

NATIONAL REPORT: RUSSIA

Prof. Masha Antokolskaia

Free University of Amsterdam

August 2008

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

NATIONAL REPORT: RUSSIA

Prof. Masha Antokolskaia
Free University of Amsterdam
August 2008

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.

According to Russian law, spouses are persons who have entered into a civil marriage.

a. upon marriage

Yes. If the spouses have not concluded a marital agreement, the statutory regime of community of property (Art. 256 Russian Civil Code, Art. 33-39 Russian Family Code) applies to their property relationship from the moment of the registration of their civil marriage.

b. during marriage

Yes. If the spouses have not concluded a marital agreement, the statutory regime of community of property (Art. 256 Russian Civil Code, Art. 33-39 Russian Family Code) applies to their property relationship during their marriage.

c. upon separation

Yes. The concept of a legal separation is not known in Russian law. Art. 38 Russian Family Code allows one/both spouse(s) to request the court to determine their personal property, i.e., the assets acquired by each of the spouses after a de facto separation, but before a formal divorce. In this case the petitioner needs to prove that the spouses have separated without an intention to resume their marital relationship and that the assets in question have been acquired during the period of separation.

d. upon death

Yes. The death of one of the spouses leads to the dissolution of the community, or an end to the contractual regime governing the property relationship of the spouses. If one of the spouses dies, the matrimonial property is first divided according to Art. 38 and 39 Russian Family Code, in the case of the statutory regime, or the provisions of the marital agreement, in the case of a contractual regime. Thereafter the share of the deceased spouse constitutes his or her deceased estate which has to be divided between the heirs according to the rules of the law of succession.

e. upon divorce

Yes. A divorce leads to the dissolution of the community or an end to the contractual regime governing the property relationship of the spouses. If the spouses divorce, the matrimonial property is divided according to Art. 38 and 39 Russian Family Code in the case of the statutory regime, or the provisions of the marital agreement in the case of a contractual regime.

f. upon annulment

Yes. Art. 30 Russian Family Code governs the consequences of the annulment of a marriage concerning the property relationship of the spouses. In the case of an annulment, it is presumed that the marriage never came into being. The general rule is formulated in Art. 30 para. 2 Russian Family Code. According to this rule, the property relationship of persons whose marriage has been annulled shall be governed by the provision of the Civil Code regarding joint ownership. Specific rules governing the matrimonial property relationship of the spouses are not applicable. The marital agreement concluded by such persons will be declared null and void. Art. 30 para. 4 Russian Family Code allows the court to deviate from this general rule concerning a *bona fide* spouse whose marriage has been annulled. The court can therefore determine that the property relationship of such a spouse will be governed by the rules on the spouses' community of property (Art. 34, 38 and 39 Russian Family Code) and that the matrimonial agreement is considered to be valid. In such a case the consequences of an annulment for the property relationship resembles those of divorce.

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

The general rules governing property relations between spouses are to be found in article 256 of the first part of the Civil Code of the Russian Federation.¹ The specific rules on this matter are located in part III (Art. 31-46) of the Family Code of the Russian Federation.² The rules of the Russian Family Code may not contradict the provisions of the Civil Code, because the latter enjoys a higher ranking in the system of Russian statutes. This is due to the fact that the enactment of the Russian Civil Code is a matter of purely Federal competence, while the enactment of the Russian Family Code is a matter of the joint competence of the Russian Federation and the Subjects of the Russian Federation.

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

In the course of the 18th century the matrimonial property regime of the Russian Empire evolved into the system of separate property.³ A married woman had a right to administer and alienate her own property without any intervention by her husband.⁴ After the Russian Revolution in 1917 this system remained unchanged up to 1926. However, as the divorce rate increased, the separate property regime tended to disadvantage women, the majority of whom did not have an independent income at that time. Thus, in 1926 a limited form of community property, the community of acquisitions, replaced the separate property regime. Two features distinguished the newly introduced Russian system from those in Western Europe of that time. First, the community in Russia was administered by both the husband and the wife on an equal basis. Secondly, Russian law did not allow any contractual deviation from the statutory matrimonial property regime. The limited form of community property has remained applicable and essentially unchanged until the present day. When a market economy started to be implemented in the 1990s, the disadvantages of the system, where the spouses were unable to opt out of the statutory regime by means of entering into a marital agreement, became increasingly apparent.

¹ As amended by the Federal Law of 18.12.2006 N 231-ФЗ. Further referred to as the Russian Civil Code. *Гражданской кодекс Российской Федерации*. Adopted on 21 October 1994, in force since 1 January 1995. *Собрание законодательства Российской Федерации* 1994, No. 32, item 3301. For an English translation see: 21 Review of Central and Eastern European Law, 1995, No. 3/4, p. 245-430.

² Further referred to as the Russian Family Code. *Семейный кодекс Российской Федерации*, adopted on 8 December 1995, in force since 1 March 1996. *Собрание законодательства Российской Федерации*, 1996, No. 1, item 15. For an English translation see: W. Butler and J. Henderson, *Russian Legal Texts. The Foundation of a Rule-of-Law State and a Market Economy*, Simmons and Hill Publishing Ltd, The Hague, London, Boston, 1998, p. 517-593.

³ Art. 109 *Svod Zakonov Rossiiskoy Imperii*.

⁴ Art. 114 *Svod Zakonov Rossiisko Imperii*.

In 1995 the new Russian Civil and Family Codes provided for the introduction of a marital agreement, which allowed the spouses to opt out of the statutory regime and to subject their property relationship to a contractual regime governing marital property. The current Russian system regulating property relations between spouses consists of rules governing the statutory (default) regime of matrimonial property, which is a limited community (community of acquisitions); and the rules governing the contractual regimes regulating matrimonial property. Russian law contains almost no rules which are applicable to property relationships irrespective of the signed matrimonial property regime (the so-called 'primary regime').

A marital agreement can be concluded at any time before or after the marriage has been solemnized. A marital agreement must be entered into in writing and requires the form of a notarial deed. If a contract has been concluded before the celebration of the marriage, it comes into force at the time of registering the marriage. The law does not provide any models for such contractual regimes. The spouses enjoy a wide degree of freedom to create their own contractual regime. The only limitations to their freedom are of a very basic nature: the marital contract may not regulate purely personal non-patrimonial relationships and may not include provisions regarding minor children. Furthermore, a marital agreement may not restrict the maintenance rights of a spouse who is unable to work and cannot provide for him or herself. A more general limitation is formulated in Art. 42 para. 3 Russian Family Code. According to this article, any provisions of a marital agreement that 'place one of the spouses in an extremely unfavourable position' are voidable at the request of the aggrieved spouse.

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

At the moment there are no proposals before Parliament. Various academics have argued that the matrimonial property regime should be extended to informal marriage-like unions. Several rather technical proposals have been made in order to improve the regulation of marital agreements.

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

Not applicable: Russian law does not provide for any form of registered or civil partnerships.

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

Other rules of private law governing property relationships do not normally play a role in relations between spouses. However, it is possible that spouses become the joint owners of, for instance, a house which they have jointly purchased with their respective personal funds. This can also occur if both spouses receive the same undividable asset (e.g. a house) by way of an inheritance or donation.

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

The law of succession is independent from the law governing the property relationship between spouses. In the case of the death of one of the spouses the matrimonial property is first divided according to the statutory rules (in the case of the statutory regime) or the provisions of the marital agreement. Thereafter the share of the deceased spouse constitutes his or her deceased estate, which has to be divided between the heirs according to the rules of the law of succession. The surviving spouse, together with the parents and the children, is

considered to be an heir of the first degree (Art. 1142 para. 1 Russian Civil Code). If an heir of the first degree (including the surviving spouse) is unable to work, he or she has a right to a mandatory share which cannot be set aside by a will (Art. 1149 para. 1 Russian 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)?**

Chapter 6 Russian Family Code governs the personal non-patrimonial rights and duties of the spouses.

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”.**

Russian law contains no specific rules which govern the obligations of the spouses to contribute to the expenses of the family household. However, Russian maintenance law allows child and spousal maintenance to be awarded during the marriage. Therefore if one of the spouses fails to provide for the household expenses of the family, which includes minor children, he or she can be obliged to pay child maintenance (Art. 80-82 Russian Family Code). If one of the spouses is unable to work and to provide for him or herself and the other spouse does not contribute to the family expenses, there is a possibility to claim spousal maintenance (Art. 89 Russian Family Code). These maintenance law rules are mandatory and cannot be set aside by a marital agreement.

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

The Russian Family Code does not provide any specific rules governing liability for household debts incurred by the other spouse. The Russian Civil Code and Russian Housing Code do contain specific provisions concerning debts relating to the use of the family home.⁵ These rules are not specifically aimed at spouses, but rather impose joint and several responsibility for debts arising from the use of the family home on all adult members of the household. Art. 292 para. 1 Russian Civil Code and Art. 31 para. 3 Russian Housing Code provide for such responsibility for the members of the household of the dwelling's owner and Art. 677 para. 2 Russian Civil Code and Art. 69 para. 2 Russian Housing Code provide for the responsibility of the members of the household of the tenant of the dwelling. These rules are not mandatory, however, and can be set aside by a marital agreement or an agreement between the owner and the members of his or her household.

- 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”.**

Russian law does not recognise the notion of a matrimonial or family home. The Russian Family Code does not contain any specific rules which apply to transactions in respect of the matrimonial home irrespective of the matrimonial property regime.

⁵ Russian Housing Code (*Жилищный кодекс Российской Федерации*) of 29 December 2004 N 188-ФЗ, in force since 1 March 2005.

Under the statutory regime each of the spouses may freely and independently dispose of the matrimonial (family) home belonging to his or her personal property. Such transactions should be in writing and are subjected to obligatory state registration (Art. 249 Russian Civil Code). The consent of the other spouse for transactions in respect of the matrimonial home, which belongs to the spouse's personal property, is not legally required. Notwithstanding this clear legal rule, notaries who formalise transactions with regard to dwellings belonging to the personal property of married persons usually ask for the written consent of the other spouse. As this practice is not required by the law, the spouse-owner can judicially challenge a refusal by a notary to carry out the transaction without the consent of the other spouse.

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

There are no specific rules governing acquisitions and/or transactions in respect of household goods 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...)?

There are no other rules governing transactions entered into by one spouse irrespective of the matrimonial property regime (e.g. entering into guarantees, incurring debts, etc.). The rules of Art. 35 Russian Family Code, governing transactions entered into by one of the spouses, are only applicable if the statutory regime regulating matrimonial property has not been set aside by a marital agreement.

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

There are no specific rules concerning one spouse acting as an agent for the other.

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

There are no restrictions or limitations concerning transactions between spouses irrespective of the matrimonial property regime (e.g. gifts, etc.). Also the rules governing the statutory regime of the community of property provide for no restrictions concerning transactions between spouses (e.g. gifts, etc.).

C. MATRIMONIAL PROPERTY REGIMES

C.1. General issues

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

Yes. Art. 256 para. 1 Russian Civil Code and Art. 40-44 Russian Family Code allow spouses to enter into a contract regarding their matrimonial property regime (a matrimonial contract).

16. What regime is applicable, using the list below,⁶ 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?

Community of property.

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)?

Art. 42 para. 2 Russian Family Code explicitly mentions the possibility to opt for the separation of property or joint property (community property with specific shares).

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

a. Question 16.

The rules governing the statutory (default) regime of matrimonial property are to be found in Art. 256 para. 2 Russian Civil Code and Chapter 7 Russian Family Code.

The Russian community of property system is a limited one and can be defined as a community of acquisitions. The community property consists of assets acquired by the spouses during the marriage (Art. 256 para. 2 Russian Civil Code), with the exception of assets acquired by way of a gift or inheritance or by means of other transactions without consideration when these assets are of a purely personal nature. Objects of intellectual property are also excluded (Art. 34 para. 2 Russian Family Code). Any increase in the value of the separate property of each of the spouses remains separate property and is not subjected to a division upon the termination of the marriage. This can only be different if the non-owner spouse manages to prove his or her monetary or labour contribution to the increase in the other spouse's property (Art. 37 Russian Family Code). Income from the exploitation of intellectual property fall within community property (Art. 256 para. 2 part 4 Russian Civil Code, Art. 34 para. 2 Russian Family Code). Each of the spouses is allowed to freely dispose of his or her personal assets. There are no restrictions with regard to any specific assets like the matrimonial home or household goods. The administration of the community fund is not exercised by the spouses concurrently, but commonly. Thus, in theory, the consent of both spouses is required for every transaction. However, with regard to ordinary transactions conducted by one of the spouses, there is a rebuttable presumption that the other has consented. The conveyance of immovable property, transactions requiring the form of a notarial deed and some other important transactions require an explicit formal consent on the part of both spouses. In the case of divorce or the death of one of the spouses the community has to be divided. The general rule is that there is an equal division. However, under certain circumstances a judge has the discretion to reduce the share of one of the spouses.

b. Question 17.

Art. 42 part. 2 Russian Family Code mentions the contractual regimes for the separation of property, other forms of community property and shared property (community property with determined shares). However, Russian law does not provide for any further regulation (models) concerning those contractual regimes. The aforementioned possibilities are no more than examples that the spouses can draft for themselves. Spouses are free to draft any contractual regime regulating their matrimonial property, as long as they remain within the mandatory limitations determined by Art. 42 para. 3 Russian Family Code.

⁶ For an explanation of this list, see the document: CLASSIFICATION OF MATRIMONIAL PROPERTY REGIMES PROPOSED BY THE CEFL.

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

No information available.

C.2. Specific regimes

I. Community of property

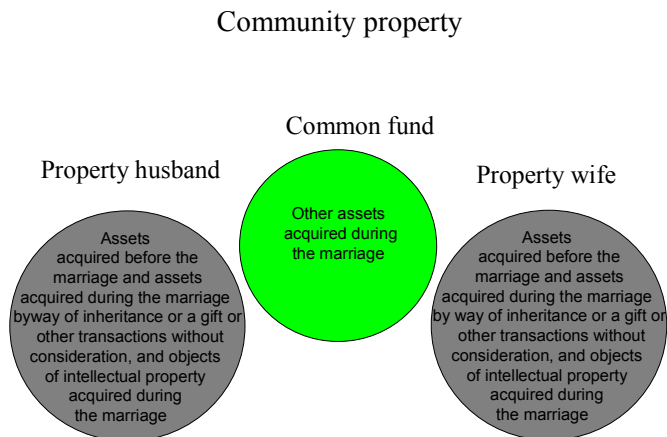
I.1. Categories of assets

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

The Russian community of property system is a limited community that can be defined as a community of acquisitions. Within this system three funds can be distinguished: community funds, the personal funds of the wife and the personal funds of the husband. The community comes into being by operation of law at the moment when a civil marriage is registered.

The community property consists of the assets acquired by the spouses during the marriage (with the exception of assets acquired by way of a gift or inheritance or by means of other transactions without consideration, when these assets are of a purely personal nature; as well as objects of intellectual property (Art. 256 para. 2 Russian Civil Code and Art. 34 para. 2 Russian Family Code)). Any increase in the value of the separate property of each of the spouses remains separate property and is not subjected to a division upon the termination of the marriage. This can only be different if the non-owner spouse manages to prove his or her monetary or labour contribution to the increase in the other spouse's property (Art. 37 Russian Family Code). Income from the exploitation of intellectual property fall within the community (Art. 256 para. 2 part 4 Russian Civil Code, Art. 34 para. 2 Russian Family Code). Each of the spouses is allowed to freely dispose of his or her personal assets. There are no restrictions with regard to any specific assets like the matrimonial home or household goods. The administration of the community fund is not exercised by the spouses concurrently, but commonly. The community of property will dissolve in the following situations: the death of one of the spouses, a divorce, or a choice for another property regime by post-nuptial agreement. A division of the community property is possible at any time during the marriage (without a dissolution of the community) as well as after divorce. The general rule is that there is an equal division. However, under certain circumstances, as laid down in Art. 39 para. 2 Russian Family Code a judge has the discretion to reduce the share of one of the spouses.

The following chart can illustrate the Russian regime of community of property:



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

The spouses' community property is a specific kind of joint property: the community property of both spouses. Community property is defined in Art. 244 para. 2 Russian Civil Code as joint property without shares. In this form of property each participant is entitled to the whole property as long as the community exists. Under Russian law community property can only arise as a result of a statute and never by means of a contract (Art. 244 para. 3 Russian Civil Code). Russian law provides for just two cases of common property: the community property of spouses and the community property of farmers' households. According to Art. 253 para. 4 Russian Civil Code, the general rules of the Civil Code concerning common property are only applicable to the community property of the spouses in the absence of special provisions in the Russian Civil and Family Codes. The administration of the community property is governed by Art. 35 Russian Family Code. Spouses are entitled to divide the community property at any time during their marriage (with or without the dissolution of the community property regime) and upon divorce. The personal property of each spouse is governed by the general rules of property law under the Civil Code. There are no specific family law rules with regard to the administration of such property.

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

The personal funds of the husband and wife include:

1. assets acquired before the marriage;
2. assets acquired during the marriage by way of a gift
3. assets acquired during the marriage by way of inheritance
4. assets acquired during the marriage by way of other transactions without consideration
5. assets for personal use acquired during the marriage (clothing, footwear, etc.) with the exception of jewellery and other luxury items.
6. objects of intellectual property acquired during the marriage,
7. assets acquired by one of the spouses during the marriage, but paid from his or her personal means
8. assets acquired by each of the spouses after de facto separation can be declared personal assets by means of a court order
9. any increase in the value of personal property

Ad. 4. The most important example of other transactions without consideration is the privatisation of apartments and houses on behalf of the tenants. In Soviet times all dwellings in cities and towns were owned by municipalities. At the beginning of *perestroika* almost all dwellings were transferred into the private ownership of the tenants without consideration being provided by those tenants. If only one of the spouses was a tenant (e.g. because it was his or her premarital dwelling) he or she often became the sole owner. The law protected the interests of minor children living in the same dwelling, but there was (and is) no protection for the interest of adult family members including spouses. Therefore a considerable number of family dwellings became the personal property of one of the spouses.

Ad. 5. Assets for personal use are not defined by the law. Article 36 Russian Family Code only provides some examples of such assets: clothing or footwear. An exception is made for jewellery and other luxury items. The law provides no guidance in determining what items should be considered as 'luxury' items. Case law has determined that 'luxury' items are items of a significant value and not those which are necessary in daily life. The standard of living of each family therefore has to be taken into consideration. Thus for a model family a wife's expensive mink coat could constitute a luxury item, while for an affluent family the same coat can be considered to be ordinary clothing.

The law does not include professional assets (for instance a musical instrument belonging to a spouse who is a musician) among items for personal use and so they belong to the community assets of the spouses. In the legal literature it has been suggested that professional

assets should be considered as the personal assets of the spouse who uses them, provided that they do not have any great value.⁷

Ad 6. Objects of intellectual property belong to the personal assets of each of the spouses due to the amendment of Art. 256 para. 2 Russian Civil Code and Art. 36 Russian Family Code in 2006. Since then, any income received as a result of the exploitation of such objects fall within the community, but the objects themselves remain the personal property of their author.

Ad. 8. Art. 38 Russian Family Code allows spouses to request a court, when the matrimonial property is being divided, to declare that the assets acquired by each of the spouses after de facto separation, but before the formal divorce, are the personal property of each of them. In this case a petitioner has to prove that the spouses have separated without any intention to resume their marital relationship and that the assets in question have been acquired during the period of separation.

Ad. 9. Any increase in the value of the separate property of each of the spouses remains separate property and is not subject to any division upon the termination of the marriage. This can only be different if the non-owner spouse manages to prove his or her monetary or labour contribution to the increase in the value of the other spouse's property (Art. 37 Russian Family Code).

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

No.

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

Yes. Art. 37 Russian Family Code governs all kinds of investments made by spouses in each other's assets during the marriage. This provision states that if, during the marriage, the value of the personal assets of any of the spouses has significantly increased due to the investment of community assets, the personal assets of the other spouse or the labour of the other spouse, the personal assets of the spouse in question can be declared to belong to the community property of the spouses. The law mentions, as examples, a significant increase in value due to renovation, rebuilding or reconstruction. The transformation of assets from personal to community property can take place by an agreement between the spouses during the division of property according to Art. 38 para. 2 Russian Family Code, or by a court order according to Art. 38 para. 3 Russian Family Code.

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

Art. 256 para. 1 Russian Civil Code and Art. 34 para. 1 Russian Family Code provide for a general rule that 'assets of the spouses, acquired during the marriage, are considered to be their community property'. Art. 34 para. 2 Russian Family Code contains the following non-exhaustive list of assets acquired during the marriage which belong to the community:

1. the earnings of each of the spouses
2. income from business activity
3. income from the exploitation of objects of intellectual property
4. pensions received
5. social security benefits received

⁷ E. Kulagina, 'Commentary to Art. 36 Russian Family Code', in: A. Netchaeva (ed.), *Commentary on the Family Code of the Russian Federation*, Moscow: Uright, 2008, p. 143.

6. other payments with no specific purpose (for example, a material allowance received from an employer; or compensation for personal injury received from a tortfeasor⁸)
7. movable and immovable assets; securities; shares, contributions, participatory shares deposited in banks or commercial organisations, income acquired from the community property of the spouses
8. any other assets acquired during the marriage, irrespective of which of the spouses is the owner or in whose name the money has been deposited.

The only exceptions to the aforementioned rule are those assets listed in Art. 36 Russian Family Code (that determines that assets acquired during the marriage by way of a gift or inheritance, or by means of other transactions without consideration when these assets are of a purely personal nature, and objects of intellectual property), which are considered to be the personal property of each of the spouses (Art. 256 para. 2 part 4 Russian Civil Code, Art. 34 para. 2 Russian Family Code).

The earnings of the spouses belong to the community property. There are no specific rules governing spouses' earnings. In the legal literature there is an ongoing discussion with regard to the moment when earnings and other income, listed in Art. 34 para. 2 Russian Family Code, fall within the community property. The most accepted opinion is that such earnings and income become community property from the moment when a spouse is entitled there to.⁹

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

Russian law provides no specific rules regarding the spouses' pension rights and claims or insurance rights. The lack of such a regulation is one of the most significant deficiencies of Russian matrimonial property law.

Insurance and pension payments received by one of the spouses during the marriage fall under the general definition of 'income' in Art. 34 para.1 Russian Family Code and are therefore considered to be community property.

The situation concerning pension and insurance rights and claims is much more complicated. A lacuna in the law leads to the situation that both kinds of rights are not taken into consideration when the spousal property is divided upon the death of one of the spouses or divorce. Therefore these rights de facto belong to the individual property of the spouse who is entitled to them. This situation has never been challenged before the courts. If such a claim would occur, the court would apply the general rules of matrimonial property law. The result of such an application is rather predictable. It is therefore important to distinguish between insurance and private pension schemes, on the one hand, and pension rights following from obligatory pension insurance, on the other.

The situation concerning insurance and private pension rights does not seem to be so difficult. If such rights have been built up during the marriage and the payments were made from the community property of the spouses (most often from earnings or other income) the court should hold that such rights belong to the community property of the spouses. This is because, according to the general rule in Art. 34 para. 1 Russian Family Code, 'assets of the spouses acquired during the marriage are considered to be their community property', irrespective of who has title or in whose name the money has been deposited (para. 2).

⁸ In the legal literature it is rightly pointed out that only compensatory payments, which compensate for lost earnings, are considered community assets. Compensatory payments deemed to cover medical costs and other costs of recovery are considered to be strictly personal and therefore fall within the exception of Art. 36 Russian Family Code.

⁹ E. Kulagina, 'Commentary to Art. 34 Russian Family Code', in: A. Netchaeva (ed.), *Commentary on the Family Code of the Russian Federation*, Moscow: Uright, 2008, p. 134.

The situation concerning pension rights arising from the obligatory pension insurance is more difficult. Russian pension law currently recognises several kinds of such pensions. The most relevant for the purposes of this report are:

- the old-age pension
- a pension for persons unable to work due to a disability¹⁰

Such pensions include:

- a basic part to which every person who has reached the age of retirement is entitled, and which is financed from a special federal social tax¹¹
- an insurance part which is based on obligatory pension insurance payments into the Pension Funds¹²
- an accumulated part which is based on another part of the obligatory pension insurance payments into the Pension Funds. This part is accumulated in the special account of each insured person¹³

The basic part is not accumulated by the person who is entitled to the pension. Therefore, under Russian law a right to receive such a pension in the future is not considered to be a part of the spousal assets.

Insurance and accumulated parts are actually accumulated by the entitled persons throughout their professional or business career. The contributions to the Pension Fund can be considered to be part of the earnings or other income of such persons. Earnings and other income undoubtedly belong to the community property of both spouses. According to the general rule in Art. 34 para. 1 Russian Family Code, 'assets of the spouses acquired during the marriage are considered to be their community property', irrespective of who has title or in whose name the money has been deposited (para. 2). The logical conclusion should be that the insurance and accumulated parts of the pension right built up during the marriage should be considered to be the community property of the spouses.

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?

No. The rules of Art. 26 Russian Family Code providing that these kinds of property belong to the personal property of each of the spouses, are mandatory.

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

There is a rebuttable presumption of a community of property regarding assets acquired during the marriage (Art. 34 para. Russian Family Code). However, this presumption in fact relates to all kinds of movable assets. This assumption is justifiable to the extent that if a

¹⁰ Art. 5 Russian Federal Law of 17 December 2001 г. N 173-ФЗ 'On labour-related pensions in the Russian Federation'.

¹¹ Art. 9 para. 3 Federal Law of 15 December 2001 г. N 167-ФЗ 'On obligatory pension insurance in the Russian Federation'.

¹² According to Art. 7 Russian Federal Law 'On obligatory pension insurance in the Russian Federation', every person carrying out work or services on the basis of an employment contract or any other civil contract, as well as self-employed persons, businessmen, farmers, persons engaging in the professions, etc., full under the obligatory pension insurance. The pension insurance contributions have to be paid into the Pension Fund by employers on behalf of their employees and by the insured persons themselves in all other cases. (Ibid. Art. 6).

¹³ Art. 9 para. 3 Federal Law of 15 December 2001 г. N 167-ФЗ 'On obligatory pension insurance in the Russian Federation'.

spouse challenges whether a movable asset belongs to community property, stating that this particular item has been acquired by him or her before the marriage, he or she still bears the burden of proof.

A spouse who claims that an asset belongs to the community property does not have to prove this. A spouse who claims that an asset belongs to his or her separate property does bear the burden of proof.

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

A rebuttable presumption of the community of property applies equally between spouses and against third persons.

30. Which debts are personal debts?

The law (Art. 45 Russian Family Code) speaks of the personal debts of the spouses without defining them. Legal literature has specified personal debts. They are:

- debts incurred by each of the spouses before marriage
- debts incurred by each of the spouses during the marriage with regard to his or her personal property
- strictly personal debts of each of the spouses (e.g. an obligation to pay compensation to the victim of personal injury, an obligation to pay maintenance)¹⁴

31. Which debts are community debts?

There is no legal definition of community debts. In the legal literature community debts are defined as follows:

- debts incurred by both spouses jointly. These can be debts arising from contractual and tortious obligations and from unjust enrichment
- debts for which the spouses are jointly and severally responsible according to the law, for example debts with regard to the maintenance of the matrimonial home (Art. 672 sub. 2 Russian Civil Code, Art. 31 para. 3 and Art. 69 para. 2 Russian Housing Code)
- debts incurred by one of the spouses in his or her name but solely for the benefit of the family (for example, a wife borrows money in order to repair a dishwasher, or to provide for the children)¹⁵

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

Art. 45 para. 1 Russian Family Code states that creditors can recover the personal debts of each of the spouses, in the first place, from the personal assets of this spouse. However, if the spouse's personal assets appear to be insufficient, the creditor can request the division of the community property of the spouses in order to recover the debt from the share of the debtor spouse (Art. 255 Russian Civil Code, Art. 45 para. 1 Russian Family Code). This rule also applies in the case of the bankruptcy of one of the spouses. In this way Russian law protects the interests of the insolvent person's spouse.

These rules are mandatory and apply irrespective of the single matrimonial property regime.

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

¹⁴ E. Kulagina, 'Commentary to Art. 45 Russian Family Code', in: A. Netchaeva (ed.), *Commentary on the Family Code of the Russian Federation*, Moscow: Uright, 2008, p. 162.

¹⁵ E. Kulagina, 'Commentary to Art. 45 Russian Family Code', in: A. Netchaeva (ed.), *Commentary on the Family Code of the Russian Federation*, Moscow: Uright, 2008, p. 163.

According to Art. 45 para. 2 Russian Family Code, creditors can primarily recover community debts from the community assets of the spouses. If such property appears to be insufficient, both spouses are jointly and severally liable concerning their personal property.

I.2. Administration of assets

34. How are personal assets administered?

Each spouse administers his or her personal assets solely and independently of the other spouse. There are no statutory exceptions for the family home, household goods or any other items.

35. How are community assets administered?

According to Art. 35 Russian Family Code, the administration of the community assets is not exercised by the spouses concurrently, but commonly. Thus, in theory, the consent of both spouses is required for every transaction. However, with regard to ordinary transactions conducted by one of the spouses, there is a rebuttable presumption that the other has consented. The conveyance of immovable property, transactions requiring the form of a notarial deed and some other important transactions require an explicit formal consent on the part of both spouses.

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

There are no special provisions in this regard. General rules of civil law concerning a mandate (Art. 971 et seq. Russian Civil Code) allow every adult who is legally capable to mandate the administration his or her assets to any other adult who is legally capable. Spouses do not form an exception to this rule.

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?

Art. 35 para. 2 Russian Family Code states that the administration of immovable community property as well as entering into (community property) transactions requiring the form of a notarial deed and/or registration require consent on the part of both spouses in the form of a notarial deed.

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

No. There has been a suggestion in the literature that acts of administration concerning business assets belonging to the community always require the consent of the other spouse in the form of a notarial deed. However, it has been rightly stated that this suggestion is based upon an erroneous reading of the law.¹⁶

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

The law contains no special rules in this respect.

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

¹⁶ E. Chefranova, *Механизм семейно-правового регулирования имущественных отношений супругов*, Moscow, 2007, p. 14.

There are no specific provisions in this respect. As spouses administer their personal assets independently from each other, no disputes can arise on this matter. Since the law provides for no dispute resolution regarding the administration of community assets, each or the spouses can prevent any act of administration by refusing his or her consent. A particularly non-resolvable dispute can be brought to an end by the division of the community property, as each spouse can at any time seek a division of the community property without requesting a divorce (Art. 38 para. 1 Russian Family Code). However, it has been rightly pointed out that the lack of any possibility to request the courts to overrule a refusal by an obstructive spouse or to substitute the consent of a temporary missing or incapable spouse can seriously infringe the interests of the other spouse.¹⁷

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?

As spouses administer their personal assets independently of each other, no such violation can take place.

If a spouse violates the rules governing the administration of community assets, the transactions entered into by this spouse are voidable. That means that they can be declared invalid by the court upon the request of the aggrieved spouse.

In the case of ordinary transactions conducted by one of the spouses, the rebuttable presumption that the other spouse has consented would protect a third party. This presumption can only be revoked if the spouse who seeks the invalidation of the transaction is able to prove that the counterpart of the other spouse knew, or should have known, that he or she was opposed to such a transaction (Art. 35 para. 2 Russian Family Code). The general statute of limitations with regard to voidable civil transactions (Art. 181 para. 2 Russian Civil Code) means that the aggrieved spouse can challenge such a transaction within one year from the moment that he or she becomes aware or should have become aware of the transaction. It is very difficult to prove that one of the spouses was opposed to the transaction and therefore cases in which ordinary transactions are challenged are very rare. Nonetheless, in the legal literature it has been suggested that the possibility of challenging ordinary transactions entered into by the other spouse should be limited to transactions regarding household assets or the running of the household.¹⁸

This situation is different in the case of those transactions specified in Art. 35 para. 3 Russian Family Code which requires the explicit consent of the other spouse in the form of a notarial deed. In such a case the spouse, whose consent has not been received, is entitled to request the court to declare a transaction invalid within one year from the moment that he or she became aware or should have become aware of the transaction. The aggrieved spouse only has to prove that he or she had not given her or his consent. Such proof is relatively simple because both acts are strictly formal: consent requires the form of a notarial deed and the transaction itself requires the form of a notarial deed and/or registration.

If the court considers a transaction to be valid, the spouse who entered into the transaction without the consent of the other spouse is responsible for any damage suffered by his or her counterpart.

¹⁷ E. Chefranova, *Механизм семейно-правового регулирования имущественных отношений супругов*, Moscow, 2007, p.14.

¹⁸ E. Chefranova, 'Имущественные отношения в семье – новые тенденции в правовом развитии', in: *Семейное право России: проблемы развития*, Moscow, 1996, pp. 69-71.

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

Family law contains no specific regulation on this matter. Civil law distinguishes between two cases: when a person who is mentally ill is declared legally incapable (Art. 29 Russian Civil Code) and when legal capability is limited by a court order with regard to a person who, due to alcohol or drug abuse, places his or her family in a difficult financial situation (Art. 30 Russian Civil Code).

In the first case, a person who is mentally ill and has been declared legally incapable is unable to enter into any transactions. This means that such a person is totally incapable of administering both his or her personal assets and community assets. The court will appoint a guardian for such a person. The court is free to appoint any person as a guardian; the spouse does not enjoy a privileged position in this respect. However, if the spouses are not de facto separated, the other spouse is likely to be appointed as a guardian. If the other spouse is appointed as a guardian, he or she shall administer both the personal assets of the incapable spouse and the community assets. If another person is appointed as a guardian, this person shall administer the personal assets of the incapable spouse, and shall replace him or her in the co-administration of the community assets.

In the second case the legal capacity of a person who, due to alcohol or drug abuse, places his or her family in a difficult financial situation is limited. Such a person is only allowed to enter into ordinary transactions involving a small amount of money. For all other transactions, including receiving and disposing of his or her earnings or other income, he or she needs the consent of a curator appointed by the court. A person with limited capacity is not allowed to receive his or her earnings and other income. They are received directly by the curator. Therefore a person with limited capacity retains only a very limited ability to administer both his or her personal funds and community assets. The primary purpose of limiting the capacity of such a person is to protect the financial interests of his or her family. Therefore, the court is free to appoint any person as a curator; in most cases the other spouse will be chosen. If other spouse is appointed as a curator, he or she shall administer both the personal assets of his or her spouse and the community assets together with him or her. The consent of both is formally required for every act of administering the community property (on the presumption of consent see the answer to question 35). If another person is appointed as a curator, this person shall administer the personal assets of the person with limited capacity together with this person. The community assets will in such a case be administrated by three persons: the other spouse; the spouse with limited capacity and the curator of that spouse. The consent of all three of them is formally needed for every act of administration (on the presumption of consent see the answer to question 35).

I.3. Distribution of assets upon dissolution

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

The community property regime can be dissolved upon the following grounds:

- divorce
- a change of property regime by marital agreement
- the death of one 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?

- In the case of divorce the moment when the marriage is dissolved is decisive

- When the property regime is changed by a marital agreement, the moment of formalising the marital agreement by a notarial deed is decisive, unless the marital agreement provides otherwise
- When one of the spouses dies, the moment of death is decisive

If the spouses live apart before the dissolution of their marriage, the matrimonial property regime continues to apply. However, Art. 38 Russian Family Code allows a spouse to request the court to declare that assets acquired by him or her after de facto separation, but before the formal divorce, are his or her personal property. In this case the petitioner needs to prove that the spouses have separated without any intention of resuming their marital relationship and that the assets in question have been acquired during the period of separation.

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?

Art. 37 Russian Family Code governs all kinds of investments made by spouses in each other's assets during the marriage. This provision states that if during the marriage the value of the personal assets of any of the spouses has been significantly increased due to the investment of community assets, the personal assets of the other spouse or the labour of the other spouse, the personal assets of the spouse in question can be declared to belong to the community property of the spouses. The law mentions the following as examples of a significant increase in value: renovation, rebuilding or reconstruction. The transformation of the assets from personal to community assets can take place by an agreement between the spouses during the division of property according to Art. 38 para. 2 Russian Family Code, or by a court order according to Art. 38 para. 3 Russian Family Code. The law does not provide for any possibility of compensation. However, declaring a personal asset to be a community asset de facto boils down to compensation for half the value of the asset at the time of the dissolution of the community property.

There are no similar rules for the situation when personal assets are invested in the community property. If such a case appears before the courts, several solutions are possible.

1. The court can make use of the general rule in Art. 34 para. 1 Russian Family Code stating that all the assets of the spouses acquired during the marriage belong to the community property, unless the law explicitly provides for an exception. In this case the court would determine that all invested assets would have become community property without compensation
2. The court could apply Art. 37 Russian Family Code by way of analogy and determine that the community asset had been transferred into the personal asset of one of the spouses
3. The court could apply the rules governing unjustified enrichment (Art. 1102-1100 Russian Civil Code)

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?

There are no specific rules regulating such cases. The general rules of civil law e.g. concerning unjustified enrichment (Art. 1102-1100 Russian Civil Code) can be used in such cases. Art. 1102 Russian Civil Code states that a person who has unduly acquired or saved property has to return the property or pay compensation to the person at whose expense the property was acquired or saved.

If the personal assets of one of the spouses have been used for paying community debts or vice versa, then when the community property is dissolved this spouse can claim compensation to the extent of half the payment on the ground of unjustified enrichment. According to Art. 1107 Russian Civil Code, he or she is also entitled to claim interest.

If the community assets have been used for paying the personal debts of one of the spouses, the other spouse has a right to claim compensation as described above.

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

There are no specific rules on this matter.

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

There are no specific rules on this matter. In theory, the spouses administer the community assets after dissolution in the same way as before. In practice, ordinary acts of administration not requiring the consent of the other spouse in the form of a notarial deed are executed by the spouse who possesses the respective part of the assets.

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

It is important to mention that under Russian law the division of assets is also possible with the dissolution of community property (Art. 38 para. 1 Russian Family Code). Spouses are free to divide community assets at any time during the marriage without stating any reasons. Such a division can be made with or without changing the matrimonial property regime by a marital agreement. If the regime has not been changed, the statutory regime of community of property continues to govern the spouses' matrimonial property after the division (Art. 38 para. 6 Russian Family Code). Also, a creditor of one of the spouses can request the division of community funds during the marriage. The creditor acquires such a right if the personal assets of the spouse debtor appear to be insufficient to pay the debt. In this case the creditor can request the division of the community property of the spouses in order to recover the debt from the share of the debtor spouse (Art. 255 Russian Civil Code, Art. 45 para. 1 and Art. 38 para. 1 Russian Family Code). Such a division does not lead to the dissolution of the community. After the division, the community property regime continues to govern the property relations between the spouses (Art. 38 para. 6 Russian Family Code).

During the marriage and in the case of divorce the spouses can divide the community assets subject to a mutual agreement or, in the case of a disagreement, by a court order (Art. 38 para. 2 Russian Family Code). The agreement can take the form of a notarial deed if the spouses so wish.

The general rule is an equal division of property (Art. 39 para. 1 Russian Family Code). If the division takes place by means of a court order, the court can determine which assets should be attributed to each spouse. In the case of the attribution of assets to one of the spouses and the value of these assets exceeds this spouse's share, the court can order that the other spouse should receive compensation in the form of half of the value of these assets. This compensation can either be in money or in other assets (Art. 38 para. 3 Russian Family Code).

Assets acquired solely for the needs of minor children (clothing, footwear, study materials and sporting assets, musical instruments, etc.), as well as bank deposits and insurances paid by the spouses of behalf of the children, are considered to belong to the children and are attributed without compensation to the spouse with whom the children reside (Art. 38 para. 5 Russian Family Code).

50. How are the community debts settled?

Community debts are distributed between the spouses proportionally (Art. 39 para. 3 Russian Family Code).

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

The law gives neither of the spouses any preferential rights over the family home and/or the household assets. However, in practice, the court almost always attributes the family home and the household assets to the spouse with whom the minor children reside after divorce. In more than 90% of cases this happens to be the wife. Such attribution does not normally influence the general rule of an equal division. Thus when attributing the matrimonial home to the wife taking care of the children, the court can order that the husband should receive compensation in the form of half the value of these assets. This compensation can be either in money or in other assets (Art. 38 para. 3 Russian Family Code). However, Art. 38 Russian Family Code entitles the courts to order such compensation, rather than obliging them to do so. In the interests of minor children, or the interests of one of the spouses (if such interests weigh heavily), the court is allowed to deviate from the general rule of an equal division (Art. 39 para. 2 Russian Family Code) and to attribute the family home and household assets without any compensation.

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

The spouse who uses professional assets for his or her professional activity has a preferential right to receive such assets upon the division of community property. The law does not refer to professional assets (for instance, a musical instrument belonging to a spouse who is a musician) among the items for personal use. Therefore such assets are considered to be community assets. Although there is no specific legal provision in this respect, it has become the judicial practice that the court attributes professional assets to the spouse who uses them.¹⁹ Such attribution does not, however, influence the general rule of an equal division. The court can order that the other spouse should receive compensation in the form of half the value of these assets. This compensation can be either in money or in other assets (Art. 38 para. 3). Art. 38 Russian Family Code entitles the courts to order such compensation, rather than obliging them to do so. If the spouse who uses professional assets is unable to pay compensation, the court, if the interests of that spouse so require and if these interests weigh heavily, is allowed to deviate from the general rule of an equal division and to attribute such professional assets without any compensation (Art. 39 para. 2 Russian Family Code).

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

The division of community property and the attribution of maintenance are generally considered as two independent matters. As an ex-spouse's entitlement to maintenance depends, among other things, on his or her financial needs, the attribution of assets upon the division of the community property can affect the financial situation of the ex-spouse. It is important to note that the granting of post-divorce maintenance is rather unusual in Russia. Only a divorcee who is unable to provide for him or herself due to invalidity or the reaching of retirement age is entitled to receive maintenance after divorce.

If maintenance is paid as a result of an agreement between the (ex-)spouses, rather than under a court order (Art. 104 Russian Family Code), they are free to determine how such maintenance is provided. Therefore the spouses can stipulate that maintenance should be provided in the form of granting one of them more than half of the community assets.

¹⁹ E. Kulagina, 'Commentary to Art. 36 Russian Family Code', in: A. Netchaeva (ed.), *Commentary on the Family Code of the Russian Federation*, Moscow: Uright, 2008, p. 143.

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

The division of community property has no effect on the pension rights and claims of the spouses.

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?

If the division of community property takes place as a result of an agreement between the spouses, they are free to set aside the general rules on such a division.

The court can deviate from the general rule of an equal division if the interests of minor children or the interests of one of the spouses (and these interests weigh heavily) so require (Art. 39 para. 2 Russian Family Code). The most common example of such a deviation is the attribution of the family home and/or household assets to the spouse with whom the minor children reside, without compensation (see the answers to question 51). Another typical example is the attribution of professional assets without compensation to the spouse who uses them (see the answers to question 52). A deviation from an equal division is also possible in the interest of a spouse who needs certain valuable assets (e.g. a car) due to health problems.

Another situation when the court can deviate from an equal division in the interests of one of the spouses is when the other spouse has no income without a justified reason or has squandered property to the detriment of the family (Art. 39 para. 2 Russian Family Code). Art. 34 para. 3 Russian Family Code explicitly states that these provisions do not apply to a spouse who has no income due to raising the children or running the household. Also a spouse who has no income due to illness, studying or unemployment is not considered to have no income without a justified reason. In the literature it has also been suggested that if one of the spouses has no income due to the joint decision of both spouses, the other spouse loses his or her right to use that fact against him or her.²⁰

Legal practice has considered the following to amount to squandering property to the detriment of the family: using family assets to purchase alcohol and narcotics, gambling, engaging in expensive hobbies, etc. The essential element for this provision to apply is that the interests of the family suffer as a consequence of such behaviour. This requirement is not satisfied when, for example, an affluent person uses his or her personal assets for gambling when this is not detrimental to the family finances.

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

No.

II. Community of accrued gains/Participation in acquisitions

Not relevant.

III. Deferred community

Not relevant.

²⁰ M. Antokolskaia, *Семейное право*, Moscow, Jurist, to be published in December 2008.

IV. Separation of property

Not relevant.

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?**

Since entering into force on January 1 1995, the Russian Civil Code permits spouses to make a pre-nuptial agreement. Such agreements are legally binding.

- 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?**

Since entering into force on January 1 1995 the Russian Civil Code allows spouses to make a post-nuptial agreement. Such agreements are legally binding.

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

A marital agreement must be in writing and requires the form of a notarial deed.

- 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.**

A marital agreement must be in writing and requires the form of a notarial deed. An additional requirement for validity in relation to the creditor(s) of the spouse(s) is formulated in Art. 46 para. 1 of the Russian Family Code. According to this rule, one or both spouses are obliged to inform their creditor(s) of the conclusion, amendment or dissolution of a marital agreement. If one or both spouses fail to fulfil this duty, they are responsible towards his or her or their creditors regardless of the marital agreement (Art. 46 para. 1 Russian Family Code).

Russian law has no system for the registration of marital agreements.

If the interests of creditors are violated by the conclusion, violation or termination of a marital agreement, the creditors are entitled to judicially request that their contract with the spouse(s) be amended (Art. 46 para. 2 Russian Family Code).

- 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?**

Art. 16 Russian Law on Notaries obliges a notary to explain to his or her clients their rights and duties and to warn of the consequences of their actions, so that their lack of legal knowledge cannot be used to their detriment.²¹ If a notary in private practice violates his or her duty to provide information, his or her responsibility is governed by Art. 17 Russian Law

²¹ Fundamental Aspects of the Law on Notaries of the Russian Federation N 4462-1, of 11 February 1993 (*Основы законодательства Российской Федерации о нотариате*).

on Notaries. This provision is rather vague, as it states that the notary is obliged to indemnify the aggrieved client by paying damages, but 'only if such damages cannot be recovered in another way'. This means that the notary bears subsidiary responsibility if he or she violates his or her duty to provide information.

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

No data is available.

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

The spouses enjoy a wide degree of freedom to modify the statutory regime of matrimonial property or to create their own contractual regime (Art. 42 Russian Family Code).

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

a. categories of assets;

Through a marital agreement, spouses can modify the status of their already acquired and/or future assets. They can also make modifications with regard to their pre-marital assets (for instance, by introducing the regime of a total community of property); their community assets (for instance, by introducing a regime of separation of property or one of the forms of a different community); their personal assets (for instance, by extending or limiting their scope). They can also create a system of participation in each other's assets.

b. administration of assets;

Spouses are generally free to deviate from the statutory rules on administration. However, in doing so they may not affect their passive and active civil capacity and violate general principles of family law, such as equality between the spouses, as formulated in article 1 Russian Family Code. Therefore, for instance, a contractual rule limiting the power of one of the spouses to administer his or her own personal assets will not be allowed as it limits their active civil capacity. A contractual rule stating that the community property would be administrated by only one of the spouses would be incompatible with the principle of equality.

c. distribution of assets;

The spouses enjoy a far-reaching freedom to deviate from the statutory rules on the distribution of assets. There are legal academics who believe that the spouses are not allowed to redistribute their pre-marital assets by means of a marriage agreement. It is claimed that such a redistribution is contrary to Art. 256 para. 3 Russian Civil Code, which only mentions the possibility to redistribute post-marital assets.²² However, this point of view has been convincingly criticised.²³

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

²² T. Zaytzeva, R. Goleeva, and V. Jarkov, 'Семейное право в нотариальной практике,' *Бюллетень нотариальной практики*, N 1, 2002, p. 16.

²³ L. Maximovich, *Брачный договор в российском праве*, Moscow, Os'-89, 2003, p. 83-85.

Not applicable. There is only one ground for the dissolution of marriage under Russian law: the marriage has irretrievably broken down.

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?

No. There are no such clauses. Most typical are matrimonial agreements making special provisions for business assets, the matrimonial home and amending the scope of the community. A choice for a separate property regime is also relatively common.

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

Yes.

A) Upon an application by one of the spouses the court can also amend or dissolve a marital agreement due to an unexpected change of circumstances (Art. 451 Russian Civil Code). This is a general civil law ground for amending or dissolving civil contracts. The court is entitled to order that a contract be amended or dissolved if the circumstances have so substantially changed that the execution of the contract would lead to serious harm to the party/parties in question.

According to Art. 451 para. 2 part 2 Russian Civil Code, a change is considered to be substantial if the parties would not have concluded their contract in the first place had they been able to reasonably foresee that change, or the provisions of such a contract would have been different. But establishing a substantial change of circumstances is in itself not sufficient for Art. 451 Russian Civil Code to apply. Art. 451 Russian Civil Code will only apply if the following four requirements are simultaneously satisfied:

1. The parties did not foresee such a change of circumstances at the time of concluding the contract
2. The change of circumstances has occurred due to an event which the claimant could not have foreseen, taking into consideration the normal level of care and caution
3. Executing the contract without amending it would lead to such a serious violation of the property interests of the parties that the claimant would to a significant extent lose the consideration to which he or she was entitled under the contract.
4. It does not follow from the essence of the contract that the claimant has to bear the risks of a change of circumstances.

One can readily see that this rule has been drafted for ordinary (commercial) civil contracts and not specifically for such contracts as marital agreements. The drafters²⁴ of the Family Code foresaw that marital agreements, due to their specific features of being of long duration and of a personal nature, would require a more flexible mechanism for amending and dissolving such an agreement due to a change of circumstances. A need for change could for instance arise when a young financially independent future couple had contractually agreed on a separation of property regime, but in the course of marriage, due to the birth of a handicapped child, the wife has to give up her job and become financially dependent upon the husband. Therefore the initial version of the Russian Family Code, which was approved by both chambers of Parliament, provided for a more flexible mechanism giving the courts a considerable discretion to amend or dissolve a marital agreement upon a change of circumstances. However, this rule was vetoed by the President as contradicting the Civil Code. Therefore the final text of the Russian Family Code (Art. 43 Russian Family Code) contains no more than a reference to the general rule of Art. 451 Russian Civil Code.

²⁴ The author of this report was one of the six members of the Commission that drafted the Russian Family Code of 1995 and which was commissioned by the State Duma of the Russian Federation (the Lower Chamber of the Russian Parliament).

B) Upon an application by one of the spouses the court can declare a marital agreement or certain provisions thereof void on the following grounds listed in Art. 42 para. 3 Russian Family Code:

1. a certain provision affects the spouses' passive or active civil capacity (for instance, limiting the ability of one of the spouses to take up employment)
2. a certain provision limits the ability of the spouses to resort to the courts
3. a certain provision regulates a matter which is of a purely personal non-patrimonial nature (for instance, a provision that the spouses would not have children, or a regulation on the distribution of household tasks)
4. a certain provision governs the relationship with regard to minor children (for instance, a provision on the administration of the child's property)
5. a certain provision restricts the maintenance rights of a spouse who is unable to work and cannot provide for him or herself.
6. a certain provision places one of the spouses in an extremely unfavourable position
7. a certain provision is contrary to the basic principles of Russian family law, as specified in Art. 1 Russian Family Code: freedom of marriage, equality of the spouses, the amicable resolution of family disputes and priority being given to protecting the interests of minor children and disabled family members.

The law does not make any distinction between the prohibition on regulating matters of a purely personal non-patrimonial nature and other limitations. However there is an important difference. If spouses include a certain provision in their contract which regulates purely personal relationships, then upon an application by the aggrieved spouse such a provision will be considered unenforceable rather than being invalid.

Ad. 3. The prohibition on regulating matters of a purely personal non-patrimonial nature has led to a great deal of discussion in the literature,²⁵ because Russian law allows marital agreements to be made conditional upon the (non-)occurrence of certain events. In this way spouses could indirectly regulate personal relationships that they are not allowed to regulate directly. For instance, spouses are not allowed to include in their matrimonial contract a provision that they would try to have a child, but they can state that up until the birth of the first child their matrimonial property regime will be a separation of property and, thereafter, a community of property.²⁶

Ad. 4. Spouses are generally allowed to make agreements with regard to their children. For example, they can make agreements on child maintenance or the execution of their parental rights. However, such agreements cannot be included in a matrimonial contract. The reason for this is the protection of the child's interests. Agreements with regard to children require that the child's opinion be taken into consideration (Art. 57 Russian Family Code). Also the courts have broader discretion to amend child-related agreements when they appear not to be in the best interests of the child,

Ad. 5. Spouses are generally allowed to make maintenance agreements at any time during the marriage and upon divorce. Such agreements may be included in a marital contract. According to Art. 102 Russian Family Code, a maintenance agreement that infringes the rights of a former spouse, who lacks the capacity to work and essential means, is voidable upon an application by that spouse. Therefore a marital agreement cannot contain a provision by which a spouse renounces his or her present or future right to maintenance when he or she will lack the capacity to work and essential means. Such a provision is voidable upon an

²⁵ For an overview see: L. Maximovich, *Брачный договор в российском праве*, Moscow, Os'-89, 2003, p. 123-127.

²⁶ Низамиева О.Н. *Договорное регулирование имущественных отношений в семье*. Казань, Таглитат, 2005. p. 126 М. Antokolskaia, *Family Law*, Moscow, Jurist, to be published in December 2008.

application by the aggrieved spouse. The same applies to any agreement reducing the amount of maintenance far below the amount that could be claimed before the courts. This general limitation on the freedom of spouses when concluding maintenance agreements is repeated in Art. 42 para. 3 Russian Family Code with regard to provisions on maintenance in a marital agreement.

Ad. 6. This prohibition on placing one of the spouses in an extremely unfavourable position is an open rule which gives the courts a wide discretion with regard to marital agreements. The background to this rule is the concern of the drafters that one of the (future) spouses could, by abusing feelings of love, trust and dependency on the part of the other spouse, include serious violations of the interests of that spouse in the marital contract.²⁷ Despite no statistical data on the application of this rule being available, this provision gave rise to justified anxiety among some legal authors. It has been rightly suggested that the existence of such a vague rule could lead to its extensive interpretation by the courts, which could completely bar the application of marital agreements in Russia.²⁸ Several authors²⁹ have advocated an explanation of this provision in a Directive³⁰ by the Supreme Court. However, so far the Supreme Court has not given the lower courts³¹ any general guidelines for the application of this rule. In one of its Directives³² it only provided an example of placing one of the spouses in an extremely unfavourable position: a contractual regime depriving one of the spouses of all rights to the assets acquired during the marriage.

One of the problems with the application of this provision is that the law does not specify at which moment one of the spouses should be placed in an extremely unfavourable position: at the moment of the conclusion of the marital contract, or at the moment of the court hearing. This provision is aimed at the total or partial annulment of the marital agreement, which has retroactive effect, rather than amending or dissolving the marital agreement, which operates for future purposes. Therefore it is logical to assume that the rule should be interpreted in such a way that one of the spouses should be placed in an extremely unfair position at the moment of concluding the marital contract. However, the absence of any clarity in this respect allows the courts to use the possibility of annulling a marital contract as a kind of substitute for a flexible mechanism to amend or dissolve marital agreements due to a change of circumstance.

²⁷ M. Antokolskaia, *Family Law*, Moscow, Jurist, to be published in December 2008.

²⁸ L. Maximovich, *Брачный договор в российском праве*, Moscow, Os'-89, 2003, p. 131.

²⁹ E. Segalova, 'Наследование членов семьи и ближайших родственников: история, практика, перспективы', *Советское государство и право*, № 12, 2000, p. 59.

³⁰ The Directives of the Supreme Court should not be confused with case law. They contain abstract rules formulated by the Plenum of the Supreme Court in general terms. They are formulated on the basis of Supreme Court cases and are designed to guide the practice of the lower courts. In fact, they are de facto legal acts created by the Supreme Court when, in reality, it does not have any explicit competence to do so.

³¹ Decisions of the higher courts in particular cases are, in theory, not considered to be relevant for the practice of the lower courts. The relevance of case law as a source of law has been traditionally denied in Russia. Nowadays the doctrinal attitude is changing. See, for instance: V. Lazarev, *Теория права*, Moscow, Jurist, 2000, p. 192- 196; R. Livshits, 'Судебная практика как источник права', *Журнал российского права*, № 6, 1997, p. 49-57.

³² The Application of the Divorce Legislation when the Courts Decide on Divorce Cases (Постановлении Пленума Верховного Суда РФ О применении судами законодательства при рассмотрении дел о расторжении брака) No. 15 of 5 November 1998, *Бюллетень Верховного Суда РФ*, 1999, № 1, item 7, Art. 15.