

**NATIONAL REPORT: SWITZERLAND**  
 Prof. Ingeborg Schwenzer and Anne-Florence Bock  
 University of Basel  
 August 2008

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**A. GENERAL**

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

Swiss family law is embodied in the second part of the Swiss Civil Code (Swiss Civil Code)<sup>1</sup> (Art. 90 et seq.), matrimonial law is governed by its first section.

In Swiss law, marriage is only open to persons of the opposite sex. It is commonly defined as the mutual consent of a man and a woman of full age to form an exclusive, long-lasting and officially recognized and formalized partnership. The preconditions for marriage are laid down in Art. 94 Swiss Civil Code et seq.<sup>2</sup>

**a. upon marriage**

Art. 163 Swiss Civil Code et seq. contain general rules on the property relationship during marriage, Art. 181 Swiss Civil Code et seq. govern the matrimonial property regimes. The rules on matrimonial property law only apply upon marriage.

**b. during marriage**

General provisions affecting matrimonial property law can be found in Art. 163 Swiss Civil Code et seq. The rules concerning the matrimonial property regimes – with the exception of the contractual property regime of community of property – generally do not play an important role during marriage, as under Swiss law, the default property regime mainly has the function of ensuring financial adjustment upon the dissolution of marriage. Other than under the regime of community of property, ownership is not affected by the matrimonial property regime.

**c. upon separation**

Under Swiss law, factual and legal separation must be distinguished.

*Factual separation* is the decision of the spouses to no longer share a common household. Although Art. 175 Swiss Civil Code sets forth that either spouse may only discontinue the common household if his or her personality, economic basis or the well-being of the family are endangered, these requirements are in practice interpreted broadly, i.e. the threshold is

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<sup>1</sup> Schweizerisches Zivilgesetzbuch, SR 210.

<sup>2</sup> The spouses must be of age and capable of making a rational decision (Art. 94 Swiss Civil Code); there must be no impediments to marriage such as the parties falling within the prohibited degrees of kinship (Art. 95 Swiss Civil Code) or the fact the one of the spouses is already married (Art. 96 Swiss Civil Code). The reasons for annulment are governed by Art. 104 Swiss Civil Code et seq. and include *inter alia* the prohibited degrees of kinship, the absence of the capability to make a rational decision at the time of the conclusion of the marriage, bigamy, error, coercion into marriage, or fundamental error, but also the intent to circumvent the provisions of Swiss migration law.

the strong determination of either spouse to separate.<sup>3</sup> There is normally no need for court intervention, and the property relationship between the spouses is not affected *eo ipso*. Nonetheless, obtaining a formal authorization for separation can be of advantage to justify *inter alia* the imposition of the property regime of separation of property (Art. 176 Swiss Civil Code).

*Legal separation* is governed by Art. 117 Swiss Civil Code et seq. After legal separation, the spouses formally remain married; however, the matrimonial property regime changes to the regime of separation of property *ex lege* (Art. 118 para. 1 Swiss Civil Code). Further, Art. 118 para. 2 Swiss Civil Code lays down, that the provisions on the protection of marriage apply in addition (Art. 171 Swiss Civil Code et seq.). In more detail, the court may order one of the spouses to make maintenance payments (Art. 176 para. 1 No. 1 Swiss Civil Code), it can suspend the rules on mutual representation (Art. 174 Swiss Civil Code) and make orders regarding the family home and the household assets (Art. 176 para. 1 No. 2 Swiss Civil Code). Further, the court may make the necessary orders with regard to common children (Art. 176 para. 3 Swiss Civil Code and Art. 270 Swiss Civil Code et seq.). This results in legal consequences similar to a divorce.

#### **d. upon death**

Upon the death of either spouse, the matrimonial property regime is dissolved *ex lege* (Art. 204 para. 1 Swiss Civil Code for participation in acquisitions, Art. 236 para. 1 Swiss Civil Code for community of property). The respective financial claims are calculated according to the rules of the applicable matrimonial property regime. Only after this, are the rules of inheritance law applied. The share of the assets that is allocated to the deceased spouse forms part of his or her legal estate. The rules governing the dissolution of the matrimonial property regime upon death generally do not differ from the rules governing dissolution upon divorce under the regime of participation in acquisitions, but may be different under the contractual regime of community of property (Art. 241 and 242 Swiss Civil Code).

#### **e. upon divorce**

Upon divorce, the matrimonial property regime is dissolved *ex lege* according to the rules applying to the respective property regimes (Art. 120 para. 1 Swiss Civil Code; Art. 204 para. 2 Swiss Civil Code for participation in acquisitions and Art. 236 para. 2 Swiss Civil Code for community of property).

#### **f. upon annulment**

Annulment entails the same consequences as divorce, Art. 109 para. 2 Swiss Civil Code. Until annulment, the legal consequences are the same as in a valid marriage, with the exception that the spouses have no statutory right of inheritance (Art. 109 para. 1 Swiss Civil Code).

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

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<sup>3</sup> I. Schwander, "Art. 175 para. 3", in: H. Honsell, N.P. Vogt and T. Geiser (eds.), *Basler Kommentar, Zivilgesetzbuch I, Art. 1-456 ZGB*, 3<sup>rd</sup> Ed., Basel, 2006. This view can be supported by the argument that fault no longer plays a role as a ground for divorce, and that one of the reasons for divorce is the separation of the spouses for a period of more than two years, Art. 114 Swiss Civil Code.

Swiss matrimonial property law underwent radical changes as a consequence of a reform which entered into force on 1 January 1988.<sup>4</sup> The aims of the reform were to achieve gender equality,<sup>5</sup> to strengthen the protection of housewives and to expand the autonomy of the spouses to contractually vary their property regime.<sup>6</sup>

Previously, *combination of property* (“*Güterverbindung*”) was the default matrimonial property regime in Switzerland. It differed from the current legal situation not only insofar as it comprised different property masses, but most notably with regard to the wife’s inferior position compared to the husband. Under the old regime, although the wife legally remained the owner of most of her assets, only the husband was entitled to administer and dispose of the matrimonial assets. The wife was solely entitled to dispose of the assets for the purpose of the day-to-day needs of the family. The wife’s position was also inferior to that of the husband upon the dissolution of the property regime. Here, she was only entitled to a share of one third of the marital property. Finally, marital agreements had to be registered, and the commitment to a post-marital contract had to be approved by the guardianship authorities.

The old matrimonial property regime of combination of property is still applicable to marriages entered into before 1 January 1988 if the spouses made a declaration in this respect before 31 December 1988 (Art. 9d and 9e Final Chapter Swiss Civil Code).

After 1988, no major changes with regard to matrimonial property law have been enacted. In a more general context, the divorce reform, which entered into force on 1 January 2000 contains new rules on pension sharing (Art. 122 Swiss Civil Code et seq.).

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

There are no recent proposals in parliament at this time. Yet, some critical voices among the academic community support the idea of revising matrimonial property law.<sup>7</sup> The main point of criticism is that the Swiss system is not well suited to meet the needs of practice, as it is impractical or even impossible to apply its very detailed and complicated rules in the majority of situations. To do so would require constant and detailed book-keeping during marriage. Furthermore, many important questions remain unresolved. This may be explained by the fact that most cases, in which the assets are sufficient to justify a state-of-the-art dissolution, are settled.

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

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<sup>4</sup> AS 1986 122; AS 1986 153 Art. 1; Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Wirkungen der Ehe im allgemeinen, Ehegüterrecht und Erbrecht) vom 11. Juli 1979, Bundesblatt 1979 II 1191.

<sup>5</sup> Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Wirkungen der Ehe im allgemeinen, Ehegüterrecht und Erbrecht) vom 11. Juli 1979, Bundesblatt 1979 II 1193 et seq.

<sup>6</sup> Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Wirkungen der Ehe im allgemeinen, Ehegüterrecht und Erbrecht) vom 11. Juli 1979, Bundesblatt 1979 II 1286 et seq.

<sup>7</sup> T. Sutter-Somm and F. Kobel, “Ist das schweizerische Ehegüterrecht revisionsbedürftig?”, *Die Praxis des Familienrechts*, 2004, p. 776 et seq.; A. Bock, “Dividing the Assets upon the dissolution of a marriage. A comparison between legal systems which apply a ‘hard and fast rule’ and systems with a discretionary approach to the division of assets”, in: K. Boele-Woelki and T. Sverdrup, *European Challenges in Contemporary Family Law*, Antwerp, 2008, p. 289 et seq.

As of 1 January 2007, Switzerland enacted a law implementing registered partnership for same-sex partners (Swiss Law on Registered Partnership).<sup>8</sup> The default property regime in a registered partnership largely mirrors separate property, reflecting the legislator's concept of two gainfully employed and economically independent partners. Registered partners may, however, enter into a "property contract" (Art. 25 Swiss Law on Registered Partnership). In this regard, the exact scope of party autonomy is unclear. Registered partners may clearly opt for the property regime of participation in acquisitions with its possible variations. Whether they may tailor an individual property regime to their needs is unresolved. In these authors' view, the question should be answered in the negative, since, under Swiss law, spouses do not have the possibility of unlimited party autonomy either (see Question 191 et seq.).

There is no special legal status for de facto partners under Swiss law, and the Swiss Federal Supreme Court has refused to apply matrimonial property law directly or by analogy to such couples.<sup>9</sup> Therefore, the general rules of property law and of the Swiss Code of Obligations apply to property matters between such partners.<sup>10</sup> Under certain situations, for example if the partners have a joint bank account or if they jointly own a house, the rules on the simple (economic) partnership (Art. 530 Swiss Code of Obligations) may apply.<sup>11</sup> De facto couples may enter into an agreement regulating their property relationship. However, they rarely make use of this possibility.

**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?**

In general, Swiss matrimonial property law does not affect the position of ownership; this is governed by general property law (Art. 641 Swiss Civil Code et seq.). Swiss property law recognises two different types of joint ownership: collective ownership ("*Miteigentum*", Art. 646 Swiss Civil Code) and joint ownership ("*Gesamteigentum*", Art. 652 Swiss Civil Code).

*Collective owners* each own a fraction of an object. Each owner may dispose of his or her fraction individually, as long as this is compatible with the other owners' rights.<sup>12</sup> *Joint owners*, by contrast, can only jointly dispose of their joint property.<sup>13</sup> Joint ownership is only possible if the owners are joined by a special type of community, one possibility being the matrimonial property regime of community of property, another being the simple (economic) partnership (Art. 530 Swiss Code of Obligations).<sup>14</sup> The simple (economic) partnership is the most informal form of partnership under Swiss law. It is defined as a contractual relationship between two or more persons to attain a joint purpose with joint endeavours or means. No registration or formalisation is required, and the partnership may be terminated upon six months' notice (Art. 546 Swiss Code of Obligations). This is of practical relevance where spouses conduct a common business. In addition, if spouses under the property regime of participation in acquisitions intend to jointly purchase immovable property, they often choose to form a simple (economic) partnership, as this makes it possible for them to hold the property in the form of joint ownership.

<sup>8</sup> Partnerschaftsgesetz, SR 211.231. For details see I. Schwenzer and A. Bock, "New Statutory Rules on Registered Partnerships and Protection Against Domestic Violence", in: B. Atikns (ed.), *The International Survey of Family Law*, Bristol, 2008, p. 445 et seq.

<sup>9</sup> Swiss Federal Supreme Court, BGE 108 II 204; in more detail see A. Bächler, "Vermögensrechtliche Probleme in der nichtehelichen Lebensgemeinschaft", in: A. Rumo-Jungo and P. Pichonnaz (eds.), *Familienvermögensrecht*, Bern, 2003, p. 59 et seq.

<sup>10</sup> Schweizerisches Obligationenrecht, SR 220.

<sup>11</sup> See e.g. Swiss Federal Supreme Court, 19.12.2007, 4A\_383/2007.

<sup>12</sup> Art. 646 and 648 Swiss Civil Code.

<sup>13</sup> Art. 653 para. 3 Swiss Civil Code.

<sup>14</sup> Other possibilities are the community of heirs before the inheritance is split, Art. 602 para. 2 Swiss Civil Code or certain forms of partnerships.

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

See Question 1. d. Upon the death of one of the spouses the property regime is dissolved and the deceased's share of the assets forms part of his or her estate. Under the property regime of separation of property, there is no "dissolution" in the ordinary meaning of the word. Here, each spouse's property forms part of his or her estate.

Additionally, matrimonial property law contains provisions protecting the children of the spouses from a decrease in their legally reserved portion of their parent's inheritance ensuing from (pre-) marital agreements of their parents (Art. 216 para. 1 Swiss Civil Code (for participation in acquisitions, protecting only stepchildren) and Art. 241 para. 3 Swiss Civil Code (for community of property)). It is disputed whether the latter provision applies to common children or only to stepchildren.<sup>15</sup> Finally, under the regime of community of property, neither spouse may waive his or her rights to a succession that would be allocated to the common property, or accept an over-indebted inheritance without the consent of his or her spouse (Art. 230 Swiss Civil Code).

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

The Swiss Civil Code distinguishes between general rights and duties of the spouses with regard to property (Art. 159 Swiss Civil Code et seq.) and the specific matrimonial property regimes (Art. 181 Swiss Civil Code et seq.). The general rights and duties include, among other things, the duty to contribute to the costs and expenses of the family household (Art. 163 Swiss Civil Code), including money for the personal use by the housekeeping spouse (Art. 164 Swiss Civil Code) and compensation for extraordinary contributions (Art. 165 Swiss Civil Code), rules on representation (Art. 166 Swiss Civil Code) and on the protection of the family home (Art. 169 Swiss Civil Code). The rules on the specific matrimonial property regimes are most importantly concerned with the consequences of the dissolution of the property regime, i.e. financial adjustment. Only the contractual property regime of community of property contains special rules on representation (Art. 227 para. 2 Swiss Civil Code et seq.), on the administration and disposal of the property (Art. 227 Swiss Civil Code et seq.) and on liability for debts (Art. 223 Swiss Civil Code et seq.).

**B. GENERAL RIGHTS AND DUTIES OF SPOUSES CONCERNING HOUSEHOLD EXPENSES, TRANSACTIONS IN RESPECT TO THE MATRIMONIAL HOME AND OTHER MATTERS IRRESPECTIVE OF THE SINGLE 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".**

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<sup>15</sup> C. Hegnauer and P. Breitschmid, *Grundriss des Eherechts*, 4<sup>th</sup> Ed., Bern, 2000, para. 28.46, regarding Art. 241 para. 3 Swiss Civil Code as applicable only to non-common children if the spouses have opted for the version of "community of acquisitions", i.e. if the common property is limited to the assets that would be marital property under the property regime of participation in acquisitions, as the legislator's intent was only to protect the descendants of the spouses from being deprived of the separate property of their parents, an aim that is already fulfilled under "community of acquisitions"; according to H. Hausheer and R. Aebi-Müller, "Art. 241, para. 15" in: H. Honsell, N.P. Vogt and T. Geiser (eds.), *Basler Kommentar, Zivilgesetzbuch I, Art. 1-456 ZGB*, 3<sup>rd</sup> Ed., Basel, 2006. Art. 241 para. 3 Swiss Civil Code is applicable to common children as well, regardless of the composition of the common property.

Art. 163 para. 1 Swiss Civil Code provides that each spouse shall contribute towards the appropriate support of the family. The spouses are free to decide on the extent and content of their respective contributions. The notion of “contribution” is a wide one; it encompasses financial as well as factual contributions, e.g. taking care of the household and/or the children, or contributing to the other spouse’s business or professional activities. It is presumed that the spouses share the burden of support equally; however, in the case of exceptional contributions, Art. 165 Swiss Civil Code provides for appropriate compensation. If the spouses cannot agree on the extent of their respective contributions, they may apply to the court that will then determine the proper amount of the respective financial contributions (Art. 173 Swiss Civil Code).

The determination of what constitutes “appropriate support of the family” depends on the circumstances of each case. Apart from daily needs such as food, clothing, expenses for the family home or for health matters, relevant factors are the economic situation of the family and the standard of living chosen by the spouses. Further, the housekeeping spouse has a claim to money for his or her personal use against the gainfully employed spouse.

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

The rules governing the liability of one spouse for debts incurred by the other spouse only apply as long as the spouses are not factually or legally separated. Two categories of debts must be distinguished: debts incurred for day-to-day needs and debts incurred for all other needs of the family.

The spouses are jointly and severally liable for debts incurred for the *day-to-day needs* of the family according to Art. 166 para. 1 Swiss Civil Code. Again, what qualifies as day-to-day needs will depend on the standard of living chosen by the spouses or on local custom. Typical examples include food, clothing, and expenses for health care.

With regard to debts incurred for *other needs* of the family (e.g. more expensive furniture, a car, expensive dental treatment), the spouses are only jointly and severally liable if (a) the court or one of the spouses has authorized the other spouse to incur such a debt, Art. 166 para. 2 No. 1 Swiss Civil Code, (b) in urgent circumstances (e.g. expensive but urgent repairs to the home, expensive emergency health treatment), Art. 166 para. 2 No. 3 Swiss Civil Code, and (c) if a third party relied on the fact that the debt was incurred for day-to-day needs, but in reality it was incurred for other family needs, Art. 166 para. 3 Swiss Civil Code.<sup>16</sup>

Finally, one spouse may be authorized by the other spouse to act in his or her name, and may thus incur a personal debt in the other spouse’s name according to the general rules on representation (Art. 32 Swiss Code of Obligations).

For all other debts, the spouses are in general only liable individually.

**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**

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<sup>16</sup> Since the third party with whom a contract is made must prove the authorization of the contracting spouse to represent the other spouse in the case of other needs of the family, the third party’s reliance on the fact that the contracting spouse was authorized to represent the other spouse is only relevant if the third party mistakenly believes that the contract is entered into for the day-to-day needs of the family (Art. 166 para. 1 Swiss Civil Code). See H. Hausheer, T. Geiser and R. Aebi-Müller, *Das Familienrecht der Schweizerischen Zivilgesetzbuches*, 3<sup>rd</sup> Ed., Bern, 2007, para. 08.77.

**property regime? In answering this question, briefly explain what your system understands by “matrimonial/family home”.**

The family home is the physical centre of family life. This corresponds to the main place of residence of the spouses and their children. Other than in very special circumstances,<sup>17</sup> there is only one family home.

During marriage, neither spouse may commit to a legal or other transaction that negatively affects or entails the loss of the rights to the family home (Art. 169 Swiss Civil Code). An example would be the termination of the lease or the sale of the family home. It is not completely resolved whether a lien on the family home (e.g. in the form of a mortgage) falls under the scope of this provision, although it is unanimously held that this is the case if there is a significant possibility of a forced liquidation.<sup>18</sup>

The spouses' rights to the family home are further protected by *tenancy law*. According to Art. 266m Swiss Code of Obligations, neither spouse may terminate a lease without the consent of the other spouse. Similarly, the landlord must notify a termination *separately to both* spouses according to Art. 266n Swiss Code of Obligations. Finally, if the landlord terminates the lease, the spouse who is not a party to the tenancy contract may also appeal against the termination or claim an extension of the lease (Art. 273a para. 1 Swiss Code of Obligations). An agreement on the extension of the lease with the landlord is only valid if it was entered into by *both* spouses (Art. 273a para. 2 Swiss Code of Obligations).

*Upon factual or legal separation*, the court may make an order regulating which spouse is entitled to use the family home and the household items in the future (Art. 176 para. 1 No. 2 Swiss Civil Code). The decisive criterion is the overriding practical need to use the home and the household assets, irrespective of questions of ownership.<sup>19</sup>

*Upon divorce or annulment*, the court may transfer a *lease contract* to the spouse who is dependent on the family home for an important reason (Art. 121 para. 1 Swiss Civil Code). The needs of minor children, health or business considerations qualify as important reasons. In such a case, the other spouse remains jointly and severally liable for the rent up to a period of two years; however, he or she can deduct any payments in the fulfilment of such a claim by the landlord from his or her maintenance payments (Art. 121 para. 2 Swiss Civil Code). If one of the spouses is the *sole owner* of the family home, a right of tenancy (Art. 776 Swiss Civil Code – a limited right *in rem* registered in the land register entitling its bearer to inhabit a property) may be granted against reasonable compensation to the owner spouse (Art. 121 para. 3 Swiss Civil Code).

If the spouses own the family home *together*, a similar solution can often be reached by applying the provisions of matrimonial property law that allow the allocation of a *collectively* owned asset (see Question 5 for an explanation of the legal concept of collective ownership) to the spouse whose interests prevail (Art. 205 para. 2 Swiss Civil Code for participation in acquisitions and Art. 251 Swiss Civil Code for separate property). Although these provisions

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<sup>17</sup> E.g. if the family has different homes, which it occupies during different seasons, and these homes are all equally important for family life, or if one spouse lives in the country with a child who is ill, while the other spouse lives in the city with the other children, see H. Hausheer, T. Geiser and R. Aebi-Müller, *Das Familienrecht der Schweizerischen Zivilgesetzbuches*, 3<sup>rd</sup> Ed., Bern, 2007, para. 08.98.

<sup>18</sup> See I. Schwander, Art 169, para. 10, in: H. Honsell, N.P. Vogt and T. Geiser (eds.), *Basler Kommentar, Zivilgesetzbuch I, Art. 1-456 ZGB*, 3<sup>rd</sup> Ed., Basel, 2006.; for an overview of the positions that have so far been taken by Swiss legal doctrine see H. Hausheer, R. Reusser and T. Geiser, *Berner Kommentar, Band II, 1. Abteilung, 2. Teilband, Die Wirkungen der Ehe allgemein*, Art. 159-180 ZGB, 2<sup>nd</sup> Ed., Bern, 1999, Art. 169, para. 46.

<sup>19</sup> See Swiss Federal Supreme Court, BGE 114 II 18, consideration 4.



are in practice most relevant with regard to the family home, they apply to any asset that is owned in the form of collective ownership. Only the property regime of community of property contains a specific provision with regard to the family home and the household assets, if they belong to the common property (Art. 244 para. 3 Swiss Civil Code). Here, each spouse may request the allocation of the family home against a reasonable deduction from his or her other financial claims.

Upon death, the surviving spouse may claim the allocation of the family home and/or the household goods (Art. 612a para. 1 and 2 Swiss Civil Code; Art. 219 para. 1 Swiss Civil Code for participation in acquisitions and Art. 244 para. 1 and 2 Swiss Civil Code for property held in common under community of property). Instead of transferring the property to the surviving spouse, an *usufruct* (Art. 745 Swiss Civil Code, a limited right *in rem* registered in the land register entitling its bearer to the right of use) or a right of tenancy (Art. 776 Swiss Civil Code, a limited right *in rem* registered in the land register entitling its bearer to inhabit a property) may be chosen.

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

There are no general rules on household assets in Swiss matrimonial property law outside of the rules on matrimonial property regimes and inheritance law. (In detail, see Questions 10, 85 and 155). The provisions on the family home extend to suitable furniture and household assets.<sup>20</sup>

Household assets not only include assets that are necessary for the household such as furniture or kitchen equipment, but also other objects that are used by several members of the family or for family purposes such as the family car, computers or items for interior decoration, with the exception of goods for the sole personal use of one of the family members (e.g. equipment for personal hobbies or professional use).

Domestic animals held for non-economic purposes are not household equipment. If such an animal is owned by both spouses, it is allocated to the spouse who can ensure better placement, in terms of animal protection, upon separation (Art. 651a para. 1 Swiss Civil Code).

**12. To what extent, if at all, are there other rules governing transactions entered into by one spouse irrespective of the matrimonial property regime (e.g. entering into guarantees, incurring debts...)?**

The general rule is that both spouses are free to enter into legal transactions with each other or with third parties. Apart from the provisions limiting the spouses' legal capacity to enter into transactions that negatively affect the family home (see Question 10), the provisions on *surety* (“*Bürgschaft*”, Art. 492 et seq. Swiss Code of Obligations) and the *Swiss Law on occupational benefit plans* (in detail, see Question 62) contain certain limitations.

If one of the spouses intends to enter into a contract of surety in the role of a guarantor, the *prior* written consent of his or her spouse is required, regardless of the guaranteed amount (Art. 494 Swiss Code of Obligations). This provision only applies if the spouses are not legally separated.

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<sup>20</sup> A. Büchler and R. Vetterli, *Ehe – Partnerschaft – Kinder: eine Einführung in das Familienrecht der Schweiz*, Basel, 2007, p. 59.

If one of the spouses has pension entitlements with an occupational benefit pension fund plan (in detail, see Question 62), he or she may request the cash payment of the pension entitlement under certain circumstances (e.g. a definitive departure from Switzerland or a change to self-employment).<sup>21</sup> Such a cash payment is only possible with the consent of the other spouse.<sup>22</sup>

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

According to Art. 166 para. 1 Swiss Civil Code, both spouses are entitled to represent each other in transactions concerning day-to-day needs. Representation for other needs of the family requires either the written authorization of a court or of the other spouse, or the presence of urgent circumstances (Art. 166 para. 2 Swiss Civil Code, see also Question 9). Additionally, these rules are complemented by the rules on agency (representation) of the Swiss Code of Obligations (Art. 32 et seq. Swiss Code of Obligations) and the rules on mandate (Art. 394 et seq. Swiss Code of Obligations).

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

The spouses are free to enter into legal transactions with each other (Art. 168 Swiss Civil Code). Only the general rules of contract and on the protection of personal rights restrict their freedom to contract (i.e. public policy, illegality or immorality, Art. 19 and 20 Swiss Code of Obligations; protection from excessive commitments, Art. 27 Swiss Civil Code).

## C. MATRIMONIAL PROPERTY REGIMES

### C.1. General issues

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

According to Art. 182 para. 2 Swiss Civil Code the spouses may make a marital agreement at any time before or during their marriage. However, they may only do so within the relatively narrow boundaries of the law, i.e. instead of participation in acquisitions, they may choose another pre-existing property regime, and within the chosen matrimonial property regime, they may only modify this regime where the law explicitly entitles them to do so (in more detail, see Question 191 et seq.).

**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 property regime of participation in acquisitions is the default matrimonial property regime under Swiss law (Art. 181 Swiss Civil Code).

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

The spouses may opt for the regime of community of property or the regime of separation of property (Art. 182 para. 2 Swiss Civil Code).

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<sup>21</sup> Art. 5 para. 2 FZG (Bundesgesetz über die Freizügigkeit in der beruflichen Alters-, Hinterlassenen- und Invalidenvorsorge, SR 831.42).

<sup>22</sup> Swiss Federal Supreme Court, BGE 130 V 103.

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

- a. Question 16.
- b. Question 17.

**a. Question 16**

The matrimonial property regime of *participation in acquisitions* (Art. 196 Swiss Civil Code et seq.) does not affect the ownership of the assets by the spouses. It only provides for equal financial participation in the marital property upon dissolution. Each spouse's assets and liabilities are either classified as separate property ("Eigengut") or as marital property ("Errungenschaft"). This results in four property masses. Upon the dissolution of the matrimonial property regime, each spouse essentially retains his or her separate property, whereas each spouse owes half of the positive value of his or her marital property to the other spouse, Art. 215 Swiss Civil Code. A negative balance is not shared.

**b. Question 17**

Under the regime of *separate property* (Art. 247 Swiss Civil Code et seq.), each spouse retains his or her property, there is no financial adjustment. However, if the spouses own property in the form of joint or collective property (for an explanation of the legal concepts of collective and joint ownership, see Question 5), the general rules of property law and contract law apply.

The property regime of separate property may be chosen in a (pre-)marital agreement. However, it may also be imposed *at the request* of one of the spouses upon factual separation (Art. 176 para. 1 No. 2 Swiss Civil Code) or at the request of the debt collection authorities under certain circumstances. In detail, see Question 129.

Under the contractual property regime of *community of property* (Art. 221 Swiss Civil Code et seq.), the spouses' assets and liabilities are divided into three categories: Each spouse's separate property ("Eigengut") and the common property ("Gesamtgut"), which is owned by both spouses together in the form of *joint* property (for an explanation of the legal concept of joint property, see Question 5). The parties may vary the scope of the common property by choosing between three models: the default model ("*Allgemeine Gütergemeinschaft*"), under which only the goods for the sole personal use of one spouse and damages for pain and suffering constitute separate property (Art. 222 para. 1 Swiss Civil Code); and two more restrictive models: First, "*community of acquisitions*" ("*Errungenschaftsgemeinschaft*"), under which the common property corresponds to the marital property under the property regime of participation in acquisitions (Art. 223 Swiss Civil Code); and second the "*community of exclusion*" ("*Ausschlussgemeinschaft*"), under which certain assets may be specifically excluded from the common property (Art. 224 Swiss Civil Code). Upon the dissolution of the regime of community of property upon the *death* of either spouse or because the spouses contractually enter into another matrimonial property regime, the surviving spouse, respectively the other spouse, is entitled to half of the common property (Art. 241 Swiss Civil Code). In all other cases, and most importantly upon *divorce*, each spouse takes back the assets which would be his or her separate property under the property regime of participation in acquisitions, whereas the remaining portion of the common property is split in half (Art. 242 Swiss Civil Code).

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

As the property register was abolished in 1988, no recent statistical data on the frequency of the respective matrimonial property regimes is available. However, it is certain that the most frequent property regime is the default property regime of participation in acquisitions. It may roughly be estimated that only about 5 to 10% of all spouses enter into a (pre-)marital agreement that provides for a change of the property regime, and that most of these choose separate property. Hardly any couples choose community of property any more.

## C.2. Specific Regimes

### I. Community of property

Not relevant.

### II. Community of accrued gains/Participation in acquisitions

#### II.1. Categories of Assets

##### 57. Describe the system. Indicate the different categories of assets involved.

Under the property regime of participation in acquisitions (Art. 196 et seq. Swiss Civil Code), each spouse's assets and liabilities are either classified as separate property ("*Eigengut*"), Art. 198 Swiss Civil Code, or as marital property ("*Errungenschaft*"), Art. 197 Swiss Civil Code. This results in four property masses. The property regime as such does not affect the spouses' position concerning ownership; this is governed by the general rules of property law. Upon dissolution, each asset is assigned to one of the four categories. The contributions of one property mass to another are then calculated. A possible increase in value is allocated proportionally to the contributions. Finally, each spouse may claim one half of the *positive* balance of the marital property of the other (Art. 215 para. 1 Swiss Civil Code). The respective financial claims of the spouses are set off (Art. 215 para. 2 Swiss Civil Code).

##### 58. What is the legal nature of the different categories of assets?

The allocation of an asset to either separate or marital property has no effect on ownership. The allocation is essentially done for arithmetical purposes, in order to calculate the compensatory claims for investments made by one property mass in another, and to calculate the financial claim to half of the marital property's value in the end.

##### 59. What assets comprise the separate property of the spouses?

Art. 198 Swiss Civil Code provides an exhaustive list of assets that belong to the separate property *ex lege*:

(1) Assets for the sole personal use of either spouse; (2) assets that belonged to either spouse before the commencement of the property regime; (3) assets that were acquired by inheritance, gift or otherwise without remuneration; (4) damages for pain and suffering; and (5) assets which replace pre-existing separate property. In this regard, it is not the purpose of the asset, but the means with which it was acquired that is decisive (in more detail, see Question 61).

The spouses may further stipulate that specific assets belong to the separate property by (pre-)marital agreement. This is possible for assets used for professional purposes or to conduct a business (Art. 199 para. 1 Swiss Civil Code). They may further agree that revenue deriving from separate property remains separate property (Art. 199 para. 2 Swiss Civil Code).

All other assets are allocated to the marital property. Art. 197 Swiss Civil Code defines marital property as assets that have been acquired during marriage against remuneration and provides for the following, non-exhaustive, list of examples: (1) earnings of the spouses; (2) benefits paid out by occupational benefit pension fund plans, social insurance and social security institutions; (3) indemnifications for the loss of earning capacity; (4) revenue generated from separate property; and (5) replacements for marital property.

If the allocation of an asset to one of the property masses cannot be proven, Art. 200 para. 3 Swiss Civil Code presumes an allocation to the marital property.

Debts are allocated according to the same rules, i.e. debts that existed before marriage are allocated to the separate property of the indebted spouse. Otherwise, debts are allocated to the property mass to which they are most closely connected (Art. 209 para. 2 Swiss Civil Code). Thus, if a debt was incurred to purchase an asset or is otherwise objectively connected to it, the debt follows the asset to its property mass. If a debt cannot be unambiguously allocated to a property mass, it is allocated to the marital property (Art. 209 para. 2 Swiss Civil Code).

If an asset has been financed with means derived from several sources, the asset is allocated to the property mass of the *owner spouse* who contributed the largest share.<sup>23</sup> A debt is also allocated to the same property mass, even if the debt by far exceeds the positive contributions (the most important example being the purchase of a house with a mortgage). An exception exists if the interest for the loan is regularly paid by another property mass. In that case, in general, the debt is allocated to the property mass which pays the interest.<sup>24</sup>

With regard to the allocation of means prematurely drawn from an occupational benefit plan scheme, see Question 88. At this point, it is sufficient to say that such means are in principle not affected by matrimonial property law.

#### **60. Can spouses acquire assets jointly? If so, what rules apply?**

Spouses may acquire assets together in the form of collective or joint ownership (see Question 5). In this respect the general rules of property law apply. The property regime of participation in acquisition only contains special rules for assets held in the form of *collective* ownership. According to Art. 201 Swiss Civil Code, each spouse cannot dispose of his or her share of a collectively owned asset without the consent of the other spouse. As a practical result, this leads to a convergence of collective and joint property in this respect. Further, upon the dissolution of the property regime, the spouse whose interest in keeping an item prevails may claim its allocation against reasonable compensation (Art. 205 para. 2 Swiss Civil Code).

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

Replacements are generally allocated to the same category as the asset they replace (Art. 197 para. 5 Swiss Civil Code for marital property and Art. 198 para. 4 Swiss Civil Code for separate property). The substitution principle only applies if the owner of the asset and its replacement is the same person and if there is a direct legal connection between the acquisition of an asset and the alienation of another. A replacement may occur directly, e.g. if

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<sup>23</sup> See Swiss Federal Supreme Court, BGE 123 III 152.

<sup>24</sup> A counter-exception exists if the interest for a loan that is used to finance immovable property that is allocated to the separate property is paid from the rental income of the building. Here, the debt is not reallocated, although revenue generated from separate property is generally allocated to the marital property. It is suggested by legal doctrine that another counter-exception applies if the family home is allocated to the separate property, but the interest for the loan is paid by the marital property, as here the interest on a mortgage is regarded as part of the appropriate support of the family. In detail see H. Hausheer, T. Geiser and R. Aebi-Müller, *Das Familienrecht der Schweizerischen Zivilgesetzbuches*, 3<sup>rd</sup> Ed., Bern, 2007, para. 12.69 et seq. We do not agree with the latter counter-exception. It would unduly favour the owner spouse and disregard the contributions to the support of the family by the other spouse.

an insurance company pays an indemnification for a destroyed object, but also indirectly, e.g. in the case of a sale of an asset.

It is important to note that, in this respect, it is not the purpose of the asset, but the means with which it was acquired that is decisive. This may be illustrated by the following examples: If H buys a new sofa with money that he earned (= marital property), the new sofa will also be part of his marital property. If he purchases the sofa with money that he inherited (= separate property), the sofa will be allocated to his separate property. If he trades his inherited Oldsmobile (= separate property) for a family car, the family car will still be separate property; and the same applies if he first sells the Oldsmobile and uses the proceeds to buy the family car. In contrast, if H purchases a new car using money which he earned (= marital property) to “replace” a car he inherited (= separate property), the new car would be allocated to his marital property. The Swiss Federal Supreme Court has consequently qualified a lottery prize as marital property, where the lottery ticket was purchased with marital property.<sup>25</sup>

There are two exceptions to this general rule: First, assets acquired for sole personal use always form part of the separate property, regardless of the means with which they were purchased (Art. 198 para. 1 Swiss Civil Code). Here, only the purpose of the asset is decisive; however, if the marital property has contributed to the acquisition of such an object, it is entitled to a compensation claim (in detail, see Question 83). Second, social security or pension *benefits* (but not mere pension entitlements), or indemnifications for the loss of earning capacity, always form part of the marital property regardless of the means that were used to finance the social security or pension fund (Art. 197 para. 2 Nos. 2 and 3 Swiss Civil Code). For special rules, in cases where such benefits were paid in the form of a capital sum see Question 88.

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

The Swiss social security system is composed of three so-called “pillars”. The mandatory “first pillar” (Swiss Old Age, Survivors’ and Disability Insurance Law)<sup>26</sup>, is exclusively governed by public law. It is meant to ensure a minimum standard of living for the elderly, orphans and widows and is financed by compulsory salary deductions. It is divided equally upon divorce ex officio by the competent authority.

The “second pillar”, the occupational benefits plan scheme,<sup>27</sup> is only mandatory for employees – not for self-employed persons. It is financed by salary deductions that are paid to a pension fund, and is meant to ensure the previous standard of living after retirement. The rules on the matrimonial property regimes are not applicable to such pension *entitlements* (other than to pension *benefits* that have already been paid out, see Question 61). However, the provisions on the effects of a divorce (Art. 122 Swiss Civil Code) provide for an equal division of such pension entitlements that have accrued during marriage upon divorce.

The “third pillar” comprises all other savings or special investments made with regard to retirement (e.g. a life insurance). Some of these are treated preferentially by tax legislation. In the present context, it is important to note that these pension savings are not treated differently from other assets of the spouses, i.e. if they were financed by using a spouse’s marital property, they are allocated to the marital property, and if they were financed with separate property, they are allocated to the separate property. However, valuation issues in the case of an old-age insurance that is allocated to the marital property and thus subject to

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<sup>25</sup> Swiss Federal Supreme Court, BGE 121 III 201, consideration 4.a.

<sup>26</sup> Bundesgesetz über die Alters- und Hinterbliebenenversicherung, SR 831.10, AHVG.

<sup>27</sup> Bundesgesetz über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge, SR 831.40, BVG.

financial adjustment are the subject to dispute.<sup>28</sup> In more detail, it is disputed whether the (lower) surrender value or the (higher) value of the acquired insurance benefit is decisive in the case of a life insurance. In practice, the surrender value is normally applied. This is especially important for self-employed persons as their “third pillar” is often their most valuable asset and at the same time their only provision for old age.

Further, Art. 207 para. 2 Swiss Civil Code contains a special provision regarding capital sums, which one of the spouses received from a social security institution or from unemployment insurance. Here, the hypothetical capitalized future value of the pension benefits after the date of dissolution is allocated to the separate property. In detail, see Question 88.

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

According to Art. 198 para. 2 Swiss Civil Code, gifts and inherited property form part of the separate property *ex lege*. If a third party makes a gift to both spouses, each spouse’s share is allocated to his or her separate property.<sup>29</sup> It may be inferred from the principle of freedom of contract that a donor or testator may designate a gift to form part of the marital property of the donee; however, this issue has not been discussed in the legal literature.

**64. How is the categorisation of the assets proved as between the spouses? Are there rebuttable presumptions?**

According to Art. 200 para. 1 Swiss Civil Code, a spouse who claims to own an asset must prove this (e.g. by an entry in the land register for immovable property, Art. 937 Swiss Civil Code (presumption) and Art. 971 Swiss Civil Code et seq.; by applying the presumption of property law that possession of movable property indicates ownership (Art. 930 Swiss Civil Code et seq.), or by producing evidence of the legal act that led to the acquisition of movable property, e.g. a contract of sale). Otherwise, collective property is assumed (Art. 200 para. 2 Swiss Civil Code) (for an explanation of the legal concept of collective ownership, see Question 5).

All assets are presumed to be marital property, unless proven otherwise (Art. 200 para. 3 Swiss Civil Code).

**65. How is the categorisation of the assets proved as against third parties? Are there rebuttable presumptions?**

There are no special rules with regard to third parties, Art. 200 para. 3 Swiss Civil Code applies to third parties as well (see Question 64).

**66. Which debts are personal debts?**

In general, all debts incurred personally are personal debts, the most important exception being debts incurred for the *day-to-day needs* of the family according to Art. 166 para. 1 Swiss Civil Code (see Question 67 below and in detail Question 9).

**67. Which debts are joint debts?**

The general rules (Art. 166 Swiss Civil Code) apply. The spouses are jointly and severally liable for debts incurred for the *day-to-day needs* of the family according to Art. 166 para. 1 Swiss Civil Code. With regard to debts incurred for *other needs* of the family (e.g. more

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<sup>28</sup> See K. Baumann and M. Lauterburg, “Vorbem. zu Art. 122-124, para. 100”, in: I. Schwenzer (ed.), *FamKommentar Scheidung*, Bern, 2005.

<sup>29</sup> D. Steck, “Art. 198, para. 11”, in: I. Schwenzer (ed.), *FamKommentar Scheidung*, Bern, 2005.

expensive furniture, a car, expensive dental treatment etc.), the spouses are only jointly and severally liable if (a) the court or the other spouse authorized the acting spouse to incur such a debt, Art. 166 para. 2 No. 1 Swiss Civil Code, (b) in urgent circumstances (e.g. expensive but urgent repairs to the home), Art. 166 para. 2. No. 2 Swiss Civil Code, or (c) if a third party relied on the fact that the debt was incurred for day-to-day needs, but in reality it was incurred for other family needs, Art. 166 para. 3 Swiss Civil Code. Further, either spouse may authorize the other spouse to incur a joint debt according to the general rules on representation (Art. 32 et seq. Swiss Code of Obligations). In detail, see Question 9.

**68. On which assets can the creditor recover personal debts?**

According to Art. 202 Swiss Civil Code, each spouse is liable for his or her personal debts with all of his or her assets, regardless of whether they are classified as separate or marital property.

**69. On which assets can the creditor recover joint debts?**

A creditor may recover joint debts on the entire property of both spouses, regardless of whether it is classified as separate or marital property. However, a creditor may also choose to recover his or her debt from the assets of one spouse only.

**II.2. Administration of Assets**

**70. How are the different categories of assets administered?**

Each spouse administers his or her own assets, Art. 201 Swiss Civil Code, irrespective of whether the assets are allocated to the marital or separate property. If the spouses own an asset together, the rules of property law apply (see Question 4).

Under *collective* ownership (see Question 5), each owner is entitled to use the asset as long as such use is compatible with the rights of the other collective owners (Art. 648 para. 1 Swiss Civil Code). He or she may dispose of his or her property share in the same way as an owner (Art. 646 para. 3 Swiss Civil Code). Matrimonial property law only lays down an additional requirement in Art. 201 para. 2 Swiss Civil Code: if the spouses own an asset as collective owners, neither spouse may dispose of such an asset without his or her spouse's consent, unless otherwise agreed.

Furthermore, ordinary measures of administration and use, and other measures must be distinguished. Ordinary measures of administration may be effected by each collective owner alone (Art. 647a Swiss Civil Code), whereas all other measures (e.g. measures that require construction work) require the consent both spouses (Art. 647b-647e Swiss Civil Code). The costs of administrative measures are borne by the collective owners in the proportion of their property shares unless otherwise agreed (Art. 649 Swiss Civil Code).

In any case, each collective owner may request that measures that are necessary for the preservation of the value and the usability of the asset are carried out, and, if necessary, ordered by the court (Art. 647 para. 2 No. 1 Swiss Civil Code). If an asset is threatened by imminent or growing harm, each collective owner may take the necessary prevention measures at the expense of all of the collective owners (Art. 647 para. 2 Swiss Civil Code).

The administration of *jointly* owned assets (Art. 652 et seq. Swiss Civil Code, see Question 5) is governed by the rules of the underlying community (Art. 653 Swiss Civil Code). For spouses under the regime of participation in acquisitions this will often be a simple (economic) partnership (Art. 530 Swiss Code of Obligations). If there are no other provisions in this respect, an unanimous decision by all of the joint owners is required (Art. 653 Swiss Civil Code).



**71. Can one spouse mandate the other to administer the assets?**

Each spouse may mandate the other spouse expressly or impliedly to administer his or her property, Art. 195 para. 1 Swiss Civil Code. Their relationship is then governed by the provisions on mandate (Art. 394 et seq. Swiss Code of Obligations)

**72. 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?**

The spouses' capacity to enter into legal transactions is only limited by the provisions protecting the family home (Art. 169 Swiss Civil Code, Art. 266m and 266n Swiss Code of Obligations), in detail see Question 10 and 11; and by the limitations provided in the provisions on surety (see Question 12). If a spouse has made significant gratuitous donations (exceeding customary gifts) without the consent of the other spouse during the five years preceding the dissolution of the property regime, or if a spouse has deliberately squandered his or her marital property during marriage to diminish the financial claims of the other spouse, such divestments are added to the marital property for arithmetical purposes (Art. 208 Swiss Civil Code).

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

There are no special rules on the administration of professional assets.

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

Regardless of the applicable property regime, each spouse may request the other spouse to provide information about his or her income, assets or debts, unless such information is protected by professional secrecy (Art. 170 para. 1 and 3 Swiss Civil Code). This right is enforced by the possibility to request the court to order the other spouse or any third person to provide the necessary information and/or documentation (Art. 170 para. 2 Swiss Civil Code). If one of the spouses refuses to give such information, this may be viewed as a material breach of his or her family duties according to Art. 172 Swiss Civil Code, which entitles the other spouse to preliminary measures. More importantly, a refusal to provide such information also constitutes a ground for allowing the court to order a change to the property regime of separation of property upon the request of the other spouse (Art. 185 para. 2 No. 4 Swiss Civil Code).

If one spouse has mandated the other to administer his or her assets, the provisions on mandate require the mandatee to account to the mandator at any time (Art. 400 para. 1 Swiss Code of Obligations).

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

There are no fixed rules on which spouse's interests prevail. According to Art. 172 para. 1 Swiss Civil Code, either spouse may resort to the court in the case of a dispute about an important issue or if one of the spouses does not comply with his or her family duties. In such a case, the court may order the measures that are provided for by the law (Art. 172 para. 3 Swiss Civil Code). This includes the following measures:

If one of the spouses refuses to consent to an important transaction for other needs of the family (see Question 9), the court may grant this permission instead (Art. 166 para. 2 No. 1 Swiss Civil Code.) The same applies if one of the spouses unjustifiably refuses his or her

consent to a legal transaction negatively affecting the family home (Art. 169 para. 2 Swiss Civil Code).

If the spouses cannot agree on their respective contributions to the support of the family, the court may determine the payments that are due. The court may also determine the claim of the housekeeping spouse to money for his or her personal use (Art. 173 para. 1 and 2 Swiss Civil Code).

In the case of a dispute between the spouses concerning the administration of *collectively* owned assets (for an explanation of the legal concept of collective property, see Question 5), the rules of property law apply. Most importantly, each collective owner may request that measures that are necessary for the preservation of the value and the usability of the asset are carried out, and, if necessary, ordered by the court (Art. 647 para. 2 No. 1 Swiss Civil Code). If an asset is threatened by imminent or growing harm, each collective owner may take the necessary prevention measures at the expense of all of the collective owners (Art. 647 para. 2 Swiss Civil Code). However, the specific provisions of family law (e.g. on the protection of the family home) take precedence over these general provisions of property law in the case of a conflict.

If one of the spouses has mandated the other spouse to administer his or her assets (Art. 195 Swiss Civil Code), the general provisions on mandate apply (Art. 394 Swiss Code of Obligations), and either party may revoke the mandate at any time (Art. 404 para. 1 Swiss Code of Obligations).

**76. 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 one of the spouses exceeds his or her right of representation or is incapable of exercising his or her rights of representation, the court may revoke his or her power to represent the other spouse fully or partially upon the request of the other spouse (Art. 174 para 1. Swiss Civil Code).

If one of the spouses does not fulfil his or her duties to financially contribute to the needs of the family, the court may direct his or her debtors to pay their debts directly to the other spouse (Art. 177 Swiss Civil Code). This is a very effective means, as the most important debtor is in most cases the employer of the non-contributing spouse. The measure therefore also exerts a certain amount of psychological pressure, as normally a spouse prefers not to inform his or her employer about his or her failure to support the family.

If it is necessary to ensure the economic well-being of the family or the fulfilment of one spouse's financial duties towards the family (Art. 178 para. 1 Swiss Civil Code), the court may restrict the right of either spouse to dispose of certain assets by requiring the consent of the other spouse. Such an order may be supported by interim measures of protection. If such a restriction is placed on immovable property, the court may order its entry in the land register (Art. 178 para. 3 Swiss Civil Code and Art. 78 Swiss Ordinance on the Land Register)<sup>30</sup>. This excludes an otherwise possible good faith acquisition by any third party.

If one spouse jeopardizes the interests of the other spouse or of the marital community, the other spouse may request the imposition of separate property (Art. 185 para. 2 No. 2 Swiss Civil Code).

If the spouses are factually separated, the court may further rule on the use of the family home and the household assets (Art. 176 para. 1 No. 2 Swiss Civil Code); determine the

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<sup>30</sup> Grundbuchverordnung, SR 211.432.1 (GBV).

financial contributions that are due (Art. 176 para. 1 No. 1 Swiss Civil Code); and impose the property regime of separation of property (Art. 176 para. 1 No. 3 Swiss Civil Code).

Further, the general provisions of property law apply to assets that are owned by the spouses together. Nevertheless, the specific provisions of family law (e.g. on the protection of the family home) take precedence over the provisions of property law. Thus, if there is no specifically applicable family law provision, the following rules apply: For assets that are *collectively* owned (see Question 5) by the spouses, Art. 649b para. 1 Swiss Civil Code lays down that a collective owner may be excluded from the community by a judicial decision if he or she breaches his or her duties in a manner that the continuation of the community may no longer be expected from the other owners. For assets that are *jointly* owned (see Question 5), the rules of the underlying community apply in case of a dispute regarding their administration (Art. 654 para. 1 Swiss Civil Code). For spouses under the property regime of participation in acquisitions, in most cases this will be the simple (economic) partnership (see Question 5). Thus, in most cases a liquidation of the asset in question would result, Art. 548 Swiss Code of Obligations.<sup>31</sup>

If one of the spouses has mandated the other spouse to administer his or her assets (Art. 195 Swiss Civil Code), the general provisions on mandate apply (Art. 394 Swiss Code of Obligations). A breach of duty may lead to the mandatee's liability for any resulting damage (Art. 97 and Art. 398 Swiss Code of Obligations).

Finally, Art. 208 Swiss Civil Code protects both spouses against a diminution of their financial claims upon the dissolution of the property regime. If a spouse has made gratuitous donations (exceeding customary gifts) without the consent of the other spouse during the five years preceding the dissolution of the property regime; or if a spouse has deliberately squandered marital assets during marriage to diminish the financial claims of the other spouse, such divestments are added to the marital property for arithmetical purposes.

#### **77. What are the possible consequences if a spouse is incapable of administering the assets?**

If one of the spouses is incapable of managing his or her affairs due to a mental illness (Art. 369 Swiss Civil Code) or if he or she mismanages his or her property (Art. 370 Swiss Civil Code), he or she shall be placed under guardianship. According to Art. 380 Swiss Civil Code, the other spouse or another close relative is normally appointed as guardian. Further, if the person placed under guardianship has explicitly designated a person as a guardian, this wish is normally complied with (Art. 381 Swiss Civil Code).

Further, if one of the spouses is permanently incapable of making a rational judgement, the other spouse or the affected spouse's guardian may request the imposition of the property regime of separate property (Art. 185 para. 2 No. 5 and 185 para. 3 Swiss Civil Code).

### **II.3. Distribution of Assets upon dissolution**

#### **78. 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 property regime of participation in acquisitions is dissolved *ex lege* upon the death of either spouse, or upon divorce, annulment or legal separation (Art. 204 Swiss Civil Code).

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<sup>31</sup> See in detail A. Meier-Hayoz and P. Forstmoser, *Schweizerisches Gesellschaftsrecht mit neuem Recht der GmbH, der Revision und der kollektiven Kapitalanlagen*, 10<sup>th</sup> Ed., Bern, 2007, § 12, para. 88 et seq. Restitution of the assets *in natura* is only possible if both partners agree.

It is dissolved *upon a request to the court* by either spouse if an important reason requires the imposition of separation of property, Art. 185 para. 1 Swiss Civil Code. Art 185 para. 2 Swiss Civil Code gives the following examples for important reasons: If a spouse jeopardizes the (financial) interests of the other spouse or of the marital community, if a spouse refuses to provide information about his or her financial situation, or if a spouse is permanently incapable of making rational decisions. Also, in the case of a factual separation, either spouse may request the imposition of separate property where this is appropriate (Art. 176 para. 1 No. 3 Swiss Civil Code).

Finally, the property regime of participation in acquisitions is dissolved when another property regime is *agreed upon* in a marital contract (Art. 204 para. 1 Swiss Civil Code).

**79. What date is decisive for the dissolution of the matrimonial property regime? Distinguish between the different grounds mentioned under Q 78.**

In the case of dissolution upon death or upon an agreement to adopt another matrimonial property regime, the date of death or of the agreement is decisive (Art. 204 para. 1 Swiss Civil Code). If there is no direct proof of the death of a spouse, i.e. if he or she disappeared in circumstances of mortal peril or if he or she has been missing for more than five years, the time of the mortal peril, respectively the time of the receipt of the last news, is set as the time of death (Art. 38 para. 2 Swiss Civil Code). In the case of a marital agreement, the spouses may agree on a previous date; however, such a provision is only effective *inter partes* and thus cannot affect third parties.<sup>32</sup>

In all other cases, it is the date on which the request to the court (for divorce, for separation, for annulment or for the imposition of separate property) was filed, Art. 204 para. 2 Swiss Civil Code.

**80. What is the spouses' position with regard to each others' acquisitions and gains?**

According to Art. 215 para. 1 Swiss Civil Code, each spouse (or his or her heirs) is entitled to a financial claim in the amount of half of the *positive* balance of the other spouse's marital property – a negative value (i.e. if the liabilities exceed the assets) is not shared (Art. 210 para. 2 Swiss Civil Code). The acquisition consists of the marital property plus compensation claims for investments made in other property masses by using funds derived from the marital property, minus debts that are allocated to the marital property. The respective claims of the spouses (or their heirs, as the case may be) are set off *ex lege* (Art. 215 para. 2 Swiss Civil Code) and the remaining balance is paid out. No claims *in rem* arise.

**81. How are assets determined and valued? Are e.g. premarital assets and debts, assets acquired by gift, will or inheritance and debts related those assets, the increase in value of the separate property and debts related to that property taken into account?**

The assets are determined at the time of the dissolution of the property regime. Every asset and liability is then allocated to one of the four property masses (see Question 59). The assets and liabilities are then valued. An increase in the value of an asset remains with the category of assets to which the asset is allocated. The concept of "increase in value" only encompasses a surplus that is derived from market variations (an "economic" or "market" accretion), but not a surplus that was generated by the contributions of a spouse (an "industrial" accretion).<sup>33</sup> In the latter case, the property mass that made the contribution has a compensation claim (Art. 206 and 209 Swiss Civil Code, in detail see Question 83).

<sup>32</sup> H. Hausheer and R. Aebi-Müller, "Art. 204, para. 9" in: H. Honsell, N.P. Vogt and T. Geiser (eds.), *Basler Kommentar, Zivilgesetzbuch I, Art. 1-456 ZGB*, 3<sup>rd</sup> Ed., Basel, 2006.

<sup>33</sup> See e.g. Swiss Supreme Court, BGE 131 III 595; see also D. Steck, "Art. 206, para. 17", in: I. Schwenzer (ed.), *FamKommentar Scheidung*, Bern, 2005.

Difficult questions arise if one of the spouses owns a business allocated to his or her separate property. This is all the more so if he or she is also working for this business. Revenue generated from separate property (in such a case, this may be dividends that were paid) is in principle allocated to the marital property (Art. 197 para. 2 No. 4 Swiss Civil Code); the same holds true for a spouse's earnings. If the business has increased in value, the question arises how this increase is to be allocated. The increased value of the company is often due to several factors (e.g. work by the owner spouse, the overall economic situation, a reinvestment of revenue etc.). This makes it impossible to clearly allocate the surplus to a property mass. In this regard, the Swiss Federal Supreme Court has held that if the owner spouse has continually received an adequate salary (= marital property) for his or her efforts, the remaining increased value of the business is allocated to the separate property, all the more so if dividends on the share capital (= marital property) were paid.<sup>34</sup>

Other problems arise if gains generated by such a business are not paid out in the form of a dividend (= marital property), but are reinvested in the business (= separate property). This raises problems, because this makes it possible for the owner spouse to retain money in his or her separate property that would otherwise be allocated to the marital property. One author proposes to allow such reinvestments within the limits of what a neutral investor would reinvest for refinancing and to maintain a normal level of competitiveness, at least for "smaller companies".<sup>35</sup> This issue remains unresolved, but there is a consensus that retained gains exceeding normal reinvestments qualify as an investment of the marital property in the separate property.<sup>36</sup>

According to Art. 211 Swiss Civil Code, the assets are valued according to their market value ("*Verkehrswert*"). There are different ways to ascertain the market value, depending on the asset in question. The market value of buildings is calculated as a combination between real and capitalized earnings value ("*Kombination von Real- und Ertragswert*").<sup>37</sup> For business enterprises, a going concern value is decisive if the business is continued, whereas the liquidation value is chosen if the business is liquidated.<sup>38</sup> Charges that negatively affect the value of an asset (e.g. rights of pre-emption or options) decrease the value of the respective asset. The same holds true for "latent" charges that only have an impact in the future (e.g. taxes under certain circumstances).<sup>39</sup>

Art. 212 Swiss Civil Code contains special provisions on the valuation of farms ("*landwirtschaftliches Gewerbe*"). If the farm is taken over by one of the spouses or an heir, it is valued on the basis of a capitalized earnings value. This is meant to ensure that the farm can be continued by protecting the economic basis of the farming spouse from a forced liquidation due to financial claims following from the dissolution of the property regime. However, the spouse's or heir's possible compensation claims are limited to the amount that would be calculated if the farm were valued at the market value. The value that is used for the final calculation may be appropriately increased, where this is equitable (Art. 213 Swiss Civil Code), i.e. where a valuation on a capitalized earnings value would lead to hardship for the non-farming spouse.

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<sup>34</sup> Swiss Federal Supreme Court, BGE 131 III 559, consideration 4.2.

<sup>35</sup> F.S. Jörg, *Wertveränderungen einer Aktiengesellschaft bei Auflösung des ordentlichen Güterstands*, Bern, 1997, p. 53.

<sup>36</sup> R. Aebi-Müller and D.R. Trachsel, "Grundfragen der güterrechtlichen Auseinandersetzung", in: I. Schwenzer and A. Bächler, *Dritte Schweizer FamilienrechtsTage, 23./24. Februar 2006 in Basel*, Bern, 2006, p. 223 et seq.

<sup>37</sup> Swiss Federal Supreme Court, BGE 125 III 1.

<sup>38</sup> Swiss Federal Supreme Court, BGE 121 III 152.

<sup>39</sup> See Swiss Federal Supreme Court, BGE 125 III 50: An obligation to hand over a substantial part of the purchase price of a farm to third persons in the - uncertain - event of a sale decreases the value of the farm.

**82. 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?**

Factual separation, i.e. if the spouses merely live apart prior to the dissolution of the property regime, is neither relevant for the determination nor for the valuation of the assets.

The assets are *determined* upon the date of dissolution (see Question 79), Art. 207 para. 1 Swiss Civil Code. Subsequent changes are not considered.

The decisive date for the *valuation* of each asset is the date of the settlement of the matrimonial property regime (Art. 214 Swiss Civil Code). If the settlement of the property regime is subject to court proceedings, the date of the judgment is decisive.<sup>40</sup> In the case of an agreement on another property regime, the date of the agreement is relevant; however, the spouses may agree upon a different time. For assets that are added for arithmetical purposes according to Art. 208 Swiss Civil Code (see Question 76), the decisive date is the date of divestment. For assets that have been previously sold, the date of sale is decisive (Art. 206 para. 2 Swiss Civil Code).

Consequently, after the date of dissolution, the value of the assets may vary, but not their determination or the assignment to one of the four property masses. A factual separation of the spouses before the dissolution of the property regime has no effect on the determination or valuation of the assets.

**83. 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?**

Under the matrimonial property regime of participation in acquisition, there are four property masses: Each spouse's property is divided into separate and marital property. Two different kinds of investments from one category to another must be distinguished: (a) an investment *within one spouse's property masses*, e.g. an investment of the wife's separate property in her marital property and *vice versa*; and (b) an investment of the *property masses of one spouse in the property masses of the other spouse* (e.g. an investment of the husband's separate property in the wife's separate property and *vice versa*, or an investment of the husband's marital property in the wife's separate property and *vice versa* etc.) *Factual contributions* to an asset (e.g. work rendered without remuneration) qualify as an investment as well. *Gifts* do not qualify as investments and are not compensated.

Generally, the property mass from which the investment originated is entitled to a compensation claim against the mass that received the investment. The legal consequences of the different kinds of investments vary, however, if the value of the asset that "received" the investment has increased or declined. An increase in value is only relevant if it is derived from market variations (an "economic" or "market" accretion), but not if it was generated by contributions or investments of a spouse (an "industrial" accretion).<sup>41</sup>

(a) *Investments within the property masses of one spouse, Art. 209 para. 3 Swiss Civil Code*

The compensation claim is proportionally increased or decreased, according to the ratio between the initial value of the asset and the value of the asset at the time of dissolution.

(b) *Investments made by one spouse in the property of the other spouse, Art. 206 para. 1 Swiss Civil Code*

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<sup>40</sup> Swiss Federal Supreme Court, BGE 121 III 152, consideration 3.

<sup>41</sup> See e.g. Swiss Supreme Court, BGE 131 III 595; see also D. Steck, "Art. 206, para. 17", in: I. Schwenzer (ed.), *FamKommentar Scheidung*, Bern, 2005.

Here, only an increased value is taken into account. If the value of the asset has increased, the original investment is increased proportionally according to the ratio between the value of the asset at the time of the investment and the value of the asset at the time of dissolution. If the value of the asset in question has *decreased*, the compensation claim amounts to the nominal value of the original investment. The reason for this “preferential” treatment is that the investing spouse should not be in an inferior position compared to an ordinary creditor.<sup>42</sup> However, the rule on nominal compensation does not apply if certain assets have increased in value, whereas the value of other assets has decreased. Only if the proportional decrease exceeds the proportional increase for the *total of the assets*, may the investing spouse claim the nominal value of his or her investments, i.e. a global calculation (“*Globalabrechnung*”) is made. In all other cases, the proportional decrease is subtracted from the proportional surplus.<sup>43</sup>

In the case of an investment of one spouse’s marital property in the other spouse’s marital property, these calculations are not necessary. The marital property of both spouses is split in half (Art. 215 para. 1 Swiss Civil Code), which makes such a calculation pointless. Of course, this is only possible if both spouses’ marital property has a positive value, as a negative value is not split.

Special problems arise if an asset – e.g. a house – has been financed with means derived from different property masses. In such a case, the increase in value is proportionally allocated to the contributions. If the asset was also financed with a substantial loan from a third party (e.g. a bank) the increase in value derived from the loan is allocated to the property mass to which the loan is allocated (see Question 59). If the separate and the marital property of the *owner* spouse have both contributed, the increase in value that is attributed to the loan is proportionally divided between the owner spouse’s separate and marital property.<sup>44</sup> Some commentators perceive this to be unfair as in such circumstances the marital property’s value increases less, which results in a diminution of the non-owner spouse’s claim.<sup>45</sup>

Similar problems arise if substantial renovations to the family home that is allocated to the separate property are financed with a loan, the interest on which is regularly paid with means from the marital property (e.g. from one spouse’s income). Whereas, in general, the loan and an increase in value may be reallocated to the property mass that regularly pays the interest, it is suggested by legal doctrine<sup>46</sup> that if the asset in question is the family home, no such reallocation takes place, since the interest payments are qualified as spousal support, and are therefore irrelevant with regard to matrimonial property law.<sup>47</sup> We do not agree with the

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<sup>42</sup> D. Steck, “Art. 206, para. 4”, in: I. Schwenzer (ed.), *FamKommentar Scheidung*, Bern, 2005.

<sup>43</sup> H. Hausheer and R. Aebi-Müller, “Art. 206, para. 33”, in: H. Honsell, N.P. Vogt and T. Geiser (eds.), *Basler Kommentar, Zivilgesetzbuch I, Art. 1-456 ZGB*, 3<sup>rd</sup> Ed., Basel, 2006.

<sup>44</sup> Swiss Federal Supreme Court, BGE 123 III 152, consideration 6b; BGE 132 III 145, consideration 2.3.2.

<sup>45</sup> They propose to always allocate interest-bearing debts to the marital property, since they were obtained “against remuneration” (cf. Art. 197 Swiss Civil Code). In the view of the authors, this solution has the advantage of ensuring that both spouses profit from an increase in value derived from a mortgage, see T. Sutter-Somm and F. Kobel, “Ist das schweizerische Ehegüterrecht revisionsbedürftig?”, *Die Praxis des Familienrechts*, 2004, p. 776 et seq. and p. 785 et seq. Notwithstanding this, we do not follow this opinion since in the case where the interest is paid by the separate property, it would not yield a just result.

<sup>46</sup> See H. Hausheer, T. Geiser and R. Aebi-Müller, *Das Familienrecht der Schweizerischen Zivilgesetzbuches*, 3<sup>rd</sup> Ed., Bern, 2007, para. 12.71.

<sup>47</sup> Another exception exists if the interest is paid from the rental income of a building. The reason for this exception is that revenue generated from separated property is allocated to the marital property, and because the marital property can only claim the *net* revenue. In detail see H. Hausheer, T. Geiser and R. Aebi-Müller, *Das Familienrecht der Schweizerischen Zivilgesetzbuches*, 3<sup>rd</sup> Ed., Bern, 2007, para. 12.69.

latter exception. It would unduly favour the owner spouse and disregard the contributions to the support of the family by the other spouse.

Practical problems follow from these provisions if the spouses have continuously invested in an asset, e.g. if they have regularly paid off their mortgage. In theory, the respective contributions, including the increase in value that is allocated to each compensation claim, have to be calculated anew before and after each investment. This is difficult to accomplish in practice. Therefore an approximative calculation is often applied.<sup>48</sup> In sum, the practical relevance of these provisions is minimal, since they not only require complicated mathematical operations, but also (in theory) a constant valuation of the assets during marriage, which would frequently require expert evidence.

With regard to the allocation of an increase in value that is attributed to the use of means prematurely drawn from an occupational benefit plan scheme, see Question 88.

**84.** 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?

If assets of one category have been used for the payment of debts belonging to another category, this qualifies as an investment (Art. 209(1) Swiss Civil Code). The rules applicable to investments apply (see Question 83).

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

If the spouses *collectively* own an asset (see Question 5), the court may assign the asset to the spouse whose interests prevail against appropriate compensation (Art. 205 para. 2 Swiss Civil Code). The fact that the spouses have children, but also professional or health considerations, may constitute such an overriding interest. Although this provision is mostly relevant with regard to the family home or the household assets, it is generally applicable to all assets held in the form of collective property.

In the case of divorce or annulment, the rights of a spouse who is dependent on the family home are further protected by Art. 121 Swiss Civil Code (in detail, see Question 10).

Upon death, the surviving spouse may claim the allocation of the family home or of the household assets (Art. 219 para. 1 Swiss Civil Code; Art. 612a para. 1 and para. 2 Swiss Civil Code). Instead of transferring the property to the surviving spouse, the form of an *usufruct* (Art. 745 Swiss Civil Code, a limited right *in rem* registered in the land register entitling its bearer to the right of use) or a right of tenancy (Art. 776 Swiss Civil Code, a limited right *in rem* registered in the land register entitling its bearer to inhabit a property) may be chosen.

**86. Do the spouses have preferential rights over other assets?**

Not apart from their rights under Art. 205 para. 2 Swiss Civil Code, see question 85. For domestic animals, see Question 11.

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

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<sup>48</sup> See H. Hausheer and R. Aebi-Müller, "Art. 206, para. 23", in: H. Honsell, N.P. Vogt and T. Geiser (eds.), *Basler Kommentar, Zivilgesetzbuch I, Art. 1-456 ZGB*, 3<sup>rd</sup> Ed., Basel, 2006.; H. Hausheer, R. Reusser and T. Geiser, *Berner Kommentar, Band II, 1. Abteilung, 2. Teilband, Die Wirkungen der Ehe allgemein, Art. 159-180 ZGB*, 2<sup>nd</sup> Ed., Bern, 1999, Art. 206, para. 40.



Spousal maintenance is based on a balance between the creditor's ability to pay and the debtor's needs (Art. 125 Swiss Civil Code). The outcome of the dissolution of the matrimonial property regime naturally influences both. Accordingly, income and wealth are among the most relevant factors that influence a possible maintenance claim, Art. 125 para. 2 No. 5 Swiss Civil Code. Therefore, courts should first deal with the dissolution of the matrimonial property regime, after that with the splitting of pension entitlements, and only then determine whether maintenance is due and in which amount.

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

The matrimonial property regime generally does not affect the pension rights (entitlements) or claims of either spouse, with the exception of private savings made in view of retirement. However, if one spouse has invested money for his or her retirement in the form of a life insurance, the other spouse may not request his or her share to be paid in cash against the will of the debtor, but only a transfer of his or her claim to a pension fund.<sup>49</sup> In more detail, see Question 62.

However, matrimonial property law contains special rules on how pension benefits (or an indemnification for the loss of earning capacity) that were paid out in the form of a capital sum instead of annuities are taken into account. The general rule is that pension benefits are allocated to the marital property (Art. 197 para. 2 and 3 Swiss Civil Code). If one of the spouses has received such a capital sum, only the portion of this sum that corresponds to the capitalized value of the annuities that would have been paid during the marriage is allocated to the marital property. The share that corresponds to the capitalized future value of the annuities that would be due after the dissolution of the property regime is allocated to the separate property (Art. 207 para. 2 Swiss Civil Code). The reason for this provision is that a capital sum is usually meant to cover a very long time span. Therefore, only the part of the pension benefit that accrues during marriage should be allocated to the marital property. This provision may also be applied by analogy in cases where the capitalized pension benefits were paid out before marriage.<sup>50</sup>

Further difficult problems arise from the option to prematurely draw pension entitlements from an occupational benefit plan account in order to finance self-occupied housing.<sup>51</sup> This possibility is of substantial practical relevance as in many cases the pension entitlements are the spouses' most important asset. Although such means have been paid out, they remain "bound" within the social security system, since they have to be refunded *inter alia* if the house is sold or if the person entitled to these means dies before he or she reaches the age of retirement.<sup>52</sup> Consequently, they are not subject to matrimonial property law, and the special rules on the sharing of pension entitlements upon divorce (Art. 122 Swiss Civil Code) remain

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<sup>49</sup> Obergericht des Kantons Luzern, II. Kammer, 2.4.2007, 22 06 111, *Die Praxis des Familienrechts*, 2008, p. 179.

<sup>50</sup> See H. Hausheer and R. Aebi-Müller, "Art. 207, para. 14 and Art. 197, para. 27", in: H. Honsell, N.P. Vogt and T. Geiser (eds.), *Basler Kommentar, Zivilgesetzbuch I, Art. 1-456 ZGB*, 3<sup>rd</sup> Ed., Basel, 2006.

<sup>51</sup> Art. 30c Swiss Old Age, Survivors' and Disability Insurance Law (Bundesgesetz über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge, SR 831.40, BVG), see Question 62. The consent of the other spouse is required. Further, the spouses may pledge their pension entitlements to obtain the necessary credit for self-occupied housing, Art. 30b Swiss Old Age, Survivors' and Disability Insurance Law.

<sup>52</sup> Art. 30d Swiss Old Age, Survivors' and Disability Insurance Law. The obligation to refund is limited to the proceeds of the sale, i.e. the public charges and debts that are secured by a mortgage may be deducted from the sales price, Art. 30d para. 5 Swiss Old Age, Survivors' and Disability Insurance Law.

applicable. If the house was sold at a loss, only the proceeds of the sale are credited to the pension fund and shared.<sup>53</sup> Thus, if the spouses divorce before the spouse, whose pension entitlements were used, reaches the age of retirement, his or her pension entitlements are split as if the means had remained within the pension fund. This may give rise to difficult questions if the remaining pension entitlements do not suffice to pay the other spouse's financial claim.<sup>54</sup> Another problem is that pension entitlements that were prematurely drawn no longer bear interest. This raises the question as to which part of the pension entitlements should bear this loss – the pension entitlements that were accumulated before marriage or the pension entitlements which were built up during marriage and that are shared upon divorce (Art. 122 Swiss Civil Code). In the second case, the other spouse would also participate in the loss. This question remains unresolved.<sup>55</sup>

In the context of matrimonial property law, the problem consists of allocating an increase or a decrease of the value of the family home that is attributable to such funding to one of the four property masses upon the dissolution of the property regime (Art. 209 para. 3 Swiss Civil Code). Pro memoriam: the contributions themselves are not subject to financial adjustment, since they remain within the social security system. Different solutions have been suggested by legal doctrine. The predominant opinion seems to allocate – notionally – the means derived from the pension entitlements to the property mass of the investing spouse who has contributed the most, i.e. the pension entitlements are treated in the same way as a loan.<sup>56</sup> An increase in value is then allocated to the same property mass. This means that if the property was e.g. financed by pension entitlements and marital property, the increased value is allocated to the marital property; if it was financed with separate property and pension entitlements, the increased value is allocated to the separate property. If both property masses of a spouse have contributed, the increase or decrease in value is allocated proportionally. If the property was financed only by means derived from pension entitlements, it is allocated to the marital property, including an increased value.

Some authors<sup>57</sup> perceive this to be unjust, since the pension entitlements that have been used to finance the property may have been built up before marriage, and would consequently not have to be shared upon divorce. Yet they may be treated as “forced” marital property if they have been used to finance self-occupied housing. Also the reverse situation is not resolved satisfactorily according to the traditional doctrine. If pension entitlements that have been built up during marriage are used to finance a house that is allocated to separate property, the

<sup>53</sup> Swiss Federal Supreme Court, BGE 132 V 332.

<sup>54</sup> See T. Geiser, “Vorsorgeausgleich: Aufteilung bei Vorbezug für Wohneigentumserwerb und nach Eintreten eines Vorsorgefalls”, *Die Praxis des Familienrechts*, 2002, p. 83 et seq. and p. 90 et seq.

<sup>55</sup> For an overview of the solutions that have so far been suggested by legal doctrine, see D. Trachsel, “Spezialfragen im Umfeld des scheidungsrechtlichen Vorsorgeausgleiches: Vorbezüge für den Erwerb selbstgenutzten Wohneigentums und Barauszahlungen nach Art. 5 FZG”, *Die Praxis des Familienrechts*, 2005, p. 529 et seq. and p. 533 et seq.

<sup>56</sup> That was apparently the intent of the legislator, see Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Personenstand, Eheschliessung, Scheidung, Kindesrecht, Verwandtenunterstützungspflicht, Heimstätten, Vormundschaft und Ehevermittlung) vom 15. November 1995, Bundesblatt 1996 I 1 et seq., 110. See also D. Trachsel, “Spezialfragen im Umfeld des scheidungsrechtlichen Vorsorgeausgleiches: Vorbezüge für den Erwerb selbstgenutzten Wohneigentums und Barauszahlungen nach Art. 5 FZG”, *Die Praxis des Familienrechts*, 2005, p. 529 et seq. and p. 539 et seq.; T. Geiser, “Vorsorgeausgleich: Aufteilung bei Vorbezug für Wohneigentumserwerb und nach Eintreten eines Vorsorgefalls”, *Die Praxis des Familienrechts*, 2002, p. 83 et seq. and p. 93 et seq.; S. Wolf, “Grundstücke in der güter- und erbrechtlichen Auseinandersetzung”, *Zeitschrift des Bernischen Juristenvereins*, 2000, p. 241 et seq. and p. 254 et seq.

<sup>57</sup> T. Sutter-Somm and F. Kobel, “Ist das schweizerische Ehegüterrecht revisionsbedürftig?”, *Die Praxis des Familienrechts*, 2004, p. 776 et seq. and p. 783 et seq.

other spouse does not participate in a possible increase in value. At the same time, his or her claim to half of the other spouse's pension entitlements may be reduced upon divorce. Therefore, certain authors suggest (notionally) allocating the compounded pension entitlements that have been built up before marriage to the separate property and pension entitlements that were built up during marriage to the marital property, and to proportionally split an increase in value.

**89. Can the general rules (above Q 80) be set aside or adjusted, e.g. by agreement between the spouses or by the competent authority? To what extent, if at all, can the competent authority order the transfer of assets to the creditor spouse?**

The spouses may deviate from the general rules *by (pre-)marital agreement* in three respects:

(a) they may designate business assets and/or revenue generated from separate property to be separate property, Art. 199 para. 2 Swiss Civil Code, see Question 59.

(b) the spouses may modify the way in which the marital property surplus is shared, Art. 216 Swiss Civil Code. They may agree e.g. on different quotas, on a fixed sum with the rest being split according to a specific proportion, on a maximum claim (a "ceiling"), or they may (often in combination with a testamentary contract) allocate the entire surplus to the surviving spouse. However, such an agreement must not diminish the reserved part of the inheritance of non-common children or their descendants.

(c) the spouses may limit the rights of the surviving spouse to remain in the family home, Art. 219 para. 1 Swiss Civil Code.

The spouses may deviate *by a simple contract in writing* from the rules on the participation in the increased value of an asset in the case where one spouse invested in the other's assets, Art. 206 para. 3 Swiss Civil Code (the rules on the allocation of an increase in value to investments are explained in Question 83).

Although the spouses' possibility to adjust the general rules is in theory limited to the options explained above (Art. 182 para. 2 Swiss Civil Code), in practice, and in the case of a divorce by total or partial consent, the spouses often agree on a solution tailored to their specific needs. This is possible because the court's power to examine a divorce convention is limited to clarity, completeness and obvious inadequacy (Art. 140 para. 2 Swiss Civil Code). Thus, a court would only interfere in very extreme cases (e.g. a waiver of each and every right under matrimonial property law).<sup>58</sup> Further, as there is no duty to provide the court with an inventory of the spouses' assets, the court in most cases lacks the basis to review the parties' agreement.

The *court* may defer the performance of the respective claims arising from the dissolution of the matrimonial property regime if immediate payment would lead to hardship for the debtor, Art. 218 Swiss Civil Code. It cannot redistribute assets (apart from the family home, see Question 10).

Under Swiss matrimonial property law, fault on the part of either spouse is irrelevant. Also, Swiss law does not contain a hardship clause, e.g. for cases in which one of the spouses provided no contribution to the matrimonial property at all. Only in very extreme cases may the general provision prohibiting an abuse of a right (Art. 2 para. 2 Swiss Civil Code) be applied to deny one spouse's claim to half of the marital property of the other spouse.<sup>59</sup> This

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<sup>58</sup> I. Schwenzer, "Grenzen der Vertragsfreiheit in Scheidungskonventionen und Eheverträgen", *Die Praxis des Familienrechts* 2005, p. 1 et seq. points out that there has so far not been a single case in which the clause "the spouses declare that they have properly dissolved their property regime" has even been examined by a court.

<sup>59</sup> Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Wirkungen der Ehe im allgemeinen, Ehegüterrecht und Erbrecht) vom 11. Juli 1979, Bundesblatt 1979 II

provision, however, is hardly ever applied. The sharing of the surplus of the marital property was denied in a case where the wife had left the husband five days after their marriage, but claimed half of his marital property and half of his pension entitlements three years later.<sup>60</sup> The Swiss Federal Supreme Court has so far not decided this question.

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

Specific rules govern the preferential right of the surviving spouse to the family home and family chattels, see Question 85.

### III. Deferred Property

Not relevant.

### IV. Separation of Property

#### IV.1. Categories of Assets

**129. Describe the System. Indicate the different categories of assets involved.**

Separation of property is governed by Art. 247-251 Swiss Civil Code. There are only two categories of assets: the husband's and the wife's respective separate property. No marital property exists. Each spouse retains and administers his or her separate property. Upon dissolution, there are no claims for financial adjustment. Debts and investments between the spouses are governed by the Swiss Code of Obligations, i.e. the relationship of the spouses is the same as it would be toward an independent third party. Therefore, separation of property under Swiss law is not a "property regime" in the ordinary sense of the term.

The regime of separation of property may be chosen by the parties in a *(pre)-marital agreement* (Art. 182 Swiss Civil Code); this is frequently done to protect business assets. It is imposed on the spouses *upon a request to the court* by either spouse if there is an important reason, Art. 185 para. 1 Swiss Civil Code. Art 185 para. 2 Swiss Civil Code gives the following examples of important reasons: If a spouse jeopardizes the interests of the other spouse or of the marital community, if a spouse refuses to provide information about his or her financial situation, or if a spouse is permanently incapable of making rational decisions. Also, in the case of a factual separation, either spouse may request the imposition of separate property, where this is appropriate (Art. 176 para. 1 No. 3 Swiss Civil Code). In this regard, it is disputed under which circumstances separation of property should be imposed. According to the practice of the courts in certain cantons, the regime of separation of property may be imposed if one of the spouses merely seeks a divorce.<sup>61</sup> Some legal scholars disagree with this practice, as it circumvents Art. 204 para. 2 Swiss Civil Code, which determines the date of the filing of the divorce petition as the time of the dissolution of the property regime. They require evidence that it is no longer reasonable for the spouses to be economically and financially united.<sup>62</sup>

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1191 et seq., 1321. See also I. Schwenzer and E. Freivogel, "Der praktische Fall: Das fleissige Lieschen", *Die Praxis des Familienrechts*, 2007, p. 336 et seq.

<sup>60</sup> Tribunal cantonal de Fribourg, 1<sup>e</sup> Cour d'Appel, Arrêt du 18 juin 2003 en la cause A.B. contre B.B., A1 2002-51, *Die Praxis des Familienrechts*, 2004, p. 382 et seq.

<sup>61</sup> Solothurn: Obergericht Solothurn, *Schweizerische Juristen-Zeitung* 2001, 581 et seq.; Lucerne: Obergericht Luzern, *Luzerner Gerichts- und Verwaltungsentscheide* 2001, No. 7; Zurich: Obergericht Zürich, *Blätter für zürcherische Rechtsprechung* 2001, No. 24 and *Blätter für zürcherische Rechtsprechung* 2004, No. 2.

<sup>62</sup> R. Vetterli, "Art. 176, para. 41", in: I. Schwenzer (ed.), *FamKommentar Scheidung*, Bern, 2005.

Separate property may also be imposed on spouses under the regime of community of property under certain circumstances in debt collection and bankruptcy proceedings (Art. 188 Swiss Civil Code et seq.). Finally, the regime of separation of property follows *ex lege* from a legal separation (Art. 118 para. 1 Swiss Civil Code).

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

The spouses' separate property consists of their respective assets and debts.

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

The spouses may acquire assets jointly according to the general provisions of property law, in detail see Question 5.

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

Since there are only two categories of assets (the husband's and the wife's respective separate property), substitution is not relevant.

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

For a brief description of the Swiss social security system see Question 62. Pension entitlements that have accrued for gainfully employed persons under the occupational benefits plan scheme (see Question 62) are not affected by separation of property; however, they are normally split equally upon divorce (Art. 122 Swiss Civil Code), irrespective of the applicable property regime (for exceptions see Question 158).

Other savings or investments made with regard to retirement (e.g. a life insurance) are treated in the same way as the other assets of the spouses, i.e. they remain with the owner spouse. This lack of financial adjustment leads to problematic results in cases where one spouse has taken care of the household while the other was self-employed. In such a case, the working spouse does not have pension entitlements (see Question 62) that could be shared according to Art. 122 Swiss Civil Code, thus the other spouse is left empty-handed.

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

Ownership is proved according to the general rules of property law (e.g. by an entry in the land register for immovable property, Art. 937 Swiss Civil Code (presumption) and Art. 971 Swiss Civil Code et seq., by applying the presumption of property law that possession indicates ownership (Art. 930 Swiss Civil Code et seq.), or by providing evidence of the legal act that led to the acquisition of movable property, e.g. a contract of sale). If neither spouse is able to prove his or her ownership of an asset, collective property is presumed (Art. 248 para. 2 Swiss Civil Code, for an explanation of the legal concept of collective property, see Question 5).

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

The same rules that apply to the spouses (Art. 248 Swiss Civil Code) apply to third parties, see Question 134.

**136. Which debts are personal debts?**

All debts incurred personally are personal debts, the most important exception being debts incurred for the *day-to-day needs* of the family according to Art. 166 para. 1 Swiss Civil Code (see Question 137 below and in detail Question 9).

**137. Which debts are joint debts?**

The general rules (Art. 166 Swiss Civil Code) apply. The spouses are jointly and severally liable for debts incurred for the *day-to-day needs* of the family according to Art. 166 para. 1 Swiss Civil Code. With regard to debts incurred for *other needs* of the family (e.g. more expensive furniture, a car, expensive dental treatment etc.), the spouses are only jointly and severally liable if (a) the court or a spouse authorized the other spouse to incur such a debt, Art. 166 para. 2 No. 1 Swiss Civil Code, (b) in urgent circumstances (e.g. expensive but urgent repairs to the home), Art. 166 para. 2 No. 2 Swiss Civil Code, or (c) if a third party relied on the fact that the debt was incurred for day-to-day needs, but in reality it was incurred for other family needs, Art. 166 para. 3 Swiss Civil Code. Further, either spouse may authorize the other spouse to incur a joint debt according to the general rules on representation (Art. 32 Swiss Code of Obligations et seq.) In detail, see Question 9.

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

According to Art. 249 Swiss Civil Code, each spouse is liable for his or her personal debts with all of his or her assets.

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

A creditor may recover joint debts on the entire property of both spouses. However, a creditor may also choose to recover his or her debt from one spouse only.

**IV.2. Administration of Assets**

**140. How are assets administered?**

Each spouse administers his or her assets, Art. 247 Swiss Civil Code. If the spouses own an asset together, the general rules of property law apply (see Question 4).

Under *collective* ownership (see Question 5), each owner is entitled to use the asset as long as such use is compatible with the rights of the other collective owners (Art. 648 para. 1 Swiss Civil Code). He or she may dispose of his or her property share in the same way as an owner (Art. 646 para. 3 Swiss Civil Code). However, the asset as a whole may only be disposed of by all owners together (Art. 648 para. 1 Swiss Civil Code).

Further, ordinary measures of administration and use, and other measures must be distinguished. Ordinary measures of administration may be effected by each collective owner alone (Art. 647a Swiss Civil Code), whereas all other measures (e.g. measures that require construction work) require the consent of both spouses (Art. 647b-647e Swiss Civil Code). The costs of administrative measures are borne by the collective owners in the proportion of their property shares unless otherwise agreed (Art. 649 Swiss Civil Code).

In any case, each collective owner may request that measures that are necessary for the preservation of the value and the usability of the asset are carried out, and, if necessary, ordered by the court (Art. 647 para. 2 No. 1 Swiss Civil Code). If an asset is threatened by imminent or growing harm, each collective owner may take the necessary prevention measures at the expense of all collective owners (Art. 647 para. 2 Swiss Civil Code).

The administration of *jointly* owned assets (Art. 652 Swiss Civil Code et seq., see Question 5) is governed by the rules of the underlying community (Art. 653 Swiss Civil Code). For

spouses under the regime of separation of property, this will be a simple (economic) partnership (Art. 530 Swiss Code of Obligations) in most cases. If there are no other provisions in this respect, an unanimous decision by all joint owners is required (Art. 653 Swiss Civil Code).

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

Either spouse may mandate the other spouse expressly or impliedly to administer his or her property, Art. 195 para. 1 Swiss Civil Code. Their relationship is then governed by the provisions on mandate (Art. 394 et seq. Swiss Code of Obligations).

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

The spouses' capacity to enter into legal transactions is only limited by the provisions protecting the family home (Art. 169 Swiss Civil Code, Art. 266m and 266n Swiss Code of Obligations), in detail see Question 10 and 11; and by the limitations provided in the provisions on surety (Art. 494 Swiss Code of Obligations) or in the law on occupational benefit plan schemes (see Question 12).

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

There are no special rules on the administration of business assets.

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

Regardless of the applicable property regime, each spouse may request the other spouse to provide information about his or her income, assets or debts, unless such information is protected by professional secrecy (Art. 170 para. 1 and para. 3 Swiss Civil Code). This right is strengthened by the possibility to request the court to order the other spouse or any third person to provide the necessary information and/or documentation. If either spouse refuses to give such information, this may be viewed as a material breach of his or her family duties according to Art. 172 Swiss Civil Code, which entitles the other spouse to take preliminary measures.

If one of the spouses has mandated the other with the administration of his or her assets (Art. 195 Swiss Civil Code), the provisions on mandate require the mandatee to account to the spouse who has given the mandate at any time (Art. 400 para. 1 Swiss Code of Obligations).

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

There are no fixed rules on which spouse's interests prevail. According to Art. 172 par. 1 Swiss Civil Code, either spouse may resort to the court in the case of a dispute about an important issue or if one of the spouses does not comply with his or her family duties. In such a case, the court may order the measures that are provided for by the law (Art. 172 para. 3 Swiss Civil Code). This includes the following measures:

If one of the spouses refuses to consent to an important transaction for other needs of the family (see Question 9), the court may grant this permission instead (Art. 166 para. 2 No. 1 Swiss Civil Code.) The same applies if one of the spouses unjustifiably refuses his or her consent to a legal transaction negatively affecting the family home (Art. 169 para. 2 Swiss Civil Code).

If the spouses cannot agree on their respective contributions to the support of the family, the court may determine the payments that are due. The court may also determine the claim of the housekeeping spouse for money for his or her personal use (Art. 173 para.1 and 2 Swiss Civil Code).

In the case of a dispute between the spouses concerning the administration of *collectively* owned assets (for an explanation of the legal concept of collective property, see Question 5), the rules of property law apply. Most importantly, each collective owner may request that measures that are necessary for the preservation of the value and the usability of the asset are carried out, and, if necessary, ordered by the court (Art. 647 para. 2 No. 1 Swiss Civil Code). If an asset is threatened by imminent or growing harm, each collective owner may take the necessary prevention measures at the expense of all collective owners (Art. 647 para. 2 Swiss Civil Code). However, the specific provisions of family law (e.g. on the protection of the family home) take precedence over these general provisions of property law in the case of a conflict.

If one of the spouses has mandated the other spouse to administer his or her assets (Art. 195 Swiss Civil Code), the general provisions on mandate apply (Art. 394 Swiss Code of Obligations), and either party may revoke the mandate at any time (Art. 404 para. 1 Swiss Civil Code).

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

If one of the spouses exceeds his or her right of representation or is incapable of exercising his or her rights of representation, the court may revoke his or her power to represent the other spouse fully or partially upon the request of the other spouse (Art. 174 para. 1 Swiss Civil Code).

If one of the spouses does not fulfil his or her duties to financially contribute towards the needs of the family, the court may direct his or her debtors to pay their debts directly to the other spouse (Art. 177 Swiss Civil Code). This is a very effective means, as the most important debtor is in most cases the employer of the non-contributing spouse. The measure therefore also exerts a certain amount of psychological pressure, as normally, a spouse prefers not to inform his or her employer about his or her failure to support the family.

If it is necessary to ensure the economic well-being of the family or the fulfilment of one spouse's financial duties towards the family (Art. 178 para. 1 Swiss Civil Code), the court may restrict the right of either spouse to dispose of certain assets by requiring the consent of the other spouse. Such an order may be supported by interim protection measures. If such a restriction is placed on immovable property, the court may order its entry in the land register (Art. 178 para. 3 Swiss Civil Code and Art. 78 Swiss Ordinance on the Land Register). This excludes an otherwise possible good faith acquisition by any third party.

If the spouses are factually separated, the court may further rule on the use of the family home and the household assets (Art. 176 para. 1 No. 2 Swiss Civil Code) and determine the financial contributions that are due (Art. 176 para. 1 No. 1 Swiss Civil Code).

Further, the general provisions of property law apply to assets that are owned by the spouses together. Nevertheless, the specific provisions of family law (e.g. on the protection of the family home) take precedence over the provisions of property law. Thus, if there is no specifically applicable family law provision, the following rules apply: With regard to assets that are *collectively* owned by the spouses (see Question 5), Art. 649b para. 1 Swiss Civil Code determines that a collective owner may be excluded from the community by a judicial decision if he or she breaches his or her duties in a manner that the continuation of the



community may no longer be expected. For assets that are *jointly* owned, the rules of the underlying community apply (Art. 654 para. 1 Swiss Civil Code). For spouses under the property regime of separation of property, this will frequently be the simple (economic) partnership (see Question 5), with the consequence of the liquidation of the asset in question in most cases, Art. 548 Swiss Civil Code.<sup>63</sup>

If one of the spouses has mandated the other spouse to administer his or her assets (Art. 195 Swiss Civil Code), the general provisions on mandate apply (Art. 394 Swiss Code of Obligations). A breach of duty may result in the mandatee's liability for any resulting damage (Art. 97 and Art. 398 Swiss Code of Obligations).

There are no other consequences in cases of maladministration.

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

If one of the spouses is incapable of managing his or her affairs due to a mental illness (Art. 369 Swiss Civil Code), or if he or she mismanages his or her property (Art. 370 Swiss Civil Code), he or she shall be placed under guardianship. According to Art. 380 Swiss Civil Code, the other spouse or another close relative is normally appointed as a guardian. Further, if the person placed under guardianship has explicitly designated a person as a guardian, this wish is normally complied with (Art. 381 Swiss Civil Code).

**IV.3. Distribution of Assets upon dissolution**

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

Since separation of property does not lead to financial adjustment, there is no dissolution of the property regime as such. The property regime of separation of property ends *ex lege* upon the death of either spouse, or upon divorce or annulment. Further, the spouses may choose another property regime in a marital contract (Art. 182 and 187 para. 1 Swiss Civil Code). Finally, if separation of property was imposed by the court according to Art. 185 or 188 Swiss Civil Code et seq., the *court* may order a change to the previous property regime upon the request of one of the spouses, if the reason for the imposition of separation of property ceases to apply (Art. 187 para. 2 and 191 Swiss Civil Code). In such a case, the return to the previous property regime has no retroactive effect, i.e. the assets are allocated anew to the different categories, irrespective of their previous allocation.<sup>64</sup>

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

Since there is no financial adjustment upon the "dissolution" of the regime of separation of property, the date of dissolution is in most cases not of relevance. Therefore Swiss law does not contain any provisions in this respect. However, the date of dissolution may be relevant in the case where the regime of separation of property is dissolved because the reason for the imposition of this property regime ceases to apply (Art. 187 para. 2 and Art. 191 Swiss Civil

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<sup>63</sup> See in detail A. Meier-Hayoz and P. Forstmoser, *Schweizerisches Gesellschaftsrecht mit neuem Recht der GmbH, der Revision und der kollektiven Kapitalanlagen*, 10<sup>th</sup> Ed., Bern, 2007, § 12, para. 88 et seq. Restitution of the assets *in natura* is only possible if both partners agree.

<sup>64</sup> H. Hausheer and R. Aebi-Müller, "Art. 187, para. 8 and Art. 191, para. 17", in: H. Honsell, N.P. Vogt and T. Geiser (eds.), *Basler Kommentar, Zivilgesetzbuch I, Art. 1-456 ZGB*, 3<sup>rd</sup> Ed., Basel, 2006.

Code), or if the parties chose another property regime by marital agreement, as in such a case the assets must be reallocated to different categories of property.

In the case of dissolution upon death or upon the agreement on another matrimonial property regime, the date of death or of the agreement is decisive. In the case of a marital agreement, the spouses may agree on a date. In all other cases, it is the date on which the request to the court (for divorce, for annulment or for the change to the previous property regime) was filed.

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

Each spouse retains his or her separate property. There is no financial adjustment. If an asset is *collectively* owned by the spouses (see Question 5), either spouse may request its allocation against reasonable compensation in the case of an overriding interest (Art. 251 Swiss Civil Code).

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

There are no special rules under separation of property with regard to the determination or valuation of the assets. The assets are determined according to the general provisions of Property Law and the Code of Obligations. As there is no financial adjustment, the determination and valuation of the assets is mainly relevant to establish either spouse's need or ability to pay in the context of maintenance (see Question 157)

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

Since there is no financial adjustment, the dates of determination and valuation are not relevant, and the Swiss Civil Code does not contain provisions in this respect.

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

There are no special provisions governing investments in the other spouse's assets under the regime of separation of property, therefore the provisions of the Swiss Code of Obligations apply. Thus, it must first be determined whether an express or implied contractual relationship (e.g. a loan, a donation, a simple (economic) partnership etc.) has been established. If no contractual relationship exists, compensation may be obtained according to the rules on unjustified enrichment (Art. 62 Swiss Code of Obligations et seq., *condictio causa data causa non secuta*).<sup>65</sup>

Further, if one of the spouses has made exceptional contributions to the support of the family or to the other spouse's profession, Art. 165 Swiss Civil Code provides for appropriate compensation. The relevant factors for the calculation of such compensation include the financial situation of the other spouse, as well as benefits and detriments resulting from such a contribution to the contributing spouse, e.g. an overall higher standard of living may qualify as a benefit, whereas a detriment may consist of professional disadvantages suffered

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<sup>65</sup> See in general I. Schwenzler, "Restitution of Benefits in Family Relationships", *International Encyclopedia of Comparative Law, Vol. X: Restitution - Unjust Enrichment and Negotiorum Gestio*, Chapter 12, Tübingen et al. 1997

because a spouse no longer pursues his or her career. Therefore, the compensation will not consist of the salary that would be paid to a third party for like work or of the objective value of the contributions, but may be higher or lower.<sup>66</sup>

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

The same rules that apply to investments in the other spouse's assets apply to the payment of the other spouse's debts, i.e. compensation may be obtained according to the rules of contract law in the case of a pre-existing contract or according to the rules on unjustified enrichment, see Question 153.

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

There are no special provisions regarding the family home under separation of property. If the spouses *collectively* own an asset (see Question 5), the court may assign the asset to the spouse whose interests prevail against appropriate compensation (Art. 251 Swiss Civil Code). The fact that the spouses have children, professional or health considerations may constitute an overriding interest. Although this provision is mostly relevant with regard to the family home or the household assets, it is generally applicable to all assets held in the form of collective property. The rights of a spouse who is dependent on the family home are further protected by Art. 121 Swiss Civil Code in the case of a divorce or the annulment of the marriage (see Question 10 for details).

Upon death, the surviving spouse may claim the allocation of the family home or of the household goods (Art. 612a para. 1 and 2 Swiss Civil Code). Instead of transferring the property to the surviving spouse, the form of an *usufruct* (Art. 745 Swiss Civil Code, a limited right *in rem* registered in the land register entitling its bearer to the right of use) or a right of tenancy (Art. 776 Swiss Civil Code, a limited right *in rem* registered in the land register entitling its bearer to inhabit a property) may be chosen.

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

Not apart from their rights under Art. 251 Swiss Civil Code, see question 155. For domestic animals, see Question 11.

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

Spousal maintenance is based on a balance between the creditor's ability to pay and the debtor's needs (Art. 125 Swiss Civil Code). The outcome of the dissolution of the matrimonial property regime naturally influences both. Accordingly, income and wealth are among the most relevant factors that influence a possible maintenance claim, Art. 125 para. 2 No. 5 Swiss Civil Code.

The Swiss Federal Supreme Court upheld a cantonal decision which increased the wife's maintenance claim because the spouses had chosen separation of property in a marital contract, which deprived the wife (who had mainly taken care of their common child) of the financial fruits of the marriage, whereas the husband had a substantial fortune.<sup>67</sup>

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<sup>66</sup> See in detail F. Hasenböhler and A. Opel, "Art. 165, para. 10 et seq.", in: H. Honsell, N.P. Vogt and T. Geiser (eds.), *Basler Kommentar, Zivilgesetzbuch I, Art. 1-456 ZGB*, 3<sup>rd</sup> Ed., Basel, 2006.

<sup>67</sup> Swiss Federal Supreme Court, 29.10.2001, 5P.268/2001, *Die Praxis des Familienrechts*, 2002, p. 369 et seq., consideration 4.c).

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

According to the rules on the consequences of a divorce, pension entitlements according to occupational benefit plan schemes (see Question 62) are normally split in half (Art. 122 Swiss Civil Code). The court may refuse to split the pension entitlements if this would be manifestly inequitable when considering *inter alia* the result of the dissolution of the property regime (Art. 123 para. 2 Swiss Civil Code). This may be the case if one spouse is self-employed and makes retirement provisions in the form of private savings, which consequently belong to his or her separate property and are not subject to a financial adjustment, whereas the other spouse builds up pension entitlements under an occupational benefit plan scheme (in detail, see Question 62), which are normally split upon divorce (Art. 122 Swiss Civil Code).<sup>68</sup>

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

The spouses may only choose another property regime in a marital contract (Art. 182 para. 2 Swiss Civil Code): they cannot modify the property regime of separation of property.

The court cannot transfer property from one spouse to the other, apart from assets held in collective ownership by the spouses (Art. 251 Swiss Civil Code, see Question 155; for an explanation of the legal concept of collective property, see Question 5).

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

There are no such rules under Swiss law.

**V. Separation of property with distribution by the competent authority.**

Not relevant.

**D. MARITAL AGREEMENTS**

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

Future spouses may enter into a pre-marital agreement with the same content as a marital agreement. The same prerequisites apply to the conclusion of both. Pre-nuptial and marital agreements are equally binding; they have to meet the same requirements in all respects. The pre-nuptial agreement enters into force upon the solemnisation of the marriage (Art. 182 Swiss Civil Code).

**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?**

The spouses may at any time enter into a marital agreement. They may also modify or annul a (pre-)nuptial agreement at any time during their marriage, even after they have requested a divorce. It is important, however, to distinguish a post-nuptial agreement from a divorce convention. Only the latter is subject to judicial control (Art. 140 Swiss Civil Code). Here, the

<sup>68</sup> Baumann and Lauterburg, "Art. 123, para. 52", in: I. Schwenzler (ed.), *FamKommentar Scheidung*, Bern, 2005.

Swiss Federal Supreme Court adopts a formalistic approach: A marital contract which only contains provisions regarding the matrimonial property regime, but does not provide for other effects of a divorce, qualifies as a marital contract, and is therefore not subject to judicial control.<sup>69</sup>

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

A (pre-)marital agreement must be entered into by a notarial deed (Art. 184 Swiss Civil Code) and must be signed by the parties. Voluntary representation is not possible, i.e. the spouses must appear in person. Minors and persons placed under guardianship must be represented by their legal representative.

The spouses may regulate certain issues regarding property law by a simple contract in writing. Such an agreement does not qualify as a (pre-)marital contract. Thus, under the property regime of participation in acquisitions, the spouses may deviate from the rules on the participation in the increased value of an asset in the case where one spouse has invested in the other's assets, Art. 206 para. 3 Swiss Civil Code (in detail, see Question 83).

**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.**

There are no additional requirements apart from those explained in Question 193. The registration of marital agreements was abolished in 1988.

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

Full disclosure is not necessary. However, the general rules of contract law apply, i.e. in specific circumstances a (pre-)marital contract may be invalid because of fundamental error, fraudulent misrepresentation or duress (Arts 23 et seq. and 28 et seq. Swiss Code of Obligations), or the general rule prohibiting an abuse of a right (Art. 2 para. 2 Swiss Civil Code) may apply. However, each spouse may request the other's participation in the making of an inventory in the form of a public deed, Art. 195a Swiss Civil Code.

**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?**

The notary has a duty of consultation, a mere instruction is insufficient. He or she has to ascertain that the contract is based on the free will of the parties and that it is in accordance with the law. Further, the notary has to do the following: explain to the parties their current legal status and the changes that follow from the marital contract, ask them relevant questions, possibly compare and explain different versions of the marital contract, and thus ensure that the parties recognise the contract's effects and clearly state their will.

If the notary does not fulfil his or her obligations, the contract remains valid. However, the notary may face a claim for damages according to specific provisions of the public law of the Swiss cantons or, if the cantons have not enacted special provisions on the liability of notaries,

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<sup>69</sup> Swiss Federal Supreme Court, 4.12.2003, 5C.114/2003, *Die Praxis des Familienrechts*, 2004, p. 345 et seq.

according to the general provisions of tort law, Art. 41 Swiss Code of Obligations et seq. (cf. Art. 61 Swiss Code of Obligations).<sup>70</sup>

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

Currently, there is no statistical data available on the frequency or content of marital agreements. A substantial number of spouses enter into a combination of marital and testamentary contract, which modifies participation in acquisitions with the aim of ensuring the highest possible benefit for the surviving spouse. Further, it may fairly be assumed that only 5-10% of all spouses make a marital contract that changes their property regime, and that most of these couples choose separation of property.

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

The spouses may only choose, change or modify their property regime within the boundaries of the law, Art. 182 para. 2 Swiss Civil Code. This means that they may choose between the statutory property regimes. In other words, there is a *numerus clausus*. The chosen property regime itself may only be modified where the law explicitly provides for this. Thus, the spouses cannot create their own regime.

**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;**

Under participation in acquisitions, the spouses may designate business assets that would otherwise belong to the marital property as separate property, Art. 199 para. 1 Swiss Civil Code; they may also assign revenue generated from separate property to the separate property (Art. 199 para. 2 Swiss Civil Code).

Under community of property, the spouses may modify the assets that belong to the common property (Art. 223 Swiss Civil Code et seq.).

**b. administration of assets;**

The spouses are free to mandate each other with the administration of their assets by an ordinary contract irrespective of the applicable property regime, Art. 195 Swiss Civil Code. Such a contract is not considered as a marital contract, it is governed by the provisions on mandate in the Swiss Code of Obligations (Art. 394 Swiss Code of Obligations et seq.).

**c. distribution of assets;**

Under *participation in acquisitions* and *community of property*, the spouses may modify the proportion in which the marital property surplus, or the common property respectively, is shared (Art. 216 Swiss Civil Code for participation in acquisitions; Art. 241 and 242 Swiss Civil Code for community of property). They may e.g. agree on different quotas, on a fixed sum with the rest being split according to a specific share, on a maximum claim (a "ceiling"), or they may (often in combination with a testamentary contract) allocate the entire acquisition

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<sup>70</sup> In detail, see M. Moser, *Le droit notarial en Suisse*, Bern 2005, p. 135 et seq. If the cantonal law merely refers to federal law, it is disputed whether contract or tort law applies. The predominant opinion and case law hold that tort law applies, while a more recent opinion supports the application of contract law.

(respectively common property) to the surviving spouse. The spouses may also agree on a different method of valuation either in a (pre-)marital contract or in a normal contract after the dissolution of the property regime.<sup>71</sup> However, such an agreement must not diminish the reserved part of the inheritance of non-common children or their descendants (Art. 216 para. 2 and Art. 241 para. 3 Swiss Civil Code).

Additionally, spouses may deviate *by a simple contract in writing* from the rules on participation in the increased value of an asset in the case where one spouse has invested in the other's assets with regard to a specific contribution (Art. 206 para. 3 Swiss Civil Code for participation in acquisitions; Art. 239 in conjunction with Art. 206 para. 3 Swiss Civil Code for community of property). If the spouses wish to generally exclude participation in an increase in the other's assets, they must provide for this in a (pre-)marital contract.<sup>72</sup> They may not, however, agree on participation in a possibly decreased value of the assets.<sup>73</sup>

The majority of the legal doctrine holds that the spouses may not waive the right to participation in the increased value of an asset in the case where a property mass of a spouse has invested in the other property mass of the same spouse (e.g. investment of the wife's marital property in her separate property, Art. 209 Swiss Civil Code).<sup>74</sup>

Further, by (pre-)marital contract the spouses may exclude the rights of the surviving spouse to the family home (Art. 219 Swiss Civil Code) under participation in acquisitions.

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

The parties are entirely free to provide for different legal consequences with regard to the different forms of dissolution in their marital agreement. They may also provide for a "restitution clause", i.e. a clause according to which assets that were assigned to a spouse according to the marital agreement have to be restored to the heirs or the other spouse in case of remarriage or death.<sup>75</sup>

However, Art. 217 (participation in acquisitions) and Art. 242 Swiss Civil Code (community of property) presume that a marital contract modifying the proportion in which the marital property surplus/ the common property is shared only applies upon the dissolution of the marriage by death or upon the conclusion of another marital agreement. If the parties intend otherwise, they have to provide so explicitly in their marital agreement.

A marital contract extending the assets that belong to the common property under community of property only applies in the case of death or upon the conclusion of another marital agreement. In all other cases, the separate property is limited to the assets that would be separate property under participation in acquisitions (Art. 242 para. 1 Swiss Civil Code).

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

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<sup>71</sup> D. Steck, "Art. 211, para. 4", in: I. Schwenzer (ed.), *FamKommentar Scheidung*, Bern, 2005.

<sup>72</sup> D. Steck, "Art. 206, para. 30", in: I. Schwenzer (ed.), *FamKommentar Scheidung*, Bern, 2005.

<sup>73</sup> H. Hausheer, R. Reusser and T. Geiser, *Berner Kommentar, Band II, 1. Abteilung, 2. Teilband, Die Wirkungen der Ehe allgemein, Art. 159-180 ZGB, 2<sup>nd</sup> Ed.*, Bern, 1999, Art. 206, para. 60.

<sup>74</sup> H. Hausheer, R. Reusser and T. Geiser, *Berner Kommentar, Band II, 1. Abteilung, 2. Teilband, Die Wirkungen der Ehe allgemein, Art. 159-180 ZGB, 2<sup>nd</sup> Ed.*, Bern, 1999, Art. 209, para. 60. The spouses may only allocate revenue generated from separate property to the separate property by (pre-)marital contract according to Art. 199 para. 2 Swiss Civil Code.

<sup>75</sup> D. Steck, "Art. 216 N 11 et seq. ", in: I. Schwenzer (ed.), *FamKommentar Scheidung*, Bern, 2005.

The most important reason for spouses to enter into a marital contract is the desire to benefit the surviving spouse as much as possible. This may be achieved in various ways, most importantly by stipulating a clause which entitles the surviving spouse to the entire marital property (Art. 216 Swiss Civil Code, see also Question 198 c). Such a clause is often complemented by a testamentary contract (Art. 494 Swiss Civil Code et seq.), in which the spouses agree to leave their estate to each other, and limit the inheritance of other possible heirs to the legally reserved portion. Although the formal requirements for marital and testamentary contracts differ (a testamentary contract requires *inter alia* two witnesses, Arts 512 and 500 Swiss Civil Code et seq.), it is very common to join both in a single contract.

The choice of separation of property used to be a frequent choice for self-employed persons who owned a business; however, the interest of guaranteeing the economic basis of the business may also be assured by assigning business assets to the separate property (Art. 199 para. 1 Swiss Civil Code).

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

In general, a (pre-)marital contract is not subject to special judicial review. Even if a (post-)marital contract is concluded after a divorce has been requested, the court does not interfere as long as the contract only regulates property matters<sup>76</sup> – other than in the case of a divorce convention, which is an agreement regulating all effects of a divorce. The prevailing doctrine favours this complete absence of scrutiny by a court; however, there are a few critical voices who advocate control by the court. The reason for this is that the prevailing approach does not sufficiently consider the often unequal bargaining power and the frequent lack of gender equality.<sup>77</sup>

However, in any case the general principles of contract law also apply to marital contracts. This means that marital contracts may be set aside if they are illegal or immoral (Art. 19 para. 1 and 20 Swiss Code of Obligations), or for mistake, fraudulent misrepresentation or duress (Arts 23 et seq. and 28 et seq. Swiss Code of Obligations). Finally, in extreme cases, relying on a marital contract may infringe the prohibition of an abuse of a right (Art. 2 para. 2 Swiss Civil Code).

A further limitation can be found in the protection of the rights of non-common children to the reserved portion of their inheritance. Art. 216 para. 2 Swiss Civil Code (for participation in acquisitions) determines that an agreement modifying the allocation of the marital property surplus is invalid if it negatively affects the reserved portion of non-common children or their descendants. A similar provision exists for community of property in Art. 241 para. 3 Swiss Civil Code, although it is disputed whether this provision applies to common children as well.<sup>78</sup>

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<sup>76</sup> Swiss Federal Supreme Court, 4.12.2003, 5C.114/2003, *Die Praxis des Familienrechts*, 2004, p. 345 et seq.

<sup>77</sup> I. Schwenger, "Grenzen der Vertragsfreiheit in Scheidungskonventionen und Eheverträgen", *Die Praxis des Familienrechts*, 2005, p. 1 et seq.; I. Schwander, "Eheverträge zwischen ewigen Verträgen und Inhaltskontrolle", *Allgemeine Juristische Praxis*, 2003, p. 572 et seq.

<sup>78</sup> C. Hegnauer and P. Breitschmid, *Grundriss des Eherechts*, 4<sup>th</sup> Ed., Bern, 2000, para. 28.46, regard Art. 241 para. 3 Swiss Civil Code as being applicable to only non-common children if the spouses have opted for the version of "community of acquisitions", i.e. if the common property is limited to the assets that would be marital property under the property regime of participation in acquisitions, as the legislator's intention was only to protect the descendants of the spouses from being deprived of the separate property of their parents, an aim that is already fulfilled under "community of acquisitions"; according to H. Hausheer and R. Aebi-Müller, "Art. 241, para. 15", in: H. Honsell, N.P.



An agreement on the settlement of matrimonial property in a divorce convention (i.e. *not* in a marital contract) is subject to a judicial review as to clarity, completeness and obvious inadequacy (Art. 140 para. 2 Swiss Civil Code), since the settlement of the property regime may have an effect on maintenance (see Question 87 and 157). In practice, because of the limited scope of control, the court seldom interferes.<sup>79</sup>

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Vogt and T. Geiser (eds.), *Basler Kommentar, Zivilgesetzbuch I, Art. 1-456 ZGB*, 3<sup>rd</sup> Ed., Basel, 2006. Art. 241 para. 3 Swiss Civil Code is applicable to stepchildren as well, regardless of the composition of the common property.

<sup>79</sup> I. Schwenger, "Grenzen der Vertragsfreiheit in Scheidungskonventionen und Eheverträgen", *Die Praxis des Familienrechts*, 2005, p. 1 et seq., points out that there has so far not been a single case in which the clause "the spouses declare that they have properly dissolved their property regime" has even been examined by a court.