

NATIONAL REPORT: SWEDEN

Prof. Maarit Jänterä-Jareborg, Margareta Brattström and Kajsa Walleng
Uppsala University
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		
C.1. General issues	Questions 15-19	p.
C.2. Specific regimes		
<i>I. Community of property</i>	Questions 20-56	Not relevant
<i>II. Community of accrued gains/Participation in acquisitions</i>	Questions 57-90	Not relevant
<i>III. Deferred community</i>	Questions 91-128	p.
<i>IV. Separation of property</i>	Questions 129-160	Not relevant
<i>V. Separation of property with distribution by the competent authority</i>	Questions 161-190	Not relevant
D. Marital agreements	Questions 191-201	p.

NATIONAL REPORT: SWEDEN

Prof. Maarit Jänterä-Jareborg, Margareta Brattström and Kajsa Walleng
Uppsala University
October 2008

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.

a. Upon marriage

Yes. Automatically, upon conclusion of a marriage, special rules concerning the property relationship between spouses become applicable. These rules are found in Ch. 7 of the Swedish Marriage Code (in Swedish: *Äktenskapsbalken*), entitled "The property of spouses". The rules are an expression of a deferred community property regime (in Swedish: *giftorättssystem*). When marriage is entered into, each spouse's property shall, under the main rule, become so-called *marital property* (in Swedish: *giftorättsgods*) forming a part of the deferred community property regime, Ch. 7 § 1.¹ Under this system, each spouse continues to alone own all of his or her property throughout the marriage and to administer it alone, regardless of the type of property or the time and manner of acquisition. All debts remain a spouse's own debts. On the other hand, the system gives each spouse a special claim called "right in deferred community property" (in Swedish: "*giftorättsanspråk*"), to the other spouse's marital property. In principle, this right implies a right to half of the value of both spouses' marital property, after deduction for debts, when the regime is dissolved. The value of the marital property shall, in other words, be shared equally between the spouses upon dissolution of the matrimonial property regime. But until that day each of the spouses continues to own and control his or her property and to be alone responsible for all debts incurred by him or her.

At present (2008), the concept of spouses is in Swedish law limited to a man and a woman who have entered into marriage with one another, Ch. 1 § 1 Swedish Marriage Code. Nevertheless, with few exceptions, the rules applicable to spouses apply also to same-sex couples who have registered a partnership, Registered Partnership Act (1994:1117) Ch. 3 § 1. A Bill, suggesting a gender-neutral concept of marriage, is expected to be put forth by the Government in December 2008. If Parliament (as is expected) approves of this Bill, same-sex marriages will be permitted in Sweden during the course of 2009.

b. During marriage

The rules concerning the property of spouses that become applicable upon marriage continue to apply during marriage. During marriage each spouse owns alone all his or her property, which he or she also administers alone. During marriage each spouse is also alone responsible for his or her debts, see the answer above to Question 1(a).

c. Upon separation

¹ Exempted from this regime is the spouses' so-called separate property (in Swedish: *enskild egendom*). The grounds upon which property becomes the owner spouse's separate property are explained under Question 91 and Question 94. In Sweden, existence of separate property remains relatively uncommon.

No. Legal separation was abolished in Swedish law through the 1973 reform of the previous Swedish Marriage Code (in Swedish: *Giftermålsbalken*) and has, as a result, not existed in Swedish law since 1974. If the spouses separate, the rules in Ch. 7 of the Marriage Code concerning the spouses' property relations continue to apply, since the marriage is legally still existing. This applies also during the so-called reconsideration period which in certain cases in Swedish law must precede a divorce.² The spouses are, namely, still married during this reconsideration period, with the result that no special rules apply concerning their property relationship during this period of time. A division of property can, however, if one of the spouses requests it, take place immediately from the day when proceedings for divorce were commenced, independent of an eventual reconsideration period or not, , Ch. 9 § 4 Swedish Marriage Code.

d. Upon death

Yes, special rules are found in the Swedish Code of Inheritance (in Swedish: *Ärvdabalken* (1958:637)), in Ch. 3 entitled "The inheritance rights of a spouse, the rights of heirs of the first deceased spouse in the property left by the subsequently deceased spouse". In addition to these rules, the rules of the Swedish Marriage Code concerning division of property may need to be taken into account.

When the marriage is dissolved by the death of either spouse, the starting point is that the whole estate of the deceased spouse goes to the surviving spouse, Inheritance Code Ch. 3 § 1. This applies irrespective of whether the spouses' property is marital property or separate property.³ No property division needs therefore to take place. If, however, the first deceased spouse leaves children who are not the spouses' joint children or if the deceased spouse has left a will, the surviving spouse is not entitled to the whole estate. Instead, a property division shall be carried out in accordance with the Marriage Code to materialize the rights of the surviving spouse and the direct heirs (= the deceased spouse's children) and residuary testamentary beneficiaries of the deceased spouse, Ch. 9 § 5 Swedish Marriage Code.

It should also be mentioned that Ch. 3 § 1 para. 2 Swedish Code of Inheritance, safeguards a certain fixed minimum protection for the surviving spouse from the estate of the deceased spouse, irrespective of any children or testamentary dispositions of the deceased spouse. This so called basic amount rule (in Swedish: *basbeloppsregeln*) is, however, of very limited financial value (in 2008, approximately 16 000 Euros). Furthermore, it is available only to the extent that the amount received by the surviving spouse does not come up to this level in the property division following the death of the first deceased spouse, regard being given also to the surviving spouse's separate property.

The Swedish Marriage Code also contains special provisions concerning various rights to which the surviving spouse alone is entitled in a property division which takes place after the first deceased spouse.⁴ Where adequate, these detailed and technical provisions will be touched upon in the answers to the subsequent questions.

e. Upon divorce

As a rule, yes. When marriage is entered into, each spouse's property becomes, under the main rule, so called marital property belonging to the deferred community property regime,

² M. Jänträ-Jareborg, "Swedish National Report", answers to Question 14, Question 18 and Question 23, in: K. Boele-Woelki, B. Braat, I. Sumner (eds.), *European Family Law in Action*, Volume I: Grounds for Divorce, Intersentia 2003.

³ It follows that the classification of the spouses' property becomes of relevance only later on, in a property division following the death of the surviving spouse.

⁴ See, e.g., Ch. 10 § 2-3 and 5, Ch. 11 § 8 para. 3 and § 9 para. 2 Swedish Marriage Code. See M. Brattström and A. Singer, *Rätt arv*, 2nd edition, Iustus Förlag 2007, pp. 62 ff.

Ch. 7 § 1 Swedish Marriage Code. A divorce leads to a dissolution of the deferred community property regime and a property division needs to be performed, according to special provisions in the Swedish Marriage Code. Excepted are cases where the deferred community property regime does not apply, but only on condition that neither of the spouses requests the right to take over the joint dwelling or household goods from the other spouse, Ch. 9 § 1 Swedish Marriage Code.

f. Upon annulment

No. Marriage annulment was abolished through the 1973 reform of the previous Swedish Marriage Code (*Giftermålsbalken*) and has not existed in Swedish law since 1974. A marriage can only be dissolved by the death of either spouse or by divorce, even if it is concluded contrary to an absolute impediment to marriage.

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

The first written provisions in Swedish law date back to the 13th century. In these laws, as well as in the laws of the following centuries, different rules applied for countryside and for town.⁵ According to rural law, the husband's share of marital property was 2/3 and the wife's 1/3; all under the administration of the husband. Inherited land and land owned by a spouse before marriage was, however, considered as the owner's separate property. According to town law, all property was regarded as marital property belonging to the spouses with equal halves.⁶ Marital property was in both systems jointly owned property but administered by the husband. These principles and differences were maintained in the Marriage Book of the 1734 codification of the law of Sweden (in Swedish: *1734 års lag*). In 1845 a regulation was enacted introducing for the whole country equal spousal shares regarding marital property.⁷ As co-owner to property each spouse was economically safeguarded at the end of the marriage, receiving half the balance of marital property. With very few exceptions marriages were at the time dissolved by the death of a spouse.

The present Swedish legislation concerning the property relationship between spouses can be traced back to a Nordic family law co-operation in the early 1900's. Although not all solutions were identical from the beginning and differences have increased in the past decades, both through new legislation and case law, this Nordic legal co-operation resulted in a basically similar Nordic model on spousal property rights, which basically still is applicable in the five concerned countries (Sweden, Denmark, Finland, Iceland, Norway). In Sweden, the new rules were inserted into the 1920 Marriage Code (*Giftermålsbalken*) which came into force in 1921. Contrary to previous law, the qualification of property as marital property no longer meant joint ownership of property. Instead, in the new system (in Swedish: *giftorättssystem*) each spouse continued to own his or her property throughout the marriage, regardless of the time and manner of acquisition, but the spouses got a future claim to equally share each other's marital property in a future property division. The reform did away with the prerogatives of the husband and placed both spouses on an equal footing as regards rights and liabilities. Important, ideologically was that this reform gave the wife, who normally was the housekeeper/homemaker, a claim to share the husband's eventual wealth through her right to marital property (in Swedish: *giftorätt*). These basic principles have survived, and were transferred into the new Swedish Marriage Code (in Swedish: *Äktenskapsbalken*) enacted in

⁵ The oldest provincial laws were written down in the 13th century, but it was first in the middle of the 14th century that a common "Provincial Law" and a common "Town Act" were introduced, applicable in the whole realm of Sweden. See G. Inger, *Svensk rättshistoria*, 2nd edition, Liber Förlag, 1983, p. 16.

⁶ G. Inger, *Svensk rättshistoria*, 2nd edition, Liber Förlag, 1983, p. 24.

⁷ A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, p. 90.

1987 and in force since 1988. Simultaneously with the enactment of the new Marriage Code, the provisions of the Swedish Inheritance Code (in Swedish: *Ärvdabalken*) regarding the rights of the surviving spouse were revised. Since 1988, the surviving spouse inherits the deceased spouse before the spouses' joint children.⁸

The law reforms carried out during the last two decades can be described as marginal or limited corrections to the main rule of equal division of the Swedish deferred community property system. The most recent revision is from 2007, in force since 1 July 2007. Through this reform, a spouse was given the right to withdraw from the property division between the spouses property which that spouse has received as compensation for personal injury and violation, Ch. 10 § 2a Swedish Marriage Code.⁹ This reform aimed at primarily at protecting an abused and violated wife by letting her exempt from the property division the compensation she had received by court order from her violent and abusive husband! In addition, a special rule was enacted to protect the interests of a spouse in the property division between the spouses as regards the impact of debts of the other spouse, resulting from that spouse's criminal actions, Ch. 11 § 4a Swedish Marriage Code.

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

No initiatives have been taken by the Swedish Government to further reform the current law concerning the property relationship between spouses. Generally speaking, the law can be claimed to be well established and approved by the public. There are, nevertheless, two issues which are debated in particular in the legal literature claiming that Swedish law should be reformed. The first issue is of fundamental importance since it puts into question the scope of the deferred community property regime under Swedish law. It is asked whether the ideology of the early 1900's justifying the inclusion of all property, irrespective of when and how it has been acquired, can still be justified in a society where almost all women are gainfully active and where the legal equality and independence of spouses is emphasized in all areas of law. Also, in Sweden most spouses today have such economical wealth that earlier was reserved to the wealthier classes of society (houses, cars, capital). Today, spouses also often have children from previous relationships. It is estimated that approximately half of the marriages that are now celebrated in Sweden will be terminated by divorce. Should not property which the spouses bring into the marriage be excluded, as well as property which a spouse inherits or receives through a gift or will? The second debated issue relates to the contractual freedom of the parties in form of a marital property contract. With reference to the high divorce rates in Sweden, there are demands to reform the law so as to make it possible for spouses to agree that the deferred community property regime shall apply if the marriage is dissolved through the death of a spouse but not if the marriage is dissolved through divorce; in the latter case the property should in whole or in part be separate property and not be included in property division. In both cases, it has been suggested that there should be more scope for adjustment of the property division.

In this connection can also be mentioned that, under auspices of the Ministers of Justice in the Nordic States (cooperating in connection with the Nordic Council), an academic group, consisting of leading Scandinavian professors of family law, conducted in early 2000's comprehensive comparative preparatory studies on the possibilities of harmonizing the rules on, e.g. marital property relations and inheritance. To date (2008), it is not on the political agenda to carry out or to further investigate the group's proposals.

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

⁸ See more in: M. Brattström and A. Singer, *Rätt Arv*, 2nd edition, Iustus Förlag AB, 2007, pp. 22-24.

⁹ See also answer to Question 95.

Yes. The rules regarding the property relationship between spouses are fully applicable to registered partnerships according to the Registered Partnership Act (1994:1117), Ch. 3 §. Note that in Sweden partnership registration is only available for same-sex couples.¹⁰

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?

General principles on the law of obligations are also applicable to spouses. As a result, spouses can enter into legal transactions with each other or, e.g., acquire property jointly and become joint owners. In Swedish case law, a principle of "caveat" ("hidden") joint ownership of property has developed in respect of property to which only one of the spouses holds title but which has been acquired for the spouses' joint use, on condition that the spouses can be deemed to have aimed that the property was to be owned jointly by them and that the other spouse also has made some financial contribution to the acquisition.¹¹

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

If the marriage is dissolved by the death of a spouse, the rules of both the Swedish Marriage Code regarding the marital property relations of spouses and the Swedish Inheritance Code regarding the rights of the surviving spouse need to be taken into account. The starting point is that the whole estate of the deceased spouse goes to the surviving spouse as a right of inheritance, Ch. 3 § 1 Swedish Inheritance Code. This applies irrespective of the property regime applied during the spouses' marriage and irrespective of stipulations affecting the property's qualification (as marital property or separate property) in the marriage.¹² The inheritance right of the spouses' joint children after the first deceased spouse will be materialized only after the death of the surviving spouse. If, however, the first deceased spouse leaves children who are not the spouses' joint children or if the first deceased spouse has left a will favouring someone else than the surviving spouse, then the surviving spouse is not entitled to the whole estate. Instead, a property division shall then be performed by the surviving spouse and the heirs and residuary testamentary beneficiaries of the deceased spouse, Ch. 9 § 5 Swedish Marriage Code.

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

Yes. The Swedish Marriage Code contains certain general rules on inter-spousal rights and duties that remain distinct from the marital property relations of the spouses. Hence, according to Ch. 1 § 2 Swedish Marriage Code, the spouses shall show faithfulness and consideration for one another. They shall jointly take care of their home and children and in consultation promote the best interests of the family. Furthermore, spouses shall "share expenditure and practical responsibilities with one another". Furthermore, "they shall supply each other with the information needed to enable the financial circumstances of the family to be assessed", Ch. 1 § 4 Swedish Marriage Code. The breach of these rules is not legally sanctioned. Instead, they can be qualified as "moral" guidelines for the spouses, aiming to

¹⁰ Partnership registration is the Swedish alternative for same-sex couples who in the Swedish system to date (2008) cannot enter into marriage.

¹¹ See further Question 96. According to Swedish case law, the same principle applies also in relation to cohabitation in a marriage-like relationship.

¹² It follows that the applicable marital property regime and the qualification of the spouses' property as marital property or separate property becomes of relevance only later on, in a property distribution following the death of the surviving spouse.

make it clear that both spouses are expected to contribute to the well-being and maintenance of the family.

During marriage both spouses shall, each according to his or her ability, contribute to the maintenance needed to meet the spouses' joint and personal needs, Ch. 6 § 1 Swedish Marriage Code. Swedish law is built upon the notion that spouses share the same standard of living.¹³ If a spouse is not able to meet the costs of his or her personal needs or to fulfill the payments which that spouse otherwise attends to for the maintenance of the family, the other spouse has a duty to contribute with the necessary money, Ch. 6 § 2 Swedish Marriage Code. These duties, which are legally sanctioned, are independent of the spouses' matrimonial property regime, but form still a part of the "financial relations of spouses".

B. GENERAL RIGHTS AND DUTIES OF SPOUSES CONCERNING HOUSEHOLD EXPENSES, TRANSACTIONS IN RESPECT TO THE MATRIMONIAL HOME AND OTHER MATTERS IRRESPECTIVE OF THE SINGEL MATRIMONIAL PROPERTY REGIME

8. What, if any, are the obligations of spouses to contribute to the costs and expenses of the family household? In answering this question, briefly explain what your system understands by "costs and expenses of the family household".

According to the Ch. 6 § 1 Swedish Marriage Code "spouses shall, each according to his or her ability, contribute to the maintenance needed to meet their joint and personal needs". If a spouse is not able to meet the costs of his or her personal needs or to fulfill the payments which that spouse otherwise attends to for the maintenance of the family, the other spouse has a duty to contribute with the necessary money, Ch. 6 § 2 Swedish Marriage Code. These provisions can be seen as a specification of the general rules in Ch. 1, see above Question 7, in particular as regards the spouses' duty to share expenditure with each other. Maintenance for children is regulated separately in the Swedish Children and Parents Code (in Swedish: *Föräldrabalken*). This regulation emphasizes the parents' joint responsibility, but with regard to each parent's ability to share the costs.¹⁴

Swedish legislation refers to the spouses' joint and personal needs, instead of "costs and expenses of the family household". Joint needs consist of expenses for food, housing, and other ordinary expenses. Expenses for personal needs include clothing and other special individual needs of a spouse.

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

Spouses are considered to be two separate individuals as regards ownership of property and liability for debts. It follows that each spouse is liable for debts made by him or her, Ch. 1 § 3 Swedish Marriage Code. There are no special rules regarding liability for household debts. Also the above-cited provision in Ch. 6 § 2 Swedish Marriage Code (Question 7 and Question 8) obliging a spouse to contribute to joint and personal expenses when the other spouse is not able to meet his or her share of these expenses refers only to the inter-spousal relation. It can not be invoked by a creditor to the debtor spouse, even if the debt results of paying for household expenses. Joint responsibility for debts arises only when both spouses have jointly become indebted.

Before the 1987 reform of the Swedish Marriage Code, the law contained rules on the spouses' powers of attorney regarding legal acts on behalf of the joint household. A spouse could,

¹³ This is explicitly stated in the *travaux préparatoires* to the 1920 Marriage Code, *Lagberedningen* 1918, p. 191.

¹⁴ See Ch. 7 § 1 Swedish Children and Parents Code.

accordingly, become liable for debts incurred by the other spouse for such purpose. These rules were, however, not transferred into the 1987 Marriage Code for reasons such as their limited practical importance and the need to protect each spouse against claims from the other spouse's creditors.¹⁵

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".

During marriage each spouse owns alone all his or her property, irrespective of whether the property is marital property or separate property. According to the main rule, the owner spouse is also free to dispose of his or her property. This free right of disposition does not, however, apply to the matrimonial home to which the Swedish Marriage Code refers as "the joint dwelling of the spouses". Joint dwelling of the spouses is defined in Ch. 7 § 4 of the Marriage Code as real property or a building or part of a building owned or leased by one of the spouses or held by a spouse as tenant owner or on the right of tenancy, in all cases on condition that the property is intended as the joint home of the spouses and that it is mainly held for this purpose. In practice, it is normally easy to decide whether the criteria of a joint dwelling are fulfilled or not; property used mainly for recreational purposes is not included.¹⁶ The definition or label of property as the spouses' joint dwelling does not require or presume that the spouses own the property jointly. It is also irrelevant whether the joint dwelling belongs to the deferred community property or is the owner spouse's separate property.

The owner spouse is subject to the following restrictions as regards disposal of the spouses' joint dwelling. The owner spouse may not without the consent of the other spouse dispose of the joint dwelling by alienation, pledging as security, mortgaging, letting or granting in any other way the use of real property constituting the spouses' joint dwelling, Ch. 7 § 5 Swedish Marriage Code. If a spouse refuses to give his or her consent to the other spouse's disposal over the joint dwelling owned by that spouse, the court can, upon application by the owner, permit the action, Ch. 7 § 8 Swedish Marriage Code. Nevertheless, no such consent or permission is required if the joint dwelling is the owner spouse's separate property due to a stipulation by a third party who has given the spouse that property on the condition that it shall be the recipient's separate property, Ch. 7 § 5 para. 2 Swedish Marriage Code.

If a spouse has disposed of the joint dwelling without the required consent or permission, the other spouse may initiate legal proceedings to have the transaction declared void by court and to have the title or use of the property restored, Ch. 7 § 9 para. 1 Swedish Marriage Code. Such proceedings must be commenced in court within three months of the other spouse learning of the disposition of the property. If registration of title has been granted with respect to the transfer of real property or an indefinite period lease, proceedings may, however, not be commenced, Ch. 7 § 9 para. 2 Swedish Marriage Code.

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

Also in respect of joint household goods the owner spouse's right of disposal is subject to restrictions, Ch. 7 §§ 4-5 Swedish Marriage Code, meaning that also in this respect there are specific rules. The law defines "the joint household goods of spouses" as referring to furniture, domestic appliances and other corporeal chattels for indoor use intended for the

¹⁵ See *Governmental Bill Prop. 1986/87:1* (Äktenskapsbalk m.m.), pp. 122-123.

¹⁶ A home that is mainly used for recreational purposes is not included in what is defined as the joint dwelling, Ch. 7 § 4 para. 3 Swedish Marriage Code.

joint home, Ch. 7 § 4 para. 2 Swedish Marriage Code. Household goods exclusively for the use of one spouse are not to be seen as joint household goods, Ch. 7 § 4 para. 2 Swedish Marriage Code. Household goods used mainly for recreational purposes are not either included, Ch. 7 § 4 para. 3.

The definition or label as “joint household goods” does not presume that the spouses own the property jointly. It is also irrelevant whether the goods in question belong to the deferred community property or are the owner spouse’s separate property. Instead, the property must be intended and also used by both spouses in their joint home. The owner spouse may not without the consent of the other spouse command over the household goods in form of alienation or pledging as security, Ch. 7 § 5 para. 1 Swedish Marriage Code. If a spouse refuses to give his or her consent to the owner spouse, the court may upon application by the owner spouse permit the action, Ch. 7 § 8 Swedish Marriage Code. Nevertheless, no such consent or permission is required if the household goods are the owner spouse’s separate property due to a stipulation by a third party who has given the spouse that property on the condition that it shall be the recipient’s separate property, Ch. 7 § 5 para. 2 Swedish Marriage Code.

If the owner spouse has disposed of joint household goods without the necessary consent or permission, the other spouse can initiate legal proceedings to have the transaction declared void and title or use restored, Ch. 7 § 9 para. 1 Swedish Marriage Code. Proceedings must be commenced in the court within three months from the time the spouse learnt of the delivery of the household goods, Ch. 7 § 9 para. 2 Swedish Marriage Code. The transfer or pledging as security of household goods shall not, however, be declared void if the new possessor gained possession of the property in good faith, Ch. 7 § 9 para. 1 Swedish Marriage 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...)?

In Swedish law, only the spouses’ joint dwelling and joint household goods are governed by specific rules irrespective of the matrimonial property regime (Question 10 and Question 11). These rules aim at protecting the joint dwelling and the joint household goods.

In this connection, one could even mention the provision in Ch. 7 § 5 Swedish Marriage Code which requires the other spouse’s consent for the owner spouse’s right to alienate, mortgage, let or in any other way grant the use of *real property* not consisting the spouses’ joint dwelling, but only on condition that the real property in question is marital property. Thus, the applicability of this provision is dependant on how the real property in question is qualified, i.e., whether it belongs to the deferred community property or not.

In Swedish law, spouses are regarded as two separate and independent individuals as regards ownership of property and liability for debts.

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

In Swedish law, general rules on agency are applicable even in situations where one spouse acts as an agent for the other spouse. There are, in other words, no specific rules concerning spouses.

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

In Swedish law, spouses are regarded as two separate and independent individuals as regards ownership of property and liability for debts. It follows of general principles of

Swedish law, even without an explicit mentioning in the Swedish Marriage Code, that spouses are free to make agreements with each other or effect unilateral legal acts, e.g., donate gifts to each other. There are, however, special rules for the protection of the spouses' creditors.

A gift between spouses becomes effective *between the spouses* if the general conditions for the completion of gifts have been observed (such as tradition in regard of movable property) or if the gift has been registered with the district court (in Swedish: *tingsrätt*), Ch. 8 § 1 para. 1 Swedish Marriage Code.¹⁷ The earlier requirement that a gift between spouses needed to be made in form of marital property contract to be legally valid was abolished through the 1987 reform of the Swedish Marriage Code. On the other hand, the Marriage Code states explicitly that an undertaking (promise) by one spouse to make a gift to the other spouse during the marriage has no legal effect, Ch. 8 § 2 Swedish Marriage Code. In this respect, the old law was kept in the 1987 law revision. Property that a spouse receives as a gift from the other spouse becomes the recipient spouse's marital property, unless the spouses, in form of a marital property contract, agree that it shall be the recipient spouse's separate property.

In relation to the *donor's creditors* the effectiveness of a gift between spouses is, as a rule, dependant on registration with the district court, Ch. 8 § 1 para. 2 Swedish Marriage Code.¹⁸ From the creditor's point of view, the following rules are of particular importance. If the spouse who has made a gift to the other spouse is unable to pay a debt for which the donor was responsible when the gift became effective in relation to the donor's creditors or if for any other reason the donor may be assumed to be insolvent, the other spouse shall be liable for the deficit up to the value of the gift, Ch. 8 § 3 para. 1 Swedish Marriage Code. A condition is, however, that the donor was insolvent already at that point of time or became insolvent because of the gift. Gifts between spouses may in addition be recovered under the Swedish Bankruptcy Act (1987:672) or under the Act on the Reconstruction of Enterprises (1996:764), see Ch. 8 § 3 para. 3 Swedish Marriage Code.

"Ordinary presents" between spouses, meaning gifts that are not in disproportion to the donor spouse's financial circumstances, are exempted from the requirement of registration also in relation to creditors. Such a gift is effective in relation to the donor spouse's creditors, if the gift is effective as between the spouses, Ch. 8 § 2 Swedish Marriage Code.

C. MATRIMONIAL PROPERTY REGIMES

C.1. General issues

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

Yes. According to Swedish Marriage Code spouses and prospective spouses may through a marital property agreement determine that certain property belonging or accruing to either one of them shall be that person's separate property instead of marital property (which is the main rule under Swedish law). By means of a new agreement, spouses may determine that

¹⁷ A registered gift shall be published by the court in the Official Swedish Gazette and in the local press, so that the creditors have an opportunity to consider that their interests are not set aside because of the gift, Ch. 16 § 3 para. 2 Swedish Marriage Code. See also A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, pp. 140-143.

¹⁸ A registered gift shall be published by the court in the Official Swedish Gazette and in the local press, so that the creditors have an opportunity to consider that their interests are not set aside because of the gift, Ch. 16 § 3 para. 2 Swedish Marriage Code. See also A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, pp. 140-143.

such property (i.e., property made separate through their previous marital property contract) is to be marital property. For more detailed information, see section D.

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 applicable regime under Swedish law is the so-called deferred community of property.

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

No. Swedish law lacks provisions on alternative matrimonial property regimes. However, by determining in their marital property agreement that both spouses' present and future property in whole shall be the owner spouse's separate property (as well as any income or gain of that property), the spouses can in effect introduce a full separation of property in their marriage.

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

a. Question 16.

Upon marriage, each spouse's property shall, under the main rule, become deferred community property, Ch. 7 § 1 Swedish Marriage Code, irrespective of when and how the property has been acquired. This applies also during the marriage. The spouses' property belonging to deferred community is called "marital property". This qualification of the property does not affect the right of the ownership; on the contrary each spouse owns all of his or her property all property and also manages it freely (with the exception of property constituting the spouses' joint dwelling and joint household goods). Equally, all debts remain exclusively the debtor spouse's debts. Upon dissolution of the marriage (or when the deferred community property regime for some other reason comes to an end), the debts of each spouse are met by property belonging to that spouse. The deferred community property regime gives each spouse the claim for an equal division of the value of the combined balance of the spouses' marital property, after deductions have been made to cover debts, Ch. 11 § 3 Swedish Marriage Code. This equal division rule is aimed at achieving an economic balance between the spouses.

b. Question 17.

As has been stated above, Swedish law does not contain provisions on any alternative property regime. Nevertheless, by determining in their marital property agreement that both spouses' present and future property in whole shall be the owner spouse's separate property (as well as any income or gain of that property), the spouses can in effect introduce a full separation of property in their marriage. Ch. 9 § 1 para. 1 Swedish Marriage Code. contains a special provision for this situation, stipulating that as a rule no property division needs to take place if the spouses only have separate property. If, however, a spouse requests the right to take over a dwelling or household goods belonging to the other spouse, a property division becomes necessary, according to this provision. The right to take over a joint dwelling or household goods owned by the other spouses is explained under Question 123. The restrictions of the Marriage Code regarding the owner spouse's right to dispose of a joint dwelling or joint household goods apply also when this property is the owner's separate property due to the spouses' marital property agreement, see above Questions 10 and 11.

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

The main rule in Swedish law is the deferred community property regime, which automatically becomes applicable upon marriage, Ch. 7 § 1 Swedish Marriage Code. The deferred community regime can, however, be set aside, entirely or in part, by spouses and prospective spouses through a marital property agreement. During the year of 2007, 47.898 couples married in Sweden. During the same year 10.464 marital property agreements were registered in Sweden.¹⁹ This number covers both marital property agreements aimed to become effective from the date of the marriage and marital property agreements made during the marriage. As regards the general content of these agreements, see below Question 197. It should be noticed in particular that these figures also include registered agreements entered during the marriage with the purpose of replacing an earlier marital property agreement which stipulated that property was to be separate, in whole or in part. It means that a marital property agreement can also be used to reintroduce the deferred community property regime into the spouses' marriage. For these reasons, it is not possible to indicate the frequency to which the deferred property regime is set aside, in whole or in part, or reintroduced. See also answer to Question 197.

III. Deferred community

III.1 Categories of assets

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

According to the main rule in Swedish law, all property of the spouses is included in the deferred community property regime and is called *marital property*, Ch. 7 § 1 Swedish Marriage Code. This means that, as a rule, both property that a spouse introduced into the marriage and property that a spouse has acquired during the marriage, irrespective of how the property was acquired (through that spouse's earnings, as a gift or inheritance, etc) are included.

As described above (Question 18), marriage does not affect the ownership to property. Each spouse continues to be the sole owner to the property that he or she introduced into the marriage. Each spouse owns exclusively also the property that he or she acquires during the marriage. A spouse manages freely all his or her property, with the exception of property that constitutes the spouses' joint dwelling or joint household goods. The debts of a spouse remain that spouse's own debts for which he or she alone is responsible. Characteristic for the Swedish deferred community property regime is that upon marriage each spouse gets a special claim called "right in deferred community property" (in Swedish: "*giftorättsanspråk*"), to the other spouse's marital property. In principle, this right implies a right to half of the value of both spouses' marital property, after deduction for debts, when the regime is dissolved. The value of the marital property shall, in other words, be shared equally between the spouses upon dissolution of the matrimonial property regime. But until that day each of the spouses continues to own and control his or her property alone.

The spouses may also have so-called *separate property* which is not included in the deferred community property regime and is excepted from any future property division. A spouse's property becomes his or her separate property due to stipulations in the spouses' marital property agreement²⁰, or due to stipulation by a third party, who has donated or bequeathed property to a spouse, upon condition that the property shall be the recipient's separate property, see Ch. 7 § 2 Swedish Marriage Code. As a rule all property replacing separate property is regarded as separate property of the owner.

¹⁹ Information from Statistics Sweden, for contact information see; www.scb.se.

²⁰ If the spouses so wish, they may still include property that is made separate in form of a marital property agreement in a property division.

Swedish law also knows the concept of *personal property* of a spouse. Unless such property is stipulated to be separate property, see below Question 94, it still belongs to the category of marital property although special rules may apply regarding its treatment in a property division between spouses. The concept of personal property is specified below, under Question 95.

92. What is the legal nature of the different categories of assets?

Marital property of a spouse is included in a property division, whereas separate property is not included.²¹ Personal property belongs, as a rule, to the category of marital property, but may still be exempted from property division. See answer to Question 91.

93. What assets are categorised as marital property?

According to the main rule in Swedish law, all property of the spouses is *marital property*, forming part of the deferred community property regime. This means that, as a rule, both property that a spouse introduced into the marriage and property that a spouse has acquired during the marriage, irrespective of how the property was acquired (through that spouse's earnings, as a gift or inheritance, etc) are included. As expressed by the law "A spouse's property is marital property in so far as it is not separate property", Ch. 7 § 1 Swedish Marriage Code. (See Question 94 as regards categorization of separate property).

94. What assets are categorised as separate property?

Spouses can themselves determine that property shall be separate by making a marital property agreement to that effect, Ch. 7 § 2 para. 1 Swedish Marriage Code. Property can also be separate because of a stipulation in a gift, from someone other than the spouse, that the donated property shall be the recipient's separate property, Ch. 7 § 2 para. 2 Swedish Marriage Code. Separate property is also property that a spouse has received by testamentary disposition on condition that it be the recipient's separate property, as well as property which a spouse has taken as heir and which under the will of the deceased is to be separate property of the recipient, Ch. 7 § 2 para. 3-4 Swedish Marriage Code. Finally property can be separate due to a stipulation to such effect in a beneficiary clause of a life or personal accident or permanent health insurance policy or a pension savings scheme, entered into by someone other than the other spouse, Ch. 7 § 2 para. 5 Swedish Marriage Code. As a rule, property replacing separate property is regarded as separate property of the owner, Ch. 7 § 2 para. 6 Swedish Marriage Code. On the other hand, any income deriving from separate property is marital property (unless otherwise provided in the spouses' marital property contract or in a gift or testamentary disposition by the third person from whom the separate property comes), Ch. 7 § 2 para. 2 Swedish Marriage Code. See also answer to Question 97.

95. What assets are categorised as personal property?

Swedish law knows the concept of *personal property* of a spouse but, still, it is a question of property that normally belongs to the category of marital property. Characteristic for this property is that special rules apply regarding its treatment in a property division between spouses. The personal property of the spouses is also called "property of special nature" and it consists of two types of property.

The first type is property of a personal nature such as clothes and other objects which a spouse holds for his or her exclusive personal use, as well as personal presents that a spouse has received. Each spouse has the right to withhold these assets from the property division

²¹ These rules are, however, dispositive and the spouses may with certain restrictions set them aside.

“to a reasonable extent”, Ch. 10 § 2 Swedish Marriage Code.²² The assessment of what is reasonable is to be made on the basis of the economical standard of the spouses.²³ To the category of property of a personal nature belongs also compensation to a spouse for personal injury and violation, suffered by him or her, as well as any income of such property, Ch. 10 § 2a Swedish Marriage Code.²⁴ Also this property may be withheld from the property division.²⁵

The second type of property of special nature includes rights that cannot be transferred, Ch. 10 § 3 para. 1 Swedish Marriage Code. Such rights shall not be included in the division of property if this would conflict with conditions or other restrictions applicable to the right. A right to a state pension, a right to receive maintenance and a hunting right may be given as some examples of rights which can neither be transferred nor should be included in a division of property. Another example is an author’s right to an as yet unpublished work.²⁶ Special rules exist furthermore in relation to life insurance and private pensions which may upon certain conditions be exempted from property division, see Ch. 10, § 3 para. 2-3 Swedish Marriage Code.²⁷ See further below, under Question 98.

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

Yes. To start with, it follows from the general rules of Swedish law, included in the Swedish Act on Joint Ownership (in Swedish: *Lag (1904:48 p. 1) om samägande*), that spouses, just as any other persons, can acquire assets jointly and become joint owners. The spouses may, e.g., have bought the property jointly in both spouses’ name or they may have received it jointly through a gift or a will. In these cases, the spouses’ joint acquisition and resulting joint ownership is expected to have taken place “openly”, and both spouses hold title to the property.

Swedish case law has, in addition, in a number of cases accepted that a caveat (“hidden”) joint ownership can arise between spouses²⁸ when the requirements of “open” joint ownership are not fulfilled. Although in these cases the property in question had been acquired only in the name of one spouse, the court concluded that at the time of acquisition the spouses must have intended that the property would be jointly owned. Such common intention has been considered to exist where it has been shown that the property was, actually, acquired for the joint use of the spouses and that the other spouse (the “hidden” joint owner) had made some financial contribution to the acquisition with the aim of becoming joint owner. It is furthermore required that the spouse who formally acquired title to the property, was aware of this purpose.²⁹ See the Swedish Supreme Court decisions of 1980, 1981 and 1982³⁰ which all have contributed to the development of the principles and requirements relating to the so-called caveat joint ownership between spouses.

²² If one spouse has died this right only applies to the surviving spouse.

²³ L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, Nordstedts Förlag AB, 1990, p. 293.

²⁴ Ch. 10 § 2a Swedish Marriage Code (in force since 01.07.2007) was enacted as a response to several much debated cases where compensation that a spouse had received from the other spouse due to domestic violence was included in the division of property, while the other spouse who had been obliged to pay this compensation had the right to cover his debts for this compensation before the division! See A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, pp. 108-110.

²⁵ If one spouse has died this right only applies to the surviving spouse

²⁶ This example is developed further by Å. Saldeen, “Family Law”, in: *Swedish Law A Survey*, Juristförlaget, 1994, pp. 366-367.

²⁷ In addition, Ch. 10 § 5 Swedish Marriage Code is of relevance.

²⁸ This case law includes cohabitation in marriage-like relationships. It is of relevance in particular in these kinds of relationships.

²⁹ Å. Saldeen, “Family Law”, in: *Swedish Law A Survey*, Juristförlaget, 1994, pp. 363-364.

³⁰ NJA 1980, p. 705, NJA 1981, p. 693 and NJA 1982, p. 589.

In most cases, the principle of caveat joint ownership has been applied to real estate property used as the spouses' joint dwelling.³¹ Case law confirms, however, that it can also arise in relation to co-operative flats (in Swedish: *bostadsrätt*) used as the joint dwelling and to movable property such as boats, cars, etc.³²

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

The Swedish Marriage Code is based on the general assumption that where property owned by a spouse is substituted by other property, the replacing property is subject to the same classification, i.e. marital property or separate property, that applied to the property that it substitutes. Two specific rules can, however, be identified. According to **Ch. 7 § 2 para. 1 No. 6** Swedish Marriage Code substitution for a spouse's separate property continues to be separate property, *unless* otherwise provided by the legal act on the basis of which the property is separate, i.e. the marital property agreement between the spouses, or through the conditions of a gift or a will by a third person. If, e.g., a person has sold an apartment which he had received as a gift from his parents on condition that it shall be his separate property and uses the purchase sum to buy a house when he marries, the house is classified as his separate property, unless the parents had stipulated otherwise for such an event. In other words, if the marital property agreement or the conditions in a gift or will contain a clear regulation about how the substitution is to be qualified, that is to be followed.

An interesting solution aimed to adjust the spouses' property relations to the "default regime" of deferred community property even in case of separate property follows of Ch. 7 § 2 para. 2 Swedish Marriage Code. According to this provision any income or profit deriving from a spouse's separate property is marital property, unless otherwise provided by a marital property agreement or through a stipulation in a gift or a will by a third person.³³

There is in other words, one presumption for substitution of separate property, and another one for income or profit of separate property. The principal rule is that substitution for separate property continues to be separate property, but that income and profit from separate property become marital property, Ch. 7 § 2. 1 p. 6 and § 2 para. 2 Swedish Marriage Code.

Swedish law does not distinguish between movables and immovables in this respect.

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

There are in Sweden three kinds of pensions: the state pension, the occupational pension, and the private pension based on individual savings. The state pension is governed by public law legislation. Occupational pensions are usually based on agreements between employers and employees or their organizations. Private pensions based on individual saving relate to personal saving schemes and may consist of pension insurance or individual pensions linked to savings. All three forms of pension usually constitute marital property and thus, according to the main rule, are to be included in the property division between the spouses. Nevertheless, recourse to a special rule on "property of special nature"³⁴ can result in several types on pension rights being exempted from the property division. See Ch. 10 § 3 para. 1 Swedish Marriage Code (see also Question 95 above).

³¹ A recent Supreme Court decision of 18.07.2008 confirms that also a real estate used only for recreational purposes can be included, on condition that all above-mentioned requirements for caveat joint ownership are fulfilled.

³² See Swedish Supreme Court decisions NJA 1992, p. 163 and NJA 2002, p. 3.

³³ A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, p. 99.

³⁴ See answer to Question 95.

A first condition for pension rights to be exempted, as being property of a special kind, is that they cannot be transferred. A further condition is that there exists some special reason that can justify the exemption of those rights from the division of property. The right to a state pension is always nontransferable, and the same is often true of the right to an occupational pension as well. The notion that pension rights should safeguard the entitled person's future ability to provide for his or her subsistence has been deemed as a special reason for exempting them from property division. There is no such prohibition on transference of private pension savings. Consequently, in case of divorce, private pension savings are, normally, included in the property division.

Nevertheless, when a marriage is dissolved through the death of a spouse, also the private pension savings of the surviving spouse are exempted from the property division, see Ch. 10 § 3 para. 2. Swedish Marriage Code If the pension savings plan or the insurance policy was held by the deceased spouse, special rules apply according to Ch. 4 § 6 Swedish Act (1993:931) on Individual Pension Savings, or Ch. 14 § 7 para. 1 Swedish Insurance Contracts Act (2005:104). Often the surviving spouse is the beneficiary.

In property division following divorce private pension savings as well as pension insurance rights may be exempted, in whole or in part, if it would be unreasonable to include them with regard to the spouses' financial conditions and the overall circumstances, Ch. 10 § 3 para. 3 Swedish Marriage Code

An insurance policy belongs to the spouse who has taken out the insurance and is treated as marital property. An insurance benefit taken upon a spouse's life or health will at that spouse's death go to the beneficiary of the insurance policy, totally independent of both how the spouses' property relations are regulated, Ch. 10 § 5 para. 1 Swedish Marriage Code and the rules on inheritance. See Ch. 14 § 7 Swedish Insurance Contracts Act (2005:104).

99. 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. In Swedish law, property belonging to a spouse can be that spouse's separate property because of a stipulation, in a gift or a will, by a third person that the donated or bequeathed property shall be the recipient's separate property, Ch. 7 § 2 para. 1 No. 2-4 Swedish Marriage Code. Property which is subject to such a condition may not be transformed into marital property by the recipient, by means of stipulation in a marital property agreement, unless otherwise provided in the juristic act on the basis of which the property is separate. Also property substituting separate property will become separate property, unless otherwise provided in the juristic act by the third person, Ch. 7 § 2 para. 1 No. 6 Swedish Marriage Code. On the other hand, any income or profit deriving from separate property is marital property, unless otherwise provided in the juristic act in question.

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

In Swedish law, spouses are regarded as two separate and independent individuals as regards ownership of property and liability for debts. The general principles of Swedish law on obligations and property are applied. The spouse who has brought the asset in his or her name will normally be regarded as the owner. Still, according to a statement in the *travaux préparatoires* to the 1921 Marriage Code, property belonging to the joint household is to be seen as jointly owned if both spouses have incomes and contribute to the expenses.³⁵ As has been pointed out in the answer to Question 96, also the rules on so-called caveat joint ownership, developed in case law, can result in joint ownership of the spouses, even if only

³⁵ *Governmental Bill* (Den nya giftermålsbalken) NJA II 1921, p. 89.

one spouse formally holds title and even if the property does not qualify as joint household goods. Normally, however, there is a presumption that other property than joint household goods belongs to the spouse who both paid for the property and uses it. This is confirmed in the Supreme Court decision of 1992,³⁶ where a boat that had been acquired during marriage-like cohabitation in one cohabitant's name only, was not considered to be owned jointly between the cohabiting couple since the boat had not been acquired for their joint use. The same would apply to spouses. This presumption can be overruled by evidence to the contrary.³⁷

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

Swedish law contains special rules concerning how ownership is presumed in relation to a spouse's creditor. In order to protect the creditor's recovery of debts made by a spouse it is presumed that chattels found in the spouses' common possession belong to the spouse who is subject to the distraint. If the other spouse wishes to prevent the distraint that spouse must be able to prove that, instead, he or she owns the property or prove that it is probable that the property is jointly owned by the spouses, Ch. 4 § 19 Swedish Enforcement Code (in Swedish: *Utsökningsbalken*, 1981:744). In the application of this presumption regard must also be had to other rules. A gift (other than ordinary presents) between the spouses can, e.g., not become effective in relation to the donor's creditors if the gift has not been registered with a court (see above Question 14).

The above-mentioned rule of presumption of ownership does not include real estate property. Instead, general principles apply concerning ownership to real estate property. According to Ch. 4 § 24 Swedish Enforcement Code, real estate property can only be distrained if it is clear that the property belongs to the debtor. In situations of debt recovery this means that distraint of the property can only be carried out if the debtor spouse has a title deed to the property.³⁸

102. Which debts are personal debts?

Any debt that a spouse has taken upon is the debtor spouse's personal debt in the sense that that spouse alone is liable, Ch. 1 § 3 Swedish Marriage Code. It does not make any difference if the debt refers to marital or separate property or so-called personal property or for what purpose or when it was taken upon by a spouse.³⁹

103. Can spouses have joint debts? If so, on what conditions?

Yes. In Swedish law spouses can, just as any other individuals, according to general principles of the law of obligations, take upon debts jointly, e.g., when they take a loan together. In that case, the spouses answer for the debt together and often with joint responsibility, unless otherwise stipulated in the contract, see Ch. 1 § 2 Swedish Bills and Exchange Act (1936:81, in Swedish: *Skuldebrevslagen*).

³⁶ NJA 1992, p. 163.

³⁷ This was confirmed in a recent Supreme Court decision of 18.07.2008 concerning caveat joint ownership to a real estate used by the spouses for recreational purposes.

³⁸ A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, p. 87. In case of caveat ownership between spouses, the creditor to the spouse whose ownership is "hidden" can claim distraint of that spouse's right in the real property in accordance with , Ch. 4 § 23 Swedish Enforcement Code. See Supreme Court decision NJA 1985, p. 615. See also A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, pp. 82-83.

³⁹ A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, p. 84.

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

In Swedish law, the creditor to a spouse may recover that spouse's debts from all property belonging to that spouse, irrespective of whether the property is marital property or separate property and irrespective of for what purpose the debt came about. It is also irrelevant whether the debt refers to the debtor spouse's marital property or to his or her separate property.

In cases of distraint (in Swedish: *utsökning*), the debtor enjoys a so-called *beneficium*, regulated in Ch. 5 § 2 Swedish Enforcement Code, and giving him or her the right to exempt certain property that is necessary for the debtor's and his or her family's subsistence.⁴⁰ From distraint are exempted, according to this provision, clothing, assets aimed solely for personal use, furniture and household goods necessary for a home, professional assets, a cooperative flat used as the debtor's main home and necessary means for maintenance during one month.

105. If there are joint debts, on which assets can the creditor recover them?

In Swedish law, a spouse is liable for any debt with all his or her property, see above Question 104. If the spouses are jointly responsible for a debt, e.g., because they have taken a joint loan, the creditor may turn to any one of the spouses for the recovery of the debt, or to them both, unless otherwise stipulated in the contract. If one of the spouses pays the whole debt, that spouse has a right to demand payment from the other spouse for that spouse's share of the debt, Ch. 1 § 2 Swedish Bills of Exchange Act (1936:81),

If the spouses do not answer for the joint debts with joint responsibility, the creditor can claim no more than one spouse's share of the debt, Ch. 1 § 1 Swedish Bills of Exchange Act (1936:81). The creditor can recover his or her claim from a spouse from all property belonging to that spouse, irrespective of the nature and categorization of the debtor spouse's property. See also answer to Question 104 concerning the debtor's right to exempt certain property from distraint.

III.2 Administration of assets

106. How are the different categories of assets administered?

Each spouse administers alone his or her property during marriage, no matter to what category the assets belong, Ch. 1 § 3 Swedish Marriage Code. The 1987 law revision abolished the earlier requirement according to which each spouse was under the obligation to take care of and preserve his or her marital property with the corresponding right for the other spouse to receive compensation in the property division if the owner spouse has neglected this duty. Still, the law provides for some protection against disloyal actions from the other spouse. Accordingly, Ch. 11 § 4 Swedish Marriage Code provides for compensation for a spouse in situations where the other spouse without the consent of the first-mentioned spouse has to a not insignificant extent reduced his or her marital property by making a gift or by increasing the value of his or her separate property. These actions of the other spouse must have taken place within a period of three years preceding the divorce. If this is the case, the protected spouse's share shall be calculated as if the value of the gift or the value of the marital property used were still included in the marital property of the other spouse. During the so-called critical time, i.e. the time between the commencing of divorce proceedings and the actual property division, both spouses are under the duty to account for his or her property and for

⁴⁰ See further, A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, pp. 88-89.

property that he or she has managed but which belongs to the other spouse, Ch. 9 § 3 Swedish Marriage Code.⁴¹

If the spouses own property jointly they are subject to the general principles of the law on obligations regarding administration of joint property, see Swedish Act (1904:48 p. 1) on Joint Ownership.

A spouse's right to dispose of property used as the joint dwelling of the spouses or as their joint household goods is subject to special rules, restricting the owner's rights of disposal in order to protect that special property. See above Question 10 and Question 11. See also the special rule concerning real estate property, touched upon in the answers to Question 12 and Question 108.

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

It follows of general contractual principles in Swedish law that a spouse owning property can mandate the other spouse to, e.g., administer the owner spouse's assets, in whole or in part. See Ch. 2 § 10 Swedish Act on Contracts (1915:218), which is interpreted to include administration of assets.

108. 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? Is the categorisation of the property as separate or as marital property of relevance in this respect?

In Swedish law, important acts that require the consent of the other spouse refer to the owner spouse's right to dispose of the spouses' joint dwelling and of their joint household goods, irrespective of whether this property is the owner spouse's marital property or separate property, see answers to Question 10 and Question 11. In addition to this, Swedish law requires the other spouse's consent for the owner spouse's right to alienate, mortgage, let or in any other way grant the use of real property *not* consisting the spouses' joint dwelling (see Question 10) but only on condition that the real property in question is marital property, Ch. 7 § 5 Swedish Marriage Code. Thus, the applicability of the last-mentioned restriction is dependant on the categorization of the property (see Question 12).

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

In Swedish law, no such special rules exist.

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

In Swedish law, there is a generally applicable rule (both during marriage and upon its dissolution) obliging the spouses to "supply each other with the information needed to enable the financial circumstances of the family to be assessed", Ch. 1 § 4 Swedish Marriage Code. It is seen as a matter of course that spouses shall show each other openness and trust and not hold back important information regarding economic issues such as administration of assets. This duty is of special relevance in case of divorce, in particular for the period between commencing the divorce proceedings and the period when the property division is carried out. See also the answer to Question 120.

111. How are conflicts between the spouses concerning the administration of assets resolved? Do they have access to a conflict resolution mechanism?

⁴¹ For further information, see answer to Question 120 below.

In Swedish law, a spouse who wishes to dispose of his or her property that is used as the spouses' joint dwelling or as joint household goods but without succeeding in receiving the other spouse's consent, may apply to court for the court to permit the action, Ch. 7 § 8 Swedish Marriage Code. Decisive for whether the court will permit or forbid the action is whether the other spouse has had a reasonable ground to refuse to give his or her consent to the owner spouse's disposition.⁴² In cases where property is owned jointly by the spouses, the Swedish Act on Joint Ownership (1904:48 p. 1) applies. In case of conflict, a spouse may apply to court for the court to appoint a special representative (in Swedish: *god man*) to administer the property in question during a certain period of time. Another option available under this Act is to apply to court to have the jointly owned property sold through public auction. If the jointly owned property is used as the spouses' joint dwelling or joint household goods, court permission for the measure in question can be granted both under the rules of Ch. 7 § 8 Swedish Marriage Code and under the Swedish Act on Joint Ownership; the Swedish Marriage Code takes, however, priority.

112. 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 has violated the rules requiring the other spouse's consent for a certain act, as described in the answer to Question 10 and Question 11, or acted without permission of court where the other spouse refused his or her required consent, the court shall upon application of the other spouse declare that the transaction is void and that title or use – where the violation consists of alienating of property or granting the use of property – is to be restored, Ch. 7 § 9 para. 1 Swedish Marriage Code. This applies also where a spouse, without the other spouse's necessary consent, has pledged the spouses' joint household goods as security, unless the new possessor gained possession of the household goods in good faith. Proceedings for declaring a transaction void must be commenced in court within three months of the other spouse learning of the disposition of property. In respect of household goods, this time limit is, however, calculated from the time the other spouse learned of their delivery. If registration of title has already been granted with respect to the transfer of real property or an indefinite period lease, proceedings may not be commenced, Ch. 7 § 9 para. 2 Swedish Marriage Code. In addition, Swedish law contains special provisions when divorce proceedings have been initiated, making it possible to place a spouse's property or part of it by court order and upon application of the other spouse under special administration, if it is necessary to do so in order to protect the other spouse's rights in relation to the division of property, Ch. 9 § 8 Swedish Marriage Code.

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

In Swedish law, this kind of situation is not regulated particularly in the Marriage Code but falls under the general rules contained in Ch. 11 § 4 and § 7 Swedish Children and Parents Code (in Swedish: *Föräldrabalken*, 1949:381). Of these rules follows that if a spouse – or any other adult – is incapable of administering his or her own property due to illness, physical disorder, weakened state of health or a similar situation, the court can order a special protective measure called *godmanskap* for the assistance of that spouse or, which is more far-reaching, place the spouse under special administrative supervision (in Swedish: *förvaltarskap*). In both cases, a personal representative is appointed for the spouse. The spouse must consent to the measure, unless consent cannot be fetched due to his or her state of health. In practice it is common that the other spouse is appointed by court for these functions, on condition that he or she is willing to accept such an appointment.

III.3 Distribution of property upon dissolution

⁴² *Governmental Bill, Prop. (Äktenskapsbalk m.m.) 1986/87:1*, pp. 138-139.

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

The grounds for dissolution of the matrimonial property regime in Swedish law consist of a) divorce, b) the death of a spouse, and c) agreement between spouses during a subsisting marriage, without a divorce case being in progress, to carry out a property division, Ch. 9 § 1 Swedish Marriage Code. The last-mentioned ground requires that the spouses first notify a district court of their agreement to distribute their property by means of division during the marriage. Such notification, which must be made in writing, shall be recorded by the court, Ch. 9 § 1 para. 1 Swedish Marriage Code. Interestingly, in the last-mentioned situation, once the property division has been carried out, the deferred community property regime is revived, i.e. it becomes applicable again in the spouses' marriage, unless the spouses set it aside through a matrimonial property agreement.

115. What date is decisive for the dissolution of the matrimonial property regime? Distinguish between the different grounds mentioned under Question 114.

The decisive date in case of divorce is the date when the proceedings for divorce were commenced. When the marriage is dissolved by the death of a spouse and a divorce case was not in progress at the time of the death, the day of the spouse's death is decisive. If divorce proceedings were pending at the time of the death, decisive is instead the date when the divorce proceedings were commenced. The decisive date for property division during marriage without a divorce case in progress is the day of notification to the court. See Ch. 9 § 2 Swedish Marriage Code. In all these situations, the decisive date is called the "critical time" (in Swedish: *kritiska tidpunkten*) meaning the point in time for determining which assets and liabilities should be into account on the dissolution of the property regime and division of property.

116. Upon dissolution of the matrimonial property regime which assets belong to the deferred community? How are those assets valued? Can, and if so on what conditions, any property belonging to the deferred community be withheld from the property division?

The property that belongs to the deferred community property is the property that belongs to the spouses at the so-called "critical time" (see Question 115 for definition) and that has not been made separate through the spouses' matrimonial property agreement or by stipulation of a third party.⁴³

The Swedish Marriage Code does not contain any specific rules on how to value the included assets. Certain principles have, however, been developed through legal practice and case law. When assessing the value of the property its notional sale value, i.e., market value, is normally used. Even other grounds for setting a value on the assets may be employed, such as the value of the use of an object (in Swedish: *bruksvärde*), in particular in the case of household goods which both spouses need. Using the value of the use is in this case regarded to be more fair, since the value of the use on household goods is often higher than their normal second-hand market value. Also a deferred tax liability as well as costs for selling the property shall be taken into consideration at the valuation of property such as real property, co-operative flats, stocks and private pension schemes.⁴⁴ For example, according to the Supreme Court decision of 1975,⁴⁵ when assessing the value of real estate property, also the

⁴³ For the various grounds on which property can be made separate in Swedish law, see answer to Question 94.

⁴⁴ A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, p. 173.

⁴⁵ NJA 1975, p. 288.

tax which a spouse to whom the real property is allocated in the property division will be liable to pay when eventually selling the property as well as the costs for selling the property are to be taken into account.

Property may be withheld from the property division even though the property as such belongs to the deferred community if it is so-called personal property, or what in Swedish law also is called "property of special nature". Included are two kinds of property. The first kind consists of property of personal nature such as clothes, other necessary objects aimed for a spouse's exclusive personal use and personal presents, Ch. 10 § 2 Swedish Marriage Code. Each spouse has the right to withhold such assets, to a reasonable extent. The assessment of what is reasonable is to be made on the basis of the financial standard of the family.⁴⁶ If one spouse has died, this right only applies in relation to the surviving spouse, Ch. 10 § 2 Swedish Marriage Code. To property of a personal nature that can be excepted from the division of property belongs also compensation that a spouse has received for personal injury suffered by him or her and violation, Ch. 10 § 2a Swedish Marriage Code. If one spouse has died, this right only applies in relation to the surviving spouse.

The second kind of property of special nature includes rights which cannot be transferred. Such rights shall not be included in the division of property if this would conflict with conditions or other restrictions applicable to the right, Ch. 10 § 3 para. 1 Swedish Marriage Code. A spouse's right to state pension, a right to receive maintenance and a hunting right may be given as examples of rights which can neither be transferred nor should be included in a division of property. Another example is an author's right to an as yet unpublished work.⁴⁷ Special rules exist furthermore in relation to life insurance and private pensions which may upon certain conditions be exempted from property division, see Ch. 10, § 3 para. 2-3 Swedish Marriage Code.⁴⁸ See also the answer to Question 95 and Question 98.

117. 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 time for the determination of the assets belonging to the deferred community property is, as mentioned under Question 115, the so-called "critical time", which for divorce is the day when the divorce proceedings were commenced and, if a marriage has been dissolved by the death of a spouse, the day when the death occurred. When a property division is carried out during a subsisting marriage, the critical time is the day of notification to the court, Ch. 9 § 2 Swedish Marriage Code. In Swedish law no relevance is given to factors such as whether the spouses have lived apart before the dissolution of marriage or not.

The Swedish Marriage Code does not contain any specific rule on the decisive date for the valuation of assets. Certain principles have, however, been developed through legal practice and case law. The prevailing view today is that decisive for valuation is the date when all the spouses' assets and liabilities have been investigated (in Swedish: *utrett*), i.e., made subject to an inventory and valued, although a considerable period of time may have passed between this date and the above-mentioned "critical time" for determination of what property – and liabilities – are to be included.⁴⁹ When assessing the value of the property its notional sale value, i.e., market value, is normally used as it is at the time of valuation, but also other methods may be employed, see above answer to Question 116. It is recommended that the

⁴⁶ L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, Nordstedts Förlag AB, 1990, p. 293.

⁴⁷ This example is developed further by Å. Saldeen, "Family Law", in: *Swedish Law A Survey*, Juristförlaget, 1994, pp. 366-367.

⁴⁸ In addition, Ch. 10 § 5 Swedish Marriage Code is of relevance.

⁴⁹ A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, p. 172.

valuation of the assets and liabilities should be done as close as possible to the actual division of the property.⁵⁰

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

If a spouse, without the consent of the other spouse and to a not insignificant extent, reduces his or her marital property by using his or her marital property to increase the value of his or her separate property, *in property division occasioned by divorce* the other spouse's share shall be calculated as if the value of the marital property used were still included in the marital property of the first mentioned spouse. A requirement is, however, that such actions took place within a period of three years preceding the commencement of divorce proceedings, Ch. 11 § 4 para. 1 Swedish Marriage Code. The same applies as regards a spouse's investments in his or her "personal property"⁵¹ (that is withheld from the property division because the property is of such kind that it cannot be transferred or otherwise is of personal nature) or acquisition of such property, Ch. 11 § 4 para. 2 Swedish Marriage Code. This includes situations where a spouse's use of his or her marital property has resulted in an increase in the value of that spouse's own pension insurance or pension savings account or a special benefit to that spouse arising from such pension or from a pension savings agreement, Ch. 11 § 4 para. 2 Swedish Marriage Code.

The purpose of this rule of compensation is to put the other spouse in the same position as if the owner spouse had abstained from the actions in question.⁵² The valuation shall therefore be attributable to the time for the division of property. It follows that the other spouse will be compensated also for an eventual increment value of the asset.⁵³

This rule on the right to compensation is only applicable to property division due to divorce, and not in case of death of a spouse, or when property division is performed during a subsisting marriage.

On the other hand there is no special rule of compensation if, on the contrary, a spouse has used his or her separate property for the benefit of his or her marital property, e.g. to make improvements in a building owned by him and belonging to the deferred community of property regime, that property continues to be marital property and will be included in property division. The only method to take account of this form of transfer of property from separate property to marital property is through the general rule concerning adjustment of property division, regulated in Ch. 12 § 1 Swedish Marriage Code. This provision has been drafted with regard to situations where it would be unreasonable to oblige a spouse to surrender property to the other spouse in accordance with the principles underlying the division of property in the Swedish deferred community property regime. It can, exceptionally, result in letting the owner spouse retain more of the value of his or her marital property than would follow of the rule of equal division.

119. What happens if assets belonging to one category have been used for payment of debts belonging to another category of assets? Is there a rule of compensation? And if so, how is compensation calculated?

⁵⁰ A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, p. 171 and Ö. Teleman, *Bodelning under äktenskap och vid skilsmässa*, 4th edition, Nordstedts juridik, 2003, p. 107.

⁵¹ See answer to Question 116.

⁵² *Governmental Bill: Prop. (Äktenskapsbalk m.m.) 1986/87:1* p 173.

⁵³ A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus förlag, 2008, pp. 182-183.

There is no general rule of compensation for these kinds of situations. Theoretically at least, compensation might be achieved by making use of the general rule of property adjustment, described above under Question 118.⁵⁴ Nevertheless, the adjustment rule is to be used restrictively. It has to be judged from case to case if the circumstances give reason for adjustment.⁵⁵

Since 1 July 2007, Swedish Marriage Code contains a special provision, Ch. 11 § 4a, concerning situations where the cause of a spouse's debt is a criminal act committed by that spouse. If such a debt is deducted from that spouse's marital property or if that spouse has used his or her marital property to pay such a debt, the other spouse's share shall in property division be calculated as if the debt had not been deducted or as if the payment had not been made. A condition for this compensation is that the debt in question affects the result of the property division.⁵⁶ The debt must also have arisen within three years before the proceedings for divorce were commenced, the death of a spouse occurred or notification was made to the district court about property division during marriage, Ch. 11 § 4a para. 2 Swedish Marriage Code.

120. How are assets administered after dissolution of the matrimonial property regime but before allocation? Can a spouse's rights in relation to the division of property be protected against transactions by the other spouse? If so, how?

After the so-called critical time that decides what assets and debts are to be taken into account in the property division (see above answer to Question 115) each spouse continues to administer his or her property alone irrespective of to what category the property belongs. Nevertheless, each spouse is required, for the period until division of property is performed, to give account of his or her property as well as of property which he or she has managed but which belongs to the other spouse, Ch. 9 § 3 Swedish Marriage Code. In addition, this provision obliges the spouses to supply any particulars that may be of importance when property division takes place. The duty to give account is not limited to marital property but includes also separate property and such personal property that may be withheld from property division as well as the spouse's debts. Its justification is that after the critical time but before division of property takes place each spouse administers his or her property in the joint interests of both spouses.

The restrictions regarding a spouse's right to dispose of the spouses' joint dwelling and household goods continue to apply after the critical time until the property division takes place (see answer to Question 10 and Question 11). Special questions arise if a spouse after the critical time has sold marital property and bought other property instead. The new property will not be part of the property division since it has been acquired after the critical-time. The reduction of the marital property will instead be compensated through the spouse's duty of accounting the same amount. If, for example, the husband after the critical time has sold shares belonging to his marital property to buy a car, the car will not be part of the property division. If the shares were worth 100 000 Swedish Crowns and the car, at the time of division of the property is worth 80 000 Swedish crowns the husband shall be required to account for 100 000 Swedish crowns.⁵⁷ In this manner, the other spouse is protected against actions by the owner spouse, after the critical time, which reduce the value of the latter's marital property.

⁵⁴ L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, Nordstedts Förlag AB, 1990, pp. 361-362.

⁵⁵ *Governmental Bill: Prop. (Äktenskapsbalk m.m.) 1986/87:1* p. 188.

⁵⁶ A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, p. 185.

⁵⁷ A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, p. 178.

A spouse's careless administration of his or her property after the critical time can give the other spouse a right to compensation. In the Swedish Supreme Court decision of 1962,⁵⁸ the husband had after the critical time but before property division abstained from his right to inherit his brother although his share in the brother's estate had been part of the marital property at the critical time. As a result the Court found him responsible to account for his share in his brother's estate and the wife received a corresponding right to compensation in the property division. Not only economical compensation, but also criminal liability can come into question if a spouse neglects to administer his or her property with good care. Hence, in the Swedish Supreme Court decision of 1974,⁵⁹ a husband had sold a housing-flat and consumed the purchase sum on his own. The Court stated that each spouse's marital property after the critical time formed a property mass to which both spouses had a share. By consuming the purchase sum the husband had intentionally deprived the wife of her rights, and was found criminally liable.

In case of divorce, Swedish law provides for the possibility of a court order to place a spouse's property under special administration until property division is performed. If, when proceedings for divorce have been commenced, it is necessary to protect a spouse's rights in relation to the division of property, a court may order the other spouse's property or part of that property to be placed under special administration. This requires an application to court by the spouse who considers his or her rights to be in danger. However, such action may not be taken if contested by a spouse, if acceptable security is provided, Ch. 9 § 8 para. 1 Swedish Marriage Code. Where a spouse's property has been placed under special administration by court order this decision applies as a rule until property division is performed or the question of divorce lapses, is disallowed or dismissed, Ch. 9 § 8 para. 2. Swedish Marriage Code.

121. Briefly explain the general rules governing the division of the assets. Explain who may carry out the division (spouses/competent authority) and what means are available when a spouse refuses to cooperate in the division?

When division of property takes place, the spouses' shares in the marital property shall first be calculated, Ch. 11 § 1 Swedish Marriage Code. In calculating these shares, a deduction shall be made from each spouse's marital property sufficient to cover the debts which that spouse had. Which assets and debts are to be taken into account is determined on the basis of circumstances prevailing at the so-called critical time, Ch. 9 § 2 para. 1 Swedish Marriage Code (see answer to Question 115). A creditor's claims on a spouse which carry a preferential right in that spouse's separate property shall only be covered by that spouse's marital property in so far as payment cannot be obtained out of his or her separate property. The same applies to debts which the spouse has incurred for the purposes of keeping up his or her separate property or to improve it, or which in any other way are attributable to the spouse's separate property, Ch. 11 § 2 para. 2 Swedish Marriage Code. This applies even in respect of claims relating to such rights that cannot be transferred and are exempted from property division, Ch. 11 § 2 para. 3 Swedish Marriage Code.

The combined balance of the spouses' marital property, after deductions have been made to cover debts, shall be calculated. The value thereof shall then be divided equally between the spouses, Ch. 11 § 3 Swedish Marriage Code. Nevertheless, the rule on dividing equally the value of the marital property is dispositive and can be set aside by an agreement between the spouses. If the spouses agree, each party can take other shares than half of the value of the marital property. The spouses may even agree that separate property is to be included in the property division. Each spouse must, nevertheless, take account of the interests of his or her creditors and may not, to the creditors' detriment, allow separate property to be included in

⁵⁸ NJA 1962, p. 294.

⁵⁹ NJA 1974, p. 47.

the property division or in any other manner forgo property that is to be included in the property division, Ch. 13 § 1 Swedish Marriage Code.⁶⁰

The division of property is primarily a private transaction, to be performed by the spouses together without involvement of any public authorities. In practice, the division is normally carried out by means of an agreement between the spouses, upon divorce. But a property division may also take place during the marriage, without divorce proceedings in progress, if the spouses are agreed, Ch. 9 § 1 Swedish Marriage Code. In that case the spouses must, however, first notify a district court in writing of their agreement. The court shall record the notification and cause notice thereof to be published in the Official Swedish Gazette and in the local press, Ch. 16 § 3 para. 2 Swedish Marriage Code. The purpose with this publication is to give the spouses' creditors an opportunity to consider the effects of the spouses' property division from point of view of the creditors' interests. This is important because it is upon property division that ownership of property may be transferred from one spouse to the other.

According to the law, a document concerning the division of property is to be drawn up and signed by both spouses, Ch. 9 § 5 Swedish Marriage Code. It is, furthermore, possible to register the spouses' agreement on property division with the court, but this is not mandatory, Ch. 13 § 6. However, in case of a spouse's bankruptcy, registration with the court is of importance since it is from the day of notification for registration with court that a three year period starts to run during which the creditors of a spouse can attack the property division, Ch. 4 § 7 para. 1 Swedish Bankruptcy Act. A condition is that the debtor spouse has forgoed property in the property division to the detriment of his or her creditors.

Swedish law does not require that the spouses consult legal expertise for the property division, and most spouses also manage to conduct it on their own. In complex cases as well as in cases of disagreement, lawyers are, however, normally consulted. In addition, in cases of disagreement, a spouse may apply to the court for appointment of a so-called *property division executor* (in Swedish: *bodelningsförrättare*), usually a lawyer, who shall decide upon the distribution of property on behalf of the spouses, Ch. 17 § 1 Swedish Marriage Code.⁶¹ This is the normal road to take in those cases where the spouses are unable or unwilling to cooperate with each other. The task of the court-appointed property division executor is to settle all disputed questions relating to the property division in accordance with the provisions of the Swedish Marriage Code, Ch. 17 § 6 Swedish Marriage Code.

Where necessary, the property division executor shall ensure that an inventory of the spouses' property is carried out. Each spouse is expected to declare his or her assets and debts for this inventory. If a spouse fails to provide particulars for this purpose, the court may, on the application of the property division executor, oblige the spouse to do so on penalty of a fine, Ch. 17 § 5 para. 1 Swedish Marriage Code. A spouse can also, if the other spouse requests it, be required to confirm, on oath before the court, the accuracy of a property inventory that has been drawn up, Ch. 17 § 5 para. 2 Swedish Marriage Code. Untrue information can lead to criminal liability.⁶²

⁶⁰ If as a result of such a forbidden action, the spouse is unable to pay a debt that arose before the property division took place, or if for any other reason that spouse may be assumed to be insolvent, the other spouse is liable for the deficit up to the value of the decrease caused by the first- mentioned spouse's action, Swedish Marriage Code Ch. 13 § 1 para. 3.

⁶¹ Prop. 1986/87:1 p. 221 and Ö. Teleman, *Bodelning under äktenskap och vid skilsmässa*, 4th edition, Nordstedts Juridik, 2003, p. 272.

⁶² Ö. Teleman, *Bodelning under äktenskap och vid skilsmässa*, 4th edition, Nordstedts Juridik, 2003, p. 280.

After the property division document has been drawn up by the property division executor, it shall be served without delay on both spouses. A spouse may then, within four weeks, challenge the property division by commencing proceedings against the other spouse in court. If no appeal takes place within this time, the division of property becomes legally effective, Ch. 17 § 8 Swedish Marriage Code.

A property division is not necessary when one of the spouses has died on condition that the circumstances are such that the surviving spouse shall take over all the property, see above Question 1(d) If, however, the first deceased spouse leaves children that are not the spouses' joint children or if the deceased has left a will, property division shall be performed by the other spouse and the heirs and residuary testamentary beneficiaries of the deceased, Ch. 9 § 5 Swedish Marriage Code.

Neither is a property division necessary if the spouses only have separate property and neither of them requests the right to take over the joint dwelling or household goods from the other spouse, Ch. 9 § 1 Swedish Marriage Code.

122. How are the assets allocated?

On the basis of the shares calculated for the spouses, the spouses' marital property is distributed in form of portions. Each spouse has a preferential right to be allocated to his or her portion his or her own property or such part of it as that spouse wishes, Ch. 11 § 7 Swedish Marriage Code. The spouse whose assets exceed one half of the total divisible mass can choose whether he or she wants to surrender property to the other spouse or to pay a corresponding sum of money instead. If the other spouse receives property instead of money that property shall, as far as possible, not be manifestly unsuitable for that spouse, Ch. 11 § 9 Swedish Marriage Code. On the other hand, if choices are limited, the receiving spouse has to accept what he or she gets.⁶³ The rules are dispositive, meaning that spouses can set them aside and, e.g., instead agree to exchange assets with each other.

A spouse is not supposed to surrender assets to the other spouse unless his or hers creditors are fully compensated. A spouse may not either forgo property that may be taken in execution in exchange for property that may not be so taken. If a spouse sets the creditors' interests aside in favour of the other spouse, the favoured spouse can become personally liable towards the other spouse's creditors up to the value of the decrease, Ch. 13 § 1 Swedish Marriage Code.⁶⁴

Special rules apply concerning allocation of the spouses' joint dwelling and joint household goods, Ch. 11 § 8 Swedish Marriage Code. See also the answer to Question 123.

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

The spouse who has the greatest need of the spouses' joint dwelling or household goods has the right to be allocated this property in property division following a divorce, Ch. 11 § 8 Swedish Marriage Code. However, if this property is owned by the other spouse, such allocation can take place only on condition that it can be considered reasonable for the owner spouse, having regard to the overall circumstances. The spouse in greatest need is usually considered to be the spouse who, following the divorce, will have custody of the children or, in the case of joint custody, the actual care of the children. Also other factors such as the

⁶³ Two Supreme Court decisions, NJA 1960, p. 411 and NJA 1963, C 43, confirm that the receiving spouse has to accept unsuitable assets, when the other spouse has nothing else to surrender.

⁶⁴ A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, pp. 214-216.

spouses' age and health and prospects of getting hold of a new home can be taken into consideration.⁶⁵

As a starting point, this preferential right over allocation also applies when the joint dwelling or household goods is the other spouse's separate property *by reason of a marital property contract*. In this case, however, regard will even be had to circumstances such as the period of time that has passed since the marital property contract was drafted, the spouses' purpose when drafting such contract and how the spouses' financial circumstances have developed thereafter.⁶⁶ On the other hand, if the joint dwelling or joint household goods is the owner spouse's separate property *by reason of a stipulation in a gift or a will* by a third person, such property cannot be allocated to the other spouse. See Ch. 11 § 8 para. 1 Swedish Marriage Code.

The spouse to whom the joint dwelling or household goods is allocated has to count this property in his or her share in the property division. Only if the value of this property is very limited, a spouse may be entitled to receive it without a corresponding deduction from his or her portion, Ch. 11 § 8 para. 1 Swedish Marriage Code; this will often be the case in respect of a rental apartment. When a spouse takes over the joint dwelling or household goods with a corresponding deduction but does not provide the other spouse with marital property, the first-mentioned spouse shall instead pay a corresponding sum of money. If acceptable security is provided for the payment, the spouse may be given reasonable time in which to pay, Ch. 11 § 10 Swedish Marriage Code.

124. Do the spouses have preferential rights over the allocation of other assets?

No. Save for the owner spouse's preferential right to be allocated his or her own property, or such part of it as that spouse wishes (Question 122), and the special rules concerning allocation of the spouses' joint dwelling and household goods (Question 123), no other preferential rights exist in Swedish law.

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

The starting point in Swedish law is that each spouse is responsible for his or her own support after divorce; normally no maintenance rights or duties exist between former spouses. Nevertheless, under certain conditions a spouse can be obliged to pay maintenance for his or her ex-spouse in need of maintenance, Ch. 6 § 7 Swedish Marriage Code. Normally, however, maintenance can only be granted for a transitional period following the divorce, with regard to what is reasonable and the other spouse's ability to pay and other circumstances.⁶⁷

When assessing a spouse's claim for maintenance upon divorce, the outcome of the property division in the deferred community property regime is taken into account.⁶⁸ Regard is had to what a spouse receives in the property division, as well as to his or her separate property. Capital transferred from one spouse to the other spouse as a result of the dissolution of the

⁶⁵ A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, pp. 207-208.

⁶⁶ *Governmental Bill: Prop. (Äktenskapsbalk m.m.) 1986/87:1* p. 180.

⁶⁷ See M. Jänträ-Jareborg, "Swedish National Report", answer to Question 58, in: K. Boele-Woelki, B. Braat, I. Sumner (eds.), *European Family Law in Action, Volume II: Maintenance Between Former Spouses*, Intersentia 2003.

⁶⁸ See M. Jänträ-Jareborg, "Swedish National Report", answers to Question 59 and Question 60, in: K. Boele-Woelki, B. Braat, I. Sumner (eds.), *European Family Law in Action, Volume II: Maintenance Between Former Spouses*, Intersentia 2003.

deferred community property regime is considered to reduce the latter's need for maintenance after divorce.

Maintenance payments following divorce shall, according to the main rule, be made periodically, Ch. 6 § 8 Swedish Marriage Code. However, if there are special reasons, the court can order that the maintenance payment is to be made as a lump sum. This condition is considered to be fulfilled, e.g., if the property division leads to an unreasonable result, due to the fact that the property of one of the spouses is exempted because of its separate character. By ordering the spouse who draws an advantage on this basis to pay a lump sum to the other spouse, the court can to a certain extent correct the outcome of the property division. The spouse receiving unreasonably little property may, thus, be compensated by maintenance in form of a lump sum so that he or she can, e.g., buy necessary household goods or, with these means, acquire a necessary pension protection.⁶⁹

126. 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?

In Swedish law, state pensions and normally even occupational pensions are exempted from property division, whereas private pensions, based on individual savings, are normally included in case of divorce, Ch. 10 § 3 Swedish Marriage Code (see also Question 98 above). The spouse to whom the private pension belongs is entitled to have the pension rights allocated in his or her portion. Even if the spouse to whom the private pension rights belong would wish to surrender these rights to the other spouse in the property division following divorce, this may be unsuitable⁷⁰ due to technicalities of the pension system, not least regarding the timing of the payments. When marriage is dissolved through the death of a spouse, the private pension savings of both spouses are exempted from the property division.

In property division following divorce private pension savings as well as pension insurance rights may be exempted, in whole or in part, if it would be unreasonable to include them with regard to the spouses' financial conditions and the overall circumstances, Ch. 10 § 3 para. 3 Swedish Marriage Code.

127. On what conditions, if at all, can the general rules (above Question 121) be set aside or adjusted, e.g. by agreement between the spouses or by the competent authority?

As has been pointed out in the answer to Question 121, in Sweden normally spouses on their own perform the property division, without any involvement of a public authority. The rules described under Question 121 are all dispositive, which means that the spouses may set them aside in their property division if they are in agreement. The spouses may, e.g., agree that their portions shall be different, e.g., that one spouse shall receive 60 % of the net value of the marital property and the other spouse 40 %. The spouses may also agree to include in the property division property that is a spouse's separate property, due to the spouses' marital property contract, or such pension rights that otherwise would be exempted from the property division, Ch. 10 § 4 Swedish Marriage Code. Nevertheless, a spouse may not to the detriment of his or her creditors allow his or her separate property be included in the division or in any other way forgo property that it is to be included in the property division, Ch. 13 § 1 Swedish Marriage Code. If that happens and the spouse becomes insolvent, the favoured spouse becomes personally liable for the deficit up to the value of the decrease.

As regards the right of a competent authority to set aside or adjust these general rules, Ch. 12 of the Swedish Marriage Code (entitled "Adjustment of property division") is of relevance, in particular § 1. Such an adjustment may be made both by the property division executor,

⁶⁹ *Governmental Bill, Prop.*(Äktenskapsbalk m.m.) 1986/87:1 p. 190 and A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, pp. 62-63.

⁷⁰ See above under Question 122.

appointed by the court to carry out the property division between the spouses, or by the court upon the request of a spouse.

According to the said provision, in so far as it is unreasonable, in view especially of the duration of the marriage but also the spouses' financial situation and overall circumstances, for one spouse in the property division to surrender property to the other spouse to the extent that follows of the general rules, the property shall instead be divided in such a way as to enable the first-mentioned spouse retain more of his or her marital property. If one spouse has been adjudged bankrupt when property division is to be performed or if there are other special reasons for not dividing the spouses' marital property, the spouses shall each retain their marital property as their share. See Ch. 12 § 1 Swedish Marriage Code. This § is aimed for cases when the marriage is dissolved by divorce, and it is not applicable to property division occasioned by the death of a spouse.

This rule operates as a corrective to the main rule of equal division of the value of the marital property, but only in favour of the spouse to whom most of this property belongs. It has been drafted with the purpose of preventing a spouse to "divorce to money" of the wealthier spouse after a short marriage.⁷¹ As regards the relevant length of the marriage, the *travaux préparatoires* to the Marriage Code indicate that the line goes somewhere around five years of marriage after which time all marital property should normally be divided equally.⁷² Furthermore, it is also indicated that the spouses' joint dwelling and household goods should normally be divided equally, if they are marital property, irrespective of the length of the marriage. In the Supreme Court decision of 1998,⁷³ the court permitted the wife to exempt half of her marital property from the property division with reference to the fact that the spouses' marriage had been short – it had lasted for three years, after two years of marriage-like cohabitation – and that the spouses' marital property was owned by the wife who had inherited it from her father and brother. Three children had been born during the couples' relationship. The marital property consisted mainly of the spouses' joint dwelling, that was a real estate inherited by the wife from her father.

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

A property division in accordance with the rules of the deferred community property system of Swedish law is not necessary when one of the spouses has died and the surviving spouse shall take over the deceased spouse's all property, due to the rules of succession concerning the surviving spouse's right to the deceased spouse's estate, see above Question 1 (d). If, however, the deceased spouse leaves children who are not the spouses' joint children, or if the deceased spouse had made a will, property division shall take place between the surviving spouse, on the one side, and the heirs and residuary testamentary beneficiaries of the deceased spouse, on the other side, Ch. 9 § 5 Swedish Marriage Code.

There is a special rule concerning *adjustment of property division in the case of a spouse's death*, Ch. 12 § 2 Swedish Marriage Code. According to this rule, in a property division occasioned by the death of a spouse, both sides shall, if the surviving spouse so requests, retain their marital property as their shares. The surviving spouse may also limit this request to part of his or her marital property only, in which case the other side shall retain a corresponding quota of the deceased spouse's marital property. This option, aimed primarily to favour the surviving spouse, is of special interest for that spouse in cases where he or she owns the major part of the marital property.

⁷¹ See A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, pp. 187-196.

⁷² *Governmental Bill, Prop. 1986/87:1*(Äktenskapsbalk m.m.) p. 44, and p. 187.

⁷³ NJA 1998, p. 487.

There are, in addition, certain other rules concerning property division occasioned by the death of a spouse, which work in favour of the surviving spouse.⁷⁴ These rules permit the surviving spouse to except personal property⁷⁵ from the property division or such compensation that he or she has received for personal injury and violation, even when this property is marital property and according to the main rule should be included in the property division. See Ch. 10 § 2 and § 2a Swedish Marriage Code.

On the other hand, both the surviving spouse and the heirs and residuary testamentary beneficiaries of the deceased, have the possibility to except rights which cannot be transferred.⁷⁶ Such rights may not be included in the division of property if this would conflict with conditions or other restrictions applicable to the right, Ch. 10 § 3 para. 1 Swedish Marriage Code.

When one spouse dies, the private pension savings of both spouses, which in case of divorce are included in the property division, are exempted. (In Swedish law, other pension rights fall outside property division.) Nevertheless, through various forms of survivors' pensions, the surviving spouse is often able to share in the deceased spouse's pension rights.⁷⁷

If a spouse dies while a divorce case is in progress, the provisions on property division occasioned by divorce apply, Ch. 9 § 11 Swedish Marriage Code.

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, future spouses may by means of a marital property agreement determine that property belonging or accruing to either of them is to be that person's separate property (in Swedish: *enskild egendom*), Ch. 7 § 3 para. 1 Swedish Marriage Code. To be binding, the marital property agreement must be drawn up in writing and signed by both of the future spouses, Ch. 7 § 3 para. 2 Swedish Marriage Code. In addition, the agreement must be registered with the court, Ch. 7 § 3 para. 3 Swedish Marriage Code. A marital property agreement entered into by future spouses becomes applicable from the date the marriage is entered into, on condition that it is given to the court for registration within one month of the marriage. If the agreement is registered later, it becomes binding from the day it is given to the court, Ch. 7 § 3 para. 3 Swedish Marriage Code. It is the registration with the court that makes the marital property agreement binding between the parties. It should also be noted that although a marital property agreement can be made by future spouses it can be registered with court only after the marriage has taken place.⁷⁸

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, spouses may by means of a marital property agreement determine – any time during their marriage – that property belonging or accruing to either of them is to be that spouse's separate property (in Swedish: *enskild egendom*), Ch. 7 § 3 para. 1 Swedish Marriage Code. This means that the deferred community property regime shall not apply to that property. In

⁷⁴ This means that the other side consisting of the deceased spouse's heir and residuary testamentary beneficiaries cannot invoke a corresponding right.

⁷⁵ See above answer to Question 95.

⁷⁶ See above answer to Question 95.

⁷⁷ M. Brattström, *Makars pensionsrättigheter*, Iustus Förlag AB, 2004, pp. 47-49.

⁷⁸ Ö. Teleman, *Äktenskapsförord*, Second edition, Nordstedts Juridik AB, 2006, p. 23.

order words, property made separate through a marital property contract is not included in a future property division. As has been pointed out above under Question 17, the spouses may even agree that *all* their property is to be separate property, which means that they in fact through a marital property contract can introduce full separation of property into their marriage. By means of a new marital property agreement spouses may determine that property made separate by the previous marital property agreement shall be marital property. This kind of a subsequent agreement can appeal to spouses who have been married during a long period of time, or when they for some other reason find it more suitable that the deferred community property regime should apply to the property in question.

As in the case of a marital property agreement by future spouses (see answer to Question 191), the marital property agreement must fulfill certain form requirements and it becomes binding only from the date when it is registered with court, Ch. 7 § 3 para. 2-3 Swedish Marriage Code.

It may also be suitable to point out under this Question that in Swedish law spouses may, prior to an impending divorce, enter into an agreement on the subsequent division of property or on other matters relating thereto, a so-called *pre-agreement* (in Swedish *föraotal*), Ch. 9 § 13 Swedish Marriage Code. A pre-agreement is available for the spouses only if a divorce is immediately approaching; it cannot be used as an alternative to a marital property contract. A pre-agreement can be described as an agreement to make an agreement in a close future with a certain content. In their pre-agreement the spouses can, e.g., agree that certain assets shall be allocated to one of them at the future division of property, how a deduction of a debt shall then be made or how the assets should be valued.⁷⁹ If a spouse after the divorce proceedings have been commenced refuses to confirm this agreement, the other spouse can request the court to appoint a property division executor. The property division executor shall follow the pre-agreement, on condition that he or she finds it to be valid and reasonable. The property division executor also has the mandate to adjust it, if he or she in an overall assessment finds the terms unreasonable, Ch. 12 § 3 para. 2 Swedish Marriage Code.

The right to enter into a pre-agreement exists even after proceedings for divorce have commenced, but before the marriage is dissolved (e.g., while a reconsideration period is pending), in spite of the fact that the spouses at that moment also have the choice of entering into a final agreement on property division. In the Supreme Court decision of 2004⁸⁰ this extension in time was justified by the need to promote agreement between spouses. If the spouses in a pre-agreement have stipulated that certain assets shall be transferred from one spouse to the other, this does not have any effect against a third party such as the spouses' creditors, until the pre-agreement has been confirmed in a formal application for divorce.⁸¹ The pre-agreement needs to be drafted in writing and signed by both spouses, but no registration is required

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

To be valid in form, a marital property agreement under Swedish law must be drawn up in writing, duly signed by both spouses and registered with the court, Ch. 7 § 3. 2-3 Swedish Marriage Code. The court for registration is any district court in Sweden; in other words the spouses may chose to what district court they wish to submit their application for registration, Swedish Marriage Code Ch. 16 § 2. After registration with court, the court shall send the registered marital property agreement to Sweden's central marriage registry (in

⁷⁹ L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, Nordstedts Förlag AB, 1990, pp. 282-286.

⁸⁰ NJA 2004, p. 317.

⁸¹ See Supreme Court decisions NJA 1974, p. 684 and NJA 1985, p. 432.

Swedish: *äktenskapsregister*), kept by Statistics Sweden, Ch. 16 § 3 and § 1 Swedish Marriage Code.

Contrary to earlier Swedish law, the present Swedish Marriage Code of 1987 does not require that a marital property agreement between spouses or future spouses is witnessed. This requirement was abolished because signatures by witnesses were considered often to come about hastily and without adding to the solemnity of the agreement, as well as because this kind of a requirement increases the risk for future disputes concerning the invalidity of the agreement, based on alleged defects in form.⁸²

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 formal requirements for the validity of a marital property agreement are described above under Questions 191-193. Swedish law does not differentiate between formal requirements for the validity of a marital property agreement between spouses and in relation to a third party. There is reason to emphasize that the spouses' (or future spouses') stipulations concerning the classification of property as "separate property" or as "marital property" does not have any impact on the ownership to the property in question or on the spouses' liability for debts.⁸³

According to Swedish law, a marital property contract must be registered with court, Ch. 7 § 3. 2-3 Swedish Marriage Code. The court for registration is any district court in Sweden. The registration procedure takes place at the application of the spouses and it is a simple written procedure without requirements concerning presence of the parties or their eventual legal representative. Basically, the court upon registration of a marital property agreement only controls that the formal requirements are fulfilled before registration can be granted. This is confirmed by the Swedish Supreme Court decision of 1997⁸⁴ where the Court stated that it is not up to the court to assess the legal effect of a marital property agreement upon its registration. Nevertheless, case law gives at hand that registration is to be refused if the agreement goes beyond the scope provided by the basic provision in Ch. 7 § 3 Swedish Marriage Code.⁸⁵ According to that provision spouses and future spouses may by means of a marital property agreement determine that property belonging or accruing to either of them is to be that spouse's separate property or that property which has been made separate through the spouses' previous marital property agreement shall be marital property.

The court where registration is requested is, however, under no duty to inspect the agreement's tangible content. In case law it has not been considered sufficient to refuse registration for the reason that the content of the agreement is not clear enough or that it is difficult to interpret, see the appellate court decisions (second instance) of 1985 and 1992.⁸⁶ It remains an open question whether such a marital property agreement will be given legal effect in a future legal dispute between the spouses on the issue.

It follows that the fact that a marital property agreement has been registered with a court in Sweden is not a guarantee of the legal validity of the agreement since the control of the court in connection with the registration is mainly of a formal nature. There is, however, very little case law where the legal validity of a marital property agreement has later on been disputed

⁸² A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, p. 136.

⁸³ See A Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, p. 134.

⁸⁴ NJA 1997, p. 37.

⁸⁵ See Supreme Court decision NJA 1970, p. 320, described under Question 198.

⁸⁶ RH 1985:95 and RH 1992:49.

by a spouse, due to the fact that the stipulations by the spouses did not remain within the scope provided by Ch. 7 § 3 Swedish Marriage Code.

The Swedish registration system is criticized in the legal literature for creating a false impression on the parties that a marital property contract becomes binding upon registration, since a more comprehensive control of the validity of its content falls outside the courts' control upon registration.⁸⁷ Upon divorce, either one of the spouses can initiate court proceedings against the other spouse claiming that the agreement, due to its content, is to be set aside as invalid or adjusted.

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

No, Swedish law does not require that future spouses or spouses disclose their assets and debts, in whole or in part, before making a pre- or post-nuptial contract regarding matrimonial property relations. An explanation is that in spite of the entry into marriage each spouse alone continues to own and control his or her property and to be responsible for his or her own debts. A marital property agreement can never under Swedish law affect the ownership of the property or the responsibility for debts.

The general provision in Ch. 1 § 4 Swedish Marriage Code obliging the spouses to supply each other with the information needed to enable the financial circumstances of the family to be assessed cannot be invoked in support of a disclosure as a condition for a valid matrimonial property agreement. That provision is to be seen as a kind of a "moral" guideline for the spouses, aiming to make it clear that both spouses are expected to contribute to the well-being and maintenance of the family.⁸⁸

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?

Although many spouses (and future spouses) consult legal expertise before drafting a marital property agreement and for registering the agreement with court, this is not obligatory in Swedish law. Swedish law does not either require assistance of a notary.⁸⁹ The spouses are instead free to draft the agreement themselves and to apply for registration on their own. Often spouses are content with using standard forms (that can be bought in, e.g., book stores) when making their marital property agreement and do not consult any legal expertise.

A marital property agreement must be registered with a court in Sweden to become legally binding. The court's examination of the application is focused on formalities and certain basic requirements as regards the content of the agreement, see above Question 194. The court with which the spouses apply for registration of the marital property agreement does not have any obligation to inform the spouses about the content and the consequences of their agreement.⁹⁰

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

⁸⁷ A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, pp. 137-138 and Ö. Teleman, *Äktenskapsförord*, 2nd edition, Nordstedts Juridik AB, 2006, p. 26.

⁸⁸ See above answer to Question 7.

⁸⁹ It should be mentioned that Swedish law does not have the institution of notaries in the continental European sense.

⁹⁰ The court's functions in connection with registration are described under Question 194.

The statistics below account for the number of marriages celebrated in Sweden during the years 2003 - 2007 as well as the number of marital property agreements registered with court in Sweden during the same period of time. When assessing this information it is important to keep in mind that the numbers do not correlate. The couples included in the statistics who registered a marital property agreement on a certain year, may have registered the agreement in connection with their entry into marriage, but they may just as well have registered the agreement during the course of their marriage, perhaps decades after the marriage was concluded. (The statistics tell us nothing about that.) A registered agreement may also replace an earlier marital property agreement between the spouses. The available information does not reveal whether registered agreements where spouses or spouses-to-be stipulate that property is to be separate covers all property of both spouses or only certain assets. As a result, it is not possible to draw conclusions as regards how common it is that spouses set the deferred marital property regime aside in whole.

The statistics reveal, however, the number of couples that have stipulated that property should be separate, in whole or in part, and the number of couples that stipulated that separate property should be marital, i.e., they brought back the deferred community property regime in whole or in part in situations where they had set it aside by an earlier marital property agreement.⁹¹

Year	Couples entering into marriage	Registered marital agreements	Prescription separate property	Prescription marital property
2003	39 041	13 590	12 483	1 107
2004	43 088	10 949	9 684	1 265
2005	44 381	9 738	8 858	880
2006	45 551	9 746	8 971	793
2007	47 898	10 464	9 573	891

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?

There is only one statutory matrimonial property regime in Swedish law, namely the deferred community property regime. The applicability of this regime can be set aside in relation to certain - or all property of a spouse - through the spouses' (or spouses- to-be) marital property agreement. If it is set aside in whole, in which case the spouses or future spouses must agree that all property - present and future - shall be the owner's separate property, the marital property agreement introduces in fact a full separation of property into the marriage. The spouses can also choose to agree that certain property - present or future, of one or both spouses - shall be the owner spouse's separate property and only to that extent set aside the applicability of deferred community property regime. This creates flexibility into the system.

Once the spouses have registered a marital property agreement introducing separation of property, in whole or in part, they may always register a new agreement where they stipulate that that property shall be marital property. This agreement reintroduces the deferred community property regime into the marriage, in whole or in part.⁹² The spouses may not create a regime of their own and their freedom is basically limited to the right, in form of a

⁹¹ Information from Statistics Sweden, for contact information see; www.scb.se. To understand the contents of these agreements, see also answers to Question 198 and Question 199.

⁹² See Ch. 7 § 3 Swedish Marriage Code.

marital property agreement, to classify their property as separate or marital.⁹³ It is not either possible to limit in time the validity of a marital property contract.

The Swedish Supreme Court decision of 1970⁹⁴ constitutes an important precedent. In this case the spouses had agreed that each spouse's property would be that spouse's separate property but that all property would gradually, during the first ten years of the marriage, become marital property. Registration of the marital property agreement was refused.⁹⁵

- 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;
 - b. administration of assets;
 - c. distribution of assets;
 - d. depend upon the ground of dissolution of the marriage?

The permitted modifications in Swedish law, in form of a marital property agreement, are limited to classification of assets as separate property or as marital property, Ch. 7 § 3 Swedish Marriage Code. No other kinds of modifications are permitted in form of a marital property agreement. On the other hand, once the property division is performed by the spouses, they can agree to include in the division such property that has been made separate in the spouses' marital property contract. In that case, such property shall for the purposes of the property division be regarded to constitute marital property, Ch. 10 § 4 Swedish Marriage Code. In property division the spouses may also agree that each shall take property with different shares, e.g., 60 % of the value of the marital property to one spouse and 40 % of the value of the marital property to the other spouse.

Swedish law does not at present permit marital property contracts where spouses stipulate that the classification of the property in a future property division shall depend upon the ground of dissolution of the marriage (e.g., that property shall be marital property when property division is occasioned by the death of a spouse, but separate property in case of divorce). Nevertheless, the provision of the Ch. 12 § 2 Swedish Marriage Code granting the surviving spouse the right to request that no division or only partial division of the spouses' marital property shall take place, adds a certain flexibility into the system, see the answer to Question 128 and to Question 201.

- 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?**

A typical contractual clause in a Swedish marital property agreement is a stipulation that certain assets – or all property – belonging or accrued in the future – shall be the owner spouse's separate property. It is not uncommon that such a clause relates to property that a spouse has inherited or received through gift or will from a third person (e.g. parents) or may in the future inherit or receive by gift or will.⁹⁶ At present, it is not possible to stipulate

⁹³ In addition, Swedish law permits the spouses to carry out a property division during a prevailing marriage which makes it possible for them to realize each other's marital property claim in the deferred community property. See *Governmental Bill, Prop.(Äktenskapsbalk m.m.) 1986/87:1* p. 53 and A. Agell and M. Brattström, *Äktenskap, Samboende, Partnerskap*, 4th edition, Iustus Förlag, 2008, p. 159.

⁹⁴ NJA 1970, p. 320.

⁹⁵ See Ö. Teleman, *Äktenskapsförord*, Second edition, Nordstedts Juridik AB, 2006, p. 35.

⁹⁶ As has been pointed out above under Question 99, another way of achieving this result is that the third person from whom the property comes from stipulates it as a condition for his or her gift or will that the property shall be the recipient's separate property.

conditions in a marital property agreement in Swedish law, e.g., that the agreed classification of property as separate property shall apply only in case of divorce but not in case of death of either spouse.⁹⁷ The spouses' stipulations in a marital property contract simply must remain within the limits provided by Ch. 7 § 3 Swedish Marriage Code.⁹⁸

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

Ch. 12 Swedish Marriage Code deals with adjustment of property division and consists of three §. § 1 is primarily applicable in a property division occasioned by divorce, and has been described above under Question 127. § 2 deals with adjustment in case of property division occasioned by the death of a spouse; see above under Question 128. § 3 concerns the adjustment of terms in a marital property agreement.⁹⁹ These three §§ are aimed to establish a certain hierarchy, meaning that § 3 concerning adjustment of terms of a marital property agreement is aimed as the last alternative, when it is not possible to achieve an equitable result through any other solution.¹⁰⁰ This has to do with the fact that the principle of keeping contracts ("pacta sunt servanda") is firmly rooted in the Swedish legal system. Before the present Marriage Code of 1987, Swedish law did not contain any specific provision dealing with adjustment of terms of marital property agreements. Instead, the general provision concerning adjustment of contracts in the Act of Contracts (in Swedish: *Avtalslagen*, 1915:218) was considered to be applicable by analogy. To mark the relevance of the issue, a specific provision was included in Ch. 12 § 3 of the 1987 Marriage Code. According to this provision, if a term of a marital property agreement is unreasonable in view of the subject-matter of the agreement, the circumstances when it was drawn up, circumstances subsequently arising and the overall circumstances, it may be adjusted or disregarded in the division of property. This provision covers both prenuptial and postnuptial agreements.

Often the legal effects of a marital property agreement become visible only when property division is to be carried out, in particular when this takes place due to divorce. Normally the core of the problems is that property, that otherwise would have been included in the property division, has been made separate by the marital property agreement. The spouses can, e.g., have determined that all property shall be separate property, but when the marriage is dissolved it turns out that one spouse has considerable property acquired during the marriage whereas the other has very little property. If the marital property agreement is respected as it is, the last-mentioned spouse may need to leave the marriage empty-handed. Another situation is where the spouses have stipulated that the property of one of the spouses shall be his or her separate property (whereas the property of the other spouse remains marital property). On divorce, the spouse with marital property may find it unreasonable to share in the property division the net value of all his or her property equally with the other spouse when that spouse's property is not included in the division. If it is not possible to achieve an equitable solution by any other methods, adjustment of the marital property contract is an option. Such adjustment, which can even result in setting the marital property agreement aside, can be made by the court-appointed property division executor or by the court, upon application of a spouse, Ch. 12 § 3 Swedish Marriage Code.

A recommendation in the *travaux préparatoires* to the 1987 Marriage Code, according to which the said provision should be applied restrictively,¹⁰¹ has been followed in case law. The first

⁹⁷ Ö. Teleman, *Äktenskapsförord*, 2nd edition, Nordstedts Juridik AB, 2006, p. 35.

⁹⁸ In this regard Swedish law is at present more rigid than Norwegian, Danish or Finnish law.

⁹⁹ It applies also to so-called pre-agreements between spouses when divorce is under consideration, see above under Question 192.

¹⁰⁰ L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, Nordstedts Förlag AB, 1990, p. 446.

¹⁰¹ *Governmental Bill, Prop 1986/87:1 (Äktenskapsbal m.m.)* pp. 193-194.

case on the issue decided by the Swedish Supreme Court,¹⁰² set an important precedent in this respect. In this case, the spouses with two children had been married for 11 years when they, instead of a divorce which they had considered, decided to draw up a marital property contract introducing full separation of property into the marriage. The initiative was taken by the husband, whereas the wife only after certain hesitation agreed, but after having consulted a lawyer. The spouses divorced after additional 12 years, the marriage having lasted altogether 23 years. At the time of the marital property agreement the spouses' assets were of limited value, but at the time of the divorce the husband' property was of considerable value. The wife requested that the court would declare the marital agreement void or adjust it. The Court (vote 3-2) maintained the agreement, finding that its terms were not unreasonable at the time of the agreement or with regard to later developments. This decision has been criticized in legal literature, but also later Swedish case law shows very little willingness to adjust or set aside terms of marital property agreements.

As has been pointed out, adjustment by court of a marital property contract is the last option in Swedish law. In this connection there is reason to emphasize in particular that *spouses*, according to Ch. 10 § 4 Swedish Marriage Code, may agree that property which has been made separate by means of a marital property agreement shall be included in their property division. Where the spouses have agreed on this, that property shall for the purposes of the property division be treated as marital property.

¹⁰² NJA 1993, p. 583.