

NATIONAL REPORT: PORTUGAL
 Guilherme de Oliveira, Rosa Martins and Paula Vitor
 University of Coimbra
 August 2008

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

Yes. Spouses are the individuals who celebrated between themselves a valid and effective marriage contract. Marriage is the contract celebrated between individuals of different gender who intend to establish a family through a full communion of life (Art. 1577 Portuguese Civil Code). Therefore the law does not consider as spouses the members of a *de facto* union or those who live in joint household economy (see Laws 7/2001, of May 11 and 6/2001, of May 11), nor those who are betrothed. Reference to these relationships will only be made if the opportunity arises.

a. upon marriage

It appears that, in the terms of the Portuguese legal system, there is no difference between the situations of paragraph a. and of paragraph b. For this reason we will only answer to paragraph b.

b. during marriage

Art. 1068 Portuguese Civil Code, Art. 1678-1687 Portuguese Civil Code, Art. 1690-1736 Portuguese Civil Code, Art. 1753-1766 Portuguese Civil Code.

Art. 28-28A Portuguese Code of Civil Procedure, Art. 427, Art. 825, Art. 912-915, Art. 1118-1121A, Art. 1416, Art. 1425-1426, Art. 1441, Art. 1463 Portuguese Code of Civil Procedure.

Art. 1-2 and Art. 189-191 Portuguese Code of Civil Registration.

Art. 4 Portuguese Code of the Notary.

c. upon separation

- Separation of property:

Art. 1767-1772 Portuguese Civil Code.

Art. 75, Art. 427, Art. 1118-1121A, Art. 1404 Portuguese Code of Civil Procedure.

- Separation of persons and property:

Art. 1794-1795 Portuguese Civil Code.

Art. 75, Art. 427, Art. 1118-1121A, Art. 1404, Art. 1413 Portuguese Code of Civil Procedure.

Art. 272A, Art. 272B, Art. 272C, Art. 210A, Art. 210E, Art. 210I, Art. 210J, Art. 210N Portuguese Code of Civil Registration.

d. upon death

Art. 1106-1107, Art. 1688-1689, Art. 2080 para. 1 sub a, Art. 2101 para. 1, Art. 2103A sub a, Art. 2103C, Art. 2133 para. 1 sub a and b, Art. 2139 para. 1, Art. 2142-2144, Art. 2157-2161 Portuguese Civil Code.

Art. 72 and Art. 1326 Portuguese Code of Civil Procedure.

e. upon divorce

Art.1789-179, Art. 1793, Art. 1105 Portuguese Civil Code.

Art. 75, Art. 427, Art. 1118-1121A, Art. 1404, Art. 1413 Portuguese Code of Civil Procedure.

Art. 272A, Art. 272B, Art. 272C, Art. 210A para. 4, Art. 210E, Art. 210I, Art. 210J, Art. 210N Portuguese Code of Civil Registration.

f. upon annulment

Art. 1647-1648 and Art. 1688 Portuguese Civil Code.

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

There are no recent reforms relating to the property relationship between the spouses. The majority of the rules on property relationship between spouses is found in the Portuguese Civil Code of 1966. This Code revoked the Civil Code of 1867. Worthy of note is the recognition, by the new Code, of the regime of community of property as the default regime, replacing the previous default regime of universal community of property.

The most important changes in this area occurred in 1977, when the Civil Code was reformed. Its goal was to adapt the civil law to the new Constitution which had been promulgated in 1976. The subject of Family Law, in general, and that of Matrimonial Law, in particular, was profoundly altered in order to comply with the new constitutional principle of equality among spouses (Art. 36 para. 3 CRP).

Regarding the property legal effects of marriage, the cited principle of equality led to the extinction of the paradigm of the husband's supremacy, as head of the family, over the wife, regarding the powers of administration and disposal of property. Thus, according to Art. 1678 para. 1 Portuguese Civil Code, each spouse has the administration of their own property and, according to para. 3 of this same article, both spouses administer the common property.

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

There are no reform proposals that deal specifically with this area. However, the recent reform of the legal regime of divorce is worthy of mention, since it will, indirectly, affect the property relationship between spouses. Parliament has already approved the Decree of the Assembly of the Republic n 232/X which, after promulgation by the President of the Republic and publication in the Official Gazette of the Republic (*Diário da República*), will enter into effect in the Portuguese legal system and significantly alter the Civil Code.

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

First, there are no “registered or civil partnerships” in Portugal. Only the figure of the *de facto union* exists and it is legally regulated (Law 7/2001, of May 11). It is a “*quasi-matrimonial*” relationship between two people who, regardless of their gender, live for more than two years in a *de facto union* (Art. 1).

The rules that discipline the property relationship between the spouses are only applicable to marriages. The relations between members of a *de facto union* are regulated by the general rules of Law of Obligations, including Contract Law, and of Property Law. However, doctrine admits, under certain terms, contracts of cohabitation that may include rules about the property relationship of the members of the *de facto union*. Doctrine also maintains that the rule that binds both spouses for debts incurred by one of them in order to cover normal household expenses (Art. 1691 sub b Portuguese Civil Code) may also be extended to the *de facto union*.

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?

Yes. When the spouses are married under the regime of separation of property and are joint owners of the same piece of property, the general rule of joint ownership is applied (Art. 1736 para. 2 and Art. 1403-1413 Portuguese Civil Code).

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

There is no direct relationship between the rules of property relationship between spouses and the Law of Succession. There are, however, some connections.

First, when the marriage is dissolved by death, the distribution of the couple’s assets precedes the partition of the estate (Art. 1688 and 1689 Portuguese Civil Code).

Second, the surviving spouse (married under the regime of universal community of property or of community of property, thus having the right to half of the common assets) has the right to demand the partition, even if not an heir (Art. 2101 Portuguese Civil Code).

Third, the surviving spouse has the right to be awarded, at the time of the partition of the estate, the right to inhabit the family home and to use its respective contents (Art. 2103A and 2103B Portuguese 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 rights and duties of the spouses (Art. 1672 Portuguese Civil Code) are independent from the matrimonial property regime. Irrespective of the matrimonial property regime, there is the duty of assistance, which includes both the duty to contribute to the household expenses and the obligation to provide maintenance (Art. 1675 and 1676 Portuguese Civil Code).

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".

One of the conjugal duties established in Art. 1672 Portuguese Civil Code of the Civil Code is the duty of assistance. This duty, in turn, includes two other obligations: the duty to contribute to the household expenses (Art. 1676 Portuguese Civil Code) and the obligation to provide maintenance (Art. 1675 Portuguese Civil Code). The duty to contribute to the household expenses belongs to both spouses and can be satisfied by any of them, either through the commitment of their resources (earnings and incomes) to those costs, or through domestic labour or through sustenance and education of the children.

Household expenses vary according to the concrete circumstances of the couple and are defined through daily life. Household expenses include expenses with sustenance, clothing, shoes, hygiene, cleaning, amusements, electricity, telephone, Internet, heating, furniture, decoration of the house, education of children.

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

Yes. Any of the spouses has the legitimate right to incur into debt without the consent of the other (Art. 1690 para. 1 Portuguese Civil Code). If the debt incurred by one of the spouses (alone or without the other's consent) has the objective of covering normal household expenses, both spouses will be liable (Art. 1691 para. 1 sub b Portuguese Civil Code).

Note that the liability will only affect both spouses if these debts are incurred in order to cover normal expenses of the household, evaluated according to parameters set by the life style of the couple.

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".

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The house where the family lives is the family home, determined in common agreement by the spouses taking, into consideration the requirements of the professional life and the interests of the children, in order to safeguard the unity of family life. (Art. 1673 para. 1 Portuguese Civil Code).

Given its importance, the family home is the object of special protection under the Portuguese Family Law. Thus, irrespective of the property regime and the quality of personal property or of common property of the family home, the consent of both spouses is required in order to sell, encumber, lease or create personal rights to make use of the family home (Art. 1682A para. 2 Portuguese Civil Code). The same applies to the disposal of the right to lease the family home in those cases where it is leased (Art. 1682B Portuguese Civil Code).

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".

"Household goods" are the "movable property jointly used by both (spouses) in the household" (Art. 1682 para. 3 sub a Portuguese Civil Code) that, namely, include furniture, electrical appliances, china, silverware, etc. Its acquisition can be made by any of the spouses; its disposal or encumbrance always requires the consent of the other spouse (Art. 1682 para. 3 sub a Portuguese Civil Code) irrespective of the matrimonial property regime.

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...)?

Irrespective of the matrimonial property regime, consent of both spouses is always required for:

- disposal or encumbrance of common movable property jointly administered by both spouses (Art. 1682 para. 1 Portuguese Civil Code);
- disposal or encumbrance of movable property jointly used by both spouses as common instrument of labour (Art. 1682 para. 3 sub a Portuguese Civil Code);
- disposal or encumbrance of movable property that exclusively belongs to the spouse that does not administer them (Art. 1682 para. 3 sub b), Portuguese Civil Code);
- disposal, encumbrance, or the creation of personal rights to make use of personal or joint immovables (Art. 1682A para. 1 sub a Portuguese Civil Code);
- disposal, encumbrance, or leasing of personal or joint commercial establishment (Art. 1682A para. 1 sub b Portuguese Civil Code).

Both the husband and the wife have the legitimate right to incur into debt without the consent of the other spouse (Art. 1690 para. 1 Portuguese Civil Code).

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

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One of the spouses can administer the personal property of the other if properly mandated by the other (Art. 1678 para. 2 sub g Portuguese Civil Code). While the law does not refer to it specifically, doctrine has extensively interpreted this precept as including the possibility of one spouse administering, alone, the common property, whenever properly mandated by the other.

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

One of the general principles that regulate the subject of property relationship between spouses is the principle of immutability (Art. 1714 para. 1 Portuguese Civil Code). According to this principle, after the celebration of the marriage, the spouses cannot alter the matrimonial property regime that was agreed to or that was legally established in the absence of a pre-nuptial agreement. Therefore, it is expressly forbidden to enter into contracts of acquisition and sale, and jointly participate in companies between spouses. (Art. 1714 para. 2 Portuguese Civil Code) in order to impede the spouses to use this method to alter the composition of the property components.

The exceptions are the creation of and participation in commercial companies or civil companies established under commercial law, providing that only one spouse assumes unlimited liability (Art. 8 para. 1 Portuguese Code of Commercial Societies) and the participation of both spouses in the same capital company, as well as the payment made by the liable spouse to the other (Art. 1714 para. 3 Portuguese Civil Code). Donations among spouses enjoy a special regimentation, characterized by their free revocability (Art. 1765 para. 1 Portuguese Civil Code).

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C. MATRIMONIAL PROPERTY REGIMES

C.1. General issues

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

Yes. The Portuguese system is ruled by the principle of freedom regarding the matrimonial property regime. According to this principle, the betrothed parties may prepare a pre-nuptial agreement through which they can determine their property regime, either by choosing one of the regimes typified in the Law, or by forming, within the legal limits, their own regime (Art. 1698 Portuguese Civil Code).

Those aged 60 or older, as well as the ones whose marriage was celebrated without the preliminary wedding process (Art. 1720 para. 1 Portuguese Civil Code) must follow, by imposition, the regime of separation of property, without the benefit of freely preparing a pre-nuptial agreement. The betrothed parties who have adult or minor children are also restricted by not being allowed to choose the universal community of property regime (Art. 1699 para. 2 Portuguese Civil Code).

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

In those cases, the default regime is, since May 31, 1967, that of the community of property (Art. 1717 Portuguese Civil Code). Before that date, the default regime was that of the universal community of property. For those aged 60 or more, as well as for the ones whose marriage was celebrated without the preliminary wedding process, the imperative regime is that of the separation of property (Art. 1720, n 1, Portuguese Civil Code).

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

Beyond the default regime, the parties may opt for the other regimes regulated by law: the universal community of property regime and the separation of property. Note that those who have adult or minor children can choose any regime other than that of the universal community of property (Art. 1699 para. 2 Portuguese Civil Code).

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

Question 16

In the community of property regime there are three different groups of assets: the individual property of one of the spouses, that of the other spouse, and the common assets. The individual property of each one of the spouses is constituted by the property they held at the time of the celebration of the matrimony, as well as the property obtained gratuitously after the celebration of the wedding and that acquired based on previously vested own right (Art. 1722 para. 1 and 2 Portuguese Civil Code).

Common assets are constituted by the product of the labour performed by the spouses, and by what is acquired by onerous title during marriage (Art. 1724 Portuguese Civil Code).

Question 17

In the separation of property regime there are only two groups of assets: the individual property of one of the spouses and that of the other spouse. There is a total separation between the properties held by each spouse individually; there are no common assets. However, there may be property belonging to both spouses in joint ownership. Each spouse preserves control and fruition of the property taken to the matrimony, as well as of the one acquired during marriage (Art. 1735 Portuguese Civil Code).

In principle, the universal property regime presupposes only one group of assets: the common assets. The common assets are constituted by all the present and future assets that are not included in the exceptions established by law (Art. 1732 Portuguese Civil Code). The

only personal property is constituted by a group of residual assets that the law classifies as incommunicable (Art. 1733 Portuguese Civil Code).

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

According to the most recent statistics, out of a total of 46,329 marriages celebrated in 2007, 40,120 chose to apply the default regime of the community of property, 3,790 applied the regime of separation of property and 1700 applied the universal community of property regime.

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.

In this regime there are three groups of assets: the individual property of one of the spouses, that of the other spouse, and the common assets. The individual property of each one of the spouses is constituted by the property they held at the time of the celebration of the matrimony, as well as the property obtained gratuitously after the celebration of the wedding and that acquired based on previously vested own right (Art. 1722 para. 1 and 2 Portuguese Civil Code). Common assets are constituted by the product of the labour performed by the spouses, and by what is acquired by onerous title during marriage (Art. 1724 Portuguese Civil Code).

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

The individual assets belong separately to their owner. Community patrimony is a collective one: it belongs globally to both spouses, who are titleholders of one unique right over it. This patrimony is not divided into quotas as in the joint ownership: it cannot be divided.

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

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Personal assets of each spouse are:

- those held at the time of the celebration of the matrimony (Art. 1722 para. 1 sub a Portuguese Civil Code)
- those acquired gratuitously through succession or donation after the celebration of the wedding (Art. 1722 para. 1 sub b Portuguese Civil Code)
- those acquired during marriage based on previously vested own right (Art. 1722 para. 1 sub c and para. 2 Portuguese Civil Code)
- assets subrogated for personal assets (Art. 1723 Portuguese Civil Code)
- assets acquired partially with personal funds or assets of one of the spouses and, partially with community funds or assets, when the former portion is more valuable than the latter (Art. 1726 Portuguese Civil Code)
- undivided assets partially acquired by one of the spouses who already held another part before the matrimony (Art. 1727 Portuguese Civil Code)
- assets acquired based on personal property title, such as, for example, accessions, materials obtained from the demolition or destruction of assets, dividends from amortization of securities (bills of exchange, promissory notes, cheques) (Art. 1728 para. 1 and 2 Portuguese Civil Code)
- assets considered personal by their own nature (diplomas, decorations, moral authorship rights, personal correspondence)
- assets considered personal by the will of the spouses who, in a pre-nuptial agreement, may determine that they be incommunicable
- Assets considered personal by legal disposition (Art. 1733 Portuguese Civil Code). This article, even though is incorporated in the universal community of property regime, is applied to the community of property regime based on an *ad majus*

argument. In reality, in the universal community of property regime all assets are common, except for those listed in Art. 1733 of the Portuguese Civil Code. If these assets are considered incommunicable in a regime where the communion is so all-embracing, the *ad majus* argument grounds the idea that these assets will be considered incommunicable in a regime that includes, beside the community property, the category of the personal assets of each of the spouses.

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

Yes. According to Art. 1723 sub a Portuguese Civil Code, the assets subrogated for the personal assets of one of the spouses through direct exchange retain the quality of personal assets. Regarding movable assets, Art. 1725 Portuguese Civil Code establishes that if there are doubts about the nature of the assets, they are considered as community assets.

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

Yes. According to Art. 1723 sub c Portuguese Civil Code, the assets acquired or the improvements made with personal funds or assets of one of the spouses retain the quality of personal property of the investor. In order for this situation to apply, the law imposes two requirements:

- That the origin of the funds or assets be specifically mentioned in the acquisition document or in an equivalent document
- And that this statement be made with the intervention of both spouses

When these two publicity requirements are not met, the asset will be considered as a common one because it is an asset acquired onerously, after the celebration of the matrimony (Art. 1724 sub b Portuguese Civil Code). However, part of the doctrine understands that the *ratio legis* of these requirements is due to the need to protect the interests of third parties who, unfamiliar with the transaction, may trust the presumption that an asset acquired, by onerous title, after the marriage, is a common asset (Art. 1724 sub b Portuguese Civil Code). According to these authors, the consequence of the non-observance of those requirements, that is, the asset being considered as a common one, only takes place when third party interests are at stake. When this does not happen, that is, in the relations between spouses, any means of evidence may be used to determine the nature of the asset in question. Regarding movable assets, Art. 1725 Portuguese Civil Code establishes that if there are doubts about the nature of the assets, they are considered as community assets.

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

Community assets are:

- the product of the labour performed by the spouses (Art. 1724 sub a Portuguese Civil Code). Therefore, the salaries as well as other revenues derived from the labour of the spouses, namely awards for productivity, intellectual property rights, among others, are considered as community assets
- the assets acquired by onerous title during marriage (Art. 1724 sub b Portuguese Civil Code)
- profits and revenues derived from personal assets and the value of the improvements made on such assets (Art. 1728 para. 1 and Art. 1733 para. 2 Portuguese Civil Code)
- movable assets, excepting evidence in the contrary (Art. 1725 Portuguese Civil Code)
- assets subrogated for community assets
- assets acquired partially with personal funds or assets of one of the spouses and, partially with community funds or assets, when the latter portion is more valuable than the former (Art. 1726 Portuguese Civil Code).

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

The community patrimony is constituted by the assets acquired in substitution of salaries, such as retirement pensions, retirement complements resulting from savings derived from salaries, and the indemnities destined to compensate a reduction in the capacity to earn. However, the indemnities derived from facts occurred against the person of each of the spouses or against their personal assets which are considered as being incommunicable are not part of the community (Art. 1733 para. 1 sub d Portuguese Civil Code).

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?

As a rule, in the context of the community of property regime, a donation or a legacy will only belong to the spouse to whom they were made. A donation or a legacy will only enter the group of the community assets when made to both spouses. Beyond this point, the author of the donation or of the legacy may stipulate an incommunicability clause relating to the assets object of the donation or the legacy (Art. 1733 para. 1 sub a Portuguese Civil Code). This clause imposes the incommunicability of the asset, even if the spouses may want to make or may have made a contrary stipulation.

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

Regarding movable assets, Art. 1725 Portuguese Civil Code establishes that when the nature of the assets is doubtful, they are presumed to be common assets. This is an *ius tantum* presumption that may be rebutted through evidence in the contrary. Any means of evidence is allowed. Regarding immovable assets there is no presumption such as the one just referred to.

The problem of the evidence which can be presented regarding the classification of the assets as personal or community property is linked with the subrogation phenomenon. As we have already indicated, according to Art. 1723 sub c Portuguese Civil Code, the assets acquired or the improvements made with personal funds or valuables belonging to one of the spouses retain their quality of personal assets, providing that the origin of the funds or of the valuables is duly mentioned in the acquisition document or on equivalent document and that this statement be made with the intervention of both spouses.

When these two publicity requirements are not met, the asset will be considered as a common one, because it is an asset acquired onerously, after the celebration of the matrimony (Art. 1724 sub b Portuguese Civil Code). Regarding relations between spouses, part of the Portuguese doctrine admits that even if such formalities are not carried out, the evidence on the nature of the asset in question can be presented through any means because the third party interests that those publicity requirements are suppose to assure are not in jeopardy.

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

Also regarding third parties, with respect to movable assets, Art. 1725 Portuguese Civil Code establishes that in case of doubt about the nature of the assets, these are presumed to be community assets. This is an *ius tantum* presumption that may be rebutted through evidence in the contrary. Any means of evidence is allowed.

In reference to immovable assets, since there is no presumption, one can present the problem relative to the assets subrogated for the personal assets. As we indicated, according to Art. 1723 sub c Portuguese Civil Code, the assets acquired or the improvements made with personal funds or valuables belonging to one of the spouses retain their quality of personal assets, providing that the origin of the funds or of the valuables is duly mentioned in the acquisition document or in equivalent document and that this statement be made with the intervention of both spouses.

When these two publicity requirements are not met, the asset will be considered as a common one because it is an asset acquired onerously, after the celebration of the matrimony (Art. 1724 sub b Portuguese Civil Code), since we are in the presence of third party interests that the law wanted to protect with those publicity requirements.

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30. Which debts are personal debts?

Debts of the sole responsibility of one of the spouses:

- debts incurred by one of the spouses without the consent of the other (Art. 1692 sub a Portuguese Civil Code)
- debts derived from crimes or other facts committed by one of the spouses (Art. 1692 sub b Portuguese Civil Code)
- debts which burden personal assets of any of the spouses (Art. 1692 sub c and Art. 1694 para. 2 Portuguese Civil Code)
- debts which burden donations, inheritances or legacies when the respective assets are personal (Art. 1693 para. 1 Portuguese Civil Code)

31. Which debts are community debts?

Both spouses are responsible for:

- debts incurred, before or after the celebration of the matrimony, by both spouses, or by one of them with the consent of the other (Art. 1691 para. 1 sub a Portuguese Civil Code);
- debts incurred by any of the spouses, before or after the celebration of the matrimony, in order to cover the normal expenses of the household (Art. 1691 para. 1 sub b Portuguese Civil Code);
- debts incurred during marriage by the administering spouse, for the common benefit of the couple, and within the limits of their administrative powers (Art. 1691 para. 1 sub c Portuguese Civil Code);
- debts incurred by any of the spouses in the course of trade, except if proven not to have been incurred for the common benefit of the couple (Art. 1691 para. 1 sub d Portuguese Civil Code);
- debts that encumber donations, heritages or legacies, when the respective assets have entered the community patrimony (Art. 1691 para. 1 sub e and Art. 1693 para. 2 Portuguese Civil Code);
- debts that encumber community assets (Art. 1694 para. 1 Portuguese Civil Code);
- debts that encumber personal assets if originated by the reception of the respective revenues (Art. 1694 para. 2 Portuguese Civil Code).

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

For the debts of the exclusive responsibility of one of the spouses respond the personal assets of the debtor and, secondarily, half of the community assets (Art. 1696 para. 1 Portuguese Civil Code). This means that, initially, the creditor will attack the personal assets of the debtor spouse. Only later, if there are no personal assets or if they are insufficient, will the creditor obtain payment through the half of the community property owned by the debtor spouse.

Together with the personal assets, the revenues of the assets taken to the matrimony or brought in later gratuitously, also respond (Art. 1696 para. 2 sub a Portuguese Civil Code), as well as the assets subrogated for these (Art. 1696 para. 2 sub c Portuguese Civil Code), and the product of the labour and the intellectual property rights of the debtor spouse (Art. 1696 para. 2 sub b Portuguese Civil Code).

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

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On debts which are of the responsibility of both spouses, respond the community assets of the couple and, lacking these or if they are insufficient, the personal assets of any of the spouses, who are jointly liable (Art. 1695 para. 1 Portuguese Civil Code). This means that if there are no community assets or if they are insufficient to pay the debt, the creditor may demand the totality of the payment from any one of the spouses.

I.2. Administration of assets

34. How are personal assets administered?

As a rule, personal assets are administered by the spouse who owns them (Art. 1678 para. 1 Portuguese Civil Code)

35. How are community assets administered?

As a rule, community assets are administered by both spouses. In the case of ordinary administrative acts, either one may carry it out without requiring the other's consent (Art. 1678 para. 3 part 1 Portuguese Civil Code). Regarding the remaining acts of administration, the consent of both spouses is required (Art. 1678 para. 3 part 2 Portuguese Civil Code).

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

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Yes. According to Art. 1678 para. 2 sub g Portuguese Civil Code, a spouse can grant the other, through mandate, powers to administrate his or her personal property. While the law only mentions personal assets, doctrine has admitted, based on the *ad majus* argument, that powers to administer community assets may also be granted to one spouse by the other through this means.

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?

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Yes. The other spouse's consent is always required in order to:

- dispose of personal or community immovable assets (Art. 1682A para. 1 sub a Portuguese Civil Code);
- encumber personal or community immovable assets through the constitution of rights *in rem* of fruition or of guarantee, lease them, or constitute, over them, personal rights of fruition (Art. 1682A para. 1 sub a Portuguese Civil Code);
- dispose of a personal or community commercial establishment (Art. 1682A para. 1 sub b Portuguese Civil Code);
- encumber or lease a personal or community commercial establishment (Art. 1682A para. 1 sub b Portuguese Civil Code);
- dispose of the family home (Art. 1682A para. 2 Portuguese Civil Code);
- encumber the family home through the constitution of rights *in rem* of fruition or of guarantee, lease it, or constitute, over it, personal rights of fruition (Art. 1682A para. 2 Portuguese Civil Code)
- dispose of the right to lease the family home (Art. 1682B Portuguese Civil Code);

- dispose of personal or community movables jointly used by the spouses in the household (Art. 1682 para. 3 sub a Portuguese Civil Code);
- dispose of personal or community movables jointly used by the spouses as joint instrument of labour (Art. 1682 para. 3 sub a Portuguese Civil Code);
- dispose of personal or community movable assets that are not within their scope of administration (Art. 1682 para. 2 and para. 3 sub b Portuguese Civil Code);
- repudiate inheritances or legacies (Art. 1683 para. 2 Portuguese Civil Code).

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

Yes. As exception to the rules that each one of the spouses has the power to administer his or her personal assets and that for the administration of community assets both are responsible, each one of the spouses is also responsible for the administration of the other's personal assets or community assets which are exclusively used by him or her as instrument of labour (Art. 1678 para. 2 sub e Portuguese Civil Code).

Concerning the disposal of movable personal or community assets which are jointly used by both spouses as joint instrument of labour, the consent of the other spouse is always necessary, independently of their nature (Art. 1682 para. 3 sub a Portuguese Civil Code).

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

Yes, in case one of the spouses granted a mandate to the other to administer the community assets. However, a rendering of account and the delivery of the respective balance, if it exists, is only required in relation to the acts carried out during the last 5 years (Art. 1681 para. 2 Portuguese Civil Code).

This rule also applies to the cases in which one of the spouses administers community assets whose administration, by law, does not belong to him or her without a written mandate, but with the knowledge and no opposition of the other. (Art. 1681 para. 3 Portuguese Civil Code).

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

The direction of the family belongs to both spouses (Art. 1671 para. 2 Portuguese Civil Code), so both have equal powers regarding the administration of assets. However, when the consent of the other spouse is legally required to carry out certain acts, and there is an unjustified refusal or the impossibility to grant it on his or her part, it is possible to use legal instruments in order to supply the consent (Art. 1684 para. 3 Portuguese Civil Code). There are no cautionary measures as in other legal systems, and the only avenue remaining is that of taking legal action in general terms.

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?

In those cases in which one of the spouses practices an act for which the consent of the other is necessary and it was not obtained, not even judicially provided, the act will be annulable. The spouse who did not consent or his or her heirs can, within 6 months from the knowledge of the act, but never later than 3 years after its celebration, demand the annulment of the act (Art. 1687 para. 1 and 2 Portuguese Civil Code). When one of the spouses disposes or encumbers personal assets of the other's over which he or she had no administrative rights, the sanction is nullity (Art. 1687 para. 4 Portuguese Civil Code).

When one of the spouses administers the community or personal assets of the other without a mandate, he or she only responds for the acts that were intentionally carried out at the expense of the couple or of the other spouse (Art. 1681 para. 1 Portuguese Civil Code). When the administration of those assets is based on a mandate, the administrator responds on the same terms as the agent (Art. 1681 para. 2 Portuguese Civil Code). When one of the spouses administers community assets whose administration, by law, does not belong to him or her without a written mandate, but with the knowledge and no opposition of the other spouse, the applicable regime is that of the agency; if there is opposition, the administering spouse responds as *mala fides* possessor (Art. 1681 para. 3 Portuguese Civil Code).

The law also provides as a last resort that any of the spouses may request the simple judicial separation of property, whenever the maladministration by the other spouse jeopardizes his or her assets (Art. 1767 Portuguese Civil Code).

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

Both situations have the same answer. If one of the spouses is incapable to carry out the administration of the personal assets of the other, the administration of those assets belongs to the other spouse, unless there is an adequate mandate granted to a third party (Art. 1678 para. 2 sub f Portuguese Civil Code). The doctrine understands that also in this case, this possibility should be extended to the administration of community assets, based on the *ad majus* argument.

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The law also provides that the spouse who is not the administrator of the assets may be able to take any necessary measures on their behalf, if the other spouse is, for any reason, incapable to do it, and if the delay of such measures may cause damages (Art. 1679 Portuguese Civil Code).

I.3. Distribution of assets upon dissolution

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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?

Causes for dissolution of the community are as follows: death of one of the spouses, divorce, annulment and declaration of nullity of the matrimony, separation of persons and property, simple judicial separation of property, absence and insolvency of any of the spouses.

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?

death

The property relationship between spouses ceases through the dissolution of a marriage by death (Art. 1688 para. 1 Portuguese Civil Code). The moment of death corresponds to the irreversible cessation of the functioning of the cerebral trunk (Law n 141/99, of August 28).

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divorce

The property relationship between spouses ceases through the dissolution of a matrimony by divorce (Art. 1688 para. 1 Portuguese Civil Code). The effects of the divorce without the consent of the other spouse are produced at the moment of communicating the decision *in rem judicatam* but, regarding the property relationship between spouses, the effects are retroactive to the date of filing the suit (Art. 1789 para. 1 Portuguese Civil Code).

If the *de facto* separation between spouses is proven in the divorce proceedings, each of the spouses may request the Court to declare the appropriate date to be that on which the separation began. In this case the effects of the divorce may be retroactive to that date (Art. 1789 para. 2 Portuguese Civil Code). The property relationship between spouses in the case of a divorce by mutual consent ceases from the moment of the decision by the Registrar of Civil Office which "has the same effect as a judicial decision on the same matter" (Art. 1776 para. 3 Portuguese Civil Code).

annulment

The property relationship between spouses ceases through a declaration of the nullity or the annulment of a marriage (Art. 1688 para. 1 Portuguese Civil Code). This means that the community will cease on the date of communicating the annulment decision *in rem judicatam* or on the date of the registration of the decision by the ecclesiastical court that declared the nullity of a Catholic marriage.

separation of persons and property

The property relationship between spouses ceases with the separation of persons and property (Art. 1688 para. 1 and Art. 1795A Portuguese Civil Code). If the separation is by mutual consent, its effects will be produced on the date when it is decreed by the Registrar of Civil Office.

If the separation is litigious, its effects will be produced on the date of communicating the decision *in rem judicatam*. If a *de facto* separation between spouses is proven in the divorce proceedings, each of the spouses may request the Court to declare the applicable date to be that on which the separation began. In this case the effects of the divorce may be retroactive to that date (Art. 1789 para. 2 Portuguese Civil Code).

simple separation of property

The community of property between spouses ceases with the distribution of the common assets that takes place after the communication of the decision *in rem judicatam* that decreed the simple judicial separation of property (Art. 1770 Portuguese Civil Code).

absence

The community of property ceases between the spouses when the spouse of the absent spouse who is not separated in person and property demands an inventory and distribution of the common assets, following proceedings to declare the legal absence of the other spouse (Art. 108 Portuguese Civil Code and Art. 1103 et seq. Portuguese Code of Civil Procedure).

insolvency

The community of property ceases with the distribution of the common assets that takes place following the communication of the decision *in rem judicatam* that decreed the simple judicial separation of property (Art. 1770 Portuguese Civil Code) if and when the spouse of the insolvent party demands this during the insolvency proceeding (Art. 141 para. 1 sub b and Art. 143 Portuguese Code of Insolvency and Enterprise Recovery -- *Código da Insolvência e da Recuperação de Empresas*).

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?

If the personal property of one of the spouses was enriched at the expense of the community property, or if the community property was enriched at the expense of the personal property of one of the spouses, there is a right of compensation. In the first instance, there is a claim of the community property over the personal property; in the second example, a claim of the

personal property over the community property. These compensations can only be demanded at the time of distribution of the common assets (Art. 1726 Portuguese Civil Code).

The law is silent on the issue of knowing if the compensations, at the moment of distribution of the couple's assets, are made based on nominal value or on the accrual in value. In the absence of a specific rule that considers compensations as "value debts", the general rule of Art. 550 Portuguese Civil Code (*nominalist principle*) will apply.

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?

If the personal property of one of the spouses has been used to pay debts incurred by both spouses, or if the community property has been used to pay debts of the exclusive responsibility of one of the spouses, there is a right of compensation. In the first instance, there is a claim of the personal property on the community property (Art. 1697 para. 2 Portuguese Civil Code); in the second case, a claim of the community property on the personal property (Art. 1697 para. 1 Portuguese Civil Code). These compensations can only be demanded at the time of distribution of the common assets (Art. 1697 Portuguese Civil Code).

The law is silent on the issue of knowing if the compensations, at the moment of distribution of the couple's assets, are made based on nominal value or on the accrual in value. In the absence of a specific rule that considers compensations as "value debts", the general rule of Art. 550 Portuguese Civil Code (*nominalist principle*) will apply.

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

The distribution of the spouses' property is composed of three distinct operations: separation of personal property; liquidation of the community property through the computation of the compensations and the accounting of the debts to third parties and between spouses; and the distribution of the common assets. This indicates that the payment of compensations between spouses precedes the payment of the debts they are both responsible for.

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

There are no specific rules about the administration of community property after dissolution of marriage but before division of the property.

However, Portuguese jurisprudence is divided into two positions:

- One defends that the initial structure of the community property remains the same, in virtue of the immutability principle of the matrimonial property regime. It becomes undivided in status, which is not confused with the figure of joint ownership¹;

- The other defends that the community property degenerates into joint ownership, with each former spouse having at their disposal an ideal quota and being allowed to request the division of the community property, with the rules of joint property in application.²

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

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¹ Supreme Court of Justice of 3 April 2008, Supreme Court of Justice of 19 December 2007, Supreme Court of Justice of 11 October 2005, Court of Appeal of Lisbon of 4 March 2004, available on <www.dgsi.pt>.

² Supreme Court of Justice of 5 December 1995, Supreme Court of Justice of 1 February 1995, available on <www.dgsi.pt>.

The distribution of the spouses' property is composed of three distinct operations: separation of personal property; liquidation of the community property through the computation of the compensations and the accounting of the debts to third parties and between spouses; and the distribution of the common assets.

Initially, each spouse receives their personal property. Subsequently, the necessary compensations take place. After the compensations, the debts are paid. Finally, each spouse receives his or her half share, following the distribution of the common assets.

The division of the community property has to respect the rule of equal shares. This is an imperative rule and it determines that the spouses have to participate in half shares in the assets and liabilities of the community, and that any clause that foresees otherwise is null and void (Art. 1730 Portuguese Civil Code).

50. How are the community debts settled?

With the decree of the judicial separation of persons and property, or the divorce, or with the declaration of nullity or annulment of the matrimony, any spouse can request inventory for the division of the spouses property (Art. 1404 para. 1 Portuguese Code of Civil Procedure). The inventory procedure includes a conference of interested parties in which the approval of the passive is deliberated on (Art. 1353 para. 3 Portuguese Code of Civil Procedure). In the absence of an inventory procedure there are no specific rules.

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

In the context of the distribution of the common assets after the dissolution of the matrimony through divorce, the spouses have no preferential rights over the family home. Art. 1793 Portuguese Civil Code only refers to the possibility of, in the divorce cases, the court allowing the lease of the family home to one of the spouses. This possibility exists whether the family home is a common asset or a personal asset of the other spouse. The court shall take into consideration each spouse's needs and the interests of the children of the family (also see Art. 1105 Portuguese Civil Code).

When the matrimony is dissolved through death, the surviving spouse has the right to be granted, at the moment of the partition, the right of habitation of the family home, and the right to use the respective contents, and owing compensation to the co-inheritors if the value received exceeds his or her portion of the estate and of the division in half, if there is one (Art. 2103A para. 1 Portuguese Civil Code).

If the family home is not part of the estate, this same regime will be applied in relation to its contents (Art. 2103B Portuguese Civil Code). In the case of death of the original leaser spouse, regarding the right to lease the family home, the surviving spouse benefits from the automatic transmission of the position of renter (Art. 1106 and Art. 1107 Portuguese Civil Code).

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

Yes. If the instruments of labour of each one of the spouses entered the community property, the spouse who needs them for professional reasons has the right to receive them at the moment of the distribution of the common assets (Art. 1731 Portuguese Civil Code).

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

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There is no direct relationship between the division of community property and the attribution of a maintenance pension to the spouse that may need it.

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

There is no direct relation between the distribution of the common assets and the attribution of a pension.

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?

The rule of the division in half that applies to the division of the community property is imperative. It cannot be set aside either by the will of the spouses or by the competent authority. The latter, in turn, has the obligation to make sure that the rule is respected. Consequently, the spouses participate in half of the assets and liabilities of the community, and any clause that foresees otherwise is null and void (Art. 1730 Portuguese Civil Code).

Regarding the order of the operations in the division, it will have to be respected in the case of a judicial division, since it will have to follow the proceedings of the judicial procedure of inventory (Art. 1404 para. 1 and Art. 1326 et seq. Portuguese Code of Civil Procedure, with the necessary adaptations). In the case of the extrajudicial division, there are no specific rules.

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.

Yes. The law allows that the spouses in a pre-nuptial agreement, notwithstanding the property regime adopted by them, may stipulate, that the distribution of the common assets should be carried out according to the universal community of property regime if the marriage is dissolved due to the death of one of the spouses, when there are common descendants (Art. 1719 para. 1 Portuguese Civil Code).

II. Community of accrued gains/Participation in acquisitions

Not relevant.

III. Deferred community

Not relevant.

IV. Separation of property

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

There are only two groups of assets: the separate property of one of the spouses and that of the other spouse. There is a total separation between the properties held by each spouse individually; there are no community assets. Nevertheless, there may be assets belonging to both spouses in joint ownership. Each spouse retains control over the property taken into the marriage, as well as of property acquired during the marriage (Art. 1735 Portuguese Civil Code).

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

The separate property of each spouse comprises those assets taken into the marriage, as well as those acquired by each spouse during that marriage (Art. 1735 Portuguese Civil Code).

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

Yes. The spouses may acquire assets jointly. In this case, the general rules of joint ownership apply (Art. 1403-1413 Portuguese Civil Code).

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

No.

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

They are the separate property of the spouse who holds them.

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

The ownership of the assets between the spouses is proved according to the general rules. However, when doubts arise about one spouse's exclusive ownership of movable assets, it is presumed that these assets belong jointly to both of them (Art. 1736 para. 2 Portuguese Civil Code). Through a pre-nuptial agreement the betrothed may establish presumption clauses aiming to determine the ownership of movable assets. These clauses may be set aside when there is evidence to the contrary (Art. 1736 para. 1 Portuguese Civil Code).

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

Regarding third parties, the ownership of assets is proved according to the general rules. However, when doubts arise about one spouse's exclusive ownership of movable assets, it is presumed that these assets belong jointly to both of them (Art. 1736 para. 2 Portuguese Civil Code). Through a pre-nuptial agreement the betrothed may establish presumption clauses aiming to determine the ownership of movable assets. These clauses produce legal effects towards third parties and may be set aside when there is evidence to the contrary (Art. 1736 para. 1 Portuguese Civil Code).

136. Which debts are personal debts?

The following are debts which are the sole responsibility of one of the spouses:

- debts incurred by one of the spouses without the consent of the other (Art. 1692 sub a Portuguese Civil Code)
- debts deriving from crimes or other transgressions committed by one of the spouses (Art. 1692 sub b Portuguese Civil Code)
- debts which burden the personal assets of any of the spouses (Art. 1692 sub c and Art. 1694 para. 2 Portuguese Civil Code)
- debts which burden donations, inheritances or legacies when the respective assets are personal (Art. 1693 para. 1 Portuguese Civil Code)

137. Which debts are joint debts?

Both spouses are responsible for:

- debts incurred, before or after the celebration of the marriage, by both spouses, or by one of them with the consent of the other (Art. 1691 para. 1 sub a Portuguese Civil Code);

- debts incurred by any of the spouses, before or after the celebration of the marriage, in order to cover normal household expenses (Art. 1691 para. 1 sub b Portuguese Civil Code);
- debts incurred during the marriage by the administering spouse for the common benefit of the couple and within the limits of their administrative powers (Art. 1691 para. 1 sub c Portuguese Civil Code);

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

For debts which are the exclusive responsibility of one of the spouses, the creditor can recover against the personal assets of the debtor (Art. 1696 para. 1 Portuguese Civil Code). The creditor cannot recover against the personal assets of the other spouse.

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

For joint debts, the creditor can recover against the personal property of each of the spouses, since there are no common assets in this regime. Note that in the regime of separation of property the spouses are not jointly liable (Art. 1695 para. 2 Portuguese Civil Code). Therefore, the creditor cannot demand the total amount of the debt from any of the spouses, as is the case under the regime of community of property; the creditor can only demand from each of the spouses half of the debt.

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IV.2 Administration of Assets

140. How are assets administered?

As a rule, the personal assets of each spouse are administered by their owner (Art. 1678 para. 1 Portuguese Civil Code).

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

Yes. According to Art. 1678 para. 2 sub g Portuguese Civil Code, a spouse can mandate the other to administer his or her personal property.

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

Yes. The other spouse's consent is always required in order to:

- dispose of the family home (Art. 1682A para. 2 Portuguese Civil Code);
- encumber the family home through the constitution of rights *in rem* of fruition or of guarantee, to lease it, or to constitute personal rights of fruition thereover (Art. 1682A para. 2 Portuguese Civil Code)
- dispose of the right to lease the family home (Art. 1682B Portuguese Civil Code);
- dispose of movables jointly used by the spouses in the household (Art. 1682 para. 3 sub a Portuguese Civil Code);
- dispose of movables jointly used by the spouses as a joint instrument of labour (Art. 1682 para. 3 sub a Portuguese Civil Code);
- dispose of movable assets that are not within their scope of administration (Art. 1682, para. 2 and 3 sub b Portuguese Civil Code);

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

Yes. As an exception to the rules that each one of the spouses has the power to administer his or her personal assets, each one of the spouses is also responsible for the administration of the

other's personal movable assets which are exclusively used by him or her as an instrument of labour (Art. 1678 para. 2 sub e Portuguese Civil Code).

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

Yes, in case one of the spouses has granted a mandate to the other to administer his or her personal assets. However, the rendering of accounts and the delivery of the respective balance, if it exists, is only required in relation to acts carried out during the last 5 years (Art. 1681 para. 2 Portuguese Civil Code).

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

The task of running the family belongs to both spouses (Art. 1671 para. 2 Portuguese Civil Code), so both have equal powers regarding the administration of assets. However, when the consent of the other spouse is legally required to carry out certain acts, and there is an unjustified refusal or an impossibility to grant it on the part of that spouse, it is possible to use legal instruments in order to obtain the necessary consent (Art. 1684 para. 3 Portuguese Civil Code). There are no cautionary measures as in other legal systems, and the only avenue remaining is that of taking legal action in general terms.

146. What are the possible consequences when a spouse violates the rules governing the administration of assets? What are the possible consequences in other cases of maladministration of the assets?

In those cases in which one of the spouses carries out an act for which the consent of the other is necessary and it was not obtained, not even judicially, the act will be annulable. The spouse who did not consent or his or her heirs can, within 6 months from becoming aware of the act, but never later than 3 years after it takes place, demand the annulment of the act (Art. 1687 para. 1 and 2 Portuguese Civil Code).

When one of the spouses disposes of or encumbers personal assets of the other over which he or she had no administrative rights, the sanction is nullity (Art. 1687 para. 4 Portuguese Civil Code).

When one of the spouses administers the personal assets of the other without a mandate, he or she is only responsible for the acts that were intentionally carried out at the expense of the other spouse (Art. 1681 para. 1 Portuguese Civil Code).

When the administration of those assets is based on a mandate, the administrator is responsible on the same terms as the agent (Art. 1681 para. 2 Portuguese Civil Code).

When one of the spouses administers personal assets of the other whose administration, by law, does not belong to him or her without a written mandate, but with the knowledge of and no opposition from the other spouse, the applicable regime is that of agency; if there is opposition, the administering spouse is responsible as a *mala fides* possessor (Art. 1681 para. 3 Portuguese Civil Code).

The law also provides as a last resort that any of the spouses may request the simple judicial separation of property, whenever maladministration by the other spouse jeopardizes his or her assets (Art. 1767 Portuguese Civil Code).

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

If one of the spouses is incapable of carrying out the administration of his or her personal assets, the administration of those assets belongs to the other spouse, unless an adequate mandate is granted to a third party (Art. 1678 para. 2 sub f Portuguese Civil Code).

The law also provides that the spouse who is not the administrator of the assets may be able to take any necessary measures on their behalf, if the other spouse is, for any reason, incapable of doing so, and if a delay in such measures may result in damage (Art. 1679 Portuguese Civil Code).

IV.3 Distribution of Assets upon Dissolution

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

By definition, under the regime of separation of property there are no community assets. Therefore, there will be no need to divide them. In the case of a separation of persons and property, as well as of the dissolution of the marriage through the death of one of the spouses, through divorce or an annulment and a declaration as to the nullity of the marriage, each of the spouses will keep the assets he or she owned before the marriage, as well those acquired later.

Regarding the assets which are jointly owned by the spouses, they may be divided according to the rules laid down for the division of jointly owned property (Art. 1412 and 1413 Portuguese Civil Code and Art. 1052-1056 Portuguese Code of Civil Procedure).

If one spouse is absent the other, as long as he or she is not separated in persons and property, may demand an inventory, following proceedings to declare the other spouse legally absent (Art. 108 Portuguese Civil Code and Art. 1103 et seq. Portuguese Code of Civil Procedure).

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

Separation of persons and property

The property relationship between spouses ceases with the separation of persons and property (Art. 1688 para. 1 and Art. 1795A Civil Code). If the separation is by mutual consent, its effects will be produced on the date when it is decreed by the Registrar of the Civil Office. If the separation is without the consent of the spouse, its effects will be produced on the date when the decision is communicated *in rem judicatam*.

If the *de facto* separation between spouses is proven in the divorce proceedings, each of spouses may request the Court to declare that the appropriate date is the date on which the separation began. In this case the effects of the divorce may be retroactive to that date (Art. 1789 par. 2 Portuguese Civil Code).

Death

The property relationship between spouses ceases through the dissolution of the marriage by the death of one of the spouses (Art. 1688 para. 1 Portuguese Civil Code). The moment of death corresponds to the irreversible cessation of the functioning of the cerebral trunk (Law n 141/99, of August 28).

Divorce

The property relationship between spouses ceases through the dissolution of a marriage by divorce (Art. 1688 para. 1 Portuguese Civil Code). The effects of a divorce without the consent of one of the spouses are produced at the moment when the decision is communicated *in rem*

judicatam but, regarding the property relationship between spouses, the effects are retroactive to the date of filing the request for divorce (Art. 1789 para. 1 Portuguese Civil Code).

If the *de facto* separation between spouses is proven in the divorce proceedings, each of spouses may request the Court to declare the date on which the separation began to be the appropriate date. In this case the effects of the divorce may be retroactive to that date (Art. 1789 para. 2 Portuguese Civil Code).

The property relationship between spouses in the case of a divorce by mutual consent ceases from the moment of the decision by the Registrar of the Civil Office which “has the same effect as a judicial decision on the same matter” (Art. 1776A para. 3 Portuguese Civil Code).

Declaration of nullity and annulment

The property relationship between spouses ceases through a declaration of the nullity or an annulment of a marriage (Art. 1688, n 1 Portuguese Civil Code). This means that the property relationship between spouses will cease on the date of communicating the decision to annul *in rem judicatam* the civil marriage or on the date of registering the decision of the ecclesiastical Court that declared the nullity of a Catholic matrimony.

Absence

If one spouse is absent the other, as long as he or she is not separated in persons and property, may demand an inventory, following proceedings to declare the other spouse legally absent (Art. 108 Portuguese Civil Code and Art. 1103 et seq. Portuguese Code of Civil Procedure).

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

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When the property relationship between the spouses ends, each of them retains the assets he or she owned. Regarding assets that may eventually belong to both in joint ownership, there is no obligation to divide them, even though the property relationship among the spouses has ceased.

151. How are assets determined and valued? Are e.g. premarital assets and debts, assets acquired by gift, will or inheritance and debts related those assets, the increase in value of the spouses' property and debts related to that property, pension rights and claims and insurance rights taken into account?

All assets and all debts referred to in the question are taken into consideration. The assets and debts referred to are considered to be the personal property of each spouse. Any determination or valuation has no influence on the assets and amounts that each spouse will receive.

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

For any determination and valuation, the relevant date on which the effects of the divorce are produced is that of communicating the divorce decree *in rem judicatam*. Regarding the property relationship among spouses, the effects of the divorce will enter into force from the date of filing the action.

If a *de facto* separation between spouses is proven in the divorce proceedings, each of them may request that the effects of the divorce be retroactive to the date on which the separation began. The decision will determine that date (Art. 1789 para. 2 Portuguese Civil Code).

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

If the personal assets of one of the spouses are used for investments in the personal assets of the other, a credit arises in favour of the latter. Credits among spouses follow the general regime of the Law of Obligations, including Contract Law. There are no special rules for compensation, and the nominal principle applies (Art. 550 Portuguese Civil Code).

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

For debts which are the exclusive responsibility of one of the spouses, only his or her personal assets are taken into account. However, if the personal assets of one of the spouses were used to pay a debt which is the exclusive responsibility of the other, a credit arises among them.

Credits among spouses follow the general regime of the Law of Obligations, including Contract Law. There are no special rules for compensation, and the *nominal principle* applies (Art. 550 Portuguese Civil Code).

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

In the context of the dissolution of a marriage through divorce, the spouses have no preferential rights over the family home.

Art. 1793 Portuguese Civil Code only refers to the possibility, in divorce cases, of the court to grant the lease of the family home to one of the spouses. This possibility exists whether the family home is a personal asset of one of the spouses or is jointly owned by both of them. The Court shall take into account each spouse's needs and the interests of the children of the family (also see Art. 1105 Portuguese Civil Code).

When a marriage is dissolved through the death of one of the spouses, the surviving spouse has the right to be granted, at the moment of the partition, the right of habitation in the family home, and the right to use the respective contents, compensation thereby being owed to the co-inheritors if the value received exceeds his or her portion of the estate (Art. 2103-A, n1, Civil Code).

If the family home does not form part of the estate, this same regime applies to its contents (Art. 2103B Civil Code).

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

No.

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

There is no direct relationship. The property relationship between spouses ceases in the case of divorce or a separation of persons and property. There may or may not be an obligation to grant maintenance to the spouse who may need it.

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

There is no direct relationship.

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

No.

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

Yes. The Law allows the spouses to establish in a pre-nuptial agreement that if the marriage is dissolved through death and there are common descendants, the division of the assets will be made according to the universal community of property regime, regardless of the regime actually adopted (Art. 1719 para. 1 Portuguese Civil Code).

V. Separation of property with distribution by the competent authority

Not relevant.

D. MARITAL AGREEMENTS

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

Yes. On the subject of property relationship between spouses, the rule is that of the principle of freedom of choice of property regimes (Art. 1698 Portuguese Civil Code). The betrothed can determine the property regime of their matrimony through a pre-nuptial agreement which defines the categories of property: the community property and the personal property of each of the spouses. The pre-nuptial agreement, if valid, effective, and did not expire, is compulsory.

- 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?**

No. On the subject of property relationship between spouses, the rule is that of the principle of immutability of property regimes (Art. 1714 Portuguese Civil Code). The property regime chosen by the betrothed through a legally established pre-nuptial agreement cannot be altered by them after the celebration of the matrimony.

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

Pre-nuptial agreements are only valid if celebrated through a statement made before an official of the Civil Office or through a public deed (Art. 1710 Portuguese Civil Code and Art. 189 para. 1 Portuguese Code of Civil Procedure).

- 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.**

Regarding third parties, the pre-nuptial agreements only produce effects after having been registered (Art. 1711 para. 1 Portuguese Civil Code and Art. 191 para. 1 Portuguese Code of Civil Procedure). Except for a legal provision in the contrary, facts requiring compulsory registration can only be invoked after registration (Art. 2 Portuguese Code of Civil Procedure).

The pre-nuptial agreement is registered through its mention on the text of the marriage entry, whenever the record is drawn up or the certificate of the respective public deed is presented before the celebration of the matrimony.

The pre-nuptial agreement, whenever presented after the celebration of the wedding, and the change of the property regime, agreed to or legally determined, are registered through an annotation on the marriage entry (Art. 190 para. 1 and 2 Portuguese Code of Civil Procedure).

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

No.

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

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If the pre-nuptial agreement is drawn up through a public deed before a notary, he or she must, during this process, inquire, interpret and adapt it to the legal system, informing the betrothed about its value and scope (Art. 4 para. 1 Portuguese Code of the Notary). Breach of this duty generates disciplinary responsibility (Art. 61 do Statute of the Notary).

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

According to the most recent figures, out of a total of 46,329 marriages celebrated in 2007, 6,209 had entered into pre-nuptial agreements.

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?

Through a pre-nuptial agreement, the betrothed can freely determine the property regime of their matrimony, either by choosing one of the regimes established by law, or by introducing changes in the regimes typified by law, or by creating mixed regimes, or even new ones, providing that they observe the limitations imposed by the law (Art. 1698 Portuguese Civil Code).

However, there are cases in which this freedom is restricted. For instance, when the marriage is celebrated between persons who have children, even if adults or emancipated, the betrothed will not be able to choose the universal community of property regime, nor stipulate the communicability of the assets listed in Art. 1722 para. 1 Portuguese Civil Code.

Greater restriction to the freedom of choice of property regimes is found in those situations in which the marriage was celebrated without being preceded by the banns publication process, and when the marriage was celebrated by persons having completed sixty years of age. The betrothed have no choice whatsoever. The law determines that their marriage will be ruled by the separation of property regime (Art. 1720 para. 1 and 2 Portuguese Civil Code).

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199. If spouses can modify through pre- and/or post-nuptial agreements a statutory regime or create their own regime, can those modifications be made to:

a. categories of assets

In principle, the betrothed can, through a pre-nuptial agreement, classify certain assets as personal property or common property. They cannot, however, stipulate the communicability of the assets listed in Art. 1733 Portuguese Civil Code (Art. 1699 para. 1 sub d Portuguese Civil Code).

b. administration of assets

Changes to the rules about administration of the couple's assets cannot be subject of a pre-nuptial agreement (Art. 1699 para. 1 sub c Portuguese Civil Code).

c. distribution of assets

The rule that the spouses participate in half of the assets and liabilities of the community (Art. 1730 Portuguese Civil Code) cannot be altered by pre-nuptial agreement nor through a promissory contract concerning the distribution of the common assets – through which the spouses, during the marriage, promise each other that the composition of each other's half portion at the time of the distribution will be that which was agreed to in this contract.

Regarding pre-nuptial agreements, it is generally agreed that the betrothed have the possibility of making stipulation about the distribution of common assets. Therefore,

providing that the already mentioned rule of the division in half is not affected, the betrothed can establish which assets will belong to each one at the time of the distribution.

The promissory contract of division raises certain doubts in view of the principle of immutability. However, these reservations are dispelled given that such a contract does not introduce any changes to the categories property of the spouses. Consequently, providing that the “rule of half” is respected (Art. 1730 Portuguese Civil Code), preferential attributions stipulated in promissory contracts of division should be allowed.

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

Yes. Given that the betrothed can celebrate a pre-nuptial convention on condition (Art. 1713 Portuguese Civil Code) and this condition, for example, refer back to the cause of dissolution of the marriage.

There is, also, the possibility of the betrothed establishing that, if the marriage is dissolved through death, when there are common descendants, the division of the asserts will be made according to the universal community of property regime, regardless of the adopted regime (Art. 1719 para. 1 Portuguese Civil Code).

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?

▲ They are not known.

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

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In principle, the court cannot override what is stipulated either in an pre-nuptial agreement or in a promissory contract concerning the distribution of the common assets. However, if the spouses, in a pre-nuptial agreement, do not comply with the limits imposed by the law in Art. 1699 Portuguese Civil Code, the clause that violates that compliance will be null and void (Art. 294 Portuguese Civil Code).

Regarding the promissory contract concerning the distribution of the common assets, the competent authority will only have to determine if the agreement between the spouses does not violate the imperative “rule of the half” (Art. 1730 Portuguese Civil Code) or other coercive legal dispositions.