Besides the consistency of the regime, the spouses also need to guarantee the stability of the marriage conditions. Consequently it is not possible for the spouses to allow their choice of the matrimonial property regime to depend on the dissolution of the regime. Case law and legal experts accept that a clause which conflicts with the essential characteristics of the regime is indeed not contrary to public safety but is invalid because of this contradiction. In a community of property compensation cannot be totally excluded because it is an essential element of this matrimonial regime.⁶¹ It is however possible to exclude certain compensation or to modulate the manner of settlement.

Finally, the spouses are unable to deviate from the rules of mandatory law, e.g. the furnishing of proof towards third parties.

As far as the content is concerned, the contract of modification is binding to the same extent as the agreement which has been drawn up before marriage.

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

Prenuptial Agreements

Prenuptial agreements need to be drawn up in a notarial deed as prescribed by Art. 1392 Belgian Civil Code. Since the prenuptial agreement is a solemn contract, it is impossible to draw up such an agreement orally or privately, even if that private agreement has been laid down with a notary to keep under its original documents.

Art. 1389 Belgian Civil Code. prohibits the stipulation of conditions by means of a simple reference to repealed legislation. Such regimes must be taken *in extenso*. If they opted for a regime foreseen by the B.W., a simple reference will be sufficient (Art. 1389 *in fine* Belgian Civil Code).

Postnuptial Agreement - Modification during the Marriage

During the marriage spouses are entitled to introduce modifications to their prenuptial agreement. A modification is in the first place only possible where there is mutual agreement between the spouses.

In the past, the modification procedure was very complicated, with a distinction being made between the small, medium and large procedure. On 14 August 2008, the new law extensively simplifying the procedures for the modification of a pre- or postnuptial agreement appeared in the Belgian Bulletin of Acts and Decrees. The current distinction between the different procedures of modification (large, medium and small modification procedure) has been repealed and the court's approval has been abolished. The procedure no longer depends on the type of modification which the spouses wish to carry out (Art. 1394 - 1395 Belgian Civil Code).

⁶¹ Cass., 17.09.2007, *NjW* 2007, 797, note GDR, *R.W.* 2007-08, 534, note Du Mongh and Declerck.

The policy lines of the new law can be described as follows. Art. 2 of the law rewrites Art. 1394 Belgian Civil Code in the sense that the distinction between the small, medium and large modification procedure disappears. The inventory also becomes optional. The new Art. 1394 para. 2 Belgian Civil Code reads as follows: *“If one of the spouses so requests, the act of modification of the matrimonial property regime will be preceded by an inventory of all movable and immovable property and all debts of the spouses”*. However, an inventory is still required if the modification of the matrimonial property regime results in the liquidation of the previous regime. Subject to the case meant in the 2nd para., the inventory can be drawn up on the basis of declarations.

- 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.**

Prenuptial Agreements

In accordance with Art. 76 and Art. 101 Belgian Civil Code the marriage certificate must mention the date of the prenuptial agreement, the name and the duty station of the notary who has drawn up the certificate and the marriage regime of the spouses. If these details are not mentioned, the conditions which differ from the legal regime cannot be invoked against third parties who have concluded contracts with both spouses or with one of them, unless they were informed in a different way about the prenuptial agreement. If these third parties will not suffer from the stipulated matrimonial regime, but profit, they are entitled to rely on it, even if they were not initially aware of the matrimonial regime.

The prenuptial agreement which contains an immediate transfer of immovable property or immovable property rights needs to be registered in the registers of the land and mortgage registry (Art. 1, 1^e Belgian Law of Mortgages).

Contractual appointments of heirs, stipulations to take in advance and stipulations of an unequal division also have an impact on the liquidation/distribution of the inheritance. Prenuptial agreements in which future spouses assign the whole or a part of the assets of their inheritance to one another must be registered in the central register of utmost statements mortis causa. This central register is kept by the royal federation of Belgian notaries (Art. 6 K.B. 28 October 1977).

If one of the spouses is a merchant at the moment that the agreement has been drawn up, an extract of the prenuptial agreement must be sent to the chancery of the court of commerce within the jurisdiction where the trading spouse is registered in the register of companies as per Art. 12 para. 1 Belgian Commercial Code (Wetboek van Koophandel/Code de commerce) based on Art. 13 Belgian Commercial Code, the notary is obliged to send the extract to the court registry of the Court of Commerce within a period of three months. If the spouse becomes a merchant after his marriage or starts a new trading company, he or she needs to ensure that the extract is sent to the court registry him or herself: Art. 14 Belgian Commercial Code.

Postnuptial Agreement - Modification during the Marriage

The postnuptial agreement is mentioned in the margin of the marriage certificate (Art. 76, 10^o Belgian Civil Code). Art. 1396 Belgian Civil Code provides that the notary is responsible for the publication of the postnuptial agreement in the Belgian Bulletin of Acts and Decrees. However, this publication is not required for modifications concerning matrimonial advantages and the appointment of the surviving spouse as an heir. They can be invoked against a third party as soon as they are mentioned in the margin of the marriage certificate.

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

Prenuptial Agreements

No.

Postnuptial Agreement - Modification during the Marriage

As mentioned in the answer to question 193, the Law of 18 July 2008 on modifying the marital property regime without the interference of the court will also reform the inventory requirements. The stocktaking becomes optional from this moment onwards. The new Art. 1394 para. 2 Belgian Civil Code reads as follows: *"If one of the spouses so requests, the certificate of modification of the marriage property regime will be preceded by an inventory of all movable and immovable properties and all debts of the spouses."* However, stocktaking is still required if the modification of the marriage property regime results in the settlement of the previous regime. Subject to the situation meant in the 2nd par., the inventory can be made up based upon declarations. The inventory is an authenticated certificate.

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

Art. 9 of the Law on the Notarial Profession stipulates that the notary has to inform the parties entirely and objectively. If there are unbalanced conditions or if there is a threat of contradictory interests, the notary must indicate that the parties are able to ask for the assistance of a lawyer or another notary. The informational duty of the notary covers any possible economic and fiscal consequences of the certificate which the parties intend to have drawn up. Giving the necessary information is 'commitment' by the notary, who can prejudice his or her own liability by omitting to do so. The Law of 18 July 2008 which explains the modification of the marital property regime without the interference of the court has explicitly anticipated that the notary needs to notify the execution of the deed.

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

No statistical data available. In general, experience suggests that the regime of separation of property is used to limit the liability for each spouse's debts.

The regime of community is used in order to strengthen the position of the longest living spouse in the case of regimes of community of property by adding 'matrimonial advantages' (especially the survivorship clause). Because of fiscal aspects any reservation may have arisen. The input of a specific asset is used to avoid the accession of property (mainly concerning construction sites). Any wider input is seldom. The regime of complete community is nearly obsolete.

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?

The spouses have a wide freedom of choice. The legislator has introduced two models: a regime based on the legal regime, where stipulations as to the extension of the common profits or as to amendments to the equal partition of the common property are accepted (Art. 1451-1465 Belgian Civil Code) and a regime of separation of goods that aims at a pure separation (Art. 1466-1469 Belgian Civil Code).

The spouses, however, can also introduce modifications to the legal regime which are not stipulated in the law, e.g. the exclusion of certain goods from the common assets or a condition which ensures a fixed amount from the common capacity for a spouse. The spouses

can also choose a regime which differs completely from the regimes which have been proposed by the legislator. Thus, the parties have the possibility to choose a foreign regime or a 'tailor-made' regime.

The free choice is however limited by a number of substantive provisions as explained in the question concerning the marriage contract. (See Question 192).

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;

Yes, although in community property regimes it is impossible to exclude income from labour.

b. administration of assets;

In regimes of community of property, one cannot deviate from the rules of the administration of the legal property regime which are related to the supervision of one's own and common property.⁶²

c. distribution of assets;

Yes. Spouses have e.g. the ability to stipulate a survivorship clause or to stipulate the possibility of taking property in advance. See Question 200.

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

The choice of the marriage regime of the spouses cannot depend upon the ground for the dissolution of the regime.

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

Regimes of community of property:

1. Stipulations as to the extension of common profits

Spouses can agree that their own present and future movable property or immovable property is entirely or partially subsumed into the common property. In the first case there a regime of complete common assets begins. Input can be by one or both spouses. The outcome is not a donation but an advantage conferred on the marriage under onerous title.

2. Stipulations of an unequal division

Possibility to take in advance

Spouses can agree that the longest living of the two will have the right to take in advance, before division, either a certain amount of money, or certain goods *in natura*, or a quantity or a percentage of a certain category of goods from the common assets (Art. 1457 Belgian Civil Code). The stipulation to take in advance is a survivorship right and can therefore only be stipulated subject to this condition.

An unequal division and a survivorship clause

Spouses can agree that the longest living of the two will receive more than half of the community property or even receive all the assets (Art. 1451 Belgian Civil Code) at the moment of division. This latter is called a survivorship clause. These stipulations can be concluded only as survivorship rights.

Regimes of separation of property:

⁶² Rb. Antwerp, 24.09.1987, *T.Not.* 1988, note Libert.

To the stipulated separation of goods, certain conditions can be added which slightly moderate the strict property/asset separation, especially focusing on the division of the savings realized during the marriage, and which protect the financially weaker spouse. The spouses can choose, for example, a regime of separation of property in combination with acquets, where the spouses agree in the marriage contract which goods will belong to whom.

Spouses can also opt for a (periodical) settlement clause. There will be a complete and pure separation of the goods during the marriage, but upon the dissolution of the marriage a payment is made. The spouses will foresee an internal correction. The value of the final property of each spouse, including all the goods he or she owns at the moment of the dissolution of the regime, has to be compared with the value of his or her initial property, comprising all goods he or she owns at the commencement of the marriage. Each spouse has a right to an equal share of this difference. In this way, the financially weaker spouse can participate in the property increase of the other spouse. The settlement clause does not necessarily have to refer to all the goods of the spouses. In most cases, this is restricted to the property advancement arising out of income from labour. Furthermore, several allocation formulas can be established and its coming into force can be dependent on certain conditions.

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

Prenuptial Agreements

The prenuptial marriage contract is not subject to any preceding test because no legal approval is prescribed. However, the marriage contract can be wholly or partially declared null and void. The spouses cannot include provisions which are contrary to public order or morality, or other stipulations of imperative law. However, there is no substantive (opportunism) control. Spouses whose marriage contracts are null and void are considered to be married under the legal regime *ex tunc*.

Postnuptial Agreement - Modification during the Marriage

Due to the reformation of the modification procedure (See Question 3, 193), the new law of 18 July 2008 modifying the marital property regime without the interference of the court has abolished judicial control. During the parliamentary debates it was noted that the spouses experienced discrimination because they had to tolerate judicial control during their marriage while there was no judicial control when they made a prenuptial agreement. This is one of the reasons why the new law has been enacted.

The same rules are applicable as with prenuptial agreements: the spouses cannot include provisions which are contrary to public order or morality, or other stipulations of imperative law. However, there is no substantive (opportunism) control.