

NATIONAL REPORT: GERMANY

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August 2008

A. General	Questions 1-7	p.
B. General rights and duties of spouses concerning household expenses, transactions with respect to the matrimonial home and other matters irrespective of the single matrimonial property regime	Questions 8-14	p.
C. Matrimonial property regimes		
C.1. General issues	Questions 15-19	p.
C.2. Specific regimes		
<i>I. Community of property</i>	Questions 20-56	p.
<i>II. Community of accrued gains/Participation in acquisitions</i>	Questions 57-90	Not relevant
<i>III. Deferred community</i>	Questions 91-128	Not relevant
<i>IV. Separation of property</i>	Questions 129-160	Not relevant
<i>V. Separation of property with distribution by the competent authority</i>	Questions 161-190	Not relevant
D. Marital agreements	Questions 191-201	p.

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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 special rules concerning the property relationship between spouses (Ehegatten) apply to all couples of the opposite sex who have contracted a marriage before a registrar¹.

a. upon marriage

General rules concerning the property relationship between spouses upon marriage are to be found in §§ 1357-1362 German Civil Code (Bürgerliches Gesetzbuch). They apply irrespective of the matrimonial property regime which is applicable. Additionally, the property relationship between the spouses is determined by the applicable matrimonial property regime, for which statutory rules can also be found in the German Civil Code.

b. during marriage

During marriage the same rules apply as upon marriage; see the answer to question 1a.

c. upon separation

Changes in the property relationship due to a separation are dealt with in §§ 1357 para. 3 and 1361a German Civil Code irrespective of the applicable matrimonial property regime. A separation has no further impact on the property relationship with regard to the various matrimonial property regimes, as separation itself does not suffice to end the matrimonial property regime. However, a separation may lead to a dissolution of the matrimonial property regime of accrued gains and to a premature equalisation claim, § 1385 German Civil Code. As a general rule the matrimonial property regime ceases due to a divorce, an annulment, the death of one of the spouses or by a contractual agreement.

d. upon death

Rules concerning the property relationship upon the death of one of the spouses are to be found in the provisions concerning the law of succession (§§ 1931 et seq., 2265 and 2303 German Civil Code) and to a certain extent also in the rules regarding the applicable property regime (§ 1371 German Civil Code).

e. upon divorce

Irrespective of the property regime which is applicable, the provisions of the German Household Items Regulation apply,² regulating the allocation of household assets and the matrimonial home. As to spouses living in a community of accrued gains, §§ 1372 et seq. German Civil Code apply, basically providing for the assessment of the accrued gains and for the spouses' right to demand compensation. As regards spouses who live in the contractual property regime of the general community of property (Gütergemeinschaft) the division of common property (Gesamtgut) between the spouses is dealt with in §§ 1471 et seq. German Civil Code. The procedure follows the rules for non-contentious matters (freiwillige

¹ See with regard to the meaning of marriage A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 30, § 3 No. 2.

² Verordnung über die Behandlung der Ehwohnung und des Hausrats vom 21.10.1944 in the version dated 11.12.2001 (German Household Items Regulation).

Gerichtsbareit) laid down in the German Act on Voluntary Jurisdiction.³ According to a reform project these rules will be integrated into a new law on family procedure.⁴

f. upon annulment

Upon an annulment of a marriage according to § 1318 para. 1 German Civil Code the rules governing divorce are generally applicable. However, § 1318 para. 2-4 German Civil Code lays down certain modifications which deal with the peculiarities of an annulment as opposed to divorce, the latter being based on a no fault principle on account of the different reasons for the dissolution of the marriage.

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

In the German Civil Code dating from 1900, the default matrimonial property regime was called 'administration and usufruct' (Güterstand der Nutzverwaltung) implying the right of the husband to administer the property which was brought into the marriage or acquired during the marriage by the wife.⁵ In addition to the default regime, three different contractual property regimes existed: a general community of property (Gütergemeinschaft), a community of property acquired during marriage (Errungenschaftsgemeinschaft) and a community of property with the exception of real estate that had been brought into, received or inherited during the marriage (Fahrnisgemeinschaft).

The property regime of 'Nutzverwaltung' was not compatible with the constitutional requirement of equality (Art. 3 para. 2 Grundgesetz, Germany's Basic Law). The German Constitution laid down in Art. 117 the date of 31 March 1953 as the date by which all statutes violating the requirement of equality must have been abrogated. As no new property regime had by that time been introduced, from 1 April 1953 until 1 July 1958 the separation of property applied as the default property regime. The first great family law reform, the German Equality Law dated 18 June 1957,⁶ then replaced the separation of property with the community of accrued gains. The idea was to ensure that each spouse would participate in the accrued gains by obtaining a claim for compensation *in personam* (schuldrechtlicher Ausgleichsanspruch),⁷ thereby taking into account that the task of housekeeping, which was then exclusively assigned to the wife,⁸ and the husband's gainful employment, were considered to be of equal value.

A further law reform that influenced the property relationship between spouses was the first reform of matrimonial law,⁹ which in 1977 led to the right of both spouses to gainful employment (§ 1356 German Civil Code) and to an extension of the agency in fact implied, i.e. the authority of both spouses to enter into transactions in order to meet the appropriate

³ Gesetz über die freiwillige Gerichtsbarkeit vom 20.05.1898 (as amended).

⁴ Gesetzesentwurf der Bundesregierung – Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, <<http://www.bmj.de/files/-/3019/RegE%20FGG-Reformgesetz.pdf>>; see also Question 3.

⁵ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 89, § 5 No. 2; T. Rauscher, *Familienrecht*, 2nd Edition, Heidelberg: C.F. Müller, 2008, No. 70.

⁶ Gesetz über die Gleichberechtigung von Mann und Frau auf dem Gebiet des bürgerlichen Rechts, BGBl 1957 I 609.

⁷ T. Rauscher, *Familienrecht*, 2nd Edition, Heidelberg: C.F. Müller, 2008, No. 78.

⁸ § 1356 German Civil Code in the version dated 01.07.1958 obtaining until 14.06.1976, see BGBl I 1957, p. 609.

⁹ Erstes Gesetz zur Reform des Ehe- und Familienrechts vom 14.06.1976, BGBl 1976 I 1421.

necessities of the family (the so-called 'Schlüsselgewalt' according to § 1357 German Civil Code).¹⁰

Since the unification of the two German republics, the Civil Code of the Federal Republic of Germany (German Civil Code) has been applicable both in East and West Germany. In principle, all legal relationships created in East Germany under the Family Code of the former German Democratic Republic (Familiengesetzbuch) remain valid, but as of 3 October 1990 their effects have been governed by the German Civil Code. Only a few provisions of the East German Family Code have remained in force under special transitional provisions.¹¹ In the former German Democratic Republic, the statutory matrimonial regime was a 'participation of accrued gains' (Errungenschaftsgemeinschaft), meaning that all the assets accumulated through normal income during marriage belonged jointly to the spouses (§ 13 para. 1 Family Code). In 1990, this regime of matrimonial property was automatically converted into the regime of the community of accrued gains. The common property which the spouses had owned under the 'participation of accrued gains' was converted into co-ownership with equal shares, unless the spouses had chosen otherwise.

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

On 1 November 2007 a draft bill on the Amendment of the Equalisation of Accrued Gains and the Law of Guardianship was placed before the German Parliament. On 20 August 2008 it became a government draft.¹² According to the draft, debts that exist at the beginning of the community of accrued gains will be taken into consideration, whereas currently for the purpose of calculating the accrued gains the original assets are deemed to be never less than zero (§ 1374 German Civil Code).¹³ The rights of the spouses to information concerning the other spouse's property at the beginning and the end of the property regime of the community of accrued gains is to be strengthened through a right to a presentation of documents (§ 1379 German Civil Code).¹⁴ The decisive point in time for determining the equalisation claim shall be brought forward to the time when the divorce petition is filed, § 1384 German Civil Code,¹⁵ whereas currently the end of the matrimonial property regime – and thus generally the time when the divorce becomes final – is decisive, see § 1378 para. 2 German Civil Code. At present, the spouse who is entitled to an equalisation is not sufficiently protected against manipulation by the other partner: although the decisive date for the calculation of the accrued gains is the date on which the divorce petition is served (§ 1384 German Civil Code), the amount of the equalisation claim is limited by the value of the property existing at a later date, namely the date on which the property regime comes to an end, i.e. generally the date on which the divorce takes legal effect. This results in a considerable danger of manipulation.¹⁶ Further, the rules regarding the allotment of household assets and the matrimonial home are to be incorporated into the German Civil

¹⁰ T. Rauscher, *Familienrecht*, 2nd Edition, Heidelberg: C.F. Müller 2008, No. 85. For details concerning § 1357 German Civil Code see Question 13.

¹¹ See Article 234 Introductory Act to the German Civil Code.

¹² Gesetzentwurf der Bundesregierung zur Änderung des Zugewinnausgleichs und des Vormundschaftsrechts, <http://www.bmj.bund.de/files/-/3239/RegE_Gueterrecht.pdf>. For a more detailed overview see W. Kogel, "Reform des Zugewinnausgleichsrechts - quo vadis?", *Forum Familienrecht*, 2008, pp. 185-193, and E. Koch, "Die geplanten Neuregelungen des Zugewinnausgleichs", *FamRZ*, 2008, pp. 1124 - 1129.

¹³ On the current valuation of premarital assets and debts see Question 81.

¹⁴ As to the current rights of spouses to information, see Question 195.

¹⁵ For details see Question 79.

¹⁶ See draft proposal p. 17, <<http://www.bmj.bund.de/files//2616/RegE%20Gesetz%20zur%20C4nderung%20des%20Zugewinnausgleichs%20und%20Vormundschaftsrechts.pdf>>

Code while the current German Household Items Regulation is to be repealed. Moreover, the legal redress against dishonest transfers of property is to be improved,¹⁷ and the substitution of assets according to § 1370 German Civil Code will be abolished.¹⁸

Additionally, there is a recent reform proposal concerning the adjustment of pension rights (Versorgungsausgleich).¹⁹ However, as the pension rights adjustment is an independent legal institution and is not influenced by the matrimonial property regime, it will not be dealt with explicitly in the following chapters.²⁰

A reform project concerning the procedure in family law matters is also underway.²¹ Currently the procedure governing family law matters is laid down in the German Code on Civil Procedure and in the German Act on Voluntary Jurisdiction. This highly complex scheme of rules and references will be improved through an Act on Family Law Matters and on Voluntary Jurisdiction, combining the procedure for all family law matters in one act.

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 directly apply to registered partnerships. Registered partnerships are dealt with in the German Law on Registered Partnerships,²² containing independent provisions which today – with a few exceptions – resemble those for marriage. Thus with regard to the property relationship, the community of accrued gains is now likewise the default property regime for registered partners, and § 6 German Law on Registered Partnerships refers to §§ 1363 para 2. – 1390 German Civil Code.²³ Registered partners also have the right to enter into a contractual agreement, § 7 German Law on Registered Partnerships.

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 exclusiveness of family law rules on matrimonial property depends on the property regime in question.²⁴

The community of accrued gains is not exclusive. The basis of this property regime is a division of property rights. However, the spouses are free to use the mechanisms of property law, such as fractionally shared joint ownership (so-called 'Bruchteilsgemeinschaft' as per §§

¹⁷ See draft proposal p. 18, <<http://www.bmj.bund.de/files//2616/RegE%20Gesetz%20zur%20C4nderung%20des%20Zugewinnausgleichs%20und%20Vormundschaftsrechts.pdf>>

¹⁸ For more details see Question 61.

¹⁹ For the recent reform proposals see: Entwurf eines Gesetzes zur Strukturreform des Versorgungsausgleichs (VA StrRefG), BR-Drs. 343/08, <http://www.bmj.bund.de/files/-/3153/RegE%20VA%20StrRefG%20BR-Drs.%20343-08_Versorgungsausgleich.pdf>.

²⁰ See Question 16 for an overview on the pension rights adjustment.

²¹ Gesetzesentwurf der Bundesregierung – Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, <<http://www.bmj.de/files/-/3019/RegE%20FGG-Reformgesetz.pdf>>.

²² Lebenspartnerschaftsgesetz vom 16.2.2001, BGBl, 2001 I 266, reformed through Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts vom 15.12.2004 (BGBl 2004 I 3396).

²³ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 210, § 7 No. 37.

²⁴ For details on rules and institutions which are additionally applicable see R. Wever, *Vermögensauseinandersetzung der Ehegatten außerhalb des Güterrechts*, 4th Edition, Bielefeld: Gieseking, 2006.

1008 et seq. German Civil Code), and the mechanisms of partnership law (§§ 705 et seq., §§ 718 et seq. German Civil Code) to create joint rights of participation.²⁵ Nevertheless, there are limits to the use of property law as far as special family law rules apply. Thus the spouses' property in terms of household assets is dealt with in § 1370 German Civil Code, which lays down the subrogation by operation of law concerning replaced household assets. In other cases when household goods are purchased, however, the acquisition of ownership follows the rules of property law. According to the so-called 'Schlüsselgewalt' in § 1357 German Civil Code,²⁶ if one spouse contracts with a third person in order to purchase goods for their subsistence, the other spouse will merely be jointly liable (to pay the price of the goods), but he or she will not become a joint owner by operation of this rule.²⁷ The rules of property law are, however, construed in such a way that when the spouses purchase household goods an assumption of joint ownership applies.²⁸

Due to a lack of matrimonial regulations within the framework of the separation of property, only the property law rules apply. Hence a joint ownership (§§ 1008 et seq. German Civil Code) is possible, as are joint partnership participations.

The rules concerning a community of property are exclusive. Instead of the acquisition of common property, single property or fractionally shared joined property can only be attained if the acquisition of common property has been excluded in the marital property agreement.²⁹

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

The law of inheritance is dealt with in the fifth book of the German Civil Code. It contains certain rules on the spouses' right to inherit, already taking into account the different matrimonial property regimes. If necessary, it makes reference to the provisions of matrimonial property law. The statutory right of the spouse to inherit is laid down in § 1931 German Civil Code, which leaves the provision of § 1371 German Civil Code applicable and thus gives the spouse living in a community of accrued gains the choice between a matrimonial solution or a solution according to the law of inheritance. The matrimonial solution consists of – according to § 1931 para. 3, § 1371 para. 3, § 2303 German Civil Code – a compensation claim to the amount of the actual equalisation of the accrued gains as well as a claim to a compulsory portion (Pflichtteil) of the testator's estate. The solution according to the law of inheritance is composed of a statutory inheritance right heightened by a flat-rate compensation claim of a quarter of the inheritance.

If a testator's spouse is excluded from the succession by will or a contract of inheritance, he or she is entitled to payment by the heir of a compulsory portion (Pflichtteil), which equals one-half the value of the statutory inheritance share, see § 2303 para. 2 German Civil Code. The entitlement to a compulsory portion of the inheritance is additional to a compensation claim due to the equalisation of the accrued gains.

According to §§ 2265 et seq. German Civil Code spouses are entitled to make a joint will and they enjoy special relief concerning contracts of inheritance and the renunciation of a future

²⁵ T. Rauscher, *Familienrecht*, 2nd Edition, Heidelberg: C.F. Müller 2008, No. 373.

²⁶ For further details see Question 13.

²⁷ For the dominant opinion regarding the acquisition of household goods see BGH 13.3.1991, *FamRZ*, 1991, 923, T. Rauscher, *Familienrecht*, 2nd Edition, Heidelberg: C.F. Müller, 2008, No. 284, J. Gernhuber and D. Coester-Waltjen, *Familienrecht*, 5th Edition, Munich: Beck, 2006, p. 169, § 19 No. 66, G. Brudermüller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck 2008, § 1357 No. 20; dissenting e.g. D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 176.

²⁸ See also BGH 13.3.1991, *FamRZ*, 1991, 923.

²⁹ T. Rauscher, *Familienrecht*, 2nd Edition, Heidelberg: C.F. Müller, 2008, No. 447.

inheritance.³⁰ Additionally the surviving spouse as the statutory heir is entitled to the objects belonging to the matrimonial household and to the wedding gifts; this is the so-called preference of the surviving spouse ("Voraus") pursuant to § 1932 German Civil Code.

For details on the different matrimonial property regimes see Question 90 and Question 160.

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)?

General rights and duties of the spouses are dealt with in §§ 1353–1362 German Civil Code. These rules concern especially the rights and consequences of transactions to meet the appropriate necessities of the family (§ 1357 German Civil Code) and the duty and scope of family maintenance (§§ 1360-1360b German Civil Code). Additional rules as to the separate property regimes are to be found in §§ 1363 et seq. German Civil Code for the community of accrued gains, in §§ 1415 et seq. German Civil Code for the community of property and in § 1414 German Civil Code with regard to the separation of property.

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

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

The duty to contribute to the costs and expenses of the family household is regulated in §§ 1360-1360b German Civil Code. Pursuant to § 1360 sent. 1 German Civil Code both spouses are obliged to contribute through their work and their property to the reasonable maintenance of the family. The duty to provide maintenance can also be achieved by managing the affairs of the family household, § 1360 sent. 2 German Civil Code.

Costs and expenses of the family household (the so-called 'Familienunterhalt') encompass, pursuant to § 1360a para. 1 German Civil Code, everything that is necessary according to the circumstances of the spouses to pay for the costs of the household and the personal needs of the spouses and their children, who would be entitled to maintenance in accordance with §§ 1601 et seq. German Civil Code. The maintenance obligation extends to educational expenses for the spouse, provisions for old age and an incapacity to work or employment as well as allowances and advances on the costs of litigation. The amount required to cover the costs and expenses of the family household is established in accordance with the marital circumstances, which are determined by income and property.³¹

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

A marriage does not inevitably lead to joint and several liability.³² However, pursuant to § 1357 German Civil Code spouses have an agency which is factually implied, i.e. the authority to enter into transactions in order to meet the appropriate necessities of the family. As far as

³⁰ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 78, § 4 No. 99.

³¹ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 62, § 4 No. 46.

³² A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 66, § 4 No. 59.

these transactions are concerned the spouses are joint and several debtors (§§ 421-425 German Civil Code) and joint and several creditors (§ 428 German Civil Code).

Even within the scope of the community of property regime, the debts of one spouse are first and foremost regarded as his or her personal debts. The common property is only liable according to §§ 1437 et seq. German Civil Code for common property obligations.

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

The term matrimonial home refers to all rooms that are or have been used by the spouses as living accommodation or which were according to the circumstances meant to be used in that way. The term is to be broadly construed.³³

The acquisition of the family home primarily follows the mechanisms of property law, whereas the lease of living accommodation is entered into according to the rules concerning rental accommodation. The acquisition of a house is not seen as a transaction under § 1357 German Civil Code as it contains an investment decision.³⁴ Consequently, such transactions do not result in the other spouse being a joint and several debtor or creditor.

Irrespective of ownership and the matrimonial property regime the spouses are generally joint possessors of the matrimonial home;³⁵ the right to be a joint possessor derives from the duty to conjugal life pursuant to § 1353 German Civil Code.

The allotment of the matrimonial home in the case of separation is dealt with in § 1361b German Civil Code. According to this rule the matrimonial home can be allotted to a spouse to avoid undue hardship. Pursuant to § 1361b para. 1 sentence 2 German Civil Code undue hardship is defined as the state when the welfare of the children living in the family household is endangered. Furthermore, undue hardship includes cases in which a spouse has intentionally and unlawfully injured the other spouse, so that a shared home is not an option (§ 1361b para. 2 sent. 1 German Civil Code).

In the event of a divorce the allotment of the matrimonial home is dealt with under the German Household Items Regulation. This jurisdiction lies with the family court and the procedure follows the rules for non-contentious matters. As provided by recent reform projects,³⁶ the procedural rules will be incorporated into the new Act on Family Law Matters and on Voluntary Jurisdiction,³⁷ and the substantive rules will be transferred to the German Civil Code. The Regulation applies irrespective of the property regime, as it is not meant to protect financial interests, but rather to preserve the interest in the continuity of the existing property.

In the case of single ownership by one spouse (§ 3 German Household Items Regulation) the allotment to the other spouse can only be made in order to avoid undue hardship. Due to the single ownership the owning spouse ranks above the other spouse.

³³ H. Boden in: *Anwaltkommentar BGB, Band 4 Familienrecht*, Bonn: DAV, 2005, § 1361b No. 3.

³⁴ BGH, 12.10.1988, *FamRZ*, 1989, 35.

³⁵ BGH, 31.01.1979, *BGHZ*, 73, 253, 257.

³⁶ See Question 3.

³⁷ Gesetzesentwurf der Bundesregierung – Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, <<http://www.bmj.de/files/3019/-RegE%20FGG-Reformgesetz.pdf>>; see Question 3.

If the spouses are joint owners or tenants (§ 5 German German Household Items Regulation) the allotment can be made on the grounds of § 2 German Household Items Regulation, but with the discretion of the court. According to § 2 sentence 2 German Household Items Regulation, the court has to take into account all the special circumstances of the case, especially the welfare and interests of the children.

An allotment does not transfer ownership to the other spouse, but merely allots the right to use the matrimonial home. It is possible for the court to arrange a lease or appropriate compensation for the use in favour of the house-owning spouse.³⁸ In the case of a tenancy the court can decide that one spouse continues the former joint tenancy on his or her own or that one spouse substitutes for the other spouse in the tenancy contract (§ 5 para. 1 sentence 1 German Household Items Regulation).

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 term ‘household assets’ covers all movable items (the definition of movable items can be found in § 90 German Civil Code), which are, according to the circumstances of the spouses and their children, designed to enable their cohabitation.³⁹

The possession of these items is governed by the general principles of property law. However, items that are jointly used are normally also jointly possessed pursuant to § 1353 German Civil Code. The acquisition of household assets follows the rules of property law.⁴⁰ Within the scope of the community of accrued gains certain rules modify the property law: thus § 1370 German Civil Code determines a subrogation by obligation of law for household goods that have been replaced and § 1369 German Civil Code limits the rights to dispose of household goods.⁴¹

In the case of separation § 1361a German Civil Code regulates the allotment of the household assets. Essentially, each spouse is entitled to those assets that he or she owns (§ 1361a para. 1 sentence 1 German Civil Code). In the event of joint ownership or the needs of the other spouse the allotment is made in accordance with the principles of justice and fairness.

The allotment in the case of divorce is dealt with in the German Household Items Regulation.⁴² According to this regulation, the allotment differs depending upon the ownership of the household items in question. Jointly owned household goods are to be divided in a just and appropriate way pursuant to § 8 para. 1 and § 2 German Household Items Regulation. Allotment leads to single ownership by the spouse to whom the allotment is made. To ensure a just division the court can impose compensation payments upon the spouse who received the asset, § 8 para. 3 sentence 2 German Household Items Regulation. If the item is owned by one spouse alone a right of use can be granted to the other spouse under the strict requirements of § 9 para. 1 German Household Items Regulation.⁴³

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...)?

³⁸ T. Rauscher, *Familienrecht*, 2nd Edition, Heidelberg: C.F. Müller, 2008, No. 719a.

³⁹ H. Boden in: *Anwalthkommentar BGB, Band 4 Familienrecht*, Bonn: DAV, 2005, § 1361a No. 4.

⁴⁰ See Question. 5.

⁴¹ As to recent reform proposals see footnote 12.

⁴² As to recent reform proposals see footnote 12.

⁴³ T. Rauscher, *Familienrecht*, 2nd Edition, Heidelberg: C.F. Müller, 2008, No. 724.

Pursuant to § 1357 German Civil Code, the spouses have an implied factual agency, i.e. the authority to enter into transactions in order to meet the appropriate necessities of the family⁴⁴. The other spouse is bound by the contract irrespective of whether the contracting party knows that this consequence will arise or that the 'acting spouse' is actually married⁴⁵. As a consequence, both spouses will be jointly and separately liable.⁴⁶

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

There are no specific rules concerning the acting of one spouse as an agent for the other. Parts of the German legal literature consider the provision of § 1357 German Civil Code to be a special agency rule.^{47,48} Thus the spouse acts both for himself or herself and for the other spouse as his or her agent. Other scholars regard the provision of § 1357 German Civil Code as a legal power in itself, as § 1357 does not require the disclosure of any actions as an agent.⁴⁹ However, the effect of § 1357 German Civil Code, in both cases, is that the spouse is bound by the legal transaction entered into by the other spouse.⁵⁰ Outside the scope of § 1357 the normal agency rules (§§ 164 et seq. German Civil Code) apply. Furthermore, the administration of the common property in a community of property embraces certain agency rules, §§ 1422 et seq. German Civil Code.

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

As a rule, transactions between spouses are not limited by general provisions. However, due to the protection of creditors in relation to third parties, restrictions may apply. In particular the German Law on the Avoidance of Legal Acts by a Debtor Outside the Insolvency Proceedings (German Law of Avoidance) allows the creditor in the course of debt enforcement to access property that has been transferred from the debtor to a third party – the other spouse – without remuneration (§ 4 German Law of Avoidance) or with the intention to disadvantage the creditor.^{51,52}

In order to protect the spouses' creditors against fraudulent transactions between the spouses, one spouse can act as a surety for the other spouse. In general, due to the emotional pressure to enter into a surety ship, such an act by a family member is considered void because of a violation of morality according to § 138 German Civil Code if there are no financial resources to cover the debt. However, an exception is made and the contract is not void if the surety

⁴⁴ See also Questions 8 and 13.

⁴⁵ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck 2007, p. 68, § 4 No. 65.

⁴⁶ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck 2007, p. 69, § 4 No. 67.

⁴⁷ See Question 12.

⁴⁸ A. Wacke in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck 2000, § 1357 No. 22.

⁴⁹ T. Rauscher, *Familienrecht*, 2nd Edition, Heidelberg: C.F. Müller, 2008, No. 275.

⁵⁰ G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck 2008, § 1357 No. 3 et seq.; T. Rauscher, *Familienrecht*, 2nd Edition, Heidelberg: C.F. Müller, 2008, No. 275.

⁵¹ Gesetz über die Anfechtung von Rechtshandlungen eines Schuldners außerhalb des Insolvenzverfahrens - Anfechtungsgesetz, *BGBl I*, 1994, 2911.

⁵² See H. Brox and W.D. Walker, *Zwangsvollstreckungsrecht*, 7th Edition, Cologne, Berlin, Bonn, Munich: Carl Heymanns, 2003, No. 269 et seq.

ship is needed to protect the creditor from fraudulent conveyances between the spouses and this is explicitly mentioned in the contract.⁵³

C. MATRIMONIAL PROPERTY REGIMES

C.1. General issues

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

§ 1408 German Civil Code allows the spouses to contractually determine the applicable matrimonial property regime. They are entitled not only to choose one of the statutory property regimes, but also to modify it.⁵⁴

16. What regime is applicable, using the list below,⁵⁵ if spouses have not made a contract (default regime) or are not allowed to make a contract or are not allowed to make a contract with binding effect?

The community of accrued gains (Zugewinnngemeinschaft) applies as the default regime, as long as spouses have not entered into a marriage contract choosing otherwise, § 1363 para. 1 German Civil 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, spouses can opt for a regime of community of property (Gütergemeinschaft) or for the separation of property (Gütertrennung). The separation of property is not only an optional property regime, but is also a subsidiary statutory property regime, which means that the separation of property automatically takes place when a judgment recognising the premature equalization of accrued gains (§ 1388 German Civil Code) or dissolving the community of property (§ 1449, 1470 German Civil Code) becomes final.

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

a. Question 16

The community of accrued gains is based on a separation of property during marriage and thus a separate administration of property. According to § 1363 para. 2 German Civil Code the separation of property affects not only premarital property but also property that has been acquired during marriage. Not until the community of accrued gains comes to an end – which can be due to a divorce, a marriage contract (§§ 1372 et seq. German Civil Code) or the death of a spouse (§ 1371 German Civil Code) – does the equalisation of the accrued gains take place⁵⁶. The form of the equalisation of accrued gains depends on the reasons for the termination of the community of accrued gains.⁵⁷ Thus in the case of a divorce or marriage contract, the spouse with the smaller acquisition is entitled to half the amount of the

⁵³ See H. Heinichs in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 138 No. 38d.

⁵⁴ G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1408 No. 15. For detailed information see Question 198.

⁵⁵ For an explanation of this list, see the document: CLASSIFICATION OF MATRIMONIAL PROPERTY REGIMES PROPOSED BY THE CEFL.

⁵⁶ See also Question 200 regarding the decision to end the community of accrued gains through a marriage contract.

⁵⁷ See Question 78 on the grounds for the dissolution of the community of accrued gains.

difference between the accrued gains, § 1378 German Civil Code. In case of the death of one of the spouses the inheritance share of the surviving spouse, who is an heir or a beneficiary of a legacy, is increased by a flat-rate equalisation of accrued gains totalling a quarter of the inheritance (see § 1371 German Civil Code).

During marriage the spouses are protected through limited powers of disposal concerning household assets (§ 1369 German Civil Code) and the entirety of the property (§ 1365 German Civil Code).

Equalisation of the accrued gains does not provide the spouses with pension rights. Old-age provisions for the spouses are only granted through the matrimonial property regimes with respect to the acquired property itself.⁵⁸ To avoid the detrimental effect resulting from the fact that pension rights are not covered, an independent legal institution exists to distribute pension rights between the spouses. Hence, the so-called pension rights adjustment (Versorgungsausgleich) is independent of the matrimonial property regime and will therefore not be dealt with in the following sections. In general, it can be said that upon divorce, there is an equal division of all pension rights accrued by the spouses during the marriage, § 1587a para. 1 German Civil Code. The legislator has provided two basic models for the equalisation of different types of pension rights, one under social security as well as other public law (öffentlich-rechtlicher Versorgungsausgleich) and one under private law (schuldrechtlicher Versorgungsausgleich). If the equalisation takes place under the rules of public law the Family Court will transfer the claim to half the difference in the value of one spouse's pension rights to the other spouse (§§ 1587b et seq. German Civil Code). The court thus transfers one spouse's claim to future pension rights in such a way that the receiving spouse gains his or her own future claim to the transferred pension rights. Where no equalisation under public law is possible, a contractual equalisation of pension rights will take place according to § 1587f German Civil Code. The pension rights adjustment can, however, be excluded by a prenuptial or postnuptial agreement, see §§ 1408 para. 2, 1414 and 1587o German Civil Code. Included in the pension rights adjustment are all expectations or promises of a pension on the grounds of age, disability or incapacity. For these purposes, the marriage is deemed to have ended in the month which precedes the one during which the action for divorce was filed, § 1587 para. 2 German Civil Code.⁵⁹

b. Question 17

Separation of property:

The consequence of the separation of property is that, as far as their property is concerned, the spouses are treated as if they were not married. There are no restrictions or limitations to the actions of the spouses and no participation in the other spouse's property. Only the general rights and duties are to be taken into account.⁶⁰

Community of property:

The community of property can only be achieved contractually.⁶¹ Within the system of the community of property, up to five different groups of property assets exist.⁶² In addition to

⁵⁸ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck 2007, p. 68, § 6 No. 129.

⁵⁹ For recent reform proposals see: Entwurf eines Gesetzes zur Strukturreform des Versorgungsausgleichs (VA StrRefG), BR-Drs. 343/08, <http://www.bmj.bund.de/files/-/3153/RegE%20VA%20StrRefG%20BR-Drs.%20343-08_Versorgungsausgleich.pdf>.

⁶⁰ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 128, § 5 No. 161.

⁶¹ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 129, § 5 No. 163.

⁶² A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 129, § 5 No. 165.

the common property of the spouses (Gesamtgut) each spouse can have separate property (the so-called 'Vorbehaltsgut') and special property (Sondergut). As a rule, property existing at the time of entering into the community of property as well as property acquired thereafter becomes common property, § 1416 German Civil Code. The common property is jointly held property, i.e. both spouses have an identical interest in the undivided whole and it can be administered by one or both spouses. Separate property exists concerning assets designated in the marriage contract or received by way of a gift or succession subject to a stipulation that they are reserved from the common property and property replacing any of these assets.⁶³ Special property comprises assets which are incapable of being transferred by a legal transaction. This property is solely owned of the spouse in question and is administered by the spouse personally but on behalf of and for the benefit of the common property, § 1417 German Civil Code.

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

No explicit data exist on the frequency of the use made of the matrimonial property regimes. However, it can be said that marriage contracts are rather rare and that couples setting aside the default property regime of the community of accrued gains prefer the separation of property.⁶⁴

⁶³ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 130, § 5 No. 171.

⁶⁴ B. Thiele in: Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: De Gruyter 2000, Vor § 1408 et seq. No. 30.

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

C.2. Specific regimes

I. Community of property

Not relevant.

II. Community of accrued gains/Participation in acquisitions

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

The statutory default matrimonial regime in which the spouses live is one of a community of accrued gains unless they have agreed otherwise by a marriage contract (§ 1363 para. 1 German Civil Code). The concept of accrued gains is defined in § 1373 German Civil Code. Accrued gains is the amount by which the final assets of a spouse exceed his or her initial assets. If the accrued gains of one spouse exceed the accrued gains of the other, the other is entitled to half of the surplus as an equalization claim (§ 1378 German Civil Code). Which of the spouses is entitled to this claim and what it amounts to is therefore determined by comparing each of the spouses' assets at the beginning ("initial assets", § 1374 German Civil Code) and at the termination ("final assets", § 1375 German Civil Code) of the property regime. Only in the case of a divorce is the relevant date for determining the final assets set at the date when the application for divorce becomes pendant, § 1384 German Civil Code. The legislative intention is to offset at least some of the disadvantages that one of the spouses, generally still the wife, has suffered during the marriage. The equalization claim, however, is generally only a claim for payment, not a claim for the transfer of assets.⁶⁵

The community of accrued gains means that during the marriage the assets are essentially separate. The property of the husband and the property of the wife will not become joint property; there is a separation of property. This also applies to property acquired by a spouse after entering into the marriage (§ 1363 para. 2 sent. 1 German Civil Code). During the marriage each spouse manages his or her assets independently. Gains by the spouses during the marriage shall be equalized only if the community of accrued gains comes to an end (§ 1363 para. 2 sentence 2 German Civil Code).

However, the assets are not entirely separate during the marriage and some restrictions apply. The independent management is limited in several ways by the law to protect the other spouse's interests. There are restrictions for transactions in respect of assets in their entirety (§ 1365 German Civil Code) and restrictions for the disposal of household goods (§ 1369 German Civil Code). Other provisions attempt to prevent a diminution of assets. The Reform Bill will considerably strengthen these restrictions.

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

Under the statutory regime of community of accrued gains the property of the husband and wife – whether acquired before or during the marriage – does not become joint property (§ 1363 German Civil Code). Therefore the legal nature of the different categories of assets means that there is generally unrestricted personal property of the spouses. "Initial" and

⁶⁵ E. Koch in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck 2000, § 1378 No. 3.

“final assets” are basically only accounting items for the calculation process in the context of equalization of gains.

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

Generally all assets comprise the separate property of the spouses. The community of accrued gains as such does not create property. This can only occur by other means, see Question 60. Assets that a spouse has brought into the marriage or has received as a gift or inherited later are part of his or her initial assets and are thus protected from equalization, see Questions 63 and Question 80.

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

Questions of ownership between the spouses are determined by both matrimonial property rules and the general provisions of civil law concerning movable and immovable property. However, spouses can acquire assets jointly. But such joint property may only occur under the general rules where the spouses decide to purchase jointly (see § 1008 German Civil Code). In the relationship between the spouses the provisions of §§ 742 et seq. German Civil Code apply (Bruchteilsgemeinschaft; co-ownership by defined shares), see Question 5. Especially where movable property is concerned, the question of who actually owns what may often be difficult to answer for third parties as well as the spouses themselves. For immovables there is clarification in the land register.

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

Also in the community of accrued gains the problem of the replacement of household items arises. Household items required to replace missing or unusable ones become the property of the spouse who owned the missing or unusable items (§ 1370 German Civil Code). This rule is applied irrespective of who has paid.⁶⁶ However, under the Reform Bill § 1370 German Civil Code will be abolished as being superfluous and contrary to the expectations of the parties.

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

Pension rights and claims are not included in the equalization of gains since they are subject to special provisions (§ 1587 para. 3 German Civil Code)⁶⁷. There is a special pension rights adjustment for those rights and expectations (Versorgungsausgleich). This is an attempt to compensate the time that has been devoted totally or substantially to child care and housework. The principle of an equalization of accrued gains has been extended to the equalization of pension rights, see Question 88.

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?

A third party cannot stipulate in a gift or a will to what category of assets it will belong. However, the spouse who acquired a gift, an heirship or a legacy is duly protected. Assets which are acquired by a spouse after the beginning of the matrimonial regime, as a result of the death of the other spouse or in consideration of a prospective right to inheritance, through a gift, or as furnishings, shall be included in the initial assets, after the deduction of obligations, insofar as the circumstances do not warrant their inclusion in the income (§ 1374 para. 2 German Civil Code). “As a result of death” encompasses intestate and testate

⁶⁶ D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 149.

⁶⁷ D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 254.

succession.⁶⁸ A transaction occurs “in consideration of a prospective right to inheritance” especially if there is no full economic equivalent to the performance of the other party, e.g. the parents of the spouse.⁶⁹ According to the case law this rule is exclusive and cannot be extended to other kinds of income.⁷⁰ Only by the application of § 1381 German Civil Code (gross inequity) may the result be adjusted, see Question 80.

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

There is a rebuttable presumption as to ownership in marriage. In respect of movables intended for the exclusive personal use of either spouse, it is presumed between the spouses and in relation to the creditors that they belong to the spouse for whose use they were intended (§ 1362 German Civil Code). Apart from that, the general presumption of ownership for the possessor applies.⁷¹ It is presumed in favour of the possessor of a movable that he or she is the owner of that property (§ 1006 para. 1 German Civil Code).

One method of proof, though not very often used, is the establishment of an inventory of initial assets. If the spouses have jointly established, in such an inventory, the content and the value of the initial assets of one of the spouses and the items to be added to such assets, it will be presumed in the relationship of the spouses with each other that the inventory is accurate (§ 1377 para. 1 German Civil Code). Each spouse may demand the cooperation of the other spouse in the drawing up of the inventory. Each spouse may employ, at his or her expense, an expert for establishing the value of the assets and the obligations (§ 1377 para. 2 German Civil Code). Insofar as no inventory has been drawn up, it shall be presumed that the final assets of a spouse represent his or her accrued gains (§ 1377 para. 3 German Civil Code).

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

The categorisation of assets may be proved against third parties by all means. There is, however, a rebuttable presumption as to ownership in the provisions on the general effects of marriage and this is applicable to all matrimonial property regimes.⁷²

In favour of the creditors of each spouse it is presumed that movables in the possession of either or both spouses belong to the debtor (§ 1362 para. 1 sent. 1 German Civil Code). This presumption, that the possessor is also the owner, does not apply if the spouses live in separation and the objects are in the possession of the spouse who is not the debtor. (§ 1362 para. 1 sent. 2 German Civil Code).

In respect of particular objects intended for the exclusive personal use of either spouse (e.g., clothing, jewellery, tools for professional use) it shall be presumed in relation to the creditors that they belong to the spouse for whose use they were intended (§ 1362 para. 2 German Civil Code).

⁶⁸ G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch, Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1374 No. 10.

⁶⁹ G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1374 No. 11.

⁷⁰ BGH, 22.12.1976, BGHZ 68, 43, 44 et seq. = FamRZ 1977, 124 (lottery winnings). See also D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 259.

⁷¹ G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1362 No. 6.

⁷² D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 178.

The presumption of ownership is supplemented by another presumption in the case of an execution of a judgment against one of the spouses. If it is presumed that one of the spouses is the owner of movables, then for the purpose of execution it is also presumed that only the debtor is in custody and possession of the movables. Therefore execution against this spouse is possible (§ 739 para. 1 German Code of Civil Procedure).

66. Which debts are personal debts?

Debts are personal debts if only one spouse is the debtor.

67. Which debts are joint debts?

Often creditors enter into contracts with both spouses, which means that the general rules on joint and several obligations apply. This regularly occurs in respect of consumer loan contracts and leases of residential property, but often also for sales contracts. If more than one person owes performance in such a way that each is obliged to effect the entire performance, but the obligee is only entitled to demand the performance on one occasion, then, according to § 421 German Civil Code, the obligee may at his or her discretion demand performance from each of the obliged parties. Until the entire performance has been effected, all obliged parties remain obliged.

There is, however, a special provision for transactions for the provision of necessities. Each spouse is entitled to enter into transactions for the appropriate provision of the necessities of life for the family ("Schlüsselgewalt"), see Question 5. Such transactions are also effective as against the other spouse. Both spouses acquire rights and obligations arising from such transactions, unless circumstances indicate a different conclusion (§ 1357 para. 1 German Civil Code). This provision is not applicable if the spouses are separated (§ 1357 para. 3 German Civil Code). The obligations are joint obligations in the sense of § 421 German Civil Code.⁷³ However, this kind of liability is independent from the matrimonial property regime and forms part of the rules concerning the general rights and duties of the spouses, see Question 9.

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

Against which assets the creditor can recover personal debts is determined only by the general rules of civil law and civil procedure. The restrictions for transactions in respect of assets in their entirety (§ 1365 German Civil Code) do not prevent an execution of a judgment against the owner.⁷⁴

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

There is no specific restriction as to against which assets the creditor can recover joint debts. The general rules of civil law and civil procedure apply.

II.2. Administration of assets

70. How are the different categories of assets administered?

In the interest of practicality there is a general principle of the independent management of assets. Each spouse manages his or her assets independently (§ 1364 German Civil Code). The

⁷³ M. Wellenhofer, in: B. Dauner-Lieb, T. Heidel and G. Ring (eds.), *Anwaltkommentar zum Bürgerlichen Gesetzbuch*, Band 4: Familienrecht, Bonn: Deutscher Anwaltverlag, 2005, § 1357 No. 23.

⁷⁴ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 109, § 5 No. 90.

consent of the other spouse is not necessary for every transaction. Each spouse is, however, limited in the management of his or her assets according to some legal provisions of the German Civil Code; see Questions 72, 74 and 76.

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

There are no specific rules concerning one spouse acting as an agent for the other (see Question 13). One spouse may mandate the other to administer his or her assets. No formal marital agreement is necessary for this.⁷⁵ If a spouse relinquishes the management of his or her property to the other spouse, the right to revoke such a relinquishment at any time may only be excluded or limited by a marriage contract; a revocation based on a serious ground nevertheless remains permissible; § 1413 German Civil Code.

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?

There are some important transactions concerning assets that require the consent of the other spouse. Although there is no specific rule governing transactions in respect of the matrimonial home (see Question 10), there is a limitation to the right to dispose of property in its entirety.⁷⁶ A spouse may only enter into an obligation to dispose of his or her property in its entirety with the consent of the other spouse. If he or she has entered into such an obligation without the consent of the other spouse he or she may fulfil such obligation only if the other spouse gives his or her consent (§ 1365 para. 1 German Civil Code).

Defining the term “disposal of property in its entirety” results in considerable difficulties. The courts have pointed out that the term is to be interpreted from an economic point of view. Therefore, even the disposal of one item of property (e.g., the family home) alone may suffice to fulfil the requirements of § 1365 German Civil Code if this item constitutes the entire or at least nearly the entire property of the spouse.⁷⁷ In cases of wealthy spouses this is the case where less than 10% remains.⁷⁸ Under more modest economic conditions at least 15 per cent must remain to exclude § 1365 German Civil Code.⁷⁹ What a spouse receives in return for the transaction is not to be taken into account.⁸⁰

The acting spouse does not have to be aware of the fact that he or she is disposing of his or her property to such an extent. The courts have laid down another important unwritten requirement which has substantially curtailed the limitation. The other party to the transaction has to be aware that the spouse’s (almost) entire property is involved or this must have been evident due to his or her knowledge of the couple’s financial situation. Where the other party is not aware of this, § 1365 German Civil Code does not apply and thus no consent is required⁸¹.

Where the transaction falls within the scope of § 1365 German Civil Code consent will be required for the obligation entered into as well as for the actual transferral of the property. If such a transaction conforms to the principles of regular management, the Guardianship Court may, upon an application by one spouse, substitute the consent of the other spouse

⁷⁵ D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 208.

⁷⁶ For an abolition of this restriction Deutscher Notarverein, *Reform des Zugewinnausgleichs- und Vormundschaftsrechts: Stellungnahme des Deutschen Notarvereins*, Notar, 2008, 15, 16.

⁷⁷ BGH, 28. 04. 1961, *BGHZ*, 35, 135, 145.

⁷⁸ See BGH, 13. 03. 1991, *FamRZ*, 1991, 669, 670.

⁷⁹ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 106, § 5 No. 76.

⁸⁰ See BGH, 25. 06.1980, *BGHZ*, 77, 293, 299.

⁸¹ BGH, 26.02.1965, *BGHZ*, 43, 174, 177 f.

where the latter unreasonably refuses to give it, or by reason of illness or absence is prevented from making such a declaration, and any delay entails a jeopardy (§ 1365 para. 2 German Civil Code). Such a substitution of consent is not easily obtained, however.

If there is no initial consent, a later ratification of the contract is possible. Then a contract concluded only by one spouse becomes effective (§ 1366 para. 1 German Civil Code). A third party is entitled to revoke the contract up until ratification. If he or she knew that the husband or wife was married, he or she may only revoke if the husband or wife had untruthfully stated that the other spouse had consented; he or she may not even revoke in such a case if it was known to him or her that the other spouse had not ratified (§ 1366 para. 2 German Civil Code).

If a third party demands that a spouse produces the required ratification by the other spouse, only the latter may declare his or her ratification to the third party (§ 1366 para. 3 German Civil Code). The ratification may be declared only within two weeks from the receipt of the demand; if it is not given, it is deemed to have been refused. Where ratification is refused, the contract is ineffective (§ 1366 para. 4 German Civil Code). If the Guardianship Court orders a substituted ratification, its decision is only valid if the spouse notifies the third party thereof within the two-week time-limit; otherwise the ratification is deemed to have been refused. A unilateral legal transaction carried out without the requisite consent is ineffective (§ 1367 German Civil Code).

There are also rights of the claimant spouse against third parties. If the other spouse has disposed of his or her property without the requisite ratification of the claimant, then the spouse is also entitled to enforce in court his or her rights arising out of the ineffectiveness of the disposition against the third party (§ 1368 German Civil Code). In the absence of the required consent, no bona fide purchase is possible as §§ 1365, 1369 Civil Code constitute an absolute restraint on alienation.⁸²

The disposal of household items is also limited under matrimonial property law (see Question 11).⁸³ A spouse may only dispose of items in the conjugal household belonging to him or her and may only undertake an obligation for such disposition if the other spouse consents thereto (§ 1369 para. 1 German Civil Code). It does not matter in this context whether the item in question is owned solely by the acting spouse or whether it is held jointly. Items serving only the personal use of one of the spouses are not covered by § 1369 German Civil Code.

The Guardianship Court may, upon an application by one spouse, substitute the consent of the other spouse if the latter unreasonably refuses it, or by reason of illness or absence is prevented from making a declaration (§ 1369 para. 2 German Civil Code). The provisions of §§ 1366 to 1388 German Civil Code apply *mutatis mutandis* (§ 1369 para. 3 German Civil Code).

There is no restriction concerning gifts to third parties. However, an inappropriate gift may lead to a premature equalization of accrued gains (§ 1386 German Civil Code). There is also a protective provision in the context of final assets (§ 1375 para. 2 German Civil Code), see Question 80.

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

There are no special rules for the administration of professional assets.

⁸² See BGH, 13.11.1963, *BGHZ*, 40, 218, 219 f.

⁸³ For the abolition of this restriction see *Deutscher Notarverein, Notar*, 2008, 15, 16.

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

There is no specific duty for one spouse to provide information to the other about the administration of the assets. There is, however, a general obligation to provide some information, based on the duty of conjugal community under general matrimonial law (§ 1353 para. 1 German Civil Code),⁸⁴ which also exists for the community of accrued gains, see Question 195.

A duty to provide information upon the termination of the matrimonial regime also exists. At that moment each spouse is obliged to furnish information concerning the contents of his or her final assets to the other spouse. Each spouse may demand to be present at the drawing up of the inventory and that he or she be furnished with information regarding the value of the assets and obligations. He/she may also demand that the inventory be drawn up at his or her expense by the competent authorities or by a competent official or notary (§ 1379 para. 1 German Civil Code). This is also possible if a spouse has petitioned for divorce or filed a claim for the annulment of the marriage (§ 1379 para. 2 German Civil Code).

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

The resolution of disputes between the spouses concerning the administration of assets depends on the assets in question. Since generally each spouse manages separately his or her assets each spouse can decide according to his or her own preferences. One solution may be a premature dissolution of the community of accrued gains, see Question 80.

If there is co-ownership by defined shares in a certain asset according to § 741 German Civil Code, then each part owner may at any time demand the cancellation of the co-ownership (§ 749 German Civil Code). Such a cancellation occurs by a division in kind if the joint object is capable of being divided into identical parts corresponding to the shares of the part owners (§ 752 German Civil Code). Where such a division in kind is excluded, the cancellation of co-ownership occurs by the sale of the joint object (in the case of a plot of land by compulsory auction) and by a division of the proceeds (§ 753 para. 1 German Civil Code).

There is, however, some protection under the rules for enforcement. In the case of co-ownership by spouses or ex-spouses the defendant may obtain a provisional stay of execution if the welfare of a common child would be seriously endangered⁸⁵. Another form of protection lies in the fact that the co-owner's share may constitute his or her entire assets and therefore his or her application for a forced sale can already be blocked by the other spouse (see § 1365 German Civil Code)⁸⁶. It has also been argued that such an application may be contrary to the duty of conjugal community under general matrimonial law (§ 1353 para. 1 German Civil Code)⁸⁷.

⁸⁴ G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch, Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1353 No. 13.

⁸⁵ See § 180 para. 3 Law on forced sale and forced administration (Gesetz über die Zwangsversteigerung und Zwangsverwaltung; ZVG). More in detail see D. Schwab, "Der Schutz der Familienwohnung im deutschen Recht", in: D. Henrich and D. Schwab (eds.), *Der Schutz der Familienwohnung in Europäischen Rechtsordnungen*, Bielefeld: Gieseking, 1995, p. 129, 137 et seq.

⁸⁶ See D. Schwab, "Der Schutz der Familienwohnung im deutschen Recht", in: D. Henrich and D. Schwab (eds.), *Der Schutz der Familienwohnung in Europäischen Rechtsordnungen*, Bielefeld: Gieseking, 1995, p. 129, 139; A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 106, § 5 No. 79.

⁸⁷ G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1353 No. 11.

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?

It is widely recognized that existing German law does not effectively prevent manipulations of the assets of one spouse when divorce becomes a likely course of events. Therefore the Reform Draft Bill tries to strengthen the existing remedies (see Question 3). One has to distinguish between different situations and problems. Where a spouse violates the rules governing the administration of assets this may lead to a premature equalization of accrued gains (§ 1386 para. 2 German Civil Code), see Question 80. In the case of a lack of information also a premature equalization of accrued gains may be claimed (§ 1386 para. 2 German Civil Code), see Question 80. Still another problem are manipulations which, as a result, may make the gains of the debtor spouse “disappear” before the decisive moment when the application for divorce is filed (§ 1384 German Civil Code). Therefore there is also a protective provision in the context of the diminution of final assets (§ 1375 para. 2 German Civil Code), see Question 81.

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

If a spouse is incapable of administering his or her assets, this may lead to a premature equalization of accrued gains (§ 1386 German Civil Code), see Question 80. There is also a protective provision in the context of final assets (§ 1375 German Civil Code), see Question 81. Moreover, the general rules on care for persons of full age (Betreuung) apply (§§ 1896 et seq. German Civil Code). The other spouse may become the carer (Betreuer) (see § 1897 para. 5 German Civil Code).

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?

According to § 1372, if the matrimonial regime is terminated otherwise than by the death of one of the spouses, the accrued gains shall be equalized according to the provisions of §§ 1373 to 1390 German Civil Code. There are several grounds for the dissolution of the matrimonial property regime.

A change of the property regime or an exclusion of the statutory matrimonial property regime by agreement will lead to the dissolution of the community of accrued gains (see §§ 1408 and 1414 German Civil Code).

The premature equalization of accrued gains is another ground. The separation of property takes place when the judgment recognising the premature equalization of accrued gains becomes final (§ 1388 German Civil Code).

A marriage will automatically end in the case of an annulment (§ 1313 German Civil Code). The consequences of an annulment are in many cases basically the same as in the case of a divorce (§ 1318 German Civil Code).

If the spouses have been separated for at least three years, either of them may apply for the premature equalization of claims (§ 1385 German Civil Code). When the judgment recognising the premature equalization of accrued gains becomes final, the separation of property takes place (§ 1388).

In the case of divorce there is a dissolution of the community of accrued gains, § 1564 Civil Code.⁸⁸

With the death of one of the spouses a dissolution also occurs (§ 1371 para. 1 German Civil Code).

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

The decisive date for the dissolution of the matrimonial property regime is the dissolution itself.

A change of the property regime or an exclusion of the statutory matrimonial property regime will occur by agreement.⁸⁹ In the case of a premature equalization of accrued gains the decisive date is when the judgment recognising the premature equalization of accrued gains becomes final (§ 1388 German Civil Code).⁹⁰ In the case of an annulment of a marriage the decisive date is when the judgment becomes final.⁹¹ In the case of separation and an application for the dissolution of the marital property regime the decisive date is when the judgment becomes final.⁹² In the case of divorce the relevant date for the actual dissolution is the day on which the divorce decree becomes final, § 1564 German Civil Code.⁹³ In the case of the death of one of the spouses the date of death is the decisive moment.⁹⁴

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

The central element of the community of accrued gains is the equalization of such gains. If the matrimonial regime is terminated otherwise than by the death of one of the spouses, the accrued gains shall be equalized according to the provisions of §§ 1373 to 1390 (§ 1372 German Civil Code). Since accrued gains are the amount by which the final assets of a spouse exceed his or her initial assets, one has to start with a determination of the final assets. Then the value of the initial assets has to be subtracted; the result is the accrued gains. The accrued gains of the spouses then have to be compared. If the accrued gains of one spouse exceed those of the other, this spouse is entitled to half of the surplus as an equalization claim (§ 1378 para. 1 German Civil Code).

The amount of the equalization claim shall be limited to the value of the assets which exist upon the termination of the matrimonial regime, after the deduction of any obligations (§ 1378 para. 2 German Civil Code). In cases of divorce this may be critical as the debtor spouse may tactically reduce his or her assets in the – often considerable – time between the pendency of the divorce application (as the relevant date for determining the final assets, § 1384 German Civil Code) and the actual dissolution, i.e., the day on which the divorce

⁸⁸ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 158, § 6 No. 35.

⁸⁹ G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1361 No. 2.

⁹⁰ G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1361 No. 2.

⁹¹ G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1361 No. 2.

⁹² I. Groß, in: B. Dauner-Lieb, T. Heidel and G. Ring (eds.), *Anwaltkommentar zum Bürgerlichen Gesetzbuch, Band 4: Familienrecht*, Bonn: Deutscher Anwaltverlag, 2005, § 1386 No. 1.

⁹³ G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1361 No. 2.

⁹⁴ E. Koch, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck 2000, § 1371 No. 1.

judgment becomes final (§ 1564 German Civil Code).

A new limit will be introduced by the Reform Bill. According to this bill the equalization claim cannot be higher than half of the actual assets of the other spouse. Thus it will be prevented that the debtor will be indebted by the equalization of accrued gains. On the other hand, according to the Reform Bill there will be protection against disloyal acts also for the equalization claim itself. Such a diminution of property will not be recognised.

The equalization claim only comes into existence upon the termination of the matrimonial regime (§ 1378 para. 3 German Civil Code). From this time onwards it is subject to inheritance and is transferable. An agreement made by the spouses during proceedings for the dissolution of their marriage for the purpose of the equalization of the accrued gains when the marriage is dissolved requires a notarial deed; § 127 German Civil Code shall also apply to an agreement which is entered in the record of the proceedings before a trial court in a matrimonial action, otherwise neither spouse may oblige him or herself to dispose of his or her equalization claim prior to the termination of the matrimonial regime (§ 1378 para. 3 German Civil Code).

The equalization claim prescribes in three years; the period begins to run from the time when it becomes known to the spouse that the matrimonial regime has been terminated (§ 1378 para. 4 German Civil Code). However, the claim prescribes at the latest thirty years after the termination of the matrimonial regime.

Special circumstances may modify or even exclude an equalization claim. A special provision deals with advancement (*Vorausempfang*). An equalization claim by a spouse shall take into account what was received by him or her through a legal transaction *inter vivos* from the other spouse with an understanding that it should be taken into account in the equalization claim. In case of doubt it shall be presumed that dispositions should be taken into account if their value exceeds the value of occasional gifts which are customary according to the living standards of the spouses (§ 1380 para. 1 German Civil Code).

When the equalization claim is calculated, as a first step the value of the disposition shall be included in the accrued gains of the spouse who made such a disposition. Then, as a second step, the value of the disposition also has to be subtracted from the accrued gains of the receiver.⁹⁵ Then, if the receiver has an equalization claim, as a third step the advancement reduces his claim.⁹⁶ The value is established as of the date of the disposition (§ 1380 para. 2 German Civil Code).

A refusal to pay on grounds of gross inequity is possible. The debtor may refuse to fulfil an equalization claim to the extent that the equalization of accrued gains would be grossly inequitable in the circumstances of the case (§ 1381 para. 1 German Civil Code). Gross inequity can exist particularly if the spouse who made smaller gains over a considerable period negligently failed to carry out the economic obligations which are inherent in marital relations, e.g., maintenance obligations (§ 1381 para. 2 German Civil Code). It is the subject of some controversy if the maladministration of the claimant spouse's own assets can justify an objection by the debtor based on § 1381 German Civil Code.⁹⁷ It is also disputed how far

⁹⁵ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 119, § 5 No. 122.

⁹⁶ Details are controversial G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1380 No. 10 et seq.

⁹⁷ Pro E. Koch, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck 2000, § 1381 No. 17. Contra G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1381 No. 16.

marital misconduct can be relevant.⁹⁸ The general clause of § 1381 German Civil Code is also used in some cases where the strict rules for initial and final assets would lead to inappropriate results.

There can also be a postponement of the claim. The Family Court may, upon application, postpone an equalization claim to the extent that it is not contested by the debtor, if immediate payment would occur at an unreasonable time even though the interests of the creditor have been taken into account, e.g. granting payment by instalments. An immediate payment would also occur at an unreasonable time if the housing and living conditions of the common children would deteriorate with lasting effect (§ 1382 para. 1 German Civil Code). A debtor must be ordered to pay interest on a postponed claim (§ 1382 para. 2 German Civil Code). The Family Court may, upon application, order that the debtor furnish security for a postponed claim (§ 1382 para. 3 German Civil Code). Insofar as an action relating to the equalization claim is pending before the courts, the debtor may only present an application for postponement within such an action (§ 1382 para. 5 German Civil Code). Upon application, the Family Court may also rescind or vary a final decision, if the circumstances have substantially changed after the decision (§ 1382 para. 6 German Civil Code).

A “premature” equalization of accrued gains may occur in some cases. If the spouses have been separated for at least three years, either of them may apply for such an equalization (German Civil Code § 1385). A spouse is also entitled to apply for a premature equalization if the other spouse has, over a long period of time, negligently failed to fulfil the economic obligations inherent in the marital relations and it can be presumed that he or she will also fail to fulfil these obligations in the future (§ 1386 para. 1 German Civil Code). A spouse may also claim a premature equalization of accrued gains in some other cases (§ 1386 para. 2 German Civil Code), e.g., if the other spouse has entered into a legal transaction of the kind mentioned in § 1365 German Civil Code (disposal of property in its entirety) without the requisite consent.

It is also possible if the other spouse has decreased his or her assets through acts mentioned in § 1375 German Civil Code (disloyal acts) and a substantial jeopardy for a future equalization claim is feared. A spouse is also entitled to claim a premature equalization if the other spouse has persistently refused, without sufficient justification, to disclose the extent of his or her assets (§ 1386 para. 3 German Civil Code). The Reform Bill extends the application of § 1386 German Civil Code and adds the case where there is an unreasonable refusal to inform the other spouse of his or her own assets.

When a claim for the premature equalization of accrued gains or for an annulment of the marriage is filed, or an application for divorce is registered, a spouse may demand the furnishing of security, if it is feared that his or her right to the future equalization of accrued gains will be in substantial jeopardy (§ 1389 German Civil Code). Wilfully concealing assets is such a case. It is however controversial which kinds of other fraudulent manoeuvres may justify the furnishing of security.⁹⁹

There can also be claims by a spouse entitled to equalization against third parties. To the extent that a spouse is left without an equalization claim as a result of the other spouse having made gratuitous dispositions to a third party with the intention of causing a detriment to the spouse, this third party is obliged to make a restitution of the assets so obtained to the spouse pursuant to the provisions concerning the return of unjust enrichment (§§ 812 et seq. German Civil Code). The third party may avoid the restitution by paying the amount

⁹⁸ Only in “extreme cases” G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1381 No. 17.

⁹⁹ G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1389 No. 4.

outstanding (§ 1390 para. 1 German Civil Code). The same provisions apply to other legal transactions if the third party had knowledge of the intent to cause a detriment to the spouse (§ 1390 para. 2 German Civil Code). The Reform Bill aims to change the priority of the claims. Restitution by payment will be the first alternative; restitution of the asset obtained will only be the second choice.

The claim prescribes three years after the termination of the property regime (§ 1390 para. 3 German Civil Code). If the claim for a premature equalization of accrued gains or for divorce or an annulment of the marriage is filed, a spouse may demand that the third party furnish security in respect of the equalization claim against the third party (§ 1390 para. 4 German Civil Code). This shall be extended by the Reform Bill.

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?

If the gains accrued by one spouse exceed those of the other spouse, the latter is entitled to half of the difference in the surplus as an equalization claim, § 1378 para. 1 German Civil Code. "Accrued gains" thus means the amount by which the final assets of a spouse exceed his or her initial assets (§ 1373 German Civil Code) and consequently initial and final assets have to be determined and valued. "Assets" include in principle everything with an economic value. The Code allows for several adjustments to the actual amount of initial and final assets in the interest of a true equalization of accrued gains.

Initial assets are the assets belonging to a spouse, after the deduction of his or her obligations, at the beginning of the matrimonial regime; obligations may only be deducted from the extent of the property (§ 1374 para. 1 German Civil Code). The rule that there can be no "negative initial assets" and that even the assets of a spouse who is heavily indebted at the time of the marriage are set at nil can lead to unfair results for the other spouse. Therefore this rule shall be abolished under the Reform Bill on the community of accrued gains.

According to the legal concept, assets which have been acquired by a spouse after the beginning of the statutory property regime as a result of death or in consideration of a prospective right to inheritance, or through a gift, or as furnishings, are made independent of the conjugal community and bear no connection with the joint accrue ment through the marriage. They are generally an expression of a personal relationship of the receiving spouse with a third party. According to § 1374 para. 2 German Civil Code, they are therefore to be treated as if they had been made before the beginning of the property regime and are - after the deduction of any obligations - to be included in the initial assets, insofar as the circumstances do not warrant their inclusion in the income. According to the case law this rule is exclusive and cannot be extended to other kinds of income¹⁰⁰. However, the legal form of the privileged transaction is not decisive. It can also occur in the form of a sale of a house.¹⁰¹ The value of a house can be reduced by the encumbrance with a right of residence for the seller.¹⁰² A gift between the spouses,¹⁰³ and also a "disposition as a result of marriage",¹⁰⁴ are not covered by § 1374 para. 2 Civil Code.

Final assets are those assets belonging to a spouse, after the deduction of any obligations, at the time of the termination of the matrimonial regime. For the final assets also the market

¹⁰⁰ BGH, 22.12.1976, *BGHZ*, 68, 43, 45 and *FamRZ*, 1977, 124. See also D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 259.

¹⁰¹ BGH, 22.01.2006, *BGHZ*, 170, 227, 324 and *FamRZ*, 2007, 978.

¹⁰² BGH, 22.01.2006, *BGHZ*, 170, 227, 324 and *FamRZ*, 2007, 978.

¹⁰³ BGH, 20.05.1985, *BGHZ*, 101, 65; 14.10.1987, *FamRZ*, 1988, 373.

¹⁰⁴ BGH, 26.11.1981, *BGHZ*, 82, 227, 234.

value is decisive; the law does not prescribe a specific method of calculation.¹⁰⁵ Spouses who are liable as joint and several debtors can generally, for the purpose of determining the final assets, only take into account as an obligation the respective share they are obliged to bear within their internal relationship.¹⁰⁶ Obligations can be deducted if under the provisions of § 1390 there are claims against third parties, even to the extent that these exceed the amount of the assets (§ 1375 para. 1 German Civil Code). However, any agricultural or forestry asset which is to be taken into consideration for the computation of the initial or final assets shall be appraised according to the value of its produce (Ertragswert, § 1376 para. 4 German Civil Code).

It is also necessary to equalize any undue diminishing of a spouse's final assets (which he or she may diminish in order to improve his or her position in relation to the other spouse). Therefore the final assets of a spouse include fictitious amounts by which such assets were diminished due to certain facts (§ 1375 para. 2 German Civil Code). The first is that after the beginning of the matrimonial regime a spouse made gratuitous dispositions by which he or she did not comply with a moral obligation or one which arose from principles of common decency. Another case is when the spouse has squandered assets or has entered into transactions with the intention of causing a detriment to the other spouse. There is, however, a time-limit. The amount of the property diminution shall not be included in the final assets if it occurred at least ten years before the termination of the matrimonial regime or if the other spouse had consented to such gratuitous disposition or the squandering of property (§ 1375 para. 3 German Civil Code).

In litigation, it may be difficult for a spouse to know what his or her partner's initial and final assets actually amount to. § 1377 German Civil Code presumes for that purpose that where the spouses jointly established the contents and value of their respective initial assets in an inventory, this inventory is accurate. Each spouse may demand co-operation in the drawing up of such an inventory. Where no such inventory has been drawn up – as in the majority of cases – § 1377 German Civil Code presumes that the final assets of a spouse represent his or her accrued gains, i.e., that no initial assets existed. Each spouse is therefore obliged to prove the existence and amount of initial assets if he or she claims to have had such assets.

To make their final assets transparent, each spouse according to § 1379 German Civil Code is obliged to furnish information concerning the contents of his or her final assets to the other spouse. In the case of an annulment or a divorce, such a claim may already be made following the petitioning for the annulment or divorce, § 1379 para. 2 German Civil Code. The presentation of evidence may be demanded according to the Reform Bill on the community of accrued gains.

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?

For calculating the accrued gains one has to distinguish between different grounds and dates, see Question 82.

The relevant date for the determination and valuation of initial assets is the beginning of the matrimonial regime. The market value of the assets is decisive.¹⁰⁷ The value for the computation of initial assets shall be, at the beginning of the matrimonial regime, the value of the assets existing at that time (§ 1376 para. 1 clause 1 German Civil Code).

¹⁰⁵ BGH, 06.02.2008, *BGHZ*, 175, 207 and *FamRZ*, 2008, 761, 762 f.; D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007.

¹⁰⁶ BGH, 09.01.2008, *FamRZ*, 2008, 602.

¹⁰⁷ E. Koch, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck 2000, § 1376 No. 8.

There is, however, a different rule for assets which are excluded from the equalization of gains (§ 1374 para. 2 German Civil Code, see Question 81). For these assets to be included in the initial assets, the value at the time of acquisition is decisive (§ 1376 para. 1 clause 2 German Civil Code).

The relevant date for the determination and valuation of final assets is the time of the termination of the matrimonial regime. Even if only the value of still existing initial assets, e.g., land or a business, has increased, the difference between the final and the initial value has to be equalized.¹⁰⁸ However, it is necessary to exclude purely fictitious profits which may occur only because of inflation, e.g., for the same piece of land. For this purpose the courts follow a formula using the Federal consumer price index.¹⁰⁹ According to this formula the initial asset is increased in value and thus reduces the accrued gains of the spouse. The fact that a spouse made gains before the pendency of the divorce application, but only after a preceding factual separation of the spouses, does not justify an objection by the debtor based on the general clause of § 1381 German Civil Code.¹¹⁰ For a diminution in assets to be included in the computation of the final assets, the value at the time of such diminution is decisive (§ 1376 para. 2 German Civil Code). The provision of § 1376 para. 1 and 2 German Civil Code applies *mutatis mutandis* to the appraisal of obligations (§ 1376 para. 3 German Civil Code).

A special provision deals with the time of calculation in the case of divorce. In this case the date for calculating the amount of accrued gains will be the date of pendency of the application for divorce instead of the date of the termination of the matrimonial regime (§ 1384 German Civil Code). This is the date of serving the application for divorce (§ 261 German Civil Code). This rule will be extended by the Reform Bill also to the equalization claim itself.

There is also a special provision for the time of calculation in the case of a premature equalization (§ 1387 German Civil Code). If the claim for a premature equalization of accrued gains is recognized, then the date on which the claim for a premature equalization was filed will be the date for calculating the accrued gains instead of the date of the termination of the matrimonial regime. § 1387 German Civil Code will be amended so that this date is also decisive for the equalization claim itself.

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?

If assets belonging to one spouse have been used for the other spouse, in principle there is no additional right to compensation in matrimonial property law. The basic idea is that the rules on the equalization of accrued gains are almost exclusive. It is not totally excluded from arguing that there was an undisclosed partnership agreement between the spouses which after the breakdown of the marriage can serve as a basis for a compensation claim¹¹¹ (see Q. 5 and 153). However, the courts regularly argue that the rules on the equalization of accrued gains are sufficient and they deny claims based on partnership law¹¹².

¹⁰⁸ See E. Koch, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck 2000, § 1373 No. 14.

¹⁰⁹ See D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 260.

¹¹⁰ G. Bruder Müller, in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1381 No. 19.

¹¹¹ BGH, 22.02.1967, *BGHZ*, 47, 157, 162 et seq.

¹¹² See A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 142, § 5 No. 227.

There are no specific rules concerning gifts between spouses (see Question 14). Here it suffices that the courts have indeed accepted such further claims, using a restricted notion of "gifts".¹¹³

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?

If one spouse has paid certain debts, compensation is possible under the rules of the law of obligations. If there was a contractual liability of both spouses against a third party and one of the spouses had paid as a joint debtor, a compensation claim may arise according to § 426 German Civil Code dealing with the duty to adjust advancements and the passing of claims.¹¹⁴ The joint and several debtors are obliged in equal proportions in relation to one another unless this is "otherwise determined" (*anderweitig bestimmt*). This has been interpreted by the courts in the sense that there will be no compensation if payment was made during an existing marriage since it is assumed that the paying spouse did not have the intention of reclaiming his or her money.¹¹⁵ However, if payment has occurred after the breakdown of the marriage it is assumed that the paying spouse had the intention of recovering. Generally, there is a division in equal amounts between the spouses.¹¹⁶ The decisive date for the breakdown of the marriage is generally the date from which the spouses finally lived apart.¹¹⁷

Only in extraordinary cases is a compensation claim possible according to the so-called "interference with the basis of the transaction" (*Störung der Geschäftsgrundlage*, § 313 German Civil Code),¹¹⁸ see Question 153.

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

The spouses do not have preferential rights over the matrimonial home and the household assets. However, it is generally accepted that general matrimonial law gives the non-owning spouse a right of occupation (possession)¹¹⁹. In some cases the courts have also recognized a right of the non-owning spouse to block the sale of the matrimonial home¹²⁰. According to the Civil Code only the restrictions according to §§ 1365, 1369 exist (see Question 72). However, if the spouses are separated or if one of them wants to live separately, either spouse may plead severe hardship and apply for exclusive possession of the matrimonial home on this ground (§ 1361b German Civil Code). Another ground is domestic violence. The final termination of the matrimonial consortium as it occurs upon divorce brings about the need to divide the household assets and to determine the use of the matrimonial home. Where the parties cannot agree, these issues will be decided by a court order according to the rules set out in the

¹¹³ See §§ 531 para. 2, 812 German Civil Code.

¹¹⁴ BGH, 30.09.1987, *FamRZ*, 1987, 1239, 1240; 06. 11. 2002, *FPR*, 2003, 246.

¹¹⁵ G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch*, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 426 No. 9a.

¹¹⁶ BGH, 11.05.2005, *FamRZ*, 2005, 1236, 1237; A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 139, § 5 No. 218.

¹¹⁷ R. Wever, *Vermögensauseinandersetzung der Ehegatten außerhalb des Güterrechts*, 4th Edition, Bielefeld: Giesecking, 2006, No. 368."

¹¹⁸ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 143 f., § 5 No. 234.

¹¹⁹ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 53 f., § 4 No. 13 et seq.

¹²⁰ See D. Schwab, "Der Schutz der Familienwohnung im deutschen Recht", in: D. Henrich and D. Schwab (ed.), *Der Schutz der Familienwohnung in Europäischen Rechtsordnungen*, Bielefeld: Giesecking, 1995, p. 129, 135 et seq.

German Household Items Regulation (“Hausratsverordnung”), see Question 10. This is a Regulation which has been specially made for this purpose but has not been incorporated into the Civil Code. Jurisdiction lies with the family court. The procedure follows the rules for non-contentious matters (freiwillige Gerichtsbarkeit). There is a reform project subject to which the procedural rules will be introduced into a new statute on family procedure.

Common household assets are not included in the equalization of gains since there are special provisions to deal with them.¹²¹ In the allocation of household items the courts will not necessarily follow ownership relationships according to the general rules of civil law. Instead the court will distribute according to equity principles.

Household items owned jointly by the spouses will be divided equitably and expediently, according to § 8 of the Regulation, subject to the presumption that effects acquired during the marriage are jointly owned.

Even items owned solely by one of the spouses may be distributed to the other spouse if he or she needs them and if such distribution is deemed equitable in the circumstances of the case (§ 9). Usually a court order will establish that the item is leased, and only in exceptional cases will the court transfer ownership (§ 9 para. 2). Similarly, the court may issue orders relating to the use of the matrimonial home by way of establishing or reshaping existing tenancy agreements, even if the ownership remains unchanged (§§ 3 et seq.).

The content of the Regulation will be transferred to the Civil Code according to the Reform Bill on the community of accrued gains (new §§ 1586a et seq. German Civil Code).

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

The spouses do not have preferential rights over other assets.

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

The provisions relating to maintenance upon divorce are not directly connected with the rules relating to other post-marital financial consequences such as the equalization of accrued gains and the adjustment of pension rights.¹²² Matrimonial property law does not fulfil a function of maintenance. Its purpose is to equalize accrued gains and to compensate for losses due to marital arrangements but not to satisfy the needs of a spouse after divorce. Therefore the dissolution of the matrimonial property regime as such does not affect the attribution of maintenance. However, the maintenance debtor’s ability to pay and the needs of the maintenance claimant may be influenced by actually existing claims and money received under matrimonial property law.¹²³

According to recent case law it must also be avoided that the value of the same asset is taken into account twice as a part of the maintenance debtor’s ability to pay and also as an asset of the debtor spouse in the context of the equalization of accrued gains.¹²⁴ The courts therefore try to draw a line between maintenance and the equalization of accrued gains. For example, the existing goodwill of a veterinary practice may be taken into account as a final asset

¹²¹ D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 254.

¹²² See K. Kroll, “The Reform of German Maintenance Law”, in: B. Atkin (ed.), *The International Survey of Family Law*, 2007 Edition, Bristol: Jordan Publishing, 2007, p. 85 et seq.

¹²³ See G. Brudermüller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1577 No. 10.

¹²⁴ See A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 114, § 5 No. 107.

whereas future income is taken into account for maintenance after divorce.¹²⁵ It is controversial how a double utilization of debts for maintenance and the equalization of accrued gains can be avoided.¹²⁶ The mere fact that such an obligation also plays a role in the ability to pay in maintenance law is not a convincing argument in respect of the calculation of the final assets.¹²⁷

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?

Pension rights and claims are not included in the equalization of gains since these are covered by special provisions,¹²⁸ see Question 62. The special pension rights adjustment (Versorgungsausgleich) is an attempt to compensate the time that has been devoted totally or substantially to child care and housework. The principle of an equalization of accrued gains has been extended to the equalization of pension rights. An equal division takes place of all pension rights and expectations accrued by the spouses during the marriage (§§ 1587 et seq. German Civil Code). The spouse who has the higher pension expectation or prospect is under an obligation to effect the equalization. The claimant is entitled to half of the difference in value. Such a pension rights adjustment is independent of the matrimonial property regime of the parties. The dissolution of the matrimonial property regime does not affect the pension rights and claims of one or both spouses. However, insurance in the form of a lump-sum payment which is not covered by the equalization of pension rights is taken into account by the equalization of accrued gains.¹²⁹

The legislator has provided two basic models for the equalization of different types of pension rights, one under social security or, respectively, public law ("öffentlich-rechtlicher Versorgungsausgleich") and one under private law ("schuldrechtlicher Versorgungsausgleich"). If there is an equalization under the rules of public law the Family Court will transfer the claim to half of the difference in the value of the pension rights of one spouse to the other spouse (§§ 1587b et seq. German Civil Code). The court thus transfers one spouse's claim to future pension rights in such a way that the receiving spouse gains his or her own future claim to the transferred pension rights. Where no equalization under public law is possible a contractual equalization of pension rights will be performed according to § 1587f German Civil Code.

The spouses may completely depart from the statutory rules governing the splitting of pensions by way of a marriage contract which excludes of splitting of pensions. Such an exclusion will be deemed ineffective, however, when an application for a divorce has been entered within one year after the date of the contract (§ 1408 para. 2 Civil Code). Further, the spouses can conclude an agreement in connection with the divorce (§ 1587o German Civil Code). This agreement will require notarial authentication or recording in a Court protocol and the approval of the Family Court.

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?

¹²⁵ See BGH, 06.02.2008, *BGHZ*, 175, 207 and *FamRZ*, 2008, 761, 763 f.

¹²⁶ See A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 114, § 5 No. 107.

¹²⁷ See E. Koch, "Die Entwicklung der Rechtsprechung zum Zugewinnausgleich", *FamRZ*, 2008, 1381, 1383.

¹²⁸ D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 254.

¹²⁹ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 114, § 5 No. 106.

The spouses may avoid – even if they wish to remain under the statutory property regime as such – by way of a marital agreement contract some dangers and harsh results inherent in the rigid rules of the statutory regime (§§ 1408 para. 1, 1410 German Civil Code). This is especially possible where one of the spouses runs an enterprise or where substantial gains have occurred during the marriage but without any relation to the marriage itself. The spouses may thus exclude certain items of property – e.g., an enterprise – from the equalization. They may also agree on other modifications as to how the equalization of accrued gains is to take place (see Question 199). § 1378 para. 3 sentence 2 German Civil Code also grants the spouses the right to draw up such an agreement during the proceedings for the dissolution of their marriage.

The equalization claim arises upon the termination of the property regime and from this time onwards it is subject to inheritance and is transferable, § 1378 para. 3 sent. 1 German Civil Code. Such a claim may be reduced according to § 1380 para. 1 Civil Code if he or she has received assets from the other spouse, either because such dispositions were actually understood to reduce a further equalization claim or because they are presumed to have been meant in such a way because they exceed the value of occasional customary gifts according to the spouses' living conditions.

The debtor may partly or entirely refuse to fulfil an equalization claim if, under the circumstances of the individual case, an equalization of accrued gains would appear to be grossly inequitable, see § 1381 German Civil Code (see Question 80). However, the courts have been cautious in accepting such gross inequity.¹³⁰ They require an intolerable clash with the ideas of justice as in cases where the claimant had significantly and negligently failed to carry out his or her obligations arising from the conjugal community (see § 1381 para. 2 German Civil Code).

The statutory equalization of gains under §§ 1363 et seq. German Civil Code may not in all cases lead to satisfactory results. A spouse may therefore try to achieve further compensation by way of legal provisions outside matrimonial property law. How far this is possible or whether this is prevented by § 1363 et seq. German Civil Code acting as *leges speciales* in the area of equalization has been subject to debate. It will depend on the grounds on which such further claims are based in the individual case; see Questions 83 and 84.

The Family Court may order, upon an application by the creditor, that the debtor transfers certain items of his or her property to the creditor spouse, subject to taking the same into account in the equalization claim, if this is necessary to avoid gross inequity to the creditor and if it can reasonably be expected of the debtor; the decision shall determine the amount to be taken into account for the equalization claim (§ 1383 para. 1 German Civil Code).

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

According to the law of succession the surviving spouse is entitled to receive a quarter of the estate if there are any surviving children (or their issue) of the deceased (§ 1931 para. 1 and 2 German Civil Code). He or she will receive half of the estate if the deceased is survived only by his or her parents or their issue (i.e., sisters, brothers or nieces, nephews of the deceased) or grandparents. The surviving spouse receives the total estate if the deceased is not survived by any of the aforementioned relatives.

However, there is a specific equalization of accrued gains upon death besides the rules of succession. If the matrimonial regime is ended by the death of one of the spouses, the equalization of accrued gains is achieved by increasing the statutory share in the estate of the surviving spouse by one quarter of the estate. In this regard it is irrelevant whether the

¹³⁰ See BGH, 18.03.1992, *FamRZ*, 1992, 787, 788.

spouses have made gains in any individual case; the arithmetical equalization of accrued gains is always replaced by the addition of a quarter of the assets (§ 1371 para. 1 German Civil Code). This also occurs if the spouse who acquired the smaller surplus dies first; the resulting discrimination of the heirs of this spouse has been repeatedly criticized.¹³¹

Upon death without the surviving spouse being either an heir or the recipient of a legacy (Vermächtnis) an equalization claim is granted according to the general rules of matrimonial property law. The surviving spouse is entitled to demand the equalization of accrued gains according to the provisions of §§ 1373 to 1383, 1390 German Civil Code. The compulsory portion (Pflichtteil) of the surviving spouse or of another person entitled to a compulsory portion is in this case determined according to the statutory share in the estate of the spouse without taking into account the above-mentioned increase (§ 1371 para. 2 German Civil Code).

If the surviving spouse disclaims the inheritance, he or she is entitled to demand, in addition to an equalization of accrued gains, the compulsory portion even though, according to the provisions of succession law, it would not be due to him or her. However, this does not apply when he or she has waived his or her right to the statutory share in the estate or his or her compulsory portion by means of a contract with his spouse (§ 1371 para. 3 German Civil Code).

There is another protective provision in succession law which is applicable to all matrimonial property regimes, according to which an heir has a special obligation. He/she is bound as regards all the members of the deceased's family who, at the time of death, belonged to the deceased's household and were maintained by him or her, to maintain them for the first thirty days after the accrual of the inheritance and to permit them to use the house and all the household assets (§ 1969 para. 1 German Civil Code).

III. Deferred community

Not relevant.

IV. Separation of property

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

To the extent that the parties opt for a contractual regime, they do so nearly exclusively in favour of separate property. Separation of property occurs where the spouses have formally agreed on such a regime. It also occurs where the spouses exclude or eliminate the statutory matrimonial regime, except if their marriage contract provides otherwise (§ 1414 sent. 1 German Civil Code). The same applies if the equalization of accrued gains or the equalization of pension rights is excluded or the community of property is eliminated (§ 1414 sent. 2 German Civil Code). Separation of property also takes place when the judgment recognising a premature equalization of accrued gains becomes final (§ 1388 German Civil Code), see Question 80. Also when a judgment terminating the matrimonial property regime of community property becomes final and absolute, separation of property applies from then onwards (§§ 1449, 1470 German Civil Code).

There are only two different categories of assets, those belonging to the husband and those belonging to the wife. Each spouse remains the owner of his or her assets. Assets which are

¹³¹ See, A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 106, § 5, p. 123 f., No. 141.

newly acquired by the spouses will become personal assets.¹³² Joint assets only can come into existence by the application of the general rules of civil law in the form of co-ownership by defined shares, see Questions 60 and 130. However, a certain influence is exerted by general matrimonial law so that there is no complete independence of the spouses' assets.¹³³ A spouse, for example, also has a right to possession of the matrimonial home, see Question 85 and 155.

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

The separate property of the spouses comprises all kinds of assets, see Question 59. Often one of the spouses transfers property or other assets to the other spouse in the course of the marriage. Should the marriage be subsequently dissolved, problems may arise if a spouse then wishes to regain such assets, as the law does not provide special rules for this case. See Question 153.

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

Joint property may only arise according to the general rules, e.g., if the spouses jointly enter into a transaction.¹³⁴ Spouses can acquire assets jointly in the form of co-ownership by shares, see Question 5. But also a partnership may be created by them. See Question 60.

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

There is no substitution of assets governed by specific rules. It is also not necessary to distinguish between movables and immovables, see Questions 61 and 153.

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

The position of pension rights and claims and insurance rights is in general not affected by the separation of property. The rules on the equalization of pension rights apply independently from the matrimonial regime,¹³⁵ see §§ 1587 et seq. German Civil Code (Questions 62 and 88). In addition to an agreement establishing separate property the equalization of pension rights may be excluded by a marital agreement (§ 1408 para. 2 German Civil Code, see Question 191). However, in particular, where there is an agreement on the separation of property, plus the exclusion of maintenance after divorce and the exclusion of the equalization of pension rights to the detriment of a weaker, needy spouse, such an agreement may be unenforceable or even invalid according to recent case law, see Question 201.

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

The ownership of assets is proved between the spouses according to the general rules of matrimonial law. As to the rebuttable presumption of § 1362 German Civil Code which is also applicable here,¹³⁶ see Question 64.

¹³² D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 191.

¹³³ J. Gernhuber and D. Coester-Waltjen, *Familienrecht*, 5th Edition, Munich: Beck, 2006, § 40 No. 1.

¹³⁴ D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 192.

¹³⁵ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 129, § 5 No. 161.

¹³⁶ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 129, § 5 No. 161.

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

The ownership of assets can be proved against third parties according to the general rules of civil law and matrimonial law. There are rebuttable presumptions which are also applicable in cases of separate property.¹³⁷ See Question 65.

136. Which debts are personal debts?

Debts are personal debts under the law of obligations. Each spouse is generally not liable for the debts of the other spouse,¹³⁸ see Question 66.

137. Which debts are joint debts?

Joint debts may be debts according to the rules of the law of obligations. For example, the spouses may enter into a loan agreement where both spouses become joint and several debtors according to § 421 German Civil Code,¹³⁹ see Question 67. The provision on spousal liability for necessities (§ 1357 German Civil Code) also applies here,¹⁴⁰ see Question 5.

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

Against which assets the creditor may recover personal debts is determined by the general rules of civil law and civil procedure. There is no restriction in matrimonial property law, see Question 68.

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

There are no special rules determining against which assets the creditor can recover joint debts, see Question 69.

IV.2. Administration of assets

140. How are assets administered?

Each spouse administers his or her assets independently. Marital status does not determine any limitations on managing or disposing of property.¹⁴¹ See Question 70.

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

There are no specific rules concerning one spouse acting as an agent for the other (see Q. 13). According to the general rules of civil law one spouse can mandate the other to administer the assets. The general provision of § 1413 German Civil Code is also applicable in cases of separation of property.¹⁴² See Question 71.

¹³⁷ G. Brudermüller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1362 No. 1.

¹³⁸ D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 192.

¹³⁹ D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 192.

¹⁴⁰ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 129, § 5 No. 161.

¹⁴¹ E. Kock, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, 4th Edition, Munich: Beck 2000, § 1414 No. 12.

¹⁴² G. Brudermüller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1413 No. 1.

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

There are no acts concerning such assets that require the consent of the other spouse. The spouses may act in an unrestricted fashion.¹⁴³ § 1365 German Civil Code is inapplicable.¹⁴⁴

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

There are no special rules for the administration of professional assets. See Question 73.

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

There is no specific duty for one spouse to provide information to the other about the administration of the assets. See Question 74. The provisions concerning the community of accrued gains do not apply here. Only a general duty under matrimonial law exists, see Question 195.

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

It is generally accepted that there is a duty under matrimonial law that a spouse has to consider the interests of the other spouse also in economic matters.¹⁴⁵ There are, however, no specific duties concerning the administration of the spouses' assets. Disputes between the spouses concerning the administration of assets are therefore resolved according to the general rules of property law, see Question 75.

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?

Since under the separate property regime each spouse manages his or her assets him or herself there are no special consequences when a spouse violates rules governing the administration of assets,¹⁴⁶ see Question 75. For the possible consequences in other cases of the maladministration of assets see Question 76.

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

There are also no special consequences under matrimonial property law if a spouse is incapable of administering the assets. The general rules on care for persons of full age apply; see Question 77.

IV.3. Distribution of assets upon dissolution

¹⁴³ D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 192.

¹⁴⁴ See D. Schwab, "Der Schutz der Familienwohnung im deutschen Recht", in: D. Henrich and D. Schwab (ed.), *Der Schutz der Familienwohnung in Europäischen Rechtsordnungen*, Bielefeld: Giesecking, 1995, p. 129, 135 et seq.

¹⁴⁵ G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck, 2008, § 1353 No. 11, 12.

¹⁴⁶ See E. Koch, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck 2000, vor § 1414 No. 12.

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 grounds for the dissolution of the matrimonial property regime are to a large extent the same as for the community of accrued gains; they include a change of the property regime (see §§ 1408, 1414 German Civil Code), the death of a spouse, the annulment of the marriage and a divorce, see Question 78. Separation of the spouses is not such a ground.

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

The decisive dates for the dissolution of the matrimonial property regime are basically the same as for the community of accrued gains, see Questions 79 and 148. The date for a change of the property regime by agreement is the date of the agreement. In the case of an annulment of the marriage the decisive date is when the judgment becomes final. In the case of divorce the relevant date for the actual dissolution is the day on which the divorce decree becomes final. In the case of the death of a spouse the date of death is the decisive moment.

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

The dissolution of the matrimonial property regime as such has no consequences regarding the property of the spouses; separate property remains separate. If there is joint property of the spouses in the form of co-ownership (§§ 1008 et seq. German Civil Code) this will remain unchanged. The relationship between the co-owners follows the rules of law of obligations, i.e., of co-ownership by defined shares (§§ 741 et seq. German Civil Code), see Questions 5, 60 and 75.

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?

Assets are determined according to the rules of property law. Any increase in value of the spouses' property and debts related to that property are, in principle, only relevant for these assets, but see Questions 153 and 154.

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 dates for the determination and valuation of assets depend on the general rules of civil law.

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?

If one spouse's assets are used for investments in the other spouse's assets a basis for a right to compensation can be an express contractual agreement. However, also in cases where such a contract is lacking several bases for claims have to be considered.

One basis for recuperation may be the revocation of a gift. According to § 516 German Civil Code a donation is a disposition by means of which someone enriches another person from his or her own assets if both parties are in agreement that the disposition occurs gratuitously. A declaration of revocation is possible in the case of "gross ingratitude" (§§ 530 and 531 German Civil Code). If the donation is revoked, a return of the gift may be demanded under

the provisions on the return of unjust enrichment (§§ 812 et seq. German Civil Code). This is possible in cases of “grave marital misconduct”.¹⁴⁷ However, the application of the law of donations is often excluded by the courts. Instead they use the concept of a so-called “disposition caused by marriage” (ehebedingte Zuwendung) or an “unnamed donation”.

If, e.g., the capital of one spouse is used to renovate the house of the other spouse a compensation claim may arise under partnership law.¹⁴⁸ According to § 705 German Civil Code, by a partnership agreement the partners mutually subject themselves to an obligation to promote the achievement of a common purpose in the manner stipulated by the contract, in particular, and without limitation, to make the agreed contributions. Such an undisclosed partnership agreement must not be explicit.¹⁴⁹ The agreement must, however, concentrate on a specific object.¹⁵⁰ The purpose of such an agreement must go beyond the typical framework of cohabiting as man and wife. An example of this would be the establishment of an enterprise of one of the spouses (e.g., a retail outlet). The claim is based on an analogy to § 738 German Civil Code which deals with the winding-up of a partnership. According to this provision a partner is obliged to return to the retiring partner the items he transferred. The value of the share follows § 722 German Civil Code. If there were contributions in an unequal value this forms an argument that also the shares should be unequal.¹⁵¹

In the case of a “disposition caused by marriage” a claim is possible according to the so-called “interference with the basis of the transaction” (Störung der Geschäftsgrundlage, § 313 German Civil Code). For these marriage-related transactions no special purpose for the performance of assets or services is necessary. The basis for the disposition is to contribute to the realisation of marital cohabitation, explained by an implied contract of co-operation sui generis. With the breakdown of the marriage the basis for the transaction no longer exists and there can be a compensation claim.¹⁵² However, a comprehensive analysis of the situation of the former spouses is necessary, taking into account the length of the marriage, the age of the parties and the existence of a situation which is inequitable for the plaintiff.¹⁵³ If there was a counter-value, a claim will be excluded.

Claims based on unjust enrichment (§ 812 para. 1 sent. 2 clause 2 German Civil Code) are generally denied by the courts.¹⁵⁴ If there were services in the business or the professional sphere of the other spouse and there was no contract between the spouses, then – with the exception of a donation – the same claims may arise.¹⁵⁵

¹⁴⁷ BGH, 28.10.1982, *FamRZ*, 1983, 349; D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 193.

¹⁴⁸ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 142, § 5 No. 229.

¹⁴⁹ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 141, § 5 No. 225.

¹⁵⁰ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 141, § 5 No. 226.

¹⁵¹ BGH, 14.03.1990, *FamRZ*, 1990, 973, 974; D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 194.

¹⁵² BGH, 30.06.1999, *FamRZ*, 1999, 1580, 1581 f.; 28.03.2006, *FamRZ*, 2006, 1022; A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, § 5 No. 222.

¹⁵³ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 144, § 5 No. 235.

¹⁵⁴ BGH, 26.11.1981, *BGHZ*, 82, 227, 231; D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 195.

¹⁵⁵ BGH, 13.07.1994, *BGHZ*, 127, 48, 50 et seq. and *FamRZ*, 1994, 1167; D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 196.

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

If one spouse's assets have been used for paying a debt of the other spouse the general rules of the law of obligations apply, see Question 84. If both spouses are joint and several debtors and only one of them has paid, compensation may be claimed under the rules of joint liability (§ 426 German Civil Code),¹⁵⁶ see Question 84.

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

The spouses do not have preferential rights over the matrimonial home and the household assets. The general rules, under which there is a right of possession and some protection for the other spouse applies,¹⁵⁷ see Questions 10 and 85.

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

The spouses do not have preferential rights over other assets, see Question 86.

157. 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 as such does not affect the attribution of maintenance, see Question 87.

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?

The dissolution of the matrimonial property regime as such does not affect the pension rights and claims of one or both spouses. However, in the case of divorce there will be a splitting of the pension, unless it is agreed otherwise, see Question 88.

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?

The general rules can be set aside or adjusted, e.g., by an agreement between the spouses or by the competent authority, see Question 89.

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

There are no specific rules which are applicable if one of the spouses dies. Only the general rules apply, see Question 90. However, the surviving spouse may argue that he or she inherited compensation claims or another heir may try to get compensation from the surviving spouse according to the rules of compensation, see Question 153.

It should also be mentioned that there is a special rule in succession law which modifies the position of the surviving spouse. If at the time of the accrual of the inheritance there was separation of property and if, apart from the surviving spouse, one or more children of the deceased are entitled as statutory heirs, the surviving spouse and each child will inherit in equal parts (§ 1931 para. 4 German Civil Code).

¹⁵⁶ D. Schwab, *Familienrecht*, 15th Edition, Munich: Beck, 2007, No. 192.

¹⁵⁷ E. Koch, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th Edition, Munich: Beck 2000, § 1414 No. 14.

V. Separation of property with distribution by the competent authority

Not relevant.

D. MARITAL AGREEMENTS

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

According to § 1408 para. 1 German Civil Code future spouses are permitted to regulate their property relationship by making a pre-nuptial agreement. If they refrain from doing so, they live in the statutory property regime of the community of accrued gains, § 1363 para. 1 German Civil Code. The property regimes of community of property and the separation of property can be stipulated in the marriage contract. The marital agreement allows the spouses further to exclude any pension right adjustments, see § 1408 para. 2 German Civil Code.

As a basic principle, marital agreements are binding. Only the courts can set them aside, see Question 201.

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

Spouses are permitted to make a post-nuptial agreement revoking or changing their property regime, § 1408 para. 1 German Civil Code. The requirements and effects of a post-nuptial agreement do not deviate from those of pre-nuptial agreements. Both follow the same principles.

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

According to § 1410 German Civil Code the marital agreement must be drawn up in the presence of a notary. Although both parties must be present at the same time each spouse can appoint an agent to represent him or her. Pursuant to § 167 para. 2 German Civil Code there are no formal requirements for granting this authority.¹⁵⁸

If one of the spouses is a minor or an adult who is subject to guardianship, the special provision of § 1411 para. 1 German Civil Code applies. According to this provision, a minor with limited contractual capacity can conclude a marital agreement but requires the consent of his or her legal representative to do so, § 1411 para. 1 sentence 1 German Civil Code. This also applies to an adult who is subject to guardianship if an order has been issued for this person to the effect that the consent of his or her guardian is required for the conclusion of a marital agreement, § 1411 para. 1 sentence 2 German Civil Code.

If the legal representative is a guardian for a minor or an adult and if the marital agreement seeks to exclude or limit the equalisation of accrued gains or to agree to or repeal the community of property, the legal representative's consent is not sufficient for the marital agreement to be concluded. Rather, pursuant to § 1411 para. 1 sentence 3 German Civil Code the approval of the guardianship court is required. Moreover, § 1411 para. 1 sentence 4 German Civil Code limits the powers of the legal representative in that he or she is not allowed to conclude a marital agreement on behalf of a minor spouse with limited contractual capacity or of a legally competent person who is subject to guardianship.

A special provision has been laid down in § 1411 para. 2 German Civil Code for spouses who lack contractual capacity. It specifies that the legal representative concludes the agreement but he or she can neither agree to nor repeal the community of property, § 1411 para. 2

¹⁵⁸ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 90, § 5 No. 7.

sentence 1 German Civil Code. Moreover, the additional requirement of approval by the guardianship court applies in the case of a guardian for a minor and an adult.

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, the marital agreement must be entered in the matrimonial property register which is kept by the local court for the publication of dispositions affecting matrimonial property rights, § 1412 para. 1 German Civil Code. Despite this rule the spouses can invoke the marital agreement in relation to a third party who is aware of the agreement. According to § 1412 para. 2 German Civil Code, the same rule applies when the spouses repeal or modify a marital agreement which has been entered in the matrimonial property register. By contrast, in the spouse's relations with each other all registrable actions are effective without being actually entered.

For entry in the matrimonial property register an application by the spouses is required, § 1560 German Civil Code. The application must be filed at each and every local court where one of the spouses has his or her habitual residence, § 1558 para. 1 German Civil Code. The entry must be published, § 1562 para.1 German Civil Code. In accordance with § 1563 German Civil Code anyone is permitted to consult the matrimonial property register.

The only facts registrable are those that are relevant in relation to third parties. Those are matrimonial agreements, unless they are limited to internal matrimonial property settlements.¹⁵⁹

Entry in the matrimonial property register does not entail a presumption of accuracy. A third party cannot therefore, in accordance with § 1412 German Civil Code, rely on the registered property situation being the actual position, but that party can rely on the silence of the matrimonial property register or on the continuation of a correctly entered legal situation (negative publicity).

If a third party relies on § 1412 German Civil Code, they must also allow the legal situation to apply even if it were against themselves, as it would exist as a whole according to the statutory property regime. A third party cannot therefore rely on the non-registration of individual restrictions while at the same time using the marital agreement as a basis. The third party may also plead the true legal situation and does not have to claim the protection of § 1412 German Civil Code.¹⁶⁰

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

The law does not provide for a general duty to disclose the spouses' assets upon the conclusion of a marital agreement. If a pre-nuptial agreement is made, other provisions do not result in a duty of disclosure either, although the economic consequences of a waiver of post-nuptial rights do not become truly apparent until the assets and debts of the partners are known.¹⁶¹ Upon the conclusion of a marriage, the spouses commit themselves to marital cohabitation and to take responsibility for each other. From this general duty of respect, an

¹⁵⁹ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 100, § 5 No. 51.

¹⁶⁰ T. Rauscher, *Familienrecht*, 2nd Edition, Heidelberg: C.F. Müller, 2008, No. 368.

¹⁶¹ A. Sanders, "Unwissende Ehegatten – Sittenwidrigkeit und Aufklärungspflichten beim Abschluss von Eheverträgen", *FuR*, 2005, 104, 110.

entitlement to information can be derived for the duration of the marital cohabitation.¹⁶² This entitlement is directed at the communication of the principal assets, information about key asset transactions and ongoing income and therefore includes a general duty of information.¹⁶³ If there is a violation of this duty a claim for the premature equalisation of accrued gains can be made, § 1386 para. 3 German Civil Code. Marital property law furthermore results in a duty of information if the marital agreement is a post-nuptial agreement and if one spouse has therefore already acquired claims to the equalisation of accrued gains or a pension rights adjustment. For example, according to § 1379 para. 1 sentence 1 German Civil Code a claim to information concerning the final assets exists if the statutory matrimonial property regime is terminated as a result of an agreement on the separation of assets.¹⁶⁴

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 notary must advise the spouses about the legal scope of their agreement; in particular, he or she must ensure that an inexperienced spouse or a spouse not conversant with such matters is not disadvantaged, § 17 para. 1 German Notarial Recording Act. If the spouses wish to exclude a pension rights adjustment in essence, the notary should include in the agreement a note pointing out the potentially far-reaching consequences for the spouses' disability and old-age provisions and to the fact that the separation of assets regularly comes into force. The notary owes this to the contracting parties by virtue of his or her office. However, he or she is also obliged to do so in his or her own interests. After all, if the duty to provide an explanation is culpably breached, the notary must make good the resulting pecuniary loss to the spouse who has been disadvantaged by the agreement in accordance with § 19 German Federal Ordinance on Public Notaries. However, a failure to provide explanations does not as a rule entitle the agreement to be contested;¹⁶⁵ the marital agreement does not therefore become invalid solely on account of the notary violating his or her duties.¹⁶⁶

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

No statistical data exist. According to estimates by experts, less than 10 % of married couples conclude a marital agreement.¹⁶⁷

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?

¹⁶² G. Bruder Müller in: Palandt, *Bürgerliches Gesetzbuch*, 67th Edition, Munich: Beck 2008, § 1353 No. 13; BGH, 25.6.1976, FamRZ 1976, 516, 517.

¹⁶³ M. Grandel, in: *Juris Praxis Kommentar*, 2nd Edition, Saarbrücken: Juris GmbH 2005, § 1353 No. 50.

¹⁶⁴ See for reform proposals Question 3.

¹⁶⁵ E. Rehme, in: Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: de Gruyter, 2000, § 1408 No. 98.

¹⁶⁶ J. Gernhuber and D. Coester-Waltjen, *Familienrecht*, 5th Edition, Munich: Beck 2006, p. 349, § 32 No. 16.

¹⁶⁷ S. Stach, *Eheverträge - Gesetz und Rechtstatsachen*, Berlin, 1988, p. 16 et seq.; capital.de published at 8th June 2007,

<<http://www.capital.de/politik/100006841.html?eid=100003213>>; focus.de published at 22th January 2001, <http://www.focus.de/politik/deutschland/beziehungen-ehe-alles-schief-geht_aid_188116.html>.

If the spouses do not enter into a marital agreement, they live according to the rules of the community of accrued gains, § 1363 German Civil Code.¹⁶⁸ The spouses can however choose one of the other matrimonial property regimes, i.e. the separation of property or the community of property.¹⁶⁹ They can also repeal the property regime in which they are living, e.g. the community of accrued gains or the community of property, or exchange the separation of property for another matrimonial property regime. The spouses can either choose one of those regimes as it is or depart from specific rules within one matrimonial property regime, as long as those are not obligatory.¹⁷⁰

The marital agreement can be limited to negative provisions only by repealing the current matrimonial property regime or by eliminating the equalisation of accrued gains or the pension rights adjustment. As a result the spouses live in a separation of property regime, as long as there are no divergent provisions to be found in the agreement, § 1414 German Civil Code.¹⁷¹

One controversial subject is the question whether matrimonial property regimes which combine elements of different statutory regimes, or which include completely novel elements, are permissible. Whereas some argue that marital agreements cannot depart from the matrimonial property regimes provided by the German Civil Code,¹⁷² others emphasise the importance of the freedom of contract and allow matrimonial property regimes which mix elements of the different statutory regimes or are completely invented.¹⁷³

Reference to outdated and foreign matrimonial property regimes is however forbidden, § 1409 German Civil Code.

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;

In cases where the spouses choose the community of property by concluding a marital agreement, there are three possible categories of assets: common property (Gesamtgut), separate property (Vorbehaltsgut) and special property (Sondergut), §§ 1416-1418 German Civil Code.¹⁷⁴ The category to which an asset belongs and the extent to which modifications can be made is determined by the following principles: it is presumed that an asset belongs to the common property. If it is claimed that an asset belongs to another category, then proof must be provided.¹⁷⁵ Special property includes all assets to which a spouse is entitled and which cannot be assigned by a legal act, § 1417 German Civil Code. Such property is only created by operation of law, not by, for example, non-assignability as established by a legal act. Accordingly, spouses cannot turn common property into special property or vice versa

¹⁶⁸ For details see Questions 16 and 18a.

¹⁶⁹ For details see Questions 17 and 18b.

¹⁷⁰ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 91, § 5 No. 14.

¹⁷¹ A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 91, § 5 No. 15.

¹⁷² A. Lüderitz and N. Dethloff, *Familienrecht*, 28th Edition, Munich: Beck, 2007, p. 91, § 5 No. 13; F.H. Gaul, in: Soergel, *Kommentar zum Bürgerlichen Gesetzbuch*, 12th Edition, Stuttgart Berlin Köln Mainz: Kohlhammer 1988, § 1408 No. 17.

¹⁷³ T. Rauscher, *Familienrecht*, 2nd Edition, Heidelberg: C.F. Müller, 2008, No. 353; B. Thiele, in: Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th Edition, Berlin: de Gruyter, 2000, Vor § 1408 et seq. No. 23.

¹⁷⁴ For information on the different categories see Question 18b.

¹⁷⁵ G. Langenfeld, *Handbuch der Eheverträge und Scheidungsvereinbarungen*, 5th Edition, Munich: Beck, 2005, No. 536.

through a marital agreement. However, special property can be transformed into separate property through a marital agreement, as separate responsibility is thereby maintained.¹⁷⁶ Separate property includes assets which have been declared a spouse's reserved property through a marital agreement, § 1418 para. 2 sentence 1 German Civil Code. Separate property can be established when the community of property is concluded or later. It can also be turned into common property again later on.¹⁷⁷

If the spouses choose the community of accrued gains, they can exclude the initial assets from the equalisation of accrued gains in such a way that real increases in value, unlike nominal increases in value deriving from monetary devaluation, are not equalised.¹⁷⁸ It is also possible to exclude the operating assets or an equity holding in a company from the equalisation of accrued gains.¹⁷⁹

b. administration of assets;

One spouse can assign the administration of his or her assets to the other spouse. To do this no marital agreement is required. The right to revoke the assignment at any time can however only be excluded or restricted by a marital agreement, § 1413 German Civil Code.

c. distribution of assets;

If the spouses live in a community of accrued gains, an equalisation of accrued gains takes place in the case of divorce, § 1372 German Civil Code. Concerning this equalisation, spouses can make modifications. They can, for example, exclude the equalisation of accrued gains only upon divorce but not on the death of a spouse.¹⁸⁰ Whether the equalisation of accrued gains can be excluded for one spouse only is a matter for discussion. While some allow the equalisation of accrued gains for one party only,¹⁸¹ others regard this as immoral and against public policy.¹⁸²

Moreover, the spouses can influence the amount of the equalisation of accrued gains. Generally speaking, the law provides for a 50:50 division of accrued gains in marriage, § 1378 para. 1 German Civil Code. However, the equalisation ratio can, for example, be modified upwards or downwards.¹⁸³ Furthermore, limiting the equalisation claim by fixing a maximum is possible, which can be either independent of the duration of the marriage or geared to its duration.¹⁸⁴ Moreover, the scope of the equalisation of accrued gains can also be limited by agreeing on a maximum amount of money for the final assets of both spouses.¹⁸⁵

¹⁷⁶ G. Langenfeld, *Handbuch der Eheverträge und Scheidungsvereinbarungen*, 5th Edition, Munich: Beck, 2005, No. 542.

¹⁷⁷ G. Langenfeld, *Handbuch der Eheverträge und Scheidungsvereinbarungen*, 5th Edition, Munich: Beck, 2005, No. 544.

¹⁷⁸ G. Brambring, *Ehevertrag und Vermögenszuordnung unter Ehegatten*, 5th Edition, Munich: Beck, 2003, No. 101; G. Langenfeld, *Handbuch der Eheverträge und Scheidungsvereinbarungen*, 5th Edition, Munich: Beck, 2005, No. 442.

¹⁷⁹ G. Brambring, *Ehevertrag und Vermögenszuordnung unter Ehegatten*, 5th Edition, Munich: Beck, 2003, No. 102.

¹⁸⁰ G. Langenfeld, *Handbuch der Eheverträge und Scheidungsvereinbarungen*, 5th Edition, Munich: Beck, 2005, No. 431.

¹⁸¹ G. Langenfeld, *Handbuch der Eheverträge und Scheidungsvereinbarungen*, 5th Edition, Munich: Beck, 2005, No. 437.

¹⁸² T. Rauscher, *Familienrecht*, 2nd Edition, Heidelberg: C.F. Müller, 2008, No. 363.

¹⁸³ G. Langenfeld, *Handbuch der Eheverträge und Scheidungsvereinbarungen*, 5th Edition, Munich: Beck, 2005, No. 517.

¹⁸⁴ G. Langenfeld, *Handbuch der Eheverträge und Scheidungsvereinbarungen*, 5th Edition, Munich: Beck, 2005, No. 519.

¹⁸⁵ G. Langenfeld, *Handbuch der Eheverträge und Scheidungsvereinbarungen*, 5th Edition, Munich: Beck, 2005, No. 508.

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

The spouses can make the implementation of the equalisation of accrued gains dependent on the spouse's fault in the divorce and/or the repealing of marital cohabitation; the reason given for allowing this to be done is that when the fault principle was abandoned in the first Marital Law Reform,¹⁸⁶ the contractual agreement of the fault principle for consequences of divorce was not at the same time excluded; moreover, this is generally compatible with the principle of entitlement to divorce in the case of the irretrievable breakdown of the marriage. Another reason is that the spouses can also agree that the equalisation of accrued gains be excluded altogether. However, the law demands that the spouses, for reasons of legal certainty, should specify sufficiently in the agreement what they mean by culpable behaviour, i.e. what duties would have to be breached for the sanctions to come into play.¹⁸⁷

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?

Although the matrimonial property regimes of separation of property and community of property can be, and are, chosen, the focus of marital agreement practice is on modifications to the community of accrued gains.¹⁸⁸ Here there are a number of typical constellations.

Generally the equalisation of accrued gains takes place in the event of the death of one of the spouses (§ 1371 German Civil Code) as well as if the termination of the matrimonial property regime occurs in a different manner (§ 1372 German Civil Code).¹⁸⁹ It is often agreed that the equalisation of accrued gains be excluded among living persons whereas the equalisation of accrued gains remains in place in the event of death.¹⁹⁰

The initial assets include those belonging to one spouse after the deduction of liabilities when entering into the matrimonial property regime; the liabilities can only be included up to the amount of the assets (§ 1374 para. 1 German Civil Code). Furthermore, the assets acquired by a spouse after entering into the matrimonial property regime on account of death or with consideration to a future right to an inheritance, as a gift or as an endowment, are added to the initial assets after the deduction of any liabilities (§ 1374 para. 2 German Civil Code). By law the initial assets and the increase in the value of the initial assets become items of the final assets, and the other spouse thus participates in particular in the increases in value through the equalisation of accrued gains, without these assets and the increase in value being actually the result of the joint efforts of the spouses.¹⁹¹ In practice, therefore, it is often agreed that the equalisation of accrued gains should take place, but that the initial assets and the privileged acquisition are specifically excluded from the calculation of the equalisation of accrued gains.¹⁹²

Following on from the same principles, it is possible to take operating assets out of the equalisation of accrued gains. It is then agreed that the company or the equity holding are not to form an item in the equalisation of accrued gains among living persons, i.e. that it will not

¹⁸⁶ Das Erste Gesetz zur Reform des Ehe- und Familienrechts vom 14.6.1976, *BGBI*, I S. 1421

¹⁸⁷ DNotI-Report 21/2000 November 2000, "Verknüpfung des Zugewinnausgleichs mit verschuldensabhängigen Momenten", p. 174.

¹⁸⁸ G. Langenfeld, *Handbuch der Eheverträge und Scheidungsvereinbarungen*, 5th Edition, Munich: Beck, 2005, No. 425.

¹⁸⁹ See Question 18a.

¹⁹⁰ G. Langenfeld, *Handbuch der Eheverträge und Scheidungsvereinbarungen*, 5th Edition, Munich: Beck, 2005, No. 430 et seq.

¹⁹¹ G. Langenfeld, *Handbuch der Eheverträge und Scheidungsvereinbarungen*, 5th Edition, Munich: Beck, 2005, No. 441.

¹⁹² G. Langenfeld, *Handbuch der Eheverträge und Scheidungsvereinbarungen*, 5th Edition, Munich: Beck, 2005, No. 442.

be taken into account either in the initial assets or in the final assets. As far as corporate assets are concerned, the same level of asset security is achieved as that which is found in the separation of assets, whereas an equalisation of accrued gains takes place in the case of other assets.¹⁹³

The law allows a premature equalisation of accrued gains, for example, in cases where the spouses have lived apart for at least three years (§ 1385 German Civil Code) or in cases where one of the spouses has culpably failed to meet the economic obligations arising from the marital relationship over a prolonged period and it is to be assumed that he or she will continue to do so in future (§ 1386 para. 1 German Civil Code). Beyond the special cases that are provided for in §§ 1385, 1386 German Civil Code the spouses may include further facts in their agreement upon which a premature equalisation of accrued gains is to take place.¹⁹⁴

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

There are no explicit legal provisions which state that authorities and courts can modify or set aside marital agreements. Moreover, according to § 1408 German Civil Code the freedom of contract applies as a general rule.

In a fundamental decision dating from 2001,¹⁹⁵ the German Federal Constitutional Court called for a judicial review of marital agreements, despite the existing freedom of contract¹⁹⁶. The Federal High Court of Justice has since further specified the requirements to be placed on such a review of marital contracts.^{197,198} Accordingly, the statutory provisions on post-marital maintenance, accrued gains and pension rights adjustments are, in principle, open to contractual regulation; there is no indispensable minimum content of consequences of divorce in favour of the entitled spouse.¹⁹⁹ However, this general openness of the consequences of divorce to contractual regulation must not result in the protective purpose of the statutory provisions being undermined at will by contractual provisions, which would be the case if one spouse were to incur an unacceptable and clearly one-sided distribution of burdens. The burden on one spouse weighs all the more heavily the more immediately the contracting-out of statutory provisions encroaches on the so-called 'core area' (Kernbereich) of the law on the consequences of divorce.²⁰⁰

To determine this core area, the importance of the individual provisions on the consequences of divorce are decisive, and the Federal High Court of Justice has established a ranking in this respect. On the first level are maintenance payments for looking after a dependant child. On the second level is maintenance for old age and illness and the equalisation of pension rights. On the third level is maintenance for unemployment, and on the fourth level maintenance payments for healthcare and old-age provision. This is followed by maintenance for training as well as maintenance paid to supplement a creditor's insufficient level of income and subsequently by the equalisation of accrued gains on the last level²⁰¹. This means that whereas the spouses are the most restricted in their freedom to make contractual

¹⁹³ G. Langenfeld, *Handbuch der Eheverträge und Scheidungsvereinbarungen*, 5th Edition, Munich: Beck, 2005, No. 453 et seq.

¹⁹⁴ L. Bergschneider, *Verträge in Familiensachen*, 3rd Edition, Bielefeld: Gieseking, 2006, No. 664.

¹⁹⁵ BVerfG, 06.02.2001, *FamRZ*, 2001, 343.

¹⁹⁶ BVerfG, 06.02.2001, *FamRZ*, 2001, 343, 346.

¹⁹⁷ BGH, 11.02.2004, *FamRZ*, 2004, 601.

¹⁹⁸ BGH, 06.10.2004, *FamRZ*, 2005, 26; BGH, 12.01.2005, *FamRZ*, 2005, 691; BGH 25.05.2005, *FamRZ*, 2005, 1449.

¹⁹⁹ BGH, 11.02.2004, *NJW*, 2004, 930, 933.

²⁰⁰ BGH, 11.02.2004, *NJW*, 2004, 930, 934.

²⁰¹ BGH, 11.02.2004, *NJW*, 2004, 930, 934.

arrangements concerning maintenance for looking after children, the equalisation of accrued gains is the most accessible to contractual agreements.

The judge must examine whether an evidently one-sided distribution of burdens occurs as a result of a post-nuptial agreement which is unacceptable for the spouse suffering the burden.²⁰²

In so doing, the judge must first of all carry out an 'effectiveness check' (Wirksamkeitskontrolle) using § 138 para. 1 German Civil Code, which declares a legal transaction that is contrary to morality to be void. It is to be examined whether the agreement resulted in a one-sided distribution of burdens at the time it was concluded, so that a breach of morality is to be assumed. This type of breach is only assumed, however, if the agreement encroaches on the core area of the law on the consequences of divorce without this drawback being attenuated by other benefits to the spouse suffering as a result or by the particular circumstances of the spouses.²⁰³

If the agreement remains valid thereafter, a 'performance check' (Ausübungskontrolle) guided by § 242 German Civil Code takes place, according to which the debtor is obliged to bring about performance according to the requirements of good faith, taking into consideration customary practice. The judge must use this general clause to examine whether and to what extent a spouse abuses the legal power he or she has been granted by agreement if in the event of a divorce he or she claims, in the face of a statutory consequence of divorce demanded by the other spouse, that this consequence has been effectively excluded by the agreement. Here it must be noted that the higher-ranking the contractually excluded, but now demanded, consequence of divorce, the more grave must be the reasons suggesting its exclusion. If the contractually agreed exclusion is pleaded and this violates § 242 German Civil Code, the judge must order the legal consequence which takes into account, in a balanced manner, the justified concerns of both parties in the situation that has now occurred.²⁰⁴

What this means for the matrimonial property regime and, in particular, for the equalisation of accrued gains, is that the spouses are able to conclude very far-reaching agreements. With a view to the subordinate importance which the Federal High Court of Justice attributes to the equalisation of accrued gains in the system of the law on the consequences of divorce, excluding the matrimonial property regime of the community of accrued gains and thus contracting the matrimonial property regime of separation of property will regularly pass judicial scrutiny and be both valid and enforceable.²⁰⁵

²⁰² BGH, 11.02.2004, *NJW*, 2004, 930, 934.

²⁰³ BGH, 11.02.2004, *NJW*, 2004, 930, 935.

²⁰⁴ BGH, 11.02.2004, *NJW*, 2004, 930, 935.

²⁰⁵ BGH, 28.03.2007, *FamRZ*, 2007, 1310, 1311.