

PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING PROPERTY RELATIONS BETWEEN SPOUSES

PREAMBLE

Recognising that, notwithstanding the existing diversities between national family law systems, there is nevertheless a growing convergence of laws;
Recognising that the free movement of persons within Europe is hindered by the remaining differences;
Desiring to contribute to common European values regarding the equality of spouses;
Desiring to strike a balance between the spouses' private autonomy and their solidarity;
Desiring to contribute to the welfare of the family;
Desiring to secure the protection of the family home;
Desiring to guarantee each spouse a fair share in the property acquired during the marriage;
Desiring to contribute to the harmonisation of family law in Europe and to strengthen the rights of its citizens;
The Commission on European Family Law recommends the following Principles:

CHAPTER I: GENERAL RIGHTS AND DUTIES OF THE SPOUSES

Principle 4:1 General application

The Principles contained in this Chapter apply irrespective of the matrimonial property regime.

Principle 4:2 Equality of the spouses

Both spouses have equal rights and duties.

Principle 4:3 Legal capacity of the spouses

Subject to the following Principles, each spouse has full legal capacity and in particular is free to enter into legal transactions with the other spouse and with third persons.

Principle 4:4 Contribution to the needs of the family

- (1) Each spouse should contribute to the needs of the family according to his or her ability.
- (2) The contribution to the needs of the family encompasses contributions to the running of the household, the personal needs of the spouses and the maintenance, upbringing and education of the children.
- (3) If a spouse does not fulfill his or her obligation to contribute to the needs of the family the other spouse may request the competent authority to determine the contribution.

Principle 4:5 Protection of the family home and household goods

- (1) Any act of disposal of rights to the family home or household goods requires the consent of both spouses.
- (2) Any act of disposal by one spouse without the consent of the other is valid if the latter ratifies it.
- (3) If a spouse refuses or is unable to give consent, the other spouse may request authorisation by the competent authority.
- (4) Any act of disposal in breach of the preceding paragraphs may be annulled by the competent authority upon the application of the non-consenting spouse.

Principle 4:6 Protection of the leased family home

- (1) Where the family home is leased to one spouse, the lease is deemed to belong to both spouses, even if it has been concluded before the marriage.
- (2) One spouse may not terminate or modify the lease without the consent of the other.
- (3) The landlord should notify both spouses to terminate the lease.

Principle 4:7 Representation

- (1) One spouse may authorise the other spouse to represent him or her in legal transactions.
- (2) When a spouse is unable to express his or her intentions, the competent authority may authorise the other spouse
 - (a) to act alone where the consent of his or her spouse would otherwise be required;
 - (b) to represent his or her spouse when the latter has the power to act alone.

Principle 4:8 Duty to inform

Each spouse has the duty to inform the other about his or her assets and debts and about significant acts of administration in so far as it is necessary to enable the other to exercise his or her rights.

Principle 4:9 Freedom to enter into marital property agreements

Spouses should be free to enter into agreements determining their marital property relationship.

CHAPTER II: MARITAL PROPERTY AGREEMENTS

Principle 4:10 Concept

(1) In a marital property agreement made before the marriage the future spouses may choose their matrimonial property regime.

(2) During the marriage the spouses may modify their matrimonial property regime or change it for another regime.

Principle 4:11 Form requirements

Marital property agreements should be drawn up by a notary or other legal professional with comparable functions, be dated and should be signed by both spouses.

Principle 4:12 Disclosure

When entering into a marital property agreement the spouses should be under a mutual duty to disclose their assets and debts.

Principle 4:13 Obligations of a notary or other legal professional with comparable functions

The notary or other legal professional with comparable functions should

- (a) give impartial advice to each spouse separately,
- (b) ensure that each spouse understands the legal consequences of the marital property agreement, and
- (c) ensure that both spouses freely consent to the agreement.

Principle 4:14 Effects as against third parties

As against third parties marital property agreements are binding if at the time of making the transactions with a spouse

- (a) such information is publically documented; or
- (b) they knew of the relevant parts of the agreement.

Principle 4:15 Exceptional hardship

Having regard to the circumstances when the agreement was concluded or those subsequently arising, the competent authority may, in cases of exceptional hardship, set aside or adjust a marital property agreement.

CHAPTER III: MATRIMONIAL PROPERTY REGIMES

SECTION A: PARTICIPATION IN ACQUISITIONS

Principle 4:16 Applicability of the participation in acquisitions regime

The participation in acquisitions regime applies if the spouses have not agreed otherwise in accordance with Chapter II.

CONCEPT

Principle 4:17 Concept of participation in acquisitions

- (1) Participation in acquisitions is a matrimonial property regime during which property is owned separately by the spouses.
- (2) Each spouse's property comprises acquisitions and reserved property.
- (3) Upon dissolution of the regime each spouse participates in the acquisitions made by the other during the regime in accordance with Principle 4:31.

ASSETS

Principle 4:18 Acquisitions

- (1) The acquisitions comprise the assets acquired during the regime, other than the reserved property. In particular, the acquisitions include
 - (a) each spouse's income and gains whether derived from earnings or property;
 - (b) assets acquired by means of either spouse's income or gains.
- (2) Assets are presumed to be acquisitions unless they are proved to be reserved property.

Principle 4:19 Reserved property

Reserved property comprises

- (a) assets acquired before the commencement of the regime;
- (b) gifts, inheritances and bequests acquired during the regime;
- (c) assets substituting reserved property;
- (d) assets that are personal in nature;
- (e) assets exclusively acquired for a spouse's profession;
- (f) increases in value of the property included in (a) to (e).

Principle 4:20 Presumption of joint ownership

Assets are presumed to be owned jointly by both spouses unless otherwise proved.

DEBTS

Principle 4:21 Personal debts

Debts incurred by one spouse are his or her personal debts.

Principle 4:22 Recovery of personal debts

Personal debts are recoverable from the debtor spouse's acquisitions and his or her reserved property.

ADMINISTRATION

Principle 4:23 Administration of property

Subject to Principles 4:6 and 4:7, each spouse is entitled to administer his or her property independently.

DISSOLUTION

Principle 4:24 Grounds for dissolution

The regime on the participation in acquisitions is dissolved by

- (a) the death of a spouse;
- (b) the annulment of the marriage, divorce or legal separation;
- (c) the change of the matrimonial property regime by agreement between the spouses; or
- (d) the decision of the competent authority based upon serious grounds.

Principle 4:25 Date of dissolution

The dissolution of the regime on the participation in acquisitions takes effect

- (a) at the date of the death of a spouse;
- (b) in the case of annulment of the marriage, divorce or legal separation, at the date of the application;
- (c) in the case of an agreement to change to another matrimonial property regime, at the date of the change; and
- (d) in the case of a decision by the competent authority, at the date of the application.

LIQUIDATION

Principle 4:26 Determination and valuation of acquisitions

- (1) The acquisitions of each spouse should be determined at the date of the dissolution of the regime, as specified by Principle 4:25.
- (2) The acquisitions should be valued at the date of the liquidation of the regime.

Principle 4:27 Detrimental transactions

In calculating the acquisitions of each spouse account should be taken of

- (a) excessive gifts;
- (b) dissipation of assets;
- (c) other acts that have intentionally diminished the value of the acquisitions to the detriment of the other spouse.

Principle 4:28 Compensation

- (1) The acquisitions of a spouse should be compensated for any contribution profiting his or her reserved property.
- (2) The reserved property of a spouse should be compensated for any contribution profiting his or her acquisitions.
- (3) Debts encumber the property in relation to which they were incurred. In cases of doubt they are presumed to encumber the acquisitions.
- (4) In the case of investment for the acquisition, improvement or preservation of an asset the calculation of the compensation should take into account any resulting increase or decrease in the value of the asset.
- (5) The compensation should be paid in money, unless the spouses agree otherwise.

PARTICIPATION

Principle 4:29 Agreement on participation

Spouses are free to agree on the participation in the acquisitions.

Principle 4:30 Allocation of the family home and household goods

The competent authority may, in the interest of the family and subject to payment of compensation, allocate the family home and household goods to one of the spouses.

Principle 4:31 Equal participation in the net acquisitions

- (1) If one spouse's net acquisitions exceed the value of that of the other, the latter participates in the surplus to the amount of one half.
- (2) Net acquisitions are the value of the acquisitions after deducting the debts.

- (3) Losses made by one spouse exceeding his or her acquisitions at the date of the dissolution, should not be shared by the other spouse.
- (4) The claim of participation is a monetary one, unless the spouses agree otherwise.
- (5) Upon request of the debtor spouse the competent authority may, where there are serious grounds for doing so, authorise payments to be deferred or payable in instalments.

Principle 4:32 Adjustment by the competent authority

In cases of exceptional hardship the competent authority can

- (a) adjust the participation;
- (b) set aside or modify any spousal agreement made in accordance with Principle 4:29.

SECTION B: COMMUNITY OF ACQUISITIONS

Principle 4:33 Applicability of the community of acquisitions regime

The community of acquisitions regime applies if the spouses have not agreed otherwise in accordance with Chapter II.

CONCEPT

Principle 4:34 Concept of the community of acquisitions

- (1) The community of acquisitions is a matrimonial property regime comprising community property and personal property.
- (2) Community property is property acquired during the community of acquisitions and which is not personal property.
- (3) Personal property is each spouse's own property.

ASSETS

Principle 4:35 Community property

- (1) Community property comprises any property movable and immovable acquired during the regime that is not the personal property of one of the spouses.
- (2) In particular, community property includes
 - (a) the spouses' income and gains whether derived from earnings, community property or personal property;
 - (b) assets acquired either jointly or individually by the spouses during the community of acquisitions by means of the spouses' income and gains;
 - (c) gifts and bequests to both spouses or to one spouse on condition that they belong to community property.

Principle 4:36 Personal property

Personal property comprises

- (a) assets acquired before entering into the community of acquisitions;
- (b) gifts, inheritances and bequests acquired during the regime;
- (c) assets acquired through substitution, investment or reinvestment in accordance with Principles 4:37 and 4:38;
- (d) assets personal in nature, acquired during the regime;
- (e) assets exclusively acquired for a spouse's profession.

Principle 4:37 Substitution

(1) Any asset substituting personal assets without extra payment should be regarded as personal property.

(2) Any asset substituting personal assets with additional payment should be regarded as personal property unless the payment provided by community property equals or exceeds the value of the substituted asset.

(3) Where additional payment is made by one category of property, compensation is payable by the other.

Principle 4:38 Investment or reinvestment

(1) Any asset acquired solely through the investment or reinvestment of personal assets should be regarded as personal property.

(2) Any asset acquired partly through the investment or reinvestment of personal assets and partly through community assets should belong to the personal property unless the payment provided by community property equals or exceeds the value of the investment or reinvestment.

(3) Where additional investment or reinvestment is made by one category of property, compensation is payable by the other.

Principle 4:39 Presumption of community property

Assets are presumed to be community property unless they are proved to be personal property in accordance with Principles 4:35 to 4:38.

DEBTS

Principle 4:40 Community debts

The community debts are

- (a) debts incurred jointly by both spouses;
- (b) debts incurred by one spouse in order to meet the appropriate family needs;
- (c) debts related to the maintenance of children;
- (d) debts incurred by one spouse for the use or administration of community assets or in the interest of the community property;
- (e) debts related to a spouse's professional activities;

- (f) debts related to gifts and bequests belonging to community property;
- (g) debts that have not been proved to be personal debts.

Principle 4:41 Personal debts

Personal debts of a spouse are

- (a) debts incurred before entering into the community of acquisitions;
- (b) debts related to gifts, inheritances and bequests acquired by one spouse during the regime;
- (c) debts related to personal property;
- (d) debts which are personal by nature;
- (e) debts incurred without the required consent of the other spouse.

Principle 4:42 Recovery of community debts

- (1) Community debts can be recovered from the community property and from the personal property of the spouse who incurred the debt.
- (2) If the spouses are jointly and severally liable, the debt may also be recovered from the personal property of either spouse.

Principle 4:43 Recovery of personal debts

- (1) Debts which are personal to one spouse can be recovered from
 - (a) the debtor spouse's personal property;
 - (b) the debtor spouse's income and gains;
 - (c) the community assets to the extent of their merger with the debtor spouse's personal property.
- (2) Personal debts related to tort or crime can also be recovered from half of the net value of the community property where the debtor spouse's personal property, income and gains are insufficient for recovery.

ADMINISTRATION

Principle 4:44 Administration of community property

- (1) Each spouse is entitled to administer community property, but important acts require joint administration.
- (2) If one spouse refuses to consent to an act requiring joint administration, the other spouse may apply to the competent authority for authorisation to act alone.

Principle 4:45 Acts requiring joint administration

Subject to Principles 4:4 to 4:8 and taking into account the economic circumstances of the spouses, acts requiring joint administration include in particular the following:

- (a) acquisition, alienation and encumbrance of immovable property;
- (b) entering into significant loan agreements, guarantees and sureties;
- (c) making significant gifts.

Principle 4:46 Annulment of acts of administration

Acts requiring joint administration may be annulled by the competent authority upon the application of the non-consenting spouse.

Principle 4:47 Administration of personal property

Subject to Principles 4:6 and 4:7 each spouse is entitled to administer his or her personal property independently.

Principle 4:48 Divestment of the right to administer community property

(1) Upon application by one spouse the competent authority may divest the other spouse of the right to administer in whole or in part the community property on the grounds of

- (a) inability to express his or her intentions;
- (b) serious maladministration; or
- (c) serious failure to comply with the duty to inform in accordance with Principle 4:8.

(2) To the extent that one spouse has been divested of the right to administer the community property the power vests exclusively in the other spouse.

(3) Upon application of either spouse the competent authority may reinstate the divested spouse.

DISSOLUTION

Principle 4:49 Grounds for dissolution

The community of acquisitions regime is dissolved by

- (a) the death of a spouse;
- (b) the annulment of the marriage, divorce or legal separation;
- (c) the change of the matrimonial property regime by agreement between the spouses; or
- (d) the decision of the competent authority based upon serious grounds ordering separation of property.

Principle 4:50 Date of dissolution

The dissolution of the community of acquisitions regime takes effect

- (a) at the date of the death of a spouse;
- (b) in the case of annulment of the marriage, divorce or legal separation as between the spouses, either at the date of the application or, if the spouses separated earlier, at the date of their separation and as against third persons, at the date of the registration of the decision of the competent authority;
- (c) in the case of an agreement to change to another matrimonial property regime as between the spouses, at the date of the change and as against third persons, at the date of the publication of the agreement;

- (d) in the case of separation of property ordered by the competent authority as between the spouses, at the date of the application and against third persons, at the date of the publication of the application.

Principle 4:51 Administration after dissolution

After the dissolution of the community of acquisitions the general rules of joint ownership apply to administration.

LIQUIDATION

Principle 4:52 Determination and valuation of the community property

- (1) Community property should be determined at the date of the dissolution of the community of acquisitions, as specified by Principle 4:50.
- (2) The community assets should be valued at the date of their distribution.

Principle 4:53 Compensation

- (1) The community property should be compensated for any contribution profiting the personal property of a spouse.
- (2) The personal property of a spouse should be compensated for any contribution profiting the community property.
- (3) In the case of investment for the acquisition, improvement or preservation of an asset, the calculation of the compensation should take into account any resulting increase or decrease in the value of the asset.
- (4) The compensation should be paid in money, unless the spouses agree otherwise.

Principle 4:54 Ranking of community debts

Community debts and compensation rights rank equally.

DISTRIBUTION

Principle 4:55 Agreement on distribution

Spouses are free to agree on the distribution of the community property.

Principle 4:56 Allocation of the family home, household goods and professional assets

In determining the distribution of community property a competent authority may, in the interest of the family and subject to payment of compensation, allocate to one of the spouses

- (a) the family home and household goods;
- (b) professional assets.

Principle 4:57 Equal sharing and adjustment

- (1) The community property should be distributed equally between the spouses.
- (2) In cases of exceptional hardship the competent authority can
 - (a) adjust the distribution;
 - (b) set aside or modify any spousal agreement made in accordance with Principle 4:55.

Principle 4:58 Recovery of community debts after distribution of the community

- (1) Community debts can be recovered after the distribution of the community from the share of the community of each spouse and from the personal property of the spouse who incurred the debt.
- (2) The spouse who paid a community debt after the distribution of the community has recourse against the other spouse for half of the payment.