

## MATRIMONIAL REGIMES

**Iosif Florin Moldovan, PhD**

Faculty of Legal Sciences

"Vasile Goldis" Western University of Arad, Romania

**Abstract:** The matrimonial regime represents the entirety of the legal provisions concerning the property relations between spouses during marriage, as well as the legal documents they conclude with other people, governing a (measurable) patrimonial asset.

In addition to the legal community regime, with the adoption of the new Civil Code two new matrimonial regimes were introduced, namely the regime of property separation and the regime of the conventional community.

Where the two spouses opt for one of the other two regimes, instead of the legal community regime, it is necessary that they should sign a marital agreement.

**Key words:** matrimonial regime, property relations, legal community, marital agreement.

### **The matrimonial regimes regulated by the Civil Code**

In the Civil Code there are regulated three matrimonial regimes: spouses or future spouses may choose one of these, which is applicable to their marriage.

- the legal community regime;
- the separation of property regime (with the possibility of joint acquisitions);
- the conventional community regime.

By law, spouses cannot combine rules that are specific to these different regimes in order to create their own regime, and may only choose one of those prescribed by law.

However, the Civil Code also introduced in Romanian law the principle of the mutability of matrimonial property regimes, entitling the spouses to change, during their marriage, the matrimonial regime applicable to them.

### **Choosing the matrimonial regime**

The freedom of the spouses to decide through contract provisos on the legal nature of their property and the manner of managing these assets is greater or lesser depending on the conception underlying this institution in every legal system.

According to the new regulations of the Civil Code, the spouses may choose the matrimonial regime that is applicable to their marriage from amongst those provided for by law. This will take the form of concluding a marital agreement.

### **The marital agreement**

*Notion:* A marital agreement designates the legal document whereby the future spouses, making use of the freedom conferred to them by the legislator, establish, by mutual agreement, their own matrimonial regime, or change, during their marriage, the matrimonial regime under which they were married.<sup>1</sup> In the recent

Romanian doctrine, it has also been defined as: *the agreement whereby the future spouses establish the matrimonial regime they shall abide by.*

#### *The juridical nature of the marital agreement*

In the Romanian law, before the entry into force of the Family Law Code, marital agreement, which was also present in older enactment, namely in the Civil Code of 1864<sup>2</sup>, was equated with the notions of marital contract, dowry establishment, dowry sheet, marriage contract, and was defined as the "convention whereby the future spouses regulate their matrimonial regime, in other words, the condition of their present and future property in the pecuniary relations that marriage entails."

Given its special importance for the family that comes into being through marriage, the marital agreement was considered a genuine *family pact*.

This is a contract that has a specific juridical cause, a qualification that we may find both in the classical doctrine from before the adoption of the Family Code and in the current doctrine.

#### *The legal characteristics of the marriage agreement*

- it is a bilateral legal instrument;
  - it is a complex contract, which may encompass several legal instruments, each retaining its legal identity and characteristics;
  - it is a solemn act;
  - it is an synallagmatic document (Article 1171 first thesis of the Civil Code);
  - it is an instrument that is an accessory to marriage;
  - it is a public act;
  - it is not compatible with the common law modalities (terms, conditions).
- However, the provisions of Article 330 from the Civil Code, paragraph 3, shall be taken into account. According to them, the "agreement concluded during marriage shall take effect from the date specified by the parties or, in its absence, from the date of its conclusion".

#### *The validity prerequisites for the marriage agreement*

*Substantive conditions* - refer to: the competence of the contracting parties, the consent thereof, the legal object and cause.

- the competence of the parties to enter into a matrimonial agreement is assessed according to the principle *habilis ad nuptias, habilis ad pacta nuptialia*, which means that any person who can marry validly also has the capacity to enter into a matrimonial agreement.<sup>3</sup>
- the consent of those who wish to enter into a matrimonial agreement will be subject to the general rules of validity necessary for the conclusion of legal acts, governed by Article 1204 of the Civil Code.
- the cause of the marriage agreement is special, which entails that the parties intend to marry and to form a family together, or, if already married, to continue family life, changing the matrimonial regime applicable to their marriage so as to

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create the best framework for the prosperity of the future ménage. In the absence of such a legal will, concluding a matrimonial agreement would not have a legitimate cause.

*Formal conditions.* The matrimonial agreement is concluded through an instrument authenticated by a notary public and is a solemn legal document. At the conclusion of the marriage agreement, according to Article 330 of the Civil Code, the consent of both spouses must be given before a notary public, either personally or by an authentic, special proxy having a predetermined content. The breach of the provisions is sanctionable by the absolute nullity of the act.

*The date of concluding the marriage agreement*

According to the provisions of Article 330 paragraph 2 of the Civil Code, the date of concluding the marriage agreement may be either before or during the marriage, but it will produce effects only during the marriage.

The validity of matrimonial agreements concluded long before the marriage subsists as long as they represent the will of the spouses: the law does not specify a deadline in this sense.

*The lapse of the matrimonial agreement*

The matrimonial agreement will become null and void if the idea of concluding the marriage is abandoned.

The matrimonial agreement will become null and void in the following cases:

- there is a manifestation of the will of the parties to relinquish the marriage;
- there is an ascertainment of the nullity or annulment of the marriage (except in the case of the putative marriage);
- when the guardianship court decides on the legal change of the matrimonial community regime, in this case ruling in favor of the separation of property regime.

*The publicity of the matrimonial agreement*

Under Article 334 of the Civil Code:

- the statement on the marriage certificate;
- the inclusion in the national notarial register of matrimonial property regimes;
- depending on the nature of the goods, the agreement will be included in the real estate register, written down in the trade register and other publicity records as provided by the law.

*The simulation of the matrimonial agreement*

It is regulated by Article 331 of the Civil Code, which provides for the secret document whereby a different matrimonial regime is chosen or changed, for which the publicity conditions provided by law are met; this takes effect only between the spouses and cannot be opposed to *bona fide* third parties.

*Amendments to the matrimonial agreement*

A change entails certain differences depending on whether it occurs before or after the conclusion of the marriage.

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Before the marriage, the matrimonial agreement may be amended at any time, in whole or in part, under the conditions stipulated by the law regarding its form and publicity.

After the conclusion of the marriage, the spouses may modify the matrimonial regime applicable to them only after at least one year after the marriage date, by concluding a matrimonial agreement (Article 369 of the Civil Code.)

#### *The nullity of the marriage agreement*

The matrimonial agreement is void when it is concluded by disrespecting the substantive and formal conditions provided by law.

#### **The preciput clause**

This is regulated by Article 333 of the Civil Code, reference to it being also made in Article 367 letter d of the Civil Code.

The preciput clause is agreement of will between the spouses, or where appropriate, of the intending spouses, made under the law, contained in the matrimonial agreement, under which the surviving spouse is entitled to take, free of charge, before the division of inheritance, one or more common property assets, held in common or in joint ownership.

This clause may be stipulated for the benefit of either spouse or for the benefit of only one of them.<sup>4</sup>

The preciput may also constitute the exclusive object of a matrimonial agreement.

The preciput clause creates a right to preciput, which is born for the benefit of the surviving spouse, at the time of the other spouse's death.

For each of the spouses (when the cause is stipulated for the benefit of either of them), or for the spouse to the benefit of whom the clause was provided, the preciput is a possible right to which he or she may be entitled under the suspensive condition of survival.

#### **Changing the matrimonial regime**

Article 319 paragraph 2 of the Civil Code provides the possibility to change the matrimonial regime adopted by the spouses, consecrating thus the principle of the mutability of matrimonial regimes.

The law does not provide the concrete ways of matrimonial regime change, but according to the principle of the symmetry of legal documents, they coincide with those whereby it was adopted.

Upon the termination or change of the matrimonial regime, Article 320 of the Civil Code provides that it shall be liquidated through the mutual agreement of the spouses (an authentic document being drawn up) or in court (in this case, the judicial ruling constitutes the liquidation act).

The **application of the matrimonial regime** chosen through the marriage agreement concluded according to the legal requirements takes place at a different

time, depending on when it was concluded, before or during marriage. The date when the legal matrimonial regime or the agreement comes into force is:

- if a conventional matrimonial regime is chosen through an agreement, this will take effect from the date when the marriage is concluded (Article 313, paragraph 1, of the Civil Code);
- if the future spouses have not agreed to a conventional matrimonial regime, the legal regime shall apply to them from the date when the marriage is concluded;
- in the event of concluding a matrimonial agreement during the marriage, whereby a conventional matrimonial regime is chosen or whereby a conventional matrimonial regime is changed in favor of a legal regime or the matrimonial regime applicable to their marriage is modified, this will take effect from the date specified by the parties or, if that is absent, from the date of its conclusion, but not before the lapse of at least one year since the conclusion of the marriage (Article 369 of the Civil Code).

The application of the matrimonial regime adopted by marriage agreement or, in its absence, the application of the legal matrimonial regime should be subject to the following principles:

- the principle of equality between the spouses;
- the principle of the free choice of a matrimonial regime;
- the principle of the mutability of the matrimonial regime;
- the principle of the accessoriness of the matrimonial regime to the institution of marriage;
- the principle of the uniqueness of the applicable matrimonial regime.

The matrimonial regime is always applied together with the primary regime.

### **The termination of the matrimonial regime**

It is applied in principle applies throughout the marriage. If the marriage is terminated, the matrimonial regime ceases on the date the request for a divorce is filed.

According to the principle of the mutability of matrimonial regimes adopted by the Romanian Civil Code, the spouses may agree to amend or change it during the marriage.

The matrimonial regime may be changed by the guardianship court, establishing the judicial separation of property, under the law.

### **The liquidation of the matrimonial regime**

This is the legal operation whereby the spouses or former spouses separate their assets. This implies, in principle, the following:

- each of the spouses taking possession of their own property;
- the division of the joint assets (if any);
- debt adjustment.

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**The matrimonial regimes regulated in the Civil Code****The legal community matrimonial regime**

This is applicable whenever the spouses do not express, through the conclusion of a marital agreement, their option for the adoption of a conventional matrimonial regime.

The legal community matrimonial regime is a matrimonial community regime capable of ensuring the effective protection of the spouses' common interests, ensuring, at the same time, sufficient flexibility and freedom of decision to each of them.

**The spouses' assets in the legal community matrimonial regime:**

- the mass of joint assets;
- the mass of the husband's own assets;
- the mass of the wife's own assets.

**The termination and liquidation of the legal community matrimonial regime**

The termination of legal community matrimonial regime occurs in the following cases:

- at its conventional or legal change;
- at the termination of marriage through the death of one of the spouses;
- at the declaration of nullity or the annulment of the marriage;
- at the dissolution of the marriage.

The liquidation of the legal community matrimonial regime occurs on the cessation of the community, according to Article 355 of the Civil Code. The liquidation of the legal community matrimonial regime is a complex operation, defined by law in Article 357 of the Civil Code, regulating each spouse's taking possession of their own assets, the division of the joint assets and the settlement of any liabilities. The presumption of the spouses' equal contribution to the acquisition of joint property becomes applicable, unless a different contribution is ascertained.

**The conventional matrimonial regimes**

The conventional matrimonial regimes regulated under the Civil Code are the following:

- the separation of property regime (with the option of joint acquisitions);
- the conventional community regime.

*The separation of property matrimonial regime.*

This is a typical separatist regime, offering the spouses a wide patrimonial independence, limited only to the application of the provisions of the primary regime.

**The spouses' assets under the separation of property matrimonial regime**

In this regime there exist only the personal assets of one or the other of the spouses. We do not find here the mass of joint property, characteristic only of the community matrimonial regimes.

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Each spouse retains exclusive ownership of all the assets in their possession at the time of concluding the marriage, but also those they acquire during the marriage, for a consideration or free of charge.

Any property acquired is the exclusive property of the spouse in whose name the property was bought, even if it is paid for with money of the other spouse.

### **The spouses' debts in the separation of property matrimonial regime.**

In this system there is only the personal debt of each of the spouses, except for the debts incurred by the household expenses.

The fundamental principle governing the spouses' debts under this matrimonial regime is provided for in Article 364 paragraph 1 of the Civil Code, which states that 'Neither of the spouses shall be held liable for the obligations arising from the acts committed by the other spouse'.

### **The termination and liquidation of the separation of property matrimonial regime.**

*The termination of the separation of property matrimonial regime takes place:*

- at its conventional change;
- at the termination of the marriage through the death of a spouse;
- on ascertaining the nullity or annulment of the marriage;
- on the dissolution of the marriage.

*The liquidation of the separation of property matrimonial regime involves mainly the following operations:*

- the identification of each spouse's own assets;
- the division of the property acquired in co-ownership, or the transformation thereof into a full and exclusive ownership right for each of the spouses;
- the mutual payment of any possible claims arising between the spouses during the marriage;
- the payment of the spouses' common creditors.

### **The matrimonial regime of joint acquisitions**

Under Law no. 71/2011 regarding the implementation of Law 287/2009 of the Civil Code, Article 360 of the Civil Code was supplemented with a new paragraph, which introduces the possibility of changing the separation of property matrimonial regime, which, in fact, amounts to a regulation of the new matrimonial regime, namely the regime of joint acquisitions.

In all the systems of law from which the legislature drew inspiration for enacting the Civil Code, the matrimonial regime of joint acquisitions represents a distinct matrimonial regime, not a manner of liquidating the separation of property regime.

### **Changing the matrimonial regimes**

#### **The conventional change**

The matrimonial regime may be amended under the agreement of the spouses, whenever they want, under the following conditions:



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- at least one year since the conclusion of the marriage must have passed;
  - the legal requirements for concluding marriage agreements are complied with. Changing a matrimonial regime will be achieved by concluding a new marriage agreement in the form of an authentic instrument, before a notary public.
  - the fulfillment of all the forms of publicity provided by law for the enforceability of the marital agreement.

### **The judicial modification**

Changing the matrimonial regime applicable to a family may also be achieved in court, at the request of one of the spouses, where:

- the matrimonial regime applicable to the spouses is that of the legal or conventional community;
- the other spouse concludes acts that endanger the property interests of the family.

### **Notes**

<sup>1</sup>C. M. Craciunescu, *Regimuri matrimoniale*, Bucharest: Ed. All. Beck, 2000, p. 11

<sup>2</sup>Article 1224 from the Civil Code of 1864, or Article 932 bearing the name of marital convention.

<sup>3</sup>M. Avram, C. Nicolescu, *Regimuri matrimoniale*, Bucharest: Ed. Hamangiu, 2010, p. 81.

<sup>4</sup>In the initial form of Article 333 of the Civil Code.

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