

NATIONAL REPORT: DENMARK
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 August 2008

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1. Are there special rules concerning the property relationship between spouses (explaining what is meant by spouses)
 - a) upon marriage and/or
 - b) during marriage and/or
 - c) upon separation and/or
 - d) upon death and/or
 - e) upon divorce and/or
 - f) upon annulment?

If so, briefly indicate the current sources of these rules. If so, briefly indicate the current sources of these rules.

The current source of rules concerning property relationships between spouses is the Danish Consolidated Act No. 37 of 5 January 1995 on the Legal Effects of Marriage, (*lovbekendtgørelse om ægteskabets retsvirkninger*).¹

Spouses are married husbands and wives.

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

The property rights derived from marriage are primarily embodied in Act No. 56 of 18 March 1925 governing the legal effects of marriage (Danish Act on the Legal Effects of Marriage). The Danish Act on the Legal Effects of Marriage is aimed at ensuring equal rights for spouses. There have so far been only a few reforms in this respect. Since 1925, where no contracts have been entered into, the legal matrimonial regime has been the deferred community of property. Until 1990, a contract for separate property included the division of matrimonial property both during the spouses' lifetime (upon a legal separation or divorce) and in the event of the death of one of the spouses. Since October 1990 it has also been possible to enter into contracts for separate property, which are only to be effective during both spouses' lifetime, called "divorce separate property".² It also remains possible to make contracts for separate property to be effective if one of the spouses dies.

¹ Amended by Act No. 389 of 14.06.1995, Act No. 385 of 22.05.1996, Act No. 446 of 09.06.2004, Act No. 542 of 24.06.2005, Act No. 483 of 07.06.2006 and by Act No. 523 of 06.06.2007. There is no official translation of the Danish legislation. The name of the Act corresponds to that used in Hans Viggo Godsk Pedersen's account in: R. Blainpain (ed.), *International Encyclopaedia of Laws, Family and Succession Law*, Supplement 26 - Denmark, Kluwer Law International, 2004, Part III Matrimonial Property Law. The description in this report is partly based on his account.

² See Act No. 396 of 13.06.1990. The reform was mainly based on Commission Report No. 714/1974, *Formueordningen*, (Matrimonial property). For more on this reform, N. Munck and F. Taksøe-Jensen, *Særeje. Nye særejereformer og deres betydning ved generationsskifte*, Copenhagen: GadJura, 1996; I. Nørgaard, *Formueordninger mellem ægtefæller efter gennemførelsen af særejereformen i 1990*, Copenhagen: Jurist- og Økonomforbundets Forlag, 2001; I. Lund-Andersen, N. Munck and I. Nørgaard, *Familieret*, Copenhagen: Jurist- og Økonomforbundets Forlag, 2003, pp. 363-406; and L. Nielsen, *Familieretten*, Copenhagen: Gjellerup/Gads Forlag, 2006, pp. 155-196.

A further reform was recently undertaken. By Act No. 483 of 7 June 2006, if one of the spouses dies, all the pension entitlements of the surviving spouse are the separate property of that surviving spouse. See § 16 a Danish Act on the Legal Effects of Marriage.

In the event of a legal separation or divorce, only the reasonable pension entitlements of each spouse are their separate property; see § 16 b Danish Act on the Legal Effects of Marriage.³

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

There has been a debate in the academic community about reforming the rules on the division of assets between spouses. In her 1993 thesis, Professor Linda Nielsen argued that the law on the division of a married couple's assets in the event of separation and divorce ought to correspond to a greater degree to the length of the period of cohabitation, "where it must generally be assumed that there are shared feelings and common conduct". Assets which have clearly been acquired in the period prior to cohabitation, as well as inheritances and gifts, ought to be excluded from the division of assets.⁴ Professor Finn Taksøe-Jensen appears to support these ideas.⁵

In her 2001 thesis, Professor Irene Nørgaard does not go that far, as her starting point is the maintenance of the current regime: a deferred community of property.⁶ However, at the same time she suggests that consideration should be given to the introduction of a discretionary rule for the administration of the property, which could take into account "what each spouse has, for example, brought into the marriage or inherited or received as a gift".⁷

It is expected that in the near future the Ministry of Justice will appoint a committee with the task of considering a revision of the law on the legal consequences of marriage, including special arrangements between spouses concerning their property.

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 also apply to registered partnerships.⁸

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?

The rules concerning the matrimonial property relationship between spouses are not exhaustive. Since spouses are independent individuals with respect to property law,

³ See Commission Report No. 1466/2005, *Ægtefællers pensionsrettigheder, Behandling på skifte af fællesbo* (Pensions on divorce and death); and I. Nørgaard, *Pensionsrettighedens behandling ved separation, skilsmisse og død*, Copenhagen: Jurist- og Økonomforbundets Forlag, 2007.

⁴ L. Nielsen, *Familieformueretten*, 1993, p. 257.

⁵ See F. Taksøe-Jensens' review of *Familieformueretten* in *Ugeskrift for Retsvæsen* 1993 B (Weekly Journal of Law), pp. 337-345.

⁶ See I. Nørgaard, *Formueordninger*, 2001, pp. 19-27, where a consideration of the financially weaker spouse and practical considerations are emphasised as reasons for maintaining a deferred community of property.

⁷ I. Nørgaard, *Formueordninger*, 2001, p. 400, with footnote 2.

⁸ See Act No. 372 of 07.06.1989 on Registered Partnerships (*Lov om registreret partnerskab*). The Act is described by Ingrid Lund-Andersen, "The Danish Registered Partnership Act", in: K. Boele-Woelki and A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp - Oxford - New York: Intersentia, 2003, pp. 13- 23.

according to § 29 Danish Act on the Legal Effects of Marriage they may enter into ordinary property contracts with each other regarding property which one or both of them control and be mutually liable for such property. Certain formalities must be observed regarding transactions which are free of charge from one spouse to the other.

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

There is a special institution called uskiftet bo (undivided estate), which means that the surviving spouse can delay the division of the community property with (common) beneficiaries and maintain undivided possession over the entire estate, often until the death of the surviving spouse.

Any person who is over 18 years of age has the right to dispose of his or her estate by means of a will according to the Danish Inheritance Act (*Arveloven*), § 62.

If a testator is married, special rules apply, depending on whether the property is part of the community property or his or her separate property. Parties can freely dispose of their separate property, according to the Danish Inheritance Act, § 90, provided that the value does not exceed the value of the legitimate portion (3/4) if they have forced heirs, e.g. their spouse.

Concerning the community of property, a testator is allowed to dispose of 3/4 of the value of his or her statutory share of the community property, but can only dispose of property which he or she has contributed to the marriage; see the Danish Inheritance Act, § 91 para. 1.

According to the Danish Inheritance Act, § 91 para. 2, the other spouse's consent is required for drawing up a will concerning the following classes of property, provided they are included in the community property:

1. Property that serves as the family home or where both of the spouses' or the other spouse's business is conducted.
2. The contents of the family home.
3. The other spouse's work tools.
4. A motor vehicle used by the other spouse.

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.

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

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

According to § 2 Danish Act on the Legal Effects of Marriage, husbands and wives must, according to their individual means, contribute towards the maintenance of the family in a way which is appropriate to the spouses' living conditions, by providing money, working in the home or otherwise. Maintenance is considered to include the funds necessary for housekeeping and the raising of the children, as well as for meeting the special needs of either spouse.

“Costs and expenses of the family household” include, e.g. housing, heating, gas, electricity, transportation, insurance, food, cleaning, clothing and toys for the children, leisure activities etc.

The special needs of either spouse include, e.g. clothing, medicine and expenses for dental and medical treatment, union fees, vacations, and pocket money etc.

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

According to § 11 Danish Act on the Legal Effects of Marriage, each spouse is entitled to enter into such contracts with a third party as are usually concluded for the purpose of meeting day-to-day household needs or the children’s needs – with liability for both spouses when they are still in marital cohabitation.

However, the other spouse is not liable if the third party knew or should have known that the contract was unreasonable.

This rule covers what can be termed ‘usual contracts’ for meeting the needs referred to above, which depend on the family in question, its ordinary living conditions and consumption.

It has been questioned whether the rule covers one-off purchases of items ordinarily used in modern households, such as an iron, a vacuum cleaner and, more questionably, a washing machine and other more expensive articles such as furniture.⁹ There are, as yet, no decided cases in which § 11 has been applied to one-off purchases of such items.

A number of decisions have defined the extent of the joint liability rule. For example, if only one spouse has signed the lease for the family apartment, the other spouse is neither liable for the rent nor for any repair costs when the premises are vacated. Also, charges for heating which are paid in addition to the rent are not covered by § 11. According to the case law, however, heating oil for the heating of family premises is covered by § 11.¹⁰ Electricity, gas and water are similarly covered by this §, as are the necessities for maintaining children, for example food, clothing and, to a certain extent, toys and the expenses for leisure activities and the like.

The paragraph does not cover loans, even if the money is used for purchases for the household or to repay debts. If a purchase is made with a credit card, liability can be extended under the specific rules governing credit cards.

A wife’s rights under § 11 are more wide-ranging than those of her husband, as she may make it his duty as well as hers to provide for her special needs, including clothing, hairdressing, necessary medical and dental treatment but probably not extensive cosmetic surgery, special courses or the like.

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”.

⁹ For more on this see I. Lund-Andersen, N. Munck and I. Nørgaard, *Familieret*, Copenhagen: Jurist- og Økonomforbundets Forlag, 2003, pp. 460-461.

¹⁰ See *Ugeskrift for Retsvæsen* 1985 (Weekly Journal of Law), p. 77 V.

There are no rules governing the acquisition and/or transactions in respect of the matrimonial/family home, irrespective of the matrimonial property regime if the home is owned by one of the spouses.

“Matrimonial home” means real property serving as the family home, and it not only includes single-family houses, but also larger properties in which the family occupies a flat, as well as cottages used only on weekends and vacations.

If the matrimonial/family home is rented, neither spouse may terminate the tenancy without the consent of the other, see § 81 Danish Rent Act (*Lejeloven*).

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”.

There are no rules governing acquisitions and/or transactions irrespective of the matrimonial property regime. “Household assets” means furniture, refrigerators, freezers, ovens, washing machines, dryers, dishwashers, radios, televisions, videos, CD players, DVD players, computers etc., but not cars, boats, bicycles, paintings, book collections, collections of wine etc.

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...)?

There are no rules governing acquisitions and/or transactions irrespective of the matrimonial property regime. “Household assets” means furniture, refrigerators, freezers, ovens, washing machines, dryers, dishwashers, radios, televisions, videos, CD players, DVD players, computers etc., but not cars, boats, bicycles, paintings, book collections, collections of wine etc.

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

One spouse is entitled to act as an agent for the other, while they cohabit, if the other spouse is prevented from discharging his or her duties due to absence or illness, and if no other party has been authorised to act in matters which cannot be postponed without inconvenience, including the right to collect income; see § 13 Danish Act on the Legal Effects of Marriage.

Only where it is absolutely necessary for the family can a spouse dispose of or mortgage property. However, if necessary, real property may be disposed of or mortgaged with the consent of the relevant government authority.

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

There are only restrictions concerning gifts according to § 30 Danish Act on the Legal Effects of Marriage. Gifts between spouses are only acceptable under a marriage settlement. This is necessary in the interests of creditors, as well as with respect to the relationship between the spouses.

However, ordinary gifts (occasional gifts and donations) which are not out of proportion to the donor’s circumstances do not require a marriage settlement. Gifts comprising life insurance, death benefit insurance or other means of maintenance may also be donated without a marriage settlement.

According to § 32 Danish Act on the Legal Effects of Marriage it is for the spouses to prove that a transaction between them does not have to be executed under a marriage settlement.

§ 31 Danish Act on the Legal Effects of Marriage contains an important exception to the rule that gifts between spouses are only valid under a marriage settlement. According to § 31, a spouse who has accumulated a surplus during a calendar year may gratuitously transfer up to half of this surplus to his or her spouse in the following year without making a deed of gift between spouses. With respect to the donor's creditors, it is a condition for the validity of the transfer that the donor must execute a document specifying the amount of the surplus when transferring it. Another element of a valid transfer is that the donor should retain sufficient funds to meet his or her obligations.

Even if a valid gift has been donated from one spouse to another under a registered marriage settlement, it may be annulled under § 33 Danish Act on the Legal Effects of Marriage if the donor is unable to satisfy his or her creditors, and if the donor did not, when making the donation (when the marriage settlement was registered), withhold sufficient funds to satisfy his or her creditors. This rule only benefits those creditors who had a claim against the donor when the transfer was made.

If a spouse becomes personally insolvent, even valid gifts to the other spouse given under a registered marriage settlement may be annulled according to § 64 Danish Bankruptcy Act (*Konkursloven*).

Gifts between spouses executed later than 2 years before the date of insolvency may be annulled, unless it can be proved that the debtor was not or had not yet become insolvent when executing the gift.

Occasional gifts and donations that are not out of proportion to the donor's circumstances are exempted from the provisions of § 64 Danish Bankruptcy Act and from § 33 Danish Act on the Legal Effects of Marriage.

C. MATRIMONIAL PROPERTY REGIMES

C.1. General issues

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

Yes, spouses are entitled to make a contract for separate property.

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 or are not allowed to make a contract with binding effect?

Danish law takes a deferred community of property within marriage as the statutory basis.

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)?

Yes, by a marriage settlement spouses can enter into contracts for separate property covering all assets or a part thereof, or for specific assets to be held as separate property, so that the assets are held as partly separate property and partly community property. It is also possible to enter into a fixed-term contract providing for separate property, e.g. for five years. Further, spouses can make contracts for separate property which are only to become effective upon the division of the matrimonial property in both spouses' lifetime (divorce separate property).

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

a. Question 16

The essential characteristic of deferred community of property is only evident when one of the spouses dies, or in the event of a legal separation or divorce. When the community is terminated, each spouse receives that half of the community property which he or she owns, while receiving half of his or her spouse's share of the community property in return.

Since one spouse is not liable for the other spouse's debts, only half of the positive balance of the share of the community property may be ceded.

Basically, all of the spouses' possessions form part of the community of property. This includes both the property which the spouses own at the time of the marriage and the property acquired by them during the marriage; see § 15 Danish Act on the Legal Effects of Marriage. Special documents are needed if an asset is to be held as separate property rather than community property. Possible documentation includes, e.g. a registered marriage settlement, directions laid down in a will, or a deed or a gift.

Under a deferred community of property, the spouses have a claim to the statutory shares of the community property. Therefore, a spouse must not abuse the right to deal with the property he or she has contributed to the marriage so that it is unduly exposed to the risk of a reduction in value to the detriment of the other spouse; see § 17 Danish Act on the Legal Effects of Marriage.

§§ 18 and 19 Danish Act on the Legal Effects of Marriage contain rules that prohibit the spouse, to whose contributory property the matrimonial home, its household effects and the trade tools of the other spouse belong, from engaging in certain transactions without the other spouse's consent.

As far as community property is concerned, a surviving spouse will often retain undivided possessions of the estate from a deceased spouse, but this does not apply to the deceased spouse's absolute separate property.

b. Question 17

Assets held as "divorce separate property" are not included in a division of matrimonial property upon a legal separation or divorce, but the community of property applies where the administration of deceased persons is concerned.

Assets held as "absolute separate property" are not included in a division of matrimonial property whether this is due to a legal separation, divorce or in the event of the death of a spouse.

§ 28 Danish Act on the Legal Effects of Marriage regulates the right to establishing separate property.

According to § 28 para. 2, in a marriage settlement it is possible to enter into a fixed-term marriage contract providing for separate property, and it may be stipulated that all assets or a part thereof are to be held partly as separate property and partly as community property. For example, it can be decided that 30% is to be community property and 70% is to be divorce separate property (*brøkdelsæreje*). The portions must be related to a spouse's own property.¹¹

¹¹ Thus, it cannot be agreed that $\frac{1}{4}$ of the spouses' total property is to be the husband's property and $\frac{3}{4}$ to be the wife's absolute separate property. Such an agreement would be contrary to § 30 para. 2 Danish Act on the Legal Effects of Marriage, whereby it cannot be

It can also be agreed that the separate property is to be reduced in stages, e.g. 50% after 10 years of marriage, 75% after 15 years, and the complete ending of separate property after 20 years of marriage.¹² Further, it may be provided by a marriage settlement that absolute separate property can only be granted if one of the spouses dies, or a specifically designated spouse or the surviving spouse.

According to § 28 para. 3 Danish Act on the Legal Effects of Marriage a contract for separate property also includes any income earned from the separate property, unless otherwise agreed. When separate property is replaced, the replacement is also separate property. This principle of substitution has created the authority for the assumption in the practice of the courts that an item of property can belong to two or more categories of property as a consequence of the form of financing used, and without the spouses entering into an agreement concerning this 'shared separate property' (*anpartssæreje*).¹³ For example, there can be a situation where a spouse owns half a house as absolute separate property together with a friend, and the spouse inherits the other half of the house from the friend where the will of the friend determines that the inheritance shall be held as divorce separate property. As long as the property is not sold, any increase or decrease in value will be shared between the two types of separate property.

A gift can be considered to be separate property when it has been given by a third party subject to the condition that it is to be held as separate property; see § 28 a Danish Act on the Legal Effects of Marriage. A testator can direct that his or her estate which is to be inherited by a beneficiary - including indefeasible shares - is to be held by the beneficiary as separate property.

A marriage settlement can be amended by a subsequent settlement. However, according to § 28 b para. 2, no conditions may be included in a settlement which are contrary to a donor's or testator's stipulations making gifts separate property for the beneficiary.

There are no rules preventing a spouse who owns the matrimonial home as separate property from selling or mortgaging it. Nor are there rules preventing a spouse who owns furniture and household effects as separate property from selling or pledging them as security.

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.

agreed that what one spouse acquires in the future is to be passed to the other without payment.

¹² Such an arrangement is a mixture of time-limited separate property and divorce separate property.

¹³ See Tidsskrift for Familie- og arveret 2007 (Journal of Family and Succession Law) p. 284. This concept of 'shared separate property' was introduced by F. Taksø-Jensen and N. Munck in *Særeje*, Copenhagen: Gadjura, 1996, in a discussion of new forms of separate property and their importance for succession. This concept has led to much discussion in the family law literature; see I. Nørgaard in Ugeskrift for Retsvæsen 1997 B (Weekly Journal of Law) pp. 299-205, and in *Formueordninger mellem ægtefæller efter gennemførelsen af særejereformen i 1990*, Copenhagen: Jurist- og Økonomforbundets Forlag, 2001, pp. 64-82; and I. Lund-Andersen, N. Munck and I. Nørgaard, *Familieret*, Copenhagen: Jurist- og Økonomforbundets Forlag, 2003, pp. 372-373, in which I. Nørgaard is critical of 'shared separate property', arguing that it raises a number of problems both in practice and in principle. In her view, this problem of mixing items together is better solved in § 23 para. 2 and 3 of the Danish Act on the Legal Effects of Marriage on the requirement for consideration. H. Dam, R.K. Feldthusen and F. Taksø-Jensen defended 'shared separate property' in Ugeskrift for Retsvæsen 2002 B (Weekly Journal of Law), pp. 430-434.

The number of contracts made for separate property has increased. In 1992 the number was around 5,000, in 1994 it was 6,250, and in 2005 around 11,000 marriage settlements were contracted.¹⁴

¹⁴ L. Nielsen, *Familieretten*, Copenhagen: Gjellerup/Gads Forlag, 2006, p. 158.

C.2. Specific regimes

I. Community of property

Not relevant.

II. Community of accrued gains/Participation in acquisitions

Not relevant.

III. Deferred community

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

According to the Danish Act on the Legal Effects of Marriage, a deferred community of property is the statutory basis in Denmark. Basically, all of a spouse's possessions form part of the community property. This includes both the property which the spouses own at the time of the marriage and the property acquired by them during the marriage; see § 15 para. 1 Danish Act on the Legal Effects of Marriage. Since a community of property is considered to be the statutory basis for marriage, special agreements are needed if an asset is to be held as separate property and not as community property.

The concept of a deferred community of property has no bearing upon which spouse deals with specific assets, nor does it concern a creditor's right to satisfy his or her claims from the assets. The principles of separate liability and separate ownership apply in relation to creditors. The spouses are thus independent individuals with respect to the law of property in spite of their marriage, and regardless of whether the spouses have agreed to have separate property or a deferred community of property. Although an asset is part of the community property, the spouse who has contributed it still has ownership of that asset.

As long as the community exists, each spouse can deal freely with the property which he or she has contributed to the marriage, within certain limits.

The essential meaning of a community of property is only evident when one of the spouses dies or in the event of a legal separation or divorce. When the community is terminated each spouse cedes half of the community property which he or she owns, while receiving half of his or her spouse's share of the community property in return. Since one spouse is not liable for the other spouse's debts, only half of the positive balance of the share of the community property may be ceded.

Even though the most significant differences between a deferred community of property and separate property are only evident when the community is terminated, the differences do have a bearing upon the community while it still exists. Under a deferred community of property each spouse has a claim to the statutory shares of the community property. This justifies the rule that a spouse must not abuse the right to deal with the property which he or she has contributed to the marriage in a manner which is detrimental to the interests of the other spouse; see § 17 Danish Act on the Legal Effects of Marriage. Furthermore, §§ 18 and 19 Danish Act on the Legal Effects of Marriage contain rules that prohibit the spouse to whose contributory property the matrimonial home, its household effects, and the trade tools of the other spouse belong from entering into certain transactions without the other spouse's consent. With certain variations, this protective measure is further developed in § 70a Danish Division of Family Assets Act (*Fællesboskifteloven*), governing the joint right of spouses to select certain assets for personal use prior to the division of community property, and § 91 of the Inheritance Act (*Arveloven*), governing the right to deal with assets from the community

property under a will. These limitations do not apply where the property is held as separate property. As far as community property is concerned, the surviving spouse will often retain undivided possession of the estate from the deceased spouse, but that does not apply to the deceased spouse's absolute separate property; see § 17 Danish Inheritance Act. Since divorce separate property means that community property applies to the administration of the estate of the deceased spouse, the surviving spouse will also have the opportunity to retain undivided possession of the estate of this part of the deceased spouse's property.

The assets involved can be held as part of the deferred community property, or as separate property, or as separate property in the event of a legal separation or divorce. Some of the assets of the deferred community property are categorised as personal rights, e.g. copyright, goodwill and life insurance.

§ 15 para. 2 Danish Act on the Legal Effects of Marriage, on rights in community property that are non-assignable or are otherwise of a personal nature, concerns rights that do not seem immediately to fit into the system of community property/separate property. Upon the administration of property when there is a separation or divorce, the treatment of individual rights under § 15 para. 2 must be decided by interpreting the laws, private agreements or other rules that apply to the right in question. Accordingly, some rights are kept entirely outside the division of property, some are partially excluded and others are included.

§ 15 para. 2 should thus be understood as meaning that a division of property should be made unless other special rules apply which directly prevent a division from being made. In its decision reported in 1976, the Supreme Court interpreted the rule so that the personal nature of a right can in itself mean that it is kept outside the division of property.¹⁵

There is a long list of rights which fall under § 15 para. 2: pensions, life insurance, goodwill, rights of way, the right to library royalties, compensation for personal injuries, savings schemes, copyright, employee shares, holiday pay etc.

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

Assets held as part of the deferred community property are included in the division of the deferred community property in the event of a legal separation or divorce, or upon the death of one of the spouses.

Assets held as part of the divorce separate property are not included in a division of matrimonial property either upon divorce or a legal separation, but they are included as community property when the marriage is terminated by the death of one of the spouses.

Assets held as absolute separate property are not included in the division of the matrimonial property either upon divorce or a legal separation, or upon the death of one of the spouses.

93. What assets are categorised as marital property?

All assets owned by the spouses at the time of the marriage and assets acquired by them during the marriage; see § 15 para. 1 of the Danish Act on the Legal Effects of Marriage.

94. What assets are categorised as separate property?

- Assets included in a valid marriage settlement – containing a contract between the spouses for separate property,
- Any assets that replace assets covered by the settlement,

¹⁵ Ugeskrift for Retsvæsen 1976 (Weekly law Journal) p. 560 H.

- Income from separate property (and what is bought with that income) unless otherwise stipulated in the settlement,
- Assets which have been made separate property by being given as a gift by a third party on condition that the transferred assets are to be separate property, and
- Assets which have been made separate property by the direction of a testator in a will – including indefeasible shares.

95. What assets are categorised as personal property?

Personal property includes clothing, writing materials, some sports equipment, watches, aids and appliances for disabled persons (including custom-made cars for disabled persons), and jewellery, provided that the value of the personal property is not disproportional to the financial circumstances of the spouses.

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

Spouses can acquire assets jointly in the same way as persons who are not married to each other. There are no specific rules governing the situation where a person who has acquired an asset jointly with another person wants to terminate the joint ownership.

The spouses' respective shares of the assets belong to the deferred community property, unless one or both spouses use money which is part of the established separate property. The jointly acquired asset can be, e.g. separate property in respect of one spouse's share and community property in respect of the other spouse's share, and each share will be dealt with under the rules of the respective regime if the community of property is terminated by a legal separation, divorce or the death of one spouse.

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

It is not necessary to distinguish between movables and immovables.

The substitution of assets is not governed by specific rules, but in general if a spouse makes a barter agreement and exchanges assets from the community property, the replacement assets will be considered to be community property; if the exchanged assets are separate property, the new assets will be considered to be separate property; see § 28 para. 3 Danish Act on the Legal Effects of Marriage.

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

In 2006 new rules were adopted on the treatment of pension rights in the administration of property in the event of a separation or divorce.¹⁶ Previously, the interpretation of § 15 para. 2 Danish Act on the Legal Effects of Marriage had led to the legal situation whereby current life pension rights were assumed to be outside the community property, and thus not subject to a division. In contrast, pension schemes in the form of capital pensions or annuities were to be divided, since such schemes were not assumed to be of such a personal character that they could be exempted from the rules on community property under § 15 para. 2. This position under the law had been subject to much criticism.

In the framing of the new rules, the emphasis has been put on the purpose of the pension in question. The principal problem was whether, in relation to the administration of marital

¹⁶ Under Law No 146/2006. This review is based on Betænkning (Parliamentary Report) No. 1466/2005; I. Nørgaard, *Pensionsrettighedens behandling ved separation, skilsmisse og død*, Jurist- og Økonomforbundets Forlag 2007; and I. Nørgaard, *Note on RVL § 15, stk. 2 – rettighedens behandling på separations- eller skilsmisseskitte*, 2008.

property, pension rights should be considered as another form of capital, and therefore included in the division of the community property, or whether the special purpose and character of pension rights mean that they should not be included. A more family policy-oriented point of view would lead to the inclusion of such rights in the division of the community property, while a more pensions policy-oriented point of view would lead to the exclusion of such rights. It was necessary to evaluate these two points of view.

The new rules have adopted the view that reasonable pension rights should be excluded from the community property. From the point of view of family policy considerations this perhaps extreme position has been modified by four rules, all of which are based on well known principles of marriage law.

1. Only reasonable pension rights are not included in the community property; see § 16 b Danish Act on the Legal Effects of Marriage. The value of surplus pension rights that are not 'reasonable' is therefore included in the division of the community property; see § 16 b para. 3 Danish Act on the Legal Effects of Marriage. 'Reasonable' pension rights include, for example, all normal occupational pension schemes, regardless of whether they are voluntary or obligatory. It is the contribution level at the time of contribution that is decisive. High or extra contributions, for example to compensate for the fact that the pension beneficiary has started pension savings somewhat late in life, are only reasonable for the spouse who has the lesser amount of pension savings.¹⁷ Also, reasonable amounts paid out on the basis of a capital pension or from a supplementary one-off payment are not included in the community property, see § 16b para. 2, unless the amount is regarded as having been exhausted. On the other hand, amounts paid on the basis of current life pension schemes or from pension annuities cannot be excluded from the community property. If pension payments can be excluded from the community property, the same applies to income from and substitutes for such amounts.

2. No division is made in the case of a marriage of short duration; see § 16 c Danish Act on the Legal Effects of Marriage. All pension arrangements can be excluded from the community property if the marriage has been short, see § 16 c, which means less than five years. This also applies to pensions that have been paid out, under the same rules as payments under reasonable pension arrangements; see § 16 c para. 2 Danish Act on the Legal Effects of Marriage. It is usual to take any prior period of cohabitation into account.

3. Compensation from the community property is possible if the marriage itself is the reason for a loss of pension rights; see § 16 d Danish Act on the Legal Effects of Marriage. If, during the marriage, a spouse has saved less than what would correspond to a reasonable pension arrangement, and this is because, out of regard for the family or the other spouse, the spouse in question has, in whole or in part, not been in active employment, has been on leave or has worked reduced hours, that spouse can receive compensation; see § 16 c para. 1 Danish Act on the Legal Effects of Marriage. However, compensation from the community property may not be more than half of the difference between the values of the pension savings which each of the spouses has made during the marriage; see § 16 c para. 2 Danish Act on the Legal Effects of Marriage. The *travaux préparatoires* on the law assumes that there is a *de minimis* limit.¹⁸

4. Reasonable compensation is possible in cases of long-lasting marriages, see § 16 e Danish Act on the Legal Effects of Marriage, meaning marriages of 15 years or more. Account can be taken of any prior period of cohabitation. Furthermore, it is a requirement that there should

¹⁷ It is clear from the comments on the draft law that, in principle, the spouse that has the smaller amount of pension savings can make further pension contributions in order to come up to the same level as the pension arrangement for the other spouse.

¹⁸ Compensation should not be given if the deficit in pension savings does not amount to what would be two years' pension savings for a person in full-time employment.

be a large difference in the values of the spouses' pension rights. The spouse with the lesser pension rights may be given an amount to ensure that he or she is not at an unreasonable disadvantage with regard to pension rights; see § 16 e Danish Act on the Legal Effects of Marriage.

Under Law No. 484/2006, new provisions have been adopted on the right of a spouse, after separation or divorce, to maintain the right to a spouse's pension associated with his or her former spouse (*Ægtefællepensionsloven*).¹⁹ The Danish Law on spouses' pensions applies to civil and public servants and other spouses for whom provision for spouses is part of or is established as part of an employment relationship, and where the spouse's pension is calculated on a collective basis; see § 1.1 para. 3 Danish Law on Spouses' Pensions.²⁰

If a married person is covered by a pension arrangement which gives a right to a spouse's pension in the event of the pensioned person's death, upon separation or divorce it must be decided whether the right to a spouse's pension is maintained after the separation or divorce. The marriage must have lasted for at least five years, which is calculated from the date when the marriage was entered into up to the date of separation or divorce without prior separation; see § 1.1 para. 2 Danish Law on Spouses' Pensions. It is also a condition that a spouse has a right to a spouse's maintenance; see § 1.1 para. 1 Danish Law on Spouses' Pensions. A spouse is only entitled to a pension for the same period for which the right to a spouse's maintenance applies; see § 2.1 para. 1 Danish Law on Spouses' Pensions. The pension thus replaces the maintenance if the person who makes the contribution dies during the maintenance period. The right to a spouse's pension is a function of the maintenance right.²¹ For the right to a spouse's pension it does not make any difference whether the pension arrangement is considered as separate property or community property.

As for life insurance rights, a married policyholder can nominate a spouse or a third party as a beneficiary, with a right to revoke the nomination, or to decide that there is to be no beneficiary. In these situations in the event of a separation or divorce the repurchase value of the policy is included as an asset in the policy shareholder's share of the property, but it is not included as an asset in the share of the property of the beneficiary spouse. This does not prevent the policy holder from having dealings with the insurance; see § 108 para. 1 Danish Law on Insurance Agreements (*Forsikringsaftaleloven*). In principle, the benefit to a spouse lapses with a separation or divorce.²²

If a policyholder has irrevocably nominated a third party as a beneficiary of a life insurance policy, the repurchase value is not included as an asset in the policy holder's share of the property, since the policy holder cannot convert the policy to money without the agreement of the third party beneficiary; see § 108 para. 2 Danish Law on Insurance Agreements.

If the policyholder has irrevocably nominated his or her spouse as beneficiary, the situation is less straightforward. If the separation/divorce means that the irrevocable benefit lapses, the

¹⁹ See Betænkning (Parliamentary Report) No. 1293/1995; Betænkning (Parliamentary Report) No. 1466/2005, Chapters 13 and 15; and I. Nørgaard, *Pensionsrettighedens behandling ved separation, skilsmisse og død*, Jurist- og Økonomforbundets Forlag 2007, Chapter 5.

²⁰ The collective calculation of the spouse's pension means that the spouse's pension is linked to the main pension arrangement in such a way that the pension contributions are independent of whether or not the owner of the pension rights is married. Since the law is now gender-neutral, registered partners are also now covered by the law.

²¹ Betænkning (Parliamentary Report) No. 1293/1995, p. 121.

²² See I. Nørgaard, *Arveret*, 2008, p. 187 et seq. In the case reported in *Ugeskrift for Retsvæsen* (Weekly law Journal) U 1984.249 Ø, the nomination of a spouse as a beneficiary was regarded as having lapsed upon separation. The spouse's husband had died four days after the separation.

repurchase value should be included as an asset in the policyholder's share of the property. If the benefit remains in force, despite the separation/divorce, it is not included as an asset either in the policyholder's share of the property or in the beneficiary spouse's share of the property. This is because the policyholder cannot have dealings with the insurance, see § 108 para. 2, and the beneficiary spouse's right is dependent on the beneficiary being alive when the insured event occurs.

According to § 18 para. 3 Danish Liabilities for Damages Act (*Erstatningsansvarsloven*), compensation for personal injury and compensation for a person who has suffered loss of dependency does not form part of the community property between the spouses in the event of a division of property upon a legal separation, divorce or the death of one of the spouses. But it is a condition that the sum of money is not to have been spent.

The compensation does, however, form part of the community property when the spouse who has been awarded the compensation dies, unless the compensation has been held as absolute separate property under a marriage settlement.

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

Yes. A gift given by a third party subject to the condition that it is to become separate property is to be considered as separate property. Where directions have been given by a testator that a bequest is to become separate property for the heir, the bequest is also to be considered as separate property – including indefeasible shares; see § 28 a Danish Act on the Legal Effects of Marriage.

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

There are no specific rules on how to prove the ownership of the assets between spouses and there are no rebuttable presumptions. However, a spouse's registered title to an asset will obviously favour the presumption that the asset belongs to that spouse.

If, in accordance with § 22 Danish Act on the Legal Effects of Marriage, the spouses have made a list of the community property and which parts thereof each spouse controls, such a list may be taken into consideration.

As to the assets acquired during a marriage, it will often not have been made clear to whom the asset is to belong or whether it is to be jointly owned. If both spouses have paid a share of the original cost or a share of the down payment, it will probably be found that the asset is owned jointly by them. However, a spouse's contribution to the payment of interest and the repayment of capital on an asset acquired by the other spouse will not normally be sufficient to establish joint ownership of the asset unless special arrangements have been made.

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

There are no specific rules governing the matter and there are no rebuttable presumptions. Since a creditor may only take enforcement proceedings against possessions belonging to the debtor spouse, the spouses share a mutual interest in establishing that the assets belong to the non-debtor spouse. A claim by the spouses that an asset belongs to the non-debtor spouse will therefore hardly be sufficient under enforcement proceedings.

The spouses must be able to prove that the spouse to whom the asset allegedly belongs had the funds necessary to obtain the asset. The production of an invoice bearing the spouse's name or the vendor's evidence may not be sufficient proof, as the funds with which the asset

was obtained may have belonged to the other spouse. A list of the assets belonging to each spouse drawn up by the spouses in accordance with § 22 Danish Act on the Legal Effects of Marriage might serve as evidence. If one spouse has a registered title to a property, his or her creditor will be entitled to enforce the security thereby created.

102. Which debts are personal debts?

According to § 25 Danish Act on the Legal Effects of Marriage, each spouse is liable for his or her obligations to the extent of the community property at his or her disposal and his or her separate property, whether the obligations have arisen before or during the marriage. As a general rule, only the spouse who has entered into a contract or has committed a wrongful act is liable for any subsequent claims and he or she is liable to the extent of all of his or her property.

103. Can spouses have joint debts? If so, on what conditions?

According to § 11 Danish Act on the Legal Effects of Marriage, which governs joint liability for certain household debts or debts incurred in meeting the children's needs or debts incurred by the wife for meeting her special needs, both spouses are liable for such debts.

If the spouses jointly enter into a contract with a third party, e.g. to obtain some assets or to raise a loan, both of them are liable.

When the spouses have a joint debt or are jointly liable, they are both liable for the whole debt and to the extent of all their possessions, whether held as community property or separate property.

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

A creditor can recover personal debts against all assets owned by the debtor spouse, whether the assets are a part of the community property at his or her disposal or are his or her separate property.

105. If there are joint debts, on which assets can the creditor recover them?

The creditor can recover joint debts against all assets owned by the spouses, whether the assets are part of the community property or separate property.

III.2 Administration of assets

106. How are the different categories of assets administered?

During the marriage each spouse exclusively administers his or her assets. If the assets are part of the spouse's separate property, the administration is only restricted by the spouse's mutual maintenance obligation.

If the assets are part of the community property, the administration is subject to additional restrictions.

§ 17 Danish Act on the Legal Effects of Marriage contains a general rule governing the duty to deal responsibly with property contributed to the marriage by a spouse. The rule is phrased as follows: "A spouse shall administer the community property in such a way that it is not unduly exposed to the risk of deterioration to the detriment of the other spouse".

§§ 18 and 19 Danish Act on the Legal Effects of Marriage govern the consent of the other spouse to control real property and movables which provide the framework of the matrimonial home.

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

Yes. One spouse can authorise the other spouse to make certain transactions in accordance with the general rules of agency or to administer the assets in general. § 13 Danish Act on the Legal Effects of Marriage contains a rule whereby if, during cohabitation, one spouse is unable to manage his or her affairs due to absence or illness, the other spouse may do what cannot be postponed without causing the first spouse inconvenience, including collecting income. However, real property may in no event be disposed of or mortgaged without the consent of the relevant government authority. The courts, however, have established such strict requirements for showing that a person is unable to manage his or her affairs that this provision is not applied.

108. 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? Is the categorisation of the property as separate or as marital property of relevance in this respect?

The categorisation of the property as separate or as marital (community) property is relevant. In Danish law there are only restrictions on assets held as community property.

The rules concerning the community property are:

- A significant gift from a spouse to a third party requires the consent of the other spouse if the gift has such a high value that the lack of consent would mean that the first spouse would be in breach of § 17 Danish Act on the Legal Effects of Marriage, according to which a spouse must exercise his or her right to deal with community property in a way which does not reduce the value of the property or damage the interests of the other spouse.
- According to § 18 Danish Act on the Legal Effects of Marriage, neither spouse may, without the consent of the other spouse, dispose of or mortgage real property which forms part of the community property, if such real property serves as accommodation for the family, even as a holiday cottage, or if that spouse's or the other spouse's business activities are related to the property in question. Nor may such real property be leased or let without the consent of the other spouse, if this would mean that it could no longer be used as the spouses' joint dwelling or as the base for the other spouse's business activities.

Where one spouse has entered into such a contract without obtaining the requisite consent, the other spouse may obtain a judgment to annul the contract if the third party knew or should have known that the first spouse was not entitled to enter into the contract.

According to § 19 Danish Act on the Legal Effects of Marriage, a spouse may not dispose of, pledge or mortgage personal property which forms part of the community property without the consent of the other spouse, if such personal property forms part of the household goods in the spouses' joint home, or forms part of the other spouse's necessary work tools or is used by the children for their personal needs.

Where one spouse has entered into such a contract without obtaining the requisite consent, the other spouse may obtain a judgment to annul the contract, unless the third party acted in good faith.

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

§ 14 Danish Act on the Legal Effects of Marriage contains a rule on agency. The rule is phrased as follows: "Where personal property which is at the disposal of one spouse has been taken over for use in a business carried out by the other spouse, with the first spouse's consent, any contracts concluded by the other spouse in respect of such personal property shall become binding on the first spouse, unless the contracting third party realized or should have realized that the other spouse was not entitled to enter into the contract." This rule is rarely used in practice.

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

No. Each spouse exclusively administers his or her own property.

111. How are conflicts between the spouses concerning the administration of assets resolved? Do they have access to a conflict resolution mechanism?

Where a spouse or his or her guardian withholds consent in the cases referred to in §§ 18 and 19 Danish Act on the Legal Effects of Marriage concerning the family home and household goods, the relevant government authority may, on request, uphold the contract if it considers that there are no reasonable grounds for withholding consent; see § 20 Danish Act on the Legal Effects of Marriage.

Conflicts concerning household debts etc., see § 11 Danish Act on the Legal Effects of Marriage, and conflicts between the spouses concerning the annulment of a contract according to §§ 18 and 19 concerning the family home and household goods are to be settled by the courts.

Claims for compensation, e.g. if a spouse has reduced the value of the property which he or she has contributed to the marriage and which is held as community property by abusing his or her control over that property, see § 23 Danish Act on the Legal Effects of Marriage, can only be made in the event of the division of property. If the required compensation cannot be covered the claim is extinguished.

112. 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?

If a spouse breaches § 18 or 19 Danish Act on the Legal Effects of Marriage by entering into a contract concerning the family home or the household goods without the other spouse's consent, the other spouse may obtain a judgment to annul the contract if the third party did not act in good faith.

Under § 38 Danish Act on the Legal Effects of Marriage, a spouse may demand that the community property be divided during the marriage when the other spouse has significantly reduced the value of the share of the community property which he or she controls by failing to manage his or her financial affairs or abusing his or her control over the community property, or otherwise acting irresponsibly.

If a division of the community property is made according to § 38 Danish Act on the Legal Effects of Marriage during the marriage, already at that stage a spouse is entitled to claim compensation if the other spouse's mismanagement has substantially reduced the value of that part of the community property which is at his or her disposal. As far as possible, the compensation must rectify the reduction in the value of the property with regard to the other spouse. If necessary, the other spouse is entitled to claim that the first spouse should pay half

the deficit out of his or her separate property; see § 23 Danish Act on the Legal Effects of Marriage.

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

According to § 13 Danish Act on the Legal Effects of Marriage, during the continuance of cohabitation, if a spouse is unable to manage his or her affairs due to absence or illness, the other spouse has the right to do what cannot be postponed without causing the other spouse inconvenience, including the collection of income. Under this paragraph real property may in no event be disposed of or mortgaged without the consent of the relevant government authority.

However, the courts have established such strict requirements for showing that a person is unable to manage his or her affairs that the provision is not applied. Instead the spouse who is incapable of administering his or her assets may authorise the other spouse or another person to do so. According to the general rules on guardianship, the other spouse or a third person can be appointed as a guardian or, if necessary, as a guardian *ad litem*.

III.3 Distribution of property upon dissolution

114. 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?

According to Danish law the grounds for the dissolution of the deferred community of property are as follows, see § 16 para. 2 Danish Act on the Legal Effects of Marriage:

When the marriage is terminated due to the death of one spouse, a divorce or an annulment, a legal separation or the division of community property during marriage based on the absence of matrimonial property.

115. What date is decisive for the dissolution of the matrimonial property regime?

Where a marriage is terminated due to the death of one spouse the decisive date is the date of death.

Upon annulment, the decisive date is the date of the judgment.

Upon divorce or a legal separation granted by the local State Administration, the decisive date is the date of the permit from the State Administration.

Upon divorce or a legal separation obtained by a judgment, the decisive date is the date of the judgment. If the judgment is appealed to a higher court and the judgment is confirmed, the date of the judgment of the court of first instance remains the decisive date.

If a division of the community property during the marriage is granted by the Probate Court, the decisive date is the date of the application for the division of the community property.

116. Upon dissolution of the matrimonial property regime which assets belong to the deferred community? How are those assets valued? Can any property belonging to the deferred community be withheld from the property division, and if so on what conditions?

1) Upon dissolution of the matrimonial property regime, which assets belong to the deferred community?

All assets belong to the deferred community property, unless they have been made separate property by a marriage settlement, in accordance with a will or given as a gift by a third party subject to the condition that the asset is held as separate property.

2) How are these assets valued?

If the spouses themselves cannot agree on the valuation of the assets, the valuation can be made with the help of the Probate Court. An asset will be valued at its market value.

3) Can, and if so on what conditions, any property belonging to the deferred community be withheld from the property division?

Some of the rights of a personal nature and some of the non-assignable rights mentioned in § 15 para. 2 Danish Act on the Legal Effects of Marriage can be withheld from the property division if the special rules applying to such rights are not compatible with the rules on community of property, e.g. an author's copyright, or goodwill connected with a spouse who owns a business.

Further, personal assets e.g. clothing, writing materials, some sports equipment, watches, aids and appliances for disabled persons (including custom-made cars for disabled persons), and jewellery provided that the value of the personal property is not disproportional to the financial circumstances of the spouses.

117. 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 and valuation is the ending of the division of the matrimonial property, unless the spouses have agreed otherwise.

The fact that the spouses live apart before the dissolution of the marriage is not relevant for the date of valuation.

118. 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?

If a spouse has used funds from his or her separate property to acquire or improve the property which he or she has contributed to the marriage (community property), he or she may have priority in claiming compensation from that property; if the property which he or she has contributed to the marriage does not provide sufficient funds, the claim for compensation will fail; see § 23 para. 3 Danish Act on the Legal Effects of Marriage.

If a spouse has used funds from the property which he or she has contributed to the marriage to acquire or improve his or her separate property, or to acquire rights under § 15 para. 2 Danish Act on the Legal Effects of Marriage, the other spouse may claim compensation from the residuary community property or, if necessary, he or she may claim that the first spouse should pay half the deficit out of his or her separate property; see § 23 para. 2 Danish Act on the Legal Effects of Marriage.

Claims for compensation may only be made in the event of the division of property, and if the required compensation cannot be covered the claim will be extinguished; see § 24 Danish Act on the Legal Effects of Marriage.

As a starting point there is nominal compensation. However, the *travaux préparatoires* on § 23 para. 2 Danish Act on the Legal Effects of Marriage allows for the possibility of a more

discretionary settlement, which is also assumed in practice.²³ In theory it is stated that this exercise of discretion includes an overall evaluation of the changes in values which have affected the means which have been added to. The evaluation concerns, in part, the changes that are a consequence of the added means, and in part changes which are due to external factors. Among other things, inflation can be taken into account.²⁴

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

If a spouse has used funds from the property which he or she has contributed to the community property to pay a debt that relates to his or her separate property, the other spouse may claim compensation for this out of the residuary community property or, if necessary, half of it out of the first spouse's separate property; see § 23 para. 2 Danish Act on the Legal Effects of Marriage.

If a spouse uses funds from his or her separate property to pay debts not relating to his or her separate property, in most cases the spouse will not be entitled to claim compensation. According to § 23 para. 3 Danish Act on the Legal Effects of Marriage, the spouse will only be entitled to claim compensation if the debt concerns a specific asset, e.g. real property which has increased in value.

In principle there is nominal compensation. However, the courts can vary this principle on the basis of a discretionary evaluation.

120. How are assets administered after dissolution of the matrimonial property regime but before allocation? Can a spouse's rights in relation to the division of property be protected against transactions by the other spouse? If so, how?

Each spouse continues to control the property which he or she has contributed to the marriage and, of course, he or she controls his or her separate property, even if the property is administered by the Probate Court.

All rules giving protection against transactions by the other spouse, e.g. §§ 14, 18, 19 and 23 Danish Act on the Legal Effects of Marriage, are extended in time until the allocation of the community property has been made.

In addition to the protection referred to, according to § 66 Danish Division of Family Assets Act (*Fællesboskifteloven*), a spouse may be deprived of the possibility to control property which he or she has contributed to the marriage if it is presumed that he or she will restructure it.

121. Briefly explain the general rules governing the division of the assets. Explain who may carry out the division (spouses/competent authority) and what means are available when a spouse refuses to cooperate in the division?

As a rule, each spouse cedes half the real property that he or she has contributed in return for a reciprocal share of the other spouse's property; see § 16 para. 2 Danish Act on the Legal Effects of Marriage.

In the event of the division of matrimonial property between living spouses, the property is divided in accordance with the specific rules in Chapter 6 of the Danish Division of Family Assets Act. In the event of the division of property where one spouse dies, the estate is

²³ Ugeskrift for Retsvæsen 1998 (Weekly Journal of Law), p. 505 V.

²⁴ See I. Lund-Andersen, N. Munck and I. Nørgaard, *Familieret*, Copenhagen: Jurist- og Økonomforbundets Forlag, 2003, pp. 443-433.

administered under the specific rules in Chapter 5 of this Act. Separate property does not enter into the division of property. In the event of the division of matrimonial property between living spouses, it does not matter whether the assets are held as divorce separate property or as absolute separate property. However, divorce separate property is treated as community property if one of the spouses dies. In some cases the assets have become so mixed that it cannot be determined who owns what. In that case if at the time of acquiring the assets both spouses had the economic opportunity to contribute substantially, joint ownership of the assets may be the solution. If the assets have been mixed in a way that it cannot be determined whether the assets are separate property or community property, they are treated as community property.

As a starting point the spouses divide the property privately, if necessary with expert assistance, by entering into an agreement on the division of property. If the spouses disagree concerning individual aspects of the agreement, these may be brought before the Probate Court.

Each spouse may request that the community property (estate) be administered by the Probate Court; see § 64 Danish Division of Family Assets Act. Even though the property is administered by the court, each spouse still controls the property which he or she has contributed to the marriage.

If one spouse refuses to cooperate in the division, the other spouse may demand that the community property be administered by the Probate Court, and the Probate Court may deprive the first spouse of his or her control of the property which he or she has contributed to the marriage; see § 66 Danish Division of Family Assets Act.

122. How are the assets allocated?

During the division, after a valuation under § 70 a Danish Division of Family Assets Act, each spouse may claim possession of items of property from the estate. If both spouses claim possession of the same asset, the spouse to whose property that asset belonged when it was contributed to the marriage is entitled to it.

If it cannot be determined to whose property the asset belongs, the spouse who is to take possession may be chosen by lot.

A spouse may take possession of an asset even though it is more valuable than the spouse's statutory share of the community property, but in that case the spouse must make a cash payment, which is equivalent to the surplus value, to the other spouse; see § 70 b Danish Division of Family Assets Act.

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

Yes. § 70 a para. 2 Danish Division of Family Assets Act provides that, depending on the circumstances, spouses can select assets which are part of the property which the other spouse has contributed to the marriage, even when both spouses claim possession of the asset.

§ 70 a para. 2 No. 1. Real property which is used exclusively or mainly as the matrimonial home may be taken into possession by one spouse if the property is necessary for the maintenance of the matrimonial home of that spouse. This is particularly the case where the spouse in question is granted parental custody or, in the case of joint parental custody, if the children primarily live with that spouse. The provision will not normally apply where it is possible for the spouse to obtain some other suitable home; or where the spouse is unable to

meet the financial obligations connected with the possession of the matrimonial home; or where the other spouse has a special connection with that property.

§ 70 a para. 2 No. 5. Furniture and other household effects belonging to the matrimonial home may be taken into possession by one spouse where this is necessary for the maintenance of the matrimonial home or where the effects have been of importance to the spouse in question.

124. Do the spouses have preferential rights over the allocation of other assets?

Yes. § 70 a para. 2 of the Danish Division of Family Assets Act provides that, depending on the circumstances, a spouse can select items of property which are part of the property which the other spouse has contributed to the marriage, even when both spouses claim possession of the item in question.

§ 70 a para. 2 No. 2. Real property which has been used as a holiday cottage by the family may be claimed by a spouse if it is of great importance to that spouse. A holiday cottage which has not been used in this way is not included in this provision.

§ 70 a para. 2 No. 3. A spouse may claim possession of a business enterprise if it has been run exclusively or primarily by that spouse.

§ 70 a para. 2 No. 4. Trade tools and other business chattels may be claimed by a spouse to the extent that this is necessary for continuing the business.

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

The dissolution of the matrimonial property regime does not influence maintenance after divorce unless the property is substantial.

126. 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?

The dissolution of the matrimonial property is relevant for the extent to which a spouse can be granted payment from the other spouse in order to avoid the first spouse being put in an unreasonable situation with regard to a pension (*rimelighedskompensation*); see § 16 e para. 2 Danish Act on the Legal Effects of Marriage. The spouse who is in the more disadvantageous position with regard to pension rights should therefore not be given any payment if, in connection with the division of property, that spouse has received a substantial payment from the other spouse. Likewise, it can be relevant if a spouse receives payment in accordance with § 16d, which gives sufficient compensation for that spouse's disadvantageous position with regard to a pension.

127. On what conditions, if at all, can the general rules (above Q 121) be set aside or adjusted, e.g. by agreement between the spouses or by the competent authority?

Where, as they are entitled to, the spouses divide the property privately by entering into an agreement on the division of property, they can freely set aside or adjust the general rules as long as they agree to do so.

A marriage settlement can be amended or set aside according to § 58 of the Formation on Dissolution of Marriage Act (*Ægteskabsloven*): Where, on the occasion of a legal separation or divorce, the spouses have agreed on the division of the property (the maintenance obligation or other conditions), the marriage settlement may be changed by a judicial decree or held not to be binding if it is deemed to have been unreasonable for either spouse at the time of its making.

The rules of equal division can be adjusted by the Probate Court according to § 69 and 69(a) of the Danish Division of Family Assets Act if the marriage is annulled or has been very short-lived.

In the case of the annulment of a marriage (which is seldom) each spouse has priority in selecting what they contributed to the community property at the time of the marriage, inheritance, gifts as well as the assets they have transferred from their separate property to the community property. Then the remaining property is divided equally between the spouses. If the funds of the estate are insufficient for the selection in priority, the property is divided in accordance with the funds in respect of which each spouse would have had priority, had the estate held sufficient funds; see § 69 of the Danish Division of Family Assets Act.

In the case of a division upon divorce or a legal separation, it is possible to apply similar rules under § 69 Danish Division of Family Assets Act if an equal division of the property would be obviously unfair; see § 69 a Danish Division of Family Assets Act. The rule can be applied if one of the spouses has contributed most of his or her property to the community property as described in § 69, i.e. has contributed property at the time of the marriage, has acquired inheritances or gifts during the marriage, or has transferred assets from his or her separate property to the community property. An equal division may be found to be obviously unfair where the marriage has been short-lived and without any significant economic community. There may be a derogation from the standards of an equal division to the extent that this is found to be reasonable.

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

The surviving spouse has the right to remove, in advance, items that are only for personal use as long as their value is not disproportionate to the economic circumstances of the spouses. The same applies for items that are intended to be used by children; see § 11 para. 1 Danish Inheritance Act (*Arveloven*). Because the items are removed in advance, they are not included in the valuation of the estate.

Furthermore, according to § 11 para. 2 Danish Inheritance Act, the surviving spouse has the right to supplement his or her inheritance of the estate's profit in a smaller estate. The provision allows the spouse to supplement his or her inheritance in a way that combines his or her share of the deferred community property with his or her own separate property. In 2008 this amount is DKK 600,000 (approximately € 81,000). The right to supplement an inheritance comes before testamentary dispositions and the rights of inheritance of living beneficiaries, including their indefeasible shares.

Concerning the right to claim the division of the estate's property after valuation, the spouse has priority over the other beneficiaries in the will; see § 12 para. 2 Danish Inheritance Act in respect of property which is community property, and § 13 para. 2 Danish Inheritance Act in respect of the dead spouse's absolute separate property. However, natural heirs have a right of priority in respect of items which are of special sentimental value, unless the item of property is part of the property which a spouse can take beforehand under § 11 para. 1 Danish Inheritance Act, or unless it has been the spouses' residence.

The special institution called *uskiftet bo* (undivided possession of the estate) means that a spouse can delay the division of the community property with common beneficiaries and can continue to maintain undivided possession over the entire community estate; see § 17 Danish

Inheritance Act.²⁵ The delay can last until the death of the surviving spouse. As divorce separate property is considered to be community property in the event of death, the “undivided possession” includes divorce separate property, but of course not absolute separate property.

IV. Separation of property

Not relevant.

V. Separation of property with distribution by the competent authority

²⁵ See Hans Viggo Godsk Pedersen’s account in R. Blainpain (ed.) *International Encyclopaedia of Laws, Family and Succession Law*, Supplement 26 - Denmark, Kluwer Law International, 2004, pp. 150-156. See also R.K. Feldthusen & L. Nielsen, *Arveretten*, Copenhagen: Gjellerup/Gads forlag, 2007, pp. 67-90; and I. Nørgaard, *Arveret*, Copenhagen: Jurist- og Økonomforbundets Forlag, 2008, pp. 81-118.

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?**

Pre-nuptial agreements between future spouses which deal with their property relationship require a formal marriage settlement in order to be valid. The settlement is binding on the future spouses and any third party, provided that the content is not inconsistent with the rules of the Danish Act on the Legal Effects of Marriage (§§ 28, 28 a, 28 b and 30).

- 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?**

Post-nuptial agreements between spouses which regulate or change their property relationship require a formal registered marriage settlement in order to be valid. Such a settlement is binding on the spouses and any third party, provided that the content is not inconsistent with the rules of the Danish Act on the Legal Effects of Marriage (§§ 28, 28 a, 28 b and 30).

If a post-nuptial agreement is not binding, either because it is not registered or because its contents conflict with the Act, it is without effect.

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

In order to be valid between the spouses, a marriage settlement must be in writing, signed by both spouses, and registered in the register of marriage settlements (*personbogen*); see § 35 Danish Act on the Legal Effects of Marriage.

- 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.**

In order to be valid in relation to a third party, a marriage settlement must be in writing, signed by both spouses and registered in the register of marriage settlements (*personbogen*).

The registration takes place at the civil court. Having been registered, the marriage settlement is valid from the date on which the application for registration is received by the court office.

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

No, it is neither necessary nor required by the rules governing marital agreements. It is possible to make a marital agreement stating, e.g. "All assets which each spouse owns at the time of the marital agreement shall belong to the spouse's separate property as well as all assets that he or she will acquire during the marriage"; see § 28 para. 1 and 2 Danish Act on the Legal Effects of Marriage. In that case a spouse's debts, whether incurred before or during the marriage, will be attached to his or her separate property.

- 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?**

In Danish law the agreement does not have to be made before an official.²⁶

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

The number of contracts regulating separate property has increased. In 1992 the number was around 5,000, in 1994 it was 6,250 and in 2005 around 11,000 marriage settlements were contracted.²⁷

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?

Within the limits set by § 28 Danish Act on the Legal Effects of Marriage, the spouses have the freedom to choose, by a marriage settlement:

- the separation of property instead of a deferred community of property,
- to combine separation of property and a deferred community of property e.g. certain assets being held as separate property, and the rest as community property, so that a certain part of the property is separate property, the rest being community property,
- the marital agreement for separate property may be for limited time e.g. 5 years,
- the marital agreement for separate property can provide that the separate property is to be reduced in stages, e.g. 50 % after 10 years of marriage,
- the marital agreement for separate property may be limited so as only to be effective upon the division of matrimonial property in both spouses' lifetime (divorce separate property),
- the marital agreement may provide that absolute separate property can only be granted if one of the spouses dies, to a specifically designated spouse or to the surviving spouse.

Marital agreements for separate property may not otherwise be made subject to conditions, e.g. applicable only on legal separation or divorce in specific circumstances or at the request of one of the spouses.

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

Separation of property upon divorce or a legal separation and absolute separate property may be combined in various ways. One or both of the spouses may have assets which form part of the community property, assets which are to be separate on divorce, and assets which are held as absolute separate property.

An agreement for separate property can apply to all the property or to the specific property of a spouse. It is possible to provide that a proportion of specific assets or of the spouse's assets is to be held as separate property. The courts have established that a provision in a marriage settlement to the effect that a given amount is held as separate property is valid. The case concerned the validity of the following provision: 'DKK 500,000 of the net value of the

²⁶ In 1994 the provision whereby certain marriage settlements had to be approved by a public authority was repealed. According to the *travaux préparatoires* on the law, in assessing whether a marriage settlement should be approved, the public authority had to consider whether the interests of the wife had been sufficiently taken into account. If this was not the case, approval would be denied. Equal consideration was not given to the interests of the husband. See I. Lund-Andersen, N. Munck and I. Nørgaard, *Familieret*, Copenhagen: Jurist- og Økonomforbundets Forlag, 2003, pp. 409-410.

²⁷ L. Nielsen, *Familieretten*, Copenhagen: Gjellerup/Gads Forlag, 2006, p. 158.

husband's property is the husband's divorce separate property'.²⁸ The agreement entered into was found to contain a sufficient specification of the husband's property that was to become separate property. The validity of an 'amount of separate property' must presume that the amount is specified. Presumably it cannot be agreed that 'the first DKK 500,000 in my estate shall be separate property', as this amount would not be related to specific property.²⁹

b. administration of assets

An agreement for the administration of assets cannot be included in a marriage settlement.

c. distribution of assets

The rights of spouses to combine community property and separate property in a marriage settlement are described in § 28 Danish Act on the Legal Effects of Marriage. Such an agreement will include what will substitute for the property covered by the agreement and income from such property, but it is possible to agree otherwise in a marriage settlement.

The spouses are entitled to alter an existing property settlement between them by means of another registered marriage settlement at any time. However, a third party's testamentary dispositions or a deed of gift regarding separate property cannot be altered unless the will or deed provides for this, or without the donor's subsequent consent; § 28 b para. 2 Danish Act on the Legal Effects of Marriage.

d. depend upon the ground of dissolution of the marriage

A marriage settlement for separate property may not depend on the grounds for divorce. Thus no special significance can be attached to divorce on the ground of adultery. But it can be provided that a contract for separate property only becomes effective if a designated spouse dies first.

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 most usual kinds of contractual clauses provide that a marriage settlement for absolute separate property will only apply if a particular spouse lives longer or that there will be absolute separate property for the surviving spouse, regardless of which spouse that is – called combined separate property (*kombinationssæreje*); see § 28 para. 2 Danish Act on the Legal Effects of Marriage. Property which becomes separate property upon divorce or a legal separation is community property, so that payment from the estate must be calculated for this property. Such an arrangement favours the surviving spouse over the children of the first spouse to die.³⁰

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

As a marriage settlement is a contract between 2 persons, the Danish Law of Contract (*Aftaleloven*) applies to pre-nuptial and post-nuptial agreements. The settlement can be set

²⁸ See Ugeskrift for Retsvæsen 2007 (Weekly Journal of Law) p. 2748 Ø. In practice, many marriage settlements are set up as 'an amount of separate property' or 'an amount of community property', but there have been questions among legal theorists as to whether such provisions are valid; see I. Lund-Andersen, N. Munck and I. Nørgaard, *Familieret*, Copenhagen: Jurist- og Økonomforbundets Forlag, 2003, pp. 373-375; and L. Nielsen, *Familieretten*, Copenhagen: Gjellerup/Gads Forlag, 2006, pp. 181-182.

²⁹ L. Nielsen, *Familieretten*, Copenhagen: Gjellerup/Gads Forlag, 2006, p. 181.

³⁰ See I. Lund-Andersen, N. Munck and I. Nørgaard, *Familieret*, Copenhagen: Jurist- og Økonomforbundets Forlag, 2003, pp. 377-378; and L. Nielsen, *Familieretten*, Copenhagen: Gjellerup/Gads Forlag, 2006, pp. 176-179.

aside by a court if one of the conditions for invalidity (duress, fraud, lack of capacity etc.) is fulfilled. Fraud can be committed either by the other spouse or by a third party. A marriage settlement can therefore be declared invalid if a third party has acted fraudulently, even if the other spouse has acted in good faith. Further, if it would be unreasonable to maintain the contract, a marriage settlement can be set aside or modified on grounds of unfairness under § 36 Danish Law of Contract.

A marriage settlement can be set aside if one of the spouses did not have the capacity to act because of mental incapacity or the like; see § 46 Danish Law of Guardianship (*Værgemålsloven*).