

## NATIONAL REPORT: NETHERLANDS

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September 2008

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

The term 'spouse' is not expressly defined in the Dutch Civil Code. However, it follows from the system of the Civil Code that a spouse is a person who is married according to the marriage provisions (Art. 1:30-1:77 Dutch Civil Code).

**a. upon marriage**

There are no specific rules on the property relations between spouses upon marriage, except the general provisions of contract law and property law in Book 3 and 5 Dutch Civil Code.

**b. during marriage**

Title 1.6 ('Rights and Duties of the Spouses', Art. 1:81-1:92a Dutch Civil Code) regulates the rights and duties and Title 1.7 ('The Statutory Community of Property', Art. 1:93-1:113 Dutch Civil Code) provides for rules on the community of property; both titles are applicable during marriage. Title 1.8 ('Marriage Contracts', Art. 1:114-1:143 Dutch Civil Code) contains provisions on marital agreements, which mostly relate to the possibilities of contractual agreements concluded before or during the marriage.

**c. upon separation**

Title 1.10 ('Judicial Separation and Dissolution of the Marriage after Judicial Separation', Art. 1:169-1:183 Dutch Civil Code) in combination with Art. 1:99 under b Dutch Civil Code. Title 1.6 is not applicable to spouses who are judicially separated (Art. 1:92a Dutch Civil Code).

**d. upon death**

Title 1.7.3 ('Dissolution of the Community of Property', Art. 1:99-1:113 Dutch Civil Code) concerns the termination of the community. In case the spouses have agreed to participate in the acquisitions (a matrimonial property setoff clause), the Civil Code entails a number of provisions dealing with the ending of the marriage by the death of a spouse, such as Art. 1:141 para. 3 and Art. 1:142 para. 1 sub a Dutch Civil Code.

**e. upon divorce**

In the case of a divorce it depends on whether the spouses were married under the marital property system. If they were, Art. 1:99-1:108 Dutch Civil Code apply. In case the spouses agreed to netting covenants which result in participation in the acquisitions, the Civil Code entails a number of provisions dealing with the ending of the marriage, such as Art. 1:141 para. 3 and Art. 1:142 para. 1 sub b Dutch Civil Code.

**f. upon annulment**

Art. 1:77 Dutch Civil Code lays down a provision on the legal effects of an annulment. In principle the annulment has retrospective effect to the date when the marriage was entered into. However, in some respects, the annulment has the same effects as a divorce. Concerning the property relationship between the spouses an annulment order has the same effects as a divorce for a spouse who acted in good faith. However, if the marriage is annulled on account of a prior marriage or registered partnership, the first spouse is protected, even if the second spouse acted in good faith. In relation to a third party who acquired rights in good faith prior to the registration of the annulment order, the annulment has the same effects as a divorce.

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

In 1957 legislation was enacted which abolished the legal incapacity of married women. In this act the administration of property was radically changed so that also wives could administer their property and the community property.<sup>1</sup> In 1970 the revised Book 1 of the Dutch Civil Code on family law, which includes the provisions on the matrimonial aspects of marriage, entered into force. The provision that the husband is the 'head' of the marital union was abolished. As of May 1995, the Dutch Pension Rights Equalisation (Separation) Act entered into force.<sup>2</sup> Subsequently, in 1998 the Dutch Act on Registered Partnership introduced the new formal lifestyle registered partnership. The Act opening marriage for same-sex couples entered into force on 1 April 2001.<sup>3</sup> In 2001 a number of changes were made relating to the mutual rights and duties of the spouses.<sup>4</sup> Since September 2002 Book 1 has contained a new title on participation in acquisitions under the abolition of the *wettelijk deelgenootschap* (statutory community of property).<sup>5</sup>

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

Currently the legislature is planning to revise the matrimonial property law substantially. As a result of the discussions in 1995 relating to the introduction of the registered partnership in 1998, the question was raised whether the current marital property regime was still meeting changed social conditions. Since then Dutch matrimonial property law has been the subject of intense debate and revision. The Committee on Rights and Duties reported on this issue in 1997 and in 2000 a comprehensive comparative law research was conducted by the Molengraaff Institute for Private Law.<sup>6</sup> Finally, in 2003, a Bill was sent to the Second Chamber of Parliament,<sup>7</sup> after consultations with many experts in the field.<sup>8</sup> The proposals for

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<sup>1</sup> See for a more elaborate description of these developments: Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, Nos. 289-291; E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, Nos. 1-11.

<sup>2</sup> *Staatsblad* 1994, 342.

<sup>3</sup> Act opening up marriage (Amendment of Book 1 of the Civil Code in relation to the opening of marriage to persons of the same sex) *Staatsblad* 2001, 9.

<sup>4</sup> Statute of 31.05.2001, *Staatsblad* 2001, 275. See C. Forder and I. Sumner, "Bumper issue: All you ever wanted to know about Dutch family law (and were afraid to ask)", in: A. Bainham (ed.), *The International Survey of Family Law 2003*, pp. 263-321 (269-270).

<sup>5</sup> Act on contractual participation clauses of 14 March 2002, *Staatsblad* 2002, 152 and 370.

<sup>6</sup> K. Boele-Woelki *et al.*, *Huwelijksovermogensrecht in rechtsvergelijkend perspectief*, Ars Notariatus CIII, 2000. See further K. Boele-Woelki (ed.), *Algehele gemeenschap van goederen: afschaffen!?*, Ars Notariatus CVII 200; B. Braat, *Indépendance et interdépendance des époux dans le régime matrimonial légal des droits français, néerlandais et suisse*, European Family Law series No. 6, 2004.

<sup>7</sup> *Kamerstukken II 28 867*. C.L.M. Smeets, *Het wetsvoorstel tot aanpassing van de wettelijke gemeenschap van goederen*, 2<sup>e</sup> UCERF Symposium 18 April 2008, <[www.arsaequi.nl/pdf/Carla%20Smeets.pdf](http://www.arsaequi.nl/pdf/Carla%20Smeets.pdf)>.

reforming the statutory community of property contemplate a number of pressing problems.<sup>9</sup> The most far-reaching proposal in the Bill excludes assets acquired and debts incurred before the celebration of the marriage. In addition, assets acquired by succession or gift will be excluded from the community of property. Under the current system, parents and other persons who wish to bequeath or to donate certain property to a spouse, have to draw up a will in which they determine that the assets will not fall into the community. Further, a new system of compensation for a number of investments in the other spouse's assets is envisaged, based on the 'rule of investment' or 'participation rule' (*beleggingsleer*) rather than on the currently deployed system of a nominal right of compensation.<sup>10</sup>

In addition, the provisions on the administration of community property will be subject to a number of changes, introducing in Art. 1:97 Dutch civil Code (proposed) the provision that each spouse has an independent right to administer community goods which are not registered in the name of the other spouse. Further, Art. 1:95 Dutch Civil Code (proposed) contains a new rule on the substitution of property in the situation that spouse A acquired an asset with more than 50% of his or her private property. The asset will then be his or her private property, whereas spouse B or the community will have a right to be compensated for the part provided by the private property of B or the community property.

Although the government has consulted practitioners and scholars alike, there has been a great deal of criticism.<sup>11</sup> As a result, the total revision of Dutch matrimonial property law has not yet been finalized. In the spring of 2008, 14 professors of notarial law and family law sent an open letter to the Second Chamber requesting a speedy consideration and positive approval of the Bill.<sup>12</sup>

In the very last stage of this important bill in the Second Chamber, three far-reaching amendments have been suggested by Members of Parliament. The *first* and most profound one aims to introduce a right to compensation to be assessed by the courts in the situation

<sup>8</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, Nos. 289-291; E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, Nos. 12-15 and 823-848.

<sup>9</sup> B. Braat, "Wetsvoorstel 268 867 in rechtsvergelijkend perspectief", *WPNR*, 2005 No. 6617, pp. 290-300; B. Breedveld, *De huwelijksgemeenschap bij echtscheiding, De omvang, ontbinding en verdeling door de rechter*, 2008, pp. 27-34.

<sup>10</sup> Dutch Supreme Court 15.1.2008, *NJ*, 2008, 110. See A.J.M. Nuytink, "De onder uitsluitingsclausule verkregen grond en de daarop gebouwde nieuwe woning: nominaliteitsleer of beleggingsleer?" *AA*, 2008, pp. 628-631.

<sup>11</sup> E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, Nos. 824-826; See in particular C.G. Breedveld-De Voogd and W.G. Huijgen, "Naar een beperkte gemeenschap: Niet doen!", *WPNR*, 2004 No. 6562, pp. 43-49; H.F.C. Schoordijk, "Het huwelijk als partnership, vanuit rechtsvergelijkend perspectief (verdient een vierde tranche vernieuwing huwelijksvermogensrecht aanbeveling?)", *WPNR*, 2003 No. 6525, pp. 272-278; A.L.P.G. Verbeke, "Beperkte gemeenschap. Evenwicht en eenvoud", *WPNR*, 2004 No. 6568, pp. 168-173; Gr. van der Burght, E.E.A. Luijten and W.R. Meijer, "De ingreep in de wettelijke gemeenschap, een mission impossible?", *WPNR*, 2003 No. 6545, pp. 649-657; W.G. Huijgen, "Wie zit er op de nieuwe huwelijksgemeenschap te wachten?", *NJB*, 2005, p. 2317; F. Schonewille, "Rechtspolitieke rede aan de open groeve (?) van wetsvoorstel 28.867", *EB Tijdschrift voor scheidingsrecht*, 2006, pp. 19-24; C.A. Kraan, "Een drastisch gereviseerd wetsvoorstel tot aanpassing van de wettelijke gemeenschap van goederen", *FtV*, 2006, pp. 14-19; Gr. van der Burght, "Kanttekeningen bij de Tweede Nota van Wijziging derde tranche", *FtV*, 2005, pp. 9-14; Gr. van der Burght, "The Netherlands, Overview of Matrimonial Developments", in: B. Adkin (ed.), *The International Survey of Family Law 2007*, pp. 207-215.

<sup>12</sup> Letter to the Minister of Justice, *NRC Handelsblad*, 3 January 2008.

that the spouses agreed in a marital contract to deviate from the marital property regime and where spouse A worked for spouse B's company or profession or in the household without receiving fair compensation. This proposal specifically redresses the harsh effects resulting from marital agreements containing a complete separation of property.<sup>13</sup> The idea of tailor-made decisions by the courts on just compensation is completely new to the Dutch system. The *second* amendment would undo an important feature of the bill, namely the exclusion of assets acquired as a result of a gift or succession from the community of property.<sup>14</sup> The amendment proposes to maintain the current system, which requires parents and other persons who wish to bequeath or to donate certain property to a spouse to draw up a will in which they determine that the assets will not fall into the community. A *third* amendment proposes not to introduce art. 1:95 Dutch Civil Code (proposed) concerning the substitution of property, as a result of which spouse A would become exclusively entitled to assets acquired by him or her with more than 50% of his or her private property. The argument for not introducing this rule is that it would create uncertainty for the spouses and is difficult to work with in practice.<sup>15</sup>

It was concluded that the complex subject of the *first* amendment required a more fundamental consideration than was possible at this stage of the parliamentary process. The Minister of Justice agreed to investigate the possibilities to mitigate the harsh results of the complete separation of property and the first amendment was withdrawn. The *second* amendment has been accepted, which means that nothing changes in this respect. The testator or donator will still be required to determine that the assets will not fall into the community. If he or she does not, the assets will fall into the community. In relation to the *third* amendment, Art 1:95 Dutch Civil Code (proposed) is still part of the Bill, since at a later stage the amendment was also withdrawn.<sup>16</sup> The Second Chamber has accepted the Bill and at the time of finalizing this report the First Chamber has not completed its final reading.<sup>17</sup>

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

The marital property regulations apply to spouses and registered partners alike (Art. 1:80b Dutch Civil Code). The relevant provisions concerning marriage are declared to be applicable to registered partners, which encompass the provisions on rights and duties, the community of property and marital contracts. Consequently, if the future parties to a registered partnership do not draw up a registered partnership contract, their property will be regulated according to the rules on the statutory community of property scheme.

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

The rules concerning matrimonial property relationships are not exclusive. The general provisions on property law are also applicable, such as joint ownership (Title 3.7 'Community' Dutch Civil Code). One should realise, however, that this is mostly relevant if spouses are not married under the community of property regime, since the nature of the regime implies that, in principle, the assets belong to both spouses on the basis of the matrimonial property regime.

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<sup>13</sup> *Kamerstukken II* 28 867, No. 15.

<sup>14</sup> *Kamerstukken II*, 28 867, No. 14.

<sup>15</sup> *Kamerstukken II* 28 867, No. 16, p. 1.

<sup>16</sup> *Handelingen II*, 09.04.2008, No. 68, p. 4741-4763; *Handelingen II*, 11.09.2008, No. 111, p. 8078-8084; *Handelingen II*, 18.09.2008, No. 3, p. 179. B. Braat, "Matrimonial property law: diversity of forms, equivalence in substance," in: M.V. Antokolskaia (ed.), *Convergence and Divergence in European Family Law, European Family Law Series No. 18*, 2007, pp. 237-250.

<sup>17</sup> *Kamerstukken I*, 28 867, A.

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

If a spouse who is married under the community of property regime dies, his or her assets first have to be divided on the basis of the community of property rules. Subsequently, the law of succession determines that the surviving spouse acquires all the assets of the deceased's estate if the deceased spouse's will did not provide that the entire section in the Dutch Civil Code on the intestate succession of a spouse is not applicable (Art. 4:13 Dutch Civil Code).

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

Yes, the rules of Title 1.6 ("Rights and Duties of the Spouses") Dutch Civil Code apply regardless of the specific property relationships of the spouses. However, spouses are allowed to deviate from the provision of Art. 1:84 para. 1 and 2 Dutch Civil Code concerning the contribution to the costs of the household. A written agreement (not necessarily a marriage contract) is required.

**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".**

Generally, all expenses which serve the physical and mental well-being of the spouses and their children are considered to be the costs of maintaining the household.<sup>18</sup> These costs serve a general interest. They include, in particular, the costs of raising and educating children (Art. 1:84 para. 1, first sentence Dutch Civil Code)<sup>19</sup> who are part of the family and who belong to both spouses or to one of them (Art. 1:82 Dutch Civil Code). Maintenance payments for children from a previous marriage who are not part of the spouses' family are not considered household costs. Whether tax obligations are costs and expenses of the family household is disputed.<sup>20</sup> There is no case law concerning this question.

The extent of the duty of each spouse to contribute to the costs of maintaining the household is regulated by statute according to a four-step system. First, the costs are chargeable to the common income of the spouses; second, insofar as this is insufficient, to their own income on a *pro rata* basis; third, insofar as their income is insufficient, such costs are chargeable to the common capital; and fourth and finally, insofar as this is also insufficient to their own capital on a *pro rata* basis (Art. 1:84 para. 1 Dutch Civil Code). These rules do not concern the spouses' liability in respect of third parties, but exclusively concern their internal relationship. Although spouses may deviate from these rules of contribution through a written contract (Art. 1:84 para. 3 Dutch Civil Code), this scarcely happens in practice.

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<sup>18</sup> A.L.G.A. Stille, *Personen- en familierecht* (loose-leaf edition) title 6 *Rechten en verplichtingen van echtgenoten*, Artikel 84, Nos. 1-7, pp. 84-1 - 84-22.

<sup>19</sup> See F. Schonewille, "Inleiding, kosten van de huishouding", in: F. Schonewille (ed.), *Relatievermogensrecht geschetst*, 2007, pp. 1-8.

<sup>20</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 205.

The spouses owe each other a duty to contribute correspondingly to covering the expenditures for the property insofar as special circumstances do not preclude this (Art. 1:84 para. 2 Dutch Civil Code). There is no statutory rule which regulates compensation among the spouses for contributions to the household costs. However, the Dutch Supreme Court has decided that each spouse loses his or her claim against the other if the spouses have not set off their claims periodically at the end of each calendar year in accordance with the principle of reasonableness and fairness. As a result, when spouse A has contributed too much according to the norm of Art. 1:84 para. 1 Dutch Civil Code, a set-off claim by spouse A against spouse B will be unsuccessful after a divorce.<sup>21</sup>

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

In principle, each spouse is only liable for obligations entered into by him or herself (Art. 3:276 para. 1 Dutch Civil Code). Each spouse is together with the other spouse liable for obligations entered into by the other for the benefit of the ordinary running of the household, including obligations arising from employment contracts entered into by the spouse as an employer on behalf of the household (Art. 1:85 Dutch Civil Code). From the creditor's point of view, both spouses are debtors, both wholly and jointly. The non-acting spouse does not, however, become a party to the contract and does not derive from Art. 1:85 Dutch Civil Code the power to exercise creditor's rights. What the 'normal running of the household' should include depends on the circumstances of each particular case, whereby the nature of the expenses, the financial circumstances and the family's lifestyle as it appears to the outside world are considered to be decisive factors. Anyhow, the different elements of the costs which belong to the 'normal running of the household' are less wide-ranging than the 'cost of the household'.<sup>22</sup> There is hardly any recent case law concerning the definition of this terminology. Furthermore, in the past it has been considered to abolish the provision altogether.<sup>23</sup>

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

Regardless of the matrimonial property regime in force between the spouses, a spouse requires the written consent of the other spouse (there are some exceptions<sup>24</sup>) for contracts for the disposal (sale or barter), encumbrance (in particular mortgaging) or the usufruct (personal rights of use) and legal transactions for the discontinuation of the usufruct of a dwelling (notice to terminate a tenancy agreement) in which the spouses live jointly or in which the

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<sup>21</sup> See Dutch Supreme Court 22.05.1987, *NJ*, 1988, 231 annotated EAAL (*Ridder te voet*); Dutch Supreme Court 29.04.1994, *NJ*, 1995, 561, annotated by WMK (*Doktersvrouw*). Invoking a limitation clause (in the form of a netting covenant) which has been included in a marital agreement regulating the setting-off in case one of the spouses has contributed to the costs of the household to an extent which exceeds his or her obligation is, however, possible. See Dutch Supreme Court 15.09.2006, *RvdW*, 2006, 854.

<sup>22</sup> E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, Nos. 59-67.

<sup>23</sup> An amendment by the Second Chamber prevented the repeal of Art. 1:85 Dutch Civil Code which the government during the revision of Title 6 of Book 1 (Rights and Duties of the Spouses) in 2001 considered to be outdated. See Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, no 228.

<sup>24</sup> Art. 1:88 para. 2 Dutch Civil Code determines that a spouse does not need consent where the legal transaction must be performed on the grounds of a rule of law or of a preceding legal transaction for which consent was granted or was not required.

other spouse is living alone or other things pertaining to such a dwelling or to the household effects (Art. 1:88 para. 1 sub a Dutch Civil Code). As appears from the use of the word ‘for’, consent is already required at the obligatory stage, i.e. upon the conclusion of the contract serving to assume the obligation to dispose, encumber, etc., as opposed to upon the disposal, encumbrance, etc. itself. The rule applies to the house which is jointly inhabited by the spouses or inhabited by the protected spouse alone, but also to accommodation constituting the ‘second residence’ of the spouses, provided that it is regularly used.<sup>25</sup>

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

Generally, contracts for the disposal, encumbrance or usufruct and legal transactions for the discontinuation of the usufruct of household assets require the written consent of the non-acting spouse. This rule applies regardless of the matrimonial property regime in force between the spouses.<sup>26</sup> A definition of the term ‘household assets’ is not provided by statute. Art. 1:88 para. 1 sub a Dutch Civil Code only refers to ‘things pertaining to such a dwelling or to the household effects.’

**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...)?**

A spouse requires the written consent of the other spouse (there are a few exceptions contained in Art. 1:88 para. 4 and 5 Dutch Civil Code) regardless of the matrimonial property regime in force between them for the following other legal transactions:<sup>27</sup>

- Gifts,<sup>28</sup> with the exception of normal, non-excessive gifts and of those for which nothing is drawn from his or her own capital during the life of the spouse (Art. 1:88 para. 1 sub b Dutch Civil Code). These comprise legacies and the revocable and irrevocable benefit of a third-party from life insurance for which (single) premiums have been paid.
- Contracts which claim that a spouse, other than in the normal conduct of his or her profession or business, commits him or herself as a surety or a joint and several co-obligor, or will answer for a third party or bind him or herself or an obligation of a third person (Art. 1:88 para. 1 sub c Dutch Civil Code). The simple fact that the conclusion of a contract can result in solidary debtorship (for example, entering into a general partnership) does not give rise to the requirement of consent.
- Hire-purchase contracts (payment in instalments)<sup>29</sup>, except for things which only or mainly serve for the normal conduct of his or her profession or business (Art. 1:88 para. 1 sub d Dutch Civil Code).

<sup>25</sup> Dutch Supreme Court 28.11.1975, NJ, 1976, 466; Dutch Supreme Court 25.02.1983, NJ, 1983, 696. See M.J.A. Mourik and L.C.A. Verstappen, *Handboek voor het Nederlands vermogensrecht bij scheiding*, 2006, p. 67.

<sup>26</sup> M.J.A. Mourik and L.C.A. Verstappen, *Handboek voor het Nederlands vermogensrecht bij scheiding*, 2006, p. 67.

<sup>27</sup> A.L.G.A. Stille, “Beperking van de handelingsbevoegdheid van echtgenoten”, in: F. Schonewille (ed.), *Relatievermogensrecht geschetst*, 2007, pp. 9-26.

<sup>28</sup> A gift is any material favour which is also a legal act.

<sup>29</sup> In this context an important decision has been taken by the Dutch Supreme Court on 28.03.2008, *RvdV*, 2008, 362 (*Dexia-zaak*). The Dutch Supreme Court held that a contract for a share lease is to be considered as a sale on deferred terms which according to Art. 1:88 para. 1 sub d Dutch Civil Code requires the consent of the other spouse. Again it has been confirmed that this provision protects the other spouse and if follows from Art.

Given their object or nature, these legal acts to which also the transactions referred to in Question 11 belong, are capable of prejudicing certain rights or may involve a substantial risk. The rationale of Art. 1:88 Dutch Civil Code is to protect the spouses from each other and from themselves in the interest of the family.<sup>30</sup>

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

There are no specific statutory provisions concerning one spouse acting as an agent for the other spouse. However, when one spouse, at the request of the other spouse, administers the property of the latter, their internal relationship is governed by the rules concerning mandate (Art. 7:400 Dutch Civil Code) whereby both the marital relationship and the nature of the administered property are to be taken into account.<sup>31</sup>

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

Legal transactions between spouses are possible. They may, for instance, conclude a sales contract between themselves. In 2003, the legislator removed the provision that prohibited donations between spouses.<sup>32</sup>

## C. MATRIMONIAL PROPERTY REGIMES

### C.1. General issues

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

Yes, marriage contracts may be made by the prospective spouses both prior to their marriage and during their marriage (Art. 1:114 Dutch Civil Code), but subject to a number of conditions as set out in Art. 1:114-1:121 Dutch Civil Code. These conditions concern, *inter alia*, requirements as to the notarial form of the contract, the contents of the contract, which may not be contrary to mandatory law, *bonos mores* or Dutch public policy, and the registration of the contract in order to have effect in relation to third parties.

**16. What regime is applicable, 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?**

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1:80b Dutch Civil Code that this protection also includes registered partners. Unmarried partners, however, do not fall within the scope of Art. 1:88 para. 1 sub d Dutch Civil Code.

<sup>30</sup> Dutch Supreme Court 15.12.1978, NJ, 1979, 427. See also M. de Rooij, G. Schmidt and B.J. van het Kaar, *National Report, The Netherlands*, T.M.C. Asser Institute/ULC, *Study on Matrimonial Property Regimes and the Property of unmarried couples in private international law and internal law*, <[http://ec.europa.eu/civiljustice/publications/docs/regimes/dutch\\_report\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/regimes/dutch_report_en.pdf)> under nr. 1.2.1.7.

<sup>31</sup> C.A. Kraan, *Huwelijksvermogensrecht*, 2008, pp. 103-115.

<sup>32</sup> *Staatsblad* 2002, 227. The rationale of this prohibition was the fear that the donating spouse would improperly influence the other spouse. Also the protection of creditors was used as an argument in favour of this prohibition. See E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 20.

The Dutch default regime is the community of property which exists between the spouses by operation of law from the time of the solemnisation of the marriage insofar as no derogation is made therefore by a marriage contract (Art. 1:93 Dutch Civil Code).<sup>33</sup>

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

Yes, firstly the community of benefits and income (*gemeenschap van vruchten en inkomsten*, Art. 1:123-1:127 Dutch Civil Code) and, secondly, the community of profits and losses (*gemeenschap van winst en verlies*, Art. 1:128-1:130 Dutch Civil Code). Both regimes may be qualified as a community of property regime. Thirdly, rules are provided for netting covenants which result in a participation in acquisitions, which is also referred to as a matrimonial property setoff clause (*verrekenbedingen*, Art. 1:132-1:143 Dutch Civil Code). Since 1 September 2002 the statutory community of property (*wettelijk deelgenootschap*) is no longer an alternative matrimonial property regime.<sup>34</sup>

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

**a. Question 16**

The community of property system is characterised by the effect that all assets and all debts of both spouses fall, by operation of the law, within the community of property (*boedelmenging*). The community of property results the property of the spouses merging into one common estate. Both spouses are equally entitled to the community of property. This applies to 'premarital' assets and debts which are already present at the time of concluding the marriage and to assets acquired and debts contracted during the marriage.

**b. Question 17**

The community of benefits and income (*gemeenschap van vruchten en inkomsten*) is not often chosen by spouses in the Netherlands. The spouses have to make a marital contract in which they opt for this type of community. In that case the provisions of Art. 1:124-1:127 Dutch Civil Code apply, unless otherwise agreed by the spouses. It is based on a community of property regime in combination with two separate private properties of both spouses (Art. 1:124 Dutch Civil Code). This type of community comprises all property, with a number of exceptions. Private property of the spouses under this regime are (Art. 1:124 Dutch Civil Code):

- assets acquired before the marriage;
- assets acquired by way of hereditary succession, bequests or wills;
- assets which are acquired for more than half of the price with private property;
- assets which belong to a business or profession conducted by one of the spouses unless it concerns registered property in the name of the other spouse (Art. 1:126 para. 1 Dutch Civil Code).

There are a number of other goods which do not fall within the community of benefits and income. In addition, a number of debts are excluded (Art. 1:126 Dutch Civil Code):

- premarital debts;
- debts which are directly related to the acquisition of assets by way of a gift or will;
- private debts;
- debts related to the profession or business of one spouse, and
- a number of other debts.

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<sup>33</sup> B. Braat, "Les régimes matrimoniaux aux Pays-Bas", in: A. Bonomi and M. Steiner (eds.), *Les régimes matrimoniaux en droit comparé et en droit international privé: actes du Colloque de Lausanne du 30 septembre 2005*, *Comparativa*, 76, 2006 p. 177-200.

<sup>34</sup> Act of 14.03.2002, *Staatsblad* 2002, 152

If the Bill relating to the reform of the marital property regime<sup>35</sup> will be accepted, this default system will be abolished.

The community of profits and losses (*gemeenschap van winst en verlies*) is also rarely chosen by spouses in a marital contract. If it is, in principle the provisions on the community of benefits and income will apply. The main difference with the community of benefits and income is that a negative sum of assets and debts of the community will be borne by the spouse from whose side these have fallen into the community (Art. 1:127 Dutch Civil Code). Under a community of profits and losses a negative total will be borne equally by both spouses.

The regulations (Art. 1:132-1:143 Dutch Civil Code) concerning periodical netting covenants (*verrekenbedingen*) cannot be regarded as forming a separate regime because the spouses are to determine the content of the netting covenants themselves in their marital contract. Consequently, the rules on netting covenants subsequently apply if the spouses have not provided otherwise.<sup>36</sup> However, the system of *verrekenbedingen* can generally be characterised as a system of participation in acquisitions. It has only partly been codified.

Two main forms of netting covenants are to be distinguished: the periodical (in effect annual) netting covenant (Art. 1:141 in combination with Art. 1:132-1:140 Dutch Civil Code) and the final netting covenant respectively when the marriage comes to an end (Art. 1:142 and Art. 143 in combination with Art. 1:132-1:140 Dutch Civil Code). They are frequently included in marital contracts either separately or in combination with each other.

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

The most recent empirical research indicates that in 25% of the marriages and registered partnerships concluded in 2003 a marital agreement was drawn up. As a corollary, 75% of spouses marrying in that year were married under the default system of the community of property regime. Other systems (25%) chosen were: 67% netting covenants/participation in acquisitions, 6% under a regime of separation of property, 18% with a partial community regime and 8% with still other options. The percentage of marital agreements containing a complete separation of property has considerably decreased during the last few decades (almost 70 % of all contracts in 1970, but in 2003 less than 11%).<sup>37</sup>

This implies that, on the one hand, the community of property, being the default system, under which most spouses in the Netherlands are married, will be dealt with in this questionnaire and, on the other hand, also the system of netting covenants/participation in acquisitions, since next to the default system, it is the most frequently used.

It is however important to note that marital contracts containing a complete separation of property in combination with the agreement not to participate in acquisitions, is also important. In the past many spouses married in what was commonly referred to as a cold exclusion (*koude uitsluiting*). Mostly women, who had substantially invested in their marriage,

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<sup>35</sup> *Kamerstukken Tweede Kamer* 28 867.

<sup>36</sup> M.J.A. Mourik and L.C.A. Verstappen, *Handboek voor het Nederlands vermogensrecht bij scheiding*, 2006, pp. 281-342 and Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk – Natuurlijke personen en familierecht*, 2006, Nos. 389-415.

<sup>37</sup> M.J.M. van Mourik and W. Burgerhart, *De ontwikkeling in de praktijk der huwelijks- en partnerschapsvoorwaarden in de periode 1997-2003*, WPNR, 2005 No. 6648, pp. 1027-1039.

but were left empty-handed after a divorce, brought their cases to the courts.<sup>38</sup> In the legal doctrine the opinions as to the *koude uitsluiting* substantially differ.<sup>39</sup>

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<sup>38</sup> The most relevant decisions are: Dutch Supreme Court 11.04.1986, *NJ*, 1986, 622 (*Baartman-Huijbers*); Dutch Supreme Court 04.12.1987, *NJ*, 1988, 610 (*Helmondse kledingbokser*); Dutch Supreme Court 04.12.1987, *NJ* 1988, 678 (*Bloemendaalse horeca*); Dutch Supreme Court 25.11.1988, *NJ*, 1989, 529 (*Hilversumse horeca*); Dutch Supreme Court 15.09.1995, *NJ* 1996, 616 (*Le Miralda*); Dutch Supreme Court 29.9.1995, *NJ*, 1996, 88 (*Melkquotum*)

<sup>39</sup> See E.A.A. Luijten, and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 555. Further M.J.A. Mourik, "Huwelijkse voorwaarden en de eisen van redelijkheid en billijkheid", *WPNR*, 5811 No. 1987, pp. 1-5; H.C.F. Schoordijk, "De syllabus errorum van de koude uitsluiting", *NTBR*, 2003, pp. 2-12 and Twee recente arresten van de Hoge Raad over koude uitsluiting van iedere gemeenschap en hun betekenis voor de rechtspraak (I), *WPNR* 5858 No. 1988, p. 53-56 and (II) *WPNR*, 5859 No. 1988, pp. 65-69; A. Verbeke, "Een wettelijk verbod op koude uitsluiting", *NJB*, 2001, pp. 2185-2186.

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

## C.2. Specific regimes

### I. Community of property

#### I.1. Categories of assets

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

As soon as the spouses are married, a general community of property exists by operation of law. This community comprises, in principle, all assets and all debts of both spouses. This includes the assets of each spouse which were acquired before the marriage and all the goods of both spouses which are acquired during the marriage (Art. 1:93 and 1:94 para. 1 Dutch Civil Code). It also comprises all the debts of the spouses, regardless of the moment at which they are incurred (Art. 1:94 para. 2 Dutch Civil Code). Although the community of property in principle contains all assets and debts, there are exceptions concerning specifically attached assets and debts (*verknochte goederen en verknochte schulden*) and assets which are acquired as a result of a gift or hereditary succession where the testator has determined that the assets will be the personal property of the donee/beneficiary. Thus, there may be three different categories of assets:

1. the community of property containing both assets and debts;
2. personal property and personal debts of spouse A;
3. personal property and personal debts of spouse B.

Specific rules regulate the administration of the assets forming the community of property (Art. 1:97 Dutch Civil Code). After a dissolution of the community (mostly when a spouse dies or upon divorce) the spouses have, in principle, an equal share in the dissolved community of property.

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

The community is the joint property of both spouses, but this community has a rather specific nature. The general rules of contract and property law on joint property/ community in title 7 of Book 3 Dutch Civil Code are not applicable according to Art. 3:189 para. 1 Dutch Civil Code. It is not possible to apply for an order to divide this community, at least not while it is intact.<sup>40</sup> In the legal doctrine there is no consensus as to the exact nature of the community of property, more in particular whether it concerns a community in which the spouses are jointly entitled to the whole community or that each spouse is – at least in some respects – entitled to half of it.<sup>41</sup> The prevailing opinion in the legal doctrine is the first one, entailing that each spouse is entitled to the whole community subject to respecting the same rights of the other spouse. Property which is not a part of the community of property is the private

<sup>40</sup> E.A.A. Luijten, and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 160.

<sup>41</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 295; E.A.A. Luijten, and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, Nos. 159 and 163; M.J.A. Mourik and L.C.A. Verstappen, *Handboek voor het Nederlands vermogensrecht bij scheiding*, 2006 No. 4.1.2.

property of the spouses. The general provisions of contract and property law apply, unless the marital property provisions determine otherwise.

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

The notion of *verknochte goederen* is relevant in this context. These are assets which are specifically attached or which have a close affinity to one of the spouses (Art. 1:94 para. 3 Dutch Civil Code). These assets will only fall within the community insofar as this would not be contrary to such affinity. As this is an exception to the general rule, it should be interpreted narrowly.<sup>42</sup> There is a gradual classification of affinity and its implication for the status of the assets.<sup>43</sup> In the last resort, the Dutch Supreme Court will determine which assets belong to which category and what the consequences of that type of close relationship between one spouse and the asset are. For instance the right to obtain maintenance by spouse A from a former spouse is his or her personal property and spouse B does not have to be compensated for its value upon the dissolution of the community.<sup>44</sup> The other spouse is therefore not entitled to economic ownership of the right to maintenance. On the other hand, damages relating to an accident suffered by spouse A and obtained before the marriage do fall within the community and will, upon the dissolution of the community, be conferred upon spouse A, but spouse B has a right to be compensated for the value.<sup>45</sup>

Intellectual property rights fall within the community and the spouse who originally acquired these rights has no right to claim that they be assigned to him or her. However, the principles of good faith may indicate that such a distribution is appropriate. When these types of rights are used in the profession of one of the spouses, there might be a right to have these rights assigned to that particular spouse on the basis of Art. 1:101 Dutch Civil Code.<sup>46</sup> With respect to some types of assets, there is, due to a lack of relevant case law by the Dutch Supreme Court, a discussion among legal scholars as to in which category do certain assets belong.<sup>47</sup>

Another provision is that after the dissolution of the community of property, each spouse may claim the value of his or her clothing and other small personal objects against their estimated value (Art. 1:101 Dutch Civil Code). However, these are not as such the personal assets of one of the spouses; the provision only confers a right to make a claim against the estimated value of these objects.

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

There is no explicit rule relating to the substitution of the personal property of a spouse. In the legal doctrine it has been submitted that if an asset is private property on the basis of a

<sup>42</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 301.

<sup>43</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 300-316; E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, Nos. 184-188; E.A.A. Luijten, "De algehele gemeenschap van goederen", in: F. Schonewille (ed.), *Relatievermogensrecht geschetst*, 2007, pp. 30-31 with a typology of different categories of closely related assets and the consequences thereof.

<sup>44</sup> Dutch Supreme Court 26.1.1933, *NJ*, 1933, 797.

<sup>45</sup> Dutch Supreme Court 3.11.2006, *LJN* AX8843 and Dutch Supreme Court 3.11.2006 *LJN* AX7805.

<sup>46</sup> E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 200.

<sup>47</sup> G. van der Burght, "Relativiteit in het huwelijksvermogensrecht", *FtV*, 2008, pp. 22-31.

close affinity with a spouse, substitution will generally not be possible.<sup>48</sup> If such personal property has been used to pay a community debt, the spouse has, however, a right to compensation from the community (Art. 1:95 para. 2 Dutch Civil Code), but this provides only a contractual right to compensation and not a right to a good.

In relation to assets which are the private property of one spouse on the basis of the will of a testator, it has been argued by legal scholars that the acquired asset will be private property (substitution) if the asset has been delivered to that spouse and if the private asset forms at least half of the total sum in order to acquire the asset.<sup>49</sup>

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

The investment of personal assets is governed by Art. 1:95 para. 2 Dutch Civil Code, which lays down the rule that the spouse who has made this investment has a right to be compensated by the community of property in case his or her personal property has been used to pay a community debt (*reprise*). This is a personal right to financial compensation (*persoonlijk vorderingsrecht*) and not a right to claim goods (*goederenrechtelijk recht*).<sup>50</sup> The amount of compensation is in principle to be assessed according to the amount of the investment at the moment that the personal property has been invested.<sup>51</sup> There is in principle no difference between investments in movables and immovables. The spouses may agree otherwise in a marital agreement.

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

In principle the community comprises all the present and future property of both spouses, except:

- Assets which have been obtained from the will of a testator or by means of a gift and where the testator/donor has provided that these assets will not fall within the community (by means of an exclusion clause (*uitsluitingsclausule*), Art. 1:94 para. 1 Dutch Civil Code).<sup>52</sup>
- Assets which have a close affinity to one of the spouses in any particular manner (*verknochte goederen*). These assets will only fall within the community insofar as this would not be contrary to such affinity (Art. 1:94 para. 3 Dutch Civil Code).

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<sup>48</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 449 and 301.

<sup>49</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 320; C.A. Kraan, *Huwelijksvermogensrecht*, 2008, pp. 73-74; E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 181.

<sup>50</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 451 .

<sup>51</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 452; E.A.A. Luijten, and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 546.

<sup>52</sup> A testator may, e.g., include the following clause in his or her will: 'I stipulate that no acquisitions from my estate may become part of any community of property to which the acquirer is entitled by marriage or a registered partnership, nor be involved in a settlement on the basis of any stipulation agreed in an ante nuptial or post nuptial agreement or registration agreement.'

- The right of usufruct in Art. 4:29 and Art. 4:30 Dutch Civil Code is excluded. This type of asset falls outside the community, Art. 1:94 para. 1 Dutch Civil Code.<sup>53</sup>
- Pension rights covered by the Pension Rights Equalisation (Separation) Act and rights to a pension for dependants connected with such pension rights (Art. 1:94 para. 4 Dutch Civil Code).

On the basis of the inheritance law a spouse has a number of statutory rights, which are of a mandatory nature. If necessary for the support of the surviving spouse, the heirs are required to co-operate in establishing a usufruct with respect to a number of goods, including the dwelling and household effects (Arts 4:29 and 4:30 Dutch Civil Code). If these rights to establish a usufruct and the usufruct itself would fall within the community, the surviving spouse would still not be able to enjoy the protection deemed necessary by the legislature.

The exception relating to pension rights has to be understood in the context of the Dutch Pension Rights Equalisation (Separation) Act, which is a *lex specialis*. On the basis of this act, old-age pension rights accrued during the marriage which fall under the scope of the act have to be divided, in principle equally, between the ex spouses after divorce. This is independent from the marital property regime of the spouses and thus applies to all spouses, unless the spouses explicitly agreed otherwise. This implies that during the marriage the pension rights are the private property of the spouse who is entitled to these rights. So if a spouse as an employee has accrued old-age pension rights, these rights are his or her private property.

When assets fall within the community of property this implies that they form part of this community under the law of property. As a corollary, they may serve to recover the debts incurred by each spouse before or during the marriage. It also brings about the situation that the provisions on the administration of assets within the community of property will apply. Both spouses are entitled to use the community assets. Only after the dissolution of the community is a division possible. In principle, it is not relevant which assets have been acquired by which spouse.<sup>54</sup>

There are no specific rules for the earnings of the spouses. As income is an asset, it falls within the community of property.

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

According to Art. 1:94 para. 4 Dutch Civil Code the community of property does not comprise pension rights covered by the Pension Rights Equalisation (Separation) Act and rights to a pension for dependants connected with such pension rights. These rights fall within the scope of the Dutch Pension Rights Equalisation (Separation) Act.<sup>55</sup> This implies that during the marriage the pension rights are the private property of the spouse who is entitled to these rights. After a divorce, the old-age pension rights accrued during the marriage which fall under the scope of the Pension Rights Equalisation (Separation) Act have to be divided, in principle equally, between the ex spouses. This is independent from the marital property regime of the spouses and thus applies to all spouses, unless the spouses have explicitly agreed otherwise in their marital contract or in a divorce agreement (*echtscheidingsconvenant*, Art. 1:155 Dutch Civil Code). The ex spouses may have a direct claim against the insurance company.<sup>56</sup>

<sup>53</sup> E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 183.

<sup>54</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 298.

<sup>55</sup> *Wet Verevening pensioenrechten*. The same applies to widowers or widows (surviving relatives) pension rights which are related to these pension rights.

<sup>56</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 615a.

When spouses have agreed to opt out of the Pension Rights Equalisation (Separation) Act, the old-age pension rights are private property on the basis of Art. 1:94 para. 4 Dutch Civil Code. There is no right after a divorce to a division of pension rights acquired after the divorce.

Other pension rights which do not fall within the scope of the Dutch Pension Rights Equalisation (Separation) Act may fall within the community. In that case the general rules on the division of the community will apply. On the other hand, some types of pension rights might be private property by reason of their close relationship with just one of the spouses. An example is a disablement insurance or benefit (*invaliditeitsuitkering*). Upon divorce the other spouse is not entitled to half of the accrued value of the pension right.<sup>57</sup>

In relation to other pension rights such as private pension rights which are independent from employment conditions and annuity the case law of the Dutch Supreme Court applies. This means that after a divorce the spouses who have been married under a community of property regime have to net the value of the pension rights accrued during the marriage.<sup>58</sup>

In respect of life insurance a distinction is made between the right under the policy (the right to designate a beneficiary) and the right from the policy (the right to payment arising from the revocable or irrevocable designation as the beneficiary and from the death of the policyholder/insured). The right under the policy falls within the community. The right to payment will only belong to the community when it arises from an irrevocable designation as a beneficiary.<sup>59</sup>

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

Yes, Art. 1:94 para. 1 Dutch Civil Code provides for this possibility, to the extent that if the third party stipulates that the assets will belong to spouse A in private, these assets will be the personal property of A.<sup>60</sup> In practice many testators make such an 'exception clause', which has been one of the reasons for the government to propose changes to the community of property system. The spouses themselves cannot subsequently contract otherwise.<sup>61</sup>

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

There are no specific rules governing the onus of proof in these cases. The general provisions on evidence in the Civil Procedure Code apply, including art. 150 which determines that the

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<sup>57</sup> Dutch Supreme Court 23.12.1988, NJ, 1989, 700.

<sup>58</sup> Dutch Supreme Court 27.11.2001, NJ, 1982, 503 (Boon/Van Loon). Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 308; C.A. Kraan, *Huwelijkvermogensrecht*, 2008, pp. 85-87; E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 229 and 233.

<sup>59</sup> C.A. Kraan, *Huwelijkvermogensrecht*, 2008, pp. 91-92; M. de Rooij, G. Schmidt and B.J van het Kaar, *National Report, the Netherlands*, T.M.C. Asser Institute/ULC, *Study on Matrimonial Property Regimes and the Property of unmarried couples in private international law and internal law*, <[http://ec.europa.eu/civiljustice/publications/docs/regimes/dutch\\_report\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/regimes/dutch_report_en.pdf)> under nr.1.2.2.2.

<sup>60</sup> B. Breederveld, *De huwelijksgemeenschap bij echtscheiding, De omvang, ontbinding en verdeling door de rechter*, 2008, p. 61-86.

<sup>61</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 318; E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 169.

party who claims certain legal effects of specific facts and circumstances, in principle has to prove these facts and circumstances. Further, evidence may be provided by any means (Art. 152 Dutch Code of Civil Procedure). As a general point of departure, it may be presumed that all assets are community assets (Art. 1:94 para. 1 and para. 3 Dutch Civil Code). If a spouse claims that an asset is personal property, this has to be proven by him or her. It depends on the nature of the asset how the spouse may prove this. If it concerns assets of which a testator has determined that they will belong to a spouse in private, the last will drawn up by a notary will provide this evidence (Art. 157 Dutch Code of Civil Procedure). If it concerns assets which are closely related to a spouse, the spouse who claims the affinity has to assert this which will prevent the asset from falling within the community. However, as a last resort, it is the Dutch Supreme Court which will decide whether such an affinity exists.<sup>62</sup> The registration of registered property is not decisive for the determination of ownership when spouses are married under the community of property.

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

There is no difference between third parties and spouses. There are no specific rules governing the onus of proof in these cases. The general provisions on evidence in the Civil Procedure Code apply, including Art. 150 Dutch Code of Civil Procedure which determines that the party who claims certain legal effects of specific facts and circumstances, in principle has to prove these facts and circumstances. Further, evidence may be provided by any means (Art. 152 Dutch Code of Civil Procedure). As a general point of departure, it may be presumed that all assets are community assets (Art. 1:94 para. 1 and para. 3 Dutch Civil Code). If a spouse claims that an asset is personal property, this has to be proven by him or her, also against a third party.

**30. Which debts are personal debts?**

All debts fall within the community, regardless of whether the debt has been incurred before or during the marriage. There is one exception to this rule for debts which have a close affinity with one spouse.<sup>63</sup> A debt contracted in relation to a personal asset is a personal debt (Art. 1:94 para. 3 Dutch Civil Code). An example is a debt contracted by spouse A for the renovation of a house which is his or her personal property. A debt relating to an inheritance acquired under an exclusion clause (*uitsluitingsclausule*), such as succession tax, is also a personal debt.

**31. Which debts are community debts?**

All debts incurred before or during the marriage by either one or both spouses are community debts, except the debts which are closely related to one spouse (Art. 1:94 para. 2 Dutch Civil Code).

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

The creditor may recover a personal debt of spouse A from the community of property and from spouse's A personal property (Art. 1:96 para. 1 Dutch Civil Code), but not from spouse's B personal property. However, if the debtor recovers the debt from the community, spouse A

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<sup>62</sup> Dutch Supreme Court 03.11.2006, *NJ*, 2008, 258 (whether an asset is closely related and whether that prevents that asset from falling within the community, depends on the nature of the asset).

<sup>63</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 325-326; E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, Nos. 239-241.

is under a legal duty to compensate the community (Art. 1:96 para. 2 Dutch Civil Code). Spouse B may, however, designate property owned by spouse A which will constitute sufficient recourse.

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

It depends on whether both spouses are liable or just one of them. Suppose only spouse A is liable, then the creditor may recover the debt from the community as well as from the personal assets of spouse A. If both spouses are liable, the debts may be recovered from the personal assets of B as well (Art. 1:95 para. 1 Dutch Civil Code). If the community debts concern household debts in the sense of Art. 1:85 Dutch Civil Code both spouses are liable in relation to the creditor, regardless of who contracted with the creditor (Art. 1:85 Dutch Civil Code). The debts may then be recovered from the community of property and the personal property of both spouses.

## **I.2. Administration of assets**

### **34. How are personal assets administered?**

Each spouse administers his or her personal assets (Art. 1:90 Dutch Civil Code).<sup>64</sup> The administration by a spouse of any property includes, to the exclusion of the other spouse, the exercise of the powers connected therewith, including the power to dispose of the property and the power to perform and permit non-legal acts with respect to such property. This is subject to the powers of enjoyment and use belonging to the other spouse in accordance with the marital relationship (Art. 1:90 para. 2 Dutch Civil Code). The other spouse is not allowed to perform such acts. However, spouse B has, just as anyone else, a right to contract (*obligatoire rechtshandelingen verrichten*) with respect to goods under the administration of spouse A. This implies that spouse B may agree with a third party to sell a car under the administration of spouse A. However, this does not bind spouse A. Ultimately, this results in a breach of contract by spouse B in relation to the third party.

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

Property within the community is subject to the administration of the spouse from whom it originated, insofar as the spouses have not agreed otherwise in a marriage contract. A court order may also alter the general administration of property (Art. 1:97 Dutch Civil Code). When spouse A has acquired a car, only he/she is entitled to acts of administration in relation to the car.

Where property within the community originated from spouse A, and it is used in the profession or business of spouse B with the consent of spouse A, spouse B administers that property insofar as it concerns transactions which are considered to constitute normal business or professional conduct. For all other acts, the administration of these assets is jointly exercised by the spouses (Art. 1:90 in combination with Art. 1:97 para. 2 Dutch Civil Code).

If the government proposal will be enacted by Parliament, the provisions on the administration will be amended. Both spouses will then each and independently be entitled to administer community property which is not registered in the name of one of them (Art. 1:97 proposed Dutch Civil Code).

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<sup>64</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 327, 330-335; E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, Nos. 256-260.

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

Yes, there are two ways. First, a spouse can request the other spouse to administer any property (community assets or personal assets). In this case, their internal relationship is governed by the rules concerning mandate (Art. 7:400 Dutch Civil Code) whereby both the marital relationship and the nature of the administered property are to be taken into account (Art. 1:90 para. 3 Dutch Civil Code). Second, if, as a result of absence or another cause, a spouse cannot administer his or her own property the district court may, at the request of the other spouse, order him or her to administer such property or a part thereof while excluding the incapable spouse from the administration (Art. 1:91 Dutch Civil Code).<sup>65</sup>

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

Irrespective of the matrimonial property regime of the spouses the following legal transactions require the consent of the other spouse under Art. 1:88 para. 1 (a) – (d) Dutch Civil Code:

- Contracts for the disposal, encumbrance or the usufruct of the house and household effects;
- Significant gifts;
- The provision of security for third parties other than in the normal conduct of the spouse's profession or business;
- Hire-purchase contracts, except for things which only or mainly serve for the normal conduct of the spouse's profession or business.

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

The administration of professional assets is regulated by Art. 1:97 para. 2 Dutch Civil Code. Where property within the community is used by spouse B, with the consent of spouse A who administered it, in the normal exploitation of the former's profession, the administration is vested in the former spouse and for the rest in the spouses jointly.<sup>66</sup>

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

Art. 1:98 Dutch Civil Code stipulates the obligation of both spouses to give information about the administration, the condition of the property and any debts of the community, if the other spouse asks for information.

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

There is no specific provision, except Art. 1:91 Dutch Civil Code, which entitles both spouses to apply to the courts for an administration order when, as a result of absence or another cause, a spouse finds it impossible to administer his or her own property or the community property, or to a serious extent fails to administer the community property. In practice, there is hardly any case law on this subject.<sup>67</sup>

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<sup>65</sup> C.A. Kraan, *Huwelijksvermogensrecht*, 2008, pp. 109-110.

<sup>66</sup> C.A. Kraan, *Bestuur*, in: F. Schonewille (ed.) *Relatievermogensrecht geschetst*, 2007, pp. 59-60.

<sup>67</sup> Court of Appeal of The Hague 28.02.2006, *LJN AW4127*.

However, the pending Bill<sup>68</sup> contains a new provision. According to Art. 1:97 para. 3 Dutch Civil Code (proposed) disputes between the spouses in respect of the administration regarding assets and liabilities pertaining to the community of property, may be submitted to the district court at the request of the spouses or either one of them.

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

Two aspects have to be distinguished: on the one hand, the relationship between a third party and the spouse and, on the other, the relationship between the spouses themselves. Further, a distinction has to be made between registered property and movables and other non-registered property.

When a *third party* cannot ascertain which spouse has the power of administration over a moveable asset which is not registered property or a right to bearer, the third party may consider the spouse who holds the asset or the right to bearer as having such power (Art. 1:92 para. 1 Dutch Civil Code). The third party is then acting in good faith and this will generally result in the acquisition of the asset by the third party unless it concerns a gift (Art. 3:86 Dutch Civil Code). The condition of good faith is thus a less stringent standard than normal, when it is also necessary that a third party could not know whether the contracting party is competent.

If it is registered property, a third party is generally not acting in good faith, since the third party should have consulted the registers, which would show that the spouse with whom he was acting was not competent (Art. 3:88 and Art. 3:24 Dutch Civil Code).<sup>69</sup>

In the relationship between *the third party and the competent spouse*, Art. 1:92 para. 2 Dutch Civil Code determines that the spouse who is hindered by a third party in good faith in the administration of any property, has a right to terminate such a hindrance within a reasonable period after having become aware of this hindrance. The third party may also give the spouse a reasonable period to exercise such a right and if the spouse does not exercise this right within the period, the right to terminate the hindrance lapses.

In case the third party may not claim protection, the competent spouse is still the owner of the assets which he or she may revindicate. However, this would result in the liability of the non-competent spouse who contracted with the third party, since he or she cannot meet the obligation to transfer the property rights. This liability may result in a duty to compensate for the damage to the third party, which would in the end be a debt falling within the community. To prevent such a result, the competent spouse may be a party to a legal transaction (Art. 1:90 para. 4 Dutch Civil Code).

To prevent problems in the future, the other spouse may ask the courts to terminate the community of property (Art. 1:109 Dutch Civil Code). This is possible if the spouse appears to act contrary to the administration of the other spouse over community assets, or when he/she does not meet his or her duty to provide the requested information. The community regime is then replaced by a separation of property regime.

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

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<sup>68</sup> *Kamerstukken II*, 28 867.

<sup>69</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 340-341; E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 282

There is no distinction as to whether personal or community assets are concerned. If a spouse is incapable of administering assets the courts may, at the request of the other spouse, order him or her to administer such property or a part thereof while excluding the incapable spouse from the administration (Art. 1:91 Dutch Civil Code).

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

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

The community of property will be dissolved, by operation of law, in the case of (Art. 1:99 para. 1 Dutch Civil Code):

- the death of a spouse;
- divorce;
- legal separation;
- termination of a registered partnership by mutual consent;
- dissolution of a registered partnership;
- where a spouse's existence is uncertain (Art. 1:412-Art. 1:425 Dutch Civil Code) and the other spouse remarries or enters into a registered partnership;
- a court order terminating the community;
- dissolution as a result of a subsequent marital agreement.

The insolvency of a spouse is not a ground for the dissolution of the community of property.

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

1. If one of the spouses dies, this date is relevant (Art. 1:99 para. 1 sub a Dutch Civil Code in conjunction with Art. 1:149 sub a Dutch Civil Code). In the case of divorce, it is the date of the registration in the civil status register of the court decision that the marriage has been dissolved (Art. 1:163 para. 1 Dutch Civil Code). This implies that assets acquired by one of the spouses after the divorce order will fall within the community if the order has not yet been registered.

2. The date of registering the decree of judicial separation in the Matrimonial Property Register is decisive (Art. 1:173 Dutch Civil Code).<sup>70</sup>

3. The court order granting the application to terminate the community of property becomes effective against third parties when it has been publicly announced by means of an insertion or of an extract from the court order in the Government Gazette and in one or more daily newspapers specified in the court order. Furthermore, the court order must be registered in the Matrimonial Property Register (Art. 1:116 Dutch Civil Code). From that date onwards, the community is terminated and replaced by a separation of property regime (Art. 1:112 Dutch Civil Code).

4. If the community of property is terminated by a marriage contract the date specified therein is decisive, but it may only be used against third persons who are unaware of it if the provisions of the contract were registered in the public Matrimonial Property Register.

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<sup>70</sup> This is not the same register as the register of Births, deaths, marriages and registered partnerships.

The value of the assets will be determined according to the value at the moment of the factual division, unless good faith requires otherwise.<sup>71</sup> The ex spouses may agree otherwise.<sup>72</sup> When the court determines the division, the date of the court order is decisive.<sup>73</sup>

It is irrelevant whether the spouses have been living apart.

The Bill on the revision of the marital property system contains a number of changes in this respect, the most important one being that the moment of the request for a divorce will be decisive, instead of the ending of the marriage (Art. 1:99 Dutch Civil Code (proposed)).

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

The investment of community property is governed by Art. 96 para. 2 Dutch Civil Code, which lays down the rule that the spouse whose debts have been paid by the community, is under a duty to compensate the community (*récompense*). This is a personal right to financial compensation (*persoonlijk vorderingsrecht*) and not a right to claim a good (*goederenrechtelijk recht*). The amount of compensation is in principle to be assessed according to the amount of the investment at the moment that the property has been invested, which implies nominal compensation.<sup>74</sup> There is no difference between investments in movables and immovables.

The other way around, the same principle applies when personal assets have been used for investments in the community property (Art. 1:95 para. 2 Dutch Civil Code). The spouse is entitled to claim the nominal amount at the time of the investment (*reprise*).

It has been argued in the legal doctrine that the principle of nominal compensation may in exceptional cases be set aside for reasons of good faith.<sup>75</sup>

If the Bill on the revision of the marital property system will be accepted, the currently deployed system of a nominal right of compensation will be replaced by a system of compensation for certain investments based on the 'rule of investment' or 'participation rule' (*beleggingsleer*).<sup>76</sup>

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

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<sup>71</sup> Dutch Supreme Court 12.10.2001, *RvdW*, 2001, 153; Dutch Supreme Court 22.03.1996, *NJ*, 1996, 710; Dutch Supreme Court 6.3.1996, *NJ*, 1997, 593, Dutch Supreme Court 12.2.1999, *NJ*, 1999, 551, Dutch Supreme Court 6.10.2001, *NJ* 2001, 147. E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 347.

<sup>72</sup> Dutch Supreme Court 17.04.1998, *NJ*, 1999, 550.

<sup>73</sup> Dutch Supreme Court 22.09.2000, *NJ*, 2000, 643.

<sup>74</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 452; E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 546. In special cases an exception may be allowed on the basis of good faith. See for instance Dutch Supreme Court 15.02.2008, *NJ* 2008, 110.

<sup>75</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 452 (for both reprises and récompenses); E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 547 (only in relation to récompenses).

<sup>76</sup> Art. 1:87 Dutch Civil Code (proposed).

The investment of community property is governed by Art. 96 para. 2 Dutch Civil Code, which lays down the rule that the spouse whose debts have been paid by the community, is under a duty to compensate the community (*récompense*). This is a personal right to financial compensation (*persoonlijk vorderingsrecht*) and not a right to claim a good (*goederenrechtelijk recht*). The amount of compensation is in principle to be assessed according to the amount of the investment at the moment that the property has been invested.<sup>77</sup> There is no difference between investments in movables and immovables.

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

There is no specific rule on priority, which implies that the general rules of property and contract law are applicable. In the legal doctrine the prevailing view is that both the spouse who is entitled to compensation from the community and a third party who is a creditor of the community property are concurrent creditors.<sup>79</sup> However, some scholars are of a different opinion.<sup>80</sup>

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

The provisions on the administration of property (Art. 1:97 and Art. 1:98 Dutch Civil Code) are no longer applicable. Also court orders or agreements relating to the administration of property no longer have effect. Art. 3:170 Dutch Civil Code determines that both ex spouses have to act together. There is an exception concerning urgent acts which cannot be postponed and acts which are necessary for the normal use of the asset. Each spouse is allowed to perform these three types of acts independently of the other spouse (Art. 3:170 para. 1 Dutch Civil Code). Apart from that, acts of administration have to be performed jointly, unless otherwise determined by the spouses.

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

Each spouse is entitled to half of the dissolved community of property, unless it has been determined otherwise in a marital contract or written divorce agreement (Art. 1:100 para. 1 Dutch Civil Code). Exceptions to the equal sharing of property are possible on the basis of reasonableness and fairness, but only in extreme situations.<sup>81</sup> Title 3.7.2 Dutch Civil Code concerning a number of specific communities (*bijzondere gemeenschappen*) is applicable.

#### **50. How are the community debts settled?**

<sup>77</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 452.

<sup>78</sup> Art. 1:87 Dutch Civil Code (proposed).

<sup>79</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 460; E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 543.

<sup>80</sup> For an overview see Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 260.

<sup>81</sup> Dutch Supreme Court 07.12.1990, NJ, 1991, 593. Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 357; E.A.A. Luijten, and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 305.

After the dissolution of the community, Art. 1:102 Dutch Civil Code determines exclusively in relation to community debts that each spouse will be fully liable for the community debts for which he or she was already liable before the dissolution. In relation to community debts for which the spouse was not liable, he or she will become liable for half of the debt after the dissolution of the community (Art. 3:192 Dutch Civil Code). When spouse A contracted a community debt before the dissolution, but this creditor has not yet been paid after the dissolution of the community, the creditor may seek to recover the debt fully from the community property and spouse A's private property and for half of the value from spouse B's private property.<sup>82</sup>

A community debt creditor may ask the courts to appoint a liquidator when the community will be divided before the due and payable debts have been paid. The creditor has this right also in the situation in which there is a risk that he or she will not be paid completely or partially within a reasonable time (Art. 3:193 para. 1 Dutch Civil Code).

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

Each spouse has the right to claim clothing and small objects which serve for his or her personal use, the capital assets used in a profession or business, and family papers and mementoes against their estimated value (Art. 1:101 Dutch Civil Code). This is a right in relation to the other (ex) spouse and does not have effect in relation to third parties.

Regardless of whether the family home is owned or rented by one or both spouses, the spouses may agree who is allowed to take over the dwelling, but if they cannot reach an agreement, each spouse may also request the court to decide which of them is allowed to take over the dwelling.

If it concerns a dwelling which is the *sole property* of spouse A, spouse B may ask the court to grant him or her the right to continue to live in the house and use its household effects for six months after the divorce (Art. 1:165 Dutch Civil Code and Art. 822 para. 1 sub a and Art. 827 para. 1 sub d Dutch Code of Civil Procedure).<sup>83</sup>

If it concerns a *rented dwelling*, the spouse who is not the original tenant will be a co-tenant by operation of law insofar as he or she actually has his or her main residence in the dwelling (Art. 7:266 Dutch Civil Code). Upon divorce the co-tenant may ask the courts to take over the contract (Art. 7:266 para. 5 Dutch Civil Code).

If the dwelling has been *rented by both spouses* from the start, each spouse may ask the courts to take over the contract. The court will have to balance the interests of both parties.

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

Assets which are closely related to one of the spouses may, after the dissolution of the community, be distributed to this spouse. This follows from Art. 1:94 para. 3 Dutch Civil Code and the principle of good faith.<sup>84</sup> This is a preferential right to the distribution of these assets after dissolution. It only has effect in relation to the other spouse and not to third

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<sup>82</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, Nos. 364-365; E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 310.

<sup>83</sup> Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, No. 664.

<sup>84</sup> E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, Nos. 187 and 351.

parties. An example is a collection which fell within the community. After the dissolution the collecting spouse is entitled to claim these assets against their estimated value.<sup>85</sup>

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

In theory there is no relation between the division, on the one hand, and the attribution of maintenance, on the other. The ex spouses may come to an agreement on maintenance, but if they do not, the court may upon request determine the amount of maintenance on the basis of the needs of the maintenance creditor and the financial capacity of the maintenance debtor. However, the ex spouses are allowed to make a contract on the division of the property and the spousal maintenance, which will in practice not be checked by the court. Thus it is possible, for instance, to award a lump-sum payment instead of periodical maintenance payments. This lump-sum may affect the division of property.

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

The community of property does not comprise pension rights which fall within the scope of the Dutch Pension Rights Equalisation (Separation) Act. Old-age pension rights accrued during the marriage which fall under the scope of the Dutch Pension Rights Equalisation (Separation) Act have to be divided, in principle equally, between the ex spouses after a divorce. This is independent from the marital property regime of the spouses and thus applies to all spouses, unless the spouses have explicitly agreed otherwise in their marital contract or in a divorce agreement (Art. 1:155 Dutch Civil Code). The ex spouse may have a direct claim against the insurance company. Other pension rights such as private pension rights which are independent from employment conditions and annuity are included in the community and have to be divided upon divorce. As it is possible to make an agreement on the exact division, pension claims could be relevant in the negotiating process.

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

That is very well possible if both ex spouses agree. Art. 1:100 Dutch Civil Code on the equal division of the community of property explicitly refers to the situation in which the ex spouses contract otherwise. This may have been agreed upon by a marital contract or by a divorce agreement.

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

No, the general rules apply: Art. 1:99 in conjunction with Art. 1:149 sub a Dutch Civil Code.

## **II. Community of accrued gains/Participation in acquisitions**

### **II.1. Categories of assets**

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

In the first place it is worth mentioning that to a large extent the Dutch system of netting covenants (*verrekenbedingen*) has been developed in practice. The attraction of excluding the community of property is that it ensures that property inherited by spouse A does not leave the family via spouse B and that it protects one spouse in the event of the bankruptcy of the

<sup>85</sup> E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 190.

other's business. However, one serious disadvantage is that a spouse who is not economically active during the marriage can end up empty-handed at the end of the marriage. To deal with this problem, notaries developed clauses which excluded a community of property by providing for some participation in the profits accrued by both spouses during the marriage. The netting covenants were developed in order to combine the advantages of the cold exclusion (*koude uitsluiting*) with the advantages in terms of the protection of the joint property regime. This resulted in the so-called 'Amsterdam contractual participation clause' (*Amsterdams verrekenbeding*).<sup>86</sup> The scheme was approved by the Dutch Supreme Court in early 1944.<sup>87</sup> Since then the Dutch Supreme Court<sup>88</sup> has been requested to develop rules for the spouses' non-compliance in respect of their mutual obligations to net income or capital to which they agreed in their marital contracts. As a result, in September 2002, some rules for netting covenants were codified in the Dutch Civil Code. These regulations (Art. 1:132-Art. 1:143 Dutch Civil Code) cannot be regarded as forming a separate regime because the spouses are to determine the content of the netting covenants themselves in their marital contract. Consequently, the rules on netting covenants subsequently apply – they are to be considered as permissive provisions – if the spouses have not provided otherwise.<sup>89</sup> However, the system of *verrekenbedingen* can generally be characterised as a system of participation in acquisitions. It has only partly been codified. The *verrekenbedingen* are frequently used in practice. In 67 % of all marriage and partnership contracts which were concluded in 2003 the participation in acquisitions was chosen.<sup>90</sup>

Secondly, it should be stressed that the netting covenant system functions well in combination with any form of limited community of property which spouses have often chosen in their marital contract such as a community of property which only encompasses household effects or the family home. Two main forms are to be distinguished: the periodical (in effect annual) netting covenant (Art. 1:141 in combination with Art. 1:132-1:140 Dutch Civil Code) and the final netting covenant respectively when the marriage comes to an end (Art. 1:142 and Art. 1:143 in combination with Art. 1:132-1:140 Dutch Civil Code). They are frequently included in marital contracts either separately or in combination with each other. The possibility to agree on different forms follows from the wording of Art. 1:132 para. 2 Dutch Civil Code which allows the spouses to derogate from the provisions on netting covenants in their marriage contract, either explicitly or on account of the nature of the covenants, unless otherwise provided.

Netting means that spouses economically set-off their claims, which does not affect their position as owners of certain assets as agreed upon in their marital contract. No legal definition of the periodical and final netting covenant is provided. In this respect party autonomy prevails. When at the end of the marriage a periodical netting obligation agreed by a marriage contract is not complied with – which is common practice – the respective obligations are transformed into a final netting obligation by operation of law. To that end Art. 1:141 Dutch Civil Code determines that the netting obligation shall remain applicable over the specific period and will extend to the balance from the investment and reinvestment

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<sup>86</sup> C. Forder and I. Sumner, "Bumper issue: All you ever wanted to know about Dutch family law (and were afraid to ask)", in: A. Bainham (ed.), *The International Survey of Family Law 2003*, pp. 268-321 (270-276).

<sup>87</sup> Dutch Supreme Court, 21.1.1944, NJ, 1944,45.

<sup>88</sup> E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht, 2005*, Nos. 636-703.

<sup>89</sup> M.J.A. Mourik and L.C.A. Verstappen, *Handboek voor het Nederlands vermogensrecht bij scheiding*, 2006, pp. 281-342 and Asser-De Boer, *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, eerste deel - Personenrecht, eerste stuk - Natuurlijke personen en familierecht*, 2006, Nos. 389-415.

<sup>90</sup> M.J.M. van Mourik and W. Burgerhart, "De ontwikkeling in de praktijk der huwelijks- en partnerschapsvoorwaarden in de periode 1997-2003", *WPNR*, 2005 No. 6648, pp. 1027-1039.

of whatever was not netted and over the benefits there from. In addition, it is presumed that the capital then present has been formed from what had to be netted unless there is a different obligation on account of the requirements of reasonableness and fairness in the light of the netting obligation (Art. 1:141 para. 3 Dutch Civil Code). A spouse can provide evidence to the contrary by demonstrating that a certain asset was not acquired with capital in respect of which the periodical netting obligation was applicable. In particular capital acquired pursuant to hereditary succession, bequests or gifts are explicitly mentioned as exceptions which refute the statutory presumption (Art. 1:133 para. 2 Dutch Civil Code).

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

The assets belong to the private property of each spouse or they form a simple community (*eenvoudige gemeenschap*, Art. 3:166 Dutch Civil Code) in which both spouses almost always have an equal share.<sup>91</sup> The legal nature of an asset depends on the way in which the respective assets have formally (the transfer of legal ownership) been acquired. Has the asset been delivered to one of the spouses or to both spouses or has it been acquired through succession by one of the spouses or both spouses? When the spouses have agreed upon a limited community of property – e.g. a limited community of household effects – any asset that has been acquired by one spouse is deemed to be community property by operation of law if such a community can usually be comprised of such assets (Art. 1:131 para. 1 Dutch Civil Code), with the exception of assets which one spouse acquired pursuant to hereditary succession or a gift in respect of the last will of the testator or the donor who stated that it would not fall within the limited community of property (Art. 1:94 para. 1 Dutch Civil Code). A special rule applies in relation to assets which have been acquired with capital belonging to the costs and expenses of maintaining the household (Art. 1:84 Dutch Civil Code): if spouse A has purchased such an asset with capital to which spouse B according to his or her duty has contributed in order to cover the expenditure of the household costs, the question arises to which property the asset belongs: to the property of spouse A, to the property of spouse B or to the property of both spouses? It has been argued that the asset should belong to both spouses jointly; however, also other solutions have been proposed.<sup>92</sup>

#### **59. What assets comprise the separate property of the spouses**

The property of each spouse can comprise any sort of asset. The way in which an asset has been acquired determines to which property of each spouse the asset belongs.

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

Both spouses can acquire the legal ownership of an asset: it belongs to the spouses in joint ownership. The general rules of property law are applicable. In principle they are entitled to an equal share provided that they have not agreed otherwise (Art. 3:166 Dutch Civil Code). When the spouses have agreed, by means of a marital contract, on a limited community of property regime, the asset will be deemed community property provided that it could comprise such an asset. Where there is no such community regime, each of the spouses will be deemed to own one-half (Art. 1:131 Dutch Civil Code).

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

Whereas under the regime of netting covenants the netting of capital and income occupy centre stage, questions relating to the substitution of property generally are of less importance. However, this kind of question may arise when the spouses have agreed upon a

<sup>91</sup> C.A. Kraan, “De uitsluiting van iedere gemeenschap van goederen”, in: F. Schonewille (ed.), *Relatievermogensrecht geschetst*, 2007, pp. 135-140.

<sup>92</sup> C.A. Kraan, *Huwelijksvermogensrecht*, 2008, pp. 197-198.

limited community of property. If either more than one-half of the price of an asset is for the account of the limited community of property or for the account of the property of each spouse the asset falls within the limited community of property or within the private property of each spouse. This follows from Art. 1:124 para. 2 Dutch Civil Code. Property subject to registration, however, is owned by the spouse whose name has been recorded in the register.<sup>93</sup>

When the marital contract only contains a netting covenant but no agreement on a limited community of property, the general rules on the acquisition of ownership are applicable. If the asset has been delivered to one of the spouses, it only belongs to his or her property. As a result no claims for substitution of property can be exercised; instead rights of reimbursement might arise.<sup>94</sup> A right of reimbursement entails a shift of assets between the spouses which is not based upon a contract (e.g. a loan). If spouse A has contributed to the purchase of an asset delivered to spouse B, the asset falls within the private property of spouse B, but in favor of spouse A a claim for a reimbursement to the amount of his or her contribution (nominal acquisition doctrine) arises. This claim will amount to the nominal investment. If the pending Bill<sup>95</sup> will be adopted claims of reimbursement will no longer be determined according to the nominal acquisition rule. The contribution of spouse A to the acquisition of the asset of spouse B will then be considered as an investment. As a result the investor only shares on a pro rata basis if the value of the investment has increased. According to a significant decision by the Dutch Supreme Court, however, the contribution of one spouse to the purchase of an asset (in particular a house) should be considered as being a performance of a natural obligation (*natuurlijke verbintenis*).<sup>96</sup> This means that no reimbursement claim is possible.

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

Each spouse is entitled to his or her own (retirement) pension rights. The Pension Rights Equalisation (Separation) Act (*lex specialis*) determines that each spouse in the event of a divorce or a judicial separation is entitled to claim one-half of the retirement pension which the other spouse has built up during the marriage (Art. 1:155 Dutch Civil Code). Furthermore, each spouse is exclusively entitled to amounts which arise out of insurance benefits taken out of his or her life insure or annuity policy.

## **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?**

It may be stipulated by the will of the testator or when a gift is made that an asset will fall outside the (limited) community of property. Additionally, it may be provided by third parties that no netting of the assets acquired in this way is permitted from capital acquired pursuant to hereditary succession, bequests or gifts and from the benefits thereof, if the marriage contract provides for netting. As a result the will of the third party prevails over the will of the spouses as stated in their marital agreement (Art. 1:134 and Art. 1:133 para. 2 Dutch Civil Code).

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

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<sup>93</sup> Dutch Supreme Court 2.04.1976, NJ, 1976, 450 annotated by WMK (*Modehuis Nolly*).

<sup>94</sup> Dutch Supreme Court 12.06.1987, NJ, 1988, 150 annotated by EAAL (*Kriek/Smit*).

<sup>95</sup> *Kamerstukken* 28 867, No. 9, part. A.

<sup>96</sup> Dutch Supreme Court 01.10.2004, NJ 2005, 1 (*Natuurlijke verbintenis*). See in particular A.H.N. Stollenwerck, "Van uitsluiting naar beperkte gemeenschap, geen schenking!", *ftV*, 2005, pp. 4-10 and B.H.E.M. Schols and F.A.M. Schoenmaker, "Natuurlijke verbintenis, fiscale verbintenis? Natuurlijk!", *FBN*, 2006, pp. 3-7.

Where there is a dispute between the spouses concerning the ownership of an asset the spouse who claims to be the owner bears the burden of proof. This follows from the general law on evidence (Art. 1:150 Dutch Code of Civil Procedure). If the spouses have agreed on a limited community of property the acquired assets fall within the respective community if it can comprise such assets (Art. 1:131 para. 1 Dutch Civil Code). For instance, a dishwasher belongs to the household effects whereas a shotgun belongs to the property of the spouse who holds a licence for that shotgun. If the ownership of the asset cannot be proven, each of the spouses will be deemed to own one-half (Art. 1:131 para. 1 Dutch Civil Code). Disputes concerning ownership in respect of property which is subject to registration (such as houses or ships) seldom arise because the listing of the name of the person in the register is sufficient evidence. Frequently, spouses include a standardised evidence or settlement agreement in their marital contract which determines to whom certain assets belong.

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

As against third parties ownership of an asset has to be proven by the spouse who claims to be the sole owner. In principle, the asset belongs to the spouse to whom it has been delivered.

If it concerns rights to bearer and unregistered property assets which were brought into the marriage by one of the spouses, evidence against third parties can only be proven if the respective assets are mentioned in the marriage contract or in an appendix to this contract signed by the parties and the notary (Art. 1:130 Dutch Civil Code).

**66. Which debts are personal debts?**

Each spouse is the sole debtor of any debt which he or she has incurred. This follows from the law of obligations and can be directly derived from Art. 3:276 Dutch Civil Code.

**67. Which debts are joint debts?**

Only debts which the spouses have incurred together are joint debts (Art. 1:85 Dutch Civil Code).

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

Only the debtor spouse is liable to the full extent of his or her property. The creditor cannot recover personal debts from the property of the other spouse. Where the spouses have agreed on a limited community of property in their marital contract the creditor can also recover debts from this community (Art. 1:95 para. 1 Dutch Civil Code).

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

Joint debts of the spouses can be recovered from the properties of each spouse each time for the amount of the respective spouse's share in the joint debt. If the spouses are solidary debtors<sup>97</sup> the creditor can recover joint debts from the property of one of the spouses: subsequently he or she has a claim of recourse against the other spouse to the amount of the payment which exceeds his or her own share in the debt (Art. 6:10 Dutch Civil Code).

**II.2. Administration of assets**

**70. How are the different categories of assets administered?**

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<sup>97</sup> Specific solidary debts exist by operation of law according to Art. 1:85 Dutch Civil Code.

Each spouse administers his or her own property to the exclusion of the other spouse (Art. 1:90 Dutch Civil Code).

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

A spouse can request the other spouse to administer any property (community assets or personal assets). In this case, their internal relationship is governed by the rules concerning mandate (Art. 7:400 Dutch Civil Code) whereby both the marital relationship and the nature of the administered property are to be taken into account (Art. 1:90 para. 3 Dutch Civil Code).<sup>98</sup>

If, as a result of absence or another cause, a spouse cannot administer his or her own property the district court may, at the request of the other spouse, order him or her to administer such property or a part thereof while excluding the incapable spouse from the administration (Art. 1:91 Dutch 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?**

A spouse requires the written consent of the other spouse (there are a few exceptions, as provided in Art. 1:88 para. 4 and 5 Dutch Civil Code) regardless of the matrimonial property regime in force between them for the following other legal transactions (Art. 1:88 para. 1 sub a-d Dutch Civil Code):

- Contracts extending to the disposal, encumbrance or usufruct of the house and household effects;
- Significant gifts;
- The provision of security for third parties other than in the normal conduct of the spouse's profession or business;
- Hire-purchase contracts, except for things which only or mainly serve for the normal conduct of the spouse's profession or business.<sup>99</sup>

Given their object or nature, these legal acts to which also the transactions referred to in Question 11 belong are capable of prejudicing certain rights or may involve a substantial risk. The rationale behind Art. 1:88 Dutch Civil Code is to protect the spouses from each other and from themselves in the interest of the family.<sup>100</sup>

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

No special rules for the administration of professional assets which are used in the conduct of the profession or business of the spouses are applicable within the 'regime' of netting covenants. If, however, as a result of absence or another cause a spouse cannot administer his or her own property the district court, may, at the request of the other spouse, order him or her to administer such property or a part thereof while excluding the incapable spouse from the administration (Art. 1:91 Dutch Civil Code).

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

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<sup>98</sup> C.A. Kraan, *Huwelijksvermogensrecht*, 2008, pp. 103-116.

<sup>99</sup> A.L.G.A. Stille, "Beperking van de handelingsbevoegdheid van echtgenoten", in: F. Schonewille (ed.), *Relatievermogensrecht geschetst*, 2007, pp. 9-26.

<sup>100</sup> Dutch Supreme Court 15.12.1978, *NJ*, 1979, 427.

Within the ‘regime’ of netting covenants no statutory rule establishes that a spouse has a duty towards the other spouse to provide information about the administration of his or her property. The pending Bill,<sup>101</sup> however, contains a new rule which - when so requested - obliges the spouses to provide each other with information regarding the conduct of the administration and the condition of the property in question as well as the state of the debts. This proposed rule would be in accordance with Art. 1:98 Dutch Civil Code which only applies if between the spouses the default regime (general community of property) exists.

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

Disputes between spouses about the administration of property seldom occur. Case law is rare.

**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?**

If a spouse fails, to a serious extent, to administer his or her own property, the district court may, at the request of the other spouse, order him or her to administer such property or a part thereof while excluding the first-mentioned spouse (Art. 1:91 para. 1 Dutch Civil Code). If a spouse breaches the administration rules, for instance he or she sells a moveable thing of the other spouse, a valid sales contract is nevertheless concluded, but the spouse who is in breach is not capable of providing consent,<sup>102</sup> unless the other spouse cooperates by giving his or her consent. To a certain extent, third parties dealing with a spouse who has no right of administration over a movable thing are protected. If he or she cannot ascertain which of the spouses has the right of administration, he or she may consider the spouse who holds the thing as having such a right (Art. 1:92 para. 1 Dutch Civil Code).

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

If a spouse finds it impossible to administer his or her property, the court may, at the request of the other spouse, order him or her to administer such property or a part thereof while excluding the incapable spouse (Art. 1:91 para. 1 Dutch 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?**

The ‘regime’ of netting covenants ends on the grounds determined by law. The following grounds are to be distinguished (Art. 1:142 para. 1 sub a–g Dutch Civil Code):

- the death of a spouse;
- divorce;
- legal separation;
- discontinuation of the mutual netting obligation;
- termination of a registered partnership by mutual consent;
- dissolution of a registered partnership;
- when a spouse’s existence is uncertain (Art. 1:412 to Art. 1:425 Dutch Civil Code) and the other spouse remarries or enters into a registered partnership.

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<sup>101</sup> *Kamerstukken II*, 28 867, No.1/2, part A.

<sup>102</sup> Since the reform of the matrimonial property law in 1992, the right of administration does not include entering into obligatory legal transactions.

The spouses may at any time derogate from these grounds – except death and when a spouse is missing - by written contract (Art. 1:142 para. 2 Dutch Civil Code). In addition, they are at all times free to change their matrimonial property regime by making a marital contract.

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

The applicable dates for the termination of the ‘regime’ of netting covenants are the following (Art. 1:142 para. 1 sub a-g Dutch Civil Code):

- the time of the death of a spouse;
- the date of the lodging of the divorce petition
- the date of lodging the petition for a legal separation;
- the date of lodging the petition to discontinue the mutual netting obligation;
- the date on which the agreement on the termination of a registered partnership is made;
- the date of lodging the application for the dissolution of a registered partnership;
- the date on which the court order declaring that there is a legal presumption of the death of the spouse whose existence is uncertain becomes final and binding.

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

Upon the dissolution of the ‘regime’ of netting covenants a spouse obtains no rights whatsoever in respect of the property of the other spouse. Assets of one spouse which have been acquired with capital in respect of which during the marriage no netting has taken place are considered to be joint assets: each spouse will be deemed to own one-half (Art. 1:141 para. 1 and 3 Dutch Civil Code). Where an asset is partly acquired using capital in relation to which no netting during the marriage has taken place, the acquired asset is deemed to be part of such nettable capital for such a share as corresponds to the part of the consideration applied at the time of the acquisition (Art. 1:136 para. 1 Dutch Civil Code).<sup>103</sup>

Example: Shortly after the conclusion of the marriage spouse A bought a house. It was totally financed by a mortgage loan to which spouse B has not contributed. During the marriage the mortgage has been redeemed by spouse A who is the only breadwinner. Spouse A’s income has been reduced by the costs of the household to which also the mortgage interest belongs. In this case the income put aside by spouse A – which has been used to pay off the loan – belongs to the nettable capital which, according to the netting covenant, should have been set off every year. The gradual payment of the mortgage debt is considered to be an investment in the house of spouse A to which both spouses have contributed. If no netting has taken place the netting obligation relates to the actual value of the house at the moment of the divorce to which both spouses have an equal share (Art.1:141 Dutch Civil Code). If the house has a value of € 200,000 each spouse receives € 100,000. The setting off has only economic consequences. The position of spouse A as the owner of the house is unaffected.

81. How are assets determined and valued? Are e.g. premarital assets and debts, assets acquired by gift, will or inheritance and debts related to those assets, the increase in value of the separate property and debts related to that property taken into account?

In principle, premarital property and debts as well as capital acquired pursuant to hereditary succession, bequests or gifts are excluded from the netting obligation. The obligation to net relates exclusively to all other capital or income acquired by the spouses while such an obligation exists (Art. 1:133 para. 2 Dutch Civil Code). An increase in the value of an asset is

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<sup>103</sup> M.J.A. Mourik and L.C.A. Verstappen, *Handboek voor het Nederlands vermogensrecht bij scheiding*, 2006, pp. 277-342.

deemed to be part of the nettable capital (Art. 1:141 para. 1 Dutch Civil Code).<sup>104</sup> If a spouse has incurred liability in connection with an acquisition of an asset, the asset is also deemed to form part of the nettable capital insofar as the liability is deemed to be part thereof or is redeemed or paid therefrom.

Example: Spouse A has bought a house *before* entering into the marriage; one-half has been paid with his own property and one-half with a mortgage loan to which spouse B has not contributed. Spouse A is the only breadwinner and during the marriage the mortgage debt has been redeemed with his income, after deduction of the costs of the household to which the mortgage interest belongs. In this case the income<sup>105</sup> put aside by spouse A – which has been used for paying off the loan – belongs to the nettable capital which, according to the netting covenant, should have been set off every year. The gradual payment of the mortgage debt is considered to be an investment in the house of spouse A to which both spouses have contributed. If no netting has taken place the netting obligation relates to the actual value of the house at the moment of the divorce to which both spouses have an equal share (Art.1:141 Dutch Civil Code). If the house has a value of € 200,000, € 100,000 belong to the nettable capital. As a result each spouse receives € 50,000 Euros. The setting off has only economic consequences. The position of spouse A as the owner of the house is unaffected.<sup>106</sup>

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

The applicable dates on which the composition and extent of the nettable capital shall be determined are (Art. 1:142 para. 1 sub a-g and para. 2 Dutch Civil Code):

- the time of a spouse's death;
- the date of lodging the divorce petition
- the date of lodging the petition for a legal separation;
- the date of lodging the petition to discontinue the mutual netting obligation;
- the date on which the agreement to terminate a registered partnership is made;
- the date of lodging the application for the dissolution of a registered partnership;
- the date on which the court order declaring that there is a legal presumption of the death of the spouse whose existence is uncertain becomes final and binding.

A factual separation between the spouses before these dates is irrelevant. Spouses may, however, according to Art. 1:142 para. 2 Dutch Civil Code, agree on dates which derogate from the dates determined in Art. 1:142 para. 1 Dutch Civil Code.

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

Where an asset is acquired *partly* with capital which *is not* deemed to be part of the nettable capital and *partly* with capital which *is* deemed to be part of the nettable capital, the value of such an asset is deemed to be part of the nettable capital for such a share as corresponds to the part of the investment of the capital which is deemed to be part of the nettable capital (Art. 1:136 para. 1 Dutch Civil Code). The netting obligation extends to the balance from the investment and reinvestment of whatever was not netted and over the benefits there from.

<sup>104</sup> This provision codifies the so-called *beleggingsleer*. See E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, No. 637 et seq.

<sup>105</sup> The saved income consists of the earnings that have not been used for the costs of the household during the year.

<sup>106</sup> See further M.J.A. Mourik and L.C.A. Verstappen, *Handboek voor het Nederlands vermogensrecht bij scheiding*, 2006, pp. 277-342; C.A. Kraan, *Huwelijksovermogensrecht*, 2008, pp. 255-256.

Example: Spouse A has bought a house before entering into the marriage, one-half has been paid with his own property and one-half with a mortgage loan to which spouse B has not contributed. Spouse A is the only breadwinner and during the marriage the mortgage debt has been redeemed with his income, after deducting the costs of the household to which the mortgage interest belongs. In this case the income of spouse A which has been set aside – for paying off the loan – belongs to the nettable capital which, according to the netting covenant, should have been set off every year. The gradual payment of the mortgage debt is considered to be an investment in the house of spouse A to which both spouses have contributed. If no netting has taken place the netting obligation relates to the actual value of the house at the moment of the divorce in which both spouses have an equal share (Art.1:141 Dutch Civil Code). If the house has a value of € 200,000 Euros, € 100,000 Euros belong to the nettable capital. Consequently each spouse receives € 50,000 Euros. The setting off only has economic consequences. The position of spouse A as the owner of the house is not affected.<sup>107</sup>

**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 a spouse has incurred a liability in connection with the acquisition of an asset with capital which falls under the netting obligation, the acquired asset is deemed to be part of the nettable capital in as far as the liability belongs thereto or is paid or redeemed there from (Art. 1:136 Dutch Civil Code in conjunction with Art. 1:141 para. 1 Dutch Civil Code).

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

No. The spouse who is a creditor of the other spouse because property is deemed to be part of the nettable capital enjoys no preferential rights in relation to other creditors in respect of assets which fall under the 'regime' of netting covenants; in other words, in respect of which the spouses have agreed upon the obligation to net income or capital. This rule even applies if it concerns the family home and/or household effects.

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

No. The spouse who is a creditor of the other spouse because property is deemed to be part of the nettable capital enjoys no preferential rights in relation to other creditors in respect of assets which fall under the 'regime' of netting covenants; in other words, in respect of which the spouses have agreed to net income or capital.

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

It is conceivable that the spouse who is entitled to receive maintenance from the other spouse acquires capital when the 'regime' of netting covenants has been terminated. In this specific case where the maintenance creditor has received assets which contribute to his or her living expenses the court might decrease the amount of the spousal maintenance to be paid.<sup>108</sup>

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<sup>107</sup> See further M.J.A. Mourik and L.C.A. Verstappen, *Handboek voor het Nederlands vermogensrecht bij scheiding*, 2006, pp. 277-342 and C.A. Kraan, *Huwelijksvermogensrecht*, 2008, pp. 255-256.

<sup>108</sup> The court may take into account the rules on maintenance which have been established by the Netherlands Association for the Judiciary (*Tremarapport*): <[www.nvvr.org](http://www.nvvr.org)>. See B. Dijksterhuis, *Rechtens normeren de alimentatiehoogte. Een empirisch onderzoek naar rechterlijke samenwerking in de Werkgroep Alimentatienormen (1975-2007)*, diss. Leiden, 2008.

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

Generally speaking, no connection exists between the settlement of the ‘regime’ of netting covenants, on the one hand, and the equalization, set-off and the distribution of pension rights, on the other. However, spouses may conclude a contract in which they include both categories of assets.

**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?**

The spouses are free to derogate from the general statutory rules on netting covenants (Art. 1:141 para. 3 and 4 Dutch Civil Code).<sup>109</sup> Generally, the court has only a very limited competence to override, modify or set aside a marital contract if the effects thereof are unacceptable in view of the principle of reasonableness and fairness.<sup>110</sup> However, a certain margin of interpretation concerning the marital contract or the divorce covenant may be used.<sup>111</sup> Often the facts are extremely complex. In particular, at lower instances conflicting decisions can be found.

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

Besides the rules on succession, the ‘regime’ of netting covenants does not provide for specific rules if one of the spouses dies. Only the rules on the composition and extent of the nettable capital (Art. 1:142 para. 1 Dutch Civil Code) are *mutatis mutandis* to be applied in respect of a spouse upon his or her death to his or her assignees under universal title (Art. 1:143 para. 3 Dutch Civil Code).

**III. Deferred community**

Not relevant.

**IV. Separation of property**

Not relevant.

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

Not relevant.

<sup>109</sup> An example has been provided by E.A.A. Luijten and W.R. Meijer, *Huwelijksgoederen- en erfrecht, Huwelijksgoederenrecht*, 2005, No. 673 in relation to the decision by the Dutch Supreme Court 02.03.2001, *NJ* 2001, 584 annotated by S. Wortmann (*Visserijbedrijf*).

<sup>110</sup> Dutch Supreme Court 18.06.2004, *NJ* 2004, 399.

<sup>111</sup> Dutch Supreme Court 28.11.2003, *NJ* 2004, 116. See J. Duijvendijk-Brand, “Uitleg van huwelijkse voorwaarden”, *WPNR*, 2007 No. 6709, pp. 388-397.

## 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?**

Future spouses are permitted to make detailed and binding agreements prior to their marriage regulating their property relationship (Art. 1:114 Dutch Civil Code). Generally, their contractual freedom is unlimited. In their pre-nuptial agreement they may derogate from the provisions of the statutory community of property regime. Evidently, the stipulations may not violate mandatory rules, *bonos mores* or Dutch public policy (Art. 1:121 para. 1 Dutch Civil Code). It is not allowed that the parties provide that a spouse is responsible for a larger share of the liabilities than that spouse shares in the community of property (Art. 1:121 para. 3 Dutch Civil Code).

**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 enter into a marriage contract (a post-nuptial agreement) during their marriage (Art. 1:114 Dutch Civil Code). The general rule of Art. 1:121 para. 1 Dutch Civil Code applies: in their marriage contracts the spouses may derogate from the provisions of the statutory community property regime provided that the stipulations therein do not conflict with the provisions of mandatory law, *bonos mores* or Dutch public policy. In post-nuptial agreements spouses may re-regulate all aspects of their property relationship provided that a spouse will not be made responsible for a larger share of the liabilities than that spouse shares in the community of property (Art. 1:121 para. 2 Dutch Civil Code). Such a clause is void.

Spouses may make detailed and binding agreements with a view to the impending dissolution of their marriage through divorce (a divorce covenant) regulating all aspects of their property relationship (Art. 1:100 para. 1 Dutch Civil Code):<sup>112</sup> their contractual freedom is almost unlimited. If, for instance, the spouses conclude a settlement agreement (Art. 7:900 Dutch Civil Code), they may even stipulate terms which are contrary to Art. 1:121 para. 2 Dutch Civil Code, provided that the respective conditions have not only been agreed upon to that end (Art. 7:902 Dutch Civil Code). Practice has shown that tax-related matters (income tax) are regularly taken into account when spouses conclude a divorce covenant.<sup>113</sup>

In order to be valid, post-nuptial agreements must be entered into by a notarial instrument (Art. 1:115 para. 1 Dutch Civil Code).

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

Under penalty of being declared void both pre-nuptial and post-nuptial agreements must be entered into by a notarial instrument in order to be valid (Art. 1:115 para. 1 Dutch Civil Code). In addition, the approval of the district court is required for making or altering marriage contracts *during* a marriage (Art. 1:119 para. 1 Dutch Civil Code). The rationale behind this is the protection of creditors: The court may only refuse approval where there is a risk that creditors may be prejudiced or if one or more terms of the marital contract are in breach of the rules of mandatory law, *bonos mores* or Dutch public policy (Art. 1:119 para. 2. Dutch Civil Code). The pending Bill proposes to abandon the court approval requirement.<sup>114</sup>

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<sup>112</sup> The divorce covenant must be in writing. No other formal requirements apply.

<sup>113</sup> M.J.A. Mourik and L.C.A. Verstappen, *Handboek voor het Nederlands vermogensrecht bij scheiding*, 2006, Nos. 5.1.1-5.1.7.

<sup>114</sup> *Kamerstukken II*, 28 867, No. 9.

Divorce covenants must be in writing if spouses agree therein to derogate from the equal share distribution of the community of property upon divorce (Art. 1:100 para. 1 Dutch Civil Code).

**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.**

Both pre and post-nuptial agreements must be entered into by a notarial instrument in order to be valid against third parties (Art. 1:115 Dutch Civil Code). Divorce covenants must be in writing if spouses agree therein to derogate from the equal share distribution of the community of property upon divorce (Art. 1:100 para. 1 Dutch Civil Code). Marital contracts containing agreements on the property relationship between the spouses may be used against third persons only if the marital contract has been registered in the public Matrimonial Property Register kept at the clerk's office in the district court within whose jurisdiction the marriage is entered into (Art. 1:116 para. 1 Dutch Civil Code).

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

For the making of a pre-nuptial agreement the full disclosure of the future spouses' assets and debts is not necessary. The marital contract may be drafted in general terms. The making of a post-nuptial agreement, however, requires the district court's approval (Art. 1:119 para. 1 Dutch Civil Code). In order to scrutinize the draft notarial deed along with the petition the court usually requests the full disclosure of the spouses' debts and assets. A full disclosure of the spouses' debts and assets is also not required for a divorce covenant; however, practice has shown that this is essential for the drafting of a balanced agreement which cannot be easily affected.<sup>115</sup>

**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 civil notary is *qualitate qua* obliged to inform (future) spouses about the content and consequences of the marital contract: this follows directly from notarial regulations and has recently been confirmed in two decisions by the Dutch Supreme Court.<sup>116</sup> If a notary is involved in the drafting of a divorce covenant – which is increasingly the case<sup>117</sup> – the same rules apply, although no notarial instrument is to be drafted. If a notary neglects his or her duty he or she may be held liable according to the disciplinary rules governing notaries and he or she may be held liable for compensation in the form of damages.

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

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<sup>115</sup> District Court Breda, 24.01.2007, *LJN AZ7006*. See also rule III.18 which should be taken into account by advocate-mediators who belong to the Family Lawyers/Mediators Association: <[www.vfas.nl](http://www.vfas.nl)>.

<sup>116</sup> Dutch Supreme Court 27.06.2003, *NJ 2003, 524 (Zweedse vrouw)* and Dutch Supreme Court 09.09.2005, *NJ, 2006, 99 (Zeeuwse notaris)*.

<sup>117</sup> In the spring of 2008, the Minister of Justice sent a bill for approval to the Council of State, which is aimed at granting competence to the civil notary to file divorce requests under certain circumstances. See in this context

<[www.justitie.nl/onderwerpen/wetgeving/wetgevingsprogramma/privatrecht/wetsvoorstel-bevoegdheid-notaris-terzake-van-verzoeken-tot-echtscheiding.aspx](http://www.justitie.nl/onderwerpen/wetgeving/wetgevingsprogramma/privatrecht/wetsvoorstel-bevoegdheid-notaris-terzake-van-verzoeken-tot-echtscheiding.aspx)>.

The most recent empirical research indicates that in 25% of marriages and registered partnerships concluded in 2003 a marital agreement was drawn up. As a corollary, 75% of spouses marrying in that year were married under the default system of the community of property regime. Other systems chosen (making up the other 25%) were: 67% - participation in acquisitions, 6% - separation of property, 18% - a partial community regime, and 8% - other options. The percentage of marital agreements containing a complete separation of property has considerably decreased during the last few decades (almost 70% of all contracts in 1970, but in 2003 less than 11%).<sup>118</sup> New research will probably be conducted in 2009.

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

The contractual freedom of the spouses is almost unlimited. Only the restrictions provided in Art. 1:121 para. 2 Dutch Civil Code are to be taken into account. Spouses may, for instance, either choose a statutory regime, such as the community of benefits and income (*gemeenschap van vruchten en inkomsten*) or the community of profits and losses (*gemeenschap van winst en verlies*) or they may modify these regimes. They may also create their own regime. Marriage contracts which provide for one or more obligations in respect of netting income or capital are an example of how spouses may create their own 'regime'.

**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?**

Modifications can be made to all categories of assets.

**b. administration of assets?**

Modifications can be made in relation to the administration of assets.

**c. distribution of assets?**

Modifications can be made to the distribution of assets. The parties may not provide, however, that a spouse is made responsible for a larger share of the liabilities than that spouse shares in the community of property (Art. 1:121 para. 2 Dutch Civil Code).

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

Modifications can be made in relation to the ground for dissolving the marriage.

**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?**

There are no typical contractual clauses which modify the statutory matrimonial property regime. Frequently, however, spouses agree on a final netting covenant in their marital contract which, as a corollary, effects the exclusion of any community of property between them. According to the final netting covenant spouses commit themselves to set-off their income and capital as if they were married in a general community of property; such a clause

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<sup>118</sup> M.J.M. van Mourik and W. Burgerhart, "De ontwikkeling in de praktijk der huwelijks- en partnerschapsvoorwaarden in de periode 1997-2003", *WPNR*, 2005 No. 6648, pp. 1027-1039.

may provide that the final netting only takes place if the marriage is dissolved by the death of one of the spouses.

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

Generally, the courts only have a very limited competence to override, modify or set aside a marital contract if the effects thereof are unacceptable in view of the principle of reasonableness and fairness. This also applies to divorce covenants. The competence to interpret the marital contract<sup>119</sup> is not laid down in any statutory rule, which applies to marital contracts or divorce covenants.

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<sup>119</sup> Dutch Supreme Court 18.06.2004, *NJ*, 2004, 399. The spouses had not lived up to what they had agreed upon in their marital contract.