

NATIONAL REPORT: SPAIN
 Prof. Cristina González Beilfuss
 University of Barcelona
 October 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		
. 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	p.
<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: SPAIN
Prof. Cristina González Beilfuss
University of Barcelona
October 2008

Introductory note: Since Spanish law is a non-unified legal system there is no uniform Spanish law regarding the property relationship between spouses. This report deals only with the rules of the misleadingly entitled “Derecho civil común” which coexist with the rules of the so-called “Derechos civiles forales” (Catalonia, the Balearic Islands, Aragon, Navarre, the Basque Country and Galicia). Which law applies to a given couple is a conflict of law issue not dealt with in this report.

A. GENERAL

- 1. Are there special rules concerning the property relationship between spouses (explaining what is meant by spouses)?
If so, briefly indicate the current sources of these rules.**

Since the opening up of marriage in 2005, a marriage can be contracted by different-sex and same-sex couples without any distinction. The rules concerning the property relationship between spouses are applicable to any married couple, regardless of whether the marriage is a same-sex or different-sex union (Art. 44 para. 2 Spanish Civil Code).

- a. upon marriage**
- b. during marriage**

There are special rules which become applicable if a couple marry and continue to be applicable during the marriage. On the one hand, there are general rules applying to all married couples regardless of their matrimonial property regime. These rules concern household expenses, the matrimonial home etc. They are mainly contained in Chapter I of Title III of Book IV of the Spanish Civil Code under the heading “General Provisions” (Art. 1315-1324 Spanish Civil Code). On the other hand, there are three different matrimonial property regimes developed in the provisions of Chapters IV, V and VI of Title III Book IV of the Civil Code. One of these regimes, the Community of acquisitions (“régimen de gananciales”) is the default regime which applies if the parties have not chosen otherwise or if their marital agreement is ineffective. The other two regimes are optional. There are, moreover, rules on marital agreements and gifts contained in Chapters II and III of Title III of Book IV.

- c. upon separation and/or**

A distinction must be made between legal and factual separation. There are explicit written rules on the effects of a legal separation upon the property relationships between spouses. Art. 83 of the Civil Code establishes that neither spouse will be able to bind the other spouse’s property for household expenses after legal separation. There are also several rules on the common effects of separation, divorce and the annulment on the property relations between spouses. According to Art. 95 Spanish Civil Code the separation decision dissolves the matrimonial property regime. Art. 90 E) provides that if a separation is based on mutual consent there must be an agreement by the spouses on the division of their matrimonial property regime. This agreement is submitted to the competent authority for approval. If the judge does not allow the agreement or if the separation is contentious the judge will take measures concerning the division of the matrimonial property regime (Art. 91 Spanish Civil Code).

There are only very few explicit rules on *de facto* separation. The most prominent is as Art. 1388 Spanish Civil Code, which establishes that a spouse can request to administer community property individually, if the spouses have factually separated. Other rules, although not explicitly addressing situations of factual separation, are nevertheless basically applicable in situations of conflict between the spouses. The most important of these is Art. 1318 II Spanish Civil Code on family and household expenses which establishes that the competent judicial authority can take provisional measures in order to guarantee the payment of present and future expenses. This rule is mainly applicable in cases of where a marriage has factually broken down.

d. upon death

There are some rules of succession law that relate to matrimonial property. The most important is Art. 1321 Spanish Civil Code, which establishes that the surviving spouse is entitled to the household assets which are directly allocated to him or her before the matrimonial property is divided and the succession initiated. Title over the household assets is not relevant.

e. upon divorce

There are several rules on the common effects of separation, divorce and annulment on the property relations between spouses (Art. 90, 91, 93, 95 and 96 Spanish Civil Code). According to Art. 95 Spanish Civil Code the divorce decision dissolves the matrimonial property regime. Art. 90 E) Spanish Civil Code provides that if a divorce is based on mutual consent there must be an agreement by the spouses on the division of their matrimonial property regime. This agreement is submitted to the competent authority for approval. If the judge does not allow the agreement or if divorce is contentious the judge will take measures concerning the division of the matrimonial property regime (Art. 91 Spanish Civil Code).

f. upon annulment

There are several rules on the common effects of separation, divorce and annulment on the property relations between spouses (Art. 90, 91, 93, 95 and 96 Spanish Civil Code). According to Art. 95 Spanish Civil Code the annulment decision dissolves the matrimonial property regime. This also applies to annulment decisions rendered by the Catholic Church authorities if they are recognised in Spain. Art. 90 E) Spanish Civil Code provides that if an annulment is based on mutual consent there must be an agreement by the spouses on the division of their matrimonial property regime. This agreement is submitted to the competent authority for approval. If the judge does not allow the agreement or if the annulment is contentious the judge will take measures concerning the division of the matrimonial property regime (Art. 91 Spanish Civil Code).

Art. 1395 Spanish Civil Code moreover establishes that if a marriage is annulled and one of the spouses is declared to have acted in bad faith, he or she will not participate in the acquisitions made by the other spouse during the marriage if that spouse so requests.

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

The rules currently in force were last reformed in 1981 shortly after the entry into force of the Spanish 1978 Constitution. The main purpose of that reform was to establish equality between the spouses in their property relationship, according to Art. 32 para. 1 and 14 of the Constitution.

The 1981 reform meant a radical change especially in the system of the administration of matrimonial property. Administration by the husband was substituted by a system of joint

administration. The 1981 Reform also removed limitations on the capacity of the spouses to contract and make gifts to each other. It also introduced an explicit reference to housework as a way of contributing to the household expenses.

The 1981 reform also introduced general rules on the property relationships between spouses (the so-called “*regimen matrimonial primario*”), which are applicable regardless of the matrimonial property regime. Some of these rules already existed under the old law, but were not presented systematically. Other rules, for example those protecting the matrimonial home contained in Art. 1320, were, however, new.

A new legal regime of participation in acquisitions was also included in the Reform. There are no historical precedents for this regime. German and French law inspired the new rules in the Spanish Civil Code. During the process of reform there was a proposal that participation in acquisitions should become the default system, but this was rejected on the grounds that the general public and notaries were hardly aware of this regime and were therefore ill-prepared to deal with this system in practice. It was therefore introduced as a legal regime which could be chosen by the parties. There were also some initiatives to establish separation of property as the default system, but they were also unsuccessful since they meant a break with tradition. It was therefore decided that community of acquisitions should continue to be the default system in the “*Derecho civil común*”, where it has prevailed since the XIIIth Century. The matrimonial property regime since 1981 is therefore mutable, since it is possible to make matrimonial agreements not only before marriage, but also during the marriage. Before the reform marital agreements could only be made before the marriage.

Another major reform in this area was a special procedure in order to divide matrimonial property after dissolution, which was introduced in 2000, when a new Law on Civil procedure was enacted. Also the new Insolvency law of 2003 contains special rules on the insolvency of a married debtor.

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

There are no recent proposals for reform in this area. It is worth mentioning, however, that there is a certain tendency in favour of separation of property as the default system in certain areas governed by the “*Derecho civil común*”. The number of marital agreements opting for the separation of property has increased enormously since 1975. There are some estimations that 30% of all marriages contracted today dispense with the default community regime and substitute it with a separation of property system. A region traditionally considered to be part of the *Derecho civil común*, the Autonomous Community of Valencia, enacted a new law on matrimonial property in 2007 (*Ley de la Comunidad Valenciana 10/2007, de 20 de marzo, de régimen económico matrimonial valenciano*). This law has been challenged on constitutional grounds because there are doubts as to whether the Comunidad de Valencia can legislate in this field. Interestingly, it introduces separation of property as the default system.

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

Registered or civil partnerships are unknown institutions in the so-called “*Derecho civil común*”. They exist in other Spanish legal systems. Whether the rules regarding the property relationship between spouses contained in the “*Derecho civil común*” apply to partnerships formalised in other legal systems (foreign or national) is a conflict of law issue that is not dealt with here.

Both case law¹ and the legislation on unmarried couples (e.g., Art. 4 para. 1 of the Law on unmarried couples of Madrid) recognise that unmarried couples can contractually establish that certain rules regarding the property relationship between spouses apply to their property relationship notwithstanding the fact that they have not married. The legal literature is however divided as to whether party autonomy allows unmarried partners to opt for the application of the whole block of matrimonial property law rules. Since these agreements cannot be registered in a Public Registry, they would in any case only be effective between the spouses and not bind third parties.

The rules regarding property relationships between spouses do not generally apply in cases where unmarried couples have not made any agreement about their property relationship.

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?

This depends on the governing matrimonial property regime. If spouses have opted for a separation of property, the rules on joint property play a role in so far as spouses often buy assets jointly.

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 and the law regarding the property relationships between spouses are in principle independent. There are, however, certain links between the rules on the property relationship between spouses and the rules on the succession rights of the surviving spouse like the so-called “surviving right of the spouse”.

Art. 1321 Spanish Civil Code establishes that the household assets are to be handed over to the surviving spouse upon the death of his or her partner. They are not to be taken into account in the division of the matrimonial property regime or succession. Excluded are assets of historical or artistic value and those that have an extraordinary value. The Supreme Court has established that the concept of extraordinary value is relative and has to be determined according to the social status of the family in question.²

The provision is not applicable if the spouses have legally separated. If the spouses have separated *de facto* the provision might not apply because there is by definition no common household, but opinions are divided, however.

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

Yes. These rules are contained in Chapter I of Title III of Book IV of the Civil Code. They apply regardless of the special matrimonial property regime to which the couple are subject and are known as the “regimen matrimonial primario” in the legal literature.

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

¹ STS of 22.01.2001 (RAJ 2001/1678).

² STS of 16.02.2004 (RAJ 2004/749).

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”.

Art. 1318 Spanish Civil Code establishes that each of the spouses has to contribute to the costs and expenses of the family household. Under the default system the costs and expenses are to be paid first out of the spouses' common property. If common property is insufficient the costs and expenses will be paid out of each spouse's personal property in proportion to their individual resources. The latter rule is also the general rule that applies if the spouses have opted for a separation of property or participation in acquisitions as their matrimonial property regime.

Art. 1438 Spanish Civil Code establishes that spouses can contribute through housework. Although not expressly mentioned, any other form of contribution in money or in kind is also admissible. There is no clear concept of what is meant by “housework” neither in the case law nor in legal writing. Some decisions and authors require, for example, that the spouse who contributes through housework actually takes care of the family personally, while others interpret that ensuring that a third person performs the housework is already housework. A contribution through housework is valued according to the costs the spouses would have had to incur if they had hired external help. There is no provision in the Civil Code or conclusive case law devoted to the situation in which one spouse has participated in the commercial or professional activities of the other spouse. In the legal literature some authors (Lacruz and De Los Mozos³) advocate that such participation should be considered as contributing to household expenses.

The concept of the costs and expenses of the family refers to the living costs of parents and children according to the circumstances of the family and local usage (Art. 1362 Spanish Civil Code). They can therefore include holidays or salaries for domestic employees insofar as such expenses are adequate taking into account the social position of the family. Also the costs of loans contracted in order to meet family expenses qualify as costs and expenses of the family household.

The concept of the costs and expenses of the family household includes the maintenance and education costs of common children and the children of one spouse who live in the family home (Art. 1362 Spanish Civil Code). The concept also extends to contributions to health care which are broadly embraced under the rather loose concept of “gastos de previsión”.

Family costs and expenses also cover litigation costs (“litis expensas”) when one spouse litigates against the other spouse or against a third party in the interest of the family, except if this litigation is not in good faith or is adventurous. In order for litigation costs to be considered as costs and expenses of the family the plaintiff has to show that he or she has insufficient means to meet such expenses out of his or her own property and does not qualify for legal aid because of the economic situation of the other spouse.

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

Yes, but only if these debts cannot be covered by common property or by the property of the spouse who incurred the debt.

Art. 1319 Spanish Civil Code authorizes any spouse to incur ordinary expenses for the household according to local usage and the circumstances of the family. If the default

³ J.L. De los Mozos, “Comentario a los arts. 1435 a 1444”, in: M. Albadalejo (dir.), *Comentarios al Código civil y Compilaciones Forales*, t.XVIII, Vol.III, Madrid, 1985, p. 379; J.L. Lacruz: *Elementos de Derecho civil*, t. IV, Madrid, 2002, p. 279.

matrimonial property regime applies, the debts arising out of such expenses are to be paid out of community property and out of the property owned by the spouse who incurred the debt. Both masses of assets are jointly liable. Only if a debt cannot be paid out of these masses of assets does the other spouse, that is the spouse who did not personally incur the debt, become subsidiarily liable. In case the spouses have opted for a separation of property or participation in acquisitions as their matrimonial property regime, the spouse who did not incur the debt is subsidiarily liable if the other spouse does not have sufficient resources in order to meet the debt.

This rule ceases to apply once a separation, divorce or annulment claim becomes pending (Art. 102 para. 2 Spanish Civil Code). There is controversy as to whether one spouse is still liable for household debts incurred by the other spouse in cases of a factual separation. This seems to depend on whether or not the separation is generally known by third parties.

If one spouse has paid household debts out of his/her own property he or she can request a reimbursement out of the common property or the property owned by the other spouse, depending on the prevailing matrimonial property regime.

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”.

Any transaction involving rights on the matrimonial home requires the consent of both spouses, even if title to the home is only vested in one spouse. Approval of the transaction can be express or tacit and can take place before or after the transaction. Included in the concept of a transaction is any act disposing of rights to the family home (sale, bailment, usufruct, mortgage) which deprives the family of its habitual place of residence or creates an actual risk of such a situation occurring.

The matrimonial home is to be understood as the place in which the family habitually dwell. This would exclude holiday homes or immovables used for professional purposes. If an immovable is used both as the family home and for gainful activity it will benefit from special protection as the family home. There can be more than one family home. An example given in the legal literature (Lacruz and Rams⁴) is when the children of the family reside in a different apartment in order to pursue their studies.

Registration of a transaction concerning a home pertaining to only one of the spouses requires a declaration by the spouse carrying out the transaction specifying that the immovable does not amount to the family home.

If one of the spouses does not approve of the transaction or is incapacitated, absent or otherwise prevented from expressing his or her consent, the matter can be referred to the competent authority (Art. 1321 Spanish Civil Code) which can authorize the transaction if it is in the interest of the family.

If a transaction concerning the matrimonial home is carried out without the consent of one of the spouses and this spouse does not confirm the transaction retroactively, such a transaction can be annulled at the request of the spouse whose consent was not requested or his or her heirs. If the transaction was gratuitous it is void.

According to Art. 1321 the rights of the *bona fide* purchaser are protected in cases of error or falsehood that can be attributed to one spouse, who would then be liable to pay damages to the other spouse. This rule very often prevents the spouse whose consent was not requested

⁴J.L. Lacruz: *Elementos de Derecho civil*, t. IV, Madrid, 1997, p. 204.

from recovering the family home and has been very much criticised in the legal literature. In the case law the *bona fide* requirement has been strictly construed. Art. 1321 is not applicable if the purchaser should have discovered that the dwelling is the family home when, for example, inspecting the immovable property prior to its acquisition.

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

The rules protecting the matrimonial home are also applicable to household assets. These are described as movables for the ordinary use of the family (art 1323 Spanish Civil Code). Jewellery, works of art and antiques are excluded, as are goods of outstanding value (Art. 1322 Spanish Civil Code). Movables that are not used in the family home like cars and other vehicles are excluded (Art. 346 Spanish Civil Code).

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 such rules.

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

Art. 71 Spanish Civil Code clarifies that a spouse does not represent the other spouse if there has been no contract between the spouses to that effect. *A contrario* this provision implies that spouses are free to enter into contracts of agency and mandate with each other. The general rules on mandate contained in Art. 1709 and seq. Spanish Civil Code, which are in principle applicable, are however softened in Art. 1439 Spanish Civil Code which exempts the spouse who administers the other spouse's assets on mandate from the duty to be accountable for the consumed returns, unless there is proof that they were used for a different purpose than for paying the household expenses.

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

Such restrictions have been abolished. Art. 1323 Spanish Civil Code expressly recognises that spouses can enter into, with each other, all kinds of contracts and can transfer to each other any assets or any valid title. In the context of regulations on the sale of goods Art. 1458 Spanish Civil Code establishes that spouses are free to sell goods to each other.

C. MATRIMONIAL PROPERTY REGIMES

C.1. General issues

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

Yes. According to Art. 1315 Spanish Civil Code spouses can establish, modify or substitute the matrimonial property regime applicable to their marriage either in whole or in part through an agreement in the so-called "capitulaciones matrimoniales ". The agreement can take place either before or during the marriage (Art. 1316 Spanish Civil Code) and has to be formalised in a notarial deed (Art. 1317 Spanish Civil Code)

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

The default system is the community of acquisitions (“sociedad de gananciales”), which is a community of property system. It applies if the spouses have not entered into a contract concerning their matrimonial property regime or if this contract is ineffective (Art. 1316 Spanish Civil Code). The rules on the default system are contained in Chapter IV, Title III, Book IV of the Civil Code (Art. 1344-1410 Spanish Civil Code)

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

The Civil Code contains two legal regimes besides the default regime, which are applicable if the parties have opted for one of these regimes in a marital agreement known as a “capitulaciones matrimoniales”. These are participation in acquisitions (“régimen de participación”) which is regulated in Chapter V, Title III, Book IV of the Civil Code (Art. 1411-1434 Spanish Civil Code) and the separation of property (“régimen de separación de bienes”) which is dealt with in Chapter VI, Title III, Book IV of the Civil Code (Art. 1435-1444). Separation of property is considered to be the implicit choice if the spouses have merely agreed not to apply the community of acquisitions.

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

a. Question 16.

The default matrimonial property regime begins either at the moment when the marriage is celebrated or later if the spouses initially contracted another matrimonial property regime and then entered into a new contract opting for the community of acquisitions (Art. 1345 Spanish Civil Code). It entails three distinct masses of property, the so-called “bienes privativos” or the private property of each spouse, and the so-called “bienes gananciales” or the acquired property which the spouses have obtained during their marriage. There are rules which distinguish one mass from the other.

The mass of acquired property is subject to special rules of administration. This mass of property is liable for the debts incurred for the costs and expenses of the family. If at the moment of the division of the matrimonial property regime there is property which is left over, this property is divided in equal part between the spouses (Art. 1344 Spanish Civil Code). The private property of each spouse is held and administered by each spouse individually and is liable for the personal debts of the spouse to whom it belongs.

b. Question 17.

The two other legal regimes are participation in acquisitions and the separation of property. Under the system of participation in acquisitions the spouses hold and administer both the property brought into the marriage and the property individually freely acquired during the marriage (Art. 1412 Spanish Civil Code), but participate in the benefits obtained by the other spouse during the marriage once the regime is terminated (Art. 1411 Spanish Civil Code). There are therefore certain limitations to the principle of the free administration of personal assets in order to guarantee that each of the spouses will be able to participate in the benefits obtained during the marriage when the regime is dissolved. There is no mass of property held in common by both spouses. The most important rules contained in the Spanish Civil Code are the rules on division, which require an evaluation of the mass of property held by each spouse at the beginning and the end of the marriage in order to determine the benefits that are to be shared (Art. 1417 Spanish Civil Code).

The regime of separation of property will apply if the spouses explicitly opt for this or if they establish that they do not want to be subject to the default system of community of acquisitions (Art. 1435 first and second indent). It can also be judicially determined if the community of acquisitions or the participation in acquisitions regime are extinguished during the marriage unless the spouses provide otherwise (Art. 1435 third indent). Separation of property means that each spouse owns the property brought into the marriage and the property individually acquired during the marriage. Each spouse individually administers his or her property and freely disposes of it (Art. 1437 Spanish Civil Code). Both spouses contribute to the costs and expenses of the household in proportion to their resources. A contribution can be in kind, for example through work in the house. The spouse contributing through work in the home has a compensation claim when the regime is terminated. If there is no agreement between the spouses on the amount to be paid as compensation it will be determined by the competent judicial authority (Art. 1438 Spanish Civil Code).

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

Research undertaken in 2003⁵ shows that marital agreements have increased by 981.4% between 1921 and 2001. This enormous increase has been particularly important since 1975. It means that 30.8 % of all marriages in 2001 were subject to a marital agreement. According to the authors of this research most of these agreements were made in order to establish separation of property as their matrimonial property regime. Based on such research one can roughly estimate that one in three couples contracting a marriage opt for a separation of property. Participation in acquisitions, which was introduced in 1981, has not been successful since it is generally considered to be too complicated.

C.2. Specific regimes

Default system

I. Community of property

I.1. Categories of assets

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

The system is a system of community of acquisitions which at least potentially involves three distinct masses of property: the private assets of each spouse (the so-called “bienes privativos”) and the assets which are acquired during the marriage by the spouses which are deemed to be common assets regardless of who actually acquired them (the so-called “bienes gananciales”). The mass of common property is liable for the costs and expenses of the household. When the regime is dissolved the common assets are divided into two equal shares between the spouses.

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

There has been considerable debate among authors and in the case law concerning this issue in part because the Civil Code uses the expressions “sociedad de gananciales” and “comunidad de gananciales” indistinctly. The prevailing opinion today is that the common

⁵ A. Lamarca i Marquès *et al.*, “Separación de bienes y autonomía privada familiar en Cataluña: ¿Un modelo pacífico sujeto a cambio?”, Working Paper de Dret Català No. 7 Barcelona, October 2003, www.indret.com.

assets form a separate and autonomous fund, which is distinct from the funds of each of the spouses.⁶ This autonomous fund is subject to the costs and expenses of the household.

Case law has concluded that the common property is not divided into shares belonging to each spouse.⁷ The spouses cannot dispose of their share in the common property *inter vivos*. They are not entitled to request a division of the common property, but are on the contrary obliged to remain in the community until the matrimonial property regime is dissolved and divided.

The private assets of each spouse are separate funds from the common fund. There can therefore be legal relationships between the funds without there being any extinction because of confusion.

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

Art. 1346 Spanish Civil Code lists the assets which are considered to be personal assets. Other provisions (Art. 1348, 1352, Art. 1359, 1360 Spanish Civil Code) explicitly address difficult issues. Art. 1346 Spanish Civil Code specifies that the assets subsequently mentioned under paragraphs a) to h) are to be considered as personal assets even if they were acquired out of funds which are common funds. In this case, however, the common fund will have a compensation claim for the value of the contributions made against the personal assets of the benefiting spouse.

Personal assets are:

a) Goods and rights brought into the community by each spouse (Art. 1346 para. 1 Spanish Civil Code). Gifts obtained on the occasion of the marriage (*donationes propter nuptiam*) are considered to be personal assets and are divided into two equal shares if they were given to both spouses, unless otherwise specified by the donor.

Even if payment for an asset bought by one of the spouses before the marriage/beginning of the community property regime is partially postponed until after the marriage/ beginning of the community property regime and paid out of money belonging to the common fund, the asset will be considered a personal asset if the first instalment of the payment took place before the marriage/ beginning of the community property regime (Art. 1357 I Spanish Civil Code). Art. 1357 II however excludes the family home and household assets from this rule. In this case Art. 1354 Spanish Civil Code is applicable. According to this provision if an asset is bought partly with money which belongs to the personal fund, and partly with resources out of the common fund, it will belong *pro indiviso* to both funds in proportion to the payments made. This rule is also applicable if the family home and/or household assets were bought through a loan or mortgage, which is partially paid off after the community of property regime comes into being.⁸

b) Assets acquired gratuitously by donation or succession (Art. 1346 para. 2 Spanish Civil Code) by a spouse after the community property regime began. If the assets are bequeathed to both spouses and are accepted by both, they will fall into the community property unless otherwise provided by the donor or testator (Art. 1353 Spanish Civil Code).

c) Assets acquired out of private property or in substitution for assets belonging to the private property of one of the spouses (Art. 1346.3 Spanish Civil Code). If the asset is acquired partially out of personal assets and partly out of common assets it will belong *pro indiviso* to

⁶ STS of 10.07.1982 (RAJ 1982/4226).

⁷ Among others see STS of 01.09.2000 (RAJ 2000/6479) citing numerous previous Supreme Court decisions.

⁸ STS of 31.10.1989 (RAJ 1989/7038) and STS of 18.12.December 2000 (RAJ 2000/ 10396).

the community fund and the personal fund of the spouse whose property was used in proportion to the resources employed for acquisition.

d) Assets acquired through the exercise of an option for preferential acquisition, which belonged to one spouse (Art. 1346 para. 4 Spanish Civil Code), even if payment is made out of common funds. In this case the community property has a compensation claim against the spouse who benefited.

e) Assets of a personal character like maintenance claims or assets which are not to be transmitted *inter vivos* because of their special connection with one spouse like pension rights (Art. 1346. 5 Spanish Civil Code).

f) Clothing and personal objects of one spouse unless they are of an extraordinary value having regard to the social position of the spouses (Art. 1346.7 Spanish Civil Code).

g) Assets used for exercising one spouse's profession (Art. 1346.8 Spanish Civil Code). The case law is restrictive as regards the interpretation of this provision: only assets that are absolutely necessary for the exercise of a profession are considered to be personal assets. In the case of a lawyer, for example, the provision would include books and computers, but not works of art decorating his/her office. The rule is not applicable if the assets are part of an establishment exploited jointly by both spouses.

h) Payments obtained in return for a loan made by one spouse to a third party before the marriage (Art. 1348 Spanish Civil Code)

i) Subscribed shares or other titles acquired as a consequence of personal shares (Art. 1352 Spanish Civil Code).

j) Improvements made to personal assets (Art. 1359 para. 1 Spanish Civil Code) or contributions made in favour of an enterprise or establishment belonging to one spouse (Art. 1360 Spanish Civil Code) regardless of whether they were paid for out of common funds or as a consequence of work done by the other spouse. If this was the case a claim between the personal fund of the benefiting spouse and the common fund would arise.

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

Yes, there are special rules. Art. 1346.3 Spanish Civil Code establishes the general principle of substitution by providing that assets acquired out of personal assets or in substitution for personal assets are also considered to be personal assets. But there are several exceptions to this rule of real substitution such as, for example, the rule that clothing and objects for personal use are considered to be personal assets of the spouse using them (Art. 1346.7 Spanish Civil Code) or the rule that instruments necessary for the exercise of a profession belong to the personal fund of the spouse exercising that profession (Art. 1346.8 Spanish Civil Code). In this case the criterion for establishing that the asset is a personal asset is its destination not its origin.

Another important exception is established in Art. 1355 Spanish Civil Code which allows the spouses to reach an agreement qualifying a given asset as a common asset, even though it was acquired out of the personal property of only one spouse.

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

Art. 1383 Spanish Civil Code establishes that spouses have to inform each other periodically regarding their economic activities. This duty also covers the investment of personal assets. A

repeated breach of this duty allows the other spouse to request a judicial dissolution of the community property (Art. 1393 para. 4 Spanish Civil Code).

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

Art. 1347 Spanish Civil Code establishes which assets are classified as community assets or "bienes gananciales". A few other provisions deal with special situations in this connection (Art. 1349, 1350 Spanish Civil Code).

The following are considered to be community assets:

a) The first assets mentioned in Art. 1347 para. 1 Spanish Civil Code are the spouses' earnings. The fact that they are listed in the first place shows that they are considered to be the main source of gains for the family, which is viewed as a community effort. The concept of earnings is very wide and includes any income that is a consequence of gainful activity carried out by one of the spouses. According to Art. 1351 Spanish Civil Code even prizes won in lotteries and other games of chance are common property.

Indemnities obtained because of a change in working conditions (e.g. changing the location of a factory) or because of a diminution in the earning capacity of one spouse are considered to belong to the community property, although there is a dispute in connection with insurance contracts since indemnities obtained for personal injury are considered to be personal assets and the borderline is difficult to draw.

b) The fruits, rental payments and interests of both common assets and of personal assets owned by either spouse (Art. 1347 para. 2 and Art. 1349 Spanish Civil Code). There is a dispute as to whether or not the expenses incurred in order to obtain such fruits, rental payments or interests are to be deducted before they enter the community. An increase in the value of personal assets such as, for example, an increase in the value of land is not considered to be the fruit of such property. It does not therefore belong to the community property and only reverts to the spouse holding that land as a personal asset. Livestock are also considered to be the fruit of certain property. If there are more head of cattle when the regime is liquidated than when the spouses brought these cattle into the community property, the exceeding numbers will be considered community property (Art. 1350 Spanish Civil Code).

c) Assets acquired with common property or to substitute common property, regardless of whether the acquisition is made for both spouses or for only one of them (Art. 1347.3 Spanish Civil Code). If the asset is acquired partly with community property, partly with the personal property of one spouse, it belongs *pro indiviso* to both masses of property in proportion to the contributions made.

d) Assets acquired through the exercise of an option for preferential acquisition, which belonged to the community property (Art. 1347 para. 4 Spanish Civil Code), even if payment is made out of personal assets belonging to only one spouse. In this case the spouse with whose funds the asset was acquired has a claim for the contribution made against the community property.

e) Enterprises and establishments founded by one spouse with community property (Art. 1347 para. 5 Spanish Civil Code). Since income obtained through work is considered to be common property, an enterprise created through the work of one spouse is also considered Community property.

f) Assets acquired by donation or succession if they are bequeathed to both spouses without any distinction and are accepted by both, unless otherwise provided (Art. 1353 Spanish Civil

Code). If they are bequeathed to only one spouse they belong to the personal assets of that spouse (Art. 1346 para. 2 Spanish Civil Code).

g) Improvements made to common assets (Art. 1359 para. 1 Spanish Civil Code) or contributions made in favour of an enterprise or establishment belonging to the community property (Art. 1360 Spanish Civil Code) regardless of whether they were paid out of personal assets. If this was the case a claim between the personal fund of the benefiting spouse and the common fund would however arise.

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

According to Art. 1346 para. 5 Spanish Civil Code both pension and insurance rights qualify as personal assets. They are not viewed as gains but are considered to be inherently personal benefits.

Interest from of these rights will however be considered Community property (Art. 1347 para. 2 Spanish Civil Code). If participation in the pension or insurance scheme was financed through community property, the mass of Community property will have a claim against the spouse benefiting from the pension or insurance rights to the amount of the contribution made.

Since earnings are qualified as Community property according to Art. 1347 para. 1 there is a dispute as to certain insurance rights which compensate for the loss of employment. There is no conclusive authority on whether they should be regarded as personal or common assets.

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

Yes. There is a presumption in Art. 1353 Spanish Civil Code that gifts or bequests made in favour of the spouses jointly without further specification belong to the community property. This entails that there is a possibility for the third party to exclude that the gift or bequest reverts to the community, if he or she so specifies. Another simpler way of attaining that result is to make the gift or bequest to only one of the spouses. This excludes the asset from falling within the community property since the gift or bequest is not a result of the joint effort of the spouses (Art. 1346 para. 2 Spanish Civil Code).

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

Several rules are important in this connection. According to Art. 1355 Spanish Civil Code the spouses can expressly or tacitly agree that a certain asset acquired after the constitution of the Community property regime is a Community asset, even if it would not qualify as such under the legal rules in force. Although the provision does not expressly establish that the spouses can agree to qualify a certain asset as belonging to the personal assets of only one of them, even although it was acquired with common resources the Direccion General de Notariado (a Governing body of Notaries and Registrars) decided in a Resolution of 25 December 1990⁹ to accept this possibility. The Supreme Court endorsed this viewpoint in its decision of 19 December 1997.¹⁰

Another important rule for the categorization of assets between the spouses is laid down in Art. 1324 Spanish Civil Code. According to this provision, in order to establish that a given asset is a personal asset a unilateral declaration (the Code speaks of a confession) suffices. On

⁹ RAJ 1990/7153.

¹⁰ RAJ 1887/9110

its own such a declaration will however be insufficient against third parties like forced heirs or creditors of the community or the spouses individually.

The classification of assets is also made easier through two presumptions laid down in Art. 1355 para. 2 and 1361 Spanish Civil Code. Art. 1361 Spanish Civil Code establishes that assets are presumed to be community assets unless there is proof that they belong to the personal fund of any of the spouses. This provision is a basic rule in order to solve conflicts on the qualification of assets. The threshold of the evidence to rebut the presumption is high: the party wishing to set aside the presumption will have to prove conclusively, preferentially through documents, that the asset is a personal asset or was acquired with assets that were personal.

Art. 1355 para. 2 Spanish Civil Code contains another presumption *iuris tantum* that acquisitions obtained by the spouses together, without them specifying shares in that property, are presumed to be community property.

According to Art. 95 of the Reglamento del Registro hipotecario an asset can be registered as a personal asset of somebody who is subject to the community of property matrimonial property regime only if the person acquiring the asset proves through a public document that the asset was acquired with private funds.

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

The presumption established by Art. 1361 Spanish Civil Code according to which assets are community property unless there is proof that they are personal assets is applicable between the spouses and against third parties. According to the Supreme Court¹¹ a unilateral declaration by one spouse that a given asset is a personal asset does on its own not serve to rebut the presumption that the asset is community property vis-à-vis third parties.

This presumption is upheld in the Property Registry: an asset acquired by one of the spouses without him or her specifying that it has been acquired for the community is nevertheless registered as belonging to the community. The disposal of these assets which are registered in the name of the spouse who acquired them is therefore only possible with the consent of the other spouse or, if that cannot be obtained, with judicial authorization.

30. Which debts are personal debts?

Personal debts are negatively defined. A debt that does not qualify as a community debt is a personal debt. There are, however, special provisions on gambling debts which are considered to be personal debts except if they are incurred by both spouses jointly or by one spouse with the consent of the other or if they are moderate taking into account social usage and the circumstances of the family (Art. 1371 and 1372 Spanish Civil Code).

There are some difficult cases. One is the case of guarantees given by one spouse on behalf of a third party in the course of commercial activities, which is doubtful because debts incurred in connection with a professional activity are considered to be community debts. There is no provision dealing with this issue. It seems that debts which arise in such a situation should be considered personal debts unless it can be shown that they were incurred in the interest of the family.

Another difficult case is that of debts incurred in order to satisfy subsistence, maintenance and education costs of the children of one spouse who do not live with the family. Whereas the maintenance and education costs of the children of one spouse who live in the family

¹¹ Judgments of 08.02.1993 (RAJ 1993/688) and 02.07.1996 (RAJ 1996/5550)

home qualify as community debts, the debts incurred for a child not living with the family are excluded from art 1362 para. 1 Spanish Civil Code. They therefore qualify as a personal debt of the spouse who is the parent of the child. It should be remembered, however, that it is possible for the spouses to agree that these debts are considered as community debts.

31. Which debts are community debts?

Different kinds of debts can be distinguished.

a) Art. 1362 para. 1 establishes that debts incurred in order to satisfy the costs and expenses connected with the subsistence of the family, the maintenance and education of common children and of the children of one spouse who live in the family home and health care expenses in accordance with social usage and the circumstances of the family qualify as Community debts. They are known as “cargas del matrimonio”.

b) Debts incurred for the acquisition, administration and enjoyment of community assets (Art. 1362 para. 2 Spanish Civil Code) are considered to be community debts.

c) Debts incurred for the ordinary administration of personal assets (Art. 1362.3 Spanish Civil Code) are also considered to be community debts. This is justified because the fruits, rental payments and interests obtained from such personal assets during the marriage belong to the community.

d) For the same reason ordinary debts incurred in the context of the professional activity of one spouse are community debts since the earnings of that spouse belong to the community (1362 para. 4 Spanish Civil Code). If the activity carried out by one of the spouses qualifies as commercial the Commercial Code applies (Art.6-11 Ccom). In this case the creditor will not be able to recover against all community assets but only against those acquired with the benefits of the commercial activity: in order for the creditor to be able to recover from the other community assets it is necessary that the spouse who is not engaged in commercial activities has consented thereto. In practice the preferential treatment given to commercial activities as compared to professional activities is somehow mitigated by the fact that consent is presumed to have been given if there is no opposition. Debts incurred to pay taxes or to contribute to the social security system are also community debts if they are incurred in the context of a professional or commercial activity.

d) Art. 1363 Spanish Civil Code moreover establishes that gifts that are made or promised by both spouses without them specifying that they shall be paid wholly or in part with personal assets qualify as Community debts.

e) According to Art. 1366 Spanish Civil Code debts incurred as a result of torts committed by one spouse acting for the benefit of the community or administering community assets will be considered as community debts unless there is fault or negligence on the side of the spouse who committed the tort.

f) Debts incurred by both spouses jointly or by one with the consent of the other are also community debts (Art. 1367 Spanish Civil Code).

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

Personal debts are recovered from the personal assets of the debtor spouse.

If these are insufficient the creditor can request the seizure of community assets. This will be notified to the other spouse, who has the option to either accept that community property is used in order to cover personal debts incurred by his or her spouse or to request that the seizure is limited to the share of the debtor spouse in the community property. In such a case the community is dissolved (Art.1373 Spanish Civil Code). The creditor will not be able to recover until after the division of the matrimonial property regime and then from the

property attributed to the debtor spouse. This provision has been harshly criticised because it provides ample room for manoeuvring and postponing payment to creditors.

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

Community debts are recovered from community assets and from the personal assets of the spouse or spouses who incurred the debt (Art. 1369 Spanish Civil Code).

If the creditor recovers from the personal assets of a spouse and the debt is a community debt the spouse whose personal assets were used to settle the debt would have a compensation claim against the community property in its entirety for the value of the payment made.

The personal assets of the spouse who did not contract the debt are immune except for debts incurred for household expenses according to Art. 1319 Spanish Civil Code, in which case the personal assets of the non-debtor spouse will be seized if the creditor cannot recover from the community assets or the personal assets of the debtor spouse.

The main difficulty in practice will be that there is no presumption that a debt incurred by one spouse is a community debt. The creditor will need to prove that that is the case. It is therefore common that the creditor requests the consent of the other spouse or that the debt is jointly contracted.

I.2. Administration of assets

34. How are personal assets administered?

The spouse who is the titleholder individually administers personal assets without interference by the other spouse. An important exception to this rule relates to the matrimonial home and household assets (Art. 1320 Spanish Civil Code). Any transaction involving rights to the matrimonial home or the household assets requires the consent of both spouses, even if title to the home or assets is only vested in one spouse. Approval of the transaction can be express or tacit and can take place before or after the transaction. Included in the concept of a transaction is any act disposing of rights to the family home (sale, bailment and usufruct, mortgage), which deprives the family of its habitual place of residence or creates an actual risk of such a situation occurring.

35. How are the community assets administered?

The general rule is that spouses administer community assets jointly (Art. 1375 Spanish Civil Code) unless they have agreed otherwise in a marital agreement. Marital agreements on the administration of community property therefore take precedence in determining the system for administering community assets.

If there is no agreement, spouses administer community assets jointly. Under the system of joint administration it is however not mandatory for both spouses to act together. It suffices that one spouse acts with the express or tacit consent of the other spouse (Art. 1376 and 1377 Spanish Civil Code). According to Art. 1322 if one spouse acts without the consent of the other spouse there is still the possibility of the other spouse giving his or her consent retroactively once the transaction has already taken place. If the spouse whose consent was not requested does not consent *a posteriori*, he or she or his or her heirs can annul the act. After four years from the moment when the act became known to the spouse whose consent was not requested or from the moment of the dissolution of the matrimonial property regime or the marriage there can be no action for an annulment, which then results in the act being validated (Art. 1301 Spanish Civil Code).

There are, moreover, many special rules.

- a) Art. 1319 Spanish Civil Code authorizes any spouse to incur ordinary expenses for the household according to local usage and the circumstances of the family.
- b) Gifts or donations made by one of the spouses without the consent of the other spouse are void. Consent cannot be given retroactively (Art. 1378). Exempt from this rule are ordinary gifts that can be made by any of the spouses. The concept of “liberalidades de uso” is defined as gifts which are made out of a moral or social obligation.
- c) Transactions on the fruits, rental payments or interest from personal assets can be carried out by the spouse who holds title to the personal assets individually, even though the fruits, interest and rental payments from the personal assets qualify as community assets. The transactions envisaged under this rule are acts of ordinary administration necessary to preserve and economically exploit the asset (Art. 1381 Spanish Civil Code).
- d) Art. 1382 Spanish Civil Code establishes that any spouse is free to borrow community money if this is necessary, having regard to social usage and the circumstances of the family, for activities related to the exercise of his or her profession or for the ordinary administration of personal assets. The other spouse’s consent does not have to be requested but the spouse has to be duly informed before or after the money is disposed of.
- e) Art. 1384 Spanish Civil Code provides that unilateral acts of administering community assets or disposing of money and titles by the spouse who holds title to the assets or who is in possession of these assets are valid. This rule seeks to protect the rights of third parties. It does not entail that these assets constitute a separate fund. Therefore the other spouse will always be able to request that these assets are jointly administered.
- f) Art. 1385 para. 1 Spanish Civil Code establishes that the spouse who entered into a contract can unilaterally claim his or rights arising out of the contract, even though community assets were used in connection with this contract.
- g) Both spouses are allowed to act unilaterally in defence of community assets (Art. 1385 para. 2 Spanish Civil Code)
- h) Urgent necessary expenses can be incurred unilaterally (Art. 1386 Spanish Civil Code). The provision refers to extraordinary situations since each of the spouses is entitled to act unilaterally in order to attend to the ordinary needs of the family according to Art. 1319. An example of such a situation is expenses connected to urgent medical treatment.
- i) Individual disposal of community assets *mortis causa* is the general rule since Art. 669 Spanish Civil Code prohibits joint acts of disposal *mortis causa*.
- j) Unilateral administration is established in Art. 1387 if one spouse is the legal guardian of the other spouse who is an incapacitated adult, or if one spouse represents the other who has been legally declared to have disappeared.
- k) There is also the possibility of the competent authority declaring that one spouse is to administer the community assets individually in cases in which the other spouse is not able to consent, or has abandoned the family home or has factually separated from the other spouse (Art. 1388 Spanish Civil Code)

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

Yes. There are no restrictions on a mandate between the spouses (Art. 102 para. 2 and 71 Spanish Civil Code). The difficult issue in the case of a mandate to administer community property is whether the creditor will be able to recover against the personal assets of the non-

acting spouse. This will depend on the power conferred. A vague authorization to administer community property seems not to be enough to engage the personal assets of the spouse who issued that authorization.

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?

Acts concerning community assets always require the consent of the other spouse (Art. 1377 Spanish Civil Code). Consent can however be given retroactively after the act in question except in the case of significant gifts which are void if consent was not given before the gift was made (Art. 1378 Spanish Civil Code).

Acts concerning personal assets do not require the consent of the other spouse, except in the case of acts concerning the matrimonial home and household assets, which always require the consent of both spouses even if title is only vested in one of them (Art. 1320 Spanish Civil Code).

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

No. Professional assets are classified as the personal assets of the spouse exercising that profession (Art. 1346.8 Spanish Civil Code). That spouse therefore administers them freely without interference from the other spouse.

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

Yes. Art. 1383 establishes that spouses have to inform each other periodically concerning their economic situation. This duty covers both the administration of community assets and the administration of personal assets. If a spouse repeatedly breaches this duty, the other spouse is entitled to request a judicial dissolution of the matrimonial property regime.

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

Disputes between spouses concerning the administration of community property or in respect of personal assets, which are granted special protection and therefore require the consent of both spouses like the matrimonial home or household assets, can be referred to the competent court (Art. 1376 and 1377 Spanish Civil Code). The judge will evaluate the pros and cons of the act of administration or transaction proposed by one of the spouses and not accepted by the other spouse having regard to the interest of the family. If the proposed act concerns an asset it will be evaluated not only from an economic point of view, but other factors will also be taken into consideration, e.g., sentimental value.

If the competent authority reaches the conclusion that a proposed act of administration is in the interest of the family, it will substitute the spouse refusing to give his or her consent. The judge can subject authorization to certain conditions e.g. an authorization to sell an asset, but only above a certain price.

Since the consent of the non-acting spouse can be given retroactively also judicial intervention can be requested before or after the transaction. If the dispute refers to an act of disposal, authorization can be judicially requested for a single act or for a determined number of acts. If, however, the dispute refers to acts of administration it can refer to a category of acts.

In case of repeated disputes concerning administration one of the spouses can request that the community be terminated if he or she proves that his or her rights in the community are being endangered (Art. 1393 para. 2 Spanish Civil Code).

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?

If a spouse acts without the express or tacit consent of the other spouse and thereby violates the rules governing the administration of community property or of the matrimonial home and household assets, the spouse whose consent was omitted or his or her heirs may request that such acts be annulled (Art. 1322 Spanish Civil Code). After four years from the date on which the act became known to the spouse whose consent was not requested or from the moment of the dissolution of the matrimonial property regime or the marriage there can be no action for an annulment, which thereby results in the act being validated (Art. 1301 Spanish Civil Code).

If the act undertaken by one spouse without the consent of the other spouse is gratuitous (a donation or a gift), it is void.

Additionally, an act of administration or disposal undertaken by one spouse against the interests of the community property gives rise to a compensation claim in favour of the community (Art. 1390 Spanish Civil Code) The rule applies not only if the act was an act which breached the legal rules of administration, but also if the act only benefited one spouse or caused intentional harm to the community property. If the acting spouse moreover tried to hide from the other spouse the personal benefit obtained by him or her or the harm intentionally caused to the community property and a third party participated in such fraudulent behaviour, it will be possible to invalidate the act (Art. 1391 Spanish Civil Code).

In cases of negligence or ineffective administration of community property and personal property by one of the spouses, the other spouse will be able to request the dissolution of the community property regime if he or she proves that his or her rights in the community have been damaged or endangered (Art. 1393 para. 2 Spanish Civil Code). Although there is no express provision establishing that each spouse is liable towards the community property for faults in the administration, the legal literature derives a duty of administration according to due standards of diligence by applying Art. 1366 Spanish Civil Code or Art. 67 Spanish Civil Code by analogy.

42. What are the possible consequences if a spouse is incapable of administering

a. his or her personal assets

If a married person is incapacitated or judicially declared to be absent, his or her spouse will normally become his or her guardian and legal representative (Art. 234 Spanish Civil Code). This rule applies by operation of the law and entails that the spouse will administer the personal assets of his or her incapacitated spouse subject to supervision by the competent authority according to the rules of guardianship.

b. community assets.

If a married person is incapacitated or judicially declared to be absent the system of joint administration of community property is substituted, by operation of the law, by a system of individual administration by the other spouse according to Art. 1387 Spanish Civil Code. In contrast to what occurs with respect to the personal assets of the incapacitated spouse, the administration of community property is not subject to supervision by the competent

authority according to the rules of guardianship.¹² Art. 1389 however provides that the Judge can establish limitations to the spouse's powers of administration in the interest of the family. Acts of disposal with regard to immovables, commercial establishments and valuable movables or shares require judicial authorization.

Even if a spouse has not been judicially incapacitated there are possibilities to substitute the system of joint administration of community assets with a system of individual administration in cases in which one of the spouses is *de facto* not capable. According to Art. 1388 Spanish Civil Code a spouse can initiate judicial proceedings and request that he/she be authorised to administer community property individually if the other spouse is in a situation in which it is impossible to ask for his or her consent to acts of administration or when this spouse has abandoned the family home or if the spouses have factually separated. The competent authority will evaluate the request having regard to the circumstances of the case and the abilities of the requesting spouse. There is a dispute in the legal literature as to whether acts of disposal would be covered if the judge decided to allow individual administration of community assets. According to Fernandez De Villavicencio¹³ even if the Judge decided in favour of the petition only acts of administration could be carried out individually. Disposing of community assets would be excluded and could therefore only take place with judicial authorization according to Art. 1376 and 1377 Spanish Civil Code. Other authors like Lacruz¹⁴ or Diez-Picazo¹⁵ do not distinguish between acts of disposal and acts of administration. Art. 1389 would in any case be applicable. This provision allows the Judge to establish limitations to the powers of administration of the acting spouse in the interest of the family. Acts of disposal with regard to immovables, commercial establishments and valuable movables or shares always require judicial authorization.

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?

One should distinguish between grounds which apply *ipso iure* and grounds allowing one spouse to request the dissolution of the community property regime although this distinction has been somehow blurred by the Supreme Court which has established that a Judge can dissolve the regime on his or her own motion if a ground for the dissolution is established in a judicial proceeding which is not principally concerned with dissolution.

The grounds for the dissolution of the Matrimonial Property regime are established in Art. 1392 Spanish Civil Code. They apply *ipso iure* according to the Supreme Court¹⁶ and are the following:

a) Divorce, the death of one of the spouses or a Declaration of the death of one of the spouses
The community of acquisitions is terminated by operation of the law when the marriage is dissolved through divorce or the death of a spouse or if one spouse is judicially declared to have died (1392 para. 1 Spanish Civil Code).

b) Annulment of the marriage

A marriage annulment also entails the dissolution of the matrimonial property regime (Art. 1392 para. 2 Spanish Civil Code).

c) Legal separation (1392.3 Spanish Civil Code)

¹² Decision by the DGRN of 12.07.1999 (RAJ 1999/4756).

¹³ M.C. Fernández de Villavicencio: *La cogestión de los bienes gananciales*, Madrid, 1997, p. 62.

¹⁴ J.L. Lacruz: *Elementos de Derecho Civil*, t. IV, Madrid, 1990, p. 479

¹⁵ L. Diez- Picazo and A. Gullón: *Sistema de Derecho civil*, t. IV, Madrid, 2004, p. 190.

¹⁶ STS of 08.10.1990 (EDJ 1990/9100).

De facto separation is not a ground for dissolution.

d) Marital agreements (1392 para. 4 Spanish Civil Code)

The spouses are free to opt for another legal regime or to make modifications within a given legal regime or even to establish their own rules for their property relations at any time during their marriage. If they do so the Community of acquisitions is dissolved. If they reach an agreement merely establishing that they want to terminate their community property regime this entails the dissolution of the community property and its substitution with a separation of property according to Art. 1435.3 Spanish Civil Code.

Art. 1393 Spanish Civil Code establishes grounds allowing one spouse to request the dissolution of the matrimonial property regime such as:

a) That there is a final court decision incapacitating one of the spouses or declaring him or her to be absent or to be a spendthrift. A dissolution can also be requested if one of the spouses has been declared insolvent or if he or she has been convicted of abandoning the family according to Art. 226 and 227 of the Criminal Code (Art. 1393 para. 1 Spanish Civil Code).

b) That one of the spouses has of his/her own volition repeatedly undertaken acts of administration which defraud the community property or damage or endanger the rights of the other spouse in the community property (Art. 1393 para. 2 Spanish Civil Code).

c) That the spouses have factually separated for more than one year (1393.3 Spanish Civil Code). Although the written law establishes that factual separation is only a ground for requesting the dissolution of the community property regime there is case law which determines that a prolonged separation is a ground for dissolution which operates even if none of the spouses has requested the dissolution.¹⁷ The matter is not yet determined, however.

d) That one of the spouses has repeatedly and gravely breached his or her duty to inform the other spouse about his or her economic activities (Art. 1393 para. 4 Spanish Civil Code).

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?

It is necessary to distinguish between the date that is decisive for the dissolution, and the date on which the community assets are determined and evaluated.

The date that is relevant for the dissolution of the community property differs according to the ground for the dissolution. In the case of the death of one of the spouses the relevant date is the date on which one of the spouses passed away as recorded in the Civil Register.

There is a dispute as to the date in case one of the spouses has been judicially declared to be dead. Some authors interpret that the relevant date is the date at which the judicial decision became final because that is the date when the marriage is dissolved according to Art. 85 Spanish Civil Code; others argue, however, that the community of property is dissolved on the date when the death presumably occurred and which is determined in the decision declaring that one of the spouses has died.

The relevant date when the ground for dissolution is a marital agreement changing the matrimonial property regime is the date at which the notarial deed containing such an agreement was issued.¹⁸

¹⁷ STS of 11.10.1999 (EDJ 1999/32569) and STS of 26.04.2000 (EDJ 2000/6207).

¹⁸ STS of 21.07.1987.

In the case of divorce, separation or an annulment the relevant date is the date on which the judicial decision on divorce, legal separation and annulment becomes final (Art. 95 para. 1 Spanish Civil Code). If a first instance decision on divorce, legal separation or annulment is appealed and the appeal is restricted to accessory matters like maintenance or child custody, the decision dissolving, suspending or annulling the marriage already becomes final at first instance according to Art. 774 para. 5 of the Law on Civil Procedure, with the consequence that the date of the first instance decision is also the date which is relevant for the dissolution of the matrimonial property regime.¹⁹ In legal writing many authors argue that the dissolution of the matrimonial property regime should be advanced to the moment when the judicial proceeding was initiated (Lacruz²⁰) or to the moment when the spouses separated de facto (Montero Aroca²¹). Although *de loge late a de facto* separation does not dissolve the community of property, the rules on the administration and disposal of community property cease to apply if the spouses so agree in the so-called *Convenio regulador* (Art. 90 Spanish Civil Code) which contains all the agreements on accessory matters and which is necessary if separation is based on mutual consent. In the case of a contentious divorce, the judge can also suspend the application of these rules on his or her own motion (Art. 103 para. 4 Spanish Civil Code). The relevant date in that connection is the date on which the agreement is judicially approved or the date when the decision is taken by the judge.

In cases of de facto separation it is also permissible for the spouses to privately agree that they will no longer participate in the benefits obtained by the other spouse and provisionally distribute community property between themselves. However, these kinds of agreements do not dissolve the property regime.²²

If one of the spouses has requested a dissolution based on the grounds established in Art. 1393 Spanish Civil Code, the date of the dissolution is the date of the decision delivered by the judge (1394 Spanish Civil Code). There is controversy as to whether the decision has to be final.

After the dissolution of the community property it will then be divided, but this does not have to take place immediately after the dissolution.²³ There is no established time when it is mandatory to request the division. It can therefore occur that there is a more or less prolonged period of time during which the Community is dissolved but has not yet been divided. If the ground for the dissolution was the death of one spouse a division very often only takes place after the death of the other spouse. An agreement stipulating that there will be no division for a maximum period of ten years is admissible (Art. 400 Spanish Civil Code). The relevant date for determining which assets are community property and for evaluating these assets is the date of division.

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?

¹⁹ STS of 30.01.2004 (RAJ 2004/438).

²⁰ J.L. Lacruz, "La disolución y liquidación del régimen económico del matrimonio en el *Convenio regulador*", in: *Convenios reguladores de las relaciones conyugales, paterno filiales y patrimoniales en las crisis de matrimonio. Bases conceptuales y criterios judiciales*, Pamplona, 1984, p. 285.

²¹ J. Montero Aroca: *Disolución y liquidación de la sociedad de gananciales (la aplicación práctica del art. 95 del Código civil y de los arts. 806 a 810 de la Ley de Enjuiciamiento Civil*, Valencia, 2002, p. 59.

²² STS of 04.12.1985 (RAJ 1985/6202) and of 01.02.1990 (EDJ 1990/914).

²³ STS of 08.10.1990 (EDJ 1990/9100).

If community assets are used for investments in personal property the community has a right of compensation in respect of the personal property benefiting from such investments. If personal assets have been used for investments in the community property it will be the spouse whose assets were used who will have a compensation claim against the community property (Art. 1358 Spanish Civil Code). Compensation is nominal, but the amount is updated. The index commonly used is the consumer price index. The relevant date is the date of the division.²⁴

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?

Art. 1358 Spanish Civil Code establishes a rule of compensation that applies to both debts and investments. Compensation is nominal, but the amount is updated. The index most commonly used is the consumer price index.

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

Art. 1399 Spanish Civil Code establishes that community debts towards third parties have to be settled before compensation between the spouses and the community can take place. Concerning community debts there are also priority rules. Art. 1399 Spanish Civil Code mentions maintenance debts of the community as the first that have to be settled and then refers to general rules contained in Art. 1921 et seq. Spanish Civil Code and in the Insolvency Statute.

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

Community assets continue to be community assets after dissolution until a complete division, but the nature of and the rules governing the community property change. In order to differentiate the community property is called "Comunidad posganancial" after dissolution. The main difference is that each spouse or each spouse's heirs have an abstract share in the common property which can be disposed of and that in principle no further acquisitions enter the community property after dissolution.

The rules on administration, which were used before the dissolution, cease to apply. If the community was dissolved because of a divorce, legal separation or annulment or because the competent authority granted such dissolution at the request of one of the spouses the rules of administration will be determined in the judicial decision (Art. 106 cc, Art. 1394 Spanish Civil Code)

If the community was dissolved because of the death of one of the spouses succession law rules and rules on co-ownership will apply by analogy. Any act disposing of a specific asset requires the consent of the spouse or their heirs.²⁵ An act of disposal without the consent of one of the titleholders is void. All titleholders have to jointly administer community assets according to the rules of co-ownership, which means that administration is subject to the views of the majority of the co-owners. Disagreements can be referred to the competent authority. Agreements stipulating that one person is to administer the assets are permissible, in which case general rules on mandate become applicable.

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

There are two systems of division: a contractual division and a judicial division.

²⁴ STS of 17.02.1992 and STS of 23.12.1993.

²⁵ RDGRN of 20.04.2005 (RAJ 2005/5013).

A contractual division can take place in the marital agreement opting for another matrimonial property regime, in the agreements which are required as a pre-condition for divorce or legal separation based on mutual consent and in the context of the succession of one of the spouses, in which case the agreement will be between the surviving spouse and the administrator. A division can also take place in a separate transaction between the spouses or their heirs in a private or public document. A contractual division is subject to the general rules that also apply in case of a judicial division requiring an inventory of assets and liabilities, an evaluation of the community property in its entirety, the settlement of debts towards third parties and compensation claims between the community and the spouses and then the division of the remainder and the allocation of specific assets to each spouse, but there is the possibility to set aside or modify these rules.

The rules on judicial division are laid down in both the Civil Code (Art. 1396-1410 Spanish Civil Code) and from a procedural point of view in Art. 806 et seq. of the Code of Civil Procedure, which contains a specific procedure for the division of matrimonial property.

The first step is to make an inventory of the assets and liabilities of the community (Art. 1396 Spanish Civil Code) and, if deemed necessary and agreed, of each spouse's personal assets and liabilities. Each spouse has a right and a duty to cooperate in that respect. If there are disagreements between the spouses the judge will decide.

Once the inventory is made it is then evaluated - the relevant date is the date of the division. Community debts and compensation claims are then settled according to a priority order. Community debts towards third parties are settled first according to the maxim "first pay and then divide"; once they have been deducted compensation between the personal masses and the Community mass takes place. The next phase is to divide the remainder between the two spouses or their successors and the allocation of specific assets to each spouse. There are rules establishing preferential rights in that respect.

50. How are the community debts settled?

Community debts are first settled in monetary terms. If there is not enough money in the community mass, it is possible to allocate community assets for the payment, but this requires that all parties concerned, that is the creditor and the spouses, so agree. If any of the parties is opposed to this, community assets will be sold and the money so obtained will be used for payment (Art. 1400 Spanish Civil Code).

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

Such rights only exist if the property regime is dissolved because one of the spouses has died. In the case of household assets it is not exactly a preferential right. Unless they are of an extraordinary cultural, economic or historical value, household assets will always be attributed to the surviving spouse immediately upon death. They are not included among the community property which has to be divided (Art. 1321 Spanish Civil Code); whether they are community or personal assets belonging to one or the other is irrelevant.

As regards the matrimonial home, Art. 1406 para. 4 Spanish Civil Code establishes a preferential right of each spouse over the immovable property which he or she uses as his or her habitual residence, if and only if it belonged to the community. The surviving spouse can choose whether he or she wants to be attributed ownership or another right allowing him or her to use or inhabit the immovable property (Art. 1407 Spanish Civil Code). If the valuation of the immovable property exceeds the value of the share of community property allocated to the surviving spouse, he or she will have to pay the excess.

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

Yes. Art. 1406 establishes preferential rights over:

a) Assets for personal use. Since Art. 1346.7 Spanish Civil Code categorizes clothing and other assets for personal use as personal assets, a characterization of what is meant in Art. 1406 Spanish Civil Code is not an easy matter. Art. 1346 Spanish Civil Code excludes assets of an important economic, cultural or historical value, which are not considered to be personal assets. They would be covered by Art. 1404 Spanish Civil Code. Hence spouses would have a preferential right over such assets.

b) Economic establishments effectively run by one spouse.

c) The premises used by one of the spouses for the exercise of his or her profession.

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

Matrimonial property and maintenance are in principle independent areas of the law. They are connected, however, especially in the case of divorce, legal separation or an annulment. The spouse whose standard of living has suffered the most because of the break-up of the marriage is entitled to request the so-called “pension compensatoria” according to Art. 97 Spanish Civil Code. One of the factors to be considered in this respect is the needs and economic abilities of each spouse after the break-up. In assessing this factor the division of community property will be taken into account.

Since an actual division does not have to take place immediately after the dissolution of the community property regime, the spouses or their children are entitled to request maintenance for the time between the dissolution and the division. Such maintenance will be advanced by the community (Art. 1408 Spanish Civil Code) and deducted from the assets allocated to the maintenance creditor after the division.

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

Pension rights and claims qualify as personal assets. A division of the community property does not therefore entail any pension sharing or the like.

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?

A contractual division is admissible. The spouses can in that context set aside or modify the general rules of division.

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.

Art. 1406 para. 4 Spanish Civil Code establishes a preferential right of each spouse over the immovable property which he or she uses as his or her habitual residence, if it belonged to the community property. The surviving spouse can choose whether he or she wants to be attributed with ownership or another right allowing him or her to use or inhabit the immovable property (Art. 1407 Spanish Civil Code). If the valuation of the immovable property exceeds the value of the share attributed to the surviving spouse, he or she will have to pay the excess.

IV. Separation of property

IV.1. Categories of assets

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

Separation of property is the matrimonial regime which applies (a) if the spouses have explicitly opted for this in a marital agreement (Art. 1435 para. 1 Spanish Civil Code), (b) if the spouses have excluded a community of acquisitions as their matrimonial property regime in a marital agreement (Art. 1435 para. 2 Spanish Civil Code), or (c) if one of the spouses requested the dissolution of a previous community of acquisitions regime and the judge has consented thereto (Art. 1435.3 Spanish Civil Code). The last mentioned is only possible in certain circumstances like a *de facto* separation which has lasted for more than one year (Art. 1393.3 Spanish Civil Code), grave and repeated breaches of the duty to provide information on economic activities by the other spouse (Art. 1393 para. 4 Spanish Civil Code), unilateral acts carried out by the other spouse which are either fraudulent or damage or endanger the rights of the requesting spouse in the community property (Art. 1303 para. 2 Spanish Civil Code), or if the other spouse has been incapacitated, declared to be absent, a spendthrift or insolvent or has been convicted of abandoning the family (Art. 1393 para. 1 Spanish Civil Code).

The system is described in Art. 1437 Spanish Civil Code. Each spouse owns the assets he or she brought into the marriage and the assets which he or she acquires individually afterwards. Each spouse administers and freely disposes of his or her personal property. The system therefore involves two masses that belong to each of the spouses. There is no community mass. Both spouses have to contribute to the household expenses in proportion to their resources, unless otherwise agreed. If upon dissolution it is determined that one spouse has excessively contributed he or she will have a compensation claim against the other spouse.

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

The separate property of the spouses is composed of the assets which each spouse already owned before the marriage and of the assets he or she acquired after the marriage regardless of title (Art. 1437 Spanish Civil Code).

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

One spouse can acquire assets jointly with the other spouse in the same way as he or she can acquire assets jointly with a third party. The ordinary rules of co-ownership established in Art. 392 et seq. of the Civil Code apply. The fact that spouses have acquired an asset jointly does not therefore give rise to any separate mass of community property.²⁶

However, since it is very common for spouses to acquire assets jointly Art. 1441 Spanish Civil Code establishes a rebuttable presumption that assets are co-owned by both spouses, unless there is proof to the contrary.

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

There has been a development in respect of cases in which one spouse has invested his or her personal assets in the acquisition of an asset by the other spouse. The traditional position was that the fact that one spouse invested in the personal assets of the other spouse was not relevant for determining ownership: what mattered was only who is formally the titleholder of the asset.²⁷ If assets belonging to the other spouse were used for such an acquisition, this spouse would be entitled to compensation.

²⁶ STS of 14.03.1994 (RAJ 1994/177).

²⁷ STS of 14.02.1989 (RAJ 1989/836).

There are more recent decisions, however, which seem to apply rules of substitution. If it can be proven that an asset was acquired with funds belonging totally or in part to the spouse who is not the formal titleholder, he or she will be considered to be the owner or co-owner of an asset.²⁸

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

Pension and insurance rights qualify as personal assets of the spouse who is the beneficiary. Pension rights based on previous labour are taken into account, however, when determining the resources available to each spouse in order to contribute to the household expenses.

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

Since it is very common that spouses acquire assets jointly Art. 1441 Spanish Civil Code establishes a rebuttable presumption that assets are co-owned by both spouses, unless there is evidence that the asset was acquired individually by only one spouse. In principle what matters is whether there is proof of who is the formal titleholder of the asset. If there is no such proof, the spouses will be considered to be the co-owners of the asset.

However, there are decisions that have set aside any evidence of individual title because there was proof that the asset had been acquired with funds belonging to the other spouse.²⁹

There are special rules as regards joint bank accounts. The Supreme Court already established in 1971³⁰ and has confirmed in many decisions since then that the fact that money is deposited in a joint bank account is not proof that the money is co-owned by the spouses, but only means that both spouses can dispose of the money. In order to establish ownership it is necessary to investigate the origins of the money. If such an investigation is not successful the presumption that each spouse owns 50% of the money will apply.

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

Art. 1441 Spanish Civil Code establishes a rebuttable presumption that assets are co-owned by both spouses, unless there is proof that the asset was acquired individually by only one spouse. A unilateral declaration by one spouse does not qualify as proof *vis-à-vis* third parties. In cases of the insolvency of the debtor spouse another presumption comes into play. Unless there is evidence to the contrary, it will be presumed that 50% of the assets acquired with non-gratuitous title by the non-debtor spouse in the year before the insolvency procedure started belong to the debtor spouse (Art. 78 Insolvency statute).

136. Which debts are personal debts?

Debts incurred by one spouse individually are personal debts unless they were incurred in connection with ordinary household expenses, in which case they qualify as joint debts (Art. 1319 Spanish Civil Code)

137. Which debts are joint debts?

²⁸ STS of 28.04.1997 (EDJ 197/3259).

²⁹ STS of 28.04.1997 (EDJ 197/3259).

³⁰ STS of 24.03.1971 [RAJ /1447).

Joint debts are those incurred by both spouses jointly and the debts incurred by one spouse in connection with ordinary expenses for the household according to local usage and the circumstances of the family (Art. 1319 Spanish Civil Code).

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

The creditor can recover from the personal assets of the debtor spouse (Art. 1440 Spanish Civil Code). If the debtor owns assets jointly with his or her spouse ordinary rules of co-ownership apply.

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

If both spouses have incurred a debt jointly the creditor can recover the debts from the personal assets of each spouse in proportion to their share in the property. If one spouse has incurred the debt in connection with the household expenses the creditor will first recover from the personal assets of the spouse who incurred the debt. If that spouse does not have enough resources, the other spouse will be personally liable subsidiarily.

IV.2. Administration of assets

140. How are assets administered?

Art. 1437 Spanish Civil Code establishes that each spouse administers and disposes of his or her personal assets freely. It is however recognised that marriage entails that a spouse is implicitly authorized to use the personal assets of the other spouse. Although the general principle is the free administration of individual assets, it should be recalled that both spouses have to contribute to the household expenses (Art. 1318 and 1438 Spanish Civil Code) and that acts affecting the family home and the household assets always require the consent of both spouses, regardless of who is the titleholder (Art. 1320 Spanish Civil Code). Beyond that there is a general duty for spouses to act in the interest of the family (Art. 67 Spanish Civil Code).

If assets have been acquired jointly by both spouses the ordinary rules on the administration of assets in co-ownership will apply.³¹ According to these rules acts of administration can only take place if there is agreement between the co-owners.

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

Yes, there are no limitations on a mandate. One spouse can mandate the other spouse to administer his or her own assets (Art. 71 Spanish Civil Code). The general rules on mandate contained in Art. 1709 et seq. Spanish Civil Code, which are in principle applicable, are however softened in Art. 1439 Spanish Civil Code which exempts the spouse who administers the other spouse's assets on a mandate from the duty to account for consumed returns, unless there is proof that they were used for a different purpose than for paying the household expenses.

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

Acts concerning the matrimonial home and household assets always require the consent of both spouses even if title is only vested in one of them (Art. 1320 Spanish Civil Code).

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

³¹ STS of 14.03.1994 (RAJ 1994/1779)].

No.

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

There is no specific rule to that effect. There is, however, a general rule established in Art. 67 Spanish Civil Code that spouses have to respect and assist each other and act in the interest of the family that can be used to construe a duty to provide information. If spouses own assets jointly ordinary rules of co-ownership apply: the agreement of both spouses is necessary for undertaking an act of administration (Art. 398 Spanish Civil Code), which presupposes that both spouses are sufficiently informed.

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

Disputes between spouses concerning the administration of personal assets that are granted special protection and therefore require the consent of both spouses like the matrimonial home or household assets can be referred to the competent court (Art. 1376 and 1377 Spanish Civil Code). The judge will evaluate the pros and cons of the act of administration or transaction proposed by one of the spouses and not accepted by the other spouse having regard to the interest of the family. If the competent authority reaches the conclusion that a proposed act of administration is in the interest of the family, it will substitute the spouse refusing to give his or her consent. The judge can subject authorization to certain conditions e.g. authorization to sell an asset, but only above a certain price.

Since consent by the non-acting spouse can be given retroactively and judicial intervention can also be requested before or after the transaction. If the dispute refers to an act of disposal authorization can be requested for a single act or for a determined number of acts. However, if the dispute refers to acts of administration it can refer to a category of acts.

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

If a spouse acts without the express or tacit consent of the other spouse and thereby violates the rule governing the administration of the matrimonial home and household assets, the spouse whose consent was omitted or his or her heirs may request that such acts be annulled (Art. 1322 Spanish Civil Code). After four years from the date on which the act became known to the spouse whose consent was not requested or from the moment of the dissolution of the matrimonial property regime or the marriage there can be no action for an annulment, which thereby results in the act being validated (Art. 1301 Spanish Civil Code). If the act undertaken by one spouse without the consent of the other spouse is gratuitous (a donation or gift), it is void.

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

If a married person is incapacitated or judicially declared to be absent his or her spouse will normally become his or her guardian and legal representative (Art. 234 Spanish Civil Code). This rule applies by operation of the law and entails that the spouse will administer the personal assets of his or her incapacitated spouse subject to supervision by the competent authority according to the rules of guardianship.

IV.3. Distribution of assets upon dissolution

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

There is no express provision establishing the grounds for dissolution, but the following are established grounds for dissolution:

- a) A change of matrimonial property regime, which requires a marital agreement, formalised in a notarial deed (at. 1325 Spanish Civil Code).
- b) The death or the declaration of the death of one of the spouses (Art. 85 Spanish Civil Code)
- c) Divorce (Art. 95 Spanish Civil Code)
- d) Annulment of the marriage (Art. 95 Spanish Civil Code).
- d) Legal separation (Art. 95 Spanish Civil Code)

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

The relevant date if the ground for dissolution is a marital agreement changing the matrimonial property regime is the date on which the notarial deed containing such an agreement was issued.³²

There is a dispute as to the date when one of the spouses has been judicially declared to be dead. Some authors interpret that the relevant date is the date on which the judicial decision became final because that is the date on which the marriage is dissolved according to Art. 85 Spanish Civil Code; others argue, however, that the matrimonial property regime is dissolved on the date when the death presumably occurred and which is determined in the decision declaring that one of the spouses has died.

In the case of divorce, legal separation or an annulment the relevant date is the date on which the judicial decision on divorce, legal separation and annulment becomes final (Art. 95 para. 1 Spanish Civil Code). If a first instance decision on divorce, legal separation or an annulment is appealed and the appeal is restricted to accessory matters like maintenance or child custody, the decision dissolving, suspending or annulling the marriage already becomes final at first instance according to Art. 774 para. 5 of the Law on Civil Procedure, with the consequence that the date of the first instance decision is also the date which is relevant for the dissolution of the matrimonial property regime.³³ In the legal literature many authors argue that the dissolution of the matrimonial property regime should be advanced to the moment when the judicial proceeding was initiated (Lacruz³⁴) or to the moment when the spouses de facto separated (Montero Aroca³⁵).

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

Since both spouses have the duty to contribute to the household expenses in the way they have agreed or, if there is no agreement, in proportion to their resources, it is necessary to value that contribution and to deal with compensation claims which may have arisen between the spouses if one spouse has contributed in excess of what he or she was obliged to do, once the property regime is dissolved (Art. 1438 Spanish Civil Code).

³² STS of 21.07.1987.

³³ STS of 30.01.2004 (RAJ 2004/438).

³⁴ J.L. Lacruz, "La disolución y liquidación del régimen económico del matrimonio en el Convenio regulador", in: *Convenios reguladores de las relaciones conyugales, paterno filiales y patrimoniales en las crisis de matrimonio. Bases conceptuales y criterios judiciales*, Pamplona, 1984, p. 285.

³⁵ J.Montero Aroca, *Disolución y liquidación de la sociedad de gananciales (la aplicación práctica del art. 95 del Código civil y de los arts. 806 a 810 de la Ley de Enjuiciamiento Civil*, Valencia, 2002, p. 59.

The concept of resources is based on the income the spouses receive in the form of salaries, other earnings, any pension rights deriving from previous paid employment and the fruits or rental payments deriving from personal assets. Also the value of personal assets and the earning capacity of a spouse based on his or her professional training and previous work experience play a role in determining the resources of that spouse. If a spouse has economic obligations in the form of, for example, maintenance debts these will be considered in so far as this spouse's resources are diminished by such debts and liabilities.

A contribution to household expenses can take place in the form of monetary payments, contributions in kind and through housework. If one spouse has contributed in excess of what he or she was obliged to do, he or she will have a compensation claim for the amount established by the competent authority, unless the spouses reach an agreement to that effect. Housework as such does not form the basis of the claim, which only arises if the contribution made was excessive having regard to agreements between the spouses on this matter or to the amount of the contribution which is proportionate to the resources of each spouse.

A separation of property means that there is no mass of community property, which has to be divided after the dissolution of the matrimonial property regime; however, it is increasingly common that spouses have acquired property or incurred debts jointly or cannot prove who is the actual titleholder of a certain asset, in which case it will be presumed that they are joint owners. When the matrimonial property regime is terminated a division of joint assets ordinarily takes place. This can be done either by the spouses contractually or requires intervention by the competent authority. The ordinary rules on the division of common property are applicable.

There has been a debate as to whether the special procedures established in the Law of civil procedure for the division of the matrimonial property regime (Art. 806 et seq. Ley de enjuiciamiento civil (Civil Procedure Act 2000)) can be applied if this regime is separation of property. The Law of Civil procedure makes express reference to the property regimes of a community of acquisitions (Art. 806-810 LEC) or participation in acquisitions (Art. 811 Ley de enjuiciamiento civil (Civil Procedure Act 2000)) and seems to imply that the special procedure is not mandatory when the matrimonial property regime does not entail a community mass (Art. 806 Ley de enjuiciamiento civil (Civil Procedure Act 2000)). The majority opinion today is that it is useful to apply Art. 806-811 Ley de enjuiciamiento civil (Civil Procedure Act 2000) especially if many assets are co-owned by both spouses or if there are joint debts.³⁶ To apply an ordinary procedure in such a situation would not be cost-effective.

The first step is to make an inventory of each spouse's resources including all the concepts as described above. The resources of each spouse are then valued. The debts and liabilities of each spouse are then deducted. The resulting amounts are subsequently compared to the amounts needed for satisfying the household expenses in order to determine the amount of each spouse's contribution. If one spouse has contributed in excess of what he or she was obliged to do, he or she will have a compensation claim against the other spouse. The next phase is the division of assets owned by the spouses' jointly and the allocation of specific assets to each spouse.

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

In order to determine whether one spouse has excessively contributed to household expenses it will be necessary to determine and value each spouse's resources. The concept of resources

³⁶ Audiencia Provincial de Barcelona, decision of 20.01.2003.

is wide and embraces premarital assets and debts, assets acquired by means of a gift, will or inheritance, personal assets acquired during the marriage, pension rights based on previous paid employment and even the earning capacity of that spouse. It should however be recalled that the determination and appraisal of such assets does not aim to divide them between the spouses but is undertaken only in order to establish each spouse's obligation to contribute to household expenses and to compare it to the contribution effectively made by each spouse and thereby establish whether one spouse has excessively contributed.

The basic idea is to determine the market value of all the resources available to each spouse. The most difficult operation is that of valuing housework and the earning capacity of a spouse. In order to determine the value of the housework performed reference is very often made to the costs the spouses would have had to incur if they had hired external help. For determining earning capacity the average salaries or remuneration for a person with similar training and work experience are used.

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

The relevant date is the date at which the spouses ceased living together.

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

There is a duty to compensate. Compensation is nominal, but the amount is updated. The index most commonly used is the consumer price index.

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

There is a duty to compensate. Compensation is nominal, but the amount is updated. The index most commonly used is the consumer price index.

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

No. The family home and the household assets belong to the spouse who acquired those assets. If they were acquired jointly or there is no proof as to who is the titleholder and the assets are therefore presumed to be joint property, they will be divided according to the general rules of co-ownership.

If the ground for the dissolution of the matrimonial property regime is legal separation, divorce or an annulment the competent authority will decide on the use of the matrimonial home and the household assets or validate the spouses' agreement to that effect (Art. 90 C and art 91 Spanish Civil Code). If there are children the residential parent will very often be the spouse who will be granted the use of the family home and the household assets regardless of who is the titleholder. Ownership, as such, is not affected by this decision.

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

No.

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

The right to be compensated in the case of an excessive contribution to household expenses established in Art. 1438 Spanish Civil Code and the “pensión Compensatoria” which is granted to the spouse whose economic situation has suffered more because of legal separation and divorce according to Art. 97 Spanish Civil Code are conceptually clearly different claims, which can be accumulated. Maintenance under Art. 97 Spanish Civil Code applies regardless of which matrimonial property regime is applicable, whereas the compensation claim for an excessive contribution to household expenses only applies if the matrimonial property regime is separation of property. Maintenance is granted based on the economic situation of the spouses at the time of the divorce, whereas compensation is based on the contributions made by the spouses during their marriage according to their common duty to contribute to household expenses.

Especially the lower Courts do however often confuse maintenance and compensation claims in practice. There are even decisions by the Supreme Court which show confusion and apply the rules governing maintenance to the compensation claim and vice versa.³⁷

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

The division of matrimonial property does not affect pension rights and claims. They are considered to be personal rights and neither current legislation nor case law provides that they should be shared or divided after the dissolution of the matrimonial property regime.

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

The spouses can set the general rules aside. They can reach an agreement on their contribution to household expenses and also on the compensation which is due to the spouse who has contributed in excess either to what was agreed on or, lacking such agreement, to what was proportionate to each spouse’s resources. The division of joint assets can also take place contractually.

If the ground for the dissolution of the matrimonial property regime is divorce, legal separation or an annulment and the petition is based on the mutual consent of the spouses, agreements on the division of the matrimonial property regime must be included in the proposal concerning the regulation of accessory matters which the spouses have to attach to the claim (Art. 90 E Spanish Civil Code). The agreements contained in such a proposal on the property relationship between the spouses will be approved by the Judge unless if they are harmful to the children or gravely detrimental to the interests of one of the spouses.

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

No.

D. MARITAL AGREEMENTS

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

Yes. Art. 1325 and 1326 Spanish Civil Code allow future spouses to enter into an agreement regulating their property relationship in the so-called “capitulaciones matrimoniales”. These

³⁷ STS of 11.02.2005 (RAJ 2005/1407).

agreements are conditional on the marriage actually taking place within one year (Art. 1334 Spanish Civil Code).

The main purpose of such agreements is to determine the matrimonial property regime either by opting for one of the legal systems available and departing from the default system and/or by modifying certain provisions within a given matrimonial property regime or even by making conventional rules regarding the property relationship applicable to their marriage. These kinds of agreements can also refer to aspects outside the matrimonial property regime such as, for example, gifts on the occasion of the marriage, the succession of the spouses, the recognition of a child born out of wedlock, the consequences of a future break-up etc.

If the marital agreement is valid both from a substantive and a formal point of view it is binding both on the parties, who can however substitute it for another agreement during the marriage, and on third parties. The latter effect requires publicity.

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?

Yes. Post-nuptial agreements on the property relationship between spouses are permitted at any time during the marriage without any time limitations. The spouses can either establish a matrimonial property regime to substitute the default system or modify or change previous agreements (Art. 1325 and 1326 Spanish Civil Code)

In practice post-nuptial agreements very often take place in order to change from the default community system into a separation of property. It is therefore only consequential that the Civil Code contains a rule establishing that a change in the matrimonial property regime is not binding on third parties regarding rights they acquired prior to the change of matrimonial property regime (Art. 1317 Spanish Civil Code). A creditor having rights which were acquired prior to the post-nuptial agreement will therefore be able to recover according to the matrimonial property regime which existed at the moment when the debt was incurred, without having to challenge the post-nuptial agreement. Art. 1317 Spanish Civil Code is an exception to the general rule according to which post-nuptial agreements become binding on third parties from the moment of their publication.

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

Marital agreements on the property relationship between spouses have to be made in the form of a notarial deed (Art. 1327 and 1280 Spanish Civil Code), regardless of whether they are pre-nuptial or post-nuptial. This formal requirement is a validity or a *solemnitatem* requirement that has been established with the purpose of protecting third parties. A marital agreement which is not contained in a notarial deed is null and void. It is neither binding between the parties nor *vis-à-vis* third parties.

If an agreement modifies a previous agreement, it is moreover necessary to attach a note to the previous notarial deed indicating that the agreement has been modified (Art. 1332 Spanish Civil Code).

194. What formal requirements must the pre- and/or post-nuptial agreement fulfil to be valid in relation to a third party? Is there a system of registration of pre- and/or post-nuptial agreements? If so describe briefly the system and its effect.

The first formal requirement is that the agreement is contained in a notarial deed. Otherwise it is null and void between the spouses or spouses to be and *vis-à-vis* third parties.

Additionally, agreements only become enforceable in relation to a *bona fide* third party if they are recorded in the Civil Register (Register of Births, Marriages and Deaths) according to Art. 1333 Spanish Civil Code. Such effect only takes place from the date of registration and does not affect rights acquired by the third party on a prior date.

Art. 1333 also establishes that if the agreement concerns immovables it must be recorded in the Property Register. If one or both spouses qualify as a merchant the agreement will as well be recorded in the Commercial Register (Art. 11 and 12 Commercial Code).

The Civil Register will contain a note as to the existence of a marital agreement on the property relationship between the spouses together with an indication of the matrimonial property regime in force between them as well as a reference to the notarial document in which the agreement is contained (Art. 266 para. 4 Reglamento del Registro Civil). It does not reproduce the exact content of the agreement. If a third party is interested in discovering more about the matrimonial agreement this party will have to request a copy from the notary public who authorized the deed containing the agreement. In order to be able to receive such a copy the third party will have to show a legitimate interest in obtaining such information by proving that he or she has an economic right in respect of one of the spouses (Art. 266.9 Reglamento del Registro Civil). Since the matrimonial agreement can contain private information the notary public will often not disclose the full content of the marital agreement but only provide a partial copy.

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?

According to the rules regulating notaries (art 147 Reglamento Notarial) the notary has to inform the parties of the meaning and scope of the proposed agreement. A failure to do so may entail that the notary is sanctioned (Art. 346 Reglamento Notarial), but does not affect the agreement as such.

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

Research undertaken in 2003³⁸ shows that marital agreements have increased enormously (by 981.4% between 1921 and 2001). The increase has been particularly important since 1975. It means that 30.8 % of marriages were subject to a marital agreement in 2001. According to the authors of this research most of these agreements were made in order to establish separation of property as their matrimonial property regime.

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?

They can opt for one of the legal regimes, modify such a regime and create their own regime.

³⁸ A. Lamarca i Marquès *et al.*, "Separación de bienes y autonomía privada familiar en Cataluña: ¿Un modelo pacífico sujeto a cambio?", Working Paper de Dret Català No. 7 Barcelona, October 2003, www.indret.com.

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;

According to Art. 1355 Spanish Civil Code spouses can expressly or tacitly agree that a certain asset acquired after the constitution of the community property regime is a community asset, even if it would not qualify as such under the legal rules in force. Although the provision does not expressly establish that the spouses can agree to qualify a certain asset as belonging to the personal assets of only one of them, even although it was acquired with common resources the Direccion General de Notariado (a governing body for notaries and registrars) decided in a Resolution of 25 December 1990³⁹ to accept this possibility. This viewpoint has also been endorsed by the Supreme Court in its decision of 19 December 1997.⁴⁰

b. administration of assets

Yes. This is explicitly recognised in Art. 1375 Spanish Civil Code as regards the default matrimonial property regime. There is a dispute, however, as to whether or not an agreement conferring the administration of community assets on only one spouse is compatible with Art. 1328 Spanish Civil Code, a provision establishing that agreements in violation of the principle of equality between the sexes are void. There is no conclusive authority on this issue but the majority opinion seems to uphold such agreements.

c. distribution of assets;

Agreements on the distribution of assets are admissible (Art. 1315 and 1325 Spanish Civil Code).

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

Agreements which apply in the case of a divorce, legal separation or an annulment are admissible (Art. 1315 and 1325 Spanish Civil Code).

200. Are there typical contractual clauses used in practice to modify essential elements of the matrimonial property regime, where applicable, or to achieve a certain result, e.g. that certain rights are excluded only upon divorce but not on death of a spouse?

No.

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

Art. 1328 Spanish Civil Code establishes that agreements contrary to the law, good morals or which restrict equal rights between the spouses are void. This means that the competent authority can set aside agreements in cases in which consent was vitiated because one spouse abused his or her superior position. Unfairness or the fact that an agreement is detrimental to one of the spouses does not provide a sufficient ground to annul an agreement.

³⁹ RAJ 1990/7153.

⁴⁰ RAJ 1887/9110.