Jurnalul de studii juridice

Journal of Legal Studies

ISSN: 1841-6195 (print); e-ISSN: 2067-8509 (electronic)

Covered in: Index Copernicus, Ideas RePeC,

EconPapers, Socionet, CEEOL

Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code

Nadia Cerasela ANIȚEI

Jurnalul de studii juridice, Year VIII, No. 3-4, December, pp: 49-84

Published by:

Lumen Publishing House

MATRIMONIAL REGIME LEGAL UNDER THE PROVISIONS OF THE ROUMANIAN CIVIL CODE

Nadia Cerasela ANIȚEI [1] [2]

Abstract

By Law no. 287 of July 17, 2009 on the Civil Code republished through Law no. 71/2011, the new Civil Code is subject to the tendency of the modern legislations to create a triple economic balance in relations between spouses matters by means of the matrimonial regimes established:

1. between spouses: the emergence of marital agreements, which led to the adoption of more flexible legal rules, that allow spouses a certain freedom to choose the regime of patrimonial relations between them;

2. within the family: to protect the interests of the family, they resorted to mandatory rules that provided for limitations and prohibitions (Art. 321-322 on family home - new concept in the Romanian law, art. 316 regarding the acts seriously threatening family interests);

3. between family and society-third parties: through the establishment of certain substantive requirements of legal acts, including of the marital agreements concluded by affidavit, with the obligation to be made public.

We believe that in the new Civil Code, Chapter VI of Book II - The family is called Patrimonial rights and obligations of spouses devotes Section 1 Common provisions, paragraphs 1-3, art. 312-328 to the primary regime. The primary regime governed by art. 312-328 of the new Civil Code is defined as all legal norms governing the relations established between spouses, or between one or both spouses on the one hand, and third parties, on the other hand, relations having as object existing assets at the time of marriage, acquired during it, as well as contracted obligations in connection with such goods or the carrying out of the obligations of marriage that apply to all marriages, regardless of the matrimonial regime to which the spouses are subjected.

---

[1] Nadia Cerasela ANIȚEI - Associate Professor PhD., Faculty of *Faculty of Legal, Social and Political Sciences*, University of „Dunarea de Jos" Galati, E-mail: ncerasela@yahoo.com

[2] Articol prezentat la Conferinta *Reconsidering Democracy: (New) Theories, Policies and Social Practices* Celje, Slovenia, 23-24 March 2012, International School for Social and Business Studies, Celje, Slovenia http://www.mfdps.si/Files//Dogodki/CEE%20Forum%202012/ CEE%20Forum%202012%20Programme_final.pdf

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

The provisions of art. 312 of the Civil Code establish: a legal system that is the community property regime and two conventional regimes: separation of property regime and the regime of conventional community (the latter includes conventional exemptions from the community property regime).

The legal matrimonial regime *includes property acquired by both spouses during marriage, except for the goods provided by law, which are each spouse's own assets. The legal community regime will apply in all situations in which prospective spouses do not opt for the* ***separation of property regime*** *or for the* ***conventional community regime***. ***Separation of property regime*** *is characterized in that each of the spouses is the exclusive owner of their property and of that they acquire by themselves after the marriage, at the adoption of this regime spouses are required to draw up an inventory of movable property belonging to each one at the date of the contracting of marriage.* ***The Conventional community regime*** *is applicable when by matrimonial agreement, they derogate from the provisions on the legal community regime, and the matrimonial convention concluded in this case may narrow or widen the community of goods.*

Keywords:

property relations between spouses, matrimonial property regime, legal matrimonial regime; separation of property regime, conventional community regime.

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

Introductory notions to legal community regime

In terms of the **matrimonial regime**, the patrimonial relations between spouses are based on **the legal community regime**, including the property acquired by each spouse during marriage, except for goods provided by law, that are each spouse's own assets. This regime has been greatly improved. For example, it has been expressly provided that the spouses jointly, or together with others, may put the basis companies, associations and foundations, according to the law, bringing common goods, but, only with the consent of both spouses[3].

Patrimonial assets

Explanatory notes

The patrimony of each person includes the rights (the patrimonial assets) and obligations (patrimonial liabilities). This structure is fully applicable to the property of each spouse, which includes both the common property rights and own goods rights as well as joint and own liabilities. We can therefore say that the matrimonial assets includes common property of spouses and own property of each spouse, while patrimonial liabilities include the common debts and own debts of spouses (M., Avram. C., Nicolescu., (2010) :182).

Matrimonial community of property includes not only property acquired by spouses during marriage, but also the debts or obligations assumed by them in relation to other people during this period. Therefore, the assets of each spouse should be considered from two perspectives one active and another one passive (A., Al., Banciu. (2011) :105-109).

The patrimonial assets of each spouse consists of common property and own property. Regarding the common property, art.339 of the Civil Code sets the community rule, providing that "property acquired during the legal community regime by any of the spouses is, from the date of their acquisition, joint property of spouses", and art.340 of the new Civil Code providing eight categories of own assets for each spouse, represents the own property exception.

From the list of art.340 of the new Civil code we see that it creates the possibility of birth of two masses of own property: the husband's mass of own goods and the wife's mass of own property, which means that their presence along with the mass of common property of both

[3] Of the Explanatory Memorandum on the draft of the new Civil Code.

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

spouses, fulfils the characteristic feature of all commentary regimes namely the existence of three distinct masses of goods in the family heritage[4].

Common property of spouses

The notion of property (I., P., Filipescu. I. A., Filipescu, (2006):67-68)

The new Civil code uses in art.339 the notion of "*property acquired during the legal community regime by any of the spouses is ....*". This concept must be understood in its legal meaning, referring both to things that can be the object of property rights and obligations and to patrimonial rights and the actions regarding the patrimonial goods and rights. We know that the patrimonial rights are real, main or accessory rights regarding the movable and immovable property and the claims-rights, while the actions are those related to real rights and the claims rights. Consequently, the term of property covers both tangible, ie movable and immovable and intangible assets, ie real rights, rights of property rights claims and actions regarding the patrimonial rights. Property may become common property without distinguishing whether it is movable or immovable, tangible or intangible. Thus, the notion of *"property acquired during the legal community regime by any of the spouses is ...."* refers to all the patrimonial rights, and therefore to claim rights as well.

The concept of acquisition

To acquire in the sense of art.339 of the new Civil Code is to become the holder of a real right or of a claim right through legal acts or deeds.

Property becomes common without distinguishing in principle between modes of acquisition, except those acquired by gratuitous acts (property acquired through legal inheritance and property acquired through donation or testament, which are own property) that are common only if the person who received it provided that it will be common.

The property is "*common"* in case of real rights, weather it that was acquired in a native way (access, usucapio, fruit acquisition by the holder in good faith) or in a derivative way (contract tradition, testamentary succession, the rights constituent court order). Similarly, in terms of claim rights, the interest in principle is not how the acquisition was made (by

[4] Ibidem.

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

contract or unilateral legal act, the licit or illicit legal fact) (D., Lupaşcu (2009) :92).

According to art.339 property acquired during the legal community regime by any of the spouses is, either from the date of receipt, common property of spouses. We note that art.339 of the new Civil Code reproduces with some nuances art.31 of the current Family Code. In fact, the category of property acquired before marriage will not be provided expressly, and personal assets and those destined for the exercise of the profession will form distinct categories of own goods (T., Bodoaşcă, (2005) :173-174).

Providing the community property rule, from the date of their acquisition, during the legal community, the legislature made this statement, implicitly acknowledging the idea that this matrimonial regime remains effective until its conventional modification, which it allows by art. 369 of the new Civil Code, after at least one year after marriage, or whenever the spouses wish to replace the existing matrimonial regime with another matrimonial regime, by an authentic notary act, under the conditions provided for concluding matrimonial agreements and those regarding the publicity (A., Al., Banciu. (2011) :100).

However, regarding the usucapio we distinguish the following situations:

1. extra-tabular usucapio provided by art. 930 of the new Civil Code;

2. tabular usucapio provided by art.931 of the new Civil Code.

As such, under the rule of the new Civil Code, whether we refer to extra-tabular usucapoi (10 years), or to the tabular usucapio (5 years) for the acquisition of ownership the registration of the right in the Land book is required (V., Stoica. (2009) : 346-376; M., Avram. C., Nicolescu., (2010) :182).

Property becomes common no matter if in the act of purchase both spouses were recorded or only one of them or if it was acquired by the work of both spouses or by the work of only one of them. According to art.885 paragraph 1 of the new Civil Code in the Land book the establishment and relocation of real rights on real estate has a constitutive effect. Therefore the constitutive or translational effect on real estate rights is subject to registration in the land book of the acquisition title of real estate rights. Until registration, the act produces legal effects between the parties in terms of obligations required (V., Stoica. (2009) : 444).

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

Regarding the exceptions of art.887 paragraph 1 of the new Civil Code it is provided that "real rights are acquired without registration in the land book when they come from inheritance, natural accession, forced sale, expropriation for public use, and in other cases provided by law". Therefore, in these cases, the holder of such rights may use these rights through the Land book only after the registration is made.

In terms of the opposability to third parties, art.902 of the new Civil Code provides that subject to notation in the Land book among others, is the quality of common property of a real estate, matrimonial agreement, and the modification, or if necessary, its replacement, the destination of a building as family housing.

According to art.341 of the new Civil Code the labor income, the sums due by way of pension under social security and others alike, and revenues due under an intellectual property right is common property, regardless of the date of receipt, but only if the claim on their collection becomes due during the community.

Article 341 of the new Civil Code considers the "income", the sums collected by way of salary, pension, etc.., this is common property.

Article 341 of the new Civil Code conditions the quality of common property to the due date of the claim, which must be within the community system operation. Therefore, if the due date ranges during the community, the sum of money collected even after the termination of the community regime is common property. Conversely, if the due date was prior to the commencing of this regime, the amount of money collected even during the community is own property (M., Avram. C., Nicolescu., (2010) :215).

The quality of the acquirer

For a property to be common the acquirer is required to have the quality of spouse at the time of acquisition.

There are common both the assets jointly acquired by spouses and those acquired by the spouses separately.

It makes no difference whether the act of acquiring lists only the name of a spouse.

Acquisition period

Marriage lasts between the contracting moment and the moment of termination, dissolution, finding of its invalidity or cancellation.

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

The legal criterion for delimiting common property from own property, is the acquisition of such common property "*during the marriage."* So, common property is only the assets acquired after marriage. In this respect, art.289 of the new Civil Code provides: *"Marriage is terminated when, after the consent of each of the future spouses, the civil officer declares them married,"* thus uphelding the doctrine and jurisprudence solution.

Termination of marriage

From the study of art.259 paragraph 5 of the new Civil Code we see that it sets to rights two cases of termination of marriage, namely:

- death of a spouse;
- judicial declaration of death of a spouse.

a. Death of a spouse

Marriage being completed *intiuitu personae*, the physical death of one spouse leads to its termination.

b. Judicial declaration of death of a spouse

Marriage terminates in case of judicial declaration of death of a spouse, the date of death being the one determined by the final declarative death decision. Thus according to art.52 of the new Civil Code, *"The dead person is considered to have died on the date the final decision has established it as that of the death. If the decision does not show time of death, it is considered that the one declared as dead died in the last hour of the day established as that of death (paragraph 1). In the absence of abundant evidence it will be established that the person declared dead died in the last hour of the last day of the period prescribed by art.49 or 50, as appropriate (paragraph 2). The court may correct the death date determined under the provisions of paragraph (1) and (2) provisions, if it is proved that the declared dead person might not have died at that time. In this case, the date of death is established by the rectification decision"(paragraph 3). Also, according to art.54 of the new Civil Code (paragraph 1) "If the person declared dead is alive, at any time, the decision that declared the death may be cancelled.*

(2) The person who was declared dead may ask, after the annulment of the declarative death decision, his/her assets be returned in kind, and if it is not possible, their restitution by equivalent. However, the purchaser is not required to return it unless it can be proved that at the acquiring date he knew or he should have known that the person declared dead was alive."

Article 293 paragraph 2 of the new Civil Code provides "*If the spouse of a person declared dead has remarried and, thereafter, the declaratory death decision is canceled, the new marriage remains valid if the spouse of the person who was*

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

declared dead was in good faith. The first marriage is considered dissolved at the date of the completion of the new marriage. "

We note that paragraph 2 of art.293 of the new Civil Code expressly provides the good-faith solution of the spouse of the person who was declared dead by court order.

Assets acquired until that date are common.

If the date of death is corrected, the property is common if it was acquired by the new date of death.

In case of death declaratory decision cancellation, the community of goods does not come to an end.

If the person declared dead does not return and, meanwhile, the former spouse has remarried, the community of goods as a result of the first marriage is preserved until the conclusion of this new marriage if the spouses were in good faith. In case of bad faith, the new marriage is null and void, being completed in fraud of law.

The community of goods ceases. The part of the common assets due to the deceased spouse forms the succession along with the other assets that had belonged to him/her and will be referred to heirs. The surviving spouse is called to inheritance according to Law no. 319/1944 provisions. According to art.350 of the new Civil Code: "*Each spouse may dispose of the share due to him/her, at the end of marriage, from the community of property"*. We note that, by ending the marriage each spouse disposes of the share due to him/her at the termination of marriage. Art.355 of the new Civil Code provides: "*Upon termination of the community, it is liquidated by court or notary authentic document. (paragraph 1) Until the completion of liquidation, the community subsists both in relation to assets and in respect of the obligations. (paragraph 2). When the community is terminated by the death of a spouse, the liquidation is made between the surviving spouse and the heirs of the deceased spouse. In this case, the deceased spouse's obligations are divided between heirs proportional to the inheritance shares" (Paragraph 3).*

Termination of matrimonial regime takes place in case of finding of invalidity of marriage, annulment of marriage, dissolution of marriage and termination of marriage.

Dissolution of marriage

Regarding the dissolution of marriage by divorce, art.382 of the new Civil Code provides: "*Marriage is dissolved on the day when the divorce decision remained final (paragraph 1). Notwithstanding, if the divorce action is*

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

continued by the applicant spouse's heirs, according to art.380 marriage is considered dissolved on the date of death (paragraph 2). In the case provided by art. 375, marriage is dissolved on the date of the issuance of the divorce certificate"(paragraph 3).

In the case stipulated by art.375 of the new Civil Code, ie when divorce is recorded by administrative way or notary way, (C., Mares, (2013) :89-101), marriage is dissolved on the date of issue of the divorce certificate according to art.382 paragraph 3 of the new Civil Code.

The effects of divorce C., Mares, (2013) :45-51)on the matrimonial regime is governed by art.385-387 of the new Civil Code. According to art.385 of the new Civil Code "In case of divorce, the matrimonial regime ceases between spouses at the date of the request for divorce (paragraph 1). However, either or both spouses together, in case of divorce by agreement, can ask the divorce court to find that the matrimonial regime ceased at the date of separation in fact." (paragraph 2).

The provisions of this Article shall apply accordingly in case of divorce provided by art.375 (paragraph 3). Article 386 of the new Civil Code provides: "*The documents referred to in art.346 paragraph (2), as well as the acts which determine obligations of the community, concluded by one of the spouses after the request for divorce are void if they were made in the other spouse's fraud (paragraph 1). The provisions of art.345 paragraph (4) remain applicable"* (paragraph 2).

However, either or both spouses together, in case of divorce by agreement, can ask the divorce court to find that the matrimonial regime ceased at the date of separation in fact. These provisions are applicable in case of divorce by agreement between spouses found by administration or notary.

In terms of the opposability in relation to third parties art.387 of the new Civil Code provides: *"The divorce court decision and, where applicable, the divorce certificate referred to in art.375 are opposable to third parties under the law (paragraph 1). The provisions of art.291, 334 and 335 are properly applied, including in the case of art.375"(paragraph* 2).

So we see that the provisions of art.99 paragraph 3 of the new Civil Code according to which the court decision on a person's marital status is enforceable against any other person as long as the opposite has not been established is properly applied, as well as that of art.101 of the new Civil code regarding the publicity on the marriage certificate about the dissolution of marriage and the cessation of the matrimonial regime.

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

Also, the publicity formalities in the national notary register of matrimonial regimes provided by art.334 should be met, by applying the provisions of art.291 of the new Civil Code.

Also, according to art. 335 of the new Civil code, the divorce can be enforced against third parties relating to acts concluded by them with one of the spouses only if the publication formalities provided by Art.334 of the new civil code had been met or if third parties have found out about it otherwise.

The annulment of marriage

As regards the dissolution of the absolute or relative null and void marriage null, in principle, as nullity causes retroactive effects it is considered that the community property has never existed. (C. Mares, (2012) :61-84)

However the exception to this principle is the putative marriage, namely that absolute or relative null and void marriage, at the conclusion of which at least one spouse was in good faith. Thus, art.304 of the new Civil Code provides that *"at the contracting of a null or annulled marriage the spouse in good faith keeps up to the date when the court decision becomes final, the quality of a spouse in a valid marriage. (paragraph 1). In the situation referred to in paragraph (1) patrimonial relations between the former spouses are subject, by similarity, to the provisions relating to divorce "(paragraph 2).* Also, according to art.306 paragraph 1 of the new Civil Code *"the court decision of finding the nullity or of annulment of marriage is enforceable against third parties under the law. The provisions of art.291, 334 and 335 shall apply accordingly. "*

However paragraph 2 of the same article stipulates that the nullity of marriage cannot be opposed to a third person against an act previously concluded by them with one of the spouses, except where the publication formalities provided by the law regarding the action of nullity finding or of annulment have been met or the third party became acquainted, otherwise, before the conclusion of the act, with the nullity cause of marriage.

The provisions of art.291, 334 and 335 shall apply accordingly to action publicity in nullity finding or annulment of marriage.

Separation of spouses

Property acquired by spouses during their separation according to the doctrine and jurisprudence (I., P., Filipescu. I. A., Filipescu, (2006) :74;

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

M., Avram. C., Nicolescu., (2010) :182) is common property for the following reasons:

a. separation in fact does not entail the termination or dissolution of marriage, so the assets should be considered as goods acquired during marriage;

b. the law contains no exemption in respect of such goods;

c. if such a solution had not been given, it would mean that the spouses would be able to change their matrimonial regime, separating in fact before the acquisition of certain assets and determining in this way, a legal regime of property other than that provided by law.

However, separation of spouses in fact is important in respect to the contribution of each spouse to the acquisition of joint property. Thus, if the spouse who remained in the common house, after separation in fact supported the household tasks and gained some common property, the other spouse's contribution will be ascertained - based on the evidence - his share of contribution to the acquisition and preservation of common goods is greater than the other spouse's. Similarly, the case law decided that if the goods purchased on deferred payment, the value of the good in proportion to the rates paid by one spouse only after separation in fact is not own good, but only increases the contribution of that spouse to the acquisition of joint property.

Assets acquired by concubines **(M., Avram. C., Nicolescu, (2010) :193-195).**

Assets acquired by cohabitants are not common property.

Indeed the community property regime does not apply to concubines who are subject to common law regarding the legal patrimonial relations between them. If a concubine acquires a good through the contribution of the other concubine, then the good belongs to the person that acquired, and the other has only a right to claim. Also, one can see the existence of a right of share ownership regarding the property acquired during cohabitation, upon proof that the parties have agreed to it. Moreover, in view of practical judicial solutions, concubines may agree that a good acquired by one of them, with the substantial contribution of the other, to be considered common good from the date of marriage, if they marry. For example, it was decided that in relation to the circumstances of the case, the fact that two people have lived in concubinage and had built a house together, contributing to it, can justify

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

the conclusion that the parties have agreed to become co-owners of the building, and not only one to have a right to claim.

Also, given that during long-term cohabitation, the concubines may acquire property together with a large quantity and high value it was decided that, for sharing this property, it may be used, by analogy - the rules applicable to the liquidation of the legal community regime, to determine the extent to which each concubine contributed to the acquisition of property, as in case of the spouses. Thus, the goods become common property in shares depending on the contribution to their acquisition, no matter on whose name the act of buying was signed, and witness evidence is admissible to prove the contribution. It has been thus, a trend of penetration of the provisions applicable to the community property of the spouses on shares of concubines, especially due to practical reasons during partition. In principle, however, the debate remains as in the case of the concubines, the co-ownership evidence and of the share should be made in relation to each item and not to the whole of the common property as in case of the spouses.

In case of concubinage followed by marriage, there may be both own property and common property in shares - parties and common property acquired during marriage. Please note that in case of property acquired during cohabitation, the share of each concubine is own good, acquired before marriage, so these assets common ownership on shares are considered in relation to the common law regime according to art.634-645 of the new Civil Code, and not to the regime of joint property of spouses.

Acquisition time **(I., P., Filipescu. I. A., Filipescu, (2006) :67-68; D., Lupaşcu (2009) :94)**

Acquisition time is when one spouse becomes the owner of the right transferred. Being the claim included before the marriage in the patrimony of a spouse, but achieved during marriage, is not joint property; only the one born during marriage, but achieved after marriage is common property. If a spouse acquires a claim that entitles him/her to claim the transfer of ownership to property (both of the claim right and of the right of ownership) in relation to the moment when this becomes part of the spouse's assets is determined whether or not this is a common good.

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

In case of conventions affected by means, the solution is different as one refers to *"term"* or to *"condition"*.

Property acquired during marriage by a term-affected convention is common good. If the goods was alienated during marriage through such an agreement it is not part of common property.

Property purchased during marriage under suspensive condition is considered acquired after the achievement of the condition, with retroactive effect, from the date of the agreement. Likewise, common property alienated during marriage under suspensive condition will be excluded from the community of goods after the fulfillment of the condition with retroactive effect.

If an asset was acquired during marriage under resolutory condition, the act becomes effective, because this condition does not affect the obligation itself and so, that good becomes common, but the completion of this quality, depends on the achievement or non-achievement of the stipulated condition. Providing that the condition is achieved the contract will be dissolved with retroactive effect, considering that it has never been concluded. Symmetrically, the common good alienated during marriage by convention under resolutory condition is considered out of the community, the act being effective, but the completion of alienation will depend on the achievement of the condition: Assuming the completion of the condition, the act will be abolished retroactively, so that the good shall be regarded still as part of the joint property of spouses.

Portion of property acquisition

Paragraph 1 of art.343 of the new Civil Code provides: *"The quality of common good should not be proven."* The text thus establishes a presumption of community, in relation to which the following comments must be made:

a. presumption of community, as a means of evidence, not to be mistaken for the community property. Under this assumption, any property acquired during marriage by either spouse is joint property without having to prove that the property has been acquired by contribution of both spouses;

b. presumption of community is relative, meaning that it can be proved otherwise, namely that the property is not common, but own property of one of the spouses.

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

Spouses' own property

According to art.342 of the new Civil Code "Each spouse may use, administer and dispose freely of their own goods, under the law."

According to the research literature (M., Avram. C., Nicolescu., (2010) :210-212; C., Mareş, (2013) :112-114).from the provisions of art.339-344 of the new Civil Code it can be observed that:

1. the legal nature of own goods undoubtedly results from the interpretation per a contrario of art.339 of the new Civil Code which provides that there are common goods in joint property of spouses' the assets acquired during the legal community;

2. the letter. a) art. 340 of the new civil code sets that the acquirer should have expressly provided that the goods will be common, which means a change in the solutions by means of which it is accepted that the will of the acquirer may be implied, resulting unequivocally in certain factual circumstances.

3. letter. c) art. 340 of the new Civil Code regarding the assets for the exercise of a profession, law exempted goods that are elements of a common stock-in-trade. This means that the elements of a stock-in-trade that are acquired during marriage, with common goods are common property even if it is destined to the exercise of the profession of a spouse, unlike other goods destined for the exercise of the profession of either spouse, which are own property, even if they have been acquired with common property;

4. the letter d) art. 340 of the new Civil Code states that there is own property the economic rights of intellectual property in relation to their creations and the distinctive signs that they recorded. It is noted that this category of goods is distinct from that provided in letter. e), and from the goods covered by art.341 of the new Civil Code, namely the income due under an intellectual property right, the latter being regarded as common property by the legislature expressly. Letter. d) takes into account the patrimonial copyright as are provided by art. Law No. 12-13 din. 8 /1996 on copyright and related rights as amended and supplemented. Therefore, although these patrimonial rights are own property, the proceeds of exploitation of the work are common property, following similar rules as the wages;

5. letter. h) art. 340 of the new Civil Code stated that there are own property, own property fruits, solution established as *lege lata* in the doctrine and jurisprudence.

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

According to art.342 of the new Civil Code each spouse may use, administer and dispose freely of their own goods, under the law.

We note that, in the absence of specific provisions on how to meet their property management, the provisions of common law will be applied but they will consider, where appropriate, protection rules that configure the primary imperative regime that prevail over any other provisions: for example, according to art.322 paragraph 1 of the new Civil Code if the marital home is own good of one of the spouses, the other spouse may not dispose discretionary by himself/herself by the property in question.

Evidence of own property under art.343 paragraph 2 of the new Civil Code may be made by any means of evidence but this rule will not be incidental, in the case of art.340 points a, in case the property is acquired by inheritance or donation. Also, according to paragraph 3 of the same article for the property acquired before marriage, before its conclusion an inventory will be drawn up by the notary public or under private signature, if the parties so agree. In the absence of the inventory, it will be presumed, until proven otherwise, that the goods are common.

According to art.344 of the new Civil Code either of the spouses may make any mention in the land book or, as appropriate, in other records of publicity provided by law regarding the ownership of an asset to the community.

From the provisions of art.350 of the new Civil Code is clear that by the termination of marriage[5] each spouse disposes by legate of the share he/she is due at the termination of marriage.

Patrimonial liabilities

Patrimonial liability of each spouse has two categories of debt: own debt and common debt. Accordingly, the spouses have two categories of lenders: personal and common.

Regarding the debt, art.351 of the new Civil Code provides four categories of obligations for which spouses respond with common property, and hence *per a contrario*, the rule that all the other debts are own, and the ones limited provided are the exception for joint debt. Thus, it appears that the common debt refers practically to any expenditure made

[5] Termination of marriage can be defined as the *ispo jure* end (final) of marriage, which occurs in the cases determined by law restrictedly.

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

in connection with the management, conservation and acquisition of the common assets. Thus, they aimed at ensuring a balance between assets and liabilities, so that any obligation that is related to a common good either for conservation, management and even acquiring of the property, have the nature of a joint debt.

Also art.35 letter d) of the new Civil Code has clarified the content of this category of joint debts, taking into account the damage caused to a third party, by acquiring an asset, regardless of ownership, being thus acquired the proposals established in the legal literature (I., P., Filipescu. I. A., Filipescu, (2006) :54-70; D., Lupaşcu (2009) :94; M., Avram. C., Nicolescu., (2010) :225-228), starting from the assumption that in this matter a different treatment for the two forms of ownership: public and private is not justified.

Regarding the regime of common debt the provisions of art.352 of the new Civil Code provide that to the extent that joint obligations have not been covered by the pursuit of common goods, the spouses are jointly liable with their own assets. In this case, the one who paid the common debt is subrogated in the creditor's rights for which he has borne over the share to which he would be entitled from the community if liquidation is made at the date of the payment of the debt.

The spouse who paid common debt has a retention right over the property of the other spouse until the full of claims that the former owes to the latter.

Therefore, the principle of joint liability for the common debts is established, as well as a retention right pursuant to art.2495-2499 of the new Civil Code as a guarantee for the benefit of the spouse who paid fully the joint debt.

The provisions of art.354 of the new Civil Code show that labor income of a spouse and those assimilated to it cannot be pursued for debts incurred by the other spouse, except obligations assumed for covering ordinary expenses of the marriage (article 351 letter (c) of the new Civil Code). The text restricts, therefore the general pledge of common creditors of the spouses, which allows the maintenance of professional independence of spouses and the community conservation of a minimum of resources.

In conclusion, in corroboration of the provisions of art.352, art.353 and art. 354 of the new Civil Code it results that the legal regime of joint obligations can be summarized in two rules:

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

a. only common creditors can pursue common goods;

b. to the extent that joint obligations have not been covered by the pursuit of common goods, the spouses are jointly liable with their assets. The liability with own goods for the common debts, is according to art.352 of the new Civil Code subsidiary liability. This means that the spouses, in case of suit of own goods for common debts, may oppose the benefit of discussion, that is, the exception by which the spouses invite common creditors to pursue the common good first and only then, to the extent that the debt has not been covered, to proceed to the suit of own property (A., Al., Banciu. (2011) :109-116).

We observe that the suit order of the spouses property is imperative and should be respected, even though the spouses are jointly obligated.

Operation of community of property regime

***General considerations on the management of common property* (M., Avram. C., Nicolescu., (2010) :228-233; C., Mareş, (2013) :118-120).**

At the basis of common property management lies the principle of equality of spouses. Thus, theoretically four common property management systems can be conceived:

1. *joint management* - each spouse is entitled to participate in the management of common property, along with the other. Under this system all the acts on the common property are committed by the couple together, the consent of both spouses being always necessary. This system ensures the patrimonial cohesion between the spouses, because, by definition, all decisions are taken jointly by both spouses;

2. *parallel management* - each spouse has the same powers over common property. This system means that each spouse has the power to manage by him/her-self the community property, in other words each is equally *"community leader"*. Equality between spouses is translated thus by mutual independence regarding the management of common property. Each spouse may commit acts on common property under its own power conferred by law, and not as a representative of the other spouse;

Each spouse may commit acts on the common goods under its own power conferred by law, but not as a representative of the other spouse;

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

3. *separate management* - each spouse has power only on their own property. It has been showed in the research literature that this system has a double disadvantage, on the one hand destroys any community spirit during the marriage, on the other hand presents serious practical difficulties because it requires to be determined for each item by which spouses it was acquired;

4. exceptional, the so-called *exclusive management* in which a spouse has an exclusive power, given the legal nature of the act or property. Part of this mechanism are _ the legate; the partition of the inheritance becoming part of the community (which can be requested only by the heir spouse); acts of management of common property which were affected by one spouse's exercise of the profession and which can only be concluded by the spouse who exercises the profession, without any interference from the other spouse, provided it acts are current.

Common property management under the new Civil Code

In the system of the new Civil Code for most acts dealing with the common property of spouses, the legislature has established *joint management mechanism* for certain categories of goods and the *parallel management* system for the other categories of goods.

Scope

Art.345 and Art.346 allows for the identification of the scope of *parallel management* system, both in terms of assets and of legal documents' nature upon it. From the analysis of these texts it follows that are subject to parallel rule management the following categories of documents having the common goods as object:

- acts of conservation;
- acts of use;
- acts of administration;
- disposition acts with onerous title on movable assets which, by law, are not subject to publicity formalities, as well as the regular gifts;
- acts of acquisition of joint property (M., Avram. C., Nicolescu., (2010) :254).

We agree with the research literature (M., Avram. C., Nicolescu., (2010) :254).which considers that although the legislator refers only to acts, within its scope we can include rules and appropriate legal actions,

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

brought by either spouse or brought against any of them. Therefore, each spouse may stand alone in a trial, being allowed to formulate mobile or real estate actions, as each spouse has the passive procedural quality to stand alone in a trial and to protect the community of assets.

Regarding the action claiming joint ownership goods art.643 of the new Civil Code establishes the solution according to which "*Every co-proprietor can stand alone in court regardless of the procedural quality, any action relating to co-ownership, including in case of the claim action (paragraph 1). Decisions on behalf of co-ownership are in the advantage of all co-owners (paragraph 2). Decisions adverse to a co-owner are not applicable to the other co-owners. When the action is brought before the court by all co-owners, the defendant may ask the court concerned the introduction of the other co-owners as plaintiffs, on terms and conditions set out in the Code of Civil Procedure for the proceedings of others. (paragraph 3)*" [6]

According to art.344 of the new Civil Code any of the spouses may make mention in the land book or, as appropriate, in other records of publicity provided by law on the affiliation of an asset to the community.

Liability for acts prejudicial to the community

Paragraph 4 of art.345 of the new Civil Code establishes the principle of responsibility between spouses for the management of common property. This means that the spouse who, by the acts he/she has signed by him/her-self damaged the interests of the other spouse regarding the community of goods is liable for the damage caused. The act remains valid, so that the rights of third parties are not affected (eliminated), but the spouse who has concluded the act by him/her-self may be required to pay damages to the other spouse. Therefore, in case the fraud is proven, the spouse who suffered damage may request the cancellation of acts signed by the other spouse, after the request for divorce, taking into account the fact that, according to art.385 paragraph 1 a matrimonial regime between spouses ceases retroactively, in principle from the date of the request for divorce. The provisions of art.345 paragraph 4 still apply, meaning that the spouse who did not participate in the conclusion of the act can only claim compensation from the other spouse, if the third party purchaser was in good faith M., Avram. C., Nicolescu., (2010) :255-256).

[6] Through this text the question of the old rule of humanity is solved in the spirit of European Court of Human Rights (Case Lupas against Romania).

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

Common management (co-management) system - exception to the parallel management system

Article 346 of the new Civil Code refers to the need of spouses' consent to the following categories of documents: acts of disposal on common assets, except for acts on movable assets whose alienation is not subject to forms of publicity, as well as regular gifts; onerous acts of disposal whose object is the movable assets on the forms of publicity, as well as gratuitous acts between living on movable goods, except the usual gifts; acts involving change of use of a common good.

Per a contrario, it follows that the acts of disposal of real estate goods require the express consent of the spouses.

In conclusion, it appears that in relation to the acts of disposal on movable and immovable property whose alienation is subject to certain formalities of publicity and to the gratuitous acts between living the co-management rule prevailed.

Also, acts involving change of use of a common good can be committed only with the consent of both spouses. Therefore, although related to the whole mass of the common property of spouses the rule seems to be parallel management, in fact, in relation to the acts of disposal on movable and immovable assets whose alienation is subject to certain formalities of publicity, and to gratuitous acts between living the co-management rule prevailed.

As regards movable property whose alienation is subject to publicity formalities, since the text does not distinguish, it follows that there are considered both tangible movable assets (eg ships, aircraft) and the intangible ones (M., Avram. C., Nicolescu., (2010) :257).

Means of expressing the consent

First of all the conclusion of the act in agreement is imposed.

But if the initiative of the act conclusion belongs to a spouse, then he/she must have the consent of the other spouse as required by art.346 of the new Civil Code. This means that the agreement between spouses will be made either by signing the document in the presence of both, or by the conclusion of the act by one of the spouses, but also on behalf of the other spouse, based on an express and special mandate.

We note the distinction between the primary matrimonial regime, where, for some special cases the need for an express written consent of the other spouse is required (eg, regarding the family home).

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

The sanction

We note that according to art.347 paragraph 1 of the new Civil Code if the act is concluded without the consent of the other spouse the sanction of relative nullity applies. The regime of relative nullity is the common law. The spouse in question has the possibility to confirm the act. Paragraph 2, 1st thesis of the same article provides as an exception that third-party purchasers who submitted necessary diligence to learn about the nature of the property will be protected from the effects of nullity. Therefore, in this case, the injured spouse, who has not given his/her consent can only claim compensation from the other spouse. Paragraph 2, second thesis of the same article provides that the spouse who did not participate in the conclusion of the act can only claim damage compensation from the other spouse, if the third party purchaser was in good faith.

Exclusive management under the new Civil Code

Exclusive management means that the acts covered by this mechanism can only be achieved by one of the spouses, by virtue of the personal character of the act committed. Part of this category are:

a. the legate. The provisions of art.350 of the new Civil Code show that by termination of marriage[7] each spouse is entitled by legate to the share he/she is due at the termination of marriage. The solution is justified by the personal character of the testament on the one hand, and on the other hand, by the effect of "*mortis causa*" of the act, which requires that it becomes effective at the death of the spouse, when the community property ceases;

b. management of money or titles from the accounts opened in the name of only one spouse. The titular spouse of the account has exclusive management, regardless of the legal origin or nature of such property as required by art.317 paragraph 2 of the new Civil Code;

c. Common assets for the exercise of the profession of one spouse and which have not the legal nature of own goods, namely the elements of a stock-in-trade belonging to the community of goods as shown in the provisions of art.340 points c 2nd thesis in conjunction with Article 327 of the new Civil Code which establishes the professional independence of

[7] Termination of marriage can be defined as the end (final) of marriage, which occurs in cases determined by law..

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

the spouses. Exclusive management considers only current management acts as an exception to the parallel management rule. But no derogation is allowed from the conjunction consent of the spouses condition and where serious acts are involved the provisions of art. 346 and 347 of the new Civil Code are applied;

d. although securities are common property, the spouse who is associated exercises alone all rights arising from this quality as provided by art.349 paragraph 2, 2md thesis of the new Civil Code.

Management of own assets under the new Civil Code

According to art.342 of the new Civil Code, each spouse may use, administer and dispose freely of their own goods, under the law.

In the absence of specific provisions on the way in which property management has to be achieved, the mechanisms of common law shall be applied, but taking into account, where appropriate, protective rules that configure the primary imperative system, which prevails over any other provisions: for example, as required by art.322 paragraph 1 of the new Civil Code, if the marital home is one of the spouses' own good, he/she cannot dispose alone and discretionary by the estate in question.

Division (partition) of common property during marriage

The new Civil Code maintains the possibility of division of joint property during marriage, allowing the spouses to perform an amicable separation.

Thus, according to art.358 of the new Civil Code the spouses have the possibility of division of joint property, in whole or in part, during marriage by agreement and by an act concluded in authentic notary act or by the court in case of dispute.

In the division of joint property the provisions of art.357 paragraph 2 of the new Civil Code are applied, in that, first the share to each spouse is entitled is determined based on his/her contribution to the acquisition of joint property and to the fulfillment of common obligations. Until proven guilty, it is presumed that spouses have contributed equally.

Assets allocated to each spouse by partition become own goods and undivided goods remain common property.

According to paragraph 4 of art.358 of the new Civil Code, the community regime ceases only under the law, even if the entire joint

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

property was divided according to this article. Therefore, goods that will be earned after this partition are subject to the legal community regime, becoming, as case, common property or own property.

Also art.353 of the new Civil Code expressly provides that common property cannot be pursued by personal creditors of one of the spouses. However, after the suit of the debtor spouse's own assets, his personal creditor may request the partition of joint property, but only to the extent necessary to cover his/her claim. The assets divided as such become own goods and can be suited by the personal creditor.

Assets and liabilities of spouses in the light of companies (M., Avram. C., Nicolescu., (2010) :278-284).

Article 348-349 of the new Civil Code contain express legislative solutions regarding the common property contribution in the establishment of a legal person.

With regard to art.348 of the new Civil Code research literature notes that the hypothesis under consideration is not only within the scope of companies[8], but takes into account any society, including the civil society[9], associations and foundations[10].

Secondly, in terms of the proposed solutions the following main aspects can be identified:

a. Article 348 paragraph 1 of the new Civil Code establishes the rule that common property can be brought as contribution to the establishment of a company or of an association or foundation. This is not new law in relation to the regulation *de lege lata*.

b. Article 348 paragraph 1 of the new Civil Code establishes the-co-management rule regardless of the movable or immovable nature of the common property regardless weather the ownership itself is brought as input. By reference to art.346 paragraph 1 of the new Civil Code and in article 347 of the new Civil Code it is inferred that in terms of their seriousness, the legislature has assimilated the contribution of an act of alienation of the common good, which is why the condition of the express consent of both spouses is required.

[8] On the regulation of companies, see Law. 31/1990, republished in the Official Gazette no. 1066 of November 17, 2004, as amended and supplemented.
[9] On company contract consider art. 1881-1954 of the new Civil Code.
[10] See G.O. No. 26/2000 on *associations and foundations*, published in the Official Gazette no. 39 of January 31, 2000, as amended and supplemented.

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

c. Article 348 paragraph 2 of the new Civil Code envisages, by way of consequence, the case in which the spouses become associates, and must designate a common representative who can be one of the spouses or a third party under the law.

In conclusion, we see that on the one hand, both paragraph 1 and paragraph 2 of art.348 of the new Civil Code refer to "the law". According to the research literature it is stated that the generic issues covered by the new Civil Code will be reflected in an appropriate regulation in the company law, especially as regards the establishment of the company by people which assumes *ab initio* the individualization of the contribution of each associate.

On the other hand, the research literature states that it is worth noting, that in light of the new Civil Code, even if the solution was preserved, in the sense that for the establishment of a company, the contribution of each spouse must be individualized, the spouses would have no practical difficulty because they can either establish common shares from the property contribution, or even voluntary share the common goods they want to bring as input, and after that each spouse can establish the contribution with their own goods, becoming thus associate. Moreover, we believe that art.357 paragraph 2 of the new Civil Code can find application, under which, until proven otherwise, it is presumed that spouses have contributed equally. This means that at the establishment of a company, the spouses may participate with the common property, being presumed that in relation to the company each acquired the quality of associate for half the common good input, allowing each spouse to exercise the rights arising from the quality of associate, corresponding to the share of the contribution.

a. Article 349 paragraph 1 of the new Civil Code specifically considers the hypothesis of companies. It is noted that the text establishes the co-management rule, both for the acts by which a spouses disposes the bringing of a common good as contribution to a company (company establishment phase) and for the acts of acquisition of shares with common goods (the phase subsequent to the establishment of a company). This solution is different from that of *lege lata* that allowed to one spouse to do all these acts under mutually silent mandate between the spouses, except for the contribution of movable property that required the express consent of both spouses (M., Avram. C., Nicolescu., (2010) :281-284). The sanction if the agreement of one spouse is absent is relative

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

nullity of the act, provided by art. 347, unless the act's object is to acquire the shares traded on a regulated market, where the spouse who has not given his/her consent may require only compensation.

b. Given the nature of the common good brought as a contribution, in all cases, the shares are common property, but the associate spouse exercises the rights deriving from this quality alone. This means that, with exception to the common property management rule, we have an exclusive management.

The new Civil Code does not expressly provide that the alienation of shares of common property the consent of both spouses is required or just of the spouse who has the quality of an associate. As such we mention:

- First, although these assets are movable, they do not fall under parallel management, given that not any of the spouses could conclude acts on shares, but only the spouse who is an associate. Exclusive management therefore is the exception in this matter to the parallel management rule;
- Secondly, the question whether the text which establishes exclusive powers for the associate spouse derogates from the special rules of common property co-management. Indeed, the agreement of both spouses condition can be taken into consideration, if we consider that the alienation of certain classes of shares is subject to publicity measures, making incidental the provisions relating to these category of movable goods co-management according to art.346 paragraph 2 of the new Civil Code.

Taking into account the provisions of art.98 of Law no. 31/1990 and art.145 of Law no. 297/2004 and the provisions of art.346 paragraph 2 of the new Civil Code research literature asks the following question: are we dealing with a *"publicity formality"* within the meaning of art.346 paragraph 2 of the new Civil Code? Research literature responds as follows: even if at first glance, the answer seems affirmative, there are serious doubts, because art.98 of Law no. 31/1990 provisions are suppletive, dispositional, since paragraph 2, second thesis allows for the articles of association to provide other *"forms of transmission of ownership to the shareholders."* Or, paragraph 2 of art.346 of the new Civil Code envisages the publicity formalities *"prescribed by law",* which correlates with art. 19 of the new Civil Code according to which *"Publicity procedure and*

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

conditions are established by law" and not by the will of the parties, particularly because of the important effects of publicity, namely opposability to third parties or even constitutive effects."

If we considered that formalities laid down by Law no. 31/1990 are just formalities of publicity within the meaning of art.346 paragraph 2 of the new Civil Code, the question is to determine whether the provisions of art.346 paragraph 2 of the new Civil Code, which establish the agreement of both spouses are applied or if art.349 paragraph 2 is applied as a special text.

In the first interpretation, given that, according to art.349 paragraph 2 of the new Civil Code the associate spouse alone exercises all rights arising from this quality, it could be equally considered that he may alone dispose of the shares by legal acts, whatever their nature. This would mean that the text is derogatory from common management rules.

In another possible interpretation, one might assume that art.349 paragraph 2 takes into account the rights deriving from the quality of associate. However, the right to dispose of shares does not arise not only from the quality of *"associate",* which undoubtedly is transferred along with the shares, but is also a prerogative of joint ownership of spouses of these intangible movable) shares , actions). As these goods are regarded as common property, it means that in relation to the acts of disposal of shares (alienation, encumbrance, etc..) the co-management rule could not be totally ignored.

Therefore, it follows that the act will be completed, as appropriate, only by the spouse who is an associate (exclusive management) or by this spouse with the consent of the other spouse (joint management) according to art.346 of the new Civil Code. Thus, co-management would be required in case of the transfer of shares by declaration in the shareholder register in accordance with art.98 of Law no. 31/1990 as in all cases where transfer is free, it is expected to require the consent of both spouses.

We cannot say that the solution seems unnatural. Shares are negotiable securities, so the normal solution for the dynamics of civil circuit is that the shareholder spouse to be able to dispose alone and exclusively by it. If we were to accept the agreement between the spouses for the transfer of securities, it seems that it would be rather a condition comparable to non-negotiable securities (for partnerships).

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

In conclusion we believe that the regulation of the new Civil Code is a valuable step forward in solving many problems associated to assets and liabilities of spouses associates or shareholders in a company, but which does not exclude further legislative steps, even within company law, to clarify issues (some intrinsic to this legislation) susceptible to divergent interpretations.

Termination of the legal community regime

Analyzing the provisions of art.319 of the new Civil Code relating to termination of matrimonial regime we see that, whether it comes to: the legal matrimonial regime, the conventional community matrimonial regime or the separation of goods regime, whichever shall cease by:

a. death of one or both spouses, in which case the marriage ceases;

b. divorce;

c. delivery of nullity or annulment of marriage;

d. changes in the legal community regime under law during marriage.

When the effects of marriage end regardless of the specific causes: divorce, nullity, death of a spouse, etc.., the effects of the matrimonial regime will cease when marriage is considered dissolved, annulled or terminated.

As an effect of the death of a spouse community ceases because marriage also ceases.

As a result of divorce art.385 of the new Civil Code provides for termination of matrimonial regime. As a result, the judgment of divorce becomes effective at the date the request for divorce was tabled, but to third parties, according to art.387 of the new Civil Code, the decision of divorce becomes effective from the date of fulfillment of the publicity forms provided by law by art.291, 334 and 335 of the new Civil Code.) (C., Mareş (2013) :94).

However, according to art.385 paragraph 2 of the new Civil Code either or both spouses together can ask the divorce court to find that the matrimonial regime ceased from the date of separation in fact. Also, these provisions shall also apply in case of divorce by agreement between the spouses, if they so agreed.

Also, according to art.355 paragraph 1 of the new Civil Code when the community ceases, it is liquidated by court or by notary authentic act and according to paragraph 3 of the same article, when the

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

community ceases by the death of a spouse, settlement is made between the surviving spouse and the heirs of the deceased spouse. Thus, the obligations of the deceased spouse are divided between heirs in proportion to their duties of inheritance. So, first it is determined the share each spouse is entitled to of the community property; then the community share to which the deceased spouse is entitled shall be included in the succession.

If the matrimonial regime is terminated by divorce, former spouses remain joint property co-owners of the common property until the shares of each according to art.356 of the new Civil Code is set.

Also, paragraph 2 of art.355 of the new Civil Code provides that until the completion of liquidation, the community subsists on assets and on liabilities. From the provisions of this paragraph we see that a distinction is made between: termination of matrimonial regime and termination of the community property.

Although the text refers only to the dissolution of marriage, it is also applicable in case of termination of putative marriage, when applying by similarity the divorce provisions according to art.304 paragraph 2 of the new Civil Code.

In case of marriage annulment, the annulment operating retroactively, marriage is considered non-existent and thus the marital regime is non-existent.

Liquidation of legal community regime

In the event of termination or change the matrimonial regime is liquidated in the following ways:

- by agreement, by authentic notary document;
- by judicial decision, the final court decision representing the act of liquidation.

According to art.355 paragraph 1 of the new Civil Code when the community ceases, it is liquidated by court or notary authentic document and according to paragraph 3 of the same article the deceased spouse's duties are divided between the heirs in proportion to their respective shares from the inheritance.

When community ceases by the death of a spouse, settlement is made between the surviving spouse and the heirs of the deceased spouse. Thus, according to art.355 paragraph 3 of the new Civil Code the

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

deceased spouse's obligations are divided between the heirs in proportion to their respective shares from the inheritance.

Modes of liquidation and partition of goods are governed by the provisions of art.320 of the new Civil Code, filled with common law provisions regarding the partition.

Also, paragraph 2 of art.355 of the new Civil Code provides that until the completion of liquidation, the community subsists on assets and on liabilities. From the provisions of this paragraph we see that a distinction is made between: termination of matrimonial regime and termination of the community property.

When community regime ceases by the death of a spouse, settlement is made between the surviving spouse and the heirs of the deceased spouse. Thus, according to art.355 paragraph 3 of the new Civil Code the deceased spouse's obligations are divided between the heirs in proportion to their respective shares from the inheritance.

If the matrimonial regime is terminated by divorce, former spouses remain joint property co-owners of the common property until the shares of each according to art.356 of the new Civil Code is set.

Although the text refers only to the dissolution of marriage, it is also applicable in case of termination of putative marriage, when applying by similarity the divorce provisions according to art.304 paragraph 2 of the new Civil Code.

However, although art.356 lies within the section relating to the legal community regime, it also applies to conventional community, in accordance with provisions ofart.368 of the new Civil Code.

If spouses have not proceeded to division of common property, along with the cessation of the community of goods (by divorce, dissolution of putative marriage, replacement of community of assets with separation of goods), the community of goods survives, and the common property of the spouses will have the legal nature of joint property (M., Avram. C., Nicolescu., (2010) :299).

According to art.668 of the new Civil Code *"If it arises by operation of law, joint property is subject to the disposition of that law completed, as appropriate, with those of the legal community regime (paragraph 1). If the source of joint property ownership is a legal act, the provisions relating to community legal regime applies appropriately" (paragraph 2).*

We note that in accordance with the provisions of this article, the regime of legal community of spouses is considered as a system of

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

common law in joint property ownership. This means that, practically, if the liquidation did not take place at divorce, joint property of surviving spouses' joint property survives rules regarding the management of common assets are those applicable during marriage, namely that of the legal community of goods. The legislator has opted for this solution for a survival of rule applicable to the matrimonial regime of community of goods. Please note that when community property ceases upon termination of matrimonial regime (divorce, dissolution of putative marriage) will continue to apply only the provisions of the legal community of goods that reflect the joint property regime (such as those relating to property management) and not the other matrimonial specific legal provisions (eg rules relating to the primary imperative regime) (M., Avram. C., Nicolescu., (2010) :299).

After termination of community, its specific rules are applicable only to common property acquired during it.

Assets acquired after divorce, or in case of the putative marriage, after its dissolution, they are the exclusive property of each spouse and no longer supplies the community of goods.

Likewise, the assets acquired after the replacement of community with the separation of goods are not common goods.

If the matrimonial regime ends by divorce former spouses remain joint property owners of the common property until the shares of each are established. So, in accordance with art.357 paragraph 1 of the new Civil Code within the liquidation of the community, both spouses will take its own goods, then they will proceed to the partition of joint property, by the contribution of each spouse to the acquisition of common goods and to the achievement common obligations. So, the community liquidation starts by determining the division mass, then the goods to be assigned to co-owners will be evaluated and the last step will be the actual division of assets and liabilities. Until proven otherwise, it is presumed that spouses have contributed equally. So, the community liquidation starts by determining the division mass, which is the first basis of matrimonial regime liquidation before partition itself. After establishing accurate and complete structure of the community, they will evaluate the goods that will be assigned to spouses and the actual division of assets and liabilities.

These special provisions are supplemented by general provisions of art.669-695 of the new Civil Code relating to partition which according

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

to art.686 of the new Civil Code are applicable to goods under common ownership, regardless of their source, and to those in joint property.

Providing that marriage is annulled, the matrimonial regime being non-existent marriage a liquidation between spouses *de facto* not *de jure* will take place, by the rules of non-division or society of fact between third parties.

In case of putative marriage when both spouses were in good faith to liquidation, the rules of divorce shall be applied. Between them, the date of termination of the community is the date of introduction of the action for annulment. When only one spouse is considered in good faith, only he/she will invoke the matrimonial regime effects and a liquidation of the community by the rules of divorce (A., Al., Banciu. (2011) :118).

However in relation to art.358 of the new Civil Code it should be noted that although the possibility of division of joint property is provided, in whole or in part, during marriage by agreement of the spouses and by authentic act signed by notary or by court in the event of disagreement, the community regime according to paragraph 4 of this article shall cease only under the law even if all joint property were divided according to this article(A., Al., Banciu. (2011) :119).

Article 369 paragraph 1 of the new Civil Code provides: "*After at least one year from the termination of marriage, the spouses may, whenever they wish, replace the existing matrimonial regime with another matrimonial regime or modify it, under the conditions provided by law for conclusion of matrimonial agreements.*"

We note that the matrimonial regime may be changed or modified by another matrimonial regime whenever the spouses wish so after at least one year from the contracting of marriage but under the conditions provided by law for concluding matrimonial agreements.

Changing marital regime entails the termination of the old community regime only where new regime adopted is a separatist regime. In this case, the termination of the community will take place at the date when formalities required by law for marital agreement publicity by which the regime is changed are met.

Compared to third parties, no change of the matrimonial regime can be opposed if performed in fraud of their interests (article 369 paragraph 4 of the new Civil Code)(C., Mareş (2013) :108).

In case of change of the matrimonial regime change by a minor spouse, the date of termination of the community is the date the decision by which the guardianship court approves the modification of the

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

matrimonial regime by matrimonial convention becomes final (art.337), regime which has been previously agreed by the legal guardian of the minor spouse.

We note that from the provisions of art.359 of the new Civil Code is absolutely void any convention contrary to the provisions relating to the legal community regime, to the extent that it is not compatible with conventional community regime. So, the legal community regime will apply in all situations in which prospective spouses do not opt for separation of property regime or for the conventional community regime.

Conclusion

The provisions of art. 312 of the Civil Code establish: a legal system that is the community property regime and two conventional regimes: separation of property regime and the regime of conventional community (the latter includes conventional exemptions from the community property regime).

The legal matrimonial regime includes property acquired by both spouses during marriage, except for the goods provided by law, which are each spouse's own assets.

The legal community regime will apply in all situations in which prospective spouses do not opt for the separation of property regime or for the conventional community regime.

Separation of property regime is characterized in that each of the spouses is the exclusive owner of their property and of that they acquire by themselves after the marriage, at the adoption of this regime spouses are required to draw up an inventory of movable property belonging to each one at the date of the contracting of marriage.

The Conventional community regime is applicable when by matrimonial agreement, they derogate from the provisions on the legal community regime, and the matrimonial convention concluded in this case may narrow or widen the community of goods.

The new Civil Code places at the basis of patrimonial relations between spouses the principle of autonomy of will, predicting a real legislative reform of the matrimonial regime existing at present in Romania.

In terms of the matrimonial regime, the patrimonial relations between spouses are based on the legal community regime, including the property acquired by each spouse during marriage, except for goods

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

provided by law, that are each spouse's own assets. This regime has been greatly improved. For example, it has been expressly provided that the spouses jointly, or together with others, may put the basis companies, associations and foundations, according to the law, bringing common goods, but, only with the consent of both spouses[11].

The legal community regime is based on the following principles:

1. the principle of equality between spouses is established by art. 308 of the new Civil Code and includes:

a. the goods of the spouses are common or own goods without taking into account weather they were acquired by the husband or by the wife;

b. the management, use and disposal of common property are regulated so that each spouse is conferred practically the same powers over common property;

c. in case of divorce, of dissolution or termination of marriage, when it comes to the liquidation of the matrimonial regime and division of common property the court cannot make any discrimination based on sex. This does not mean that the goods will always be divided in equal shares, as the criterion against which they will determine the share ownership of common assets of each spouse is the actual contribution that each has had in the acquisition and preservation of such property;

2. the principle of subordination of patrimonial relations between spouses to personal relations between spouses. Thus the community of goods was regulated as a mass of goods affected to the accomplishment of marriage tasks;

3. the principle of recognition of any of the spouses' work in the household. According to this principle, as outlined in the provisions of art.326 of the new Civil Code the work of either spouse in the household is a contribution to common property acquisition;

4. the principle of exercise of parental rights and obligations to their children. Parental rights and responsibilities are acknowledged regarding the child's person and its heritage: The distinction between the two categories of rights is useful, especially if parental care is divided, when a specific allocation of rights and duties between the two parents or between them (or one of them) and a third person who provides alternative child protection takes place. According to this principle it can

[11] Of the Explanatory Memorandum on the draft of the new Civil Code.

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

be established each spouse's financial contribution to children's raising and education.

Legal community regime has the following juridical features M., Avram. C., Nicolescu., (2010) :173-182):

1. *it is a regime of partial community* because:

- in relation to goods, the spouses have, according to the new Civil Code two categories of goods: common property (art. 339) and own property (art. 340). The rule is that goods are common, and the exception that certain categories of goods are own property. It is a predominantly community regime, in which the separation of goods is limited, subsidiary;
- spouses have two categories of debts: common debt (art. 352) and own debt (art. 353);

2. *it is a legal regime*. The legal character of the legal community regime should be understood in the context when future spouses or the spouses during marriage are able to choose a certain matrimonial regime. Thus, according to art.312 paragraph 1 of the new Civil Code *"Future spouses may choose a certain matrimonial regime: legal community, the separation of goods or conventional community."* However, the application of the law is not, legally, an effect of the intending spouses' option (a kind of tacit matrimonial agreement), as paragraph 312 paragraph 1 lets us believe, but a legal consequence of marriage, in the absence of a marriage agreement;

3. *it is a mutable and flexible regime*. Legal community regime can be replaced during marriage by matrimonial agreement by another matrimonial regime under certain conditions and limitations. According to art.359 of the new Civil Code it is provided that "*any agreement contrary to the provisions of this section (the legal community regime) is null and void.* " This article must be considered in conjunction with art.366-368 of the new Civil Code which allow a derogation from the legal community regime in certain circumstances and within certain limits.

4. *it is an imperatively limited regime*. From the corroboration of art.312 paragraph 1 of the new Civil Code with art.332 paragraph 1 of the new Civil Code according to which *"By matrimonial convention one cannot derogate under the sanction of absolute nullity from the legal provisions of the matrimonial regime chosen, except as expressly provided by law";* it means that a marital agreement that would opt for a matrimonial regime other than that provided by law is null and void. For example, future spouses or spouses cannot choose the acquisition regime. However, by agreement spouses

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

may expand or restrict legal community property, they may establish the obligation of agreement of both spouses to conclude certain administrative acts, they may agree to include a preciput clause or determine the way of liquidation of conventional community. So, the imperative character of the legal community regime is limited by the fact that future spouses or spouses are able to regulate, by matrimonial agreement, certain aspects derogating from the legal community regime provisions.

References

M., Avram. C., Nicolescu. (2010), *Regimuri matrimonial (Matrimonial Regimes),* Hamangiu Publishing House, Bucharest.

Al., Bacaci. V., C., Dumitrache. C., Hageanu. (2005), *Dreptul familiei (Family Law).*4th edition, All Beck Publishing House, Bucharest.

A., Al., Banciu. (2011), *Raporturile patrimoniale dintre soți (Patrimonial Relations between Spouses),* Hamangiu Publishing House.

T., Bodoaşcă. (2005), *Dreptul familiei (Family Law),* All Beck Publishing House, Bucharest.

C., M., Crăciunescu. (2000), *Regimuri matrimonial (Matrimonial Regimes),* All Beck Publishing House, Bucharest.

N., C., Dariescu. (2006), *Raporturile patrimoniale dintre soții străini având aceeași cetățenie și cu domiciliul în România (Patrimonial relations between foreign spouses of the same nationality and residing in Romania),* Lumen Publishing House, Iaşi.

N., C., Dariescu. (2008), *Raporturile patrimoniale dintre soții în dreptul internațional privat (Patrimonial relations between spouses in private international law),* C. H. Beck Publishing House, Bucharest.

N., C., Dariescu. (2007), *Convenția matrimonială în dreptul internațional privat roman* (*Matrimonial Convention in Romanian Private International Law),* Lumen Publishing House, Iaşi.

Georges, A., L., Droz. (1974), *Les régimes* matrimoniaux en *Droit international privé comparé* în *Receil des cours de L'Académie de droit international de la Haye,* Tome 143, 1974/III

P., Filipescu. A., I., Filipescu. (2006), *Dreptul familiei (Family Law),* All Beck Publishing House, Bucharest, 2006.

C., Hamangiu, I., Rosetti – Bălănescu, A., Băicoianu. (1998), *Tratat de drept civil (Civil Law Treaty),* vol. III, All Beck Publishing House, Bucharest.

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84

C., Mareş, (2013), *Dreptul familiei* (*Family Law*), C. H. Beck Publishing House, Bucharest.

P., Vasilescu. (2003), *Regimuri matrimoniale. Parte general, (Matrimonial Regimes. General Part)*, Rosetti Publishing House, Bucharest.

P., Vasilescu**.** (2009), *Regimuri matrimoniale. Parte general (Matrimonial Regimes. General Part)*, 2nd edition revised, Universul Juridic Publishing House, Bucharest, 2009.

Revue

C., Mareş, (2013), Divorţul pe cale judiciară (Divorce court proceedings), *Revista Dreptul (Law Review)* nr. 6/2013.

C., Mareş, (2012), Nulitatea căsătoriei în reglementarea Codului civil (Nullity of marriage under the Civil Code regulations), *Revista Dreptul (Law Review)* nr. 9/2012.

C., Mareş, (2013), Divorţul pe cale administrativă sau prin procedură notarială (Divorce by administrative or notarial procedure), *Revista Dreptul (Law Review)* nr. 7/2013.

C., Mareş, (2013), Efectele desfacerii căsătoriei prin divorţ în lumina noului Cod civil (The effects of the dissolution of the marriage by divorce in the light of the new Civil Code), *Revista Dreptul (Law Review)* nr. 8/2013.

Legislation

Romanian Civil Code of 2009 - Law no. 287/25.06.2009, in the Romanian Official Monitor no. 511/24.07.2009, modified by the Law no. 71/2011 for the application of the Civil Code, in the Romanian Official Monitor no. 409/10.06.2011 and by the Government Emergency Ordinance no. 79/20.09.2011 for the regulation of some necessary measures for the entry into force of Law no. 287/2009, in the Romanian Official Monitor no. 696/30.09.2011.

Anitei, N.C., (2013). Matrimonial Regime Legal under the Provisions of the Roumanian Civil Code, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:49-84