

NATIONAL REPORT: CATALONIA

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Observatory of European and Comparative Private Law, University of Girona

August 2008

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A. GENERAL

1. Are there special rules concerning the property relationship between spouses (explaining what is meant by spouses)?

- 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.

Although some provisions of the Catalan Family Code 1998¹ still refer to “husband and wife”, Catalan law begins with the concept of spouse that results from state law currently in force, laid down in the Spanish Civil Code.² Pursuant to the provisions of the Spanish Civil Code, a spouse is a person who has married according to any of the forms of marriage accepted by the law³. These forms “will have the same requirements and effects when both parties are of the same or of different sex” (Art. 44 II Spanish Civil Code).⁴

Under the heading of “*The effects of marriage*”, Title I of the Family Code includes, in addition to the personal effects of marriage (see Art. 1, 2 and 3 Catalan Family Code), a list of economic consequences linked to marriage.

Among those consequences occurring *during marriage*, the most relevant are:

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- ¹ Act 9/1998, of 15.07.1998, of the Family Code (DOGC (Diari oficial de la Generalitat de Catalunya (Catalan Official Journal)) No. 2687, 23.07.1998; correction of mistakes DOGC (Diari oficial de la Generalitat de Catalunya (Catalan Official Journal)) No. 2732, 28.9.1998). Amended by Act 3/2005, of 08.04.2005 (DOGC (Diari oficial de la Generalitat de Catalunya (Catalan Official Journal)) No. 4366, 19.04.2005). See Art. 1, 2 and 4 Catalan Family Code.
 - ² According to the Constitution, the competency to lay down who may marry, under which conditions and in which forms belongs to the State legislature (Art. 149.1.8 in connection with Art. 32 para. 2 Spanish Constitution 1978).
 - ³ The Spanish Civil Code allows the celebration of marriage in a civil form (Art. 49 and 50 Spanish Civil Code) and also in a religious form. The religious form may refer either to a Roman Catholic marriage, by application of the Agreement with the Holy See currently in force, when the spouses marry in accordance with the Canon Law rules (Art. 60 Spanish Civil Code), or to marriages solemnised according to other denominations and religions (Art. 59), pursuant to specific legislation passed for certain religious creeds. However, although in all cases marriage solemnised in a religious form has civil effects from the moment of its solemnisation, full recognition of its civil effects requires marriage to be recorded in the Register of Births, Marriages and Deaths (Art. 61 I and II Spanish Civil Code) and, therefore, if a marriage has not been recorded, it will not produce any detrimental effects against third parties in good faith (Art. 61 III Spanish Civil Code).
 - ⁴ This second paragraph has been added by Act 13/2005, of 01.07.2005, which modifies the Civil Code with regard to the right to marry (BOE (Boletín Oficial del Estado (Spanish Official Journal)) No. 157, 02.07.2005).

1. each spouse is entitled to incur debts in order to meet the ordinary family expenses (Art. 3 para. 2 Catalan Family Code), as well as to manage the affairs of the other spouse without his or her authorisation in situations of emergency or when the other spouse is unable to do so (Art. 3 para. 3 in fine Catalan Family Code);
2. the Code defines family expenses (Art. 4 Catalan Family Code), and it also specifies how the spouses and other family members are to contribute to the payment of these expenses (Art. 5 Catalan Family Code) as well as their liability to third parties (Art. 8 Catalan Family Code); and
3. the limitations to the free disposal of the family home and of the chattels of ordinary use (Art. 9 Catalan Family Code).

Additionally, the Family Code considers that the existence of a matrimonial property regime is an essential part of the rules governing marriage. Therefore, after providing that the spouses may lay down the rules governing their matrimonial property in a marital agreement (Art. 10 para. 1 Catalan Family Code) it establishes that "if there is no agreement or if the marital agreement is ineffective, separation of property is the governing matrimonial property regime" (Art. 10 para. 2 Catalan Family Code). Moreover, although the Code also adds that "spouses may transfer property and rights by any title to each other and conclude with each other all sorts of legal transactions", it still subjects exchanges carried out between spouses during marriage (Art. 11 in fine Catalan Family Code) and acquisitions of one spouse from the other shortly before this other spouse falls into bankruptcy to a rebuttable presumption of gift (Art. 12 Catalan Family Code).

Property relationships between spouses upon the death of one of them that are not related to the law of succession are established by Art. 35 and 36 Catalan Family Code. Article 35 provides that the surviving spouse who was not legally or *de facto* separated is entitled to the ownership of the linens, furniture and accessories that compose the household equipment of the spousal dwelling. To this, Art. 36 adds that he or she is also entitled to abide in the former spousal dwelling for the lapse of one year and to obtain maintenance from the estate of the deceased spouse for the same period. Both rights are independent of the succession rights in the estate of the pre-deceased spouse and are compatible with any other right that the surviving spouse may have in the other's estate. Finally, being spouses (or becoming spouses in the future) allows the couple to enter into a succession agreement.⁵

Most of the personal and economic consequences of marriage, both between spouses and *vis-à-vis* third parties, cease when spouses separate, even if *de facto*. Marriage breakdown shown by filing a petition of separation or just the intention to file it revokes by operation of the law the power of attorney granted by one spouse to the other and also puts an end to the possibility that one of the spouses may bind property belonging to the other spouse, while carrying out the management of the household (*potestad doméstica*) (Art. 102 and 103 Spanish Civil Code). Moreover, in the cases of nullity of marriage, divorce or judicial separation, the regulatory agreement or the judicial decree must provide, depending on the circumstances of the case, for the following aspects (see Art. 76 para. 3 Catalan Family Code):

⁵ See now Art. 431-2 Catalan Civil Code (as recently introduced by Act 10/2008, of 10th of July, passing the Fourth Book of the Catalan Civil Code, on successions [DOGC (Diari oficial de la Generalitat de Catalunya (Catalan Official Journal)) No. 5175, 17.7.2008]). Before, inheritance agreements called *heretaments* could only be agreed in a public deed and in favour of the spouses, their children or, reciprocally, between the spouses themselves, in favour of each other (Art. 67 to 100 Catalan Succession Code 1991). Additionally, spouses governed by the matrimonial property regime of separation of property are also entitled to make acquisitions with the so-called *pacte de supervivència* (survival agreement) (Art. 44 to 47 Catalan Family Code), which means that when one spouse dies, his or her share in the jointly acquired asset does not pass on to his or her estate and the surviving spouse becomes its sole owner.

1. The manner, if any, in which the spouses continue to contribute to family expenses. This refers exclusively to the expenses related to the family dwelling and other assets for family use.⁶ The rules applicable to these expenses are not the rules of contribution that were applicable to family expenses during life in common, but the rules that result from the ownership of these assets.⁷

2. The liquidation of the matrimonial property regime and

3. The division of common assets and properties.

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

There are basically three stages in the evolution of Catalan Law in this matter:

1. *Pre-constitutional stage.* During this period the applicable rules are to be found in State Act 40/1960, of 21st of July, on the Compilation of the Special Civil Law of Catalonia. The rules concerning the property relationships of the spouses are based upon the rules inherited from the tradition of Roman law (as, for instance, the prohibition of gifts between spouses, the prohibition of the intercession of wives in favour of their husbands, or the so-called *muciana* presumption). The matrimonial property regime established by the Compilation is the separation of property, although balanced to some extent with family institutions developed over centuries by the practice of the public notaries and regularly included in prenuptial agreements (such as the dowry and associated rights, the administration and disposition of exclusive or paraphernal property of the wife, the universal usufruct of the widow and the *any de plor* [year of mourning]), which the Compilation regulates in all detail.

2. *The coming into force of the Spanish Constitution and the adjustment of Catalan Family Law.* Act 13/1984, of 20th of March, passed by the Catalan Parliament amends many provisions of the Compilation in order to adjust it to the constitutional principle of legal equality of the spouses before marriage enshrined in Art. 32 para. 1 Spanish Constitution 1978. The prohibitions referring to gifts between spouses and to wives interceding in favour of their husbands are abolished and the scope of the *muciana* presumption undergoes substantial revision.

3. *Amendment of the 1960 Compilation with regard to property relationships between spouses by Act 8/1993, of 30th of September.*⁸ Besides systematising the regulation on the subject matter, this amendment aimed at “introducing correctives into the default matrimonial property regime in order to prevent possible situations of inequality at the moment of its dissolution”.⁹ The main corrective was the introduction of a specific remedy - the so-called “economic compensation on the grounds of work” (current Art. 41 Catalan Family Code), which aimed at correcting the shortcomings of the separate property regime when one of the spouses - in

⁶ Joaquín Bayo Delgado, “Article 76 del Codi de Família”, in: Joan Egea Fernández and Josep Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 380.

⁷ J. Ferrer Riba, “Separació de béns i compensacions en la crisi familiar”, in: *Nous reptes del Dret de família. Materials de les Tretzenes Jornades de Dret català a Tossa*, Girona: Documenta Universitaria 2005, p. 79. See on this subject-matter STS (Sentencia del Tribunal Supremo (Sala de lo Civil) (Decision of the Spanish Supreme Court, Civil Chamber)) 31.05.2006 (holding that after separation the payments made for the purchase of joint assets must be allocated in accordance with the share that each spouse has in them and not according to the financial resources of each of them). On the difference of approaches in the practice of the courts see, however, J. Egea Fernández, “Articles 4-5”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 95-96.

⁸ DOGC (Diari oficial de la Generalitat de Catalunya (Catalan Official Journal)) No. 1807, 11.10.1993.

⁹ § I Preamble of the Act 8/1993.

most cases, the wife - had done the household chores or had worked in the entrepreneurial or professional activity of the other spouse without receiving a salary in exchange.¹⁰ In these cases, due to his or her unpaid work, this spouse has not been able to obtain any assets from his or her work and the separation of property regime existing during marriage prevents him or her from participating in the increase of assets obtained by the other spouse. Having in mind that spouses frequently acquire assets in common in spite of the fact that one of them - usually, the wife - lacks the economic resources to pay for them, the 1993 amendment also introduced as corrective measure the rebuttable presumption that the corresponding share of the price had been donated by one spouse to the other.

The amendments carried out in these last two stages have been included in the regulation of the consequences of marriage contained in the Family Code.

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

It has been clear since the end of the 70s that the separation of property regime must undergo reforms; in particular, to offer a solution for the most serious cases of lack of protection of the spouse who is financially more vulnerable after the dissolution of the matrimonial property regime by divorce or death of the other spouse. Legal scholarship backed the introduction into Catalan law of a sort of participation in the acquisitions, along the lines of the changes produced in Italy or Germany. The *Comissió Jurídica Assesora*, an official body that legally advises the Catalan government, went so far as to prepare a Bill Draft in 1992 on a "matrimonial property regime of separation of property with participation in the acquisitions".¹¹ This and other bill draft projects were rejected, among other reasons, on the grounds that public opinion was for the most part in favour of keeping the default regime of separation of property.¹²

The alternative, finally adopted in 1993, was to keep the separation of property regime, with the introduction of corrective remedies; entitling the spouse who had worked for the household or for the other spouse without payment in exchange, or with insufficient payment, to receive economic compensation from the other spouse, if this produced a situation of inequality between the patrimonies of both spouses (Art. 23 Catalan Civil Law Compilation 1984). In 1998 the Family Code added that this inequality had to imply an unjust enrichment of one spouse at the expense of the other (Art. 41 Catalan Family Code).

In 2006, the Catalan Codification Commission prepared a Bill Draft updating Catalan Family Law in order to incorporate it into the Second Book of the Catalan Civil Code (hereafter Catalan Civil Code), dealing with Persons and Family.¹³ Although the draft did not become law, due to an early election of the Catalan Parliament, the draft adapted the rules referring to

¹⁰ This was the most obvious aim of the Act 8/1993 (L. Jou i Mirabent, "Article 23", in: *Comentari a la modificació de la Compilació en matèria de relacions patrimonials entre cònjuges*, Barcelona: Generalitat de Catalunya, 1995, p. 199).

¹¹ For a brief reference to the background of the amendment see L. Jou i Mirabent, "Article 23", in: *Comentari a la modificació de la Compilació en matèria de relacions patrimonials entre cònjuges*, Barcelona: Generalitat de Catalunya, 1995, p. 199-200.

¹² See, however that, according to an opinion poll conducted at the same time that the Compilation was amended, whereas 26.1 % of the persons who were interviewed were in favour of a matrimonial property regime of separation of property, 73.5% were in favour for a regime of participation in the acquisitions. See Institut Català de la Dona (1995), Figure 18.

¹³ BOPC (Butlletí Oficial del Parlament de Catalunya (Catalan Parliament Official Journal)) No. 353, 15.06.2006, p. 53.

contracts concluded between spouses to the 2003 Bankruptcy Act¹⁴ (see Art. 12, 23 and 24 Catalan Family Code) and established with more detail the scope of economic compensation to one of the spouses on the grounds of his or her work in the household, or for the other spouse (see current Art. 41 Catalan Family Code), by introducing a quantitative limitation and new standards that should enable to set it in a more objective manner.

During the current parliamentary term the Catalan government aims at passing the Second Book of the Catalan Civil Code which, in general terms, will follow the guidelines laid down in the 2006 Bill Draft.

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

The rules regarding the property relationship between spouses do not apply to registered or civil partnerships.¹⁵ However, the 1998 Act for the Stable Unions of Couples (hereafter, Act on Stable Unions of Couple 1998 (LUEP))¹⁶ lays down rights and duties which are very similar to those of the spouses for couples who live together without being married and meet the conditions established by the Act.

These rights and duties are:

1. The duty to contribute to common expenses, as defined by Art. 4 and 23 Act on Stable Unions of Couple 1998 (LUEP), for which the partners are solidary liable (see Art. 5 and 24 Act on Stable Unions of Couple 1998 (LUEP)).¹⁷
2. The limitations to the power of disposal of the common dwelling and of the chattels of common use without the consent of the other partner (Art. 11 and 28 Act on Stable Unions of Couple 1998 (LUEP)).
3. The rights of the surviving partner that entitle him or her to retain certain chattels (Art. 18 para. 1 and 33 para. 1 Act on Stable Unions of Couple 1998 (LUEP)), as well as to abide in the former common home during the year following the death of the partner and to obtain maintenance at the expense of the estate of the deceased partner during the same period of time (Art. 18.2 and 33.2 Act on Stable Unions of Couple 1998 (LUEP)). These are family rights and are independent of any other rights to which the surviving cohabitant may be entitled by virtue of the succession rules.

¹⁴ *Ley 22/2003, de 9 de julio, Concursal* [Bankruptcy Act] (BOE (Boletín Oficial del Estado (Spanish Official Journal)) No. 164, 10.07.2003).

¹⁵ See, however, STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 13.02.2003, holding that an acquisition with survival agreement agreed upon by a non-married couple was valid on the grounds of the principles of self-determination and constitutional protection of the family.

¹⁶ Act 10/1998, of 15.07.1998 (DOGC (Diari oficial de la Generalitat de Catalunya (Catalan Official Journal)) No. 2687, 23.7.1998), amended by Act 3/2005, of 08.04.2005 (DOGC (Diari oficial de la Generalitat de Catalunya (Catalan Official Journal)) No. 4366, 19.04.2005). This Act applies to same-sex couples who have declared by public notary deed that they wish to establish a stable union and also to different-sex couples who have declared by public notary deed that they wish to establish a stable union, or that have cohabited for a minimum period of 2 years or have had a common child.

¹⁷ The scope of the concept of family expenses in the *Llei d'unions estables de parella* (Act on Stable Unions of Couple 1998) is narrower than in the Family Code and does not include the expenses incurred in the acquisition of the common dwelling (see Art. 4 para. 1 Act on Stable Unions of Couple 1998 (LUEP)). See A. Mirambell i Abancó, in: F. Badosa Coll and J. Marsal Guillaumet (eds.), *Manual de dret civil català*, Madrid, Barcelona: Marcial Pons, 2003, p. 452.

Moreover, although indirectly, bankruptcy legislation also imposes some limitations upon the freedom of contract between partners, since it provides that the judge may annul those acts made in favour of a person who is “in a special relationship with the bankrupt person” (Art. 71 LC Ley Concursal (Bankruptcy Act 2003)), an expression that may include a person living together as a couple with another, regardless whether this couple meets the requirements laid down by the Stable Union of Couples Act or not.

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?

In the separation of property regime the property that the spouses have in common is subject to the general rules of joint ownership. The only peculiarity of this property is that it can be “taken as a whole” when dividing the property after marriage breakdown (Art. 43 para. 2 Catalan Family Code), so that property “can be divided considering as a single division all or part of the property under this situation” (Art. 552-11.6 Catalan Civil Code).

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

In principle, there is none. Each one operates independently. As a rule, the liquidation of the matrimonial property regime that takes place upon the death of one of the spouses does not affect the inheritance rights that the surviving spouse may be entitled to in the state of the deceased spouse.

In the case of a separate property regime, “economic compensation on the grounds of work” arises in the cases of “legal separation, divorce or annulment” only (see Art. 41 para. 1 Catalan Family Code). When marriage ends by death of one of the spouses, this compensation cannot be awarded and the only right that the law attributes to the surviving spouse is the right to obtain the payment of a sum of money, to the maximum amount of one fourth of the estate of the deceased spouse –once the debts of the deceased and the legal portion to which family members are entitled to have been deducted - if he or she does not have the means to maintain the lifestyle that he or she enjoyed during marriage (the so-called *quarta vidual* [widow’s/widower’s fourth], see Art. 452-1 Catalan 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)?

Yes. These rules refer to spouses acting in the interest of the family (Art. 3 Catalan Family Code), to their contribution to family expenses and to liability rules regarding these (Art. 4 to 8 Catalan Family Code), to the disposal of the family home and the chattels of ordinary use (Art. 9 Catalan Family Code), to transactions between spouses (Art. 11 to 14 Catalan Family Code) and to family widowhood right (Art. 34 and 35 Catalan Family Code).

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

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

Pursuant to Art. 5 para. 1 Catalan Family Code, spouses must contribute to family expenses. In principle, they will do so as they agree. Lacking any agreement, Art. 5 para. 1 Catalan

Family Code lays down the standard of proportional contribution, *i.e.* in accordance with the “economic resources” of each spouse, a concept that encompasses both the income resulting from work or property revenues and the rest of his or her property and assets. Moreover, Art. 5 para. 1 Catalan Family Code provides that the contribution may consist of “contribution to the household chores” or of “unpaid or insufficiently paid personal or professional collaboration with the professional or entrepreneurial activity of the other spouse”.¹⁸

Art. 4 para. 1 Catalan Family Code provides that “family expenses are those that are necessary to maintain the family according to usage and to the standard of living of the family” and refers expressly to:

1. Maintenance “in its widest sense” of the spouses, their underage children and their children of age and relatives who live with them in the family home.¹⁹ In the case of children that are not common to them and of relatives, their expenses are not considered to be family expenses if they can afford them with their own financial resources (see Art. 4.2 Catalan Family Code).
2. “Insurance, medical and healthcare expenses” of the persons already mentioned.²⁰
3. The expenses deriving from the *maintenance* (emphasis added) of the dwellings and other assets of family use.
4. The expenses deriving from the *acquisition* and *improvements* (emphasis added) to the dwellings and other assets of family use, including the payments of the loans obtained for this purpose. However, if the dwellings or the assets are not jointly owned by the spouses and belong exclusively to one of them, Art. 4 para. 1 b) II Catalan Family Code provides that these expenses are family expenses only “in the part corresponding to the value of their use”.²¹

¹⁸ In addition to the spouses, Art. 5 para. 2 Catalan Family Code mentions the *children* who live with the family, who must also contribute to the family expenses in proportion to “the income they obtain with their activities, the revenues of their assets and property and with their work in the family’s interest” (Art. 146.1 Catalan Family Code). It also mentions “the rest of the relatives who live with the family”, who contribute “to the extent of their possibilities and according to the expenses that they cause” (Art. 5 para. 3 Catalan Family Code).

¹⁹ The scope of this obligation is assessed by reference to the definition of the obligation of maintenance included in Art. 259 Catalan Family Code, which provides that “maintenance includes everything that is indispensable for the support, dwelling, clothing and medical assistance of the person entitled to it, as well as the expenses for education, if this person is not of age, and the expenses to continue in education once this person comes of age, when he or she has finished it on grounds that are not imputable to him or her”. Maintenance also includes funeral expenses (Art. 259 para. 2 Catalan Family Code).

²⁰ As regards expenses incurred in contributions to pension or retirement plans, some authors cast doubts on whether they can be deemed as family expenses insofar as they may well be attributable to the exclusive interest of the spouse who holds the corresponding rights. See E. Roca Trías, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 300. See also J. Egea Fernández, “Articles 4-5”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 104, who excludes them as family expenses.

²¹ See E. Roca Trías, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 298-299 for harsh criticism against deeming as family expenses those deriving from the acquisition and improvements of the family dwelling, when it belongs exclusively to one of the spouses. At any rate, the “part corresponding to the value of their use” could be determined by assessing the hypothetical cost of renting a house of the same type and circumstances (see J. Egea Fernández, “Articles 4-5”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari*

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

“Before third parties both spouses are solidary liable for the obligations entered on the grounds of family expenses to which Art. 4 refers to, if these expenses are in accordance with the usage and the standard of living of the family; if this is not the case the spouse who has entered to obligation is the one who is liable” (Art. 8 Catalan Family Code). Internally, the contribution of each of the spouses will be measured according to what they have expressly or tacitly agreed or, when such an agreement does not exist, according to the standard of proportionality (Art. 5 Catalan Family Code). Moreover, it must be taken into account that Art. 3.2 Catalan Family Code empowers each spouse to incur in debts for the purpose of meeting *ordinary* family expenses²² and that both spouses have the reciprocal duty “to inform each other sufficiently of the management of the assets that they carry out with regard to the family expenses” (Art. 6 Catalan Family Code).²³

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”.

Pursuant to Art. 9 Catalan Family Code, and “regardless of which matrimonial property regime applies”, the spouse who is the owner of the family dwelling may not carry out any act of alienation, encumbrance or, more in general, disposition of his right, that endangers the family use of the dwelling. The provision encompasses both the disposition of the dwelling that is the exclusive property of one of the spouses and the disposition of the share of the dwelling owned in joint property with the other spouse, or of any other rights that entitle the use of the dwelling.

Article 9 Catalan Family Code lays down the possibility of replacing the consent of the other spouse by means of a judicial order issued “in the interest of the family or on the grounds of another just cause”, as well as the consequences when this consent or authorisation of the judge fails (see Art. 9 para. 2 and 9 para. 3 Catalan Family Code). The provision does not establish what a family dwelling is, nor does it furnish any standards to define it. If this provision is connected to Art. 4 Catalan Family Code, which establishes the family domicile, one can start from the idea that the family dwelling is the place “where spouses, or one of them with most of the rest of the family, usually live together”.²⁴

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”.

The rules of Art. 9 Catalan Family Code that establish limitations to the acts of disposal by the owner of the family dwelling in order to protect it also apply to the acts of disposal of the

al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua, Madrid: Tecnos, 2000, p. 103-104).

²² See J. Egea Fernández, “Articles 4-5”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 98.

²³ For the infringement of which the law does not provide for any sanction (A. Mirambell i Abancó, in: F. Badosa Coll and J. Marsal Guillaumet (eds.), *Manual de dret civil català*, Madrid, Barcelona: Marcial Pons, 2003, p. 454).

²⁴ E. Roca Trías, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 305.

“chattels of ordinary use”. However, the Code neither provides a definition nor sets any standards to identify precisely to which chattels it refers.²⁵

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...)?

The 1984 amendment of the Compilation abolished the rules that prevented wives from providing security or to intercede in favour of their husbands or of any other person (see Art. 321 and 322 of the 1960 Compilation).²⁶ According to Catalan Law now in force, married persons are not subject to any specific regime when entering any transaction. The only particular rules are:

1. *Liability for the exclusive debts of the other spouse.* As a general rule, each spouse may incur in debts for which he or she will be liable with all his or her assets (Art. 1911 Spanish Civil Code). The other spouse will be only liable for those debts incurred on the grounds of family expenses (Art. 8 Catalan Family Code) or if he or she has given his or her consent to them. In spite of this, in the case that joint accounts are seized by reason of debts which are exclusive to one of the spouses, Art. 13 Catalan Family Code provides that “the spouse who is not the debtor may avoid the seizure of *those amounts that he or she proves that belong to him or her exclusively*” (emphasis added). This means that, if the non-debtor spouse cannot prove the amount that belongs to him or her exclusively, the presumption of joint ownership prevails (see Art. 40 Catalan Family Code) and he or she will only be able to prevent the seizure of half of the account balance existing when the seizure took place.

2. *Acquisitions carried out by one of the spouses immediately before bankruptcy of the other spouse was established.* Acquisitions of one of the spouses by onerous title that have taken place immediately before bankruptcy of the other are rebuttably presumed to be a gift of the bankrupt spouse (Art. 12 Catalan Family Code) and, for this reason, they do not come into the detriment of creditors²⁷ and the acquired property –if it has not been passed on to protected third parties- or its value can be given back or refunded to the debtor.²⁸

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

Pursuant to Art. 3 para. 3 Catalan Family Code no spouse can assume the representation of the other if representation has not been conferred to him or her.²⁹ Accordingly “the rules

²⁵ In the Draft Bill of the Family Code the provision applied to the “household equipment”, but during parliamentary proceedings its scope was amended by making reference to “chattels of ordinary use”. See J. Egea Fernández, “Articles 4-5”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 101.

²⁶ The legal prohibition of the intercession of wives in favour of their husbands (Art. 322 Compilation 1960) was declared unconstitutional by decisions of the old *Audiencia Territorial de Barcelona* of 15.10.1982 and 14.03.1983.

²⁷ See Art. 531-14 Catalan Civil Code .

²⁸ According to the LC Ley Concursal (Bankruptcy Act 2003), however, the legal consequence of the lack of proof regarding the origin of the funds used to pay the price of acquisition is that it is presumed that the bankrupt spouse made a gift amounting to *half of the price* (Art. 78 LC Ley Concursal (Bankruptcy Act 2003)).

²⁹ Compare with the original version of Art. 60 CC, which established that “the husband is the [legal] representative of his wife”. This provision was in force until the entry into force of Act 14/1975, of 02.05.1975, amending the Civil Code and the Commercial Code regarding the legal condition of married women and their spousal duties (BOE (Boletín Oficial del Estado (Spanish Official Journal)) No. 107, 5.5.1975). At any rate, it did not

referring to the management of the business of another are applicable to the acts performed by one of the spouses in the name of the other" (see Art. 3 para. 4 Catalan Family Code). If the spouse acted as an agent of the other, the rules of the contact of mandate will apply (see Art. 1709 to 1739 Spanish Civil Code). In any other case, it is considered that Art. 3 para. 4 refers to the provisions of *negotiorum gestio* or benevolent intervention in the affairs of another (Art. 1888 to 1894 Spanish Civil Code). The only specific difference with regard to these rules is that it is presumed that the interference with the legal sphere of the other spouse is presumed legitimate when it deals with ordinary family expenses (Art. 3.2 Catalan Family Code) and in "situations of emergency and when it is impossible for the other spouse to give his or her consent" (see Art. 3 para. 3 Catalan Family Code).³⁰

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

The 1984 Amendment of the Compilation abolished the prohibition of gifts between spouses performed outside marital agreements (Art. 20 Compilation of 1960). In order to emphasise this change, since the 1984 Amendment all subsequent legal texts referring to the subject matter have enshrined the principle according to which "spouses may transfer each other assets and rights by any title and carry with each other all sorts of legal transactions" (see current Art. 11 Catalan Family Code).³¹ In spite of that, however, current regulation upholds the rule that when a claim is filed any transfer between spouses is presumed to have been performed by gratuitous title (Art. 11 in fine Catalan Family Code) and, as under the rules previously in force, in the case of a claim brought by a third party it is for the spouses to prove that the legal transaction was in fact carried out by onerous title.³²

C. MATRIMONIAL PROPERTY REGIMES

C.1. General issues

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

Yes. The legal instrument to attain this end is the so-called *capítols matrimonials* (marital agreements) (Art. 15 para. 1 Catalan Family Code), which can be entered into either before or after marriage (although those that have been entered into before marriage are effective after the solemnisation of marriage only [see Art. 15 para. 2 Catalan Family Code]).

apply to Catalan married women. In spite of the case law of the Supreme Court, which on many occasions declared otherwise, such limitation on the legal capacity of married women was against Catalan law. Indeed, the Compilation of 1960 made it clear beyond any doubt that married women were free to administrate and to dispose of their exclusive or paraphernal property (see Art. 49 para. 3), upholding thereby the traditional criteria that the Supreme Court had mistakenly circumvented. On this issue, see J. Delgado Echeverría, *El régimen matrimonial de separación de bienes en Cataluña*, Madrid: Tecnos, 1974, pp. 45 ff.

³⁰ The prevailing opinion seems to favour a restrictive interpretation, which limits the legitimate interference in the other spouse's affairs on the basis of this provision to the possibility of incurring in *extraordinary* family expenses. See A. Mirambell i Abancó, in: F. Badosa Coll and J. Marsal Guillamet (eds.), *Manual de dret civil català*, Madrid, Barcelona: Marcial Pons, 2003, p. 451 and J. Egea Fernández, "Articles 4-5", in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 98-99. In another sense, see however E. Roca Trías, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 313.

³¹ See Art. 18.1 Catalan Civil Law Compilation 1984.

³² See Art. 11 Compilation 1960 and 18.1 in fine Catalan Civil Law Compilation 1984.

For them to be valid they must be laid down in a notary public deed (Art. 17 para. 1 Catalan Family Code) and cease to have effect when a marriage is annulled or when it is dissolved by divorce (Art. 20 para. 1 Catalan Family Code).

The matrimonial property regime can be modified during marriage. Changes, however, cannot be opposed to third parties until the changes are recorded in the Register of Births, Marriages and Deaths and in the other corresponding registers (Property Register, Commercial Register (Art. 17 para. 2 Catalan Family Code). Moreover, "the modification of the matrimonial property regimen does not affect the rights acquired by third parties" (Art. 19 Catalan Family Code).

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

Separation of property (Art. 37-47 Catalan Family Code).

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)?

Besides the default regime of separation of property, the Catalan Family Code regulates to following matrimonial property regimes:

1. Participation in acquisitions (Art. 48-60 Catalan Family Code)
2. Community of property (Art. 66-75 Catalan Family Code)
3. The so-called *associació de compres i millores* (association to acquisitions and improvements) (Art. 61-63 Catalan Family Code)
- d) The so called *agermanament* (lit. twinning) or *pacte de meitat per meitat* (agreement by half and half) (Art. 64 Catalan Family Code)
4. The so-called "pacte de convivença or mitja guanyeria" (Art. 65 Catalan Family Code) *i.e.* a pact by which the acquisitions already made and those to be made in the future will become joint property of the spouses during the regime and will be divided in equal shares upon dissolution.

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

a. Question 16.

Under the separation of property regime each spouse has the ownership, the enjoyment, the administration and the free disposal of all his or her assets (Art. 37 Catalan Family Code). Entering marriage does not give rise to any consequences either upon the ownership of the assets pertaining at that moment to each of the spouses or upon the ownership of the assets that each of them may acquire during marriage (see Art. 38 Catalan Family Code). Since a common patrimony is not established, one cannot properly speak of a *liquidation* of the regime when the regime dissolves. However set-off of unprescribed credits and debts incurred on the grounds of family expenses can take place. Additionally, in the cases of legal separation, divorce or annulment of marriage "the spouse who has worked for the household or for the other spouse without payment in exchange, or with insufficient payment, is entitled to obtain economic compensation from the other spouse, in the event that this fact has produced a situation of inequality between the patrimonies of both spouses which implies an unjust enrichment of one spouse" (Art. 41 Catalan Family Code). Additionally, in these cases there is a specific procedure for the division of the assets that the spouses owned jointly, which allows that "if it concerns more than one asset and the judge considers it appropriate, for the purpose of the division all the assets can be taken as a whole" (Art. 43 para. 2 Catalan Family Code).

b. Question 17.

The matrimonial property regime of participation in acquisitions was introduced by the 1993 Amendment to the matrimonial property regime included in the Compilation and “confers to each spouse, when the regime dissolves, the right to participate in the gains obtained by the other during the time that this regime has been in force” (Art. 48 para. 1 Catalan Family Code). During marriage each spouse has the ownership, the enjoyment, the administration and the free disposal of all his or her assets, although the interest that both spouse have in the result of the liquidation of the regime justifies the duty that the law imposes upon them to inform each other sufficiently on the management of the assets (Art. 49 Catalan Family Code). The liquidation takes place once the regime has been dissolved and it is carried out for the purpose of establishing the participation credit to which the spouse who has obtained fewer gains during the time the regime has been in force is entitled (see Art. 54 para. 1 Catalan Family Code). The difference between the gains of each spouse is assessed taking into account the value of the assets of each spouse, to which is added the value of those assets that have been alienated by gratuitous title and the value of those assets that have been destroyed or alienated by onerous means with the aim of fraudulently diminishing the gains. From this value, the value of those assets that each spouse had when the regime started and the value of those acquired afterwards as a result of a gift, inheritance or bequest must be subtracted, if these assets still exist, and if this is not the case, the value of those assets subrogated in their place, if they can be identified (Art. 55 and 56 Catalan Family Code).

In the community property regime, which was introduced for the first time into Catalan Law by the Family Code in 1998, *joint* assets are “all the assets and rights that the spouses own when they agree [to] the regime of community property, those that they acquire by any title during marriage and the gains and profits of all sorts that they obtain” (Art. 67 para. 1 Catalan Family Code) (whereas *personal* assets are all those assets to which the spouses attribute the condition of personal, those acquired by gratuitous title and the assets that are subrogated to these two types (Art. 68 Catalan Family Code). When the property regime of community is dissolved, “joint assets are divided into equal shares between spouses or between the surviving spouse and the heirs of the deceased spouse” (Art. 75 para. 1 Catalan Family Code).

The other matrimonial property regimes included in the Family Code stem from the preceding legislation which gathered them together in a Chapter entitled *Matrimonial Property Regimes in Local Law*, since these regimes were – along with the so-called *pact of equality of assets and gains* (Art. 62 Catalan Civil Law Compilation 1984), which has not been included into the Family Code – regimes that were specific to some parts of Catalonia. In any case, the regulation of these regimes is extremely brief and, in order to complete it, the Family Code refers to historical rules (see Art. 65.2 Catalan Family Code), to the rules of the participation in the acquisitions (Art. 61 Catalan Family Code) or to the rules governing community property (Art. 64.2 Catalan Family 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.

The overwhelmingly prevailing matrimonial property regime is separation of property. A vast majority of marriages subject to Catalan Law are governed by this default regime, since the traditional practice of making marital agreements in which spouses agreed the so-called “dowry regime”, *i.e.* the separation of property regime to which the wife contributed with the dowry in favour of the husband, has totally fallen into disuse.³³

³³ J.J. López Burniol, *La “resurrecció” dels capítols matrimonials. (L'àmbit de l'autonomia de la voluntat en els contractes reguladors de la convivència)*, Barcelona: Acadèmica de Jurisprudència i Legislació, 1999, pp. 33-38. Notwithstanding this fact, according to the second temporary provision of the Family Code, dowries and other associated rights “constituted or to be stipulated in the future” “shall be governed by the provisions in

Indeed, if at the beginning of the 20th Century it was still rather frequent to make marital agreements, from the middle of the 20th Century onwards the number of marital agreements diminished dramatically. Thus while 2,696 marital agreements were made in en 1921, there were only 384 marital agreements made in 1974. Currently, and in spite of the fact that Catalonia has trebled its population since the latter date, the number of marital agreements made in Catalonia every year is around 3,500 and their function has little to do with their historical purpose. Additionally, the small increase in the number of marital agreements made over the last 20 years has not given rise to an increase in the number of voluntary matrimonial regimes regulated in the Family Code as alternatives to the default regime. Despite these new regimes being aimed at offering more possibilities to spouses, they have gone unnoticed and very few marriages have adopted them, and the historical local regimes have fallen into disuse and can hardly ever be found in practice.³⁴

C.2. Specific regimes

II. Other regime available: Community of accrued gains/Participation in acquisitions

II.1. Categories of assets

57. Describe the system. Indicate the different categories of assets involved.

The matrimonial property regime of participation in acquisitions confers to each spouse, when the regime dissolves, the right to participate in the gains obtained by the other during the time that this regime had been in force (Art. 48 para. 1 Catalan Family Code). It does not, however, give rise to any sort of joint property between spouses either during marriage or after its dissolution. While the regime is in force, each spouse may expect to participate in the gains obtained by the other.³⁵ When the regime dissolves, the consequence is that the former spouse or, in cases of death, the surviving spouse or the heirs of the deceased spouse, are entitled to the corresponding *credit of participation*.³⁶ Moreover, and in spite of the fact that Art. 54 para. 1 Catalan Family Code uses the expressions *initial patrimony* and *final patrimony*, the Catalan model of participation in the acquisitions -inspired by the Swiss and Quebec models- is not based on the idea of comparing the value of the patrimony of both spouses at two different moments, but on the idea of identifying a section of the patrimony of each

force... as laid down in the Compilation of Catalan Civil law". As a result, the corresponding provisions of the Catalan Civil Law Compilation 1984 are still in force after of the Family Code entered into force (A. Mirambell i Abancó, in: F. Badosa Coll and J. Marsal Guillaumet (eds.), *Manual de dret civil català*, Madrid, Barcelona: Marcial Pons, 2003, p. 486).

³⁴ L. Puig Ferriol, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed. València: Tirant lo blanch, 1998, p. 386. See also R. Casas Vallés, "Comentari als articles 48 a 60 del Codi de família", in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 281.

³⁵ From the moment of the termination of the regime, and while the credit of participation has not been determined, neither spouse is allowed to dispose of his or her assets without the consent of the other spouse or his or her heirs, or without judicial authorization (Art. 54 para. 2 Catalan Family Code). This provision has caused criticism from the legal scholarship. For instance, see L. Puig Ferriol, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed. València: Tirant lo blanch, 1998, p. 373.

³⁶ L. Puig Ferriol, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed. València: Tirant lo blanch, 1998, p. 367.

spouse (the *gains*) and to calculate upon the net value the participation to which one of them is entitled.³⁷

58. What is the legal nature of the different categories of assets?

There are no different categories of assets. The establishment of different categories of assets comes into question at the time of liquidation of the regime only and for the purpose of fixing the credit of participation (Art. 51 para. 1 Catalan Family Code), without altering the legal condition of the assets as regards who owns them or who can administer them or has the power to dispose of them.

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

There is no joint property either during the regime or at the time of its liquidation and, therefore, all the property of the spouses is separate property. For this reason if spouses happen to own any piece of property in common, this joint property is subject to the general rules of joint property that apply to everybody.

However, since when the regime is liquidated some of property of the spouses will be considered gains and some not (Art. 55 and 56 Catalan Family Code), the expression *separate property* may be used to emphasise that as regards this latter the other spouse will not obtain any participation of its economic value. This property is (Art. 56 Catalan Family Code):

1. Property owned by each spouse when the regime comes into effect and property acquired by each spouse to replace this private property.
2. Property possessed by each spouse acquired by gift, succession or bequest while the regime was into effect and property acquired to replace this private property.
3. The amounts obtained from awards compensating for personal injuries or non-pecuniary losses, those obtained as maintenance or disability allowances as well as all amounts that have a similar intensely personal character.

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

They may certainly do so, and both by onerous and gratuitous title. The rules that apply to the possession, administration and disposition of this property are the general rules of co-ownership. The value of the share of each spouse is taken into account when determining the value of his or her assets for the purpose of fixing the credit of participation.

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

The regime is based upon the idea that property owned by one spouse when the regime is dissolved, but which this spouse already owned when the regime came into effect or acquired by gratuitous title afterwards, is not a gain in which the other spouse may participate. If the spouse has alienated any piece of this property by onerous title, or has received something as a compensation for its loss, the property that he or she has received in exchange for the compensatory sum replaces it by subrogation and is private property of this spouse. As regards this replacement, the law does not distinguish between movables and immovables and does not make any express reference to counter payments in money.

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

³⁷ R. Casas Vallés, "Comentari als articles 48 a 60 del Codi de família", in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions establides de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 279.

Art. 56 Catalan Family Code mentions “maintenance pensions or disability allowances” and starts from the idea that, as sums that are received on intensely personal grounds, they are not taken into account when assessing the credit of participation. As regards the scope of this exception, since this is a matrimonial regime that is hardly used in practice, there is no case law on this point.

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

The law provides that the value of the assets acquired by gratuitous title cannot be considered gains and therefore, it cannot be taken into account when assessing the credit of participation (see Art. 56 para. 1 b) Catalan Family Code) and it does not allow the donator or testator to decide otherwise. Therefore, a third party may, for instance, donate one asset to one of the spouses or, if he wants them to share the donated asset, donate it to both of them; what he cannot do, however, is to alter the qualification of the assets as “private” or “gains” that the law attributes to them (see also Question 59).

64. How is the categorisation of the assets proved as between the spouses? Are there rebuttable presumptions?

The general procedural rules regarding proof apply (see Art. 56 para. 2 pr Catalan Family Code). Moreover, since the regime of participation in the acquisitions is in effect the rules of the separate property regime – to the extent they are compatible with the principles and aims of the participation regime³⁸ – apply (see Art. 48 para. 2 Catalan Family Code), formal ownership determines who owns property, regardless of whether it belonged to the same spouse when the regime came into affect or whether he or she acquired it afterwards by any title (Art. 38 Catalan Family Code).

If there is any doubt as regards which spouse is the owner of a piece of property or to whom a right or an asset belongs, the law rebuttably presumes that it belongs to both in equal shares. An exception to this occurs in the case of movables for personal use or directly intended for the activity of one of the spouses and which are not of extraordinary value, where the law presumes that they belong to this spouse (Art. 40 Catalan Family Code).

As regards property that was in the patrimony of one spouse when the regime came in effect, Art. 56 para. 2 *in fine* Catalan Family Code provides that “the inventory made by both spouses or by one with the consent of the other is presumed to be correct”. The inventory binds the spouses, not third parties, although it is considered that it can be challenged on the grounds of vitiated consent of one of the spouses.³⁹

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

The same rules applicable to spouses apply to third parties, with the special feature that the inventory made by both spouses (see Art. 56 para. 2 *in fine* Catalan Family Code) does not bind third parties. Third parties can challenge the inventory by furnishing proof that contradicts in whole or in part the facts that it contains.

66. Which debts are personal debts?

³⁸ L. Puig Ferriol, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed. València: Tirant lo blanch, 1998, p. 368.

³⁹ R. Casas Vallés, “Comentari als articles 48 a 60 del Codi de família”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 311.

Personal debts are those incurred by one spouse as long as they are not related to the family expenses as laid down in Art. 4 Catalan Family Code. Pursuant to Art. 55 a) Catalan Family Code, the amount corresponding to these debts is deducted from the value of the property owned the corresponding spouse for the purpose of assessing the credit of participation.

67. Which debts are joint debts?

Spouses are joint debtors for only those debts that they have incurred jointly or that have been incurred by one spouse with the express consent of the other (arg. ex Art. 13 Catalan Family Code). Joint debts are also those incurred in order to meet family expenses, since the spouses are solidarily liable for these debts *vis-à-vis* third parties regardless of the matrimonial property regime that applies (Art. 8 Catalan Family Code).

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

The creditor will be able to recover personal debts on the assets of the debtor spouse only. The expectancy on a credit of participation cannot be the object of a seizure execution. The creditor for the personal debts is not entitled to request the dissolution of the regime and its liquidation.

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

Liability for joint debts falls on all assets of any of the spouses. When debts have been incurred on the grounds of family expenses, the creditor may recover the whole debt on the assets of any of the spouses (Art. 8 Catalan Family Code).

II.2. Administration of assets

70. How are the different categories of assets administered?

Pursuant to Art. 49 Catalan Family Code, “during marriage each spouse has the ownership, the enjoyment, the administration and the free disposal of all his or her assets, but he or she has the duty to inform the other sufficiently of the management performed of these”.

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

Yes.

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

With regard to the family dwelling and the chattels of ordinary use, and regardless of which matrimonial property regime applies, Art. 9 Catalan Family Code requires the consent of the spouse who is not the owner to dispose of this property in a way that endangers its use. For the rest, while the regime is in effect there is no other limitation for acts of disposition, either by onerous or by gratuitous title, upon the property of any of the spouses.

However, the value of those assets that have been alienated by gratuitous title or that have been destroyed or alienated by onerous title with the aim of diminishing the gains fraudulently, will be included in the patrimony of the spouse concerned at the time of the liquidation of the regime and their value will be assessed according to the physical or material state the asset had when it was alienated (Art. 55 b) and c) Catalan Family Code). Moreover, if after assessing the participation credit the debtor spouse does not have enough assets to pay it, the creditor spouse may request the rescission of these alienations (Art. 60 para. 1 Catalan Family Code). These rules cannot be applied if gifts (a) had been consented to

by the other spouse or (b) are usual gifts or gifts in favour of a children of the donor on the grounds of their marriage or made to facilitate their employment.

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

No.

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

According to Art. 49 Catalan Family Code, the autonomy of each spouse in the administration and disposal of his or her assets is linked to the “duty to inform sufficiently the other spouse of his or her management performed of these”. Legal scholarship considers that the spouse must give information on those acts of disposal or management that may have bearing on the participation expectation of the other spouse.⁴⁰ A serious or repeated failure to comply with this duty of information entitles the other spouse to apply for the advanced dissolution of the regime (Art. 52 b) Catalan Family Code).

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

Consistent with the idea that while the regime is in effect the administration of the assets is carried out autonomously by each spouse or by one representing the other, the Family Code does not include any provisions regarding how to resolve disputes concerning the administration of assets. The general rules of co-ownership apply to those assets owned in common; these rules start from the majority rule for the acts of ordinary administration (Art. 552-7.2 Catalan Civil Code) and from a qualified majority rule for the acts of extraordinary administration (Art. 552-7 para. 3 Catalan Civil Code). In the case of a dispute, these general rules refer to the intervention of the judge, who will decree what he or she considers appropriate and will even be able to appoint a court administrator (see Art. 552-7 para. 4 Catalan Civil Code).

76. 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?

In general, the maladministration of one of the spouses that seriously endangers the interests of the other spouse allow him or her to apply to the court for the advanced dissolution of the regime (Art. 52 c) Catalan Family Code).⁴¹ It is considered that the application of this rule requires the performance of a plurality of acts having certain continuity and a negative impact upon the assets of the spouse concerned.⁴² It is doubtful, however, whether this rule would be applicable when the administering spouse obtains revenues that are lower than those that could be expected when considering his or her skills and professional qualifications or, in general terms, a better use of these assets.⁴³

⁴⁰ R. Casas Vallés, “Comentari als articles 48 a 60 del Codi de família”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 283.

⁴¹ See M. Martín Casals, “Article 52”, in: *Comentari a la modificació de la Compilació en matèria de relacions patrimonials entre cònjuges*, Barcelona: Generalitat de Catalunya, 1995, pp. 261-263.

⁴² L. Puig Ferriol, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed. València: Tirant lo blanch, 1998, p. 372.

⁴³ Against such a possibility, L. Puig Ferriol, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed. València: Tirant lo blanch, 1998, p. 372. See also R. Casas Vallés, “Comentari als articles 48 a 60 del Codi de família”, in: J. Egea Fernández

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

If a spouse is incapable of administering the assets or it is impossible for him or her to do so, and this situation seriously endangers the interests of the other, the possible consequence is that this situation entitles the other spouse to apply to the court for the advanced dissolution of the matrimonial property regime (Art. 52 d) Catalan Family Code). This application is also possible when the other spouse is absent or falls into bankruptcy.⁴⁴

II.3. Distribution of assets upon dissolution

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

Art. 51 Catalan Family Code specifically provides for the regime to dissolve “in any case” by the dissolution or annulment of marriage, by legal separation and by agreement of the spouses solemnised in a nuptial agreement.⁴⁵

Besides these cases, and pursuant to Art. 52 Catalan Family Code, the judge *may* dissolve the regime at the request of one of the spouses if there has been a *de facto* separation for longer than one year or if a spouse fails to observe, in a serious or repeated manner, his or her duty to inform the other spouse sufficiently, administrates the assets in a way that is irregular or finds himself or herself in a situation that seriously endangers the interests of the spouse applying for advanced dissolution.

79. What date is decisive for the dissolution of the matrimonial property regime? Distinguish between the different grounds mentioned under Q 78.

If the dissolution is the result of an amendment of a modification of the matrimonial property regime laid down in a nuptial agreement, the decisive date is the date on which the agreement was made; however, as for third parties, the modification of the regime will not have any effect until it is inscribed in the Register of Births, Marriages and Deaths or in the corresponding public registers (Art. 17 para. 2 Catalan Family Code).

When the regime dissolves due to death or declaration of death, the dissolution takes place at the moment that this occurs, notwithstanding the fact that liquidation is made later on.

In the case of *de facto* separation, for the matrimonial property regime to be dissolved there must be a decree that declares its dissolution. In these cases, the dissolution of the regime is carried back to the moment when the petition was filed (Art. 53 Catalan Family Code), if the petition was at the request of one of the spouses and if the *de facto* separation had lasted longer than one year or any other of the conditions provided by Art. 52 Catalan Family Code have been met (see above Question 78). In the case of petition for divorce or for legal separation, although there is no legal provision, it seems that the same solution applies and

and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 283 (“there is not such a duty to increase the gains”).

⁴⁴ L. Puig Ferriol, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed. València: Tirant lo blanch, 1998, p. 373.

⁴⁵ The marital agreement, however, brings about the termination of the regime only insofar as the regime of participation in the acquisitions is replaced by another regime, not if the agreement merely modifies certain rules of its operation (L. Puig Ferriol, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed. València: Tirant lo blanch, 1998, p. 371).

the date when the petition was filed is also the relevant date (Arg. ex Art. 53 Catalan Family Code).

80. What is the spouses' position with regard to each others' acquisitions and gains?

Pursuant to Art. 48 para. 1 Catalan Family Code, the matrimonial property regime of participation in the acquisitions entitles each spouse, when the regime dissolves, to participate in the gains obtained by the other during the time that the regime has been in effect. Unless there is a valid agreement that provides for a different way of participating, the credit of participation is assessed as follows (Art. 57 Catalan Family Code):

1. If only one spouse has obtained gains, the other spouse or his or her heirs are entitled to half of the value of these gains.
2. If both spouses have obtained gains, the spouse that has obtained fewer gains (or his or her heirs) is entitled to half of the difference between the value of his or her gains and the value of the gains of the other spouse.

81. 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 separate property and debts related to that property taken into account?

To assess the gains obtained by each spouse their assets must be valued according to the value that they have at the time of the liquidation (Art. 55 a) Catalan Family Code), with the deduction of the private debts, and without making any distinction between debts incurred before or after the coming into effect of the regime.⁴⁶ Gifts and assets alienated fraudulently by one of the spouses are assessed according to the physical or material state they had when they were alienated (Art. 55 b) Catalan Family Code), so that subsequent changes in them will be irrelevant.

Assessing the gains requires the deduction of the value of those assets that already belonged to one spouse when the regime came into effect, as well as the value of those assets acquired during the regime by gift, inheritance or bequest, or the value of those that have replaced any of them. An essential condition for carrying out this deduction of value is that the original assets and those acquired subsequently by virtue of onerous title still exist in the power of the spouse or that the counter-performance received for their alienation still exists in his or her patrimony. As regards the assessment of these assets it is determined "according to their material state at the moment when the regime came into effect or when they were acquired" (Art. 56 Catalan Family Code). Therefore, any eventual detriment suffered by these assets during the time the regime was in effect is not taken into account and, for the same reason, the spouse who is not the owner does not participate in the simple plus value of these assets, *i.e.*, in any increase in the value of these assets that is not the result from improvements or investments carried out during the time the regime was in effect.⁴⁷

⁴⁶ L. Puig Ferriol, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed. València: Tirant lo blanch, 1998, p. 376. But see Art. 56 a) Catalan Family Code, according to which the amount of the encumbrances (*cargas*) must be deducted from the value of the assets already existing in the patrimony of each spouse at the beginning of the regime. Some authors suggest that this reference to *cargas* could be understood either as rights *in re* or also as any debt for which the separate property of the spouse could be seized. See R. Casas Vallés, "Comentari als articles 48 a 60 del Codi de família", in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 309.

⁴⁷ R. Casas Vallés, "Comentari als articles 48 a 60 del Codi de família", in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 305. Critical of this

82. 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 relevant date for the determination of the assets is the date of the dissolution of the regime, since only those assets that the spouses own on this date will be taken into account (Art. 55 a) Catalan Family Code).⁴⁸ As regards valuation, however, the assets that have been acquired are valued according to the value they have at the time of the liquidation of the regime (Art. 55 a) Catalan Family Code), whereas all the assets that they already owned when the regime entered in force, the assets acquired later on by gratuitous title and those that have replaced any of them and that still exist when the liquidation takes place will be valued according to the value they had “when the regime entered into effect or when they were acquired”, respectively (Art. 56 b) Catalan Family Code).

83. What happens if assets belonging to one category have been used for investments in the assets belonging to another category? Is there any right to compensation? If so is this a nominal compensation or is it based on the accrual in value?

There are no specific rules in the Family Code dealing with this problem and, since this is a matrimonial regime that is hardly ever used in practice, the courts have not had the opportunity to establish case-law yet. However, taking into account the general rules of the Code, the investment of assets gained by one spouse on assets that are his or her private property is taken into account indirectly only, to the extent that this investment gives rise to an improvement or a material change in the asset concerned. Thus, for instance, if the profit of these assets or other assets (such as money earned with the job or professional activity of the spouse) is invested in his or her private property, the plus value or increase of value resulting from this investment will be a gain in which the other spouse will be entitled to participate (Art. 55 a) Catalan Family Code).⁴⁹ Accordingly, compensation is carried out by considering this plus value a gain and not by reimbursing the other spouse the specific amount or value invested in the improvement.

However, it must be taken into account that the Code establishes the requirement that assets acquired by gratuitous title and those that one spouse already had when the regime entered into effect *still exist* in the patrimony of the spouse, or that the assets that have replaced them can be identifiable and *also exist* in his or her patrimony. This means that investments made by one spouse on private assets of the other will not be taken into account when assessing the credit of participation if these assets have been spent, have perished or have deteriorated during the regime.

84. What happens if assets belonging to one category have been used for payment of debts belonging to another category of assets? Is there a rule of compensation? And if so, how is compensation calculated?

Compensation does not take place by reimbursing the spouse with the specific amount invested but by taking it into account when assessing the credit of participation. In fact, the law mentions only the burdens placed upon the assets that belonged to one spouse when the regime entered into force or on those that are the result of a gift or have been inherited during

result, see L. Puig Ferriol, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed. València: Tirant lo blanch, 1998, p. 380.

⁴⁸ It must be borne in mind that in the cases where the dissolution derives from a judicial decree it is carried back to the moment when the petition was filed (Art. 53 Catalan Family Code).

⁴⁹ Even if the investment is made on existing properties or assets, their value is assessed “according to the material state at the moment when the regime came into effect or when they were acquired” (Art. 56 a) Catalan Family Code).

the time the regime was in force. For these cases, it establishes that the amount of these burdens is discounted from the value attributed to these assets (Art. 56 a) Catalan Family Code).

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

The payment of the credit of participation must be made in money (Art. 58 para. 1 Catalan Family Code). However, if the dissolution of the regime results from the death of the spouse who holds the patrimony, Art. 59.2 Catalan Family Code provides that the surviving spouse "may require to be given in payment of his or her credit of participation the family dwelling", and pay the difference in money if the value of the dwelling is higher than the amount of the credit of participation. It can be understood that when the law refers to the family dwelling it includes the household assets and, therefore, that the rule extends to them.

Additionally, for all other cases of dissolution, Art. 59 para. 1 *in fine* Catalan Family Code provides that the spouses may agree to the attribution in payment of certain assets and that it "may be requested unilaterally by the debtor or by the creditor spouse and the judge may grant it if there is an interest worthy of consideration" (Art. 59 para. 1 Catalan Family Code). Since there is no case-law on this regime, there are no court standards that establish when such an interest worthy of consideration exists. Legal scholarship considers that the creditor could assert his or her interest of affection upon certain assets (for instance, the family dwelling or certain chattels) or his or her pecuniary interests as regards certain assets that are useful for the practice of his or her profession or activity.⁵⁰ In any case, since this would impose upon the debtor the duty to part with one or several assets that are in his or her ownership, legal scholarship recommends a very careful application of this provision.⁵¹

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

Besides the right of the surviving spouse to be given the family dwelling in payment (Art. 59.2 Catalan Family Code), there are no other instances of preferential rights over any other assets. However, it must be taken into account that Art. 59.1 Catalan Family Code provides that the attribution of certain assets in payment of the participation credit "may be requested unilaterally by the debtor or by the creditor spouse and the judge may grant it *if there is an interest worthy of consideration*".

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

The spouse whose financial situation has been impaired as a result of the divorce or legal separation and, in the cases of nullity of marriage, the bona fide spouse only, is entitled to receive maintenance from the other spouse which does not exceed either the standard of living that the couple enjoyed during marriage or the standard of living the spouse obliged to make the payment can afford to maintain (Art. 84 para. 1 Catalan Family Code).⁵²

⁵⁰ L. Puig Ferriol, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed. València: Tirant lo blanch, 1998, p. 382.

⁵¹ R. Casas Vallés, "Comentari als articles 48 a 60 del Codi de família", in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 316.

⁵² On the legal nature of this right and its differences with spousal maintenance rights see M. Martín Casals, J. Ribot and J. Solé Feliu, "Spanish Report on Maintenance between Former Spouses", in: Katharina Boele-Woelki, Bente Braat and Ian Sumner (eds.), *European Family Law in Action*, Vol. II, Antwerpen, Oxford, London, New York: Intersentia, 2003, p. 6-7.

To assess the maintenance award, the judicial authority shall take into consideration, among other factors, “the resulting financial situation of the spouses as a consequence of the nullity of marriage, the divorce or the legal separation, and the economic prospects for both spouses” (see Art. 84.2 Catalan Family Code). Certainly, the fact that a spouse is entitled to receive a sum as payment of his or her credit of participation means that he or she is in a less unfavourable financial situation than when this credit of participation does not exist. And this, as a matter of principle, may justify a case wherein the maintenance award that he or she receives is smaller.⁵³

88. 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?

Pursuant to Art. 56 b) Catalan Family Code these rights and claims are intensely personal and for this reason they are not included in the mass of acquisitions which is taken into account to establish the participation credit. The dissolution of the regime does not have any effect on them.

89. Can the general rules (above Q 80) be set aside or adjusted, e.g. by agreement between the spouses or by the competent authority? To what extent, if at all, can the competent authority order the transfer of assets to the creditor spouse?

Art. 50 Catalan Family Code expressly admits that parties may agree to unequal shares. The only condition for the validity of this agreement is that this inequality is established with mutual character and that it is exactly the same for each spouse. If the agreement is not valid, the law provides that equal shares must apply (see Art. 50 para. 2 Catalan Family Code). The judge may neither set aside this default rule nor order any transfer of assets.

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

Art. 59.2 Catalan Family Code provides that the surviving spouse “may require to be given the family dwelling in payment of his or her credit of participation”, and pay the difference in money if the value of the dwelling is higher than the amount of the credit of participation.

IV. Default regime: Separation of property

IV.1. Categories of assets

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

Pursuant to Art. 37 Catalan Family Code, in the separation of property regime “each spouse has the ownership, enjoyment, administration and free disposition of all his or her assets, within the limits established by the Law”.⁵⁴ Both when the regime is in effect and when it dissolves there are no common assets of the spouses that must be divided later on or a common patrimony that must be liquidated. Hence, the simple fact of being married under

⁵³ Art. 84 Catalan Family Code does not mention this case. Nevertheless, the parallel rule of compatibility of the economic compensation resulting from the dissolution of the separation of property regime with the maintenance award may apply. Accordingly, the amount awarded as credit of compensation must be taken into account when deciding to order an additional maintenance award.

⁵⁴ These limits are the duty to act in the interest of the family (Art. 1 para. 1 and 3.1 Catalan Family Code), the duty to contribute to family expenses (Art. 5 Catalan Family Code) and a restriction on the free disposal of the family dwelling and of the chattels of ordinary use (Art. 9 Catalan Family Code). See A. Mirambell i Abancó, in: F. Badosa Coll and J. Marsal Guillaumet (eds.), *Manual de dret civil català*, Madrid, Barcelona: Marcial Pons, 2003, p. 472.

this regime does not alter in the slightest the financial self-determination with regard to the assets that he or she owns.⁵⁵

However, it would be a mistake to treat couples married under this regime from a financial point of view, as if marriage had never taken place.⁵⁶ Not only because the Family Code provides a set of rules which apply regardless of the matrimonial property regime in effect and which have been laid down with the default matrimonial property regime of separation of property in mind, and which aim to mitigate when necessary,⁵⁷ but also because in the Catalan regulation of the separation of property regime there are certain rules which call into question a full financial separation of the assets of the spouses.⁵⁸

These rules are:

1. Art. 39 in fine Catalan Family Code, which as regards the acquisitions made by one spouse during marriage rebuttably presumes that, if it is proven that the payment was made by the other spouse, there has been a gift.⁵⁹
2. Art. 41 Catalan Family Code, which provides that when the matrimonial property regime has been dissolved by annulment, divorce or legal separation, the spouse who has worked for the household or for the other spouse without payment in exchange, or with insufficient payment, is entitled to receive economic compensation from the other spouse if this has produced a situation of inequality between the patrimonies of both spouses, which implies an unjust enrichment of one spouse at the expense of the other.⁶⁰

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

In the separation of property regime each spouse owns all assets that he or she had when the regime entered into effect as well as all the others that he or she acquires by any title during the regime (Art. 38 Catalan Family Code). The fact that he or she invested funds from the other spouse in order to acquire these assets or that this other spouse transferred these assets by any title does not change the basic fact that the assets belong to the acquiror. Moreover, in principle there is a rebuttable presumption that the money used to pay the asset come from his or her own patrimony, not from the patrimony of the other spouse (Art. 39 *pr* Catalan Family Code).

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

⁵⁵ E. Roca Trías, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 341.

⁵⁶ L. Puig Ferriol, "Articles 37-40", in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 214.

⁵⁷ J. Egea Fernández, "Articles 4-5", in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 95.

⁵⁸ For instance, see STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 27.10.2005 ("one may no more speak about the operation of a strict separation of property regime, but of a separation of property regime with the economic compensation of altruistic work").

⁵⁹ This presumption applies only to acquisitions that have taken place since 12.10.1993, when Act 8/1993 entered into force. In this sense see STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 05.03.1998.

⁶⁰ This right may only be claimed concerning separation of property regimes that terminated on grounds of legal separation, divorce or annulment since 12.10.1993 (see Final Provision of Act 8/1993).

Spouses married under the matrimonial property regime of separation of property may acquire assets jointly. In this case each one will acquire, as his or her asset or as private property, the share that results from the title of acquisition.

Unless otherwise agreed, the law considers that spouses acquire by equal shares and applies the ordinary rules of co-ownership, *i.e.* the same rules that are applicable when the co-owners are not married to each other. The only specific rule is a procedural rule that allows them to accumulate the claim for the division of the assets that the spouses have under the co-ownership regime to the proceedings of annulment, divorce, legal separation, or execution of ecclesiastic judgements of annulment (Art. 43 Catalan Family Code).⁶¹

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

The substitution of the spouses' assets is not governed by any specific rules. Assets received as counter-performance, in the case of transactions by onerous title, or assets that have replaced those that have perished (such as damages awards or sums paid by insurance companies) come into the patrimony of the spouse who owned the corresponding assets. By contrast, since the regime does not establish any joint patrimony, there is no real subrogation between different patrimonies.⁶² When assets of one spouse are invested to acquire another asset, this asset becomes joint property of the spouses or private property of one of them. The principle of real subrogation does not apply then, since ownership of the assets does not depend on the source of the funds used to acquire them but only on what their title of acquisition establishes (Art. 39 Catalan Family Code).⁶³

However, it is possible that assets that originally belonged to one of the spouses have been replaced by other assets whose ownership cannot be established with certainty. This can be the case with regard to money or chattels in the possession of one of the spouses, where it is likely that when the regime dissolves it becomes impossible to trace back the origin of the money or counter performance employed to acquire them and, accordingly, to apply the principle of real subrogation to them. In these cases the unavoidable result is to consider that the asset concerned belongs to both spouses in equal shares (Art. 40 Catalan Family Code).

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

There are no specific rules on pension rights or claims and insurance rights resulting from an insurance contract underwritten by one spouse or both. These assets belong to their holder and do not give rise to any specific rules as regards when they are due or how are they going to be collected or administered.

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

The ordinary means of proof of the ownership of private assets is its title of acquisition. The assets belong to whoever appears as purchaser in the title of acquisition or as owner in the

⁶¹ L. Puig Ferriol, "Articles 37-40", in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 218.

⁶² E. Roca Trias, in: L. Puig Ferriol and E. Roca Trias, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 344.

⁶³ A. Mirambell i Abancó, in: F. Badosa Coll and J. Marsal Guillaumet (eds.), *Manual de dret civil català*, Madrid, Barcelona: Marcial Pons, 2003, p. 473-474. See STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber))05.03.1998.

documents resulting from the transaction carried out between the spouses or with third parties. The same effect is produced by the empowerment resulting from the title that has been registered in the Property Register (Art. 38 Ley Hipotecaria (Land Registry Act)) or from the possession of movables in the concept of owner (Art. 522-1 para. 1 Catalan Civil Code).⁶⁴

Besides these cases of formal or apparent ownership, ownership of one asset by any of the spouses can also be ascertained by the acknowledgement of one of the spouses that the asset belongs to the other.⁶⁵ To this effect, public and private documents whose authenticity has not been challenged will furnish full proof in the proceedings (Art. 319 and 326 Ley de enjuiciamiento civil (Civil Procedure Act 2000)). If the acknowledgment is made in the same proceedings “the facts acknowledged by one party will be considered true if he or she took part in them and the establishment of the truth of these facts are entirely to his or her detriment” (Art. 316 Ley de enjuiciamiento civil (Civil Procedure Act 2000)).

When there is a doubt about which spouse is the owner of an asset, it is considered that it belongs to both of them by equal and undivided shares. However, when the assets are for personal use or are directly allocated to the performance of the activity of one of the spouses and do not have an extraordinary value it is considered that they belong to him or to her (Art. 40 Catalan Family Code). The same happens with funds placed in joint accounts from which any of the holders is entitled to withdraw the whole sum.⁶⁶ Since this is a default rule, the presumption of joint ownership can be changed by a prior agreement of the spouses aimed at avoiding future disputes on the ownership of the assets, provided that this agreement conforms to the principle of legal equality in the marriage.⁶⁷

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

Against third parties, the same standards as against spouses apply. However, whereas spouses are bound by the declarations that they have made, either in court or out of it, about the property rights of each spouse, these declarations cannot be to the detriment of third

⁶⁴ As regards presumptions based upon the possession of the assets, against this view see L. Puig Ferriol, “Articles 37-40”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 230.

⁶⁵ E. Roca Trías, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 342. In the case decided by STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 19.01.2004 the court deemed the presumption of gift to be inapplicable because the claimant afforded enough evidence to prove that the acquisition was made by both spouses, regardless of the fact that only one of them appeared formally as the owner of the assets. The decision drew this conclusion from a private deed where both spouses had acknowledged, two years before their separation, that they were joint owners of the assets.

⁶⁶ It must be borne in mind that having been authorised to dispose of the funds does not necessarily entail that half of the amount belongs to the spouse. Proving the origin of the money may well lead to the conclusion that only one of the spouses is the legal owner of certain funds. As regards the seizure of amounts held in joint accounts see Art. 13 Catalan Family Code, which allows the spouse who is not the debtor to avoid seizure of the amounts that he or she proves belong to him or her exclusively.

⁶⁷ L. Puig Ferriol, “Articles 37-40”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 228.

parties. Accordingly, third parties suffering detriment may challenge the acknowledgment made on the rights of the other if it is false or covers up a gift performed fraudulently.⁶⁸ Moreover, formal ownership can also be challenged by third parties by proving simulation of the transaction or lack of transfer of the assets, in particular whenever one spouse has only made a fictitious transfer to the other. The possibility of proving simulation of the transfer does not exclude, obviously, the possibility that third parties may use the legal rebuttable presumption which considers that the transfer of assets, taking place between the spouses allegedly by onerous titles, was in fact a gift (Art. 11 *in fine* Catalan Family Code).

136. Which debts are personal debts?

Personal or private debts are those incurred by one of the spouses only, as long as they are not connected with the support of the family or any other family expenses (Art. 4 Catalan Family Code).

137. Which debts are joint debts?

On principle spouses are joint debtors only for those debts that they have incurred together or that one spouse has incurred with the express consent of the other (Arg. ex Art. 13 Catalan Family Code). Joint debts are also all those related to family expenses, since spouses are solidarily liable for these debts before third parties, regardless of the matrimonial property regime governing their relationships (Art. 8 Catalan Family Code).

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

The creditor can recover personal debts on the assets of the debtor spouse only.

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

Liability for joint debts falls on the assets of either of both debtor spouses. In the case of debts for family expenses, the debtor may claim full payment from either of the spouses (Art. 8 Catalan Family Code).

IV.2. Administration of assets

140. How are assets administered?

Art. 37 Catalan Family Code emphasises as an essential characteristic of the separation of property regime that not only does each spouse have the property of his or her assets but also “the enjoyment, the administration and the free disposal of all his or her assets, within the limits established by the Law”. This last expression refers to the restrictions on the disposition of the family dwelling and of the chattels of ordinary use pursuant to Art. 9 Catalan Family Code⁶⁹ as well as, in more general terms, to the duty of both spouses to act in the interest of the family (Art. 1 para. 1 Catalan Family Code).⁷⁰

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

⁶⁸ See E. Roca Trías, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 343.

⁶⁹ See J. Egea Fernández and J. Ferrer Riba, *Codi civil de Catalunya i legislació complementària amb notes de concordança i jurisprudència*, 13th ed, Barcelona: EUB, 2007, p. 280.

⁷⁰ L. Puig Ferriol, “Articles 37-40”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 215-216.

Yes, either expressly or tacitly. This mandate will be governed by the general rules of the contract of mandate (see Art. 1709 et seq.).⁷¹

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?

As regards the family dwelling and the chattels of ordinary use, Art. 9 Catalan Family Code requires, regardless of the type of regime that governs the marriage, the spouse who is not its owner to give his or her consent to the disposal of this property if it endangers its use by the family. Apart from that, the law does not provide for any other restrictions on the acts of disposal of the assets of the spouses, either by onerous or by gratuitous title, while the regime is in effect.

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

No.

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

By contrast to the participation in the acquisitions regime (see Art. 49 Catalan Family Code), the Code does not provide for the duty to inform the other spouse with regard to the administration of their private assets.

Pursuant to Art. 6 Catalan Family Code, the only duty the spouses have in this regard is “to inform each other sufficiently of the management of the assets related to family expenses” (Art. 6 Catalan Family Code). The scope of this duty – for the infringement of which the law does not provide sanction – is far less than the duty imposed by Art. 49 Catalan Family Code in the matrimonial regime of participation in the acquisitions. The reason for this is that in the separation of property regime the law only protects the interest of the spouse not to become solidary debtor vis-à-vis third parties on the grounds of family debts (see Art. 8 Catalan Family Code); debts with which he or she probably did not count on or which he or she may have considered that were not adequate to the interests of the family.

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

There are no provisions dealing with this aspect, consistent with idea that each spouse administers his or her own assets autonomously (Art. 37 Catalan Family Code) or that he or she administers the assets of the other by virtue of the representation conferred by the other according to the general rules (Art. 3 para. 3 *a contrario* Catalan Family Code).

The general rules of co-ownership will apply to jointly owned assets, which provide for the majority rule of co-owners for the acts of ordinary administration (Art. 552-7.2 Catalan Civil Code) and for a qualified majority rule for acts of extraordinary administration (Art. 552-7

⁷¹ In 1984, the special regime applicable to the mandate conferred by the wife to the husband to administrate her assets that were not part of the dowry was repealed (see Art. 51 Compilation 1960). The main feature of this regime was the husband’s duty to give back any fruits or revenues obtained and not consumed as well as any gains that he may have drawn while administering his wife’s assets (see E. Roca Trías, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 186). See a critical overview of this amendment in A. Mirambell i Abancó, “Article 20”, in: *Comentari a la modificació de la Compilació en matèria de relacions patrimonials entre cònjuges*, Barcelona: Generalitat de Catalunya, 1995, p. 186.

para. 3 Catalan Civil Code). When a dispute arises, these rules refer the resolution of this dispute to the judge, who can decide as he or she considers appropriate and even appoint a court administrator (see Art. 552-7 para. 4 Catalan Civil Code).

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?

This problem does not arise in this regime.

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

This problem does not arise in this regime.

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 Family Code does not include a provision to deal with the grounds for the dissolution of the separate property regime.

Bearing in mind that this is the default matrimonial property regime and, therefore, that this regime does not come into effect if the spouses agree to a different regime in the nuptial agreement (Art. 10 para. 1 Catalan Family Code), a first ground for the dissolution of this regime occurs when the spouses replace it with a different one during the marriage in a marital agreement.

Additionally, when a marriage dissolves the dissolution of the regime also takes place. This happens in the case of death, declaration of death or divorce (Art. 85 Spanish Civil Code). An annulment of marriage also gives also rise to the dissolution of the regime (arg. ex Art. 20 para. 1 Catalan Family Code).

Legal separation also dissolves the matrimonial property regime (arg. ex Art. 95 Spanish Civil Code and 774 para. 4 Ley de enjuiciamiento civil (Civil Procedure Act 2000)). What happens in the case of separation of property is that the situation of the spouses will not change very much except in those respects that are linked to the protection of third parties and, more specifically, to creditors of the spouses (see Art. 78 LC Ley Concursal (Bankruptcy Act 2003)).⁷² On the other hand, the right of the spouse who has worked for the household or for the other spouse without payment in exchange, or with insufficient payment, to receive economic compensation from the other spouse arises not only in cases of divorce or annulment of marriage but also in cases of legal separation (Art. 41 para. 1 Catalan Family Code).

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

If the dissolution takes place by the replacement of the matrimonial property regime carried out in a marital agreement, the date of the solemnisation of the agreement is the decisive date, although vis-à-vis third parties the change of property regime will not produce any effects until the date of registration of this change in the Register of Births, Marriages and Deaths or in the corresponding registers (see Art. 17 para. 2 Catalan Family Code). When the regime has

⁷² See E. Roca Trías, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 349.

been dissolved by death or declaration of death, the relevant date is the date of the death or the date on which death has been declared.

When the regime dissolves on the grounds of annulment, divorce or legal separation the Family Code does not contain a rule that parallels Art. 53 Catalan Family Code. This, for the dissolution of the regime of participation in the acquisitions, provides that the relevant date for the dissolution of the participation regime is the date on which the corresponding petition was filed. Theoretically, the problem could arise when there is a very long lapse of time between the date the petition was filed and the date on which it was resolved by the decree of court and it becomes necessary, in order to assess the economic compensation on the grounds of work provided by Art. 41 Catalan Family Code, to ascertain whether the relevant financial condition of one spouse, at the moment of the dissolution of the regime, was when the decree was issued, the petition was filed or even when life in common ceased. However, this problem does not actually arise. Although the petition for this compensation must be filed in the first matrimonial proceedings that take place between the spouses, case-law has repeatedly declared that economic compensation on the grounds of work is awarded for the economic imbalance existing *when the marriage breaks up*, and not when the corresponding petition is filed or when the decree of divorce, annulment or legal separation is issued.⁷³

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

First of all, the dissolution of the matrimonial property regime brings about the liquidation of the reciprocal debts and credits for family expenses of the spouses. This consequence takes place regardless of the grounds for which the regime is dissolved (death, annulment, divorce or legal separation).⁷⁴

Additionally, when the regime is dissolved on the grounds of annulment, divorce or legal separation and one of the spouses has worked for the household or for the other spouse without payment in exchange, or with insufficient payment, the dissolution of the regime entitles him or her to receive, from the private assets of the other spouse, economic compensation if this fact has produced “a situation of inequality between the patrimonies of both spouses which implies an unjust enrichment” (Art. 41 para. 1. *in fine* Catalan Family Code). This compensation award is paid in money “unless the parties agree, or the judge, on justified grounds, authorises payment to be made with assets of the debtor” (Art. 41 para. 2 Catalan Family Code). Payment must be made in cash, unless the parties agree on, or the judge authorises, adjourned payment or payment by instalments, which will yield interests for the creditor and will not exceed three years.⁷⁵

Case law has interpreted the conditions required for obtaining this compensation in a manner that is very favourable to the interests of the applicant spouse. In fact, legal doctrine points out that there is a tendency to attribute to this right the function of a sort of *participation in the acquisitions* instead of the *strict* function of *restitution of the enrichment* of one spouses brought

⁷³ STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 27.04.2000 (“the *de facto* separation determines the moment when inequality between the patrimonies must be ascertained, but it is the extinction of the regime by the judicial decree that brings about the right to economic compensation”).

⁷⁴ E. Roca Trías, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 350.

⁷⁵ J. Solé Feliu, “La compensació econòmica per raó de treball de l'article 41 del nou Codi de Família de Catalunya”, *La Llei de Catalunya i Balears*, No. 231, 1998, p. 2.

about by the impoverishment of the other.⁷⁶ In this sense, it is worth emphasising the following aspects of this case-law:

a) In spite of the fact that work for the household is recognised by the law as a means of fulfilling the duty to contribute to family expenses that rests on both spouses (see Art. 5 para. 1 Catalan Family Code), case law has rejected that the right to economic compensation requires the petitioning spouse to furnish proof of any sort of “over contribution” on his or her part.⁷⁷ Higher court case law rejects the idea, suggested by some lower courts, that the ordinary household work is not sufficient to give rise to compensation⁷⁸ and that it requires something more, a *plus*, either because it has been specifically arduous or burdensome or because it has simultaneously entailed work for the household and work in the economic activity of the other spouse.⁷⁹ This case law stresses, in fact, that “it has no bearing that the work for the household has been greater or small, full-time or part-time”,⁸⁰ and considers that in awarding compensation it is irrelevant, for instance, whether during marriage a spouse had domestic service or enjoyed the assistance of other persons in the household chores, or that the petitioning spouse sporadically combined household with gainful employment.⁸¹ The

⁷⁶ See the helpful outline provided by J. Ferrer Riba, “Separació de béns i compensacions en la crisi familiar”, in: *Nous reptes del Dret de família. Materials de les Tretzenes Jornades de Dret català a Tossa*, Girona: Documenta Universitaria 2005, p. 83-86. See also E. Bosch Capdevila, “Comentari a la darrera jurisprudència del Tribunal Superior de Justícia de Catalunya en matèria de compensació econòmica de l’article 41 del Codi de Família”, *Revista catalana de dret privat*, 2004, vol. 3, p. 136-144. Along the lines of the development of case law see P. Ortuño Muñoz, “Articles 41-43”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d’unions estables de parella i a la Llei de situacions convivencials d’ajuda mútua*, Madrid: Tecnos, 2000, p. 234 ff.

⁷⁷ STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 14.04.2003 (“the relationship between Art. 4 para. 1 and 5.1 Catalan Family Code is artificial and is grounded only upon their literal wording. The contribution to family expenses during the marriage and the economic comparison when the crisis arises are based upon different principles and seek different goals”). More recently, see also STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 29.05.2007.

⁷⁸ Among many others, SAP (Sentència de Audiencia Provincial (Provincial Court Decision)) Barcelona 05.03.2001 (quashed by STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 27.10.2005).

⁷⁹ In legal doctrine see for instance: X. Cecchini Rosell, “La compensació econòmic per raó del treball en el règim de separació de béns. Comentari a la sentència del Tribunal Superior de Justícia de Catalunya de 27 d’abril de 2000”, *La Llei* 2001, No. 329, p. 2 (“one should assess exclusively... whether the claimant’s contribution to the family burdens has been excessive and left unpaid due to this excess”). Against this view, see STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 21.10.2002 (“to demand that the claimant had performed especially burdensome tasks... means to disregard the spirit of the law and close the gates to a corrective which has already been accepted by society”) and 12.01.2004 (“by no means does the law require that the claimant had developed two jobs, i.e. the housework and the unpaid cooperation with his or her spouse”). See also STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 27.10.2005.

⁸⁰ STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 27.04.2000.

⁸¹ Accordingly, for instance, the right to economic compensation on the grounds of work shall be granted to “the spouse who had worked only part time so as to be able to take care of the household or of the children” (STSJC (Sentència del Tribunal Superior de

only case that it clearly excludes is where both spouses have carried out gainful activities or have been employed during marriage, regardless of whether the distribution of roles in the household has been balanced or not and whether the household chores have substantially fallen upon one of the spouses (typically the wife).⁸²

b) The required situation of imbalance in the patrimony of the spouses at the time of the marital breakdown has also been understood in a very lax way that also favours the award of the economic compensation.⁸³ Although it was contended initially that compensation is justified by the fact that “since both spouses have contributed to meeting family expenses... there is no reason why, in plain words, one should remain rich and the other remain poor”,⁸⁴ in many subsequent decisions sheer comparison with the patrimonies of both spouses has prevailed.⁸⁵ Thus, compensation has been awarded if there was a serious imbalance,⁸⁶ in spite of the fact that the applicant spouse enjoyed a sound financial situation, albeit clearly worse than his or her spouse’s.⁸⁷ When assessing the imbalance between the patrimonies of the

Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 10.02.2003).

⁸² See STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 26.05.2005. In this case the wife continued to work as a teacher during the marriage and managed to acquire a huge fortune, in part thanks to the funds provided by her husband. In general terms, STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 10.02.2003 conceded that “to compensate for situations of inequality when both spouses have developed a professional activity outside the household would go against the wording and the spirit of the norm and would be contrary to the core of the separation of property regime, which consists in having both patrimonies separated within the marriage”.

⁸³ The right to economic compensation on grounds of work does not even arise, however, if the other spouse has no assets or the gains or earnings made while the regime was in force have been lost or consumed. See P. Ortuño Muñoz, “Articles 41-43”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 237.

⁸⁴ STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 27.04.2000.

⁸⁵ Mirambell i Abancó (2003) p. 478. See also J. Ferrer Riba, “Separació de béns i compensacions en la crisi familiar”, in: *Nous reptes del Dret de família. Materials de les Tretzenes Jornades de Dret català a Tossa*, Girona: Documenta Universitaria 2005, p. 85.

⁸⁶ For example, see STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 21.6.2004, which awarded €60,000 to a 44-year-old woman, who had been married for 20 years and raised two children, on the basis that her assets were comparatively less than the properties acquired by her husband during the marriage.

⁸⁷ In this sense see E. Bosch Capdevila, “Comentari a la darrera jurisprudència del Tribunal Superior de Justícia de Catalunya en matèria de compensació econòmica de l'article 41 del Codi de Família”, *Revista catalana de dret privat*, 2004, vol. 3, p. 146. As examples of this trend see STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 21.10.2002 and 26.03.2003. Some decisions, however, have stressed that “no one should mix up the right to economic compensation laid down in Art. 41 Catalan Family Code with a right to equal patrimonies without further ado” (STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 26.05.2005; see also STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 19.10.2006).

spouses, however, case law has never applied, either by analogy or as guidance, the rules of the regime of participation in the acquisitions (Art. 55 and 56 Catalan Family Code).⁸⁸

c) The condition establishing that the situation of imbalance must entail an unjust enrichment that has its origin in the work for the household or for the other spouse has been watered down by case law to the extent that it has made it utterly superfluous.⁸⁹ Thus, although the legislature included this requirement in 1998 in the Family Code as a novelty, case law contended from the outset that “it does not mean that the work of the wife has given rise to her husband’s enrichment and to her impoverishment”, stressing that “in general, one could always say that whenever one spouse works without pay he or she will incur an enrichment in favour of the other”.⁹⁰ These assertions have been subsequently expanded by saying that “the exclusive work for the family and the household... is essential for the other spouse to be able to devote all his efforts, without any disturbance to the generation of wealth”,⁹¹ or that “already by the fact that one of the spouses drops the possibility of working outside the home or, by devoting his or her efforts to the business of the other, enables the other spouse to obtain an enrichment, since he knows that the household and, if this is the case, his or her children will be well looked after or that his or her business in the hands of a stalwart collaborator”.⁹²

⁸⁸ During the parliamentary discussion of the draft bill, a proposal to apply as default rules the provisions on the liquidation of the participation in acquisitions regime was rejected. Some scholars, nevertheless, suggest that these rules could help to determine the situation of inequality between the two patrimonies required by Art. 41 Catalan Family Code. See L. Jou i Mirabent, “Article 23”, in: *Comentari a la modificació de la Compilació en matèria de relacions patrimonials entre cònjuges*, Barcelona: Generalitat de Catalunya, 1995, p. 204 and E. Roca Trías, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 353.

⁸⁹ In the case decided by STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 27.02.2006, once the inequality between the patrimonies of the spouses and the claimant’s work as housewife for 28 years were proven, the decision concluded that “with things as they are, the unjust enrichment appears to be completely proven”.

⁹⁰ STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 27.04.2000. On the other hand, in STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 19.01.2004 the court dealt with the claim of a husband who had been working for one of the businesses owned by his wealthy wife. The court reached the conclusion that the claimant had not managed to prove that he had been receiving an insufficient payment for his work, nor that “his work has had any influence whatsoever the acquisition of his wife’s fortune or at least on increasing its revenues”.

⁹¹ STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 27.04.2000. See also STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 26.03.2003, which declared that “without the wife’s wholehearted dedication to the housework and to the care of the common children it is unlikely that [the husband] would have acquired the fortune he now has”.

⁹² STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 21.10.2002. In other cases, the court has said that the wife’s work “helped to maintain and to develop her husband’s business” (STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 01.07.2002) or that her cooperation “helped to increase the productivity of her husband’s business thereby favouring the increase of his wealth” (STSJC (Sentència del Tribunal

d) The moment which is relevant to starting an evaluation of the work for the household or for the activity of the other spouse does not necessarily coincide with the coming into effect of the matrimonial property regime, since if the spouses have lived together before marriage the period of time of pre-nuptial cohabitation will also be taken into account when determining the right to economic compensation and its amount, as well as the assets acquired by both spouses during this period.⁹³

The spouses may agree on the amount of the economic compensation. If there is no agreement, however, the amount is fixed by the judge. In this respect case law has rejected the adoption of general standards and has confined itself to pointing out that the judge will decide, at his or her discretion, case by case, in sight of the proofs furnished during the proceedings.⁹⁴ It rejects applying a market value to work carried out, and more specifically making recourse to the average salary of a housemaid when evaluating work for the household.⁹⁵ According to case law such a standard would “mix terms beyond comparison”.⁹⁶ On the other hand, although establishing the amount of economic compensation according to a standard that entails a share or a participation in the patrimony of the debtor spouse is also rejected,⁹⁷ the difference between the patrimony of the spouses and the importance of the economic resources of the debtor are usually decisive in the assessment of the amount of the economic compensation.⁹⁸ Therefore, legal writing underlines the idea that case law does not value the work in itself but takes into account the gains or the financial resources of the debtor spouse.⁹⁹

Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 29.12.2003).

⁹³ STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 12.1.2004 and 27.02.2006.

⁹⁴ Among many others, see STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 27.04.2000, 14.04.2003 and 27.10.2005.

⁹⁵ See in this sense L. Jou i Mirabent, “Article 23”, in: *Comentari a la modificació de la Compilació en matèria de relacions patrimonials entre cònjuges*, Barcelona: Generalitat de Catalunya, 1995, p. 203. J. Egea Fernández, “Articles 4-5”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 111, who also thinks that the salary of a housemaid is “a quite accurate point of reference for assessing the value of the spouse’s housework”; bearing in mind as well the amount of the hypothetical earnings he or she has lost because of his or her dedication to housework.

⁹⁶ STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 27.04.2000. Case law has also rejected the idea that the amount of the economic compensation should be reduced by taking into account whether the spouse could have saved anything had his or her activity been paid (STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 19.10.2006).

⁹⁷ Among many others see STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 27.04.2000.

⁹⁸ More often than not, defendants try to make it difficult to determine their assets and properties and courts react by using indirect means of proof and judicial presumptions. See for instance the reasoning used by the court in STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 26.02.2007.

⁹⁹ E. Bosch Capdevila, “Sentencia 8/2000, de 27 d’abril, del Tribunal Superior de Justícia de Catalunya: Compensació econòmica per raó de treball”, *La notaría*, 2000, p. 178.

When assessing the amount of economic compensation many decisions still make recourse to the factors contained in the prior regulation (see Art. 23 Catalan Civil Law Compilation 1984) that were left out of the new regulation of this institution in the Family Code,¹⁰⁰ *i.e.*, the duration of marriage, the importance of the activity of the petitioning spouse in the family or the scope of the imbalance in the patrimonies of the spouses.¹⁰¹ At any rate, when determining both the existence of the right to obtain economic compensation and its amount, acquisitions of the creditor spouse that have been financed with funds coming from the debtor spouse must also be taken into account.¹⁰²

Legal scholarship is very critical with the solutions adopted by case law. It contends that by emphasising patrimonial imbalance, case law has made of the economic compensation a device by which it attributes to one spouse an undetermined share of the acquisitions of the other spouse during marriage (and even during prenuptial cohabitation).¹⁰³ However, since the courts do not have the power to turn the separation property regime into a regime of participation in the acquisitions or into a differed community, by refusing to evaluate the work of the spouse according to independent standards, case law has given rise to a situation of great uncertainty. This acts as a disincentive to settlements, increases the litigation costs and comes to the advantage of the more powerful spouse, since he or she has more resources to afford court proceedings that can be very expensive.¹⁰⁴

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?

¹⁰⁰ P. Ortuño Muñoz, "Articles 41-43", in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 243 (rejecting them because they are very difficult to assess and risk being biased).

¹⁰¹ STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 27.02.2006 made reference to the personal and professional circumstances of the spouse at the moment of marriage breakdown and to the lost opportunities resulting for one spouse from the unpaid work he or she had developed during the marriage.

¹⁰² See especially STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 10.03.2003, which stated that the financial contributions made by the husband for the family during the marriage did not equal what he owed in justice to his wife, to whom he had been married for 25 years during which she performed the domestic chores and worked for him in his consulting room as clerk, administrative assistant and nurse.

¹⁰³ Among many others see E. Bosch Capdevila, "Sentencia 8/2000, de 27 d'abril, del Tribunal Superior de Justícia de Catalunya: Compensació econòmica per raó de treball", *La notaría*, 2000, p. 179. The court seems to be aware of the disapproving opinion held by the majority of the legal scholarship. Nevertheless, the court disregards those opinions and stresses that the rule laid down in Art. 41 Catalan Family Code provides a new approach aiming at "removing anachronistic situations, which concealed extremely unjust inequalities in the marriage relationship". According to the court, the opposition of some scholars and lower courts is mainly due to a misapprehension of the aims of rule that will eventually disappear (STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 12.01.2004).

¹⁰⁴ J. Ferrer Riba, "Separació de béns i compensacions en la crisi familiar", in: *Nous reptes del Dret de família. Materials de les Tretzenes Jornades de Dret català a Tossa*, Girona: Documenta Universitaria 2005, p. 86.

The starting point of the courts is to establish and evaluate the assets of each spouse at the dissolution of the regime. As a matter of principle, however, the assets that each spouse had when the regime came into effect and those acquired subsequently by gratuitous title (gifts, inherited assets, bequests, etc) should not be taken into account. However, when assessing the imbalance existing between the patrimony of the spouses, debts that are still pending are taken into account, regardless of their source and the moment when they arose.

At the outset, some court decisions have taken the patrimony of the debtor spouse as a whole, including the assets that he already owned when he got married and those subsequently acquired by gift or inheritance.¹⁰⁵ In this case the rationale behind the solution was that “the husband could not have kept and increased his patrimony had [it] not been for his wife’s choice to work in the household, which enabled her husband to engage himself – in this case, full-time – to strengthen his financial situation”.¹⁰⁶ Later decisions have moved away from this rationale and have held that “imbalance has taken place during marriage and for these reasons, assets that each spouse owned before entering into it cannot be taken into account”¹⁰⁷ and, accordingly, have rejected the inclusion of assets coming from the debtor’s family.¹⁰⁸

As regards plus values of private assets, case law starts from the idea that assets that cannot be taken into account when assessing economic compensation on the grounds of work are those that “the spouses had acquired as private assets before marriage and those that they acquire ... as a replacement or as a result of their investment, as well as the plus values that accrue from these assets by the mere passage of time, by the fluctuation of the markets or by any other reasons unrelated to their administration, preservation, repair, renewal, reform or extension” (emphasis added). However, “the increase and the preservation of value undergone by private assets of the spouses on the grounds of investments made with income [coming from a labour, commercial or industrial activity] or attributable to the direct activity upon them of the spouses themselves” (emphasis added) must be taken into account.¹⁰⁹

Additionally, patrimony of each spouse also includes pension rights and entitlements resulting from insurance contracts underwritten by one of them or by both. In particular, in the case of pension or retirement plans, the corresponding capital is included as an asset. By contrast, pension rights that give rise to allowances that one of the spouses already draws are not usually capitalised when assessing the patrimony of its holder.

¹⁰⁵ E. Bosch Capdevila, “Sentencia 8/2000, de 27 d’abril, del Tribunal Superior de Justícia de Catalunya: Compensació econòmica per raó de treball”, *La notaria*, 2000, p. 179.

¹⁰⁶ STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 10.02.2003.

¹⁰⁷ STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 27.02.2006, 19.10.2006 and 29.05.2007. In legal scholarship see already P. Ortuño Muñoz, “Articles 41-43”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d’unions estables de parella i a la Llei de situacions convivencials d’ajuda mútua*, Madrid: Tecnos, 2000, p. 244.

¹⁰⁸ STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 26.05.2005 (rejecting the award of economic compensation on the basis that most of the husband’s assets came from his own family and were burdened with securities constituted to guarantee a number of loans still pending to be paid).

¹⁰⁹ See STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 09.05.2005, which dealt with a stable union of couple but applied Art. 13 Act on Stable Unions of Couple 1998 (LUPE), a provision functionally equivalent to Art. 41 Catalan Family Code. Later the court applied the same criteria to a marriage subject to the separation of property regime (see STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 29.05.2007).

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 relevant moment for assessing the imbalance in the patrimony of the spouses to which Art. 41 Catalan Family Code refers to, and for the valuation of the private assets of each spouse, is the moment of the *de facto* separation or when life in common ceases, regardless of the fact that economic compensation on the grounds of work is awarded by the decree that provides for the dissolution of the property regime in the first proceedings that take place between the spouses.¹¹⁰

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?

"Investments" means here an allocation of funds for the increase of the patrimony of the other spouses (by contrast to the payment of debts, which enriches by diminishing liabilities). For this reason it includes both the payment of the price of the acquisitions made by the other spouse and the allocation of private funds to the preservation and improvement of the private assets of the other spouse.

1. As regards the money spent for the acquisition, payment of improvements and repayment of loans for the acquisition (or improvement) of *the family dwelling and other chattels of ordinary use of the family* which are owned as private assets of one of the spouses Art. 4 para. 1.b) II *in fine* Catalan Family Code provides that "the part corresponding to their value of use" is a family expense to which both spouses have the duty to contribute in proportion to their resources. Case law has not defined how to value this *family use* for the allocation of the expenses between the private patrimonies of the spouses. In any case, the result of this provision is that, at least up to a certain amount, these payments were a debt of one of the spouses and for this reason she or he cannot seek reimbursement or compensation from the owner of the assets concerned.

2. As regards any *acquisition* of one of the spouses during the marriage that has been financed partially or totally with assets of the other spouse, Art. 39 Catalan Family Code presumes that this spouse has donated the corresponding sum to the money paid in exchange.¹¹¹ For this reason, in this case there is neither reimbursement nor compensation. However, these transactions may be revoked if the required exceptional conditions are met.¹¹²

¹¹⁰ STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 27.04.2000. P. Ortuño Muñoz, "Articles 41-43", in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 251.

¹¹¹ E. Roca Trías, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 344.

¹¹² According to Art. 14 Catalan Family Code "gifts made between spouses out of marriage agreements may be revoked in the general cases of revocation of gifts, although in the case of the supervening of children, the revocation is only valid if such children are common to the spouses". The general cases to which the provision refers are, besides the supervening of children, non-compliance with the conditions set out by the donor, ingratitude and lack of economic means of the donor (Art. 531-15 Catalan Civil Code).

The presumption of gift is rebuttable and for this reason the spouse concerned may furnish proof that he or she did not make a gift¹¹³ but transferred the money on other grounds. Case law, applying the rules in force until 1993 - i.e. until the moment in which the presumption was introduced for the first time into Catalan Law by amending the Compilation - pointed out that since gifts could not be presumed, what the spouse had paid was in fact a "reimbursable advance payment", which did not entitle him or her to any property on the asset acquired with his or her money, but only the right to recover the sums of the invested funds.¹¹⁴

3. Improvements - in their strictest sense - in private assets made with funds or assets of the other spouse, together with the expenses of acquisition, are dealt with in Art. 4 para. 1 Catalan Family Code where they refer to the family dwelling or to chattels of family use. When this is not the case, it seems that the rule included in Art. 39 Catalan Family Code should also apply to these money transfers, since, if the amount to acquire an asset is presumed to be a gift, for the same reason that which has been paid to reform, improve or simply maintain what has been acquired should also be presumed to be a gift. However, the Catalan Superior Court of Justice - i.e. the Supreme Court for Catalan Law - has held recently that the amount of private property that one spouse invests in the reconstruction of a building which is joint property of the spouses gives rise to a claim for reimbursement (and not to a presumption of gift) in favour of the spouse who paid them in full to the builder.¹¹⁵

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

In this case the payment does not aim to enrich the other spouse, but to increase his or her patrimony by diminishing his or her liabilities.

One can find reasons in the legal texts for considering that the amounts paid for the debts of one spouse can be claimed by the other according to the general rules (see Art. 1158 II and 1145 II CC; as regard family expenses, see Art. 3.5 in connection to Art. 5 Catalan Family Code). Nevertheless, it is obvious that Art. 39 Catalan Family Code describes what is precisely the situation in which one of the spouses uses the assets of the other spouse to pay his or her own debts (i.e. the money paid as the price of the acquisition). Therefore, lacking sufficient proof to the contrary it can be held that the payments made by the spouse for the debts of the other give rise to the rebuttable presumption that they are a gift and not a loan or a reimbursable advanced payment.

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

No. Both the family dwelling and the chattels for personal use belong to the spouse who acquired them and must be attributed to him or her when distributing the assets after the

¹¹³ E. Roca Trías, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 344. L. Puig Ferriol, "Articles 37-40", in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 222.

¹¹⁴ See STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 10.05.1993, 19.10.1993, 31.01.1994 and 05.03.1998.

¹¹⁵ STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 26.05.2005 (holding that the work done to the building could not qualify as "acquisitions" for the purposes of Art. 39 Catalan Family Code and that "gifts may not be presumed").

dissolution of the property regime. However, according to Art. 83 Catalan Family Code, the *use* of the family dwelling and its corresponding chattels may be attributed to one of the spouses, either by common agreement or by a court decree which takes into account whichever spouse retains the custody of the children and which one is in a more vulnerable position.

A different question is that, if there is a *doubt about to whom the assets belong*, (because there is no public register that records who is the owner because the title of acquisition has been lost), there is a rebuttable presumption¹¹⁶ that, as long as they do not have an extraordinary value, the chattels that are for “personal use” belong to the spouse who uses them (Art. 40 in fine Catalan Family Code) and must be attributed to him or her when liquidating the regime. The other assets whose ownership cannot be ascertained will be distributed to the spouses in equal shares. However, it must be borne in mind that for the purpose of the distribution of these and other assets that are in joint ownership, Art. 43 Catalan Family Code entitles any spouse to request that they are taken as a whole for the purpose of their division.

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

No. Only when there is a doubt about which spouse owns movables for personal use or directly intended for the activity of one of the spouses and which are not of extraordinary value, the law rebuttably presumes that they belong to this spouse and, lacking any proof to the contrary, it attributes them to him or her (Art. 40 *in fine* Catalan Family Code).

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

Pursuant to Art. 41 para. 3 Catalan Family Code, the right to economic compensation on the grounds of work is compatible with any other economic benefits arising from the marital breakdown that the spouse concerned may be entitled to, and so it “must be taken in to account when assessing these other entitlements”.¹¹⁷ Both claims can be accumulated in the same proceedings, but when establishing maintenance (Art. 84 Catalan Family Code), the judge must take into account whether economic compensation on the grounds of work established by Art. 41 Catalan Family Code has been awarded and what its amount is (Art. 84.2 *d*) Catalan Family Code).¹¹⁸

¹¹⁶ L. Puig Ferriol, “Articles 37-40”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convencionals d'ajuda mútua*, Madrid: Tecnos, 2000, p. 230.

¹¹⁷ STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 30.06.2005.

¹¹⁸ Before the entry into force of the Family Code, a discussion was held about the compatibility of economic compensation on grounds of work with the maintenance claims arising from divorce or separation proceedings. See especially SAP (Sentència de Audiencia Provincial (Provincial Court Decision)) Barcelona 2 and 03.12.1997, where the court held the view that “both economic claims share the same legal nature ... and are grounded upon the same foundations”. Against this opinion see SAP (Sentència de Audiencia Provincial (Provincial Court Decision)) Tarragona 20.03.1996 and Girona 15.12.1997. The Family Code settled the discussion in favour of compatibility. A few weeks after, the STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 31.10.1998 quashed the decision of the lower court in SAP (Sentència de Audiencia Provincial (Provincial Court Decision)) Barcelona 22.09.1996, arguing that prior to the admission of the maintenance claim the amount of the economic compensation must be determined. In the same vein, see recently STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 03.04.2007.

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?

It does not affect them at all. The holder of the pension right will carry on receiving payments in full since the legislation in force does not provide for any allocation of any part or share of this pension to the former spouse. It is true that, as a matter of principle, the pension right should be capitalised in order to establish the basis for what is necessary to assess the economic compensation on the grounds of work, but we do not know of any decision that has ever dealt with this topic.

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?

Art. 42 Catalan Family Code provides that the claim for economic compensation on the grounds of work can only be brought when filing the first proceedings on making the petition for legal separation, annulment or divorce, or for the execution by civil courts of the decrees adopted by ecclesiastical courts.¹¹⁹ From the terms of this provision it is clear, in the first place, that the judge may not award compensation *ex officio* if one of the spouses has not claimed for it. Accordingly, the petition for compensation rests solely on the spouse who considered that he or she is entitled to it, even to the extent that, according to the law, if this spouse does not file his or her petition in the first matrimonial proceedings taking place between the spouses, he or she will not be able to file it in any subsequent proceedings of annulment or divorce (see Art. 42 para. 1 Catalan Family Code).

Since this is a subject-matter that rests exclusively on the will of the parties, in proceedings that take place by common agreement of the spouses it will not be necessary for the regulatory agreement that the spouses are obliged to present to the judge, either jointly or by one of them with the consent of the other spouse, to include any provisions as regards economic compensation on the grounds of work (Art. 77 Catalan Family Code). If the agreement does not mention it, it must be understood that the spouse who might be entitled to it, renounces it.¹²⁰ Moreover, the judge who has to approve or authorise the regulatory agreement cannot refuse authorisation on the grounds that it is seriously detrimental to one of the spouses.¹²¹

Case law has admitted that renunciation of economic compensation on the grounds of work may be made by a private agreement between the spouses made before entering matrimonial proceedings, as long as this renunciation has been clearly drafted and does not give rise to a too generic or undetermined clause.¹²²

¹¹⁹ Very critical of the wording of this provision, see E. Roca Trías, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 354.

¹²⁰ P. Ortuño Muñoz, "Articles 41-43", in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2000, p. 247.

¹²¹ Contrary to Art. 90 II CC, Art. 78.1 Catalan Family Code requires the regulating agreement to be authorised, unless it is "harmful for the children". See STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 19.07.2004 (contending *obiter* that the agreement terms could be harmful "directly or indirectly, as long as they entail a serious economic impairment for the spouse who takes care of them after marriage breakdown").

¹²² SAP (Sentencia de Audiencia Provincial (Provincial Court Decision)) Girona 01.03.2004 (JUR 2004\118887) denied the validity of this waiver, included in a separation agreement, because it was too broad and unspecific: "[the parties] expressly declare their will that in case of separation, divorce or annulment of the marriage there shall be no right to any kind of

The right to economic compensation on the grounds of work of Art. 41 Catalan Family Code derives from a provision that the law views as an effect of the dissolution of the matrimonial property regime of separation of property and by definition this default property regime can be replaced by a different one or modified by an agreement between the spouses laid down in pre-nuptial or post-nuptial marital agreements (Art. 10 and 15 para. 1 Catalan Family Code). In spite of that, legal scholarship is clearly divided as regards the possibility of the spouses making an advanced renunciation of the compensation either before entering marriage or during it and, at any rate, before marital breakdown.¹²³ In favour of the position that would allow spouses to do so, it is contended that Art. 15 para. 1 *in fine* Catalan Family Code seems to back this possibility when it mentions that they can make in a nuptial agreement “the licit agreements that they see fit, including those that provide for a situation of marriage breakdown”.¹²⁴ One of the reasonings for those who oppose this possibility is that when Art. 3 para. 1 Llei d’unions estables de parella (Act on Stable Unions of Couple 1998) tries to make a regulation for registered partnerships that parallels the regulation established for married couples, it attributes to them a very similar right and points out that it cannot be renounced “until the moment when it can be enforced”.¹²⁵ Case law has not had the opportunity to deal with these problems so far.

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

No. Precisely, the right to economic compensation on the grounds of work provided by Art. 41 Catalan Family Code is not applicable when marriage dissolves by death or by declaration of death. In these cases, the surviving spouses is only entitled to rights recognised by the law of succession, such as widowhood right, which are independent of the matrimonial property regime (Art. 35 and 36 Catalan Family Code) or those attributed by the operation of law on

compensation on grounds of either the marriage or the marital cohabitation”. In the same vein, STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 19.07.2004 reached the conclusion that a waiver to the right to economic compensation on grounds of work included in a separation agreement was ineffective insofar as it was not explicit enough. Its wording was the following: “The wife is assigned the [above mentioned] monthly amount and is thus bound not to claim anything else to his husband in concept of compensatory allowance and/or economic compensation”.

¹²³ P. Ortuño Muñoz, “Articles 41-43”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d’unions estables de parella i a la Llei de situacions convivencials d’ajuda mútua*, Madrid: Tecnos, 2000, p. 246-247.

¹²⁴ E. Roca Trías, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 352. See also E. Roca Trías, “Autonomía, crisis matrimonial y contratos con ocasión de la crisis”, in: J. Manel Abril Campoy and M^a Eulàlia Amat Llari (eds.), *Homenaje al Profesor Lluís Puig i Ferriol*, Valencia: Tirant lo Blanch, 2006, p. 2132-2133.

¹²⁵ A. Mirambell i Abancó, in: F. Badosa Coll and J. Marsal Guillaumet (eds.), *Manual de dret civil català*, Madrid, Barcelona: Marcial Pons, 2003, p. 476-477 and J. Ferrer Riba, “Familienrechtliche Verträge in den Spanischen Rechtsordnungen”, in: Sibylle Hofer, Dieter Schwab and Dieter Henrich (eds.), *From Status to Contract? Die Bedeutung des Vertrages im Europäischen Familienrecht*, Bielefeld: Giesecking, 2005, p. 289. Against the validity of an advanced renunciation, but agreeing to the possibility of predetermining the rules to assess its amount see J.J. López Burniol, *La “resurrecció” dels capítols matrimonials. (L’àmbit de l’autonomia de la voluntat en els contractes reguladors de la convivència)*, Barcelona: Acadèmica de Jurisprudència i Legislació, 1999, p. 44. See also J. Egea Fernández, “Pensión compensatoria y pactos en previsión de una ruptura matrimonial”, in: *Estudios jurídicos en homenaje al profesor Luis Díez-Picazo*, vol. IV, Madrid: Thomson Civitas, 2003, p. 4571.

the state of the deceased spouse when the surviving one is in need (Art. 380 Catalan Succession Code 1991).

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?

Self-determination of spouses can be exercised in different ways. The traditional one is making “marital agreements” (Art. 15 para. 1 Catalan Family Code). Before marriage takes place, the law refers exclusively to this possibility and points out that marital agreements only come into effect after the solemnisation of marriage (Art. 15 para. 2 Catalan Family Code). Marital agreements, besides establishing the property regime that will govern marriage, may also “appoint heirs (the so-called *heretaments* or contractual institution of an heir, made on many occasions by the parents of one of the spouses in favour of one or both spouses or of the children they may have in the future), make gifts or lay down all those provisions or agreements that they see fit, including those that provide for a situation of marriage breakdown” (Art. 15 para. 1 Catalan Family Code).¹²⁶

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?

Marital agreements can be made either before or after the celebration of marriage, and may “appoint heirs, make gifts or *lay down all those provisions or licit agreements that the spouses see fit, even in anticipation of a marriage breakdown*” (Art. 15 para. 1 Catalan Family Code).

At present, and along with marital agreements, agreements of the spouses on their economic relationship are also made in:

1. Regulatory agreements approved by the court in the proceedings of legal separation or divorce (Art. 76 Catalan Family Code and 777 Ley de enjuiciamiento civil (Civil Procedure Act 2000)) and
2. Atypical legal transactions, *i.e.* not governed by specific rules, which are made on the occasion of marriage breakdown.¹²⁷

In both cases they are agreements made after marital breakdown that case law has held as valid and effective, in spite of the fact that they are not solemnised in the form of marital agreements, so long as they refer to aspects that are at the free disposition of the parties, including the liquidation of the matrimonial property regime or the transfer of assets between spouses due to the situation of marriage breakdown.¹²⁸

¹²⁶ Marital agreements can be revoked or modified with the consent of both spouses. However, when other persons –such as their parent- have taken part in the marital agreement, revocation or modification also requires also the consent of these other persons, or of their heirs, if it affects any entitlement or provision that they have made (Art. 18.1 Catalan Family Code). At any rate, such a requirement does not apply to changes of the matrimonial property regime in force or to succession agreements that only concern the spouses or their children (Art. 18 para. 2 Catalan Family Code).

¹²⁷ See the outline provided by E. Roca Trías, “Autonomía, crisis matrimonial y contratos con ocasión de la crisis”, in: J. Manel Abril Campoy and M^a Eulàlia Amat Llari (eds.), *Homenaje al Profesor Lluís Puig i Ferriol*, Valencia: Tirant lo Blanch, 2006, p. 2116-2128.

¹²⁸ STS (Sentencia del Tribunal Supremo (Sala de lo Civil) (Decision of the Spanish Supreme Court, Civil Chamber)) 22.04.1997 (RJ 1997\3251), 27.01.1998 (RJ 1998\110), 26.07.2000 (RJ 2000\748) and 15.02.2002 (JUR 2002\61275).

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

The formal requirement of marital agreements is that they must be made in a public deed authorised by a notary (Art. 17 para. 1 Catalan Family Code) which becomes ineffective if marriage is annulled or dissolved by divorce (Art. 20 para. 1 Catalan Family Code).

By contrast, atypical transactions made on the occasion of marital breakdown – and which can also give rise to important economic consequences for the spouses - may be established (a) in the regulatory agreement presented in proceedings filed with the consent of both spouses and which are included in the decree that establishes separation or divorce, or (b) in a private document made before or after matrimonial proceedings.¹²⁹ In both cases what the spouses have agreed will be binding on both of them if the agreement meets the conditions required for the validity of a contract.¹³⁰

The differences between the formal requirements that must be met in marital agreements and in other agreements can be explained by taking into account the fact that the requirement providing for solemnisation in a public deed refers to the so-called “typical content” of matrimonial agreements, *i.e.* the establishment or modification of the matrimonial property regime and any other agreements related to it. Other sorts of agreements, in spite of the fact that they may also be included in marital agreements, do not belong to their “typical content” and, for this reason, they are not subject to the formalism imposed by Art. 17 para. 1 Catalan Family Code. In this sense, the modification or replacement of those agreements contained in marital agreements, but which do not belong to their typical content, do not require a public deed for their validity. For this reason, for instance, case law has considered that agreements referring to the *liquidation* of a property regime that has already been dissolved are valid.¹³¹

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.

The matrimonial property regime can be modified either before or after the celebration of marriage by making a marital agreement that is solemnised in a public deed. The changes, however, cannot affect third parties until the modification has been recorded in the Register of Births, Marriages and Deaths and in the other relevant public registers (Register of Property , Commercial Register) (Art. 17 para. 2 Catalan Family Code). In the cases of modifications made once the matrimonial property regime is already in force, Art. 19 Catalan Family Code provides that “[they do] not affect the rights acquired by third parties”.

Neither can other agreements that the spouses reach regarding their economic relationships (for instance, transfer of assets, clearance of debts, etc.) affect third parties, until they are recorded in the corresponding public registers (for instance, in Register of Property if what is agreed modifies the entitlements they may have upon immovable property). Moreover, it must be borne in mind that, although Art. 11 Catalan Family Code provides, that “spouses may transfer property and rights each other by any title and conclude all sorts of legal

¹²⁹ RDGRN 05.02.2003 (RJ 2003\2268).

¹³⁰ STSJC (Sentència del Tribunal Superior de Justícia de Catalunya (Sala Civil i Penal) (Decision of the Catalan Superior Court, Civil and Criminal Chamber)) 19.07.2004 (agreements entered into by the spouses “are binding as in any other contract”). See E. Roca Trías, “Autonomía, crisis matrimonial y contratos con ocasión de la crisis”, in: J. Manel Abril Campoy and M^a Eulàlia Amat Llari (eds.), *Homenaje al Profesor Lluís Puig i Ferriol*, Valencia: Tirant lo Blanch, 2006, p. 2128.

¹³¹ P.J. Femenía López, “De las capitulaciones matrimoniales”, in: B. Ribera Blanes and J. Barceló Doménech (eds.), *El régimen económico del matrimonio*, Madrid: Dykinson, 2005, p. 141.

transactions with each other”, when third parties (as for instance, creditors or persons having an entitlement in the estate of one of the spouses) challenge any of these transactions before the court it is for the spouse or spouses concerned “to prove that the legal transaction was in fact carried out by onerous title”.

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

No.

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?

The participation of the public notary in the execution of the public deed that contains the marital agreement or, in general, in the agreements on the economic relationships that the spouses notarises the following facts:

1. The identity of the parties, their capacity and that they have legal standing for the act they are performing,
2. That they have given their consent to it freely, and
3. That the execution of the deed conforms to legality and to the fully informed will of the parties.

Hence, the public notary has the duty to ensure that the parties give their consent freely and, for this reason, he or she will not authorise the public deed if he or she suspects that the consent of any of the parties is vitiated. Additionally, the public notary must “investigate, interpret and adapt” the common consent of the parties, even when the aim is to execute a deed according to a memorandum or convert a private agreement into a public deed. Moreover, Art. 147 of the Notary Regulations (hereafter, RN) requires the notary to inform the parties of “the meaning and scope of the draft”. This implies that “without setting his or her impartiality aside, the public notary will inform one of the parties of the clauses contained in the deed and of the draft document of the other ... and will give more specific legal assistance to the party who needs it more”.

Notary Regulations in force provide that public notaries who do not fulfil the duties to inform and to legally assist the parties and in the latter case, more specifically, the duty to assist the party who needs it more, will be subject to a disciplinary sanction (see Art. 346 et seq. RN). However, there will be a rebuttable presumption that the legal transaction carried out is valid and effective, unless it is proven that the consent of any of the parties was vitiated or that, due to this content, the agreement is partially or totally voidable. In other words: the lack of information or legal assistance from the public notary is not, in itself, a ground for the invalidity of the marital agreement or of the atypical family agreements that the public deed contain.

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

Available statistical data show a steady increase in the number of marital agreements made in Catalonia over the last twenty years. Whereas by the end of the 70s’ only around 500 marital agreements were made every year, in 2003 they had already reached the number of 3,727, which means an increase in a 700% in 25 years. The rate of marital agreements per number of marriages was in that year around 12.1%.¹³²

¹³² A. Lamarca Marquès, E. Farnós Amorós, A. Azagra Malo, and M. Artigot i Golobardes, “Separate Property and Family Self-determination in Catalonia: A Changing Model? ”, in:

This increase is basically the result of two facts: (a) the modification or the replacement of the matrimonial regime of *sociedad de gananciales* (society of gains), which is the default regime that governs married couples subjected to the Spanish Civil Code and who reside in Catalonia and, mainly, (b) the adjustment of the default matrimonial property regime of separation of property to a situation of marital breakdown. Recent research shows that it could also have its grounds in the amendments of the regime separation of property made since 1993, a moment at which economic compensation on the grounds of work (current Art. 41 Catalan Family Code) and the possibility of making marital agreements “in anticipation of a marriage breakdown” (current Art. 15 Catalan Family Code), were introduced into Catalan Law. It is contended that these possibilities, mainly in the case of remarrying couples or with regard to family business, have brought about a “resurrection” or upsurge of marital agreements.¹³³

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?

Spouses or future spouses may either choose from any of the statutory matrimonial property regimes available¹³⁴ or modify the default matrimonial property regime to adapt it to their needs. They may also draw up any other matrimonial property regime by drafting the appropriate clauses in their agreement.

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;
- b. administration of assets;
- c. distribution of assets;
- d. depend upon the ground of dissolution of the marriage?

The freedom that spouses have to shape their matrimonial property regime as they see fit refers to all these aspects. More specifically, in the case of separation of property the agreed modifications may, for instance, refer to:

1. The categories of assets, in particular since spouses may subject certain private or joint assets to the payment of family expenses¹³⁵ (something which is even more clearly possible if we bear in mind that the rules regarding a voluntary establishment of a dowry by the wife in favour of her husband are still in force¹³⁶) or may also place certain assets in common or

M. Martín-Casals and Jordi Ribot (eds.), *The Role of Self-determination in the Modernisation of Family Law in Europe*, Documenta Universitaria: Girona, 2006, p. 112.

¹³³ A. Lamarca Marquès, E. Farnós Amorós, A. Azagra Malo, and M. Artigot i Golobardes, “Separate Property and Family Self-determination in Catalonia: A Changing Model? ”, in: M. Martín-Casals and Jordi Ribot (eds.), *The Role of Self-determination in the Modernisation of Family Law in Europe*, Documenta Universitaria: Girona, 2006, p. 121-122.

¹³⁴ Art. 9 para. 3 Spanish Civil Code draws the limits of the spousal self-determination with regards to the definition of the law governing their property relationships within the marriage: the spouses may choose from among a) the law that governs the effects of their marriage; b) the law of any of the parties or c) the law of the country of residence of any of the parties at the time of entering into the agreement.

¹³⁵ See Blasi Pujol (2006) p. 722.

¹³⁶ According to the Second Temporary Provision of the Family Code, Art. 8 para. 3 Catalan Civil Law Compilation 1984 is still in force. According to it “if there is a dowry or any other assets allocated to relieve the matrimonial burdens, their fruits and revenues shall be used with preference to pay family expenses”. See J. Egea Fernández, “Articles 4-5”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions*

provide that certain assets that will be acquired in the future will become joint property and that these assets will be governed by the general rules of co-ownership.

Moreover, the agreement can refer to the way in which each spouse contributes to family expenses (Art. 5 para. 1 Catalan Family Code). However this agreement cannot free one of the spouses of his or her duty to contribute, since this agreement would be against the principle of legal equality of the spouses in marriage.¹³⁷

2. The administration of the assets, where the modifications agreed may, for instance, include that each spouse confers on the other the entitlement to administer privately or jointly owned assets of the other, or the power to dispose of jointly owned assets without the consent of the other.¹³⁸

3. The liquidation of the matrimonial property regime, where in their marital agreement they can adjust the conditions that give rise to the economic compensation on the grounds of work by establishing, for instance, that certain unpaid work in the activity of the other spouse is to be considered as free and does not entitle him/her to economic compensation,¹³⁹ or to make the claim for economic compensation dependant upon whether during marriage certain assets are transferred or not.¹⁴⁰ By contrast, legal scholarship discusses whether renouncing economic compensation in full is valid or not.¹⁴¹ It seems clear, however, that spouses may agree to rules that are different from those provided by the default regime of separation of property as regards to the assets that are going to be used to pay any possible compensation, to exclude certain assets when assessing the imbalance existing between the patrimony of the spouses, or to deprive the right to economic compensation on the grounds of work to the spouse who has behaved in a seriously reproachful manner with the other spouse.

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?

The main modifications to the default regime of separation of property are not carried out in practice by making marital agreements that introduce certain clauses that tend to mitigate its possible harshness. What is usual in practice is that the correction is made by joint

estables de parella i a la Llei de situacions convivencials d'ajuda mútua, Madrid: Tecnos, 2000, p. 114.

¹³⁷ See E. Roca Trías, in: L. Puig Ferriol and E. Roca Trías, *Institucions del Dret Civil de Catalunya*, vol. II, 5th ed., Valencia: Tirant lo blanch, 1998, p. 301 and Mirambell i Abancó (2003) p. 475.

¹³⁸ P.J. Femenía López, "De las capitulaciones matrimoniales", in: B. Ribera Blanes and J. Barceló Doménech (eds.), *El régimen económico del matrimonio*, Madrid: Dykinson, 2005, p. 137. STS (Sentencia del Tribunal Supremo (Sala de lo Civil) (Decision of the Spanish Supreme Court, Civil Chamber)) 08.06.1993 declared that the agreement in which the spouses conferred each other the right to free disposal of all their assets was not contrary to the principle of equality. See nonetheless the limitations imposed by Art. 9 para. 1 Catalan Family Code as regards the disposition of the family dwelling.

¹³⁹ E. Roca Trías, "Autonomía, crisis matrimonial y contratos con ocasión de la crisis", in: J. Manel Abril Campoy and M^a Eulàlia Amat Llari (eds.), *Homenaje al Profesor Lluís Puig i Ferriol*, Valencia: Tirant lo Blanch, 2006, p. 2134.

¹⁴⁰ E. Roca Trías, "Autonomía, crisis matrimonial y contratos con ocasión de la crisis", in: J. Manel Abril Campoy and M^a Eulàlia Amat Llari (eds.), *Homenaje al Profesor Lluís Puig i Ferriol*, Valencia: Tirant lo Blanch, 2006, p. 2134.

¹⁴¹ See J. Egea Fernández, "Pensión compensatoria y pactos en previsión de una ruptura matrimonial", in: *Estudios jurídicos en homenaje al profesor Luis Díez-Picazo*, vol. IV, Madrid: Thomson Civitas, 2003, p. 4570-4572 and more references therein.

acquisitions in equal shares made during marriage or by depositing in joint accounts income or returns obtained by each spouse.¹⁴²

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

In Catalan Law the standard for overriding the agreements made between spouses, either by marital agreement or in any of the documents that are specific to the breakdown of the marriage (such as the regulatory agreement authorised by the court or legal transactions concluded upon separation) is that they do not meet the requirements provided by the general rules on the validity of contracts (“licit agreements”, Art. 15 para. 1 Catalan Family Code). In the case of marriage it must be particularly emphasised that the court must declare null and void those agreements that infringe the principle of legal equality of the spouses in marriage (Art. 32 Spanish Constitution 1978). However, they cannot make this declaration simply on the grounds that they are “seriously detrimental to one of the spouses” (Art. 90 II Spanish Civil Code ≠ Art. 78 para. 1 Catalan Family Code).

In the case of agreements that are made in anticipation of a hypothetical, future, marital breakdown, legal scholarship fills in the lack of sufficient legal regulation in Art. 15 para. 1 Catalan Family Code by saying, in the first place, that they are voidable not only when consent is vitiated (by mistake, fraud or threats) but also in cases of “bad faith and abuse of right”¹⁴³; in the second place, that courts must also set aside those agreements as a result of which “one of the spouses is left in a situation where after marriage breakdown he or she cannot appropriately take care of his or her needs”¹⁴⁴ or that the circumstances existing at the moment when they are put into practice, when compared to those that existed when the agreement was made, have changed in an unforeseeable manner.¹⁴⁵

¹⁴² L. Puig Ferriol, “Articles 37-40”, in: J. Egea Fernández and J. Ferrer Riba (eds.), *Comentari al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convencionals d'ajuda mútua*, Madrid: Tecnos, 2000, p. 217.

¹⁴³ J. Egea Fernández, “Pensión compensatoria y pactos en previsión de una ruptura matrimonial”, in: *Estudios jurídicos en homenaje al profesor Luis Díez-Picazo*, vol. IV, Madrid: Thomson Civitas, 2003, p. 4561-4562.

¹⁴⁴ J. Egea Fernández, “Pensión compensatoria y pactos en previsión de una ruptura matrimonial”, in: *Estudios jurídicos en homenaje al profesor Luis Díez-Picazo*, vol. IV, Madrid: Thomson Civitas, 2003, p. 4567.

¹⁴⁵ E. Roca Trias, “Autonomía, crisis matrimonial y contratos con ocasión de la crisis”, in: J. Manel Abril Campoy and M^a Eulàlia Amat Llari (eds.), *Homenaje al Profesor Lluís Puig i Ferriol*, Valencia: Tirant lo Blanch, 2006, p. 2137. See also J. Ferrer Riba, “Familienrechtliche Verträge in den Spanischen Rechtsordnungen”, in: Sibylle Hofer, Dieter Schwab and Dieter Henrich (eds.), *From Status to Contract? Die Bedeutung des Vertrages im Europäisches Familienrecht*, Bielefeld: Giesecking, 2005, p. 291.

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